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COVID-19 Business Legal Alert: Navigating the New Norm

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Issues Facing Small & Large Companies

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Hot Topics

- **Force Majeure Clauses**
- **Debt Management – Up and Down**
- **Federal COVID-19 Legislation**
- **Shelter-in-Place/Stay at Home Orders**

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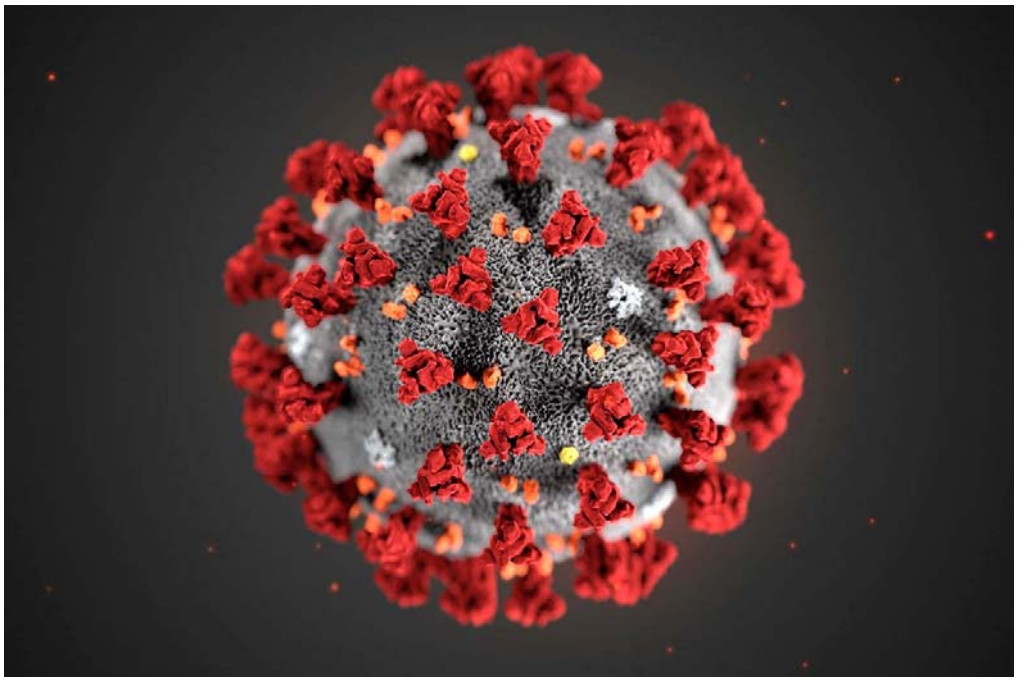
Force Majeure



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Force Majeure

Is the COVID-19 outbreak a force majeure?

It depends on your contract….

So… READ YOUR CONTRACT.

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Force Majeure

- No “standard” force majeure (FM) clause.
- Negotiated clauses like any other.
- FM terms vary by industry & by contract.

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Force Majeure

- The “boilerplate” FM clause at the back of the contract may hold some surprises.

- **The contract controls.**

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Force Majeure

Sample clause…

Should performance of any obligation created under this Agreement become **illegal or impossible** by reason of **fire, flood, storm,** act of God, **governmental authority, labor disputes, war or** any other cause not enumerated herein but which is **beyond the reasonable control** of the Party whose performance is affected, then the performance of any such obligation is suspended during the period of, and only to the extent of, such prevention or hindrance, provided the affected Party provides **reasonable notice of the event of force majeure** and exercises all reasonable diligence to remove the cause of force majeure.

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Force Majeure

- **List of events …**

- Flood
- Earthquake
- Fire
- Storm
- Governmental authority
- Strike or labor stoppages
- Acts of terrorism
- War
- Natural Disaster

- Epidemic ….?
- Pandemic…?
- Virus …?

- Act of God
- Catch–All

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Force Majeure

Act of God….?

- Force or act of nature
- Unforeseeable
- Could not be prevented by reasonable foresight or care
- Global COVID19 pandemic….will be litigated.

