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Litigating an Invisible Enemy: Will the United States Insurance Industry Survive the Covid-19 Pandemic?

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LITIGATING AN INVISIBLE ENEMY: WILL THE UNITED STATES INSURANCE INDUSTRY SURVIVE THE COVID-19 PANDEMIC?

AN INSURANCE DEFENSE GUIDE TO SARS-COV-2 LITIGATION IN A POST-PANDEMIC AMERICAN JUDICIAL SYSTEM

Alisa Baird*

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I. INTRODUCTION

On January 30, 2020, the world unknowingly changed forever when the World Health Organization announced that a novel coronavirus originating from Wuhan, China, was a public health emergency of international concern.[1] By March 13, 2020, United States President Donald J. Trump had declared a national emergency due to the rapid spread of the highly contagious virus SARS-CoV-2, also known as "COVID-19."[2] The COVID-19 pandemic caused the worst economic disaster in global history.[3] While the long-term effects of the U.S. quarantine have yet to be fully recognized, the consequences on the American economy and judicial system are already emerging with the reopening of a new and unprecedented society.

This article provides a comprehensive guide for insurance defense of COVID-19 claims and litigating in a post-pandemic American judicial system. Part II begins with an analysis of business interruption litigation and litigation strategies to defend against claims from civil authority orders.[4] Part III shifts the focus to major lawsuits against directors and officers from the COVID-19 pandemic and the strongest defenses against liability.[5] Part IV moves toward general liability against employers for third-party bodily injury and harm from COVID-19 infection and exposure.[6] Part V focuses on employee discrimination and retaliation claims and legal defenses.[7] Part VI examines the devastating cases of nursing home negligence and wrongful death from COVID-19 outbreaks in long term care facilities and the applicable laws and defenses to each claim.[8] Part VII analyzes the categories of COVID-19 class action litigation and specific litigation strategies available

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1. *Rolling updates on coronavirus disease (COVID-19)*, WHO (June 17, 2020), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen.

2. Letter from Donald J. Trump, U.S. President, to Secretary Wolf, Secretary Mnuchin, Secretary Azar, and Administrator Gaynor (Mar. 13, 2020) (on file with the White House), https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/.

3. *Coronavirus shock vs. global financial crisis—the worst economic disaster*, DW, *https://www.dw.com/en/coronavirus-shock-vs-global-financial-crisis-the-worse-economic-disaster/a-52802211* (last visited Jan. 25, 2021).

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See infra* Part V.

8. *See infra* Part VI.

to party-defendants.[9] Finally, Part VIII gives an overview of juror mentalities and awards throughout historical times of crisis and predictions for COVID-19 nuclear verdicts.[10]

II. BUSINESS INTERRUPTION LOSSES

Businesses in nearly every United States industry suffered significant damage from the COVID-19 economic shutdown. This reality has led to the inevitable dispute between business owners and insurance providers over whether insurers should pay the financial losses sustained by the closures and how much, if any, is recoverable. As a result, the American legal system has been flooded with litigation against defendant insurers for recovery of COVID-19 business interruption losses. As insurance defense litigation will be overwhelmed with these cases for the next several years, it is necessary that defendant insurers understand which business interruption lawsuits are viable, their strongest defenses, and how to calculate business losses from government-ordered shutdowns.

A. Civil Authority Orders of Natural Disasters.

Civil authority orders are common provisions found within the business interruption coverage of a commercial property insurance policy. These provisions commonly apply when access to the insured's property is prohibited due to a governmental order issued as a result of direct physical loss or damage to the business owner's property or to the property adjacent to the business.[11] This coverage is most often triggered after a natural disaster scenario which leaves the land and business structures damaged or destroyed.[12] Hurricanes, tornados, and wildfires are all types of natural disasters which may cause federal, state, or local governments to shut down access to certain areas of a community due to hazardous conditions left in the wake of the catastrophe.[13] Business losses during the government-ordered prohibition from access to the employer's property may be recoverable under these provisions.[14]

Some of the most contentious areas of COVID-19 litigation center around debating the validity of business interruption claims and the calculation of business losses during the pandemic shutdown.[15] While the courts have historically never had an opportunity to

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9. *See infra* Part VII.

10. *See infra* Part VIII.

11. It should be noted that some policies are written to cover losses resulting only from direct physical loss or damage to property adjacent to the business, and not damage to the owner's property itself. *See generally* United Air Lines, Inc. v. Ins. Co. of the State of Pa., 439 F.3d 128 (2d Cir. 2006); Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co., 440 F. Supp. 3d 520 (D.S.C. 2020).

12. *See, e.g.*, *Kelaher*, 440 F. Supp. 3d 520; Assurance Co. Am. v. BBB Serv. Co., 593 S.E.2d 7 (Ga. Ct. App. 2003).

13. *See, e.g.*, *Kelaher*, 440 F. Supp. 3d 520; *Assurance Co.*, 593 S.E.2d 7.

14. *See, e.g.*, *Kelaher*, 440 F. Supp. 3d 520.

15. *See, e.g.*, Bethan Moorcraft, *Chubb sued by human rights non-profit over COVID-19 business interruption coverage*, INS. BUS. AM. (Apr. 29, 2020), https://www.insurancebusinessmag.com/us/news/breaking-news/chubb-sued-by-human-rights-nonprofit-over-covid19-business-interruption-coverage-221072.aspx; Lyle Adriano, *Six insurers face federal class action lawsuits for denying business interruption claims,* INS. BUS. AM. (Apr. 20, 2020), https://www.insurancebusinessmag.com/us/news/breaking-news/six-insurers-face-federal-class-action-lawsuits-for-denying-business-interruption-claims-220062.aspx.

interpret a virus in the context of inclusionary losses, that precedent is forthcoming.[16] At least six (6) major insurance providers are now named defendants in civil class action lawsuits by business owners seeking recovery of COVID-19 business interruption losses.[17]

B. COVID-19 Business Interruption Defenses.

When an insurance company is sued for the recovery of business interruption losses resulting from the COVID-19 economic shutdown, there are several defenses it must raise in order to successfully litigate the exclusion. Plaintiffs have a difficult burden showing COVID-19 civil authority orders are within the subject policy's intended inclusionary losses. The first argument a defendant must raise is the element of direct physical loss or damage to property. Since civil authority orders require physical loss or damage to the business owner's property or to the property adjacent to the business, defendant insurers must litigate on the grounds that the virus does not satisfy this element of the claim.[18] Plaintiffs' attorneys have gone on the attack with creative arguments in an attempt to satisfy the property damage requirement.[19] Plaintiffs argue that the coronavirus constitutes property damage because it "physically infects and stays on surfaces of objects or materials" and the virus contamination causes "a direct physical loss needing remediation to clean the surfaces of the establishment."[20] At best, this argument is weak and lacks primary authority and context.

Historically, courts have held that the "physical loss or damage" burden is met when "an item of tangible property has been physically altered by perils such as fire or water."[21] Albeit, a virus may cause physical harm to a human being, but it cannot visibly alter the tangible structure of a business. Insurance defendants must argue longstanding law that "physical damage" by its ordinary meaning excludes damage that does not physically disturb the building structure or is incorporeal.[22]

However, even if courts find the virus satisfies the property damage or loss requirement, defendant insurers may successfully develop a litigation strategy based on the rationale for the shutdown. Every state across the country has experienced its own unique set of quarantine orders. State governors and local lawmakers each developed their own rules and enforcement for non-essential business shutdowns.[23] An insurance

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16. *See, e.g.*, Moorcraft, *supra* note 15; Adriano, *supra* note 15.

17. The insurance company defendants are Aspen American Insurance, Auto-Owners Insurance, Lloyd's of London, Society Insurance, Oregon Mutual Insurance, and Topa Insurance Company. Adriano, *supra* note 15.

18. *See generally United Air Lines*, 439 F.3d 128; *Kelaher*, 440 F. Supp. 3d 520; MRI Healthcare Ctr. Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal. App. 4th 766 (2010).

19. *See* Complaint, French Laundry Partners, LP, et al. v. Hartford Fire Ins., et al. (Cal. Super. Ct. Mar. 25, 2020).

20. *See* Complaint, Cajun Conti LLC, et al. v. Certain Underwriters at Lloyd's, London, et al., No. 2020-CC-01183 (2020) (available at https://www.insurancejournal.com/research/app/uploads/2020/03/Oceana-Petition-for-Dec-J-executed.pdf).

21. *MRI Healthcare*, 187 Cal. App. 4th at 778–79 (internal quotations omitted).

22. *See generally id.*; Complaint, *French Laundry Partners* (Cal. Super. Ct. Mar. 25, 2020).

23. *See, e.g.*, Press Release, OFF. TEX. GOVERNOR GREG ABBOTT, *Governor Abbot Issues Executive Order, Implements Statewide Essential Services And Activities Protocols* (Mar. 31, 2020) (on file with author); Okla. Exec. Order No. 2020-04 (Mar. 28, 2020), https://www.cityoftulsa.org/media/12617/2020-04.pdf; J. Clay Jenkins, *Safer At Home Order*, DALLAS CTY. (Apr. 18, 2020),

defendant may succeed in litigation by arguing that the business did not close due to property damage by the virus, but that the shutdown orders came as a result of a public health crisis. As civil authority orders require the government's interference with a business to be *the direct result* of physical damage or loss of the insured's property or the property adjacent to it, then all shutdowns made from fear of the outbreak or as precautionary measures do not satisfy the requirement.[24]

This distinction was emphasized by the court in *Jones Walker* when Plaintiffs filed suit for business income losses as a result of shutdown orders over Hurricane Gustav.[25] The Mayor of New Orleans, Louisiana, ordered a mandatory evacuation and "cited anticipated high tides and the possibility of hurricane-force winds and widespread severe flooding among [other factors]" which made the shutdown necessary.[26] The *Jones Walker* court held that the Plaintiff could not establish the required nexus between the civil authority order and the actual property damage or loss from the hurricane because the prohibition was issued *in anticipation of* a possible catastrophic occurrence.[27] Consequently, Defendants' motion for summary judgment was granted and business interruption losses were denied by the court.[28]

In *United Air Lines, Inc. v. Ins. Co. of State of Pennsylvania*, Plaintiff United Air Lines, Inc. ("United") sued Insurance Company of the State of Pennsylvania ("ISOP") seeking indemnity for losses suffered as a result of September 11, 2001, terrorist attacks on the New York City World Trade Center and the Pentagon in Arlington, Virginia.[29] United had a ticket office in the World Trade Center which was destroyed during the September 11, 2001, terrorist attacks.[30] It was not disputed that United could recover for lost earnings attributable to the ticket office's physical damage.[31] However, United's Arlington facilities suffered no significant physical damage as a result of the attack on the Pentagon.[32]

The court determined that, for United to recover business losses, it would be "required to demonstrate that the business interruption at issue resulted from either 1) physical damage to property at the insured location in question, i.e., the Airport, or 2) an order of civil authority as a direct result of physical damage to property adjacent to the insured location in question."[33]

In granting the Defendant's motion for summary judgment, the court held it was factually impossible for United to show that its facilities closed as a direct result of damage to the Pentagon; the airport's shutdown occurred prior to the attack on the Pentagon.[34] The

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https://www.dallascounty.org/Assets/uploads/docs/covid-19/orders-media/041820-DallasCountyOrder.pdf.

24. Order and Reasons at 6–7, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp. et al., No. 09-6057 (E.D. La. Oct. 11, 2020).

25. *Id.* at 2.

26. *Id.* at 2.

27. *Id.* at 4 (emphasis added).

28. *Id.* at 14–15.

29. *United Air Lines, Inc.*, 439 F.3d at 129.

30. *Id.*

31. *Id.*

32. *Id.*

33. United contends that the Pentagon fulfilled this requirement. *Id.*

34. *United Air Lines*, 439 F.3d at 134.

court explained that the government's decision to halt air travel was based *on fears of future attacks* and not the result of destruction to the Pentagon.[35] COVID-19 government shutdown orders are generally a comparable scenario. Several U.S. states and local governments closed non-essential businesses as a preventative public health control measure during the early stages of the pandemic.[36]

For example, Governor Gina Raimondo of Rhode Island went to great lengths to attempt to protect the state from outsiders fleeing to Rhode Island seeking refuge from neighboring states with high infection rates.[37] With the largest pandemic crisis centered around New York City, Governor Raimondo conceded that a surge in Rhode Island cases was inevitable and that the state must prepare for a state-wide public health crisis.[38] Accordingly, insurance defendants litigating in states such as Rhode Island have a strong defense that the civil authority orders were responsive to the anticipation of a catastrophic COVID-19 occurrence and not due to an actual outbreak of high magnitude.

Next, a defendant insurer may prevail on the plain language within the government's civil authority order.[39] Plaintiffs seeking compensation for business interruption losses must show a *complete* prohibition to access their property during the government-ordered shutdown.[40] For now, this requirement is somewhat of an overlooked caveat in COVID-19 business interruption litigation.[41] The majority of non-essential business shutdowns do not completely prohibit the owner from accessing their property.[42] For example, the majority of states followed the White House and Center for Disease Control and Prevention guidelines, which directed citizens to avoid eating and drinking in bars, restaurants, and food courts.[43] State and local government shutdowns prohibited in-person dining at these establishments but allowed the non-essential businesses to remain open for

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35. *Id.*

36. *See, e.g.*, Georgia Governor Brian Kemp announced that he made the decision to initiate a civil authority order shutdown after learning that COVID-19 may be transmitted by non-symptomatic carriers. Greg Bluestein, *Georgia governor to order shelter in place to curb coronavirus,* AJC (Apr. 1, 2020), https://www.ajc.com/blog/politics/breaking-georgia-governor-orders-shelter-place-curb-coronavirus/vdAoWkjq39W2usr9e8W8BL/. Missouri Governor Mike Parson announced the state's need to "stay ahead of the battle" with the enforcement of his stay-at-home order. @GovParsonMO, TWITTER (Apr. 3, 2020, 5:04 PM), https://twitter.com/GovParsonMO/status/1246196795107160064?s=20.

