MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP

ATTORNEYS AT LAW

The COVID-19 Pandemic Newsletter

(VOL. 2, JUNE 29, 2020)

Meltzer Lippe

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INTRODUCTION

There have been a number of developments in Pandemic-related litigation, governmental investigations and oversight, legislative initiatives and other areas since the publication of our May 18, 2020 COVID-19 Pandemic Newsletter (our "***May 18, 2020 Newsletter***"). These issues continue to evolve and proliferate at a rapid pace. We have attempted below to focus upon certain of the more interesting developments within each of the subject areas addressed.

I.

COMMERCIAL LANDLORD-TENANT DISPUTES OVER THE NONPAYMENT OF RENT

As noted in our May 18, 2020 Newsletter (Section I), the Pandemic has spawned the widespread nonpayment of rent that has become a flashpoint for commercial landlords and tenants.

The stakes are high: "Nearly half of commercial retail rents were not paid in May. Companies as big as Starbucks say the financial devastation from the shutdown has left them unable to pay their full property bills on time. Some companies warn they will not be able to pay rent for months. The problem for the broader U.S. economy is that when businesses like Ross Stores and T.J. Maxx stop paying rent, it sets off an alarming chain reaction. Landlords are now at risk of bankruptcy, too. Commercial real estate prices are falling. Jobs at property management companies and landscapers face cuts. Banks and private investors are unwilling to lend to most commercial real estate projects anymore, and cash-strapped city and local governments are realizing the property taxes they usually rely on from business properties are unlikely to be paid this summer and fall." *See* "The Next Big Problem for the Economy: Businesses Can't Pay Their Rent," *The Washington Post* (June 4, 2020), accessible at *https://www.washingtonpost.com/business/2020/06/03/next-big-problem-businesses-cant-or-wont-pay-their-rent-its-setting-off-dangerous-chain-reaction/*.

In response to this crisis, many commercial landlords and tenants have been endeavoring to resolve, and have indeed resolved, their Pandemic-related rent disputes through negotiation. Accordingly, in Section I(A), below, we address certain issues that are likely to arise in such negotiations.

Failed negotiations have often led to litigation. In Section I(B), below, we therefore discuss a sampling of additional lawsuits that have been filed in connection with commercial tenants' nonpayment of rent. Finally, in Section I(C), below, we focus upon proposed and enacted legislation addressing Pandemic-induced nonpayment of rent.

A. THE IMPACT OF NEGOTIATED RENT-ABATEMENT AND RENT-DEFERRAL AGREEMENTS

(i) GENERAL CONSIDERATIONS

Tenants who cannot use their premises or who can operate there only in a limited capacity are increasingly seeking rent abatements or deferrals.

Some tenants have argued that the decrease in the amount of electricity consumed during the period in which they have been unable to occupy their premises warrants an abatement of a significant portion of the electric component of their rent, which is designed to be a pass-through of the landlord's electricity costs. The same may be true for common-area and operating expenses that are paid only to the extent they exceed a base-year amount. Landlords may be receptive to arguments seeking the abatement of common-area and operating expense because such 2020 expenses, which are often paid monthly based upon estimates and then reconciled at year end, are likely to be lower than the base-year amount.

When entering into new leases that have a base year for common-area and operating expenses, tenants may wish to ensure that the base-year numbers are "grossed-up" with respect to any building or shopping center that is less than 95-percent occupied. Now and in the coming months there are likely to be many vacancies that will artificially depress the base-year numbers. Even if the building or shopping center is fully leased, it is likely that common-area and operating expenses will remain unnaturally low due to the reduced usage of the premises resulting from the Pandemic-related restrictions. Tenants are likely to insist that the base-year expenses for a new lease not be less than the actual expenses for the prior year, since the failure to do so could result in large increases to the tenant in common-area and operating expense costs for the balance of the lease term.

Some leases require tenants to operate continuously. Such a continuous-operation provision prohibits the tenant from "going dark," even if it continues to pay rent. The landlord might therefore argue that a tenant's Pandemic-related closing of its premises constitutes a breach of said provision. The tenant's potential reliance upon the doctrines of frustration of purpose or impossibility will be more challenging if the lease allows the tenant to use the premises "for any legal purpose." While a broad use provision is generally desirable for a tenant, the landlord could argue that, because the tenant was not limited in its use, it could have continued to operate the premises for an essential use.

Shopping center tenants will often insist that that their leases contain co-tenancy provisions that require the continued operation (a) of the businesses of a certain percentage of the other tenants (or of a certain percentage of the square footage in the shopping center) and/or (b) of specific anchor tenants in that center. Accordingly, a co-tenancy lease provision might allow a shopping center tenant to argue that the Pandemic-related closure of other stores in the shopping center entitles the tenant to pay reduced rent or terminate its lease.

Office tenants may argue that they should not be required to pay rent since they were or are prohibited or encouraged to refrain from working at the premises. However, a tenant may well be

deemed to be "using" its office if, although its employees are working remotely, the tenant's computer servers that facilitate such remote work — and for which the landlord continues to incur electrical charges — are housed at the premises.

Certain retail leases contain provisions that require the tenant to pay rent based upon a percentage of the gross sales generated by the tenant at the premises. The definition of "gross sales" is often heavily negotiated and sometimes excludes online sales. Even where online sales are excluded from the definition, landlords may argue that such sales that culminate in the pick-up of merchandise by the customer (including "curbside" pick-up) at, or the shipping of merchandise from, the premises should properly be included in the gross-sales calculation.

Leases containing a market-rate renewal option that is exercisable in the next few months will also present challenges to landlords because the current market rental rate is likely depressed. Accordingly, landlords may seek to include in market-rate renewal provisions language that sets as the floor the market rate that was in effect for the last year of the initial lease term (plus an escalator, if possible).

Landlords of properties containing multiple tenants may wish to consider including confidentiality provisions in agreements modifying tenant obligations, so that they can preserve the ability to deal individually with tenants based upon their respective circumstances.

(ii) LOAN AGREEMENTS AND PROPERTY SALES

Landlords owning financed properties must consider the effects on their loan covenants of entering into agreements to defer or abate rent. Thus, for example, when approached by a tenant requesting rent relief, a landlord operating with a first loan and a mezzanine loan affecting the premises will typically be required to obtain the consent of its lenders.

A landlord seeking to sell its occupied property must be wary during this Pandemic period because most purchase agreements contain a covenant requiring the seller to continue to operate the property in the same or substantially similar manner in which it was operated prior to the execution of the purchase agreement. The landlord is in a delicate position. On the one hand, the landlord's granting of a rent abatement or deferral request might violate such a covenant. On the other hand, the landlord's rejection of a tenant's rent-abatement or rent-deferral request could lead to a situation in which the tenant cannot discharge its rent-payment obligations, resulting in the landlord-seller's inability to provide the purchaser with the requisite estoppel certificate, which, in turn, might be used as a basis for the purchaser to walk away from the deal.

Finally, the purchase agreement will usually provide that the landlord-seller cannot amend its tenant leases without the purchaser's consent. Where the purchase is being financed, the loan documents will typically require that a certain level of rent payment be maintained through the time of closing and during the life of the loan. This can pose challenges given the proliferation of Pandemic-induced rent abatements and deferrals.

B. LITIGATION SPAWNED BY THE NONPAYMENT OF RENT

When negotiations fail, commercial landlords have turned to litigation to recover unpaid rent. *See* our May 18, 2020 Newsletter at 1-3.

(i) THE *ROSS DRESS FOR LESS* LAWSUIT

On May 4, 2020, the commercial landlord sued discount retailer Ross Stores ("***Ross***") to recover more than $5.5 million in unpaid rent, accelerated rent payments and attorneys' fees under certain leases. *See Palm Springs Mile Associates, Ltd. v. Ross Dress for Less, Inc.*, No. 1:20-cv-21865 (S.D. Fla.). The landlord alleges that — like Starbucks (*see* our May 18, 2020 Newsletter at 5) — Ross "has implemented a predetermined, national policy of refusing to pay rent when due" and has "[i]nvok[ed] the circumstances of COVID-19 . . . [to] engag[e] in economic self-help[.]" May 21, 2020 Amended Complaint (Docket No. 13) ¶¶ 2-3. *See also id*. at ¶¶ 33-39. The landlord also notes that the leases' *force majeure* clauses do not excuse Ross's obligation to make rent payments. *Id.* ¶ 32.[1]

On May 26, 2020, Ross moved to dismiss the Amended Complaint. *See Ross Dress for Less*, No. 1:20-cv-21865 (Docket No. 14). In its Motion to Dismiss, Ross argues, among other things, that the landlord failed to satisfy certain conditions precedent to commencing a lawsuit, including the requirements that it provide pre-suit notice and an opportunity to cure and then participate in mandatory mediation. *See* Motion to Dismiss (Docket No. 14) at 1-2. Focusing on the procedural failures that it argues require dismissal of the lawsuit, the motion only briefly mentions the Pandemic, disclaims reliance upon the *force majeure* clause and reserves the tenant's right to raise merits arguments if the motion is denied. *See id.* at 7 n.7, 8, 14.

(ii) *THE GAP, INC.* LAWSUIT

In *48th Americas LLC v. The Gap, Inc.*, No. 1:20-cv-03471 (S.D.N.Y.) (filed May 5, 2020), the landlord seeks to recover from The Gap more than $530,000 in unpaid rent and other charges for April and May 2020, as well as attorneys' fees. On May 27, 2020, in response to the landlord's seven-page Amended Complaint (Docket No. 11), The Gap filed a 29-page Answer with Affirmative Defenses and Counterclaims (the "***Gap Answer***") (Docket No. 13). The Gap Answer asserts that the Pandemic not only created "unforeseeable" and "unimaginable" circumstances that prevented and excused The Gap from paying rent for April and May 2020, but also entitles The Gap to a refund for the rent that it paid in March 2020:

[1] On April 22, 2020, Palm Springs Mile Associates also filed a rent-nonpayment lawsuit against AMC movie theaters, seeking to recover more than $7.5 million in unpaid rent and accelerated rent payments. *See Palm Springs Mile Associates, Ltd. v. American Multi-Cinema, Inc.*, No. 1:20-cv-21687 (S.D. Fla.). On May 29, 2020, the landlord, perhaps having reached a negotiated settlement with the tenant, voluntarily dismissed its lawsuit. *See id.* Docket No. 7.

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> "The COVID-19 pandemic has presented unique and unprecedented circumstances that were unforeseeable—indeed, unimaginable—at the time this lease was executed. The disease is highly contagious and its spread has been rapid. The government's reaction was profound and has prevented the store from opening its doors for months. To protect the health and safety of its employees, customers, and the surrounding community, and comply with applicable law, Gap was required to close this store and keep it closed. And like innumerable other companies, it was required to make the difficult decision to furlough this store's employees — and tens of thousands more for closed stores across the country — to preserve its finances while revenue from the stores dropped to zero overnight. Even now, as government restrictions begin to ease for some activities and types of businesses but not others, the disease remains virulent, and extensive guidelines are required to be followed that may provide some measure of protection, but will radically change the shopping experience for a long time to come. ***Indeed, shopping for apparel in physical stores will look nothing like what was contemplated by the lease when it was executed. In a world of unforeseeable events, the circumstances the store has faced are at the extreme end of unforeseeability. These circumstances not only impose a severe and irreparable hardship on Gap, they frustrated the express purpose of this lease and made the principal object of the lease illegal, impossible, and impracticable, all for a period of time that remains unknown and unknowable. Thus, the subject lease and applicable law nullified any obligation to pay rent from mid-March through the present, entitle Gap to a refund of rent and expenses it paid in advance for March 2020, and require that the lease be rescinded and terminated or, at a minimum, modified as a matter of law***."

Gap Answer at 1-2 (emphasis added).[2]

C. PROPOSED LEGISLATIVE RELIEF FOR TENANTS

In our May 18, 2020 Newsletter (at 3), we addressed several Pandemic-related tenant Bills under consideration in New York State. Below is a brief update on the status of those Bills, as well as a newly-enacted New York City law and a proposed California statute.

[2] In our May 18, 2020 Newsletter (at 2-3), we addressed *Van Buren Industrial Investors, LLC v. Archway Marketing Services, Inc.*, No. 2:20-cv-11006 (E.D. Michigan). On that same date, the tenant filed an Answer in which it argued that its Pandemic-induced nonpayment of rent was excused under the impossibility of performance doctrine. *See* Answer ¶ 32 (Docket No. 8). On June 5, 2020, plaintiff filed a Notice of Voluntary Dismissal and the court entered an Order of dismissal on June 10, 2020. *See id.* Docket Nos. 9-11.

(i) NEW YORK STATE BILLS AND STATUTES

On May 28, 2020, the New York State Assembly passed (by a vote of 62-0) New York State Senate Bill 8138B, which was substituted for Assembly Bill 10252A (discussed in our May 18, 2020 Newsletter at 3). The Bill, if enacted into law, "will allow a local taxing jurisdiction to defer property taxes due to the COVID-19 pandemic [or other declared state disaster emergency] or separate property taxes into as many installment payments as necessary without liability to the county." *See https://www.nysenate.gov/legislation/bills/2019/s8138/amendment/b.*

On June 8, 2020, Governor Cuomo signed into law S.8122-B, which was substituted for A.10241-A (discussed in our May 18, 2020 Newsletter at 3). The law authorizes local governments to extend the deadline for filing property tax abatements to July 15, 2020. *See* "Governor Cuomo Signs Legislation Authorizing Local Governments to Extend Deadline for Filing Property Tax Abatements to July 15th" (June 8, 2020), accessible at *https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-authorizing-local-governments-extend-deadline-filing-property*. In signing the Bill into law, Governor Cuomo stated: "New Yorkers and businesses all across the state have suffered both personal and economic hardships from the COVID-19 pandemic[.] . . . Extending the deadline for filing property tax abatements to July 15th will help provide these individuals and businesses with some much-needed assistance to help recover from the devastating effects of the pandemic as we begin to enter a new normal." *Id*.

In our May 18, 2020 Newsletter (at 3), we also discussed New York State Assembly Bill No. A10245, which would suspend the payment of certain property taxes and rent payments during a state disaster emergency. That Bill has not moved forward since it was introduced on April 8, 2020.

(ii) NEW YORK CITY'S TENANT PERSONAL LIABILITY LAW

On May 26, 2020, New York City Mayor Bill de Blasio signed into law the COVID-19 Relief Package (the "***NYC Tenant Personal Liability Law***"), which amends the New York City Administrative Code to prohibit landlords from enforcing personal liability provisions in the commercial leases of certain qualifying tenants. *See* NYC Admin. Code § 22-1005 ("Personal liability provisions in commercial leases"), accessible at *https://codelibrary.amlegal.com/codes/newyorkcity /latest/ NYCadmin/0-0-0-124037*; "Mayor de Blasio Signs COVID-19 Relief Package Into Law" (May 26, 2020), accessible at *https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-124037* (discussing the signing of the new law).

The NYC Tenant Personal Liability Law prohibits the enforcement of any "provision in a commercial lease or other rental agreement involving real property located within [New York City] that provides for one or more natural persons who are not the tenant under such agreement to become, upon the occurrence of a default or other [triggering] event [between March 7, 2020 and September 30, 2020, inclusive], wholly or partially personally liable for payment of rent, utility expenses or taxes owed by the tenant under such agreement, or fees and charges relating to routine building maintenance owed by the tenant under such agreement[.]" *See* NYC Admin. Code § 22-1005. To qualify for protection under the

NYC Tenant Personal Liability Law, a commercial tenant must have been: (a) required to "cease serving patrons food or beverage for on-premises consumption or to cease operation" under Governor Cuomo's Executive Order No. 202.3 (issued March 16, 2020); (b) deemed a "non-essential retail establishment subject to in-person limitations" under guidance issued by the New York State Department of Economic Development pursuant to Governor Cuomo's Executive Order No. 202.6 (issued March 18, 2020); or (c) required to "close to members of the public" under Governor Cuomo's Executive Order No. 202.7 (issued March 19, 2020). NYC Admin. Code § 22-1005.

It is unlawful "harassment" for landlords to "attempt[] to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable pursuant to section 22-1005 of the code." NYC Admin. Code § 22-902(a)(14), accessible at *https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-42543*.

In signing the NYC Tenant Personal Liability Law, Mayor de Blasio stated: "[O]ne of the other crucial elements of today is the focus on tenants . . . who are dealing with some unprecedented problems because of the coronavirus, [and] dealing with some landlords . . . who unfortunately are taking advantage of this crisis and using it as a time to harass or mistreat tenants. Legislation today also addresses that crucial issue." *See* Transcript of Bill Signing (May 26, 2020), accessible at *https://www1.nyc.gov/office-of-the-mayor/news/377-20/transcript-mayor-de-blasio-holds-hearing-signs-intros-1898-a-1908-b-1914-a-1916-a-1932-a-*.

