



COURTS, CONTRACTS, COMMERCIAL LEASES, INSURANCE COVERAGE AND COMMERCIAL SHIPPING DURING COVID-19

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AGENDA

- Contractual Considerations Regarding Non-Performance and the COVID-19 Shutdown
 - Joseph C. Monahan
- Status of New York State Trial Courts and Discussion of Commercial Lease Provisions in the Context of COVID-19
 - Matthew A. Bondy
- Business Interruption Coverage for First-Party Losses Caused by the Coronavirus COVID-19 Pandemic
 - Patrick C. Campbell
- Shipping and Transportation Regulators Responses to COVID-19
 - Wook Chung
- Q&A



01 CONTRACTUAL CONSIDERATIONS REGARDING NON-PERFORMANCE AND THE COVID-19 SHUTDOWN

JOSEPH C. MONAHAN



POTENTIAL JUSTIFICATIONS FOR NON-PERFORMANCE

- *Force Majeure* Provisions
- Impracticability
- UCC § 2-615



FORCE MAJEURE

- Contractual allocation of the risk
- Did the parties intend for the event to be the type of *force majeure* event covered by the contract?
 - *Force Majeure* provisions narrowly construed
 - Language matters – finite listing vs. open-ended
 - Intent regarding foreseeable event not specifically listed (“pandemic” after swine flu?)
 - Act of God?
- Assuming it is covered by the contract, does it justify non-performance?
 - Was the event beyond the control of the non-performing party?
 - Has the party seeking to invoke the provision shown that it took steps to perform notwithstanding the occurrence of the event?
- Notice



IMPRACTICABILITY

- Restatement (Second) of Contracts § 261
 - A supervening event, the non-occurrence of which was a basic assumption of both the contracting parties, renders performance impracticable
 - Can include impracticability due to governmental order (§264)
 - Foreseeability
 - Must be incapable of being performed – not merely impractical
 - Financial inability to perform is typically not sufficient
 - Does not apply if performance is practicable by someone, just not by the non-performing party (objective standard)
 - If party attempts to perform notwithstanding the supervening event, but fails, can be liable for breach
 - *Force majeure* provision as limitation?



UNIFORM COMMERCIAL CODE 2-615

- Applicable to contracts for the sale of goods
- Delay or non-delivery is not a breach if it is made impracticable by the occurrence of contingency the non-occurrence of which was a basic assumption of the parties OR by good faith compliance with foreign or domestic governmental order – even if later determined to be invalid
 - *Where only partly impacts performance, seller must allocate production and deliveries in fair and reasonable manner*
 - *Must seasonably notify buyer, including notice of any allocation*
- Increased costs or collapse of the market can qualify in certain cases – more lenient than common law impracticability



02

STATUS OF NEW YORK STATE TRIAL COURTS AND DISCUSSION OF COMMERCIAL LEASE PROVISIONS IN THE CONTEXT OF COVID-19

MATTHEW A. BONDY



STATUS OF NEW YORK STATE COURT OPERATIONS

- Statutes of limitations and other court deadlines have been tolled through May 7, 2020. (Executive Orders 202.8 and 202.14)
- Until further order, no papers are being accepted unless in connection with a list of essential matters. This directive applies to both paper and electronic filings in the trial courts. Administrative Order (“AO”) 78/20
- AO 78/20 includes a catchall provision allowing other unspecified matters to be designated as essential, but it “is designed to address the very rare cases where individual facts necessitate an immediate hearing notwithstanding current public health concerns; it will be interpreted restrictively.”
- AO/78/20 does not address discovery in pending matters, which continues to be governed by AO 71/20, and provides, inter alia, that no participant in civil litigation will be penalized if discovery compliance is delayed for reasons relating to the coronavirus emergency.



STATUS OF NEW YORK STATE COURT OPERATIONS

- The virtual court operations program allowing participants in essential proceedings to appear by audio or video conference is now operating statewide for essential matters including arraignments, bail applications, orders of protection landlord lockouts and urgent code violations, and other essential and emergency criminal, family and civil matters.
- AO/85/20 provides for the expansion of virtual court operations and remote access to additional, nonessential court matters.
- The prohibitions on filing new cases and filings in pending non-essential cases remains in place. No new non-essential matters may be filed until further notice; nor may additional papers be filed by parties in pending nonessential matters.



ESSENTIAL MATTERS

- Criminal matters
 - Arraignments
 - Bail applications, reviews and writs
 - Temporary orders of protection
 - Resentencing of retained and incarcerated defendants
 - Essential sex offender registration act (SORA) matters
- Family Court
 - Child protection intake cases involving removal applications
 - Newly filed juvenile delinquency intake cases involving remand placement applications, or modification thereof
 - Emergency family offense petitions/temporary orders of protection
 - Orders to show cause
 - Stipulations on submission



ESSENTIAL MATTERS

- Supreme Court
 - Mental Hygiene Law (MHL) applications and hearings addressing patient retention or release
 - Newly filed MHL applications for an assisted outpatient treatment (AOT) plan
 - Emergency applications in guardianship matters
 - Temporary orders of protection (including but not limited to matters involving domestic violence)
 - Emergency applications related to the coronavirus
 - Emergency Election Law applications
 - Extreme risk protection orders (ERPO)
 - MHL hearings addressing the involuntary administration of medication and other medical care



ESSENTIAL MATTERS

- Civil/Housing matters
 - Applications addressing landlord lockouts (including reductions in essential services)
 - Applications addressing serious code violations
 - Applications addressing serious repair orders
 - Applications for post-eviction relief
 - Any other matter that the court deems essential
- This list of essential proceedings is subject to ongoing review and amendment as necessary.



