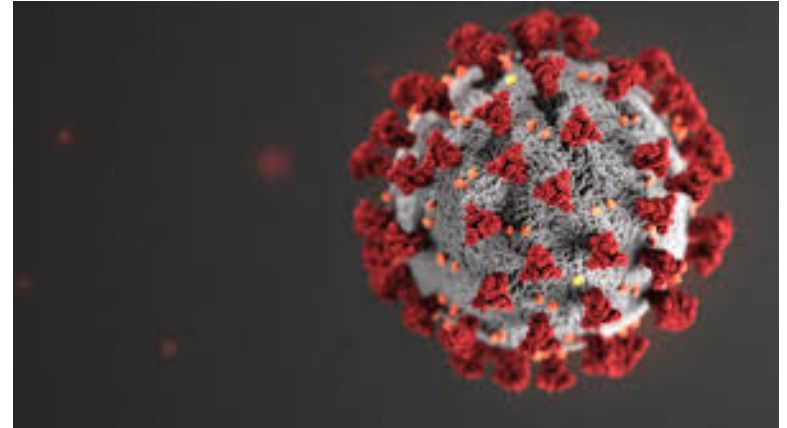


A Trip Around The Legal World of The COVID-19 Pandemic

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5/14/2020



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Topic Overview



Force Majeure and Contractual Matters – unforeseen circumstances and performance under contracts.



Landlord/Tenant Relations – The current state of legal and practical relationships between landlords and tenants under closure orders.

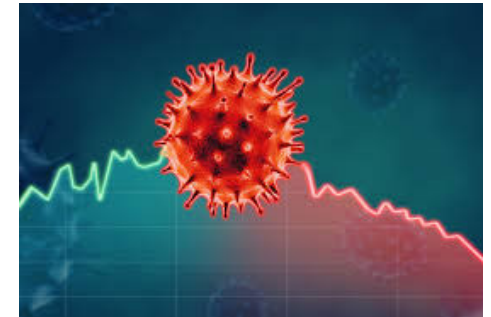


Governmental Actions – Federal, local and state, orders and programs and what they mean today and in the future for your clients.



Mediation – How to move cases to closure when the courts are closed.

Force Majeure



Force Majeure Clauses



A generally “glanced over” “boilerplate” provision that frees parties from liability or obligation when extraordinary events or circumstances keep one or both from fulfilling contractual obligations

Ex. 1- Acts of God – fire, explosion, earthquake, drought hurricane, tornado; 2 – War; 3 – Strikes, Lockouts, Labor Disputes



Construed narrowly and will generally only excuse a party’s nonperformance that has been rendered impossible by an unforeseen event

Many contracts include language that states that the occurrence of the force majeure event must make performance of the contractual obligations impossible, impracticable or illegal; also watch notice and cure provisions with regard to the force majeure clauses.



Some contracts also require notice and reasonable endeavors to overcome the force majeure event

See, e.g., Richard A. Lord, 30 Williston on Contracts § 77:31 (4th Ed.) noting a party seeking the benefits of a force majeure clause must show that performance is impossible “in spite of skill, diligence, and good faith” to continue to perform

Force Majeure and COVID-19



- Since there are no “standard” force majeure clauses, whether the Coronavirus pandemic is considered a force majeure event will come down to definition in your specific contract.
 - ❖ For example, the collective bargaining agreement between the NBA and its players’ union specifically refers to “epidemics” as a *force majeure* event that allows the league’s owners to withhold salary and potentially revoke the entire agreement.
- If a “pandemic” or “disease” was not specifically mentioned is there a broad catch-all definition, such as “unforeseeable circumstances beyond the parties’ control” that could be invoked?
- The judicial interpretation of “foreseeability” varies jurisdictionally and is highly fact-specific on whether the pandemic was or was not foreseeable and courts IN THE PAST have generally narrowly construed these types of clauses (although that may change!).

No Force Majeure Clause?