Given that the NYC Tenant Personal Liability Law modifies material terms of privately negotiated contracts, it is likely to be challenged as violative of the Constitution's Contracts Clause. *See* U.S. Constit., Art. I, Sec. 10, Cl. 1 ("[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts"). Kalman Yeger, a New York City Council Member who voted against the NYC Tenant Personal Liability Law, explained:

> "[The NYC Law], in my view, is unconstitutional. [It] [v]iolates article one, section 10, the United States Constitution [and it] interferes with the contract already done and that's a basic statement of the Constitution. Now, I understand that there are those that will have a different opinion on it and they are entitled to that different opinion, but my oath requires me to look at whether or not this is Constitution[al] [and] my oath requires me to support the Constitution. So, for that reason, I vote no on [the NYC Tenant Personal Liability Law.]"

City Council City of New York, Transcript of the Minutes of the City Council Stated Meeting (May 13, 2020) at 58, accessible at *https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4424954&GUID=C2A4AC16-7409-465E-B5A4-A84F6E7989FB&Options=&Search=*. *See also* City Council City of New York, Transcript of the Minutes of the Committee on Small Business Jointly with the Committee on Consumer Affairs and Business Licensing (April 29, 2020) at 88-91 (City Council Member Yeger: "The city cannot retroactively adjust, amend a contract that was entered into by two parties at arm's length. You can't do it, [because it's] illegal. . . . . We don't have a legal authority to go backwards into a

contract that was entered into five, six, seven, three years ago, one year ago, 16 months ago and amend[ ] [it] retroactively to remove a provision."), accessible at *id*.

(iii) CALIFORNIA'S PROPOSED TENANT-PROTECTION LAW

On May 29, 2020, the California Senate Judiciary Committee approved an amended version of Senate Bill ("***SB***") 939. The May 29, 2020 Bill would have provided certain commercial hospitality tenants, including small businesses "that operate[ ] primarily in California and [are] eating or drinking establishment[s], place[s] of entertainment, or performance venue[s]" that have been negatively impacted by the Pandemic, with, among other things, eviction protection, an opportunity to negotiate lease modifications with their respective landlords and the right to terminate their leases if those negotiations do not yield a satisfactory outcome. California Legislative Information Bill Text, accessible at *http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB939&search_keywords=COVID%23%23%23corona%23%23%2319*. The May 29, 2020 Bill provided, in part, as follows:

> "A commercial tenant that is an eligible COVID-19 impacted commercial tenant may serve written notice on the premises' landlord affirming, under the penalty of perjury, that the commercial tenant is an eligible COVID-19 impacted commercial tenant as defined by this section and stating the lease modifications the commercial tenant desires to obtain.
>
> ". . . If the eligible COVID-19 impacted commercial tenant and the landlord do not reach a mutually satisfactory agreement within 30 days of the date the landlord received the negotiation notice, then within 10 days thereafter, the eligible COVID-19 impacted commercial tenant may terminate the lease by serving a notice of termination of the lease on the landlord."

Id.

The May 29, 2020 Bill had been opposed by landlords, who threatened legal action if the Bill was passed in that form. *See, e.g.*, "California SB 939 Amended to Focus More on Hospitality Tenants," *Mortgage Professional America Magazine* (June 3, 2020) ("Pushback from the landlord community over California senate bill 939 continues, triggering threats of legal action should the bill be passed. . . . . Rob Lapsley, president of the business lobbying group California Business Roundtable (CBR) told the *California Globe* the CBR would sue the state in court to block SB 939 should it pass and be signed into law."), accessible at *https://www.mpamag.com/ commercial/california-sb-939-amended-to-focus-more-on-hospitality-tenants-224233.aspx*.

Before the May 29, 2020 Bill was scheduled for a June 18, 2020 Senate Appropriations Committee hearing and vote, its authors, California State Senators Scott Wiener and Lena Gonzalez, proposed changes to eliminate some of its more controversial aspects, including the provision that would have given tenants the right to unilaterally terminate their leases without penalty if lease-modification

negotiations with their landlords failed. *See, e.g.*, "California's SB 939 Fails in Committee," *Commercial Observer* (June 18, 2020), accessible at *https://commercialobserver.com/2020/06/california-senate-bill-939-sb-fails-committee-eviction-moratorium-renegotiations-shelter-in-place/*. Notwithstanding the modifications, the Bill did not pass. *See id*.; *https://sapro.senate.ca.gov/sites/sapro.senate.ca.gov/files/2020%20Senate%20Suspense%20Bills%20-%20Unofficial%20Results.pdf* (listing the "Unofficial Results" of the Senate Appropriations Committee vote).

II.

IMPOSSIBILITY OF PERFORMANCE CLAIMS IN THE M&A CONTEXT

As noted in our May 18, 2020 Newsletter (at 6-7), the Pandemic has spawned litigation by sellers against buyers that have backed out of M&A transactions on the ground that the Pandemic has created a material adverse event or effect (an "***MAE***").

Because closing deadlines are rapidly approaching in certain of these negotiated merger and acquisition ("***M&A***") transactions, sellers have been requesting that courts, including the Delaware Chancery Court, expedite their proceedings. Several motions requesting such expedited treatment have been filed with the Delaware Chancery Court. These motions have met with mixed results. *See, e.g., AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC*, No. 2020-0310 (Del. Ch.) (motion granted); *Realogy Holdings Corp. v. SIRVA Worldwide, Inc*., No. 2020-0311 (Del. Ch.) (motion for expedited trial denied); *The We Co. v. Softbank Grp. Corp*., No. 2020-0258 (Del. Ch.) (motion denied); *Snow Phipps Grp., LLC v. KCake Acquisition, Inc*., No. 2020-0282 (Del. Ch.) (motion denied); *In Juweel Investors Ltd. v. Carlyle Roundtrip, L.P*., No. 2020-0338 (Del. Ch.) (motion denied); *Forescout Technologies, Inc. v. Ferrari Group Holdings, L.P.*, No. 2020-0385 (Del. Ch.) (motion granted) (*see* Section II(B), below).

A. THE *JUWEEL INVESTORS* LAWSUIT

In *Juweel Investors Ltd. v. Carlyle Roundtrip, L.P.*, No. 2020-0338 (Del. Ch. Ct.) (filed May 6, 2020; redacted version removing certain protected and confidential information filed May 11, 2020), the buyers agreed to acquire from *Juweel Investors Ltd.* ("***Juweel***") an ownership interest in a holding company operated under the brand name American Express Global Business Travel ("***Amex***"). *See* Complaint ¶ 1. The merger agreement was signed in December 2019 and the transaction was scheduled to close on May 7, 2020, with an outside termination date of June 30, 2020. *Id*. ¶¶ 1-2, 14.

The merger agreement's MAE clause excludes changes in "general business or economic conditions," "social conditions" or "Legal Requirements," unless such changes "disproportionately and adversely affect[]" Amex relative to its peers. Complaint ¶¶ 6, 36. The agreement also includes various financing and re-financing obligations. *See id*. ¶¶ 14, 34, 38-41, 149.

On April 8, 2020, the buyers notified Juweel that they would not consummate the transaction because there had been an MAE and Juweel failed to operate its business in the "[o]rdinary [c]ourse." Complaint ¶¶ 8, 11. Juweel alleges that there was no MAE or change in its manner of operations and the buyers "manufactur[ed] excuses to back out of the deal" because they had "buyers' remorse." *Id*. ¶¶ 4, 8. Juweel seeks to compel the buyers to consummate the transaction. *Id*. ¶ 15.

On May 14, 2020, Delaware Vice Chancellor Slights held a telephonic conference in which he denied Juweel's motion to expedite the proceedings. *See Juweel Investors*, No. 2020-0338, May 14, 2020 Telephonic Conference Transcript at 3:4-5. Although Juweel pled colorable claims and demonstrated that it would likely suffer irreparable harm absent expedited proceedings (*id*. at 11:17-12:4), the court concluded that those factors were outweighed by (a) the hardship and impracticability of holding such a complex proceeding during the Pandemic and (b) the fact that Juweel did not file its lawsuit until almost a month after learning that the buyers would not proceed with the transaction. *Id*. at 10:7-15, 13:2-15:21. "As a practical matter, what plaintiff seeks is for litigation that would normally play out over the course of 18 months to two years to be adjudicated by trial in less than a month. And while this Court is, I think, as accommodating as any in the world when it comes to expedited litigation, what the plaintiff seeks here is a bridge too far." *Id*. at 3:20-4:2.

B. THE *FORESCOUT TECHNOLOGIES* LAWSUIT

In *Forescout Technologies, Inc. v. Ferrari Group Holdings, L.P.*, No. 2020-0385 (Del. Ch.) (filed May 19, 2020), a subsidiary of private equity fund Advent International ("***Advent***") agreed to acquire Forescout Technologies ("***Forescout***") for approximately $1.9 billion. Complaint ¶ 39. The agreement was signed in February 2020 and the transaction was scheduled to close on May 18, 2020, with an outside termination date of June 6, 2020. *Id*. ¶¶ 2, 63, 77. The merger agreement's MAE clause — which was drafted after COVID-19 was declared a "global public health emergency" — excludes "changes in general economic conditions" or the occurrence of "epidemics" or "pandemics," unless such changes or occurrences have a "materially disproportionate adverse effect" on Forescout's financial condition relative to that of its peers. *Id*. ¶¶ 57-58.

On May 15, 2020, Advent sent a letter to Forescout stating that it would not consummate the merger because there had been an MAE and Forescout failed to continue to operate its business in the "ordinary course." *Forescout* Complaint ¶¶ 80-81, 86. Forescout alleges that there was no MAE or change in its manner of operations and that Advent "fabricat[ed] reasons to avoid closing the Merger" because it had "buyer's remorse." *Id*. ¶¶ 75, 82, 86. Forescout seeks a declaratory judgment that Advent is in breach of the merger agreement and an Order requiring Advent to consummate the merger. *Id*. Prayer for Relief. To the extent its request for specific performance is denied, Forescout seeks monetary damages for the breach, which are capped by the contract's $111 million termination fee. *Id*. ¶ 21 and Prayer for Relief.

On May 22, 2020, Vice Chancellor Glasscock held a video conference during which he granted Forescout's motion to expedite the proceedings. The Vice Chancellor explained: "I have read the motion to expedite. It appears to me to be pretty clear that it needs to be granted. . . . I am extremely

loath to just say, 'Well, this is just a damages case, that's all I can do.' That doesn't seem equitable to me. . . . [The Court needs to] determine whether there are rights that require equitable relief before the opportunity to exercise equity is lost. That's really my concern." *Forescout Technologies*, No. 2020-0385-SG, May 22, 2020 Video Conference Transcript at 4:21-22; 13:9-12; 16:8-11; 18:20-23.

On May 26, 2020, in lieu of an evidentiary hearing, the parties agreed to the entry by the court of a Temporary Restraining Order (the "***TRO***") enjoining Advent from terminating the transaction or invoking the expiration of the termination date as a defense to Forescout's claim for specific performance. *See Forescout Technologies*, No. 2020-0385, May 26, 2020 Stipulation and Order for the Entry of a Temporary Restraining Order ¶¶ 2-3. The TRO is to remain in effect until the earlier of entry of a final judgment in the action, or 11:59 p.m. on August 6, 2020 (the new termination date); the parties are to jointly request a five-day trial on the merits, subject to the Court's availability, beginning on or after July 20, 2020, with a decision to be entered by the court on or before August 6, 2020. *Id*. ¶¶ 4-6.

C. THE *SIMON PROPERTY GROUP* LAWSUIT

On June 10, 2020, shopping mall owner Simon Property Group ("***Simon***") sued developer Taubman Centers ("***Taubman***") for a declaratory judgment holding that the Pandemic's effect upon Taubman constituted an MAE that entitles Simon to walk away from its February 9, 2020 agreement to acquire Taubman. *See Simon Property Group, Inc. v. Taubman Centers, Inc.*, No. 2020-181675 (Michigan Circuit Court, Oakland County). The merger agreement contains an MAE clause that excludes a "pandemic" unless said pandemic disproportionately affects Taubman as compared to Taubman's industry peers. Complaint ¶ 1. The merger agreement also requires Taubman to operate its business in the ordinary course until the closing. *Id*.

Simon alleges that the Pandemic has disproportionately affected Taubman and that Taubman has failed to operate its business in the ordinary course:

> "On February 9, 2020, after extensive negotiations, Simon agreed to acquire most of Taubman . . . for approximately $3.6 billion. Taubman agreed that Simon could terminate the deal if Taubman suffered a Material Adverse Effect ('MAE') or if Taubman breached its covenant to operate its business in the ordinary course until closing. The parties explicitly agreed that a 'pandemic' would be an MAE, if it disproportionately affected Taubman 'as compared to other participants in the industries in which [it] operate[s].' On June 10, 2020, Simon properly exercised its right to terminate the acquisition agreement (the 'Agreement'; Ex. A) for two independent reasons. First, the COVID-19 pandemic constitutes an MAE because it has had a uniquely devastating and disproportionate effect on Taubman compared with other participants in the retail real estate industry. Second, Taubman has repeatedly violated the ordinary course covenant in the wake of the pandemic, causing serious and irreparable damage to its business, by, among other violations, failing to make essential cuts in operating expenses and capital expenditures and financing those unnecessary expenditures by borrowing hundreds of millions of dollars . . . . Simon brings this action for a declaration that it validly

terminated the Agreement and to recover damages caused by Taubman's breaches of contract."

Complaint ¶ 1.

In its June 17, 2020 Answer, Affirmative Defenses and Counterclaim, Taubman denied Simon's allegations that it had suffered an MAE or failed to operate in the ordinary course, requested specific performance and characterized Simon's action as "a classic case of buyer's remorse." *Id*. at 1. On that same date, Taubman also filed a Motion for Expedited Proceedings, seeking a five-day non-jury trial beginning on August 24, 2020. *See* Taubman's June 22, 2020 Form 8-K (Item 8.01, Other Events), accessible at *https://www.sec.gov/ix?doc=/Archives/edgar/data/890319/000114036120014396/nc10012982x1_8k.htm*.

D. DOES THE FAILURE TO INVOKE AN MAE CLAUSE CONSTITUTE A BREACH OF A BOARD'S FIDUCIARY DUTY?

While, as reflected above, the cases involving the Pandemic-induced invocation of MAE clauses to terminate pending mergers and acquisitions typically give rise to the seller's contention that the invocation constitutes an unjustified attempt by the buyer to walk away from a transaction that it no longer wishes to pursue, at least one case has faulted a company's Board of Directors for its ***failure to invoke an MAE clause***. *See Local 464A United Food and Commercial Workers Union Pension Fund v. Antonellis*, No. 2020-0376 (Del. Chancery) (filed May 15, 2020) (styled as a direct class action lawsuit, not a derivative action, seeking recovery for alleged breaches of fiduciary duty owed to the shareholders).

In *Antonellis*, the Board of Directors and certain officers of Xperi Corporation are alleged to have breached their fiduciary duties to shareholders by failing to assess in connection with the company's $3 billion merger with TiVo Corporation whether the negative impact of the Pandemic on TiVo constituted an MAE that permitted Xperi to terminate the December 2019 merger agreement and/or perhaps seek other interested purchasers. Complaint ¶¶ 1-3. The Complaint alleges that the defendants "breached [their] duty of loyalty by deliberately failing to fulfill [their] contractual and fiduciary obligations to assess whether TiVo, in light of the pandemic and its economic fallout, has suffered a MAE under the Merger Agreement that would enable Xperi to terminate the Merger Agreement[.]" *Id*. ¶ 2.

III.

LITIGATION ARISING OUT OF EVENT CANCELLATIONS AND REDUCED SERVICES

A. EVENT CANCELLATIONS

The Pandemic and related government shutdown orders have resulted in myriad cancellations of sporting events, concerts, trips and the like. Consumers who prepaid for these cancelled events have demanded refunds. When those refund requests have been refused, some of them have sued. We discuss just a few select examples below.

(i) CONCERTS, BASEBALL GAMES AND OTHER ENTERTAINMENT EVENTS

Several class action lawsuits seeking refunds have been filed against ticket sellers, including Ticketmaster and StubHub.

The lawsuits filed against Ticketmaster and its parent company, Live Nation Entertainment, Inc., allege that, in late March 2020, Ticketmaster changed its refund policy. While the company had previously provided refunds for "postponed, rescheduled or cancelled" events, its new Pandemic-era policy permits refunds only for "cancelled" events. *See, e.g., Hansen v. Ticketmaster Entertainment, Inc.*, No. 3:20-cv-02685 (N.D. Cal.) (filed April 17, 2020), Complaint ¶ 2 (alleging that, "[a]fter the coronavirus outbreak forced the cancelation or postponement of most large events and public gatherings, Ticketmaster retroactively revised its policies applicable to the prior ticket sales to allow for refunds only for canceled events, not postponed or rescheduled ones"); *Tezak v. Live Nation Entertainment, Inc.*, No. 1:20-cv-02482 (N.D. Ill.) (filed April 23, 2020), Complaint ¶¶ 47-48 (alleging that Ticketmaster "made a 'clarification' to its refund policy that noted that while refunds would be made for events that were 'cancelled,' refunds for events that were postponed or rescheduled were at the discretion of the event promoter. Of course, the absurdity of this position is that . . . [the defendants were the event promotors, and they] had indefinitely 'postponed' hundreds or thousands of events that plainly could not occur any time in the foreseeable future.").

