

The image features a low-angle, upward-looking view of several modern skyscrapers with glass facades, set against a clear blue sky. The buildings are slightly out of focus, creating a sense of depth. A vertical orange bar is positioned on the left side of the image. The text is overlaid on the top portion of the image.

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Navigating a “New Normal”: Tips for Practicing in a Post-Pandemic World

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A low-angle, upward-looking photograph of several modern skyscrapers with glass facades, set against a clear, deep blue sky. The buildings are arranged in a way that creates a sense of height and architectural scale. The text 'Corporate M&A' is overlaid in white on the left side of the image.

Corporate M&A



M&A – Current State of Affairs

M&A Transactions Today

- Halt in M&A Transactions; buyers are more hesitant to take risks
- Mergers this year are down 33% at \$762.6 billion
- Number of deals also fell 20% year-on-year

M&A Transactions Post COVID-19

- EY Survey: 56% of more than 2,900 executives surveyed globally plan to make acquisition in the next 12 months
- Some buyers will try to capitalize on new or growing post COVID-19 industries



M&A – Deal Financing

As loans from financial institutions might not be as readily available to certain companies post COVID-19 – buyers might have to rely on other financing sources:

- Buyers might have to seek business partners to fund a transaction – impacts the early stages of a deal
- Buyers might have to rely on seller notes to fund part of the purchase price
- Buyers might choose to purchase target companies with equity as opposed to cash



M&A – Target Valuation

Buyers are having and will continue to have a hard time valuing target companies in order to determine a purchase price – certain key issues for a buyer to consider:

- How to analyze a seller's historical financial information
- How and to what extent can a buyer rely on seller's financial projections and the underlying assumptions
- How to distinguish short term and long term events impacting the value of a target company
- How to account for potential post closing synergy and integration issues in target valuation process



M&A – Risk Allocation

Usual purchase price mechanisms may not be adequate to protect buyer investment, or to appropriately value seller's business, in a post COVID-19 environment:

- Buyer's interest: Buyer's want to get the deal value and allocate risk in case the company underperforms
- Seller's Interest: Seller's want certainty in pricing and wants to see the transaction completed

Potential solutions:

- Purchase price reduction, with seller friendly approach to representation and warranties, and indemnification
- Earn-out provisions

M&A – Due Diligence Process – Commercial Contracts

Buyer will have to pay close attention to certain clauses in a target company's material contracts with third parties:

- Termination, force majeure or similar clauses, affecting parties obligation to perform
- Exclusivity clauses that would affect parties flexibility to obtain resources
- Minimum purchase and sale requirements

Depending on the target company's industry, the buyer will have to ask specific diligence questions to the seller to try to assess the overall economic impact of the outbreak on target company's businesses

M&A – Due Diligence Process – Other Buyer areas of Interest

Revenue and Supply:

- Any impact on the target company's customers and their ability to pay invoices
- Any impact on the target companies business supply chains
- Whether the target company plans to implement any changes to its supply chains in response to COVID-19

Employment:

- Any impact on the target company's workforce and any relevant layoffs or furloughs as a result of COVID-19
- Any impact of travel restrictions
- Any written remote work policy or practice

Finance:

- Any impact of COVID-19 on the target company's future financial performance

M&A – Due Diligence Process – Other Buyer areas of Interest

Insurance:

- Whether the target company's insurance policies adequately cover any COVID-19 disruptions and whether the target company has filed any claims

Data Privacy:

- Whether the target company is complying with data privacy protections concerning information the target company has been collecting from employees or non-employees in connection with COVID-19

Tax Considerations:

- Whether the target company has taken any steps with respect to tax payments and deposits in light of COVID-19, as well as any changes in its distribution structure, transfer pricing arrangements, etc.
- Any tax considerations due to new remote policies

M&A – Material Adverse Effect

COVID-19 might impact the parties approach to the role and definition of a “Material Adverse Effect” (MAE) in a purchase agreement to further allocate risk

- Generally, hard standard to meet in court
- Sellers will insist on typical exceptions for acts of gods, with specific emphasis on pandemics language exception and other similar exceptions
- Sellers might insist on COVID-19 specific exception language
- Other exception language for changes in “general economic conditions” or “financial markets” might be negotiated
- Exception to the exception with “disproportionately affects” language



