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COVID-19 AND COMMERCIAL CONTRACTS

By Steven Eisenstein

The current pandemic crisis has disrupted everyday life in many ways. With the economic disruption caused by the closure of so many businesses and with so many people in financial distress contract performance has become more difficult if not impossible. Understanding your rights under these circumstances could be crucial to your economic survival. There are a number of legal theories which come into play when analyzing each specific situation.



FORCE MAJEURE

Generally speaking force majeure can excuse a party from a contractual obligation because of the occurrence of an unexpected event beyond its control in specified circumstances. A property drafted contract or lease will contain a force majeure clause. It must be read carefully as the party's rights and remedies will frequently turn on the specific language of the clause. A typical force majeure clause lists the events that excuse performance. They typically include war, riot labor stoppages and severe weather. Frequently there is a catch all event such as Acts of God. Pandemic events may or may not be included in the list. Some states, like New York, rely almost exclusively on the specific language and deny relief when the event is not clearly covered. New Jersey has generally been driven less by the exact language and more by the intent of the parties and the specific circumstances but it is a case by case analysis.

After confirming that an event would fall within the force majeure definitions consideration must be had as to the standard for relief. Does the clause provide that performance must be impossible or just made more difficult? In the case of a lease does relief turn on whether access to the premises is barred or whether circumstances or governmental orders prohibit the tenant from carrying on the specific business? The clause must be examined carefully to ascertain the intent of the parties.

Once it is determined that an event may be covered by the force majeure clause the remedies must be considered. Again it is important to review the specific clause. If a remedy is set forth it is likely to be the one enforced. In some cases payment could be suspended during the crisis. For instance, in a lease a monthly payment may be excused. In other cases payment could be deferred and collected in full at a later date. In other cases it is not payment which must be deferred but time for performance such as delivery of goods. In some circumstances the contract may be extended to ensure that the parties receive the full benefit of their bargain. In all cases a very careful and detailed analysis is called for.

Under many clauses a specific notice is required in order to invoke the benefits of force majeure. The party invoking the benefits must notify the other party of its intent. Sometimes within a specific time window and sometimes as soon as possible or practicable. Once again, an individual analysis must be made.

A typical force majeure clause may include a requirement of a certain level of mitigation. Such phrases as good faith and commercially reasonable efforts are common though best efforts, a higher standard, is not unknown. In the specific case of Covid-19 it has not yet been determined whether a party should seek relief from one of the available governmental programs such as PPP or an SBA loan or grant before claiming force majeure. These cases will undoubtedly follow.

IMPOSSIBILITY

The New Jersey Supreme Court has recognized that when unforeseen circumstances make it “objectively impossible” for a party to perform that party may be excused from a contractual obligation. It is important to remember that for performance to be impossible the standard is that the thing cannot be done, not that the party cannot perform it.

IMPRACTICABILITY

Even if performance under a contract may be theoretically possible, New Jersey, unlike some other states, has recognized the doctrine of impracticability in contract law. New Jersey courts have held that in the absence of a specific clause relieving a party of the duty to perform, circumstances may arise that would make performance unexpectedly impractical if not impossible. The Supreme Court has held that impracticability requires the occurrence of an event, the non-occurrence of which was a basic assumption of the parties when the contract was made.

FRUSTRATION OF PURPOSE

Finally, New Jersey courts have accepted the common law doctrine of frustration of purpose when an intervening event has changed the nature of the parties’ overall bargain. The nature of the bargain must be fundamentally changed and the frustration must be so severe that it clearly exceeds the balance of risks originally agreed to by the parties.

CONCLUSION

We are in unprecedented times and clauses which many people ignored in crafting their leases and contracts have suddenly taken on vital importance. It will likely take years of litigation to sort out what has happened to commercial relationships during this crisis but in the interim each case must be carefully examined on its merits. An experienced commercial attorney may be necessary to help you understand your rights and how to assert them.

SBA Releases Paycheck Protection Program Loan Forgiveness Application

By Kevin Murphy

On Friday, May 15, 2020, the U.S. Treasury and Small Business Administration released an 11 page loan forgiveness application with instructions on how to complete it.



