Protecting Your Business in the Age of COVID-19

By: Nicole C. Behnen and Allison K. Sonneveld, Polsinelli, PC

The COVID-19 global pandemic has dramatically impacted businesses in virtually every facet imaginable. The need for personal protective equipment and test kits has resulted in manufacturers changing their production lines and stay-at-home guidelines/social distancing guidelines from federal, state and local authorities have caused shutdowns, supply chain disruption and problems with worker availability. Businesses are being forced to establish policies to keep their customers and employees safe and how to protect themselves in the event employees test positive for COVID-19. As many states continue to gradually re-open businesses and lift certain pandemic-related restrictions aimed at containing the spread of COVID-19, businesses now find themselves charged with navigating myriad legal considerations while resuming operations.

PREP Act

The Health and Human Services Secretary ("HHS") issued a Declaration under the Public Readiness and Emergency Act ("PREP Act") to encourage the design, development and manufacturing of different measures meant to fight COVID-19.[i] As a result, manufacturing changed dramatically. Car companies converted assembly lines to make ventilators and face shields. Clothing manufacturers stopped sewing clothes and began producing masks and distilleries began producing sanitizer instead of spirits. Such a quick shift will undoubtedly result in some injury or defective products. The question becomes how these manufacturers can be protected. The PREP Act provides immunity for claims of loss in tort or contracts for losses related to the use of a Covered Countermeasure.[ii] However, such immunity is not absolute, as it does not provide immunity for willful misconduct.[iii] According to the HHS' omnibus advisory opinion addressing the products covered by the PREP Act, "the number of products used for COVID-19 that are approved, licensed, or cleared are too numerous to list."[iv]

In order to be covered under the PREP Act, a manufacturer must produce a "Covered Countermeasure" or be a "Covered Person" under the Act.[v] The HHS Secretary amended its original PREP Act Declaration to expand Covered Countermeasures to "any antiviral, any other drug, any biologic, any diagnostic, any other device, any respiratory protective device, or any vaccine, used to treat, diagnose, cure, prevent or mitigate COVID-19."[vi] A Covered Countermeasure must be a "qualified pandemic or epidemic product"[vii] which is essentially any product, drug or device manufactured, used, designed, developed, modified or procured to diagnose, prevent, treat, or cure a pandemic/epidemic or to limit the harm of such pandemic/epidemic.[viii] Products or technology meant to enhance the use and effects of such products or devices are also covered.[ix] Additionally, Covered Countermeasures must comply with the Food, Drug and Cosmetic Act or be authorized for emergency use under the PREP Act.[x] Even if a product is not a Covered Countermeasure, if it was reasonably believed that it was covered, the PREP Act immunity will still apply.[xi]

A person or entity that manufactures or distributes countermeasures, program planners of countermeasures and a person or official who administered a Covered Countermeasure is a Covered Person.[xii] Additionally, a person who prescribed, administered or dispensed such countermeasure and any agent of entities involved in the manufacture, distribution and planning of such countermeasure is covered.[xiii] Both public and private sector employees are covered under the Act.[xiv] Entities should document all reasonable precautions they are taking in order to safely manufacture or distribute products qualifying as Covered Countermeasures. All efforts to verify safety should be documents in order to show the reasonable belief that such item or device was covered.[xv]

Although PREP Act immunity is broad, it is not absolute. A Covered Countermeasure or a Covered Person is not immune for claims for willful misconduct that resulted in death or serious injury.[xvi] Willful misconduct includes that which is done with reckless disregard as to the risk or without justification.[xvii] If there is an allegation of willful misconduct, a claim can be brought before a three-judge panel who can determine whether is clear and convincing evidence of willful misconduct.[xviii]

Protecting against other COVID-19 related claims

Restrictions aimed at containing the spread of COVID-19, including stay at home orders, travel restrictions and social distancing requirements, have caused many businesses to close or temporarily shut down. Despite these shut downs, supply chain disruptions and limited work availability many companies have continuing financial and performance obligations they are contractually required to meet. Any segment of the supply network could face a claim or be subject to a claim related to supply chain interruptions. A company's continuing obligation to perform under a contract ***could*** be excused in light of the pandemic by (1) the terms of the contract itself, such as a *force majeure* provision; (2) common law doctrines such as commercial frustration; and (3) code-based doctrines such as commercial impracticability. *Force majeure* is a contractual provision intended to relieve or excuse the contracting parties of liability due to an event of effect that the parties could not have anticipated. Such events are typically set forth in the contract and often include things such as riots, war, terrorist acts, pandemics, epidemic, natural disasters and acts of God. Whether COVID-19 qualifies as an event of *force majeure* will vary from contract to contract mainly because of the wording of the provision and applicable state or county law.

Even if there is no *force majeure* provision in the contract, companies may be able to avoid contractual obligations under the doctrine of commercial frustration which provides: If the occurrence of an event, not foreseen by the parties and not caused by or under the control of either party, destroys or nearly destroys the value of the performance or the object or purpose of the contract, then the parties are excused from further performance. While the Missouri Supreme Court has not yet formally adopted this doctrine, intermediate Missouri appellate courts and federal courts in Missouri have applied it for the past 40 years, and there is little doubt that it is the law of Missouri[xix].

