COVID-19

And Contract Solutions

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As we all know, the effect of the COVID-19 virus has been far-reaching and debilitating to businesses for the last several months. We have all watched as our economy has suffered significantly through loss of revenue and unemployment. Now that the stay at home orders are relaxing, businesses are striving to reopen and provide their services and we are anxious to resume our lives. With this reopening, businesses are taking steps to protect themselves from the potential liability exposures arising from allowing the public back into their universities, stores, restaurants and churches where people could potentially contract the COVID-19 virus. It's a double-edge sword. Businesses want to restore their revenue by opening quickly but with that comes the potential for lawsuits. Foreseeably, people who contract the COVID-19 and suffer long term health problems from the virus may try to place blame on the venue where they became exposed to the illness, alleging that the business negligently maintained the facilities, failed to properly screen other patrons or failed to take other precautions to prevent the spread of the virus. To address these potential exposures, businesses are turning to contract provisions to eliminate or reduce this exposure.

History of Exculpatory Agreements

By now if you have ventured out at all lately, you have seen the signs on the doors of open establishments disclaiming liability for any exposure to COVID-19. Enter at your own risk. The patron has the option of not entering if she is not willing to take that risk. Akin to those warning signs, the assumption of risk doctrine has found its way into today's contracts to formalize the same principle in what is known as an exculpatory agreement: if a patron is not willing to assume the risk, she cannot enter or participate in the activity offered. This is a form of the Primary Assumption of Risk Doctrine which exists in most, if not all, states throughout the United States. This doctrine developed in order to encourage vigorous participation in recreational sporting activities such as skiing, flag football and the like. Because certain activities are inherently hazardous, the primary assumption of risk doctrine relieves the recreational facility owner/operator of any liability from the patron's injuries that may arise from encountering those inherent risks because the fun in the activity is derived from this competition and challenging one's physical skill level.

Use of Exculpatory Agreements for COVID-19 Exposures

Turning to what may be our new normal as businesses reopen, businesses are seeking the protection of the exculpatory agreements to reduce, if not eliminate, their COVID-19 exposures. We have already seen university athletic programs implement exculpatory agreements that student athletes must sign before they are allowed to return to campus, participate in athletic training and travel with the team. In addition to waiving all claims from COVID-19, some include a warranty from the student affirming that the student will abide by the CDC guidelines, which further serves to protect universities from any liability by demonstrating that they are taking active steps to ensure student compliance with all appropriate safety measures. The agreement also allows students to decline from returning to campus due to COVID-19 concerns.

Exculpatory agreements are also appearing in construction contracts between general contractors and subcontractors requiring subcontractors and their employees to assume the risk of COVID-19 exposure in coming onto a job site, take proper precautions to minimize that exposure and assume responsibility for monitoring their own employees to prevent anyone from coming onto the job site who may be presently infected with the virus.

Drafting Exculpatory Clauses

In order to increase its enforceability, an exculpatory agreement must clearly identify the following:

- The activity to be engaged in;
- The inherent risks associated with that activity, including exposure to COVID-19;
- A statement of assuming ANY AND ALL RISKS, whether inherent risks or otherwise;
- A statement of consideration, i.e., that the participant is signing this agreement in consideration for being allowed to participate in the activity or being allowed on the premises;
- A covenant not to sue the Releasee with a waiver and release on behalf of the participant and all of his/her heirs of all claims, known or unknown, causes of action, damages, expenses, including attorney's fees, due to contracting COVID-19; and
- A forum selection and choice of law clause designating the local court and state where the Releasee is located. This is crucial for the drafter to make sure that the agreement will be interpreted and enforced under the laws in which it was drafted as discussed more fully below.

Each state has its unique requirements for drafting exculpatory agreements. Therefore, you must consider the specific state case law where your business is located to find the nuances in the wording or formatting to use such as font size. For example, states such as California and Texas require that the agreement specifically waive any claims arising out of the Releasee's own negligence so the Releasor is fully apprised of what is at stake in signing the agreement. In order to best position your company for any future litigation that may arise out of an exculpatory agreement, you should consult a local attorney knowledgeable in the nuances in drafting these agreements.

Enforceability of Exculpatory Agreements

Exculpatory agreements, if properly drafted, are more likely to be enforceable provided the services for which they are offered are not a mandatory service, such as for a common carrier, or against public policy. Public policy may vary from state to state as well. In most states, the exculpatory agreement will not be enforced if it attempts to waive liability for someone's gross negligence or willful misconduct. Because of this limitation and specific drafting technicalities, having an exculpatory agreement in place does not guarantee that your company will not be sued or that the agreement will be enforced. If the injuries are severe enough and damages great enough, the injured party will still file suit to challenge the enforceability of the agreement. While there is no sure fire way to avoid every lawsuit, having an exculpatory agreement may reduce the number of lawsuits filed in the first place, and may reduce defense costs in obtaining early dismissal of those lawsuits that still get filed.