M&A – Interim Covenants

COVID-19 might impact parties approach to restrictions on the conduct of the business during the period between signing and closing

- Generally, buyers want to restrict any non “ordinary course of business” actions by the target company
- Post COVID-19, sellers might want more flexibility between sign and close to address uncertainty related to global health emergencies, without buyer consent
- Buyers might compromise by accepting that buyer consent cannot be “unreasonably withheld”



M&A – Closing Conditions

Generally, buyers will pay closer attention to closing conditions as a way to walk out of a deal if it seems like the target company will not be able to function as anticipated post closing

- Buyers might want to rely on closing conditions rather than relying on the absence of MAE
- Buyers might want a higher bring down standard for a wider variety of seller representations
- Buyers might look for a condition precedent which requires a level of normal financial performance or meeting a minimum performance requirement

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Corporate Finance

Credit Documentation (*What to Consider for Existing Commitments*)

- Solvency – Most credit agreements include a representation that the loan parties are solvent before and after giving effect to the requested loan
 - Who is covered by the representation?
 - What is the meaning of “solvency” under the credit documentation?
- Material Adverse Effect – Almost all credit agreements include a representation as to the absence of a Material Adverse Effect
 - How do you determine whether a Material Adverse Effect has occurred?
- Absence of Defaults – Most credit agreements include an absence of default condition to borrow funds
 - Are there any cross-defaults under other agreements?
 - What are the limitations on the use of proceeds?
 - Has the borrower complied with all financial reporting and information requirements?
- Post-Closing Obligations – Many credit agreements contain post-closing covenants related to security matters

Credit Documentation (*What to Consider Regarding Financial Performance Metrics*)

- What does this mean for Consolidated Net Income?
 - Borrowers may seek to minimize the impact to their bottom line due to COVID-19 by requesting to exclude certain costs, expenses and losses related to COVID-19
- What does this mean for EBITDA add-backs?
 - Borrowers may request an add-back related to an extraordinary, unusual or non-recurring event
 - It is important for Lender's to pay careful attention to whether the requested adjustments relate to extraordinary costs, expenses or losses
 - Borrowers may seek to add back proceeds of business interruption insurance
- What do the adjustments mean for the financial covenants and other provisions in credit documentation
 - Lender's must examine the impact of the adjustments as the amount of certain adjustments may not be capped and may extend beyond the current fiscal period

Credit Documentation (*What to Expect Going Forward*)

- Expect Borrowers to Request Waivers
 - Due to COVID-19, some Borrowers will not be able to meet certain of their financial covenants and will request certain default be waived
- Expect Borrowers to Request Extensions
 - Quarterly reports
 - 2019 fiscal year-end
 - Quarterly financial statements related to first quarter of 2020
- Forbearances
 - If Lender decides restructuring is more favorable than a foreclosure of the collateral, a forbearance usually provides the best legal protection
 - Means “refraining from action”
 - Keeps lender’s remedies available



Credit Documentation (*What to Expect Going Forward*)

- Amendments to Preserve Liquidity
- Amendments to Extend Deadlines of Financial Reporting Requirements
- Amendments to Accommodate the Paycheck Protection Program

Credit Documentation (*Paycheck Protection Program*)

- The CARES Act authorizes the Small Business Association (“SBA”) to provide 100% guarantees for \$349 billion in PPP loans.
- The PPP:
 - is intended to permit and incentivize small businesses to maintain employee and salary levels.
 - involves loans originated by SBA-approved lenders.
 - provides for loans that are deferred and forgivable.

Credit Documentation (*Paycheck Protection Program*)

- How much can be borrowed in PPP Loans?
 - Borrowers may apply for one loan up to \$10 million
- What do payroll costs include?
 - Salaries (including commission or similar compensation, tips, payment for vacation or medical leave) and self-employment compensation
 - Dismissal or separation costs
 - Payment for group health care and retirement benefits
- What do payroll costs exclude?
 - Employer's portion of payroll tax expenses such as Social Security and Medicare

Credit Documentation (*Paycheck Protection Program*)

