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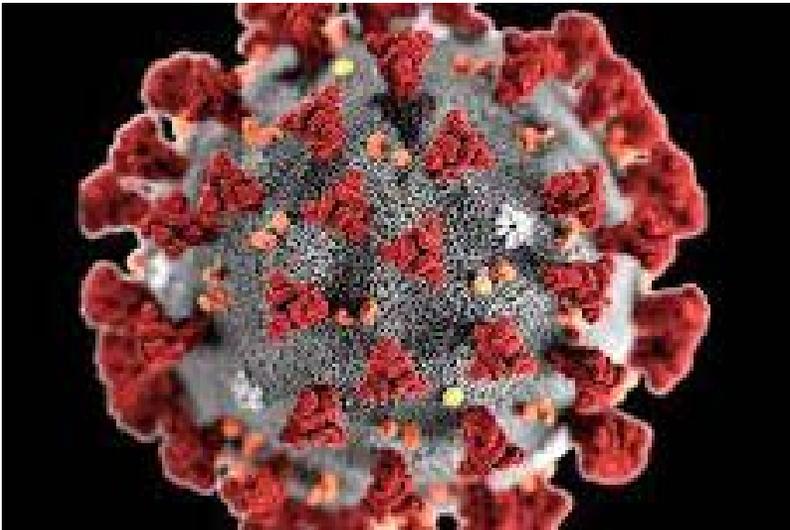
# LITIGATION DUE TO THE PANDEMIC

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# In the midst of the pandemic:

- On March 9, 2020, Ohio Governor DeWine declared a state of emergency.
- Subsequent orders by Ohio's Director of Health closed bars and restaurants, limited the size of public gatherings, and even closed the polls
- On March 22, 2020, the Director issued her Stay at Home Order exempting only essential activities, businesses, and government functions.
- On March 24, 2020, Michigan Governor Whitmer's Stay at Home Order went into effect.
- Various of these orders have been modified, but remain in place. No one knows when they will be completely lifted and potential additional restrictions are looming.

## **During and after the pandemic:**

- What is happening as the pandemic continues on and these orders are being lifted or modified?
- Businesses will realize they lost money because purchases, projects, and deals were delayed or cancelled.
- They will want to blame someone for that loss.
- They will want to sue that someone for that loss.
- They will realize they might be sued for someone else's loss.

## Recent real-life examples:

- A buyer in Texas sought an injunction requiring the seller to complete a business acquisition.
- A buyer under a land contract sues the seller to force an extension of the closing date due to COVID-19.
- A restaurant sues its insurance broker for failing to make sure it had business interruption coverage.

# What should you do now?

- Find out what your contracts say about:
  - Delays?
  - Inability to perform?
  - Liquidated damages?
  - Extensions of time?
  - Notice requirements?
- This is necessary whether you have a claim to make or expect to receive a claim!

## Notice Requirements.

- Notice requirements are of paramount concern.
- If contained in your contract, notice is almost certainly a prerequisite to making a claim later.
- Failure to give proper notice will likely waive the claim. *See Maghie & Savage, Inc. v. P.J. Dick Inc.*, 10th Dist. Franklin No. 08AP-487, 2009-Ohio-2164, ¶ 25.
- Notice is important even if not specifically required.
- Now is the time to give the required notice.

## Giving Proper Notice.

- To give proper notice, you need to know:
  - When the notice has to be given;
  - To whom notice must be given;
  - How notice must be given; and,
  - The amount of detail required.

## Giving Notice Now.

- Notice should be given now even though information is incomplete.
- You may not know the extent of your loss, but give notice of what you do know.
- Refer to the states of emergency declared at the federal and state levels and identify the impacts already seen.
- Refer to the contract provisions governing notice.
- Supplement your initial notice as more information is known.

# Documentation.

- Start documenting the impacts from the pandemic now.
- Don't wait to the end to compile your documentation.
- Daily logs are invaluable real time documentation.
- Examples include:
  - Labor shortages.
  - Decreased productivity from social distancing.
  - Material supply problems.

## Defensive Steps.

- If you expect to face a claim, consider possible defenses.
  - “Force Majeure” (“Superior Force”)
  - Impossibility or Impracticability of Performance
  - Frustration of Purpose
  - Commercial Impracticability Under the UCC

# Force Majeure.

- Refers to an event or effect that can be neither anticipated nor controlled; an act of God.
- Requires a Force Majeure contract clause:
  - **Force Majeure.** *Seller shall not be responsible for its failure to perform under this Agreement if such failure results from causes beyond its reasonable control, including, but not limited to: acts of God; strikes or other labor disturbances; equipment failure; power failure; inability to obtain suitable supplies, material, or parts; war; acts of terrorism; **epidemics**; floods; fires; accidents or other similar events, the non-occurrence of which was a basic assumption at time the Agreement was made.*
- May excuse a failure to perform.

## Impossibility or Impracticability of Performance.

- Does not require a specific contract clause.
- “[E]xcuses performance under a contract because it has been rendered impossible due to the occurrence of an unforeseeable event.” *Lehigh Gas-Ohio, L.L.C. v. Cincy Oil Queen City, L.L.C.*, 1st Dist. No. C-150572, 2016-Ohio-4611, 66 N.E.3d 1226, ¶ 15.
- “The performance must be rendered impossible without fault of the party asserting the defense and where the difficulties could not have been reasonably foreseen.” *Skilton v. Perry Local School Dist. Bd. of Educ.*, 11th Dist. Lake No. 2001-L-140, 2002-Ohio-6702, ¶ 26.

## Frustration of Purpose.

- Does not require a specific contract clause.
- A “companion doctrine” of impossibility.
- Performance remains possible, but such performance would produce a dramatically different result from what the parties anticipated when the contract was signed.
- Not widely accepted in Ohio. *Wells v. C.J. Mahan Const. Co.*, 10th Dist. Franklin No. 05AP-180, 2006-Ohio-1831, ¶ 18.
- Will be narrowly construed.

# Commercial Impracticability Under the UCC

- Parties seeking to excuse performance under a contract for the “sale of goods” may try to invoke commercial impracticability under UCC 2-615 (Ohio Rev. Code § 1302.73).
- Provides a possible defense to a breach of contract claim “if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made”
- Generally requires an extraordinary and unforeseen occurrence.

# Commercial Impracticability Under the UCC

- Considerations include:
  - Was COVID-19 foreseeable?
  - Is or was partial performance still possible?
  - Has adequate notice been given of the impracticability?
  - Was the party claiming impracticability negligent or at fault in any way?
  - Does the contract between the parties allocate this risk?

## Consider insurance.

- Look at your policy for business interruption coverage.
- Governed by the terms of your policy.
- Since the SARS outbreak, many insurers have excluded coverage for “Loss Due to Virus or Bacteria.”
- Ohio House Bill 589 would require insurers who issued business interruption policies to cover losses due to COVID-19, even if such coverage was excluded by the policy.

# QUESTIONS?

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