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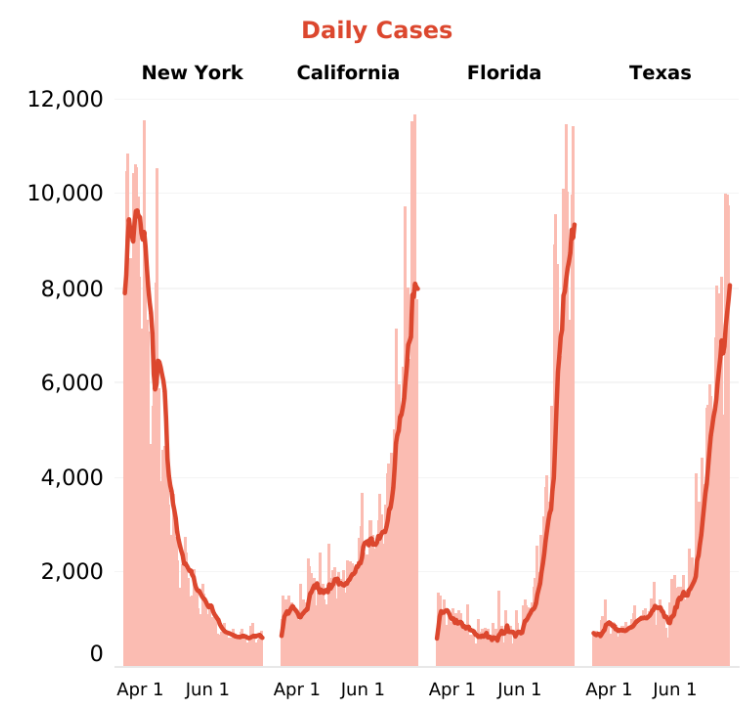
# Mitigating COVID-19 Construction Risks – Common Law Excuse of Performance Doctrines, Claims Considerations, and Builder's Risk Insurance

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## COVID-19 State of Affairs



## **COVID-19 State of Affairs – Potential Project Impacts and Delays**

- Exacerbation of [Pre-COVID Labor Shortages](#)
- [Supply Chain](#) Disruption
- [CDC / OSHA](#) Compliance for Job Site and Worker Safety
- Impact of [State / Local / Municipal Orders or Ordinances](#)

## Overview of Presentation

- Historical Perspective on Common Law Excuse of Performance Doctrines
- Contractual and Legal Considerations for Handling COVID Claims under AIA A201 - 2017 General Conditions
- Potential Paths to Coverage for COVID Delays under Builder's Risk Insurance ("BRI")



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# COMMON LAW EXCUSE OF PERFORMANCE

## Historical Perspective to Modern Events

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Presented by: Brian D. Solomon, Esq., Kirwin Norris, P.A.

Research assistance by: Zoe L. Woods, Esq.,

## Paradine v. Jane, [1647] EWHC KB J5, 82 ER 897

- Lessee sued for unpaid rent.
  - Defense: premises destroyed by invading German enemies.
  - Holding: Tenant must pay rent.
  - Lease required tenant to maintain the “[R]ent is a duty created by the parties...there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement....”.

## Taylor v. Caldwell, England and Wales High Court, Queen's Bench Division (1863)

Facts: Defendants leased The Surrey Gardens and Music Hall – Four grand concerts. First concert date: June 17, 1861.

- June 11, 1861: Music Hall destroyed by accidental fire.
- Music Hall sued defendants for rent.
- Lease did not address duties if Music Hall were destroyed.

- Holding:
  - Defendant released from paying rent.
    - Implied covenant that rent would be paid in exchange for use of the Music Hall.
    - Extended rationale of personal contracts and bailments.
    - Implied that the contract was predicated on the existence of the person or chattel.
    - Music Hall-essential to contract.
    - Non-existence of Music Hall not Defendant's fault.



## Day v. United States, 249 U.S. 159 (2017)

### **Facts:**

- Government had built a bulkhead 142 feet high to protect a canal and locks.
- Contractor hired to complete the canal and locks and responsible for keeping the work in place in good condition.
- During construction, it became apparent that the flood waters would overflow the bulkhead.
- Contractor increased the height of the bulkhead to protect its work and then sued for the additional costs.

### **Holding:**

Government not liable for additional costs to increase height of the temporary bulkhead in place. Contractor performed additional work to protect its work already in place.

## FRUSTRATION OF PURPOSE

Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc. 174 So. 2d 614 (Fla. 2d DCA 1965)

### Facts:

- Farms contracted with Crown Ice to deliver snow ice needed in freight cars and trucks at the packing house. Crown Ice was unable to produce sufficient ice. Farms terminated contract.
- Crown Ice sued for breach.

### Holding:

- Crown did not breach based on its defense of “Frustration of Purpose.”

- Frustration of purpose” refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party.
- Crown Ice was aware of Farms’ needs when entering the contract. When the needs were not met, Farms’ purpose in entering the contract was “frustrated” thus justifying the termination of the contract.

