MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP

ATTORNEYS AT LAW

The Covid-19 Pandemic Newsletter

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INTRODUCTION

We welcome our clients and friends to our inaugural newsletter addressing selected legal issues that you may be currently addressing or may soon be forced to confront in connection with the COVID-19 pandemic (the "***Pandemic***") and the federal, state and local governmental responses thereto.

Many of these matters have led and will invariably continue to lead to disputes among contracting parties and other constituents and will therefore require careful consideration of a number of issues, including negotiation approaches, proposed governmental fixes, pre-litigation positioning and litigation strategies. We have already begun to experience the initial phase of the litigation explosion arising out of Pandemic-related matters. In addition to the numerous Pandemic-related state court cases that have been filed throughout the country, federal court case filings "citing COVID-19" have increased "week-over-week since March 1, including 110% between the weeks of April 12-18 and April 19-25 alone and 16% the following week." "Tracking New Litigation Caused by COVID-10," *LexMachina.com* (May 11, 2020), accessible at *https://lexmachina.com/tracking-new-litigation-caused-by-covid-19/.*

While we are pleased to be able to mobilize the resources of our entire firm to assist our clients, and while all of our attorneys are guiding clients in connection with discrete aspects of Pandemic-related legal and business issues, we have assembled a multi-disciplinary task force (the "***Meltzer Lippe Pandemic Task Force***") to address these issues in a more comprehensive fashion. Its objective is to keep you informed of material developments in this fluid environment. (Our Task Force Editor and Project Coordinator, along with their respective contact information, are listed on the last page of this newsletter.)

We intend to publish subsequent editions of this newsletter periodically in response to the ever-evolving developments in the disparate areas that have been impacted by the Pandemic and the related governmental responses.

I.

COMMERCIAL LANDLORD-TENANT DISPUTES OVER THE NONPAYMENT OF RENT

A. LITIGATION THEORIES

For the reasons addressed in our detailed April 1, 2020 memorandum to clients and friends, titled *The Impact of the COVID-19 Pandemic on Commercial Lease-Payment Obligations: Potential Arguments For Landlords and Tenants*© (the "***Meltzer Lippe Commercial Lease Memorandum***"), rent-nonpayment disputes that cannot be resolved through negotiation and/or government intervention will have to be litigated.

Our Commercial Lease Memorandum, which is available upon request, addresses several issues that may be of interest to commercial landlords and tenants, including an analysis of the foreseeability-based defenses (impossibility of performance, temporary commercial impracticability and frustration of purpose), *force majeure* clauses and certain tactical considerations.

The New York Court of Appeals has held that, "[g]enerally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome[.]" *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987). Impossibility of performance will excuse nonperformance of a contract "only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible." *Id.*

Moreover, the New York courts have made clear that the mere fact that the contracting party would incur additional expense or inconvenience does not render performance impossible. *See, e.g., 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968) ("where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused"); *Warner v. Kaplan*, 71 A.D.3d 1, *5 (1st Dep't 2009) ("where performance is possible, albeit unprofitable, the legal excuse of impossibility is not available"), *leave to appeal denied*, 14 N.Y.3d 706 (2010); *Axginc Corp. v. Plaza Automall, Ltd.*, 2017 WL 11504930, at *8 (E.D.N.Y. 2017) ("Plaza argues that it could not perform on the contract (specifically, pay the rent it owed Axginc) because it could not procure flood insurance. But Plaza's asserted inability to procure flood insurance did not make performance impossible — just more expensive."), *aff'd*, 759 Fed. Appx. 26 (2d Cir. 2018); *Bank of America Nat'l Trust & Savings Ass'n v. Envases Venezolanos, S.A.*, 740 F. Supp. 260, 267 (S.D.N.Y.) ("[D]efendants do not assert that they absolutely cannot perform under the contract. They maintain only that performance will be extremely expensive, much more expensive than they had anticipated at the time the Restructuring Agreement was signed. However, financial difficulty does not, in and of itself, make out an impossibility defense."), *aff'd sub nom*, 923 F.2d 843 (2d Cir. 1990). *See* Meltzer Lippe Commercial Lease Memorandum at 6-8.

In a trilogy of cases filed in the Eastern District of New York on May 7, 2020, Sunrise Mass LLC, a commercial landlord, sued three commercial tenants for nonpayment of rent. *See Sunrise Mass LLC v. BG Retail, LLC*, No. 2:20-cv-02097 (E.D.N.Y.); *Sunrise Mass LLC v. Michael's Store, Inc.*, No. 2:20-cv-02098 (E.D.N.Y.); *Sunrise Mass LLC v. Party City Corp.*, No. 2:20-cv-02100 (E.D.N.Y.). The brief Complaint filed in each of the cases alleges that the defendant tenant failed to pay rent for the months of April and May 2020. Although the pleadings make no specific reference to the Pandemic, it appears that the tenants' nonpayment of rent is tied to the current economic crisis. Because they have not yet responded to the Complaints, we do not know whether the tenants intend to assert defenses under the impossibility of performance doctrine and/or other doctrines. The Complaints seek damages for breach of contract, but do not request injunctive relief.

The Complaint in *Van Buren Industrial Investors, L.L.C. v. Archway Marketing Services, Inc.*, No. 2:20-cv-11006 (E.D. Michigan) (filed April 23, 2020), asserts straightforward claims for breach of contract (and unjust enrichment) for nonpayment of rent, but, unlike the *Sunrise Mass* Complaints, also seeks injunctive relief. By requiring the court to balance the equities — indeed, the *Van Buren* Complaint asserts that "[g]ranting injunctive relief to [Van Buren] is in the public interest" (Complaint ¶ 56) — the claim for injunctive relief may well open the door for the tenant to place before the court the tragic health toll caused by the Pandemic and the economically punishing governmental directives in response thereto that have contributed to the tenant's inability to pay its rent. *Cf.* Meltzer Lippe Commercial Lease

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Memorandum at 40 ("[i]f feasible — subject, of course, to performing a careful analysis of the specific circumstances at issue — landlords may be better served by commencing pure breach-of-contract claims to recover the unpaid rent, as opposed to filing claims for injunctive relief that will require the courts to consider equitable factors"). Moreover, the *Van Buren* Complaint's acknowledgement that the tenant "continues to use and occupy the Property as an 'essential business'" (Complaint ¶ 35) may provide an additional equitable factor for the court's consideration.

B. PROPOSED LEGISLATIVE FIXES

Various legislative and other government rent-related proposals and directives have been introduced or issued during the Pandemic. While many of them address residential landlord-tenant relationships (*see, e.g.*, May 7, 2020 New York Executive Order No. 202.28 and the Orders referenced therein), certain proposals have also focused upon commercial landlords and tenants.

For example, on April 8, 2020, three pandemic-related bills were introduced in the New York State Assembly: Bill No. 10241 (which would extend tax-abatement filing deadlines by 90 days); Bill No. 10245 (which would provide relief for commercial landlords, commercial tenants and others) and Bill No. 10252 (which would empower counties to defer during the emergency period the payment of real property taxes by their residents, without the accrual of interest or penalties). It is unclear whether any of these Bills (some of which duplicate portions of other bills pending in the New York State Senate) will ever become law.

New York Assembly Bill No. 10245 is particularly sweeping. In addition to suspending real estate taxes for owners of one-, two- or three-family dwellings, the proposed legislation would provide rent-payment relief for affected residential tenants and small-business commercial tenants. (The Bill borrows from Section 131 of the New York Economic Development Law, which provides: "For the purposes of this chapter, a small business shall be deemed to be one which is resident in this state, independently owned and operated, not dominant in its field and employs one hundred or less persons.")

Tenants whose leases expire during the emergency period would be entitled to automatic renewal of their leases at the current rent. Although the Bill directs that rent payments be "suspended," it also provides that qualifying tenants "shall not and shall never be required to pay any rent waived during such time period."

In turn, landlords deprived of rent payments as a result of the Bill would be eligible for mortgage forgiveness up to the amount of their lost rent. A qualifying landlord "shall not and shall never be required to pay any mortgage payments waived during such time period." Bill 10245 would also suspend/waive the payment of utility charges during the covered period.

As currently written, the Bill does not provide relief for lenders that are deprived of mortgage payments.

C. LANDLORDS' POTENTIAL INSURANCE COVERAGE FOR RENT NONPAYMENT

Commercial landlords should review their insurance policies carefully to determine whether they can make a colorable claim against those policies for business-interruption coverage.

On April 30, 2020, Thor Equities, LLC filed a lawsuit against its insurer, Factory Mutual Insurance Company, alleging a claim for anticipatory breach of its commercial property insurance policy and for a declaratory judgment confirming Thor's right under the policy to receive reimbursement for its lost rental income. In its Complaint, filed in *Thor Equities, LLC v. Factory Mutual Insurance Company*, No. 1:20-cv-03380 (S.D.N.Y.), plaintiff alleges that the so-called "Time Element" section of its policy "provides coverage for lost earnings or lost profits (at Thor's option) 'directly resulting from physical loss or damage of the type insured' to Thor's property. . . . Critically for a commercial property owner such as Thor, the Time Element section also includes RENTAL INSURANCE, covering . . . the rental income from the rented portions of such property, according to bona fide leases, contracts or agreements in force at the time of loss[.]" *Thor Equities* Complaint ¶¶ 35, 38 (uppercase lettering in original). *See generally* Section III(A), below.

D. PROSPECTIVE CHANGES TO RENT CLAUSES

Commercial landlords and tenants are now engaged in spirited negotiations concerning pandemic-specific *force majeure* language that tenants are urging be included in new leases.

