


**Managing External Relationships and Supply Chains After COVID-19**



**COVID-19**

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**Michael Brady**

- Nearly 23 years as a business and class action litigator. Chairs Warner's Litigation and Automotive Groups
- Regularly represents automotive suppliers in contract negotiations and supply chain disputes
- Defends companies in class action cases involving antitrust, consumer and securities fraud

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**Homayune Ghaussi**

- Nearly 17 years experience in litigation and contract negotiations
- Chair of Warner's Supply Chain Litigation Group
- Regularly works with clients in supply chain contracting and dispute resolution

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### Problems in Re-Opening Business Operations

- How can I declare force majeure due to COVID-19 and the government shut downs?
- What should be expected of me after I've declared force majeure or been shut down by a shelter in place order?
- What are the risks associated with a force majeure declaration?
- How do I manage my customers and suppliers as I get my business back up and running?



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### What is a Force Majeure Event?

- A "Superior Force"
- Allows for excused or delayed contractual performance
- An event that could not be foreseen or anticipated and makes performance impossible or commercially impracticable
- No fault by either party
- An act of God, natural disasters, fire, war
- May include pandemic or government action



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### How is a Force Majeure Event Defined?

- Contract terms
- Uniform Commercial Code – sale of goods
- Common law – services, real estate



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**Providing Notice of Force Majeure**

- Contractual written notice
- Now is the time to review (again) notices sent/received, and responses
- Communication early and often – be proactive

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**As Businesses Begin to Open ...  
What Does This Mean for You?**

- Review each contract carefully
  - What are your contractual obligations to your customers?
  - What are your suppliers' contractual obligations to you?
- Force Majeure provision
- Shipment and delivery terms
- Duty to mitigate harm

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**How Much Must You Incur Financially to Mitigate Impact?**

- Generally seller must make reasonable efforts to avoid/minimize the impact
- Increased costs generally won't excuse performance
- Some contracts state seller must bear the costs associated with failure to make timely deliveries
- But force majeure declaration excuses late performance
- Significant cost increase due to unforeseen event that alters essential nature of performance may excuse performance.

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### How Do You Allocate Your Capacity Among Your Customers?

- “Fair and reasonable” allocation of supply among existing customer base
  - Not arbitrary
  - No self-dealing
  - Can rely on sales history
- Provide reasonable notice of your decision

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### Risks of Declaring Force Majeure

- Was the declaration proper? Was the event foreseeable or anticipated?
- Even if force majeure is appropriate, party must still take reasonable measures to reduce harms, and resume performance
- Buyer may seek other sources during force majeure event
- Buyer may terminate contract
- Buyer may seek damages if force majeure event lasted longer than it should have

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### More Risks Regarding Force Majeure ....

- Be careful regarding future COVID related declarations
- A COVID incident now that impacts your business may not qualify as a force majeure
  - Was it foreseeable?
  - Is there fault?
- Be careful about future contracts
- Should your contracts be refreshed?

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**Managing External Relationships**

- Assessing customers' needs
- Assessing your own ability to restart and supply
- Assessing status of your supply base
- Controlling contracts – e.g., payment
- Requesting adequate assurance

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**Customer Inquiries**

- Responding to customer inquiries:
  - Respond accurately
  - Be clear response is based on information available at time of response
  - Keep in mind state and local orders affecting your operations

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**What Are Your Customers' Needs?**

- What level of support does your customer actually need?
  - Assess and confirm orders
  - Realistic?
- Regular Customer Communication:
  - Explain concerns, reliance
  - Emphasize Collaboration
- Communication between sales and purchasing teams

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**Your Capacity and the Capacity of Your Supply Base**

- Fully assess your capacity
  - Determine law/executive orders
  - Raw materials, labor?
  - COVID countermeasures?
- Fully assess your supply base's capacity and readiness
  - Financial Audit needed?
  - Alternative supplier options?
  - Need for adequate assurance of performance

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**Supply Base Control**

- Seeking status of suppliers:
  - Determine if suppliers will be able to restart
  - Determine if any issues may prevent restart
  - Determine financial status of suppliers
- Customers may claim default if you don't appropriately control supply base
- Check your contract terms to determine your rights/obligations

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**Contracts Control**

- Addressing performance concerns with customers and suppliers:
  - Determine factual basis for concerns
  - Seek information from customer/supplier
  - If necessary, seek adequate assurance under UCC 2-609, or contract provision

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## Payments

- Customers may seek to alter payment terms, or delay payments
- Suppliers may demand shorter payment terms
- Review Contract terms for rights
- If necessary, seek adequate assurance under UCC 2-609, or contract provision

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## Seeking Adequate Assurance of Performance

- UCC 2-609 Process:
  - Fact intensive standard
  - Must have factual basis for seeking adequate assurance
  - Once adequate assurance sought, if response inadequate, may deem responder in breach and terminate contract
  - If termination found to be improper, termination can be breach

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## Build a Record ...

- Communicate early and often
- Speak with "one" voice
- Inform customers *in writing* of your allocation/production decisions
- Inform suppliers *in writing* of order requirements/procedures
- Litigation is on the horizon ...

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**Warner's COVID-19 Resource Center**  
[www.wnj.com](http://www.wnj.com)

**Question of the Day** – Answers to high-priority concerns

**eAlerts** – Identifying key developing issues and action to take

**Webinars** – Online registration and links to previously recorded sessions and materials

*Sign up for COVID-19 eAlert and webinar notices by emailing [covid@wnj.com](mailto:covid@wnj.com) and you will be added to the email subscriber list.*

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**Upcoming Warner Webinars**

- **May 6:** Employment Litigation after COVID-19
- **May 7:** COVID-19 Strategies for Reducing Your Legal Spend
- **May 12:** Gaining Access to Government Data During COVID-19 with FOIA and OMA

*Register for our webinars by visiting: [www.wnj.com/Events](http://www.wnj.com/Events)*

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Questions?



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