The day on which the *Hansen* lawsuit was filed, Ticketmaster announced that it would again amend its refund policy. *See* "Ticketmaster Preparing Refund Plan for Thousands of Postponed Shows," *Billboard.com* (April 17, 2020), accessible at *https://www.billboard.com/articles/business/touring/9360740/ticketmaster-preparing-refund-plan-for-thousands-of-postponed-shows*. However, Ticketmaster explained subsequently that it is leaving the ultimate refund decision to the individual event organizers, some of which may decide to only offer credits. *See* "Updated Information About Event Status, Refunds and Options," *Ticketmaster.com* (May 1, 2020) ("If an event has been postponed, it means the event organizer is still working to determine whether the event will be rescheduled or canceled;

in the meantime, your tickets are still valid. When the event organizer cancels or reschedules the event, we'll follow up with an additional email letting you know the new status and whether the event organizer is offering options for refunds or the alternatives of a refund or credit."), accessible at *https://blog.ticketmaster.com/refund-credit-canceled-postponed-rescheduled-events/?site=10085&pageType=178235&nativePromo=3389&slot=2&campaign=1441150&flight=11225864&nativeId=19294720*.

The StubHub lawsuits allege that, in late March 2020, the company replaced its "FanProtect" guarantee, which had provided cash refunds for cancelled events, with an allegedly less valuable program providing credit coupons. *See, e.g., McMillan v. StubHub, Inc.*, No. 3:20-cv-00319 (W.D. Wisconsin) (filed April 2, 2020), Complaint ¶ 24 (alleging that Stubhub has stated that "no refunds would be offered, noting that in the event of a cancellation '[w]e'll give you a coupon worth 120% of your original order. You can apply this coupon toward multiple StubHub events in the same currency. It is valid for 1 year.'").

On May 29, 2020, plaintiffs in six putative class action lawsuits asserting claims against major ticket resellers, including StubHub, Vivid Seats LLC and Seatgeek, Inc., for retroactively eliminating or amending their respective guaranteed-refund policies, moved to transfer their actions to the Northern District of Illinois or, alternatively, the Western District of Wisconsin for coordinated pretrial proceedings before the Judicial Panel on Multidistrict Litigation ("***JPML***"). *See In re Secondary Ticket Market Refund Litigation*, MDL No. 2951 (Docket No. 1). Responses to plaintiffs' JPML petition are due by June 22, 2020.

A putative class action lawsuit has been filed against Major League Baseball ("***MLB***") and each of its teams (along with Ticketmaster and StubHub) for refusing to refund ticket purchases for Pandemic-induced game cancellations. *See Ajzenman v. Office of the Commissioner of Baseball*, No. 2:20-cv-03643 (C.D. Cal.) (filed April 20, 2020), April 29, 2020 Amended Complaint ¶¶ 2-3 ("While many businesses across this country have acted lawfully and ethically by providing consumers with refunds for events that will never occur during this pandemic, sometimes at the risk of bankruptcy, it remains notable that America's pastime — baseball — is refusing to do right by its fans. As stadiums remain empty for the foreseeable future, baseball fans are stuck with expensive and unusable tickets for unplayable games in the midst of this economic crisis.").

Shortly after the *Ajzenman* lawsuit was filed, MLB announced that it was allowing, but not requiring, teams to offer refunds for cancelled games. *See* "MLB Allowing Teams to Offer Refunds for Games Lost to Coronavirus," *ESPN.com* (April 28, 2020), accessible at *https://www.espn.com/mlb/story/_/id/29108891/mlb-fans-now-get-refunds-lost-games*. Curiously, Paragraph 3 of the *Ajzenman* Amended Complaint, which was filed the day after the MLB announcement, alleges that "MLB has yet to issue a statement" confirming the new refund policy. In any event, various teams have posted detailed refund information through MLB's website. *See, e.g.*, St. Louis Cardinals 2020 Ticket Refund Information, accessible at *https://www.mlb.com/cardinals/tickets/refund*.

On April 10, 2020, a putative class of consumers who purchased monthly memberships and season passes to two Six Flags Great Adventure parks in California sued to recover the monthly fees that they were charged despite the Pandemic-related park closures. *See Rezai-Hariri v. Magic Mountain LLC*, No. 8:20-cv-00716 (C.D. Cal.), Complaint ¶ 1 ("Defendants have made the baffling decision to keep charging all of [their] customers monthly membership fees while prohibiting access to Six Flags Magic Mountain as the novel coronavirus, COVID-19, rages throughout the world and the United States economy has gone into a deep recession"). *See also Ruiz v. Magic Mountain, LLC*, No. 2:20-cv-03436 (C.D. Cal.) (filed April 13, 2020); *McConnell v. Six Flags Entertainment Corp.*, No. 2:20-cv-03665 (C.D. Cal.) (filed April 21, 2020).

Members of gym chains operated by Town Sports International ("***TSI***") have filed against the company putative class action lawsuits seeking to recover monthly membership fees that were charged during the time in which the facilities were closed in accordance with governmental shutdown orders. *See Namarato v. Town Sports International, LLC*, No. 1:20-cv-02580 (S.D.N.Y.) (filed March 26, 2020); *Radford v. Town Sports International Holdings, Inc.*, No. 1:20-cv-02938 (S.D.N.Y.) (filed April 9, 2020); *Danforth v. Town Sports International, LLC*, No. 1:20-cv-03195 (S.D.N.Y.) (filed April 22, 2020). TSI has filed motions to dismiss in all three actions. For example, in its May 15, 2020 motion to dismiss the Second Amended Complaint in *Namarato*, TSI argued, among other things, that it complied with various states' disparate consumer regulatory laws regarding health club services, refunds and extended memberships. *See Namarato*, No. 1:20-cv-02580, Motion to Dismiss (Docket No. 25-1) at 1-3. *See also Danforth*, No. 1:20-cv-03195, TSI Motion to Dismiss (Docket No. 14); *Radford*, No. 1:20-cv-02938, TSI Motion to Dismiss (Docket No. 21).

(ii) HOSPITALITY AND TRAVEL

On June 16, 2020, plaintiffs in putative class action lawsuits alleging that foreign and/or domestic passenger airlines improperly refused to offer travelers refunds for flights that were cancelled due to the Pandemic moved to transfer 38 such actions (and all additional related filed actions) to the Northern District of Illinois for coordinated pretrial proceedings before the JPML. *See In re COVID-19 Airfare Refund Litigation*, MDL No. 2957 (Docket No. 1). The airline defendants include, among others, American Airlines, United Airlines, JetBlue Airways, Spirit Airlines, Southwest Airlines, Delta Airlines, British Airways and Air Canada.

According to the plaintiffs' JPML motion, the lawsuits allege that the airlines "refused to honor the refund obligations imposed on them by their own contractual agreements and federal law. Instead, they have offered their customers an unwanted raincheck, functionally taking an interest free bridge loan (which in many cases will never be repaid before the voucher expires) from their customers in addition to the billions in taxpayer dollars provided in the form of federal bailouts. As a result, passengers nationwide have been deprived of refunds to which they are entitled for flights that they did not take, in the midst of the greatest economic crisis in living memory." Memorandum in Support of Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated Pretrial Proceedings (JPML Docket No. 1-1) at 1-2. The motion cites an April 3, 2020 U.S. Department of Transportation notice to all airlines stating that "passengers should be refunded promptly when their scheduled flights are cancelled

or significantly delayed" due to declared national disasters and noting that "the airlines' obligation to refund passengers for cancelled or significantly delayed flights [due to COVID-19] remains unchanged." *Id*. at 2-3. Responses to plaintiffs' JPML motion are due by July 9, 2020.

On April 24, 2020, customers who booked lodgings through Turnkey Vacation Rentals sued the company for refusing to refund, as opposed to credit, customers for Pandemic-related trip cancellations. In *Cahill v. Turnkey Vacation Rentals, Inc.*, No. 1:20-cv-441 (W.D. Tex.), plaintiff alleges: "Turnkey . . . has sought to shift the burden of this extraordinary crisis onto its customers" by failing to issue refunds. Complaint ¶ 5. The Complaint contrasts Turnkey's actions with those of its competitor, Airbnb, which agreed to issue refunds for Pandemic-related cancellations and created a $250 million fund to compensate property owners impacted by such cancellations. *Id*. ¶ 4.

On May 4, 2020, the mother of a bride whose 300-person wedding was cancelled due to the Pandemic sued the wedding venue (the Mayo Hotel) for refusing to issue a refund. The Petition in *Gilliss v. Mayo Hotel & Lofts MT LLC, dba The Mayo Hotel*, No. CJ-2020-1505 (Oklahoma District Court, Tulsa County) alleges a breach of contract based upon a *force majeure* theory and seeks a declaration that plaintiff is entitled to a refund. Petition ¶¶ 6, 20 ("[d]espite repeated requests by Gilliss for reimbursement of the monies paid to date, the Mayo Hotel has failed and refused to reimburse Gilliss and is therefore in breach of Contract"). *See also* "Wedding party sues Mayo Hotel over COVID-19 cancellation," *TulsaWorld.com* (May 7, 2020), accessible at *https://www.tulsaworld.com/news/local/wedding-party-sues-mayo-hotel-over-covid-19-cancellation/article_acc88968-81cf-5089-92d0-c1d49c805991.html*. The lawsuit is likely to be stayed or dismissed in favor of arbitration. *See* Petition ¶¶ 18-19 (plaintiff acknowledges that the dispute should be arbitrated pursuant to the operative contract, but alleges that her demand for arbitration was ignored by the hotel); June 4, 2020 Answer ¶ 18 (the hotel denies plaintiff's substantive allegations and notes that the dispute is required to be arbitrated).

(iii) EVENT-CANCELLATION INSURANCE

After the state of California shut down non-essential travel in March 2020, Richard Robbins alleged that he was forced to cancel his trip. On June 2, 2020, Robbins, on behalf of a putative class of travelers who purchased trip-cancellation insurance from Generali Global Assistance, Inc. ("***GGA***"), sued the company for denying their insurance claims. *See Robbins v. Generali Global Assistance, Inc.*, No. 2:20-cv-04904 (C.D. Cal.). The Complaint alleges that plaintiff purchased insurance from GGA in February 2020 "to insure against, among other things, trip cancellation, trip interruption and travel delays" for his planned trip to Utah in April 2020. Complaint ¶ 1. The policy covers cancellations in the event the traveler is prevented from taking a scheduled trip "due to one of the following unforeseeable Covered Events," which include being "[q]uarantined" — a term that is defined therein as "the enforced isolation of you or your Traveling Companion, for the purpose of preventing the spread of illness, disease or pests." *Id*. ¶¶ 2, 22.

In denying plaintiff's policy claim, GGA allegedly asserted that the Pandemic-induced quarantines constitute "'a foreseeable event under any plans purchased on or after January 29, 2020'" and thus are not "unforeseeable" covered events under the policy. *Robbins* Complaint ¶ 25. GGA offered to

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provide plaintiff with "'a voucher for the full amount of the insurance premium [he] paid to be applied to a future trip.'" *Id*. Plaintiff seeks declaratory relief, as well as damages for alleged breach of contract, bad faith and unfair competition. *Id*. ¶ 5.

On June 10, 2020, another putative class action was filed against Generali by purchasers of travel insurance whose trips were cancelled due to the Pandemic. In *Morris v. Assicurazioni Generali Group, S.p.A.*, No. 1:20-cv-04430 (S.D.N.Y.), plaintiff seeks to recover the premiums that travelers paid for "post-departure" insurance policies, which cover losses — such as medical emergencies and lost luggage — that occur during the trip. The Complaint alleges that, because the trips never occurred and the insurers were therefore "never at risk of having to cover the perils of actual travel," the retention by the insurers of the insurance premiums constitutes unjust enrichment and conversion. Complaint ¶¶ 7-8.

B. REDUCED SERVICES

Consumers have also sued where the services have been reduced or otherwise modified, but not cancelled outright, due to the Pandemic.

For example, college students from more than 70 universities who prepaid their tuition for the 2019-2020 academic year have sued for reimbursement, alleging that the online classes provided in lieu of in-person classes were inferior. *See, e.g.*, *Dutra v. Trustees of Boston University*, No. 1:20-cv-10827 (D. Mass.) (filed April 29, 2020); *In re Columbia University Tuition Refund Action*, 1:20-cv-03208 (S.D.N.Y.) (filed April 23, 2020); *Haynie v. Cornell University*, No. 3:20-cv-00467 (N.D.N.Y) (filed April 23, 2020); *Student A. v. Harvard University*, No. 1:20-cv-10968 (D. Mass.) (filed May 20, 2020); *Gociman v. Loyola University Chicago*, No. 1:20-cv-03116 (N.D. Ill.) (filed May 26, 2020); *Doe v. Brandeis University*, No. 1:20-cv-11021 (D. Mass.) (filed May 28, 2020). *See also* "More Than 70 Universities Sued for Refunds Following COVID-19 Campus Closures," *Expert Institute* (June 9, 2020), accessible at *https://www.expertinstitute.com/resources/insights/universities-sued-for-covid-19-refunds-following-campus-closures/*.

On May 18, 2020, a putative class action lawsuit was filed against Weight Watchers by customers seeking refunds for in-person workshops that had been cancelled due to the Pandemic. In *Vodden v. WW International, Inc*., No. 1:20-cv-03856 (S.D.N.Y.), plaintiff alleges that the "virtual" online class alternatives offered by Weight Watchers were inferior to the in-person classes for which customers paid and, moreover, Weight Watchers charged higher prices for the virtual classes. Complaint ¶ 8.

IV.

BUSINESS-INTERRUPTION INSURANCE COVERAGE

A. POTENTIAL INSURER LIABILITY

(i) LITIGATION

In our May 18, 2020 Newsletter (at 8-9), we addressed the staggering number of business-interruption lawsuits that have been filed in federal and state courts. Since then, the number of filings has continued to climb. As of June 26, 2020, approximately 200 such cases pending in dozens of federal district courts were awaiting a consolidation decision by the JPML. *See In re: COVID-19 Business Interruption Insurance Coverage Litigation*, MDL No. 2942. This staggering number includes neither the federal court cases that have not been identified on the JPML docket nor the numerous cases filed in state courts (which, given the nature of certain state court dockets, are more difficult to monitor).

Dozens of filings have been made in support of and opposition to the petitions seeking JPML consolidation and coordination of the federal business-interruption insurance cases. *See generally* "A Primer On The Push To Combine COVID-19 Coverage Cases," *Law360.com* (June 9, 2020), accessible at *https://www. law360.com/articles/1280575/a-primer-on-the-push-to-combine-covid-19-coverage-cases*.

Recently, the parties that filed the original JPML consolidation petitions submitted a reply brief, supported by an expert declaration, arguing that the lawsuits and policies at issue were not as dissimilar as the consolidation opponents had suggested. *See, e.g.*, Declaration of Professor Tom Baker [of the University of Pennsylvania Carey School of Law], Exhibit A to Plaintiffs' Reply in Support of Subsequent Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings (filed June 15, 2020) (Docket No. 544-1) ¶ 5 (reviewing nearly every federal and state court Pandemic-related business-interruption insurance lawsuit filed and opining that such actions are appropriate for consolidation and coordination because of the "standard form nature of [the] insurance policies [at issue] and the limited number of policy provisions that are relevant to any insurance dispute").

Some federal courts have stayed individual actions pending the consolidation decision by the JPML. *See Menns, Inc. v. Erie Ins. Exchange*, No. 1:20-cv-02895 (N.D. Ill.) (filed May 14, 2020) (Docket No. 10) (granting joint motion to stay pending a decision by the JPML); *Camp 1382 LLC v. Lancer Ins. Co.*, No. 1:20-cv-03336 (S.D.N.Y.) (filed April 29, 2020) (Docket No. 9) (granting joint motion to stay); *Pacific Endodontics PS v. Ohio Cas. Ins. Co.*, No. 2:20-cv-00620 (W.D. Washington) (filed April 23, 2020) (Docket No. 9) (granting joint motion to stay). *But see S.A. Palm Beach LLC v. Certain Underwriters at Lloyd's London*, No. 9:20-cv-80677 (S.D. Fla.) (filed April 22, 2020) (Docket No. 15) (ordering dispositive motion briefing to go forward, while staying all other deadlines pending the JPML's consolidation decision); *Laudenbach Periodontics and Dental Implants, Ltd. v. Liberty Mutual*

Ins. Group, No. 2:20-cv-02029 (E.D. Pa.) (filed April 27, 2020) (Docket No. 12) (denying without discussion defendants' motion to stay).

