

COVID-19 (a/k/a) Corona Virus; the Project Plague: Legal Checklists for Risks, Problems and Concerns

**Presented by Bill Sommers,
Bill Andrews and Tony Stergio**



Black Swan Event



Construction Law Foundation of Texas



Part I: Human Dimension

- Shelter in place is the new quarantine
- Social distance
- Lack of personal contact
- Uncertainty
- Fear

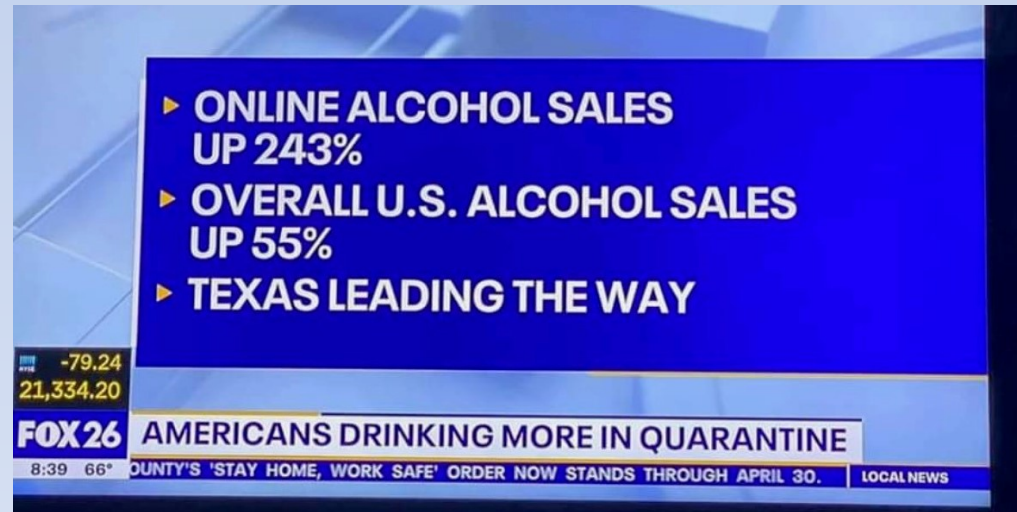


Facts and Figures

- **Worldwide confirmed cases**
 - March 15, 2020: 181.6K
 - March 23, 2020: 418K
 - March 30, 2020: 857.5K
 - April 6, 2020: 1.3M
- **Worldwide deaths**
 - March 15, 2020: 6K
 - March 23, 2020: 15K
 - March 30, 2020: 38K
 - April 6, 2020: 75.5K
- **United States confirmed cases**
 - March 15, 2020: 3K
 - March 23, 2020: 35K
 - March 30, 2020: 164K
 - April 6, 2020: 369K
- **United States deaths**
 - March 15, 2020: 68
 - March 23, 2020: 1K
 - March 30, 2020: 3K
 - April 6, 2020: 10.5K

Staggering Socioeconomic Impact

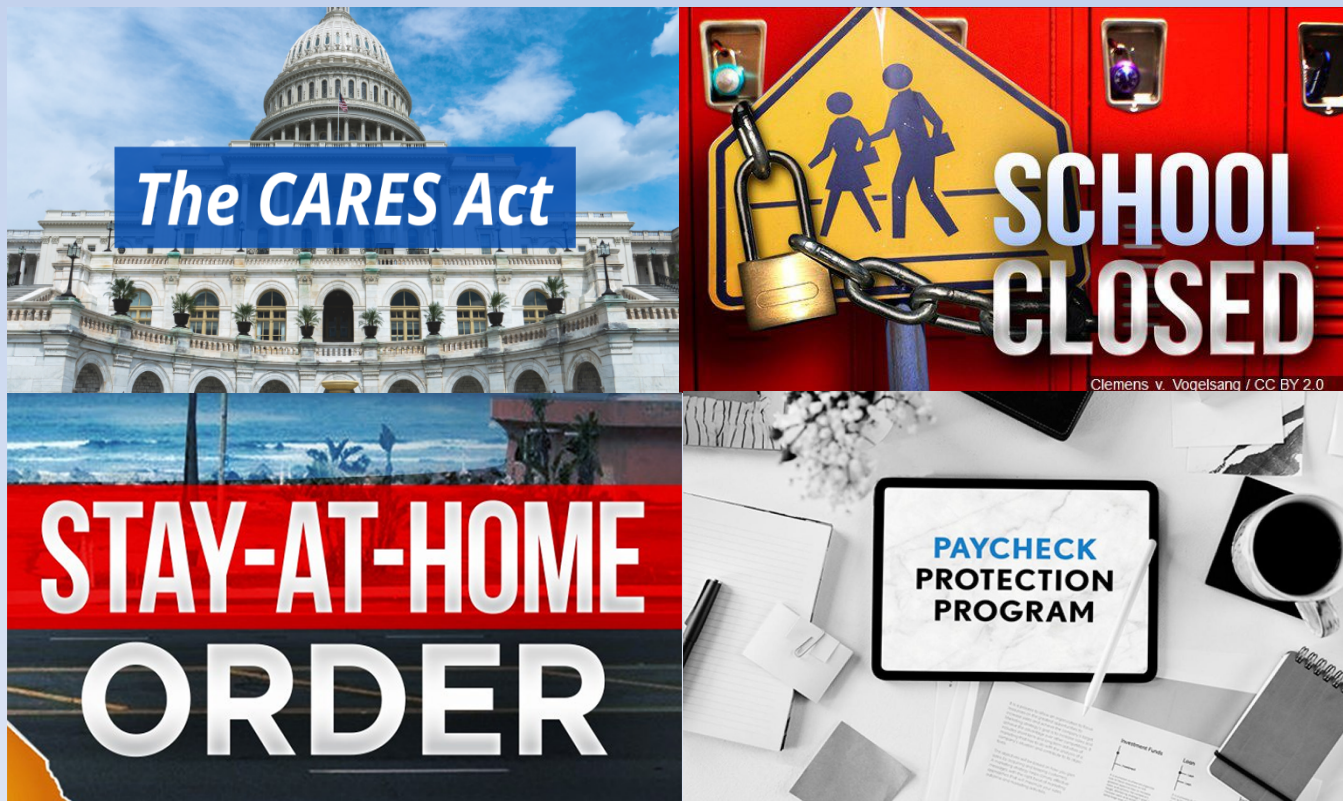
- Business closures
- Unemployment
- Court Restrictions
- Essential Occupations
- Diminished health care response
- Alcohol Sales Skyrocket!



