



EDITOR'S PICK SPOTLIGHT

Discussing business protection strategies with Marc Lamber

Kathleen B. Kunz, Tucson Local Media Apr 24, 2020 

Marc Lamber is a Phoenix-based attorney who specializes in plaintiffs' catastrophic injury and wrongful death litigation at Fennemore Craig, a regional business law firm. As the COVID-19 pandemic halts the national economy and businesses can no longer operate as usual, Lamber urges business owners to take a look at their contracts and insurance policies for possible coverage against the economic fallout. This interview was edited for space and clarity.

What are some ways that struggling business owners can protect themselves from contract obligations that they may not be able to fulfill at this time?



In the world of contracts, one way of potentially excusing or suspending performance is a Force Majeure clause. The clause is often equated with an "Act of God" clause, meaning a clause that

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suspends a party's performance or excuses non-performance when the circumstances are beyond the control of the party to the contract. It makes performance impossible and so that's what a Force Majeure clause addresses. Typically, the event is not only outside of the party's control, the event has to be something that's just not foreseeable. So it's not 'Wow, prices went up so I can't perform the contract.' That's something that contracts normally account for and allocate risk. That's what a contract is designed to do. So fluctuation in market conditions are usually seen as normal risks of a contract. But in contrast, Force Majeure is addressing a situation that isn't foreseeable and that is outside of the party's control. So you think of something like this, a pandemic.

Not every contract has a Force Majeure clause, many do, but not all. And then there's certainly variability in a Force Majeure clause. If you have that clause in your contract, there can be clauses that are drafted very specifically, and address specific Force Majeure events. So you could review your contract and find that it actually references a pandemic or viruses. There are Force Majeure clauses that will reference compliance with federal, state or municipal law orders. So if you have what you see in most states, the governor has enacted by executive order something that shuts down a business. There may be references in a Force Majeure clause that deal specifically with that situation. So you could have a Force Majeure clause that's very specific, and then you could have a Force Majeure clause that's very general. That just references "Acts of God" and then you have to interpret what is an "Act of God" and in Arizona, the courts have interpreted that, but it's a more general term than something as specific as a pandemic or government action. Oftentimes examples in a Force Majeure provision are like fires, floods, hurricanes, earthquakes, it addresses war or strikes or lockouts.

Another area that I think businesses should be thinking about and certainly looking into is their insurance and seeing if they have business interruption insurance. There's already a lot of litigation involving that in COVID-19, you've got a lot of businesses that are looking to use their insurance to try to recover for losses. And there's some big questions about property insurance—where you typically have an insurance that would insure against a building being burned down—whether that applies here to a virus, which isn't near typical property damage, instead it's not being able to operate.

The advice to businesses and business owners is as anxiety inducing, scary and terrifying the circumstances are right now, in all respects, it's important to review your contracts. It's important to review your insurance policies, because people may have some safety nets of which they're not even aware.



What should a company do first if they want to take action on a Force Majeure clause or any other avenue?

I'm recommending that everyone, and it sounds self-serving, but they should go and speak with a lawyer because you want to make sure that if you're going to invoke a Force Majeure clause, that you're doing so with a good legal basis, because if you don't, there's risk. If you invoke a clause maybe improperly, it can be argued that now you've breached the contract. And that carries with it its own risk. So I think you have to be circumspect. But it all starts with getting that contract out and making sure you're evaluating it and determining that if you have a Force Majeure clause, what does it say? That's the analysis—it doesn't end there, it begins there.

How has the COVID-19 pandemic impacted these business contracts and different types of insurance?

If you look around the country there is a lot of litigation, it's widespread and it started in the last month or so where you have different businesses now that are filing lawsuits because they're going to their insurance company saying 'My business has been interrupted, there's coverage' and the insurance company is saying 'No, there's not coverage we have an exclusion' and so now there's going to be a lot of litigation as to is there coverage or is there not? And that's probably going to vary from state to state depending on what the laws are of the state.

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Anything else you'd like to add?

If you don't have a Force Majeure clause and you don't have insurance coverage for this, there are still other things that a business owner could consult with an attorney about. There are equitable defenses to contract performance, two of which are relative to COVID-19. One is called Frustration of Purpose, and the other is the Doctrine of impossibility. Those are two equitable defenses to performing a contract, meaning under certain circumstances you're not required to perform under a contract. Different from a Force Majeure provision which is written into a contract, these are not written provisions, these are implied in every contract. So they occur when an unforeseen event undermines a party's principal purpose for entering into a contract. And you can envision many circumstances where that's probably happened in light of COVID-19. So hope is not all lost, there are other avenues still to consider going down and I would encourage them to speak with legal counsel about that.



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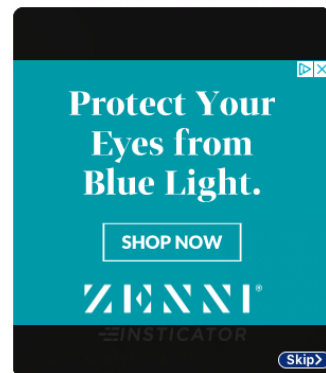


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azbiz.com

7225 N. Mona Lisa Rd. #125
Tucson, AZ 85741

Phone: 520-797-4384

Email: tucsoneditor@tucsonlocalmedia.com

