US Outlook: Novel Legal Challenges from the New Coronavirus

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Executive Summary

With the unfolding coronavirus (COVID-19) outbreak labelled as a pandemic, businesses, universities, and other institutions are presented with novel challenges. From a legal perspective, the evolving situation will likely implicate previously seldom-used contractual excuses in a variety of commercial contexts. Businesses will also have to consider potential tort liability as they seek to keep running, while providing for the safety of employees and patrons. Given the stakes, the novelty of the issues, and the fact that many decisions will entail losses by some party or constituency, litigation will undoubtedly stem from the unfolding crisis. A framework for considering some of the unfolding issues around contractual disruptions and potential tort liability may assist private sector leaders in making decisions during this epidemic that may later be the subject of litigation. This memorandum reviews the evolving landscape to provide guidance for navigating some of these difficult challenges.

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I. Introduction

On March 11, 2020, the World Health Organization declared COVID-19 a pandemic.[1] In just over 60 days since the first identified COVID-19—the disease caused by the novel coronavirus 2019 (also known as SARS-CoV-2)—case, there have been over 110,000 confirmed cases globally;[2] by contrast, the entire 2003 SARS outbreak caused about 9,000 illnesses.[3]

Early evidence suggests that COVID-19 will be especially challenging to contain for governments and public health officials. Compared with other viruses, such as the more familiar seasonal flu, COVID-19 appears to have a longer incubation period, during which time people may be contagious before presenting symptoms.[4] According to the WHO, the virus may persist on surfaces for a few hours or up to several days.[5] There is presently no available vaccine, and no evidence that humans have pre-existing natural antibodies to protect them.[6] Though an estimated 80% of patients

require no hospitalization, other people do experience more severe cases, especially among at-risk populations.[7]

In addition to the human toll, the 2003 SARS epidemic caused estimated economic losses of around $40 billion.[8] COVID-19 caused an estimated $50 billion decline in global exports in the month of February 2020 alone and experts are forecasting $1 trillion in losses, besides the trillions of dollars in value lost in stock markets.[9] The situation is rapidly evolving.[10] For instance, on February 11, JetBlue's president noted that the virus was not impacting its business "in any meaningful way" but that the company was "keeping a very close eye on it."[11] That turned out to be wise because within a couple weeks, JetBlue started to see demand for air travel deteriorate "worse than what we saw after 9/11."[12] U.S. stock markets have also seen volatility not seen since 9/11 or the 2008 financial crisis, and central banks moved quickly to cut interest rates.[13]

On March 10, 2020, the CDC issued new guidelines for employers and businesses – recommending proper hygiene, ventilation, reducing meetings and gatherings, and reconsidering travel.[14] The updated guidelines complement steps already taken by many in the private sector to combat the epidemic.[15] Businesses have quashed non-essential travel, cancelled events, encouraged employees to work from home, and taken other aggressive measures to prevent an outbreak in their workplaces.[16] These disparate benchmarks create challenges for institutions assessing the proper response to an evolving situation.[17]

Business leaders are facing challenges as contractual obligations are becoming more difficult, costly, or even impossible to perform.[18] Global supply chains have been disrupted as China, the global leader in manufacturing output, put at least 50 million people under a mandatory quarantine for more than a month.[19] Businesses may confront questions about moving forward with merger and acquisition activity.[20] The short term increase in demand as buyers stockpile goods has not helped alleviate the broader challenges to economic activity.[21] Market volatility has increased.[22] As market conditions worsen, institutions may face challenges accessing credit and investors may re-evaluate existing and prospective commitments.[23] Among other issues, the crisis is compromising the ability of parties to perform contracts, and has already spawned tort liability claims.[24]

II. Disruption to Commercial Contracts

The COVID-19 epidemic will likely present challenges for parties to binding contracts thrown into question by the global response to the outbreak. Some contracts may become prohibitively difficult to perform, while others may be rendered worthless to one party, at least for the time being. The allocation of losses caused by the challenges of performance will depend on the particular facts and circumstances, but parties would be wise to keep track of the doctrines of force majeure, frustration of purpose, and impossibility. And parties that have or will commit to merger and acquisition transactions need to also consider material adverse change provisions.

Force Majeure: "The purpose of a Force majeure clause is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties."[25] A sample force majeure clause might read:

> The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes (except those involving a party's employees or agents), civil disorder, curtailment of transportation facilities, or any

other emergency beyond the parties' control, making it impossible to perform their obligations under this Agreement. Either party may cancel this Agreement for any one or more of such reasons upon written notice to the other.[26]

Courts in the United States look at various elements when considering a claim of force majeure, always starting with the language of the contract.

1. **Does the contract contain an applicable force majeure clause?** There must be a contractual force majeure clause[27] that encompasses the claimed force majeure event. Force majeure clauses are construed narrowly[28] and only applied to the events listed on the face of the contract.[29] Catch-all language will only bring into the clause events of "the same character or class as the specific events mentioned."[30]

    - In a seminal New York case, the Court of Appeals refused to apply a force majeure clause to excuse the performance of a party that lost its contractually required insurance coverage and could not obtain insurance from any insurer.[31] The contract's force majeure clause had broad catch-all language but the court construed "other similar causes beyond the control of such party" as related to day-to-day operational concerns, which the court found did not include the ability to obtain sufficient liability insurance.[32]

    - In another defining case, a New York appellate court applied a force majeure clause that included "governmental prohibition" to excuse performance interrupted by a judicial restraining order. The court reasoned that a judicial order, though not specifically enumerated, fit into the category of governmental prohibition.[33]

2. **Was the force majeure foreseeable?** If there is an applicable force majeure clause but the epidemic is not listed, rather it is only captured through catch-all language, some courts may independently inquire whether the applicable event was truly an unforeseeable great force.[34]

3. **Was performance rendered impossible?** Performance will generally only be excused if the force majeure clause rendered performance impossible.[35] Courts may look into whether performance was attempted and failed before excusing performance for a force majeure, though this varies by jurisdiction and can usually be overcome by the language of the contract.[36] Courts will usually find that a government order prohibiting performance renders contractual performance impossible and therefore, excused.[37]

    - In an oft-cited decision, the United States Court of Appeals for the Second Circuit held that, although a foreign coast guard detained a ship en route and prevented shipment, the force majeure clause could not be invoked to excuse performance; the seller fulfilled its duty to ship the product and nothing made it impossible for the buyer to issue payment.[38]

    - The global financial crisis of 2008 made it impossible for a party to build a restaurant because it needed its limited funds to meet debt obligations. A New

York appeals court refused to excuse performance despite a broad force majeure clause, reasoning that "financial hardship" is not grounds for invoking force majeure.[39]

- The devastating effects of the notorious Spring 2015 avian flu outbreak on a poultry famer's operations did not suffice to cancel an order for no-longer-needed machinery. Although the farmer was no longer building the site for which the machine was ordered, the force majeure clause applied to the machine supplier's ability to perform, and no force majeure prevented the supplier from performing.[40]

