RECENT DEVELOPMENTS IN BUSINESS LITIGATION

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This article highlights significant business litigation cases decided from October 1, 2019, through September 30, 2020 (and occasionally into October 2020), addressing the following: (1) remedies and business income losses in the COVID-19 pandemic; (2) the impact of COVID-19 on securities litigation; (3) negotiation class certification; and (4) defenses to breach of contract claims arising out of COVID-19.

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I. REMEDIES IN BUSINESS LITIGATION: UPDATE ON BUSINESS INCOME LOSSES IN THE CORONAVIRUS PANDEMIC

Disruption of business operations began and grew in 2020 as the coronavirus pandemic progressed. Remedies were hard to find. The remedy addressed in this update concerns claims to reimburse losses of business income caused by the pandemic.

The reported success rate of these claims was not great in 2020. The full story is not so bleak, however, because the final rules are not yet written.

A. *Business Interruption Coverage*

Most claims resulting from the coronavirus pandemic in 2020 addressed standard "Business Interruption" (BI) Insurance Coverage.[1] Most standard BI claims have been denied by the Courts, which is also true of claims under other coverages written on standard insurance policy forms in general use in the insurance industry. Those policy forms unambiguously require that the loss be an "accidental direct physical loss to Covered Property," or words to that same effect.[2]

The results of the cases decided in 2020 teach that pandemic insurance claims will likely fail if those claims depend on standard insurance policy provisions that require physical damage. To find for plaintiffs on such claims, courts have required tangible, physical alteration to the property itself.[3] Many insurance companies that employ edited versions of the standard forms in their own policies retain the requirement of direct physical

1. Both this article section and the author, Dennis Wall, benefitted greatly from interviews with Robert H. Jerry, II, Dean Emeritus and Professor Emeritus of Law, University of Florida School of Law, and Professor Emeritus of Law, University of Missouri School of Law, and Professors Tom Baker, University of Pennsylvania School of Law, and Daniel Schwarcz, University of Minnesota School of Law, all of whom generously and graciously shared their time and expertise. Each of them, Dean Jerry in particular, provided research leads that proved to be invaluable. All errors are my own.

2. The "direct damage to property" requirement may be phrased in different words in particular coverage provisions, such as Extra Expense Coverage, but the "direct damage to property" requirement is the same in effect. Similarly, some insurance coverages require that *someone's* property be physically damaged, such as Civil Authority Coverage for losses incurred as a result of orders issued by civil authorities.

3. Telephone interview with Robert H. Jerry, II, Dean and Professor Emeritus of Law, University of Florida School of Law, and Professor Emeritus of Law, University of Missouri School of Law (Oct. 14, 2020) [hereinafter Jerry Interview]. At the time of this writing, the most recent example is perhaps the decision in the case of *Raymond H Nahmad DDS PA v. Hartford Casualty Insurance Co.*, No. 1:20-cv-22833-BLOOM/Louis, 2020 WL 6392841, at *8 (S.D. Fla. Nov. 2, 2020), in which the court granted a motion to dismiss for several reasons, the most prominent of which was that the BI claimants in that case alleged no accompanying physical harm to covered property.

loss, and the results are the same under those policies: COVID-19 coverage claims under policies with such a requirement are generally denied.[4]

Although many of these claims involve similar or same policy wording, the Courts have held that they do not necessarily present common questions of law or fact which dominate the discussion. This is one reason, for example, that the Multi-District Panel of federal judges has mostly declined to centralize BI Coverage cases related to the pandemic.[5] The few cases that have been centralized for federal Multi-District Litigation involved either individual local insurers or specialty insurance carriers which have the same policy wording at issue in multiple similar cases.[6] Similarly, only one State Court proceeding has been located in which a State Court consolidated pandemic-related Business Interruption Coverage cases.[7]

The decided cases prove the point that individual insurance claims in the coronavirus pandemic largely depend on individual policy language. As a result, policyholders and insurance carriers alike must review the language in their own policies in order to determine the chances of success in presenting or defending each particular individual insurance claim.

Urogynecology Specialist of Florida LLC v. Sentinel Insurance Co.,[8] decided in late September 2020, exemplifies in particular the fact that the final rules of insurance coverage for pandemic claims are not yet written. It is significant that there was no dispute in *Urogynecology Specialist* over coverages that require physical damage; those coverages were not contested.

4. *See, e.g.*, Oral Surgeons, P.C. v. Cincinnati Ins. Co., 491 F. Supp. 3d 455, 456 (S.D. Iowa 2020), *aff'd*, 2021 WL 2753874 (8th Cir. July 2, 2021); 10E, LLC v. Travelers Indem. Co. of Conn., 483 F. Supp. 3d 828, 835–37 (C.D. Cal. 2020). Moreover, interviews with nationally recognized experts on insurance coverage and regulation confirmed both the general rule that standard insurance policy language requiring direct physical loss is given effect by most courts, and the existence of different results nationwide in the case law depending on different facts including different policy language. Jerry Interview, *supra* note 3; telephone interview with Daniel Schwarcz, Professor of Law, University of Minnesota Law School (Oct. 14, 2020).

5. *See In re* COVID-19 Bus. Interruption Prot. Ins. Litig., 482 F. Supp. 3d 1360, 1362 (J.P.M.L. 2020).

6. *See, e.g.*, *In re:* Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig., 492 F. Supp. 3d 1359, 1361–62 (J.P.M.L. 2020) (centralization of lawsuits filed against regional insurance carrier involving common policy language); *In re:* Nat'l Ski Pass Ins. Litig., 492 F. Supp. 3d 1352, 1354 (J.P.M.L. 2020) (centralization of lawsuits against specialty insurance company).

7. Joseph Tambellini, Inc. v. Erie Ins. Exch., Nos. GD-20-005137 and GD-20-006901, (Pa. Ct. Common Pleas, Allegheny Cnty. July 23, 2020) (order granting joint motion for coordination).

8. Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., 489 F. Supp. 3d 1297 (M.D. Fla. 2020).

Instead, the policyholder actually presented its claim *based on* coverages that require physical damage.[9] The insurance carrier moved to dismiss for failure to state a claim because of a virus exclusion in its policy which, the carrier contended, barred the policyholder's claim "for loss or damage caused directly or indirectly" by the "[p]resence, growth, proliferation, spread or any activity" of virus.[10] The court denied Sentinel's motion.

The reasons that the court denied Sentinel's motion to dismiss all flow from twin rules of Florida coverage law. First, an insurance policy must be construed in favor of coverage if it is ambiguous, and second, an insurance policy is ambiguous if it is susceptible to more than one reasonable interpretation, at least one of which favors coverage.[11] "Here, several arguably ambiguous aspects of the Policy make determination of coverage inappropriate at this stage," the court held.[12]

The court found that the policy was "arguably ambiguous" because the policy was not complete. As with other virus exclusion forms,[13] the virus exclusion in *Urogynecology Specialist* was added to the policy by an endorsement which modified several other coverage forms, but "[t]hose forms are not provided in the Policy itself, nor were they provided to the Court."[14] The insurance carrier filed a certified copy of the policy,[15] as carriers do in many cases , but the copy of the policy was incomplete. When the policy is incomplete, the court may declare an ambiguity in favor of coverage, or, as the court did here, rely on the ambiguity to deny the insurer's motion to dismiss.

