

## COVID-Driven Commercial Litigation – What Businesses Can Expect

As the nation (and much of the world) remains gripped in uncertainty surrounding the COVID-19 pandemic and the impact of the unprecedented measures being taken to combat its spread, one thing appears beyond doubt on the legal front: as with all major displacements, a wave of litigation is likely to follow. Indeed, we have already seen emergency litigation in some areas, and an uptick in a number of others, and we expect a broader surge as events continue to unfold. Whether the product of genuine issues arising and/or “opportunistic” plaintiffs’ counsel — in the near term and emerging in the weeks and months ahead — we anticipate the impact to be felt far and wide, across industries and the economic and geographic spectra.

While impossible to anticipate the full breadth of potential COVID-19 related litigation, based on what we have already seen and the legacy of other downturns, we can safely predict certain areas where one would expect to see significant activity. The following is not intended as a comprehensive analysis of each, but rather an overview of issues clients and their counsel should be cognizant of — not only in the immediate context of litigation, but in managing and mitigating risk going forward (including revisiting policies, contract language, and best practices in pertinent areas).

### Insurance Coverage Disputes

A question faced by a multitude of businesses — and insurance companies — is whether their commercial property policies provide coverage for business interruption losses resulting from the presence of the virus at covered locations or due to governmental orders mandating closure. As companies consult their policies and insurers regarding whether the pandemic or government imposed restrictions aimed at stemming the pandemic are covered events, disputes and litigation (between insurers and their policyholders ) over that issue have begun to emerge, and more are likely to follow.

### Event Cancellations

Mid-March brought a screeching halt to essentially all live in-person events — from sports and entertainment, to weddings, bar mitzvahs, corporate outings and other parties, to vacations, to ... just about anything that is *not sitting at home*. For some of these, e.g., professional sports and major concerts, there has been increasing public pressure from fans and others (including public officials) regarding refunds. Consumers have recently brought lawsuits regarding refunds (and refund policies) against third-party ticket sellers, such as Ticketmaster and StubHub, as well as Major League Baseball and its teams. With additional widespread cancellations or postponements of events for which tickets were already (often long ago) purchased (or deposits or other payments made), no doubt to come, more of these actions can be expected. Hospitality businesses (including pool, golf, tennis and/or beach clubs, as well as amusement parks and other venues/locales for which customers purchase season or monthly passes) will face similar issues, as will others — indeed, the list of businesses potentially implicated is wide. In each case, the language of the ticket/contract and refund policy will be important, as well as a particular state’s consumer protection laws. While significant business issues (i.e., customer relations, loyalty, and brand protection) will weigh heavily on how companies handle these issues, the legal landscape will help shape the analysis — both reactively and proactively as clients and counsel would be well served to use this time to focus on, enhance, and/or re-work best practices and existing language addressing such contingencies.

### Education



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### Related Practice Areas

- Commercial Litigation
- Financial Services

### Industry Sectors

- Education
- Insurance
- Real Estate & Construction
- Sports

Colleges and universities forced to close campuses and transition to remote learning (to the extent feasible) for the remainder of the winter/spring semester face similar issues regarding the refund of tuition, room and board, and other fees related to use of facilities or other resources rendered inaccessible — monies collected well in advance of the shutdowns. Indeed, though many schools have made efforts to return at least some portion of monies paid, suits have arisen against a handful, nationwide, seeking recovery (under contract and equitable claims). With rumors of major universities on the East Coast and elsewhere contemplating the adoption of remote learning (and closed campuses) for the fall semester, the potential for a significant wave of litigation should such restrictions/policies be adopted for the fall semester is extremely high.

## **Contracts — Force Majeure and Material Adverse Effect**

An uncountable number of contractual relationships in the distribution chain and otherwise have been disrupted. In many instances, performance has been rendered impossible, difficult, or simply impractical. As businesses evolve from survival mode to recovery mode (and courts concurrently reopen more broadly to new filings), the number of breach of contract suits can be expected to burgeon, with parties relying on force majeure (or similar) clauses to defend non-performance. Some businesses may find themselves using such clauses as a sword, while encountering them elsewhere as a shield. Contract language and a particular jurisdiction's jurisprudence regarding these clauses will be significant. By way of example, New York narrowly interprets such provisions, while Florida and California construe them more liberally. Questions as to whether the pandemic itself and/or governmental social distancing orders suffice to protect non-performance, or whether performance was "impossible" or "impracticable" financially or otherwise, will be front and center.

