WHEN DOES THE DOCTRINE OF IMPOSSIBILITY OF PERFORMANCE APPLY IN ILLINOIS?

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As COVID-19 continues to take its toll on the economy, some will be looking to avoid certain contractual obligations, while others will be looking to hold parties to their contractual obligations. For those looking to avoid their contractual obligations due to COVID-19 in Illinois, one defense being discussed is the doctrine of impossibility of performance.

The doctrine of impossibility of performance is also known as legal impossibility, legal impracticability and impossible performance. The doctrine excuses contractual performance when the performance is rendered objectively impossible either by operation of law or because the subject matter of the contract has been destroyed. See Innovative Modular Solutions v. Hazel Crest School District, 2012 IL 112052, ¶37.

Said another way, the doctrine is applied if there is an unanticipated circumstance that made the performance of the contract vitally different from what should reasonably have been within the contemplation of the parties at the time they entered into the contract. See Sunshine Imp & Exp Corp. v. luxury Car Concierge, Inc., No. 13 C 8925, 2015 WL 2193808 (N.D. Ill. May 7, 2015).

If a government order, such as a state or local “stay in place” order, makes a party’s contractual performance impossible, that party may be able to avoid its contractual obligations under the doctrine of impossibility of performance. Generally, if parties enter a contract and subsequent events not described in the contract render performance impossible, the parties’ performance is not excused, but delayed. However, the doctrine of impossibility is an exception. In an instance where the continued existence of a particular circumstance is so necessary to the performance of the contract that, by law, it is implied to be a condition of the contract, the destruction of that circumstance excuses, not just delays, performance. Leonard v. Autocare Sales & Service Co., 392 Ill. 182, 187 (1945).
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When can impossibility be applied?

A party raising impossibility as a defense to contract performance must show (1) an unanticipated circumstance, (2) that was not foreseeable, (3) that the party did not contribute to, and (4) and that the party seeking the defense tried all practical alternatives to avoid. Bank of America, N.A. v. Shelbourne Development Group, Inc., 732 F.Supp.2d 809, 827 (N.D. Ill. 2010). However, because the lawful purpose of a contract is to allocate risks that affect performance, and because contractual performance should only be excused in extreme circumstances, the doctrine is narrowly applied. See YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 402 Ill.App.3d 1, 6 (2010).

In addition, there are several important caveats to the application of the doctrine.

- First, the doctrine does not apply to excuse performance as long as it lies within the power of the party invoking the doctrine to remove the obstacle to performance. See Downs v. Rosenthal Collins Group, LLC, 2011 IL App (1st) 090970, ¶37.
- Second, the defense of impossibility fails when the party invoking it has not made reasonable efforts to prevent the occurrence of the event that has made performance impossible, i.e., the party must demonstrate that it has tried all practical alternatives available to permit performance. See First Nat. Bank of Chicago v. Atlantic Tele-Network Co., 946 F.2d 516 (7th Cir. 1991).
- Third, the party asserting the doctrine must not have contributed to the circumstances causing the alleged impossibility. See Blue Cross Blue Shield of Tennessee v. BCS Inc. Co., 517 F. Supp. 2d 1050, 1056 (N.D. Ill. 2007).
- And fourth, the party advancing the doctrine has the burden of proving impossibility. See Michigan Avenue National Bank v. State Farm Insurance Companies, 83 Ill. App. 3d 507, 514 (1980).

Courts in Illinois have applied the doctrine of impossibility of performance in the following instances:

- Borrower defended its inability to obtain a construction loan commitment by a date certain, which resulted in the bank accelerating amounts due under a loan, by claiming that unforeseeable and unprecedented economic downturn and recession made its performance impossible. In asserting this defense, the borrower relied in part on statements by the bank's own officers and executives that the current economic conditions were “unprecedented,” “unparalleled” and “not reasonably foreseeable.” The court recognized that generally when performance becomes economically burdensome, performance is not excused, but in this instance, the court found that if the borrower could establish that the parties could not have foreseen the extent of the economic downturn (the 2008 credit crunch) and performance was therefore impossible, it could satisfy the requirements for an impracticability defense. Bank of America, N.A. v. Shelbourne Development Group, Inc., 732 F.Supp.2d 809 (N.D. Ill. 2010).
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- In an old Illinois Supreme Court case, the court addressed the issue of whether a school district was required to pay a teacher who was ready, able and willing to teach during the time the school was closed by the state board of health as a result of an influenza epidemic. While recognizing the doctrine of impossibility of performance, the court found that the school district could have inserted into the teacher’s employment contract a provision exempting the district from liability in the event of a contagious epidemic. However, because the school district chose not to do so, the court held that it was not relieved from its liability to pay the teacher. See *Phelps v. School Dist. No. 109, Wayne County*, 302 Ill. 193 (1922). As a word of caution, this holding may be limited to its facts involving public school teachers following the Spanish flu epidemic, and does not analyze reasonableness or foreseeability found in later cases involving commercial contracts.

- In a more recent Illinois Supreme Court case, the court addressed whether a school district would have to honor certain lease obligations where the lease was canceled under the authority of the Downstate School Finance Authority for Elementary Districts Law (“Act”). The school district argued that it was unable to satisfy its obligations under the lease because a third party exercising sole control over the district’s finances canceled the leases under the authority of the Act. After examining the Act, the court rejected the impossibility defense stating “the subject matter of the lease contracts … have not been destroyed, nor [had the statute authorizing the state body to take over the district’s affairs] rendered performance of the contracts objectively impossible by operation of law.” *Innovative Modular Solutions v. Hazel Crest School District*, 2012 IL 112052, ¶ 37.

- As a defense to an employee’s claim that an employer had breached the employee’s severance contract by not paying severance benefits, the employer invoked the impossibility of performance doctrine, arguing that severance benefits were prohibited by the Federal Deposit Insurance Act (“FDIA”). While the trial court had ruled in favor of the employer, the appellate court found that there was a question as to whether the employee fell within an exception to the FDIA because the employer had the ability to seek an exemption from the Act and had failed to do so. See *Rosenberger v. United Community Bancshares, Inc.*, 2017 IL App (1st) 161102.

Again, while the doctrine of impossibility exists in Illinois, the proponent seeking to excuse complete performance and nullify the contract has a narrow opportunity, and facts matter.

If you have questions about the doctrine of impossibility – whether performance is excused or delayed – contact Thad Felton at taf@greensfelder.com.

Link to COVID-19 Resources page