

COVID-19 ISSUES AND ANSWERS FOR NACM MEMBERS

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National Association of Credit Management members and the broader business community are undoubtedly facing unprecedented times with the COVID-19 outbreak. This article is intended to address certain legal issues and provide possible solutions to NACM members concerning the many hurdles we face as members of the business community during the COVID 19 outbreak and response. The topics addressed in this article include: (a) external (customer/client) relations; (b) contractual/legal relationships; and (c) internal (employee) relations. We have integrated answers to specific questions received from NACM members.

A. CUSTOMER RELATIONS, DELINQUENT ACCOUNTS, & LAWSUITS

You should expect to experience delays in payment and collection of accounts receivable, but you can diminish the impact of these delays by walking the line between demanding strict compliance with the terms of credit extended and remaining flexible with customers. You should anticipate a balancing act between preserving relationships with customers and the enforcement of contract rights for cash-flow purposes.

1. Payment Options

On the payment side, you should consider entering into payout agreements with customers who are slow to pay or not paying. A payout agreement can modify the payment schedule to decrease or eliminate customer's payments for a set amount of time, temporarily reduce or eliminate interest payments and

penalties or modify other payments terms to ensure the customer keeps making acceptable payments toward the amount due.

The payment terms that might be offered/agreed to will likely depend upon your company's needs (including cash flow considerations) and a particular customer's situation. The solution will not likely be a "one size fits all" set of terms, and this is why it will be important to assess your company's needs along with your customer's requests for extensions, among other things. Therefore, it will be critical to document these agreements to mitigate the risk of outright nonpayment and to attempt to stabilize cash-flow.

It is important that you communicate your willingness to enter these agreements with your customers. Customers too often take the "ignore it and it will go away approach." Being proactive about a willingness to work with a customer going through a financially challenging time may be the difference between collecting and not collecting. However, you will want to carefully word your willingness to work with customers so that you are not waiving any of your rights under your contract(s) or otherwise.

2. Preserving Legal Rights

You also will need to ensure your legal rights to collect amounts due remain intact. Doing so may entail sending demand or notice letters, filing lawsuits, perfecting lien rights and enforcing security agreements, amongst other things. You should keep close watch on delinquent accounts or any you may expect will become delinquent and move quickly to preserve your rights. Any necessary demands or notices can be worded in such a way to preserve rather than damage client relationships.

3. Lawsuit Status and Considerations

It may be necessary to pursue legal action, including initiating a lawsuit. You may already be involved in ongoing legal proceedings. Keep in mind that you may have to pursue legal action, even in these times, if, for example, your claims are approaching the end of a statute of limitations period. If a limitations period expires before suit is appropriately and timely filed, your claims, and your ability to force payment, may be lost. Statute of limitations will be governed by applicable state laws. In Texas, the Supreme Court has issued an order that gives courts discretion to extend or toll applicable statutes of limitation, but you should not rely on every court or judge to do so. [First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9042 \(Tex. Mar. 13, 2020\)](#).

Although courts and administrators around the country have canceled or delayed many trials and hearings due to COVID-19, deadlines imposed by the applicable statute of limitations, the contractual terms, lien statutes and other rules will remain in place, unless varied by agreement or by special court order. There may be delays and postponements of in person hearings, but, for the time being, most courts are mainly still open for business with respect to accepting newly filed lawsuits and other case filings. However, court status is changing day-by-day and should be closely monitored.

With video-conferencing, email and e-file capabilities, courts and administrators still may be able to resolve disputes and render judgment without the need for in-person interaction. Likewise, other aspects of cases, including depositions and mediations, will still be able to proceed with video conferencing

capabilities. The Texas Supreme Court has expressly ordered that courts “[a]llow or require anyone involved in any hearing, deposition or other proceeding of any kind [other than jurors,] to participate remotely, such as by teleconferencing, videoconferencing or other means[] . . .” [First Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9042 \(Tex. Mar. 13, 2020\)](#).

B. FORCE MAJEURE AND OTHER CONTRACT DEFENSES

As a business, you probably have entered into agreements with other companies that impose ongoing payment or performance requirements. Some of those might be impossible or difficult to meet during this difficult time. Your customers will likely be raising these same issues with you with respect to their performance or payment obligations. Thus, the legal doctrines of force majeure (act of god), impossibility and/or impracticability will be key concepts at play for you or your customers concerned about payment and/or performance under applicable contracts.

1. Force Majeure

Many (but certainly not all) contracts include a force majeure provision. Force majeure provisions can be broad or specific and may (or may not) identify what constitutes a triggering event (e.g., natural disaster, war, famine) and what an obligee must do to rely on the provision. Accordingly, it is important for you to look closely at the contract about which you have concerns and identify whether the contract has a force majeure provision or not, and to understand, if it exists, what is its specific scope. It will define (and may limit) your rights as they relate to the COVID-19 outbreak.

In Texas, if a *force majeure* provision does not specifically reference a “pandemic,” “epidemic,” “quarantine,” “government action” or some similar circumstance, you may need to rely on a catchall provision in the clause, if broadly worded. In that case, a court may require that the party relying on the event to avoid performance establish that the parties could not have foreseen the event at the time of contracting. See, e.g., *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 182-83 (Tex. App—Houston [1st Dist.] 2018, pet. denied). Unless you entered the contract within the period in which the president (or some local or state government official) declared a state of emergency, it is unlikely a court would consider the COVID-19 pandemic a foreseeable event. If the clause does specifically address an applicable circumstance, there is no need to establish the event was not foreseeable, but you may be in all likelihood limited to the specific events listed or described. See *Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976). Beware that, if the provision addresses specific circumstances, any catch-all provision or language might be limited to similar situations due to the more specific language. *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015). Many *force majeure* provisions also will require notice of a party’s intent to rely on the provision: the contract may require, for instance, that the party relying on the provision notify the other party in writing of its intent to withhold performance.

