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# CONSTRUCTION LITIGATION ISSUES AMID COVID-19

By Paul S. Callaghan, Esq.



Despite a pandemic which has taken a toll on the lives and livelihoods of so many, our construction industry clients have not seen any significant interruptions in their operations during this time. There were delays in some trades on many projects for a short period initially, but for the most part they have not had any effect on overall schedules. Even though long-established construction projects have continued, the pandemic has seriously impacted commercial real estate leasing - as business expansion has stalled.

Although the heated housing market has recently cooled, residential construction has apparently progressed seamlessly and without

serious interruptions. Similarly, heavy highway construction has been advancing as planned without any serious issues relating to the pandemic aside from additional safety precautions.

## Supply Chain Issues

If an issue were to occur in any sector of the construction industry, it would probably involve the supply chain for certain materials because, for example, a supplier might have to close its factory due to Covid-19, or there was an increase in demand.

Notably, many construction contracts contain clauses imposing "liquidated damages" for delays and also include provisions regarding "force majeure" or "Act of God" to excuse certain

contractual obligations under certain circumstances.

## Key Contract Language

Liquidated damages establish a specific amount of money that must be paid for failing to perform - usually by a certain date and under the terms of a contract. The amount often escalates as time goes by absent completion. A "force majeure" clause is designed to protect the parties if contractual obligations cannot be performed due to events which are outside of their control and could not be avoided by the exercise of due care. A force majeure clause may list specific events; it may also be vague to include anything out of the parties' control. Concerning the coronavirus, it is my opinion that any broad force majeure

language should apply in most circumstances arising after the World Health Organization declared the pandemic in March. This opinion is based upon the fact that the pandemic is both out of the control of the contracting parties and cannot always be avoided through the exercise of due care. Of course, determining whether a particular force majeure clause applies will have to be analyzed on a case-by-case basis based upon the language of the provision, the facts relating to non-performance, and any unique circumstances presented. Many contracting parties, including owners and developers, are likely to recognize that recent conditions have in some cases made timely performance impossible, and they may be willing to waive or forego enforcement of liquidated damages provisions. In these cases, litigation is likely to be avoided.

### Litigation Expected

Nevertheless, we are certain that there will be a significant amount of litigation regarding the application of force majeure clauses to the pandemic. For example, if a contractor or subcontractor was behind schedule before the pandemic and then attempts to use the pandemic and a force majeure clause as an excuse for noncompliance, then the imposition of liquidated damages may very well be warranted and litigation is likely to ensue.

*(For almost 30 years Paul S. Callaghan has represented insurance companies and their policyholders, as well as local, national and international corporations, in a wide variety of litigation matters – at trial and on appeal in Rhode Island and Massachusetts.*

*He has tried more than 30 cases to conclusion in the state and federal courts and has numerous reported decisions in the R. I. Supreme Court, the U. S. District Court for the District of Rhode Island, and the U.S. Court of Appeals.*

*In the area of insurance coverage, Paul has handled numerous cases involving extra contractual liability, claims handling, insurance fraud, breach of contract, coverage litigation, and bad faith.*

*He has also handled a wide variety of construction-related matters including construction defect, bodily injury, property damage, contracts, arbitration, indemnification, insurance and surety cases.*

*Paul recently obtained a directed verdict in favor of a major construction company headquartered in New England.*

*He is a graduate of the University of Massachusetts at Amherst; his law degree was awarded from Case Western Reserve University School of Law. He is a Partner with the firm and can be reached at:*

*[pcallaghan@hcc-law.com](mailto:pcallaghan@hcc-law.com)*

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