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Edited by: Alan Gassman

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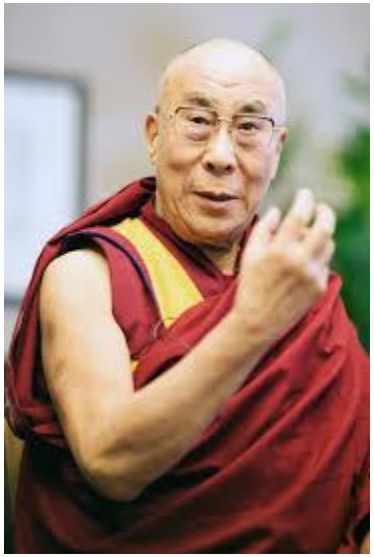
Covidarama, Drama and a Talking Llama

Not to be confused with the Dalai Lama



Executing Documents During the Coronavirus Lockdown

Force Majeure and Similar Strategies as a Defense Against Non – Performance

PPP Loans Must Be Necessary to Avoid Fines and/or Imprisonment, but What Does Necessary Mean

Forbes Article

Humor

Upcoming Webinar

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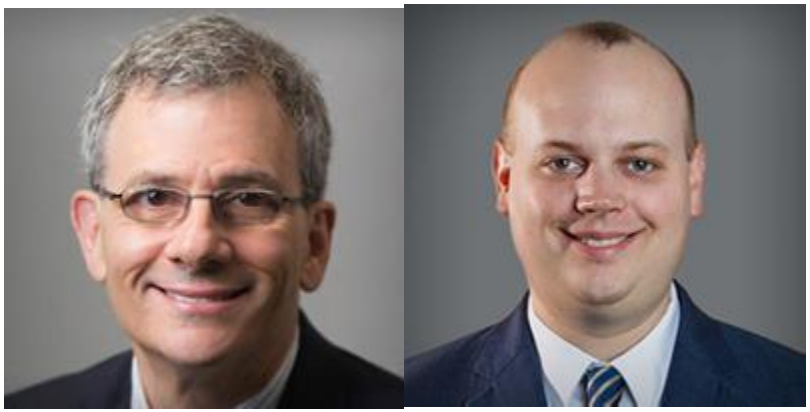
By: Alan Gassman and John Beck



COVID-19 has drastically change life in America and around the world. As states and nations restrict travel and limit activities outside of the home to essential services, many activities that were once routine are now becoming logistical nightmares.

For the legal field, this has created a problem for individuals that need to sign legal documents, especially for estate planning documents.

The following is an excerpt from an article that Marty Shenkman will be posting on Leimberg Information Services, which has been authored by John N. Beck and Alan S. Gassman.

On June 7, 2019, prior to COVID-19's prevalence and spread, Florida enacted Remote Online Notarization (RON) laws that became effective on January 1, 2020.[1] These laws allow for many non-testamentary documents to be notarized electronically without a notary being physically present at the signing, however, virtual notary presence is required.

These laws also include provisions allowing for estate planning documents to be signed electronically that will become effective July 1st of this year. There have been no updates for RON in Florida during the COVID-19 pandemic to address RON and testamentary documents, meaning these documents must still be notarized in person.

In order for an electronic will to be self-proving, the will must be signed on or after July 1, 2020 in the electronic presence of two witnesses and a remote online notary, using the same procedures that are currently required for the remote notarization of other documents. Notably, certain documents like trusts and wills do not need to be notarized to be valid in Florida, but do need to be notarized in the presence of two witnesses and the testator to be self-proving.

Due to COVID-19's impact, Florida's Supreme Court issued AOSC20-16, suspending the requirement for a Florida notary to be physically present in front of an individual to administer an oath through May 29th of this year.[2]

AOSC20-16 provides that a Florida notary may swear in a witness remotely if the notary can positively identify the witness from a location within the State of Florida using audio-video communication.[3] If the witness is outside the State of Florida, the witness may simply consent to being placed on oath via audio-video communication.

AOSC20-16 only applies to administrations of an oath, however, and does not apply to notarization of document signings. RON is Florida's primary method of dealing with COVID-19's implications for document signing. Unlike many states which temporarily authorized RON, Florida's statutes already outline its requirements.

It is important to note that not all Florida notaries are able to perform a valid RON[4]. In order to become remote online notary, a Florida notary public must complete the following:

1. The individual must already have a valid and current notary commission, a civil-law notary appointment, or a commissioner of deeds appointment in Florida;

2. The notary must successfully complete an education training course and receive a certificate of completion RON;

3. The notary must obtain an Errors and Omission policy with a minimum of $25,000 coverage and a bond in the amount of $25,000 and provide evidence of the same;

4. The notary must submit an Application Registration for Online Notary Public to the Florida Secretary of State, Division of Corporations, along with copies of the support documents indicated above and the Application filing fee of $10.00;

5. After registering as a Florida remote online notary, the notary must contract with an approved third party vendor to provide the remote online notary with the technological support that is required to perform online notarizations, including a secure online audio-video platform, advanced identity proofing and credential analysis, and long-term document storage; and

6. RONs must keep an electronic journal record for at least 10 years, which includes the video and audio recording of each RON service.

Notary boxes must now also indicate whether the notarization was completed via RON or in the physical presence of the signor.

For the average person seeking notarization of a signature, RON does not require much more than a document needing a notarization — even if it must be witnessed — and a computer or device with audio and recording capabilities. There are many businesses that are currently offering RON service for Florida signings and a simple Google search for "Florida remote online notary" will provide several options available 24 hours a day. The maximum fee for a RON is set statutorily at $25.00 per signature. Some RON providers charge a flat $25.00 per notary signature fee and others will charge less for additional signatures.

It may not be practical to use a remote online notary for signings where a large number of documents need to notarization because the process may take much longer than a document signing in the physical presence of a notary due to RON procedures. These procedures include extra qualifying statements, extra steps involved to verify the person's identity, and the client needing to be computer savvy enough to utilize the audio/video software and upload their identifying documents in an acceptable form.

The following chart provided by Florida's Real Property, Probate and Trust Law Section of the Florida Bar outlining certain document signing requirements for documents executed prior to July 1, 2020:[5]

COVID-19 has impacted the ability of most firms to easily conduct in-person signings. RON laws in Florida, especially starting on July 1, 2020, should somewhat ease this problem.

