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Contracts and COVID-19: What Healthcare Providers Need to Know

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Outline

- The concept of force majeure
- COVID-19 & force majeure
- Action items
 - Reviewing & revising contracts
 - Invoking & defending against force majeure

“Force Majeure”

- Concept in contract law that a party may be excused from performing under a contract where such performance becomes
 - i. impossible or impracticable
 - ii. due to
 - iii. unforeseeable events
 - iv. which are outside its control
- Mere hinderance of performance or increased costs typically not sufficient

Excused from Performance

- If a force majeure event occurs, the impacted party may be excused from part or full performance
 - Part performance may be “excusable delay”
- If force majeure event does not occur, the impacted party ...
 - Is not excused from performance
 - Must perform the contract
 - Will be in breach of the contract if it does not perform, notwithstanding delays or disruption caused by the event

“Force Majeure” Provisions

- Provisions, which state:
 - If a certain event occurs (e.g., natural disasters, acts of war), a party is excused from performance until the event ends
 - May include a notice requirement
 - May have catch-all language, e.g., event includes “all other acts beyond the parties’ reasonable control.”
- Note: Not all force majeure provisions created equal

Example – IT Support Services

Force Majeure: Contractor will not be responsible for failure to perform or deliver any goods or services as a result of a cause beyond its reasonable control, including, but not limited to, work stoppages, fires, civil disobedience, riots, rebellions, floods, war, acts of terrorism, acts of God and other similar occurrences. The obligations and rights of Contractor will be extended on a day-to-day basis for the duration of the excusable delay.

Other Provisions May Have “Force Majeure” Effect

- Any number of contract provisions may excuse performance due to events beyond a party’s control
 - Note: What matters is not how the provision is labelled; it is how provision affects performance
 - Standard provisions that may apply:
 - “Material Adverse Event”
 - “Change in law”
 - “Termination with Cause”

Health Care Example – Services Agreement

- In a professional services agreement, several provisions may excuse performance:
 - Able to terminate if government regulation renders performance impermissible
 - If change in law that impacts reimbursement, able to renegotiate the contract and/or terminate
 - Provider has to have unrestricted ability to provide services

Impossibility or Impracticality

- Even if the contract has no “force majeure” or similar provision, a party may still be excused from performance
 - Iowa common law: Doctrines of “impossibility / impracticability” or “frustration of purpose”
 - UCC: “Excuse by Failure of Presupposed Conditions”
- Same concept: generally applies where such performance becomes (i) impossible or impracticable (ii) due to (iii) unforeseeable events (iv) which are outside its control

COVID-19 and Force Majeure

- COVID-19 pandemic has significantly impacted the ability of companies to perform under contract
 - Impact of highly contagious virus
 - Impact of federal and state government response
 - Secondary effects of both virus and response, including supply chain disruptions, business closures, cancelled sales, etc.

Impact within Health Care Industry

- Impact of highly contagious virus
 - Staffing shortages, whether due to sickness, quarantines, or PTO
- Impact of federal and state government response
 - Prohibition of elective surgeries
- Secondary effects of both virus and response
 - Lack of supplies (PPE), staffing, etc.

Checklist: Action Items

- ❑ Review and Analyze Current Contracts
- ❑ Act On / Invoke Your Contract Remedies
- ❑ Plan on How To Mitigate Delays in Performance from Other Parties
- ❑ Revise Contracts Going Forward
- ❑ Consider Other Resources, incl. Insurance, Government Programs to Cover Non-Performance

Review and Analyze Contracts

- There is no general application of “force majeure”
 - While the COVID-19 pandemic is unprecedented, and has fundamentally altered the ability to perform under contract, parties are not broadly excused from performance
- Inquiry is case-specific; analysis is always contract-specific

What Provision To Look For?

- A “force majeure” provision
 - In some contracts, an “excusable delay” provision
 - Any other provision which would excuse performance due to the COVID-19 pandemic
 - Any other provision which would excuse performance generally (e.g. termination without cause)
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Analyze: Is There a Force Majeure Event?

Consider the COVID-19 pandemic, the governmental response, including quarantine, and secondary impacts

Is the specified event listed?

Is the list of events limited or unrestricted?

Is the claimed event really unforeseeable?



Mere fear of some event may be viewed with skepticism by a counterparty or court

Analyze: Causation, Causation, Causation

- Courts require that a party claiming force majeure to establish causation
 - Must show that the unforeseen event actually caused the non-performance
 - Very fact-specific inquiry
- Instead of generalizing about the impact of COVID-19, support with data from governmental orders and trade or professional associations

Analyze: What is the Remedy for an Event?