For critical business contracts such as M&A or other transactional agreements and related complex financing agreements, there will likely be significant disputes over whether material adverse effect or similar provisions can be properly relied upon by parties citing the pandemic (and/or related governmental actions) as grounds for terminating (or otherwise not going through with) a previously agreed to deal — whether because of an impact on valuation, liquidity, projections, or otherwise. Such analysis is traditionally a fact/deal specific one, which may be complicated here by uncertainty as to how long the condition(s) relied on will persist and the fact that, while the pandemic is widespread, its impact may be distinct based on geographical or other factors (e.g., localities and/or market sectors opening piecemeal).

## **Consumer Product Based Claims**

Sadly, as we've come to expect in moments of crisis involving even an impending (let alone already present) danger and a panicked public, heightened demand brings with it profiteering. We've already seen claims of price gouging arise for products ranging from much needed medical supplies and PPE, to hand sanitizer, sanitizing wipes and beyond. We are likely to see more.

Separately, claims of false advertising or deceptive marketing (whether under consumer protection statutes or otherwise) of all sorts of products including, for example, those regarding the health, safety and/or efficacy of (supposed) sanitizing products and purported treatments for the virus have already been and likely will continue to be filed. This is also an area we expect governmental scrutiny — state and federal — to be aggressive.

## **Real Estate**

In the immediate wake of the shutdowns being put in place, actions concerning commercial and residential leases spiked. Issues regarding tenants' failure and/or inability to make rental payments and whether, under the pandemic's conditions, a commercial tenant whose business has been ordered closed can properly be held to have use of the property during , have been and are expected to remain prevalent.

In the longer term, we expect these events are likely a precursor to an onslaught of issues pertaining to distressed real estate assets — e.g., foreclosures, renegotiations and workouts — and concurrently, a rise of litigation and bankruptcy filings.

## **Financial and Securities**

## Securities Fraud & Enforcement

The volatility of the stock market since the onset of the pandemic presents an environment we expect to produce a wide array of securities fraud claims — most specifically, public companies being sued for materially misleading statements or omissions regarding the impact or severity of COVID-19 on their businesses. We would also expect there to be an uptick in enforcement actions by the SEC. While stocks are down across the board, plaintiffs' lawyers are adept at mining for targets — and this is likely to be more of an issue for certain industries than others. In particular, businesses that may have had early or specified knowledge regarding the true nature of the pandemic — such as those in the hospitality, defense, and health/drug industries — whose public disclosures may have minimized or concealed the risk, or otherwise been misleading. As these cases have started to arise, at least one pharmaceutical company has already been sued for misleading statements pertaining to its (purported) development of a COVID-19 vaccine, and other such suits can be envisioned against companies likewise trying to cash in on addressing the pandemic. Companies whose products have experienced a sudden surge in usage as a result of remote work and social distancing may also find themselves at enhanced risk — indeed, Zoom is facing a proposed securities class action claiming that the vulnerabilities/security risks in its product that have been exposed during this time were known but not disclosed.

Similarly, market conditions also suggest a potential uptick in accountants/auditors liability cases, as assets valued and metrics relied upon (e.g., cash flow) have been upended by the crisis. Claims of fraud, mispricing and/or failure to conduct sufficient diligence/dig deep enough present as ripe targets for plaintiffs' lawyers.

## Banking/Finance

Banks and other financial institutions face a variety of litigation risks emanating from the economic side of this crisis. In the short term, litigation over loan defaults (as businesses lose cash flow) and debt collection actions (whether efforts to enforce or forestall) has arisen and more may emerge, despite the implementation of temporary measures designed to provide much needed relief to borrowers. Class actions have arisen against banks based on their handling and implementation of federally directed programs intended to keep businesses afloat (e.g., the SBA and CARES Act). While the issue of whether a private right of action exists under the formative legislation is a threshold question, recent actions filed have sought to sidestep that issue by floating a variety of theories.

Long term, however, perhaps the most significant threat — and anticipated wave of litigation — can be found in the lessons of the 2008 financial crisis, which was driven, in large part, by collateralized debts in the form of mortgage-backed securities (and related derivative products). Litigation over responsibility for that collapse took on many forms and is only now coming to an end, 12 years later. This crisis could well impact a broader class of assets and securities than simply those that hinge on real estate.

## Health Care Related Suits

Hospitals, nursing homes, urgent care facilities, and other health care providers face a significant and broad risk of litigation. There is a range of potential claims, including those related to their performance/provision of medical services (testing, advice and treatment) — though several states (including New York, New Jersey, and Pennsylvania) and the federal government have sought to insulate providers and suppliers from civil liability — the safety of their facilities, compliance with guidelines and preventative measures taken to prevent the spread of the virus, disclosures to patients, residents, and their families, handling of protected information/compliance with privacy laws, privacy and other concerns implicated by the sudden rise in telemedicine, and issues related to payment, billing, and reimbursement. Suits between and among providers and suppliers, based on the tremendous costs associated with responding, and widely reported shortages in supplies can also be expected.

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