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Force Majeure Issues Relating to Katrina

Hurricane Katrina undoubtedly affected the ability of many businesses to fulfill their contractual obligations. The necessary facilities may have been destroyed. Needed personnel or supplies may be unavailable. The issues presented by such situations are referred to in the law as “force majeure” or impossibility of performance.

In many commercial transactions, force majeure issues have been expressly addressed in the contract, so it is important to promptly obtain and review the contract to see if there are applicable force majeure provisions. Force majeure issues are also addressed in various statutes. In some situations, the contractual provisions may more clearly set forth the circumstances where force majeure applies, as well as the procedures that must be followed in such circumstances. Some contracts may have modified the default provisions provided by law. It is even possible that under some circumstances, a party may have assumed the risk of an unforeseen force majeure event.

Many contractual provisions and some statutory provisions require a party that is claiming force majeure to notify the other parties to the contract of the event of force majeure. Some provisions require "prompt" "timely" or "seasonable" notice. Therefore, it is important to determine promptly whether there is a notice requirement in any situation. Don't just assume that because everyone knows about Katrina, notice provisions can be disregarded.

Some force majeure situations may totally relieve a party of an obligation to perform a contractual obligation. Other situations may merely suspend or delay the time for performance. It is important to determine which is applicable in a particular situation. If one party's performance obligations are excused as a result of force majeure, the performance obligations of the other parties are usually excused as well.

Some jurisdictions discuss the concept of the *foreseeability* of the force majeure event. This may present major issues for litigation. On the one hand, it was certainly foreseeable that New Orleans could have been hit by a Category 4 or 5 hurricane with the resulting flooding. Indeed, such an event had been predicted in various studies.

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On the other hand, the possibility of such a catastrophic event was statistically remote. (The Commander of the Corps of Engineers suggested in a recent television interview that there was less than a .05% chance of a Category 4 or 5 hurricane hitting New Orleans and causing the sort of flooding that we have seen.) Courts have shown more concern for the reasonableness of the parties' foresight in a particular situation than for the objective foreseeability of a particular event. Thus, the fact that an event was foreseeable does not preclude a conclusion that the parties could not have reasonably foreseen it, since they may not have thought it sufficiently important a risk to have made it the subject of a clause in the contract."

Jones Walker has marshaled its existing experience in force majeure issues and is ready to assist clients as they navigate the post-Katrina world.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances.

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