37. *See* R.I. Exec. Order No. 20-13 (Mar. 28, 2020), https://governor.ri.gov/documents/orders/Executive-Order-20-13.pdf.

38. *See id.*; G. Wayne Miller, *R.I. Tightens Restrictions After 2 Virus Deaths,* PROVIDENCE J. (Mar. 28, 2020, 1:28 PM), https://www.providencejournal.com/news/20200328/ri-tightens-restrictions-after-2-virus-deaths.

39. *See* S. Hospitality, Inc. v. Zurich Am. Ins. Co., 393 F.3d 1137, 1139 (10th Cir. 2004).

40. *See id.* at 1140 (emphasis added).

41. *See generally S. Hospitality*, 393 F.3d 1137.

42. For example, Alabama, Louisiana, Illinois and Texas are among many states that have limited non-essential businesses such as restaurants to drive-through and takeout orders only. *See* Scott Harris, State Health Officer, *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19* (Apr. 3, 2020), https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf; Ill. COVID-19 Exec. Order No. 8 (Mar. 20, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx; Tex. Exec. Order No. GA 14 (Mar. 31, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-14_Statewide_Essential_Service_and_Activity_COVID-19_IMAGE_03-31-2020.pdf.

43. *See* CDC, *Considerations for Events and Gatherings* (last updated Jan. 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html.

drive-through, delivery, and takeout orders.[44] Essentially, business owners were not completely prohibited from access to their property. The courts commonly rule in line with this argument in circumstances of natural disasters.[45]

In *Southern Hospitality, Inc. v. Zurich Am. Ins. Co.*, an Oklahoma hotel owner ("Southern Hospitality") sought business losses resulting from canceled reservations after U.S. air travel was halted by government order during the September 11, 2001, terrorist attacks.[46] The dispute between the parties centered on what constituted prohibited access to the hotel's property.[47] The hotel's business interruption coverage contained a civil authority order provision which read:

> Civil Authority. We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that *prohibits access to the described premises due to direct physical loss of or damage to property*, other than at the described premises, caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to two consecutive weeks from the date of that action.[48]

Southern Hospitality argued that the airport closures completely prohibited out-of-state customers from accessing the hotel, which resulted in substantial business losses, and that the court should interpret this prohibition as an inclusionary business interruption.[49] In its motion for summary judgment, Defendant insurer contended the order did not actually prohibit hotel access but only frustrated it to some extent.[50] Further, the hotel's insurance policy was a contract under Oklahoma law and must be enforced by its plain and ordinary meaning.[51]

The *Southern Hospitality* court found that, while it was factually undisputed the hotel indeed remained open during the shutdown, the issue was whether the civil authority order constituted prohibited access to the property.[52] The court reasoned that "the plain and ordinary meaning of 'prohibit' is to 'formally forbid, esp. by authority' or 'prevent[,]'" and that "'[a]ccess' means 'a way of approaching or reaching or entering.'"[53] While the hotel's business was frustrated by the shutdown, it did not completely deny access to the property.[54]

When the law is applied to COVID-19 cases, defendant insurers will likely prevail on summary judgment in a large percentage of business interruption claims by restaurant

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44. *See, e.g.*, Scott Harris, State Health Officer, *Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19* (Apr. 3, 2020), https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf; Ill. COVID-19 Exec. Order No. 8 (Mar. 20, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx; Tex. Exec. Order No. GA 14 (Mar. 31, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-14_Statewide_Essential_Service_and_Activity_COVID-19_IMAGE_03-31-2020.pdf.

45. *See, e.g.*, *S. Hospitality*, 393 F.3d 1137.

46. *Id.* at 1138

47. *See id.* at 1139–40.

48. *Id.* at 1139 (emphasis added).

49. *Id.* at 1139–40.

50. *S. Hospitality*, 393 F.3d at 1140.

51. *Id.* at 1139.

52. *Id.* at 1139–40.

53. *Id.* at 1139–40.

54. *Id.*

and other non-essential business owners where business operations were frustrated but not completely prohibited during the economic shutdown.[55]

C. How to Calculate COVID-19 Business Losses.

There are two widely accepted methods to calculate business interruption losses in natural disaster scenarios: the Post-Catastrophe Economy *Ignored* Approach and Post-Catastrophe Economy *Considered* Approach.[56] The majority of federal and state courts follow one of these two methods to calculate natural disaster business interruption losses.[57] In the Post-Catastrophe *Ignored* Approach, business losses are calculated in a scenario as if the catastrophe never occurred.[58] In other words, the value of the business interruption is determined solely on historical sales data.[59] In the Post-Catastrophe Economy *Considered* Approach, business interruption losses consider a business's profitability during a hypothetical scenario that the catastrophe occurred but the business was not damaged and remained open.[60] In this approach, the actual profits after the business reopens are critical to the calculation.[61]

In cases where defendant insurers are responsible for COVID-19 business losses, it is necessary they understand lost profits analyses for business interruption claims. As previous litigation has shown, how business losses should be calculated is a heavily litigated area of the law; the outcome may mean the difference of millions of dollars.[62]

This risk is exemplified in the Fifth Circuit case, *Catlin Syndicate Ltd. v. Imperial Palace of Mississippi, Inc.*, when Hurricane Katrina damaged the Imperial Palace casino, forcing a government-ordered shutdown.[63] Once Imperial Palace reopened, its revenues spiked dramatically more than its pre-hurricane revenue.[64] The main issue before the *Imperial Palace* court was how to compute the casino's business losses.[65] The parties' disagreement on how the business interruption should be calculated was the difference of over $70 million.[66]

The insurance company argued the Post-Catastrophe *Ignored* Approach should be used and that the business losses should be based on Imperial Palace's profits as if

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55. *See generally S. Hospitality*, 393 F.3d 1137.

56. *See* Christopher French, *The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses*, 30 GA. L.J. 461 (2014); *compare* Berk-Cohen Assocs., LLC v. Landmark Am. Ins. Co., 433 Fed. App'x 268 (5th Cir. 2011), *with* Am. Auto. Ins. Co. v. Fisherman's Paradise Boats Inc., No. 93-2349-CIV-GRAHAM, 1994 U.S. Dist. LEXIS 21068 (S.D. Fla. Oct. 1, 1994).

57. *See* sources cited *supra* note 56.

58. *See* sources cited *supra* note 56.

59. *See* sources cited *supra* note 56.

60. *See* Christopher French, *The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses*, 30 GA. L.J. 461 (2014); *compare Berk-Cohen Assocs., LLC* v. Landmark Am. Ins. Co., 433 Fed. App'x 268 (5th Cir. 2011), *with* Am. Auto. Ins. Co. v. Fisherman's Paradise Boats Inc., No. 93-2349-CIV-GRAHAM, 1994 U.S. Dist. LEXIS 21068 (S.D. Fla. Oct. 1, 1994) (holding that taking advantage of economic opportunities such as an increase in demand after Hurricane Andrew was not within the scope of the policy).

61. *See* sources cited *supra* note 60.

62. *See* Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc., 600 F.3d 511, 516 (5th Cir. 2010).

63. *Id.* at 512.

64. *Id.*

65. *Id.*

66. *Id.*

Hurricane Katrina had never hit.[67] In other words, the court should only look at pre-hurricane profits.[68] In contrast, Imperial Palace argued that "the correct hypothetical was not one in which Hurricane Katrina did not strike at all; it was one in which Hurricane Katrina struck but did not damage Imperial Palace's facilities."[69] Imperial Palace pushed for the Post-Catastrophe *Considered* Approach which included consideration of profits earned when it reopened after Katrina.[70] The *Imperial Palace* court held it was a jurisdiction utilizing the Post-Catastrophe Economy *Ignored* Approach and that it would not "look prospectively to what occurred after the loss."[71] Thus, Imperial Palace was unable to benefit from its inflated revenue stream resulting from the natural disaster.[72]

III. DIRECTORS AND OFFICERS LIABILITY

On March 4, 2020, the Securities and Exchange Commission ("SEC") released an order cautioning companies to inform investors of potential COVID-19-related business risks.[73] Unfortunately, the SEC's cautionary statement did not appear to prevent corrupt practices within the corporate sector.[74] By April 2020, the first wave of allegations involving coronavirus-related securities fraud and misconduct by major corporate directors and officers ("D&O") went public.[75] Initially, there was a fair amount of skepticism as to whether any of these allegations of executive misconduct would ever see the light of a courtroom. After all, a D&O claim had never been litigated in connection with any other virus outbreak in recent history.[76] This skepticism was quickly put to rest with the swift filings of securities class action lawsuits against two major corporations in the medical and tourism industries—Inovio Pharmaceuticals, Inc. and Norwegian Cruise Lines.[77] The allegations against the directors and officers range from wrongful public misstatements to blatantly misleading sales tactics.[78] As the American economy experiences tremendous obstacles from the COVID-19 pandemic, directors and officers must adjust to fulfill their fiduciary duties to their corporations and do so without running afoul of securities laws.

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67. *Catlin Syndicate, Ltd.*, 600 F.3d at 513.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 516. The Court previously used the Post-Catastrophe *Ignored* Approach in *Finger Furniture*. *Finger Furniture Co. v. Commonwealth Ins. Co.,* 404 F.3d 312, 314 (5th Cir. 2005).

72. *See Catlin Syndicate, Ltd.*, 600 F.3d 511.

73. *See* S.E.C. Notice, 85 Fed. Reg. 17610 (Mar. 30, 2020).

74. *See* Complaint, McDermid, et al. v. Inovio Pharms., Inc., et al., No. 2:20-cv-01402-GJP (E.D. Pa. 2020); Complaint, Douglas, et al. v. Norwegian Cruise Lines, et al., No. 1:20-cv-21107 (S.D. Fla. 2020).

75. *See* Complaint, *McDermid*, No. 2:20-cv-01402-GJP (2020); Complaint, *Douglas*, No. 1:20-cv-21107.

76. E.g., there were no securities lawsuits filed against directors or officers during the MERS, SARS, or Ebola outbreaks. *See* Philipp Strasser & Jan Phillip Meyer, *Directors' and Officers' Liability in Times of a Global Pandemic Crisis - Do Desperate Times Really Call for Desperate Measures?*, LEGAL500, https://www.vhm-law.at/UserFiles/Media/downloads/docs/200330_PhS-JM_D-O-Liability_COVID19.pdf (last visited Jan. 25, 2021).

77. Complaint at 1, *McDermid*, No. 2:20-cv-01402-GJP; Complaint at 5*, Douglas*, No. 1:20-cv-21107.

78. *See* Complaint, *Douglas*, No. 1:20-cv-21107.

A. Norwegian Cruise Lines and the COVID-19 Smokescreen.

The COVID-19 outbreak tested the ethical standards of many businesses and corporations with the sudden and dramatic halt of the global economy. The dilemma was real for many corporate executives—disclose potential business/market-related disruptions and risk bankruptcy or keep up appearances to gain marketable securities.

Certain shareholders highlighted this predicament in their securities class action lawsuit against Norwegian Cruise Lines ("Norwegian"), its Chief Executive Officer, Frank J. Del Rio ("Del Rio"), and Chief Financial Officer, Mark A. Kempa ("Kempa").[79] Plaintiffs to the lawsuit represent shareholders who purchased shares from February 20, 2020, through March 12, 2020.[80] The class period began on February 20, 2020, when Norwegian published its COVID-19 press release along with its Form 8-K filed with the SEC.[81] The press release stated that Norwegian's cruise sales flourished in spite of the pandemic and that the company was even ahead of its yearly sales goals.[82] Norwegian partly attributed its success to having "proactively implemented several preventive measures to reduce potential exposure and transmission of COVID-19" and boasted that the company "has an exemplary track record of demonstrating its resilience in challenging environments."[83]

On February 27, 2020, Norwegian filed a Form 10-K with the SEC which stated that the company "must meet the U.S. Public Health Service's requirements" and noted that it was rated "at the top of the range of CDC and FDA scores achieved by the major cruise lines."[84] Norwegian cited its 10-K risk factors as "[t]he spread of the COVID-19 coronavirus, particularly in North America, could exacerbate its effect on [Norwegian]."[85] Any future wide-ranging health scares would also likely "adversely affect [Norwegian's] business, financial condition, and results of operations."[86] Shareholder Plaintiffs allege that these and several other statements within Norwegian's SEC filings were intentionally inaccurate and misleading.[87]

Shareholder Plaintiffs allege that Norwegian's D&Os made false and misleading statements and/or failed to disclose that:

> (1) the Company was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members; and (2) as a result, Defendants' statements regarding the Company's business and operations were materially false and misleading and/or lacked a reasonable basis at all relevant times.[88]

Plaintiffs bolstered their claims by reference to allegedly leaked emails from

79. Complaint, *Norwegian Cruise Lines, et al.,* No. 1:20-cv-21107 (2020).

80. *Id.* at 1–2.

81. Complaint at 5*, Douglas*, No. 1:20-cv-21107. Norwegian's Form 8-K contained its stable financial results for fourth quarter 2019 and year-end 2019.

82. *Id.*

83. *Id.*

84. NORWEGIAN CRUISE LINE HOLDINGS LTD., ANNUAL REPORT (FORM 10-K), at 33 (2019).

85. *Id.* at 49.