In an April 28, 2020 article published in *The Wall Street Journal*, "Retail Tenants, Landlords Clash Over Proposed Pandemic Rent Clauses," the author explained:

> "Most retail leases limit a tenant's ability to claim a rent abatement based on business interruption or *force majeure* clauses, which either exclude pandemics or don't relieve a tenant from paying rent. Tenant lawyers say they are insisting [that pandemic escape] clauses become a part of new leases.
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> "Landlords say other tenants want to add provisions that cancel rent payments when stores are closed for long periods, and to be able to pay variable rent — typically a percentage of sales as rent — when stores reopen. Some are refusing to consider quid pro quos such as lease extensions or the sharing of sales data proposed by the landlords. Is Long-Term Economic Problem
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> "Many landlords see this as unreasonable. While some retailers reopened in a few states including Georgia and South Carolina, which loosened coronavirus lockdown restrictions over the weekend, rent collection in May is expected to be worse than in April, property owners said.

> "They say a health crisis is beyond the property owner's control. Moreover, landlords add, they can't offer tenant relief when they are still on the hook for mortgage payments, tax, insurance and maintenance costs.
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> * * *
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> "Still, some commercial landlords said they could agree to shorter-term rent deferrals if another shutdown occurs. With more retailers potentially filing for bankruptcy protection, some property owners suggest they are willing to discuss lease modifications."

Wall Street Journal (April 28, 2020), accessible at *https://www.wsj.com/articles/retail-tenants-landlords-clash-over-proposed-pandemic-rent-clauses-11588075204?mod=hp_listb_pos1*.

Some commercial tenants have notified their landlords that they will require rent reductions as a result of the Pandemic. *See, e.g.*, "Starbucks Demands Landlords Lower its Rent For the Next Year, Citing 'Staggering Economic Crisis' of Coronavirus," *Seattle Times* (May 13, 2020), accessible at *https://www.seattletimes.com/business/real-estate/starbucks-demands-landlords-lower-its-rent-for-the-next-year-citing-staggering-economic-crisis-of-coronavirus/*.

II.

IMPOSSIBILITY OF PERFORMANCE CLAIMS OUTSIDE THE COMMERCIAL LANDLORD-TENANT CONTEXT

A. FINANCIAL DIFFICULTY: GENERALLY

As noted in Section I(A), above, in at least New York, the fact that circumstances make performing a contract economically more burdensome (even to the point of bankruptcy) does not itself excuse nonperformance under the doctrine of impossibility. *See also* Meltzer Lippe Commercial Lease Memorandum at 6-8.

Applying this principle, the United States District Court for the Southern District of New York issued a brief decision on May 8, 2020 rejecting a Pandemic-based impossibility of performance defense seeking to excuse the defendants' failure to make continued installment payments under a November 2019 settlement agreement. In *Lantino v. Clay LLC*, 2020 WL 2239957 (S.D.N.Y. 2020), the Magistrate Judge observed that, "'where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.'" 2020 WL 2239957, at *3 (quoting *407 E.61st Garage*, 23 N.Y.2d at 281). The court then explained: "At best, Defendants have established financial difficulties arising out of the COVID-19 pandemic and [Governor Cuomo's] PAUSE Executive Order that adversely affected their ability to make the payments called for under the Settlement Agreement. As such, Defendants' performance under the Settlement Agreement is not excused." *Id.*

B. PENDING M&A TRANSACTIONS

In light of the Pandemic and the weakened economic environment, more and more parties are walking away from pending corporate transactions. *See, e.g.*, "The Impact of the Coronavirus Crisis on Mergers and Acquisitions," *Forbes* (April 17, 2020) ("[p]arties to pending M&A transactions are also abandoning significant deals that were pending"), accessible at *https://www.forbes.com/sites/allbusiness/2020/04/17/impact-of-coronavirus-crisis-on-mergers-and-acquisitions/#5b1d0af6200a*. This development has begun to spawn litigation.

(i) THE MATERIAL ADVERSE EVENT CLAUSE

A critical determinative in such M&A-related litigation will be the wording of the material adverse event or effect ("***MAE***") clause set forth in the purchase and sale agreement.

In *Bed Bath & Beyond Inc. v. 1-800-Flowers.com, Inc.*, No. 2020-0245 (Delaware Chancery Court) (filed April 1, 2020), Bed Bath & Beyond ("***Bed Bath***") sued 1-800-Flowers for refusing to proceed with the March 30, 2020 closing of its $252 million purchase of a Bed Bath affiliated company. Bed Bath alleges that "the MAE definition [in the agreement] *explicitly excludes*, among other things, . . . any change resulting from changes in general business, financial, political, capital market or economic conditions (including any change resulting from any calamity, natural or man-made disaster o[r] acts of God, hostilities, war or military or terrorist attack[.]" Complaint ¶ 32 (emphasis in original).

Significantly, Bed Bath also alleges that, in 1-800-Flowers's March 27, 2020 letter advising that it would not close the transaction on March 30, 2020, the defendant "explicitly stated it was not terminating the Agreement or invoking the MAE provision." *Bed Bath* Complaint ¶ 44. *See also id.* ¶ 49 ("[Defendant's] maneuvering . . . is designed to allow it to 'wait and see' what impact the COVID-19 outbreak has on the Company's business and to assess whether it should attempt to assert in the future a retroactive invocation of a[n] MAE so as to argue that it can terminate the Agreement. . . . That is not the parties' Agreement and is utterly unreasonable.").

(ii) AWARENESS OF THE PANDEMIC DURING DEAL NEGOTIATIONS

As a general matter — subject, of course, to the particular circumstances at issue and the specific language of the governing contracts — a potential buyer that walks away from a pending deal will be on weaker ground if the seller can demonstrate that the buyer was aware of the Pandemic during the deal negotiations, but then subsequently attempted to use the Pandemic to justify abandoning an acquisition that it no longer wished to pursue or delaying one about which it had become undecided.

1. THE *KHAN* LAWSUIT

In the Complaint filed on April 2, 2020 in *Khan v. Cinemex USA Real Estate Holdings, Inc.*, No. 4:20-cv-01178 (S.D. Texas), the plaintiff asserts: "This case is about preventing Cinemex — a large Mexican cinema company backed by a multi-billionaire — from exploiting the Coronavirus-induced public health disaster as a pretext for walking away from a legally binding agreement. . . . [A]s the economy inched closer to a recession, and without a legitimate basis to back out of the deal, Cinemex suddenly began claiming that the supposedly unforeseen situation caused by the Coronavirus somehow relieved Cinemex's obligation to close under the Agreement." Complaint ¶¶ 1, 3. The pleading goes on to assert that, "[f]ar from being unforeseen, the potential impact of the Coronavirus was a significant factor discussed by the parties during their negotiation of the Agreement. Cinemex was even able to extract a multi-million dollar reduction in the purchase price for the Transaction by pointing to the Coronavirus outbreak and raising the possibility that it could force [the target business] to close for an indefinite period of time." Complaint ¶ 4.

Two days before the court was to hold its April 27, 2020 hearing on plaintiff's motion for injunctive relief and specific performance, defendant Cinemex "filed a notice of bankruptcy invoking the attendant automatic stay." April 27, 2020 Order (Docket No. 44).

2. THE *KAR* LAWSUIT

On April 3, 2020, ASAP Ditmars LLC ("***ASAP***") filed an action in the New York Supreme Court for Queens County, seeking to be relieved of its obligations under a purchase and sale agreement (the "***PSA***") due to impossibility of performance caused by the Pandemic. At issue in the lawsuit, captioned *ASAP Ditmars LLC v. KAR Hotel Owner LLC*, No. 704992/2020 (Sup. Ct. Queens Co.), is whether the Pandemic excused the failure of ASAP to close its $120 million purchase of the New York LaGuardia Airport Marriott from KAR on the scheduled time-of-the-essence date, April 3, 2020.

In lieu of proceeding with the scheduled April 3 closing of the transaction, ASAP obtained a Temporary Restraining Order preserving the status quo, thereby preventing KAR from terminating the PSA, disposing of the hotel or dissipating ASAP's $9.5 million deposit. At the conclusion of a hearing on April 28, the court continued the TRO upon the condition that ASAP post a bond by May 12 in the amount of $5 million (which it did) to supplement the $9.5 million deposit that KAR holds. As of the date hereof, the court has not ruled on ASAP's pending motion for a preliminary injunction.

A number of alleged facts could make it challenging for ASAP to obtain its requested relief based upon an impossibility of performance theory. KAR argues that ASAP had pushed for multiple postponements of the closing since January 15, 2020, well before the Pandemic created the current economic crisis, and conceded thereafter that it no longer liked the deal, as structured. #KAR contends that, after adjourning the closing a final time, to April 3, ASAP's principal told KAR that ASAP would not close even if it had "all the money in the world" because it did not like the economics of the transaction, but would be interested in purchasing the property at a later date. Defendant's April 25, 2020 Opposition Memorandum of Law (Docket No. 19) at 9.

III.

BUSINESS-INTERRUPTION INSURANCE COVERAGE

A. POTENTIAL INSURER LIABILITY

(i) LITIGATION

As noted in Section I(C), above, commercial insureds should review their insurance policies to determine whether it is feasible for them to make coverage claims for business-interruption losses suffered as a result of the Pandemic and related government directives. Depending upon the precise language of the policy and its exclusions, there are various potential arguments that might be made in support of such claims.