As noted, in addition to the federal actions, numerous state court Pandemic-related business-interruption insurance lawsuits have been filed. For example, in our May 18, 2020 Newsletter (at 9), we discussed *Joseph Tambellini Inc., d/b/a Joseph Tambellini Restaurant v. Erie Ins. Exchange*, No. 52 WM 2020 (Pa. Sup. Ct.), in which the Pennsylvania Supreme Court on May 14, 2020 rejected a request to exercise its "King's Bench" authority to coordinate state court business-interruption insurance cases. The same plaintiffs' attorneys who had unsuccessfully petitioned the Pennsylvania Supreme Court for a coordination Order have filed numerous additional business-interruption actions in Pennsylvania state court. *See, e.g., King Cobra Group LLC v. Motorists*, No. GD-20-006546 (Pennsylvania Court of Common Pleas, Allegheny County); *Smile Savers Dentistry v. CNA*, No. GD-20-006544 (Pennsylvania Court of Common Pleas, Allegheny County). *See generally* "Pa. Restaurants, Dentist Join Surge Seeking Virus Coverage," *Law360.com* (June 8, 2020), accessible at *https://www.law360.com/articles/1280991/pa-restaurants-dentist-join-surge-seeking-virus-coverage*.

We are unaware of the entry to date of a published decision on the merits in any Pandemic-induced business-interruption lawsuit.

(ii) PROPOSED LEGISLATIVE FIXES

None of the state or federal business-interruption insurance bills discussed in our May 18, 2020 Newsletter (at 12-13) has been enacted into law. However, two new national measures have been proposed.

On May 26, 2020, H.R. 7011, the *Pandemic Risk Insurance Act of 2020*, was introduced in the U.S. House of Representatives. *See https://maloney.house.gov/sites/maloney.house.gov/files/PRIA%20bill%20text.pdf*. The Bill would create the Pandemic Risk Reinsurance Program, a system of shared public and private compensation for business interruption losses resulting from future pandemics or public health emergencies arising after January 1, 2021. The House Bill is modeled loosely on the Terrorism Risk Insurance Act, which was enacted after the September 11, 2001 attacks. The Bill would require those insurers that elect to participate in the program to offer business-interruption insurance policies, as well as event-cancellation policies, that cover pandemics. The federal government, in turn, would contribute to the coverage if the aggregate losses due to the public health emergency exceed $250 million. The program would have a $750 billion cap. *See id*.

As an alternative to H.R. 7011, the National Association of Mutual Insurance Companies, the American Property Casualty Insurance Association, and the Independent Insurance Agents & Brokers of America, Inc. have sponsored the Business Continuity Protection Program ("***BCPP***"). *See https://www.namic.org/news/releases/200521mr01*. The BCPP would provide immediate revenue relief for payroll, employee benefits and operating expenses in the case of a future viral emergency. The program would be run by FEMA and paid for by taxpayers. Businesses would be required to purchase revenue replacement through participating insurers at least 90 days before a declared viral emergency.

B. POTENTIAL INSURANCE BROKER/AGENT LIABILITY

Our May 18, 2020 Newsletter (at 13-14) addressed certain business-interruption insurance lawsuits in which insurance brokers/agents were included as named defendants. A few additional lawsuits are discussed below.

In *Ybarra Investments, Inc. d/b/a Gringo's Mexican Kitchen v. Scottsdale Ins. Co.*, No. 4:20-cv-01818 (S.D. Tex.) (petition originally filed in Texas District Court, Harris County, on April 21, 2020, No. 2020-25079, and removed to S.D. Tex. on May 26, 2020), the owner and operator of a chain of restaurants in Texas sued its insurer and its agent, Terry Allen Slater ("***Slater***"), after its business-interruption claims were denied by the insurer. The Complaint alleges that Mr. Slater "is an individual engaged in the business of procuring appropriate insurance coverage selling insurance contracts to commercial entities," who has "worked with and for Plaintiff in securing a policy that would meet Plaintiff's insurance needs" for more than 10 years. Complaint ¶¶ 4, 34. *See also https://agency.nationwide.com/terry-slater-in-sugar-land-tx* (reflecting that Terry Slater is a Principal Agent of Nationwide Insurance, the parent company of defendant Scottsdale Insurance Company).

The policy at issue in *Ybarra* included a virus exclusion for "any loss of damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Complaint ¶ 29. Plaintiff alleges that this "ambiguous" exclusion "does not refer to pandemics," but to foodborne diseases or other viruses originating from inside of the insured premises. Complaint ¶ 32(f). *See also id.* ¶¶ 30-31. Plaintiff also alleges:

> "Although a future pandemic event could be catastrophic for Plaintiff's restaurant business, Plaintiff was not advised by Scottsdale or Terry Slater (a) that the exclusion was meant to cover loss and damage caused by a virus pandemic outside the Insured Properties, (b) that the virus exclusions in the Scottsdale Policy would leave Plaintiff without coverage for future pandemics, or (c) that Plaintiff should obtain additional insurance endorsements against microscopic threats and pandemic events (either from Scottsdale or another insurer) to meet Plaintiff's desire for coverage against potentially catastrophic risks outside Plaintiff's control."

Complaint ¶ 32.

The *Ybarra* Complaint alleges claims against the broker for negligence, asserting that, "on multiple occasions, Plaintiff inquired and consulted with Slater regarding the adequacy of Plaintiff's insurance coverage," and "[expressed its] desire to insure itself against risks that were beyond [its] control," especially after having suffered losses as a result of Hurricane Harvey. Complaint ¶¶ 34-35. The Complaint goes on to allege:

> "Slater did not inform Plaintiff about coverage issues or deficiencies related to virus pandemics, or that Plaintiff would not be covered under the Scottsdale Policy in the event of a virus pandemic. Slater did not inform Plaintiff of available options for coverage that would protect Plaintiff in the event of a virus pandemic.
>
> * * *
>
> "Plaintiff relied on the information provided by Slater in purchasing the Scottsdale Policy.
>
> "It was foreseeable to Slater, or should have been foreseeable to Slater, that if he failed to properly fulfill his duty to procure the proper and desired insurance coverage for Plaintiff, that Plaintiff would be damaged in the event of a loss of income caused by the actions of a civil authority in relation to a viral pandemic.
>
> "As a direct and proximate cause of Slater's negligent acts and omissions in failing to properly assess, advise and procure insurance, Plaintiff suffered damages[.]"

Complaint ¶¶ 38, 73-75.

On June 9, 2020, defendant Scottsdale Insurance Company filed a motion to dismiss the action based, primarily, on the policy's "Virus Exclusion" provision. *See Ybarra*, No. 4:20-cv-01818, Motion to Dismiss (Docket No. 12) at 14 ("Coverage under the Policy requires that the loss or damage be caused by a Covered Cause of Loss. The Virus Exclusion in the Policy applies to the entire Policy and unambiguously excludes coverage for 'loss or damage caused by or resulting from any virus.' Thus, there is no scenario where coverage can be afforded to Plaintiff for its claimed losses because the claimed losses are caused by or result from the COVID-19 virus and are expressly excluded."). On June 12, 2020, the plaintiff moved to remand the action, arguing that Scottsdale had agreed in its insurance policy contract to waive its right to removal and to submit to the jurisdiction of the court where the plaintiff chose to file its case. Motion to Remand (Docket No. 13) at ¶ 3. On June 15, 2020, the parties filed an Agreed Motion to Remand, stating that they had "conferred further and ha[d] reached an agreement to jointly request remand of the case" to the Harris County District Court. Agreed Motion to Remand (Docket No. 14) ¶ 4.

In *Magna Legal Services, LLC v. Hartford Fire Insurance Co.*, No. 200500735 (Pa. Court of Common Pleas, Philadelphia County) (filed May 13, 2020), the plaintiff sued its insurer, Hartford, as well as its insurance broker, Nottingham Agency ("***Nottingham***") and the individual broker, Jonathan Crook. *See* Complaint ¶¶ 6, 8 ("Defendant [Nottingham] is an insurance broker engaged in the business of obtaining insurance coverage for commercial entities, such as Plaintiff"). Magna alleged that it "expected and reasonably relied upon Defendants Nottingham and Crook to procure and bind all appropriate insurance coverage" and "to accurately describe the breadth and any limitations of [same], including any exclusions [for viruses or pandemics]," but defendants failed to do so. Complaint ¶¶ 41-42.

Apparently rethinking the impact on its legal-services business of suing insurance industry players, Magna dismissed its lawsuit on May 20, 2020. *See* "Legal Service Firm Drops COVID-19 Loss Suit Against Insurer," *Law360.com* (May 20, 2020) (Magna noted that it "has been a trusted partner of the insurance industry for 13 years" as a provider of litigation support to insurance companies), accessible at *https://www.law360. com/articles/ 1275457/legal-service-firm-drops-covid-19-loss-suit-against-insurer*.

V.

SEC AND DOJ INVESTIGATIONS AND ENFORCEMENT ACTIONS

As noted in our May 18, 2020 Newsletter (at 16), the Securities and Exchange Commission (the "***SEC***") has called for enhanced company disclosures concerning the impact of the Pandemic. *See also* "SEC Urges Cos. To Stay On Top Of COVID-19 Disclosures," *Law360.com* (June 24, 2020) ("[w]ith the second quarter nearing its end, [SEC] officials are urging public companies to thoroughly update their disclosures so investors have a clear picture about corporations' financial health and whether they can survive pandemic-related disruptions"), accessible at *https://www.law360.com/articles/1286333/sec-urges-cos-to-stay-on-top-of-covid-19-disclosures-*.

International regulators have also urged companies to make fulsome Pandemic-related disclosures. For example, on May 29, 2020, the International Organization of Securities Commissions issued a "Statement on Importance of Disclosure About COVID-19," accessible at *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD655.pdf*, in which it explained:

> "Investors and other stakeholders need timely and high quality financial information complete with transparent and entity-specific disclosures, including information about the impact of COVID-19 on the issuer's operating performance, financial position, liquidity, and future prospects. . . .
>
> * * *
>
> "[P]articularly in an environment of heightened uncertainty, it is important that financial reporting include disclosures that provide an adequate level of transparency and is entity-specific regarding uncertainties inherent in judgments and estimates. Disclosures should explain the material impact on specific assets, liabilities, liquidity, solvency and going concern issues as relevant and any significant uncertainties, assumptions, sensitivities, underlying drivers of results, strategies, risks and future prospects. Telling the story in a clear manner through the financial statements and management commentary is important to investors' information needs and confidence. Issuers should not limit disclosures to boilerplate discussion on COVID-19 itself, but [should] explain (i) how COVID-19 impacted and/or is expected to impact the financial performance, financial position and cash flows of the issuer, (ii) how the strategy and targets of the issuers have been modified to address the effects of COVID-19 and (iii) measures taken to address and mitigate the impacts of the pandemic on the issuer."

In conjunction with its push for more transparent company disclosures concerning the effects of the Pandemic, the SEC has issued several trading-suspension orders arising out of Pandemic-related misstatements. For example, the SEC suspended trading in the securities of No Borders, Inc. ("***NBDR***") "due to questions and concerns regarding the adequacy and accuracy of publicly available information concerning NBDR, including, since at least March 11, 2020, among other things, statements about NBDR's products and business activities related to the COVID-19 pandemic, including NBDR's COVID-19 specimen collection kits, an agreement to bring COVID-19 test kits to the United States, and NBDR's activities related to the distribution of personal protective equipment." *In the Matter of No Borders, Inc.*, SEC File No. 500-1, Order of Suspension of Trading (April 3, 2020), accessible at *https://www.sec.gov/litigation/ suspensions/2020/34-88549-o.pdf*. *See also, e.g., In the Matter of Micron Waste Technologies Inc.*, SEC File No. 500-1, Order of Suspension of Trading (May 26, 2020) (based upon "representations concerning Micron Waste's acquisition of Covid Technologies Inc., and Covid Technologies' present ability to rapidly manufacture personal protective equipment to meet the needs of the global medical community during the COVID-19 pandemic"), accessible at *https://www.sec.gov/litigation/suspensions/2020/34-88952-o.pdf*; *In the Matter of WOD Retail Solutions Inc.*, SEC File No. 500-1, Order of Suspension of Trading (May 20, 2020) (based upon "claims that the Company uses automated kiosks to sell retail items in fitness centers and would generate additional revenue as a result of the COVID-19 pandemic, when in fact the Company earned no revenue at all in 2018 or 2019" and "text message and email promotional messages … directed to investors, claiming that WOD Retail would expand its business to take advantage of the need for its contactless kiosks during the COVID-19 pandemic"), accessible at *https://www.sec.gov/litigation/suspensions/2020/34-88916-o.pdf*; *In the Matter of Custom Protection Services, Inc.*, SEC File No. 500-1, Order of Suspension of Trading (May 5, 2020) (based upon statements that the company "made in press releases issued by the Company between March 18, 2020 and April 20, 2020 about its development of frontline screening solutions for COVID-19, the 'overwhelming' response it had received for the screening solutions, and its estimate that it would earn gross revenue from new contracts for the screening solutions of $10,000 per day"), accessible at *https://www.sec.gov/ litigation/suspensions/2020/34-88815-o.pdf*.

In addition, the SEC has filed several lawsuits accusing companies of having made false and misleading statements concerning purported Pandemic-related goods and services. In *SEC v. Praxsyn Corp.*, No. 9:20-cv-80706 (S.D. Fla.) (filed April 28, 2020), the SEC alleged that Praxsyn announced falsely that it was able to acquire and supply large quantities of N95 or similar face masks. The SEC alleged that, in fact, the company had no orders to purchase such masks, had no contract with any manufacturer or supplier to obtain the masks and had no masks in its possession. *See Praxsyn* Complaint ¶¶ 2-4. The Complaint asserts that Praxsyn and its Chief Executive Officer, Frank Brady, violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and seeks injunctive relief and civil penalties. *Id*. ¶ 5.

In *SEC v. Applied BioSciences Corp.*, No. 20-cv-03729 (S.D.N.Y.) (filed May 14, 2020), the SEC alleged claims for fraud based upon the public announcement by Applied BioSciences ("***APPB***") that it was offering and shipping products to combat COVID-19. The Complaint alleges that the company, seeking to profit from the Pandemic, "dramatically shifted its focus in late March 2020 from cannabinoid-based products to pandemic-related products." Complaint ¶ 1. Although APPB issued a

press release on March 31, 2020 stating that it had begun offering and shipping home COVID-19 testing kits to the general public that could be used for "Homes, Schools, Hospitals, Law Enforcement, Military, Public Servants or anyone wanting immediate and private results," the SEC alleges that, "[i]n fact, APPB had not begun shipping the test kits and now claims it did not offer, sell or intend to sell the test kit for home or private use, but rather APPB intended to screen potential purchasers only to allow purchases in connection with use by nursing homes, schools, military, first responders, or in consultation with a medical professional." *Id*. ¶¶ 18-19, 22. The SEC further claims that the company had not shipped any COVID-19 test kits as of the time of its press release, which also failed to disclose that such kits had not been approved by the U.S. Food and Drug Administration. *Id*. ¶¶ 22-23. The SEC asserts that APPB violated Section 10(b) and Rule 10b-5. *Id*. ¶ 34.

In *SEC v. Turbo Global Partners, Inc.*, No. 8:20-cv-01120 (M.D. Fla.) (also filed May 14, 2020), the SEC alleged that Turbo Global Partners and its CEO, Robert Singerman, violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by issuing press releases claiming falsely that the company had entered into a "strategic alliance" to "actively sell[ ] equipment that scans large crowds to detect individuals with elevated fevers," which the company claimed "could be instrumental in breaking 'the chain of virus transmission through early identification of elevated fever, one of the key early signs of COVID-19.'" *Turbo Global Partners* Complaint ¶ 2. The press releases also asserted falsely, the SEC alleges, that "the product was available to be deployed immediately, and that [Turbo Global Partners] could ship the product within five days of receiving an order." *Id*.

On June 3, 2020, the SEC filed a Complaint and a motion for injunctive and other relief against investment advisor E*Hedge Securities and its CEO. *See SEC v. E*Hedge Securities, Inc.*, No. 1:20-cv-22311 (S.D. Fla.). The SEC has alleged, among other things, that E*Hedge failed to turn produce its books and records to the SEC while promoting falsely certain Pandemic-related investment opportunities. *See* Complaint ¶¶ 2-3, 20, 33, 38, 44. The E*Hedge CEO is alleged to have aided and abetted such violations. *Id*. ¶¶ 41-42, 47-48. In its motion, the SEC argued:

> "While Defendants ignore the SEC's request that E*Hedge comply with its regulatory obligations, beginning as early as March 2020, E*Hedge has attempted to capitalize on potential investor interest in products and treatments for the coronavirus, Covid-19. On March 22, 2020, E*Hedge registered and began operating Covid19invest.com, as well as social media websites relating to Covid-19[.] The Covid-19 Websites tout investment opportunities in connection with vaccines, diagnostic tests and treatments related to Covid-19. . . .
>
> "The SEC needs to examine E*Hedge's books and records to determine whether it should remain a registered entity and to determine whether E* Hedge is complying with the securities laws or otherwise engaged in conduct that is putting investors at risk."