86. *Id.* at 41.

87. Complaint at 13–14, *Douglas*, No. 1:20-cv-21107.

88. *Id.* at 7.

Norwegian executives grooming their employees on how to publicly downplay COVID-19.[89] In a March 11, 2020, Miami New Times exposé entitled "Leaked Emails: Norwegian Pressures Sales Team to Mislead Potential Customers About Coronavirus," the first allegations of corporate misrepresentations were made against Norwegian.[90] The article published a series of "leaked emails" which appear to show Norwegian executive officers directing sales staff to lie to customers about COVID-19 and pressuring them to make unrealistically high sales quotas during the industry slump.[91] Employees were even provided scripted answers to give to customers, such as that the coronavirus cannot survive or infect people in the warm climates of the Caribbean.[92]

On March 12, 2020, the Washington Post ran an article entitled "Norwegian Cruise Line Managers Urged Salespeople to Spread Falsehoods About Coronavirus" which alleged even more misconduct by the corporation's directors and officers.[93] The article reported that leaked internal memoranda included statements such as "[t]he coronavirus will not affect you" and "Fact: Coronavirus in humans is an 'overhyped pandemic scare.'"[94] The article quotes unnamed company executives as being furious by the alleged email leaks and quotes one executive as stating, "[o]ne of our own ratted."[95]

Following the negative press coverage, Norwegian's share price dramatically dropped 26.7%—resulting in losses for investors.[96] Plaintiff shareholders allege the losses were the direct result of the wrongful misstatements and misleading sales tactics of Norwegian directors and officers.[97]

B. Inovio Pharmaceuticals and the COVID-19 Bait-and-switch.

On March 12, 2020, the second COVID-19-related securities class action lawsuit was filed against Inovio Pharmaceuticals, Inc. ("Inovio") and its Chief Executive Officer, J. Joseph Kim ("Kim").[98] Plaintiff shareholders allege that, on February 14, 2020, Kim appeared on Fox Business News and announced Inovio had developed a COVID-19 vaccine in only three (3) hours after obtaining the DNA sequence from the virus.[99] Kim further declared that Inovio's "goal is to start phase one human testing in the U.S. early this summer."[100] Inovio's stock rose more than ten percent within days after the broadcast.[101]

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89. *Id.*

90. Alexi C. Cardona, *Leaked Emails: Norwegian Pressures Sales Team to Mislead Potential Customers About Coronavirus,* MIAMI NEW TIMES (Mar. 11, 2020), https://www.miaminewtimes.com/news/coronavirus-norwegian-cruise-line-leaked-emails-show-booking-strategy-11590056.

91. *Id.*; Complaint*, Douglas*, No. 1:20-cv-21107 (2020).

92. *Id.*

93. *See* Drew Harwell, *Norwegian Cruise Line managers urged salespeople to spread falsehoods about coronavirus,* WASH. POST (Mar. 12, 2020), https://www.washingtonpost.com/business/2020/03/12/norwegian-cruise-line-managers-urged-salespeople-spread-falsehoods-about-coronavirus/.

94. *Id.*

95. *Id.*

96. Complaint at 8*, Douglas*, No. 1:20-cv-21107.

97. *Id.* at 14.

98. *See* Complaint, *McDermid*, No. 2:20-cv-01402-GJP.

99. *Id.* at 2.

100. *Id.*

101. *Id.*

On March 2, 2020, President Donald J. Trump had a meeting with several leaders in the medical and pharmaceutical industries to discuss the U.S. plan of action for the COVID-19 national crisis.[102] The meeting was highly publicized and nationally broadcast through multiple media outlets.[103] Kim attended this meeting at the White House on behalf of Inovio to discuss its medical breakthroughs with regard to the virus.[104] While speaking to President Trump during the live broadcast, Kim again stated that Inovio had developed a COVID-19 vaccine within three (3) hours and that human testing would begin in April 2020.[105] After the White House conference, Inovio's share price "more than quadrupled" reaching an intraday high of $19.36 on March 9, 2020.[106]

The excitement would not last long. On March 9, 2020—the same day as Inovio's intraday-high record—Citron Research released a statement on social media: "[@Inovio] SEC should immediately HALT this stock and investigate the ludicrous and dangerous claim that they designed a vaccine in 3 hours. This has been a serial stock promotion for years. This will trade back to $2. Investors have been warned."[107]

The day after Citron Research's Twitter statement, Inovio's share price dropped from $18.72 to $9.83 per share.[108] This drop represented a 71% decline from the share-class-period high and a $643 million loss of market capitalization.[109] After the Citron Research statement, Inovio allegedly attempted damage control by qualifying its previous statements as not actually having created a vaccine, but having designed a "vaccine construct."[110]

Plaintiff shareholders filed their securities class action lawsuit alleging that Inovio and its CEO, J. Joseph Kim, "falsely described their product as a fully completed vaccine when it was nothing of the sort."[111] The defendants "falsely claimed they had developed the vaccine in a matter of hours which is a scientific impossibility."[112] The defendants also "falsely state[d] that they would be able to begin human trials in April 2020 when they had no reason to believe that they would have the necessary regulatory approvals to do so."[113]

Plaintiffs alleged corporations and executives have used COVID-19 as an opportunity to portray themselves as positioned to take advantage of the outbreak or as positioned to prosper because of the outbreak.[114] Despite the lack of precedent for D&O liability during pandemic-induced economic downturns, the post-pandemic American judicial system will likely become overwhelmed by shareholders who experienced

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102. *Id.*
103. Complaint, *McDermid*, No. 2:20-cv-01402-GJP.
104. *Id.* at 6.
105. *Id.*
106. *Id.* at 4.
107. @CitronResearch, TWITTER (Mar. 9, 2020, 9:38 AM), https://twitter.com/CitronResearch/status/1237025059056709632.
108. Complaint at 4, *McDermid*, No. 2:20-cv-01402-GJP.
109. *Id.*
110. *Id.* To analogize, Inovio's statement is like saying it built a house and then later stating it only meant that it had the blueprints designed.
111. *Id.* at 7.
112. *Id.*
113. Complaint at 7, *McDermid*, No. 2:20-cv-01402-GJP.
114. *See id.*

substantial losses during the 2020 stock market crash.

C. Securities Exchange Act of 1934: Litigation and Defenses.

Norwegian's and Inovio's corporate misstatements and fraudulent behavior are alleged violations of the Securities Exchange Act of 1934.[115] The Plaintiffs in these securities class action lawsuits alleged that corporate executives blatantly misled their investors and artificially inflated stock prices.[116] Specifically, Norwegian and Inovio are alleged to have violated Section 10(b) (17 C.F.R. § 240.10b-5) of the Securities Exchange Act of 1934 which states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[117]

Additionally, the directors and officers are alleged to be liable in their individual capacities under Section 20(a) (15 U.S.C. § 78t(a)) which states:

> Joint and several liability; good faith defense. Every person who, directly or indirectly, controls any person liable under any provision of this chapter [15 U.S.C.S. §§ 78a et seq.] or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable (including to the Commission in any action brought under paragraph (1) or (3) of section 78u(d) of this title), unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.[118]

At first blush, securities lawsuits against corporate directors and officers for COVID-19-related misconduct may appear to be plaintiff's verdict cases. In reality, D&O defendants have strong defenses to refute the presumed nexus of alleged corporate misconduct and shareholder losses.[119] The number of strong defenses are due largely to the pandemic's overall devastation to the American economy.[120] COVID-19 will undoubtedly cause a record-setting recession and the totality of its impact is not yet recognized.[121] Simply put, the American economy went "[f]rom full throttle to sudden

115. *See id.*; Complaint*, Douglas*, No. 1:20-cv-21107.
116. *See* sources cited *supra* note 115.
117. 17 C.F.R. § 240.10b-5.
118. 15 U.S.C. 78t(a).
119. *See Fireman's Fund Ins. Co. v. Univ. of Georgia Athletic Ass'n, Inc.*, 288 Ga. App. 355, 654 S.E.2d 207 (2007).
120. Kathleen Howley, *COVID-19 will cause a record-setting recession, economist say,* HOUSINGWIRE (Mar. 27, 2020), https://www.housingwire.com/articles/covid-19-will-cause-a-steep-recession-followed-by-a-bounce-back/.
121. *Id.*

stop" according to Wells Fargo economists.[122]

COVID-19 caused the history's largest point crash for the Dow Jones Industrial Average on March 9, 2020—one week later, it did it again.[123] The Dow hit a record 2,997.10 loss on March 16, 2020, beating even the 1929 Black Monday record low.[124] The downward spiral caused by COVID-19 fears continued worsening as global fears of the virus heightened, businesses shut down, and oil prices plummeted.[125]

As a result, D&O defendants must heavily focus their litigation strategy on loss causation. By a preponderance of the evidence, plaintiff shareholders must prove their share losses came as a direct result of the D&O's misrepresentations or fraudulent behavior. The extrinsic circumstances of the American economy make this a nearly impossible burden to prove. In an economy where there are significant domestic and international travel bans in place, the stock market broke record lows twice in one week, national agricultural production is at an all-time low, the oil and gas industry is on the brink of bankruptcy, and over twenty-six (26) million Americans are unemployed, a plaintiff is unlikely to prove that corporate executives' conduct was the absolute cause of their share loss. Defendants will successfully raise doubt as to a plaintiff shareholder's securities claims by arguing that a pandemic American economy caused the stock market to crash. Whether D&O misconduct or omissions occurred or not, the outcome is the same.

Further, D&O defendants must litigate aggressively that the timeline of events surrounding the share loss alone is not enough for liability. Basically, the fact that share prices dropped only after 'the truth' of D&O wrongdoing became public *is not enough* to prove the losses resulted from such conduct. The courts have long held that the sequence of events leading to share losses does not satisfy causation.[126] For example, the Supreme Court case *Dura Pharms., Inc. v. Broudo* involves a group of people who purchased stock from Dura Pharmaceuticals between April 15, 1997, and February 24, 1998 ("Respondents").[127] Respondents brought a securities fraud class action against Dura Pharmaceuticals and some of its managers and directors ("Dura").[128] Respondents claimed: (1) Dura made false statements regarding profits; (2) Dura falsely claimed the Food & Drug Administration ("FDA") would soon approve an asthmatic spray device; (3) Dura stated in February 1998 that sales would be low; (4) Dura announced eight months later that the FDA would not approve the spray device; and (5) Dura's stock dropped in value the next day and recovered within a week.[129] Most importantly, Respondents claimed they had paid an inflated price for stock and thereby suffered damages.[130]

The District Court dismissed the complaint holding it failed to allege loss causation

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122. *Id.*

123. Kimberly Amadeo, *How Does the 2020 Stock Market Crash Compare With Others?,* THE BALANCE (last updated Apr. 27, 2020), https://www.thebalance.com/fundamentals-of-the-2020-market-crash-4799950.

124. *Id.*

125. *Id.*

126. Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005).

127. *Id*. at 339.

128. *Id.*

129. *Id.*

130. *Id.* at 340.

adequately.[131] However, the Ninth Circuit reversed in part the spray device claim holding Respondents had adequately alleged loss causation. The Ninth Circuit reasoned: "plaintiffs establish loss causation if they have shown that the price on the date of purchase was inflated because of the misrepresentation."[132] The Supreme Court granted certiorari since the Ninth Circuit's reasoning was different from other Circuits' holdings. The Supreme Court stated that, to adequately plead a Section 10(b) claim "involving publicly traded securities and purchases or sales in public securities markets," a plaintiff must sufficiently plead:

> (1) *a material misrepresentation (or omission)* . . . (2) *scienter, i.e.,* a wrongful state of mind . . . ; (3) *a connection with the purchase or sale of a security* . . . ; (4) *reliance,* often referred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation . . . (5) *economic loss* . . . and (6) "*loss causation*," *i.e.*, a causal connection between the material misrepresentation and the loss. . . .[133]

The Supreme Court rejected the Ninth Circuit's reasoning and claimed it is simply "wrong."[134] The Supreme Court reasoned there is no suffered loss since the ownership of a share offsets the inflated purchase. In fact, shares are usually purchased with the mindset of selling at a later date; and if the shares were sold before the FDA news came out, there would be no loss.[135] Furthermore, if sold at a loss at a later date, the loss may not be directly attributable to the misrepresentation but due to other reasons.[136] For example, a change in "economic circumstances, altered investor expectations, new industry-specific or firm-specific facts, conditions, or other events" considered separately or as a whole may have changed the prices.[137] The Supreme Court opines that, although the securities statute is in place to maintain public confidence in the marketplace, it is "not to provide investors with *broad insurance against market losses*."[138]

Furthermore, the Supreme Court held that the Private Securities Litigation Reform Act of 1995 ("PSLR") contends that securities fraud complaints must "specify" every misleading statement with all facts "on which that belief" was "formed" and "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[139] Although the Supreme Court accepts that the pleading rules are not in place to inflict a great burden on a plaintiff, the rules do not allow "a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm."[140] Respondents' Complaint failed because merely alleging that Dura's share price dropped after the truth came out is insufficient alone to prove causation for the price inflation.[141] Therefore, the Supreme Court reversed the Ninth

131. *Dura Pharms, Inc.*, 544 U.S. at 340.
132. *Id.*
133. *Id.* at 341 (emphasis added).
134. *Id.* at 342.
135. *Id.*
136. *Dura Pharms, Inc.*, 544 U.S. at 343.
137. *Id.*
138. *Id.* at 345 (emphasis added).
139. *Id.* (quoting 15 U.S.C. § 78u-4).
140. *Id.* at 347.
141. *Dura Pharms.*, 544 U.S. at 347.

