

Are We Liable?

COVID-19 Business Litigation Exposure and Contract Liability

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Breach of Contract – Failure to Perform

- Event cancellation/postponement
 - effects of phased reopening
- Supply chain
 - failure to deliver/alternate sourcing
- Commercial leases
 - payment of rent, CAM, taxes
- Closing obligations – deals signed before and during outbreak
 - asset purchase/M&A agreements
 - real estate purchase agreements
 - Post-closing earnout disputes

Contract Liability (continued)

- Does the COVID-19 pandemic excuse performance?
 - Depends on the terms of the contract
- Force Majeure Clauses
 - Interpreted narrowly – generally limited to specifically enumerated events or similar
 - Since SARS, “pandemic” is sometimes listed; if not, could be considered foreseeable and so not a force majeure event
 - “Act of God”
 - Catch-all phrases
- Impracticability/Frustration of Purpose
 - financial hardship or unprofitability does not excuse performance

Contract Liability (continued)

- Closing Obligations: purchase agreements (M&A)
 - COVID-19 & Material Adverse Effect
 - Contractual language is key in determining allocation of risk related to pandemic or macroeconomic conditions
 - Typical exclusions for market- or industry-wide phenomena
 - Generally, such events must disproportionately affect the seller's business
- Post-Closing: Earnout Agreements
 - Buyer must use "best efforts" or "commercially reasonable efforts" to protect seller's earnout rights
 - Buyer's response to crisis/decline in business

Contract Liability (continued)

- Real estate purchase agreements
 - Closing a foreclosure sale that commenced before March 17th
 - Emergency orders prohibiting (or limiting) foreclosure proceedings
 - Time of the essence?
 - Time to cure court/government order preventing sale?

Contract Liability (continued)

- Liability for nonperformance
 - Damages
 - Acceleration of payment
 - Liquidated damages
 - Deposits/advance payments
 - Reverse break-up fees
 - Specific performance
- Consumer Protection Claims
 - Unfair business practices – failure to refund, acceleration of repayment, invocation of COVID-19 when would not have performed regardless
 - Multiple damages, attorneys' fees

Contract Liability (continued)

- Insurance Coverage Litigation
 - Business interruption
 - Typically requires direct physical loss/damage
 - Is contamination covered physical damage? Maybe, if no applicable exclusion
 - Civil authority, “all-risk” typically broader
 - Post-SARS pandemic/communicable disease/virus exclusions
 - Legislation introduced in several states to require business interruption coverage of COVID-19 losses, but not in NH