**Hopfenspirger v. West, 54 So. 3d 553, 556  
(Fla. 5th DCA 2011)**

**Facts:** Debtor gave third mortgage on property as collateral for business loan. Agreement required Debtor to liquidate the property.

Debtor refused based on properties lack equity.

**Holding:** “frustration of purpose” excuses performance by a party where the value of performance regarding the subject of an agreement has been frustrated or destroyed. The Doctrine is not limited to strict impossibility but includes “impracticability” due to unreasonable expenses.

## DOCTRINE OF IMPOSSIBILITY

### Economic Downturn

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#### Ferguson v. Ferguson, 54 So. 3d 553, 556 (Fla. 3d DCA 2011)

**Facts:** Divorce decree required plaintiff to sell property. Claimed that the economic downturn rendered the sale of the home an impossibility.

**Holding:** While economic downturn is “marked and unfortunate, [it is not]... the sort of unanticipated circumstance that falls within the purview of the doctrine of impossibility”. Defendant had to sell the property

**Am. Aviation, Inc. v. Aero-Flight Serv., Inc., 712  
So. 2d 809 (Fla. 4<sup>th</sup> DCA 1998)**

**Facts:** Aircraft refurbisher sued jet engine overhauler and its president for breach of contract for overhaul and sale of engine. Overhauler and president asserted affirmative defense of impossibility of performance and offered in proof of that defense testimony that Aero-Flight could not obtain certification for the engine because the engine had been “blacklisted” by the manufacturer. Trial court ruled in favor of overhauler. Refurbisher appealed.

**Holding:** Appellate court reversed. Defendant was in possession of the recording pertaining to the engine, and would’ve been aware of that possibility. “As part of its business practice, Aero-Flight accepted the responsibility of having the engine tested and certified as airworthy

**LSREF2 Baron LLC v. Beemer & Associates**  
**2011 WL 6838047, slip op. at 1 (M.D. Fla. Dec.**  
**29, 2011)**

Facts:

- Debtor could not make payments because rental properties were vacant due to an economic downturn.
- Sought application of “Doctrine of Commercial Impracticability”.

## Doctrine of Commercial Impracticability

“Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”

Held that economic downturns should have reasonably been within their contemplation. Market fluctuations do not usually apply.



## Mishara Constr. Co. v. Transit-Mixed Concrete Co. 310 N.E.2d 363 (Mass. Sup. Ct. 1974)

### **Facts:**

Concrete supplier unable to fulfill contract due to a picket line at the jobsite. Raised defense of impracticability.

**Holding:** Jury question whether it was caused “by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made .

## Claims Considerations – Provisions Relating to COVID Time Extensions under the [AIA A201 General Conditions](#)

### § 8.3 Delays and Extensions of Time

§ 8.3.1 *If the Contractor is delayed at any time in the commencement or progress of the Work* by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, **unusual delay in deliveries**, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, **or other causes beyond the Contractor's control**; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) **by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.**

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

## Claims Considerations – Provisions Relating to COVID Time Extensions under the [AIA A201 General Conditions](#)

COVID-19 as a “cause[s] beyond Contractor’s control”

- local quarantine order (Soap Co. v. Peet Bros. Mfg. Co., 50 Cal. App. 246, 194 P. 715 (Cal. Ct. App. 1920); *but see* Napier v. Trace Fork Mining Co., 193 Ky. 291, 235 S.W. 766 (1921))
- subcontractor’s and supplier’s delays (Smith v. Vail, 65 N.Y.S. 834 (App. Div. 1900), *aff’d*, 59 N.E. 1125 (N.Y. 1901))
- sovereign, or governmental acts (Aragona Constr. Co., Inc. v. United States, 165 Ct. Cl. 382 (1964))

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- “Articles 8.3.1, 8.3.2 [...] of the General Conditions [...] pertain to claims on the part of the contractor [...] for additional compensation based upon claims for delays or extensions of time not due to the contractor's fault[...] require that all such claims shall be [timely] made in writing to the architect [...] or else any such claim shall be waived or deemed invalid.” Tuttle/White Constructors, Inc. v. State, Dep't of Gen. Servs., 371 So. 2d 1096, 1096 (Fla. 1st DCA 1979); Marriott Corp. v. Dasta Const. Co., 26 F.3d 1057, 1069 (11th Cir. 1994); See Giannetti Bros. Const. Corp. v. Lee Cty., Fla., 585 F. Supp. 1214, 1219 (M.D. Fla. 1984).
- Don't be a snake in the grass...Inland Dredging Co. v. Panama City Port Auth., 2005 WL 4813429, slip op. at 4, n. 6 (N.D. Fla. Sept. 22, 2005)

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## Claims Considerations – Provisions Relating to COVID Time Extensions under the [AIA A201 General Conditions](#)

- Generally, “[a]bsent a liquidated damages clause or a no-damage-for-delay clause, a delayed party may recover actual damages that result from delays.” See Marshall v. Karl F. Schultz, Inc., 438 So. 2d 533, 534 (Fla. 2d DCA 1983)
- See § 15.1.5, A201 (Default) – absent an emergency endangering life or property, Contractor required to provide Notice before “proceeding to execute the portion of the Work that is the subject of the Claim”

