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Washington – Force Majeure Law

Under Washington law an "act of God" is a defense to any breach of contract claim unless the contract allocates the risk for such events to a party or specifies the effect of such an event. *Franklin Park Mall v. Country Roof Coating Contractors*, 84 Wash. App. 1085 (1997); *Donald B. Murphy Contractors, Inc. v. State*, 40 Wn. App. 98, 105, 696 P.2d 1270, 56 A.L.R.4th 1027, review denied, 103 Wn.2d 1039 (1985).

In the absence of a force majeure clause Washington law provides performance may be excused based on the principle of impossibility. In the commercial context, impossibility of performance encompasses "both strict impossibility and impracticality due to extreme and unreasonable difficulty, expense, injury or loss." *Thornton v. Interstate Sec. Co*., 35 Wash. App. 19, 30, 666 P.2d 370, 377 (1983) (quoting *Liner v. Armstrong Homes of Bremerton, Inc*., 19 Wash. App. 921, 926, 579 P.2d 367 (1978)). "Subjective inability to perform … does not excuse performance;" the unexpected, yet foreseeable event which renders performance impossible must be fortuitous and unavoidable on the part of the promisor." *Id*. "The mere fact that a contract becomes more difficult or expensive than originally anticipated does not justify setting it aside." *Pub. Util. Dist. No. 1 of Lewis Cty. v. Washington Pub. Power Supply Sys*., 104 Wash. 2d 353, 364, 705 P.2d 1195, 1204 (1985), *modified*, 713 P.2d 1109 (Wash. 1986). "When the existence of a specific thing is necessary for the performance of a contract, the fortuitous destruction of that thing excuses the promisor unless he has clearly assumed the risk of its continued existence." *Metro. Park Dist. of Tacoma v. Griffith*, 106 Wash. 2d 425, 440, 723 P.2d 1093, 1102 (1986).

Performance may also be excused under Washington law pursuant to the principle of frustration of purpose. Commercial frustration is defined under Washington law as follows: "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears." *Metro. Park Dist. of Tacoma v. Griffith*, 106 Wash. 2d 425, 441, 723 P.2d 1093, 1102 (1986). "Commercial frustration 'is limited to cases of extreme hardship where the event was not foreseeable and counter performance is nearly or totally destroyed.'" *Id*. (quoting *Thornton v. Interstate Sec. Co*., 35 Wash. App. at 31 n.3). Commercial frustration will not be found where the "desired object or effect" of the contract is not "nearly or totally destroyed." For example,

one court held that a fire's destruction of a boathouse concessions complex in a municipal park did not amount to frustration of an agreement that obligated a party to provide concessions at the boathouse, because the agreement also covered concessions at facilities other than at the boathouse. *Metro. Park Dist. of Tacoma*, 106 Wash. 2d at 442, 723 P.2d at 1103.