- A radio manufacturer refused to ship radio parts to a Swedish supplier of the Islamic Republic of Iran after the United States government prohibited sales of military equipment to Iran. The parties' contract included a force majeure excuse for "governmental interference" but the supplier argued that the government did not force the manufacturer not to ship. The court ruled that the government order alone sufficed to trigger the force majeure – the government has the ability to compel compliance and for purposes of force majeure, there is no practical choice other than to obey.[41]

4. **Was it the force majeure that rendered performance impossible?** The occurrence of a force majeure and coincidental impossibility of performance are not enough to excuse performance; it must be the force majeure that renders performance impossible.[42]

   - A massive trade war between China and the United States in 2013 did not qualify as a force majeure despite massive price drops because the force majeure provision applied to "events that give rise to an actual, physical inability to perform, not those that only make performance inconvenient."[43] The court noted that fixed price contracts will not be vacated due to fluctuation in prices, otherwise such contracts may be rendered meaningless.[44]

5. **Have all contractual pre-requisites been met?** Parties should pay careful attention to the particular requirements of the contract. Some contracts require due diligence, notice, and/or seeking assurance before force majeure can be raised as an excuse.[45] Courts will not overlook these requirements.[46]

What if performance is rendered prohibitively difficult by the virus?

In some cases, a force majeure may be a sufficient excuse even where performance was not truly impossible but rendered prohibitively difficult. When 1989's Hurricane Hugo rendered oil facilities inoperative, a court excused an oil supplier's delay due to "post-hurricane congestion" in oil production and shipments. Although the supplier was able to provide some customers, it was impossible for it to immediately supply all its customers without some delay. This delay was excused under the force majeure clause.[47]

What can be done in anticipation of litigation over a force majeure clause?

Act in good faith and document the circumstances as best as possible. A duty to act in good faith is implied in every contract, though it does not override the express terms of the contract.[48] And helpful, contemporaneous documentation may make the difference in close cases. As government

actions, orders, and supply chain disruptions in response to the virus become increasingly severe,[49] contractual parties considering the applicability of a force majeure clause will want to carefully document the effects of these events on their ability to fulfill contractual obligations. Parties should pay particular attention to the effect of government interventions such as travel and import restrictions, as these are often the most compelling bases for invocation of a force majeure clause.[50]

Frustration of Purpose: Without an applicable contractual force majeure clause, a party may still be able to escape contractual obligations due to an epidemic when a "change in circumstances" makes performance of the contract "virtually worthless."[51] Litigating frustration of purpose involves two required inquiries.

1. Was there a mutually understood "basis of the contract" that "without it, the transaction would have made little sense."[52]

2. Was the basis of the contract fully and completely frustrated. Note, however, that the contract need not have been rendered impossible, just pointless to one party due to frustration of its purpose.

    - In the avian flu case, the court dismissed the force majeure claim as inapplicable because performance remained possible but it allowed the frustration of purpose claim to go forward. The court reasoned that a jury might find that both parties fully understood the purpose of the contract – to expand the egg production operations to meet new orders from large customers – and that the new equipment would be worthless due to cancellation of orders in the aftermath of the flu.[53]

What can be done in anticipation of frustration of purpose claims?

Consider whether there is a record to show that all contractual counterparts understood the factual basis that foregrounds the contract. If there is no record but there was a mutually understood purpose to the contract, who can testify to that and can a record still be built to evidence that purpose. Going forward, consider putting the contractual purpose upfront, on the face of the contract.

If a mutually understood purpose can be shown, parties should consider how they can show the effects of the novel coronavirus on that purpose. Is performance really rendered worthless and if so, who can testify to that, what documents show that, and are there circumstances that can be contemporaneously recorded to back up the claim.

Impossibility: Where there is no applicable force majeure clause and no mutually understood contractual purpose but contractual performance is rendered impossible, the excuse of impossibility may apply.[54] At least two elements must be present.

1. Performance of the contract must have been made impossible.[55]

2. The event causing impossibility must have been unforeseeable. If it was a foreseeable event that could have been negotiated around in the contract (e.g., in a force majeure clause), courts will be reluctant to excuse performance based on impossibility.[56]

In some cases, an impossibility defense may succeed where extreme external factors have rendered performance impossible within the realm of reason, even if not truly impossible.[57] The outcome of any future litigation may depend heavily on the specific facts developed.

Case Study: Hurricane Betsy and Hurricane Katrina

Contrasting the effects of the two most severe hurricanes to affect Louisiana in recent history, as one court did, provides a potentially relevant case analysis.[58]

The Category 4 Hurricane Betsy in 1965 has been recognized as "as one of the deadliest and costliest storms in United States history."[59] A homeowner whose house was completely flooded in Hurricane Betsy was not allowed to cancel a construction contract to expand the home executed just two weeks before the hurricane. The fact that the homeowner now needed the money for expansion to simply rebuild the house did not relate directly to the basis of the contract.[60] In another case, a contractor that could not find labor in the aftermath of Hurricane Betsy was not excused from performance.[61] Difficulty or expense in performing the contract did not make it impossible to perform.

Hurricane Katrina, which ravaged Louisiana in 2005, "was the costliest storm in U.S. history."[62] After Hurricane Katrina, a federal court considered the precedent from Hurricane Betsy but nevertheless allowed a landowner to move forward with a claim that "rising construction costs, physical and financial problems for the city of New Orleans resulting from Hurricanes Katrina and Rita made it impractical to proceed" with the construction of a parking lot.[63] Although these disruptions seemingly only related to profit and not possibility, the court considered the unprecedented and unpredictable devastation that the hurricane imposed on the area's business and infrastructure.[64]

What can parties do in anticipation of an impossibility defense?

These contrasting hurricane cases illustrate the potential that courts will consider the unprecedented effects of COVID-19 on the ability of some contractual parties to meet their obligations. It is possible that some courts will allow claims on the line between prohibitive and impossible to go forward. Businesses should actively document the specific effects of the outbreak on their contracts, business, and industry.

