

California – Force Majeure Law

If addressed in the contract, the parties' agreement regarding what constitutes a force majeure event will control. See Cal. Civ. Code § 1511 (providing an implied contract term allowing for a statutory defense of impossibility "unless the parties have expressly agreed to the contrary").

"California law requires a promisor invoking a force majeure clause to show 'that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive.'" *Jin Rui Grp., Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 F. App'x 511 (9th Cir. 2015) (quoting *Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 45 Cal.2d 784, 291 P.2d 17, 21 (1955)). The impossibility or unreasonable expense must result from a wholly unforeseen event not within the reasonable contemplation of the parties given the nature of the contract; force majeure "is not intended to buffer a party against the normal risks of a contract." *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.*, 4 Cal. App. 4th 1538, 1565, 6 Cal. Rptr. 2d 698, 713 (1992), modified (Apr. 6, 1992) (quoting *N. Indiana Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986)).

In the absence of a governing force majeure clause in a contract, the principle of impossibility can be a defense to contract enforcement under California law. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 459–60, 156 P. 458 (1916). California has specific statutory authority supporting such a defense, including California Civil Code section 3526 ("No man is responsible for that which no man can control."), section 3531 ("The law never requires impossibilities."), and section 1511 (performance of an obligation is excused when "it is prevented or delayed by an irresistible, superhuman cause ... unless the parties have expressly agreed to the contrary"). "The test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care.'" *Mathes v. City of Long Beach*, 121 Cal. App. 2d 473, 477, 263 P.2d 472, 474 (1953) (citing *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal.2d 228, 238, 174 P.2d 441, 447).

"Strict impossibility, however, is not required to excuse performance; rather, performance may also be excused under circumstances showing 'impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved.'" *Hebrank v. Linmar Mgmt., Inc.*, No. 3:13-CV-

2179-GPC-JMA, 2014 WL 3741634, at *4 (S.D. Cal. July 29, 2014) (quoting *Oosten*, 45 Cal.2d at 794).

“Still, for performance to be excused, it must be objectively-not subjectively-impossible or impracticable.” *Id.* (citing *Hensler v. Los Angeles*, 124 Cal.App.2d 71, 83, 268 P.2d 12 (1964)). “Facts which may make performance more difficult or costly than contemplated when the agreement was executed do not constitute impossibility.” *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d 101, 154, 135 Cal. Rptr. 802, 833 (1977).

The contract principle of frustration of purpose also can excuse performance under California law when “performance is possible but a supervening, fortuitous event has virtually destroyed the value of the consideration to be rendered.” *Glendale Fed. Sav. & Loan Assn.*, 66 Cal. App. 3d at 154, 135 Cal. Rptr. at 833–34. Application of the principle “has been limited to cases of extreme hardship so that businessmen, who must make their arrangements in advance, can rely with certainty on their contracts.” *Lloyd v. Murphy*, 25 Cal.2d 48, 54, 153 P.2d 47, 50 (1944).