Look to Common Law Doctrines

If the contract is silent as to force majeure, parties should look to common law doctrines to determine if there could be excused performance



These doctrines may excuse nonperformance where a party establishes:

an **unexpected intervening event** occurred;

the parties' agreement **assumed such an event would not occur**; and

the unexpected event made contractual performance **impossible or impracticable**.



Under the doctrine of **frustration of purpose**, a Party must prove that:

an event substantially frustrates a party's principal purpose;

the nonoccurrence of the event was a basic assumption of the contract; and

the event was not the fault of the party asserting the defense.

Landlord/Tenant Relations



Landlord/Tenant Relations



- With many commercial tenants in dire financial straits – particularly those who rely upon an in-person customer experience (i.e. retail, restaurant, travel and entertainment) – commercial landlords and tenants are susceptible to both short- and long-term effects of orders or general “fear” keeping people away or distanced during the pandemic.
- Identifying and mitigating the negative consequences and working together is key for Landlord/Tenant relations.
- Main Issues:
 1. “Downstream” Issues
 2. Uncertainty in enforcement (governmental and contractual)
 3. “Upstream” Issues

“Downstream” Issues (1 of 2)

(The Tenant and Its Customers)



Landlords: Should be proactive in attempting to limit tenants' shortfalls, not only to prevent them from becoming/adding to the shortfalls of the landlord, but also to help a fellow member of the community in a trying time. Building goodwill for good long-term tenants is critical



Landlords: Review lease and understand contractual rights and obligations of both Landlord and tenant(s) in light of the current circumstances.

Specifically, clauses related to continuous operation, force majeure, and insurance should be examined and analyzed carefully, as well as any others related to default, suspension, and termination.



Landlords: Communicate with tenant and get an understanding of their situation and communicate expectations in this time. Open communication helps mitigate potential future issues.

“Downstream” Issues (2 of 2)

(The Tenant and Its Customers)



Landlords: Consider short-term arrangements that provide temporary abatement, but which allow the landlord to recoup its short-term loss when the economy rebounds. Consider lease buy-outs for tenants that long-term may not survive to create cash NOW

(i.e. future rental rate increase, percentage rent, term extensions, etc.)



Landlords: Seek professional guidance on governmental assistance/mandates that might affect tenant payments and potentially allow rent forgiveness.



Landlords: Don't forget to factor goodwill into decisions – social pressure and optics can be equally as debilitating as financial stressors.

Landlord/Tenant Relationships

Uncertainty in Enforcement

- Considering circumstances and tenants for which negotiations are futile and will thus require some sort of enforcement action with everything in this current environment, the availability and efficacy of enforcement is uncertain.
 - Both the federal government and the State of Texas have issued orders suspending residential eviction and foreclosure proceedings.
 - Fannie Mae and Freddie Mac have also introduced forbearance options, which allow borrowers who have suffered economic hardship as result of COVID-19 to suspend mortgage payments for up to 12 months.
 - Even if a government mandated suspension does not preclude commercial foreclosure or eviction, there is no guarantee that the courts will be able to process them in a timely manner or equitably agree to eviction.
 - Bankruptcy protection on all fronts and its impact should be evaluated.

“Upstream” Issues (People the Landlord Pays)

- With tenant issues likely to affect Landlord income generation and the efficacy of enforcement procedures uncertain, it is equally important for commercial landlords to evaluate their exposure and be proactive in mitigating any unavoidable effects of the current environment.
 - Need to be proactive in identifying and communicating with lenders to ensure that any “downstream” issues do not affect any loans they may have (including breaching loan covenants).
 - Detailed examination of loan documents, with particular emphasis placed on any clauses related to debt-to-income ratios, vacancy or tenant delinquency thresholds, or rental revenue income requirements on a monthly or annual basis.
 - What about taxes, insurance, maintenance, security (many of which are passed on in CAM)?