The doctrine should be applied in limited fashion and be reserved for circumstances that "operate to make performance valueless and the allocation of contractual risks capricious or fortuitous." As Missouri favors certainty and predictability in contract interpretation and application. Id. Missouri courts effectively entertain a presumption against excusing required performance under a contract absent exceptional circumstances. The COVID-19 pandemic —

and its consequences — was not reasonably under the control of any party. Thus, the doctrine's application to commercial frustration claims attributable to the pandemic will turn on what the parties to a contract reasonably foresaw and the purpose of the contract.

Other avenues through which performance under a contract might be excused in light of the unprecedented impact of the COVID-19 pandemic include impossibly and frustration of purpose. Impossibility has been defined as "A thing is impossible in legal contemplation when it is not practicable: and a thing is impracticable when it can only be done at an excessive and unreasonable cost."[xx] Additionally, for all contracts covered by the Uniform Commercial Code, a commercially reasonable substitute performance is required to be provided in the event of circumstances that are commercially impracticable[xxi] and a seller's delay in delivery or failure to deliver is excused if performance has been made impracticable by the occurrence of a contingency, the non-occurrence of which was a basic assumption of the contract.[xxii]

Protecting against COVID-19 related claims by Employees and Customers

Businesses of every nature – including grocery stores, banks, daycares, gyms and restaurants – may face increasing liability claims from employees and third parties claiming to have been exposed to COVID-19 at their location. While COVID-19 is considered an occupational disease for purposes of the Workers' Compensation Act, only if "the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability."[xxiii] The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.[xxiv] Due to the contagiousness of COVID-19 and the various modes of transmission, it will be difficult to identify where an employee contracted the virus. For certain industries, such as healthcare, employees may have an easier time establishing that COVID-19 was peculiar to the employment, especially if the employee was assigned to specific COVID-19 units or patients. Currently, only First Responders such as law enforcement officers, firefighters and EMTs are provided with a presumption of an occupational disease under Missouri's emergency rule.[xxv] As

businesses slowly open following the lifting of the stay-at-home orders issued through Missouri, employers may find themselves receiving COVID-19-related workers' compensation claims.

COVID-19 raises issues as to whether businesses have a heightened duty of care to their customers and what type of exposure they face if a customer claims to have been exposed to COVID-19 while at their premises. In order for businesses to best position themselves from potential lawsuits related to COVID-19 positive employees and third parties, businesses should establish guidelines and practices to combat the spread of the disease. OSHA has released non-binding recommendations to prepare workplaces for COVID-19[xxvi] which provides guidance on procedures to maintain sanitary environments.

In addition to following OSHA guidelines, good hygiene and infection control practices should be developed such as encouraging frequent hand-washing and/or use of alcohol-based sanitizer and encouraging employees and customers to stay home if they are sick and employers should have flexible policies for sickness. Regular housekeeping practices must be performed and the use of cleaners approved by the EPA are recommended. Encourage or require employees and customers to wear masks. In high traffic areas, plastic barriers should be erected. Additionally, if feasible, high efficiency air filters should be installed.

The same steps employers must take to keep their employees safe will help keep customers and other business invitees safe. While it would be more difficult for a non-employee to prove exposure at a particular premises, a well-thought infectious disease prevention plan should help businesses defend themselves from such claims.

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[i] 85 Fed. Red. 15198-01 (March 17, 2020), effective February 4, 2020 extending through October 1, 2024.

[ii] The PREP Act authorizes the Secretary of Health and Human Services to issue a declaration that provides immunity from liability for claims of loss that are caused by or related to the use of countermeasures to diseases, threats and conditions determined to "constitute a present, or credible risk of a future public health emergency to entities involved in the development, manufacture and distribution of such countermeasures." 42 U.S.C. §247d-6d, et al

[iii] 42 U.S.C. Section §247d-6d(c)(5). The PREP Act does not provide immunity from federal enforcement actions which are outside the purview of this article.

[iv] See HHS Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration Under the Act, April 17, 2020, as Modified on May 19, 2020.

[v] 42 U.S.C 247d-6d, et al.

[vi] See Amendment to Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, published 4/15/2020 and effective 3/27/2020.

[vii] It also covers security countermeasures which are not addressed in this article. See 42 U.S.C. 247d (e)(i)(1)(B) and (e) (i)(9).

[viii] 85 Fed. Red. 15198, see also 42 U.S.C. §247d-e(i)(7)

[ix] Id. at §(e)(i)(7)(A)(iii).

[x] Id. at §(b)(8)(B).

[xi] Id. at §6d(a)(4)(B).

[xii] Id. (i)(2).

[xiii] Id. (i)(2).

[xiv] Id. at (e)(i)(5).

[xv] Id. at 6d(a)(4)(B).

[xvi] See also HHS's Advisory Opinion on the PREP Act, dated 5/19/2020.

[xvii] (c)(1)(A)(i)-(iii).

[xviii] Id. at (d)(1) and (3)(5). Such suits shall be maintained only in the U.S. District Court for the District of Columbia. Id. at (3)(5).

[xix] E.g., Howard v. Nicholson, 556 S.W.2d 477, 481–82 (Mo. Ct. App.1977)

[xx] Transatlantic Financing Corp. v U.S., 124 U.S.App.D.C. 183 (D.C.Cir. 1966)

[xxi] UCC §2-614 Substituted Performance

[xxii] UCC §2-615 Excuse by Failure of Presupposed Conditions

[xxiii] RSMO §287.067

[xxiv] Id. at §287.067.7

[xxv] 2 CSR 50-5.005 (effective April 22, 2020)

[xxvi] https://www.osha.gov/Publications/OSHA3990.pdf