“Pandemic”

- From Greek (*nav pan all+onjuc demos*) which is a widespread occurrence of **an infectious disease in a community at a particular time** that spreads through human populations across a large region or even worldwide.
- All of the continents have been affected and over 83 countries.

Part II: Unprecedented Responses



Shelter in Place Orders

- Bexar, Dallas, Nueces and Harris Counties have deemed the following types of construction as “Essential Services”
 - Public Works
 - Residential
 - Commercial
 - Schools
 - Airports



Shelter in Place Orders

Stay Home, Work Safe

Bexar County issued April 6

- Effective through April 30, 2020

Dallas County amended April 3

- Effective through April 30, 2020
- Continuance of Designation of Local Disaster remains effective through May 20, 2020

Harris County amended March 24

- Effective though April 30, 2020

Nueces County issued April 2

- Effective through April 30, 2020
- City of Port Aransas Order prohibiting fishing and camping issued April 2. Deems fishing an “activity” rather than “service”.
 - Effective through April 9, 2020

The Coronavirus Aid, Relief and Economic Security Act

“The CARES Act”

- Signed into law on March 27, 2020 by President Trump
- Largest stimulus and financial aid legislation ever enacted
- Created the Paycheck Protection Program
- Will be administered by the United States Small Business Administration (SBA) under 7(a) loan program

The CARES Act

- SBA issued additional guidance to lenders last week.
- Small Businesses interested in participating should contact qualified SBA lenders immediately to being applications
- Commence on April 3, 2020 and remain open until the earlier of (i) June 30, 2020; or (ii) the \$349 billion appropriated to the program is exhausted
- [Link to the CARES Act](#)

Paycheck Protection Program (PPP)

- **Eligibility**

- ✓ Small businesses in operation as of February 15, 2020
- ✓ Fewer than 500 full or part-time employees
- ✓ Sole proprietors
- ✓ Independent contractors
- ✓ Self-employed so long as income is less than \$100,000 in one year
- ✓ Nonprofit organizations
- ✓ Veteran organizations
- ✓ Tribal concerns
- ✓ Affiliation rules waived for franchises with fewer than 500 employees
- ✓ All existing SBA 7(a) lenders are automatically approved to make PPP loans on a delegated authority basis

- **Use of Proceeds**

- ✓ Payroll costs
- ✓ Mortgage interest (but not principal)
- ✓ Costs related to group health care benefits for paid sick medical and family leave and related insurance premiums
- ✓ Rent payments
- ✓ Utilities
- ✓ Interest on Economic Injury Disaster Loans made between January 31, 2020 and April 3, 2020
- ✓ If borrower's Economic Injury Disaster Loan was used to pay borrower's payroll costs, the borrower must use proceeds from its PPP loan to pay off portion of its Economic Injury Disaster Loan used to pay payroll costs
- ✓ Interest on debt obligations incurred between February 15, 2020 and June 30, 2020

Paycheck Protection Program (PPP)

