New Litigation Frontiers, Brought to You by COVID

To make sense of the uncertainty that COVID has injected into business relationships, companies have frequently turned to litigation.

AS IT SWEPT ACROSS THE U.S. and the world, the COVID-19 pandemic left a wide swath of disruption that cut across geographic and industry boundaries—and its effects were felt quickly by businesses everywhere.

The pandemic has put a great deal of stress on business relationships, and it has put companies in a difficult position as they work to keep their employees and customers safe while trying to keep the business up and running. This has fostered numerous COVID-related lawsuits, and companies have started going to court. Still, we are in the early stages of COVID-driven litigation, with more on the way. Much of this has focused on three fundamental legal areas: commercial leases, commercial contracts, and tort liability.

Commercial leases: The details are more important than ever

COVID has affected a broad range of industries, but early on, government orders issued to limit social gatherings and restrict the activities of non-essential businesses hit retailers, movie theaters, and restaurants especially hard. With tenants facing restrictions on the use of leased premises for their normal business operations, commercial leases were soon at the forefront of COVID-related legal issues.

The experience of retailers was especially dramatic, but it illustrates how commercial leases in general have been affected by the pandemic. In May and June of last year, roughly 40 percent of national retailers did not make their lease payments to landlords, according to Datex Property Solutions. "The impact on the retail industry was instantaneous," says Allyson McKinstry, a partner at Crowell & Moring. "Many large retailers with locations all across the country were overwhelmed, and most started with a triage approach, focusing on analyzing high-value leases or those for critical locations."

At the same time, many tenants tried to negotiate with landlords to get rent abatements or other adjustments, but those efforts were not always successful. By the end of 2020, many disputes had gone into litigation. "We've seen an uptick in breach of contract litigation from both sides," says McKinstry. "There's also an ever-increasing number of tenants who are taking preemptive actions seeking declaratory relief before the landlord does." Many of these lawsuits involve force majeure arguments—with some leases, a tenant may be able to invoke the provision as a basis to abate rent, but more often these provisions favor the landlord and are being relied on by landlords to excuse performance of different lease obligations.

In the relatively few cases that have been decided, no clear pattern has emerged. For example, force majeure arguments have prevailed in some instances, but not others. Several courts have shown that they are looking beyond force majeure principles and common law doctrines, and instead are heavily focused on the lease language and location-specific facts, as well as the law in the forum in question.

Retailers and other commercial lease holders should "take the time to really understand their leases,"

McKinstry says. That may sound basic, but large retailers, for example, may have leases for hundreds or even thousands of locations that they haven't reviewed in depth for some time. Even if they have, they have probably not looked at them in light of how the pandemic has affected their business. For example, "co-tenancy provisions are front and center given the large number of COVID-driven vacancies in many malls," she says. How do you calculate co-tenancy if other retailers are operating at reduced hours? Retailers need to start analyzing their lease language through a new lens."

companies can engage only in limited operations, with limited numbers of customers in a store or curbside pickup for retail customers, how might that affect arguments about an abatement of rent or co-tenancy rent? Or, if there are further waves of shutdowns in the coming year, what will it mean to companies that negotiated abatements at the beginning of the pandemic—will that affect their ability to revisit those issues or open the door to negotiating new lease terms? Overall, McKinstry says, "we are in a different world, and a broader understanding of what your rights and

Machina analytics.

Perhaps most prominent, however, are the disagreements involving supply chain partners. Supply chains around the world were severely disrupted by the pandemic as plants, transportation networks, and even large geographic regions were suddenly shut down. "There is no question that contracts and commercial relationships have been strained—there's a lot of pain, and we are seeing litigation up and down the supply chain," says Crowell & Moring partner Luke van Houwelingen.

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In looking at leases, McKinstry says, "force majeure may be the start of your analysis, but it should not be the end." Instead, tenants need to understand all of the lease provisions, such as casualty, use, and contingency clauses; abatement and termination rights; and even provisions dealing with hazardous materials, which could include COVID as the science about the virus and how it is transmitted develops. This analysis is valuable, she says, because "key provisions vary widely in commercial leases. And you may have language in your contract that is surprisingly helpful."

Companies should also look at their leases with an eye toward a still-evolving future. For example, if changing pandemic rules mean that

obligations are under your portfolio of leases is essential to making business decisions and navigating current and future government restrictions."

Commercial contracts: Sorting out supply chain disruption

The pandemic has strained business relationships and led to commercial contract disputes over everything from service agreements to IP licenses, advertising, event-venue rentals, and even mergers and acquisitions. Between March and November 2020, the pleadings in more than 2,400 contract cases filed in federal courts involved COVID, and 438 invoked force majeure—twice as many as in the same period in 2019, according to Lex

mercial leases, resolution depends on the specific contract language, and courts have focused on the traditional elements of a claim, a defense, and contract interpretation. As a result, says van Houwelingen, "the pandemic has made a lot of lawyers think a great deal about provisions that have usually been considered boilerplate, like force majeure, as well as common law defenses such as impossibility, impracticability, and frustration of purpose."

These defenses raise a number of questions, he continues. "At heart, they are about who assumed the risk of unexpected, extraordinary circumstances. Did the contract identify the pandemic as a risk that would result in an excused performance? Does the force majeure clause identify condi-

tions like a pandemic, public health emergencies, government orders, acts of God and nature? Can labor disruptions excuse performance? Is there catchall language about unforeseeable conditions beyond the party's control—and where in the clause does that language fall? Because even that can matter in how a court will interpret the contract. And then there's causation—what was the performance that was required, and how was that performance impacted?"