Over the past several weeks, scores of commercial insureds across the country have filed lawsuits seeking coverage under property insurance policies for business losses suffered as a result of the business-closure and other governmental directives issued in response to the Pandemic. *See, e.g., French Laundry Partners, LP d/b/a The French Laundry v. Hartford Fire Insurance Co.* (Cal. Superior Court, Napa County) (filed March 25, 2020); *Big Onion Tavern Group, LLC v. Society Insurance*, No. 1:20-cv-02005 (N.D. Illinois) (filed March 27, 2020); *Billy Goat Tavern I, Inc. v. Society Insurance*, No. 1:20-cv-2068 (N.D. Illinois) (filed March 31, 2020) (putative class action); *Prime Time Sports Grill, Inc. v. DTW1991 Underwriting Limited*, No. 8:20-cv-00771 (M.D. Fla.) (filed April 2, 2020); *Boutros v. Sentinel Insurance Co.*, No. 4:20-cv-01541 (S.D. Texas) (filed originally on April 2, 2020 in Texas District Court, Harris County, and then removed to federal court on May 1, 2020); *SCGM, Inc. d/b/a Star Cinema Grill v. Certain Underwriters at Lloyd's*, No. 4:20-cv-01199 (S.D. Texas) (filed April 3, 2020); *Indiana Repertory Theatre, Inc. v. The Cincinnati Casualty Co.*, No. 49D01-2004-PL-013137 (Indiana Superior Court, Marion County) (filed April 3, 2020); *MODA LLC v. Hartford Fire Insurance Co.*, No. 20PSCV00265 (Cal. Superior Court, Los Angeles County) (filed April 3, 2020); *Mace Marien Inc. d/b/a Conch Republic Divers v. Tokio Marine Specialty Insurance Co.*, No. 105911474 (Florida Circuit Court, Monroe County) (filed April 6, 2020); *Sandy Point Dental PC v. The Cincinnati Insurance Co.*, No. 1:20-cv-02160 (N.D. Illinois) (filed April 6, 2020); *Proper Ventures, LLC d/b/a Proper Twenty-One v. Seneca Insurance Co.*, No. 2020-CA-002194-B (DC Superior Court) (filed April 8, 2020); *El Novillo Restaurant d/b/a DJJ Restaurant Corp. v. Certain Underwriters at Lloyd's London*, No. 1:20-cv-21525 (S.D. Fla.) (filed April 9, 2020) (putative class action); *Geragos & Geragos, APC v. The Travelers Indemnity Company of Connecticut*, No. 20STCV14022 (Cal. Superior Court, Los Angeles County) (filed April 9, 2020); *LH Dining, L.L.C. d/b/a River Twice Restaurant v. Admiral Indemnity Co.*, No. 2:20-cv-01869 (E.D. Pa.) (filed April 10, 2020); *MODA LLC v. Hartford Fire Insurance Co.*, No. 20CV01655 (Cal. Superior Court, Santa Barbara County) (filed April 13, 2020); *Newchops Restaurant Comcast LLC, d/b/a Chops v. Admiral Indemnity Co.*, No. 2:20-cv-01949 (E.D. Pa.) (filed April 17, 2020); *PGB Restaurant, Inc. v. Erie Insurance Co.*, No. 1:20-cv-02403 (N.D. Illinois) (filed April 19, 2020) (putative class action); *Maillard Tavern, LLC v. Society Insurance, Inc.*, No. 2020CH03843 (Illinois Circuit Court, Cook County) (filed April 14, 2020); *Simon Wiesenthal Center, Inc. v. Chubb Group of Insurance Cos.*, No. 2:20-cv-03890 (C.D. Cal.) (filed April 29, 2020); *Rising Dough, Inc. v. Society Insurance*, No. 2:20-cv-00623 (E.D. Wisconsin) (filed April 17, 2020) (putative class action); *Caribe Restaurant & Nightclub, Inc. v. Topa Insurance Co.*, No. 2:20-cv-03570 (C.D. Cal.) (filed April 17, 2020) (putative class action); *Gio Pizzeria & Bar Hospitality, LLC v. Certain Underwriters at Lloyd's London*, No. 1:20-cv-03107 (S.D.N.Y.) (filed April 17, 2020) (putative class action); *Bridal Expressions LLC v. Owners Insurance Co.*, No. 1:20-cv-00833 (N.D. Ohio) (filed April 17, 2020) (putative class action); *Dakota Ventures LLC v. Oregon Mutual Insurance Co.*, No. 3:20-cv-00630 (D. Oregon) (filed April 17, 2020) (putative class action); *Christie Jo Berkseth-Rojas DDS v. Aspen American Insurance Co.*, No. 3:20-cv-00948 (N.D. Texas) (filed April 17, 2020) (putative class action); *Café International Holding Co. LLC v. Chubb Limited*, No. 1:20-cv-21641 (S.D. Fla) (filed April 20, 2020) (putative class action); *Atma Beauty, Inc. v. HDI Global Specialty SE*, No. 1:20-cv-21745 (S.D. Fla.) (filed April 27, 2020) (putative class action); *Thor Equities*, No. 1:20-cv-03380 (S.D.N.Y.) (filed April 30, 2020); *Nari Suda LLC v. Oregon Mutual Insurance Co.*, No. 4:20-cv-03057 (N.D. Cal.) (filed May 4, 2020) (putative class action); *Greg Prosmushkin P.C. v. The Hanover Insurance Group*, No. 200500342 (Pa. Court of Common Pleas, Philadelphia County) (filed May 6, 2020); *Slate Hill Daycare Center Inc. v. Utica National Insurance Co.*, No. 7:20-cv-03565 (S.D.N.Y.) (filed May 7, 2020) (putative class action); *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*, No. 3:20-cv-03213 (N.D. Cal.) (filed May 11, 2020) (putative class action).

Plaintiffs in at least two of the federal cases have petitioned the Judicial Panel on Multidistrict Litigation (the "***JPML***") to consolidate the cases in the Eastern District of Pennsylvania for pretrial purposes. *See* April 20, 2020 Motion For Transfer and Coordination or Consolidation Under 28 U.S.C. § 1407 filed with the JPML in *In re COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2942, by counsel for plaintiffs in *LH Dining L.L.C.* and *Newchops Restaurant Comcast LLC*. As of May 15, 2020, the JPML docket reflected more than 90 related federal cases.

At least one commercial insured petitioned the Pennsylvania Supreme Court to coordinate and decide the many business-interruption insurance cases filed in Pennsylvania state courts, essentially mirroring the MDL request of the federal plaintiffs. *See Joseph Tambellini Inc., d/b/a Joseph Tambellini Restaurant v. Erie Insurance Exchange*, No. 52 WM 2020 (Pennsylvania Supreme Court). By summary Order dated May 14, 2020, the Pennsylvania Supreme Court denied the petition.

1. THE INSUREDS' "LOSS OR DAMAGE TO PROPERTY" ARGUMENT

Many of the cases allege an entitlement to business-interruption insurance coverage under all-risk property policies devoid of a pandemic/virus exclusion. Insurers that failed to adopt this exclusion, which became common after the 2003 SARS Pandemic, are seemingly at increased risk of liability. By 2006, Insurance Services Office, Inc. (the "***ISO***") had circulated proposed Policy Endorsement CP 01 40 07 06 (Endorsement CP 01 75 07 06 in New York and certain other states), which provides expressly that the insurer "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *See* "New Endorsements Filed To Address Exclusion of Loss Due To Virus or Bacteria," *ISO Circular* (July 6, 2006), accessible at *https://www. propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf. See also https://northstarmutual.com/UserFiles/File/forms/policyforms/Current/CP%2001%2040%2007%2006.pdf.*

Focusing upon the policy clause that provides coverage for "loss or damage to property," many plaintiffs have alleged, among other things, that the fact that the COVID-19 virus remains on surfaces for some period of time constitutes property damage that satisfies the clause. *See, e.g.*, May 4, 2020 Complaint filed in *Nari Suda*, No. 4:20-cv-03057 (N.D. Cal.), ¶ 23 ("[d]roplets containing Coronavirus infect a variety of surfaces and objects for a period of . . . hours, days, or weeks, if not longer").

The ISO's 2006 filing in connection with proposed Endorsement CP 01 40 07 06 (again, in New York and certain other states, it is Endorsement CP 01 75 07 06) may lend support to plaintiffs' argument. There, the ISO explained the perceived need for the proposed virus exclusion:

> "An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.
>
> "Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.
>
> "***Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage. An allegation of property damage may be a point of disagreement in a particular case. In addition, pollution exclusions are at times narrowly applied by certain courts***. In recent years, ISO has filed exclusions to address specific exposures relating to contaminating or harmful substances. Examples are the mold exclusion in property and liability policies and the liability exclusion addressing silica dust. Such exclusions enable elaboration of the specific exposure and thereby can reduce the likelihood of claim disputes and litigation.
>
> "***While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent***.
>
> "In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms."

"New Endorsements Filed To Address Exclusion of Loss Due To Virus or Bacteria," *ISO Circular* (July 6, 2006) (emphasis added), accessible at *https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf. See, e.g., Nari Suda* Complaint ¶ 73 (referencing the ISO's 2006 Endorsement CP 01 40 07 06 filing, plaintiff alleges: "The insurance industry has . . . recognized that the presence of virus or disease can constitute physical damage to property since at least 2006.").

Where plaintiffs have failed to even plead the requisite physical loss to property, insurers have pounced. For example, in *Prime Time Sports Grill*, the Lloyd's London underwriter moved to dismiss the Complaint because "[t]he policy at issue is a commercial property policy, and its insuring agreement states that a covered suspension of operations 'must be caused by direct physical loss of or damage to property at premises' . . . . Prime Time has not alleged any 'direct physical loss to property' at the insured premises, and in good faith cannot do so. There is no coverage as a matter of law, so the Court should dismiss the claim." May 4, 2020 Motion To Dismiss (Docket No. 13) at 2.

2. THE INSUREDS' "CIVIL AUTHORITY" ARGUMENT

In cases in which the policies contain a virus/pandemic exclusion, plaintiffs have focused not only upon the property loss or damage clause (making the argument set forth above concerning the property damage and loss caused by COVID-19), but upon the clause that provides coverage for losses caused by orders issued by a "civil authority." Plaintiffs contend that the business-closure/stay-at-home orders issued by the relevant state governors satisfy the civil authority clause and thus, because there is also property damage/loss, the virus exclusion does not shield the insurers.

For example, in *Slate Hill Daycare*, No. 7:20-cv-03565 (S.D.N.Y.), the Complaint acknowledges that the policy contains a virus exclusion, but asserts that said exclusion does not relieve the insurer of its obligation to provide business-interruption insurance:

> "Defendant [Utica National Insurance Group] asserts any loss resulting from property damage or Civil Authority Orders to cease normal business operations are excluded under the terms of the Policy's Virus or Bacteria Exclusion. Defendant is wrong. The COVID-19 pandemic has caused Plaintiff and the proposed Class property damage and physical loss. Moreover, the Civil Authority Orders have also caused Plaintiff and the proposed Class to suffer compensable property damage and business losses. Further, the Policy's Virus or Bacteria Exclusion clause does not apply to the COVID-19 pandemic.
>
> * * *
>
> "[A declaratory judgment is required because] Defendant disputes and denies that . . . the Policy's Exclusion of Loss Due to Virus or Bacteria does not apply to the business losses incurred by Plaintiff here that are proximately caused by the Civil Authority Orders issued in response to the COVID-19 pandemic[.]"

