

## Client Update

March 12, 2020



## Legal Considerations for Businesses relating to the COVID-19 Outbreak

The novel coronavirus known as SARS-COV-2 and the disease it causes, called coronavirus disease 2019 ("COVID-19") will likely have broad legal consequences. This Client Update outlines the most common legal issues that clients should consider. Fraser Stryker is available to answer questions and assist clients in preparation for, or response to, any legal issues related to COVID-19.

### Contractual Matters

#### *Force Majeure Events*

- Many agreements contain "force majeure clauses." Force majeure clauses are contractual provisions that excuse and allocate the risk of nonperformance due to certain occurrences outside the control of the non-performing party. Historically, courts have narrowly interpreted what events trigger a force majeure clause. Therefore, clients should carefully scrutinize the specific contractual language to see if COVID-19 could act as a "trigger" for a force majeure event. If COVID-19 is covered by a force majeure clause, Clients should also review the notice requirements for declaring a force majeure event, as agreements often impose tight timelines for a party to declare a force majeure event. Finally, clients seeking to utilize force majeure clauses should also determine if they can take any reasonable measures to perform the contractual obligations with reasonable modifications despite COVID-19.

#### *Impossibility of Performance/Frustration of Purpose*

- Even if an agreement does not have an applicable force majeure clause, clients may be protected from nonperformance. The law has a doctrine of "impossibility of performance" that may excuse a party's failure to perform under an agreement where performance has been rendered severely impractical or impossible by unforeseen circumstances. The law also has a doctrine of "frustration of purpose" that may allow a party to avoid performance where that party's "principal purpose is substantially frustrated without that party's fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made." *See* Restatement (Second) of Contracts, § 265. The doctrine of frustration of purpose arises when a change in circumstances makes one party's performance essentially worthless to the other party, thereby frustrating that party's purpose in making the agreement.

#### *Material Adverse Change Provisions*

- Certain agreements provide that the consummation of certain transactions is contingent upon there being no material adverse change to a party's business. Clients may want to

avoid consummating a transaction (like a purchase agreement) that is no longer desirable as a result of COVID-19.

- Certain agreements (like loan documents) require a party to inform the other party when it experiences a material adverse change to its business. Clients should review their contracts for obligations to report material adverse changes caused by COVID-19.
- Note, the definition of a material adverse change depends on the text of the agreement.

## **Premises Liability**

- In most United States jurisdictions, a landowner or person in possession of real property who allows third parties to access the real property for business or related purposes owes these individuals a duty of reasonable care to protect them against hazards located at the premises. The presence of a person infected with COVID-19 may create a health hazard to third party invitees. In such a case, a landowner may have a legal duty to warn these third parties, to prevent access to certain facilities, or to undertake certain enhanced sanitation measures.
- Clients owning or having possession of real property should also familiarize themselves with the recommendations from the Center for Disease Control and other local officials, such as a county health department, with jurisdiction to manage the outbreak of COVID-19 for purposes of protecting individuals who access their property.

## **Insurance Contracts**

- Clients experiencing business interruption from the COVID-19 outbreak should review any applicable insurance coverage, including business interruption insurance, to determine whether they can claim insurance benefits for certain interruptions in business due to the outbreak of COVID-19. Many business interruption insurance policies only cover direct physical loss due to events such as fire, floods, or earthquakes. As such, direct physical loss due to COVID-19 may not be readily apparent. However, there are some areas in which direct physical loss may be readily apparent, such as a situation where a factory or a workplace becomes contaminated and therefore unusable due to an outbreak of COVID-19.

## **Contact Us**

Reach out to Fraser Stryker partner Nicole Konen for more information:

**Nicole R. Konen**  
nkonen@fraserstryker.com  
(402) 978-5361

*This article has been prepared for general information purposes and (1) does not create or constitute an attorney-client relationship, (2) is not intended as a solicitation, (3) is not intended to convey or constitute legal advice, and (4) is not a substitute for obtaining legal advice from a qualified attorney. Always seek professional counsel prior to taking action.*