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Five Questions with Paul Callaghan

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PAUL CALLAGHAN, a partner in the Providence-based law firm Higgins, Cavanagh & Cooney LLP, has represented local, national and international corporations for almost 30 years. His clients include construction companies and their insurers. His area of expertise includes construction-related matters such as breach of contract, construction defect, bodily injury and property damage. He responded recently to questions posed by the Providence Business News.

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1 You recently wrote a legal column explaining how force majeure, or an "Act of God" clause, could apply in the pandemic. Can you explain what these are and how often they are found in construction contracts?

A "force majeure" clause is a provision in a contract that can excuse or delay certain contractual obligations under circumstances where there is an "Act of God" or other unexpected, uncontrollable occurrence (i.e., a "superior force"). They are designed to protect the parties if contractual obligations cannot be performed because of events that are outside of their control and are unavoidable by the exercise of due care. Common in many commercial contracts, the terminology has recently arisen in the construction context due to the pandemic.

Interestingly, many construction contracts do not employ the phrase "force majeure," but instead use terms such as "delays" and "extensions of time." For example, the American Institute of Architects' standard form agreement sets forth a general condition entitled "Delays and Extensions of Time." This section allows for a reasonable extension of time when the contractor is delayed by "causes beyond the contractor's control" or "by other causes that the contractor asserts, and the architect determines, justify delay."

Even though this standard form does not explicitly mention a pandemic or epidemic, it is fair to assume that the instant pandemic would be interpreted to fall within its scope.

Another popular form, the ConsensusDocs 200 Standard Agreement, does include epidemics in its provision for delays and extensions of time. If this document was utilized, it appears undisputed that the provision would apply.

2 It seems like a pandemic would qualify as an Act of God, unforeseen by parties in a construction matter. Does it have to be stated by name, a pandemic, for COVID-19-related delays to qualify as an Act of God?

Again, these types of provisions may list specific, triggering events, but they may also be more general to include anything out of the contractor's control or which justifies a delay. Concerning COVID-19, it is my opinion that any broad language would most probably apply in most circumstances arising after the World Health Organization declared the pandemic in March or when the governors of Rhode Island and Massachusetts and President [Donald] Trump declared states of emergency around that same time.

Of course, determining whether a particular provision applies, and most importantly for how long, will have to be analyzed on a case-by-case basis based upon the specific contract language, the particular facts relating to nonperformance and what transpired on the project, and the relation, if any, between the pandemic and the specific relief, delay, or extension of time being sought by the contractor.

3 How do you imagine litigation would result from a contractor or developer seeking protection under these clauses? What risks do they face for not completing a project deadline?

Frequently, additional consequences accrue for noncompliance with deadlines in construction contracts. One typical example is a "liquidated damages" provision, which establishes a speciĐc amount of money that must be paid for failing to perform specific tasks – usually by a certain date and under the terms of a contract. The amount of the damages often escalates as time goes by until the tasks are completed.

Many contracting parties, including owners, developers and contractors, understand that recent conditions have, in some cases, made timely performance impossible. They may be willing to waive or forego enforcement of any contractual deadlines or liquidated damages provisions. In these cases, litigation is likely to be avoided. Nevertheless, lawsuits regarding the application of "force majeure" and other similar clauses to the pandemic are virtually inevitable in many industries, including construction.

4 Is it possible that a contractor who was already behind schedule, for reasons that have nothing to do with COVID-19, could try to use the force majeure clause as an excuse to get out from under penalties?

It is possible, but in my opinion that scenario is a prescription for disaster. If a contractor or subcontractor was behind schedule before the pandemic and then attempts to use the pandemic in conjunction with a "force majeure" or similar clause as an excuse for noncompliance, then it is likely that the owner would enforce the contractual deadlines, and liquidated damages and litigation will almost certainly ensue.

5 What would you advise project owners, developers, or contractors to do going forward in the next few months?

This pandemic has taken a toll on the lives and livelihoods of so many. Problems may occur on many fronts, from workforce issues to the supply chain. Even so, many projects have continued without serious interruptions.

My advice to the construction sector is simple. Keep accurate, contemporaneous records of any disruptions in work and the costs involved. Be flexible. Try to work things out. And in those instances where you cannot, seek legal counsel to negotiate, mediate, arbitrate, and/or litigate on your behalf. ■

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