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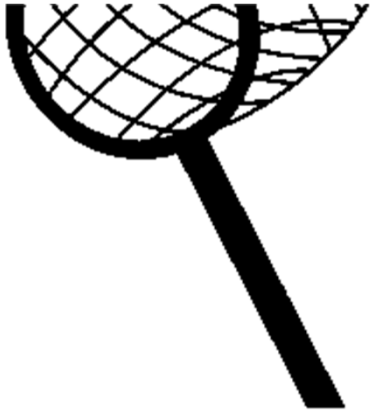
Force Majeure



Catch-all Clause

- Can be broad or narrow
- “Any like events”
- “Other similar events”
- “Other events beyond the reasonable control”
- Courts often read in unforeseeability requirements
- May be limited by the list of described events in the FM clause (Latin: *ejusdem generis)*

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Force Majeure

Standard for Non-Performance

- Impossible
- Impracticable
- Illegal
- More than financial hardship

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Force Majeure

Notice requirements

- What does your clause require? Reasonable? Prompt? Immediate? Within 5 days?
- What or when is reasonable notice?
- When did the force majeure begin?
  - When WHO declared a pandemic?
  - When President Trump declared a national emergency?
  - When Governor Abbott declared state disaster?
  - When Dallas County issued shelter in place order, only allowing "Essential Businesses" to operate?

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Force Majeure

Common Law Defenses

- Impossibility/Impracticability
  - Where the thing necessary for performance has been destroyed or deteriorated and where the action is prevented by government regulation.
  - The situation must be such that "the thing cannot be done," not that "[you] cannot do the thing."
  - Again, more than mere financial hardship.
  - Narrowly construed.

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Force Majeure

UCC Relief 2-615

- Seller did not assume the risk of the event.
- The non-occurrence of the event was a basic assumption.
- Performance "commercially impracticable" as a result of the event.

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Force Majeure

Leases

- Tenant FM?
  - Carve outs for payment/monetary obligations
  - Continuous operation clauses
  - Clauses re: compliance with laws, ordinances etc.
  - Catastrophe clauses may be implicated
  - Insurance requirements in lease
  - Insurance and related requirements
  - Check available coverage (property/liability, business interruption etc.).
  - Notice requirements
  - What if no government ordered closure?

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Force Majeure

Leases

- Landlord FM?
  - Excuse closure of common areas, shopping centers/mall, entire buildings
  - Excuse co-tenancy requirements or occupancy percentages
  - Excuse Tenant exclusivity terms

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Force Majeure

Risks and Benefits

- To take advantage of FM, contract may require you to provide notice.
- But if you are wrong or premature, you could be in breach of the contract… for your failure to perform or for wrongfully invoking FM…
- Are there specific carve-outs for payments or monetary obligations?
- What if you are on the receiving end of a FM notice? Then what?

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Debt Management

Non-Payment of Debt has a domino effect

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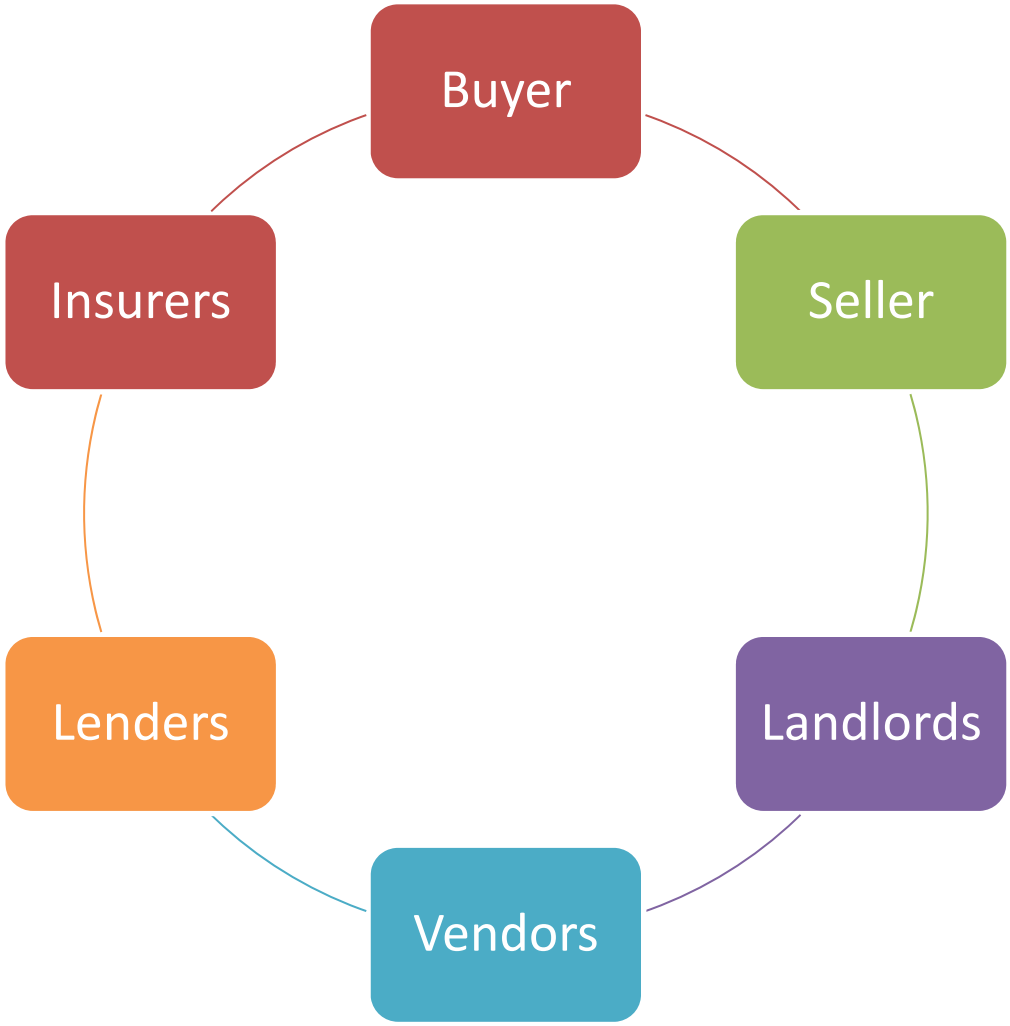

