



Fox Rothschild LLP
ATTORNEYS AT LAW

Manufacturing Success:

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

[Caroline A. Morgan](#)



[Ronald L. Williams](#)



June 30, 2020

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)



Fox Rothschild LLP
ATTORNEYS AT LAW

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?



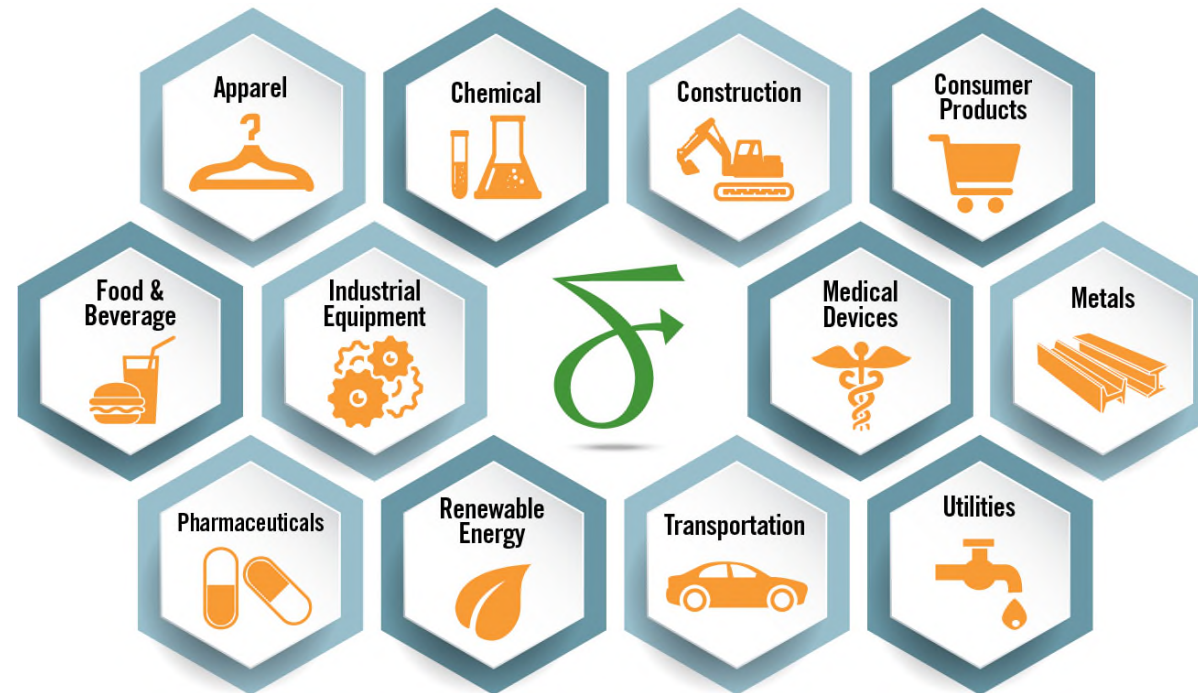
Final Thoughts

- 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.



Fox Rothschild LLP
ATTORNEYS AT LAW

Thank you for joining us for Manufacturing Success!

Caroline A. Morgan
646.601.7613
Cmorgan@FoxRothschild.com

Ronald L. Williams
610.458.4994
Rwilliams@FoxRothschild.com

David E. Hodge
864.751.7681
dehodge@foxrothschild.com



Fox Rothschild LLP
ATTORNEYS AT LAW