The court in the *Urogynecology Specialist* case further found that the policy was ambiguous because the policy's virus exclusion was in a "grouping . . . with other pollutants."[16]

That was the only reference in the court's opinion to "pollutants." However, the court cited to the virus exclusion form contained in the record in "Doc. 5-1," or Document 5-1. A review of the Court file via PACER or "Public Access to Court Electronic Records" reveals that that document is the certified copy of the insurance policy filed by the insurance carrier.

9. *See id*. at 1299–1300.
10. *Id*. at 1301.
11. *Id.* at 1302.
12. *Id*.
13. *See, e.g.*, Insurance Services Office (ISO), Form CP 01 40 07 06, *Exclusion of Loss Due to Virus or Bacteria*, https://generalliabilityinsure.com/documents/CP01400706EXCLUSIONOFLOSSDUETOVIRUSORBACTERIA.pdf.
14. Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., 489 F. Supp. 3d 1297, 1302 (M.D. Fla. 2020).
15. Notice of Filing a Certified Copy of Insurance Policy, *Urogynecology Specialist*, No. 6:20-cv-1174-Orl-22EJK (M.D. Fla. July 8, 2020), ECF No. 5-1.
16. *Urogynecology Specialist*, 489 F. Supp. 3d at 1302.

The virus exclusion in it is labelled as adding an Exclusion i to the Special Property Coverage form, among other forms.[17]

There is already an Exclusion i in the Special Property Coverage form in the policy issued by Sentinel, and it is a pollution exclusion.[18] When the court referred to "Doc. 5-1," it had Exclusion i in front of it. Sentinel's endorsement effectively added the virus exclusion to the pollution exclusion previously written in the policy, thus making the policy ambiguous for this additional reason.

It must be distinctly understood that unlike the virus exclusion endorsement modified by Sentinel and issued in its policy to Urogynecology Specialist, the standard virus exclusion endorsement does not label or "group" viruses with pollutants, nor does it group the virus exclusion with any other exclusions, including pollution exclusions. Lawyers, carriers, and policyholders will therefore be unlikely to rely successfully on the decision in this case for legal precedent on interpreting the standard virus exclusion.

With respect, that is not the point. These distinctions illustrate that each case or claim of coverage for losses allegedly caused by the pandemic is different from the others. Different policies, different policyholders, and different insurers all contribute to this great variety of claims, issues, and legal rulings.[19]

In the end, the holding in *Urogynecology Specialist* is not simply denial of a motion to dismiss because of ambiguities in an insurance policy. Rather, the decision stands apart from most other COVID-19 coverage cases because the court found that the motion to dismiss is too early a stage of litigation to refuse to entertain insurance claims in a pandemic the likes of which we have never before experienced:

> Importantly, none of the cases [cited for dismissal] dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant. Thus, without any binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture.[20]

17. Sentinel's "Limited Fungi, Bacteria or Virus Coverage" endorsement is located at pages numbered 141–43 in the policy, which are renumbered as pages 142–44 in Notice of Filing a Certified Copy of Insurance Policy, *Urogynecology Specialist*, No. 6:20-cv-1174-Orl-22EJK (July 8, 2020), ECF No. 5-1.

18. Exclusion i, titled "**Pollution**" (boldface in the insurance policy) is located at pages numbered 52–53 in the Sentinel insurance policy, which are renumbered as pages 53–54 in *id*.

19. In this connection, it is worth noting that the federal judge who decided another case under Florida law under the same virus exclusion was careful to point out that, unlike the *Urogynecology Specialist* court, the court in the later case had the benefit of the complete policy before it to construe. Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co., 499 F. Supp. 3d 1178, 1189 n.4 (S.D. Fla. Nov. 2, 2020).

20. Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., 489 F. Supp. 3d 1297, 1302-03 (M.D. Fla. 2020).

Illustrating the importance of unique insurance policy language, another federal judge in another case granted the carrier's motion to dismiss based on the same exclusion, in *Founder Institute, Inc. v. Hartford Fire Insurance Co.*[21] Based on a record that presumably included a complete insurance policy, the court diagnosed the Sentinel "Limited Fungi, Bacteria or Virus Coverage" endorsement at issue in that case as being the same unique exclusion that was at issue in *Urogynecology Specialist*. After construing the policy, the court in *Founder Institute* found no ambiguity and ultimately granted the insurance carrier's motion to dismiss based on the virus exclusion at bar.[22]

The court in *Founder Institute* and the cases it cited in favor of dismissal did not raise or address possible ambiguity arising from combining an exclusion of virus with a pollution exclusion.[23]

Even in cases with virus exclusions, a closer look at the litigation results are enlightening. Professor Tom Baker of the University of Pennsylvania has assembled a team of researchers who have together compiled the COVID Coverage Litigation Tracker or CCLT.[24] This is an ongoing compilation of results in insurance cases involving coverage claims for coronavirus-related losses. An analysis of the results in cases deciding motions to dismiss as of October 7, 2020 concluded that insurance companies are prevailing "overwhelmingly" on motions to dismiss in COVID-19 coverage cases "when their policies have virus exclusions," but the results are much less favorable to the carriers "when their policies do not have virus exclusions."[25]

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21. Founder Institute, Inc. v. Hartford Fire Ins. Co., 497 F. Supp. 3d 678 (N.D. Cal. 2020). Subsequently, the court entered a final order granting the motion to dismiss, No. 20-cv-04466-VC, 2021 WL 896937 (N.D. Cal. Feb. 12, 2021), app. docketed, No. 21-15404 (9th Cir. March 8, 2021).

22. *Founder Institute*, 2021 WL 896937, at *1.

23. The *Founder Institute* judge favorably cited three decisions in granting the motion to dismiss in that case. Two of the three cases also had the same "Limited Fungi, Bacteria or Virus Coverage" endorsement which was at issue in the *Urogynecology Specialist* and *Founder Institute* cases, confirmed by review of the court files on PACER, and in these cases the courts also said there was no ambiguity based on interpretation of complete policies. *See, e.g.*, Wilson v. Hartford Cas. Co., 492 F. Supp. 3d 417, 426–28 (E.D. Pa. 2020), appeal docketed, No. 20-3124 (3d Cir. Oct. 19, 2020); Franklin EWC, Inc. v. Hartford Fin. Serv's Grp., Inc., 488 F. Supp. 3d 904, 907 (N.D. Cal. 2020). The third case cited for dismissal in *Founder Institute* likewise found no ambiguity based on interpretation of apparently complete policy provisions, in part here pertinent. Diesel Barbershop, LLC v. State Farm Lloyds, 479 F. Supp. 3d 353, 360–62 (W.D. Tex. 2020).

None of these cases including *Founder Institute* raised or addressed possible ambiguity arising from combining an exclusion for virus with a pollution exclusion.

24. *Covid Coverage Litigation Tracker*, Penn Law (2021), https://cclt.law.upenn.edu.

25. Tom Baker, *Insurers Without Virus Exclusions are Losing Their Motions to Dismiss*, CCLT (Oct. 7, 2020), https://cclt.law.upenn.edu/2020/10/07/insurers-without-virus-exclusions-are-losing-their-motions-to-dismiss. This was updated eight days later. Tom Baker, *Updated Motion to Dismiss and Virus Exclusion Box Score*, CCLT (Oct. 15, 2020), https://cclt.law.upenn.edu/2020/10/15/updated-motion-to-dismiss-and-virus-exclusion-box-score.