*E*Hedge Securities*, No. 1:20-cv-22311 (Docket No. 5), SEC's Expedited Motion for Injunctive and Other Relief at 2.

VI.

CARES ACT: LEGISLATIVE DEVELOPMENTS AND RELATED AUDITS, INVESTIGATIONS, PROSECUTIONS AND LITIGATION

A. CARES ACT DEVELOPMENTS

On May 28, 2020, the United States House of Representatives passed H.R. 7010, the *Paycheck Protection Program Flexibility Act of 2020* (the "***PPP Flexibility Act***"). On June 3, 2020, the United States Senate passed the House Bill without changes and, on June 5, 2020, President Trump signed the Bill into law. *See https://www.congress.gov/bill/116th-congress/house-bill/7010/text.*

Among other things, the PPP Flexibility Act makes the following changes to the original Paycheck Protection Program (the "***PPP***"):

- Extends the "covered period" from eight weeks to 24 weeks, but not beyond December 31, 2020, during which a loan recipient may use funds for certain expenses while remaining eligible for forgiveness.
- Raises from 25% to 40% the portion of a forgivable covered loan that may be used for non-payroll expenses.
- Extends to December 31, 2020 the original June 30, 2020 deadline by which companies must rehire employees who have been laid off.
- Revises the deferral period for paycheck protection loans, providing, among other things, that recipients who do not apply for forgiveness have 10 months from the program's expiration to begin making payments.
- Establishes a minimum maturity of five years for a paycheck protection loan with a remaining balance after forgiveness.

See PPP Flexibility Act, accessible at *https://www.congress.gov/bill/116th-congress/house-bill/7010/text.* *See also* "Trump Signs Bill To Ease Guidelines on Coronavirus Relief Loans for Small Businesses," *CNBC* (June 5, 2020), accessible at *https://www.cnbc.com/2020/06/05/coronavirus-relief-trump-signs-bill-to-ease-limits-on-small-business-loans.html*.

B. FRAUD AND ABUSE UNDER THE CARES ACT

As predicted in our May 18, 2020 Newsletter (at 19), government agencies, including the SEC and the Department of Justice (the "***DOJ***"), have begun to assert civil claims and criminal charges relating to various aspects of the CARES Act.

On May 20, 2020, the DOJ brought criminal charges against Muge Ma, a Chinese national, for allegedly orchestrating a fraudulent scheme designed to secure $20 million in PPP and other CARES Act loans. *See United States v. Ma*, No. 20-mj-5202 (S.D.N.Y.). The unsealed Complaint alleges that Ma misrepresented to the Small Business Administration (the "***SBA***") and five financial institutions that his companies (New York International Capital LLC and Hurley Human Resources LLC) had hundreds of employees and paid millions of dollars in wages to those employees, even though Ma was the only employee. Complaint ¶¶ 1, 9. The SEC also alleges that one of Ma's companies misrepresented that it was representing New York State in procuring COVID-19 test kits and personal protective equipment to respond to the Pandemic. *Id.* ¶ 11. Ma was charged with one count of major fraud against the United States, one count of bank fraud, one count of wire fraud, one count of making false statements to a bank and one count of making false statements to the SBA. On June 5, 2020, the court ordered Ma detained as a flight risk. *See Ma*, No. 20-mj-5202 (Docket No. 8).

In *United States v. Zhang*, No. 2:20-mj-00269 (W.D. Washington) (filed May 21, 2020), the DOJ charged Baoke Zhang with engaging in a fraudulent scheme to obtain PPP funding, alleging:

> "BAOKE ZHANG submitted three different loan applications to two different lenders seeking more than $1.5 million in funds under the Paycheck Protection Program.
>
> "BAOKE ZHANG submitted the loan applications in the name of sham entities and included in those loan applications multiple materially false statements and documents, including, but not limited to:
>
> a. A loan application that claimed that the ZHANG entity had been in business since at least February 2020;
>
> b. A loan application that claimed that the business was assigned an Employer Identification Number in 2017; and
>
> c. A loan application that claimed that the business had an average monthly payroll of $240,000 and at least 25 employees."

Zhang Criminal Complaint ¶¶ 1-2. *See also* "Software Engineer Charged in Washington with COVID-Relief Fraud: Software Engineer Fraudulently Sought More than $1.5 Million in CARES Act SBA Paycheck Protection Loans," *DOJ* (May 22, 2020), accessible at *https://www.justice.gov/opa/pr/software-engineer-charged-washington-covid-relief-fraud*.

The CARES Act guidance published by the Department of the Treasury emphasizes the requirement that PPP loan applicants must have submitted good-faith certifications of need and provides a safe harbor for those who repay their PPP loans in full:

> "In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, ***all borrowers should review carefully the required certification that '[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant***.' Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower's certification regarding the necessity of the loan request. ***Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith***."

Paycheck Protection Program Loans, FAQ No. 31, U.S. Department of the Treasury (as of May 27, 2020) (emphasis added), accessible at *https://home.treasury.gov/system/ files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf*.

The SBA has further clarified how it will review the necessity certifications submitted by borrowers in connection with their PPP loan applications:

> "When submitting a PPP application, all borrowers must certify in good faith that '[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.' SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: ***Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.***
>
> "SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans.

This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

"***Importantly, borrowers with loans greater than $2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification***, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of $2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee."

Paycheck Protection Program Loans, FAQ No. 46, U.S. Department of the Treasury (as of May 27, 2020) (emphasis added), accessible at *https://home.treasury.gov/system/ files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf.*

On May 21, 2020, in *United States v. Sadleir*, No. 2:20-mj-02326 (C.D. Cal.), the DOJ filed a Criminal Complaint alleging a fraudulent scheme to obtain and spend PPP funds. As the DOJ explained in its press release:

"Sadleir allegedly obtained over $1.7 million in forgivable loans guaranteed by the SBA by falsely representing that the funds would be used to support payroll expenses for three film production and distribution companies, when, in fact, Sadleir intended to use and did use a significant portion of the funds for personal and non-business-related expenses, including personal credit cards and a car loan. Sadleir allegedly used three entities he controlled to obtain over $1.7 million in PPP loans guaranteed by the SBA for COVID-19 relief.

"The applications submitted to the lenders certified that the funds would be used for payroll expenses and other specific business-related expenses, such as utilities or rent payments. According to the complaint, these certifications were false. As soon as Sadleir obtained the funds, he allegedly transferred over half the money to a personal bank account and began using and attempting to use the funds to pay off personal credit

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card debts totaling more than $80,000 and a car loan totaling approximately $40,000, among other personal expenses."

"Hollywood Film Producer Charged with $1.7 Million COVID-Relief Fraud: Individual Used Funds for Personal Expenses," DOJ (May 22, 2020), accessible at *https://www.justice.gov/opa/pr/hollywood-film-producer-charged-17-million-covid-relief-fraud*. *See also Sadleir*, No. 2:20-mj-02326, Complaint ¶¶ 6, 22-27.

As more borrowers begin to seek forgiveness of their PPP loans, the government will undoubtedly increase its oversight.

VII.

PRIVATE PANDEMIC-RELATED SECURITIES LITIGATION

Since the publication of our May 18, 2020 Newsletter (*see* pages 20-23), private securities lawsuits have continued to proliferate. For example, the 170 securities lawsuits filed in April 2020 constituted a 56-percent increase over the 109 filings in April 2019. *See* "April 2020 Summary: Ongoing Impacts of the Coronavirus Pandemic on Litigation Activity in Federal District Court," *LexMachina.com* (May 26, 2020), accessible at *https://lexmachina.com/april-2020-summary-ongoing-impacts-of-the-coronavirus-pandemic-on-litigation-activity-in-federal-district-court/.*

A. LAWSUITS AGAINST CRUISE LINES

In our May 18, 2020 Newsletter (at 21), we suggested that *Douglas v. Norwegian Cruise Lines*, No. 1:20-cv-21107 (S.D. Fla.) (filed March 12, 2020), would likely be the "first of many" lawsuits targeting cruise lines. The prediction has proven accurate.

On May 27, 2020, a putative securities class action lawsuit was filed against Carnival Cruise Lines, captioned *Service Lamp Corp. Profit Sharing Plan v. Carnival Corp.*, No. 1:20-cv-22202 (S.D. Fla.). The Complaint alleges that Carnival committed securities fraud by, among other things, misrepresenting the degree to which its passengers — including those on the now-notorious *Diamond Princess* — were at risk of contracting, and had actually contracted, COVID-19; concealing the fact that Carnival was violating port of call regulations by downplaying the severity of COVID-19 infections on its ships; and concealing the fact that the cruise line was not following its own health and safety protocols for communicable disease outbreaks. *See* Complaint ¶ 8. *See generally* J. Rocklöv, H. Sjödin & A. Wilder-Smith, "COVID-19 Outbreak on the Diamond Princess Cruise Ship: Estimating the Epidemic Potential and Effectiveness of Public Health Countermeasures," *U.S. National Institute of Health, National Library of Medicine* (May 18, 2020), accessible at *https://pubmed.ncbi.nlm.nih.gov/32109273/.*

B. LAWSUITS AGAINST HEALTHCARE COMPANIES

On April 20, 2020, an Inovio Pharmaceuticals investor filed a shareholder's derivative lawsuit against the company's directors and Chief Executive Officer, J. Joseph Kim. *See Beheshti v. Kim*, No. 2:20-cv-01962 (E.D. Pa). Piggybacking on the *Inovio* securities class action lawsuit discussed in our May 18, 2020 Newsletter (at 21) — *McDermid v. Inovio Pharmaceuticals, Inc.*, No. 2:20-cv-01402 (E.D. Pa.) (filed March 12, 2020) — the *Beheshti* derivative lawsuit alleges that the defendants breached their fiduciary duties to shareholders by facilitating the company's false representations that it had developed a COVID-19 vaccine. The *Beheshti* Complaint alleges that it would have been futile to have made a pre-suit demand on the Board because a majority of the directors is conflicted. *See Beheshti* Complaint ¶¶ 113-35.

On June 5, 2020, the parties in *Beheshti* filed a Joint Stipulation and Order Staying the Derivative Action pending resolution of any motions to dismiss filed in the securities class action, which was entered by the court that day. *See* Docket No. 4. Since that time, at least two other derivative actions involving Inovio have been filed. *See Isman v. Benito*, No. 2:20-cv-02817 (E.D. Pa.) (filed June 12, 2020) and *Devarakonda v. Kim*, 2:20-cv-02829 (E.D. Pa.) (filed June 15, 2020).

A putative securities class action lawsuit was filed against SCWorx Corporation — which describes its business as "assist[ing] hospitals in margin improvement and critical system interoperability" (*see https://www.scworx.com/about-us*) — for allegedly asserting falsely that it was poised to sell millions of COVID-19 rapid test kits. *See Yannes v. SCWorx Corp.*, No. 1:20-cv-03349 (S.D.N.Y.) (filed April 29, 2020). The lawsuit was filed within a week of the SEC's halting trading in the company's securities because of questions concerning the "adequacy and accuracy" of the company's claims. *See* SEC Release No. 88712, Order of Suspension of Trading (April 21, 2020), accessible at *https://www.sec.gov/litigation/suspensions/2020/34-88712-o.pdf*. Paragraphs 5 and 7 of the *SCWorx* Complaint allege: "On April 17, 2020, Hindenburg Research issued a report doubting the validity of the deal [to sell millions of rapid test kits], calling it 'completely bogus,'" which was followed by, five days later, "the SEC halt[ing] trading of the Company's stock." Similar lawsuits have been filed. *See, e.g., Leeburn v. SCWorx Corp.*, No. 1:20-cv-04072 (S.D.N.Y.) (filed May 27, 2020); *Lozano v. Schessel*, No. 1:20-cv-04554 (S.D.N.Y.) (filed June 15, 2020).

On May 26, 2020, a putative securities class action lawsuit was filed against Sorrento Therapeutics for allegedly making materially misleading statements about its development of a COVID-19 "cure." The Complaint in *Wasa Medical Holdings v. Sorrento Therapeutics Inc.*, No. 3:20-cv-00966 (S.D. Cal.), alleges: "On May 20, 2020, Hindenburg Research issued a report . . . doubting the validity of Sorrento's claims and calling them 'sensational,' 'nonsense' and 'too good to be true.'" Complaint ¶ 5. Thereafter, the company backtracked on its "cure" claim. *Id.* ¶ 8.

On June 18, 2020, a putative securities class action lawsuit was filed against Chembio Diagnostics for making misleading positive statements concerning its COVID-19 antibody test the authorization for which was revoked by the FDA "due to performance concerns" with the accuracy of said tests. *See Chernysh v. Chembio Diagnostics*, No. 2:20-cv-02706 (E.D.N.Y.), Complaint ¶ 8. *See also*

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Gowan v. Chembio Diagnostics, No. 2:20-cv-02758 (E.D.N.Y.) (filed June 22, 2020) (making similar allegations).

On June 15, 2020, a putative securities class action lawsuit was filed against Co-Diagnostics for making allegedly false claims that it had developed a "100% accurate" COVID-19 test, which was revealed to be untrue when the FDA announced that "[n]o diagnostic test will be 100% accurate." *Gelt Trading, Ltd. v. Co-Diagnostics, Inc.*, No. 2:20-cv-00368 (D. Utah), Complaint ¶¶ 7, 15, 79.

C. OTHER PANDEMIC-RELATED SECURITIES LAWSUITS

In *In re Zoom Securities Litigation*, No. 5:20-cv-02353 (N.D. Cal.) (a consolidated putative class action), the Complaint alleges that Zoom failed to disclose the extent of its privacy and security failures — including its failure to encrypt data — and the fact that certain of its executives sold tens of millions of dollars of company stock while the company's stock price was artificially inflated during the period in which the privacy and security failures were concealed. *See, e.g.*, Complaint ¶¶ 7-8, 58-59.

Companies that attempt to use the Pandemic disingenuously as a shield to excuse their commercial nonperformance place themselves at risk. For example, in multiple securities class action lawsuits, plaintiffs have alleged that *iAnthus Capital Holdings, Inc.* asserted falsely that its loan default was caused by the Pandemic. *See Hi-Med LLC v. iAnthus Capital Holdings, Inc.*, No. 1:20-cv-03898 (S.D.N.Y.) (filed May 19, 2020), Complaint ¶ 54 ("[w]hile the Company ascribed its inability to make payments to the 'decline in the overall public equity cannabis markets, coupled with the extraordinary market conditions that began in Q1 2020 due to the novel coronavirus known as COVID-19 . . . , it became clear that the escrow created to cover this payment was either never established or not used for its intended purpose and that the default resulted from a conspiracy between [the private equity firm] and iAnthus' conflicted management"). *See also Finch v. iAnthus Capital Holdings, Inc.*, No. 1:2020-cv-03135 (S.D.N.Y.) (filed April 20, 2020); *Cedeno v. iAnthus Capital Holdings, Inc.*, No. 1:2020-cv-03513 (S.D.N.Y.) (filed May 5, 2020).

VIII.

NEW YORK CONSTRUCTION LAW ISSUES

A. DAMAGES FOR PANDEMIC-INDUCED CONSTRUCTION DELAYS

Although New York State continues to reopen its economy, including construction projects, there will be unavoidable residual delays and increased costs due to the Pandemic. *See e.g.*, J. Goodman, "Coronavirus Impacts Could Have Ripple Effect on US Construction Industry," *Construction*

Drive (Feb. 19, 2020), accessible at *https://www.constructiondive.com/news/coronavirus-impacts-could-have-ripple-effect-on-us-construction-industry/572586/*. Among other things, the industry must address the creation and implementation of revised safety plans; the installation of additional sanitary stations; the ongoing cleaning of frequently touched surfaces and materials; and the procurement of mandatory personal protective equipment such as masks. *See, e.g.*, "Interim Guidance for Cleaning and Disinfection of Public and Private Facilities for COVID-19," *N.Y. State Department of Health* (March 10, 2020), accessible at *https://coronavirus.health.ny.gov/system/files/documents/2020/03/cleaning_guidance_general_building.pdf*; "COVID-19 Recommended Practices for Jobsites," *Associated General Contractors of N.Y. State* (March 19, 2020), accessible at *https://www.agcnys.org/wp-content/uploads/EWH-COVID-19-Package.pdf*.

These additional safety precautions not only increase cost, but may negatively impact productivity. How will these costs be allocated? To a large extent, one must turn to the specific provisions of the governing construction contracts.

