

# DAILY REPORT

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## ADR Issues Swirl During This Extraordinary Time

The coronavirus pandemic has caused an increased level of activity related to the invocation of force majeure clauses, rental disputes, health care accommodations and parenting plan modifications.

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The coronavirus pandemic has caused an increased level of activity related to the invocation of force majeure clauses, rental disputes, health care accommodations and parenting plan modifications. Legal practitioners are helping landlords, tenants, people with illnesses and



Chanel Chauvet (left) and Gail Tusan.  
(Courtesy photos)

parents to deal with obstacles. These obstacles have forced people to adjust their typical routines. Consequently, mediators will be called upon to assist

with these novel processes, and they should be mindful of issues that can arise during these extraordinary times. Below are four examples.

### Force Majeure Provisions in Commercial Leases

Force majeure, or an event that cannot be anticipated or controlled, in effect acts as a contractual defense to delay or terminate contractual obligations based on the doctrines of impracticability, impossibility and frustration of purpose. On April 2, the State of Georgia pivoted when it issued a state-wide shelter-in-place order, which resulted in the temporary closure of most businesses. Many of these businesses have since gone out of business, and some are still trying to hang



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on. Because of the coronavirus pandemic, commercial entities are experiencing disruptions to their business practices and, in many cases, an economic downturn that has spurred contractual reviews to determine what redress is available, if any. Alternative dispute resolution can provide options for business owners who are facing financial obligations and cannot access the judicial system. Private mediators, arbitrators and

special masters can help parties (and their counsel) broker more realistic, better outcomes than may currently exist with strict adherence to the written obligations.

For commercial leases, the central question is whether rental obligations remain due under the contract. Some leases excuse rent if payment is “impossible” to perform, while others cite the “impractical” standard, which is a lower threshold that a tenant can likely clear in the current climate. By the same token, if there is an “acts of god” clause in the contract, then a landlord may be able to prevail upon proof that some of the damages were at least partially due to the tenant’s negligence or failure to mitigate. As it stands, the lease language is the only justification for a tenant to be relieved of the obligation to pay rent.

### **Rent Forgiveness**

Under a Sept. 4 order from the Centers for Disease Control and Prevention, Section 361 of the Public Health Service Act temporary halts residential evictions through the end of the year. To invoke the benefits of the moratorium, tenants are required to complete a declaration and submit it to their

landlords. When court proceedings resume and the moratorium ends, a key consideration will be how to balance the hardship for both tenants and landlords. Tenants may believe that their financial obligations have been forgiven because of the eviction moratorium. Legally speaking, however, tenants are still required to pay the balance due based on the terms of the lease, or they will likely face eviction once the moratorium is lifted. Irrespective of hardships, this is the current law, and any deviations from it will have to be mutually agreed upon by both the landlord and the tenant. Many courts would be wise to follow the lead of the Magistrate Court of Fulton County, which incorporates mediations into its case management protocol. ADR encourages compromise, and thereby help parties to resolve cases and courts to recover from extreme case backlogs caused by the suspension of hearings during the pandemic.

### **Virtual Delivery of Health Care**

Health care pivots have become a frequent occurrence during the coronavirus pandemic. Telemedicine, which

involves the delivery of care by computer or phone over the phone or on a video platform, has significantly increased in popularity. Before the pandemic, however, these appointments were generally not reimbursed by Medicare or private insurance. Today, health insurers have begun to recognize this method of care by expanding their coverage to include telehealth support services activated via “emergency-only plans.” Aetna, for example, has gone as far as waiving out-of-pocket costs for all in-network primary care visits via telemedicine platforms.

It remains to be seen whether this current care delivery model will continue. For mediators, it is important to consider how this could lead to disputes, mainly those related to compliance and malpractice issues. In Georgia, a telemedicine provider must have the patient’s medical history at the time of the consultation. Pursuant to the Ryan Haight Online Pharmacy Consumer Protection Act, it is improper for a physician to prescribe controlled substances, such as those for the treatment of chronic pain, based on a consultation via telemedicine. Therefore, although

telemedicine is especially convenient and beneficial nowadays, it still requires adherence to legal safeguards to ensure the safety of the patient. While these safeguards are certain to remain, there is no indication that coverage of medical care in this format will continue after the pandemic.

### Parenting Plan Modifications

Due to the coronavirus pandemic, customary visitation arrangements and interactions among co-parents may have changed. The general consensus, however, is that parents should follow their existing, court-ordered parenting plan if they are able to do so. Given the extraordinary circumstances, two pivots have become common: Parents agree to deviate from the child custody agreement because of the best interests of the child, or parents deviate from the child custody agreement to benefit personally. Even if parents agree to make pivot in the best interests of the child related to custodial time and visitation, it is likely to benefit one parent over the other. Therefore, the central question (keeping in mind the best interest of the child) is what is considered “fair” from

a parent’s perspective. “Fair” does not necessarily mean “equal,” but rather an equitable division of custodial time and visitation considering each parent’s work schedules and specific child care needs. With this in mind, some parents have relinquished their custodial time for health reasons, while others have sought court intervention in order to suspend the child custody arrangement for fear of the child’s health; i.e., the child is immunocompromised and the noncustodial parent refuses or is unable to quarantine, or the noncustodial parent works in the medical field. This determination is made on a case-by-case basis. It is important to note that any deviations made by the parents to the parenting plan are not waivers of the parental obligations included in the agreement, nor can they act as permanent modifications. A court is likely to view these types of changes as only temporarily necessary due to exceptional circumstances unless and until there is a court order mandating a modification.

In these extraordinary times, mediators will be called upon to help individuals and businesses work through unanticipated operational pivots and lifestyle

changes. Parties on both sides of most every issue must assess whether these COVID-19-related adjustments overall are for the better and should become permanent shifts in personal mindset and operating procedures. Ultimately, mediation will afford the flexibility and creativity needed by businesses and families to pick up the pieces and move forward in a post-pandemic environment.

*Senior Judge **Gail S. Tusan** is a JAMS panelist, serving as a mediator, arbitrator and special master. Her specialties include business disputes, health care law and family law matters. She currently serves on the board of the Dispute Resolution Section of the Atlanta Bar. **Chanel Chauvet** is a graduate of the University of Georgia School of Law and will receive her LL.M from the Geneva Academy of International Humanitarian Law and Human Rights in Switzerland in October 2020. She is a member of the State Bar of Georgia.*

