

## ***The COVID-19 Pandemic and its Effects on the Construction Industry (April, 2020)***

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By: [Gary Brown](#) On April 3, 2020, Governor DeSantis's statewide stay-at-home order went into effect, requiring all non-essential businesses, notably excluding construction, to close to the public.<sup>[1]</sup> According to DeSantis's Order construction is an essential business<sup>[2]</sup>, and therefore, has not yet felt the brunt of the coronavirus pandemic, like it has in other places.<sup>[3]</sup> For example, Boston, Cambridge, and Philadelphia have banned construction altogether, with few exceptions, and therefore have left many people jobless and projects half-finished.<sup>[4]</sup> Where construction has been, or may in the future be, halted or otherwise impacted, the "Coronavirus has prompted questions about whether pandemic-related delays are covered under force majeure" clauses.<sup>[5]</sup> Generally speaking, under typical force majeure clauses, the seller is not liable "for any delay caused by acts of God, weather conditions, restrictions imposed by any governmental agency, labor strikes, material shortages or other delays beyond the control of the [s]eller."<sup>[6]</sup> To determine whether a force majeure clause is enforceable, the court needs to determine whether the clause is illusory.<sup>[7]</sup> Ultimately, the court will find that the obligation is not illusory, and therefore enforceable, as long as the force majeure clause limits the exclusions to events beyond the control of the seller and not within the seller's discretion.<sup>[8]</sup> However, some major projects in Florida have been put on hold as a result of Coronavirus concerns and could become the subject of force majeure litigation. For example, "[w]ork on two major projects—a \$300 million Royal Caribbean Cruise Lines headquarters at Port Miami and a University of Miami UHealth Care center in North Miami—have been delayed indefinitely, due to uncertainty about the spread of COVID-19."<sup>[9]</sup> Therefore, in order to prevent delays and more projects being put on hold while complying with the "social distancing recommendations" the construction industry has changed how everyday tasks are carried out.<sup>[10]</sup> For example: (1) Miami<sup>[11]</sup>; (2) Boca Raton<sup>[12]</sup>; (3) Sarasota<sup>[13]</sup>; and (4) Charlotte<sup>[14]</sup> all process permit applications online. Moreover, Charlotte County, "suspended inspections . . . of 'existing' residential dwellings due to" the Coronavirus.<sup>[15]</sup> Therefore, even though construction has not come to an abrupt halt in some places, the process of how everyday tasks are carried out has been transformed in order to limit as much in-person contact as possible.<sup>[16]</sup> Whether construction has been halted entirely, or merely delayed, due to current Coronavirus restrictions by local and state authorities, all parties affected, from the top down, will be seeking ways to attempt to mitigate or recover their losses. Key to their success—or failure—to do so will be whether, and to what extent, force majeure and other remedies, contractual and otherwise, will be available. While the outcome of such attempts remains to be seen, what is certain is that the fallout from this pandemic will be widespread and long-lasting. <sup>[1]</sup> Chelsea Tatham, *Florida Gov. Ron DeSantis Issues Statewide Stay-At-Home Order. What Does it Mean?*, WTSP: Coronavirus (Apr. 2, 2020, 2:10 PM) <https://www.wtsp.com/article/news/health/coronavirus/florida-stay-at-home-order-ron-desantis/67-1a7f88f5-5d0d-4836-8ab9-f9cd9adb9949>; Jenny Staletoich, *South Florida Construction Is Humming Along. Some Worry About the Risk to Workers and Residents*, WLRN (Mar. 27, 2020), <http://www.wlrn.org/post/south-florida-construction-humming-along-some-worry-about-risk-workers-and-residents#stream/0> ("Construction has been deemed essential business in South Florida. Miami-Dade, Broward and Palm Beach counties have all included ongoing construction site work in orders defining which businesses can stay open. In the Keys, where roadblocks started Friday to stop visitors, workers simply need to show a note from their boss."). <sup>[2]</sup> *Id.*; Compare Mary Dougherty, *Construction Is Essential to Florida's Economy*, *Herald Trib.: Bus.*, (Apr. 6, 2020, 6:02 AM) <https://www.heraldtribune.com/business/20200406/construction-is-essential-to-floridas-economy>. ("Keeping the construction industry going during this time, keeps people employed and supports families who support local businesses and, in the end, will help our community to bounce back stronger and better than ever") with Charlie Baker, *Cambridge Joins Boston in Institution Construction Moratorium Due to Coronavirus*, *Globest* (Mar. 19, 2020) ("[T]he City of Cambridge will allow construction activity only with the explicit permission of the Commissioner of Inspectional Services."); Michaelle Bond, *Pa. Construction Sites Fall Silent; The Ban Is Too Extensive, Some Believe. Turzai Plans To Introduce A Bill Urging More Waivers*, *Phila. Inquirer: Nation & World* (Apr. 1, 2020) ("Pennsylvania is one of only a handful of states to stop