In an interview for this article, Professor Baker clarified that this is what the author would call a "forensic" analysis cataloguing all the provisions contained in the insurance policies involved in these cases, including virus exclusions, regardless of whether any particular provision was a basis for decision by any Court. In other words, this analysis does ***not*** mean that virus exclusions were the focus of any of these cases, or that the lawyers argued them for or against dismissal, but merely that virus exclusions were written in the policies. Rather, in Professor Baker's view, the existence of a virus exclusion affects the arguments that are made. The idea is that policyholders' lawyers are reluctant to argue a virus exclusion and so perhaps subconsciously shift their arguments to other policy provisions.[26]

Subtle shifts in emphasis affect the rulings in these cases as well. That is why the *Urogynecology Specialist* case is worthy of attention, even if all the other features of that case did not exist: It is one of the few decisions which have addressed a virus exclusion as the insurance carrier's only available basis for denying coverage and, in that case, the insurer failed to convince the Court to dismiss its policyholder's coverage claim.

B. "*Public Options*"

Besides possible remedies afforded by commercial insurance policies, other possible remedies were floated in 2020 in response to the pandemic. Some of these offered what might be called "public options," but none of them moved beyond the proposal stage in 2020.

One "public option" proposed in 2020 was called the Pandemic Risk Insurance Act,[27] a pandemic insurance version of the Terrorism Relief Insurance Act that Congress enacted after the September 11, 2001 terrorist attacks that provided a limited federal reinsurance backstop for claims related to terrorism.[28] Another proposal advanced in 2020, called the Business Continuity Protection Program or BCPP,[29] was for a program similar to the National Flood Insurance Program or NFIP,[30] in which Congress would provide the funding for pandemic-related claims which would be administered by insurance companies. Another proposal in 2020 centered around the concept of "parametric" insurance, which apparently has not been offered as an insurance product. Not strictly a "public option" because it does not necessarily contemplate the use of public funds to pay claims,

26. Telephone Interview with Tom Baker, Professor of Law, University of Pennsylvania School of Law (Oct. 15, 2020).

27. *See Insurers, Agents Propose Pandemic Business Relief Plan; Plaintiffs Offer BIG Compromise*, Ins. J. (May 22, 2020), https://www.insurancejournal.com/news/national/2020/05/22/569611.htm?print.

28. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002).

29. *See Insurers, Agents Propose Pandemic Business Relief Plan*, *supra* note 27.

30. The National Flood Insurance Program first came into existence in 1968. It has been modified many times since. Its current iteration can be found at 42 U.S.C. § 4001 *et seq*.

the concept of parametric insurance is discussed mostly in the context of coverage for catastrophic events. It involves providing a layer of coverage similar to Valued Property Insurance in which carriers pay for values stated—in this case, in the policy itself—once a trigger point or "point of interest" (such as a hurricane of a certain intensity or a certain point in a stock market index) is reached, subject to a policy limit, rather than indemnifying for the actual loss an insured incurs.[31] Such coverage might, for example, permit insureds to recover for pandemic-related losses without satisfying the factual intricacies of a particular property damage requirement or virus exclusion pertaining to their own property.

There were also insurance proposals advanced in 2020 that would require carriers to pay for pandemic-related losses regardless of what their policies might say.[32] None of these went beyond the proposal stage in 2020.

Finally, there is the possibility of outright grants to claimants with pandemic-related monetary losses, especially when the losses are a total loss of income, or income partially interrupted by the pandemic even if not a total loss. As of the end of October 2020, it does not appear likely that Congress will pass any additional legislation of this kind after already passing the Coronavirus Aid, Relief, and Economic Security—or CARES—Act, payments under which are loans, at least theoretically, which would be forgiven if the recipients ostensibly use the money to keep employees on the payroll.[33] In conclusion, the most significant 2020 update on remedies for pandemic-related losses is that the available remedy depends on the wording of the applicable insurance policies.

II. IMPACT OF COVID-19 ON SECURITIES LITIGATION

The impact of the COVID-19 pandemic on securities litigation has been relatively limited to this point. However, there have, in fact, been a number of securities fraud cases brought as a result of the pandemic, as well as several shareholder derivative suits. At the time of this writing, there have not been any reported decisions or verdicts, but a review of the cases evidences some interesting early trends.

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31. *See*, *e.g.*, Daniel Brettler & Timothy Goshear, *Parametric Insurance Fills Gaps Where Traditional Insurance Falls Short*, Ins. J. (Jan. 9, 2020), https://www.insurancejournal.com/news/international/2020/01/09/553850.htm; Bethan Moorcraft, *What Is Parametric Insurance?*, Ins. Bus. (Oct. 29, 2018), https://www.insurancebusinessmag.com/us/news/breaking-news/what-is-parametric-insurance-114901.aspx.

32. *See Insurers, Agents Propose Pandemic Business Relief Plan*, *supra* note 27 (noting that a hearing held in May 2020 by a subcommittee of the U.S. House of Representatives Small Business Committee "gave the insurance industry another opportunity to push back against moves to have insurers pay business interruption losses even where policies exclude such coverage involving a virus").

33. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (2020).

A. *The Initial Suits*

The initial class action securities fraud suits brought that arose from the pandemic involved allegations of misrepresentations either as to the impact of the pandemic upon operations or allegations of misrepresentations with regard to the development of a vaccine. Examples of these early cases include *Douglas v. Norwegian Cruise Lines*[34] (*Douglas*), *Service Lamp Corp. Profit Sharing Plan v. Carnival Corp.*[35] (*Service Lamp Corp.*), and *McDermid v. Inovio Pharma, Inc.*[36] (*McDermid*).

In *Douglas*, the allegation was that Norwegian Cruise Lines had violated the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 promulgated thereunder by touting the company's positive financial outlook in spite of the pandemic in a press release accompanying the filing of Norwegian's Form 8-K with the Securities Exchange Commission (SEC) on February 20, 2020, as well as Norwegian's focus placed on ensuring the health and safety of passengers and the ship's crew, discussed in Norwegian's 2019 10-K filed on February 27, 2020. Asserting their claims on behalf of a purported class of investors who had purchased shares in Norwegian during the period February 20, 2020 through March 12, 2020, Plaintiffs alleged that these statements were false and misleading because: "(1) the Company was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members; and (2) as a result, Defendants' statements regarding the Company's business and operations were materially false and misleading and/or lacked a reasonable basis at all relevant times."[37]

When, it was alleged, the truth was revealed in a *Miami New Times* article on March 11, 2020 that, in fact sales staff were being encouraged to make false representations about the coronavirus and pressure customers to book trips, and that sales were dropping precipitously, the shares of Norwegian's stock allegedly fell 26.7%.[38] Further, it was alleged that when the *Washington Post* published an article titled "Norwegian Cruise Line managers urged salespeople to spread falsehoods about coronavirus" on March 12, 2020, Norwegian's share price fell an additional 35.8 %.[39]

34. *See* Class Action Complaint for Violations of the Federal Securities Laws, Douglas v. Norwegian Cruise Lines, Case No. 1:20-cv-21107 (S.D. Fla. Mar. 12, 2020), ECF No. 1.

