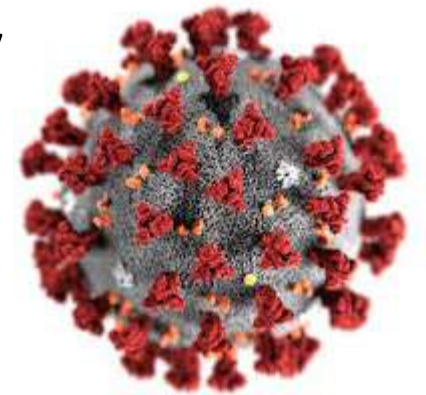


Protecting the Surety During the COV Pandemic

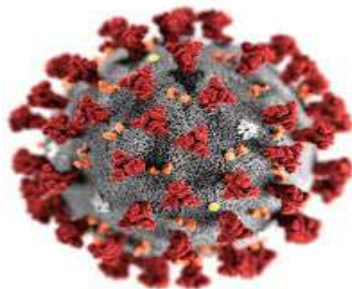


WHAT CAN WE DO TODAY?

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Disclaimer:

This presentation is for educational purposes and not intended to be legal advice. In any general presentation on legal topics, the audience should seek separate legal advice on their specific cases and facts. In this unique environment dealing with the impacts of a worldwide pandemic, this advice is even more important. The legal analysis of your claim may be dependent on facts, contractual language, laws of your jurisdiction and other issues beyond the scope of this presentation. We hope you find this brief presentation beneficial.



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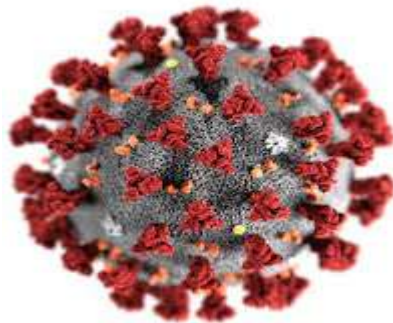
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Impossibility of Performance

What the Surety Should Know

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Potential Impacts of COVID-19

- **Employee Illness**
- **Manufacturing Disruption (materials)**
- **Restrictions on Access to Site by Owner**
- **Governmental Orders Restricting Construction**
- **Business Decisions Implemented at Recommendation of Health Officials**
- **Subcontractors, Architect, Owner, Principal, Consultant and Others Demobilizing or Withdrawing Staff**

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Impossibility of Performance

- Restatement of the Law--Contracts §454:
- “...impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.”
- *Subjective v. Objective Impossibility*: Only objective impossibility will provide defense to performance.
- *Supervening v. Existing Impossibility*: Only supervening impossibility will provide a defense to performance.

Impossibility of Performance

Restatement of the Law--Contracts §457:

“Where, after the formation of a contract facts that a **promisor had no reason to anticipate**, and for the occurrence of which he is not in contributing fault, **render performance of the promise impossible**, the duty of the promisor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation; **but where such facts occur after the time when performance of a promise is due**, they do not discharge a duty to make compensation for a breach of contract.”

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Impossibility of Performance

- Restatement of the Law--Contracts §458 (Impossibility Due to Law):
 - A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where **performance is subsequently prevented or prohibited**
 - (a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State, or
 - (b) by a judicial, executive or administrative order made with due authority by a judge or other officer of the United States, or of any one of the United States.



Impossibility of Performance

Restatement of the Law--Contracts §459 (Death or Illness):

A duty that requires for its performance action that can be rendered only by the promisor or some other particular person is discharged by his death or by such illness as makes the necessary action by him impossible or seriously injurious to his health, unless the contract indicates a contrary intention or there is contributing fault on the part of the person subject to the duty.

Impossibility of Performance

Restatement of the Law--Contracts §462 (Temporary Impossibility):

Temporary impossibility of such character that if permanent it would discharge a promisor's entire contractual duty, [**discharges a promisor's entire contractual duty**] if rendering performance after the impossibility ceases would impose a burden on the promisor substantially greater than would have been imposed upon him had there been no impossibility; but otherwise such temporary impossibility suspends the duty of the promisor to render the performance promised only while the impossibility exists.

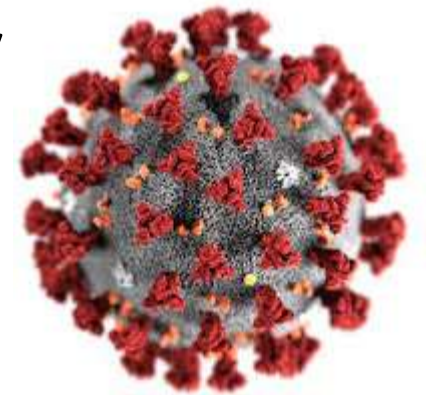


What should the Surety do NOW?!?

- Identify all impacts on performance
- Document all impediments to performance
- Put Obligees on notice of impact on performance
- Consult with Principal to document all impacts
- Include impossibility as a basis for demobilization

**COMMUNICATE WITH EVERYONE EARLY
AND OFTEN**

Protecting the Surety During the COV Pandemic



WHAT CAN WE DO TODAY?

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