

How COVID Will Impact Litigation for Years to Come

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Agenda: COVID's Lasting Impact on the Law and the Practice of Law

1. The substantive legal landscape
 - a. Force majeure
 - b. Employment
 - c. Commercial property insurance
2. The practice of law
 - a. Litigation backlog
 - b. Case investigation and evaluation
 - c. Remote proceedings



COVID's Lasting Impact

Force Majeure Clauses in Commercial Contracts

What is a *force majeure* clause?

- *Force majeure* is a contractual provision that alters the parties obligations due to unforeseen events that prevents or delays performance under the contract.
- *Force majeure* provisions are governed by state law.
- *Force majeure* provisions are applicable when performance becomes impossible.



In re Hitz—COVID-19 did qualify as force majeure

Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only **so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by ... laws, governmental action or inaction**, orders of government.... **Lack of money shall not be grounds for Force Majeure.**



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CEC Entertainment—COVID-19 did not qualify as force majeure

Subject to the casualty and condemnation provisions of this Lease, **if either party shall be prevented or delayed from punctually performing any obligations or satisfying any condition under this Lease by** any strike, lockout, labor dispute, inability to obtain labor or materials or reasonable substitutes therefor, act of God, **unusual governmental restriction**, regulation or control, enemy or hostile governmental action, civil commotion, insurrection, sabotage, fire or other casualty, or any other condition beyond the reasonable control of such party, or caused by the other party, then the time to perform such obligation or to satisfy such condition shall be extended on a day-for-day basis for the period of the delay caused by such event.

This Section shall not apply to the inability to pay any sum of money due hereunder or the failure to perform any other obligation due to the lack of money or inability to raise capital or borrow for any purpose.

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Victoria's Secret—COVID-19 did not qualify as *force majeure*

Sought rescission and reformation of commercial leases, based largely on the common law theories:

- (1) frustration of purpose;
- (2) impossibility

“The Complaint is premised on the mistaken theory that the parties did not allocate the risk of tenant not being able to operate its business and that tenant is somehow forgiven from its performance by virtue of state law.”

COVID -19
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We are still operating online
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Common law theories excusing contract performance



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The evolution of *force majeure* clauses

This is the ~~original~~-modified text that
was ~~drafted~~improved by the second
~~author~~.



Practical steps when *force majeure* might apply to your contract

- Review and analyze your contract:
 - Is there a *force majeure* provision?
 - Are certain events expressly excluded within the *force majeure* provision?
 - Is performance impracticable or impossible because of the consequences of COVID-19?
 - Has the purpose of the contract been frustrated, because of the consequences of COVID-19?
 - Have you taken steps to mitigate the effects of COVID-19 on your ability to perform?
 - Have you complied with any notice requirements?



COVID's Lasting Impact

Employment Law

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Reasonable Accommodations

- ADA and state disability laws: provide reasonable accommodation, unless it causes undue hardship.
- Work from home: is it required that it be permitted from now on?
- No ... but there may be an impact to whether WFH creates an “undue burden”.
- September 2020, EEOC updated guidance:
 - <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>



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Wage-Hour Litigation

- Expense Reimbursement
 - Home/cell phone, internet, printer, etc.
 - *Cochran*, 228 Cal. App. 4th 1137 (2014) - reasonable % of unlimited phone bill
- WFH in another state: Which state's laws apply
 - *Sullivan v. Oracle*, 51 Cal.4th 1191 (2011) - California OT laws apply to work performed in California
 - Unemployment taxes, etc.

Zoom meeting,
audio only

Zoom meeting
with video

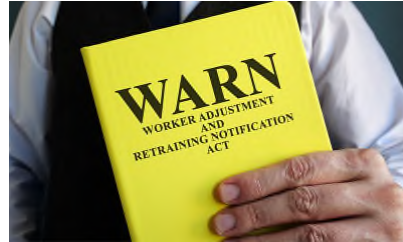


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Other Ways COVID Will Impact L&E

- WARN Act
 - COVID ≠ natural disaster
 - Unforeseeable circumstance?



COVID's Lasting Impact Commercial Property Insurance

COVID and Commercial Property Insurance

- American Property Casualty Insurance Association estimated business interruption losses between \$255 billion to \$431 billion **a month** for businesses with less than 100 employees.*
- More than 1500 lawsuits** (and counting) have been filed seeking coverage for COVID-related losses under business interruptions **commercial property insurance policies** insuring against **direct physical loss or damage to property**.** Those suits allege:
 - COVID-19's presence on property causes direct physical loss or damage
 - Government orders preventing use of the property caused direct physical loss or damage.

* <https://dev.pciaa.net/pciwebsite/Cms/Content/ViewPrint?sitePageId=60522>

** <https://cclt.law.upenn.edu/>

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Commercial Property Insurance: Pre-COVID Legal Landscape

- Most cases involved clear damage to property - fire, hurricane, earthquake, storm damage.
- Few cases addressed “direct physical loss or damage” in a meaningful and detailed way.
- Growing body of case law suggested that semi-tangible particles harmful to humans - such as **asbestos and bacteria** - could constitute “direct physical loss or damage” to property, if the presence of those substances made property uninhabitable.



