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Is Non-Performance Permitted?

The Impact of Coronavirus on Construction

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Globally, businesses are experiencing delays in productivity with many facilities being shut down for extended periods of time due to the COVID-19 pandemic. In the upcoming months and perhaps longer, construction companies may be faced with supply chain issues, delays, labor shortages and other issues as a result of the global pandemic.

As a direct result of these issues, businesses are now seeking to determine whether they or their subcontractors, material suppliers or other workers are obligated to perform under their contracts, or whether there are defenses available to them to excuse performance temporarily or even permanently.

Contractual Defense

Construction contracts often contain what is referred to as a force majeure clause. Such clauses often

include protection against delays in performance due to hurricanes or other unforeseen circumstances, but most do not specifically address circumstances constituting a global pandemic such as COVID-19. A force majeure clause is a contractual provision which excuses one or both parties' performance obligations when unforeseeable events arise, which are beyond the parties' control and make performance of the contract impracticable or impossible.

Typical force majeure events included in contracts are as follows:

- o Acts of God, such as hurricanes, floods, fires, and earthquakes;
- o Acts of terrorism, and wars;
- o Changes in laws and certain regulations, acts of governmental authorities; and
- o Labor disputes and strikes.

Successfully invoking a force majeure provision under Florida law hinges on proving several factors, including whether: (i) the event causing performance issues was foreseeable; (ii) the event causing performance issues was beyond a party's reasonable control; (iii) the event materially affected the ability of one or both parties to perform its obligations under the contract; and (iv) all reasonable efforts to provide timely notification and mitigate or otherwise avoid the consequence were taken by the non-performing party.

A recent Court decision interpreting Florida law provided useful guidance as to application of a force majeure provision as an excuse to performance. In that decision, the Court indicated that force majeure clauses are typically narrowly construed (in Florida and elsewhere) and will generally only excuse a



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non-performance. The impossibility defense may be asserted in situations where the purposes for which the contract was made have, on one side, become *impossible* to perform. However, Florida courts and other courts throughout the country have been reluctant to excuse performance because it is inconvenient, profitless, or increasingly expensive to fulfill performance obligations under the contract. In addition, the impossibility defense may not be asserted where the facts making performance impossible were known or could have been reasonably anticipated at the time of entering into the contract.

The COVID-19 pandemic is and has been widely known by the general public since earlier this year. Material delays, labor shortages and other effects from the pandemic are no longer unforeseeable and thus, attempting to rely upon the impossibility doctrine as a defense to performance of contracts that were entered into after the pandemic arose may be unsuccessful.

Impracticability is a similar defense to impossibility but may be easier to establish. Under this common law defense, non-performance may be excused if an unforeseen event makes performance so difficult or expensive, that it becomes *impractical* to perform as opposed to becoming impossible to perform. While this is a similar legal concept to impossibility, instead of rendering performance literally impossible, this doctrine makes performance so overly unreasonable, excessive, burdensome, or outrageously expensive, that it becomes excusable.

Florida also recognizes the doctrine of frustration of purpose when, after the contract has been executed, the primary purpose of the contract is rendered worthless or pointless. A classic example of this defense is where Company A was engaged by Company B to assemble lighting, staging and scaffolding for a music festival event. The event was eventually cancelled due to the "Stay-at-Home" Order issued by Governor DeSantis. In this scenario, performance is not impossible or impracticable as it could technically still be accomplished. However, the primary purpose of the subcontracted work, i.e. the concert event, was rendered pointless, thereby, excusing performance.

Other contractual provisions may be utilized to excuse a party's performance under an existing contract. Numerous governmental orders, laws, regulations and other restrictions have been implemented to address the COVID-19 pandemic. These changes may impact your company's legal rights, liability and other performance obligations in construction contracts.

Conclusion

Non-performance defenses are generally difficult to prove, but these are unprecedented times we are all facing. The courts may look more favorably on allowing excuses in performance given the impacts of the ongoing pandemic. Application of the various recognized doctrines under Florida law depends on the facts and circumstances in each situation to determine what, if any, of the potential defenses are available.

party's non-performance if the event that caused the party's non-performance is specifically identified in the force majeure provision.

For contracts not yet in place, it would be best practice to expressly include coronavirus, COVID-19 and other similar, pandemic events in the force majeure clause thereby providing express justification for potential delay or non-performance under the contract.

Other Potential Defenses

In the absence of an express contractual provision identifying a pandemic, such as COVID-19, as a force majeure event, the question arises as to what other defenses related to delay or non-performance caused by COVID-19 complications are available. Fortunately, in the absence of such a clause, there may be other contractual defenses available that may excuse non-performance.

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