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Contract Performance During Pandemic: Lessons From 1918

By **April Farris and Heaven Chee** (April 17, 2020, 5:20 PM EDT)

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Since the COVID-19 crisis erupted, business litigators and in-house counsel have become all too familiar with the words "force majeure" and "act of God." Inboxes runneth over with invitations to force majeure webinars and articles.

While yet another article may feel about as groundbreaking as florals for spring,[1] this article breaks new ground by examining contract and business liability through the lens of the last century's most devastating pandemic: the influenza pandemic of 1918, also known as the Spanish flu.

The 1918 flu pandemic was the "most severe pandemic in recent history," according to the Centers for Disease Control and Prevention. Estimates reveal that "about 500 million people or one-third of the world's population became infected with this virus.

The number of deaths was estimated to be at least 50 million worldwide with about 675,000 occurring in the United States. Mortality was high in people younger than 5 years old, 20-40 years old, and 65 years and older."[2] Approximately "a third of the population became ill," and the "case fatality rate was 2.4%."[3]

The pandemic caused significant disruption to commerce and daily life. Local governments took various measures to prevent the spread, "includ[ing] closing schools and churches, staggering business hours to reduce congestion on the transit system, and quarantining households where a member had been diagnosed with influenza."[4]

Many cities closed saloons, theaters and places of public gathering. Businesses that did not close often suffered chronic employee absenteeism, whether due to employees' fear of the illness or the necessity of taking care of sick loved ones.[5]

Given that everything old is new again, it makes sense to look for answers to today's contract questions in the legal aftermath of the pandemic of 1918. What you find may surprise you.

School Cases

A substantial body of epidemic-related contract case law developed in the context of school closures. In

1921, the Illinois Supreme Court in Phelps v. School District No. 109, Wayne County, held that an epidemic was not an act of God that would allow the school district to avoid paying teachers who were ready, willing, and able to teach, but were prohibited from doing so by school closures.[6]

Citing numerous opinions from all over the country, the court held that "the general rule established by all the decisions is that, where performance of the contract is rendered impossible by act of God or the public enemy, the district is relieved from liability." By contrast, "where the school is closed on account of a contagious disease, or destruction of the school building by fire," then "no deduction can be made from his salary for the time the school is closed" so long as the teacher is ready and willing to continue duties under the contract.[7]

In so holding, the court rejected the notion that this rule "only applies where the school is closed by the school authorities, and has no application where the school is closed by order of the state board of health."[8] The court explained that the school was lawfully "closed for the protection of the lives and health of the people of the community against the spread of a contagious epidemic," and the question of which particular authority ordered the closure did not alter the "rights of the parties to the contract."[9]

Consequently, the case was subject to the "well settled" general doctrine that "when a party contracts to do a thing without qualification, performance is not excused by inevitable accident or other contingency not foreseen it becomes impossible for him to do that which he agreed to do."[10] This particular rule had been "universally applied to cases where a schoolhouse was destroyed by fire during the period for which the teacher was employed," unless otherwise stipulated in the contract.[11]

Throughout the opinion, the court emphasized that "[b]oth parties are presumed to have known when the contract was made that the state board of health had authority to order the school to be closed, if an epidemic occurred which rendered such action necessary for the protection of the lives and health of the people of the community."[12] If the school district had wanted to avoid liability, then it was incumbent upon the district to "insert in the contract of employment a provision exempting them from liability in the event of the school being closed on account of a contagious epidemic."[13]

The Supreme Court of Oregon reached a similar decision in Crane v. School District No. 14 of Tillamook County with respect to an employee tasked with transporting students to school. The employment contract contained no carveouts for epidemics, so the epidemic did not serve as an excuse for the school district's failure to pay the driver when the school was closed during the flu pandemic.[14]

By contrast, the North Dakota Supreme Court in Sandry v. Brooklyn School District No. 78 of Williams County held that a school district was excused from paying a driver for his services during the school closure. The court distinguished the teacher line of cases on the basis that teachers were usually specially qualified, enjoyed statutory protections, and were coming from "outside the district" and thereby foregoing other opportunities.

Unlike teachers, drivers were locals who were not required to possess specific qualifications, and their performance required little or no preliminary preparation. Thus, the "holding in readiness required of the driver during a period of prolonged suspension involve[d] so little inconvenience on his part that it cannot reasonably be said to be the intention of the contracting parties that he should be paid for such period."[15]

Due to these differences, the driver was subject to the "ordinary rule applicable to personal service

contracts": if without fault of either party its performance is rendered practically impossible for a period of time, the party thus unable to give or receive performance is not liable for its breach.[16]

Business Cases

Business cases from the period are also instructive. For example, in 1920, the South Carolina Supreme Court in Poston v. Western Union Telegraph Co. affirmed a judgment that held Western Union liable in negligence for the delay in conveying a telegram that caused the plaintiff damages via the loss of a sale. The jury rejected the defense that "there was no negligence in the transmission and delivery of the messages, but that the delay, if there was any, was due solely to the prevalence of an epidemic of influenza, which was an act of God."[17]