(i) CONTRACTUAL NO-DAMAGE-FOR-DELAY PROVISIONS

For example, many, if not most, contemporary construction contracts contain provisions that preclude a contractor from seeking damages incurred as a result of delays encountered during a project. Referred to as "no-damage-for-delay" provisions, they are typically enforceable in New York. *See, e.g.*, *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 384 (1983) ("[W]e at once note that it is cast in language which on its face, tersely it is true, but clearly, directly and absolutely, states the contractor's agreement to make no claims for delay damages caused by *any* act or omission to act by the city. Such a provision, not uncommon in construction contracts, especially when entered into at arm's length by sophisticated contracting parties, in this case between a large contractor and a large city, are enforceable.") (emphasis in original).

However, contractors can recover damages even in the face of a no-damage-for-delay provision for "(1) delays caused by the contractee's bad faith or its willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract." *Corinno Civetta Constr. Corp. v. City of New York*, 67 N.Y.2d 297, 309 (1986). *See also Arnell Constr. Corp. v. N.Y.C. Sch. Constr. Auth.*, 177 A.D.3d 595, 596-97 (2d Dep't 2019) (citing *Corinno*); *Blue Water Envtl., Inc. v. Inc. Village of Bayville, N.Y.*, 44 A.D.3d 807, 809 (2d Dep't 2007) (citing *Corinno*).

Moreover, as a general matter, no-damages-for-delay provisions apply only to delays that are "reasonably foreseeable." *See, e.g.*, *Corinno*, 67 N.Y.2d at 309-10 ("even broadly worded exculpatory clauses, such as the one at issue in these actions, are generally held to encompass only those delays which are reasonably foreseeable, arise from the contractor's work during performance, or which are mentioned

in the contract"); *New York Trenchless, Inc. v. Hallen Const. Co., Inc.*, 82 A.D.3d 850, 852 (2d Dep't 2011) ("even where a contract includes a provision barring damages for delay, 'damages may be recovered for . . . uncontemplated delays [or] delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee'"), *quoting Corinno*, 67 N.Y.2d at 309; *Peckham Rd. Co. v. State of New York*, 32 A.D.2d 139, 141 (3d Dep't 1969) ("[d]elays and obstructions are actionable if they are not within the contemplation of the parties at the time the contract is made, and that contemplation involves only such delays as are reasonably foreseeable, arise from the contractor's work itself during performance, or others specifically mentioned in the contract"), *aff'd*, 28 N.Y.2d 734 (1971).

Contractors will likely argue that Pandemic-related construction delays were reasonably foreseeable and thus damages therefor are precluded by no-damages-for-delay provisions. Construction delays have been deemed foreseeable or "contemplated" when the delays are specifically referenced in the contract. *See, e.g., Buckley & Co. v. City of New York*, 121 A.D.2d 933, 934 (1st Dep't 1986); *Gottlieb Contr., Inc. v. City of New York*, 86 A.D.2d 588, 589 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 1051 (1983). Accordingly, to the extent a construction contract references delays caused by pandemics and the like, there is likely to be a strong argument that damages arising out of delays caused by this current Pandemic will be barred by the contract's no-damages-for-delay provision.

In the absence of a contract clause specifically referencing pandemics and related events, the parties will be left to argue whether a Pandemic-induced delay was contemplated under more general contract language such as that addressing government regulatory actions. *See, e.g., Bovis Lend Lease (LMB), Inc. v. Lower Manhattan Dev. Corp.*, 108 A.D.3d 135, 147 (1st Dep't 2013) ("Bovis expressly acknowledged that it assumed the 'risk of all regulatory and other Governmental Authority delays.' Certainly this lifted the no damages for delay clause out of the exception for uncontemplated delays. . . . As this Court has stated in finding a no damages for delay clause enforceable, 'while the conditions themselves may not have been anticipated, the possibility, however unlikely, of their arising was contemplated and addressed by the parties in their agreement.'"), *quoting Blau Mech. Corp. v. City of New York*, 158 A.D.2d 373, 375 (1st Dep't 1990). *But cf. generally Clifford R. Gray Inc. v. City Sch. Dist. of Albany*, 277 A.D.2d 843, 845 (3d Dep't 2000) ("[u]nder the totality of the circumstances, finding an ample basis in the record for the court's factual conclusion that the project delays were uncontemplated . . ., we decline to disturb the holding that the 'no damages for delay' clause did not bar plaintiff's claim for money damages"); *Abax Inc. v. NY City Hous. Auth.*, 282 A.D.2d 372, 373 (1st Dep't 2001) ("the evidence presented by plaintiff . . ., demonstrating over 600 days in delays, including a substantial period during which [the Contract Manager] suspended work, is sufficiently indicative of delays beyond the contemplation of the contracting parties").

(ii) CONTRACTUAL NOTICE PROVISIONS

It should be borne in mind that construction contracts typically contain exacting written-notice requirements for acts and omissions. Many such provisions require notice to be provided within 24 hours of a triggering event. Failure to comply with these notice requirements can result in the contractor's waiving its claims completely, even if it is the aggrieved party. *See, e.g., Promo-Pro Ltd. v. Lehrer McGovern Bovis, Inc.*, 306 A.D.2d 221, 222 (1st Dep't 2003) ("[c]ompliance with the notice of claim provision was an express condition precedent to the contractor's right to bring an action for recovery of change order payments and, under such provision, noncompliance clearly constituted a waiver of its claim"); *A.H.A. Gen. Constr. v. NY City Hous. Auth.*, 92 N.Y.2d 20, 30 (1998) (same); *Northgate Elec. Corp. v. Barr & Barr, Inc.*, 61 A.D.3d 467, 468-69 (1st Dep't 2009) (same).

Construction contracts typically require that the contractor or subcontractor provide to project stakeholders a notice of delay stating the cause of the delay, an estimate as to the impact that the delay might have on the project's progress schedule and, if applicable and permitted, the estimated cost. Some contracts further require that a delayed contractor or subcontractor make a formal application for an extension of time. The failure to timely provide any one of these notices will likely constitute a waiver. *See, e.g., Blue Heron Const. Co., LLC v. Vil. of Nunda*, 63 A.D.3d 1694, 1695 (4th Dep't 2009) ("[T]he court erred in denying [defendant's] motion in part, inasmuch as plaintiff failed to seek the requisite extension of the deadline for substantial completion. . . . It is undisputed that plaintiff did not request an extension of the 'Contract Times,' nor did it achieve substantial completion or final completion of the work of the contract by the contractual deadline.").

Failure to provide timely notice will likely result in a waiver even if all parties were aware of the condition causing the delay, especially in the context of public contracts. *See Huff Enters. v. Triborough Bridge & Tunnel Auth.*, 191 A.D.2d 314, 314-15, 317 (1st Dep't 1993) ("In denying defendant's motion to dismiss plaintiff's first cause of action for delay costs, the Supreme Court found a triable question of fact to exist concerning whether defendant waived reliance upon the applicable clause of the contract since '[t]he facts as alleged by plaintiff would indicate that the TBTA, through its on-site agents, was thoroughly aware of the conditions causing the delays and the effect of those delays on the progress schedule. The alleged breakdown and abandonment of the progress schedule would obviate the need to apprise the TBTA of the expected effect the delays would have upon it.' . . . To enable plaintiff to succeed in attempting to circumvent having to give written notice would eviscerate the viability of these clauses in public works projects, and none of the cases cited by plaintiff or relied upon by the Supreme Court compel such a result.").

B. OSHA GUIDANCE FOR REOPENED CONSTRUCTION SITES

On May 27, 2020, the United States Occupational Safety and Health Administration ("***OSHA***") issued a set of recommendations addressing construction workers' safety during the Pandemic

(the "***OSHA Construction Guidance***"). *See https://www.osha.gov/SLTC/covid-19/construction.html*. While the OSHA Construction Guidance is not a standard or regulation and does not create new legal obligations, it should be followed to ensure employees are provided with a workplace free from recognized hazards likely to cause death or serious physical harm.

The OSHA Construction Guidance applies to workers engaged in construction, including carpentry, ironworking, plumbing, electrical, heating/air conditioning/ventilation, utility construction work, masonry and concrete work, and earth-moving activities. The goal of the OSHA Construction Guidance is to ensure that employers continue to monitor the potential community spread of the virus and be in a position to implement infection prevention measures.

The OSHA Construction Guidance recommends conducting a job hazard analysis to determine whether work activities require close contact (within 6 feet) between workers and customers, visitors, or other members of the public. If a job hazard analysis identifies activities with higher exposure risks, and those activities are not essential, employers should consider delaying them until they can be performed safely (*e.g.*, when appropriate infection-prevention measures can be implemented or community transmission subsides).

(i) OSHA RISK-EXPOSURE LEVELS

The OSHA Construction Guidance addresses various levels of risk, as reflected in the below chart:

Exposure Risk	OSHA Recommendations
Lower	• Tasks that allow employees to remain at least six feet apart and involve little contact with the public, visitors, or customers
Medium	• Tasks that require workers to be within 6 feet of one another • Tasks that require workers to be in close contact (within six feet) with customers, visitors, or members of the public
High	• Entering an indoor work site occupied by people such as other workers, customers, or residents suspected of having or known to have COVID-19, including when an occupant of the site reports signs and symptoms consistent with COVID-19
Very High	• Category not applicable for most anticipated work tasks

(ii) ENGINEERING CONTROLS

The OSHA Construction Guidance provides separate guidelines for indoor construction sites. The Guidance advises employers to use closed doors and walls, whenever feasible, as physical barriers to separate workers from any individuals experiencing sign and/or symptoms consistent with COVID-19. For example, an employer can erect plastic sheeting barriers when workers need to occupy specific areas of an indoor work site fewer than six feet apart.

(iii) ADMINISTRATIVE CONTROLS

The OSHA Construction Guidance also advises employers to use administrative controls, when feasible, to prevent the spread of COVID-19. Employers are directed to implement and update policies to conform to the guidance promulgated by, among others, the Centers for Disease Control and Prevention (the "***CDC***") and OSHA. Employers should also train their employees on the spread of COVID-19 and investigate indoor work sites before their employees enter them to assess the need for addition safety measures. *See* OSHA Construction Guidance, accessible at *https://www.osha.gov/SLTC/covid-19/construction.html*.

The OSHA Construction Guidance also directs employers to screen visitors in advance of their arrival on the job site for signs and symptoms of COVID-19, to the extent possible. Employers are also encouraged to adopt staggered work schedules (*e.g.*, alternating workdays or extra shifts) to reduce the total number of employees on a job site and thus ensure appropriate distancing.

(iv) PERSONAL PROTECTIVE EQUIPMENT

Most construction workers are unlikely to need any personal protective equipment ("***PPE***") beyond what they use to protect themselves during routine job tasks. General "construction-relevant" PPE may include a hard hat, gloves, safety glasses and a face mask.

Although they are not technically considered PPE, cloth face coverings are recommended by the CDC as an additional prophylactic measure, especially when distancing is not feasible at a construction site. *See* OSHA Construction Guidance, accessible at *https://www.osha.gov/SLTC/ covid-19/construction.html*.

IX.

LITIGATION AND LEGISLATIVE PROPOSALS ADDRESSING POTENTIAL PANDEMIC-RELATED LIABILITY FOR REOPENED BUSINESSES

A. LITIGATION

As businesses reopen, they remain acutely aware of the risk that, no matter how much time and money they invest in protocols designed to limit COVID-19 exposure, customers and/or employees who do contract the virus while on their premises may sue them.

For example, a putative class of McDonald's employees and their family members sued the company for public nuisance and negligence for allegedly requiring the employees to work in close proximity without taking necessary COVID-19 safety precautions, including failing to provide adequate PPE, hand sanitizer and safety training, and failing to enforce safety protocols. *See Massey v. McDonald's Corp.*, No. 2020CH04247 (Illinois Circuit Ct., Cook County) (filed May 19, 2020), Complaint ¶¶ 59-64. On June 24, 2020, the court granted plaintiffs' motion for a preliminary injunction, ordering the franchise owner to provide its workers with more adequate information and better protection to help prevent the transmission of COVID-19. The court explained: "The potential risk of harm to these plaintiffs and the community at large is severe. It may very well be a matter of life and death to individuals who come in contact with these restaurants or employees of these restaurants on a regular, or even semi-regular basis, during the COVID-19 pandemic." *See* "McDonald's Told to Give Ill. Workers More Virus Protections," *Law360.com* (June 24, 2020), accessible at *https://www.law360.com/employment/articles/1286329/mcdonald-s-told-to-give-ill-workers-more-virus-protections?nl_pk=658620f1-b8cd-400e-b8c4-83b337b25c8&utm_source=newsletter&utm_medium=email&utm_campaign=employment.*

A lawsuit was filed on behalf of a Tyson Foods employee who allegedly died after contracting COVID-19 at a Tyson facility. *See Le v. Tyson Foods, Inc.*, No. 2:20-cv-00131 (N.D. Tex.) (filed May 21, 2020; voluntarily dismissed June 5, 2020). *See also Saldana v. Glenhaven Healthcare LLC*, No. 20STCV19417 (Cal. Super. Ct., Los Angeles County) (filed May 21, 2020) (wrongful death, negligence and elder-abuse claims alleged against a nursing home by the family of a resident who died after allegedly contracting COVID-19 at the home).

B. BUSINESS-IMMUNITY LEGISLATION

As the economy reopens across the nation, several state legislatures have attempted to craft legislation that would insulate from civil Pandemic-related liability those businesses that attempt in good faith to comply with applicable public health precautions and protocols. Some of these efforts are summarized immediately below.

(i) ENACTED LAWS

- **Kansas HB 2016**: Enacted on June 8, 2020, this statute protects businesses "from liability in a civil action for a COVID-19 claim if such person was acting pursuant to and in substantial compliance with public health directives applicable to the activity giving rise to the cause of action when the cause of action accrued." *See https://legiscan.com/KS/bill/HB2016/2020/X1*.

- **Louisiana S 435:** Enacted on June 12, 2020, this statute protects businesses from being held "liable for damages or personal injury resulting from or related to an actual or alleged exposure to COVID-19 in the course of or through the performance or provision of [its] . . . business operations," as long as the business and its representatives were acting in compliance with applicable health and safety procedures and did not engage in intentional or willful misconduct. *See http://custom.statenet.com/public/resources .cgi?id=ID:bill:LA2020000S435&ciq=ncsl&client_md=a11139f44f69b394f 6c68cd65b8c15ba&mode=current_text*.

- **North Carolina SB 704:** Enacted on May 4, 2020, this statute protects any business deemed to be "essential" in the North Carolina Governor's emergency orders (*e.g.*, restaurants, grocery stores and banks). *See http://custom.statenet.com/public/resources.cgi?id=ID:bill:NC2019000 S704&ciq=ncsl&client_md=7748f5a32ae8f393bd6f91c44faa875d&mode=c urrent_text*. It is unclear whether this protection will be extended to other "non-essential" businesses that have reopened or are about to reopen.

- **Oklahoma SB 1946**: Enacted on May 21, 2020, this statute protects businesses from liability in "civil action[s] claiming . . . injury from exposure or potential exposure to COVID-19," as long as the business or its agent was acting in compliance with existing health and safety regulations. *See http://custom.statenet.com/public/resources.cgi?id=ID:bill:OK2019000S194 6&ciq=ncsl&client_md=3f35f0e01fb7896c59254c5cbea366fd&mode=curre nt_text.*

- **Utah SB 3007:** Enacted on May 4, 2020, this statute protects businesses from "civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by [such business]," as long as the business was operating in compliance with existing health and safety laws and did not engage in willful misconduct. *See http://custom.statenet.com/public/resources.cgi?id=ID:bill:UT2020010S300 7&ciq=ncsl&client_md=328499a9a3abd14ba4bcda4ff8b9741c&mode=curr ent_text*.

(ii) PROPOSED LEGISLATION

- **Arizona HB 2912**: This Bill would protect a "school, church, religious institution, nonprofit organization or person, including a person who owns or operates a business, [or] corporation" from actions based on strict liability, premises liability or negligence, unless the plaintiff proves his or her case by "clear and convincing evidence." *See http://custom.statenet.com/public/ resources.cgi?id=ID:bill:AZ2020000H2912&ciq=ncsl&client_md=a5c8442 00460ac4ba3fc39bc757b4f1c&mode=current_text*.

- **Illinois SB 3989**: This Bill would protect all businesses from being held "liable for any civil damages for any acts or omissions that result in the transmission of COVID-19, other than damages occasioned by willful and wanton misconduct[.]" *See http://custom.statenet.com/public/resources. cgi?id=ID:bill:IL2019000S3989&ciq=ncsl&client_md=b2a6b569bbd976f91 86b83ac1bb808b5&mode=current_text*.

