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Business Disputes: Strategies for Dealing with the Fallout from COVID-19

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TRANSACTIONAL ISSUES GIVING RISE TO DISPUTES

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FORCE MAJEURE CLAUSES AND CLASS ACTIONS

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BUSINESS INTERRUPTION AND INSURANCE CLAIMS

Impact on Litigation and Arbitration

- COVID-19 Impact varies state by state
 - Statutes of Limitations tolled;
 - Filing of new cases barred;
 - Hearings deferred or done by telephone or video
- Case filings not significantly diminished.
- Case activity (trials & hearings) is down.
- Arbitral institutions working remotely and proceedings/hearings delayed or suspended.

What kind of new cases are we seeing?

- Consumer/retail suits re: price gouging.
- Business disruption & insurance claims.
- Commercial claims (force majeure).
- Employment disputes.
- Class Actions.
- Tort Claims (negligence/duty to warn-protect re COVID-19).

Force majeure clauses in contracts

Definition and elements

- Contractual provision to excuse party's non-performance under specific circumstances that prevent party from performing its contractual obligations
- Case-by-case analysis focused on:
 - Relevant force majeure language in contract;
 - Applicable governing law;
 - Other applicable facts (i.e., nature of alleged force majeure, scope of non-performance)
- Must closely review applicable force majeure, notice and choice of law provisions in contract when considering obligations and potential risks of non-performance

Scope and applicability of force majeure clause

Factors for consideration

- Provisions often include lists of specific events that are not "reasonably foreseeable" and are beyond parties' control (i.e., "acts of God," "pandemic" or other extraordinary events)
- Typical factors considered by courts include:
 - Qualification of event as force majeure under terms of contract (narrow construction);
 - Foreseeability and ability to mitigate risk of non-performance; and
 - Impossibility of performance (or other standard as dictated by law or contract)

Force majeure as affirmative defense to breach claim

Avoiding potential waiver of force majeure defense

- **Timeliness** of the notice – some contracts have a deadline, or general waiver principles apply;
- **Identification** of the force majeure event (e.g., pandemic, government shutdown, labor shortage);
- **Supporting evidence** of the event, its duration, and its impact on performance of the contract;
- **Remedy sought** by the party asserting force majeure; and
- Whether the receiving party **timely issues its response** to the force majeure notice

Likely COVID-19 inspired class actions

Environment ripe for class actions in light of unprecedented governmental shutdowns, business closures, employee layoffs, physical injuries, financial losses, event cancellations, etc.

- Financial institutions and debt collections
- Education
- Manufacturers and retailers
- Employment
- Event cancellation and service disruption
- Healthcare providers and nursing facilities
- Travel
- Government and civil rights
- Insurance
- Shareholder and securities
- Privacy and cybersecurity
- Transmission of COVID-19
- Website ADA accessibility

Preparing for potential class actions & disputes

Steps to consider now

- Business decisions will likely be more highly scrutinized and more directly impactful on operations, financials and workforce
- When anticipating defending a claim: Contemporaneously document decisions and decision making process, consideration of alternatives, why specific decision was made, mitigation efforts taken, ultimate decision maker and reliance on any outside advice
- When anticipating asserting a claim: Contemporaneously document all notices given, all circumstances to prove damages and why damages were caused by certain decision

Preparing for potential class actions & disputes

Steps to consider now

- Secure notes and documentation supporting important verbal decisions and communications, including important meetings and phone calls
- Preserve all internal and external correspondence and ESI
- Attorney-client privilege protection of confidential attorney-client communication made for purposes of requesting, giving or receiving legal advice

Insurance

Does business interruption insurance apply to COVID-19-related losses?

Early Business Interruption Disputes:

- Houston Wig Shop (Harris County)
- Thomas Keller Restaurant Shop (Napa County, CA)
- Billy Goat Tavern (ND. Illinois) [Yes, from SNL]

Harris County "Stay at Home" Order:

- "Whereas, the COVID-19 virus causes property loss or damage due to its ability to attach to surfaces for prolonged periods of time"

Insurance – business interruption

Potential Covered Losses

- Lost profits
- Fixed costs
- Temporary location
- Commission and training cost
- Extra expenses
- Civil authority ingress/egress (Forced closures)
- Employee wages
- Taxes
- Loan Payments

Insurance

What should I be doing now to preserve my insurance claims?

- A. Work with risk management, legal teams, and insurance brokers to identify potential policies, coverage, and applicable notice requirements.
- B. Review all potential policies, including primary and excess liability policies:
 1. Business Interruption
 2. Commercial General Liability - "all-risk"
 3. Directors & Officers
 4. Errors & Omissions

Also review whether policies are "claims made" or "occurrence" policies to determine applicable coverage and notice provisions.

Insurance

What should I be doing now to preserve my insurance claims?

C. Third Party insurance / Additional insureds

- Notice should also be provided to everyone in the supply chain (vendors, customers, others). Coverage may exist on third party policy in which your company is an additional insured.

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An abstract graphic consisting of multiple overlapping, wavy lines of varying thickness and opacity in shades of blue. The lines create a sense of motion and depth, resembling a digital signal or a complex waveform. The background is a dark, solid blue.

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