May 7, 2020 *Slate Hill Daycare* Complaint ¶¶ 19, 49.

(ii) PROPOSED LEGISLATIVE FIXES

Commercial insureds should also keep in mind that legislation seeking to force insurers to provide after-the-fact business-interruption or other insurance coverage has been introduced in multiple states. For example, New York Assembly Bill 10226-A (amended April 29, 2020 and renumbered 10226-B) provides, among other things, as follows:

> "Notwithstanding any provisions of law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes, but is not limited to, the loss of use and occupancy and business interruption, shall be construed to include among the covered perils under that policy, coverage for business interruption during a period of a declared state emergency due to the coronavirus disease 2019 (COVID-19) pandemic."

See also Ohio House Bill 589; Louisiana House Bill 858 & Senate Bill 477; Massachusetts Bill SD. 2888; New Jersey Bill A-3844; Pennsylvania House Bill 2372; South Carolina Bill S. 1188.

There is doubt as to the constitutionality and legality of certain aspects of the proposed state legislation and, thus far, none of the Bills has been enacted into law.

In apparent recognition of the constitutional obstacles to overriding existing contract terms, the Pennsylvania Senate on April 30, 2020 took a different approach in Senate Bill 1127. The Bill sets forth broad rules of construction for certain key policy provisions that make it easier for commercial insureds to seek coverage for Pandemic-induced losses. For example, "property damage" is defined to have occurred when, among other things, "a person positively identified as having been infected with COVID-19 has been present in, or if the presence of the COVID-19 coronavirus has otherwise been detected in, a building, an office, a retail space, a structure, a plant, a facility, a commercial establishment or other area of business activity[.]"

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The April 17, 2020 memorandum of one of the sponsors of Pennsylvania Senate Bill 1127, Senator Pam Iovino, explains: "This legislation is designed to clarify Pennsylvania law regarding the interpretation of this ambiguous insurance policy wording and is not intended to rewrite insurance contracts. Under my legislation, businesses would not receive additional payments beyond what their existing coverage permits. Rather, this legislation will help ensure insurers pay meritorious business interruption claims quickly and efficiently to their policyholders." Sen. Iovino's April 17, 2020 Memorandum, accessible at *https://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20190&cosponId=31619.*

At the federal level, H.R. 6494, the Business Interruption Insurance Act of 2020, was introduced on April 14, 2020. The Bill requires providers of business-interruption insurance policies to cover viral pandemics and government-directed business closures; voids, on preemption grounds, any state approval of policy exclusions to the contrary; and allows insurers to reinstate such exclusions if the insured agrees in writing or fails to pay the insurer an increased premium for the expanded coverage.

B. POTENTIAL INSURANCE BROKER LIABILITY

Because commercial insureds whose policies do contain an express virus/pandemic exclusion will face certain (but, depending upon the specific policy language, not necessarily insurmountable) challenges to the successful prosecution of claims against their respective insurers, they may elect to sue their insurance ***brokers*** (along with or independently of their insurers).[1]

Putting aside thorny questions as to the duties owed by brokers under a given state's law, these insureds may allege that they relied upon the expertise of their brokers, who failed to place the appropriate coverage that they required and/or requested and failed to explain the consequences of the virus/pandemic exclusion.

We are aware of at least four Pandemic-related cases in which the commercial insureds sued their respective insurers for business-interruption coverage and also named the insurance broker or agent. However, in only two of them is the claim against the broker fleshed out to any degree.

In *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance Co.*, No. 20ST CV 16681 (Cal. Superior Court, Los Angeles County) (filed May 1, 2020), the plaintiff sued both its insurer and its broker, HUB International Insurance Services, asserting that it is entitled to business-interruption coverage for losses arising out of the Pandemic and related governmental shutdown orders. The policy at issue includes a virus/bacteria exclusion. Complaint ¶ 37. Making clear that the negligence claim against the broker is asserted in the alternative, the Complaint alleges:

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[1] We use the term insurance "broker" to denote one who is engaged by and works on behalf of a client and is capable of soliciting for the client insurance coverage quotes from multiple insurers and then placing the desired coverage for the client with the selected insurer(s). We contrast a broker with an insurance "agent," who represents designated insurers or functions as a captive of a single insurer and therefore does not represent the client; the agent is limited to placing coverage only with his or her affiliated insurer(s).

"[T]o the extent that there is a finding that the Policy does not provide coverage, then Musso & Frank alleges in the alternative that HUB International was negligent in the procurement of the Policy.

* * *

"In that process, HUB International . . . had a duty to use reasonable care, diligence and judgment in procuring the insurance that Musso & Frank requested.

". . . In the process, they held themselves out to be experts in the field of insurance, and in particular, experts in the field of insurance for restaurants.

* * *

"HUB International . . . owed Musso & Frank a duty of due care to see that its interests were fully protected by the coverage that was requested by Musso & Frank and promised by HUB International[.]

"***HUB International . . . knew that Musso & Frank would rely, and it did justifiably rely, upon the experience, skill, and expertise of HUB International . . . to obtain and place sufficient coverage for the restaurant, even in the event of a virus***."

Musso & Frank Complaint ¶¶ 84, 86-87, 90-91 (emphasis added). *See also Ja-Del, Inc. v. Zurich American Insurance Co.*, No. 2016-CV11209 (Missouri Circuit Court, Jackson County) (filed April 28, 2020), Complaint ¶ 36 (alleging that the two defendant insurance brokers breached their duty of care to plaintiff "by communicating inaccurate information as to what the Policy covered and/or not procuring a policy that fully covered Plaintiff's business income losses").

The April 15, 2020 Complaint filed in *John's Grill, Inc. v. The Hartford Financial Services Group, Inc.*, No. CGC-20-584184 (Cal. Superior Court, San Francisco County), names Norbay Insurance Services Inc. ("***Norbay***"), which is described as "a California-licensed property insurance broker-agent and casualty insurance broker-agent" that "sold John's Grill the Policy at issue in this action and has joined in the denial of the claim that is the subject of this lawsuit, regardless of any conduct by other Defendants." Complaint ¶ 19. The Complaint does not allege whether Norbay functioned as an agent of The Hartford (or its affiliated insurance company, defendant Sentinel Insurance Company) or as plaintiff's broker. Although a specific claim against Norbay is difficult to parse from the Complaint, it appears that the plaintiff is alleging that Norbay aided and abetted the insurer's misrepresentations and concealment of the fact that it would not provide coverage under the policy for Pandemic-related losses.

In the April 2, 2020 Petition filed in *Boutros v. Sentinel Insurance Co.*, No. 2020-20934 (Texas District Court, Harris County), the plaintiff also named Alliant Insurance Services Houston, LLC ("***Alliant***"). Although Alliant is a broker (*see, e.g., http://www.alliant.com/Industry-Solutions/Pages/default.aspx*.), the Petition describes it as "a foreign-for-profit insurance company" and then as The Hartford's "agent." Petition ¶¶ 4, 8, 19. The pleading sets forth no description of Alliant's role in the events at issue other than to assert that Alliant and The Hartford "owe Plaintiff a duty to indemnify" under the insurance policy at issue. *Id.* ¶ 19. (As noted above, the *Boutros* case was removed to the U.S. District Court for the Southern District of Texas and assigned docket number 4:20-cv-01541.)

IV.

CREDIT-RISK INSURANCE COVERAGE

To the extent that businesses have purchased credit-risk insurance policies — *i.e.*, policies that provide coverage for losses sustained as a result of the insured's inability to collect its accounts receivable — they should review them carefully to ensure that they have satisfied all of their policy obligations to avoid waiving coverage.

Moreover, some policies contain an exclusion for losses "directly or indirectly caused by or arising from other forms of natural disaster or *force majeure*" or "other governmental measures which prevent performance of the contract." Accordingly, a threshold issue is whether such policy language excludes coverage for the insured's losses caused by the Pandemic and/or related government directives and legislation.

Typical requirements imposed upon insureds under credit-risk insurance policies include, among others, the following:

- The insured must notify the insurer of the occurrence of any circumstance or event likely to cause a loss, including, for example, a customer's request for an extension of the payment due date or the insured's learning unfavorable information concerning the customer's financial position, reputation or debt-payment performance.

- The insured must mitigate damages. Thus, among other things, the insured must reserve all of its rights and claims against its customers. In this current environment, an insured may wish to consider sending a brief, polite letter to each defaulting customer covered by its policy, expressly reserving all of the insured's rights and remedies; the insured may also wish to contact the customer beforehand to explain that said letter is designed to comply with the insured's policy terms. (Where the loss is due to the insolvency of a customer, the insured must file a timely proof of claim in the customer's bankruptcy proceeding.)

- After a specified period of time, the insured must place a defaulting customer's account with a collection service approved by the insurer. This policy requirement could pose a challenge for an insured that wishes to engage in an amicable negotiation with its customer, since the placement of the delinquent account with a collection service could chill the desired negotiation. As with the reservation of rights referenced above, an insured may wish to contact its customer beforehand to explain that the placement of the account with the collection service is required under the insured's policy.

Holders of credit-risk insurance policies should also be aware that some policies permit the insurer, upon notice to the insured, to reduce or cancel coverage on a going-forward basis during the policy term with respect to the insured's customers whose financial condition poses a concern to the insurer. Pending further investigation into a customer's financial condition, the insurer may or may not rescind its coverage reduction or cancellation decision.

V.

