

**#COVID-19:
What Lawyers
Want You to
Know**

COVID 19 & Contractual Obligations

- * The COVID-19 pandemic is forcing business closures, and mandating that employees stay home.
- * Businesses must evaluate existing contracts to determine whether they may be entitled to relief.
- * Many commercial contracts contain *force majeure* provisions that address the possibility of extraordinary events or circumstances beyond the control of the parties.

Force Majeure

- * *Force Majeure* – A contractual term that limits liability due to unforeseen events outside the control of the parties, and which delays or prevents contractual performance.
- * Contract law matters are governed by State law.
- * Ability to claim *force majeure* depends upon express provisions in the contract, and relief offered under State law.
- * Courts will enforce *force majeure* provisions according to their terms and applicable State law.



Key Elements of *Force Majeure*

Involves
unforeseen
events
beyond a
party's control

Excessive
hardship on
a party that
was not
reasonably
contemplated

Hardship
was not
"self created"
by the party

Limitations on *Force Majeure* Clauses



- * Each *force majeure* provision must be considered on its own precise terms.
- * *Force majeure* occurrences must be “proximate cause” of inability to perform and cannot be “reasonably foreseeable.”
- * Party must provide notice and strive to mitigate the damages.

Limitations on *Force Majeure* Clauses

- * For *force majeure* clauses, performance generally must become impossible and not simply burdensome.
- * Economic downturn or adverse business conditions are likely insufficient to constitute a *force majeure* event.



Force Majeure Examples

- * “Neither you nor we shall be liable for loss or damage, or deemed to be in breach of this Agreement, if the failure to perform obligations results from:
 - a. windstorms, rains, floods, earthquakes, typhoons, mudslides or other similar natural causes,
 - b. fires, strikes, embargoes, war, acts of terrorism or riot,
 - c. legal restrictions that prohibit or prevent performance, or
 - d. any other act of God or similar event or cause beyond the control of the party affected.”

Force Majeure Clause **Examples**

- * “Any delay resulting from any of such causes shall extend performance accordingly or excuse performance, in whole or in part, as may be reasonable, so long as a remedy is continuously and diligently sought by the affected party.”
- * *“No such cause shall excuse payment or amounts of fees and recurring fees owed other than a governmental or judicial order prohibiting such payments.”*

Force Majeure Notes

* Not all force majeure clauses reference pandemics, epidemics, viruses, diseases or the like.

* Parties must often first comply with certain obligations to take advantage of the *force majeure* protections (e.g., providing sufficient notice).

* While performance might be excused or delayed, *force majeure* clauses will not always excuse obligatory payments.

Force Majeure & COVID 19

- * A party's inability to perform its contractual obligations will depend on the facts and circumstances of each situation.
- * A causal link between the circumstances and a party's inability to perform must be established for *force majeure*.
- * For COVID 19, the governmental shutdowns of businesses, including requiring employees to work from home, might make it impossible for a party to timely perform under its contract.

Historical Situations Similar to COVID-19 & Impact on Contracts

* 1918
"Spanish Flu"
PANDEMIC

* 1939 - 1945
WWII
Government
Restrictions

* 1966-1968
Vietnam War
Escalation

Beyond *Force Majeure*

- * For situations in which a contract has *no force majeure* clause, or it is *inapplicable*, there are other options.
- * Many States recognize the common law defenses of impossibility, commercial impracticability, and frustration of purpose. In fact, California has codified these equitable provisions.
- * Each of these might be available to a contracting party as a result of the COVID-19 circumstances.

Cal. Civ.
Code §
1511(2)

The California legislature codified its equitable protections:

The performance of an obligation is excused “(2) When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary.”

Common Law Defenses

IMPOSSIBILITY

IMPRACTICABILTY

FRUSTRATION OF
PURPOSE

COMMON LAW DEFENSE: IMPOSSIBILITY

- * Impossibility is difficult to prove, even with the extreme disruptions caused by the COVID-19 pandemic.
- * Performance must be objectively impossible, not just financially unfavorable or impractical. California courts hold that the inability to perform “must consist in the nature of the thing to be done and not in the inability of the obligor to do it.”¹
- * If a party can perform with additional money, time, efforts, or resources, impossibility is not an excuse.

- * The impracticability defense is similar to impossibility, but easier to demonstrate. Performance must be difficult and expensive, such that it becomes “impracticable,” though technically possible (e.g., it requires “excessive and unreasonable” costs).
- * Uniform Commercial Code has codified it at U.C.C. § 2-615.
- * Restatement (Second) of Contracts recognizes the defense of commercial impracticability and specifically references an “act of God” in its definition in Section 261.

COMMON LAW DEFENSE: IMPRACTICABILITY

Three (3) Elements:

- * “The basic purpose of the contract, which has been destroyed by the supervening event, must be recognized by both parties to the contract.”²
- * “The event must be of a nature not reasonably to have been foreseen; and the frustration must be so severe that it is not fairly to be regarded as within the risks that were assumed under the contract.” (*Id.*)
- * “The value of counter performance to the promisor seeking to be excused must be substantially or totally destroyed.” (*Id.*)

CALIFORNIA COMMON LAW DEFENSE: FRUSTRATION OF PURPOSE

WILL “COVID-19” BE THE NEW DEFENSE TO *ALL* CLAIMS OF BREACH OF CONTRACT?

QUESTIONS ABOUND...