Force Majeure and Similar Strategies as a Defense Against Non – Performance

By: Alex Metras

The COVID-19 virus presents extraordinary circumstances for businesses. For starters, twenty-two states have officially enacted stay-at-home orders in some capacity. Both international and domestic travel have been restricted. The CDC recommends individuals remain at least six feet from one another, and that gatherings be limited to under ten people at any given time. Those who are thought to have symptoms of or exposure to the virus are to quarantine for at least two weeks.

The uncertainty in day-to-day living is translating to uncertainty in business contracts. Not being able to gather in large groups and workers being restricted to their homes are presenting scenarios where requirements in contracts are left unfulfilled.

Businesses involved in these transactions are left with what under normal circumstances would likely be considered a breach of contract. Non-performance may typically lead to termination of the contract and a resulting lawsuit, but during a near pandemic, contractual doctrines like *force majeure*, impossibility of performance, and impracticability of performance may lead to the non-performing party being excused from their requirements under a contract.

The following article explores these doctrines, their general applicability, the general risks associated with asserting these defenses, and their specific functions in the wake of COVID-19's spread.

I. ***Force Majeur***e

A. **What is *Force Majeure*?**

Asserting *force majeure* is equivalent to an affirmative defense for non-performance. It allows a party to suspend or discontinue performance of its contractual obligations under specific circumstances.[1] The parties to the contract will specify which obligations will suspend or terminate and which circumstances will trigger a *force majeure* event in the contract.

The ability to claim *force majeure* depends upon the existence of an express *force majeure* provision in the contract and the scope of relief offered under applicable state law. In general, courts will enforce a *force majeure* provision according to its terms.

B. **Requirements for Asserting *Force Majeure***

Since the parties are themselves indicating which events will trigger and qualify as a *force majeure* event, the basic requirements for asserting *force majeure* will differ by contract. However, courts are generally in agreement that non-performance due to economic hardship alone is usually not enough to fall within a *force majeure* provision.[2] Further, " . . . only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused."[3]

However, "catch-all" provisions ("acts of God", disease, emergencies, etc.) within *force majeure* clauses are commonly added and may be enforceable if a qualifying event occurs that falls under an included category.[4]

Typically, a force majeure provision becomes applicable when performance becomes impossible and not simply when it becomes merely burdensome, but parties are generally free to contract the terms that trigger the *force majeure* event.[5] For instance, a *force majeure* event may be triggered when "any delay or interruption" occurs in performance in the contract caused by certain named events.[6] Courts refrain from adding any additional requirements to the enforcement of a *force majeure* clause, because doing so would be rewriting the parties' original intentions.[7]

Courts are split on whether a specifically included event or a catch-all category triggering a *force majeure* clause must have been unforeseeable at the time of contracting. The Third Circuit, for instance, rules that events both specifically included or broadly referenced by category must be "unforeseeable and infrequent" at the time of contracting, and beyond the reasonable control of the parties to the contract.[8] This explains why economic hardship alone is insufficient, because it is ultimately foreseeable at the time of contracting and more or less within the parties' control.

Other circuits, like the Fifth Circuit, partially disagree. The Fifth Circuit allows for specific references to certain events to be foreseeable, but if the event falls under a catch-all category, that event must have been unforeseeable at the time of contracting.[9]

It is important to clarify which state's law applies to the contract, and whether that jurisdiction requires that the event triggering the *force majeure* clause be unforeseeable and out of the reasonable control of the parties at the time of contracting. Otherwise, even though a *force majeure* clause may be present in the contract, it may not be enforceable.

In Florida, *force majeure* claims are enforceable regardless of whether the event was foreseeable or not.[10] The only consideration Florida courts add beyond the exact language of the contract is whether the event was within the party's control.[11] If

the event was outside of the party's control who is asserting *force majeure*, the clause is generally enforceable; if the event was within the party's control, the *force majeure* clause is not enforceable.[12]

C. **COVID-19 and *Force Majeure***

Since the requirements for satisfying a *force majeure* assertion are determined by the applicable state law and language of the contract, the COVID-19 virus may present an event worthy of triggering a *force majeure* clause.

If the jurisdiction requires the event be unforeseeable, unless the parties knew or had reason to know at the time of contracting that a pandemic or disease was at foot at the time of contracting, COVID-19 may very well present sufficient unforeseeable circumstances beyond the reasonable control of the parties for the purposes of a *force majeure* assertion.

Force majeure might apply to these circumstances if the following two factors are present in the contract:

1. The contract in question includes an explicit *force majeure* clause; and
2. The clause includes either specific references to events that qualify, like "disease," "illness," or "pandemic," *or* general categorical references like "emergencies," "government regulation," or "other acts beyond the reasonable control of the parties."

D. **Risks of Asserting *Force Majeure***

Importantly, if a party claiming force majeure as a defense fails to succeed on the defense, that party may be held liable for non-performance, which allows the other parties to the contract to terminate the contract and sue for breach of contract.

Of all the excuses for non-performance explored, *force majeure* is the best available defense to non-performance under circumstances of COVID-19. This is because of the large degree of deference courts award the parties who formed a *force majeure* clause, versus the large set of limitations the other excuses explored in this article possess.

Like all assertions excusing non-performance explored in this article, it is crucial that prior to deciding to not perform obligations under a contract, the business consult with legal counsel to determine if that is the appropriate course of action.

II. **Impossibility of Performance**

If the contract does not include an enforceable *force majeure* clause, the non-performing party will be left with attempting to insert a different excuse, like impossibility of performance.

A. What is the Defense of Impossibility of Performance?

The defense of impossibility of performance may be asserted in situations where the purposes for which the contract was made have, on at least one side, become impossible to perform.[13]

Generally, under this doctrine, a party is discharged from performing a contractual obligation which is (1) impossible to perform and (2) the party neither assumed the risk of impossibility nor could have acted to prevent the event rendering the performance impossible.[14] This is the case in Florida law.[15]

> Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract.[16]

The impossibility is interpreted objectively, meaning that the job cannot be done by anyone.[17] As such, subjective impossibility is not an excuse for non-performance.

B. Limitations on the Doctrine of Impossibility of Performance

Some jurisdictions severely limit this doctrine's applicability to three scenarios: (i) a person necessary for performance dies or becomes incapacitated; (ii) the thing necessary for performance is destroyed or deteriorates; and (iii) the law changes making performance illegal.[18]

This doctrine is typically reserved for extremely rare circumstances.[19] This is quite different from *force majeure*'s analysis, because under that doctrine the court is typically deferential to the terms of the parties' agreement, which ultimately controls the analysis. Courts are much stricter in their application of the impossibility of performance doctrine, and unless the event falls into one of the jurisdiction's recognized scenarios where the doctrine is accepted, the Court may reject the assertion altogether.