SEC AND DOJ INVESTIGATIONS AND ENFORCEMENT ACTIONS

As occurred in the wake of the 2007/2008 recession, the Securities and Exchange Commission (the "***SEC***") and the Department of Justice (the "***DOJ***") are likely to step up their investigatory and enforcement activity in connection with Pandemic-related conduct.

An inevitable focus in the initial wave of this expected increased enforcement activity will be entities and individuals alleged to have made misrepresentations or omissions or otherwise engaged in fraud relating directly to the Pandemic. Such targets will likely include, for example, companies that fail to disclose fully the potential risks to their business operations caused by the Pandemic and related governmental directives; companies that fail to disclose their business-continuity plans, if any, to address the Pandemic; and companies that attempt to capitalize upon the crisis by misrepresenting their capabilities in providing equipment, pharmaceuticals and other products and/or services to combat COVID-19 or its effects. *See* Section VII(A), below.

The SEC has underscored the need for companies to make fulsome disclosures concerning the impact of COVID-19 upon their businesses:

> "Company disclosures should reflect this state of affairs and outlook and, in particular, respond to investor interest in: ***(1) where the company stands today, operationally and financially, (2) how the company's COVID-19 response, including its efforts to protect the health and well-being of its workforce and its customers, is progressing, and (3) how its operations and financial condition may change as all our efforts to fight COVID-19 progress***. Historical information may be relatively less significant."

"The Importance of Disclosure — For Investors, Markets and Our Fight Against COVID-19," SEC (April 8, 2020) (emphasis added), accessible at *https://www.sec.gov/news/public-statement/statement-clayton-hinman*.

VI.

CARES ACT AUDITS, INVESTIGATIONS, PROSECUTIONS AND LITIGATION

A. FRAUD AND ABUSE UNDER THE CARES ACT

Government agencies, including the DOJ, will be scrutinizing the implementation of the various aspects of the Coronavirus Aid, Relief, and Economic Security Act (the "***CARES Act***"), as they did with respect to the 2008 Troubled Asset Relief Program (or TARP). This could lead to the assertion of civil claims and/or criminal charges.

Currently, the CARES Act provides for oversight through three mechanisms: (i) a bipartisan Congressional Oversight Commission, (ii) a Pandemic Response Accountability Committee comprised of the Inspectors General of various agencies and (iii) a Special Inspector General for Pandemic Recovery (the "***SIGPR***"). The SIGPR, which has been provided an initial budget of $25 million, is vested with broad powers:

> "Congress included a variety of provisions to facilitate transparency and oversight in the implementation of the CARES Act. Among these actions was the creation of a Special Inspector General for Pandemic Recovery (SIGPR). The SIGPR is similar in purpose and legal authorities to two other special inspectors general: the Special Inspector General for the Troubled Asset Relief Program and the Special Inspector General for Afghanistan Reconstruction.
>
> * * *
>
> "The SIGPR has the same responsibilities as other inspectors general under the Inspector General Act of 1978 (§4018(c)(3)). ***These duties include making recommendations to agency leadership to promote economy and efficiency in agency administration, prevent and detect fraud and abuse, and facilitate the identification and prosecution of participants in fraud or abuse***. Further, the SIGPR is required to report those recommendations to Congress on a semi-annual basis. Finally, the SIGPR is a member of the Council of the Inspectors General on Integrity and Efficiency (§4018(i))."

"Special Inspector General For Pandemic Recovery: Responsibilities, Authority, and Appointment," *Congressional Research Service* (April 13, 2020) (emphasis added), accessible at https://crsreports.congress.gov/product/pdf/IN/IN11328. The SIGPR also has the power to issue subpoenas, administer oaths and obtain information or assistance from any federal department, agency or other entity. *Id*.

The SIGPR nominee is Brian Miller, a former prosecutor, Inspector General for the General Services Administration and Senior Associate Counsel and Special Assistant to the President. Mr. Miller, whose nomination is subject to Senate confirmation, provided the following opening statement to the Senate Banking Committee on May 5, 2020:

> "I have been fortunate to have a long career in public service that has prepared me well for this position. I have close to 30 years of experience in the Federal government. Fifteen years in the Department of Justice and nearly 10 years as the Senate confirmed Inspector General of the General Services Administration, serving across Republican and Democrat administrations. I have also served as an independent corporate monitor and practiced law in the areas of ethics and compliance, government contracts, and internal investigations. . . . If confirmed, I will conduct every audit and investigation with fairness and impartiality. I will be vigilant to protect the integrity and independence of the Office of Special Inspector General. I pledge to seek the truth in all matters that come before me and to use my authority and resources to uncover fraud, waste, and abuse."

Opening Statement of Brian D. Miller, U.S. Senate Committee on Banking, Housing and Urban Affairs (May 5, 2020), accessible at *https://www.banking.senate.gov/imo/media/doc/Miller%20Testimony%205-5-20.pdf*.

Businesses that have applied for and accepted funds under the Paycheck Protection Program created by the CARES Act (the "***PPP***") must account carefully for all of those funds. Even unintentional sloppiness could prompt suspicion of intentional misconduct among the SIGPR, DOJ investigators and other Inspectors General.

The May 13, 2020 FAQs for the CARES Act PPP state: "[T]he SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of $2 million, in addition to other loans as appropriate, following the lender's submission of the borrower's loan forgiveness application. Additional guidance implementing this procedure will be forthcoming." U.S. Department of the Treasury, "Paycheck Protection Program Loans, Frequently Asked Questions (as of May 13, 2020)," accessible at *https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf?mod=article_inline*. *See also* "Treasury Secretary Says Paycheck Protection Program Loans Below $2 Million Typically Won't Face Audits," *MarketWatch.com* (May 14, 2020), accessible at *https://www.marketwatch.com/story/treasury-says-paycheck-protection-program-loans-below-2-million-typically-wont-face-audits-2020-05-13*.

While the CARES Act oversight apparatus is still in the process of being assembled, investigations have already been launched:

> "Although these roles are not filled and the formal oversight infrastructure contemplated by the CARES Act is not fully operational, investigations into potential misuses of disbursed funds have begun. The Department of Justice (DOJ), for example, announced several actions to curb fraud among loan applications under the Paycheck Protection Program (PPP), which earmarks approximately $660 billion in CARES Act stimulus funds for potentially forgivable loans to small businesses. ***Notably, the DOJ has mounted a preliminary inquiry of submitted applications under the PPP and already announced finding 'red flags' of fraud among examined applications***. The DOJ instructed its Market Integrity and Major Fraud Unit to oversee investigations related to the PPP.
>
> "The Small Business Administration (SBA) Inspector General (IG), Hannibal 'Mike' Ware, also announced various oversight reviews and investigations into the PPP program, which is administered by the SBA. ***Ware said the SBA has already initiated dozens of investigations involving complaints of fraud. Moreover, the SBA indicated that it will review all PPP loans in excess of $2 million***.
>
> "***DOJ criminal prosecutions for PPP fraud have already begun***. On May 5, two Rhode Island businesspersons were charged by the DOJ for allegedly submitting fraudulent loan applications under the PPP for $500,000. In addition, on May 13, the DOJ announced charges against a Georgia man (who appeared in a reality TV series) for allegedly securing a $2 million PPP loan to assist his trucking business and using most of those funds for blatantly illicit purposes, including for jewelry, a lease on a luxury car, and payments for child support and outstanding loans. These are the first prosecutions to come out of any CARES Act program, and certainly will not be the last. It is also noteworthy that several agencies assisted in these DOJ investigations (FBI, IRS Criminal Investigation, SBA Office of Inspector General, and the FDIC Office of Inspector General)."

"Update: Investigations Under the CARES Act Ramp Up Even as Oversight Roles Remain Vacant," (May 15, 2020), *JD Supra.com* (emphasis added), accessible at https://www.jdsupra.com/legalnews/update-investigations-under-the-cares-44530/.

B. THE IMPACT OF PPP FUNDING ON LOAN AGREEMENTS

In addition to the potential audits, investigations and prosecutions for fraud and abuse in connection with the obtaining and spending of the PPP funds referenced in Section VI(A), above, the CARES Act has already spawned at least two lawsuits filed by businesses that accepted PPP funding and sought declarations that such funding would not constitute a default under their respective loan agreements.

In a pair of short-lived lawsuits filed on May 1, 2020 — *Beechwood Plaza Hotel of Appleton, LLC v. Wilmington Trust, N.A.*, No. 1:20-cv-03424 (S.D.N.Y.), and *Beechwood Lakeland Hotel LLC v. U.S. Bank N.A.*, No. 8:20-cv-01022 (M.D. Fla.) — the plaintiff hotel operators observed that their loan agreements with the defendants prohibit them from taking on additional debt. They then alleged: "Because the PPP funds potentially are entirely forgivable, like grants, it is unclear whether the Defendant will consider the PPP funds to be indebtedness under the Loan Agreements. In spite of numerous

requests for clarification by the Borrowers, the Defendant has failed to provide any response as to whether the Defendant will consider the Borrowers obtaining PPP funds as additional indebtedness and thus a default under the respective Loan Agreements." *Beechwood Plaza Hotel* Complaint ¶ 7. The same Complaint alleged that "Defendant's conduct flies in the face of Governor Cuomo's Executive Order No. 202.9[,]" which declared that 'it shall be deemed an unsafe and unsound business practice if, in response to the [COVID-19] Pandemic, any bank which is subject to the jurisdiction of the [New York State Department of Financial Services] shall not grant a forbearance to any person or business who has a financial hardship as a result of the COVID-19 pandemic.'" *Beechwood Plaza Hotel* Complaint ¶ 64.

On May 5, 2020, the parties reached a resolution of their disputes and both *Beechwood* cases were voluntarily dismissed with prejudice.

VII.

PRIVATE PANDEMIC-RELATED SECURITIES LITIGATION

The plaintiffs' securities bar will likely file putative class action lawsuits that piggyback on the audits, investigations, claims and criminal prosecutions addressed in Sections V and VI, above.

