

Liability Risk Management as New Hampshire Reopens for Business

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OVERVIEW

- **Safer-at-Home Order Issued Yesterday**
- **Tort Liability Risks**
- **Contract Issues**
- **Legislative Efforts**
 - **AG's opinion**
 - **BIA's suggestion for business safe harbor**
- ***And if we have time* – Bankruptcy issues**

Safer-at-Home Order Issued Yesterday

- www.covidguidance.nh.gov
- Exhibit A to Emergency Order #52 (Stay at Home 2.0; Universal Guidelines)
 - The starting point, both practically speaking and from a risk management standpoint
 - Guidance for both Employers and Employees

Potential Exposure to Claims

- Patrons/customers who claim they got sick on your premises or through exposure to your employees
- Third-party contractors who claim personal injury related to COVID-19 and tied to your employees or premises
 - Also, beyond exposure to potential claims by your vendors, with regard to your vendors, review your agreements and contracts with them and consider business continuity plans

Business Strategies to Minimize Liability Exposure on Tort Claims

- The standard of care will be set based on changing local, state, and federal regulations and guidance
 - Centers for Disease Control (CDC), Occupational Safety and Health Administration (OSHA)
 - Executive Orders at the federal and state level
 - NH – Universal Business Guidelines
 - Industry guidance – industry-specific

Local-level resources
- The need to track these standards
 - Use them to guide company policies
- Have a plan
 - Document all plans and steps taken BEFORE reopening
 - Cleaning standards – both pre-opening and ongoing
 - Employee Practices
 - Social distancing in the workplace
 - Signage

Cont.

- Specific ideas for employees: (1) a set of “no personal contact” rules; (2) a “no item sharing” policy; (3) reorganize your floor plan; (4) minimize common “gathering” areas (around copy machine); (5) modify breakrooms; (6) prominent hand-sanitizing stations; (7) post communal equipment cleaning rules; (8) face mask rules; (9) limit the number of people in closed rooms; and (10) adjust work hours from the standard 9-5
- Demonstrate and track compliance with the plan
 - Note the double-edged sword of tracking records
- Causation: Difficulty in proving the source of infection
- Consider liability release / waiver, before providing services to customers during the tail of the pandemic
 - Is that feasible? Is that good practice?

Considerations With Your Employees

- Bear in mind employee concerns, safety, and well-being
 - Physical workspace distancing
 - Scheduling adjustments to restructure staffing
 - Modified work schedule
 - Telecommuting
- Screening Employee health and documenting temperature
- Accommodating employee request for modifications
 - Consider whether jobs can be done remotely; telecommute potential
 - Performance considerations
 - May have to provide reasonable accommodations under the Americans with Disabilities Act

Cont.

- Requiring employees to wear PPE
- Updating employee illness policies
- Additional considerations include Paid Sick Leave and Extended Family Medical Leave
 - What to do when daycares and camps are closed and there is no other suitable person available to care for the worker's child

CONTRACT ISSUES

- **Do you have to perform obligations under contract?**
- **Examples:**
 - **Leases – do you have to pay rent, or CAM, or taxes?**
 - **Moratorium on foreclosures and evictions over...**
 - **Event cancellations and postponements**
 - **Do you have to pay back deposits, or make a scheduled payment if the event has not yet happened and might never?**
- **What about “Force Majeure?”**

Legal Theories that Might Permit Penalty-Free Termination of Contract or Excusal of a Contract Obligation

- **“Force Majeure” Clauses in Contract**
- **Common law doctrines that May Apply:**
 - **Commercial Frustration (aka Frustration of Purpose)**
 - **Impossibility of Performance**
 - **Impracticability of Performance**

NOTE:

1. **Simple inability to pay is usually not enough,**
2. **These doctrines are not designed to get you out of a bad deal.**

Force Majeure (Superior Force)

- Clause contained in some contracts – so its an actual term of your contract.
 - If you don't have this clause, you cannot invoke “force majeure” to terminate contract
 - Interpreted strictly.

Force Majeure. If the performance by either party of any obligation under this Agreement (other than any payment obligation) is directly delayed or prevented in whole or in part by any cause not reasonably within its control (including, without limitation, acts of terrorism or unavailability of transportation that prevents the occurrence of your meeting or at least 50% of your attendees from attending your meeting; acts of God; war; civil disturbances; accidents; or labor disputes; but excluding, if you are booking your meeting hereunder for a third party, any cause within that third party's control), it will be relieved of performance of such obligation (and the other party will be relieved of its obligation to pay for such performance) to the extent such performance is so directly delayed or prevented, without liability of any kind (and if your meeting cannot be held due to any such cause you will not be liable to us for any cancellation fees and we will promptly refund you any amounts you paid us for services or products not provided). Nothing in this Agreement will be construed as requiring either party to accede to any demands of labor or labor unions, suppliers or other entities that it considers unreasonable.