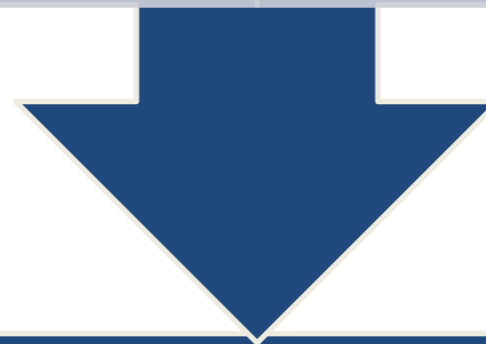
What is impact on rights / obligations?

Additional time
/ suspend
performance?

Compensation?

Excuse from
liability?

Termination
rights?



More common for provisions to excuse performance temporarily instead of permitting termination

Analyze: Obligations if Claiming Force Majeure

There are obligations of the party claiming force majeure:

- Notice: Determine what notice is required and if documentation is required to be provided
 - General recommendation is to give notice early and often
- Mitigation efforts: Does party have to take steps to avoid force majeure first?
 - Best efforts to avoid?
 - Reasonable efforts?

What If There Is No Such Provision?

- Not uncommon, particularly for the purchaser (not provider) of services
- Much more complicated analysis; should seek legal counsel
- Potential application of
 - UCC (sale of goods)
 - Impracticability / Impossibility
 - Frustration of Purpose

Act On / Invoke Remedies

Be pragmatic
about remedies

Consider not
only contract
analysis, but

- Counterparties and their credit, personality and relationship
- Other stakeholders

Formulate a plan

- Raise issue in collaborate discussion or formal notice of non-performance

Communicate,
early and often

Document

- Document steps taken to avoid impact, e.g. crisis management programs
- Create and preserve all communications, records, timelines, and documents evidencing impact
 - Substantial evidence of impossibility or impracticability must be gathered; a triggering event alone is typically inadequate

The Notice

- Be precise and follow requirements in contract
 - Timing is everything
 - Perfection matters when notice is given
- Communicate the intention to invoke the remedy offered
 - Want to avoid unwittingly communicating an intention to never perform, if force majeure provision only permits delay to perform

Litigation Options

- Traditional suit for breach of contract
 - Typically, one party will allege breach of contract (among other things) and the other party will plead as an affirmative defense the defense of force majeure
- Injunctive relief
- Declaratory judgment-determine contract rights

Timing Issues

- Traditional suit 12-18 months until trial
- Injunction-immediate hearing
- Declaratory-request expedited relief

Importance of Causation

- Could be outcome-determinative factor in claim seeking use of force majeure provision
- Meat Processing Plant
 - Closure due to COVID-19 illness
 - Seeks more favorable price from supplier

Temporary Injunction

- Elements
 - Likelihood of success on merits
 - Irreparable harm
 - No adequate remedy at law
 - Balancing equities/public interest
- Bond-125% of probable liability

Declaratory Judgment Action

- If interested in a written contract or have rights affected by a contract, you may have any question of the construction or validity determined, and obtain a declaration of rights. IRCP 1.1102.
- A contract can be construed before or after a breach occurs. IRCP 1.1103.
- Supplemental relief based on a declaratory judgment may be granted wherever necessary or proper. IRCP 1.1106
- Can request a jury. IRCP 1.1108

Mitigation

- If a counterparty acts, do not sit back and wait, while incurring damages
 - Generally recognized obligation for a non-breaching party to mitigate loss
 - May be contractual obligation as well
 - Understand what can be done to cover
 - At this point, recognition that COVID-19 pandemic will cause significant disruption
 - Document, document, document
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Revise Contracts Going Forward

- Given the experience to date, it will become harder to argue that the COVID-19 pandemic is a force majeure event
 - Impact of COVID-19 may no longer be unanticipated event
- Err on side of caution and add language to capture COVID-19 pandemic
 - Have to look down the road; experts saying that pandemic could last 12-18 months

Amendments?

- Considerations on modifications to current agreements
 - Is there a trigger event for when the modification would end, such as when state government declaration of public health emergency ends?
 - Does one party seeking the modification has discretion and ability to further modify the agreement?

Example: Revised Force Majeure Language

Event = “epidemics and/or pandemics, including but not limited to COVID-19; delays in services, labor shortages, delays in deliveries, or material shortages experienced by Company and/or its subcontractors, suppliers, or agents arising from epidemics and/or pandemics, including but not limited to COVID-19; delays or other effects arising from government-mandated or government-recommended quarantines, closures of private businesses or governmental offices, or restrictions on business, access, or travel, arising from epidemics and/or pandemics, including but not limited to COVID-19”

Other Resources

- COVID-19 will have a profound and lasting effect on the ability of parties to perform and receive rights and obligations under contract
 - Use of Force Majeure is not a “silver bullet”
 - Need to consider full suite of options to help soften impact of a party’s non-performance
 - Insurance, governmental programs, etc.
 - May impact force majeure analysis; otherwise, good business sense

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