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Commercial Property Insurance: Post-COVID Legal Landscape



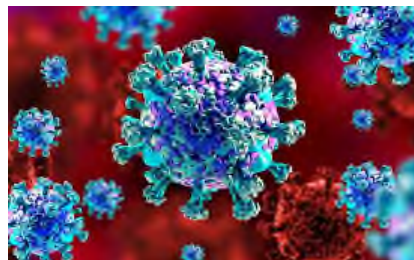
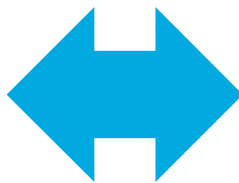
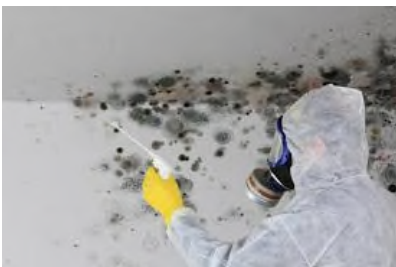
- Hundreds of cases, across the country and in almost every jurisdiction, address the definition of “direct physical loss or damage” to property.
- Most require “tangible” alteration to property - presence of intangible particles on a surface is not enough; loss of use of property is not enough.
- While the battle is still being played out in the appellate court system, trial courts suggest a move away from finding direct physical loss or damage from particles on property.

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Commercial Property Insurance: Post-COVID Legal Landscape - Possible Implications

- Substantial body of case law defines the scope of “direct physical loss or damage.”
- COVID case law may make it harder to recover for losses from semi-tangible particles like asbestos, bacteria or smoke on property.



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Other Anticipated Impacts: Increased Gap for Disease Coverage



- COVID-19 or pandemic specific exclusions in policies.
- Fewer policies providing affirmative coverage for disease (i.e., food borne illness, bacteria contamination).
- Difficult to conceive of insurance products that will fill the gap.
 - Pandemic risk is not limited by geography, type of business.
 - Efforts to widely develop, market and sell pandemic coverage pre-COVID were not successful.
 - Losses are huge and not time bound.
 - Despite predictions, legislatures and regulatory bodies have not enacted legislation to mandate pandemic coverage so far.
 - Proposed solutions
 - “Parametric” product
 - Proposals for public-private partnerships

COVID’s Lasting Impact Practice of Law

Litigation Backlogs

- Tolled statutes of limitations
- Extended answering deadlines
- Delayed criminal proceedings



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Litigation Backlogs: What You Can Do Now

- Budgeting
- Managing expectations
- Calendaring statute of limitations expirations
- ADR options



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Remote Case Evaluation: Is the In-person meeting dead?

- 40% of businesses expect that 40% or more of their workers will remain remote after COVID, across all industries.*
- 16% of the American workforce will continue to work from home even after COVID.*
- Continued remote work is more likely in industries involving knowledge-intensive work by skilled, more educated, professionals.*
- Legal field: rapid and near universal shift to remote work
 - More than 80% of law firms transitioned to remote work.**
 - More than 75% transitioned in less than one week. **
- Advantages to continued remote interaction:
 - Cost savings: travel, binders, meeting rooms
 - Time savings: travel time, commute time



* https://www.hbs.edu/ris/Publication%20Files/20-138_ec6ff0f0-7947-4607-9d54-c5c53044fb95.pdf

** <https://www.mycase.com/blog/2020/04/survey-results-how-law-firms-are-responding-to-covid-19-remote-work/>

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Remote Case Investigation and Evaluation - Internal Fact Gathering

- More important, and difficult, to assess factors like credibility, likability for witnesses
- More difficult to establish rapport with key internal witnesses
- Managing attention: more difficult to secure undivided time and attention of key witnesses
 - Strategies: Zoom rather than video call; advance planning and preparation; provide materials in a way that works for the individual



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In-house/retained counsel interactions

- Increased possibility for collaboration across geographic markets
 - In-jurisdiction legal knowledge will remain valuable, but larger talent pool for core legal work
 - Possible increased specialization
- New ways of establishing and maintaining relationships - work centered
- Critical importance of technology: everyone is an IT person



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Remote Proceedings—to Stay?



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Remote Depositions

- Cost: Increased deposition requests?
- Strategy: Negative impact of technological constraints?
- Effectiveness: As effective as in-person confrontations?



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Additional questions for remote depositions

- Is anyone else in the room with you?
- Do you agree to tell me if anyone else comes into the room?
- Are you looking at anything other than the screen upon which the deposition is being taken?
- Do you agree not to communicate with anyone else, besides me, in any way while we are on the record?



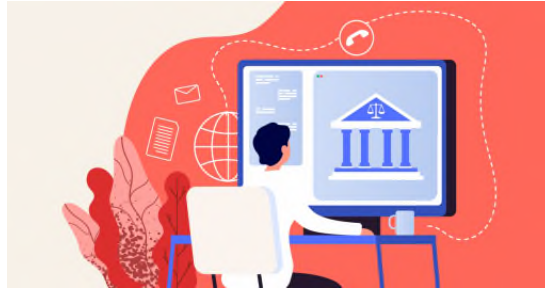
ABA Practice Points, 5 Tips for Conducting Remote Video Depositions
(<https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/five-tips-for-conducting-remote-video-depositions/>).

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Remote Hearings

- Here to stay?
- Issues to Consider:
 - Type of hearing
 - Jurisdiction
 - Court preference
 - Courtroom technology



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Thank you

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