

## WHEN CORONAVIRUS DERAILS YOUR CONSTRUCTION PROJECT

The novel Coronavirus, COVID-19, has infected over 118,000 people globally and resulted in the unfortunate death of approximately 4,200. In an effort to mitigate the spread of COVID-19, governments around the world are encouraging "social distancing," locking down communities and quarantining those infected.

On Monday, the government of Italy announced that the nation of 60-million was under total lockdown. As part of the lockdown, news agencies are reporting travel restrictions, bans on public gatherings, and requirements that people maintain at least three feet of distance between one another.

In the United States, hundreds of people have been diagnosed with or exposed to COVID-19 and placed in quarantine. Numerous cities have canceled their Saint Patrick's Day Parades and other large public gatherings. On Tuesday, the Governor of New York announced a "containment zone" around the community of New Rochelle.

Already, many businesses are implementing teleworking policies, canceling meetings, and prohibiting travel. Inevitably, the spread of COVID-19 is going to impact the schedule and progress of various construction projects around the country through supply disruptions, labor shortages, travel and work restrictions, or contaminated project sites. Construction professionals should begin actively working to mitigate their potential exposure for delays, schedule impacts, liquidated damages, and other damages potentially resulting from COVID-19.

It is important to recognize that in the event of a dispute arising from the impact of COVID-19 on a construction project, there may not be insurance coverage for the claim. Many insurance policies contain a "widespread exclusion of infectious diseases." Therefore, companies should consult with their attorney and insurance broker concerning their insurance coverage. Companies should also talk with their attorney about ways they can contractually protect their businesses against COVID-19.

For existing projects, construction professionals should review their contracts. Many contracts contain a *force majeure* provision. The term *force majeure* is Latin for "superior force." Typically, these provisions are included in contracts to protect a party from liability arising from unexpected and unforeseen conditions that prohibit a party from fulfilling its contractual obligations.

These conditions often involve extreme acts of nature, riots, wars, or other Acts of God. While the global spread of COVID-19 will presumably be construed as a *force majeure* event in many instances, oftentimes these provisions list specific events that qualify or conditions that must be met before a *force majeure* event can be declared.

If a company does not have a *force majeure* clause in its contracts, it may nonetheless be able to rescind its contract under the common-law doctrine of Frustration of Purpose. Under the doctrine of Frustration of Purpose, a party may be entitled to rescind its contract and avoid its obligations under the contract if there has been a near total destruction of the essential purpose of a transaction. The Restatement (Second) of Contracts explains that "the frustration must be so severe that it is not fairly to be regarded as within the risks that [the party seeking rescission] assumed under the contract." Depending on the severity of the impacts to a project caused by COVID-19, parties may be able to avail themselves of this doctrine.

Companies should be careful before declaring a *force majeure* event or Frustration of Purpose and consult with an attorney. Rescinding a contract and stopping work is a drastic remedy. Experienced construction attorneys can work with companies to assess their unique circumstances and explore other, less-drastic remedies like requests for equitable adjustment, renegotiation, and mediation.

It is unknown how long the global epidemic of COVID-19 will last or how serious the impacts will be. Construction professionals should, however, take steps now to allocate risks associated with COVID-19 in their contracts for new projects going forward. For new contracts, certain project impacts resulting from COVID-19 may be foreseeable. Accordingly, including a *force majeure* provision may not be sufficient, the Frustration of Purpose doctrine may not be available, and more express allocation of risk provisions in contracts should be considered.

As businesses begin implementing policies, procedures, and plans to protect their employees and mitigate the spread of COVID-19, they should also take this opportunity to evaluate their contracts for existing and new projects to protect their business.

If you have any questions about this update, please contact Kevin Poyner, [poynerk@hallevans.com](mailto:poynerk@hallevans.com).