Shareholders will also no doubt file derivative lawsuits (perhaps asserting that the making of a pre-suit demand upon the Board of Directors would be futile because the directors are conflicted), alleging that the Pandemic-related misconduct of individual directors and/or officers harmed the company.

There are signs that the plaintiffs' bar has begun to focus intently upon a variety of these cases. One recent study reported a substantial increase in securities class action lawsuit filings during the first two weeks of April 2020 (118 filings) compared to the first two weeks of April 2019 (68 filings). *See* "April Two-Week Update: Ongoing Impacts of the Coronavirus Pandemic on Litigation Activity in Federal District Court," *LexMachina.com* (April 25, 2020), accessible at *https://lexmachina.com/april-two-week-update/*.

At a minimum, companies should review their directors and officers liability insurance policies to determine whether there is applicable defense-costs and indemnification coverage.

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A. THE *NORWEGIAN CRUISE LINES* AND *INOVIO* CLASS ACTION LAWSUITS

On March 12, 2020, a securities class action lawsuit was filed against Norwegian Cruise Lines ("***NCL***"), captioned *Douglas v. Norwegian Cruise Lines, et al.*, No. 1:20-cv-21107 (S.D. Fla.) (the "***NCL Class Action***"). The Complaint alleges, among other things, that NCL made misleading statements concerning the viability of the virus and the company's preparedness therefor in an attempt to salvage the company's bookings and conceal from the market the company's declining sales. (At least one other class action lawsuit, *Banuelos v. Norwegian Cruise Lines*, No. 1:20-cv-21685 (S.D. Fla.) (filed April 22, 2020), has been consolidated with the NCL Class Action.)

The NCL Class Action may well be only the first of many lawsuits targeting cruise lines, hotels and other players in the hospitality industry for alleged misstatements concerning the nature of the virus, the severity of the Pandemic and the companies' preparedness for the crisis (from a customer health perspective and from the companies' economic standpoint). Scrutiny of company Pandemic-related statements is likely to continue, if not intensify, as restaurants, hotels and the like resume in-person service to customers. *See, e.g.*, Marriott International's "Commitment To Cleanliness" (May 6, 2020) (Marriott "has put in place a multi-pronged approach designed to meet the health and safety challenges presented by COVID-19"), accessible at *https://news.marriott.com/news/ 2020/05/06/an-update-from-our-ceo-marriotts-commitment-to-cleanliness*.[2]

Companies outside the hospitality industry are also potential targets of litigation if they make representations concerning the virus, the cleanliness of their premises and/or their preparedness and ability to weather this economic crisis. Accordingly, companies should tread carefully in making such representations.

On March 12, 2020, a purported securities class action lawsuit was filed against Inovio Pharmaceuticals, captioned *McDermid v. Inovio Pharmaceuticals, Inc.*, No. 2:20-cv-01402 (E.D. Pa.) (the "***Inovio Class Action***"). The Complaint filed in the Inovio Class Action alleges that the company made false statements that it had developed a vaccine for COVID-19, when in fact it had merely designed a vaccine construct. Complaint ¶ 6.

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[2] Of course, hospitality companies will also continue to face lawsuits arising out of their customers' Pandemic-related cancellation of events and demands for refunds. *See, e.g., The Stonebrick Group, LLC v. HSL Cottonwood RC Hotel LLC, d/b/a The Ritz-Carlton, Dove Mountain*, No. 4:20-cv-00144 (D. Arizona) (filed April 3, 2020), Complaint ¶ 3 ("In response to the COVID-19 pandemic, Stonebrick made the only possible decision — not to mention the only socially responsible decision — that is, to cancel the Retreat and request a refund of its $500,000 advance deposit. . . . Defendant has refused to refund Stonebrick its advance deposit.").

B. LOSS-CAUSATION CHALLENGES

In light of the plunging stock prices caused by the worldwide Pandemic-induced economic crisis, establishing the requisite element of loss causation — *i.e.*, that the disclosure of a company's alleged fraudulent statements and/or conduct was the cause of its stock price decline — will be a challenge for many class action plaintiffs. *Cf. Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336, 342-43 (2005) ("If the purchaser sells later after the truth makes its way into the marketplace, an initially inflated purchase price *might* mean a later loss. But that is far from inevitably so. When the purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price.") (emphasis in original).

C. FEDERAL FORUM PROVISIONS FOR DELAWARE CHARTERS

In light of the increased risk of securities litigation arising out of the Pandemic, public Delaware corporations (and private ones that contemplate a potential initial public offering) should consider making an important amendment to their charters to restrict to federal court the litigation of certain securities claims.

On March 18, 2020, the Delaware Supreme Court issued its decision in *Salzberg v. Sciabacucchi*, 2020 WL 1280785 (Del. Sup. Ct. 2020). The decision provides some measure of relief to Delaware corporations struggling with the United States Supreme Court's 2018 decision in *Cyan v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), which held that state courts possess jurisdiction to adjudicate class action lawsuits alleging claims asserted exclusively under the Securities Act of 1933 (the "***Securities Act***") and that such cases cannot be removed to federal court. (Federal courts have exclusive jurisdiction over claims alleged under the Securities Exchange Act of 1934. *See, e.g., Cyan,* 138 S. Ct. at 1065.)

Since *Cyan* was decided, it has become increasingly common for companies to face the expensive and burdensome prospect of litigating Securities Act claims in parallel state court and federal court lawsuits. In state court Securities Act cases — unlike in federal court securities cases, which are governed by the procedural protections set forth in the Private Securities Litigation Reform Act — discovery is not presumptively stayed pending the court's ruling on a motion to dismiss the Complaint.

Accordingly, certain Delaware corporations attempted to mitigate the effect of *Cyan* by amending their charters to add a provision requiring that all claims under the Securities Act be filed in federal court (a so-called Federal Forum Provision or "***FFP***"). The Delaware Chancery Court rejected the attempt. However, in its March 18, 2020 *Salzberg* decision, the Delaware Supreme Court upheld the discretion of Delaware corporations to add FFPs to their charters.

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Delaware corporations should therefore consider amending their charters in accordance with Delaware law to include an FFP. Such an amendment is likely to require an affirmative vote of the holders of a majority of the company's outstanding stock. *See* Del. Gen. Corp. L. § 242.

VIII.

PANDEMIC-RELATED LITIGATION AGAINST CHINA

A. PRIVATE CLASS ACTION LAWSUITS

On March 13, 2020, a putative class action lawsuit, captioned *Alters v. People's Republic of China*, No. 1:20-cv-21108 (S.D. Fla.), was filed in the Southern District of Florida against the People's Republic of China (the "***PRC***") and certain of its agencies, provinces and cities on behalf of "[a]ll persons and legal entities in the United States who have suffered injury, damage, and loss related to the outbreak of the COVID-19 virus," as well as a subclass of such persons and entities residing in the State of Florida. Complaint ¶ 40.

On May 4, 2020, a First Amended Class Action Complaint was filed with a new named plaintiff. The case is now captioned *Reyes v. People's Republic of China*, No. 1:20-cv-21108 (S.D. Fla.) (Docket No. 11). Alleging claims for negligence; negligent infliction of emotional distress; intentional infliction of emotional distress; strict liability for conducting ultrahazardous activity; toxic battery/civil assault; wrongful death and gross negligence, the First Amended Complaint alleges:

> "In short, Defendants' conduct as described above has been egregious and clearly contrary to the precepts of humanity; was prohibited by the internal laws of the PRC and its provincial and municipal governments; and Defendants failed to warn the world of the dangers when it had a very early opportunity to do so.
>
> "Moreover, Defendants' conduct as to their active concealment and failure to warn were intentional, reckless, grossly negligent, and/or negligent."

Reyes First Amended Complaint ¶¶ 152-53.

Several other COVID-19 private-party lawsuits have since been filed against China. *See, e.g., Buzz Photos v. The People's Republic of China,* No. 3:20-cv-00656 (N.D. Texas) (filed March 17, 2020); *Bella Vista LLC v. The People's Republic of China,* No. 2:20-cv-00574 (D. Nevada) (filed March 23, 2020); *Bourque CPA's and Advisors, Inc. v. The People's Republic of China,* No. 8:20-cv-00597 (C.D. Cal.) (filed March 26, 2020); *Aharon v. Chinese Communist Party,* No. 9:20-cv-80604 (S.D. Fla.) (filed April 8, 2020); *Azalea Woods of Ouachita v. The People's Republic of China,* No. 3:20-cv-00457 (W.D. Louisiana) (filed April 13, 2020) (plaintiff referred to on PACER as "Azelea" Woods of Ouachita); *Smith v. People's Republic of China,* No. 2:20-cv-01958 (E.D. Pa.) (filed April 20, 2020). *See also Stirling v. China, People Republic,* No. 3:20-cv-00713 (D. Oregon) (filed April 30, 2020) (handwritten *pro se* Complaint filed by an inmate).

The private lawsuits against China face procedural, substantive and political hurdles, including the limitations imposed by the Foreign Sovereign Immunities Act (the "***FSIA***"). *But see* Section VIII(C), below.

If the class action lawsuits against China do survive the procedural hurdles and a class is actually certified, companies and individuals, as members of the class, will be entitled to a share of any ultimate settlement or judgment. Alternatively, individuals or entities may elect to file separate non-class action lawsuits against the PRC and opt out of the proposed class.

B. MISSOURI'S LAWSUIT AGAINST CHINA

On April 21, 2020, Missouri became the first state to file a COVID-19 lawsuit against China. The suit, *State of Missouri v. People's Republic of China*, No. 1:20-cv-00099 (E.D. Missouri), names the PRC, various state agencies and the Chinese Communist Party. The pleading asserts that the Communist Party "is not an organ or political subdivision of the PRC, nor is it owned by the PRC or a political subdivision of the PRC, and thus it is not protected by sovereign immunity." Complaint ¶ 19. *See also Yaodi Hu v. Communist Party of China*, 2012 WL 7160373, at *3 (W.D. Mich. 2012) (the Communist Party of China and certain past and present Chinese government officials "are not entitled to FSIA immunity") (cited in *Missouri* Complaint ¶ 19).

