STATE OF FLORIDA FORCE MAJEURE LAW COMPENDIUM

(during COVID-19 pandemic)

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A. Introduction

This memorandum will seek to provide Florida exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking "force majeure" clauses in contracts in light of the ongoing COVID-19 crisis.

Force Majeure in Florida

1. Introduction

Under Florida contract law, the defense of "impossibility" may be asserted in situations "where purposes for which the contract was made, have, on one side become impossible to perform." ***Harvey v. Lake Buena Vista Resort, LLC***¸ 568 F.Supp. 2d 1354, 1367 (M.D. Fla. 2008). "Acts of God" and governmental action are among several types of business risks which implicate the impossibility defense. ***Id.*** The Doctrine of Impossibility of Performance should be employed with great caution if the relevant business risk was foreseeable at the inception of the agreement and could have been the subject of an express provision of the agreement. ***American Aviation, Inc. v. Aero-Flight Services, Inc.***, 712 So. 2d 809, 810 (Fla. 4th DCA 1998). In such cases, an inference arises that the party who naturally bears the risk chose to assume it. ***Id.*** However, with the advent of Covid-19, we do not anticipate a Florida court citing foreseeability as an impediment to applying a force majeure clause.

2. Requirements to Obtaining Relief Using Force Majeure

Foreseeability is the key trigger under Florida law to determine whether a force majeure clause will excuse performance of a contract. Even if there is no force majeure clause, Florida courts will apply the doctrine of Impossibility of Performance using a similar analysis. In ***Comacho Enterprises, Inc. v. Better Construction, Inc.***, 343 So. 2d 1296 (Fla. 3d DCA 1977), the contract provided that nine houses were to be completed within six months from the date of the agreement, "barring strikes, non-availability of materials or other causes beyond the control of the second party." ***Id.*** at 1297. Four of the houses were not completed timely because the president of the builder suffered a heart attack. The appellate court found that any delay in the completion of the project as beyond the control of the appellee because of the heart attack. ***Id.*** In ***Devco Development Corp. v. Hooker Homes, Inc.***, 518 So. 2d 922, 923 (Fla. 2d DCA 1987), the court concluded that "excessive rain, by the terms of the contract, would constitute 'any other condition' beyond Devco's control which would excuse a delay in performance."

In ***Walter T. Emery, Inc. v. LaSalle National Bank***, 792 So. 2d 567, 570 (Fla. 4th DCA 2001), the court stated:

> The Doctrine of "Impossibility" must be applied with caution and is not available concerning intervening difficulties which could reasonably have

> been foreseen and could have been controlled by an express provision of the agreement. Here, the question is whether it was reasonably foreseeable that a dispute would arise between Emery and PBL, such that Emery would be required to pay the rental payments into the registry of the court, thereby preventing Emery from fulfilling its obligation to give those very same rental payments to LaSalle, the first mortgagee. We conclude that this question is one of fact, which should not have been decided on the basis of a summary judgment.

Impossibility of performance is a defense to non-performance and refers to situations where the purpose for which the contract was made has become impossible to perform. ***Spring Lake NC, LLC v. Figueroa***, 104 So. 3d 1211, 1216 (Fla. 2d DCA 2012). When determining impossibility, courts focus on whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. ***Ferguson v. Ferguson***, 54 So. 3d 553, 556 (Fla. 3d DCA 2011). Where the risk was foreseeable when the agreement was made and could have been expressly addressed in the agreement, the Doctrine of Impossibility of Performance should be employed with great caution. ***Zephyr Haven Health & Rehab Center v. Hardin***, 122 So. 3d 916, 920 (Fla. 2d DCA 2013).

Even where performance actually becomes impossible after execution of the agreement, the doctrine cannot be invoked as a defense if knowledge of the facts making performance impossible is available at the inception of the agreement to the party claiming impossibility. ***Id.*** If the risk of the event that has supervened to cause the alleged frustration was foreseeable there should have been a provision for it in the contract, and the absence of such a provision gives rise to inference that the risk was assumed. ***American Aviation***, 712 So. 2d at 810.

3. Scope of Relief

In Florida, acts of God, impossibility of performance, and frustration of purpose are well recognized defenses to non-performance of a contract. ***Mailloux v. Briella Townhomes, LLC***¸ 3 So. 3d 394, 396 (Fla. 4th DCA 2009). An act of God which is extraordinary and unprecedented such that human foresight could not guard against it provides legal justification for the non-performance of a contract. ***Florida Power Corp. v. City of Tallahassee***, 18 So. 2d 671, 675 (Fla. 1944). The scope of relief afforded by a force majeure clause depends on the circumstances and the language of the agreement. However, in general, if a force majeure clause is triggered, or if there is no force majeure clause, the Doctrine of Impossibility applies, the scope of relief will be no penalty for non-performance of the contract. Impossibility of performance constitutes grounds for rescission of a contract under Florida law. ***Bland v. Freightliner LLC***, 206 F.Supp. 2d 1202, 1207-08 (M.D. Fla. 2002).

4. Other Considerations

The Eleventh Circuit Court of Appeals, applying Florida law, described the defense of impossibility as follows:

> There is a fascinating contradiction inherent in the judicially created impossibility defense which reveals a basic tension in the law. Contracts are born of the need for certainty. They are the merchant's exchange of serendipity for serenity, the deal upon which he can rely, for better or worse, months or years hence. A contract is insurance against change. The early common law enforced the policy by making contractual liability absolute, in the theory that a contractual duty, unlike a duty imposed by, for example, tort law, is tailored by the party for himself and any eventuality might be provided for in the contract. But change is what impossibility is about. As Professor Gilmore put it, it arises as a defense when "the real world has in some way failed to correspond with the imaginary world hypothesized by the parties to the contract." By recognizing impossibility as a sort of escape hatch from the self-made chamber of contractual duty, the courts have recognized that absolute contractual liability is economically and socially unworkable. Impossibility accommodates the tension between the changes a party bargains to avoid and the changes, unbargained for and radical, that make enforcement of the bargain unwise. Thus, it seems to us that the most profitable approach to an impossibility claim is not to pass on the relative difficulty caused by a supervening event, but to ask whether that supervening event so radically altered the world in which the parties were expected to fulfill their promises that it is unwise to hold them to the bargain. Ultimately the issue is whether the change was foreseeable. This is the rule in Florida.

Cook v. Deltona Corporation¸ 753 F.2d 1552, 1557-58 (11th Cir. 1985).