- Use of Proceeds
 - Payroll costs (at least 75% of proceeds);
 - Interest on mortgages;
 - Rent on leases;
 - Utilities for services;
 - Interest payments on other debt incurred prior to February 15, 2020; and/or
 - Refinancing an EIDL loan incurred between January 31, 2020 and April 3, 2020

Credit Documentation (*Paycheck Protection Program*)

- What should be considered under existing Credit Agreements to account for PPP?
 - Revise Indebtedness definition
 - Add definition for PPP Loan Requirements
 - Ensure PPP Loan will be Indebtedness for purposes of financial covenants
 - Add failure to comply with PPP Loan requirements and failure to pay principal and interest under the PPP Loan as an Event of Default
 - Revise provision that restricts amendments of certain documents to include PPP Loan documentation

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Real Estate Finance



Diminished Liquidity

- CMBS and CRE CLO
- CRE Warehouses – Lower Advance Rates, Higher Pricing, Increased Sub-Limits and Focus on Margin Rights
- Non-Bank Lenders
- REITs
- Life Insurance Companies
- Bank Lenders



Renewed Focus on Property Type and Geographic Location

- Focus on Warehouse and Multifamily
- Retreat from Hotel and Retail – there may be strategic opportunities
- Uncertainty Regarding the Future of Office
- Focus on Prime Markets and Sub-Markets near Employment Centers



Legal Documentation Protections

- Hard Cash Management
- Debt Services Reserve
- Additional Reserve Requirements (Seasonality, TI/LC, etc.)
- Payment Recourse
- Additional Financial Reporting Requirements
- PPP and other Governmental Assistance

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Capital Markets

CF Disclosure Guidance Topic #9

- Division of Corporation Finance issued CF Disclosure Guidance Topic #9 (“CF #9”) on March 25, 2020
 - How disclosure and securities law obligations may be impacted by COVID-19
- Three key topics
 - Assessing and disclosing the evolving impact of COVID-19
 - Trading prior to dissemination of material non-public information
 - Reporting earnings and financial results
- SEC may provide additional guidance as situation evolves
 - Invites questions



Possible Areas for Expanded Disclosure

- Principles-based disclosure may require discussion of the impact of COVID-19 in various areas, including:
 - Management’s discussion and analysis
 - Business
 - Risk factors
 - Legal proceedings
 - Disclosure controls and procedures
 - Internal control over financial reporting
 - Financial statements

Assessing and Disclosing COVID-19 Impacts

- Consider these (among other) questions when preparing disclosure:
 - How has COVID-19 impacted your financial condition and results of operations?
 - How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook?
 - How do you expect COVID-19 to affect assets on your balance sheet and your ability to timely account for those assets?
 - Do you anticipate any material impairments, increases in allowances for credit losses, or changes in accounting judgments?
 - Have COVID-19-related circumstances adversely affected your ability to maintain operations, including controls and procedures?

Assessing and Disclosing COVID-19 Impacts (cont'd)

- Have you experienced challenges in implementing your business continuity plans?
- Do you expect COVID-19 to materially affect the demand for your products or services?
- Do you anticipate a material adverse impact of COVID-19 on your supply chain or distribution methods?
- Will your operations be materially impacted by any constraints or other impacts on your human capital resources and productivity?
- Are travel restrictions and border closures expected to have a material impact on your ability to operate and achieve your business goals?



Risk Factors

- Discuss the most significant factors that make an investment in the company speculative or risky
 - Not generic risk factors
- Companies are becoming increasingly aware of additional ways in which the pandemic poses specific risks beyond previous disclosures
 - Begin drafting more detailed risk factors relating to COVID-19 for next SEC filing requiring risk factor disclosure, and as additional risks arise
 - Consider whether a COVID-19 development is sufficiently material to warrant 8-K disclosure of a new risk factor



Potential Risk Factors

- Impact of COVID-19 on operations is highly uncertain and cannot be predicted with confidence
- Failure of third parties such as suppliers, manufacturers, distributors, contractors, banks or business partners, to meet their obligations
- Demand/pricing may be impacted by
 - customers' inability to purchase products due to illness, quarantine, travel restrictions or financial hardship
 - global recession resulting from actions taken to limit the spreading of COVID-19
- Disruption/volatility in global capital markets from COVID-19 may have increased the cost of, and adversely impacted access to, capital