Frustration of Purpose

- Common law “gap filler” if contract does not have force majeure clause (or as an additional reason to support termination or suspension of obligation)
- Frustration of Purpose exists if intervening circumstances destroy the reason for a contract due to no fault of either party.
 - E.g., planning on travelling to Florida in mid-April for a group business meeting at Walt Disney
 - Executive orders require Walt Disney theme parks to close for the month of April.
 - Purpose of the hotel contract – group meeting at Walt Disney to also enjoy theme parks - has been frustrated even if group can still technically pay and hotel could still technically provide rooms.

Impossibility of Performance

- Everyone's **counting** on a **certain thing** for the contract
- Something **unforeseen** happens to that thing
- Makes it **impossible** to perform the contract
 - E.g. – contract to paint a house and house burns down. It's impossible to perform contract.

Impracticability of Performance

- Everyone's **counting** on a **certain thing** for the contract
- Something **unforeseen** happens to that thing
- Makes it **impractical** to perform the contract (not totally impossible)
 - E.g., Performance possible but is way more expensive because of unforeseen circumstances.
 - In case of COVID, might apply if performance possible but causes unreasonable exposure to virus.

Pitfalls in invoking one of these theories

- What law applies to your contract? (Most states recognize these theories, but there can be nuances in how they are applied.)
- “Cancellation” v. “Termination” or “Excusal of Performance”
 - Beware of terms that may be defined in your contract. Saying that you are “cancelling” may invoke a cancellation clause that allows the other party to claim contractual damages.
 - Make clear that you are invoking one (or more) of the 4 doctrines to terminate the contract completely or excuse performance.
 - Give prompt notice
- If you breached the contract prior to the event giving rise to the hardship, you cannot use these theories to get out of your prior breach.

Practical Strategies

First, do any of the legal theories apply to your circumstances?

- **Is “pandemic” listed as a force majeure event in your contract?**
- **Does pandemic affect the purpose of the contract, temporarily or permanently?**
 - **If temporary, may excuse performance temporarily**
- **Does pandemic affect the ability to perform the contract?**

Can legislature require insurers to cover COVID-19-related liability claims?

- Probably not
- Being tried in a few states
 - Likely a constitutional violation

If legislature can't require insurance coverage, can it block claims?

- Yes, as long as it meets constitutional balancing tests – rational relationship to important state interest – e.g. Good Samaritan law to encourage first aid in emergencies
- Being tried piecemeal in a few states so far for specific industries:
 - Healthcare
 - NOTE: NH AG has opined that existing immunity statute that applies to emergency management workers applies to health care providers (RSA 21-P:41)
- Liability insurers and BIA are supporting broader immunity protection to business reopening after pandemic
 - Trump administration and republican leadership in support
 - Democratic leadership not in support
 - Does not prevent consideration at state level of such legislation

Bankruptcy planning

- **Expectation is that bankruptcies will increase in the next year as fallout from pandemic**
- **2019 Small Business Reorganization Act (effective 2/20/20) – Ch11, subchapter V**
- **CARES Act modified thresholds making it easier for the next year to qualify for the Subchapter V process during next year**

The details...

- **At least 50% commercial debt**
- **Up to \$7.5 million in debt (will revert to \$2,725,625)**
- **Quicker resolution (plan deadline is 90 days)**
- **Not obligated to pay quarterly trustee fees**
- **Trustee focused on supervision, not running your business**
- **Equity holders can keep interests in company even if unsecured creditors will not be paid in full under plan**
- **Usually no creditors' committee**
- **Creditors can't file competing plan**
- **Court can approve plan even if all creditor classes object**
- **Debtor can stretch payment of administrative expenses out over course of plan**

Selected Bankruptcy Risk Management Issues

- Debtors – will stop paying bills, increase delay or partially pay
 - Creditor need to keep tabs on A/R if client at risk for bankruptcy or supply chain if a supplier
 - Amend current business terms or consider if contract should expire
 - Secured v. unsecured debt
- Creditors – need to worry about 90-day lookback since payment
 - Trustee or debtor may seek recovery of payments.
- Typically creditor files proof of claim
- Administrative expense exemption (sec. 503(b)(9) – value of any goods received by debtor w/i 20 days before petition filed if goods were sold in ordinary course of debtor's business)
- Trustee (or Debtor) can challenge claims - avoidance
 - Concern with fraudulent transfers with insiders (e.g., payment of dividends, redemption of shares)

Bankruptcy Risk Management continued...

- **Automatic stay of all litigation initiated by creditors – Make sure you actually stop ALL collection efforts**
 - **Fines and penalties for continuing collection efforts**
- **Debtor can choose to assume or reject contracts that have not yet been performed or leases that have not yet expired as of time petition filed.**
 - **Rejection of contracts gives creditor claim for breach damages**
 - **Choice doesn't have to be made until chapter 11 plan**
 - **Creditor will have to perform without firm assurance of payment for pre-petition damages**
 - **Can move court for timely payment**
 - **Debtor does have to make payment for post petition goods and services under CH11**
- **Can challenge discharge of certain debts**