The court affirmed, finding evidence to support the jury's ruling. The U.S. Supreme Court reversed on other grounds, holding that a joint resolution authorizing the president to take possession of the defendant's telegraph line precluded the telegraph company from being liable for damages for negligent delay while its system was under government control.[18]

The next year, in Napier v. Trace Fork Mining Co., the Kentucky Court of Appeals held that a plaintiff was not entitled to a larger payment for completing a construction job when the higher sum was contingent upon the timeliness of his work. The court did not find it persuasive that the epidemic made labor far less available than in normal conditions, as the shortage simply rendered the task more difficult and expensive.[19]

In 1923, the defendant drug company in Ohio County Drug Co. v. Howard was held liable for compensatory and punitive damages for accidentally substituting a patient's prescription for another medication and injuring her.

The court affirmed the award of compensatory damages, because the drug company's overwork and short staffing caused by the epidemic did not excuse their liability. However, the court held that it was error for the trial court not to allow the defendant to put on evidence of the epidemic as a mitigating factor against punitive damages.[20]

Pre-1918 epidemic case law may also be useful. For example, in Lowe v. Barnesville Manufacturing, the Superior Court of Delaware charged the jury by identifying an "epidemic of sickness in the defendant's factory" as an "act of God" that would excuse a contracting party's failure to deliver goods. The observation may be dicta, as it is unclear whether the defendant ever argued that an epidemic excused his performance.[21]

The Upshot

The decisions go both ways, but there is plenty of 1918-flu case law finding that the epidemic did not excuse a duty to perform. Even so, opinions like Phelps contemplate a world in which epidemic-related closures were more common, such that parties necessarily would include epidemic-related contingencies in their contracts.

It is still unclear how courts will treat the COVID 19-related contract disputes, but when attorneys inevitably make their case to the courts, they would do well to be good students of history.

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[1] The inimitable Miranda Priestly, The Devil Wears Prada (2006).

[2] History of 1918 Flu Pandemic, https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.htm (last visited Apr. 16, 2020).

[3] John T. Carlo and Wendy Chung, Review of School Closure as a Pandemic Mitigation Strategy, TexasMedicine (2009), https://www.texmed.org/template.aspx?id=7808.

[4] Jeremy Brown, The Complicated Truth about Public Closings, The Atlantic, (Mar. 14, 2020), https://www.theatlantic.com/ideas/archive/2020/03/complicated-truth-about-public-closings/607972/.

[5] Stephanie Soucheray, Great Influenza' Author [John M. Barry] Talks Covid-19, 1918 Flu, Center for Infectious Disease Research and Policy (Apr. 10, 2020), https://www.cidrap.umn.edu/news-perspective/2020/04/great-influenza-author-talks-covid-19-1918-flu.

[6] Phelps v. Sch. Dist. No. 109, Wayne Cty., 134 N.E. 312, 312 (Ill. 1922).

[7] Id. (citing Town of Carthage v. Gray, 10 Ind. App. 428, 37 N. E. 1059; Dewey v. Alpena School District, 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206; Libby v. Douglas, 175 Mass. 128, 55 N. E. 808; Randolph v. Sanders, 22 Tex. Civ. App. 331, 54 S. W. 621; Smith v. School District, 89 Kan. 225, 131 Pac. 557, Ann. Cas. 1914D, 139; Board of Education v. Couch, 63 Okl. 65, 162 Pac. 485, 6 A. L. R. 740; McKay v. Barnett, 21 Utah, 239, 60 Pac. 1100, 50 L. R. A. 371; 35 Cyc. 1099).

[8] Id.

[9] Id. at 314.

[10] Id.

[11] Id. at 313-14.

[12] Id. at 313.

[13] Id. at 314.

[14] Crane v. Sch. Dist. No. 14 of Tillamook Cty., 188 P. 712, 713-16 (Or. 1920).

[15] Sandry v. Brooklyn Sch. Dist. No. 78 of Williams Cty., 182 N.W. 689, 690-91 (N.D. 1921).

[16] Id.

[17] Poston v. W. Union Tel. Co., 107 S.E. 516, 517-18 (S.C. 1920), rev'd, 256 U.S. 662, 41 S. Ct. 598, 65 L. Ed. 1157 (1921).

[18] W. Union Tel. Co. v. Poston, 256 U.S. 662, 666-67, 41 S. Ct. 598, 65 L. Ed. 1157 (1921).

[19] Napier v. Trace Fork Mining Co., 235 S.W. 766, 766-67 (Ky. 1921).

[20] Ohio Cty. Drug Co. v. Howard, 256 S.W. 705, 707-08 (Ky. 1923).

[21] Love v. Barnesville Mfg. Co., 50 A. 536, 537 (Del. Super. Ct. 1901) (charging jury that "[t]o recover at all, the plaintiff must show a breach of the contract on the part of the defendant, showing either that the goods were not delivered, or that they were not according to sample. The defendant would not be liable for damages caused solely by the act of God, such as an epidemic of sickness in the defendant's factory, in the absence of its undertaking so to do.").