- **New Jersey S2502:** This Bill would protect all businesses from "claims for damage to individuals arising out of exposure to the COVID-19 at [their] premises," as long as the damage or exposure was not the result of willful misconduct or intentional acts. *See http://custom.statenet.com/public/ resources.cgi?id=ID:bill:NJ2020000S2502&ciq=ncsl&client_md=b1cb232 991b896d8c320368cf88d3bf6&mode=current_text*.

- **New Jersey A 4189:** This Bill would protect all businesses from "civil liability for damages or injury resulting from exposure of an individual to COVID-19 on the premises" or during business activities, as long as the damages or injury were not caused by willful or intentional acts. *See http://custom.statenet.com/public/resources.cgi?id=ID:bill:NJ2020000A418 9&ciq=ncsl&client_md=8a9684e7d5e0e8428009b93d0839cbd7&mode=cur rent_text*.

- **Wyoming SF 1005**: This Bill would protect "a property owner, property lessee, property user or a business entity . . . from civil liability for any action or omission that resulted in alleged exposure to or the contracting of coronavirus on the property or premises of the property owner, property lessee, property user or business entity," as long as the action or omission was not intentional. *See http://custom.statenet.com/public/resources.cgi? id=ID:bill:WY2020010S1005&ciq=ncsl&client_md=32c9793a2bc4d43e3a3 bcee8d087c57d&mode=current_text*.

C. PROTECTIONS ADOPTED BY BUSINESSES

Certain businesses have begun to distribute liability waivers to try to protect themselves from potential COVID-19-related claims by employees and customers. For example, the New York Stock Exchange, which recently reopened its physical trading floor, has required all on-site traders and regulatory and operational staff to sign COVID-19 liability waivers. *See* "NY Stock Exchange Partially Reopens Trading Floor; Traders, Staff Sign Liability Waivers," *The Insurance Journal* (May 28, 2020), accessible at *https://www.insurancejournal.com/news/national/2020/05/28/570117.htm*.

The Walt Disney Company has posted liability waivers on its website, which state, in part:

> "COVID-19 Warning
>
> "We have taken enhanced health and safety measures — for you, our other Guests, and Cast Members. You must follow all posted instructions while visiting Walt Disney World Resort.
>
> "An inherent risk of exposure to COVID-19 exists in any public place where people are present. COVID-19 is an extremely contagious disease that can lead to severe illness and death. . . .
>
> "By visiting Walt Disney World Resort, you voluntarily assume all risks related to exposure to COVID-19. "

"Walt Disney World Resort Phased Reopening and Important Information," accessible at *https://disneyworld.disney.go.com/travel-information/*.

The viability of such releases and waivers will no doubt be tested under the applicable law of the state at issue. As a general matter, under New York law, for example, releases of liability are enforceable "where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence[.]" *Blog v. Battery Park City Authority*, 234 A.D.2d 99, 100 (1st Dep't 1996) (internal quotation marks omitted). Such releases "have been grounds for summary judgment and dismissal, even where . . . the injured plaintiff claimed not to have read or understood the release, or even to have been misled as to its meaning. Absent fraud or duress, a party will thus be bound by the terms of such a document[.]" *Id*. (internal citations omitted). *See also United Merchandise Wholesale, Inc. v. IFFCO, Inc.*, 51 F. Supp. 3d 249, 265 (E.D.N.Y. 2014) ("[u]nder New York State law, disclaimers of liability, also referred to as exculpatory provisions, have been held to be valid").

However, New York's General Obligations Law ("***GOL***") § 5-326 provides that liability releases entered into with "pool[s], gymnasium[s], place[s] of amusement or recreation, or similar establishment[s]" whose purposes are recreational, as opposed to purely instructional, are unenforceable. The statute provides:

> "Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any ***pool, gymnasium, place of amusement or recreation, or similar establishment*** and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for ***damages caused by or resulting from the negligence*** of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be ***void as against public policy and wholly unenforceable***."

GOL § 5-326 (emphasis added). *See also Krantz v. TSI East 41*, 2007 WL 2236472, at *4 (Sup. Ct., N.Y. Co. 2007) ("[t]he statutory exemption [of GOL § 5-326] renders releases from liability made by these enumerated entities void as against public policy unless the entity can show that its facility is used for 'purely instructional purposes,' as opposed to recreational purposes"); *Evans v. Pikeway, Inc*., 7 Misc. 3d 348, 351 (Sup. Ct. Nassau Co. 2004) ("General Obligations Law § 5–326 does not apply to defendants because plaintiff was at the fitness center for instructional purposes and not recreational purposes"). *Cf. Debell v. Wellbridge Club Mgmt., Inc*., 40 A.D.3d 248, 249-50 (1st Dep't 2007) ("The motion court found that plaintiff was undergoing instruction in strength-training exercises [when she was injured] . . . and accordingly held that [GOL § 5-326] does not void the release . . . . This was error. Rather than focusing on whether plaintiff's *activity* was recreational or instructional, the motion court's focus should have been on whether the *Spa's* purpose was recreational or instructional. . . . Here, the training sessions, arguably instructional in nature, appear to be ancillary to the recreational activities offered by the Spa.") (emphasis in original).

New York-based entities operating pools, gymnasiums, amusement parks and the like for recreational purposes are therefore likely to be barred under GOL § 5-326 from enforcing COVID-19 liability waivers. While these entities may attempt to invoke the assumption of risk doctrine, they will face challenges under New York law because the infected customer is likely to argue that the injury — exposure to COVID-19 — is not an inherent risk of the particular recreational activity in which the customer sought to engage (and perhaps also that the entity acted recklessly in failing to take steps to mitigate the spread of the virus). *See generally Morgan v. State of New York*, 90 N.Y.2d 471, 484-85 (1997) ("[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation. Thus, the risks of becoming injured due to fatigue . . ., being bumped by a horse during a race or exhibition . . ., or being struck by a ball or bat during a baseball game . . . are risks which various participants are legally deemed to have accepted personal responsibility for because they commonly inhere in the nature of those activities[.] . . . Another important counterweight to an undue interposition of the assumption of risk doctrine is that participants will not be deemed to have assumed the risks of

reckless or intentional conduct[.]"); *Woo v. United Nations Int'l School*, 40 Misc. 3d 1212(A), at *3 (Sup. Ct. N.Y. Co. 2013) ("[w]hile a participant in a sports contest 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation,' such as being 'struck by a ball or bat' (*Morgan*, 90 NY2d 471), participants do not assume all risks, only those inherent in the sport"), *aff'd*, 137 A.D.3d 488 (1st Dep't 2016).

X.

TRUSTS AND ESTATES ISSUES

On March 19, 2020, New York Governor Andrew Cuomo issued an Executive Order that temporarily permits notarial acts to be conducted utilizing audio-video technology, provided certain requirements were met, including the making of an affirmative representation that the signor is physically present in New York State, that the video technology allows for direct interaction between the signor and the Notary and that the signor transmits an electronic copy of the signed document to the Notary on the date it was signed. *See* New York Executive Order 202.7, accessible at *https://www.governor.ny.gov/executiveorders*.

Other states issued similar directives. *See, e.g.*, Connecticut Executive Order No. 7K, accessible at *https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7K.pdf*; District of Columbia Act A23-0317, accessible at *https://lims.dccouncil.us/downloads/LIMS/44622/Signed_Act/B23-0750-SignedAct.pdf*; Illinois COVID-19 Executive Order 12, accessible at *https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-14.aspx*; Alabama Proclamation by the Governor dated March 26, 2020, accessible at *https://governor.alabama.gov/newsroom/2020/03/fourth-supplemental-state-of-emergency-coronavirus-covid-19/*.

Although New York Executive Order 202.7 enabled many estate and succession planning documents to be executed remotely, there were still barriers to executing critical documents, such as wills and statutory gift riders to powers of attorney, which required the physical presence of at least two witnesses. It was not until April 7, 2020, when the New York Governor issued Executive Order 202.14, that remote witnessing was permitted in a similar manner to notarial acts. *See* New York Executive Order 202.14, accessible at *https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.14_final.pdf*. The two New York Executive Orders have been extended to July 6, 2020. *See* New York Executive Order 202.38, accessible at *https://www.governor.ny.gov/news/no-20238-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency*.

While the issuance of the foregoing New York Executive Orders was welcomed by trusts and estates practitioners and their clients, they have created a new issue to be litigated. The New York courts will likely be called upon to determine whether the notarization and execution of wills, trusts and other documents during the Pandemic complied with those Executive Orders.

More nuanced questions may also arise, including, for example, whether the testator was unduly influenced during the remote execution of a will by someone off camera, whose presence was therefore unknown to the witnesses. There will also likely be heightened scrutiny of wills, trusts and other documents to confirm that they were in fact executed in person at the beginning of the Pandemic, prior to the issuance of the New York Executive Orders.

Given the likelihood of enhanced judicial scrutiny of Pandemic-era wills, trusts and other documents, attorneys supervising the execution of said documents and/or the notaries before whom the executions take place should maintain detailed records demonstrating compliance with the requirements of the New York Executive Orders.

XI.

PANDEMIC-RELATED LITIGATION AGAINST CHINA

A. PRIVATE CLASS ACTION LAWSUITS

As noted in our May 18, 2020 Newsletter (at 23-24), several private lawsuits have been filed against China, alleging that it engaged in wrongdoing in connection with the generation and spread of the COVID-19 virus. *See also Edwards v. People's Republic of China*, No. 2:20-cv-01393 (E.D. La.) (filed May 8, 2020) (putative class action filed by Daniel Edwards, the Sheriff of Tangipahoa Parish, Louisiana, on behalf of all sheriffs in the United States); *Greco v. People's Republic of China*, No. 5:20-cv-02235 (E.D. Pa.) (filed May 11, 2020); *Patella v. People's Republic of China*, No. 1:20-cv-00433 (M.D.N.C.) (filed May 15, 2020); *James-El v. The People's Republic of China*, 1:20-cv-00517 (M.D.N.C.) (filed June 9, 2020) (*pro se* Complaint filed by an inmate); *Stokes v. China's National Health Commission*, No. 3:20-cv-02221 (D.S.C.) (filed June 11, 2020) (*pro se* Complaint filed by an inmate).

B. STATE LAWSUITS AGAINST CHINA

As noted in our May 18, 2020 Newsletter (at 24), on April 21, 2020, Missouri became the first state to file a lawsuit against China arising out of the Pandemic. *See State of Missouri v. People's Republic of China*, No. 1:20-cv-00099 (E.D. Missouri). Subsequently, Mississippi also filed a lawsuit against China. *See State of Mississippi v. People's Republic of China*, No. 1:20-cv-00168 (S.D. Mississippi) (filed May 12, 2020). The *State of Mississippi* Complaint alleges that the "Court has jurisdiction over cases filed against foreign states such as the Defendants under the commercial activity exception to the Foreign Sovereign Immunities Act ('FSIA'), 28 U.S.C. § 1605(a)(2)." Complaint ¶ 36.

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

In our May 18, 2020 Newsletter (at 24-25), we addressed certain proposed federal legislation designed to facilitate the filing of Pandemic-related claims against China. *See, e.g.*, 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*; "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%20 Hold%20China%20Accountable%20(FINAL).pdf*. Thus far, none of these Bills has been enacted into law.

XII.

CONSTITUTIONAL CHALLENGES TO STATE PANDEMIC-RELATED EXECUTIVE ORDERS AND LEGISLATION

A. CHALLENGES TO STATE AND LOCAL BUSINESS-CLOSURE ORDERS

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

As noted in our May 18, 2020 Newsletter (at 26), a Western New York law firm, HoganWillig, PLLC, commenced a lawsuit against New York Attorney General Letitia James and New York Governor Andrew Cuomo. *See HoganWillig, PLLC v. James*, No. 1:20-cv-00577 (W.D.N.Y.) (filed May 13, 2020). On June 8, 2020, plaintiff amended its Complaint to allege claims for violation of the Fifth and Fourteenth Amendments of the United States Constitution in connection with its claim under 42 U.S.C. § 1983; violation of the Take Care Clause, N.Y. Const. Art. IV, § 3; and violation of the Compact Clause, U.S. Constit., Art. I, Sec. 10, Cl. 3. *See HoganWillig* Amended Complaint, No. 1:20-cv-00577 (Docket No. 7).

(ii) THE *TESLA* AND *PROFESSIONAL BEAUTY FEDERATION* CHALLENGES TO CALIFORNIA'S BUSINESS-CLOSURE DIRECTIVES

In our May 18, 2020 Newsletter (at 28-29), we discussed the lawsuit filed on May 9, 2020 by Tesla, Inc. for injunctive and declaratory relief against Alameda County, California, in response to the County's continued shutdown order. *See Tesla, Inc. v. Alameda County, California*, No. 3:20-cv-03186 (N.D. Cal.). We also noted that Tesla thereafter proceeded to resume its manufacturing activities.

See "Elon Musk Says Tesla Is Restarting California Production, Defying Local Order," *Wall Street Journal* (May 11, 2020), accessible at *https://www.wsj.com/articles/tesla-to-restart-production-elon-musk-says-11589230278*.

On May 20, 2020, Tesla dismissed its lawsuit without prejudice. *See Tesla*, No. 3:20-cv-03186 (N.D. Cal.) (Docket No. 7). It was reported that Tesla "dropped a lawsuit against the county after the local government and Tesla agreed to a deal to reopen its plant in Fremont, California officially." *See* "Tesla Withdraws Alameda County Lawsuit as Fremont Plant Operations Normalize," *CNET* (May 21, 2020), accessible at *https://www.cnet.com/roadshow/news/tesla-alameda-county-lawsuit-elon-musk-fremont-plant-production/*.

As noted in our May 18, 2020 Newsletter (at 28), in *Professional Beauty Federation of California v. Newsom*, No. 2:20-cv-04275 (C.D. Cal.) (filed May 12, 2020), plaintiffs' putative class action Complaint challenges the California Governor's March 19, 2020 stay-at-home Order. On May 19, 2020, plaintiffs filed an *ex parte* application for a TRO enjoining the California Order in which they argued: "In an overreaching response to the coronavirus pandemic, Defendants arbitrarily declared some businesses essential and others non-essential, regardless of their respective abilities to properly follow CDC guidelines [and that as] licensed professionals who wish to continue practicing their trade safely, the half-million hair and beauty professionals of California play an essential role in the physical and mental health of tens of millions of Californians." *Professional Beauty Federation*, No. 2:20-cv-04275, Plaintiff's Memorandum of Points and Authorities in Support of Ex Parte Application for a Temporary Restraining Order (Docket No. 14) at 5.

On June 1, 2020, the *Professional Beauty Federation* court ordered plaintiffs to show cause why their motion for a TRO should not be denied as moot in light of the fact that California "approved the variances requested by San Diego County and Los Angeles County[, which] means that hair salons and barbershops can reopen in these counties, subject to various limitations." *See Professional Beauty Federation*, Order to Show Cause (Docket No. 28) at 1-2. In response, plaintiffs filed a brief on June 3, 2020, arguing that their motion is not moot because "[s]ome public health officers have allowed licensed hair stylists and barbers to return to work, while others in so-called 'self-attested' counties have not. Moreover, nail salons, cosmetologists, and beauty schools may not operate at all, again with no explanation by the state or any timeline for reopening." *Professional Beauty Federation*, No. 2:20-cv-04275, Plaintiffs' Brief on Why Their Motion for a Preliminary Restraining Order Is Not Moot (Docket No. 30) at 3.

The court denied plaintiffs' motion without prejudice. *See Professional Beauty Federation*, No. 2:20-cv-04275, June 8, 2020 Order (Docket No. 32). The court held that, "[a]t this time, the Court cannot conclude that Plaintiffs' claims are moot . . . . Although the State has permitted counties to advance through Stage 2 more quickly, the State is not constrained from later reenacting the harsh restrictions which existed at the beginning of this pandemic." *Id*. at 6-7. Nevertheless, the court explained:

> "California's Stay at Home Order bears a real and substantial relation to public health insofar as it bars cosmetologists from working. SARS-CoV-2 is known to spread [sic] quickly from person to person. . . . Spread is more likely when people are in close contact with another — specifically, within approximately six feet. . . . Many people with COVID-19 have no symptoms, yet they can still spread the virus. . . . Cosmetologists such as hair stylists and barbers must be in close physical contact with their clients to perform services. . . . Plaintiffs have not suggested to this Court that they can perform services within social distancing guidelines. Accordingly, the Court cannot agree that the designation of cosmetologists as non-essential 'bear[s] no connection to public health.'
>
> "Based on the foregoing, Plaintiffs cannot obtain a preliminary injunction without showing that the balance of the equities tips heavily in their direction. It does not appear that Plaintiffs have satisfied this standard. California's Stay at Home Order is informed by a desire to preserve public health in response to a pandemic. Enjoining the State from enforcing the Stay at Home Order against Plaintiffs at this stage in the crisis would be premature and might undermine the State's efforts and disrupt the balance of powers established by our federal system."

Id. at 9, 13.

