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## Reopening a calculated decision for businesses

By Patrick Hoff  
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Though business owners are eager to reopen after weeks of coronavirus-induced closures, they're doing so with caution to ensure the safety of customers and employees.

"First in mind is, obviously, the protocols

of what to do and how to do it well," said Jeff Brower, regional director of operations for NorthPointe Hospitality Management, which operates Hotel Indigo in Mount Pleasant and the Holiday Inn Express in downtown Charleston.

Gov. Henry McMaster lifted an executive order earlier this month that had limited traffic on the road only to commuters going

to and from work at essential businesses, as well as people visiting family, obtaining essential goods or services, attending religious services and recreating alone or with family outside.

Additionally, restaurants were allowed to begin outdoor dining starting May 4.

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## CRITICAL CARGO

Boeing S.C. partnered with government and health officials to land three planes loaded with personal protective equipment in North Charleston from China for Medical University of S.C. health workers statewide.  
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Photo/Boeing Co.

## Is coronavirus a contractual 'act of God?'

By Patrick Hoff  
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Contracts with force majeure clauses have typically standardized a company's failure to perform in the event of uncertain circumstances, such as a fire, flood, war, accident or natural disaster.

But in facing today's new normal, companies may have a new legal gray area to deal with, when contracts are interrupted by a pandemic.

"I think that there's a lot of concern ... about basically having the buck stop with them financially, particularly if they're unable to perform and their provision in their contracts ... that make them responsible for delay," said Kyle Dillard, attorney and shareholder at Ogletree Deakins' Greenville office.

Force majeure is a clause in a contract that removes liability from a company if they are unable to uphold their end of the deal because of unforeseen circumstances. Typically the clauses have certain events spelled out, such as fire, flood, government action and labor disputes, but most clauses also excuse a company

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## Produce panic

Farmers worry that shoppers may move away from fresh produce as they hunker down in quarantine.

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because of an “act of God.”

Dillard said an “act of God” is typically interpreted as a natural disaster, which shuts down the entire economy, and he’s not sure if the coronavirus pandemic has reached that level because the medical community has said businesses can operate under certain guidelines.

“Certainly, a pandemic can reach the level of an act of God that would allow an entity ... to claim impossibility,” Dillard said. “But I think given the fact that public guidance isn’t suggesting that we’re at that level of threat, I think it would be very difficult for a commercial entity to avoid a contract on that basis at this time.”

He added that it will come down to what the contract says.

“In absence of language in their contract that somehow strengthens their ability to say that position, which is highly unlikely, it’s going to be difficult for them to find relief in that circumstance,” Dillard said.

Steven Meckler, the Charlotte-based managing partner for Shumaker, Loop & Kendrick LLP, said some contracts, especially with companies that do business overseas, may include language about epidemics or pandemics.

Meckler said, though, that unless a pandemic is listed as an exception, he doesn’t expect courts to rule that the COVID-19 is an “act of God.”

“I think a creative lawyer could argue that a pandemic is an act of God, but that really gets down to some really fine hairs that you’re trying to split there, and it almost gets down to a religious interpretation of what an act of God is,” he said. “So it’s going to be interesting.”

Meckler added, though, that courts typically interpret force majeure clauses very narrowly.

“When a company tries to use a force majeure clause in their contract, it’s going to get down to a very specific factual determination by the courts ... as to what the party’s intention was at the time they signed that,” he said. “I think a lot of companies are going to have a hard time going into court saying, ‘Look, we anticipated an act of God would include a pandemic,’ given there hasn’t been one since 1918 in this severity, but you never know.”

Meckler said he’s been urging small businesses to meet with a lawyer to review contracts they have with other companies and see what options they have.

“There’s going to be a lot of gray area in all of this until we get some cases that work their way through the system,” he said.

Jennifer Thiem, partner at the Charleston office of K&L Gates, said it’s important for business owners to look over any commercial contracts they have to see what options they might have. Though pandemics are not often covered in force majeure clauses, the contracts could have

other options, such as provisions that specify to whom risk is allocated.

“There may be something to work with, even if it ... doesn’t specifically say pandemic or epidemic,” Thiem said. “So you want to see what the contract says.”

Business owners may also be able to look at common law doctrines, such as the doctrine of impossibility, which covers situations where fulfilling a contract becomes impossible because of an event that was unforeseen at the time the contract was made.

Thiem added that business owners should look at insurance policies to see what coverage they might have for business interruptions. Though every policy is different, business interruption insurance is usually triggered by an event.

The current question, Thiem said, is whether a stay-at-home order from the state government is enough.

“The current battle has to do whether the government or the stay-at-home orders and the business closing down or having to alter their operations would sit within a business interruption if they didn’t have COVID on their premises,” she said.

Thiem said it’s impossible to make a blanket statement about how force majeure and insurance decisions will play out because every case will be different.

“It is certainly going to be a very fact-specific determination,” she said.

Meckler said as new contracts are

drawn up, companies should include pandemics in force majeure clauses.

“I mean, it takes a second to put an extra word or two in there, in a force majeure clause,” he said. “If it’s not in your current contract, you better make sure it’s in every one after because who knows what else is coming?”

For comparison, Meckler pointed to Sept. 11, 2001. When terrorists attacked the United States on 9/11, many small businesses had not included terrorism as an event that would trigger force majeure. Now terrorism is almost always listed.

“I think a lot of people, particularly smaller companies, probably felt pretty comfortable and didn’t even think about adding that until that happened,” Meckler said.

Thiem pointed to how the SARS outbreak in 2003 changed the insurance industry. After the panic over severe acute respiratory syndrome, insurance companies began excluding coverage related to SARS.

Meckler said companies may also forgo legal disputes and seek business-to-business solutions because, in the end, the companies still need each other.

“Say you’re a supplier to Boeing. You don’t want to get into a tussle with Boeing,” he said. “You want to try to work things out so y’all can get through this and continue a good business relationship.”

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