Potential Risk Factors (cont'd)

- Cost increases may not be fully recoverable or adequately covered by insurance
- Need to modify business practices (e.g., employee travel, work locations, and cancellation of physical participation in events)
- Consumer spending affected in many different ways (e.g., deferral of purchases, price points, and upgrading/replacement frequency)
- IT systems could be adversely affected by significant increase in remote working (increased cybersecurity attacks and phishing)
- Impact of cancellation or postponement of sporting and entertainment events or reduced in-store visits



Potential Risk Factors (cont'd)

- Industry-specific risk factors
 - Banking and financial services companies may be dependent on the willingness and ability of customers to conduct financial transactions
 - Insurance companies may face increase of claims and potential coverage disputes
 - Results, financial position and liquidity of goods and service companies or hospitality/travel companies may be adversely impacted by temporary closures of facilities or suspensions or cancellations of services
 - Pharmaceutical and life sciences companies may face disruptions in clinical trials



Forward-Looking Information

- Safe harbor for forward-looking statements set forth in Section 27A of the Securities Act and Section 21E of the Exchange Act
 - Include COVID-19 in the explanation regarding the use of forward-looking statements
 - Indicate that actual results of the impact of COVID-19 may be materially different
 - Identify forward-looking remarks with words such as “believes,” “expects,” or “hopes”
 - Include the impact of COVID-19 as a factor that could impact actual results



Management's Discussion and Analysis

- Must include information “necessary to an understanding of financial condition, changes in financial condition and results of operations”
- COVID-19 is a known trend/uncertainty; discuss management’s perspective on the type and extent of its material impacts
- Potential topics for disclosure:
 - Supply chain or distribution issues
 - Liquidity and material draws on credit facilities
 - Impact of location closures
 - Force majeure provisions that are or may be triggered
 - Disputes with insurance carriers over business continuity coverage



Business

- In SEC filings requiring a business description consider:
 - Whether company exited any business line or closed any facilities
 - Difficulty sourcing inventory and consideration of alternative sources
 - Whether any segments have been impacted more than others
 - Any lay offs or other human capital issues
 - Any announced acquisitions or organic growth initiatives that have been put on hold



Legal Proceedings

- In SEC filings requiring a description of legal proceedings determine whether COVID-19 has given rise to:
 - Any class actions or other lawsuits alleging failure to protect customers or workers from the virus
 - Any lawsuits regarding triggering of force majeure contractual provisions
 - Any lawsuits involving employees
 - Any lawsuits regarding insurance coverage



Controls and Financials

- Disclosure controls and procedures – companies should consider:
 - Making the potential impacts of COVID-19 an express part of their disclosure controls and procedures
 - Expanding list of business units contacted as part of the process
- Consider the impact of remote workforce on internal control over financial reporting
- Financial statements
 - Discuss with accountants whether COVID-19 disclosure is needed as part of their financial statement footnotes
 - Possible subsequent event footnote (borrowings under credit facilities, suspension of repurchase programs, etc.)

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Intellectual Property



Overview of IP Entity Responses to COVID-19

- Federal courts
- US Patent and Trademark Office
 - Notice of Waiver of Patent-Related Timing Deadlines under the CARES Act
 - Notice of Waiver of Trademark-Related Timing Deadlines under the CARES Act
- US Copyright Office
 - Temporary Changes to Certain Timing Provisions for Persons Affected by the COVID-19 Emergency
- Foreign jurisdictions



IP: What Hasn't Changed

- IP is an important part of business continuity planning.
- Innovative companies are still inventing, filing for IP protection, and asserting their IP.
- Companies acknowledge that IP rights are important in order to:
 - Secure market position and financial return on commercially successful innovations;
 - Prevent third parties from using their patented inventions and marks;
 - Obtain greater negotiating power when collaborating with other companies; and
 - Attract investment partners and support business expansion by demonstrating that a company has a high level of technical expertise.
- Secrecy is important.