Material Adverse Change / Effect: Merger and acquisition agreements present a particular species of challenging performance, given the stakes involved. Some such agreements contain a so-called material adverse change or material adverse effect clause ("MAC" or "MAE") that allow a buyer to terminate the agreement in the event of a material adverse event. Courts presented with an applicable MAC clause (that does not exclude epidemics) will also inquire whether the supposedly material event was unknown at the time of contracting and "substantially threaten[s] the overall earnings potential of the target in a durationally-significant manner."[65]

Parties assessing whether a MAC has occurred should consider the following:

1. **Were the conditions underlying the MAC known at the time of contracting?** For contracts entered into after the start of the outbreak, the answer might be yes. That would hurt, but not necessarily destroy, a MAC claim, depending on the actual facts and circumstances of the case. In the seminal Delaware case of *Akorn v. Fresenius* which approved application of a MAC, the court acknowledged that the buyer may have known of risks with

the target's internal compliance and specifically contracted for the MAC to avoid taking on those risks.[66] The court terminated the deal nonetheless, respecting the parties' freedom to contract.[67] Going forward, the novel coronavirus should be specifically dealt with in negotiated MAC clauses – as some companies are already doing.[68]

2. **What are the long term implications of the MAC?** Buyers that seek to invoke the coronavirus as a MAC will have to prove that its effects are more than a "short-term hiccup."[69] While exceptions exist, as a rule-of-thumb, courts may uphold the application of MAC clauses after being presented with evidence of sustained drops in performance exceeding 40% year over year.[70] Courts are unlikely to be persuaded by cyclical fluctuations, but may be moved by such massive year-over-year downturns.[71] In the short run, analyst projections for long-term changes to earnings might be helpful evidence, though the judge in the seminal *IBP* case took such projections with a grain of salt.[72] In *IBP*, a 64% drop in earnings for a beef seller due to a harsh winter was not a sufficient MAC because earnings were expected to rebound.[73] In *Akorn*, by contrast, 50% plus drops in performance were sufficient because the evidence suggested the company would not rebound.[74]

3. **Does the novel coronavirus affect the target greater than its peers?** Courts frown upon the application of a MAC for industry-wide downward trends. The Delaware Court of Chancery has consistently "criticized buyers who agreed to acquisitions, only to have second thoughts after cyclical trends or industrywide effects negatively impacted their own businesses, and who then filed litigation in an effort to escape their agreements" based on a MAC.[75] Look for analyst predictions of a company-specific downturn markedly more significant than its peers.[76] An industry-wide downturn is not preclusive to the application of a MAC, but it cuts against the argument that the target experienced a true MAC.[77] In *IBP*, the court refused to adopt a rule that a MAC cannot be the result of an industry-wide event but ultimately rejected application of the MAC because a severe winter was just a cyclical event that affected the industry as a whole.[78] In *Akorn*, the court was presented with sustained 50+ percent drops in the target's performance and analyst projections that the target would continue to perform well below its peers due to company-specific internal compliance issues. This was sufficient for application of the MAC.[79]

4. **Is there a direct link from the MAC to the target's downturn?** Parties that believe they may need to litigate the applicability of a MAC should look carefully at the reasons for the downturn in performance at the target. Courts will seriously consider evidence that the downturn is for reasons unrelated to the MAC, or even lack of evidence that the downturn and the MAC are related.[80]

5. **Is a privately negotiated resolution possible?** Although this is not likely to play into the outcome of future litigation, courts are historically reticent to apply MAC clauses.[81] In June 2001, the Delaware Court of Chancery refused to terminate a merger despite a 62% drop in performance that was predicted by some to have lasting negative effects.[82] The court admitted to being "torn about the correct outcome."[83] But in October 2018, the Delaware court terminated a merger based on a MAC after hearing "overwhelming evidence of widespread regulatory violations and pervasive compliance problems" that were accompanied by a "downturn in performance" exceeding 50% year over year that "shows no sign of abating."[84] Given the uncertain and difficult landscape for enforcing a MAC in litigation, parties might

want to consider whether they can achieve an agreeable adjustment to the deal price in private negotiations based on the unexpected effects of the novel coronavirus.[85]

Ultimately, it may be premature to tell how long-lasting the effects of the COVID-19 epidemic will be. But if corporate earnings are depressed and analysts predict potential longer-term effects for certain companies and industries (e.g., cruise lines[86]), MAC clauses may become relevant.

III. Tort Liability

The extraordinary challenges presented by the spread of the novel coronavirus present potentially new responsibilities for private entities. Courts may later be asked to judge the actions of a person or entity alleged to have contributed to the spread of the virus.

Institutions may have more information than those within its care and some degree of control over their well-being. These factors may trigger a duty to warn and, sometimes, to take other reasonable measures to protect.[87] Law and precedent, however, do not always provide clear standards.

"Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk and the public interest in the proposed solution."[88] We consider a framework in the context of some of the difficult questions facing business leaders.

1. ***How should a business respond to a close encounter with the virus? For example, if an employee tests positive, how should the employer respond?***

<u>Issue a Broad Warning</u>

The employer should consider the full scope of its reach, and fully inform all those within any degree of its control. Entities should consider who they have the ability to control, who affected employees might have come into contact with, and how far the business's communication reaches for other purposes.

- In a 2013 case, the Long Island Railroad was held liable to a cashier where it knew that its employees were carrying asbestos on their clothing into the diner where he worked. Although the LIRR did not own the diner, the court found that it exercised control over the diner because it dictated the diner's operating hours through a term in the diner's lease. This control sufficed to trigger a duty to warn.[89]

The warning should include all information known to the employer. Although risks might be minimal, the reported risk of death should be factored into the duty to warn.[90]

- In the summer of 2007, a minor student at the Hotchkiss School was bitten by a tick, contracted tick-born encephalitis and suffered permanent brain damage on a school trip to China. The court noted that the school had a duty to "minimize identifiable risks," though that duty did not extend to "risks that are so 'novel or extraordinary.'" However, the court also considered that the school was a boarding school, with potentially greater responsibility for the students within its care. The "gravity of the harm" was another factor the jury was allowed to include in assessing the school's duty. Because the harm from the tick bite was potentially grave – contracting tick-born encephalitis which could lead to permanent brain damage – the jury was allowed

to find a duty despite the highly unlikely occurrence. The school was found to have known about the risk and held responsible for failing to adequately warn.[91]

Take Additional Reasonable Protective Measures

The employer should also consider its degree of control over its employees. If the employees cannot avoid potentially affected places, a simple warning will not be sufficient – the employer has a duty to provide a safe workplace.[92]

- A duty to remedy was applied to the operator of a private prison when prisoners alleged that it "unreasonably failed to undertake actions to reduce the inmates' risk of infection" from valley fever.[93]

Take proper infection-control measures to ensure that potentially infected areas and people do not infect others. Once an employer obtains concrete information that a workplace may be infected, a duty to remedy that condition likely applies.[94] This may include thoroughly disinfecting premises and asking potentially-affected employees to self-quarantine.

- Claims that an employer failed to adequately protect employees against risks from asbestos dust have regularly been allowed to proceed to trial.[95] In one case, despite evidence that environmental testing was done at the World Trade Center site and that workers were provided protective masks, a worker's claim that his mask was not sufficient to protect against "high alkaline" dust was allowed to proceed to trial.[96]

- During the 2014 Ebola outbreak, a nurse cared for a patient in a Dallas, Texas hospital, left the hospital and travelled to Akron, Ohio where she visited a bridal shop, and then returned to Dallas where she fell ill with Ebola. Ohio health authorities ordered the bridal shop to close causing the shop owner to lose money. The shop owner has since been allowed to sue the Dallas hospital (thousands of miles away) to recover based on the hospital's failure to implement adequate infection-control procedures.[97]

- Federal courts allowed a lawsuit to proceed against the United States Bureau of Prisons for failing to adequately remedy conditions conducive to an outbreak of valley fever. Warnings alone were insufficient because the prisoners could not simply avoid the prison grounds.[98]

Alert authorities and follow official guidance.[99]

- In the case of a prison with a valley fever epidemic, a court noted that the prison acted "consistent with its duty" when it "began to work with the CDC to develop a policy for the prevention and treatment of cocci in prisoners."[100]

Consider how peers are responding. Many organizations have taken steps beyond those recommended by health authorities – stemming travel, closing offices, and cancelling events.[101] In future litigation, plaintiffs will likely be allowed to present these measure as evidence of proper conduct.[102] It may be left up to a jury to decide what the proper standard of care was in light of all the evidence.