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Debt Management

The result is a balancing act between customer relationships and the bottom line

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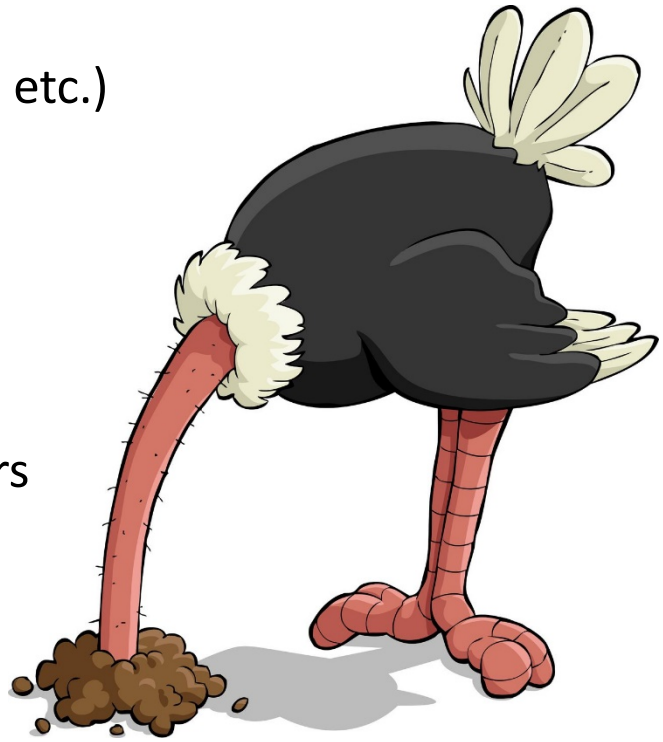
Be Proactive

Don't be an Ostrich.

-Don't wait. Communicate.
-Reach out to customers
-Find out if you are you a priority. Where are you on the "list?"
-Problem won't be going away
-Assess cash flow needs
-Reach out to your "Pipers" (lenders, insurers etc.)

Consult with counsel sooner, rather than later.

-Devise responses to FM notices
-Devise plans for workouts
-Advice on applicable statutes of limitations
-Advice on what is allowable with your lenders



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You aren't getting paid. Now what?

- Demand letters
- Notices to preserve lien rights or rights under other agreements
- File a lawsuit (statute of limitations)
- Work with customers

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Compromise

- Payout/Workout agreements
- Reduced principal/rent
- Reduced interest rates
- Forbearance/abatement*

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Get Creative with Security Options

- Personal guarantees
- Promissory notes
- Collateral
- Agreed Judgments

But, no matter what . . . get new agreements in writing.

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You owe? Don't ignore.
Get creative.

- Does your force majeure clause apply?
- Is re-financing* or restructuring an option?
- What can you realistically pay?
- Can you trade a service in exchange for a reduction?
- Can you negotiate a reduction in interest?

