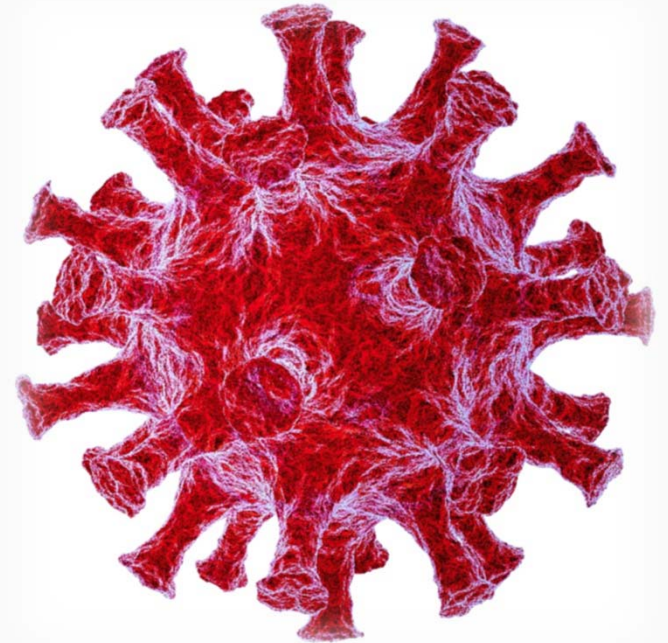


COVID-19 Next Steps

What are Next Steps as Businesses Begin to Re-open Amid the Crisis?

This program is provided for general guidance. Information contained in this presentation is not intended to provide legal advice. Your participation in this program does not create an attorney-client relationship.



NEXT CHALLENGE. NEXT LEVEL.

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NC Legislature - COVID-19 Relief Efforts

David Ferrell



NEXT CHALLENGE. NEXT LEVEL.

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NC LEGISLATURE – COVID-19 RELIEF EFFORTS

North Carolina legislature is deploying various efforts to help business and industries during this unprecedented time.

- ▶ The federal government provided NC \$3.5 billion in COVID-19 relief - to be allocated by the state legislature by the end of 2020
- ▶ The NC state legislature convened in late April and quickly passed two bills ([Senate Bill 704](#) and [House Bill 1043](#)) to provide COVID-19 relief to NC businesses and individuals which were immediately signed into law by Governor Cooper

NC LEGISLATURE – COVID-19 RELIEF EFFORTS

- ▶ The legislature allocated \$1.6B of the federal COVID-19 relief funds in the "first round" of relief - providing relief in the areas of health care, COVID-19 testing and research, education, agriculture, transportation, county governments, unemployment benefits, and other areas
- ▶ In some cases, the allocation is contingent on amendments or clarification of the federal CARES Act to allow funds to be spent for that purpose
- ▶ NC has approx. \$1.9B remaining to allocate by the end of 2020

NC LEGISLATURE – COVID-19 RELIEF EFFORTS

- ▶ The legislature passed a number of statutory changes to allow business and industries to attempt to continue to operate or recover from the COVID19 crisis
- ▶ In many cases because a particular business or industry requested the change

EXAMPLES

- ▶ Changes to notary laws to allow real estate transactions to continue
- ▶ Provide immunity from liability for certain health care workers treating COVID19 or essential businesses
- ▶ Extend approvals and permits for developments or projects that may be delayed due to COVID19

ADDITIONAL LEGISLATIVE EFFORTS

- ▶ The NC legislature is in session and will be considering additional COVID19 relief issues in the coming weeks.
- ▶ May 18 2020 marks the beginning of the “short session”
- ▶ End of session not yet established

2020 SESSION EXPECTATIONS

- ▶ \$4 Billion State Budget Shortfall expected
- ▶ More COVID-19 relief efforts

MORE COVID-19 RELIEF

- ▶ Federal relief money
- ▶ Assistance to NC business and individuals
- ▶ Senate President Pro Tem Phil Berger has indicated that he prefers to wait for further guidance from the federal government before the state decides how to spend additional federal money.
- ▶ It is not clear yet if states will be allowed to fund shortfalls in their own budgets with the federal money.

2020 SESSION EXPECTATIONS

- ▶ State appropriations bills
- ▶ Sales tax changes
- ▶ Will be “short”
- ▶ November election

ISSUES UNDER CONSIDERATION

- ▶ COVID/Supplementary G.R.E.A.T. Grant Period ([HB 1105](#))
- ▶ WC/COVID-19/Cover Essential Workers ([HB 1056](#))
- ▶ Medicaid Expansion?