35. *See* Complaint for Violation of the Federal Securities Laws, Service Lamp Corp. Profit Sharing Plan v. Carnival Corp., Case No. 1:20-cv-12202 (S.D. Fla. May 27, 2020), ECF No. 1.

36. *See* Class Action Complaint for Violation of the Federal Securities Laws, Case No. 2:20-cv-01402 (E.D. Pa. Mar. 12, 2020), ECF No. 1.

37. *See Douglas* Complaint, *supra* note 34, ¶ 21.

38. *Id.* ¶¶ 22–24.

39. *Id.* ¶¶ 25–27.

Similarly, in *Service Lamp Corp.*, a class action was brought on behalf of investors in Carnival Cruise Lines stock during the period January 28, 2020 through May 1, 2020, asserting violations of the Exchange Act based on allegations that "Carnival and several of the officers of the Company made a series of false and misleading statements and concealed material information relating to the Company's adherence to its health and safety protocols in the wake of the COVID-19 pandemic, Carnival's role in facilitating the transmission of the virus, and the Company's violation of port-of-call regulations."[40] As a result of these alleged false and misleading statements, the plaintiff alleged that Carnival common stock and securities traded at inflated prices.[41]

The plaintiff in *McDermid* made a much different set of allegations. In that case, the plaintiff alleged that Inovio and its Chief Executive Officer, J. Joseph Kim, made false and misleading statements in violation of Sections 10(b) and 20(a) of the Exchange Act with regard to Inovio's alleged development of a vaccine for COVID-19. Noting that Inovio represents itself to be a "biotechnology company focused on rapidly bringing to market precisely designed DNA medicines designed to treat, cure and/or protect people from . . . infectious diseases,"[42] the plaintiff alleged that Kim had "capitalized on widespread COVID-19 fears by falsely claiming that Inovio had developed a vaccine for COVID-19."[43] The plaintiff alleged that Kim had made these false statements on Fox Business during an interview with Neal Cavuto on February 14, 2020, and again on March 2, 2020, following a well-publicized meeting Kim had with President Trump to discuss the COVID-19 outbreak.[44] As a result, plaintiff alleged that the per share price of Inovio's stock had more than quadrupled between February 28, 2020, and March 9, 2020.[45] However, when news came out that, in fact, Inovio had not developed a COVID-19 vaccine, but had only "designed a vaccine construct" or "precursor to a vaccine," the stock dropped 71% over the two day period of March 9–10, 2020.[46]

B. *The Second Wave of Suits*

In the second wave of COVID-19-related securities suits, allegations were centered on alleged misrepresentations regarding company business, operational, and compliance policies, and/or insufficient disclosures of the risks to company operational and financial prospects as a result of the

40. *Service Lamp Corp.* Complaint, *supra* note 35, ¶ 3.
41. *Id.*
42. *See McDermid* Complaint, *supra* note 36, ¶ 4.
43. *Id.*
44. *Id.* ¶¶ 4–5.
45. *Id.* ¶ 5.
46. *Id.* ¶ 6.

COVID-19 pandemic. Such cases include *Hartel v. GEO Group, Inc.*[47] (*Hartel*); *Arbitrage Fund v. Forescout Technologies, Inc.*[48] (*Forescout Technologies*); and *Di Scala v. Proshares Ultra Bloomberg Crude Oil*[49] (*Di Scala*).

In *Hartel*, a class action was brought on behalf of investors in a real estate investment trust (REIT), alleging violation of Sections 10(b) and 20(a) of the Exchange Act based on, among other things, alleged misrepresentations in the 10K filed by the company operating the trust on February 27, 2020 with respect to the REIT's "Quality of Operations," "Corporate Social Responsibility," and "Competitive Strengths."[50] Additionally, plaintiffs alleged that misrepresentations were made with regard to the Company's COVID-19 response procedures during an earnings call with investors and analysts to discuss the Company's financial and operating results for the first quarter of 2020, and in a Quarterly Report on Form 10Q filed with the SEC with respect to "Health and Safety" and the steps implemented at the outset of the pandemic.[51] According to the allegations, the Company owned and/or managed halfway houses in the United States, and despite the Company's representations regarding their focus on safety, a newspaper article in June 2020 reported that a halfway house operated by the Company was one of the hardest hit halfway houses in the country by COVID-19, and that the virus appeared to have been spread not in spite of the facility's efforts to contain it, but because of these efforts, leading to a drop of 7.8% in the REIT's share price.[52]

In *Forescout Technologies*, the plaintiffs have alleged that Forescout (a company described in the Complaint as providing software that enables agencies and enterprises to gain improved situational awareness of their technological environment—*i.e.*, devices on their networks—and thereby orchestrate actions to reduce cyber and operational risk) had failed to disclose to investors that a planned merger with another company would likely not proceed due, in part, to a dramatic and undisclosed downturn in Forescout's business in Asia and Japan caused by the COVID-19 pandemic.[53]

In *Di Scala*, the allegations are that an exchange traded fund, its sponsor, and several of the executive officers of the sponsor of the ETF failed to disclose and/or misrepresented "the concrete harms and/or acute risks

47. *See* Class Action Complaint, Hartel v. GEO Grp., Inc., 9:20-cv-81063 (S.D. Fla. July 7, 2020), ECF No. 1.

48. *See* Class Action Complaint, Arbitrage Fund v. Forescout Techns., Inc., Case No. 3:20-cv-03819 (N.D. Cal. June 10, 2020), ECF No. 1.

49. *See* Class Action Complaint for Violation of the Federal Securities Law, Di Scala v. Proshares Ultra Bloomberg Crude Oil, Case No. 1:20-cv-05865 (S.D.N.Y. July 28, 2020), ECF. No. 1.

50. *Hartel* Complaint, *supra* note 47, ¶¶ 21–23.

51. *Id.* ¶¶ 26–29.

52. Id. ¶¶ 3, 5–6.

53. *Forescout* Complaint, *supra* note 48, ¶¶ 3–4.

to the Fund posed by the COVID-19 pandemic," amongst other issues, in a Registration Statement accompanying a public offering of shares in the Fund.[54] The Fund was designed to reflect the performance of crude oil as measured by the price of West Texas Intermediate sweet, light crude oil futures contracts traded on the New York Mercantile Exchange, and the Complaint alleges that, due to a confluence of factors, including the onset of the COVID-19 pandemic, the fund suffered billions of dollars in losses.[55]

C. *Shareholder Derivative Suits*

Plaintiffs have, more recently, brought shareholder derivative suits based on alleged breach of fiduciary duties owed by corporate officers and directors in connection with the COVID-19 pandemic. To this point, they have been limited to cases associated with related securities fraud class actions, including some of the actions discussed above. *See, e.g.*, Complaint, *Fettig v. Kim*, Case No. 2:20-cv-03316 (E.D. Pa., July 7, 2020), ECF No. 1 (seeking redress on behalf of the company for the alleged misconduct by members of Inovio's Board of Directors and upper management in making misrepresentations or material omissions concerning a COVID-19 vaccine); Verified Shareholder Derivative Complaint, *Aguilera v. Egan*, Case No. 2:20-cv-00654 (D. Utah, Sept. 17, 2020), ECF No. 2 (alleging breach of fiduciary duties by CEO and CFO in failing to correct alleged misrepresentations as to the 100% accuracy of a COVID-19 diagnostic test that had been developed by Co-Diagnostics); Complaint, *Stachowski v. Boyd*, Case No. 4:20-cv-06525 (N.D. Cal., Sept. 17, 2020), ECF No. 1 (alleging Vaxart's directors and CEOs had the Company falsely tout that a COVID-19 vaccine Vaxart was working on had been selected to be part of the country's Operation Warp Speed program to develop a vaccine on an accelerated basis, and that they personally profited from the resulting increase in the price of Vaxart's shares). However, while the bar for proving a corporate board has failed to exercise good faith oversight of the company's operations is generally considered to be extremely high in light of the standard set in *In re Caremark International Derivative Litigation*,[56] the recent decisions in *Marchand v. Barnhill*,[57] and *In re Clovis Oncology, Inc. Derivative Litigation*,[58] suggest that plaintiffs pursuing claims based on alleged failure to exercise appropriate oversight of "mission critical" operations could have a path to successful breach of fiduciary duty claims to the extent those claims are based on alleged failures to oversee efforts to protect employees and the public from the risks presented by the pandemic.