Additionally, under the impossibility of performance doctrine, the party asserting the defense must demonstrate that there is nothing that party could have done to prevent the occurrence of the impossibility, that the events causing the impossibility were unforeseeable, and that neither party assumed the risk of the impossibility.

C. COVID-19 and Impossibility of Performance

There is a chance that the impossibility of performance doctrine, while being rarely applied, may be applicable during the COVID-19 virus outbreak.

There are two scenarios where the doctrine of impossibility of performance could potentially be invoked, even in the strictest of jurisdictions:

1. The changes in the law related to COVID-19 that limit activities or gatherings which impacts the principal purpose of the contract; and
2. A person essential to performing the contract is quarantined due to either having or being exposed to COVID-19.

While there may be situations that avail themselves to this doctrine related to COVID-19, it is traditionally difficult to succeed under this doctrine. Since these changes in the law and society are inherently temporary, the impossibility of performance defense may not succeed unless performance is required during the time the changes are in effect. Otherwise, it could be argued obligations are not impossible to perform, and instead are merely delayed.

Upon asserting the impossibility defense, it would also have to be shown that nothing could be done to prevent the impossibility and that it was not considered during the time of contracting. Most parties should be able to succeed on proving COVID-19 was out of their control, but whether the pandemic was considered at the time of contracting will require a dive into the parties' knowledge at the time of contracting.

D. Risks of Asserting the Defense of Impossibility of Performance

Like with asserting *force majeure*, the risk of opening oneself to liability following non-performance of a contract exists if the defense of impossibility of performance is unsuccessful. This could result in termination of a contract and suit for breach of contract. Additionally, satisfying the doctrine of impossibility of performance is traditionally more difficult than satisfying an assertion of *force majeure*.

It is highly recommended that a business seek advice from counsel prior to deciding to not perform obligations under a contract.

III. Frustration of Purpose

In the circumstance where the doctrines of *force majeure* and impossibility of performance are inapplicable, the doctrine of frustration of purpose may be available.

A. What is the Defense of Frustration of Purpose?

Frustration of purpose arises when both parties can technically perform the obligations under the contract, but as a result of unforeseeable events, performance by one party would no longer give the other what induced the agreement in the first place.[20] As the Second Circuit puts it:

> Both parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place. Thus frustrated, Y may rescind the contract.[21]
>
> Florida law interprets frustration of purpose the same way as the Second Circuit does above.[22]

This doctrine is somewhat similar to the impossibility of performance doctrine, but the main difference is the effect the supervening event has on performance.[23] Under frustration of purpose, performance is still technically possible, but the result would not be what the parties intended when forming the contract.[24] Under impossibility of performance, performance is actually objectively impossible. In either event, successfully asserting either of these defenses excuses the asserting party from performing their obligations under the contract.

Also like the application of the doctrine of impossibility of performance, the defense of frustration of purpose is extremely limited "to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party."[25]

B. Requirements of Frustration of Purpose

Across most jurisdictions, including Florida, the elements of frustration of purpose remain the same:

1. Frustration of the principal purpose of the contract;
2. The frustration is substantial; and

3. The non-occurrence of the frustration was a basic assumption on which the contract was made.[26]

C. **COVID-19 and Frustration of Purpose**

Frustration of purpose yields the same end result as the previous two defenses, but the circumstances triggering the doctrine are different. COVID-19 may present situations where performance is still technically possible, but the end result will not be what parties intended.

If the principal purpose of the contract is prevented completely, the doctrine of impossibility is a more appropriate claim. However, if the changes spawned by COVID-19's spread do not render performance impossible, but render it meaningless, the frustration of purpose doctrine may be applicable. So long as the principal purpose of the contract was substantially thwarted by changes spawned by COVID-19, and said changes were unforeseeable at the time of contracting, the defense may be available.

Additionally, the principal purpose of a contract may only be frustrated temporarily, or while the changes caused by COVID-19 are in effect. In this circumstance, it becomes riskier to assert this defense for non-performance, because a non-time-sensitive contract could potentially be performed at a later date. In that situation, the defense of frustration of purpose may not excuse performance permanently, only temporarily until performance becomes worthwhile again.

D. **Risks of Asserting the Defense of Frustration of Purpose**

Like all the doctrines above, a certain level of risk is associated with non-performance, regardless of the assertion of the defense of frustration of purpose. If this defense fails, the party asserting the defense may be open to liability for non-performance, typically resulting in termination of the contract and suit for breach of contract.

Additionally, if the changes of COVID-19 are found to only be temporary and thus only frustrating the purpose of the contract for a certain amount of time, this defense may only post-pone performance, rather than excuse it entirely. Businesses should seek advice from counsel before deciding to not perform obligations under a contract.

IV. **Impracticability of Performance**

In the situation where none of the above doctrines are applicable, a final shot exists in the doctrine of impracticability of performance.

A. **What is the Defense of Impracticability of Performance?**

The defense of impracticability of performance may be available when a supervening event causes a party to not perform a contract, not because it was impossible, but because it is "impracticable."[27] Performance has been found to be impracticable when the supervening event renders performance extremely difficult, or creates unreasonable expenses, loss, or injury to one of the parties; it may be triggered by a slough of circumstances, like a shortage of materials due to emergency, or an unforeseen shutdown of major sources of supply.[28]

Impracticability generally does not encompass situations where performance has merely been made more difficult—it only covers situations where performance is not impossible, but extremely impracticable given the original agreement and the current circumstances spurred by the supervening event.[29] A mere change in the degree of difficulty or expense due to causes like increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, do not amount to impracticability.[30]

Additionally, the doctrine of impracticability of performance was codified in § 2-615 of the Uniform Commercial Code (UCC) and has also been expanded to most other areas of contract law after its inclusion in Article 261 of the Restatement (Second) of Contracts.[31] Under the UCC, additional requirements outside of the elements to the defense must be met for the defense to be successful.

An example of a successful defense using the doctrine of impracticability may be found in the Florida case, *Fla. Laundry Services, Inc. v. Sage Condo. Ass'n, Inc.*, 193 So. 3d 68 (Fla. 3d Dist. App. 2016). In this case, Florida Laundry Services, Inc. ("the laundry company") provided coin laundry equipment to Sage Condominium Association, Inc. ("Sage") in Miami, Florida. The laundry company claimed that Sage disconnected their laundry equipment in violation of a lease. Sage did in fact disconnect the laundry equipment, but only because they were in violation of a city code that disallowed laundry equipment on the exterior of buildings under power lines without a permit. Sage also argued that they informed the laundry company of this, but the laundry company failed to remove its equipment. If Sage were forced into compliance with city code by keeping the laundry company's equipment, serious structural changes would have to be made to their buildings, which would incur significant costs. Sage argued that these costs were inhibiting their ability to retain the laundry company's equipment if they even wanted to.