C. PROPOSED FEDERAL LEGISLATION PERMITTING PANDEMIC-RELATED LITIGATION AGAINST CHINA

On April 14, 2020, United States Senator Josh Hawley introduced the Justice For Victims of Coronavirus Act, accessible at *https://www.hawley.senate.gov/sites/default/files/2020-04/Justice-for-Victims-of-Coronavirus-Act.pdf*. The statement accompanying the Bill explained: "The bill would strip China of its sovereign immunity and create a cause of action against the CCP for reckless actions like silencing whistleblowers and withholding critical information about COVID-19. The plan would also create the Justice for Victims of Coronavirus Task Force at the State Department to launch an international investigation into Beijing's handling of the COVID-19 outbreak and to secure compensation from the Chinese government." *See* "Senator Hawley Announces Bill to Hold Chinese Communist Party Responsible for COVID-19 Pandemic" (April 14, 2020), accessible at *https://www.hawley.senate.gov/senator-hawley-announces-bill-hold-chinese-communist-party-responsible-covid-19-pandemic*.

Thereafter, Senator Tom Cotton and Representative Dan Crenshaw introduced a bill, titled "Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020," accessible at *https://www.cotton.senate.gov/files/documents/Cotton-Crenshaw%20Bill%20to%20Hold%20China%20 Accountable%20(FINAL).pdf*. The accompanying press release explained: "[The] legislation . . . would allow Americans to sue China in federal court to recover damages for death, injury, and economic harm caused by the Wuhan Virus. Specifically, the bill would amend the Foreign Sovereign Immunities Act to create a narrow exception for damages caused by China's dangerous handling of the Wuhan Virus outbreak. . . . Senator Cotton's bill is modeled after the Justice Against

Sponsors of Terrorism Act, which 97 members of the Senate voted in favor of in 2016." *See* "Cotton, Crenshaw Bill Would Allow Americans to Sue China for Virus Damages" (April 16, 2020), accessible at *https://www.cotton.senate.gov/?p=press_release&id=1352*.

IX.

CONSTITUTIONAL CHALLENGES TO STATE PANDEMIC-RELATED EXECUTIVE ORDERS AND LEGISLATION

The sweeping nature of certain of the Pandemic-related state executive orders, executive actions and legislation that have been issued, proposed or enacted thus far raise a host of constitutional issues, including the following:

- Given the sanctity of contract (*see, e.g.*, U.S. Constit., Art. 1, Sec. 10, Cl. 1), can a state government relieve parties of their bargained-for contractual obligations (*e.g.*, in the rent-payment context discussed in Section I(B), above)?

- Can a state government impose contractual obligations upon which the parties have not agreed (*e.g.*, certain state legislative proposals seek to force insurers to provide business-interruption insurance coverage; *see* Section III(A)(ii), above)?

- When do government-imposed limitations upon a property owner's use of private property become a constructive taking that requires the government to provide the property owner with just compensation in accordance with the Fifth Amendment?

- Are the executive orders of state governors mandating the closure of certain businesses, while allowing others to remain open, subject to constitutional challenge under, among other provisions, the Due Process and Equal Protection Clauses of the Fourteenth Amendment? *See* Section IX(A), below.

- At what point, even in times of public emergency, does the government's continued prohibition against the gathering by individuals for religious purposes contravene at least the Free Exercise and Assembly Clauses of the First Amendment? *See* Section IX(B), below.

A. THE CHALLENGE TO STATE AND LOCAL BUSINESS-CLOSURE ORDERS

(i) THE CHALLENGE TO THE NEW YORK GOVERNOR'S BUSINESS-CLOSURE ORDERS

On May 13, 2020, a Western New York law firm, HoganWillig, PLLC, filed a detailed, 51-page Complaint against New York Attorney General Letitia James and New York Governor Andrew Cuomo in a lawsuit captioned *HoganWillig, PLLC v. James,* 1:20-cv-00577 (W.D.N.Y.). Challenging the constitutionality of the Pandemic-related Executive Orders closing businesses and restricting activities that have been issued by the Governor and enforced by the Attorney General, the Complaint alleges, among other things:

> "Defendants, in a disturbing and gross abuse of their power, have seized the COVID-19 pandemic to expand their authority by unprecedented lengths, without any proper Constitutional, statutory, or common law basis therefor. Plaintiff thus brings this lawsuit to assert challenges to the *ultra vires* actions taken by Defendants in response to the COVID-19 pandemic.
>
> * * *
>
> "The available data from studies performed throughout the United States does not support the legitimacy of the Defendants' continuing actions in issuing arbitrary, unduly excessive Executive Orders having the full force and effect of law upon individuals and business[es] located within the State of New York, largely in violation of the individuals' and business[es]' state and federal Constitutional rights.
>
> * * *
>
> "The Executive Orders regarding being designated an 'Essential Businesses,' as interpreted by Defendant James, are unreasonable, unduly burdensome, and invasive upon the sanctity of attorney-client privilege. Even given the early predictions of the statewide inundation of patients requiring hospitalization and ventilators, Defendant James' interpretations of the Governor's Executive Orders, and her enforcement efforts as against Plaintiff, were improper.
>
> * * *
>
> "The medical data available to the Governor since mid-April of 2020 from the worldwide scientific and medical communities, and both federal and state sources, compel a finding that the emergency powers being exercised by Defendant Cuomo that infringe on the rights and liberties of the governed, have been abused since mid-April.
>
> "Defendant Cuomo's improper exercise of emergency executive power, as interpreted and sought to be enforced by Defendant James, following the emergence of new data, is inflicting upon Plaintiff, and society at large, irreparable harm."

Complaint ¶¶ 5, 30, 40, 43-44.

The *HoganWillig* Complaint seeks a declaratory judgment, injunctive relief and an award of attorneys' fees in connection with its claim under 42 U.S.C. § 1983.

(ii) THE CHALLENGE TO THE PENNSYLVANIA GOVERNOR'S BUSINESS-CLOSURE ORDER

On April 13, 2020, the Pennsylvania Supreme Court — exercising its rarely invoked, but sweeping, "King's Bench" jurisdiction to accept a case before it has been litigated in the trial court — upheld Pennsylvania Governor Wolf's Executive Order compelling the closure of all businesses except those designated by the Governor and one of his agencies as "life-sustaining." In this case, *Friends of Danny Devito v. Wolf*, 2020 WL 1847100 (Pa. Sup. Ct. 2020), the court held that Pennsylvania's Emergency Management Services Code did in fact provide the authority for the Governor's Executive Order under the specific circumstances at issue.

The majority also rejected petitioners' constitutional arguments under the separation of powers doctrine; the Fifth Amendment Taking Clause; the Fourteenth Amendment Due Process Clause; the Fourteenth Amendment Equal Protection Clause; and the First Amendment Free Speech and Assembly Clauses.

Petitioners also asserted that the Governor had acted in an arbitrary and capricious manner in deciding that petitioners' businesses must be closed, while certain others could remain open. While the Executive Order provided for a post-issuance "waiver" process that allows businesses to contest their designation as non-life sustaining, the majority held that the decisions made by the Governor and the Secretary of the Pennsylvania Department of Health in response to waiver applications were not "administrative" decisions and thus, contrary to petitioners' assertion, are not subject to judicial review.

In his concurring and dissenting opinion, Chief Justice Saylor made clear as a threshold matter that he did not believe that the court should have exercised its King's Bench jurisdiction. Instead, he opined, the court should have waited for a factual record to be developed at the trial court level. He then asserted that, while the court must grant deference to the executive in times of emergency, the court had an obligation to exercise judicial review of the waiver denials, given petitioners' "allegations of inconsistency and irrationality." The Chief Justice wrote: "[A]rbitrariness cannot be tolerated, particularly when the livelihoods of citizens are being impaired to the degree presently asserted." 2020 WL 1847100, at *25.

On May 6, 2020, Justice Samuel Alito denied the petitioners' application for a stay of enforcement of Governor Wolf's Executive Order pending the filing and disposition of their petition to the U.S. Supreme Court for a writ of *certiorari*. *See Friends of Danny Devito v. Wolf*, 2020 WL 2177482 (U.S. Supreme Court).

(iii) TESLA'S CHALLENGE TO ALAMEDA COUNTY'S BUSINESS-CLOSURE ORDERS

On May 9, 2020, car manufacturer Tesla, Inc. filed a Complaint for injunctive and declaratory relief against Alameda County, California, in response to the County's continued shutdown order. In *Tesla, Inc. v. Alameda County, California*, No. 4:20-cv-03186 (N.D. Cal.), Tesla alleges that the County of Alameda's refusal to allow Tesla to reopen its Fremont, California, plant contravenes the California Governor's March 20, 2020 Executive Order, which permits businesses classified by the federal government as "critical infrastructure" to remain open.

Tesla, which contends that its operations constitute a critical infrastructure business, alleges, among other things, that Alameda County's directives contravene the Governor's controlling Executive Order and violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment:

> "Alameda County decided that — notwithstanding the clear language and statewide logic of the Governor's order on this point — it would insist that its prior (and subsequent) conflicting pronouncements controlled over the state-wide order. Alameda County thus arrogated to itself the power to force *closure* of businesses that the state government had ordered could remain *open* because they are federally-defined 'critical infrastructure' serving vital security, safety, or economic needs of Californians.
>
> * * *
>
> "Alameda County's power-grab not only defies the Governor's Order, but offends the federal and California constitutions. First, the County's order violates the Due Process Clause of the Fourteenth Amendment because it fails to give reasonable notice to persons of ordinary intelligence of what is forbidden under the law . . . [, rendering them] unable to discern what the applicable law permits, under threat of criminal prosecution[,] . . . [and] there is no procedure for Plaintiff even to challenge the County's determination that it is not an essential business[.]
>
> "Second, the County's Order discriminates against identically situated parties without any rational basis and thereby violates the Fourteenth Amendment's Equal Protection Clause. Even as at least one neighboring county is allowing car manufacturing to resume, Alameda County continues to [prohibit it]."