ISSUES UNDER CONSIDERATION

- ▶ NCDOT financial issues
- ▶ Unemployment benefits system
- ▶ Concerns with Governor's use of executive authority under state of emergency
- ▶ Relief for local governments
- ▶ Discussions will occur about extending deadlines for COVID-19 statutory changes
- ▶ Emergency video notary and witness provisions - August 1 2020

CHANGES IN LEGISLATIVE PROCESS

- ▶ Legislative process different this year due to COVID-19
- ▶ Visitors are allowed in the building – limited capacity
- ▶ Senate holding in-person committee meetings
- ▶ House holding Zoom committee meetings

Update: CARES ACT New FAQs

Bobby Robinson

NEXT CHALLENGE. NEXT LEVEL.

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A graphic featuring a white banner with the text "CARES Act" in red, set against a background of white stars on a dark blue field, reminiscent of the American flag.

CARES
Act

CARES ACT

FREQUENTLY ASKED QUESTIONS

- ▶ Periodically, the Small Business Administration (SBA) will issue clarifying guidance for lenders and borrowers, as it relates to the Payment Protection Program (PPP).
- ▶ This guidance is issued pursuant to its Frequently Asked Questions (FAQs), which was most recently updated on May 13th , 2020.
- ▶ There are approximately 47 questions/answers outlined in this FAQ.
- ▶ Recommended to also review PPP Interim Final Rules, as there are citations to those rules throughout the FAQ guidelines.

CARES ACT

FREQUENTLY ASKED QUESTIONS

- ▶ FAQ #4: Are lenders required to make an independent determination whether affiliation rules apply?
 - Answer: *No. Responsibility of borrower and lender is permitted to rely on borrowers' certifications.*
- ▶ FAQ #5: Are borrowers required to apply SBA's affiliation rules?
 - Answer: *Yes. Borrowers must apply and certify that the affiliation rules have been taken into consideration when submitting its loan request.*

CARES ACT

FREQUENTLY ASKED QUESTIONS

- ▶ **FAQ #30: Can a lender sell a PPP loan into the secondary market?**
 - *Answer: Yes. A PPP loan may be sold into the secondary market at any time after the loan is fully disbursed. SBA approval not required. A PPP loan sold into the secondary market is 100% SBA guaranteed.*
- ▶ **FAQ #31: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?**
 - *Answer: It depends. Borrowers must make this certification in good faith, taking into account their current business activity and liquidity levels, and should be prepared to demonstrate to the SBA, upon request, the basis for its certification.*

CARES ACT

FREQUENTLY ASKED QUESTIONS

- ▶ **FAQ #38: Is a business that was in operation on February 15, 2020 but had a change in ownership after February 15, 2020 eligible for a PPP loan?**
 - *Answer: Yes. As long as the business was in operation on February 15, 2020 and has not applied nor received PPP funding, the acquiring business is eligible to apply for a PPP loan regardless of the change in ownership.*
- ▶ **FAQ #39. Will SBA review individual PPP loan files?**
 - *Answer: Yes. The SBA will review all loans in excess of \$2 million, following the lender's submission of the borrower's loan forgiveness application.*
 - *Conversely, borrowers with a PPP loan amount less than \$2 million will be deemed to have made the required certification in good faith and not reviewed.*

CARES ACT

FREQUENTLY ASKED QUESTIONS

- ▶ FAQ #40: Will a borrower's PPP loan forgiveness amount be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?
 - *Answer: No. An exception will be developed and to qualify, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower.*

CARES ACT

FREQUENTLY ASKED QUESTIONS

- ▶ FAQ #46: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?
 - *Answer:*
 - ▶ *SBA's Standard of Review: All borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."*
 - ▶ *If SBA determines that borrower lacked an adequate basis for the loan, it will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness.*
 - ▶ *If the borrower repays the loan upon notification, the SBA will not pursue any further civil or criminal fines or penalties.*
 - ▶ *This review will not affect the SBA's loan guarantee.*

Tax Update

David McCallum

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DEDUCTIBILITY OF PPP LOAN EXPENSES

CARES Act – PPP loan forgiveness amount excluded from taxable income

Does NOT address deductibility of PPP loan expenses



Notice 2020-32 – not deductible to extent of excluded amount

IRS relied on sec. 265 and the applicable 265 regs



Legislative Fix? Congress was not pleased. Ignores legislative intent.

S. 3612 – deductible even if forgiveness is excluded from income

TAX PROVISIONS IN THE CARES ACT

Employee Retention Credit

Technical Correction for QIP – 168(k)

Modification of NOLs – temp carryback

Temp Reversal of Limitation on EBLs – 461(l)

Temp Increased Limitation on Business Interest – 163(j)

EXTENDED FEDERAL FILING AND PAYMENT EXTENSIONS

- ▶ Notice 2020-23 amplified prior guidance in Notice 2020-18.
- ▶ Broadened the 7/15/2020 filing and payment extension to all TPs that have a filing or payment deadline falling on or after 4/1/2020 and before 7/15/2020.
- ▶ Individuals, trusts, estates, corporations, and other non-corporate tax filers (REITS and nonprofits) qualify for the extra time.
- ▶ Extends the time to file a Tax Court petition, claim for refund, and refund suit.
- ▶ Even extends the 45-day ID period or the 180-day exchange period for like-kind exchanges.
- ▶ People First Initiative – no new audits, limited collection activities, etc.