After a three-day non-jury trial, the judge concluded that Sage was absolved of its requirements to perform under the lease, or to retain the laundry company's equipment, because of the doctrine of impracticability. The reasoning was three-part: first, Sage was in violation of city code by having the laundry company's equipment outside of their building under a power line without a permit. Second, Sage gave notice to the laundry company about this violation, but the laundry company did not remove its equipment. Lastly,

Sage would have incurred significant costs just to be able to keep the laundry company's equipment. Thus, considering these factors, it was found to be impracticable for Sage to continue the requirements of the lease and retain the laundry company's equipment.

The laundry company appealed this decision, but Florida's Third District Court of Appeals upheld the trial judge's ruling, saying it was "supported by substantial, competent evidence." The court explicitly pointed out the crux to its ruling was that the doctrine of impracticability is not restricted to strict impossibility, and it even encompasses instances like Sage's, where unreasonable expense prohibits complying with contractual terms.

B. **Requirements of Impracticability of Performance**

For both the UCC and the common law, the elements of impracticability of performance are the same across many jurisdictions, including Florida:

1. A supervening event occurred that made performance impracticable;
2. The non-occurrence of the event was a basic assumption on which the contract was made;
3. The party asserting performance is impracticable did not cause the impracticability; and
4. The party asserting this defense did not explicitly or implicitly agree to perform in spite of the impracticability.[32]

If the contract is governed by the UCC, the party wishing to claim the defense must also satisfy the following factors to succeed:

1. The seller must not have assumed a greater obligation which caused the impracticability;
2. Where the supervening event affects only a part of the seller's capacity to perform, the seller must allocate production and deliveries to customers "fairly and reasonably"; and
3. The seller must notify the buyer that there will either be delay or non-delivery, and when allocation is required, of the estimated allocation to the buyer.

C. **COVID-19 and Impracticability of Performance**

COVID-19's impacts may trigger the possibility of claiming the defense of impracticability of performance, and possibly with more ease than the doctrine of impossibility or frustration of purpose.

If the legal changes spurred by COVID-19's spread cause performance to be absurdly costly or dangerous, it may be found to be impracticable to see the contract through. If those required for performance are in quarantine or under a stay-at-home order, there may be additional room to argue that performance is simply impracticable given the circumstances presented by COVID-19.

So long as the party seeking performance did not agree to perform regardless of the circumstances, this doctrine is still available to potentially excuse non-performance due to changes caused by COVID-19.

D. Risks of Asserting the Defense of Impracticability of Performance

Like all the other mentioned defenses, there is a possibility that the defense fails, which would open the non-performing party's liability to suit for breach of contract.

Additionally, like most other defenses presented in this article, the supervening events may only be considered temporary. The changes resulting from COVID-19 are undoubtedly not permanent, and as a result, performance—even under this defense—might only be excused temporarily until the supervening event stops impacting the ability to perform. This would depend largely on the nature and details of the contract.

Further, distinct from the other defenses, a party can agree to still perform despite an impracticability. It is important representatives do not purport to be able to perform despite existing impracticability, and the contract in question should be reviewed for language that may guarantee performance.

As always, it is wise for a business to consult with counsel before deciding to not fulfill its obligations in a contract.

V. Conclusion

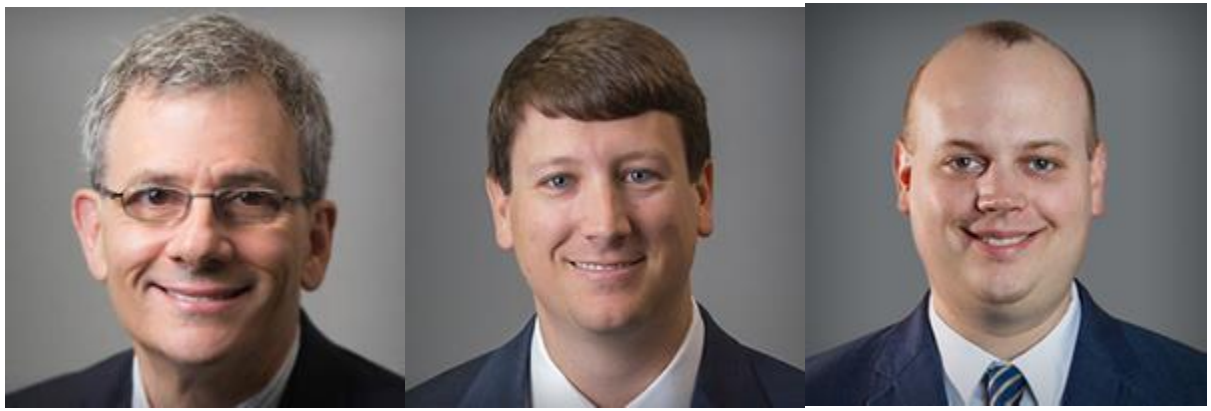
The effects of the COVID-19 virus spreading are constantly developing. New restrictions and requirements are being placed on people and businesses, which will inherently cause performance issues for businesses who may have never had them before. It is important for businesses to analyze the options available to them, determine what the best economic course of action is, and consult with an experienced attorney to determine if a defense yielding non-performance is the best choice for the business.

All resources cited in this article are available from the authors upon request.

PPP Loans Must Be Necessary to Avoid Fines and/or Imprisonment, But What Does Necessary Mean

By: Alan Gassman, Brandon Ketron & John Beck

Article featured in: Steve Leimberg's Business Entities Email Newsletter – Archive Message #186 (April 27, 2020) at http://www.leimbergservices.com



EXECUTIVE SUMMARY:

Shots fired across the bow of publicly traded companies and hedge funds that have applied for and received Payroll Protection Program ("PPP") funds warn that the language requiring that a loan must be "necessary to support the ongoing operations of the business" is a serious requirement that could cause taxpayers to be fined up to $1,000,000 and/or result in a prison term of up to thirty years. The above quoted language, which comes directly from the language of the CARES Act, and recent SBA pronouncements that publicly held companies and hedge funds will not meet this requirement because they have the ability to raise capital provides little, if

any, comfort and significant confusion and uncertainty for small businesses and professional practices that have been successful for many years and managed conservatively in order to be able to survive a crisis like this one.

