

Indiana – Force Majeure Law

Indiana law recognizes the enforceability of force majeure provisions in commercial contracts. *Specialty Foods of Indiana, Inc. v. City of South Bend*, 997 N.E.2d 23, 27 (Ind. App. Ct. 2013). Indiana Courts have defined force majeure provisions as specific contractual clauses that allocate risk if performance becomes impossible or impracticable, “esp. as a result of an event or effect that the parties could not have anticipated or controlled.” *Id.*; See also *Acheron Medical Supply, LLC v. Cook Incorporated*, 1:15-cv-1510, 2019 WL 2574147, at *2 (S.D.Ind., June 24, 2019). However, it has been noted that “Indiana has very few cases interpreting force majeure clauses.” *Specialty Foods*, 997 N.E.2d at 26.

The *Specialty Foods* case appears to be Indiana’s seminal modern case interpreting force majeure contractual provisions, and specifically provides that the scope and effect of a force majeure clause depends on the specific contract language and not on any traditional definition. *Specialty Foods*, 997 N.E.2d at 27. Thus, “[i]n other words, when the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties, and reviewing courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended.” *Id.* As such, the specific contract provision will provide the framework for an analysis of the applicability of a force majeure clause excusing nonperformance of a contractual obligation and the nonperforming party bears the burden of proving such applicability. *Id.*

With the above in mind, the initial step in analyzing a force majeure provisions applicability hinges on contractual interpretation. In this regard, Indiana law provides that “[t]he objective of a court when it interprets a contract, including a force majeure provision, is to determine the intent of the parties at the time the contract was made by examining the language used in the contract.” *Specialty Foods*, 997 N.E.2d at 26. Accordingly, Indiana courts will analyze intent in light of the circumstances existing at the time the contract was made. *Id.* Additional contract principles that apply to such contract interpretation include (1) clear and unambiguous language of a contract is to be given its plain and ordinary meaning (*Boyer Const. Group Corp. v. Walker Const. Co., Inc.*, 44 N.E.3d 119, 126 (Ind. App. Ct. 2015), and (2) courts are to interpret the contract language so as to not render any words, phrases, or terms meaningless (*Metro Holdings One, LLC v. Flynn Creek Partner, LLC*, 25 N.E.3d 141, 157 (Ind. App. Ct. 2014)). For example, the *Specialty Foods* force majeure provision included a catch-all phrase

providing excused performance for “any reason outside the control” of the nonperforming party, and while the Court noted that such language was broad and the occurrence was not specified in the force majeure provision, the occurrence was, in fact, outside of the control of the nonperforming party, and thus, held that the provision excused nonperformance. *Specialty Foods*, 997 N.E.2d at 29. Likewise, in *State v. International Business Machines Corp.*, 51 N.E.3d 150 (Ind. 2016), the Supreme Court of Indiana analyzed the specific language of a force majeure provision which included a list of specified occurrences that may excuse performance, but also included a caveat in which it was required that the nonperforming party provide notice when nonperformance will occur or performance is rendered impractical. *International Business Machines*, 51 N.E.3d at 164. The Court looked at the force majeure provision and notice requirement therein, and held that although a force majeure event had occurred, because the nonperforming party had not provided notice of its nonperformance, the nonperforming party could not rely on the force majeure provision and occurrence to excuse performance. *Id.* Accordingly, Indiana law seems to heavily rely on the specified contractual language of force majeure provisions.

Additionally, similar to other jurisdictions, while Indiana law does recognize the common law doctrine of impossibility, the doctrine is relatively uncommon. That said, under Indiana law, the doctrine of impossibility is an affirmative defense to performance of an executory contract and is generally invoked as a defense to an action for damages. *Bernel v. Bernel*, 930 N.E.2d 673, 683 (Ind. App. Ct. 2010). The doctrine has been defined as “where [] performance of a contract becomes impossible, non-performance is excused, and no damages can be recovered.” *Dove v. Rose Acre Farms, Inc.*, 434 N.E.2d 931, 935–936 (Ind. App. Ct. 1982). However, to invoke impossibility, one must demonstrate that performance is “not merely difficult or relatively impossible, but absolutely impossible, owing to the act of God, the act of the law, or the loss or destruction of the subject-matter of the contract.” *Ross Clinic, Inc. v. Tabion*, 419 N.E.2d 219, 223 (Ind. App. Ct. 1981) (citations omitted). As such, proving the defense of impossibility is a high bar under Indiana law.

In summary, while there is little modern Indiana case law specifically analyzing force majeure provisions, the *Specialty Foods* case appears to be the seminal modern Indiana case that does discuss force majeure contract clauses. In this regard, *Specialty Foods* provides the basis by which Indiana courts will analyze clauses going forward. Thus, given the *Specialty Foods*



opinion, it is clear that Indiana law does recognize the enforceability of force majeure provisions, however, Indiana courts will rely heavily on the specific language used in the provisions when interpreting their applicability to claims relating to excused nonperformance of a contractual obligation