

# ANTHONY & PARTNERS

Attorneys At Law

Business Advocacy | Bankruptcy & Creditors' Rights | Complex Litigation | Real Estate

813.273.5616 | [anthonyandpartners.com](http://anthonyandpartners.com)

April 2020

## COVID-19 PANDEMIC'S EFFECT ON CONTRACT PERFORMANCE

By Frank A. Lafalce, Esq.



The outbreak of coronavirus has forced many businesses to determine whether they are obligated to perform on their contracts or whether they can enforce the Force Majeure clause to excuse performance temporarily or permanently.

A force majeure clause is a contractual provision that excuses the performance obligations of one or both parties when circumstances arise that are beyond the parties' control and make performance of the contract impractical or impossible. Often, the force majeure clause is specifically defined in the contract, but other times no definition is provided. When defined, it typically includes acts of God, severe acts of nature, war, acts of terrorism, governmental acts that make performance impossible, strikes, and labor disputes. Mere economic hardship, however, is generally not enough to

qualify as a force majeure event excusing performance.

Even if a force majeure clause is defined in the contract, the application of the facts to the particular circumstances of the contract is crucial. In general, the courts have interpreted these definitional clauses narrowly and enforced them when the clause is specifically defined. While there are variations from state to state, under Florida law, the party seeking to enforce a force majeure clause must show that the event was unforeseeable and occurred outside the parties' control, through no fault or negligence. The party must also show that the event meets the definition in the contractual documents.

While it would seem obvious that the COVID-19 pandemic would meet the definition of force majeure because it

could not have been predicted and is clearly beyond the control of both parties, that is not the end of the inquiry. For example, in the standard commercial contract used in Florida real estate transactions, force majeure is specifically defined as "the availability of services, insurance, or other required approvals essential to Closing."

Anthony & Partners recently advised a client seller who had a buyer attempting to void a contract due to the coronavirus pandemic. When the buyer tried to invoke the clause, he had already been approved by his lender, title companies were still functioning, and the clerk's office was still open to record documents. Therefore, even though the COVID-19 pandemic may have been a force majeure event, the definition in the contract did not allow the buyer to cancel as the buyer could still perform despite the existence of the event. The pandemic did not make performance of the contract impossible or impractical.

Additionally, courts have traditionally found that government policies that affect economic conditions and profitability of a contract indirectly are not force majeure events. Accordingly, the fact that the country may go into recession, or that the virus has caused governments to close certain businesses, should not be construed to implicate a force majeure clause, especially one that has a specific definition. If a contract does not contain a force majeure clause, or if the clause is not defined, the party seeking to enforce a force majeure ►

## COVID-19 PANDEMIC'S EFFECT ON CONTRACT PERFORMANCE

*Continued from front page.*

clause must show that the event in question so frustrates the purpose that the transaction would make little sense. However, suffering economic hardship that a party may perceive due to the pandemic does not alone rise to a frustration of purpose defense.

In summary, while the coronavirus clearly is having a significant and harmful impact on businesses and their economic prospects, it may not rise to the point of their inability to perform their contracts. For a party to successfully invoke a force majeure clause, a fact-intensive inquiry on a case-by-case basis must be made. Contractual parties wishing to either assert such a defense or faced with a counterpart who is attempting to assert such a defense should consult with their counsel to determine the likelihood of success. Similarly, parties drafting contracts should consult with counsel to provide specific and detailed language as to what constitutes a force majeure in their contracts to avoid disputes in the future.

## FIRM NEWS

### January

Anthony & Partners hosted the opening reception at the 2020 American Bankruptcy Institute Annual Seminar.

### February

Anthony & Partners sponsored Karaoke Happy Hour at Fountain Mediterranean & Sushi Bistro.

### March

John A. Anthony was a guest lecturer on the topic of Representation of Secured Creditors at the Stetson University College of Law's Advanced Bankruptcy Seminar.

Anthony & Partners hosted an afternoon of camaraderie, clay shooting, and a post-shoot happy hour at Tampa Bay Sporting Clays.



**ANTHONY  
& PARTNERS**  
Attorneys At Law

### Tampa Office

201 North Franklin Street  
Suite 2800  
Tampa, FL 33602  
813.273.5616 tel  
813.221.4113 fax

### Bartow Office

415 East Main Street  
Bartow, FL 33830  
863.537.8025 tel  
863.537.6490 fax

### Toll Free:

888.247.8909

### Web:

[anthonyandpartners.com](http://anthonyandpartners.com)

### Email:

[info@anthonyandpartners.com](mailto:info@anthonyandpartners.com)

## A Message From Our Team

*Anthony & Partners wishes you continued good health during this difficult time. You can reach us by calling our main office numbers or through your main contact's direct line.*