IP: What Has Changed

- Immediate need for cost control measures
 - Deferred spending
 - Short-term reduction in certain IP activities such as searches, filing and enforcement
 - Decrease in research and development
 - Delay in commercialization
- Physical distancing (inventors, R&D, legal department, key decision makers, courts, USPTO)
- Ability to satisfy contractual terms in IP license agreements



IP: Best Practices in View of COVID-19 Crisis

- IP Prosecution
 - Continue to file first as first-to-file rules are still in place
 - All filing and payments should be made in accordance with regular statutory and regulatory deadlines whenever possible
 - Use extensions of response and fee deadlines to ease budget and strategy concerns
 - Focus on quality, not quantity
- IP Enforcement
 - Continue to safeguard valuable IP
 - Expect delays and be flexible
 - Prepare for virtual meetings, depositions, hearings and arguments
 - Open COVID Pledge and other charitable opportunities



IP: Best Practices in View of COVID-19 Crisis

- IP Licensing
 - Update force majeure clause in standard agreements
 - Undertake careful due diligence into the financial status of the other party
 - Pay close attention to termination rights



How to Best Position IP for the Post-Pandemic World

- Evaluate IP portfolio
- Develop processes for invention capture and protection
- Identify competitors or potential partners
- Identify primary and secondary markets
- Review and update standard terms of license agreements
- Review and update IP policies and forms
- Consider acquiring patent portfolios from struggling companies
- Consider licensing or selling existing but underutilized patents

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Litigation

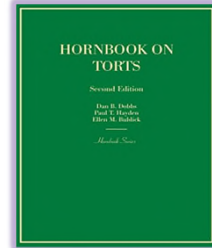


Litigation in a Post-Pandemic World

- Three main types of COVID-19-related commercial lawsuits
 - Negligence
 - Breach of Contract (not what you might expect)
 - Business Interruption Coverage
- Honorable mentions:
 - Employment-related litigation
 - Securities fraud class actions
 - Antitrust class actions
 - False Advertising

Negligence Cases

- It is the breach of a duty which one person owes to another or the absence of care under the circumstances.
- Elements of negligence:
 - the existence of a duty of care on the part of the defendant;
 - that the defendant breached that duty of care;
 - a causal connection between the defendant's breach of the duty of care and the plaintiff's injury; and
 - he or she suffered an actual loss or damage that resulted from the breach.
- The **standard of care** falls with the duty element and asks did a defendant act as would an ordinarily careful person or a reasonably prudent person.
 - Every person owes every other person the **duty to use ordinary care** to prevent any injury that might naturally occur as the reasonably foreseeable consequence of his or her own actions.



Negligence Cases (cont'd)

- Plaintiffs will rely on federal agency or other government guidance to establish a standard of care.
- Passengers and crewmembers have brought negligence class actions and single-plaintiff wrongful death cases against several cruise ships based on their alleged failure to use reasonable care in responding to the COVID-19 crisis.
- The CDC issued a “No Sail Order” on March 14, 2020, and recently extended it.
- The CDC issued **Interim Guidance for Ships on Managing Suspected Coronavirus Disease** in late 2019 and updated the guidance on February 18, 2020.
- The CDC recommended that to protect passengers and crewmembers, cruise ships should:
 - “Deny boarding of a passenger or crew member who is suspected to have COVID-19 infection based on signs and symptoms plus travel history in China or other known exposure at the time of embarkation.”
 - “Isolate passengers or crew onboard who are suspected of having COVID-19 infection in a single-occupancy cabin with the door closed until symptoms are improved.”
 - “Advise passengers and crew of the importance of covering coughs and sneezes with a tissue. Dispose used tissues immediately in a disposable container (e.g., plastic bag) or a washable trash can.”
 - “Ask the sick person to wear a facemask if tolerated, any time they leave their cabin or interact with other people.”

Negligence Cases (cont'd)

- Each case against the cruise ships relies on the CDC guidance as a standard of care.
 - *E.g., Nevis v. Costa Crociere S.P.A.*, No. 02-cv-60759 (S.D. Fla. Filed Apr. 14, 2020); *Nedeltcheva v. Celebrity Cruises Inc.*, No. 20-cv-21569 (Apr. 14, 2020).
- The estate of a former employee at a big-box retailer sued the retailer and its landlord for wrongful death.
 - The decedent and several other employees at the store had allegedly exhibited symptoms of COVID-19.
 - Another employee of the store died from COVID-19 four days after the decedent.
 - *Evans v. Walmart, Inc.*, No. 2020-L-003938 (Ill. Cir. Ct. filed Apr. 6, 2020)



