

Legal briefs and updates from Marty Kenworthy

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Kenworthy Law

Legal Briefs

March 2020

Welcome to my latest legal briefs newsletter. This newsletter concerns the impact of the coronavirus on contracts. I hope you find the information of interest.

Marty Kenworthy

Contract Law and the Coronavirus



The health of you, your family and employees should be paramount right now. In a rapidly developing environment we all may have a difficult time keeping track of the latest best courses of action and the ever-increasing restrictions and limitations on life and business. While none of us can predict when and how things will play out, consideration of your business contracts should not be completely ignored.

Whether you are a landlord, tenant, contractor, supplier, manufacturer, or any

other business owner, you are most likely party to numerous contracts. In over 30 years of legal practice I have never had the occasion to use the word pandemic – I am sure you never gave it much attention until now either. Unfortunately, the time has come. Has your business already been impacted by the coronavirus pandemic? Suppliers unable to meet your needs? Tenants being shut down and unable to operate fully, if at all? Decrease in workforce available to perform?

Force Majeure

At some point in the near future you may need to review your contracts where you or the other party is not able to perform as expected. A key provision to look for is what is referred to as a *force majeure* clause. In general terms, a *force majeure* clause protects a party that cannot perform its contractual duties because of some unforeseen event that was outside of the parties' control. Something like a war, terrorism, flood, strikes, or government restrictions are frequent examples.

If there is a *force majeure* clause that either you or the other party to the contract is relying on to excuse performance, what has to happen for that to be effective? The cases concerning such matters are fact dependent. One thing that probably needs to occur sooner than later is written notice by the party relying upon *force majeure*. If the *force majeure* clause is generic, is there enough basis to assert that the coronavirus pandemic qualifies? Whichever side of the contract you are on, a good record is a must. Keep track of dates, reasons for a party's inability to perform, efforts to mitigate (if available), what the impact is to your business, unexpected costs, and check your insurance coverage.

Insurance

As far as insurance goes, you will want to determine if you have business interruption insurance, and if so, will it cover the pandemic? Such coverage may only be available for something like a physical loss (such as a building that was

damaged), but you should address that with your insurance agent or broker. Do you have any insurance coverage for governmental action that restricts your business? There are more closures and restrictions being imposed by local, state and federal government on a daily basis. Such coverage may be unlikely but worth reviewing your policies.

Other Considerations

What if you don't have a *force majeure* clause or insurance? A couple common law theories might be worth considering.

- The concept of impossibility (or sometime called impracticability) of performance can apply when a party's performance becomes prohibitively expensive through no fault of that party.
- Frustration of purpose is another possible basis to consider, but such a defense to performance is very fact dependent.

Conclusion

It is also quite likely that the other party to the contract recognizes the situation and will work with you to reach a mutual solution. The best recourse you may have if that doesn't happen is to keep detailed records related to the matter just in case the need arises to take action in the future.

About Marty Kenworthy

Marty is the founder of Kenworthy Law, P.C. and has been practicing law for over 30 years. Prior to beginning the practice of law, Marty earned a construction engineering degree and worked for several years in the construction industry. Marty's practice includes construction matters, commercial real estate, and business and transactional matters. For more information, please visit Marty's website at: www.kenworthylawpc.com.

Please contact Marty with any questions regarding the article in this issue.

The Fine Print

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