FORCE MAJEURE CLAUSES IN NY COMMERCIAL LEASES

- *Force majeure* clauses are designed to allocate the risk of specified *force majeure* events to each party and excuse one or both parties from performing the contract if such an event occurs.
- “Force majeure clauses are to be interpreted in accord with their purpose, which is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties. When the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.”
 - Constellation Energy Servs. of N.Y. v. New Water St., 146 A.D.3d 557, 558 (1st Dep’t 2017)(internal citations omitted).



LANGUAGE WILL DICTATE

- The application of *force majeure* to the coronavirus outbreak will depend significantly on the language of the lease agreement.
- New York Courts’ narrowly interpret contractual force majeure clauses.
- Parties should scrutinize their lease and determine the following:
 - Does the lease contain a *force majeure* clause;
 - If so, what constitutes a *force majeure* event;
 - Does it excuse one or both parties from performing if a specified *force majeure* event occurs;
 - Are there notice and mitigation requirements;
 - Does it identify remedies (i.e., the right to terminate) if the *force majeure* event remains in effect after a specified amount of time; and
 - Is it limited (i.e., by language such as: “but not including a party’s failure or inability to make payments” or “*force majeure* does not apply to the payment of rent”)?
 - In the absence of an express *force majeure* clause, are there other clauses or definitions that speak to a party’s obligations in the event of unavoidable delays.



OTHER CONSIDERATIONS

- Government orders restricting non-essential businesses from operating may implicate other lease provisions and/or legal considerations, including, *inter alia*:
- Default provisions and conditional limitations;
- Co-tenancy clauses (i.e., when a large retail anchor tenant that other tenants rely on to drive traffic goes dark);
- Operating covenants that require a tenant to remain open and operating at the premises during the lease term;
- So-called hell or high-water clauses, requiring a lessee to make payments irrespective of defenses that it might have.;
- Has there been an actual or constructive eviction; and
- Do COVID-19 governmental orders constitute a taking or condemnation entitling the tenant to an abatement of rent?



03 BUSINESS INTERRUPTION COVERAGES FOR FIRST- PARTY LOSSES CAUSED BY THE CORONAVIRUS COVID-19 PANDEMIC

PATRICK C. CAMPBELL



POLICY ISSUES

- Physical Loss
 - Functional Impairment of Property
 - Physical Contamination
 - ISO Circular LI-CF-2006-175 (7/6/06)
- Virus Exclusion
 - Not Found in All Policies
 - May conflict with coverages for loss caused by government action -closure orders
 - Possible Challenge to Validity of Exclusion
- Other Types of Coverage
 - Civil Authority Coverage
 - Communicable or Infectious Disease Coverage
 - Contingent Business Interruption Coverage
 - Ingress and Egress Coverage



LITIGATION FRONT

- Cases filed
- Jurisdiction is important
- Potential for a favorable litigation environment



LEGISLATIVE FRONT

- Pennsylvania
- New York
- Massachusetts
- Ohio
- New Jersey
- House of Representatives



WHAT TO DO IF YOU THINK YOU HAVE A CLAIM

- Consult a lawyer because of the Policy Nuances
- Keep Records of Losses
- Submit Claim to Carrier
- Litigation Funding to Level the Playing Field





04 SHIPPING AND TRANSPORTATION REGULATOR'S RESPONSES TO COVID-19

W O O K C H U N G



INTRODUCING THE FEDERAL MARITIME COMMISSION

- A federal agency responsible for regulating the international ocean transportation for the benefit and protection of exporters, importers, and the American consumers.
- Mission focuses on ensuring a 1) *competitive and reliable international ocean transportation supply system that supports the U.S. economy* and 2) *protecting the public from unfair and deceptive practices*.
- Enforces the Shipping Act. FMC's jurisdiction extends to all vessel operating common carriers ("VOCCs"), non-vessel operating common carriers ("NVOCCs"), freight forwarders, and marine terminal operators ("MTOs") operating in the U.S. foreign commerce.
- Generally, FMC jurisdiction does not reach to the pure US domestic or offshore trades, sometimes known as the "coastwise" or "Jones Act" trades, nor does FMC have jurisdiction over certain vessel operation, such as bulk or tanker operators (but does have jurisdiction over cruise industry).



INTRODUCING THE FEDERAL MOTOR CARRIERS SAFETY ADMINISTRATION

- FMCSA - Formerly a part of the Federal Highway Administration, responsible for regulating intrastate trucking industry.
- Mission focuses on *preventing commercial motor vehicle-related fatalities and injuries*. Its priority is *not so much the fair or reliable trucking services, but rather the safety of the trucking industry*.
- Enforces FMCSRs. Much of FMCSA activities and endeavors are focused on ensuring safety in motor carrier operations - through enforcement of safety regulations; controlling high-risk carriers and commercial motor vehicle drivers; improving safety information systems; and strengthening commercial motor vehicle equipment and operating standards.
- Generally, FMCSRs do not apply to intra-state commerce. Further, any driver who transports an animal, vehicle or other personal property in interstate commerce in a vehicle below certain size and weight is not subject to the FMCSRs.



HELPFUL INFORMATION

- FMC
 - FMC Procedures Concerning COVID-19
(<https://www.fmc.gov/coronavirus/>)
- FMCSA
 - Emergency Declarations, Waivers, Exemptions and Permits
(<https://www.fmcsa.dot.gov/emergency-declarations>)