54. *Di Scala* Complaint, *supra* note 49, ¶ 9.
55. *Id.* ¶¶ 10, 27, 29, 37.
56. 698 A.2d 959, 967 (Del. Ch. 1996).
57. 212 A.3d 805 (Del. 2019).
58. Consolidated C.A. No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

D. *Conclusion*

There has hardly been a deluge of securities fraud and shareholder derivative litigation spawned to date by the COVID-19 pandemic, but there have been and continue to be claims arising out of the unique circumstances presented by the impact the pandemic is having on society at large, and the actions being taken to address it. It is still relatively early days in regards to these types of claims, but how this all evolves will bear close watching going forward.

III. THE NEGOTIATION CLASS CERTIFICATION: SHOULD COURTS ENCOURAGE OR EXTERMINATE INNOVATION?

The "Opioid Crisis" multidistrict litigation, consolidated in the Northern District of Ohio, consists of over 1,300 public-entity-led lawsuits. Is it possible to secure a just, speedy, and inexpensive resolution of these suits? A recent 2-1 decision by the Sixth Circuit of the United States Court of Appeals[59] in effect prohibits creativity by district court judges under Rule 23 of the Federal Rules of Civil Procedure to aid in the management of cases and the facilitation of settlements in multidistrict litigation. Should courts be in the business of encouraging or exterminating innovation? In her dissent, Judge Karen Nelson Moore argued the former.

The Sixth Circuit opinion reversed a September 11, 2019, order[60] issued by Judge Dan Aaron Polster of the Northern District of Ohio's Eastern Division which certified an unprecedented "negotiation class." A negotiation class empowers designated counsel to enter into negotiations on behalf of the entire class while individual cases continue along their respective litigation paths. In this instance it required a supermajority approval of the settlement and it also permitted members of the class to opt out of the negotiations prior to their commencement, with these "opt out" matters proceeding separately.

The Sixth Circuit majority opinion, written by Judge Eric L. Clay and joined by Judge David W. McKeague, stated that the primary problem with the certification of a negotiation class is that it is not authorized by the structure, framework, and language of Rule 23:

> However innovative and effective the addition of negotiation classes would be to the resolution of mass tort claims—particularly those of grave social consequence—we are to be "mindful that the Rule as now composed sets the requirements [courts] are bound to enforce," and we "are not free to amend a rule outside the process Congress ordered."[61]

59. *See In Re:* Nat'l Prescription Opiate Litig., 976 F.3d 664 (6th Cir. 2020).
60. *See In Re:* Nat'l Prescription Opiate Litig., 332 F.R.D. 532 (N.D. Ohio 2019).
61. *In Re: Nat'l Prescription Opiate Litig.*, 976 F.3d at 676 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997)).

The strict textualists of the Sixth Circuit majority stated:

> Rule 23 is replete with references to litigation and settlement classes . . . . Notably, the Rule does not mention certification for purposes of the "negotiation" or anything along those lines. While negotiation may lead to settlement, there is no discussion in Rule 23 identifying negotiation as a separate category of certification distinct from settlement.[62]

The court considered the negotiation class a new and novel form of class certification which was not expressly created by Rule 23. Between not finding language endorsing or prohibiting a negotiation class the court ruled the district court could not certify a negotiation class because of the absence of an explicit prohibition in the statute:

> What Plaintiffs fail to appreciate is that a new form of class action, wholly untethered from Rule 23, may not be employed by a court. The Supreme Court has specifically cautioned that "a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text." [*Wal-Mart Stores, Inc. v.*] *Dukes*, 564 U.S. [338,] 363 [(2011)] . . . The Supreme Court has also emphasized that we are to be "mindful that the Rule as now composed sets the requirements [courts] are bound to enforce," that the Rule "limits judicial inventiveness," and that "[c]ourts are not free to amend a rule outside the process Congress ordered." *Amchem*, 521 U.S. at 620. . . .[63]

The Sixth Circuit found that the now common practice of certifying a settlement class did not provide a foundation for negotiation classes. The history of settlement classes cannot be relied on to justify the expansion of Rule 23 to include negotiation classes:

> Unlike settlement classes under the pre-2018 Rule, there is no textual basis in this subsection—or any other—for the existence of a negotiation class. The class formed in the present case is not being formed for the purposes of litigation or "for purposes of settlement," but rather for the purposes of negotiation. At most, the class is being formed, pursuant to a set of rules outside the parameters of Rule 23, to explore the possibility of negotiating a settlement. But the Rule contemplates settlement classes that are formed after a deal has been reached and the parties wish to formalize their arrangement.[64]

For now, the decision in effect extinguishes the novel concept of a negotiation class before it catches any traction. However, Judge Karen Nelson Moore reserves hope for the future of the negotiation class. In her dissent, Judge Moore criticized the majority's suffocation of Judge Polster's inventiveness with textual piety. She stated:

62. *Id.* at 672.
63. *Id.*
64. *Id.* at 673.

> The district court has breathed life into a novel concept—a class certified for negotiation purposes—to aid in its Promethean duty to secure the just, speedy, and inexpensive resolution of this byzantine multidistrict litigation. *We should be in the business of encouraging, not exterminating, such resourcefulness.* Certifying a negotiation class honors the Rules' equitable heritage, complements the settlement class's history, hews to Federal Rule of Civil Procedure 23's textual requisites, and stirs no constitutional or policy qualms.[65]

Courts are necessarily vested with the power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.[66] Courts understand this principle and have interpreted the Federal Rules of Civil Procedure to promote efficient litigation and react to modern litigation trends. Examples include the recognition of the work-product doctrine in Rule 26 and the plausibility standard in Rule 8.[67] Given the peculiar properties in multidistrict litigation, Judge Moore encourages a continued liberal construction: "We should respect that every multidistrict litigation is unorthodox. Courts overseeing multidistrict litigation are adept at replicating and refining procedures over time in true common-law fashion. . . . We should encourage liberal constructions of the Federal Rules of Civil Procedure that abet, rather than constrict this process."[68]

Judge Moore further criticized the majority's restrictions on class categorization and its failure to find a textual basis for negotiation classes within Rule 23:

> The world of class actions is neither constituted in entirety nor cleft in two by the rigid categories of litigation classes and settlement classes. I find not one textual reference to the phrases "litigation class" or "settlement class" in the Rules. . . . But, as a matter of logic, negotiation is part and parcel of any class certified for settlement purposes. And the Rules' language does not separate the concept of negotiation from "settlement" or "compromise," nor did the Rules Advisory Committee rip negotiation out of "issues related to settlement." Thus, the district court's finding that Rule 23 permits certification for negotiation purposes is no "mere negative inference," *Dukes*, 564 U.S. at 363 . . . ; such a reading is a permissible, and encouraged, contemplation of the Rule's plain text.[69]

Lastly, she argued the history of the settlement class *does* justify the expansion of Rule 23 to include negotiation classes, stating: "This emergence of a negotiation class simply follows the incremental development of settlement class actions."[70]

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65. *Id.* at 677 (emphasis added).
66. *Id.* at 678.
67. *Id.* at 677–79.
68. *Id.* at 680 (internal citations omitted).
69. *Id.* at 681 (internal citations omitted).
70. *Id.* at 684.

