

Stay-at-home Order & Defenses to Contract Nonperformance.

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Covid-19 experts remain skeptical that the pandemic will fade by May, and it is uncertain whether the State of Illinois' Stay-at-home Order¹ will be lifted, in whole or in part, on May 1, 2020² or be extended. Businesses already at their breaking point will need to evaluate if they can reallocate some of their resources to survive; others are at risk of not having the resources or conditions necessary to render performance or satisfy their obligations under their contracts.

Generally, a party to a contract that binds itself to perform an act is held to its performance.³ Exceptions exist, however, where performance is rendered impossible or impracticable or one party's principal purpose for the contract is substantially frustrated by unanticipated changed circumstances. These exceptions exist because courts understand that not every circumstance that may adversely impact a party's performance is foreseeable. Therefore, Illinois courts recognize several legal doctrines for shifting risk to the party better able to bear it, either because that party is in a better position to prevent the risk from materializing or because it can better reduce the disutility of the risk, if the risk does occur. These doctrines are commonly referred to as the doctrine of impossibility, impracticability, and frustration of purpose.

Legal impossibility, or impossible performance, excuses a party's performance under the contract when performance is rendered *objectively*⁴ impossible because the subject matter is destroyed or by operation of law.⁵ Examples excusing performance on the basis of impossibility are acts of God, such as floods and hurricanes, the death or incapacity of the person necessary for performance, or prevention of performance by governmental regulation or order.⁶ The doctrine of

¹ STATE OF ILLINOIS, EXECUTIVE DEPARTMENT, *Executive Order 2020-10* (Mar. 20, 2020), <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-10.pdf>.

² STATE OF ILLINOIS, EXECUTIVE DEPARTMENT, *Executive Order 2020-18* (Apr. 1, 2020), <https://www2.illinois.gov/Documents/ExecOrders/2020/ExecutiveOrder-2020-18.pdf>.

³ *Leonard v. Autocar Sales & Serv. Co.*, 392 Ill. 182, 187 (1945).

⁴ *Objective* impossibility differs from *subjective* impossibility. The distinction between objective and subjective impossibility is between "the thing cannot be done" (objective) and "I cannot do it" (subjective). *Ury v. DI Bari.*, 2016 IL App (1st) 150277-U, *24. In general, subjective impossibility does not excuse nonperformance of the contractual obligation. *Id.*

⁵ *Rosenberger v. United Cmty. Bancshares, Inc.*, 2017 IL App (1st) 161102, *24.

⁶ *Id.*; see also Restatement (Second) of Contracts §§ 262-64 (1981).

impossibility has been narrowly applied on the basis of judicial recognition that performance should be excused only in extreme circumstances.⁷

Discharge of the duty to perform on the basis of impracticability is where a party's performance is made impracticable without its fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.⁸ Under the doctrine of impracticability, a party's performance may still be physically possible, but the duty to perform has become unfeasibly difficult or unduly burdensome for the party whose performance is due. A party may still be liable for non-performance, however, if the party implicitly or explicitly assumed the risk of the duties become impracticable.⁹ Likewise, a party's nonperformance on the basis of impracticability may be temporary, and a party will be obligated to render performance of those parts of the contract unaffected by the event making performance impracticable.¹⁰

Frustration of purpose, or commercial frustration, is also a viable defense under Illinois law.¹¹ Like the doctrines of impossibility and impracticability, the doctrine of frustration is not applied liberally. Frustration of purpose occurs where a party's principal purpose is substantially frustrated without its fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.¹² The leading illustration of this doctrine is a 1903 case captioned, *Krell v. Henry*.¹³ In *Krell v. Henry*, Krell rented Henry a room for two days so that Henry could spectate the coronation of Edward VII.¹⁴ Unfortunately, the coronation was postponed when Edward VII came down with appendicitis.¹⁵ As a result, Henry refused to pay the balance of the rent.¹⁶ When Krell sued Henry for nonpayment, the court held in Henry's favor, finding that Henry's performance was excused because his purpose in renting had been frustrated.¹⁷ Albeit not explicitly stated in the contract, the court found Krell was implicitly aware of Henry's purpose for renting the room and that the postponement of the coronation at the time the contract was formed was a contingency outside the knowledge, or power of influence, of either party.¹⁸ The court reasoned that Krell was in a better position to bare the risk because he could always rent the room at a premium rate for the coronation's new date.¹⁹ In order to prevail on this defense, the non-performing party must show that the frustrating event was not reasonably foreseeable, and the value of the counter-performance has been totally or nearly totally destroyed by the frustrating event.²⁰

The foregoing contracts defenses for nonperformance are subject to any contract language or circumstances that indicate the contrary. To this point, parties often negotiate among themselves

⁷ *Rosenberger v. United Cmty. Bancshares, Inc.*, 2017 IL App (1st) 161102, *24.

⁸ Restatement (Second) of Contracts § 261 (1981).

⁹ See *id.* § 266.

¹⁰ See *id.* § 270.

¹¹ *N. Ill. Gas Co. v. Energy Coop., Inc.*, 122 Ill. App. 3d 940, 953 (1984).

¹² Restatement (Second) of Contracts § 265 (1981).

¹³ [1903] 2 KB 740.

¹⁴ *N. Ind. Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 700 F.2d 265, 277 (7th Cir. 1986).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *N. Ill. Gas Co. v. Energy Coop., Inc.*, 122 Ill. App. 3d 940, 953 (1984).

how to allocate risk due to unforeseen circumstances in provisions commonly referred to as a force majeure clause. A force majeure clause is a contractual provision allocating the risk of loss if performance becomes impossible or impracticable.²¹ They generally apply to unanticipated circumstances or events falling outside the control of the parties, such as acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).

The State's Stay-at-home Order is having adverse effects on many businesses' and individuals' ability to conduct business and perform on their contracts. Those effects are likely to grow exponentially if the order is extended. Businesses at risk of contract nonperformance should consult with an attorney in their state to determine whether there is any recourse available to mitigate any potential exposure.

²¹ Black's Law Dictionary 327 (4th Pocket ed. 1996).

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