Negligence Cases (cont'd)

Violated the duty of care through the following acts and omissions:

- “Failed to cleanse and sterilize the store in order to prevent infection of COVID-19”
- “Failed to implement, promote and enforce social distancing guidelines promulgated by the governments of the United States of America and the State of Illinois”
- “Failed to provide the Decedent and other employees with personal protective equipment such as masks, latex gloves and other devices designed to prevent the infection of COVID-19”
- “Failed to warn the Decedent and other employees that various individuals were experiencing symptoms at the store and may have been infected by COVID-19 which was present and active within the store”
- “Failed to adequately address and otherwise ignored other employees at the store who communicated to management that they were experiencing signs and symptoms of COVID-19”
- “Failed to follow the recommendations and descriptions of mandatory safety and health standards promulgated by the **United States Department of Labor** and the **Occupational Health and Safety Administration** as set out in **Guidance on Preparing Workplaces for COVID-19**”
- Failed to follow the guidelines promulgated by **the Center for Disease Control and Prevention** (“CDC”) to keep its workplace in a safe and healthy condition and to prevent employees and others within the store from contracting COVID-19”
- “Failed to prepare or implement basic infection prevention measures as is recommended by the CDC”
- “Failed to provide employees with antibacterial soaps, antibacterial wipes and other cleaning agents as is recommended by the CDC”
- “Failed to develop policies and procedures for prompt identification and isolation of sick people as is recommended by the CDC”
- “Failed to develop, implement and communicate to its employees about workplace flexibilities and protections as is recommended by the CDC”
- “Failed to implement engineering controls designed to prevent COVID-19 infection including, but not limited to, installing high-efficiency air filters, increasing ventilation rates in the work environment and installing physical barriers such as clear plastic sneeze guards as is recommended by the CDC”
- “Failed to cease operations of the store and to otherwise close the store when it knew or should have known that various employees and others present at the store were experiencing symptoms of COVID-19”
- “Failed to periodically interview and/or evaluate its employees for signs and symptoms of COVID-19”
- “Failed to prohibit employees who were exhibiting signs and symptoms of COVID-19 from working at the store or otherwise entering the premises”

Negligence Cases (cont'd)



- Practical Tips

- Review and comply with government guidance on how to prepare and protect the premises for and from COVID-19.
 - *E.g.*, OSHA Guidance on Preparing Workplaces for COVID-19, CDC Interim Guidance for Businesses and Employers to Plan and Respond to COVID-19.
- Review and comply with industry-specific guidance.
 - *E.g.*, COVID-19 Guidance for Retail Workers.
- Pay attention to what other companies in your industry are doing to protect employees and customers from COVID-19.
 - *E.g.*, Retailers limiting the number of people who can be in the store at once.

Breach of Contract

- More business-to-consumer than business-to-business lawsuits
 - Plaintiffs' lawyers bringing consumer class actions
- Passengers who purchased airline tickets from a major air carrier brought a putative class action against the airline alleging breach of contract.
 - The plaintiffs claim that their "Contract of Carriage" they entered into with the airline when they purchased tickets required the airline to refund them if the airline cancelled flights.
 - The airline allegedly offered passengers the option to either (1) rebook flights to a route the airline has not cancelled or (2) obtain a travel credit.
 - The plaintiffs are seeking compensatory damages and specific performance.
 - *E.g., Bombin v. Southwest Airlines Co.*, No. 20-cv-01883 (E.D. Pa. filed Apr. 13, 2020).



Breach of Contract (cont'd)

- Students are bringing class actions against colleges and universities for breach of contract.
 - The students claim the institutions breached their contract by (1) moving the second half of all classes for the spring semester to online distance learning, (2) retaining the money for on-campus housing, and (3) closing institution buildings and not providing food and services.
 - *E.g., Church v. Purdue University*, No. 20-cv-000025 (N.D. Ind. filed Apr. 9, 2020).
- Members of fitness clubs are bringing class actions against the clubs claiming that the clubs breached the parties' contracts by closing the clubs and prohibiting access to its members.
 - The plaintiffs are seeking to recover all membership dues and fees.
 - *E.g., Radford v. Town Sports Int'l Holdings, Inc.*, No. 20-cv-02938 (S.D.N.Y. filed Apr. 9, 2020).