- In the case of the student bitten by a tick on a school trip, the school should have warned of the risk even though the CDC knew of no prior incidents of illness like that suffered by the student. The court considered independent expert testimony as well as evidence from the British health service, in addition to CDC guidance.[103]

2. ***What advice should a business follow absent any known contacts with the virus? For example, if an employer is not aware of any specific contacts with the virus, should it be doing anything?***

Stay Informed

First, keep informed. Liability usually does not attach for failure to protect from unknown risks,[104] but employers especially should be vigilant to potential dangers.[105] Employers should have a person responsible for keeping informed of the geographical spread of the epidemic and employees should know how to report suspected contact with the virus.

- When the renter of a vacation home in California was bitten by a poisonous brown recluse spider, the landlord was cleared of liability because he had no reason to believe that type of spider was even prevalent in the area.[106]

- Another California court refused to hold a homeowner responsible for a guest that was bitten by a tick, reasoning that the homeowner had no advance warning that his dog was carrying the potentially dangerous tick.[107]

- A restaurant was held liable for a patron's spider bite because black widow spiders were a known geographical risk and the owner failed to take adequate protective measures.[108]

Alert employees. Employers should alert employees to the general risks of the novel coronavirus and inform employees of steps they can take to stay safe, such as washing hands regularly.[109]

- Sweeny, Texas has been called "the mosquito capital of the world." A rail worker in Sweeny was warned by his employer about the risks of West Nile virus and proper preventive measures, such as wearing mosquito repellant. The employer did not provide repellant, did not mitigate puddles of standing water, mow grass, or fix the worker's rail car to prevent the entry of mosquitos. The Texas Supreme Court refused to hold the employer responsible for the known and uncontrollable naturally-occurring risk.[110]

Take Reasonable Preventive Measures

Maintain a safe workplace. Employers should also stay ahead of the virus by avoiding the presence of the virus in workplaces and mitigating any conditions conducive to infection. This might mean cancelling non-essential travel, especially to affected areas,[111] and providing sick employees with the means to stay away from the workplace.[112] These measures will help avoid liability.

- A golf course was held liable for a bee sting because its gopher holes created a condition conducive to yellow jacket nests.[113]

- In the case of a rail worker in Sweeny, Texas infected with West Nile virus by a mosquito, the court noted that the employer might have had a responsibility to mitigate the condition if the mosquitos were found in a building as opposed to natural land, or if they posed an unreasonable risk that employees could not realize or guard against.[114]

Clean and disinfect. Possibly the most important thing an employer can do to protect employees and avoid liability is to keep the workplace free of SARS-CoV-2 spores. If the spores that cause COVID-19 are not present in the workplace, employees will be safer and courts will be reticent to impose liability.

- When a plaintiff claimed that she caught valley fever from spores in a mound of dirt placed adjacent to her home, the court dismissed the case because she failed to prove that the mound contained the bacterial spores that cause the fever.[115]

- A defendant whose soil samples tested positive for the infectious spores that cause valley fever was held responsible for a neighbor's infection.[116]

- A New York court dismissed the claims of a school employee who claimed that unsanitary conditions at the school led to the presence of a fungal pathogen which gave him an eye infection. Without specific evidence that the fungus existed at the school, the school's general awareness of unsanitary conditions was insufficient to impose liability.[117]

- A New York court dismissed the claims of a teacher that horrid conditions at a school ("rodents, rodent carcasses, rodent droppings, cobwebs, cockroaches, cockroach and other bug carcasses, mildew, thick-black dust, and excessive dirt[,] numerous ceiling tiles were water-damaged and broken; there was mold on the ceiling tiles by the vents, mold on the walls, and mold in the closets") caused her allergies and asthma, because her expert witness did not present sufficient evidence that the levels of exposure at the school reached the thresholds necessary to cause injury.[118]

- A worker kneeled down in the basement of the "Hypochlorite Building of the Jamaica Wastewater Treatment Plant" in New York, noticed a strange dust and smell, and then almost immediately developed flu-like symptoms and shortly thereafter discovered a sore on his leg. His claim that the hypochlorite chemicals used at the plant caused his injuries were thrown out when the plant asserted that there was no hypochlorite present in the basement area, and the worker failed to rebut that evidence.[119]

- However, in some workers' compensation cases at least, courts have upheld decisions imposing liability on an employer for an infection based on expert testimony ruling out other possible sources of the worker's infection. For example, an emergency room technician that contracted Hepatitis C was awarded damages against her employer based on expert testimony that the hospital was the only plausible source of the worker's infection.[120] Similarly, a sanitation worker (whose route included hospitals) contracted Hepatitis B from an unknown source but the court allowed an award against his employer after an expert testified that his employment was the only plausible source for his infection.[121]

3. *How should a business think about guests? For example, should retailers close stores?*

At this point, the risks presented by the novel coronavirus are generally known due to extensive media coverage.[122] Experts have cautioned that the risk remains low[123] and governments have encouraged businesses to stay open unless advised otherwise.[124] However, this is a rapidly evolving situation.[125]

Stay Informed

Retailers should stay informed about the spread of the virus by following government reports, any potential contacts of the virus with its store locations and employees, and any other reason to believe its customers are at any greater risk of being infected at its stores.[126] For example, retailers that serve especially prone populations (e.g., businesses that service the elderly and sick) should consider developing additional measures to protect their customers – perhaps adding delivery options or curbside pickup and extending return periods so that customers can avoid unnecessary trips during flu season.[127]

Take Reasonable Preventive Measures

Take steps to disinfect premises. If the virus is not present in a store, it is difficult to blame the retailer for spread of the virus.

- A court dismissed claims that an uncovered mound of dirt spread the valley fever and noted: "Valley Fever spreads much like other naturally occurring illnesses. One can have suspicions, but without scientific data tracing the source, one cannot be sure who infected him or her with a head cold or stomach flu."[128]

Take steps to protect customers. Given the known geographical risks of coronavirus, stores might want to consider additional measures to prevent spread of the virus in their store locations.

