



## "An Ounce of Prevention is Worth a Pound of Cure" - Commercial Contracts in the Era of Coronavirus (COVID-19)

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With the spread of Coronavirus (COVID-19) in the United States, many of our clients are facing the mass cancellation of events and damaging service interruptions. This disruption can cripple one's business, so clients are prudent to consider what they should do to mitigate the damages they face from the interruption caused by this global pandemic.

To that end, it is important to consider the effect that *Force Majeure* clauses have in existing and future contracts. A *Force Majeure* clause is a provision that parties may include in commercial agreements that addresses how a party may be excused from contractual obligations in the event that the performance of that agreement becomes impossible or impracticable due to unanticipated events that are beyond the party's control.

### Coronavirus (COVID-19) in *Force Majeure* Clauses:

In the past, *Force Majeure* clauses have commonly included Acts of God, terrorism and war. However, more recently, *Force Majeure* clauses have included more specific occurrences such as SARS, MERS, and weather-related events such as hurricanes. Accordingly, it is pragmatic and advisable that clients determine if *Force Majeure* clauses in existing commercial agreements address COVID-19 and consider including outbreaks of COVID-19 in *Force Majeure* clauses included in future commercial agreements. In addition, in negotiating new *Force Majeure* clauses it is worth considering whether to include pandemic as a *Force Majeure* event.

### What to Consider in Existing Commercial Agreements:

If a client has already been affected by the disruption of services that are mandated under an existing commercial agreement, the client should closely examine the contract to determine if relief is available under an existing *Force Majeure* clause. Specifically, if the agreement includes a *Force Majeure* clause, the client should examine the following:

- Is the clause triggered by pandemics such as COVID-19;
- Does there need to be a governmental declaration before the clause is triggered;
- Are the parties required to carry insurance that addresses non-performance in the event that the clause is triggered;
- What notification provisions must be followed in the event that the clause is triggered to ensure that

relief is granted; and

- What rights are available to the parties on the occurrence of a *Force Majeure* event (e.g., termination or extension of time).

In addition, absent a *Force Majeure* clause, the parties to a contract should consider whether the relevant jurisdiction permits a party to be excused from its contractual obligations under the common law doctrines of impossibility or impracticability.

### **What to Consider in Negotiating Future Commercial Agreements:**

If a client is in the process of negotiating a commercial agreement, it is imperative to consider specifically including COVID-19, and other known viruses, as events that may trigger a *Force Majeure* clause. Doing so will safeguard clients from the costs and damages that inevitably flow from business disruptions due to the quarantines that are now in place because of the spread of COVID-19. As part of future commercial agreements, clients may also wish to cap damages that may be recovered in the event of service delays and cost overruns due to pandemics such as COVID-19. Finally, as discussed below, clients should ensure that future commercial agreements include adequate insurance coverage in the event that a *Force Majeure* clause is triggered.

### **Insurance:**

In addition to adding COVID-19 in future *Force Majeure* clauses, clients should consider the effect and desired outcome when a *Force Majeure* clause is triggered due to an outbreak of COVID-19. To assist in mitigating the effects of a disruption covered by a *Force Majeure* clause moving forward, clients should investigate whether losses associated with COVID-19 in a particular transaction can be insured and, if so, who should bear the burden of purchasing such insurance.

Making coverage clearly mandatory in commercial contracts is critical, but clients should also confirm that policies include the necessary coverage to prevent carriers from later seeking to avoid paying out insurance awards. When examining policies, clients should focus on the chronological term of coverage and the monetary coverage and ensure that the policy is written clearly enough to prevent a carrier from denying coverage.

While it is unlikely that basic property insurance policies will provide coverage for business losses arising out of the current pandemic, it is worth reviewing one's policies to assess whether such coverage might be available based upon the individual facts and circumstances of each client's particular situation. Further, clients should keep an eye on litigation relating to insurance coverage for the business impacts of COVID-19.

*Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.*

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