WHAT HAPPENS IF MY BUSINESS CAN'T PERFORM ITS CONTRACT DUE TO THE CORONAVIRUS?

Many businesses are experiencing interruptions in their operations due to the coronavirus outbreak. These interruptions can be caused by business closures, quarantines, and restrictions on travel and large gatherings. In response to these interruptions, businesses may find themselves unable to perform their contractual obligations or have a vendor or customer that is no longer fulfilling its contractual obligations. Either way, it is important to determine whether nonperformance is excusable given the global pandemic.

Businesses concerned about meeting their contractual obligations due to the coronavirus should review their contracts to determine their options. For instance, many contracts contain a *force majeure* or "Act of God" clause, which may excuse a party's nonperformance when extraordinary events outside of the party's control prevent a party from fulfilling its contractual obligations. Each situation is unique and such a clause may apply for some businesses and not for others. It is important to note that the occurrence of an extraordinary event alone does not excuse performance. Rather, a party seeking to invoke a *force majeure* clause must also show its mitigation efforts and that the event made performance truly impossible. Because the coronavirus pandemic is an uncontrollable and extraordinary event that may prevent a party from performing under a contact, the coronavirus could be considered a *force majeure* event.

A party seeking to excuse its nonperformance based on the coronavirus should review the relevant contract's *force majeure* clause. After all, whether an event qualifies as a *force majeure* event depends on the specific language included in the *force majeure* clause itself. Many contracts will specifically define what constitutes a *force majeure* event. If the parties have defined a *force majeure* event as any event outside the parties' control, then courts may be more inclined to find that the clause encompasses the coronavirus pandemic. Further, courts may apply a *force majeure* clause that specifically lists "acts of government," "pandemics," or "quarantines."

It is important to note that a drop in a customer base alone may not result in the application of a *force majeure* clause. For example, in 2018, one federal district court concluded an egg buyer was not relieved of its obligation to purchase eggs because of a drop in demand under Iowa law, but acknowledged a drop in supply due to an outbreak of avian flu might have constituted a *force majeure* event. *Rexing Quality Eggs v. Rembrandt Enterprises, Inc*., 360 F. Supp. 3d 817 (S.D. Ind. 2018).

To reach this conclusion, the court applied the Restatement on Contracts, which is used by

Wisconsin courts. Specifically, the court looked to the following guiding principal:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id. at 841 (quoting Restatement (Second) of Contracts § 261 (1979)). The court held that "a change in purchaser demand—even a substantial change—is a foreseeable part of doing business." *Id.*

Given the size and changing impact of the ongoing coronavirus outbreak, it is hard to predict how courts will apply this fact-specific analysis to the present situation. Ultimately, whether a viral outbreak like the coronavirus qualifies as a *force majeure* event will depend on how the contract is drafted and the particular facts of the situation. A party seeking to invoke a *force majeure* clause to excuse its nonperformance must be prepared to show its mitigation efforts. Therefore, documenting efforts to overcome the impacts of the coronavirus is key.

Contracts with *force majeure* clauses usually provide what remedies are available to the parties when the clause is invoked. Often, contracts allow for either party to terminate the agreement when one party seeks to invoke the *force majeure* clause. However, contracts may instead permit a party to delay performance until the *force majeure* event is resolved.

Common law remedies may also be available to parties whose contracts lack a *force majeure* clause. Specifically, parties seeking to excuse nonperformance may find relief under the doctrines of impossibility, impracticability, and frustration of purpose. However, whether and under what circumstances these doctrines apply depends on the applicable law in the relevant jurisdiction and the specific facts and circumstances causing the nonperformance.

Overall, businesses impacted by the coronavirus should review their contracts to assess what rights and remedies are available to them in the wake of the coronavirus outbreak. The attorneys at O'Neil Cannon have experience in contract disputes and would be happy to discuss your options with you.

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18 OCHDL ATTORNEYS RECOGNIZED BY SUPER

LAWYERS

Each year, *Super Lawyers* surveys the State of Wisconsin's 25,000 attorneys and judges, seeking the State's top attorneys. *Super Lawyers* then selects the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, and Super Lawyers (consisting of the top 5% of attorneys in Wisconsin).