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Communication Is Key
Avoid Surprise

- If you are owed, be transparent about what you are willing or are permitted to consider

- If you owe, be transparent about your situation and what you can realistically afford to pay

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Federal Legislation

- Phase I
  - House Bill 6074 – Coronavirus Preparedness and Response Supplemental Appropriations Act
- Phase II
  - House Bill 6201 – Families First Coronavirus Response Action
- Phase III (before the House on 3/26/2020))

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Phase I – Preparedness & Response

- $8.3 billion in emergency funding
- SBA Economic Injury Disaster Loan (EIDL)
  - Low interest rates
  - Up to $2M
- Governor Abbott declared disaster & requested
- March 20, 2020 – SBA issued EIDL for all 254 Texas counties

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EIDL

- Max loan → $2M
- Available to small businesses & private and non-profit organizations
- Uses → fixed debts, payroll, A/P, & other bills (there are restrictions on uses)
- 3.75% for small businesses
- 2.75% for non-profits

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Phase II – Families First Coronavirus Response Act (FFCRA)

- FFCRA amended the Family and Medical Leave Act (FMLA)

AND

- FFCRA amended the Emergency Family and Medical Leave and Expansion Act (EFMLA)

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Application of EFMLA

- April 2, 2020 – December 31, 2020
- Fewer than 500 employees (there are exceptions)
- Only applies if the inability to work or telework is due to the need to care for a child under 18 if school or daycare is closed
- Note – having COVID-19 or caring for a family member with COVID-19 is likely covered by the traditional FMLA

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Application of EPSLA

- April 2, 2020 – December 31, 2020
- Fewer than 500 employees (there are exceptions)
- Eligibility:
  (1) ‘ee is subject to quarantine or isolation order for COVID-19
  (2) ‘ee is advised by a healthcare provider to self-quarantine due to COVID-19
  (3) ‘ee is experiencing symptoms of COVID-19

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Application of EPSLA

(4) ‘ee is caring for individual under quarantine or isolation order for COVID-19

(5) ‘ee is caring for a child whose school or daycare has closed due to COVID-19

(6) ‘ee is experiencing any other substantially similar condition specified by the U.S. Secretary of Health and Human Services

- Calculation of benefits varies depending on whether the ‘ee falls under 1-3 or 4-6 above.

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Navigating EFMLA & EPSLA

- https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave
- https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave
- https://www.bellnunnally.com/what-the-families-first-coronavirus-response-act-means-to-your-business

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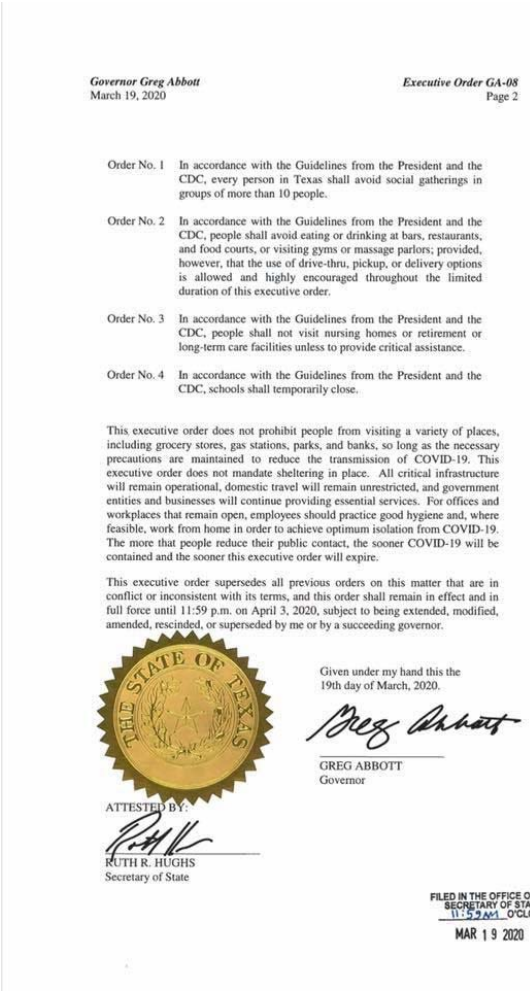
Governor's Executive Order

- Avoid groups over 10
- Avoid restaurants, bars, gyms, etc.
- No visiting nursing homes and retirement facilities
- Closing schools



Governor Greg Abbott *Executive Order GA-08*
March 19, 2020 Page 2

Order No. 1 In accordance with the Guidelines from the President and the CDC, every person in Texas shall avoid social gatherings in groups of more than 10 people.

