



THIRD PARTY RISK ASSOCIATION

May's Member Meeting
Julie Gaiaschi, CEO & Co-Founder

For your awareness, this call is being recorded



AGENDA

- Opening Remarks
- Presentation – Nyemaster Goode, P.C.
 - Eric Tubbs, Lawyer in the Business Finance & Real Estate Department – “Managing Third-Party Contractual Disruptions Caused by COVID-19”
 - Ben Roach, Litigator for Labor & Employment – “Responding to a Data Breach Involving Data Hosted by a Third Party”
- Closing Remarks



OPENING REMARKS

- **Updated Meeting Time** – TPRA Practitioner calls are now at 10 AM on the second Thursday of the month.
- **Membership Discount:** Free for three months or \$50 for the entire year. To renew, please visit our website at www.tprassociation.org/join, log into your account, click on “My Account”, and click “Pay Dues”. This promotion ends 5/31/2020 and fees will return to \$199 per year.
- **Upcoming Q2 Focus Group Call – TPRM 101:** Thursday, May 21st @ 10 – 11 AM Central
- **Spring Virtual Conference** – If you would like a CPE certificate, please complete the conference survey. A link was emailed to you.
- **Fall Virtual Conference** – Save the date for Wednesday, August 5th.



Presentations - Nyemaster Goode, P.C.

- Eric Tubbs, Lawyer in the Business Finance & Real Estate Department – “Managing Third-Party Contractual Disruptions Caused by COVID-19”
- Ben Roach, Litigator for Labor & Employment – “Responding to a Data Breach Involving Data Hosted by a Third Party”



Next Meeting: Thursday, June 11th from 10 to 11 AM Central



ERIC TUBBS



BEN ROACH

Managing Third-Party Contractual Disruptions Caused by COVID-19 & Responding to a Data Breach Involving Data Hosted by a Third Party

Disclaimer

The following presentation does not represent legal advice. If you have specific questions concerning specific circumstances, please consult your attorney.

Overview

- Managing Third-Party Contractual Disruptions Caused by COVID-19
 - Understanding and Analyzing the Disruptions
 - Force Majeure Provisions
 - Contractual Issues Beyond Force Majeure
- How to Respond when a Third Party with Your Data Suffers a Breach
 - Is it a Breach
 - Who has What Obligation
 - What is Within our Control and What Steps Can We Take

Contractual Disruptions Due to COVID-19

- The company's ability to produce goods and provide services to meet customer needs
- Its suppliers' ability to provide raw materials, components, finished product, or services
- Its logistics providers' ability to deliver goods
- Its customers' demand for, and ability to take and pay for, goods and services

Understanding the Scope of Disruptions

- Evaluate the company's ability to perform its own contractual obligations
- Identify the company's affected suppliers
- Identify the company's affected parts or materials
- Identify the company's affected logistics providers
- Keep detailed records, documents, and supporting evidence of crisis-related expenses

Analyzing Upstream and Downstream Contract Terms

- Identify key provisions relevant to COVID-19
 - Examples: Reps/warranties, covenants, exclusivity, payment rights, liquidated damages, schedule and delivery terms, allocation rights, termination rights, insurance, indemnity clauses or **force majeure clauses**
- Identify any penalties for delayed performance or nonperformance
- Identify any dispute resolution provisions for each contract
- Map the contract analysis against the company's business priorities.

Force Majeure Clauses

- Force majeure is a contractual remedy that, under certain circumstances, excuses the nonperformance of a party when the failure to perform is caused by a “fortuitous event” that makes performance impossible

Force Majeure Events

Does the force majeure provision specifically reference events attributable to COVID-19?

1. Pandemic/epidemic
2. Government order, law, or actions
3. National or regional disaster or emergency
4. Material or Equipment shortages

Force Majeure Events

Does the force majeure provision include a “catch-all” provision?

1. “acts of God”
2. “including without limitation”
3. “other events beyond the reasonable control of a party”

Force Majeure Analysis

Determining whether triggering event is a “force majeure event” does not end analysis.

- Evidence that event was unforeseeable
- Proof of causation between the event and the nonperformance
- What is the performance standard (e.g. impossible, impracticable); is the performance standard subjective or objective
- Is clause unilateral or bilateral
- Are there multiple force majeure clauses in the contract
- Are there any carve outs or exclusions (e.g. payment obligations, macroeconomic conditions, delays due to subcontractors)
- What is the contract’s governing law provision

Force Majeure Analysis, *Cont'd*

- Notice requirements
- Mitigation requirements
- Consequences of declaring force majeure
 - Anticipatory Repudiation
 - Termination of Contract or Suspension of Counterparty Performance
 - Rate Changes
 - LITIGATION

What if Contract Does Not Contain a Force Majeure Provision?