Circuit's judgment.[142]

This case applies directly to SEC litigation where plaintiffs claim a plunge in stock market prices was due to alleged misrepresentation of directors and officers. Consequently, D&O defendants have an advantage in COVID-19 litigation as loss causation will be nearly impossible for a plaintiff shareholder to prove in a securities class action lawsuit.

IV. BUSINESS NEGLIGENCE RESULTING IN THIRD-PARTY BODILY INJURY AND HARM

The Occupational Safety and Health Act of 1970 ("OSH Act") defines a safe workplace as being "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees.[143] The United States saw thousands of work-related deaths leading up to the enactment of the OSH Act.[144] The majority of these deaths were from the manual labor workforce who contributed to the coal mining, factory, and steel industries.[145] The legislative intent behind the OSH Act was to regulate high-risk-job industries to prevent or minimize on-the-job injuries and illnesses from negligent business practices.[146] With that understanding in mind, the relevant questions at hand are what constitutes a 'safe work environment' during times of a pandemic and whether businesses recognized and negated COVID-19 work-related hazards? These questions are currently the center of COVID-19 employer negligence claims across the country.[147]

A. Negligence Torts in Business Practice.

Many employers who kept operations running during the early days of the pandemic have experienced some level of internal or public backlash for their business decisions.[148] Much of the criticism stems from allegations that employers negligently placed employees and/or customers in situations where they became infected or were at high risk of exposure to COVID-19.[149]

The most highly publicized examples of alleged business negligence during the COVID-19 public health crisis are the claims against Princess Cruise Lines ("Princess").[150] Princess first received criticism in the early days of the pandemic when it continued sailing within Asia despite the continent's mounting health concerns.[151]

142. *Id.*

143. 29 U.S.C. § 654 (1970).

144. Judson MacLaury, *The Job Safety of 1970: Its Passage Was Perilous,* U.S. DEP'T OF LABOR, https://www.dol.gov/general/abogutdol/history/osha (last visited May 7, 2020).

145. *See id.*

146. *See id.*

147. *See, e.g.*, Jay Barmann, *Grand Princess Passengers Sue Cruise Line For Negligence,* SFIST (Apr. 9, 2020), https://sfist.com/2020/04/09/nine-grand-princess-cruise-passengers-are-suing-cruise-line-for-negligence/; Vin Gurrieri, *Ex-Walmart Worker's Death Spurs 'First' Ill. COVID Death Suit*, LAW360 (Apr. 6, 2020), https://www.law360.com/articles/1260853/ex-walmart-worker-s-death-spurs-first-ill-covid-death-suit; Complaint, Dalton, et al. v. Princess Cruise Lines Ltd., No. 2:20-cv-02458 (C.D. Cal. 2020).

148. *See, e.g.*, Joshua Espinoza, *Whole Foods Gets Backlash for Reportedly Recommending Employees Donate Their PTO During Coronavirus,* COMPLEX (Mar. 13, 2020), https://sfist.com/2020/04/09/nine-grand-princess-cruise-passengers-are-suing-cruise-line-for-negligence.

149. *See, e.g.*, *id.*; Gurrieri, *supra* note 147.

150. Complaint, *Dalton*, No. 2:20-cv-02458.

151. *See generally id.*

Specifically, seven (7) notable lawsuits are pending against Princess in which passengers have alleged the company "failed to implement proper screening procedures and took a 'lackadaisical approach' to customer safety."[152] According to Plaintiffs, these accusations came after Princess proceeded with a voyage on February 21, 2020, "despite knowing that two passengers who disembarked the ship from a prior voyage had COVID-19 symptoms."[153] In addition, Plaintiffs accused the company of failing to inform passengers that "sixty-two passengers and crew [members] who were previously onboard with the passengers who experienced the COVID-19 symptoms were also on board with [P]laintiffs."[154] Collectively, Plaintiffs accused the cruise company of breaching its duty of care in that it had knowledge of the prior passengers' symptoms and failed to inform and protect Plaintiffs from "exposure to the risk of immediate physical injury" which caused "emotional distress and trauma from fear of contracting the virus."[155]

Similarly, Walmart has been sued for negligence over the death of a COVID-19-infected employee.[156] Walmart allegedly failed to exercise reasonable care to keep its store as follows:

> . . . in a safe and healthy environment and, in particular, to protect employees, customers and other individuals within the store from contracting COVID-19 when it knew or should have known that individuals at the store were at a very high risk of infection and exposure due to the high volume of individuals present at and circulating throughout the store on a daily basis.[157]

Plaintiff further states that store management failed to properly clean and sterilize the premises, provide adequate protective gear to employees, or enforce social distancing recommendations.[158] The lawsuit alleges that, "[a]s a direct and proximate cause of the above acts and/or omissions of negligence, the decedent was infected by COVID-19 and ultimately died due to complications of COVID-19."[159]

In another case, Smithfield Foods, Inc. ("Smithfield") has denied it was negligent after several of its Missouri meatpacking employees tested positive for COVID-19.[160] Plaintiffs allege they were forced to worked in close proximity to one another, were denied access to proper protective equipment, and were not allowed to exercise proper social

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152. Donna Higgins, *Roundup: First COVID-19 suits filed; states and feds weigh legislation*, 25 No. 10 WESTLAW J. HEALTH CARE FRAUD 02 (Apr. 9, 2020); Complaint, Austin, et al. v. Princess Cruise Lines Ltd., No. 20-cv-2531, 2020 WL 1282232 (C.D. Cal. 2020); Complaint, Sheedy, et al. v. Princess Cruise Lines Ltd., No. 20-cv-2430, 2020 WL 1231185 (C.D. Cal. Mar. 13, 2020); Abitbol, et al. v. Princess Cruise Lines Ltd., No. 20-cv-2414, complaint filed, 2020 WL 1231198 (C.D. Cal. 2020); Complaint, Kurivial, et al. v. Princess Cruise Lines Ltd., No. 20-cv-2361 (C.D. Cal. 2020); Complaint, Gleason, et al. v. Princess Cruise Lines Ltd., No. 20-cv-2328 (C.D. Cal 2020).

153. Complaint, Weissberger, et al. v. Princess Cruise Lines Ltd., No. 20-cv-2267, 2020 WL 1445274 (C.D. Cal. 2020).

154. *Id*.

155. *Id*.

156. Complaint, Evans v. Walmart, Inc., et al., No. 2020L003938 (Ill. Cir. Ct. 2020).

157. *Id.*

158. *Id.*

159. *Id.*

160. Complaint at 3, Rural Cmty. Workers All., et al. v. Smithfield Foods, Inc., et al., No. 5:20-cv-06063 (W.D. Mo. dismissed May 5, 2020).

hygiene practices during work hours.[161] Plaintiffs claim that multiple employees contracted the virus while working at the meatpacking plant and became ill due to Smithfield's acts and/or omissions.[162]

B. Causation Is Likely Difficult to Satisfy.

To successfully argue negligence, a plaintiff must show that a defendant had a "duty of care, breached that duty, and that the damages were proximately caused by the breach."[163] Defendants such as Princess Cruise Lines, Walmart, and Smithfield must focus their defense heavily on the aspect of proximate cause. Proximate cause has two components: foreseeability and cause in fact.[164] Defendants will likely succeed on a motion for summary judgment or at trial arguing that the plaintiff could not prove by a preponderance of the evidence that "(i) the negligence was a substantial factor in bringing about the harm and (ii) absent the negligence, the harm would not have occurred"—commonly referred to as the "but for" test.[165]

Defendant employers must litigate that the plaintiff cannot make a proximate cause showing because the array of community exposures to the virus creates irrefutable reasonable doubt.[166] As such, pinpointing a specific instance or event which caused a person to contract the virus will prove not just extremely challenging, but likely impossible. Not every person who becomes infected will show symptoms; and even if they do, it may remain unclear as to how or where a claimant was exposed.[167] Thus, it is difficult to show that an employer negligently failed to keep employees "free from recognized hazards that are causing or are likely to cause death or serious physical harm" under the OSH Act.

Further, employers must litigate COVID-19 negligence claims on the credibility of the witnesses testifying as to the transmission of the disease. COVID-19, like the Ebola virus and other infectious diseases, "involve[s] matters beyond the common understanding

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161. *Id.* at 13–14.

162. *Id.* at 18.

163. Texas Health Res., et al. v. Pham, No. 05-15-01283-CV, 2016 WL 4205732, at *4 (Tex. App. Aug. 3, 2016) ("The elements of negligence are a duty, a breach of that duty, and damages proximately caused by the breach.").

164. CDC, *How COVID-19 Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html (last visited May 7, 2020) ("The virus that causes COVID-19 is spreading very easily and sustainably between people. Information from the ongoing COVID-19 pandemic suggests that this virus is spreading more efficiently than influenza, but not as efficiently as measles, which is highly contagious.").

165. *Texas Health Res.*, 2016 WL 4205732, at *4; Mayer v. Willowbrook Plaza Ltd. P'ship, 278 S.W.3d 901 (Tex. App. 2009); Am. Indus. Life Ins. Co. v. Ruvalcaba, 64 S.W.3d 126, 134 (Tex. App. petition denied 2001) ("An invitee enters land with the owner's knowledge and for the mutual benefit of both."); *see* CMH Homes, Inc. v. Daenen, 15 S.W.3d 97, 101 (Tex. 2000); *see also* Brown v. Nicholson, 1997 OK 32, 935 P.2d 319.

166. *See generally*, CDC, *Coronavirus Disease 2019 (COVID-19): Guidance Documents*, https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc (last updated Aug. 27, 2020).

167. *See Guidance for Businesses and Employers Responding to Coronavirus Disease (COVID-19)*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html (last update Jan. 24, 2021).

of the ordinary lay person, [and thus, causation] must be proved by expert testimony."[168] In *Texas Health Resources v. Pham*, the Texas Court of Appeals in Dallas concluded that the "likelihood of transmitting the Ebola virus, assuming different policies and the use of different protective equipment, is beyond a lay person's common understanding."[169] Courts should make a similar finding that the likelihood of transmitting COVID-19 through contact tracing is beyond a lay person's common understanding and will also need to be proved by expert testimony.[170] After all, "[m]ere lay testimony about causation cannot establish that a claimant has a probable right of recovery."[171] Thus, absent expert testimony that can arguably establish specific causation, employers will likely prevail against negligence claims made by plaintiffs.

C. Defending Against Workers' Compensation Claims.

Under a workers' compensation claim, an infected employee may seek compensation through an alternative court or administrative system than those described above. Employees will argue their claims are valid for workers' compensation because they were injured by COVID-19 within the course and scope of their employment. A valid workers' compensation claim depends on whether the injury occurred at work and will most likely apply in scenarios where an employee is required to work during quarantine, travel to high-risk locations, or return to work after the initial reopening of the business.[172]

In most jurisdictions, workers' compensation statutes provide that benefits are the exclusive remedy for on-the-job injuries. Because the virus is not an "injury," many jurisdictions have the responsibility to determine if the virus is an "occupational disease" which generally requires:

1. The illness to have arisen out of and in the course of employment; and
2. The illness to have arisen out of or been caused by conditions peculiar to the work.

Workers' compensation immunity is a significant hurdle for employees or their estates to overcome when filing suit against an employer. While workers' compensation immunity is jurisdiction-specific, it typically bars any separate lawsuit against the employer for an injury an employee suffers at work, especially those resulting from negligence. However, there are very limited exceptions to workers' compensation immunity—again, depending on the applicable state law.

As is the case in the civil claims described above, plaintiffs seeking workers' compensation benefits will also face an uphill battle to prove causation. The airborne infectious nature of the coronavirus will prove extremely difficult for workers to establish how, when, or where they were exposed to the virus, which may ultimately bar their

168. *See* Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 583 (Tex. 2006) (citing *Texas Health Res.*, 2016 WL 4205732, at 5); *see also* Gharda USA, Inc. v. Control Solutions, Inc., 464 S.W.3d 338, 348 (Tex. 2015) (cited by *Texas Health Res.*, 2016 WL 4205732, at *5 (Tex. App. Aug. 3, 2016)).

169. *Texas Health Res.*, 2016 WL 4205732, at *5.

170. *Id.*

171. *Id.* at *6.

172. PRACTICAL LAW COMMERCIAL TRANSACTIONS, WESTLAW, INSURANCE COVERAGE FOR COVID-19 LOSSES CHART, PRACTICAL LAW CHECKLIST (available at Westlaw W-024-5319).

claims. On the other hand, public safety workers enjoy a presumption that their exposure to a disease like COVID-19 is generally connected to their employment.[173]

Texas Governor Greg Abbott suspended Texas Government Code §§ 607.002 (1) and (2) to facilitate public safety workers "who were likely to have been exposed to COVID-19 while in the course of their employment, to be entitled to the reimbursements."[174] A gray area that employers must litigate strongly against are claims made by workers who are deemed "essential" during the pandemic.[175] Unlike public safety workers, essential workers do not enjoy the presumption that COVID-19-related injuries are connected to their employment. As such, "essential" workers who continued working during the pandemic will have a difficult time proving that their employment caused their exposure to the virus.

Additionally, defendant employers should look at their specific workers' compensation policy language for virus-related exclusions. Commonly, workers' compensation policies contain exclusionary language for the "ordinary diseases of life." Employers should argue that a pandemic is a "force majeure" or "act of God" and that the health and environmental threats of COVID-19 are a natural occurrence seen many times throughout the course of humanity.[176] Therefore, an employer must argue that, because the coronavirus pandemic was not a result of business-related negligence and was a naturally-occurring event, employees are not entitled to compensation under workers' compensation claims.