Do not forget that the outbreak itself is only one condition impacting your contracts. There are also government agencies’ responses and supply chain and workforce shortages that, while caused by the outbreak, could constitute sufficient conditions for avoiding performance on their own.

2. Impossibility, Commercial Impracticability and Frustration of Purpose

Outside of a contractual force majeure clause, impossibility is a common law defense to enforcement of a contract. Texas courts use the terms “impossibility,” “commercial impracticability” and “frustration of purpose” to describe this defense. See, e.g., *Key Energy Servs., Inc. v. Eustace*, 290 S.W.3d 332, 339 (Tex. App.—Eastland 2009, no pet.); *Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co.*, 118 S.W.3d 60, 64 n.6 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Ramirez Co. v. Hous. Auth. of City of Houston*, 777 S.W.2d 167, 173 n.11 (Tex. App.—Houston [14th Dist.] 1989, no writ).

Legal impossibility exists where the thing necessary for performance has been destroyed or deteriorated and where the action is prevented by government regulation. It is more than mere impracticability: the situation must be such that “the thing cannot be done,” not that “[you] cannot do the thing.” *Tractebel Energy*, 118 S.W.3d at 66 n.23. If the person or entity arguing impossibility applies can demonstrate as much, “the obligation to perform under a contract is completely discharged.” *City of Cibolo v. Koehler*, No. 04-11-00209-CV, 2011 WL 5869683, at *9 (Tex. App.—San Antonio Nov. 23, 2011, no pet.).

The Uniform Commercial Code (UCC), which is typically implicated in contracts for the purchase and sale of goods, also addresses impossibility/impracticability. The UCC provides that, in the absence of a contractual provision to the contrary, a seller’s delivery under a contract for sale that “has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption” of the contract or “by compliance in good faith with any applicable . . . governmental regulation or order” may be excused if the seller provides notice and performs to the extent possible. UCC § 2-615.

C. EMPLOYEE RELATIONS

The outbreak of COVID-19 has given rise to a myriad of employment issues. You can find a more comprehensive discussion of what rights NACM members might have in relation to their employees in the [article linked here](#). As a basic overview, we will have provided some basic considerations regarding operations during the COVID-19 response.

First and foremost, all COVID-19 requirements and guidelines issued by the Center for Disease Control (CDC), Occupational Safety and Health Administration (OSHA), and state, federal and local governments should be followed. At present, these guidelines, restrictions and rules are being updated frequently. It is imperative to keep abreast of these developments, including as you plan to take actions affecting your workforce.

Further, you should assess whether you will keep your physical office space open and what structures, policies and technical capabilities your company has in place to facilitate remote working. Systems, network and equipment should be evaluated and tested to help ensure a seamless (or close to seamless) transition to remote working. We stress: (a) that this is a company-by-company, office-by-office and even employee-by-employee determination; and (b) that you should adhere to legal requirements and agency guidance in implementing any changes. As business occupancy and overall operational limitations are issued by state and local authorities, remote working may end up being required to keep your company functional.

If you choose to keep your office physically open (in part or in full), here are some examples of policies and protocols you might implement:

- Create a COVID-19 or business continuity task force that plans the company's response to COVID-19 and implements specific rules and procedures;
- Require that employees take their temperature and report it to a designated employee each day before coming to the office;
- Require that employees self-report any symptoms associated with COVID-19 and require symptomatic employees to stay home (more on this in the linked article);
- Restrict company travel and require that employees notify a designated employee of any plans to travel outside the general area of your place of business;
- Encourage employees to avoid flying and public transportation;
- Restrict access to your office only to employees;
- Require that all employees wash their hands upon entering the office, as well as any time they return;
- Reschedule any meetings and/or modify them to take place over the phone or by videoconference;
- Encourage employees to refrain from shaking hands or touching each other;
- Restrict in-person internal meetings and interactions, including by requiring all internal communications to occur by telephone or video-conference and by eliminating the need to exchange physical papers;
- Cancel any non-essential employee gatherings (e.g., birthday celebrations) and restrict employee gatherings during lunches and break times;
- Require that any employee using shared space (e.g., a conference room or break room) or equipment clean up after him or herself, including by wiping down all surfaces and disposing of all trash.

CONCLUSION

We are continuing to monitor the COVID-19 outbreak. We are also watching for forthcoming legislation related to this evolving crisis. Once the legislation moves through and passes, we will then be able to answer your legislative questions, including concerning payroll issues, other tax credits and new government loan programs. We will be summarizing and providing updates accordingly. As a firm, we are working on further legal resources and materials to assist you. The Bell Nunnally [COVID-19 Legal Resource Center](#) may be accessed at bellnunnally.com.

We welcome your additional questions. We are here to help you navigate these challenging times. [Randall K. Lindley](#) may be reached at 214-740-1417, rlindley@bellnunnally.com. [Karen L. Hart](#) can be reached at 214-740-1444, khart@bellnunnally.com.



Practice Area Contact

Troy "T.J." Hales

Randall K. Lindley

Karen L. Hart