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Coronavirus Guidance for Businesses: What Should I Do Without a *Force Majeure* Clause?

Businesses are facing an unprecedented set of circumstances arising from the coronavirus ("COVID-19") crisis. Service-based businesses must address disruption in their workforces due to employee infection and/or quarantining to avoid exposure to the virus. Product-based businesses are challenged by the disruption of their supply chains for similar reasons. Disruption, and subsequent non-performance, due to crises are frequently protected against through the boilerplate "force majeure" *clause included in commercial contracts. But what defense to non-performance due to a viral pandemic does a business have if its contracts have a limited or no* force majeure *clause?*

Pennsylvania Law

Pennsylvania law recognizes the common law doctrines of impossibility, impracticability, and frustration of purpose. In 2010, the Superior Court of Pennsylvania reaffirmed these doctrines in the case, *Step Plan Servs., Inc. v. Koresko*[1] and Pennsylvania has adopted these doctrines by way of adopting the Restatement (Second) of Contracts' recitation of such doctrines.[2] Where a defendant is unable to perform, due to a supervening event, the non-occurrence of which was a basic assumption at the formation of the contract, and through no fault of the defendant, these defenses can be raised to excuse non-performance.[3] The standard for a basic assumption is objective, and goes beyond that particular party's capacity to render performance.[4] In general, any "natural and fairly predictable risk arising in the normal course of business" is not a basic assumption that would affect discharge and excuse performance.[5] Instead, basic assumptions are the absence of any supervening 'acts of God' or acts of any third parties.[6] Generally, throughout the case law, the three doctrines are often used interchangeably[7] though the doctrine of frustration of purpose is occasionally described with slight nuance.[8]

New York Law

Like Pennsylvania, New York recognizes the common law doctrines of impossibility or frustration of purpose, which may be invoked to excuse contract performance under certain circumstances. Also similar to Pennsylvania, New York cases have limited the doctrine of impossibility to

cases where performance is "objectively" impossible due to the "destruction of the means of performance" by a ***force majeure*** event or the enactment of law rendering performance illegal[9] or there has been a change in circumstances so fundamental that it would be unequitable or contrary to public policy to hold the parties to their original agreement.[10]

In an action for specific performance of a contract, the analysis is conducted as of the time the parties executed the contract. If the contract is fair when made, the fact that it has become difficult to perform by the force of changing circumstances or subsequent events will not necessarily prevent its specific performance. However, where there has been a great change of circumstances whereby the enforcement of the contract against a party thereto would be harsh and inequitable, violative of its true intent and spirit, or would not effectuate the purpose of its execution, the court, in the exercise of its discretion, may deny enforcement.[11]

A defense based on frustration of purpose releases a party from its contractual obligations where a supervening event substantially obviates or frustrates the purpose underlying the contract. Under the doctrine of frustration of purpose, a party's duty to render performance can be discharged if, after the contract is made, a party's principal purpose is frustrated without his or her fault by the unforeseen occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made. The frustration must be so severe that it is not fairly to be regarded as within the risks that the party assumed under the contract.[12] Like impossibility, this requires that the frustration resulted from a change in circumstances that was unforeseeable and beyond the parties' control. Frustration is distinguished from impossibility in that the frustration must be mutual and the change in circumstances has rendered the contract unable to be performed by both parties.

Conclusion

In the disruption scenarios described above, the doctrines of impossibility, impracticability or frustration of purpose can be raised as valid defenses against a breach of contract claim due to non-performance. For the average business, the availability of a healthy workforce and a functioning supply network are necessary to perform the critical and fundamental aspects of providing services to, or producing products for, a business' clients. If the availability of critical workforce resources or supply chain resources are eliminated as a result of the COVID-19 viral pandemic, the principal purpose underpinning the business' contracts may indeed be frustrated.

If legal action is brought for a breach of contract under agreements governed by Pennsylvania or New York law because of non-performance, and the non-performance arises out of the non-availability of critical workforce resources or a functioning supply chain resulting from the COVID-19 viral pandemic, defendant businesses should consider raising the doctrines of impossibility, impracticability or frustration of purpose as defenses against such claims.

Blank Rome's Coronavirus ("COVID-19") Task Force is continuing to monitor the COVID-19 crisis and will provide further updates for businesses as they become available.