Other Contract Provisions to Consider

Force Majeure Clauses

Another current trend in litigation concerns the lease terms where Commercial Tenants have refused to pay rent since they cannot occupy the leased premises due to the COVID-19 closures. The force majeure clause is front and center in this litigation. Force majeure clauses appear in virtually every contract as an escape clause from performance if something outside of the control of the contracting parties prevents one or both parties from performing their contractual obligations. In a recent lawsuit between a Commercial Landlord and Tenant, the Landlord sued the Tenant for back rent, which the Tenant had withheld since the Tenant could not use the restaurant space for in-dining seating because of the COVID-19 Orders. The Tenant relied on the force majeure clause in the lease to excuse its performance to pay rent. The Court sided with the Tenant in most respects, excusing payment of rent under the force majeure clause. However, the court still required the Tenant to pay 25% of the rent, which was the percentage of usable space, the kitchen area, the Tenant could still occupy in preparing and serving take-out orders. This case also pointed out that the lease was missing a standard clause that made the covenant to pay rent independent of all other covenants. Although the force majeure clause stated that the "lack of money" would not trigger the clause, this language was deemed ambiguous and the court held in favor of the Tenant, noting that the governmental order, rather than the Tenant's lack of money, relieved the Tenant of its rent obligations. Although this case was before a bankruptcy court and may not be controlling in future civil litigation, it may be persuasive. Contracting parties should therefore look carefully at the force majeure clauses in their contracts to see if it includes pandemic, both the threat/fear of pandemic or associated quarantine. The contract should be reviewed for any inconsistency between the force majeure clause and the covenant to pay rent.

Delay of Performance Clauses

Other contract terms that should be reviewed to consider the effects of COVID-19 are the delay of performance penalty clauses. Where a contractor has guaranteed to deliver the finished product by a certain deadline, the contractor can face monetary penalties if that deadline is not met. Typically, the delay or disruption clause will include a list of excusable and inexcusable delays. The delays caused by COVID-19 or any future pandemic likely were not contemplated during contract negotiations. While the force majeure clause discussed above may provide relief, the delay clause should also be reviewed to include any delays caused by pandemic on the excusable delay list. This leads to the "no damages for delay" clauses. All parties should be aware of the ramifications of this type of clause and make sure these terms are fully negotiated.

Termination Clauses

Review the termination provisions in a contract. This provision should also include pandemic outbreak as a basis for terminating the contract because subcontractors, vendors and suppliers may prefer to terminate the contract rather than face the exposure to the disease. Make sure the contract clearly delineates the circumstances and other relevant procedures to terminate the contract.

Escalation Clauses

The pandemic has also affected the material supply chain in some industries, causing commodity prices to soar. The escalation clause shifts the increased cost of materials in these situations from the contractor to the client. Contractors should revise these clauses, or include them if they have not already in their contract, to address the affects a pandemic may have on their cost of materials.

Mobilization Clauses

Construction contracts often include mobilization costs, either on a flat fee basis or a percentage of the contract price. In the event of a project shut down due to a pandemic, the contractor could incur additional costs of having to mobilize and re-mobilize once the stay is lifted. These additional mobilization costs should be contemplated in future contracts.

Safety Clauses

Construction contract safety provisions should also be revised to require everyone on the job site to comply with the current guidelines to avoid the spread of the virus, including monitoring temperatures of anyone before entering the job site, restricting equipment sharing, providing hand-sanitizing stations and limiting the number of people present at a time on the job site.

Insurance Requirement Clauses

Finally, the contracting parties should revisit the insurance requirements of their contract. We need to wait and see how the insurance market will respond in the wake of COVID-19 to provide new or revised products to address pandemic exposures. Presently, Business Interruption coverage requires direct physical loss to the insured premises before it will provide coverage. Businesses hit hard by COVID-19 have filed multiple lawsuits challenging the coverage denials. So far, two state courts have declined to find that COVID-19 caused the requisite direct physical loss. Consequently, unless the insurance industry alters the basis for providing business interruption coverage, even having a communicable disease endorsement on those policies will likely not resolve the problem. It appears that the Lloyd's market is looking to provide a solution for future pandemics. Stay tuned!