The highlights of the announcement include:

1. Alternative Payroll Covered Period

The eight-week (56 day) covered period begins as soon as the loan funds reach the business' account. However, many small businesses have pay periods that do not correspond to the loan disbursement date. The forgiveness application permits flexibility. The instructions to the forgiveness application provide:

For administrative convenience, Borrowers with a bi-weekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week (56 day) periods that begins on the first day of their first pay period following their PPP Loan Disbursement Date (the "Alternative Payment Covered Period").

The instructions further provide the following example:

If the Borrower received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement is Sunday, April 26, the first day of the Alternative Payroll Covered Period is Sunday, April 26, and the last day of the Alternative Payroll Covered Period is Saturday, June 20.

Note that the alternative payroll covered period does not apply to non-payroll costs.

2. Covered Period

The "covered period" is the 8 week period generally beginning on the date the business received the loan disbursement. Only the costs paid or incurred within the 8 week period are generally eligible for forgiveness.

Some flexibility is permitted. Specific rules govern the "paid and incurred" treatment of payroll costs. Payroll costs are paid on the day the paychecks are distributed or the business originates an ACH credit transaction. Similarly, eligible, non-payroll expenses must be paid during the eight week covered period or incurred during that time and paid on or before the next regular billing date, even if the billing date is after the incurred period.

3. Reduced Loan Forgiveness for Noncompliance

If a business' head count or payroll costs don't match pre-crisis levels, the amount of forgiveness will fall in most cases. The calculation is based on a number of factors such as a reduction in head count or if wages drop by more than 25 percent for employees who earned \$100,000 or less in 2019.

4. Non-deductibility of Wages Paid and Other Expenses that are Forgiven

The IRS has pronounced that businesses cannot deduct wages paid and other expenses that are covered by the loan and forgiven. This is based on the fact that the forgiveness itself won't be subject to income taxes.

If businesses can't deduct wages and other expenses covered by PPP, they could be surprised when they end up with higher income.

Congress is considering a narrow amendment to Code Section 265 to specifically permit the deduction of wages and other expenses covered by PPP.

THE IMPACT OF CORONAVIRUS ON HEALTHCARE DOCUMENTS

By Jack Baron

- The Coronavirus pandemic has intensified the health care concerns that many people have for themselves and their loved ones. People should also be mindful of the healthcare related documents they may have executed in conjunction with their estate planning, and whether those documents remain substantively appropriate given the individual's circumstances as well as the current environment.
- We recommend that individuals review (or if not already in place, then implement) their Living Wills, DNRs, Healthcare Proxies and HIPAA Releases (collectively, "Healthcare Documents").



A Living Will is a document which expresses your healthcare wishes. It might also express other preferences such as religious considerations.

A Do Not Resuscitate ("DNR") is a document in which you state that you do not want resuscitative or extraordinary measures taken in instances such as cardiac, cerebrovascular or pulmonary events.

A Healthcare Proxy is a document in which you designate a person (your "Healthcare Agent") to make healthcare decisions for you if are unable to do so.

A HIPAA Release is a document in which you designate a person to communicate with your healthcare providers, with access to your confidential medical records that would otherwise be protected from disclosure under the HIPAA laws.

- Make sure that your Healthcare Documents are current, as to both age and being expressive of your present wishes regarding healthcare related decisions. Documents that are more than 5-7 years old may be considered "stale" by the healthcare provider and therefore more difficult to implement. Your healthcare preferences may have changed over the years, which would suggest your documents should be updated. Given that intubation frequently is part of the treatment for Coronavirus, we recommend that you review the manner in which your Living Will addresses intubation, with consideration that intubation often has been successful in the treatment of Coronavirus.

- Your Healthcare Proxy and HIPAA Release should designate an individual, and one or more successors, as agent who is willing and able to act on your behalf. We recommend that prior to designating an agent, you discuss whether that person is willing to serve in that capacity. You should be mindful that under New Jersey law, only one individual at a time may serve as an agent under a Living Will.
- The Coronavirus pandemic has greatly affected the manner in which hospitals and other healthcare and rehabilitation facilities attend to the treatment of their patients, including interacting with family and healthcare agents. We recommend adding language to your Healthcare Documents allowing your agent to communicate with and provide instructions to the healthcare facility by telephone, email, Skype, and other similar types of communication modes, and authorizing the healthcare facility to accept such communications.

To discuss any of the above, please contact any of our Business attorneys:

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