EXTENDED NC FILING AND PAYMENT DEADLINES

- ▶ Generally following the Federal extensions to 7/15/2020
- ▶ Legislative fix (Sess. Law 2020-3) to waive interest from 4/15 through 7/15/2020 for individual income, corporate income, and franchise tax.
 - Also extends time to claim a refund, petitions for contested case hearings, and petitions for judicial review
 - NC DOR issued a Notice on 5/6/2020 with additional details
- ▶ Business Tax Credit for Unemployment Insurance Payments - equal to the amount of Unemployment Insurance Fund contributions payable on the report filed by the employer on or before 4/30/2020.

BANKRUPTCY

Avoiding Preference
Liability and Being
Retained as Attorney
for a Debtor

Lisa Sumner



NEXT CHALLENGE. NEXT LEVEL.

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PREFERENCES IN BANKRUPTCY

STATUTORY ELEMENTS

11 U.S.C. §547(b): Trustee or DIP may avoid a transfer of an interest of the debtor in property:

- To or for the benefit of a creditor
- Made while the debtor was insolvent (presumed)
- For an antecedent debt
- Made within 90 days of the filing of the bankruptcy petition (1 year for “insiders”)
- That enables such creditor to receive more than it would have had the transfer not been made and the debtor had filed a chapter 7

PREFERENCES IN BANKRUPTCY

GENERAL INFO

- ▶ Preference actions can be brought in all bankruptcy cases – any chapter
- ▶ Attorneys and law firms are not exempt
- ▶ Venue: lawsuits seeking under \$25,000 can be filed only in the federal district court for the district in which the creditor resides
- ▶ No fee-shifting – defense bears cost of defense even if successful
- ▶ Trustee or DIP generally has 2 years after bankruptcy petition date to sue
- ▶ Providing valuable goods or services to debtor (good faith) is not a defense

PREFERENCES IN BANKRUPTCY

AVOIDING LIABILITY

- ▶ Defeat 'transfer of interest of debtor' element by having solvent third-party pay fees
- ▶ Defeat 'benefit of creditor' and 'antecedent debt' element through prepayment
 - Non-refundable retainer versus security retainer
 - Flat fee in advance each month or invoices paid before shipment
 - Personal check deemed given to creditor when clears debtor's bank account
 - Lien on client's assets to secure fees or loan secured by collateral

PREFERENCES IN BANKRUPTCY

MOST COMMON AFFIRMATIVE DEFENSES

11 U.S.C. §547(c):

- Contemporaneous exchange for new value
- Subsequent new value
- Ordinary course of business



PREFERENCES IN BANKRUPTCY

MOST COMMON AFFIRMATIVE DEFENSES

Contemporaneous exchange for new value

- True Cash on Delivery (COD) arrangement - *Benjamins for Buttons*
- Cash equivalent like wire transfer on day services provided to or goods received by debtor
- Personal check treated like cash given to creditor on day check received only if check clears debtor's bank account in normal course (significant delay in deposit, re-presentment or check returned NSF defeats defense)

PREFERENCES IN BANKRUPTCY

MOST COMMON AFFIRMATIVE DEFENSES

Subsequent new value

- ▶ After creditor received a payment from debtor, did creditor provide additional services or goods to debtor on a credit/deferred payment basis (“don’t pay me now, I’ll bill you later”)?
 - If so, creditor may be able to offset liability for a particular payment by the value of the next services or goods provided to debtor on credit
 - BEWARE: calculation of new value defense is not a straightforward total offset

PREFERENCES IN BANKRUPTCY

MOST COMMON AFFIRMATIVE DEFENSES

Ordinary course of business

Payment received by creditor was for a debt that the debtor incurred in the ordinary course of the debtor's business with the creditor; AND

- (1) Payment to creditor was made in the ordinary course of the parties' business dealings with each other ["subjective test"]; OR
- (2) Payment was made according to ordinary business terms ["objective test"].

RETENTION OF PROFESSIONALS IN BANKRUPTCY

Once debtor files bankruptcy petition, debtor must file application with bankruptcy court for permission to hire professionals.

- ▶ Includes attorneys, accountants and real estate brokers.
- ▶ Don't begin work until order approving retention is entered or you risk not being paid.
- ▶ Required disclosure of all relationships with debtor to avoid conflict of interest.
Required disclosure of hourly rates or contingency fee agreement.
- ▶ Separate applications must be filed later with bankruptcy court to obtain bankruptcy court's prior approval for debtor to pay professional invoices. Payment may be quarterly or even less frequent.

