



**STATE OF UTAH
FORCE MAJEURE LAW
COMPENDIUM
(during COVID-19 pandemic)**

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A. Introduction

This memorandum will seek to provide a Utah state exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis and other similar events.

B. Force Majeure in Utah

1. Introduction

As a result of the unexpected events arising from the COVID-19 virus pandemic, a little reviewed contract provision, commonly known as a “force majeure” provision, has come to the forefront in contract interpretation, negotiation and drafting. For decades attorneys have included force majeure clauses in many types of contracts. If there has been negotiation in connection with these provisions during contract formation it has more likely related to the remedies rather than the triggering events. It is generally understood that the inclusion of a force majeure clause likely subsumes the doctrines of impracticability or frustration of purpose. In the absence of a contractual force majeure provision there might be opportunities to consider those doctrines.

2. Requirements to Obtaining Relief Using a Force Majeure contract provision

Utah has only one reported case where a force majeure provision has been considered. In *Deseret Power* the court examined the force majeure provision to determine whether a qualifying event had occurred and then whether the contractual remedy was applicable. The court did not refer to any case law in making its decisions. The court stated that the examination of a force majeure provision presents a question of law subject to determination by the court. The event of force majeure was defined as “any cause beyond the reasonable control of [Deseret Power] or PacificCorp that, despite the exercise of due diligence, such party is unable to prevent or overcome.” If such an event occurred, then the provision provided for a remedy that “both parties would be excused from whatever performance is affected by the event of Force Majeure.” The party requesting relief from performance was found not to have not exercised “reasonable control” and therefore was not entitled to relief under the force majeure provision.

The Court looked solely to the contract provision to determine whether there was an applicable event. The usual rules of contract interpretation applied in the consideration of the force majeure provision. We expect that the same analysis would apply in any Utah court which would be called on to consider such a provision.

We expect that other elements of contract interpretation and enforcement could also be applied given the appropriate circumstances. These would include (1) the burden of proof, (2) that the party claiming relief should not have participated in creating the force majeure event, (3) whether the provision is ambiguous, (4) and if so whether parol evidence could be admitted assisting in the interpretation of the force majeure provision.

It appears to be a general principle that if the force majeure provision lists specific events that the absence of a potential event will result in a determination that no relief will be provided. Without the terms “epidemic” or “pandemic” being included as a force majeure event this omission could be a determining factor in finding that there would be no remedy if such events were to occur. A possible exception to this general rule could arise from an event term that arguably has a broad meaning. One such commonly event term is an “Act of God. Historically, usage of this term has applied to events that are totally outside the control of mankind, such as hurricanes, earthquakes, flooding, etc. An exception to flooding as a qualifying event might be one where the flooding was the result of the failure of a man-made dam, for instance. If the event of an “Act of God” is listed as a qualifying event this might open the door to an argument as to whether the COVID-19 pandemic has been totally outside human control. The factors that might be considered in making such an argument may be so involved that a Utah court could find that the COVID-19 pandemic does not meet the historical application of an Act of God event.

One of the unique questions arising from the COVID-19 virus pandemic are the effects arising from government actions that have been taken in responding to the pandemic. It may be argued that those actions gave rise to one of the enumerated force majeure events thus allowing relief. Utah is fairly unique as the government action has not required many businesses to shut down. It has used a more nuanced approach than most all other states in the actions that have been taken to assist in reducing the spread of the virus. In Utah it may be more difficult to prevail with a claim that government action was a qualifying event under a force majeure clause. Another question that is arising is where a tenant in the typical shopping center is prohibited from opening by its landlord, even though there was not a governmental requirement that the shopping center be closed. Depending on what events are listed in the provision, the action by a contracting party or third-party that prevents complying with the contract could allow for relief. The starting point for making that determination is always going to be an examination of the contract language listing the qualifying events.

3. Scope of Relief

It is likely that determining the appropriate remedy will be an easier decision for the court. The force majeure remedies will often be tailor-made for the specific contract. Frequently a remedy will allow for the suspension of performance or perhaps an economic adjustment. It is also likely that the remedy will be limited to relief for

specific time frame. It is expected that the general concept of “mitigation” will be considered if there is remedy that requires application of a damage formula.

4. Other considerations

Utah courts normally strictly construe contracts between two sophisticated parties. Thus, the strict language of the contract will apply. For instance, if there is a requirement that a force majeure event *prevent* performance then an event creating a substantially greater economic burden will not likely provide grounds for relief. Some contracts for the sale of goods often have provisions that provide for adjustments for unforeseen difficulties. Provisions under Article 2, Utah Commercial Code, might apply to unforeseen events. Contracts often have provisions that relate to the assumption of certain risks. Care should be taken during negotiations and drafting so that those concepts and the force majeure provision are consistent to achieve the intended result.

The force majeure provision might include provisions regarding notice that govern the type and timing of the notice necessary in order to activate the protections of the provision. These requirements will likely be strictly construed by a Utah court.

If the contract was negotiated and signed after February 2020 and it does not list “epidemics” or “pandemics” as force majeure events it will likely be very difficult to successfully argue that a force majeure event should include the COVID-19 virus pandemic. The knowledge of the potential for a virus pandemic should have caused the parties to anticipate the need to include “pandemic” as a specific force majeure event. We strongly recommend that if a new contract is being negotiated that close consideration be made by the parties on whether to include “epidemic” or “pandemic” as a force majeure event. Likewise, the remedies should be thoughtfully considered. Gone are the days when a force majeure provision is included in a contract as mere boilerplate.

We have seen contracts between very sophisticated parties that do not contain a force majeure provision. If that is the case then the doctrines of impracticability or frustration of purpose should be considered. The application of these doctrines will likely be more flexible and give rise to more questions of fact and opportunities for negotiation. There are several reported Utah cases examining and applying these doctrines. If there is a contract without a force majeure clause the application of these doctrines as discussed in the reported Utah cases is warranted.

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