- A restaurant in California was held liable for a black widow spider bite because black widow spiders were found to a be a known geographical risk and the restaurant failed to protect its patrons.[129]

- A claim by an infected patient that a "hospital negligently allowed its premises to become 'infested and infected'" with Legionnaire's Pneumonia Virus was allowed to proceed.[130]

- When a Cornell University student took his life by jumping off a bridge, a court found the city might be held liable due to the apparent failure of its bridge redesign to stem the foreseeable tragedy. Cornell University, by contrast, was released from the suit because it had no relevant control over the bridge or contact with the student's death.[131]

The recommendations of official agencies and the **actions of competitors** should also be considered in shaping the proper response to the evolving epidemic. Official guidelines now dictate enhanced hygiene protocols such as no-contact greetings, cleaning hands at the door, increased use of non-cash payment methods, increased ventilation, regular disinfecting, and taking measures to stagger customer flow.[132] Businesses should also pay close attention to the actions of their peers. Consider posting informational signs and hand sanitizer, train employees on recognizing and responding to signs of illness in customers, mandate that

employees regularly wash their hands, and re-train employees to avoid close contact with customers.

Are there any other considerations that might affect litigation?

Against this backdrop of potential liability, we would expect that any wave of tort litigation around the novel coronavirus will also prompt courts to consider public policy. In New York, for example, "the concern for potentially unbounded liability of certain defendants" is a factor that might "lead courts to declare that no legal duty exists."[133] Still, a widow and orphans seeking remuneration for a spouse and parent that fell victim to the novel coronavirus are sympathetic plaintiffs with a potentially viable case. Business leaders should take every reasonable step within their power to help stem and avoid exacerbating the unfolding outbreak.

IV. Conclusion

These are only some of the myriad of potential legal issues posed by the spread of the novel coronavirus. If you have any questions about the issues addressed in this memorandum or otherwise, please do not hesitate to reach out to us.

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[1] World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020* (March 11, 2020) *available at* WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020 ("We have [] made the assessment that COVID-19 can be characterized as a pandemic.").

[2] World Health Organization, *Coronavirus disease 2019 (COVID-19): Situation Report – 50* (March 10, 2020) *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200310-sitrep-50-covid-19.pdf?sfvrsn=55e904fb_2.

[3] CDC, *SARS Basics Fact Sheet*, https://www.cdc.gov/sars/about/fs-sars.html.

[4] Leah Roth, *Is the Coronavirus Worse Than the Flu? Here's How the 2 Illnesses Compare*, Health.com (Feb. 26, 2020) *available at* https://www.health.com/condition/infectious-diseases/coronavirus-worse-than-flu.

[5] World Health Organization, *Q&A on coronaviruses (COVID-19)* (March 2, 2020) *available at* https://www.who.int/news-room/q-a-detail/q-a-coronaviruses.

[6] *See id.*; Emily Landon, *COVID-19: What we know so far about the 2019 novel coronavirus* (March 6, 2020) *available at* https://www.uchicagomedicine.org/forefront/prevention-and-screening-articles/wuhan-coronavirus.

[7] *Id.*

[8] NCBI, *Learning from SARS: Preparing for the Next Disease Outbreak: Workshop Summary,* https://www.ncbi.nlm.nih.gov/books/NBK92486; John Scott, *The economic, geopolitical and health consequences of COVID-19*, World Economic Forum (March 6, 2020) *available at* https://www.weforum.org/agenda/2020/03/the-economic-geopolitical-and-health-consequences-of-covid-19 (estimating $50 billion in losses).

[9] UN News, Coronavirus update: COVID-19 likely to cost economy $1 trillion during 2020, says UN trade agency (March 9, 2020) *available at* https://news.un.org/en/story/2020/03/1059011https://news.un.org/en/story/2020/03/1058601; UN News, *Coronavirus COVID-19 wipes $50 billion off global exports in February alone, as IMF pledges support for vulnerable nations* (March 4, 2020); Maggie Fitzgerald, *Global stock markets have lost $6 trillion in value in six days*, CNBC (Feb. 28, 2020) *available at* https://www.cnbc.com/2020/02/28/global-stock-markets-have-lost-6-trillion-in-value-in-six-days.html.

[10] *See* C-Span, *Coronavirus Task Force Briefing* (March 9, 2020) *available at* https://www.c-span.org/video/?470172-1/coronavirus-task-force-briefing (Dr. Fauci, Director of the National Institute of Allergy and Infectious Diseases, about whether campaign rallies should be cancelled: "This is an evolving thing, so not sure what we're going to be able to say at the time you have a campaign rally."); CDC, *Coronavirus Disease 2019 (COVID-19) Situation Summary* (March 9, 2020) *available at* https://www.cdc.gov/coronavirus/2019-ncov/summary.html ("This is an emerging, rapidly evolving situation.").

[11] CNBC, *JetBlue president: Coronavirus is not impacting us 'in any meaningful way'*, Squawk Box (Feb. 11, 2020) *available at* https://www.cnbc.com/video/2020/02/11/jetblue-ceo-airline-industry-coronavirus-squawk-box-interview.html.

[12] Seeking Alpha, *JetBlue Airways Corporation (JBLU) Management Presents at J.P. Morgan 2020 Industrials Conference (Transcript)* (March 10, 2020) *available at* https://seekingalpha.com/article/4330947-jetblue-airways-corporation-jblu-management-presents-j-p-morgan-2020-industrials-conference?part=single ("Over the last couple of weeks, the demand environment has deteriorated significantly. In fact, when I look at how the demand has deteriorated last couple of weeks, it appears to be worse than what we saw after 9/11."). JetBlue updated their guidance accordingly. *See id.* ("Given the uncertainty of the impact, the speed of events and the dynamic nature of what's going on, JetBlue has withdrawn the first quarter and full year 2020 guidance.").

[13] Paul Vigna, et al., *Stocks Fall More Than 7% in Dow's Worst Day Since 2008*, The Wall Street Journal (March 9, 2020) *available at* https://www.wsj.com/articles/asian-stock-markets-in-early-monday-sell-off-after-saudi-arabias-decision-to-cut-most-of-its-oil-prices-11583713399**;** Rosamond Hutt, *The Economic Effects of COVID-19 Around the World*, World Economic Forum (March 9, 2020) *available at* https://www.weforum.org/agenda/2020/02/coronavirus-economic-effects-global-economy-trade-travel (detailing effects of outbreak and forecasting $113 billion in lost airline revenue and billions in lost tourism revenue); John Scott, *The economic, geopolitical and health consequences of COVID-19*, World Economic Forum (March 6, 2020) *available at* https://www.weforum.org/agenda/2020/03/the-economic-geopolitical-and-health-consequences-of-covid-19 (estimating $50 billion in losses); Nick Timiraos, *Fed Turns to Crisis-Era Playbook to Combat Market Disruptions*, The Wall Street Journal (March 9, 2020) *available at* https://www.wsj.com/articles/fed-increases-short-term-funding-to-keep-lending-markets-stable-11583756069 (describing additional measures taken by the Federal Reserve "to ease strains on the plumbing of the financial system from investors' reactions to the novel coronavirus").

[14] *See* CDC, *Keeping the Workplace Safe* (March 10, 2020) *available at* coronavirus.gov.