Amount & Fees

- Equal to the sum of (a) 2.5 the average total monthly payments for “Payroll Costs”; plus (b) the outstanding amount of any SBA Economic Injury Disaster Loans
- Maximum amount is \$10,000,000.00
- All fees are waived during period between February 15, 2020 through June 30, 2020

Terms

- Interest rates cannot exceed 4%
- Lenders must provide for complete payment deferment for six months, but not more
- No personal guarantees, no collateral required, no prepayment penalty
- reduced payroll at start of covered period
- Borrowers must document compliance with rules

Forgiveness

- Amount of loan spent during eight-week period after origination date is eligible for full forgiveness if no staff reduction before June 30, 2020
- Forgiveness amount is proportionally reduced by a reduction in employees and by the amount of reduced pay of any employee beyond a 25% reduction
- Borrowers that rehire released employees and increase wages that have been reduced will not be penalized for having reduced payroll so long as employees are rehired

Interim Final Rule

- Released April 2, 2020
- Prospective applicants are ineligible to participate in PPP if they have ever obtained a direct or guaranteed loan from the SBA that is currently in default or was in default within the past seven years
- Independent contractors do not count towards calculation of Payroll Cost
- Interest rates on PPP loans are 1.00%

Interim Final Rule *Continued*

- Loan term is two years
- Allows for electronic signatures on loan documents
- PPP is “First come, first served”
- Amount of loan forgiveness will not be considered income to borrowers and will not be subject to federal income tax

Interim Final Rule *Continued*

- Applicants must submit the following forms:
 - (a) SBA Form 2483 – PPP Application Form;
 - (b) Payroll documentation;
 - (c) SBA Form 2484 – PPP Lender’s Application for 7(a) Loan Guaranty;
 - (d) possibly other documents
- Borrower Certifications: An authorized representative of the applicant must certify certain terms related to eligibility and possible forgiveness of the PPP loan proceeds. Lenders may rely on these to assess eligibility to participate in PPP
- PPP loans may be sold in the secondary market once funds have been fully disbursed. PPP loans may be sold at a premium or at a discount to par.

Underwriting Requirements for Lenders

- Certify receipt of borrower certifications;
- Certify receipt of information demonstrating that borrower had employees that were paid salaries and paid payroll taxes “on or around” February 15, 2020;
- Confirm dollar amount of average monthly payroll costs for preceding 12 months by reviewing payroll documents provided by borrower;
- Follow current bank Secrecy Act and Anti-Money Laundering requirements applicable to insured depository institutions

Lender and Agent Fees

- Lenders may charge processing fees on PPP loans for loans
 - up to \$350,000 – 5%;
 - between \$350,000 and \$2,000,000 – 3%; and
 - between \$2,000,000 and \$10,000,000 – 1%
- Agents (e.g., attorneys, accountants, loan packagers, etc.) may charge fees on PPP loans, which will be paid by Lenders out of Lender's fees for loans:
 - up to 350,000 – 1%
 - between \$350,000 and \$2,000,000 -0.5%
 - between \$2,000,000 and \$10,000,000 – 0.25%

The Texas Lawyer's Creed

A Mandate for Professionalism

- “I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.” TX R LWYR’S CREED III. 5; Tex. R. Civ. P. 21(a)(a); Tex. R. Civ. P. 21(b).
- “A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuant of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.” TX R LWYR’S CREED III.
- “The Supreme Court of Texas the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country... The abusive tactics range from lack of civility to outright hostility and obstructionism.” TX R LWYR’S CREED.
- “Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon re-enforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.” TX R LWYR’S CREED
- [Link to Texas Lawyer's Creed](#)

Electronic Forms, Filings and Hearings

- On April 1, 2020, the Supreme Court of Texas issued its Eighth Emergency Order dealing all service and statute-of-limitations deadlines in civil cases from March 13, 2020 until June 1, 2020. The order does NOT affect deadlines for filing appeals or other appellate procedures. Requests for appellate deadlines should be “generously granted”
- The Supreme Court of Texas has adopted electronic forms and filings and has stated on their website that virtual hearings are permissible. Instructions on how to perform virtual hearings can be found using the link below.
 - [Link: Supreme Court Order Requiring Adoption of Electronic Forms](#)
 - [Link: Texas Judicial Branch Allowing Virtual Hearings](#)
 - [Link: Emergency Order regarding extensions of deadlines](#)

CHECKLIST

- ✓ Familiarize yourself with PPP and how it works.
- ✓ Work with the client, the clients CPA/CFO, and the clients banker to comply with all requirements.
- ✓ Advise, lead and assist your client during this time of massive confusion among lending institutions as to underwriting and funding requirements.