Order No. 2 In accordance with the Guidelines from the President and the CDC, people shall avoid eating or drinking at bars, restaurants, and food courts, or visiting gyms or massage parlors; provided, however, that the use of drive-thru, pickup, or delivery options is allowed and highly encouraged throughout the limited duration of this executive order.

Order No. 3 In accordance with the Guidelines from the President and the CDC, people shall not visit nursing homes or retirement or long-term care facilities unless to provide critical assistance.

Order No. 4 In accordance with the Guidelines from the President and the CDC, schools shall temporarily close.

This executive order does not prohibit people from visiting a variety of places, including grocery stores, gas stations, parks, and banks, so long as the necessary precautions are maintained to reduce the transmission of COVID-19. This executive order does not mandate sheltering in place. All critical infrastructure will remain operational, domestic travel will remain unrestricted, and government entities and businesses will continue providing essential services. For offices and workplaces that remain open, employees should practice good hygiene and, where feasible, work from home in order to achieve optimum isolation from COVID-19. The more that people reduce their public contact, the sooner COVID-19 will be contained and the sooner this executive order will expire.

This executive order supersedes all previous orders on this matter that are in conflict or inconsistent with its terms, and this order shall remain in effect and in full force until 11:59 p.m. on April 3, 2020, subject to being extended, modified, amended, rescinded, or superseded by me or by a succeeding governor.

Given under my hand this the
19th day of March, 2020.

GREG ABBOTT
Governor

ATTESTED BY:

RUTH R. HUGHS
Secretary of State

FILED IN THE OFFICE OF THE SECRETARY OF STATE
11:59 AM O'CLOCK
MAR 19 2020

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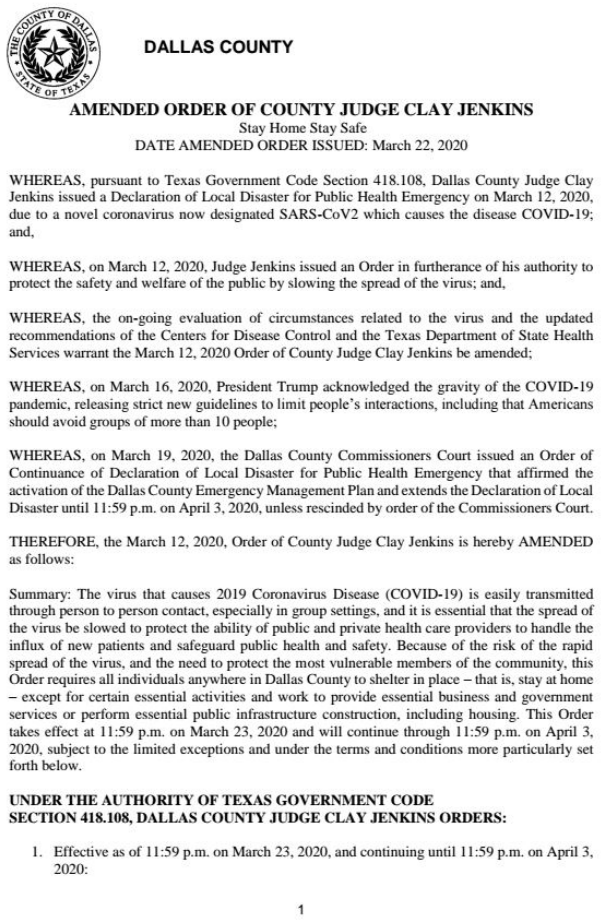
Shelter-in-Place/Stay at Home

- Dallas County
- Tarrant County
- Collin County
- Denton County
- City of Dallas
- City of Richardson



DALLAS COUNTY

AMENDED ORDER OF COUNTY JUDGE CLAY JENKINS
Stay Home Stay Safe
DATE AMENDED ORDER ISSUED: March 22, 2020

WHEREAS, pursuant to Texas Government Code Section 418.108, Dallas County Judge Clay Jenkins issued a Declaration of Local Disaster for Public Health Emergency on March 12, 2020, due to a novel coronavirus now designated SARS-CoV2 which causes the disease COVID-19; and,