It is clear that PPP loan recipients and applicants need to be aware of this issue, and to consider what is their best planning strategy and action. The recent "pronouncements" about this issue are causing many borrowers to conclude that it is safer to lay off workers than to risk penalties or even criminal prosecution, especially when the business can "now afford" to keep workers, but would lose money and reduce its chances of survival in so doing.

FACTS:

On March 27, 2020 the CARES Act became law for a primary purpose of allocating hundreds of billions of dollars to go to small businesses and professional entities to save jobs under the Payroll Protection Program ("PPP"). Many small businesses have applied and some have received funding.

The great majority of U.S. businesses and entrepreneurs have experienced significant losses and face tremendous risks as a result of the COVID-19 crisis, including significant reductions in revenue, increased expenses, and a continual state of worry for what will happen in the future.

Even though some U.S. states appear to be re-opening to some extent, the COVID-19 pandemic does not seem to be anywhere near under control. Bill Gates, a well-qualified and respected individual with extensive knowledge and experience with infectious diseases and business management, has expressed hopes that a vaccine will become available within the year. The uncertainty surrounding the timeline for a vaccine is indicative of the uncertainty surrounding businesses reopening. Even if a vaccine is released within a year, many businesses will be terribly affected by the effects of COVID-19 for much longer, and businesses not yet profoundly affected may be much like dominoes in a long line, waiting for the chain reaction that might blow their business into kingdom come. What makes this worse is the question as to whether lenders will reduce or call in credit that has been available to borrowers, and even shut down businesses that cannot satisfy loan ratio requirements, or when an "insecure lender" clause exists that permits the lender to call in loans when they feel that there is not sufficient capital to allow the loan to be as safe as it was when credit was extended.

The purpose of the PPP is allow small businesses to have moneys and encouragement to keep their payrolls in place by covering the essential day-to-day operational expenses for a period of 8 weeks after a loan is procured. The forgiveness of such loan, in whole or in part, also allows the business to increase its operating capital, if it is profitable during that period of time, in order to provide balance sheet assets that may be sorely needed in the many months to come. The program requires that the moneys advanced be used solely to

cover employee payroll, utilities, rent, interest, health insurance, and pensions, with no allowance to pay for legal and accounting fees that will be needed to help sort out how to comply with this complicated law.

The PPP loan calculation provides borrowers with a maximum of 2.5 times the average monthly amount of their payroll, health insurance, and pension expenses, with the average monthly expense calculated over twelve months. Individual employee salaries are only includable in the calculation based upon $100,000 in wages/salary plus additional amounts paid for health insurance and retirement plan contributions.

PPP loans will be forgiven if the amounts spent during the eight weeks following the date of receiving the loans satisfies these requirements:

(1) At least 75% of the funds are spent on payroll, including medical insurance and retirement plan contributions; and
(2) Other moneys are spent on rent, interest, and utilities based upon obligations in place before February 15, 2020.

COMMENT:

The subject of great concern that was brought to the forefront in the past few days is the question as to what the requirement that the loan be "necessary to support the on-going operations of the applicant" actually means. Every PPP borrower must attest to the fact that this requirement is met in their PPP loan application. The Small Business Administration ("SBA") will be auditing recipients of the PPP loans. False claims that are made intentionally with respect to this can result in criminal fines of up to $1,000,000, and imprisonment for up to thirty years.

The U.S. Treasury Department and SBA have released updated guidelines in a FAQ issued on April 23, 2020 stating that "it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification." The SBA has stated that if a business has taken a loan that the business did not "need," the business may return the loan by May 7, 2020, and face no criminal consequences.

Great pressure has therefor been placed on businesses to be sure of their eligibility, because they will face potential criminal sanctions if the loan they received was not "necessary". Unfortunately, and as discussed below, without a clear meaning of what "necessary" means, the statute containing the PPP eligibility requirements seems somewhat vague and ambiguous.

The SBA, Treasury Department, and lawmakers alike have all been issuing clarifications to the unprecedented program, its eligibility requirements, and its oversight, especially as it relates to criminal liability and the necessity requirement. These constant updates make one thing abundantly clear notwithstanding the confusion: the statute and its requirements are not straight forward as presently drafted, and reasonable players on all sides of the system are understandably interpreting the requirements somewhat differently and inconsistently. One series of articles on this situation can be found in Paycheck Protection Loan Backlash: How To Defend Your Business Reputation And Avoid Getting Shake Shacked, which is on the Forbes blog of LISI Commentator Bruch Brumberg.

Some larger businesses and hedge funds applied for PPP loans and were approved by the SBA after a review of their application. If these businesses are not qualified because the loans are not "necessary," then the definition of "necessary" is not clear, because many of these applicants must have objectively interpreted the requirements in a reasonable manner that ended in their concluding that they were eligible. Returning the money now may be more motivated by a fear of "public shaming" as opposed to concluding that the necessary standard may not have been met.

Some applicants applied for and received funding before many guidelines and clarifications were even issued. If those applicants applied for and received funds relying on an objectively reasonable interpretation of an unclear statute, without any notice from government institutions or lawmakers to the contrary, the statute might possibly be found to be unconstitutionally vague. While the authors are not experts in the area, we found the following in legal literature and feel that it is appropriate to share our understanding of this.

In 1926, the U.S. Supreme Court issued its opinion in Connally v. General Construction Co., which greatly expanded what is known as the "vagueness doctrine." In this case, the vagueness doctrine was explained to apply to "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

More recently, in 2015, the U.S. Supreme Court addressed the vagueness doctrine again in Johnson v. United States, stating that the government violates due process when it takes "away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standard-less that it invites arbitrary enforcement."

Here, where property, or at the very least a property interest, is being denied to businesses by concluding that they are not qualified for a PPP loan due to a murky or overzealous "necessary" requirement, when objectively reasonable interpretations of the term have seemingly varied based upon each individual application for the loan, it may be that the vagueness of the term "necessary" prevents criminal enforcement of this statute. This is made more convincing by the fact that the CARES Act does not give the SBA or any

other entity the right to promulgate legislative regulations or guidance, and does not provide that hedge funds or publicly traded entities cannot qualify for PPP loans. .

Since lawmakers and several government institutions have been issuing updated official and unofficial guidance on what "necessary" means in the context of PPP loans, ability to claim that there is sufficient vagueness to make the statute inapplicable in a given situation is dependent on being able to show that an applicant for PPP loans was provided "fair notice" of their ineligibility, which would disqualify them from claiming that the statute was unconstitutionally vague, because they were aware of the general parameters that made them ineligible from updated guidelines after applying. Arguing vagueness would be more appropriate for a business that applied for and received a loan prior to the new guidelines being issued, but what court will require that applicants look for FAQ's and tweets from a Senator, as mentioned below, before signing their application under the present stressful and scattered circumstances that business owners find themselves in.

