Many business owners are concerned about the impact of the coronavirus pandemic on contracts that they have in place, including purchase and sale agreements, leases, construction contracts and other contracts requiring performance within a certain timeframe. Below is an overview of Virginia law regarding contract and common law provisions that may be applicable. Although this is not an exhaustive state-by-state survey, the general principles apply in many jurisdictions. For any contract, the first task is to determine which state law applies (including choice of law provisions) so the analysis can be tailored accordingly.

**What is a Force Majeure Provision?**

The pandemic may be governed by a force majeure provision. These provisions typically address the effect of unforeseen circumstances outside the parties' control on their respective contractual obligations. The scope of a force majeure provision is determined using ordinary contract interpretation principles.

- If the provision *lists unrelated events constituting a force majeure* (such as natural disasters as well as labor disputes or governmental regulations) followed by catch-all language, a court is likely to read the catch-all broadly and conclude that pandemics are covered under “any other event out of the parties’ control” or similar language.

- If the provision is *ambiguous* and there is room for reasonable debate as to whether an event is covered, the ambiguity must be construed against the drafter, unless there is a waiver of such rule in the contract.

**TIP:** It is important to read the entire contract to determine the parties' rights and obligations pursuant to a force majeure event. Force majeure provisions are not uniform and the consequence of a given provision depends on the language used in the provision itself and elsewhere in the contract. For example, a force majeure provision may provide for an extension of time to perform, the right to suspend performance indefinitely until the force majeure event subsides, a refund of advances previously paid and/or termination of the obligation to perform. Further, a contract may provide procedural steps required to invoke the provision's protection.
What If My Contract Doesn't Have a Force Majeure Provision?

Many contracts do not contain a force majeure provision, and in other instances, a force majeure provision may not result in the desired outcome given the dynamic nature of the pandemic. The following common law doctrines may excuse performance of contractual obligations, regardless of the existence or effect of a force majeure provision.

- **Impossibility and/or Impracticability.** The defense of impossibility (sometimes referred to as impracticability or commercial impracticability) posits that a party's obligation to perform under a contract is discharged if (i) after entering into the contract, an unexpected intervening event occurs, (ii) the non-occurrence of the intervening event was a basic assumption underlying the contract, and (iii) the intervening event made performance wholly impossible or objectively economically impracticable.

- **Temporary Impossibility.** When the unexpected intervening event renders performance impossible only temporarily, the duty to perform is not discharged but is suspended until performance again becomes possible.

- **Partial Impossibility.** When the unexpected intervening event renders only part of a party's performance obligation impossible, the party has a duty to render the part of performance that is possible and/or practicable.

- **Frustration of Purpose.** When the underlying purpose of the contract is frustrated by the unexpected intervening event, the non-occurrence of which was a basic assumption of the contract, the remaining duties to render performance are discharged.

**Other Considerations**

Regardless of an applicable force majeure clause or contract defense, contracting parties typically have a duty to mitigate damages caused by another party's breach, even if the breach is a result of the pandemic. Further, contractual provisions that impose the risk of non-performance on a particular party are generally enforceable and may constitute a waiver of common law contract rights or defenses.

**Conclusion**

Businesses should carefully review their contracts for a force majeure or act of God provision. In addition to contractual provisions governing the parties’ rights during a pandemic, common law defenses to non-performance such as the doctrines of impossibility, impracticability or frustration of purpose may afford protection.

**Attorneys**

Evan V. Clarke
Justine A. Fitzgerald
Andrew M. Lohmann
Sarah T. Mikowski
Nathaniel L. Story

**Services**

Bankruptcy, Restructuring and Creditors Rights
Business Planning and Organization
Commercial Leasing
Commercial Real Estate
Complex Business Litigation
Construction
Corporate and Business Services
Creditors and Creditors Committees Representation
Debtor and Trustee Representation
Employee Benefits and Executive Compensation
Employment
Employment Counseling and Training
Employment Litigation
Environmental Law
Estate Planning
Fiduciary Services
Financial Restructuring, Workouts, and Dissolution
Financing and Private Capital Formation
General Counsel Services
Government Contracts
Health Professionals
Healthcare
Healthcare Litigation
Hospitals and Healthcare Systems
Institutional Investor Representation
Intellectual Property & Technology
Investment Management
Land Use and Zoning
Litigation and ADR
Loan Portfolios
Mergers & Acquisitions
Private Investment Funds
Property-Assessed Clean Energy (PACE) Financing
Real Estate Acquisitions and Dispositions
Real Estate Development
Real Estate Finance and Investment
Real Estate Litigation
RIA and Broker Dealer Representation
Tax
Tax Credit Finance