D. The Argument for Immunity.

Legislatures and governors are considering providing businesses with full immunity against employer-related negligence claims relating to the transmission or infection of COVID-19.[177] Immunity from negligence claims would instill a greater sense of security and confidence to restart the American economy. However, a full immunity solution may unjustly frustrate the path to legal recourse available to employees and customers with legitimate claims against businesses for violation of their common law duties; it may also disincentivize employers from the rigorous implementation of apposite safety precautions.

Ultimately, many costs of such an alternative may reside with federal, state, and local governments in the form of increased Medicaid expenditures, free care, and other social welfare protections for the victims of COVID-19 contracted in a commercial setting. To calm concerns that businesses may not follow all precautionary measures if granted

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173. *See, e.g.*, Letter from Cassie Brown, Comm'r Workers' Comp., Tex. Dep't Ins., to Tex. Workers' Comp. Sys. Participants (Mar. 30, 2020) (on file with Tex. Dep't Ins.).

174. *Id.*

175. Press Release, OFF. TEX. GOVERNOR GREG ABBOTT, *Governor Abbot Issues Executive Order, Implements Statewide Essential Services And Activities Protocols* (Mar. 31, 2020) (on file with author) ("Essential services shall consist of everything listed by the U.S. Department of Homeland Security in its Guidance on the Essential Critical Infrastructure Workforce, Version 2.0, plus religious services conducted in churches, congregations, and houses of worship.").

176. E.g., Spanish Flu of 1918, Hong Kong Flu of 1968, and H1N1 of 2009.

177. *See, e.g.*, David Morgan, *Corporate America seeks legal protection for when coronavirus lockdown lift,* REUTERS (Apr. 21, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-liability/corporate-america-seeks-legal-protection-for-when-coronavirus-lockdowns-lift-idUSKCN223179. This immunity would exclude claims against an employer for gross negligence or willful misconduct.

complete immunity, there is an alternative compromise of government-granted qualified immunity. Qualified immunity may apply to businesses which meet specific precautionary standards criteria. The criteria would directly relate to the precautionary countermeasures to COVID-19, including compliance with the Center for Disease Control and Prevention ("CDC") and state virus control guidelines.[178]Therefore, the qualified immunity option would not only provide complete immunity for compliant businesses, but would also provide a pathway for workers and patrons of businesses to pursue legal remedies for COVID-19 transmission where a business fails to comply with required precautionary standards.

Governments could further limit business liability by developing targeted immunity policies which would provide immunity only to those businesses where employees and patrons necessarily face a heightened risk of contracting COVID-19, namely, healthcare providers. Several states have already taken such steps including New York, Massachusetts, Illinois, and Arizona. These targeted protections insulate those businesses most likely to face COVID-19-related claims, but also run the risk of creating disincentives to take the maximum level of precautions. However, to alleviate such concerns, targeted immunity could be conditioned upon a business's adherence to safety and sanitation guidelines and could carve out exceptions from liability for willful misconduct or gross negligence.

V. EMPLOYEE DISCRIMINATION AND RETALIATION

More than twenty-six (26) million Americans lost their employment as a result of the United States' economic shutdown during the coronavirus pandemic.[179] In all likelihood, it will be many years, or even decades, before the damage COVID-19 has caused on the American workforce is fully realized. As nearly a decade's worth of employment gains disappeared during the first several weeks of the pandemic, the United States' job loss is on track with numbers during the Great Depression.[180] Foreseeably, the American judicial system will see an influx of claims by furloughed and terminated employees who feel that their termination was not strictly for economic reasons, but also for retaliatory or discriminatory ones. With this in mind, it is vital that employers understand the changes governing anti-discrimination legislation and the interrelationship of applicable federal and state laws that regulate the private business sector.

A. Pandemic-related Impact on Longstanding Federal Laws and Regulations.

The U.S. Equal Employment Opportunity Commission ("EEOC") enforces federal anti-discrimination laws which are enumerated in Title VII of the Civil Rights Act, OSH Act, Americans with Disabilities Act ("ADA"), Rehabilitation Act, Age Discrimination in

178. E.g., the Occupational Safety and Health Administration, the U.S. Centers for Disease Control and Prevention, etc.

179. Jeffry Bartash, *Jobless claims jump another 4.4 million – 26 million Americans have lost their jobs to the coronavirus,* MARKETWATCH (Apr. 23, 2020), https://www.marketwatch.com/story/jobless-claims-jump-another-44-million-25-million-americans-have-lost-their-jobs-to-the-coronavirus-2020-04-23.

180. Heather Long, *U.S. now has 22 million unemployed, wiping out a decade of job gains,* WASH. POST (Apr. 16, 2020), https://www.washingtonpost.com/business/2020/04/16/unemployment-claims-coronavirus/.

Employment Act, and Genetic Information Nondiscrimination Act.[181] Anti-discrimination laws require employers to provide a safe work environment without discriminating against employees based on their disability or protected-class status. The pandemic has at least partially blurred the legal boundaries between employer responsibilities and employee privacy in their traditional application. What exactly constitutes a disability and actionable discrimination in the COVID-19 era is the debate shaping the next decade of employment law litigation.

Perhaps the most obvious defense to wrongful termination or retaliation claims would be that the layoff was not a result of discrimination but occurred due to the business's economic hardships during the pandemic. It will likely be difficult to prove business interruption losses did not facilitate the need to furlough or terminate employees without additional evidence of targeted termination or discriminatory behavior.

Traditionally, an employee has the right to refuse to disclose personal medical information to his or her employer. If the business owner subsequently fires the employee for this refusal, then the employee has evidence of retaliation and wrongful termination. Yet in the 2020 pandemic era, the EEOC has announced this is not the case with COVID-19-related medical inquiries. Employers have a strong defense against wrongful termination claims when an employee refuses to cooperate in the employer's medical screening protocols. The EEOC has adopted the CDC's guidelines for workplace mitigation as legal authority for employers.[182]

For example, an employer may defend itself against a wrongful termination claim from an ill employee who refuses to provide pertinent medical information or be medically screened when coming back to work.[183] During a pandemic, employers must mitigate COVID-19 workplace health concerns as outlined by the EEOC, ADA and CDC.[184] As long as there is an active threat of the spread of infection, ADA-covered employers have the right to ask employees for personal medical information when they take sick days off from work.[185] Employees must disclose to an employer if they are experiencing symptoms of the pandemic virus such as a fever, cough, shortness of breath, etc.[186] If the employee refuses to disclose such information, there are grounds for termination without grounds for discrimination or retaliation.[187]

Additionally, employees who refuse to cooperate in workplace screening and safety protocols will likely forfeit their claims for wrongful termination or retaliation. During the COVID-19 pandemic, employers are allowed to medically screen employees by way of temperature checks, enforcement of proper hygiene practices, and social distancing in the

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181. *What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus,* U.S. EQUAL EMP'T OPP. COMM'N, https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm (last visited May 7, 2020).

182. *Id.* ("The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following [CDC guidelines].")

183. *See generally id.*

184. *See Business & Workplaces* subsection of *Coronavirus Disease 2019,* CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html (last updated May 7, 2020).

185. *What you should know*, *supra* note 181.

186. *Id.*

187. *Id.*

workplace.[188] Employees who refuse to participate in the employer's reasonable safety precautions will give cause for termination.[189] For instance, an employee who calls into work sick on a Friday and comes back to the office on Monday cannot refuse to answer the employer's reasonable questions about his or her illness or current symptoms.[190] The employee also cannot refuse a temperature check or an order to socially distance from other employees or to leave the business until he or she is tested for the virus.[191] The ADA permits mandatory testing by employers as a workplace mitigation strategy because infected employees reentering the workplace are a direct threat to the health of their coworkers.[192] As such, employers can legally terminate an employee who refuses to participate in mandatory COVID-19 testing at the workplace on the grounds that the medical testing was "job related and consistent with business necessity."[193]

Another major COVID-19-related change to longstanding federal anti-discrimination law is an employer's level of obligation to provide disabled employees with work-related accommodations.[194] Prior to the COVID-19 outbreak, it was held that the majority of accommodations for disabled employees were reasonable and affordable within the business's overall resources and budget.[195] The pandemic's economic impact on the United States has left many employers with significant difficulty or the inability to provide employees with many requested accommodations.[196] ADA guidelines now allow for COVID-19-related undue hardship considerations for employers rejecting the requests of a disabled employee.[197] For example, a vision-impaired employee who is teleworking due to the pandemic may not be granted a request for custom computer screens that are significantly more expensive than traditional monitors if the additional expense creates an undue hardship on the financially-strapped employer. It is the employer's duty to work with the employee on reasonable alternatives to his or her request, but it is understood that financial constraints in times of crisis are reasonable grounds for denial of some requested accommodations without triggering discrimination.[198]

Overall, federal anti-discrimination laws have expanded the employer's powers to control and protect its workforce during the pandemic.[199] Employers have the power to require that employees wear protective gear and follow CDC-approved infection-control practices and terminate those who refuse to comply with reasonable COVID-19 safety measures.[200] The ADA also permits employers to make disability-related inquiries and

188. *Id.*
189. *Id.*
190. *What you should know*, *supra* note 181.
191. *Id.* The only exception to these requirements being if the employer was requesting a disabled employee to take precautions that were impossible to follow due to their disability (e.g., an employee with a latex allergy cannot be forced to wear latex gloves). *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *What you should know*, *supra* note 181.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *What you should know*, *supra* note 181. The caveat being that reasonable accommodations must be

conduct medical exams if there is a direct threat to an employee's health based on the available objective medical evidence.[201] Even with the additional authority given to employers during the pandemic, there must be careful consideration as to what measures constitute reasonable workplace safety measures and unlawful disparate employee treatment based on protected-class physiognomies.[202] The distinction in treatment will ultimately determine an employer's success in litigation.

B. Federal and State Law Interrelationships.

The average American is typically familiar with constitutional rights and federal laws which govern employee discrimination actions. As discussed in the section above, federal rules and regulations have adapted in consideration of a virus-produced national crisis. While pandemic considerations are paramount in discrimination and retaliation litigation, it is necessary to understand specific state laws which interrelate to federal employment legislation.

Many states have adopted their own disability discrimination acts to supplement the ADA.[203] Some states refer to this legislation as their "Handicappers' Civil Rights Act" ("HCRA") or some variation of the name.[204] The state of Michigan has signed into law its own HCRA which reads, in part, "[An employer shall not] discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position."[205]

For an employee to successfully prove a prima facie case of discrimination against his or her employer under Michigan's HCRA, it must be established that: (1) the plaintiff is "handicapped" as defined in the HCRA, (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute.[206]

Additionally, states across the country have adopted into their public health codes several federally based regulations which govern private sector industries. Depending upon the transmittable nature of the disease, an employee may be subject to lawful termination depending on his or her infection status. For example, the Michigan Department of Public Health adopted and incorporated the United States Public Health Service transmittable disease regulation which reads, in part:

> No person, while infected with a disease in a communicable form that can be transmitted by foods or who is a carrier of organisms that can cause such a disease or while afflicted with a boil, an infected wound, or an acute respiratory infection, shall work in a food service establishment in any capacity in which there is a likelihood of such person contaminating

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performed for disabled or protected class employees. For example, modified face masks for interpreters or others who directly communicate with a hearing-impaired employee who reads lips or modified rules based on an employee's religious restrictions or beliefs. *Id.*

201. *Id.*

202. *Id.*

203. *See, e.g.*, Handicappers' Civil Rights Act, Mich. Comp. Laws § 37.1202(1)(b) (2020).

204. *See, e.g.*, *id.*

205. *Id.*

206. Merillat v. Mich. State Univ., 523 N.W.2d 802 (Mich. Ct. App. 1994).

> food or food-contact surfaces with pathogenic organisms or transmitting disease to other persons. [207]

Further, Michigan law authorizes in pertinent part:

> (1) If the department or a local health department has reasonable cause to suspect possible disease transmission by an employee of a food service establishment, it may secure a morbidity history of the suspected employee and make any other investigation as may be deemed necessary.
> (2) The department or a local health department may order an owner, operator, or person in charge of a food service establishment to do any of the following if a communicable disease is suspected or confirmed:
> (a) Immediately exclude the employee from working in the food service establishment.
> * * *
> (c) Restrict the employee's service to some area of the food service establishment, as approved by the department or the local health department, where there is no danger of transmitting disease.
> (d) Require or provide for adequate medical or laboratory examination of the employee and other employees and of their body discharges.
> (3) The owner, operator, or person in charge of a food service establishment shall exclude from the food service establishment any employee with a suspected communicable disease.[208]

When this state regulation is applied during the coronavirus pandemic, a restaurant or food service employer must prohibit all coronavirus-infected employees from working in any capacity in which they may handle food or come into contact with surfaces or objects which may touch food.[209] In essence, the Michigan Public Health Code authorizes an employer or health department to lawfully discriminate against an employee who has or is reasonably suspected of having COVID-19 or another contagious disease that may be transmitted through contact with food or surfaces.[210] Additionally, this provision does not trigger employee protection under Section 202(1)(b) of Michigan's HCRA because the virus or "handicap" directly interferes with the employee's ability to perform the duties specific to that employment. [211]

For the strongest defense against COVID-19 employee discrimination claims, a business owner's legal counsel must be well versed in the state-specific adoptions and legislation governing their specific business sector. Proper knowledge of federal and state law interrelationships may dramatically impact the probability of a successful defense verdict in the courtroom.

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207. Pursuant to § 12909(1) of the Michigan Public Health Code, the Michigan Department of Public Health adopted and incorporated within its rules the provisions of the 1976 recommendations of the United States Public Health Service, found in the publication entitled "Food Service Sanitation Manual." 1981 AACS, R 325.25103(b), provision adopted is § 3-101.