Part III: Labor and Employment Challenges, Problems and Issues



{COMPANY OR GOV ENTITY LETTERHEAD}

{DATE}

RE: CRITICAL INFRASTRUCTURE AUTHORIZATION LETTER

To Whom It May Concern:

{name of individual} is an employee of {name of company or governmental entity}. {name of company or governmental entity} has been deemed an essential service by the State of Texas and the City of {City wherein bearer of letter lives}. As such, and pursuant to the Department of Homeland Security Cyber Security Infrastructure Security Agency ("CISA"), and the guidelines provided for identifying critical infrastructure during the COVID-19 pandemic, the bearer of this letter is allowed to travel, work, operate, maintain, and respond to {name of company or governmental entity} critical infrastructure. This authorization is narrow in scope and only for purposes of the bearer performing his/her duties as it pertains to their job function.

This letter will serve as valid authorization for the employee/contract employee to respond and tend to {name of company or gov entity} critical infrastructure needs.

If you have any questions, please contact me directly.

Sincerely,

_____/signature/_____

(name of manager/supervisor in charge of safety and security)

(title)

(office number)

(cell number)

(address)

(email)

Attorneys and Staff Under Stay-at-Home Orders

- On April 2, 2020 the Office of Court Administration issued a travel authorization for lawyers and their staff confirming that lawyers are in fact exempt as they are “workers supporting the operations of the judicial system.”
- [Attorneys and Staff Under Stay-at-Home Orders](#)

Different Types of Emergency Leave

Leave Provided for:

- Government ordered quarantine;
- Quarantine/Self isolation on order of healthcare provider;
- Care for quarantined individual or substantially similar care;
- Treatment or diagnosis of Covid-19;
- Care for child due to school closure or unavailable child care.

Specific Leave Issues

- Leave can be used intermittently if employer agrees.
- Different types of leave can interact.
- No leave if employee is furloughed before April 1.
- Leave cuts off if employee is terminated or furloughed after April 1 due to lack of work/closure.

	Emergency Paid Sick Leave <i>10 days of paid leave total between reasons below</i>	Emergency FMLA <i>10 days of unpaid leave, then 10 weeks of paid leave</i>
Parent caring for his or her child because of a school closure or child care unavailability due to COVID-19	Paid at 2/3 the employee's regular rate. Capped at \$200 per day and \$2,000 in the aggregate.	Likewise paid at 2/3 the employee's regular rate. Capped at \$200 per day and \$10,000 in the aggregate.
Care for quarantined individual or substantially similar care	Paid at 2/3 the employee's regular rate. Capped at \$200 per day and \$2,000 in the aggregate.	Not covered.
Employee quarantined by government order or on advice of health care provider, or out for diagnosis or treatment due to COVID-19	Paid at full regular rate. Capped at \$511 per day and \$5,110 in aggregate.	Not covered.

Only applies if employee is unable to work or telework.
Effective April 2, 2020 through December 31, 2020

Expansion of Unemployment Benefits

- Available for employees who lose work due to Covid-19 related closures or furloughs.
- Not available due to mandatory salary reductions but an employee can get unemployment if they quit as a result of a salary reduction of more than 20%.
- Now no waiting periods for unemployment.

COVID Positive or Presumptive Positive Employee?

- Keep employee away from work until he/she gets healthcare provider release.
- See who employee contacted in three (3) days prior to becoming symptomatic.
- Notify those employees of potential positive (without identifying employee).
 - Pre-consent
 - Post-consent

Safety Issues

- Rapidly changing daily
- Look for OSHA guidance daily
- Look for upstream directives daily
- RTFC – What does your contract require you to do on Safety?
- May create inefficiencies, delay, suspensions, etc.
 - Possible claims

OSHA

General Duty Clause

- Employers must keep employees safe from known serious hazards.
- Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. 29 U.S.C. § 654, 5(a)1.

OSHA Recordable / Reportable of Covid-19

- If it can be directly attributable to work.
- There is also a possibility that a confirmed Covid-19 case among your employees could be an OSHA recordable.
- A confirmed employee COVID infection would only be recordable if it is work related. A case is presumed to be work-related if and only if an exposure in the work environment is a **discernable cause of the illness**.
 - difficult to establish given the present situation.

Worker's Compensation

- Whether Covid-19 is compensable is up to the carrier.
- Case by Case Determination
 - Occurred during the scope of – compensable!
 - If not – ordinary life disease.
- Work related Covid-19 increasingly more difficult to establish as virus spreads (outside of healthcare employment).

Legal Checklist

- ✓ Determine who is entitled to paid leave.
- ✓ Determine who is entitled to unemployment.
- ✓ Determine what employees should be kept from workplace.
- ✓ Determine what employees should be told of positive or presumptive positive employee.
- ✓ What are OSHA responsibilities?
- ✓ Are certain Covid-19 issues compensable?