Governmental Actions: National to Local

Governmental Actions

- The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)
 - SBA’s Economic Injury Disaster Loans (EIDLs)
 - Paycheck Protection Program (PPP)
 - Small Business Debt Relief Program
- Families First Corona Response Act
- Orders mandating remote hearings for all non-essential proceedings
- Stay At Home Orders and “Opening” Orders

The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)

- The U.S. Senate Committee on Small Business & Entrepreneurship released a summary of programs and assistance available to small business owners and certain nonprofit organizations through the Small Business Administration (“SBA”) under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).
- Details on the available programs are subject to additional refining and clarification, so business owners are encouraged to keep up to date on the latest developments regarding the practical application of all available assistance.



SBA's Economic Injury Disaster Loans (EIDLs)



Aimed at assisting small businesses who are suffering substantial economic injury as a result of the Coronavirus (COVID-19) in the form of long-term, low-interest loans to qualifying businesses across the country.

The SBA's EIDLs offer loans up to \$2 million to provide economic support to small businesses to combat the temporary loss of revenue they are currently experiencing as a result of COVID-19.

EIDLs can be used by Texas small businesses to pay for various operating expenses including trade payables, payroll, fixed debts, and other expenses that businesses may be struggling to pay because of COVID-19.

EIDLs will carry an interest rate of 3.75% for small businesses and 2.75% for non-profit organizations and contain long-term repayment schedules in an effort to keep payments affordable with maximum terms of up to 30 years.

Paycheck Protection Program (PPP) Loans



- PPP Loans provide cash-flow assistance through 100% federally guaranteed loans to employers who maintain their payroll during this emergency.
- PPP loans have a host of attractive features, such as forgiveness of up to 8 weeks of payroll based on employee retention and salary levels, no SBA fees, and at least six months of deferral with maximum deferrals of up to a year.
- Small businesses and other eligible entities will be able to apply if they were harmed by COVID-19 between February 15, 2020 and June 30, 2020.
- This program is retroactive to February 15, 2020, in order to help bring workers who may have already been laid off back onto payrolls. Loans are available through June 30, 2020.
- Borrowers may apply for PPP loans and other SBA financial assistance, including EIDLs, 7(a) loans, 504 loans, and microloans, and also receive investment capital from Small Business Investment Corporations (SBICs). However, you cannot use your PPP loan for the same purpose as your other SBA loan(s).
- Forgiveness certification and review will be the focus for the remainder of 2020 as governmental and bank oversight rolls out. Loans over \$2,000,000 will be subject to automatic audit.
- Lawsuits against banks have already begun (Class Action – Wells Fargo – California) based upon selection processes by banks for limited funds in the first round.
- Criminal charges are being pursued against individuals for fraud in procuring the loans.
- Additional guidance issued May 13, 2020 by IRS on certification and forgiveness process

Small Business Debt Relief Program

- Provides immediate relief to small businesses with non-disaster SBA loans, in particular 7(a), 504, and microloans.
- Under it, SBA will cover all loan payments on these SBA loans, including principal, interest, and fees, for six months.
- This relief will also be available to new borrowers who take out loans within six months of the President signing the bill into law.
- Eligibility for a 7(a), 504, or microloan:
 - **In general, businesses must meet the size standard definition under the SBA's guidelines, be based in the U.S., be able to repay, and have a sound business purpose. To check whether your business is considered small, you will need your business's 6-digit North American Industry Classification System (NAICS) code and 3-year average annual revenue. Each program has different requirements, see <https://www.sba.gov/funding-programs/loans> for more details.**





Families First Corona Response Act (1 of 2)

The FMLA Expansion Act

- New type of leave – specifically, qualifying need related to a public health emergency – employee is unable to work (or work from home) due to a need for leave to care for a child of such employee under 18 years of age, if the school or daycare provider of the child has been closed or made unavailable due to a public health emergency, which includes emergencies related to COVID-19 declared by the federal, state or local government.
- Coverage expanded to even small employers (<500 employees).
- Applies to employees who have been employed by the employer for at least thirty (30) calendar days before the public health emergency leave is requested.
- The first ten (10) days of this leave may be unpaid, then not less than 2/3 the employee's regular rate of pay for the balance of the FMLA leave (up to twelve (12) weeks), with such pay not to exceed two hundred dollars (\$200) per day or a total of ten thousand dollars (\$10,000).
- Employees of employers with twenty-five (25) or more employees will be entitled to be restored to an equivalent¹⁹ position at the end of their leave.