The 2019 lists were published by *Super Lawyers* in December 2019, and include the following attorneys from O'Neil Cannon:

- Dean P. Laing:
  - Top 10 Attorneys in Wisconsin (Ranked #2)
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Seth E. Dizard:
  - Top 50 Attorneys in Wisconsin
  - Top 25 Attorneys in Milwaukee
  - Super Lawyer
- Douglas P. Dehler: Super Lawyer
- James G. DeJong: Super Lawyer
- Peter J. Faust: Super Lawyer
- John G. Gehringer: Super Lawyer
- Joseph E. Gumina: Super Lawyer
- Gregory W. Lyons: Super Lawyer
- Patrick G. McBride: Super Lawyer
- Joseph D. Newbold: Super Lawyer
- Chad J. Richter: Super Lawyer
- John R. Schreiber: Super Lawyer
- Jason R. Scoby: Super Lawyer
- Steven J. Slawinski: Super Lawyer

In addition, Erica N. Reib was selected by *Super Lawyers* as Rising Stars (a Rising Star must be 40 years old or younger or in practice for 10 years or less).

In total, 18 attorneys of O'Neil, Cannon, Hollman, DeJong and Laing were recognized by *Super Lawyers*, which has called the firm "the Milwaukee mid-sized powerhouse."

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations.

EIGHTEEN OCHDL ATTORNEYS NAMED 2020 BEST LAWYERS IN AMERICA®

O'Neil Cannon is pleased to announce that eighteen lawyers have been named to the 2020 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.
Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in over 75 countries.

"For more than a third of the century," says CEO Steven Naifeh, "Best Lawyers has been the gold standard of excellence in the legal profession." President Phil Greer adds, "We are extremely proud of that record and equally proud to acknowledge the accomplishments of these exceptional legal professionals."

Lawyers on *The Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing.

We would like to congratulate the following attorneys named to the 2020 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation Bankruptcy
- Peter J. Faust – Corporate Law, Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Corporate Law, Trusts and Estates
- Grant C. Killoran – Litigation – Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation, Litigation – Insurance
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)
- John Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization

Law, Litigation – Bankruptcy
- Steven J. Slawinski – Construction Law

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WISCONSIN SUPREME COURT RULES IN FAVOR OF FIRM'S CLIENT

On January 29, 2019, the Wisconsin Supreme Court ruled in favor of our client, Park Bank, in a case of first impression in Wisconsin. In *Koss Corp. v. Park Bank*, 2019 WI 7, Koss Corp. sued Park Bank alleging that Park Bank acted in bad faith under the Uniform Fiduciaries Act ("UFA") in failing to detect an embezzlement being conducted by one of Koss's employees, Sue Sachdeva. Ms. Sachdeva embezzled $34 million from Koss Corp. over a 12-year period. The embezzlement was the largest embezzlement in Wisconsin history, and the ninth largest embezzlement in U.S. history.

Koss Corp. had some of its bank accounts at Park Bank, which Ms. Sachdeva used to embezzle $17 million from Koss Corp. by use of cashier's checks she obtained from those accounts, which she used to pay her creditors for personal items such as jewelry, clothing and travel. Ms. Sachdeva was ultimately caught by an American Express employee, was criminally charged for her actions, and was sentenced to 11 years in prison.

After six years of litigation, the trial court granted Park Bank's motion for summary judgment in 2016, ruling that the evidence did not support Koss Corp.'s claim that Park Bank acted in bad faith.

On December 12, 2017, the Wisconsin Court of Appeals affirmed that ruling.

