



Can we get out of that contract? Force Majeure, Frustration of Purpose and Impossibility

Force Majeure

Definition: “An event or effect that can be neither anticipated nor controlled
Blacks Law Dictionary

More typically a commercial concept versus a consumer one. Courts view commercial agreements differently than consumer ones.

Must be expressly written into the contract to have it available.

Court will look to the express language of the clause to determine applicability.

Ex: “Neither Party will be liable for any failure or inability to perform, or delay in performing, such Party’s obligations under this Agreement if such failure, inability or delay arises from an extraordinary cause beyond the reasonable control of the non performing Party provided that such Party diligently and in good faith attempts to cure such non performance as promptly as practicable



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- Some clauses delineate specific force majeure events.
 - Some clauses are drafted more generally and refer to “Acts of God” or “events outside of the parties’ control
 - If the parties have listed a specific force majeure event, the courts will not conduct a foreseeability analysis and the party is excused from performance.
 - Veath v. Specialty Grains, Inc ., 190 Ill. App. 3d 787, 797 98 (1989)
 - But using force majeure clauses may preclude you from asserting other common law contract defenses. So you may be trapped by having Force Majeure in a contract but not having a definition that addresses the situation adequately.
Commonwealth Edison Co. v. Allied Gen. Nuclear Services ., 731 F. Supp. 850, 855 (N.D.Ill. 1990)
 - Performance may be permanently excused if the force majeure event is prolonged.
Commonwealth Edison Co. v. Allied Gen. Nuclear Services ., 731 F. Supp. 850, 855 (N.D.Ill. 1990)
 - Change in cost is generally not a force majeure event.
USX Corp. V. Int’l Minerals & Chemicals Corp ., 1989 WL 10851 (N.D.Ill Feb 8,



Frustration Of Purpose

Definition: Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

People v. Shinaul, 2017 IL 120162, 88 N.E.3d 760 (Ill. 2017)

Ex: Customer contracts with a fire protection company to install a fire protection device in building because a municipality passes an ordinance requiring the device. Before any works begins the municipality rescinds the ordinance because of questions of the device's effectiveness.

- “Frustration of purpose or commercial frustration as the doctrine has been called in Illinois, is a viable defense but is not to be applied liberally.”
Northern Illinois Gas Co. v. Energy Co-op., Inc., 461 N.E.2d 1049, 122 Ill.App.3d 940, 78 Ill.Dec. 215 (Ill. App. 1984)

Frustration Of Purpose

- “The doctrine requires that the frustrated purpose "be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Additionally, the frustration must be so severe that it is not fairly to be regarded as within the risks that [the party seeking rescission] assumed under the contract. Lastly, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.”
- As to the COVID pandemic, where there is no express “Force Majeure” clause Frustration of Purpose may offer a party relief from a contract.
 - Ex:** the booking of a venue for an annual “Spring Concert.”
- Not being able to pay for the contract is likely not an example of frustration of purpose.



- **Impossibility of performance**
- “Factual situations where one party to a contract finds that the purposes for which a contract was made have become impossible to perform on one side.”
- YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 403 Ill.App.3d 1, 933 N.E.2d 860, 342 Ill.Dec. 879 (Ill. App. 2010)
- **Ex:** Someone signs an engagement letter with an attorney who, shortly thereafter loses their license and can't perform services as an attorney.
- The doctrine excuses performance where performance is rendered objectively impossible due to destruction of the subject matter of the contract or by operation of law. Impossibility of performance is limited to the destruction of the means of performance by an act of God, Vis major, or by law; (performance of contract only excused under doctrine of impossibility when it is objectively impossible). This doctrine has been narrowly applied “due in part to judicial recognition that the purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances. The party advancing the doctrine must show that the events or circumstances which he claims rendered his performance impossible”
- YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 403 Ill.App.3d 1, 933 N.E.2d 860, 342 Ill.Dec. 879 (Ill. App. 2010)