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1. 12 A.3d 401, 412 (Pa. Super. Ct. 2010) ("[A] court can excuse performance under a contract upon the occurrence of a truly unexpected event that thwarts the purpose or performance of a contract."). The Supreme Court of Pennsylvania originally adopted and developed these doctrines in *Greek Catholic Congregation of Borough of Olyphant v. Plummer*, 12 A.2d 435, 439 (Pa. 1940) and *Alvino v. Carraccio*, 162 A.2d 358, 361 (Pa. 1960).
2. *See Step Plan Servs., Inc., supra* at 412 (discussing the adoption of Restatement (Second) of Contracts §§ 261, 264, 265 (1981)).
3. *See Com. Dep't of Envtl. Res. v. Pennsylvania Power Co.*, 316 A.2d 96, 103 (Pa. Cmwlth. 1974), *aff'd*, 337 A.2d 823 (Pa. 1975) ("It has been held that where the defendant cannot perform the duty ordered, and where that inability is not due to the actions of the defendant himself, that impossibility is a defense.").
4. *See Dorn v. Stanhope Steel, Inc.*, 534 A.2d 798, 813 (Pa. Super. 1987) (noting the continued financial health of the parties is not considered a basic assumption which would affect a discharge, but rather basic assumptions are the absence of any supervening "acts of God' or acts of any third parties); see also *Luber v. Luber*, 614 A.2d 771, 774 (Pa. Super. 1992) (holding no impossibility or impracticability defense where a husband cannot perform on a marital settlement agreement due to his own financial inability and his other financial obligations).
5. *See Step Plan Servs., Inc., supra* at 411 (citing *Ragnar Benson, Inc. v. Hempfield Twp. Mun. Auth.*, 916 A.2d 1183, 1189 (Pa. Super. 2007)).
6. *See Dorn, supra* at 813 (citing with approval Restatement (Second) of Contracts § 261, comment e, stating that a party generally assumes the risk of its own inability to perform).
7. *See e.g., Step Plan Servs., Inc., supra* at 411 ("Pennsylvania law recognizes the doctrine of frustration of contractual purpose or 'impracticability of performance' as a valid defense to performance under a contract."); see also *Ellwood City Forge Corp. v. Fort Worth Heat Treating Co.*, 636 A.2d 219, 223 (Pa. Super. 1994) (holding "impossibility" to include impracticability due to "extreme and unreasonable difficulty, expense, or loss involved.")
8. *See Step Plan Servs., Inc., supra* at 414 (noting the following three requirements for the doctrine of frustration of purpose: (i) the frustrated purpose must be the principal purpose, and a basis without which the contract would have been nonsensical to form, (ii) the frustration must be substantial, and not a risk assumed by any of the parties, and (iii) the non-occurrence of the frustration must have been a basic assumption made at the time of formation).
9. *See 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 280, 244 N.E.2d 37, 40* (1968) (holding that, "[g]enerally, however, the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, vis major, or by law").
10. *See Junius Const. Co. v. Cohen (State Report title: Junius Const. Corp. v. Cohen), 257 N.Y. 393, 178 N.E. 672* (1931) (holding on appeal that substantial delay between the entry into an agreement and its performance and intervening circumstances that frustrated the defendant's original purpose for the transaction would render a ruling for specific performance inequitable).
11. *Id. See also United Water New Rochelle, Inc. v. City of New York, 180 Misc. 2d 241, 687 N.Y.S.2d 576* (Sup 1999), appeal granted, order aff'd as modified on other grounds, *275 A.D.2d 464, 712 N.Y.S.2d 637* (2d Dep't 2000) (holding that courts will not enforce or compel the specific performance of a contract where the performance compelled thereby will bring about a result which is detrimental to the public interest).
12. *Arons v. Charpentier, 36 A.D. 3d 636, 828 N.Y.S. 2d 482* (2d Dep't 2007) (holding that a contract could not be enforced due to frustration of purpose where the defendants could not recover the fees necessary to perform under the subject contract due to an intervening Supreme Court ruling and the ability to recover the fees was "so completely the basis of the [subject] contract that…without it, the transaction would have made little sense."); See also Restatement 2d of Contracts §§ 265 to 266.