(iii) ADDITIONAL CHALLENGES TO STATE BUSINESS-CLOSURE ORDERS

Since the publication of our May 18, 2020 Newsletter (*see* pages 25-29), challenges to state and local business-closure orders, as well as court decisions addressing applications for emergency relief from such orders, have continued to be filed and entered.

For example, on May 21, 2020, in *Benner v. Wolf*, 2020 WL 2564920 (M.D. Pa. 2020), the court denied an application for injunctive relief filed by business owners, real estate agents and political candidates challenging Pennsylvania's business closure and stay-at-home orders. Petitioners argued that the orders deprived them of procedural due process and that their "First Amendment rights have been unlawfully restricted by the Orders because they are unable to leave their homes and cannot gather in large groups." *Id.* at *4-*8. The court concluded that petitioners "failed to prove that the Governor violated constitutional strictures in their issuance. When faced with the real possibility that thousands of Pennsylvanians could lose their lives to COVID-19, the Governor took swift, reasonable action to prevent more widespread destruction — that the Pennsylvania death rate is not higher is a sign of the Orders' efficacy, not their irrelevance." *Id.* at *9. The court held that it would "not micromanage public policy in the midst of a pandemic. While there is ample basis for pandemic-weary Pennsylvanians to disagree about the means being instituted to fight COVID-19, there is no legal basis for us to enjoin them at this time." *Id.*

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Also on May 21, 2020, in *Ramsek v. Beshear*, 2020 WL 2614638, at *7 (E.D. Ky. 2020), the Eastern District of Kentucky denied an emergency motion seeking a preliminary injunction that would have excluded contemplated protests opposing the Kentucky Governor's Pandemic restrictions from the Governor's Executive Order prohibiting mass gatherings. Acknowledging that the Governor had pledged not to enforce the Executive Order against the protestors, the court held: "Plaintiffs fail to show a likelihood of success of establishing a credible threat of prosecution," which is a "necessary element to establish injury-in-fact as part of the pre-enforcement standing analysis." *Id.* at *7.

On May 23, 2020, the Sixth Circuit granted the protestors' motion for an injunction pending appeal, finding that they have standing despite the state's disavowal of enforcement, and are "likely to succeed in showing that the Order is a content-based restriction" because "the Order permits citizens to gather in retail stores, airports, parking lots, *and churches*, but does not permit them to gather for a protest, it discriminates against political speech." *Ramsek v. Beshear*, No. 3:20-cv-00036, Order entered by the Sixth Circuit on May 23, 2020 (Docket No. 29) at 3-4 (emphasis in original). The appellate court held that, "[d]uring the pendency of this appeal, the state is enjoined from prohibiting protesters from gathering for drive-in and drive-through protests, provided the protesters practice social distancing and otherwise comply with the Order's regulations on lawful gatherings." *Id*. at 6. On May 29, 2020 the Sixth Circuit vacated the district court's order holding that plaintiffs lack standing and remanded the case for additional findings of fact and conclusions of law. *Id.* (Docket No. 31) at 1-2.

The plaintiffs in *Altman v. County of Santa Clara*, 2020 WL 2850291 (N.D. Cal. 2020) (filed March 31, 2020), were "firearms retailers, Second Amendment-related nonprofits, and individuals seeking to exercise their right to keep and bear arms now seek a preliminary injunction requiring the counties to exempt firearms retailers and shooting ranges from the shelter-in-place orders." *Id*. at *1. Plaintiffs' claim is as follows: "Because firearms retailers are not considered 'essential businesses' under the shelter-in-place orders," and because individuals "must visit a retailer at least once for ammunition, and at least twice for firearms" under California's firearm regulations, "millions of Californians in an entire region are prohibited from exercising fundamental rights guaranteed by the Second Amendment, including the right to possess, acquire, and maintain proficiency with firearms. . . . They also argue that the Orders abridge their due process rights because they are arbitrary and capricious, overbroad, [and] unconstitutionally vague." *Id*. at *4 (internal quotation marks omitted).

Applying "intermediate scrutiny" to the Second Amendment claim, "a two-step test that requires '(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective[,]'" the court denied the motion, finding that the counties had "offered a 'convincing reason' for exempting the essential businesses . . . such as grocery stores, pharmacies, laundromats/dry cleaners, and hardware stores[,]" which are "deemed essential because they provide for the basic needs of residents for food, medicine, hygiene, and shelter." 2020 WL 2850291, at *15-*17.

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B. CHALLENGES TO STATE EXECUTIVE ORDERS RESTRICTING RELIGIOUS-WORSHIP SERVICES

(i) THE *ELIM ROMANIAN CHURCH* LAWSUIT

In *Elim Romanian Church v. Pritzker*, 2020 WL 2517093 (7th Cir. 2020), the Seventh Circuit denied a plaintiff church's emergency motion for an injunction pending appeal of an Order upholding the Illinois Governor's Executive Order that, among other things, limited gatherings to no more than 10 persons. In its May 16, 2020 decision, the Seventh Circuit explained:

> "The Executive Order's temporary numerical restrictions on public gatherings apply not only to worship services but also to the most comparable types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods, especially where speech and singing feature prominently and raise risks of transmitting the COVID-19 virus. Worship services do not seem comparable to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods. Further, plaintiffs-appellants may not obtain injunctive relief against the Governor in federal court on the basis of the Illinois Religious Freedom Restoration Act."

2020 WL 2517093 at *1.

On May 29, 2020, the Supreme Court denied without prejudice the Elim Romanian Church's application for an Order enjoining the Illinois Governor's Executive Order in light of the fact that Illinois had amended its prohibitions to recommend gatherings of no more than 10 people, but not prohibit such religious gatherings. *See* Illinois COVID-19 Guidance for Places of Worship and Providers of Religious Services (May 28, 2020), accessible at *http://www.dph.illinois.gov/sites/default/files/Church%20Guidance.pdf*. The Supreme Court wrote: "The application for injunctive relief presented to Justice Kavanaugh and by him referred to the Court is denied. The Illinois Department of Public Health issued new guidance on May 28. The denial is without prejudice to Applicants filing a new motion for appropriate relief if circumstances warrant." *Elim Romanian Church v. Pritzker*, __ S. Ct. __, 2020 WL 2781671 at *1 (2020).

(ii) THE *SOUTH BAY UNITED PENTECOSTAL CHURCH* LAWSUIT

In *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020), the Supreme Court, in a 5-4 decision that was also decided on May 29, 2020, rejected a bid by South Bay United Pentecostal Church to enjoin enforcement of certain California restrictions limiting religious-worship attendance to the lower of 25 percent of building capacity or 100 attendees. *Id.* at 1613. In his concurring opinion, Chief Justice Roberts wrote:

> "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.
>
> "***The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' . . . When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' . . . Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people***. . . .
>
> "That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable."

Id. at 1613-14 (emphasis added).

Although eloquent in its defense of the exercise by states during times of emergency of broad police powers that do not exceed their limits, the Chief Justice's concurrence provides no substantive guidance for determining when in fact "those broad limits are . . . exceeded[.]" 140 S. Ct. at 1613-14.

In a dissenting opinion joined by Justices Thomas and Gorsuch, Justice Kavanaugh explained why he would have granted South Bay United Pentecostal Church's injunction request:

> "I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

"In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. ***The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries***.

"South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

"In my view, California's discrimination against religious worship services contravenes the Constitution. As a general matter, the 'government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits.' . . . This Court has stated that discrimination against religion is 'odious to our Constitution.' . . .

"To justify its discriminatory treatment of religious worship services, California must show that its rules are 'justified by a compelling governmental interest' and 'narrowly tailored to advance that interest.' . . . California undoubtedly has a compelling interest in combating the spread of COVID–19 and protecting the health of its citizens. But 'restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom.' . . . What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

"California has not shown such a justification. The Church has agreed to abide by the State's rules that apply to comparable secular businesses. That raises important questions: 'Assuming all of the same precautions are taken, 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 State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

"In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. . . . The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church's request for a temporary injunction."

140 S. Ct. at 1614-15 (emphasis added).[3]

(iii) THE *SOOS v. CUOMO* LAWSUIT

On June 10, 2020, two Catholic priests and three Orthodox Jewish congregants sued New York Governor Cuomo, Attorney General James and New York City Mayor Bill de Blasio for allegedly violating the plaintiffs' constitutionally protected religious (and other First Amendment) freedoms by selectively enforcing the New York's Pandemic-related restrictions on public gatherings. *See Soos v. Cuomo*, No. 1:20-cv-00651 (N.D.N.Y.). Along with their Complaint, plaintiffs moved for injunctive relief, arguing:

> "It's true that the U.S. Supreme Court recently rejected a challenge to house-of-worship restrictions in California [discussed above]. But that decision did not face a glaringly unequal 10-person limit that still exists as against all outdoor religious services in New York and against indoor services in non-Phase-2 regions like New York City. And it also expressly refrained from deciding the case on the merits.
>
> "**Most important, the Supreme Court's decision preceded the exemption granted in this case to the mass protests demonstrating against the unjust death of Mr. Floyd**. As the balance of this memorandum shows, that new exemption, along with numerous others, renders Defendants' Executive Orders ('Orders') fatally underinclusive and thus violative of the Free Exercise Clause. The Orders also restrict houses of worship (and their leaders and congregants) according to the content of their expression, since these gatherings would be exempt if they were demonstrating against racism rather than engaging in religious services.
>
> "Plaintiffs, two Catholic priests (Revs. Steven Soos and Nicholas Stamos) in the North Country, a Phase 2 region, and three Jewish congregants (Daniel Schonbrun, Elchanan Perr, and Mayer Mayerfeld) in New York City, therefore now seek temporary and preliminary injunctive relief against Defendants' Orders restricting their indoor and outdoor religious services. As New York begins to reopen and the next upcoming Sabbath and Sunday holy day rapidly approaches, it is only right that religion be deemed no less valuable than protests against systemic racism and other essential and non-essential businesses. Indeed, protecting religion and its message of [racial] equality will only advance the cause of ending racism and making tragic deaths like Mr. Floyd's unthinkable."

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[3] Justice Alito would have granted the Church's application for an injunction, but did not join Justice Kavanaugh's dissenting opinion. *See* 140 S. Ct. at 1613-14.

Soos, No. 1:20-cv-00651, Plaintiffs' Memorandum of Law in Support of Plaintiffs' Application for a Temporary Restraining Order and Preliminary Injunction (Docket No. 2-4) at 2-3 (emphasis in original).

On June 26, 2020, after much briefing, the Northern District of New York granted plaintiffs' application for a preliminary injunction. *Soos*, No. 1:20-cv-00651, Memorandum-Decision and Order (Docket No. 35). While it acknowledged that, in *South Bay United Pentecostal Church*, 140 S. Ct. 1613 (*see* Section XII(B)(ii), above), the Supreme Court instructed "courts to refrain from Monday-morning quarterbacking the other co-equal, elected branches of government when those branches are responding to difficulties beyond those that are incidental to ordinary governance[,]" the *Soos* court also noted that "Chief Justice Roberts recognized, however, that there are 'broad limits' which may not be eclipsed." *Soos*, No. 1:20-cv-00651, Memorandum-Decision and Order (Docket No. 35) at 21.

Although the *Soos* court conceded, as it must, that the State and City have a compelling interest in mitigating the spread of COVID-19, it held that the prohibitions enforced against the plaintiff religious worshippers were not the least restrictive means of achieving that objective and thus fail the requisite strict scrutiny review. In granting the requested injunctive relief, the *Soos* court focused upon, among other things, the disparity between the rejection by New York State and New York City of plaintiffs' requests to engage in group religious worship activities, on the one hand, and the State and City's encouragement of recent mass street protests and relaxation of social-distancing guidelines for certain school graduation ceremonies, on the other hand. The court explained:

> "Having carefully reviewed the relevant issues, and with a firm understanding that the executive branch response to the pandemic has presented issues with a degree of complexity that is unrivaled in recent history, it is plain to this court that the broad limits of that executive latitude have been exceeded. . . . As the Chief Justice recognized in [*South Bay United Pentecostal Church*], it is not the judiciary's role to second guess the likes of Governor Cuomo or Mayor de Blasio when it comes to decisions they make in such troubling times, ***that is, until those decisions result in the curtailment of fundamental rights without compelling justification***.
>
> * * *
>
> ". . . Governor Cuomo's comments, which applauded and encouraged protesting and discouraged others from violating the outdoor limitations, likely demonstrate the creation of a de facto exemption.
>
> "Mayor de Blasio is a 'local authority' with clear enforcement power and has at his disposal one of the largest municipal police departments in the world, . . . and has also actively encouraged participation in protests and openly discouraged religious gatherings and threatened religious worshipers as set forth above. The City's argument that temporary selective enforcement of the challenged laws with respect to mass race protests is a matter of public safety . . . would perhaps be legitimate but for Mayor de Blasio's simultaneous pro-protest/anti-religious gathering messages, which clearly undermine the legitimacy of the proffered reason for what seems to be a clear exemption, no matter the reason. ***Governor Cuomo and Mayor de Blasio could have just as easily discouraged protests, short of condemning their message, in the name of public health and exercised discretion to suspend enforcement for public safety reasons instead of encouraging what they knew was a flagrant disregard of the outdoor limits and social distancing rules. They could have also been silent. But by acting as they did, Governor Cuomo and Mayor de Blasio sent a clear message that mass protests are deserving of preferential treatment***.
>
> "***Another case of individualized exemption seems even more obvious. The State has specifically authorized outdoor, in-person graduation ceremonies of no more than 150 people beginning today, June 26***. This is an express exemption from the ten- or twenty-five-person outdoor limits that apply across Phases 1, 2, and 3, and the State must extend a similar exemption to plaintiffs absent a compelling reason to the contrary. . . . ***And there is nothing materially different about a graduation ceremony and a religious gathering such that defendants' justifications for a difference in treatment can be found compelling***.
>
> "For the reasons articulated in plaintiffs' memorandum of law, defendants' generally-stated compelling interest in controlling the spread of COVID-19 is inadequate to demonstrate that they have a compelling interest that is narrowly tailored to these specific plaintiffs. . . . The City's attempt to demonstrate otherwise is unavailing . . . and the State has made no attempt to do so."

Soos, No. 1:20-cv-00651, Memorandum-Decision and Order (Docket No. 35) at 21-22, 31-33 (emphasis added).

It is not known at this time whether New York State and/or New York City will seek to appeal the *Soos* Order to the United States Court of Appeals for the Second Circuit.

(iv) OTHER RELIGIOUS-WORSHIP LAWSUITS

In our May 18, 2020 Newsletter (at 30-31), we discussed the challenge to a Virginia Executive Order banning gatherings of more than 10 persons asserted in *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204 (E.D. Va.). The district court denied plaintiff's motion for an injunction pending appeal because, "[a]s the Court found previously in addressing Plaintiff's Motion for a TRO and a Preliminary Injunction, Plaintiff is unlikely to succeed on the merits of its constitutional claims and its state statutory claim, the balance of the equities tips against Plaintiff, and preliminary injunctive relief is not in the public interest." *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204, May 21, 2020 Order (Docket No. 49) at 5. The Church's appeal to the Fourth Circuit (No. 20-01515) is pending.

In *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, 2020 WL 2305307 (E.D. Kentucky 2020), which was also noted in our May 18, 2020 Newsletter (at 31-32), the court dismissed the plaintiff's claims as moot in light of a new Order issued by the Cabinet for Health and Family Services pursuant to which, "the Mass Gatherings Order shall not apply to in-person services of faith based

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organizations." *Tabernacle Baptist Church, Inc. of Nicholasville v. Beshear*, No. 3:20-cv-00033, May 18, 2020 Order (Docket No. 42).

In *Calvary Chapel of Bangor v. Mills*, 2020 WL 2310913 (D. Maine 2020), the district court entered an agreed-to stay of the proceedings pending appeal. *Calvary Chapel of Bangor v. Mills*, No. 1:20-cv-00156, May 25, 2020 Order (Docket No. 35). The First Circuit summarily denied plaintiff-appellant's motion for an injunction pending the appeal. *See Calvary Chapel of Bangor v. Mills*, No. 20-1507, June 2, 2020 Order (1st Cir.) (Document No. 00117596871).

* * *

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

- **Bob Alessi:** Bob, the Editor of this newsletter, joined us as a partner earlier this year from the New York City office of the Wall Street law firm at which he honed his skills as a partner specializing in a wide variety of pretrial, trial and appellate litigation, corporate governance matters, internal corporate investigations and the defense of government inquiries in jurisdictions all over the country. *See https://www.meltzerlippe.com/attorneys/robert-a-alessi/.*

- **Lew Meltzer**: Lew, the Project Coordinator for this newsletter, is the Chairman of our firm and specializes in tax, corporate and real estate matters. *See https://www.meltzerlippe.com/attorneys/lew-meltzer/.*

We extend a special thank you to Steven E. Frankel and Robert S. Plosky for their invaluable assistance in the preparation of this Newsletter.

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