* Will The “Novel Coronavirus” Suddenly Be The “Novel Defense” To *EVERY* Breach Of Contract Claim?

* Will Delay Of Performance Be The Best (And Possibly *Only*) Option?

* Will A Mitigation Of Damages Requirement Be The Key Factor In Trying To Compel Performance And/Or To Seek Damages?

PREPARING FOR THE INEVITABLE...

01

→ Carefully Review Your Contracts For *Force Majeure* Terms, Including Pandemics

02

→ Analyze Your Facts To Determine If Other Common Law Defenses Might Apply

03

→ Contact Knowledgeable Counsel To Decide How Best To Protect Your Business

TOGETHER, WE CAN OVERCOME COVID-19.

01

**WE CAN PROTECT YOUR
BUSINESS INTERESTS
FOR THE LONG TERM.**

**CONNOR,
FLETCHER &
HEDENKAMP
LLP**

ADDRESS:

2211 Michelson Drive,
Suite 1100
Irvine, CA 92612

TELEPHONE:

(949) 622-2600

PARTNER E-MAILS:

Edmond M. Connor: EConnor@BusinessLit.com

Matthew J. Fletcher: MFletcher@BusinessLit.com

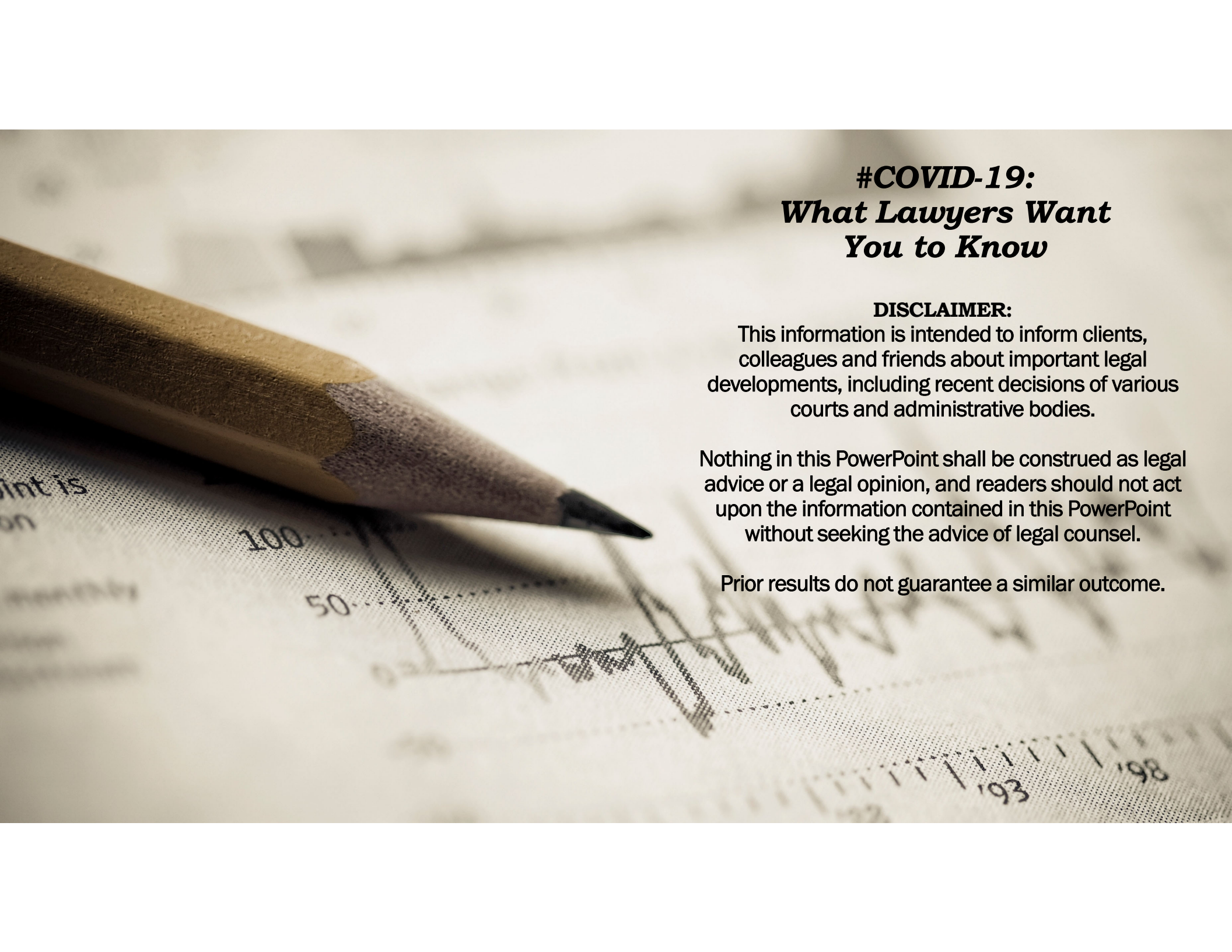
Doug Hedenkamp: DHedenkamp@BusinessLit.com

Laura Lee Blake: LBlake@BusinessLit.com

CASE CITES

1. *El Rio Oils, Canada, Limited v. Pacific Coast Asphalt Co.* (1949) 95 Cal.App.2d 186

2. *Peoplesoft U.S.A., Inc. v. Softeck, Inc.* (N.D. Cal. 2002) 227 F. Supp. 2d 1116, 1119-20



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