These types of questions were easier to answer early on in the pandemic, when comprehensive, government-mandated shutdowns made the issue much clearer. With businesses reopening, van Houwelingen says, "the effects of the pandemic are more diffuse and less concrete, but still real. Operations are permitted, but things are still not normal, and certainly not what parties likely envisioned when they contracted." Courts tend to interpret force majeure clauses narrowly. That means that situations such as being unable to source materials, worker shortages from illness, or a decline in customer demand may be seen depending on the contract language, context, and governing law—as traditional and somewhat predictable economic changes that companies need to adapt to, rather than as unforeseeable events. Sorting through this next stage of COVID-driven business challenges, he says, "is going to be a big part of commercial contract litigation in the future."

In the coming months, and perhaps years, companies will need to make sure that the ongoing uncertainty created by the pandemic is reflected in new contracts. "You'll need to address that uncertainty directly in the language of the contract. Courts are going to assume that parties writing a contract at the beginning of 2021 knew about the pandemic and its impact," van Houwelingen says. This will mean doing more than adding the term "pandemic" to force majeure clauses. "Force majeure is for the risk of unanticipated contingencies that parties otherwise didn't allocate," he says. And while it may be hard to predict precisely what will happen, it should not be hard to recognize the possibility of further pandemic-driven disruption. "Just because something is uncertain doesn't mean that it's unforeseeable," he says.

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COVID and new sources of tort litigation

Beyond the disruptions to contracts and leases, 2020 opened the door to a range of liability lawsuits tied to COVID-19. As a result, companies now face a changing landscape "where they need to think strategically about how to mitigate the risk of pandemic-related litigation," says Chalana Damron, counsel at Crowell & Moring.

In particular, Damron continues, companies need to consider the increased risk of exposure litigation in which plaintiffs allege that the companies they work for or visit have been negligent and have not done enough to protect them from the virus. Many of these lawsuits have been directed at companies hit most heavily in the early stages of the pandemic, such as nursing homes and cruise lines. But they are reaching more and more industries.

In negligence cases, the key defense, of course, is showing that the company used a reasonable standard of care in its operations—but doing so presents some special challenges in the cases arising out of the global pandemic. "COVID is unique in that the standard of care is somewhat amorphous and evolving," says Damron. Through much of 2020, companies saw differing and shifting mandates from various federal organizations, and different states and municipalities produced a patchwork of ever-changing COVID restrictions—rules that were often voluntary and sometimes reflected political priorities as much as public health considerations.

"With constantly changing guidance, companies are wondering how to comply, and how they'll justify today's decisions about standard of care a year or two from now," Damron says.

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For example, she points out that in April of last year, few areas mandated the use of masks in stores, but by the beginning of 2021, "companies almost universally had a mask policy in place. And when they're getting sued in 2021, plaintiffs are going to hold them to that newer standard—or whatever the new standard is at that point." The main takeaway, says Damron, is that companies should document the current standard of care and their rationale for implementing corresponding policies and countermeasures. "Creating 'good' contemporaneous documents can certainly reduce the risk that jurors, who may not remember the standard of care in, say, April 2020, may hold companies to a heightened standard of care that did not exist during the relevant time period," she says.

The standard of care for dealing with COVID is starting to be hammered out in litigation, and Damron says it will be instructive to watch what happens in exposure lawsuits against cruise lines and the meatpacking industry. In the meatpacking lawsuits, plaintiffs' lawyers are suing on behalf of employees and claiming companies failed to take appropriate steps to prevent the spread of COVID. Typically, they are alleging gross negligence, which can make it a torts issue rather than a workers' compensation issue. That opens the door to punitive damages and the possible negation of liability waivers and any COVID-related legal immunity laws that might be in place—not to mention decades of potential litigation from the plaintiffs' bar. "Plaintiffs' lawyers are outlining a laundry list of issues, like failing to implement contact tracing, install physical barriers, or require employees to wear masks," she says. "These cases should give us a clearer indication of what the courts and juries will take into account for actions to be considered gross negligence with COVID."

In the cruise line cases, Damron continues, negligence lawsuits have involved situations where passengers have contracted and recovered from COVID, as well as those in which they died. More recently, courts have seen "cases where a person was exposed but did not get COVID, but they are arguing that they were mentally distressed knowing that they could have been infected," she says. Overall, cruise line litigation may not only help define the standard of care, it may also shed light on issues such as standing, what constitutes recoverable injuries, and how far plaintiffs' lawyers can stretch claims.

To help mitigate the risk of exposure litigation, companies should consider waivers and other ways to acknowledge the potential COVID-related risks to employees and customers and call attention to the impossibility of eliminating all risk. Companies should also get out in front of governments and their often-mixed messages and look for more concrete sources to understand the standard of care.

"Given the uniqueness and cloudiness of the situation, looking at regulatory guidance may not be enough," Damron says. "It may be better to base your case and decisions on science and the recommendations from health care organizations." At the same time, she says, "remain flexible. With COVID, policies that are reasonable today may not seem so reasonable in a few months."

At the same time, companies should keep an eye on other tort litigation frontiers being opened up by the pandemic. Courts are seeing some product liability cases in which plaintiffs have challenged claims for the virus-killing qualities of hand sanitizers. In addition, Damron says, "plaintiffs are now making the argument that makers of e-cigarettes should have known that their products increase the likelihood of suffering serious complications from COVID." Looking ahead, she continues, "we may see lawsuits involving employees who have a reaction to COVID vaccines required by employers, and even liability lawsuits involving problems from the increased use of telemedicine devices. More and more, plaintiffs, and their lawyers, are viewing liability through the lens of COVID."

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