## Insurance Coverage - Is there a Concurrent Path to Compensation for Delays under BRI or its Endorsements?

- Under AIA 2017 Insurance and Bonds Exhibit “A”, Owner\* required to purchase the following BRI Coverage (§ A.2.3):
  - “property written on a builder’s risk ‘all-risks’ [...] policy form” (§ A.2.3.1)
  - “direct physical loss” (§ A.2.3.1.1)



## Insurance Coverage - Is there a Concurrent Path to Compensation for Delays under BRI or its Endorsements?

- In addition, the parties may require the Owner\* to purchase the following BRI Coverage (§ A.2.4):
  - Loss of Use, Business Interruption, and Delay in Completion Insurance (§ A.2.4.1)
  - ***Expediting Cost Insurance (§ A.2.4.3)***
  - Extra Expense Insurance (§ A.2.4.4)
  - Civil Authority Insurance (§ A.2.4.5)
  - Ingress/Egress Insurance (§ A.2.4.6)
  - ***Soft Costs Insurance (§ A.2.4.7)***

## BRI Coverage – Who is the “Insured”?

- Named Insured – Owner (See Dec Page)
- Additional Insured Endorsement?

### **Additional Insured Endorsement**



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

This endorsement modifies insurance provided under the:

#### **BUILDERS RISK AND INSTALLATION COVERAGE FORM**

When required by a written or oral contract, all owners; contractors and subcontractors of every tier; manufacturers; suppliers; architects and engineers are insured for their interest in the Covered Property while that Covered Property is at the "project site".

All other terms, conditions, provisions and exclusions of this policy remain the same.

- Ex. A, Insurance and Bonds, §A.2.3.1 – “The [BRI Policy] *shall* include the interests of the Owner, Contractor, Subcontractors, and Sub-subcontractors in the Project as insureds,” but not A / E by default (See also B101-2017)

## BRI Coverage – Direct Physical Loss or Damage?

- What's in a [policy](#)?
- “We will pay for direct physical loss of or damage to covered property at the premises described in the declarations caused by or resulting from any covered cause of loss.” § 11:433.Requirement of physical loss, 4 Pt. 2 [Bruner & O'Connor Construction Law § 11:433, n. 1](#) (citing Miller and Lefebvre, [Miller's Standard Insurance Policies Annotated](#), Vol. I at 468 (4th ed. 1995))
- “[BRI] policies [...] typically do not cover damages arising from pandemics, epidemics, viruses, or other public health emergencies.” [COVID-19: Construction Contracts and Potential Claims Under Business Interruption, Civil Authority, and Other Insurance Policies and Endorsements](#), Practical Law Practice Note, S. Biser, et. al. (Apr. 20, 2020); [ABA Forum on Construction Law Leadership Roundtable Series on COVID-19, Builders' Risk, Business Interruption and Other Insurance Questions](#) (Apr. 28, 2020)

## Florida Trends – First Party Property Insurance – Coverage for COVID Property Losses

- ***Business Income Loss*** - loss of business income due to a suspension of operations
- ***Extra Expense*** - expenses incurred to minimize suspension of business operations
- ***Civil Authority*** - loss of business income due to civil authority prohibiting access
- ***Ingress/Egress*** – loss of business income due to prohibition or restriction on customers’ access to business

## Florida Trends – First Party Property Insurance – Coverage for COVID Property Losses

- COVID-19 caused “direct physical loss and damage”
  - All-Risks Policy in which Insurer declined to include ISO Endorsement CP 01 40 07 06, a.k.a. “virus exclusion”
  - Local Ordinances have declared COVID-19 as causing “property loss and damage”

## Florida Trends – Insurer Coverage Defenses

- ***Qualified Opinion Testimony Needed to Establish Contaminant Caused Covered “Direct Physical Loss or Damage” (“DPL”)***
  - *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, slip op. at 3-9 (S.D. Fla. June 11, 2018)
- ***“Cleaning” alone; partial occupancy or habitability may be insufficient to establish DPL***
  - *Id.*, slip op. at 9-10.
- ***No DPL means no coverage for Business Income Loss (and Extra Expense)***
  - *Id.*, slip op. at 10 (“As addressed above, Plaintiff has not established a direct physical loss or damage. Plaintiff cannot recover under the Business Income (And Extra Expense) Coverage because Plaintiff cannot show that there was any suspension of operations caused by ‘physical damage.’”)

## Pt. II (B) – BRI Coverage – Coverage Under Endorsements?

- ***Soft Costs Coverage*** – advertisement costs; loan interest; A/E fees; taxes; Lease fees; Insurance Premiums; Legal/Accounting; Licensure/Permit fees
- ***Expediting Expense Coverage*** - temporary repairs and costs incurred to speed up the permanent repair or replacement of covered property or equipment

## Practice Points

- Ensure timely and diligent claims documentation for COVID delays
- Review BRI policies for potential coverage for delays on current projects
- Consider requiring BRI endorsements which may provide coverage on new projects





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**THE END – QUESTIONS?**