Who "Needs" a PPP Loan?

Almost every business owner and manager involved with the finances of a business are clearly aware that there are significant capital needs, which include the obvious need for monies to keep a business like a bar, restaurant or private school afloat, but also capital needs that are "necessary" to assure that the business or professional practice can survive negative future contingencies, which are much more likely now than they had been before this crisis.

For example, a professional practice that has expenses of $100,000 a month and $200,000 in the bank, may not "need" to spend PPP loan proceeds for three or even six months if revenues may continue to allow the present cash in the business to last that long, but what happens if the key professional or manager of the business gets sick with the COVID-19 virus, and the business interruption insurance that the company has or would now be willing to buy is not available because the policies do not cover a global pandemic, or what happens if a major group of customers or suppliers turn out to be dominoes in the long string of black and what tiles that eventually fall on the business and cause it to be shut down or require it to operate at a loss for several months in order to survive?

Every borrower has a different situation, and many borrowers are receiving the same amount of revenue as they were before, and may have only slightly increased expenses, but a very uncertain future.

One example that comes to mind is critical care doctors, who have medical groups that primarily service emergency rooms and intensive care units. One would generally not expect that their revenues have been reduced, but one would expect that they have a

significant risk of losing key personnel for a long period of time, and also a fear that medical systems will break down and not provide them with compensation, or even the ability to work.

It is certainly arguable that the loan is not "necessary" for this group, but standing in their shoes, I would certainly feel the need for additional capital, especially given the fact that a good many critical care professionals have contracted COVID-19, leaving their practices without a doctor or doctors and other professionals when they are terribly needed

As a practical matter, many critical care pulmonologist have office practices are now suffering because patients with underlying health conditions should be deferring any contact with a medical office to the extent possible. For example, patients who may have sleep apnea and need sleep studies or consultations are probably better off deferring these until it is safe to walk into a medical doctor's office.

What Is the Meaning of the Word "Necessary"

To further this discussion, it is necessary to consider the word "necessary," and to what extent a court or jury would find that a business or professional practice did not have sufficient need for a PPP loan because it was not "necessary." Guidance may be found from past and current interpretations of the word "necessary," and more pointed updates have been provided recently relating to this issue.

Courts' Interpretations of "Necessary"

Starting in the past, in 1819 the fourth—and perhaps most famous—Chief Justice of the U.S. Supreme Court, John Marshall, issued a monumental constitution based decision defining the word necessary as it appears in the Necessary and Proper clause of the United States Constitution. In McCulloch v. State the Supreme Court considered whether the word necessary must "always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other." The Court concluded that it does not, and explained the word necessary "frequently imports no more than that one thing is convenient, or useful, or essential to another."

Notably, Black's Law Dictionary uses the same definition of "necessary" as Chief Justice Marshall did in his opinion in McCulloch.

In 1933, the meaning of "necessary" was analyzed by the Supreme Court again in Welch v. Helvering, where a taxpayer attempted to take a deduction on expenses that he claimed fell within the test now found at Internal Revenue Code (IRC) Section 162 as being

“ordinary and necessary” business expenses. Here, the Court determined that the expenses in the case were necessary because “they were appropriate and helpful,” but they were not ordinary.

“Appropriate and helpful” is certainly a lower standard than “essential.” Since Welch, a number of cases have found that items that many would consider to be “luxury” items and services have qualified as “reasonable and necessary” business expenses, including the cost of paying for limousines to take key executives to work, taking spouses on business trips to make a good impression, and paying large salaries to key executives whose work could be performed by competent replacements for much less.

The language and application of the Accumulated Earnings Tax may provide valuable guidance. This part of the Internal Revenue Code imposes a tax on corporations (other than S corporations) that are found to have a net worth exceeding "the reasonable needs of the business."

The regulations under IRC Section 537 makes clear that the "reasonable needs of the business" can include "product liability loss reserves," and include moneys set aside for possible future expenses that are set aside and would be "directly connected with the needs of the corporation" and are "for bona fide business purposes."

The above quoted language comes from the following portion of IRC Section 537, and the regulations under Section 537, include discussion that confirms that it is necessary to have capital for the "reasonable future needs" of the business based upon what "a prudent businessman would consider appropriate for the present business purposes and for the reasonably anticipated future needs of the business. “It certainly seem that this is analogous to what is “necessary to support the operations of the business.”

Below is an excerpt from Treasury Regulation Section 1.537-1:

§ 1.537-1 Reasonable needs of the business.

(a) In general. The term reasonable needs of the business includes (1) the reasonably anticipated needs of the business (including product liability loss reserves, as defined in paragraph (f) of this section), (2) the section 303 redemption needs of the business, as defined in paragraph (c) of this section, and (3) the excess business holdings redemption needs of the business as described in paragraph (d) of this section. See paragraph (e) of this section for additional rules relating to the section 303 redemption needs and the excess business holdings redemption needs of the business. An accumulation of the earnings and profits (including the undistributed earnings and profits of prior years) is in excess of the reasonable needs of the business if it exceeds the amount that a prudent businessman would consider appropriate for the present business purposes and for the reasonably anticipated future needs of the business. The need to retain earnings and profits must be directly connected with the needs of the corporation itself and must be for

bona fide business purposes. ,,,. See § 1.537-3 for a discussion of what constitutes the business of the corporation… See § 1.537-2, relating to grounds for accumulation of earnings and profits.

(b) Reasonable anticipated needs.

(1) In order for a corporation to justify an accumulation of earnings and profits for reasonably anticipated future needs, there must be an indication that the future needs of the business require such accumulation, and the corporation must have specific, definite, and feasible plans for the use of such accumulation. Such an accumulation need not be used immediately, nor must the plans for its use be consummated within a short period after the close of the taxable year, provided that such accumulation will be used within a reasonable time depending upon all the facts and circumstances relating to the future needs of the business. Where the future needs of the business are uncertain or vague, where the plans for the future use of an accumulation are not specific, definite, and feasible, or where the execution of such a plan is postponed indefinitely, an accumulation cannot be justified on the grounds of reasonably anticipated needs of the business. **(2)** Consideration shall be given to reasonably anticipated needs as they exist on the basis of the facts at the close of the taxable year. Thus, subsequent events shall not be used for the purpose of showing that the retention of earnings or profits was unreasonable at the close of the taxable year if all the elements of reasonable anticipation are present at the close of such taxable year. However, subsequent events may be considered to determine whether the taxpayer actually intended to consummate or has actually consummated the plans for which the earnings and profits were accumulated. In this connection, projected expansion or investment plans shall be reviewed in the light of the facts during each year and as they exist as of the close of the taxable year. If a corporation has justified an accumulation for future needs by plans never consummated, the amount of such an accumulation shall be taken into account in determining the reasonableness of subsequent accumulations.

