

# POST-PANDEMIC LITIGATION

Commercial Disputes in the "End of Days"



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# COVID-RELATED CONTRACT DISPUTES

INSURANCE COVERAGE

CONTRACT AVOIDANCE

# INSURANCE COVERAGE

- HUNDREDS OF LAWSUITS ACROSS THE COUNTRY OVER BUSINESS INTERRUPTION INSURANCE COVERAGE
- KEY ISSUE: POLICIES REQUIRE “DIRECT PHYSICAL LOSS OR DAMAGE” TO COVERED PROPERTY

# INSURANCE COVERAGE

## INSURED'S HAVE BEEN SUCCESSFUL (OR AVOIDED SUMMARY DISMISSAL) IN A HANDFUL OF CASES

### Examples:

- North State Deli, LLC v. The Cincinnati Ins. Co., 2020 WL 6281508 (N.C. Super. Ct. Oct. 9, 2020)
- Studio 417, Inc. v. The Cincinnati Ins. Co., 478 F. Supp. 3d 794 (W.D. Mo. 2020)

# INSURANCE COVERAGE

**THE OVERWHELMING MAJORITY OF CASES REJECT THE INSURED'S CLAIM, FINDING NO "DIRECT PHYSICAL LOSS OR DAMAGE" TO THE INSURED PROPERTY**

Examples:

- Oral Surgeons, P.C. v. The Cincinnati Ins. Co., 2 F.4th 1141 (8th Cir. 2021)
- Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co., 2021 WL 633356 (N.D. Ill. Feb. 18, 2021)
- Berkseth-Rojas DDS v. Aspen Am. Ins. Co., 513 F. Supp. 3d 724 (N.D. Tex. 2021)

# CONTRACT AVOIDANCE

FORCE MAJEURE

COMMON-LAW DEFENSES



# FORCE MAJEURE

- MOST COMMERCIAL CONTRACTS CONTAIN A “FORCE MAJEURE” PROVISION
- TYPICALLY EXCUSES NONPERFORMANCE OR EXTENDS THE TIME TO PERFORM IF A DEFINED FORCE MAJEURE EVENT PREVENTS OR DELAYS PERFORMANCE
- NOT A COMMON-LAW DOCTRINE – STRICTLY A MATTER OF CONTRACT



# COMMON LAW DEFENSES

IMPRACTICABILITY

FRUSTRATION OF PURPOSE

# IMPRACTICABILITY

- **MOST STATES (INCLUDING TEXAS) RECOGNIZE AND ACCEPT THE COMMON-LAW IMPRACTICABILITY DOCTRINE AS A DEFENSE TO BREACH OF CONTRACT**
- **INCLUDES IMPOSSIBILITY AND ILLEGALITY OF PERFORMANCE**
- **BASED ON THE RESTATEMENT (SECOND) OF CONTRACTS OR EQUIVALENT COMMON LAW**

# IMPRACTICABILITY

## ▶ Restatement (Second) of Contracts § 261:

“Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”

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- Impracticable when it cannot be performed without extreme and unreasonable difficulty, expense, injury, or loss to a party.
- Not applicable if the contract otherwise assigns the risk (e.g., a force majeure provision applies)

# FRUSTRATION OF PURPOSE

- MOST STATES RECOGNIZE AND ACCEPT THE COMMON-LAW FRUSTRATION OF PURPOSE DOCTRINE AS A DEFENSE TO BREACH OF CONTRACT
- NO CLEAR RECOGNITION IN TEXAS AS A SEPARATE COMMON-LAW DEFENSE
- BASED ON THE RESTATEMENT (SECOND) OF CONTRACTS OR EQUIVALENT COMMON LAW

# FRUSTRATION OF PURPOSE

## ▶ Restatement (Second) of Contracts § 265:

“Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

# FRUSTRATION OF PURPOSE

## Restatement (Second) of Contracts § 265:

“Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”

- The frustrated purpose must be central to the contract.
- Substantial frustration requires more than impracticality or financial difficulty.
- Not applicable if the contract otherwise assigns the risk.



# FRUSTRATION OF PURPOSE

## CLASSIC EXAMPLES

- Krell v. Henry [1903], 2 K.B. 740 (the “coronation case”)
- Indus. Dev. & Land Co. v. Goldschmidt, 206 P. 134 (Cal. Ct. App. 1922)
- Lloyd v. Murphy, 153 P.2d 47 (Cal. 1944)

# FRUSTRATION OF PURPOSE

## FRUSTRATION OF PURPOSE HAS BEEN SUCCESSFULLY ASSERTED IN A HANDFUL OF CASES

### Examples:

- Bay City Realty, LLC v. Mattress Firm, Inc., 2021 WL 1295261 (E.D. Mich. Apr. 7, 2021)
- UMNV 205-207 Newbury, LLC v. Caffè Nero Americas Inc., 2021 WL 956069 (Mass. Super. Ct. Feb. 8, 2021)