Families First Corona Response Act (2 of 2)

Emergency Paid Sick Leave Act

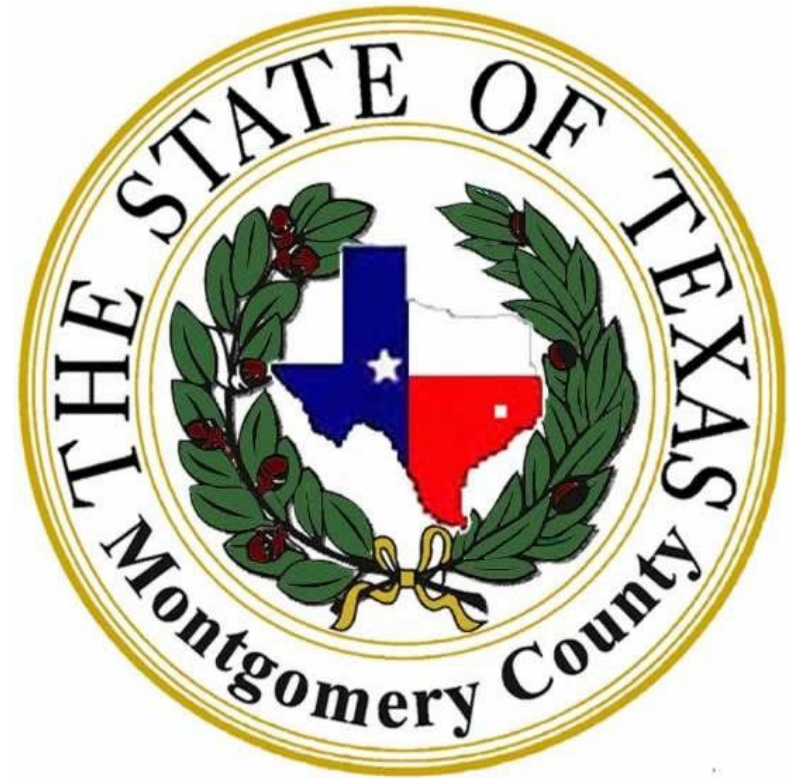
- This Act requires most employers having fewer than five hundred (500) employees to provide up to eighty (80) hours of paid sick leave to full-time employees for certain COVID-19 caused absences.
- Employees are immediately eligible to take paid sick leave under this Act, regardless of how long they have worked for the employer.
- The amount of paid sick leave is calculated based on the amount of compensation the employee would otherwise have been scheduled to earn (although, capped at \$511 per day, and a total of \$5,110 for a qualifying use).
- Employers may not require employees to first use other paid leave provided by the employer before using paid sick leave under this Act.
- Employers may not require employees to provide advance notice prior to the first workday on which the employee takes paid sick leave under this Act. Employers may require normal notice procedures for calling in sick on days following the first day.
- Employers must post, in a conspicuous place where employee notices are customarily posted, a notice of the provisions of this new statute.
- The Act contains a prohibition against retaliation by employers against employees who took leave qualifying under this statute, or who filed a complaint under the statute.