Part IV: LIABILITY, INSURANCE AND RISK MANAGEMENT PROBLEMS - RISKS AND CONCERNS



COVID-19: A minefield of potential liability and cost exposures

- Employee claims and third-party claims
- **The big question:** Do the standard construction insurance products provide coverage (defense and/or indemnity)?

Frequently asked question: My project, my work is shut down due to COVID. Am I covered?

- Business Income Insurance (f/k/a Business Interruption Insurance)
 - Not carried by many contractors
- Any coverages under the Standard ISO form?

Business Income Insurance

Problematic coverage due to:

- Virus exclusion (mandatory in Texas)
- Shutdown of Project due to fear of virus is not considered property damage
- No property damage to property described in Declarations Page (typically, the home office not specific projects)
- 72 hour waiting period

Business Income Insurance

- But, cardinal rule: always give timely and proper notice to the insurer.
- Never permit a broker to tell you there is no coverage.



Builders' Risk Insurance

- Manuscript forms
- Virus Exclusion
- Delay in completion and soft costs coverage
- Has to be property damage or caused by such damage
- Insurers may deny coverage arguing no property damages (fear of virus is not property damage)

CGL/Professional Liability Policies

- Coverage/indemnity are open issues.
- Depends on particular facts.
- More of an open game.

A realistic worry: the *Stigmatized Building lawsuit/claim*

(People “shun” the building or facility due to the stigma of the virus)



CGI/Professional Liability Policies

What about this scenario?

- Mechanical Engineer designs HVAC system which permits the virus to spread throughout the facility.
- HVAC contractor prepares shop drawings implementing design and installs the HVAC system
- Virus spreads with widespread personal injuries (sick employees of various trades/subcontractors).
- What about buildings partially occupied during construction (e.g. nursing homes/hospitals).

CGL/Professional Liability Policies

- Facility not occupied scenario/still under construction when virus spreads and seemingly causes widespread illness.
- Owner sues general contractor and design professionals claiming building stigmatized and can't rent or lease or sell
- Coverage in Legionaire disease cases

CGL/Professional Liability Policies

- CGL Policy: possible coverage
- Large deductible
- Professional liability exclusion
- *Is value engineering professional services?*
- *What about shop drawings?*

Professional Liability Policies

- Probably no virus exclusion
- Standard of Care issue looms large
- Wide open, fertile ground for lawsuits



Pollution Liability Policy

Questionable as to coverage



Automobile policies

- Fact Scenario:
 - Driver unknowingly has the virus
 - Others in vehicle get sick (*accidentally!*)
 - Injuries arise out of use of automobile
- Possible coverage
- And, if in course and scope, contractor's auto policy implicated

Workers' Compensation

- *Injury or illness incurred by an employee in course and scope of employment*
- Coverage if employee required to be at place of work and exposed to virus
- Key variable element is exposure to virus at work place

Risk Management

- Risk management practices and decisions directly impact contractual and legal liability and responsibility
- Implicate insurance coverages
- One big question transcends all sectors and groups in construction:

What are the legal duties owed by participants in the construction process?

What is the standard of care applicable to all of these participants?

Critically important for each of your clients:

- Get with their brokers and company Risk Managers
- Perform an immediate inventory and audit of all insurance coverages (project specific and company wide)
- This includes AI

Don't wait for a claim or lawsuit or demand for arbitration!



Insurance and Risk Management Checklist

- ✓ Know all your coverages?
- ✓ Perform an immediate audit with your broker/risk manager to identify each and every project and potentially applicable insurance (project specific and company wide)
- ✓ Identify those projects with claim potential
- ✓ No matter what you're told about coverage, give frequent and meaningful notice of all incidents/occurrences

Insurance and Risk Management Checklist

- ✓ Don't take a broker's opinion on coverage
- ✓ Be prepared for the lawsuits
- ✓ Those in the construction industry face potentially significant exposure

Part V: Agreements and the Law



Introduction

- Force Majeure and Suspension
- Differing Site Conditions
- Safety Concerns
- Contract Issues (RTFC)
- Notice (Notice, Notice, Notice)
- Q&A

Force Majeure (TX)

- Impossibility vs. More Expensive
- Could not have been anticipated, foreseen, or guarded against
- Impossibility – Common law defense
- Force Majeure – Contractual remedy (RTFC)
- No Texas cases on point on COVID-19

Force Majeure (Generally)

- Clauses typically interpreted narrowly (RTFC)
 - If not listed, likely not covered
 - May see a Court-created exception for COVID-19
- If not in the contract, you likely have no force majeure remedy
- “Normal” items in FM clauses:
 - Provisions often cover natural disasters like hurricanes, floods, earthquakes, and weather disturbances sometimes referred to as “acts of God.” Other covered events may include war, terrorism or threats of terrorism, civil disorder, labor strikes or disruptions, fire, **disease or medical epidemics or outbreaks**, and curtailment of transportation facilities.

