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News From the Firm

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Message From Chris....

During this pandemic, people are asking certain business questions. While it's not my intent (nor possible) to get into the weeds on everything, I do want to help shed some practical light on some things for folks. This is good stuff for everybody to know... (don't forget to click on my links below to also see my short video on this material).

Thought Process

Question #1: *What is the big picture of what's going on right now?*

Answer: First of all, there's not a lot of precedence on this sort of situation – it's never happened. The legal topics of impossibility, Force Majeure and others are, up until now, rather dusty, largely unused legal doctrines that haven't seen much daylight in our modern court system. Secondly, on public policy grounds, courts don't want business owners held to difficult standards (i.e., normal financial rigors, like making normal/ordinary, full amount rental payments) which can't easily be made during a shutdown. However, what isn't being said yet is that neither (as time goes on, and events play out) will courts want to invalidate/rescind/cancel every contract that was entered into before the pandemic just because business became more difficult to conduct – as that would be anarchy and destabilizing to our economy.

Question #2: *We've lately heard much about certain "defenses" to the enforcement of contracts, like legal "impossibility," "frustration of purpose," and "Force Majeure." What's going on with these?*

Answer: You could spend a lot of time and money right now getting handles on these, but let me try to make it as simple as I can....

Force Majeure: This is a clause that is sometimes used in contracts. To be effective and applicable, it must be stated in your contract. It apportions the risk of economic loss to either one party or the other. It covers both man-made and naturally occurring events and will have to, through litigation, be declared to apply to this pandemic (assuming it is stated in your contract). If your contract doesn't have this provision, it's understandable, as this sort of thing hasn't made this sort of provision as popular or necessary as it's now become. Also, if it's not in your contract, don't dismay – if it had been, such risk may have been apportioned to you.... Either way, if it's not in your deal, the common law attempts to make up for such omission by giving everyone the benefit of it in the form of "impossibility," "frustration of purpose" and other common law defenses to the enforcement of contracts.

Common law defenses: These do exist (and always have), but they have to be successfully proved by the party claiming them, in litigation. Furthermore, courts (historically speaking, on public policy grounds), don't like to undo deals, unless it's

completely necessary. Without dragging you through lots of legalese and process, what will likely happen is the courts will, if they do anything, entertain “temporary impossibility” claims – where defendants answer petitions with claims that they, for a certain period of time, couldn’t pay their bills (or full bills) during the shutdown – and, in some cases, rightfully so. Courts are most likely to uphold “objective impossibility” defenses more often than “subjective impossibility” defenses. Objective means, *no one could have performed under the contract*, and subjective means *I could not perform under the contract*. Bear in mind, courts do expect business owners/operators to be able to make it through a crazy month or two of bad business, while continuing to pay their bills (as “rainy days” do come, for us all).

Question #3: *Is my business excused from paying rent during this shutdown?*

Answer: That’s going to depend upon a number of things, as I’ve been cracking the lid on above. For example:

- If you’re a landlord, the Court will inquire on whether your lender granted you a forbearance as you pursued a non-paying tenant. Did you try to reasonably accommodate your tenant, entertain any sort of compromise or extension of the lease term? Did you offer some reduced rent for a month or two or three, during the shutdown?
- If you’re a business owner, did your business receive payroll relief stimulus? How was it used? When did you finally apply for it? When did you actually receive it?
- If you’re a debtor or a tenant, were you not current on your bills, even before the pandemic?
- If you’re a tenant, did your landlord really try to work with you, propose to you temporary forbearances (e.g., that extend the ultimate lease term out the same amount of time as the shut down lasted) and other good faith measures – all while you (as the tenant) refused to even return their emails and phone calls?
- If you’re a tenant, rent aside, were you at least willing to pay your lease triple net charges during the shutdown (did you even offer to pay these, or, at least try or represent to your landlord that you would try to pay these)?

At the end of the day, if the courts do anything by way of these common law defenses to contracts (hard to tell as of yet, since the courts are not open for normal, “business as usual”), they’ll look at how long the economy was shut down in relation to your business, and possibly how the strange, Corona-economy actually affected your business. For example, Lowe’s and Home Depot have been seemingly flooded with business during the shutdown - since people are stuck at home and not working as much right now. In otherwords, some businesses have done even better during this pandemic than before. So, be ready to produce financials if you’re claiming that you didn’t pay your bills during the shutdown because of the pandemic. Either way, try to be cooperative, reasonable, responsive, productively creative at problem solving and deal in good faith with your business partners during this difficult time.

What My Clients Are Saying

“Chris Griswold is an attorney that will find reasonable solutions in an economical manner to fit my clients’ best interests. My growth of knowledge of the legal system and use thereof for my clients can be contributed in a large part because of Chris Griswold’s personal willingness to educate and strengthen my knowledge on the laws. Good results from a good law practitioner like Chris are always best and hard to find it seems.”
John W. Meek, RPA / Owner, First Commercial Management, Inc. / Oklahoma City, Oklahoma

The information presented within this article is of a general nature and is not intended to be relied upon as legal advice in any particular matter without first consulting qualified counsel.

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