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# Manufacturing Success:

## Business Interruption and “Force Majeure” in the Context of Manufacturers and the Construction Industry

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# Business Interruption

- Business Interruption Insurance – provides coverage that replaces business income lost in a disaster (e.g. fire, earthquake, flood)
- Analysis of the policy
- Analysis of exclusions
- Submission of a claim or at least provision of notice



# Development of a Claim For Coverage

- Documentation
- Use of outside consultants
- Use of counsel
- Use of your broker



# Declaratory Judgement Action

- The method by which coverage claims are resolved in court
- Pleadings, motions and judgement
- Duration of litigation
- Recent rulings



# Proposed Mandatory Coverage Legislation

- The Business Interruption Insurance Coverage Act of 2020 (H.R. 6494)
- Ohio, New Jersey, Louisiana, New York, Massachusetts, Pennsylvania, South Carolina
  - ✓ Employee Cap of 100-150
  - ✓ Procedural Requirements
  - ✓ Monetary Caps
  - ✓ Time Limits



# Legal Challenges to Proposed Legislation

- Contract Clause
- Takings Clause
- Due Process Clause



# Planning For the Future

- Consultation as to coverage going forward
- Analysis of likely scenarios (e.g. second wave, a new pandemic, a government shutdown)



# Planning For the Future (Cont'd)

- Approach to dealing with a business interruption
  - A party has a duty to mitigate
  - A party has a right to “cover”
  - A party can consider termination



# Business Interruption As It Relates To t Payment Bond

- What is a payment bond?
- Who can make a claim on their payment bond?
- Time restrictions?



# Business Interruption As It Relates to a Performance Bond

- What is a performance bond?
- Can obligations be avoided by virtue of a business interruption?
- Options to consider for the future?



# “Force Majeure”

- What does “force majeure” mean?
- Typical examples
- Examination of contracts
- “e.g.”
- “i.e.”



# “Force Majeure” – Boilerplate “No More”

- What is Boilerplate?
- Does a heading need to say “force majeure” to be a “force majeure provision?”
- Is it better to have language dealing with “force majeure” that does not have that heading?



# Practical Considerations

- Impact of COVID-19 upon the courts and how the courts will view COVID-19 as “force majeure”
- Governmental orders
  - Impact upon the performance of government officials such as inspectors
  - Relationships
  - Do you need to be concerned?
  - What are the alternatives?



# “Force Majeure” in the Future

- What will your contract say?
- Do you have terms that are consistent throughout the entire supply chain?
  - If you do, how do you verify that?
  - If you do not, what plan should you implement?
- What is your plan?
  - Both ends of the supply chain
  - Relevant stakeholders
  - Communications

(Continued)



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# Manufacturers of Construction Products and Related Systems

- What are the ramifications of “force majeure?”
- Is your risk exposure more or less?
- Foreseeability?
- Risk tolerance?
- What is negotiated?
  - By the parties?
  - Counsel?



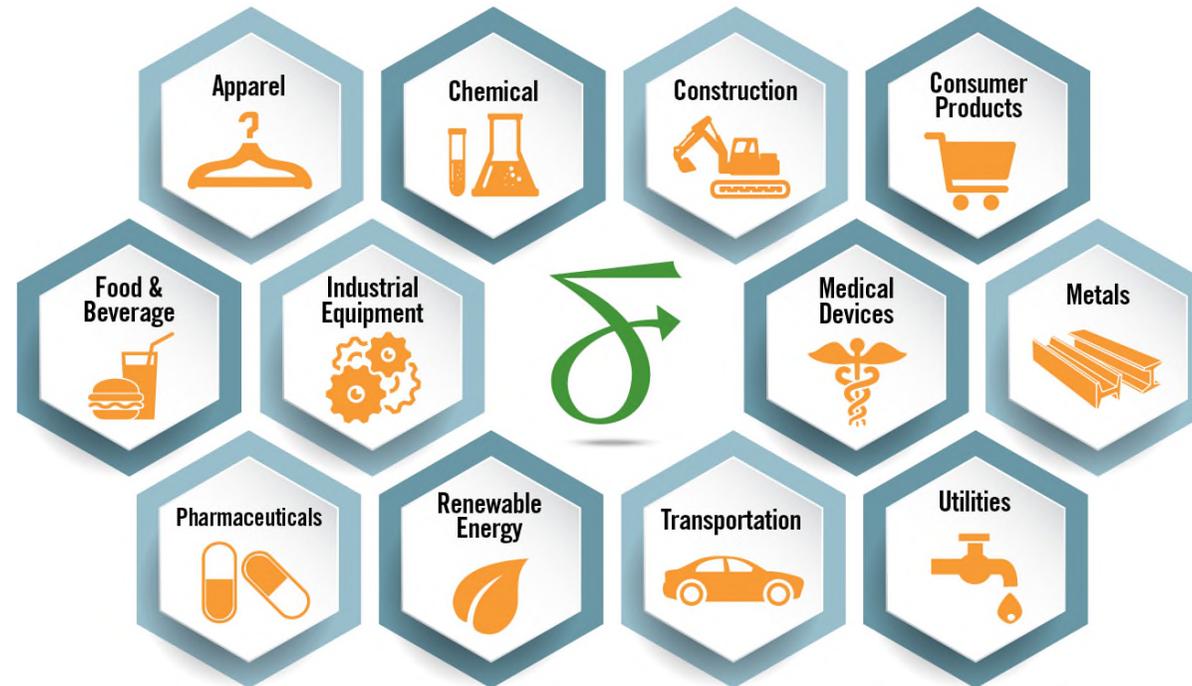
# Final Thoughts

- Takeaways
  - When faced with a business interruption, your remedies are more than just looking at whether or not you have insurance.
  - Make sure you have looked at all provisions including termination, indemnification and damage provisions.
- “Force Majeure” is here to stay – dealing with it appropriately to manage your risk is what matters.



# The Fox Rothschild Manufacturing Team

Our Manufacturing Team combines deep experience and industry knowledge spanning a wide range of legal disciplines to provide clients with the strategic advice they need to succeed.



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# Thank you for joining us for Manufacturing Success!

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