On January 29, 2019, the Wisconsin Supreme Court affirmed the Wisconsin Court of Appeals' decision in a 2-3-2 decision, with five Justices voting to affirm. The Court held that, to establish bad faith under the UFA, a bank must have acted dishonestly. The Court held that "[b]ad faith requires some evidence of bank dishonesty such as a bank willfully failing to further investigate compelling and obvious known facts that suggest fiduciary misconduct

because of a deliberate desire to evade knowledge of fiduciary misconduct." *Decision* at ¶ 55. In so ruling, the Court recognized several foundational principles that form the framework for analyzing a bank's conduct when bad faith under the UFA is alleged:

> First, bad faith is reviewed on a transaction by transaction basis, such that the facts known to each individual bank employee are not aggregated to form collective knowledge of the bank. Second, whether a bank acted in bad faith is determined at the time of the breach of fiduciary duty, not by looking back at transactions that occurred many months earlier.
>
> Third, bad faith is an intentional tort; negligence by a bank is insufficient to show bad faith. Fourth, considerations of bad faith require analyses of a bank's actions to determine its subjective intent.

Id. at ¶¶ 52, 53.

In applying these foundational principles to the facts of the case, the Court held that "[w]hile discovery was extensive and conducted for years, no proof has been proffered from which a factfinder could find that any Park Bank transaction was not honestly done." *Id*. at ¶ 71.

Our firm is proud to have represented Park Bank in this case, and pleased that all of the courts to have considered the matter — the trial court, the Wisconsin Court of Appeals, and the Wisconsin Supreme Court — all held that Park Bank has no liability to Koss Corp. in this matter.

Park Bank was represented by Dean Laing, Greg Lyons and Joe Newbold of our firm. Koss Corp. was represented by Michael Avenatti of California.

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20 OCHDL ATTORNEYS NAMED 2019 BEST LAWYERS IN AMERICA

O'Neil Cannon is pleased to announce that 20 lawyers have been named to the 2019 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in over 75 countries.

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- Peter J. Faust – Mergers and Acquisitions Law, Corporate Law
- Robert R. Gagan – Municipal Law
- John G. Gehringer – Real Estate Law, Construction Law, Commercial Litigation, Corporate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Trusts and Estates, Corporate Law
- Grant C. Killoran – Litigation – Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, Product Liability Litigation – Defendants
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- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)
- Steven J. Slawinski – Construction Law
- John Schreiber – Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, Litigation – Bankruptcy

Additionally, Attorney Dean P. Laing has been named the 2019 Milwaukee Lawyer of the Year in Product Liability Litigation–Defendants.

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A TRUSTEE'S DUTY OF LOYALTY IN WISCONSIN

In Wisconsin, anyone who agrees to become a trustee is agreeing to become a "fiduciary." A fiduciary is a person or corporation that has legal obligations to a trust's "beneficiaries," those who will benefit from a trust. In our state, a trustee owes the utmost duty of loyalty to the trust beneficiaries.

A trustee's duty of loyalty requires him or her to administer the trust solely in the interests of the beneficiaries. A trustee violates the duty of loyalty if he or she puts personal interests above the trust beneficiaries' interests.

The trustee is not allowed to profit or make deals for his or her own benefit in the administration of a trust. The duty of loyalty requires that the trustee not be motivated in his or her actions by self-interest or the interests of third parties. A trustee assumes a duty to protect the interests of the trust estate when he or she accepts an appointment as trustee. This means that a trustee cannot allow his or her personal interests to conflict with that duty in any way. This rule is intended to prevent any possible selfish interest of the trustee that can interfere with the trustee's duty to the trust's beneficiaries. Wisconsin courts have held that acting in good faith alone is not enough to satisfy the trustee's duty of loyalty to the beneficiaries.

A trustee must proceed with the utmost caution if he or she engages in a transaction between himself or herself and the trust. For example, if a trustee buys a property owned by the trust, the trustee must be able to show that he or she acted prudently and in a business-like manner with a view to obtain the same fair market value price as he or she might have anticipated with proper due diligence. In general, it is required that trust beneficiaries approve a sale between the trust and a trustee.

If you have any question, please contact Greg Lyons at Greg.Lyons@wilaw.com or 414-276-5000.