(f) Product liability loss reserves. (1) The term **product liability loss reserve** means, with respect to taxable years beginning after September 30, 1979, reasonable amounts accumulated for the payment of reasonably anticipated product liability losses, as defined in section 172(j) and § 1.172-13(b)(1). **(2)** For purposes of this paragraph, whether an accumulation for anticipated product liability losses is reasonable in amount and whether such anticipated product liability losses are likely to occur shall be determined in light of all facts and circumstances of the taxpayer making such accumulation. Some of the factors to be considered in determining the reasonableness of the accumulation include the taxpayer's previous product liability experience, the extent of the taxpayer’s coverage by commercial product liability insurance, the income tax consequences of the taxpayer's ability to deduct product liability losses and related expenses, and the taxpayer’s potential future liability due to defective products in light of the taxpayer's plans to expand the production of products currently being manufactured, provided such plans are specific, definite and feasible. Additionally, a factor to be considered in determining whether the accumulation is reasonable in amount is whether the taxpayer, in accounting for its potential future liability, took into account the reasonably estimated present value of the potential future liability. **(3)** Only those accumulations made with respect to products that have been manufactured, leased, or sold shall be considered as accumulations made under this

paragraph. Thus, for example, accumulations with respect to a product which has not progressed beyond the development stage are not reasonable accumulations under this paragraph.

It is difficult to read the above and not come to the conclusion that most U.S. businesses and professional practices have a need for PPP loans that are necessary to support the ongoing operations of the business, just like produce liability loss reserves are well respected for those businesses that have exposure to product liability losses.

A conventional and well accepted analysis of what would be necessary to borrow to be reasonably capitalized in a way similar to the Accumulated Earnings Tax analysis is the concept of the "fairness opinion" that is often issued by for companies raising capital or engaging in transactions whereby an independent opinion is provided as evidence that a business meets the required good faith certification of being "necessary to support the ongoing operations of the Applicant." This scenario is similar to the use of fairness opinions that evolved from the landmark opinion of Smith v. Van Gorkham which was decided by the Delaware Supreme Court in 1985. Fairness opinions are obtained from financial professionals to provide evidence that prudent business judgment was exercised in a corporate transaction, thus providing corporate boards with some level of liability protection. It is unclear whether opinions to support PPP good faith certification would be recognized because of the lack of current guidance but it certainly would not hurt. The authors thank valuation experts Timothy Bronza, CPA, ASA, and Elitsa Healy, CFA, for their input with respect to this.

Although it may still be unclear what "necessary" means for PPP loans, the SBA's Economic Injury Disaster Loan (EIDL) has a need requirement that requires that there be a "substantial economic injury" that is a direct result of a disaster. COVID-19 qualifies as a disaster, but the "substantial economic injury" requirements are more in-depth and similar to the "necessary" requirement for PPP loans. Substantial economic injury will most often consist of a decrease in revenue or significant increase in expenses with the result being that the business is unable to meet its obligations and pay ordinary and necessary operating expenses in the normal course of business.

"Necessary" for PPP loans could mean something very similar to "substantial economic injury," especially given the below referenced recent pronouncements. Some clarification on what "necessary" may mean under the PPP law has been provided by individual lawmakers. Legally, this may be of some significance because the legislative intent behind the PPP is the closest concrete guidance to date in absence of the SBA providing specific guidelines on the term.

In wake of the news that hedge funds and other large entities with presumably sufficient cash reserves were receiving PPP loans, U.S. Senator Marco Rubio (R-FL) became vocal on Twitter and in media appearances about Congress's intentions behind the PPP and the term "necessary." Senator Rubio is the U.S. Senate Chairman of the Committee on Small Business and Entrepreneurship and was

apparently very involved with the subject legislation. Senator Rubio recently reiterated that PPP loans must be "necessary to support the on-going operations of the business" and also indicated as follows:

1. The Small Business Committee will use subpoena power to identify anyone who gave a false certification for a PPP loan.
2. Businesses applying for a PPP loan must certify that they have been harmed by the crisis and need the PPP loan to operate.
3. Any company with revenue to cover its operations is ineligible.

While there is no doubt that Senator Rubio's comments were well intentioned and may have an overall positive impact, these statements likely have little to no precedential effect, and we know of no support for the proposition that "[a]ny company with revenue to cover its operations is ineligible."

If Senator Rubio's comments had been included in Committee Reports or in initial SBA regulations, such statements might have some precedential effect and might reduce the level of confusion we are experiencing surrounding the interpretation of the word "necessary," but these instead have been issued informally and without authority or authorization from the Statute or any governing body.

Based upon concerns voiced by advisors and businesses, it appears that these "pronouncements" will reduce both the number of loans taken, and the number of jobs that would have been saved by legitimate and concerned business owners and professionals.

How About an Opinion Letter?

Many legal advisors will recommend that an opinion letter be issued, in order to help prove that proper conditions exist to qualify for a PPP or EIDL loan, and that the borrowers have no intent to break any law in applying for and receiving such a loan. This will add to the cost, and delay in obtaining loans, but may be the most prudent action, especially for independent officers and directors who have not much to gain but much to lose by voting to take PPP or EIDL's for a for profit or not for profit agency. Associated questions include where there is officer and director liability insurance that will cover possible claims, including criminal defense costs, and whether such coverage can be put into place or increased before a loan is taken.

Conclusion

Advisors and borrowers must be very careful to closely examine their situation, and the conservative needs for cash and capital, which we believe can include recognition of the risks inherent in having a “stay-at-home” economy, which may have to endure the present challenges for a year or longer.

Given that many applicants did not receive loans because of the lack of funds or infrastructure to provide them, and that political winds may blow unpredictably, one would think that erring on the side of making sure that a business can survive the present crisis would be the most prudent course of action, especially where employees, contractors, suppliers, and customers rely on the business for their livelihood, products, and services.

Advisors must do their best to educate present and would be PPP borrowers by sharing and educating on the law and what uncertainties exist so that the benefit of taking the loans, and possible forgiveness, can be weighed against the uncertainty of possible penalties, repayment of amounts expected to be forgiven, or even criminal prosecution.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Alan Gassman posted a Forbes blog titled "Was Your PPP Loan 'Necessary'? If Not, There Could Be Horrific Repercussions" On May 4, 2020. A link to that article can be found by clicking HERE

One reader provided the following review:

"In a nutshell, you hit the nail on the head.