Complaint ¶¶ 4, 8, 9 (emphasis in original). *See also Professional Beauty Federation of California v. Newsom*, No. 2:20-cv-04275 (C.D. Cal.) (filed May 12, 2020), Complaint, Introduction & ¶ 1 ("More than two months have passed since Governor Newsom proclaimed a state of emergency in California, and throughout that time, he and others in his administration have vaguely and arbitrarily classified licensed barbering and cosmetology professionals as 'non-essential,' criminalizing the jobs these 500,000 plus state-licensed professionals perform in every community. . . . Defendants began threatening to revoke Plaintiffs' licenses. . . . They have offered no exceptions, and identified no future date for reinstatement of these lawful professions. . . . In response to the coronavirus emergency, Defendants are depriving

Plaintiffs . . . of fundamental rights protected by the United States and California constitutions, including due process, equal protection under the law, the rights to liberty, and just compensation for takings.").

Tesla has apparently elected not to wait for its lawsuit to be adjudicated before resuming its manufacturing activities. *See* "Elon Musk Says Tesla Is Restarting California Production, Defying Local Order," *Wall Street Journal* (May 11, 2020) ("Elon Musk said Tesla Inc. is resuming production of cars at its lone U.S. assembly factory in defiance of local authorities in what is quickly becoming one of the highest-profile showdowns between business and government about reopening after weeks of sheltering-in-place. . . . 'I will be on the line with everyone else,' Mr. Musk, who is Tesla's chief executive, wrote on Twitter. 'If anyone is arrested, I ask that it only be me.'"), accessible at *https://www.wsj.com/articles/tesla-to-restart-production-elon-musk-says-11589230278*.

(iv) THE WISCONSIN SUPREME COURT'S REJECTION OF THE STATE'S ADMINISTRATIVE BUSINESS-CLOSURE/SHELTER-IN-PLACE ORDER

On May 13, 2020, the Wisconsin Supreme Court issued a lengthy decision in *Wisconsin Legislature v. Secretary-Designee Andrea Palm*, No. 2020AP765-OA, striking Emergency Order 28 promulgated by Wisconsin Department of Health Services Secretary-Designee Andrea Palm. The directive required "all people within Wisconsin to remain in their homes, not to travel and to close all businesses that she declares are not 'essential[.]' . . . [The Secretary-Designee] says that failure to obey Order 28 subjects the transgressor to imprisonment for 30 days, a $250 fine or both." Opinion ¶ 1.

Making clear that it was not addressing Wisconsin Governor Evers's Executive Order declaring a health emergency in response to the Pandemic, but, rather, "the assertion of power by one unelected official, Andrea Palm" (Opinion ¶ 1; *see also id.* ¶ 5), the court wrote:

> "We conclude that Emergency Order 28 is a rule under the controlling precedent of this court . . . and therefore is subject to statutory emergency rulemaking procedures established by the Legislature. Emergency Order 28 is a general order of general application. . . . Accordingly, the rulemaking procedures of Wis. Stat. § 227.24 were required to be followed during the promulgation of Order 28. Because they were not, Emergency Order 28 is unenforceable. Furthermore, Wis. Stat. § 252.25 required that Emergency Order 28 be promulgated using the procedures established by the Legislature for rulemaking if criminal penalties were to follow. . . . Because Palm did not follow the law in creating Order 28, there can be no criminal penalties for violations of her order. . . .
>
> "We do not conclude that Palm was without any power to act in the face of this pandemic. However, Palm must follow the law that is applicable to state-wide emergencies. We further conclude that Palm's order confining all people to their homes, forbidding travel and closing businesses exceeded the statutory authority of Wis. Stat. § 252.02 upon which Palm claims to rely."

Wisconsin Legislature Opinion ¶¶ 3-4.

B. CHALLENGES TO STATE EXECUTIVE ORDERS RESTRICTING RELIGIOUS WORSHIP SERVICES

In *First Baptist Church v. Kelly*, 2020 WL 1910021 (D. Kan. 2020), the District of Kansas on April 18, 2020 enjoined Kansas Governor Kelly's Pandemic-inspired Executive Order that limited in-person religious gatherings to no more than 10 persons, but exempted from the 10-person limitation most governmental operations, airports, hotels, libraries, public transportation, grocery stores and certain other places and activities. Finding that plaintiffs had demonstrated a likelihood of success on the merits and irreparable harm, the court granted a TRO, but imposed specific social-distancing and hygiene requirements. *See* 2020 WL 1910021, at *9. Thereafter, the Kansas Governor issued a new Executive Order that permitted in-person religious gatherings subject to six-foot social distancing. In response, plaintiffs voluntarily dismissed their lawsuit on May 4, 2020.

In *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204 (E.D. Va.), the plaintiff church alleged in its April 24, 2020 Complaint that, for the purpose of enforcing Virginia Governor Northam's Pandemic-related Executive Orders banning gatherings of more than 10 persons and imposing social-distancing requirements, Virginia police officers issued a criminal citation and summons to the Pastor of the Church for holding a service for 16 persons who were spaced more than six feet apart in a 225-seat church.

Asserting various challenges to the Executive Orders on constitutional grounds (including under the Free Speech, Free Exercise of Religion, Establishment and Assembly Clauses of the First Amendment) and statutory grounds, and citing *First Baptist Church*, the *Lighthouse* Complaint sought injunctive and declaratory relief enjoining enforcement of the Executive Orders or any other Order that "prohibits religious worship services at Lighthouse, or in-person church services at Lighthouse if Lighthouse meets the social distancing, enhanced sanitization, and personal hygiene guidelines pursuant to which the Commonwealth allows so- called 'essential' commercial and non-religious entities (*e.g.*, beer, wine, and liquor stores, warehouse clubs, 'big box' and 'supercenter' stores) to accommodate gatherings of persons without numerical limit. **To be clear, Lighthouse merely seeks [an injunction] preventing Lighthouse, its pastor, and its members from being subject to criminal sanctions for having more than 10 people at its worship service on Sunday**. In making such a request, Lighthouse merely seeks to be treat[ed] equally with other businesses, and seeks only to be permitted to meet without the 10-person limit so long as they abide by social distancing, enhanced sanitizing, and personal hygiene recommendations that other businesses are allowed to follow and remain open." *Lighthouse* Complaint, Prayer For Relief (emphasis in original).

In a 33-page Order dated May 1, 2020, the Eastern District of Virginia denied the Lighthouse Fellowship Church's request for an injunction, finding, among other things, that the Church had failed to demonstrate a likelihood of success on the merits of any of its claims. The Church appealed the ruling to the Fourth Circuit (No. 20-01515); its opening brief is currently due on June 15, 2020.

On May 3, 2020, the DOJ filed in *Lighthouse* a lengthy Statement of Interest in Support of Plaintiff's Motion for an Injunction Pending Appeal. In that filing (Docket No. 19), DOJ explained: "The United States respectfully suggests that the Court erred in its Memorandum Opinion and Order of May 1, 2020, . . . denying Lighthouse's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, for the reasons below. The Court denied that motion without a hearing, without any briefing from the Commonwealth and without Lighthouse having the opportunity to reply to any justifications offered. This case . . . involves important questions of how to balance the deference owed to public officials in addressing a pandemic threatening the health and safety of the public with fundamental constitutional rights."

A few days later, on May 9, 2020, the Virginia Governor notified the *Lighthouse* court that he had issued on May 8, 2020 a new Executive Order No. 61, which modified his previous Order by permitting certain in-person religious gatherings. Executive Order No. 61, which was to take effect on May 15, 2020, would have permitted in-person religious services for up to 50-percent of the certificated occupancy for the room provided certain distancing and hygiene requirements are observed. *See* "Defendant's Notice of Issuance of Executive Order 61 and Order of Public Health Emergency Three" (May 9, 2020; Docket No. 37). However, by a filing dated May 14, 2020 (Docket No. 43), the Virginia Governor advised the court that he had amended Executive Order No. 61 via Executive Order 62, which, among other things, delays until May 28, 2020 the loosening of the restrictions on public gatherings.

On May 2, 2020, in *Maryville Baptist Church, Inc. v. Beshear*, 2020 WL 211316 (6th Cir. 2020) (*per curiam*), the Sixth Circuit granted an injunction pending an appeal from the district court's denial of a motion seeking to enjoin Kentucky Executive Orders that were enforced by state police officers against the Maryville Baptist Church: "On April 12, Maryville Baptist Church held a drive-in Easter service. Congregants parked their cars in the church's parking lot and listened to a sermon over a loudspeaker. Kentucky State Police arrived in the parking lot and issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act. The officers recorded congregants' license plate numbers and sent letters to vehicle owners requiring them to self-quarantine for 14 days or be subject to further sanction." *Id.* at *1.

Finding a likelihood of success on the merits of the Maryville Baptist Church's claims, the Sixth Circuit granted an injunction that applied to drive-in (but not in-person) services, and asked: "Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? The Commonwealth has no good answers. While the law may take periodic naps during a pandemic, we will not let it sleep through one." *Id.* at *4.

On May 8, 2020, the federal district court in *Maryville Baptist Church* extended the scope of the injunction pending appeal to cover in-person, as well as drive-in, services. *Maryland Baptist Church, Inc. v. Beshear*, 2020 WL 2393359 (W.D. Kentucky 2020). *See also Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 2020 WL 2305307 (E.D. Kentucky 2020) (May 8, 2020 Order enjoining enforcement of the Kentucky Governor's Executive Orders prohibiting mass in-person religious

gatherings). *But cf., e.g., Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913 (D. Maine 2020) (May 9, 2020 Order declining to enjoin enforcement of the Maine Governor's Executive Orders limiting public gatherings to 10 persons and distinguishing *Maryville Baptist Church* and *Tabernacle Baptist Church*), *appeal filed, Calvary Chapel of Bangor v. Mills*, No. 20-1507 (1st Cir. May 14, 2020).

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If you have any questions or comments, please feel free to contact Bob Alessi, Lew Meltzer or any of our other attorneys.

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