

Montana – Force Majeure Law

Force majeure clauses will be enforced under Montana law, but are narrowly construed. Under Montana law, a force majeure clause “is not an escape way for those interruptions of production that could be prevented by the exercise of prudence, diligence, care, and the use of those appliances that the situation or party renders it reasonable that he should employ.”

Cont'l Res., Inc. v. Montana Oil Properties, Inc., No. CV-05-74-BLG-RFC, 2006 WL 8435788, at *2 (D. Mont. May 30, 2006) (quoting *Edington v. Creek Oil Co.*, 213 Mont. 112, 120, 690 P.2d 970, 974 (1984)).

In the absence of a force majeure clause, Montana law provides for excused performance based on impossibility. Impossibility “is a strict standard that can only be maintained where the circumstances truly dictate impossibility. The general rule is that, where a party to a contract obligates himself to a legal and possible performance, he must perform in accordance with the contract terms.” *Cape-France Enterprises v. Estate of Peed*, 305 Mont. 513, 516–17, 29 P.3d 1011, 1014-15 (2001) (quoting *Barrett v. 517 Ballard*, 191 Mont. 39, 44, 622 P.2d 180, 184 (1980)). “However, ‘impossibility encompasses not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.’” *Id.* (quoting *Smith v. Zepp*, 173 Mont. 358, 364, 567 P.2d 923, 927 (1977)).

Montana’s statutory law also allows for rescission of a contract based on impossibility/ commercial frustration, under Section 28–2–603 of Montana Code Annotated, which provides: “Where a contract has but a single object and such object is unlawful, whether in whole or in part, or wholly impossible of performance or so vaguely expressed as to be wholly unascertainable, the entire contract is void.”

“While the doctrine of impossibility or impracticability is not set in stone, it is applied by courts where, aside from the object of the contract being unlawful, the public policy underlying the strict enforcement of contracts is outweighed by the senselessness of requiring performance.” *Cape-France Enterprises*, 305 Mont. at 518, 29 P.3d at 1015. For example, in the *Cape-France* case, the court affirmed rescission of a buy-sell agreement for a tract of real estate that the buyer intended to develop, after a government agency determined the groundwater was likely contaminated. The court noted that for the buyer “to proceed further with the subdivision and zoning issues it would be forced to expose itself, not only to substantial and unbargained-for economic risks but, as well, the public would be exposed to potential health



risks and possible environmental degradation.” 305 Mont. at 519, 29 P.3d at 1016.

Montana statutory law also provides that a “public contractor shall not be considered to be working beyond contract time if the delay is caused by an accident or casualty produced by physical cause which is not preventable by human foresight, i.e., any of the misadventures termed an ‘act of God’.” Mont. Code Ann. § 18-2-312.