

The Impossibility Defense

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Your house building company (Builder) is halfway done with the building of a large house when during a thunderstorm, lightning strikes the house, catching it on fire and destroying it. The Builder does everything he can to rebuild the house as fast as possible but he still ends up being 4 months late in finishing the house. Builder's contract had a serious penalty for each day the job was delayed in being completed. Builder contests the penalty on the basis of the Impossibility Defense.

If a party, by contract, is obligated to a performance that is possible to be performed, the party must make good unless performance is rendered impossible by an Act of God, the law, or the other party. *Grannemann v. Columbia Ins. Group*, 931 S.W.2d 502, 506 (Mo.App.1996). A party pleading impossibility as a defense must demonstrate that it took virtually every action within its powers to perform its duties under the contract. *Farmer's Elec. Coop. v. Mo. Dept. of Corrections*, 977 S.W.2d 266, 271 (Mo. 1998).

So, did Builder take every action within its power? Questions that the homeowner could raise about the initial lightning strike -were there lightning rods installed? Were there enough fire extinguishers present? As to after the fire, did the Builder double its work force?

That is a simple example of why the impossibility defense is a difficult defense to establish. The only successful defense that this author could find in the last 50 years in Missouri is the case of *Farmer's Elec. v. Mo. Dept. of Corrections*, 977 SW 2d 266 (Mo. 1998). Farmer's had a contract to supply electricity to the Mo. Dept. of Corrections facility on a tract of land. The Department asked the nearby city to annex the land, which it did. The supply contract thereby became illegal since the property was within the city limits, which Farmer's was prevented from serving. Farmer's impossibility defense was sustained based on illegality.

Similar to the Impossibility doctrine the doctrine of commercial frustration in cases of commercial frustration, performance remains possible but the expected value of performance in the party seeking to be excused has been destroyed by the fortuitous event which supervenes to cause an actual but not literal failure of consideration. *Howard v. Nicholson*, 566 S.W.2d. 477, 482 (Mo. App. 1977).

Like the impossibility defense there are few cases in Missouri finding commercial frustration. *Howard v. Nicholson*, 556 SW 2d 477 (Mo. Ct. App.1977) is an example of one case finding frustration. In *Howard* the owner of the building under construction went bankrupt. Performance was excused.

The courts often say that the parties should have anticipated the later event in their contract. Bankruptcy and lightning strikes are predictable and a written description in the contract of what happens if a future event occurs is more easily enforced than litigation.