[15] *See* C-Span, *Coronavirus Task Force Briefing* (March 9, 2020) *available at* https://www.c-span.org/video/?470172-1/coronavirus-task-force-briefing ("Individual entities . . . cancelling activities, that are not coming from a direct recommendation from the federal government . . . what they are probably acting on is what they would consider . . . an abundance of caution . . . . I would not criticize them for that. They are using their own individual judgment.").

[16] *See, e.g.*, Mike Isaac, et al.*, Workplace vs. Coronavirus: 'No One Has a Playbook for This'*, N.Y. Times (March 6, 2020) *available at* https://www.nytimes.com/2020/03/05/business/coronavirus-offices-covid-19.html; Andrew Hill and Emma Jacobs, *Coronavirus may create lasting workplace change*, Financial Times (Feb. 28, 2020) *available at* https://www.ft.com/content/5801a710-597c-11ea-abe5-8e03987b7b20; Jennifer Elias, *Google tells more than 100,000 North American employees to stay home amid coronavirus fears*, CNBC (March 10, 2020) *available at* https://www.cnbc.com/2020/03/10/google-tells-all-north-american-employees-to-stay-home.html; Isobel Hamilton, *Google, Facebook, Amazon, Microsoft, and Twitter ask employees to stay away from Silicon Valley and Seattle HQs as they hunker down against coronavirus*, Business Insider (March 6, 2020) *available at* https://www.businessinsider.com/facebook-google-amazon-twitter-microsoft-headquarters-close-coronavirus-2020-3.

[17] *See supra*, n.10.

[18] *See* Huileng Tan*, China invokes 'force majeure' to protect businesses — but the companies may be in for a 'rude awakening'*, CNBC (March 6, 2020); *see also* OECD, *Global economy faces gravest threat since the crisis as coronavirus spreads* (Feb. 3, 2020) *available at* http://www.oecd.org/economy/global-economy-faces-gravest-threat-since-the-crisis-as-coronavirus-spreads.htm.

[19] United States Department of State, China Travel Advisory (February 2, 2020) *available at* https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/china-travel-advisory.html; Health Alert – U.S. Embassy Beijing, People's Republic of China (March 4, 4040) *available at* https://china.usembassy-china.org.cn/health-alert-u-s-embassy-beijing-peoples-republic-of-china; Kai Kupferschmidt and Jon Cohen, *Can China's COVID-19 strategy work elsewhere?*, Science Magazine (March 6, 2020) *available at* https://science.sciencemag.org/content/367/6482/1061.

[20] Luisa Beltran, *Coronavirus Is Slamming Stocks. The Jury Is Still Out on M&A Activity*, Barron's (Feb. 27, 2020) *available at* https://www.barrons.com/articles/coronavirus-economy-mergers-acquisitions-m-a-activity-isnt-clear-51582817772.

[21] *See* The Wall Street Journal, *Latest on Coronavirus* (March 7, 2020) *available at* https://www.wsj.com/livecoverage/coronavirus?mod=article_inline ("Companies are increasing production to keep up with demand for nonwoven polypropylene" but "[t]he fast spread of the virus has suppressed business activity and trade, rattling markets.").

[22] *See* Lara He, et al., *US stocks halted after falling 7%. Global stocks plunge as oil crashes and coronavirus fear spreads*, CNN International (March 9, 2020) *available at* cnn.com/2020/03/08/investing/stock-dow-futures-coronavirus/index.html; Anna Isaac, *Investors Brace For Tough Week*, The Wall Street Journal (March 8, 2020) *available at* https://www.wsj.com/livecoverage/coronavirus?mod=article_inline.

[23] *See, e.g.*, Julia-Ambra Verlaine, Coronavirus Strains Short-Term Lending, The Wall Street Journal (March 8, 2020) *available at* https://www.wsj.com/livecoverage/coronavirus?mod=article_inline.

[24] *See, e.g.*, Complaint, *Weissberger v. Princess Cruise Lines*, No. 20-cv-2267 Dkt. 1 (C.D. Cal. March 9, 2020) (couple sued cruise lines for emotional distress suffered after allegedly negligent screening procedures led to a COVID-19 outbreak onboard).

[25] *United Equities Co. v. First Nat. City Bank*, 383 N.Y.S.2d 6, 9 (1976) *aff'd*, 363 N.E.2d 1385 (N.Y. 1977).
[26] Richard A. Lord, 30 *Williston on Contracts* § 77:31 Force Majeure clauses (4th ed. 2019).
[27] Many contracts, especially contracts for supply, contain force majeure provisions that excuse a party's performance if performance becomes impossible due to a listed event – usually extreme circumstances completely outside the control of either party such as floods, wars, and sometimes, epidemics. *Corestar Int'l v. LPB Commc'ns*, 513 F. Supp. 2d 107, 120, n.8 (D.N.J. 2007) ("*Force majeure* is, 'An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).'").
[28] *See, e.g.*, *Kyocera Corp. v. Hemlock Semiconductor*, 886 N.W.2d 445, 453 (Mich. Ct. App. 2015) ("construing the force-majeure clause narrowly, as we must").
[29] *See Wisconsin Elec. Power Co. v. Union Pac. R. Co.*, 557 F.3d 504, 507 (7th Cir. 2009) (Posner, J.) ("a force majeure clause must always be interpreted in accordance with its language and context, like any other provision in a written contract, rather than with reference to its name"); *Mitsubishi Int'l Corp. v. Interstate Chem. Corp.*, No. 08-cv-194, 2008 WL 2139137, at *3 (S.D.N.Y. May 20, 2008) ("[O]rdinarily, only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused.").
[30] *See* Glen Banks, *New York Practice Series – New York Contract Law* § 20:14 (Westlaw 2019) (collecting citations) *available on Westlaw at* 28A N.Y. Prac., Contract Law § 20:14.
[31] *Kel Kim Corp. v. Cent. Markets, Inc.*, 519 N.E.2d 295, 295-96 (N.Y. 1987).
[32] *Id.* at 297 ("The recited events pertain to a party's ability to conduct day-to-day commercial operations on the premises. While Kel Kim urges that the same may be said of a failure to procure and maintain insurance, such an event is materially different.").
[33] *Duane Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8, 9 (App. Div. 1st Dep't 2009) ("Certainly, a judicial TRO falls within the meaning of the term 'governmental prohibition.'").
[34] *Watson Labs. v. Rhone-Poulenc Rorer*, 178 F. Supp. 2d 1099, 1111–14 (C.D. Cal. 2001) (summarizing state of the law where some courts require foreseeability and others do not and applying a foreseeability requirement where parties relied on the boilerplate language of "regulatory, governmental ... action" rather than a specifically listed contractual event). *See also TEC Olmos v. ConocoPhillips Co.*, 555 S.W.3d 176, 183–84 (Tex. App. 2018) (concluding that a foreseeability requirement attaches to force majeure events not specifically enumerated in the force majeure clause); *but see Perlman v. Pioneer Ltd.*, 918 F.2d 1244, 1248 (5th Cir. 1990) ("Because the clause labelled 'force majeure' in the Lease does not mandate that the force majeure event be unforeseeable or beyond the control of Perlman before performance is excused, the district court erred when it supplied those terms as a rule of law."); *Sabine Corp. v. ONG W., Inc.*, 725 F. Supp. 1157, 1170 (W.D. Okla. 1989) ("Plaintiff's argument that an event of force majeure must be unforeseeable must be rejected. Nowhere does the force majeure clause specify that an event or cause must be a unforeseeable to be a force majeure event.").
[35] *See Hemlock Semicondutor Corp. v. Kyocera Corp.*, No. 15-CV-11236, 2016 WL 67596, at *7 (E.D. Mich. Jan. 6, 2016) (collecting cases where "courts have refused to apply contractual force majeure clauses where 'governmental action affects the profitability of a contract, but does not preclude a party's performance.'"); *Great Lakes Gas Transmission Ltd. v. Essar Steel Minnesota*, 871 F. Supp. 2d 843, 852 (D. Minn. 2012) ("Michigan courts have recognized that a force majeure clause relieves a party from termination of the agreement 'due to circumstances beyond its control that would make performance untenable or impossible.'").
[36] *See, e.g.*, *Route 6 Outparcels v. Ruby Tuesday*, 931 N.Y.S.2d 436, 437 (App. Div. 3d Dep't 2011) ("In order to use a force majeure clause as an excuse for non-performance [under Pennsylvania law], the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party [and] the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse."); *Great Lakes Gas Transmission Ltd. v. Essar Steel Minnesota*, 871 F. Supp. 2d 843, 852 (D. Minn. 2012) ("[A] force majeure clause may not be invoked to excuse performance where the delaying condition was caused by the party invoking it or could have been prevented by the exercise of prudence, diligence, and care."); *but see Sun Operating Ltd. v. Holt*, 984 S.W.2d 277, 284 (Tex. App. 1998) ("[T]he court erred in instructing that they had to use due diligence to avoid, remove, and overcome the effects of force majeure. Such was not intended by the parties, given the language in their agreement.").
[37] *See, e.g.*, *Harriscom Svenska v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993) (holding force majeure clause which included "governmental interference" excused performance when the government forbade shipping orders to Iran).
[38] *Phillips Puerto Rico Core v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985) ("[T]he non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted force majeure.").
[39] *Route 6 Outparcels v. Ruby Tuesday*, 931 N.Y.S.2d 436, 438 (App. Div. 3d Dep't 2011) ("Defendant made a calculated choice to allocate funds to the payment of its debts rather than to perform under the subject lease. Economic factors are an inherent part of all sophisticated business transactions and, as such, while not predictable, are never completely