State and County Orders

- State Level Orders:
 - Governor extends Disaster Declaration in all Counties (5/12).
 - Executive Order GA-22 (5/7) amends Executive Order GA-21 (5/5), which allowed certain businesses to re-open to 25% occupancy and phased roll out for gyms, salons, etc., to allow types of services to open earlier and eliminates jail time as a possible sanction for all COVID-19 related executive orders and local orders.
 - Executive Order GA-20 (4/27) requires air travelers from a specific list of states and cities to self-quarantine upon arrival into Texas.
 - Executive Order GA-19 (4/27) details the requirements that hospitals must adhere to, including keeping at least 15% capacity reserved for COVID-19 patients.
 - Executive Order GA-18 (4/27) is meat of "Phase I" of reopening Texas (25% capacity restaurants, etc.).
 - Executive Order GA-17 creates the "Governor's Strike Force to Open Texas" to advise the Governor on how to re-open Texas safely.
 - Executive Order GA-13 suspends various articles of the Texas Code of Criminal Procedure to prevent releases from County and Municipal jails on personal bonds and otherwise for crimes of physical violence or threats thereof.
 - Executive Order GA-10 details the reporting requirements of hospitals and other entities using FDA-approved COVID-19 testing.
- County Orders:
 - Montgomery County's disaster declaration was extended on May 11th to continue to streamline the purchase of COVID-19 related items by the County.
 - The County's "Stay Home, Stop the Spread" order was terminated on April 17th.

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<https://lrl.texas.gov/legeLeaders/governors/displayDocs.cfm?govdoctypeID=5&governorID=45>

Local Orders



- The Woodlands Township Orders:
 - As a legislatively created special district, The Township lacks the express authority to pass ordinances or directly regulate private property or businesses but encourages all members of the community to follow the CDC's guidelines relating to COVID-19.
 - The Township closed all Township parks, cancelled all Township events, and suspended Township trolley service but announced Phase One re-openings began May 1, which include the opening of some parks and the Riva Row Boat House.
 - More updates and openings tonight at 6:00 PM zoom meeting online to parallel governor's orders.

www.thewoodlandstownship-tx.gov



Coming Legal Challenges

- Litigation, Criminal Enforcement and The Constitution:
 - A battle is brewing between those believing governmental action on federal, state and/or local level has either:
 - Overreached and has improperly infringed on civil liberties (i.e. Dallas County) and/or has taken private property rights; or
 - Has created harm causing death and/or physical harm due to failure to act and/or enforce orders.
 - Wisconsin Supreme Court strikes down Governor's orders (5/13)
 - *In re Salon a la Mode, et al.*, Texas Supreme Court denied writ on lack of jurisdiction but stated "government power, even in times of emergencies, is limited by both state and federal constitutions and that officials with broad emergency powers must be held accountable if their restrictions are not the least restrictive measures that can adequately address the emergency" (2020 WL 2125844; May 5, 2020)
 - Civil Litigation – Employers, businesses and building owners are acting out of fear of future litigation in the event of infection and serious bodily injury or death (executive orders may be coming to protect those opening)
 - Criminal Enforcement – Private citizens and business owners are getting frustrated and enforcement is varying widely among geographic areas of the country and state.
- Insurance:
 - Business Interruption Insurance – most policies are denying claims either based on express exclusions or general "no coverage" opinions.
 - Comprehensive General Liability (CGL) Insurance – Read coverage carefully as there may be some coverage for "disease" or "illness" for businesses that have specialty insurance
- There will be litigation at all levels of the court system for years to come associated with the action that was and was not taken during these months.



Orders mandating remote hearings for all non-essential proceedings



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- On March 13, 2020, the Texas Supreme Court issued its first emergency order regarding the state of disaster and, among other things, allowed all courts in Texas to offer individuals to participate in court proceedings remotely.
- In Montgomery County, the courts have worked diligently to accommodate the needs of the community while still ensuring the safety of all participants, including cancelling all civil trial settings in March and April and establishing procedures for remote attendance at hearings.
- In the 284th and 410th Judicial District Courts, there are Standing Orders mandating remote hearings for all non-essential proceedings. Both courts have ordered that all court hearings shall be heard via Zoom, unless ordered otherwise.
- In County Court at Law Number 2, Judge Claudia Laird is also offering Zoom and telephonic appearances for probate and guardianship matters.



