

Understanding Your Organization's Contracts During and After the COVID-19 Pandemic

**D.C. Bar Pro Bono Center
Webinar**

Wednesday, May 20, 2020 | 12:00 PM

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First – Some Practical Advice

- Request relief whether or not you have a legal basis
- Many contract parties are amending agreements to address business rather than legal issues
- Companies large and small are seeking relief—especially under their leases

OVERVIEW

Force Majeure

Common-Law Defenses

Impacts on Specific Types of Contracts

Update on DC Legislation

Insurance—Business Interruption and Liability

Actions to Take under Existing Contracts

Negotiating Contracts Post-COVID

Force Majeure

- *Force majeure* is a common contract clause that allocates the risk that specified events that are unforeseeable and beyond the control of the parties may cause a party to be unable to perform its obligations under the contract, and may excuse or suspend performance.
- Outcomes depend heavily on contract language and state law, so the same event could result in different outcomes under different contracts – there are no universal answers.

Force Majeure (cont.)

- *Force majeure* is a common contract clause
 - *Force majeure* is not implied in contracts, but some common-law defenses may be available in its absence
 - May have a different label – e.g. “unavoidable delay”
- The specified event must be within the scope of the contract clause
 - Clauses are construed narrowly
 - Look for “pandemic”, “epidemic”, “disease outbreak”, “governmental restrictions” or similar language
 - Also look for “catch-all” clauses, like “Act of God” or “*force majeure* events” or “Events outside the control of the parties”

Force Majeure (cont.)

- *Force majeure* is intended to address events are not reasonably foreseeable
 - The risks of foreseeable events should be specifically addressed in the contract
 - The COVID pandemic is likely considered unforeseeable under existing contracts, but maybe not under new contracts
- There must be a causal relationship
 - It is not sufficient that a *force majeure* event has occurred – it must cause performance under the contract to be impossible
 - General economic conditions are not sufficient

Force Majeure (cont.)

- The *force majeure* event must make performance impossible
 - Some contracts and jurisdictions use different standards – “commercially impracticable” or “inadvisable”
 - Increased cost or difficulty of performance is not sufficient
 - Monetary obligations are not considered impossible to perform under most circumstances

Common-Law Defenses

- May be available when there is no *force majeure* clause, or when the clause is too narrow to cover an event
- Impossibility of performance
 - Very similar to *force majeure*
 - Performance becomes impossible because a “basic assumption” of the contract is no longer true due to an intervening event.
- Frustration of purpose
 - Performance is not literally impossible, but the fundamental purpose of the contract has been undermined by an intervening event

Impacts on Specific Types of Contracts

- Leases
 - *Force majeure* will generally not provide relief from monetary obligations, including rent – but it may apply to non-monetary obligations
 - Landlords have few good options and may be willing to negotiate
 - Other possible claims – constructive eviction; casualty; landlord default
 - D.C. has suspended eviction filings during emergency declaration and for 60 days after, and requires offer of payment plans to some tenants
- Loan Agreements
 - Force majeure will generally not provide relief for monetary obligations under loan agreements
 - Many lenders are offering deferrals and forbearance, but they may ask for concessions in exchange
 - D.C. has suspended foreclosure of loans, and requires forbearance by certain lenders

Impacts on Specific Types of Contracts (cont.)

- Construction Contracts
 - “Impossibility” depends on the scope of governmental restrictions.
 - Prompt notice and thorough documentation are very important.
 - Under most commonly used forms of construction contracts, COVID pandemic will likely be considered a *force majeure* event that allows extensions of time
 - Currently, construction activities are an “essential business” under D.C. executive orders, and construction sites may stay open, subject to following social distancing requirements
- Refunds of Deposits and Prepayments
 - No universal rules on refunds of deposits in most circumstances.
 - Outcomes depend on contract language and on the purpose of the deposit

Impacts on Specific Types of Contracts (cont.)