unforeseeable; indeed, 'financial hardship is not grounds for avoiding performance under a contract.'"); *but see In re Old Carco*, 452 B.R. 100, 119–20 (Bankr. S.D.N.Y. 2011) (excusing performance after 2008 financial crisis under force majeure clause that explicitly included "change to economic conditions" as a force majeure).

[40] *Rembrandt Enterprises v. Dahmes Stainless*, No. 15-cv-4248, 2017 WL 3929308, at *2, *12 (N.D. Iowa Sept. 7, 2017) ("In the spring of 2015, an epidemic of Avian Flu hit the Midwestern United States. The outbreak was notorious and engendered a large amount of media coverage and government intervention;" the flu devastated a poultry farmer's egg production operations and he was forced to shutter plans to build a new location; farmer sought to cancel its order of a commercial dryer for that cancelled location, as a result of the purported force majeure; the court refused, reasoning that the effects of the avian flu did not affect the ability of the supplier to build and deliver the dryer).

[41] *Harriscom Svenska v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993) ("[F]or RF Systems to have failed to comply would have been unusually foolhardy and recalcitrant, for the government had undoubted power to compel compliance.").

[42] *See, e.g.*, *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 453-55 (3d Cir. 1983) ("For force majeure events to excuse nonperformance, some correlation must be drawn between the occurrence of an event and the obligation of the nonperforming party."); *In re Old Carco*, 452 B.R. 100, 119–20 (Bankr. S.D.N.Y. 2011) ("[T]he 'change to economic conditions' clause will only excuse Old Carco's breach under that agreement if [] the Plant closing was caused by a change in economic conditions.").

[43] *Hemlock Semicondutor Corp. v. Kyocera Corp.*, No. 15-cv-11236, 2016 WL 67596, at *2, *7 (E.D. Mich. Jan. 6, 2016) (the Chinese government interfered in the global solar panels market with subsidies and product dumping, the United States government responded with massive tariffs and triggered a trade war that tanked the market price for solar panels; plaintiff sought to cancel its solar panels supply contract due to this purported force majeure).

[44] *Id.* at *7 ("[I]f fixed-price contracts can be avoided due to fluctuations in price, then the entire purpose of fixed-price contracts, which is to protect both the buyer and the seller from the risks of the market, is defeated.").

[45] *See PT Kaltim Prima Coal v. AES Barbers Point*, 180 F. Supp. 2d 475, 482 (S.D.N.Y. 2001) ("Parties may agree, however, that a force majeure event will have a different result, such as broadening or narrowing excuses of performance and attaching conditions to the exercise and effects of a force majeure clause. [] The Fuel Supply Agreement attaches such conditions, providing, for example, [] that the declarant is required to notify affected parties within five business days of the probable impact of the event of force majeure, and to take steps to minimize the effects of force majeure on the other party.").

[46] *E.g.*, *Sabine Corp. v. ONG W.*, 725 F. Supp. 1157, 1168 (W.D. Okla. 1989) (notice requirement not met); *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 453-55 (3d Cir. 1983) (due diligence requirement not met); *but see Ergon-W. Virginia v. Dynegy Mktg. & Trade*, 706 F.3d 419, 426 (5th Cir. 2013) (no due diligence requirement added into the contract for gas customer that did not attempt to purchase alternate supplies of gas rather than invoke force majeure).

[47] *Toyomenka Pac. Petroleum v. Hess Oil Virgin Is. Corp.*, 771 F. Supp. 63, 66-67 (S.D.N.Y. 1991) (holding that although some of the hurricane damage was restored in time to fulfill the contract, the "post-hurricane congestion" was part of the effects of the force majeure and justified a relatively short delay in fulfilling the contract).

[48] *PT Kaltim Prima Coal v. AES Barbers Point*, 180 F. Supp. 2d 475, 483 (S.D.N.Y. 2001) ("The duty of good faith and fair dealing does not change the analysis. A duty of good faith and fair dealing inheres in every contract, and affects how the terms and conditions of the contract, and the rights and obligations of the parties, are to be understood."); *InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int'l*, 719 F.2d 992, 1000 (9th Cir. 1983) ("California courts have read into force majeure clauses an implied covenant of good faith.").

[49] *See* Congressional Research Service, *COVID-19: Global Implications and Responses* (March 5, 2020) *available at* https://crsreports.congress.gov/product/pdf/IF/IF11421.

[50] *See, e.g.*, *supra* n.33 and 41 and accompanying text.