Court Operational Guidance – Office of Court Administration

Guidance for Court Proceedings on or after June 1, 2020

- Currently, courts should not be conducting any non-essential proceedings in person. **Effective June 1, courts may begin holding non-essential in-person hearings consistent with OCA's [Guidance to Courts Regarding All Court Proceedings](#).**
 - **Use “all reasonable efforts” to conduct proceedings remotely**
 - **Jury trials must NOT be held until further guidance is issued (coming mid-may for summer trials)**
- Local administrative district judges in each county and the presiding judge of each municipal court will be required to submit to the **Regional Presiding Judge for their administrative judicial region a plan for all courts in the county or city, a plan outlining protective measures for visitors.** Plan must contain:
 - Protections for Judge and Court Staff Health
 - Scheduling to reduce Court house occupancy
 - Protections for “Venerable Populations” (over 65 and underlying health issues)
 - Require Social Distancing
 - Hygiene Requirements
 - Screening (temperature)
 - Face coverings REQUIRED
 - Cleaning
- **In-person hearings, other than essential hearings that cannot be conducted remotely because doing so is not possible or practicable, may not be held on or after June 1 unless an operating plan has been submitted and acknowledged in writing by the Regional Presiding Judge.**
- <https://www.txcourts.net/court-guidance>



Mediation |

Mediation

- While the Courts in Texas are doing everything possible to move cases along, judges are confirming here in Montgomery County there will be no in-person hearings for the time being (most trials continued through June and some through July).
- This period of time will change the practice of law forever.
- In the world of COVID-19, there has never been a better time to look at alternative means of resolving matters using a third-party neutral mediator because Courts will be backed up.
- So how does mediation work when we cannot get together in a room?



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Virtual Mediation

One of the real positives of technology is that with a smart phone, iPad and/or webcam we can use videoconferencing tools, such as Zoom or FaceTime to very effectively mediate virtually with multiple persons and parties from anywhere and at any time.



Virtual Mediation: Logistics

Logistics:

- If using Zoom – set a virtual “space” by creating a Zoom room for each of the respective parties with specific schedules and times for needed interaction.
- Use the screen-sharing feature to share documents among all parties.
- Mediator joins group Zoom room for discussion/negotiation, then leaves and the parties join separate Zoom rooms for breakout sessions (unless individual parties are on site together); all parties rejoin the group when ready to meet with Mediator throughout the day.



Virtual Mediation: Benefits

Benefits:

- Videoconferencing allows for important factors, such as observing faces, judging reactions, and reading the tone of all parties.
- Virtual Mediation moves the ball toward resolution, while effectively utilizing everyone's time and keeping all parties in a safe place physically.
- Settling cases outside of court eases the burden on the courts when proceedings are held in-person again.
- Technological and “user error” can cause interesting interaction; the use of “mute” of both sound and camera is very important 😊.

*Note: Attorneys involved in currently active litigation should check the court's orders and deadlines for attending mediation and get that mediation scheduled virtually if required or timely.

Conclusion

Never in our lifetimes has there been so much global social, medical and economic uncertainty created in such a short period of time (harkens back to Pearl Harbor, the Great Depression and 1918 Pandemic).

The coming months will tell how the actions and reactions during this time have and will impact our society, our lives and the lives of our community and families.

As attorneys and counselors, it is our job to attempt to begin to return some daily predictability to our community and the world and to help guide our leaders toward the future and to take this opportunity to form our legal world into a better place.

“Nearly all men can stand adversity, but if you want to test a man’s character, give him power”

Abraham Lincoln

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*Course Name: A Trip Around The Legal World
of the COVID-19 Pandemic*

**Course number is 174086529
1 hour CLE Texas (0 hours Ethics)**