208. 1981 AACS, R 325.25909(3).

209. Pursuant to § 12909(1) of the Michigan Public Health Code, the Michigan Department of Public Health adopted and incorporated within its rules the provisions of the 1976 recommendations of the United States Public Health Service found in the publication entitled "Food Service Sanitation Manual." 1981 AACS, R 325.25103(b), provision adopted is § 3-101.

210. *See generally id.*

211. *Id.*

VI. NURSING HOME NEGLIGENCE AND WRONGFUL DEATH

A difficult aspect of COVID-19 insurance defense will, without a doubt, be litigating claims involving the loss of life. Tragically, elderly Americans living in long term care facilities, such as nursing homes, are among the most vulnerable to the disease.[212] The CDC reports that over eighty percent (80%) of coronavirus deaths are among adults over the age of sixty-five (65).[213] More than twenty-five hundred (2,500) nursing home facilities in thirty-six (36) states have reported COVID-19-positive residents due to the inability to contain the outbreak.[214] This has led to an alarming surge of more than seventy-three hundred (7,300) confirmed COVID-19 deaths linked to nursing homes.[215] As more adults over the age of sixty-five (65) in the U.S. have now died of COVID-19 than were killed in the September 11, 2001, terrorist attacks, it is fair to say that the memory of what is ongoing in these nursing facilities will not end with the pandemic.[216]

Foreseeably, nursing homes will face intense investigations into their compliance with all infection and disease prevention and control procedures and professional standards of care guidelines. As an estimated seventy-five percent (75%) of long term care facilities are actively noncompliant with federal infection and disease control regulations, COVID-19 loss-of-life litigation will primarily consist of wrongful death and negligence claims against nursing home facilities and medical staff.[217] Due to the heightened risk for emotionally charged, excessive jury verdicts, it is imperative that nursing home defendants not only litigate on technical regulatory and legal compliance, but also on the facts and reality of providing geriatric healthcare during a pandemic.

President Trump has implemented the CARES Act, a $2 trillion stimulus package that protects volunteer healthcare workers from certain civil liability.[218] In addition, several state lawmakers are taking steps to protect healthcare providers by providing civil medical immunity.[219] However, the immunity would not protect nursing homes against

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212. Suzy Khimm, et al., *More than 2,200 coronavirus deaths in nursing homes, but federal government isn't tracking them,* NBC NEWS (Apr. 10, 2020), https://www.nbcnews.com/news/us-news/more-2-200-coronavirus-deaths-nursing-homes-federal-government-isn-n1181026.

213. CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)–United States, February 12–March 16, 2020*, CDC (Mar. 18, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6912e2-H.pdf.

214. Khimm, *supra* note 212.

215. Matthew Mosk, et al., *Inside nursing homes, coronavirus brings isolation and 7,300 deaths; Outside, families yearn for news,* ABC NEWS (Apr. 19, 2020), https://abcnews.go.com/Health/inside-nursing-homes-coronavirus-brings-isolation-7300-deaths/story?id=70225836.

216. The Associated Press, *Coronavirus in US: More Americans have died from COVID-19 than in 9/11 attacks,* SYRACUSE (Mar. 31, 2020), https://www.syracuse.com/coronavirus/2020/03/coronavirus-in-us-more-americans-have-died-of-covid-19-than-in-911-attacks.html.

217. Danielle Leigh, *About 75% of nursing homes cited, violating standards to prevent the spread of disease,* ABC 7 NY (Mar. 13, 2020), https://abc7ny.com/7-on-your-side-infectious-disease-nursing-home-homes-in-united-states/6010241/.

218. Y. Peter Kang, *6 States With COVID-19 Medical Immunity, And 2 Without*, LAW360 (Apr. 17, 2020), https://www.law360.com/articles/1264964/6-states-with-covid-19-medical-immunity-and-2-without.

219. For example, New York, New Jersey, Michigan, Massachusetts, Illinois, and other states have implemented some type of immunity for health care providers. *Id.* Other states, such as Oklahoma, are in the process of providing medical immunity. Sarah Jarvis, *Oklahoma House Passes COVID-19 Civil Immunity Bill*, LAW360 (May 5, 2020), https://www.law360.com/articles/1270712/oklahoma-house-passes-covid-19-civil-immunity-bill.

civil cases involving claims such as willful, reckless or criminal misconduct or gross negligence.[220]

A. Crisis Standard of Care vs. Longstanding Standard of Care Guidelines.

Both federal and state laws establish standard of care requirements for an assisted living program to classify as a nursing facility.[221] Federal regulations require that the standard of care for long term care facilities "must establish and maintain an infection prevention and control program ("IPCP") designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of communicable diseases and infections."[222] Under 42 C.F.R. § 483.80, the IPCP must include several precautionary measures such as:

i. A system of surveillance designed to identify possible communicable diseases or infections before they can spread to other persons in the facility;
ii. When and to whom possible incidents of communicable diseases or infections should be reported;
iii. Standard and transmission-based precautions to be followed to prevent spread of infections;
iv. When and how isolation should be used for a resident, including but not limited to:
    a. The type and duration of the isolation, depending upon the infectious agent or organism involved, and
    b. A requirement that the isolation should be the least restrictive possible for the resident under the circumstances.
v. The circumstances under which the facility must prohibit employees with a communicable disease or infected skin lesions from direct contact with residents or their food, if direct contact will transmit the disease; and
vi. The hand hygiene procedures to be followed by staff involved in direct resident contact.

In April 2020, the first wrongful death lawsuit against a long term nursing care facility was filed in connection to the death of a COVID-19-infected resident.[223] In *Deborah de los Angeles v. Life Care Centers of America Inc. d/b/a Life Care Center of Kirkland, et al.,* Plaintiff, Deborah de los Angeles, alleges that her 85-year-old mother, Twilla Morin, was a nursing home resident in Defendant's Kirkland, Washington, facility when she became infected with the virus and ultimately succumbed to the disease.[224] Plaintiff contends that the nursing home failed to timely report or control the outbreak of

220. *Id.*

221. *See, e.g.*, Moore v. Warr Acres Nursing Ctr., LLC, 376 P.3d 894, 903 (Okla. 2016) (Oklahoma law requires that a nursing facility comply with all federal, state, and local laws regarding regulations and professional standards of care); 42 C.F.R. § 483.1 (2020).

222. 42 C.F.R. §.483.80 (2020).

223. Complaint, De los Angeles v. Life Care Ctrs. of Am., Inc., et al., No. 20-2-07689-9 (Wash. Sup. Ct. 2020).

224. *Id.* at 2.

the contagious respiratory illness that was first documented at the facility on February 10, 2020.[225] The Complaint states that "[a]lthough defendants were on high-alert for COVID-19 since January 2020, they lacked a clear plan of action leading to a systemic failure."[226] Further, Defendant's staff are accused of continuing the day-to-day operations of the facility in a manner which enabled the virus to thrive in the most vulnerable of environments.[227] Plaintiff argues that, in February 2020 "[i]nstead of quarantining residents and staff, defendants admitted new residents and threw a Mardi Gras party. Instead of immediately notifying authorities of a 'flu' outbreak, defendants sat on it for 17 days before reporting anything."[228]

Undoubtedly, Plaintiff is arguing negligence and wrongful death liability against the nursing home for a breach in the professional standard of care which allegedly resulted in the uncontrollable spread of the virus among elderly residents and staff.[229] While there is a longstanding standard of care framework regulating nursing homes and their personnel, it is not without some degree of circumstantial fluidity.[230]

Dependent upon the facts, Life Care Center of Kirkland's best defense is likely that it was operating under *crisis standard of care* guidelines during the coronavirus pandemic and not simply the longstanding professional standards of care for nursing homes and healthcare personnel.[231] Crisis standard of care guidelines supplement the traditional rules in unorthodox circumstances justifying a substantial change in the level of care it is possible to provide.[232] Specifically, the American Nurses Association ("ANA") defines "Crisis Standard of Care" as follows:

> [A] substantial change in usual healthcare operations and the level of care it is possible to deliver, which is made necessary by a pervasive (e.g. pandemic influenza) or catastrophic (e.g. earthquake, hurricane) disaster. This change in the level of care delivered is justified by specific circumstances and is formally declared by a state government, in recognition that crisis operations will be in effect for a sustained period. The formal declaration that crisis standards of care are in operation enables specific legal/regulatory powers and protections for healthcare providers in the necessary tasks of allocating and using scarce medical resources and implementing alternate care facility operations.[233]

According to the ANA, during "a pandemic, nurses can find themselves operating in environments demanding a balance between time-limited crisis standards of care and longstanding professional standards of care."[234] As such, variances "in the standard of care can occur in circumstances when available resources are limited or when a clinician

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225. *Id.* at 5.
226. *Id.* at 2.
227. *Id.*
228. Complaint at 2, *De los Angeles*, No. 20-2-07689-9 (Wash. Sup. Ct. 2020).
229. *Id.* at 8.
230. *See generally Crisis Standard of Care COVID-19 Pandemic,* ANA, https://www.nursingworld.org/~496044/globalassets/practiceandpolicy/work-environment/health—safety/coronavirus/crisis-standards-of-care.pdf (last visited May 9, 2020).
231. *Id.* (emphasis added).
232. *Id.*
233. *Id.* (citing IOM Guidance for Establishing Crisis Standards of Care for Use in Disaster Situations, 2012).
234. *Id*.

is practicing in an unusual setting or with unfamiliar patient care needs."[235] Hospitals, nursing homes and medical personnel now "find themselves operating in crisis standards of care environments."[236]Nursing homes and long term care facilities are given detailed guidance on how to operate under crisis standard of care procedures during disaster situations.[237] Specifically, the guidelines incorporate the following:

i. A duty to care during crises like pandemics. Employers and supervisors have a corresponding duty to reduce risks to nursing staff safety, plan for competing priorities like childcare, and address moral distress and other injuries to personal and professional integrity such crisis events can cause;
ii. A specific balance of professional standards and crisis standards of care **will be based on the reality of the specific situation, such as the presence or absence of necessary equipment, medications or colleagues**;
iii. Decision-making during extreme conditions can shift ethical standards to a utilitarian framework in which the clinical goal **is the greatest good for the greatest number of individuals,** but that shift must not disproportionately burden those who already suffer healthcare disparities and social injustice;
iv. Sacrifices in desired care must be fairly shared. This means that care decisions are not about "the best that can be done" under normal conditions. They are **necessarily constrained by the specific conditions during the crisis**.
v. Registered nurses may be asked **to delegate care to others, such as students, staff displaced from another institution, or volunteers.** This will require a rapid assessment of the skills of the others available to assist in patient care. Nurses must continue to emphasize patient safety and appropriate delegation.
vi. An **increased reliance on a nurse's own or the collective accumulated competence may be needed, as the usual range of colleagues, experts or support services may not be available**.[238]

Additionally, institutional crisis standard of care guidelines for the nursing home facility's operation in a major disaster scenario include:

i. Institutions and healthcare systems have a duty to safeguard employees with policies and practices that are evidence-based, transparently decided and have clear accountabilities;
ii. In a healthcare system characterized by structural racism, income inequality and healthcare disparities, a "first come first served" approach may compound existing injustice. Healthcare systems must counter these

235. ANA, *supra* note 230.
236. *Id.*
237. *Id.*
238. *Id*. (emphasis added).

impacts with efforts to protect at-risk populations;

iii. A range of contingencies must be planned for by accountable decisionmakers as demand for care increases and resources, such as staff and materials, become scarce;

iv. Essential decisions about allocation of resources must be made at systems and community levels;

v. The individual registered nurse should remain focused on patients and is responsible for giving the best possible care with available resources;

vi. Decisions at the system level must be:

a. Fair – Decision-making standards should be recognized as fair by all those affected by them.

b. Equitable – The process used to make decisions about scarce resources should be transparent, consistent, proportional to the scale of the emergency and degree of scarce resources, and accountable for appropriate protections and the just allocation of available resources.

B. Notice Requiring Action.

Nursing homes are trained and equipped for the prevention and control of diseases and infections that commonly afflict elderly residents. Bed sores, staph infections, and the flu are all common medical complications requiring the traditional standard of care seen within any typical nursing home environment. However, Life Care Center of Kirkland and other nursing homes across the country combatted a novel coronavirus that is considerably unlike any communal disease ever encountered in the United States.[239]

During his call for a global plan of action against the disease, United Nations Secretary-General, Antonio Guterres, regarded the coronavirus pandemic as "the greatest test" our world has endured since World War II and a "human crisis" of historical proportions.[240] COVID-19 stands apart from other commonly contracted viruses in its high rate of transmission from non-symptomatic carriers and the speed in which it spreads from person to person.[241] "In general, when the flu hits you, people lie in bed and don't go out," said Dr. Simone Wildes, an infectious disease specialist at South Shore Health.[242] "But something we are seeing with COVID-19 is that, because the symptoms are mild for most of the population, they can go out and spread the disease quite easily, especially given how long you can be infectious for."[243]

In the *Life Care Center of Kirkland* case, the nursing home has a strong defense that it did not act negligently during the timeframe in which Plaintiff's mother contracted the virus as it was operating within the professional standards of care guidelines and without

239. Vinayak Kumar, *COVID-19 has been compared to the flu. Experts say that's wrong*, ABC NEWS (Mar. 27, 2020), https://abcnews.go.com/Health/covid-19-compared-flu-experts-wrong/story?id=69779116.