Breach of Contract (cont'd)

- Practical Tips

- Understand the terms of your contract (with businesses and consumers).
 - Is there a force majeure clause? What are my obligations if I trigger the clause to excuse performance?
- Consider ways in which you can satisfy your contractual obligations despite COVID-19.
- Be understanding and reasonable when dealing with COVID-19-related contract issues.



Business Interruption Coverage Lawsuits

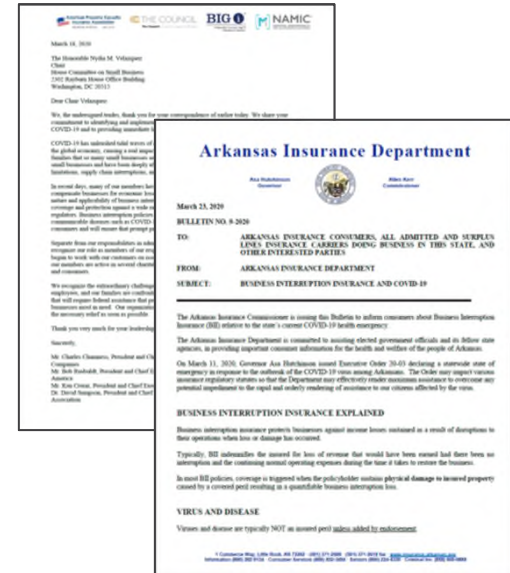
- Business interruption insurance generally covers lost income and additional expenses when a business is affected by a covered peril.
 - *E.g.*, theft, fire, wind, falling objects or lightning.
- Most commercial general liability insurance policies include business interruption coverage.

[P]ay for the actual loss of Business Income you sustain due to the necessary suspension of your “operations” during the “period of restoration.” The “suspension” must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations.

- Some insurance policies expressly exclude coverage for loss related to a communicable disease.

Business Interruption Coverage Lawsuits (cont'd)

- The insurance industry has said that policyholders should not expect business interruption coverage related to COVID-19.
 - In a March 2020 joint response letter to US Congress members, top insurance trade organizations said: “Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19.”
 - The Arkansas Insurance Department said in a bulletin that: “In most BI policies, coverage is triggered when the policyholder sustains **physical damage to insured property** caused by a covered peril resulting in a quantifiable business interruption loss. **** Viruses and disease are typically NOT an insured peril unless added by endorsement.”
 - The South Carolina Department of Insurance issued guidance stating that: “Under the business income policy, there likely is no coverage as losses occurring as a result of a virus or bacteria are typically excluded.”



Business Interruption Coverage Lawsuits (cont'd)

- Geragos & Geragos sued its insurer, seeking a declaratory judgment that its general liability policy (which allegedly does not include a viral pandemic exclusion) covers business interruption loss related to COVID-19.
 - “The global COVID-19 pandemic has physically impacted both public and private property” as “the deadly **virus physically infects and stays on surfaces of objects or materials, ‘fomites,’ for up to twenty eight [sic] days.**” *Geragos & Geragos v. The Travelers Indemnity Co. of Conn.*, No. 20ST-CV-14022 (Cal. Super. filed April 10, 2020).
- A Florida restaurant brought a class action against an insurance syndicate seeking a declaration that the insurers must provide business interruption coverage related to COVID-19 (where a policy does not include an exclusion for communicable diseases).
 - “Class members were forced to close their premises or substantially reduce their business ... to stop the spread of COVID-19 through **human to human and surface to human contact.**”

Business Interruption Coverage Lawsuits (cont'd)

- Practical Tips

- For property and casualty insurers

- Expect a lawsuit seeking a declaration that the company is required to cover business interruption loss related to COVID-19 if you do not already have one.
- Stay abreast of the results of the current litigation.
- Monitor any helpful information from trade organizations.

- For policyholders

- **Read your general liability policy!**
- Do you have **civil authority coverage** that covers situations where the business has not been damaged but has been ordered to shut down by civil authorities (usually additional)?
- Have a experience broker or attorney help you consider your coverage and/or legal options.





Questions?



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