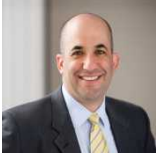


# Reviewing Business Contracts in Light of the COVID-19 Crisis



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As a result of the COVID-19 pandemic, companies are facing a wide array of business challenges, many of which would likely not have been contemplated a few weeks ago. These challenges increasingly include government-ordered shutdowns and financial turmoil that may make maintaining existing operations exceedingly difficult. With this uncertainty, many businesses are reviewing their key contracts to see what protections, and potential issues, may exist.

While all contracts are unique and require individual analysis, there are a few key clauses and considerations that all businesses should be aware of.

**1. Force majeure clauses.** A force majeure clause is a provision in many contracts that relieves the parties from meeting certain obligations when there are circumstances outside of their control. Whether the COVID-19 pandemic qualifies will be determined by the specific terms of the contract. Businesses will want to review their contracts for a force majeure clause and determine whether the COVID-19 pandemic and associated government closure orders meet the terms of the provision (for example, by referencing “disease,” “epidemic,” or “government order”).

**2. Impossibility/impracticability.** Even if a contract does not contain a force majeure clause (or if it does not apply in these circumstances), there may be other defenses available to companies that are not able to meet their contractual obligations. The first is the impossibility/impracticability doctrine, which relieves parties from their contractual obligations if unanticipated circumstances have made fulfilling the contract impossible or “commercially impracticable.” The situations in which a party may be relieved of its obligation to fulfill the contract will differ depending on the nature of the contract and the particular circumstances of the parties.

To meet the test established by North Carolina courts, the party not able to perform its contractual obligations typically must show that it is not to blame for its inability to fulfill its obligations, it did not assume the risk of being unable to fulfill its obligations, and the cause of its inability to fulfill its obligations was not foreseeable. The party may also have to show that it exhausted all possible alternatives for meeting its obligations. North Carolina courts have applied this doctrine in cases where a party's performance is "rendered impossible by the law," so if a government closure order relating to the pandemic makes it impossible to fulfill a contract, a party's obligations may be excused under this doctrine.

**3. Frustration of purpose.** The doctrine of frustration of purpose, another common law defense, may be applied even if performance is not actually impossible. Under North Carolina law, the doctrine of frustration of purpose may excuse a party's performance where unforeseeable circumstances have made the value of the agreement essentially worthless to a party. For example, if a company contracts to run ads for apparel related to the 2020 Summer Olympics during July 2020, it may argue that its purpose in buying those ads was frustrated when the Games were postponed to 2021. The doctrine cannot be used as a defense if the reason the contract could not be fulfilled was reasonably foreseeable when the contract was signed. Courts have ruled, for example, that a "decline in business" is typically considered a foreseeable event.

It is worth noting that impossibility and frustration of purpose may only temporarily excuse a party's performance. If the circumstances revert to what they were when the contract was signed, the parties will once again be required to meet their obligations.

Parties that are currently negotiating contracts should think carefully about whether to specifically include or exclude a pandemic in their force majeure clauses or to otherwise include language that specifically allocates the risk of a pandemic. Given the conditions under which these contracts are being negotiated, it may be hard to argue later that these are not foreseeable circumstances that would allow a party to invoke the impossibility or frustration of purpose doctrines.

The bottom line is if the current pandemic makes it impossible to fulfill a contract or frustrates the underlying reason for the contract, businesses may have some options to seek relief.

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Brooks Pierce is dedicated to keeping our clients fully informed during the COVID-19 crisis. For more information, please visit our [COVID-19 Response Resources](#) page.