- Purchase and Sale Agreements
 - Many purchase agreements do not contain a *force majeure* clause, but rely on express termination rights and conditions to closing
 - For new agreements, build in extension rights and contingencies for problems with closing

DC Emergency Legislation

- DC Council has been active – at least 4 emergency measures enacted
- Most recently on May 5 “Coronavirus Omnibus Emergency Amendment Act of 2020”
 - Mandates rent payment plan programs
 - Extends to one year after the health emergency
 - Applies to commercial retail tenants – so office tenants aren’t helped
 - Doesn’t apply to tenants who have received rent relief under DC’s prior COVID-19 legislation
 - **Critical – tenants must notify landlord of hardship because of covid-19**

DC Emergency Legislation (cont.)

- Payment plan terms
 - Act does not specify payment terms
 - Prepayment is permitted
 - No adverse reporting to credit bureau
 - Must waive fees and penalties
- Mortgage relief for Landlord/Rent relief for Tenant
 - Prior Legislation
 - If landlord received deferral from lender, must pass deferral through to tenants
 - To be eligible tenants must demonstrate financial hardship due to the pandemic

DC Emergency Legislation (cont.)

- Rent freeze
 - No increases in rent during the health emergency
 - Applies to “commercial retail properties”
 - Office tenants excluded
- No evictions or filings
 - Applies to commercial tenants
 - Prior legislation halted eviction proceedings
 - New law prohibits even filing eviction complaints

Insurance Considerations

- Business interruption – do you have coverage for rent and other expenses?
- Commercial general liability – do you have coverage if you are sued for a covid-19 related claim? Exclusions

Insurance Coverage – Business Interruption

- Often included within Commercial Property Insurance policy
- Scope of coverage
 - “actual loss of Business Income you sustain due to the necessary suspension of your operations during the period of restoration.”
 - caused by “direct physical loss of or damage to property at premises”
 - loss or damage must be caused by or result from a Covered Cause of Loss (i.e., not otherwise excluded).
- Exclusions
 - Virus or bacteria exclusions
 - Loss of market exclusions
 - Pollution exclusions
- “Civil Authority” coverage – still requires covered cause of loss

Insurance Coverage – Business Interruption (cont.)

- Take aways
 - Probably an uphill battle
 - Must review policy with insurance advisor – entirely depends on the language in the policy
 - If in doubt, file a claim
- Legislative Activity
 - Several states working on legislation – two approaches
 - Mandate coverage
 - Require an interpretation of the policy -- Covid is a casualty
 - Not likely to help anytime soon
 - May be subject of legal challenges

Insurance Coverage – CGL

- Most businesses carry commercial general liability coverage
- Policies may be triggered by lawsuits related to re-opening or to transmission of coronavirus at the premises
- Scope of coverage
 - Based on the “negligent conduct” of the insured that causes actual damages
 - Requires “bodily injury or property damage”
- Exclusions
 - Communicable Disease Exclusion – rarely included
 - Mold and Pollution Exclusions

Insurance Coverage – CGL (cont.)

- Take aways
 - Good chance this coverage will apply
 - Confirm with insurance agent
 - This will help guide precautions you take on reopening, etc.

Recommended Steps

- Review your contract language.
- Review insurance coverage.
- Send notices, even if not expressly required.
- Take steps to mitigate damages – on both sides.
- Keep detailed records of impacts and mitigation efforts.
- Negotiate with counterparties as a first step.
- Anticipate disputes and declarations of default.
- Consider impacts under other agreements, such as loans.
- Update contract language.

Negotiating New Contracts

- Update force majeure language
 - Include concepts like “pandemics”, “epidemics” and “quarantine” in lists of specific covered *force majeure* events
 - Refer to governmental restrictions, emergency declarations and limitations on access, including partial shutdowns, reduced capacity, etc.
- Address anticipated effects of this pandemic specifically instead of relying on general *force majeure* language
 - COVID is no longer “unforeseeable”
 - Allocate risks and responsibilities, and build in extension rights, termination rights, payment relief, etc.

Negotiating New Contracts (cont.)

- Anticipate economic effects that may fall short of “impossibility”
 - Inability to access premises or to operate a business, or governmental restrictions that require reduced capacity
 - General economic conditions that may make it difficult to operate
- Expect new rules to evolve in case law and standard contract language
- Watch for new legislation in DC and elsewhere

Questions?

- Thank you for tuning in to our program
- Happy to answer a few questions, time permitting