MENTAL CAPACITY ISSUES IN ESTATE PLANNING LITIGATION

The United States Census Bureau projects that by 2050, the 65 and older population will nearly double that of 2012. Along with this increasing older population comes an increase in

the potential for estate litigation based on mental capacity issues.

These types of claims often arise where the testator suffers from a mental or physical condition, such as Alzheimer's disease or Parkinson's disease, that could compromise a testator's ability to have an understanding necessary to execute a valid will or trust or which may make him or her susceptible to being influenced by another person while making decisions about his or her estate. Advanced age, an inability to handle financial affairs, and the testator's personality may be other relevant factors when a challenge to a person's mental capacity arises.

In Wisconsin, any person 18 years or older and of sound mind may make, amend, or revoke a will or trust. Testamentary capacity is presumed, but interested parties, including disinherited heirs, may assert that a will or trust does not reflect the true wishes of the testator. The two main ways to challenge testamentary capacity are through claims that the testator lacked legal capacity or that someone exercised "undue influence" over the testator.

The test for legal capacity in Wisconsin is quite specific and requires that a testator have the mental ability to understand the nature and extent of his or her property and his or her relationship to the beneficiaries. A testator must also be able to appreciate the scope and general effect of the provisions of his or her will or trust in relation to the beneficiaries. The testator needs to be able to contemplate these elements together for a sufficient period of time, without prompting, to form a rational judgment in relation to them, the result of which is expressed in the will or trust.

Generally, the testator must have a reasonable understanding of the terms of the will or trust, though a complete understanding of legal terms is not necessary.

A claim of undue influence is essentially one of diminished testamentary capacity, and a person challenging a will or trust may prove it by satisfying the following elements:

1. Susceptibility of the testator to undue influence;
2. Opportunity to influence the testator;
3. Disposition to influence the testator; and
4. Coveted or desired result.

As you can see, estate and probate cases involving mental capacity issues are highly fact specific. A precise application of these factors will depend on the circumstances of each case. Court decisions will depend largely on particular circumstances, which makes choosing an experienced estate planning litigation attorney to develop your case crucial.

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BEST LAWYERS® HONORS 18 ATTORNEYS IN 2018

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BEST LAWYERS® HONORS 15 ATTORNEYS IN 2017

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"*Best Lawyers* is the most effective tool in identifying critical legal expertise," said CEO Steven Naifeh. "Inclusion on this list shows that an attorney is respected by his or her peers for professional success."

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FIRM OBTAINS BIG WIN FOR CLIENT

From 1997 to 2009 Sujata Sachdeva embezzled over $36 million from her employer, Koss Corporation, in one of the Top 10 Largest Embezzlements in U.S. history. The embezzlement was reported all over the world, including on the cover of *The National Enquirer*.

Ms. Sachdeva was criminally convicted of embezzlement and is currently serving a prison term. In an attempt to recoup its loses, Koss sued its auditor, credit card company, and banks. Its auditor, Grant Thornton, settled the claim for $8.5 million, and its credit card company American Express, settled the claim for $3 million. Those lawsuits were filed in Illinois and Arizona, respectively.

Koss also sued its local bank, Park Bank, in Milwaukee, arguing that Park Bank acted in bad faith under the Uniform Fiduciaries Act by failing to discover and report the embezzlement. In the lawsuit, Koss sought damages of $43,749,400 from Park Bank. After five years of litigation, on March 11, 2016, the trial court dismissed the case in a 24–page written decision, finding that "Park Bank did not act in bad faith." The court held that, under the Uniform Fiduciaries Act, bad faith "requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry

would disclose a defect in the transaction," and "there must be some factual basis—whether an allegation of monetary self-interest or compelling evidence of wrongdoing—to suggest the bank acted intentionally to avoid knowledge of the fiduciary's wrongdoing." Here, the court held, "Koss has not provided any evidence that Park Bank intentionally ignored Sachdeva's embezzlement," and it "declines to require banks to act as detectives, whether they be Sherlock Holmes, Columbo, or Andy Sipowicz."

Dean Laing of our firm was Park Bank's lead attorney. Also working on the case were Greg Lyons and Joe Newbold.