all active construction, except sites granted waivers for medical-related work, emergency repairs, and limited residential work.") and *Boston is First US City to Shut Down Construction Amid Covid-19 Fears*, *Real Estate Monitor Worldwide* (Mar. 19, 2020) ("[T]he Mayor of Boston, Martin Walsh, ordered all of the city's construction projects to shut down, and said that the only work he expects to take place in the city in the next two weeks would be emergency works such as street repairs and utility services."). <sup>[3]</sup> See Barbara Thau, *Experts Unpack the Massive Cross-Industry Impact of the Coronavirus, From Retail to Hospitality*, *U.S. Chamber Commerce* (Mar. 20, 2020), <https://www.uschamber.com/co/good-company/launch-pad/coronavirus-effects-on-major-industries>. For instance, business sectors like the (1) retail industry; (2) hospitality industry; (3) foodservice industry; and (4) fashion industry are a few sectors that have been hit the hardest because of the Coronavirus. *Id.*; *Suffolk's New Diversification Strategy Plays Well in Florida*, *Globest* (Feb. 10, 2020) ("[W]hile housing has slowed in Miami, the forecast for the Florida construction industry calls for substantial growth, according to the Florida Dept. of economic opportunity."). <sup>[4]</sup> See Baker, *supra* note 3; Bond, *supra* note 3 ("Halting home building sites and commercial construction sites . . . [have] . . . resulted in homes and other structures sitting half-finished and, as a result, poses risks to public health and safety that must be immediately addressed. Leaving partially built homes and other construction sites exposed to the elements will compromise the integrity of building materials and add additional financial loss.") (quoting Pennsylvania Speaker of the House, Michael Turzai); Tim Logan, *Construction Has Screeched to A Halt, But Not Everywhere*, *Bos. Globe* (Mar. 22, 2020) (The construction ban has had an "economic toll of putting thousands of construction workers out of their jobs and hitting pause on . . . [Boston Mayor Martin Walsh's] . . . long-held goal of combatting Boston's sky-high housing prices with 69,000 new units by 2030."). <sup>[5]</sup> *South Florida Builders Active, But Pipeline Stalls Amid Coronavirus*, *Globest* (Mar. 20, 2020). <sup>[6]</sup> *Home Devco/Tivoli Isles LLC v. Silver*, 26 So. 3d 718, 722 (Fla. 4th DCA 2010) (citing *Stein v. Paradigm Mirsol, LLC*, 551 F. Supp. 2d 1323 (M.D. Fla. 2008)). <sup>[7]</sup> See *Snively Siesta Assocs., LLC v. Senker*, 34 So. 3d 813, 815–18 (Fla. 2d DCA 2010). <sup>[8]</sup> *Id.*; *Home Devco*, 26 So. 3d at 722; *Aikin v. WCI Communities, Inc.*, 26 So. 3d 691, 694–95 (Fla. 2d DCA 2010). But see, *Taylor v. Morrison Homes, Inc.*, 67 So.3d 224 (Fla. 2d DCA 2011) ( finding that the force majeure clause failed because the contract contained "conflicting provisions" that allowed for both rescission and specific performance, and therefore, "this limitation on . . . [Plaintiff's] right to seek specific performance . . . renders . . . [Defendant's] two-year-completion obligation illusory."). <sup>[9]</sup> Rene Rodriguez, *Virus Puts Some Big S. Fla. Construction Projects*, *Miami Herald*, 19a (Mar. 27, 2020). The planned Royal Caribbean office building, which was designed to look like a ship, would rise 10 stories and incorporate 350,000 square feet of office space. It would have also nearly doubled the company's workforce capacity, from 2,200 to 4,200. The UHealth Medical Center in North Miami was going to be built on a 10-acre site inside the \$4 billion SoLé Mia mixed-use development, a joint venture between Aventura's Turnberry and the New York-based LeFrak. The center was projected to have 225,000 square feet of space, specializing in cancer treatments from Sylvester Comprehensive Cancer Center, eye care by the Bascom Palmer Eye Institute, cardiology, and other specialties. *Id.* <sup>[10]</sup> *South Florida Builders Active, But Pipeline Stalls Amid Coronavirus*, *Globest* (Mar. 20, 2020). <sup>[11]</sup> *Id.* <sup>[12]</sup> *Id.* <sup>[13]</sup> Reilly Steve, *Building Boom Continues, Despite Virus*, *Charlotte Sun* (Mar. 26, 2020).

[14] *Id.* [15] *Id.* (explaining that “inspectors won’t come to inspect your new water heater, replacement air conditioning ducts or any other interior work for homes that aren’t new . . . . [however] . . . Charlotte building officials would accept pictures and video for certain inspection types.” [16] *See id.*

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Gary Brown is a Partner and the Head of the firm’s Construction Practice Group at Kelley Kronenberg. Gary focuses his practice on [construction defect litigation](#) and [complex commercial litigation](#). Contact Gary Brown at: Phone: 844-632-4357 Email: [gbrown@kklaw.com](mailto:gbrown@kklaw.com) ***DISCLAIMER: This article is provided as a courtesy and is intended for the general information of the matters discussed above and should not be relied upon as legal advice. Neither Kelley Kronenberg, nor its individual attorneys or staff, are responsible for errors, omissions and/or typographical errors – always seek competent legal counsel.***

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