CONTRACT LITIGATION

Force Majeure,
Frustration of Purpose
and Impossibility

Dave Pokela



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COVID-19 LITIGATION BATTLES

- ▶ Likely to be fought over the following defenses which may excuse contract performance
 - Force majeure provisions
 - Doctrine of impossibility
 - Frustration of purpose doctrine

FORCE MAJEURE CLAUSES

“Protect the parties in the event that a part of a contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care.” Black’s Law Dictionary, p. 330 (Abr. 5th ed.); *Crabtree Ave. Inv. Group, LLC v. Steak and Ale of North Carolina, Inc.*, 169 N.C. App. 825 (2005) (force majeure not applicable because event was not beyond defendant’s control)

FORCE MAJEURE CLAUSES

How North Carolina courts likely will decide any Covid-19 breach of contract case hinging on a force majeure clause will include:

- ▶ A review of the specific language of the force majeure clause, which potentially will control the determination of its applicability.
- ▶ Some clauses may simply refer to “Acts of God, war and terrorism.” However, in light of the North Carolina Supreme Court’s narrow construction of “Acts of God” in *Lea Co. v N.C. Bd. Of Transportation*, 308 N.C. 603 (1983) (“an act occasioned exclusively by violence of nature”), such a clause may not cover the Covid-19 pandemic.

FORCE MAJEURE CLAUSES

- Some clauses may be more extensive such as “war, rebellion, civil disturbance, earthquake, fire, flood, strike, lockout, labor unrest, acts of governmental authorities, shortage of materials, acts of God, acts of the public enemy and, in general, any other causes or conditions beyond the reasonable control of the parties.” Under this clause, both “acts of governmental authorities” and “other causes or conditions beyond the reasonable control of the parties” potentially could excuse performance as a result of the Covid-19 pandemic.
- Some force majeure clauses actually contain the word “pandemic.”

FORCE MAJEURE CLAUSES

- ▶ Whether the party relying upon a force majeure clause provided any timely written notice that the party is relying upon the force majeure clause.
- ▶ Whether the pandemic actually caused the specific breach of contract. This will be a very fact specific inquiry.



CONTRACT

DOCTRINE OF IMPOSSIBILITY

- ▶ “Impossibility of performance is recognized ... as excusing a party from performing under an executory contract if the subject matter of the contract is destroyed without fault of the party seeking to be excused from performance.” *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 210 (1981).
- ▶ Winning the issue of the applicability of the doctrine of impossibility ultimately will boil down to the actual facts.

FRUSTRATION OF PURPOSE DOCTRINE

In *Brenner*, the North Carolina Supreme Court described the frustration of purpose doctrine:

- ▶ Frustration is not a form of impossibility of performance.
- ▶ Under it performance remains possible, but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance.
- ▶ The doctrine of commercial frustration is based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose.

FRUSTRATION OF PURPOSE DOCTRINE


- ▶ If the frustrating event was reasonably foreseeable, the doctrine of frustration is not a defense.
- ▶ If the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration to escape their obligations.

WINNING

Winning this litigation issue likely will hinge on:

- ▶ The actual language of the contract itself (did the parties already allocate the risk involved in the frustrating event?), and
- ▶ Whether there has been a “practically total destruction of the expected value of the performance.”





EMPLOYMENT UPDATE

Bridget Blinn-Spears

NEXT CHALLENGE. NEXT LEVEL.

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PREPARING WORKSPACES

- ▶ Barriers
- ▶ Ventilation
- ▶ Room configurations
- ▶ Workstation spacing
- ▶ Traffic flow in public spaces



DECISION-MAKERS AND COMMUNICATION

- ▶ Identify teams and point people for communications
- ▶ Create and test emergency communication channels
- ▶ Plan for redundancies

SCHEDULES AND TESTING

- ▶ Who is essential on-site?
- ▶ Staggered start times
- ▶ Flex time
- ▶ Testing
 - Temperatures?
 - COVID-19?



SYMPTOMS AND PROTOCOLS

- ▶ Government contacts and coordination
- ▶ COVID-19 symptom onset at work
- ▶ Positive tests
- ▶ Presumed positive
- ▶ Tracking contacts



POSTINGS

- ▶ DOL FFCRA Notice
- ▶ Hygiene protocols
- ▶ Reinforcement of social distancing
- ▶ No entry with COVID-19 symptoms

QUESTIONS?



David Ferrell
DFerrell@nexsenpruet.com



Bobby Robinson
BRobinson@nexsenpruet.com



David McCallum
DMcCallum@nexsenpruet.com



Lisa Sumner
LSumner@nexsenpruet.com



Bridget Blinn-Spears
BBlinn-Spears@nexsenpruet.com



David Pokela
DPokela@nexsenpruet.com