Jones Waldo Legal Alert

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"Impracticable" Contracts and *Force Majeure* Clauses in the COVID-19 Age

In early April 2020, the COVID-19 pandemic has grown to more than a million confirmed cases worldwide, with more than a quarter of those cases arising in the United States. Health officials have predicted that, even with mitigating measures in place, the pandemic could claim hundreds of thousands of American lives. Millions of Americans filed for unemployment in late March 2020, and with unprecedented levels of economic uncertainty, thousands of businesses hang in the balance.

What effect do those circumstances have on existing contracts? Parties often think first of *force majeure* clauses—contract provisions activated by unanticipated or uncontrollable events. Disputes over a *force majeure* clause will most often be resolved through straightforward application of the specific language the parties chose to include in their contract. As a result, outcomes will vary widely: some *force majeure* clauses expressly refer to pandemics or public health crises, others refer only to "acts of god" or other similarly broad terms, and some contracts have no *force majeure* clause at all.

Given that variation in *force majeure* clauses, parties to a contract should be mindful of related common-law doctrines that may have a similar effect: impossibility, impracticability, and frustration of purpose. The contours of these doctrines vary from state to state. In Utah, these doctrines may excuse a party from performing its contract obligations if an unforeseen event occurs after a contract is formed, if that event is not the fault of the obligated party, and if that event makes performing the obligation impossible or "highly impracticable." Utah courts have cautioned, however, against a free-wheeling application of these doctrines. For example, Utah courts have said repeatedly that the doctrine of impracticability cannot be used when a party "takes on the risk" that a supervening event will make performance impracticable.

Because these interrelated doctrines could conceivably be raised with respect to any contract, *force majeure* provisions can be viewed as attempts to either alter or expand upon these doctrines, with a particular focus on the principle that a contract party may agree to "take on the risk" of the occurrence of a supervening event. While courts are generally reluctant to apply the doctrines of impossibility, impracticability, and frustration of purpose to release parties from the strict terms of a contract that they negotiated and signed, the impact of the COVID-19 pandemic on business operations, supply chains, and workforce stability has left many contract parties searching for answers. We are available to discuss how these doctrines may apply to your agreements or to your business.

For additional information or questions please contact:

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