# FRUSTRATION OF PURPOSE

**MOST COURTS HAVE REJECTED FRUSTRATION OF PURPOSE AS A DEFENSE TO PAYMENT, FINDING IT PREEMPTED BY A FORCE MAJEURE CLAUSE**

Examples:

- In re CEC Ent., Inc., 2020 WL 7356380 (Bankr. S.D. Tex. Dec. 14, 2020)
- The Gap Inc. v. Ponte Gadea New York LLC, 2021 WL 861121 (S.D.N.Y. Mar. 8, 2021)

# TEMPORARY FRUSTRATION

## ▶ Restatement (Second) of Contracts § 269:

“Impracticability of performance or frustration of purpose that is only temporary suspends the obligor’s duty to perform while the impracticability or frustration exist but does not discharge his duty or prevent it from arising unless his performance after the cessation of impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.”

# TEMPORARY FRUSTRATION

- **VERY LITTLE CASE LAW ADDRESSING**
- **SUCCESSFULLY ASSERTED IN A HANDFUL OF CASES**

## LITIGATION TAKE-AWAY

- COURTS STRIVE TO FIND THE ANSWER IN THE TERMS OF THE CONTRACT INSTEAD OF IN COMMON-LAW DOCTRINES, SO THE WRITTEN TERMS OF THE CONTRACT ARE PARAMOUNT
- AFTER COVID-19, EVENTS SUCH AS PANDEMICS AND GOVERNMENT RESPONSES ARE LESS LIKELY TO BE VIEWED AS UNFORESEEABLE

# ETHICAL ISSUES ARISING FROM PANDEMIC

▶ A. UNAUTHORIZED PRACTICE OF LAW

B. VIRTUAL PRACTICE OF LAW (WORKING REMOTELY)



# ETHICAL ISSUES ARISING FROM PANDEMIC

## A. UNAUTHORIZED PRACTICE OF LAW

Rules of Professional Responsibility still apply in time of pandemic.

- ABA Standing Committee on Ethics and Professional Responsibility
  - Opinion 495 (December 16, 2020)

# ETHICAL ISSUES ARISING FROM PANDEMIC

## ABA Opinion 495 – Lawyers Working Remotely

*Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.*

# ETHICAL ISSUES ARISING FROM PANDEMIC

## ABA Opinion 495 – Lawyers Working Remotely

### Model Rule 5.5

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law

# ETHICAL ISSUES ARISING FROM PANDEMIC

ABA Opinion 495

Texas Rule 5.05

A lawyer shall not

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

# ETHICAL ISSUES ARISING FROM PANDEMIC

## ABA Opinion 495

- Don't "establish" an office
  - Do not use remote address/phone number on communications
- Don't hold yourself out as being able to practice in "remote" jurisdictions
- Do not "advertise" in remote jurisdiction
- Physical presence is not enough
  - Each state has its own concepts (check local ethics opinions)
- Cocktail conversations in remote jurisdiction?

# ETHICAL ISSUES ARISING FROM PANDEMIC

## ABA Opinion 495

- Keys:
  - Permitted, “as long as necessary” to address impact of pandemic
    - Effect of “back to work” orders?
  - Be “invisible” as a lawyer in remote jurisdiction

# ETHICAL ISSUES ARISING FROM PANDEMIC

## B. VIRTUAL PRACTICE OF LAW

Rules of Professional Responsibility still apply in time of pandemic.

- Confidentiality is a key concern
  - Model Rule 1.6
  - Texas Rule 1.05



# ETHICAL ISSUES ARISING FROM PANDEMIC

## Confidentiality

### Model Rule 1.6

#### Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation . . .

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

### Rule 1.6 Model Rules of Professional Conduct

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Confidentiality

### Texas Rule 1.05

- (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:
- (1) Reveal confidential information of a client or a former client to:
    - (i) a person that the client has instructed is not to receive the information;  
or
    - (ii) anyone else, other than the client, the clients representatives, or the members, associates, or employees of the lawyers law firm.

Tex. Disp. R. Pro. Cond. 1.05

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Confidentiality – Obvious Areas of Concern

→ Not the same as working in the office

Family (and others) overhearing conversations

Papers “out in the open”

Use of emails (horror story to follow)

→ Is there a place to be “sequestered” and secured?

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Confidentiality

- Client/company information
- Employee information (HIPPA)
- Opponent's information (trade secret matters)

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Confidentiality

- Safeguards
- Strong/unique passwords
- Anti virus software (malware/ransom)
- Encryption for emails/documents
- Wifi access

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Confidentiality

- Video Conferencing (Zoom)
  - *Smash My Trash*
- Document Sharing
- Smart devices
- BYOD (remote wiping)

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Confidentiality

Always assume someone is listening in (or trying to) and put into place all necessary precautions to avoid eavesdropping.