240. Darryl Coote, *U.N.: COVID-19 is 'greatest test' since World War II,* UPI (Apr. 1, 2020), https://www.upi.com/Top_News/World-News/2020/04/01/UN-COVID-19-is-greatest-test-since-World-War-II/9631585722662/.

241. Kumar, *supra* note 239.

242. *Id.*

243. *Id.*

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notice of a national crisis. Plaintiff alleges that the nursing home was on notice of the pandemic dangers to its residents since January 2020 and that it negligently failed to take preventative measures to quarantine and discontinue patient admissions into the facility in February 2020.[244] Plaintiff's argument is weak, as the United States was not on notice of a domestic crisis during this timeframe. It was not until March 13, 2020, that President Donald J. Trump declared the coronavirus disease as a national emergency in the United States.[245] President Trump's emergency determination came only two (2) days after the World Health Organization officially categorized COVID-19 as a global pandemic.[246] The first statewide stay-at-home "quarantine" order for Washington State was issued by Governor Jay Inslee on March 23, 2020.[247] Life Care Center of Kirkland has a strong defense against the claim that it was negligent in its care from January–February 2020 if it operated within the professional standard of care guidelines prior to an official notice of the coronavirus pandemic by federal or state authorities. Further, Life Care Center of Kirkland should argue that COVID-19 guidelines for long term care facilities and nursing homes on coronavirus prevention and control, resident quarantine, symptoms of infection, and mandatory reporting of infection rates to the health departments were not released by the CDC until April 4, 2020.[248]

As the events described above unfolded in quick succession, Life Care Center of Kirkland and similarly situated defendants must immediately establish a timeline of COVID-19 occurrences within their facilities to defend themselves against allegations that they failed to act or follow standard of care guidelines. The defendant's documentation should include the date a resident first became symptomatic, actions taken by health care personnel, and the progression of the illness over time (e.g., did the nursing home resident's health decline immediately or over the course of several days, were there any clear indicators for the necessity of medical intervention, and, if applicable, when the patient was transported to a hospital or placed under the care of a medical doctor). Overall, a nursing home defendant should not be held legally liable for the death of a COVID-19-infected resident if the facility's health care personnel followed the longstanding standard of care guidelines for disease prevention and control prior to notice of a national emergency and/or before the publication of the CDC's crisis standard of care recommendations for coronavirus disease control.

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244. Complaint at 1, 3, *De los Angeles*, No. 20-2-07689-9.

245. Letter from Donald J. Trump, U.S. President, to Secretary Wolf, Secretary Mnuchin, Secretary Azar, and Administrator Gaynor (Mar. 13, 2020) (on file with the White House) (available at https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/).

246. Tamara Keith & Malaka Gharib, *A Timeline of Coronavirus Comments From President Trump And WHO,* NPR (Apr. 15, 2020), https://www.npr.org/sections/goatsandsoda/2020/04/15/835011346/a-timeline-of-coronavirus-comments-from-president-trump-and-who.

247. *Washington's stay-at-home order extended to May 4,* KING5 (Apr. 2, 2020), https://www.king5.com/article/news/health/coronavirus/inslee-extends-washington-stay-home-mandate-through-may-4/281-e08790db-aa54-4718-8e2b-a7712ebc92e5.

248. *Coronavirus Disease 2019: Nursing Homes & Long-Term Care Facilities*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html (last updated Apr. 15, 2020).

VII. CLASS ACTION LITIGATION

Business closures, layoffs, financial losses, negligence, physical injuries, and event cancellations created an unprecedented risk to corporations immeasurable to any other event in American history. The chaos of the pandemic opened the door to opportunistic litigators seeking the chance to file class action lawsuits on behalf of employees, consumers, patients, and injured citizens who allege they were disproportionately harmed by the COVID-19 pandemic. As no industry appears to be litigation proof, corporations must prepare for exhaustive legal battles in both the private and public sectors.

A. Categories of Lawsuits.

There are several industries at high risk for COVID-19 class action lawsuits. Lawsuits have already been filed in each of the six (6) major industries identified below.

First, class action lawsuits *against insurers*. Insurance providers arguably have the highest risk for COVID-19 class action lawsuits.[249] Insurers have seen a high volume of class action litigation since the start of the pandemic arising from force majeure and other contractual claims.[250] These insurers have a heighted risk to these types of claims because of their presence across a plethora of industries and situations.[251]

Second, class action lawsuits *against travel and event providers*. Travel agencies, entertainment venues and attractions, and ticket brokers face litigation for event-related cancellations and travel.[252] It appears that the U.S. airlines industry has been hit especially hard with class action lawsuits against four (4) major airliners.[253] United Airlines, Delta Air Lines, American Airlines, and Southwest Airlines have all been sued by customers for claims involving COVID-19-related cancellations, limited flight booking dates and refund-related complaints.[254]

In the *Delta Air Lines* class action lawsuit, Plaintiffs allege the airliner participated in unfair and deceitful practices by failing to honor its ticket refund policies and requests from passengers during the coronavirus outbreak.[255] According to Plaintiffs, Delta Air Lines' ("Delta") Contract of Carriage states that, if the airline cancelled or changed a flight time by more than ninety (90) minutes, passengers were entitled to the option of a full

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249. *See, e.g.*, Ed Treleven, *Class-action lawsuit joins growing number over business interruption insurance denials amid COVID-19 pandemic,* WIS. STATE J. (Apr. 30, 2020), https://madison.com/wsj/news/local/crime-and-courts/class-action-lawsuit-joins-growing-number-over-business-interruption-insurance-denials-amid-covid-19-pandemic/article_e9f48697-6a31-54fd-bd72-1c2d7a8b1f0d.html.

250. *See, e.g.*, Jennifer M. Oliver, *Contractual Distancing: Pandemic Insurance Litigation Spreads with Business Interruption Claim Denials,* NAT'L L. REV. (Apr. 19, 2020), https://www.natlawreview.com/article/contractual-distancing-pandemic-insurance-litigation-spreads-business-interruption.

251. Cruise lines, airlines, and other travel companies have been sued for allegedly failing to maintain a safe environment and for alleged damages relating to delays or cancellations.

252. *See, e.g.*, Complaint at 4, Rudolph, et al. v. United Airlines Holdings, Inc., et al., No. 1:20-cv-02142 (N.D. Ill. filed Apr. 6, 2020); Complaint at 4, Daniels, et al. v. Delta Air Lines, Inc., No. 1:20-cv-01664-ELR (N.D. Ga. filed Apr. 17, 2020); Complaint at 4, Ward, et al. v. Am. Airlines, Inc., No. 4:20-cv-00371-Y (N.D. Tex. filed Apr. 22, 2020); Complaint at 2, Bombin, et al. v. S.W. Airlines Co., No. 5:20-cv-01883 (E.D. Pa. filed Apr. 13, 2020).

253. *See* sources cited *supra* note 252.

254. *See* sources cited *supra* note 252.

255. Complaint at 2, *Daniels*, No. 1:20-cv-01664-ELR (N.D. Ga. filed Apr. 17, 2020).

refund.[256] Delta is alleged to have violated its policy by only issuing travel credits instead of full refunds to its customers.[257] Further, Plaintiffs claim Delta's website had a "Coronavirus Travel Updates" banner and a large red button to entice consumers to "Change or Cancel" their flights, yet does not include or provide easy access to the full refund request form.[258] The lawsuit against Delta seeks refunds on original ticket purchases, punitive damages, and injunctive relief for cancelled flight reimbursement.[259]

Third, class action lawsuits *against financial institutions and debt collectors*. COVID-19 has sparked civil action against lenders and debt collectors to prevent punitive measures being taken against terminated and furloughed employees unable to pay their expenditures.[260] The United States government stepped in to provide temporary relief to debtors, but inevitably foreclosures and debt collections have led to substantial litigation against financial institutions seeking to recover on past-due loans and mortgages.[261]

Fourth, class action lawsuits *against retailers who price gouge* products during the pandemic. From the early days of the COVID-19 outbreak in the United States, opportunistic retailers took advantage of the national crisis as a money-making scheme.[262] High-demand items such as hand sanitizer, toilet paper, face masks, digital thermometers, and surgical gowns were sold at dramatic markups.[263] The inflation rates of some essential items became so severe that President Trump issued an Executive Order making it illegal to hoard and price gouge critical medical supplies needed to combat COVID-19.[264] Already, consumers have filed legal action against major retailers who have participated in price-hiking tactics. For example, Amazon.com has been sued for its alleged price gouging of toilet paper and hand sanitizer at the beginning of the coronavirus pandemic.[265] E-commerce giant, eBay Inc., has also been sued in a class action lawsuit by consumers who are alleged to have paid upwards of $585.00 for a three-pack of N95 masks, the same product that sold for less than $10.00 prior to the virus outbreak.[266] Consumers also stated they paid $227.50 for a five-pack of Lysol spray cans and almost $50.00 for twelve (12) rolls of Cottonelle toilet paper.[267] These examples are just two of the dozens of major

256. *Id.* at 5.

257. *Id.*

258. *Id.* at 5–6.

259. *Id.* at 15–16.

260. *See, e.g.*, Complaint at 1, Shuff, et al. v. Bank of Am., et al., No. 5:20-cv-00184 (S.D.W. Va. filed Mar. 20, 2020).

261. On March 27, 2020, President Donald J. Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act with a sixty (60)-day foreclosure moratorium covering most American residential mortgage loans. CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

262. *See, e.g.*, Complaint at 3, Armas v. Amazon.com Inc., No. 104631782 (11th Cir. 2020).

263. *See id.*; *Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment*, U.S. DEP'T OF JUST. (Apr. 24, 2020), https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0.

264. E.g., disposable masks, surgical gowns, ventilators, and other professional protective equipment. WHITE HOUSE, *President Donald J. Trump Will Not Tolerate the Price Gouging and Hoarding of Critical Supplies Needed to Combat the Coronavirus* (Mar. 23, 2020), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-will-not-tolerate-price-gouging-hoarding-critical-supplies-needed-combat-coronavirus/.

265. Complaint at 3, *Armas*, No. 104631782.

266. Complaint, eBay Inc. v. Boch, et al., No. 5:19-cv004422 (N.D. Cal. 2019).

267. *Id.*

retailers facing civil litigation for price gouging during the national crisis.[268]

Fifth, class actions *against manufacturers and/or retailers of professional protective gear and products*. The maker of Purell hand sanitizer is facing two class action lawsuits by consumers claiming the manufacturer made misleading claims when it advertised that its product killed "99.9 percent of illness-causing germs."[269] The Plaintiffs alleged the claims are not based in scientific fact and that Purell made substantial profit during the pandemic while breaking the public's trust.[270] This is not the first instance where Purell has been accused of playing off the fears of the public by alleged misrepresentation of its product's effectiveness against diseases like the coronavirus.[271] On January 17, 2020, Purell was warned by the U.S. Food and Drug Administration that it needed to refrain from advertising unsubstantiated claims that its products effectively killed the flu and many infectious diseases.[272] As the products will be in high demand for the foreseeable future, it is likely this will become a heavily litigated industry by decade's end.

Finally, class action lawsuits *against issuers.* As discussed in greater detail in the D&O Liability section of this article, securities class action lawsuits are a major area of COVID-19 corporate litigation.[273] These lawsuits center around corporate mishandlings and deceitful behavior related to the pandemic and pandemic-related business decisions.[274] Corporations in industries across the country have received backlash in the form of securities class action lawsuits by shareholders for share losses sustained during the national crisis and allegedly due to the business decisions of directors and officers of the corporations.[275]

B. Available Defenses to Class Action Claims.

Several potential defenses are available to corporations facing COVID-19-related class action lawsuits. Specific defenses will be determined based on consideration of the legal contracts and agreements and the factual circumstances of subject litigation. The major areas of defense are discussed in detail below.

Personal jurisdiction. A defendant must determine if there are grounds to challenge personal jurisdiction at the commencement of the litigation.[276] Federal Rule of Civil Procedure 12(b)(2) provides that a party may assert the lack of personal jurisdiction defense before pleading. In a civil class action lawsuit, a defendant must look at each

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268. Costco, Walmart, Kroger, and several other merchants are named retailers in class action lawsuits for the alleged price gouging of essential groceries such as eggs. Michael Batriromo, *Costco, Walmart, Kroger 'Grossly Inflated' the Price of Eggs During Pandemic, Lawsuit Claims,* OZARKSFIRST (May 3, 2020), https://www.ozarksfirst.com/life-health/coronavirus/costco-walmart-kroger-grossly-inflated-the-price-of-eggs-during-pandemic-lawsuit-claims/.

269. Complaint at 1–2, Miller, et al. v. Gojo Indus., et al., No. 4:2020-cv-00562 (N.D. Ohio 2020).

270. *Id.*

271. Letter from Nicholas F. Lyons, Director of Compliance, FDA, to Carey Jaros, President and CEO, GOJO industries Inc. (Jan. 17, 2020) (On file with the FDA).

272. *Id.*

273. *See, e.g.*, Complaint at 1–2, *Douglas*, 2020 WL 1226410 (S.D. 2020); Complaint at 2, *McDermid*, 2020 WL 1227260 (E.D. Pa. 2020).

274. *See, e.g.*, *id.*

275. *See, e.g*., *id.*

276. Fed. R. Civ. P. 12(b)(6).

plaintiff's cause of action and its specific connection to the forum to determine if the court has general or specific jurisdiction over the defendant for every individual claim.[277] If the nexus is insufficient, a defendant should file a motion to dismiss for lack of personal jurisdiction prior to filing its answer.[278] It is also vital to note that this defense must be asserted within a defendant's first responsive pleading or the defense will be waived.