Force Majeure Clauses

Four Considerations when Reviewing Force Majeure Clauses:

1. List of Events

- Specific instances in which force majeure can be invoked (i.e. – acts of God, pandemic, governmental authority)

2. Standard of Performance

- Was performance impossible, impracticable, or illegal?
- Parties must ask:
 - Prevented from complying?
 - Hindered from complying?
 - Performance not reasonably possible?

Force Majeure Clauses *Continued*

3. Catchall Provisions

- Designed to cast a broad net
 - “any other like cause” or “any similar cause”
- Equal Quality – other cause must be of equal quality to any stated specific events
 - i.e. – if riot, fire, and strike are listed then governmental authority cannot be considered of equal quality
- Foreseeability – for catchall to apply event must have been unforeseeable

Force Majeure Clauses *Continued*

4. Notice Requirements

- When should notice be given? Timely!
- Preservation of legal rights



Force Majeure or Delay?

- What metrics will be used to evaluate delay?
Who bears any additional costs?
- If total failure of performance, how will compensation work? What will be considered reasonable mitigation?
- Contract should specify!

Force Majeure is declared.

What next?

Well drafted contracts will dictate what happens in the event of a delay:

- Guaranteed extension of the schedule (but usually not compensation)
- May have the right to replace the party or terminate the contract after a certain time;
- Party receiving the declaration of Force Majeure may have the right to take over performance;

Force Majeure is declared. What next?

Well drafted contracts will dictate what happens in the event of a delay:

- Parties may negotiate alternative performance with adjustments to the contract price for any differences in cost.
- In the event of a termination resulting from an extended delay or failure from a Force Majeure Event, contract likely specifies damages.

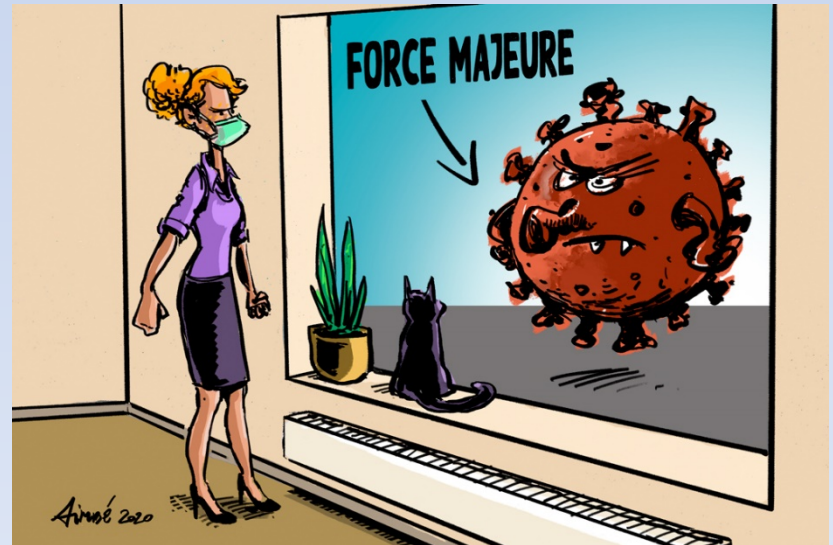
Force Majeure: In the Current COVID-19 Environment

- Declarations often are poorly drafted
- Bereft of thoughtful legal and risk management analysis
- Case in point—this declaration by a major industrial owner on a large CAPEX project:

We accept the delay in construction caused by this measure...(President Trump's 15 day isolation period declaration)

Force Majeure: In the Current COVID-19 Environment

- Force Majeure—limited relief/remedy
- Not every declaration of FM qualifies as a FM Event which is determined by:
 - The contract;
 - The facts; and
 - The law



Force Majeure: In the Current COVID-19 Environment

No common law right to FM

If FM needed for schedule relief:

- Restatement of Contracts Sec. 261;
- UCC 2-615
- Difficult to apply and navigate

Force Majeure: In the Current COVID-19 Environment

- Sole and exclusive remedy typically time extensions
- No relief for escalations, delay damages, etc.
- Analyze the FM declaration and determine whether it complies with the contract
 - And, whether project conditions qualify

Force Majeure: In the Current COVID-19 Environment

- Poorly drafted FM declaration or arguable pretextual declaration to avoid or delay payment:
 - Gives rise to claim suspension (actual or constructive)
 - And seek equitable adjustment in addition to time
 - Along with possible right to terminate

Force Majeure: In the Current COVID-19 Environment

- AIA Section 8.3.1 A201 (does not use the term FM)
- AIA Sec. 10.4 A201 (emergency)
- Consensus Docs 200 Sec. 6.3.1 (j) (refers to epidemics, not pandemics)
- FAR 52.249-14 (*excusable delays* include *epidemics* and *quarantine*).