Specifically, Rule 23 included no references to "settlement" or settlement classes until 2003.[71] The framers of Rule 23 drafted it as a "trial-ready" rule and settlement was not part of the discussion.[72] Despite the absence of clear textual authorization for settlement classes, district courts began certifying classes for settlements as early as 1970. As court dockets flooded with settlement class actions, district courts struggled to reconcile them with Rule 23's plain text.[73] Courts did this by noting Rule 23 did not specifically preclude settlement class certifications.[74]

By way of negative inference, district courts were liberated to recognize that settlement classes had "utility,"[75] "afforded considerable economies to both the litigants and the judiciary, and are also fully consistent with the flexibility integral to Rule 23."[76] Finally, in 2003, Rule 23 was revised to include settlement class actions. Judge Moore states: "[E]quity practice bore and nurtured Rule 23," and, true to form, history recurs with the rise of the negotiation class.

The rise of the negotiation class parallels that of the settlement class. Judge Moore encourages the same liberal construction of Rule 23 and freedom to experiment with negotiation classes:

> The parallel between the settlement class and the negotiation class is unmistakable; by certifying a novel negotiation class via a series of new-fashioned procedures, the district court here embraces Rule 23's equitable heritage and the developments of district courts past. We ought not disturb the relationship between innovative experiments of district courts and the subsequent codification of those developments in the revisions of the class action rule."[77]

In conclusion, Judge Moore argued neither text nor precedent contravene the certification of a negotiation class. Given the absence of language prohibiting the district court from distilling "negotiation" from "settlement" or "compromise," in Judge Moore's view, the district court's certifying a negotiation class is a permissible exercise to secure efficiently a just, speedy, and inexpensive resolution to multidistrict litigation.

The future of negotiation class certification is far from certain. Proponents in the Opiate Litigation have requested an *en banc* review of the Sixth Circuit decision. To date, no other attempts have been made to certify a negotiation class. Although the Sixth Circuit decision may effectively end the ephemeral life of the negotiation class, Judge Moore's dissent sets forth

71. *Id.*
72. *Id.* at 683.
73. *Id.*
74. *Id.* at 683–84.
75. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618 (1997).
76. Gen. Motors Corp. Pick-Up Truck Fuel Tanks Prods. Liab. Litig., 55 F.3d 768, 794 (3d Cir. 1995).
77. *In Re:* Nat'l Prescription Opiate Litig., 976 F.3d 664, 685 (6th Cir. 2020).

the framework proponents can replicate to preserve the district court's discretion in utilizing creative methods for certifying a class. Innovative techniques to secure just, speedy, inexpensive resolutions in complex, multidistrict litigation can serve to benefit both parties and the court system. Courts should be in the business of that encouragement.

IV. COVID-19 AND DEFENSES TO BREACH OF CONTRACT

As individuals and businesses have grappled with COVID-19's impact on lives and livelihoods over the past year, the courts have been asked to confront force majeure and related defenses in breach of contract litigation arising from the pandemic. While litigants seeking to excuse their contract performance due to COVID-related interference have met with only limited success, outcomes often hinge on: (1) whether a non-performing party can show that COVID-19 or related governmental orders directly caused the non-performance; (2) whether the proximate cause of the non-performance was COVID-19 itself, rather than a lack of funds potentially caused by the pandemic; or (3) whether the hardships caused by COVID-19 could have been anticipated at the time of contracting.

In confronting COVID-19-related force majeure defenses, courts generally have hewn closely to traditional notions of contract interpretation, including giving effect to the plain meaning of the parties' agreement and requiring that a defendant offer allegations sufficient to support its various defenses. Such was the case when the Southern District of Florida considered a commercial lease dispute in *Palm Springs Mile Associates, Ltd. v. Kirkland's Stores, Inc.*[78] In that case, a shopping center tenant in Hialeah, Florida, stopped making rent payments for several months, starting in April 2020, pointing as an excuse to the pandemic in general, and county regulations restricting non-essential activities and business operations in particular.[79] In denying defendant's motion to dismiss, the court observed that the defendant "fail[ed] to explain how the governmental regulations it describes as a force majeure event *resulted in* its inability to pay its rent," that in order to prevail on the defense, the defendant had to show that the restrictions on non-essential activities and business operations directly affected its ability to pay its rent, and that, in any event, "even if [the defendant] had properly linked the force majeure event to an inability to pay its rent, the issue of the applicability of the force majeure clause to this case is a factual question that cannot be determined on a motion to dismiss."[80]

78. Palm Springs Mile Assocs., Ltd. v. Kirkland Stores, Inc., Case No. 20-21724-Civ-Scola, 2020 WL 5411353 (S.D. Fla. Sept. 9, 2020).

79. *Id.* at *1–2.

80. *Id.* at *2.

In a pair of decisions from the District of Hawaii in the case *NetOne, Inc. v. Panache Destination Management, Inc.*,[81] the court similarly found that plaintiff was not entitled to a refund on deposits it made for an event that it canceled due to the pandemic. In December 2019, Plaintiff NetOne, Inc. (NetOne) entered into a "Services Contract" with defendant Panache Destination Management, Inc. (Panache) for services related to an event NetOne planned to host on the Big Island for approximately 500 people, most of whom would be traveling to the event from elsewhere, on March 22–26, 2020.[82] NetOne paid Panache a deposit of 90% of the estimated value of that contract on January 6, 2020.[83] On March 10, 2020, NetOne and Panache entered into a "Décor Contract," under which Panache agreed to provide certain services for the event, and NetOne provided a deposit to Panache of 90% of the estimated value of the Décor Contract on March 13, 2020.[84] The Centers for Disease Control shortly thereafter recommended that all events of 50 or more people be cancelled over the next eight weeks, and advised against nonessential travel.[85] On March 13, 2020, NetOne advised Panache it was cancelling the event, and on March 19, 2020, NetOne advised Panache it was cancelling the Services Contract, and went on to seek return of both deposits under both contracts' force majeure provisions.[86]

In *NetOne I*, considering NetOne's motion for summary judgment, the district court explained that, regardless of whether plaintiff had appropriately invoked the contracts' force majeure provisions, there was nothing in the contract itself providing for the return of the deposits in the event of a force majeure.[87] The district court reiterated this point in granting Panache's motion for judgment on the pleadings on NetOne's breach of contract claim several months later, though it left open the possibility that NetOne might recover some amount in unjust enrichment, observing: "Sometimes, events, such as a pandemic, create situations that cause disparate impacts. That might be why the law recognizes a cause of action sounding in unjust enrichment. And if NetOne is to recover any portion of its deposits, that is its remaining theory to which it will need to turn."[88]

81. NetOne, Inc. v. Panache Destination Mgmt., Inc., Case No. 20-cv-00150-DKW-WRP, 2020 WL 3037072 (D. Haw. June 5, 2020) (*NetOne I*); NetOne, Inc. v. Panache Destination Mgmt., Inc., Case No. 20-cv-00150-DKW-WRP, 2020 WL 6325704 (D. Haw. Oct. 28, 2020) (*NetOne II*).