- Alternative Contractual Provisions
 - Change in Law
 - Dispute Resolution
 - Termination for Convenience
- Common Law Defenses
 - Impossibility
 - Impracticability
 - Frustration of Purpose

Summary of Common Law Defenses

Defense	Definition
Impossibility	Performance is no longer possible because of a supervening event.
Impracticability	A supervening event changes the inherent nature of performance to be more difficult, complex, or challenging, contravening a basic assumption of the parties' agreement. As a result, the cost of performing increases excessively and unreasonably.
Frustration of Purpose	One party's known principle purpose for entering a transaction has been destroyed or obviated by a supervening event. Performance remains possible, but is excused when one party would no longer receive the expected value of their counterparty's performance

Contract Issues Beyond Force Majeure

- Ordering Process
- Delivery Process
- Wind-Down and Termination Assistance Services
- Disaster Recovery and Business Continuity
- Exclusivity and Other Restrictive Covenants
- Self-Help and Step-In Rights
- Termination or Suspension

What do you do when a vendor or other third party notifies you that they suffered a breach that impacted your data?

- Is it a breach?
 - Terminology matters – incident vs. breach
 - Get the facts
 - What happened
 - When
 - What data impacted

Definition of Breach

Iowa Code 715C.1

- **Unauthorized acquisition of personal information** that compromises the **security, confidentiality or integrity** of the personal information.
- “Personal Information” = First name or first initial and last name in combination with one or more of the following if not encrypted or redacted:
 - Social security number
 - Driver’s License or other government ID number
 - Financial account, credit card or debit card number + expire date, pin or password that would allow use
 - Unique biometric data
 - Electric identifier that would allow access to financial account

Legal Obligations

Vendor

- 715c.2(2) – Notify You of breach
- Contract Duties
 - Notice
 - Investigation Rights
 - Audit Rights

Legal Obligations

You

- Notify impacted Individuals – Iowa Code 715C.2(1)
 - Mail to last known address
 - Email if that is customary method of communication with individual
 - Substitute Notice if costs exceeds \$250,000, 350,000+people impacted or lack contact information.
 - Email + posting on your website
 - If more than 500 impacted must notify Attorney General's office
- Notice must state
 - Description of incident
 - Date of incident
 - Type of information exposed
 - Contact information for consumer reporting agencies
 - Advice to report suspected incidents of identity theft to law enforcement

Legal Obligations

- Notice can be delayed if requested by law enforcement
- Otherwise must be made “in the most expeditious manner possible and without unreasonable delay” consistent with any measures necessary to determine contact information, scope of the breach, and restore the integrity and security of the data.
- Notice not required if after appropriate investigation or consultation with law enforcement, you determine that no reasonable likelihood of financial harm to impacted individuals will result.
 - Decision must be documented in writing and maintained for 5 years

HIPAA

- If you are a **covered entity** or business associate AND breached data is **protected health information**
- HIPAA has its own breach notification rule
- Similar to Iowa Code 715C and other similar states laws
- Analyze whether it is a breach through risk assessment factors
- Notice to impacted individuals
- Media notice requirements for breach impacted more than 500
- HHS keeps track

What Resources are Available

- Forensic Investigation
- Insurance
- Response Consultants/Services
 - Notices
 - Credit monitoring
- Contract Rights with breached party
 - Remedial Action
 - Indemnity
 - Additional Insured
 - Terminate



Questions



Thank
You

ERIC TUBBS

(515) 283-3183

etubbs@nyemaster.com

700 Walnut, Suite 1600

Des Moines, IA 50309

BEN ROACH

(515) 283-8158

bpr@nyemaster.com

700 Walnut, Suite 1600

Des Moines, IA 50309

NYEMASTER

NYEMASTER | GOODE PC

Des Moines Office

700 Walnut Street, Ste 1600,
Des Moines, IA 50309-3899
(515) 283-3100

Ames Office

1416 Buckeye Avenue, Ste 200,
Ames, IA 50010-8070
(515) 956-3900

Cedar Rapids Office

625 First Street SE, Ste 400,
Cedar Rapids, IA 52401-2030
(319) 286-7000