Force Majeure: In the Current COVID-19 Environment

KEY POINT:

- Always at issue and key question: reasonableness of declaration as to scope, time and extent
- And overriding duty to mitigate
- Party facing such a declaration should never overlook other contractual remedies in the face of a questionable declaration as declare and/or applied

Force Majeure: In the Current COVID-19 Environment

Notices should include content and information under contract provisions addressing Owner caused delays and suspensions and differing site conditions

Impossibility of Performance

- Occurrences Rendering Performance Impossible
 1. Death or incapacity of a necessary party
 2. Destruction of the subject matter of the contract
 3. Illegality due to governmental regulation
- Standards
 - Objective – performance is excused using a reasonable person standard
 - Subjective – does not excuse performance as subjective beliefs are irrelevant

Impossibility of Performance

Impossibility is **NOT**:

- Inadvisable
 - Commercially Impractical
 - More Expensive
-
- Generally cannot contract for an illegal act (to work around Gov't order)

The UCC and Impossibility of Performance

Expands on the common law to include contracts for goods and the concept of impracticability .

Differences Between the UCC and Common Law

1. Cost – primary factor under the UCC but it must be excessive and unreasonable
2. Occurrences – expanded to include severe shortage of supplies, shutdown of major supply shortages, and incapacity of key employee

The UCC and Impossibility of Performance – Cont.

3. Foreseeability – the event must be unforeseeable
4. Partial Performance – if party can partially perform, then fulfillment to whatever extent possible is required

Differing Site Conditions

- From the TxDOT 2014 Spec Book:

5. DIFFERING SITE CONDITIONS

During the progress of the work, differing subsurface or latent physical conditions may be encountered at the site. The 2 types of differing site conditions are defined as:

- those that differ materially from those indicated in the Contract, and
- unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract.

Notify the Engineer in writing when differing site conditions are encountered. The Engineer will notify the Contractor when the Department discovers differing site conditions. Unless directed otherwise, suspend work on the affected items and leave the site undisturbed. The Engineer will investigate the conditions and determine whether differing site conditions exist. If the differing site conditions cause an increase or decrease in the cost or number of working days specified for the performance of the Contract, the Engineer will make adjustments, excluding the loss of anticipated profits, in accordance with the Contract. Additional compensation will be made only if the required written notice has been provided.

Unknown Physical Conditions

- Applies when Contractor encounters **HAZARDOUS MATERIALS**, e.g.
 - Asbestos
 - PCBs
 - Waste Products
 - Environmental contamination



COVID-19, a Physical Condition?

- Per National Institutes of Health, Princeton and University of California, Los Angeles:
 - SARS-2, virus that causes COVID detectable on physical surfaces
 - Adheres to cardboard up to 24 hours
 - Adheres for 2-3 days on plastic
 - Adheres for 2-3 days on stainless steel
 - Remains viable in aerosols (particles that stay aloft in the air) for up to three hours
- The virus that causes COVID may be physically present at your jobsite for days.

Sources:

know: How long does SARS-CoV-2, the virus that causes Covid-19, last on surfaces we touch every day?

Potentially several hours, or even days, according to a preprint published this week by researchers at the National Institutes of Health, Princeton, and the University of California, Los Angeles. The researchers exposed various materials to the virus in the lab. They found that it remained virulent on surfaces for a lengthy period: from up to 24 hours on cardboard to up to two or three days on plastic and stainless steel. It also remained viable in aerosols—attached to particles that stay aloft in the air—for up to three hours. That's all basically in line with the stability of SARS, the coronavirus that caused an outbreak in the early 2000s, the researchers note.

<https://www.wired.com/story/how-long-does-the-coronavirus-last-on-surfaces/>

Sources Continued

32 Abstract

33 HCoV-19 (SARS-2) has caused >88,000 reported illnesses with a current case-fatality ratio of ~2%. Here,
34 we investigate the stability of viable HCoV-19 on surfaces and in aerosols in comparison with SARS-
35 CoV-1. Overall, stability is very similar between HCoV-19 and SARS-CoV-1. We found that viable virus
36 could be detected in aerosols up to 3 hours post aerosolization, up to 4 hours on copper, up to 24 hours on
37 cardboard and up to 2-3 days on plastic and stainless steel. HCoV-19 and SARS-CoV-1 exhibited similar
38 half-lives in aerosols, with median estimates around 2.7 hours. Both viruses show relatively long viability
39 on stainless steel and polypropylene compared to copper or cardboard: the median half-life estimate for
40 HCoV-19 is around 13 hours on steel and around 16 hours on polypropylene. Our results indicate that
41 aerosol and fomite transmission of HCoV-19 is plausible, as the virus can remain viable in aerosols for
42 multiple hours and on surfaces up to days.