Your excellent analyzing and writing in this article was the tipping point for my hesitations and made me decide to return the PPP loan funds I just got 2 days ago. But not because I fee I am not eligible, as I am certainly impacted by Covid-19 pandemic, and see reduction of income from clients who closed business or hold operations, and greater uncertainty, but because there are too many variables that are difficult to ascertain and it is not worth the risk of punishment or stain my reputation or integrity, let alone criminality.

You accurately express what I think are many small business owners like me feel :

"The above guidance, and lack thereof, puts thousands of businesses in a quandary as to whether they should keep or receive PPP loan money to save their business, or give it back to reduce possible investigation and punishment. "

"In many cases businesses have enough money to stay in business for a few months, but not enough to stay in business for a year. A reasonable business person would certainly find PPP money to be “reasonable and necessary” to shore up a balance sheet in case things stay the same or even get worse in the upcoming weeks and months, but will the SBA agree, since they don’t seem to now? In many cases businesses have enough money to stay in business for a few months, but not enough to stay in business for a year. A reasonable business person would certainly find PPP money to be “reasonable and necessary” to shore up a balance sheet in case things stay the same or even get worse in the upcoming weeks and months, but will the SBA agree, since they don’t seem to now?"

and what about the biggest vague phrase of "uncertainty"?

All of us employees and business owners especially, do we know what will happen down the road?

And with so many mixed messages from government about Covid-19 testing and vaccines availability and reopening the economy and different states taking different actions?

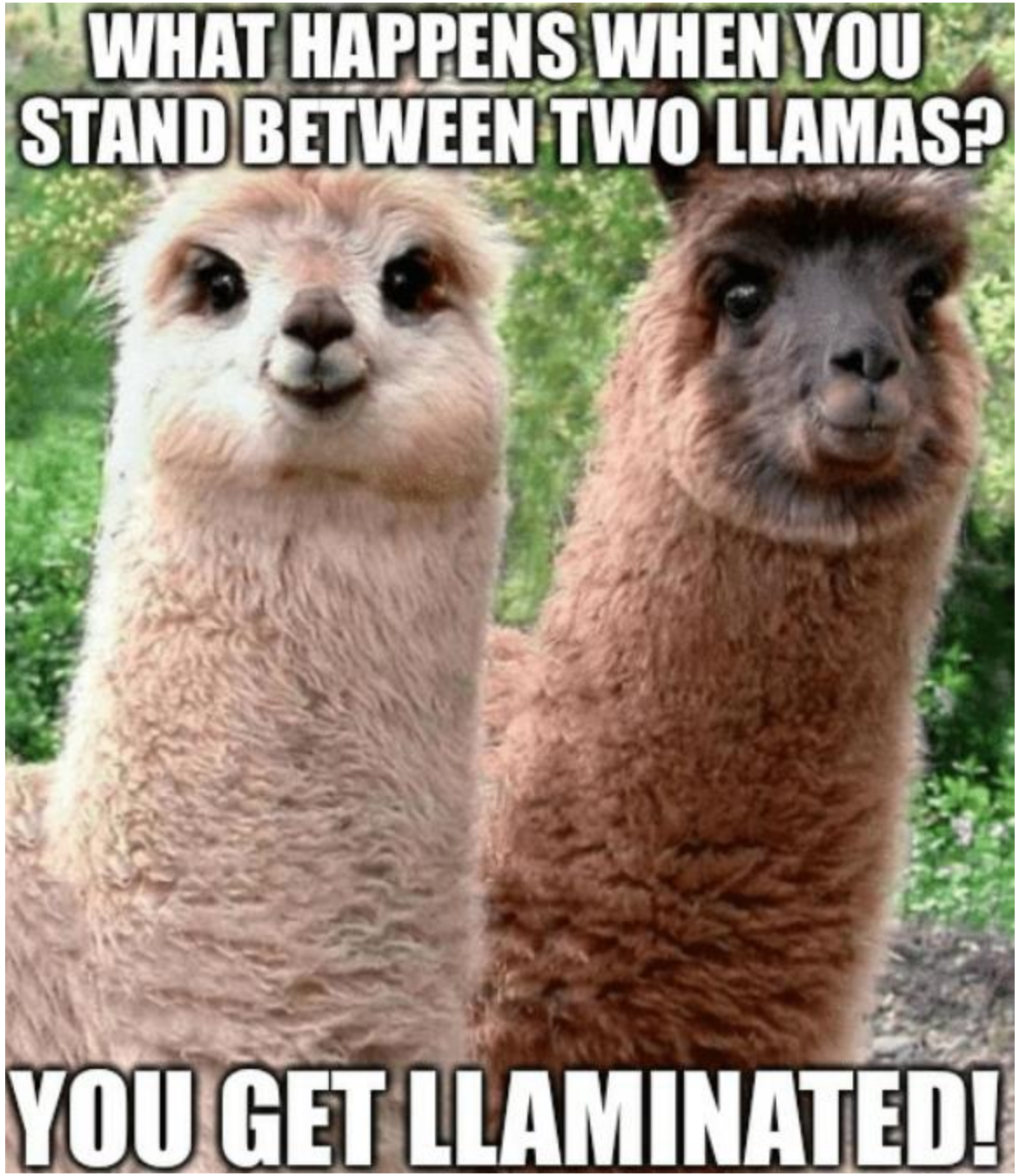
As you know, they also extended the deadline to repay the loans to May 14, which is likely because many business owners are confused and needed to rethink about what to do.

Perhaps you can write a follow up to your last publication and further drive these points that hopefully reach SBA, Senator Rubio and other leaders that:

The frequent FAQ guidance and updates seems to deter small businesses more than actually help them with Covid-19 Care Act."

-Michael B.

HUMOR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9:00 a.m. – 9:30 a.m. / ET (30 minutes)

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Brandon L. Ketron
brandon@gassmanpa.com

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"What Is Still Hot and What Is Not"

Tuesday, May 12, 2020

Presented by:

Alan Gassman and Brandon Ketron

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Thanks for reading our Thursday Report,

Which covers essential matters from borrowing to court,

Please excuse the delay in the past few editions,

We've been very engaged keeping clients on their missions.

We welcome contributions for future Thursday Report topics. If you are interested in making a contribution as a guest writer, please email Alan at agassman@gassmanpa.com

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