

# Respect the goose, don't kill it



Mike Chesser

A question that will be asked in several thousand court cases over the coming months is, "Is COVID-19 an 'Act of God' that will excuse the timely performance of a contract?" Before the last month, no lawyer or judge had ever been asked that question. The truth is, we don't know the answer.

Florida law requires every contract to be interpreted by assuming an implied duty of good faith that each party owes to the other. Whether that duty of good faith, or the possibility that an "Act of God" delays the performance of a contract (and if it does, how much delay is permitted), are questions that will be answered differently; no two judges or lawyers will predictably come to the same conclusion.

There are some legal issues about which we can all agree. One is that a legal fee provision is in almost every commercial contract. Your real estate contract, promissory note, or credit card agreement will all require that the party who breaches the agreement pay the legal fees for the other. That's because we follow the "American Rule" that requires all parties to pay their own legal fees unless there is a contract or statute that requires otherwise. Because court cases are expensive, people who draw up contracts want their legal fees to be paid if the other side does not perform the agreement.

In Florida, a legal fee provision is, by law, reciprocal. If one side has a right to collect legal fees if he or she prevails in a lawsuit, the other side has the same right if they prevail.

Notice in this introduction I have stated two things about which we are not likely to agree: First, what is an "Act of God" and what is the effect of it, and second, what is "Good Faith" in the performance of a contract. Those questions are stated right beside two realities

that we can all agree on: First, the prevailing party will be entitled to receive their legal fees, and second, that legal fees will be expensive.

Because of the above laws of contract, we sit on the edge of a perfect storm. Once business moves again, if the court system is required to modify and answer every possible question that can arise between the parties to contracts entered into before COVID, legal fees will swamp the economy. And, ironically, most answers provided by the court system will likely cost more money than the answers are worth. The most successful businesses will be those that stay out of court. The lawyers who serve their clients best will be those who do everything in their power to resolve issues without litigation.

As an example, if one side of a contract says COVID has prevented their ability to perform timely, or to perform at a cost that will permit them to continue the agreement, they may be right. Given the choice to change the terms of a contract in some way that allows the other side to have a decent outcome, or to double down

and to insist on pre-COVID contract rights, be flexible. Don't get your answers from a court.

The business that spends a significant part of its time in court, even if it wins every court case, will lose time and money. In business, that's a loss. Our job as lawyers, realtors, and accountants is more than ever to help our clients work their way through the confusion arising from COVID-19 in some fair way, outside of court.

Good lawyers who will work through and document changes in contracts so that everyone gets as nearly as possible what they originally intended, without litigation, have never been more necessary. The lawyer who kills the goose will not have an egg to stand on.

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