Be cautious when accessing confidential information remotely (trade secrets)



# ETHICAL ISSUES ARISING FROM PANDEMIC

▶ ABA Opinion 498 – Virtual Practice (March 10, 2021)

- Duty of Confidentiality ☒
- Duty of Competence
- Duty to Supervise
- Technology

# ETHICAL ISSUES ARISING FROM PANDEMIC

## ABA Opinion 498

- Duty of Competence

“To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, ***including the benefits and risks associated with relevant technology***, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

Model Rule 1.1, Comment 8.

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Competence

- Use of technology
  - Knowledge of terms of service for software
  - Ownership of information
  - Video conferencing technology safeguards
  - Emails (horror story)
    - *Rollins v. Home Depot*

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Competence

- Cloud based storage
  - Reliable access to client information
    - Texas Opinion 680
- Confirm data is regularly backed up/accessible in event of data loss

# ETHICAL ISSUES ARISING FROM PANDEMIC

## Competence

- Data Breach Policy
- Insurance coverage (ransom vs. cost of repair)

# ETHICAL ISSUES ARISING FROM PANDEMIC

- Duty to Supervise
  - Vendors and staff must understand ethical obligations
    - Proper use of technology
    - Confidentiality Agreements

# MANDATES

## TO MANDATE OR NOT TO MANDATE

### Vaccine Mandate Opinions

- *Bridges v. Houston Methodist Hospital (2021)*
- *Klaassen v. The Trustees of Indiana University (2021)*
- *Jacobson v. Massachusetts (1905)*
- *Zucht v. King (1922)*

# RECENT DEVELOPMENTS

## ▶ TEXAS PANDEMIC LIABILITY PROTECTION ACT (PLPA)

TEX. CIV. PRAC. & REM. CODE, § 148.003, eff. June 14, 2021

- Excludes liability for personal injury or death caused by exposure to a Pandemic Disease
- **Unless** claimant establishes that the person (including business entities) who exposed the claimant meets one of two conditions



# RECENT DEVELOPMENTS

## ▶ TEXAS PANDEMIC LIABILITY PROTECTION ACT (PLPA)

- Knowingly failed to disclose a condition they knew was likely to expose the claimant
  - Had control over the condition,
  - Knew the claimant was more likely than not to come into contact with the condition and
  - Reasonable opportunity and ability to remediate the condition or warn the individual of the condition prior to the exposure

# RECENT DEVELOPMENTS

## ▶ TEXAS PANDEMIC LIABILITY PROTECTION ACT (PLPA)

- Knowingly refused to implement or comply with government promulgated standards & protocols to reduce exposure
  - Had the reasonable opportunity and ability to comply
  - “Reliable scientific evidence” it was “cause in fact”

# RECENT DEVELOPMENTS

## ▶ TEXAS PANDEMIC LIABILITY PROTECTION ACT (PLPA)

- Litigation Takeaways: High Burden for Claimants
  - Retroactive
  - Must prove disease was caused by a particular exposure and mental state of the defendant.
  - Required to submit an expert report with a factual and scientific bases in support of the claims within 120 days of defendants' answer.
  - Impact of relaxed State COVID protocols?

# RECENT DEVELOPMENTS

## ▶ TEXAS SUPREME COURT EMERGENCY ORDER NO. 40

- Extends courts' ability to suspend deadlines, and modify procedures to prevent COVID exposure through October 1, 2021
  - <https://www.txcourts.gov/media/1452510/219079.pdf>
- Jury trials suspended in response to COVID 19 Delta variant surge in Harris, Travis, Dallas and Bexar Counties.

# RECENT DEVELOPMENTS

## FEDERAL COURTS

- Southern District of Texas - Suspended in person jury trials through Sept 7th. <https://www.txs.uscourts.gov/sites/txs/files/Special%20Order%20H-2021-16%20Thirteenth%20Supplemental%20Court%20Operations%20in%20Houston%20During%20COVID-19.pdf>
- Fifth Circuit Court of Appeals - Reinstated mandatory masking, evaluating procedures for September 8<sup>th</sup> sitting. <https://www.law.com/nationallawjournal/2021/07/29/federal-circuit-courts-issue-mask-mandates-amid-surge-in-delta-variant-cases/>

# RECENT DEVELOPMENTS

## JURY TRIAL BACKLOG

- Video conference hearings have successfully kept most civil cases on track
- Limited number of in-person and remote jury trials since March 2020
- Multi-year backlog of jury trials
- Impact of Speedy Trial Rights – 6<sup>th</sup> Am. & Speedy Trial Act

# RECENT DEVELOPMENTS

## ▶ WINTER STORM URI (02/13-17/2021)

- Unprecedented power demand
- Operational issues from freezing temperatures
- Power grid failure
- Estimated \$290 billion cost

# RECENT DEVELOPMENTS

## WINTER STORM URI (02/13-17/2021)

- Claims for property damage, personal injury and wrongful death
- MDL - 281<sup>st</sup> District Court in Harris County – 135 cases
- 5,000 – 6,000 additional claimants expected
- Broad range of defendants





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