

## Rethinking Contract Provisions in Light of COVID-19

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May 13, 2020

### 1. Force majeure clauses

- Excuses performance (or doesn't) of a party due to extraordinary circumstances
- High bar to enforce and burden is on non-performing party. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000).
- Generally must: (i) performance must be impossible; (ii) risk of nonperformance must be foreseeable; and (iii) qualify as force majeure under the contract.
- COVID-19 considerations: Does the force majeure involve nonperformance due to government order?
- With risk of another virus having similar impacts, consider putting in explicit pandemic event of force majeure.
- Consider alternative common law impossibility doctrine, although very hard to win
- Has anyone seen a force majeure clause that includes virus/pandemic as an out since COVID-19?

### 2. Insurance policies

- Is there coverage for business interruption, business income, or extra expense coverage (BI) related to COVID-19?
- Probably not, typically related to a direct physical loss for non-excluded events (i.e., wind, fire, collapse, etc.)
- Will we see pandemic coverage in future (remember the advent of terrorism coverage)

### 3. Using CPI as contract metric

- Often used as measuring stick in contracts
- Anticipated inflation due to COVID-19
- Depending on who you represent, consider using a % interest as a ceiling rather than a floor (i.e., the lesser of % or CPI)

### 4. Forbearances vs forgiveness

- Commonly seeing forbearances rather than forgiveness
- Leases: Many of my clients do not understand the difference and can owe a ton of money all at once depending on terms of lease (give example)
- Tenants are leveraged, commercial market still flourishing for the most part
- Consider clients with PPP money negotiating some forgiveness and potentially put more \$ on the table for rent (75-25% SBA rule applies to forgiveness, not use)

### 5. Severance agreements

- Consider explicit release of claims related to new laws (i.e., CARES Act)