82. *NetOne I*, 2020 WL 3037072, at *1–2.

83. *Id.* at *1.

84. *Id.* at *2–3.

85. *Id.* at *3.

86. *Id.* at *3–4.

87. *Id.* at *5.

88. *NetOne II*, Case No. 20-cv-00150-DKW-WRP, 2020 WL 6325704, at *4 (D. Haw. Oct. 28, 2020).

In another case closely tied to the remedies provided in the contract itself, *Zhao v. CIEE, Inc.*,[89] the District of Maine took up the case of a student who sought a full refund when her Spring 2020 study abroad program in the Netherlands was suspended and pivoted to online learning less than two months into the program. In finding that the student had alleged no material breach of her contract with the defendants, the court found that one paragraph providing for refunds if the program was cancelled "due to low enrollment or any other reason," had to be read in conjunction with another provision stating that:

> [w]ithout limitation, CIEE is not responsible for any injury, loss, or damage to person or property, death, delay, or inconvenience in connection with the provision of any goods or services occasioned by or resulting from, but not limited to, acts of God, force majeure, acts of government [. . .] *epidemics or the threat thereof*, [and] disease [. . .].[90]

The court also pointed to a paragraph providing that the plaintiff had agreed to "assume all risk of any such problems which could result from," "perceived or actual epidemics (such as, but not limited to, H1N1, Ebola, SARS, bird flu, or Zika)" which could "delay, disrupt, interrupt or cancel programs," which, the court explained, applied to an "actual epidemic" such as COVID-19.[91] Even if the plaintiff were entitled to a full refund under the paragraph she relied upon, the court ruled, that provision had to be read together with the other, epidemic-specific terms in the contract, which, the court found, foreclosed any claim for lost value of the canceled semester abroad.[92]

In other cases, however, courts have enforced force majeure provisions in whole or in part in response to COVID-19-related failures to perform. In *In re Hitz Restaurant Group*,[93] the Bankruptcy Court of the Northern District of Illinois considered the case of a commercial landlord seeking to enforce a debtor-in-possession's obligation to pay rent timely on its restaurant space post-petition. The force majeure clause in the debtor's lease stated that:

> Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as performance of any of its obligations are prevented or delayed, retarded or hindered

89. Zhao v. CIEE, Inc., Case No. 2:20-cv-00240-LEW, 2020 WL 5171438 (D. Me. Aug. 31, 2020), *appeal docketed*, No. 20-1878 (1st Cir. Sept. 25, 2020).
90. *Id.* at *3 (emphasis added by court).
91. *Id.* at *4.
92. *Id.*
93. *In Re:* Hitz Rest. Grp., 616 B.R. 374 (Bankr. N.D. Ill. 2020).

> by . . . laws, governmental action or inaction, orders of government. . . . Lack of money shall not be grounds for Force Majeure.[94]

The debtor asserted that the governor's executive order restricting restaurants to delivery, drive-through, and pick-up services triggered the force majeure clause.[95]

Reasoning that, under Illinois law, performance will only be excused by a force majeure clause where the triggering event was in fact the proximate cause of the non-performance,[96] the court found that the governor's executive order "unambiguously" triggered the force majeure clause because it "hindered" the debtor's ability to perform under the lease.[97] The court found that the executive order was "unquestionably the proximate cause of Debtor's inability to pay rent, at least in part, because it prevented Debtor from operating normally and restricted its business to take-out, curbside pick-up, and delivery."[98] In response to an argument from the creditor that what debtor was really arguing was a lack of money, which the force majeure clause specifically stated was not grounds for force majeure, the court instead maintained that what debtor was arguing was that the executive order shutting down on premises consumption at Illinois restaurants was "the proximate cause of its inability to generate revenue and pay rent," and the court found that sufficient to trigger the force majeure clause, at least in part.[99] The court also rejected as wholly without support the creditor's argument that debtor could not enforce the force majeure clause because it could have, but did not, seek to borrow money to pay its rent.[100]

However, the court did not apply the force majeure clause to entirely excuse debtor's rent obligation. Instead, observing that the executive order still did permit debtor to sell food for off-premises consumption, and that the restaurant's kitchen (unlike the dining area and bar) could still be used under the executive order, the court found that the debtor still owed at least twenty-five percent of the monthly rent to the creditor, as the kitchen comprised about twenty-five percent of the restaurant's square footage.[101]

The Eastern District of Louisiana was also sympathetic to a tenant defaulting on its rental payments in *Richards Clearview, LLC v. Bed Bath & Beyond, Inc.*[102] In that case, the landlord of a Bed Bath & Beyond (BB&B)

94. *Id.* at 376–77.
95. *Id.* at 377.
96. *Id.* (citing N. Ill. Gas. Co. v. Energy Coop., Inc., 461 N.E.2d 1049, 1058 (Ill. App. Ct. 1984)).
97. *Id.* at 377.
98. *Id.* at 377–78.
99. *Id.* at 378.
100. *Id.*
101. *Id.* at 379.
102. Richards Clearview, LLC v. Bed Bath & Beyond, Inc., Civil Action No. 20-1709, 2020 WL 5229494 (E.D. La. Sept. 2, 2020).

store at a shopping mall in Louisiana sought to evict BB&B for failure to pay some of its rent for April 2020 and all of its rent for May 2020, during which time BB&B believed the lease's force majeure clause excused it from paying rent.[103] After receiving the landlord's notice of default on June 1, 2020, BB&B paid the back rent.[104]

On March 22, 2020, the Governor of Louisiana had issued an emergency proclamation, under which all malls were closed to the public, "except for stores in a mall that have a direct outdoor entrance and exits that provide essential services and products as provided by CISA guidelines."[105] Although BB&B had a direct outdoor entrance and sold several essential products, including soap, first aid equipment, and hand sanitizer, the store closed from March 23, 2020 until June 5, 2020, although starting May 1, 2020, the store did begin limited curbside pick-up services.[106] The court deemed this closure voluntary, as the emergency proclamation's terms allowed it to remain open, but that was not the end of the story.[107] In deciding the eviction application, the court observed that, due to provisions in the lease regarding the amount of rent due based on the vacancy of certain other stores in the mall, the parties had a genuine dispute regarding whether or not BB&B had failed to pay required rent.[108] In any event, the court found, even if BB&B had had a rent deficiency and had failed to cure it timely, Louisiana law required those facts be considered under the totality of circumstances at the time.[109] BB&B's potential late payment had come only eight days after the cure period expired.[110] The court ruled that this, coupled with processing issues caused in part by the landlord and a lack of demonstrable harm caused to landlord by the delay, could not justify evicting BB&B and closing down the store, resulting in 65 employees losing their jobs in an uncertain economy and the local community losing a store that it depended upon for essential needs during the pandemic.[111]