<https://www.medrxiv.org/content/10.1101/2020.03.09.20033217v1.full.pdf>

Why DSC?

- Gets you time and MONEY
- TxDOT spec book:

Contractor when the Department discovers differing site conditions. Unless directed otherwise, suspend work on the affected items and leave the site undisturbed. The Engineer will investigate the conditions and determine whether differing site conditions exist. If the differing site conditions cause an increase or decrease in the cost or number of working days specified for the performance of the Contract, the Engineer will make adjustments, excluding the loss of anticipated profits, in accordance with the Contract. Additional compensation will be made only if the required written notice has been provided.

REQUESTS FOR ADDITIONAL COMPENSATION AND DAMAGES

- Puts obligations on TxDOT to “investigate the conditions”
- BUT MUST PROVIDE NOTICE!

Other options

Emergencies (10.4 of A201-2017)

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

- Federal Acquisition Regulation 52.216-4 Economic Price Adjustment – Labor and Material
 - Must be affirmatively added by Contracting Officer
 - Notice within 60 days of escalation
 - Up to 10% aggregate increase in labor and material costs may be permitted
 - TxDOT does not have analog, but see Consensus Docs 200.1

Don't Overlook AIA Section 2.2 A201

- Requirement that Owner furnish reasonable evidence it can pay for your clients work when a request is made in accordance with this provision.
- Right to stop work if owner fails to furnish reasonable evidence.

Contract Issues

- RTFC – Read the F***** Contract
 - You MUST read the full contract (included amendments and CO's)
 - You MUST read the final contract (the one that is signed, not what you think was signed)

Contract Issues *Continued*

- Change Orders modify the Contract (read those now CAREFULLY)
- Need a full and complete copy in the Project Files at all times
- Be mindful of Contractual Notice provision(s)

Notice (Notice, Notice, Notice...)

- Absolutely critical to give timely Notice
 - No notice, claims may be lost
- Contract typically defines:
 - What needs to be noticed
 - How the Notice needs to be sent (Email, CMRRR, letter)
 - Who it needs to be sent to (Owner, Prime, Sub, Engineer, etc.)
 - What it must contain (narrative, schedule, quantum, etc.)
 - When it must be sent

Legal Checklist

- ✓ Analyze force majeure provision together with others that may affect it - keeping in mind they can be used affirmatively and defensively
- ✓ Not every declaration of a force majeure event is valid or binding
- ✓ Any declaration of force majeure is subject to challenge and legal scrutiny – including scope & reasonableness.
- ✓ In advising clients facing force majeure declarations, make sure proper notice is given to declaring party that your client is reserving all rights, including tracking time and cost impacts which may be basis for equitable adjustment and all records are properly kept

Legal Checklist - Continued

- ✓ Remember, a defective force majeure declaration likely constitutes a breach of contract, entitling contractor to time and cost relief under delay, suspension, and potentially change order provisions.
- ✓ Do not overlook potential claim for differing site conditions.
- ✓ FAR's have potential remedies for covid-19 stalled projects.
 - Understand deadlines based upon CO's "decision".

Wrap Up

- Rapidly changing Reality
- Daily reports from News Agencies on hot spots, confirmed cases and death counts
- Uncertainty and sharing information
- Cares registration
- “that I will honestly demean myself in the practice of law; ..., that I will conduct myself with integrity and civility in dealing and communicating with the court and all parties”.
- Have faith

MOONSHINE? HELL NAW OFFICER..

WE MAKING HAND SANITIZER!

A Special Thanks!

Charles Comiskey
RiskTech, Inc. and
Brady Chapmen Holland & Associates
Charles.Comisky@bch-insurance.com

Brian Carrol
Sanderford & Carrol, P.C.
Brian@txconstructionlaw.com

Thomas Lillibridge
Langley & Banack, Incorporated
TLillibridge@langelybanack.com

Bruce Toppin
Langley & Banack, Incorporated
BToppin@langelybanack.com

Steve Nelson
Markel Surety
SNelson@Suretec.com

Tony Stergio
Andrews Myers, P.C.
TStergio@Andrewsmyers.com

Chris Scheurich
Andrews Myers, P.C.
CScheurich@Andrewsmyers.com

Champe Fitzhugh
Andrews Myers, P.C.
CFitzhugh@Andrewsmyers.com

Michael Lichtmacher
Langley & Banack, Incorporated
MLichtmacher@langelybanack.com

Questions?

Bill Sommers

Langley & Banack, Incorporated

WSommers@Langleybanack.com

Bill Andrews

Andrews Myers, P.C.

WAndrews@andrewsmyers.com

Tony Stergio

Andrews Myers, P.C.

TStergio@andrewsmyers.com