Lack of standing. Adequate substitution in a bargained-for exchange is a defense against civil action lawsuits for breach of contract. For example, events that were simply postponed during the shutdown and rescheduled during a time after the reopening of the economy provide acceptable substitutions for performance in many cases. Defendants should argue that plaintiffs have no standing in these circumstances as in many scenarios no injury ultimately occurred.

No breach. Class action defendants must consider if the relevant contracts contained provisions which allowed them to substitute services or reparation for equal/greater than contract price. These are common and enforceable provisions that offer an avenue to perform the contract in a different manner and effectively litigate a no-breach defense.

Force majeure. Class action lawsuits resulting from breach of contract claims must raise the defense that COVID-19 constitutes a *force majeure* event rendering contractual performance impossible.[279] Force majeure provisions are found in several commercial agreements and provide a contractual defense that holds a party harmless when events from a "superior force" or "act of God" render performance impossible.[280] In the United States, contractual interpretation and disputes are governed by state law; a defendant must look to prior catastrophic occurrences for legal precedent and guidance on how the court will rule on COVID-19 breach of contract claims.

Frustration of purpose or impossibility. If a contract does not contain a *force majeure* provision, a defendant may still argue that COVID-19 irreparably frustrated the purpose of its contract or simply made performance an impossibility.[281] If the contract is for the sale or lease of goods, then Uniform Commercial Code §§ 2.615 and 2A.405 are the best defense against the impracticability of the contract. For example, if an event planner contracted with a local tavern for beverage supply for a large St. Patrick's Day event but the event was canceled due to the coronavirus outbreak, this would constitute a frustration of purpose of their contractual agreement.[282] If unforeseen circumstances render the purpose of the contract frustrated or impossible to perform, there are legal grounds for breaking the contract without liability for breach.[283]

Enforcement of class action waiver or arbitration provisions. It is common for employment-related agreements to contain waivers and provisions within the contract that prohibit class action litigation for alternative dispute resolution platforms such as

277. Bristol-Meyers Squibb v. Superior Court, 137 S. Ct. 1773, 1781 (2017).

278. Fed. R. Civ. P. 12(b)(6).

279. *See* Christine Mathias, *Coronavirus and Business Contracts: When Performance Becomes Impossible or Impracticable*, NOLO, https://www.nolo.com/legal-encyclopedia/coronavirus-and-business-contracts-when-performance-becomes-impossible-or-impracticable.html (last visited May 13, 2020) (emphasis added).

280. *See id.*

281. *Id.* (emphasis added).

282. *See id.*

283. *See id.*

arbitration.[284] Class action lawsuit waivers have been upheld by the United States Supreme Court and will undoubtedly be contested in several COVID-19 cases brought before the courts.[285] Defendants and employers will likely succeed in enforcing these waivers for the arbitration alternative based on legal precedent.[286]

Unenforceability due to changes in applicable law. Stay-at-home executive orders and government-mandated non-essential business closures made it impossible for certain service contracts and agreements to be fulfilled. Under these circumstances, class action defendants will succeed against claims of breach in contracts where performance was made illegal under COVID-19 executive orders.

Lack of causation. In class action lawsuits for intentional and negligent torts, plaintiffs must establish the nexus between the alleged harm and the defendants' conduct. As discussed in the D&O Liability section of this article, the physical and economic devastation from the pandemic provides a strong intervening cause defense to the presumption that a class action defendant's actions directly caused the alleged injury.

Economic loss doctrine. This defense is available when plaintiffs inflate their damages to unreasonable or unrealistic monetary value.[287] In *Halcrow, Inc. v. Eighth Judicial District Court*, the court ruled that the economic loss doctrine barred the plaintiff's negligent misrepresentation claim against a general contractor for work performed by an undisclosed subcontractor.[288] The *Halcrow* court reasoned that the economic loss doctrine is justified in order to properly protect parties from unlimited or inflated economic liability in professional negligence claims.[289] While the full scope of the doctrine is jurisdictionally dependent, defendants to class action claims must argue the economic loss doctrine to protect themselves against excessive plaintiff recovery.[290]

Lack of class commonality. Class action defendants must evaluate the legal and factual distinctions of plaintiffs' claims in order to defeat class action certification. Legally, defendants must look for differences in the relevant timeframe and contractual language of each plaintiff's claim. Factually, defendants may find distinct variations in the circumstances leading to the alleged harmful conduct. Defendants must evaluate this evidence to consider if there is a lack of commonality among plaintiffs sufficient to defeat the class action certification.

VIII. THE POST-PANDEMIC AMERICAN JURY POOL

There has been a noticeable shift in the public's opinion of the United States' judicial system over the last several decades. At the turn of the century, the tort reform political movement was thriving, and anti-litigation mentality strongly resonated with everyday

284. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1618 (2018).
285. *See id*.
286. *See id.*
287. Halcrow, Inc. v. Eighth Judicial Dist. Court, 302 P.3d 1148 (Nev. 2013).
288. *Id.* at 1150.
289. *Id.*
290. Gale Burns, *TORTS: Economic Loss Doctrine as a Bar to Negligent Misrepresentation Claims,* NAT. LEGAL RESEARCH GRP. INC. (Dec. 30, 2013, 4:12 PM), http://www.nlrg.com/public-law-legal-research/bid/101458/TORTS-Economic-Loss-Doctrine-as-a-Bar-to-Negligent-Misrepresentation-Claims.

Americans.[291] The main concerns for our judicial system centered around a perceived unhealthy trend of frivolous lawsuits and exaggerated damages.[292] The majority of citizens were of the opinion that the extensive influx of litigation in the court systems was damaging to the American economy and the root cause of increasing insurance premiums across the country.[293] However, corporate condemnation had been slowly building since the early 2000s after a series of white-collar corruption scandals and corporate executive arrests.[294] By decade's end, the impact of corporate catastrophes like the Enron collapse transformed the prospective juror mentality from plaintiff skepticism to the anti-corporate attitude of present day.[295]

A. Historical Overview of Social Inflation and Nuclear Verdicts.

Long before the COVID-19 shutdown, the United States endured the largest economic disaster since the Great Depression during the 2008 financial crisis.[296] By 2009, the flood of stories about billion dollar corporate bailouts stood in stark contrast to the apparent lack of safety nets being provided to working class America.[297] For many Americans, the story of the 2008 financial catastrophe was simple: Wall Street had been bailed out and Main Street had been abandoned.

In the years that followed, the market bounced back and progressed through its longest expansion in history.[298] Meanwhile, employment rates and hourly wages remained stagnant.[299] As the middle class shrank, the American jury pool began to shape a "two Americas: one for the elite and one for the rest of us" mentality.[300] Jurors have steadily shifted their concern away from the harm of frivolous lawsuits and towards the threat of corrupt executives and unbridled corporate influence and power.[301] The culture eventually shifted so strongly that large corporations were being demonized as a group and believed to be guilty unless proven innocent.[302] Consequently, jury verdicts exploded because anti-corporate beliefs had become the norm, and the pervasive loss of trust was being reflected in the deliberation room.[303]

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291. Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 EMORY L.J. 1445, 1446–47, 1449 (2016).

292. *Id.* at 1469.

293. *Id.* at 1471.

294. Ken Broda-Bahm, *Corporate Corruption: Expect Sensitized Jurors*, PERSUASIVE LITIGATOR (Feb. 14, 2018), https://www.persuasivelitigator.com/2018/02/corporate-corruption-expect-sensitized-jurors.html.

295. *Id.*

296. Kimberly Amadeo, *2008 Financial Crisis Causes, Costs, and Whether It Could Happen Again*, THE BALANCE, https://www.thebalance.com/2008-financial-crisis-3305679 (last updated May 7, 2020).

297. Tam Harbert, *Here's How Much the 2008 Bailouts Really Cost*, MIT MANAGEMENT SLOAN SCHOOL (Feb. 21, 2019), https://mitsloan.mit.edu/ideas-made-to-matter/heres-how-much-2008-bailouts-really-cost.

298. Carmen Reinicke, *The US economic expansion is now the longest in history*, BUS. INSIDER (July 2, 2020, 7:06 PM), https://markets.businessinsider.com/news/stocks/us-economy-expansion-is-now-the-longest-in-history-2019-7-1028325678.

299. *Id.*

300. *See* Mark Hendrickson, *Progressive Economics: The Rise of Bureaucracy in America*, FORBES (Oct. 27, 2015, 11:31 AM), https://www.forbes.com/sites/markhendrickson/2015/10/27/progressive-economics-two-americas-bureaucratic-arrogation-and-santa-claus-socialism/#3f85cd26654c.

301. *See* Broda-Bahm, *supra* note 294.

302. *Id.*

303. *Id.*

Prior to the coronavirus pandemic, a major topic at litigation and risk management conferences was the concept of social inflation—a sociological term used to describe a multifaceted trend toward the deterioration of tort reform, increased litigation, more plaintiff-favorable judicial rulings, *generous* verdicts, and the onset of the once unthinkable phenomenon of litigation financing.[304] Historically speaking, social inflation and the resulting tide of outsized verdicts have been the result of a decade of pervasive anti-corporate attitudes, general pessimism and tribal politics activated and accelerated by the 2008 financial collapse.[305] Looking forward, it is imperative for defendants to understand the post-pandemic American jury pool mentality and if the social inflation trend survives the outbreak.

B. The Post-Pandemic Factfinder.

The factual basis of a claim is at the heart of every jury decision. The "story" told during litigation is essential to how jurors will receive, store, recall, and process the evidence. As a result, whichever party can tell the story better will have a major impact on how jurors will evaluate the choices and conduct of the parties involved in the litigation. Post-pandemic factfinders will analyze the claims by evaluating the intentions of the parties. *Was this person driven by selfishness or sacrifice? Are their plans clever or crooked? Were their behaviors understandable or careless?* Jurors will not always understand all the technical facts, demonstratives and expert testimony so they will construct the answers to these questions in the context of a narrative.

Jurors' preconceived notions of a plaintiff's or defendant's moral character will ultimately determine who must carry the burden of proof at trial. The COVID-19 pandemic will once again show that new crises can alter old assumptions. During the last century, we have seen juror perceptions sway from giving defendant insurers and corporations the benefit of the doubt to forcing them to prove they are "one of the good ones."[306] The impact of the COVID-19 pandemic on any particular area of litigation will depend on which groups emerge from the crisis as heroes and which emerge as villains.

The first responders, medical professionals, and essential workers are the heroes of a post-pandemic America. Parties to a lawsuit who are essential workers will have a stronger advantage in litigation than they did before the COVID-19 crisis. Stories of essential workers unable to quarantine are often juxtaposed with stories of the elite who experience the pandemic as a momentary inconvenience.[307]

Despite the demands of first responders, the American workforce has experienced unprecedented rates of unemployment from the COVID-19 economic shutdown.[308]

304. Bethan Moorcraft, *What is social inflation, and why is it hurting insurance?*, INS. BUS. AM, (Jan. 03, 2020), https://www.insurancebusinessmag.com/us/news/breaking-news/what-is-social-inflation-and-why-is-it-hurting-insurance-195626.aspx.

305. *Id.*

306. *Id.*

307. Rohit Thawani, *Celebrities, coronavirus has exposed how irrelevant you have become*, THE GUARDIAN (Apr. 7, 2020, 4:12 PM), https://www.theguardian.com/commentisfree/2020/apr/07/coronavirus-celebrity-influence-criticism.

308. Nicola Slawson, *36 million Americans unemployed – as it happened*, THE GUARDIAN, https://www.theguardian.com/world/live/2020/may/14/coronavirus-live-news-trump-surprised-by-faucis-reopening-warnings-as-who-says-covid-19-may-never-go (last updated May. 14, 2020).

Verdicts in employment litigation hinge on whether jurors can best see themselves in the shoes of the employee or the employer. The impact of having thirty-six (36) million citizens live through the stress, trauma and aftermath of unemployment during the government-ordered shutdowns must not be underestimated.[309] The gratitude of the nation is so strong that doctors and nurses in medical malpractice suits are more likely to be viewed favorably even in non-COVID-19-related cases. Meanwhile, stories of incompetence, corruption and fraud underlying the lack of medical supplies and infectious disease readiness could result in the broad demonizing of health care administrators.

Historically, in nursing home litigation, it has been common for jurors to express a belief that the wage-and-hour staff were likely undertrained, unskilled, and perhaps even morally suspect. COVID-19 stories of the sacrifice and heroism of aging services staff and medical professionals have changed these assumptions radically and thus changed the risk profile for aging services claims even if no COVID-19-relevant facts or claims are present. Consequently, any nursing home or long-term care facility that is accused of being unprepared for even a normal flu season may become a flashpoint for juror outrage.

As the country shifts from quarantine to a post-pandemic America, attention will increasingly be turned toward finding someone to blame. The stories of corruption, fraud, incompetence, and collusion are surfacing during America's worst economic crisis, and litigation involving claims reminiscent of these stories are a target for juror anger and frustration.

IX. CONCLUSION

Retired United States Army Command Sergeant Major Michael Mabee once said, "[w]e are not preparing for the world we live in—we are preparing for the world we find ourselves in."[310] This statement holds true now more than ever. The influx of unprecedented civil litigation creates an intense pressure on the judiciary to rule in a manner that is both fair and consistent during extraordinary times. As the United States emerges from the COVID-19 crisis, it is necessary that the American legal system fluently adapts to post-pandemic litigation and that policymakers and judicature engage in a civil dialogue which ensures a just societal outcome.

309. *Id*.

310. MICHAEL MABEE, THE CIVIL DEFENSE BOOK: EMERGENCY PREPAREDNESS FOR A RURAL OR SUBURBAN COMMUNITY 85 (2d ed. 2017).

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