Courts have also begun to grapple with defenses in the COVID-19 context that litigants often raise in similar fact patterns to those raised in force majeure cases, including impossibility and frustration of purpose. In *Belk v. Le Chaperon Rouge Co.*,[112] plaintiffs in a Fair Labor Standards Act case moved to enforce a settlement agreement reach on the record after a

103. *Id.* at *1.
104. *Id.*
105. *Id.* at *4.
106. *Id.*
107. *Id.* at *6.
108. *Id.*
109. *Id.* at *7.
110. *Id.*
111. *Id.* at *8.
112. Belk v. Le Chaperon Rouge Co., Case No. Case No. 1:18cv1954, 2020 WL 3642880 (N.D. Ohio July 6, 2020).

mediation before a Magistrate Judge on March 12, 2020. The defendants ran multiple child care centers and a private elementary school.[113] On the same day that the parties put their settlement on the record, the Governor of Ohio ordered all kindergarten through twelfth grade schools to close for several weeks, and ordered all day care centers closed absent a temporary pandemic day care license.[114] Thirteen days after that, Ohio ordered all child day care centers to close for a period of time.[115] When the plaintiffs thereafter sought to finalize a written settlement agreement by the deadline to move for joint approval on April 10, 2020, the defendants stated that they could not meet the timeline due to the COVID-19 shutdown.[116] The plaintiffs thereafter moved to enforce the settlement, and the defendants argued, among other things, that the settlement was not enforceable due to impossibility of performance.[117] Even though day care centers had since been permitted to reopen, the defendants asserted that new regulations had "wreaked havoc" on their ability to pay the settlement.[118]

The court found that, under Ohio law, an inability to pay due to financial difficulty would not establish impossibility, since parties generally assumed the risk of their financial ability to perform when entering into a contract.[119] Moreover, impossibility of performance under Ohio law "occurs where, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties."[120] Mere difficulty or burden in performing is not enough; "[r]ather, the performance must be rendered impossible without fault of the party asserting the defense and where the difficulties could not have been reasonably foreseen."[121] In addition to finding that defendants did not establish that they could not fund the settlement payment, the court found that defendants had not demonstrated that their financial difficulties caused by COVID-19 could

113. *Id.* at *1.
114. *Id.* at *2 n.2.
115. *Id.* at *9.
116. *Id.* at *3.
117. *Id.* at *4.
118. *Id.* at *9.
119. *Id.* at *10; *see also* Lantino v. Clay LLC, 1:18-cv-12247 (SDA), 2020 WL 2239957, at *2 (S.D.N.Y. May 8, 2020) (finding that entry of consent judgment in Fair Labor Standards Act case could not be averted due to impossibility of performance based on defendants' claim that they could not fund the settlement as a result of the COVID-19 pandemic and governor's orders to close down certain businesses); Shin v. Yoon, Case No. 1:17-CV-01371-AWI-SKO, 2020 WL 6044086, at *6 (E.D. Cal. Oct. 13, 2020) (finding that, even if contract defenses were available to avoid obligations under stipulated judgment, defendants had not shown impossibility of performance, as even if COVID-19 had rendered defendants themselves unable to raise the funds to pay the settlement, defendants had not shown, as they must under California law, that COVID-19 had likewise rendered other persons unable to make payments in that same amount—that is, that performance was objectively, rather than subjectively, impossible).
120. *Belk*, 2020 WL 3642880, at *10.
121. *Id.*

not have been reasonably foreseen at the time of the March 12, 2020 settlement.[122] The defendants admitted that they were aware at the time of the settlement that the governor had ordered public schools to be closed, and that order "directly impacted" the defendants' own school.[123] The court found that that should have caused the defendants, "at the very least, . . . to consider the possibility that its child day care centers could also soon be negatively impacted by the COVID-19 pandemic as well."[124] The court further noted that, in light of the developments defendants knew about on March 12, 2020, they could have delayed the settlement proceedings, tried to include a force majeure clause in the settlement, or otherwise tried to provide for the risks posed by COVID-19 in the agreement's terms, but chose not to do so.[125]

A bankruptcy court in Manhattan also pointed to the parties' agreement at a time when they knew of the pandemic in declining to extend the closing date of a hotel purchase agreement due to frustration of purpose, failure of consideration, or impossibility.[126] In *In Re Condado Plaza Acquisition LLC*, the parties had entered into a purchase agreement for a hotel in Puerto Rico, signing the initial agreement on November 20, 2019, with the purchase initially set to close by December 31, 2019.[127] The parties later agreed to several extensions of that closing date, including a second amendment to the purchase agreement on March 5, 2020, extending the closing date to March 17, 2020.[128] On March 11, 2020, the Governor of Puerto Rico declared a state of emergency due to COVID-19, and on March 15, 2020, the governor issued an order requiring closure of all government operations not related to essential services.[129] The parties nevertheless entered into a third amendment to the purchase agreement on March 17, 2020, with recitals stating that in light of government actions in response to COVID-19, the closing would not occur on March 17, 2020, but would instead take place on the later of April 17, 2020 or the date that is five business days following the government permitting the operations of the Registry of Property, law firm offices and notary public in San Juan, Puerto Rico, but in no event later than July 31, 2020.[130] The parties also ratified all other terms of the purchase agreement.[131] As events developed and various offices reopened, a closing date was set for May 11, 2020, but

122. *Id.* at *10–11.
123. *Id.*
124. *Id.* at *11.
125. *Id.* at *11 n.7.
126. *In Re:* Condado Plaza Acquisition LLC, 620 B.R. 820 (Bankr. S.D.N.Y. 2020).
127. *Id.* at 825.
128. *Id.* at 830.
129. *Id.*
130. *Id.*at 831
131. *Id.*

the purchaser did not appear, apparently wishing for more time to determine whether it wanted to and could complete the purchase.[132]

The court refused, citing the agreement's time is of the essence provision, and also roundly rejected the purchaser's attempts to extend its time to perform by pointing to purported failure of consideration, commercial impracticability, and frustration of purpose. The court found none of those doctrines applicable to postpone the closing date.[133] To support frustration of purpose, the court found, the purchaser had to show that the reasons for performance ceased to exist due to an unforeseeable event which destroyed the reasons for performance—it was not enough to merely argue that the transaction would no longer be profitable for purchaser.[134] Moreover, the court was skeptical that the purchaser could show the effects of COVID-19 on the hotel's operations were unforeseeable, given the parties' reaffirmation of the purchase after the first shutdown orders issued, rendering both the frustration of purpose and impossibility arguments dubious.[135] In any event, the court found that neither these defenses, nor failure of consideration (which also did not apply, as the hotel, despite the shutdown, still retained some value) could be invoked to extend a time is of the essence closing date.[136]

As the longer-term effects of the COVID-19 pandemic continue to manifest in the commercial sector, the year ahead will doubtless see additional contract disputes related to its impacts, and defendants can be expected to continue to test the limits of force majeure, impossibility, and related defenses in an attempt to mitigate their liability for difficulties in performance.

132. *Id.* at 831, 837.
133. *Id.* at 839–40.
134. *Id.*
135. *Id.* at 840.
136. *Id.*