WHEREAS, on March 12, 2020, Judge Jenkins issued an Order in furtherance of his authority to protect the safety and welfare of the public by slowing the spread of the virus; and,

WHEREAS, the on-going evaluation of circumstances related to the virus and the updated recommendations of the Centers for Disease Control and the Texas Department of State Health Services warrant the March 12, 2020 Order of County Judge Clay Jenkins be amended;

WHEREAS, on March 16, 2020, President Trump acknowledged the gravity of the COVID-19 pandemic, releasing strict new guidelines to limit people's interactions, including that Americans should avoid groups of more than 10 people;

WHEREAS, on March 19, 2020, the Dallas County Commissioners Court issued an Order of Continuance of Declaration of Local Disaster for Public Health Emergency that affirmed the activation of the Dallas County Emergency Management Plan and extends the Declaration of Local Disaster until 11:59 p.m. on April 3, 2020, unless rescinded by order of the Commissioners Court.

THEREFORE, the March 12, 2020, Order of County Judge Clay Jenkins is hereby AMENDED as follows:

Summary: The virus that causes 2019 Coronavirus Disease (COVID-19) is easily transmitted through person to person contact, especially in group settings, and it is essential that the spread of the virus be slowed to protect the ability of public and private health care providers to handle the influx of new patients and safeguard public health and safety. Because of the risk of the rapid spread of the virus, and the need to protect the most vulnerable members of the community, this Order requires all individuals anywhere in Dallas County to shelter in place – that is, stay at home – except for certain essential activities and work to provide essential business and government services or perform essential public infrastructure construction, including housing. This Order takes effect at 11:59 p.m. on March 23, 2020 and will continue through 11:59 p.m. on April 3, 2020, subject to the limited exceptions and under the terms and conditions more particularly set forth below.

UNDER THE AUTHORITY OF TEXAS GOVERNMENT CODE SECTION 418.108, DALLAS COUNTY JUDGE CLAY JENKINS ORDERS:

1. Effective as of 11:59 p.m. on March 23, 2020, and continuing until 11:59 p.m. on April 3, 2020:

1

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Dallas County

"This Order requires all individuals anywhere in Dallas County to shelter in place – that is, stay at home – except for certain essential activities and work to provide essential business and government services or perform essential public infrastructure construction, including housing."

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City of Richardson

"All individuals living within the City of Richardson are ordered to shelter at their place of residence . . . All persons may leave their residences only for Essential Activities, or to provide or perform Essential Governmental Functions, or to operate Essential Businesses, all as defined herein."

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Tarrant County

"All persons currently residing within the incorporated and unincorporated territory of Tarrant County shall stay at their place of residence, except as allowed by this Order. All persons may leave their residences only for Essential Travel, to work in Essential Businesses, Government Service, or Essential Critical Infrastructure, or to perform Minimum Basic Operations, as defined below."

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Denton County

"This Order requires all individuals in Denton County to STAY AT HOME – except for specific essential activities and work to provide essential business and government services or perform essential public infrastructure construction, including housing."

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Rockwall County

"This Order requires all individuals anywhere in Rockwall County to remain at home, except for certain essential activities and work to provide essential business and government services or perform essential public infrastructure construction, including housing, utilities, computer service, internet services, and road construction repair."

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Collin County

"All persons in Collin County are hereby ordered to stay home, except for travel related to essential activities. Entertainment activities are not considered essential activities . . ."

Then Collin County broke ranks . . .

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Collin County

"All businesses, jobs, and workers are essential to the financial health and well-being of our local economy and therefore are essential to the financial health and well-being of Collin County citizens . . . Businesses that are able to remain open need to remain open."

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Permitted Activity

- All tasks essential to health and safety of your or your household members
- Obtaining necessary supplies (food and supplies to work from home)
- Care for a family member or pet outside your home
- Outdoor activity with social distancing
- Go to work at an “essential businesses”

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Essential Business FAQ Resources

- https://www.dallascounty.org/covid-19/
- https://www.cor.net/departments/health-department/programs-events/health-news-events/coronavirus-disease/definition-of-essential-businesses

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Bell Nunnally Legal Services Resource Directory

As this situation unfolds, the Bell Nunnally team is here to provide resources to help you deal with issues. The Bell Nunnally Legal Services Resource Directory is frequently updated and can be accessed at:

https://www.bellnunnally.com/covid19-legal-services-resource-directory

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