[51] *PPF Safeguard v. BCR Safeguard Holding,* 924 N.Y.S.2d 391 (App. Div. 1st Dep't 2011) (citing Restatement (Second) of Contracts § 265).

[52] *Id.*

[53] *Rembrandt Enterprises v. Dahmes Stainless*, No. 15-cv-4248, 2017 WL 3929308, at *9 (N.D. Iowa Sept. 7, 2017). The fact that major customers cancelled orders was valid evidence, but not dispositive. *Id.* The frustration of purpose defense ultimately failed at trial. *See id.*, Dkt. 148 at 2 (8th Cir. Feb. 15, 2019).

[54] The Uniform Commercial Code (adopted in large part as law by most states) provides an excuse for non-performance of contract where performance "has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made." U.C.C. § 2-615. Some states have different or additional impossibility and/or impracticability laws. *See, e.g.*, *Elavon, Inc. v. Wachovia Bank*, 841 F. Supp. 2d 1298, 1306-1307 (N.D. Ga. 2011) ("Georgia law states: "If performance of the terms of a contract becomes impossible as a result of an act of God, such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor." *and* "Georgia law states that a party has not breached a contract by non-

performance 'if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made.'").
[55] *See, e.g.*, U.C.C. § 2-615.
[56] *See, e.g.*, U.C.C. § 6-215 comment 8 ("[T]he exemptions of this section do not apply when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms."); *Kel Kim Corp. v. Cent. Markets*, 519 N.E.2d 295, 296 (N.Y. 1987) ("[I]mpossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."); *InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992, 999 (9th Cir. 1983) ("Section 2–615 [Impossibility] applies only when the events that made the performance of the contract impracticable were unforeseen at the time the contract was executed. [] The extensive negotiations over the force majeure clause, discussed above, indicate that the parties not only foresaw the risk that Oxy Crude would default but also bargained over which party would bear the loss in that event.").
[57] *See Int'l Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879, 886 (10th Cir. 1985) ("Although earlier cases required that performance be physically impossible before the promisor would be excused, strict impossibility is no longer required.").
[58] See Citadel Builders v. Transcon Realty Inv'rs, No. 06-cv-7719, 2007 WL 1805666, at *4 (E.D. La. June 22, 2007). *See also* Mark Schleifstein, *54 years later, Hurricane Betsy has been promoted to a Category 4 storm*, (Dec. 12, 2019) *available at* https://www.nola.com/news/environment/article_d3ce368a-1d34-11ea-806f-bf2b8becfeff.html.
[59] *Hurricanes: Science and Society*, http://www.hurricanescience.org/history/storms/1960s/betsy/; Eric S. Blake, et al., *NOAA Technical Memorandum NWS NHC-6: The Deadliest, Costliest, And Most Intense United States Tropical Cyclones From 1851 To 2010 (And Other Frequently Requested Hurricane Facts)* (August 2011) *available at* https://www.nhc.noaa.gov/pdf/nws-nhc-6.pdf.
[60] *Schenck v. Capri Construction Co.*, 194 So.2d 378, 379-80 (La. App. 1967) (holding against the homeowner because, though the flooding certainly made the home expansion difficult and burdensome in light of the repairs needed to the home, it was not impossible to perform the contract).
[61] *Popich v. Fidelity & Deposit Co.*, 245 So.2d 394, 396 (La. 1971) (finding that scarcity of labor in the aftermath of the hurricane was too remote from the unforeseen event to qualify as an event to trigger the impossibility doctrine).
[62] *See id.*; Sarah Gibbens, *Hurricane Katrina, Explained*, National Geographic (Jan. 16, 2019) *available at* http://bit.ly/2VRaned.
[63] *Citadel Builders v. Transcon. Realty Inv'rs*, No. 06-cv-7719, 2007 WL 1805666, at *1 (E.D. La. June 22, 2007) (internal quotation marks omitted). The court ruled that there may be a viable impossibility defense and allowed the case to go forward so that the facts could be developed as to whether the contract was possible to perform (for either party) given the effects of the hurricane. *Id.* The case was subsequently settled out of court. See Order, *id.*, Dkt. 62 (Sept. 13, 2007).
[64] *Citadel Builders v. Transcon. Realty Inv'rs*, No. 06-cv-7719, 2007 WL 1805666, at *4 (E.D. La. June 22, 2007) (noting damage beyond "what anyone predicted"). The court added that, under other applicable state law, it might even "dissolve the contract if the circumstances warrant." *Id.*, at *1.
[65] *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 68 (Del. Ch. 2001); *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, *61-*62 (Del. Ch. Oct. 1, 2018) (applying Delaware law and clarifying that foreseeability is not the test but whether the risk was known is important) *aff'd*, 198 A.3d 724 (Del. 2018). These two decisions are widely cited as seminal case law with respect to the applicability of MAC clauses.
[66] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *60-*62 (Del. Ch. Oct. 1, 2018).
[67] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *60 (Del. Ch. Oct. 1, 2018) ("The proper way to allocate risks in a contract is through bargaining between parties.").
[68] Grace Burnett, et al., *Analysis: Morgan Stanley, E*Trade Merger Excludes Coronavirus*, Bloomberg (Feb. 18, 2020) *available at* https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-morgan-stanley-e-trade-merger-excludes-coronavirus (merger agreement carves out the effects of any epidemic, pandemic or disease outbreak including coronavirus from the definition of a material adverse effect); *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *62 (Del. Ch. Oct. 1, 2018) (refusing to impose a foreseeability requirement but considering whether the risks were known or not).
[69] *Id.* at *53.
[70] *Id.* (Delaware courts inquire "whether there has been an adverse change in the target's business that is consequential to the company's long-term earnings power," "measured in years rather than months"). Evidence of a decrease in profits of around 40% or higher over multiple quarters might suffice. *Id.* at *53 (citing Kling & Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* (2018)).
[71] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *56 n.591 (Del. Ch. Oct. 1, 2018); *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, *68–*69 (Del. Ch. 2001).

[72] *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 69, 71 (Del. Ch. 2001) (considering analyst projections but noting that the buyer relying on the analyst projections "has evinced more confidence in stock market analysts than I personally harbor").
[73] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *54 (Del. Ch. Oct. 1, 2018) (summarizing the seminal case of *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 70 (Del. Ch. 2001)).
[74] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *55-*56 (Del. Ch. Oct. 1, 2018).
[75] *See id*, at *3.
[76] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *56 (Del. Ch. Oct. 1, 2018) ("Analysts' estimates for Akorn's peers have declined by only 11%, 15.3%, and 15%, respectively, for those years. Analysts thus perceive that Akorn's difficulties are durationally significant.")
[77] *See In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 66, 71 (Del. Ch. 2001).
[78] *Id.*
[79] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *55-*56 (Del. Ch. Oct. 1, 2018).
[80] *See, e.g.*, *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 69–70 (Del. Ch. 2001) ("Tyson's arguments are unaccompanied by expert evidence that identifies the diminution in IBP's value or earnings potential as a result of its first quarter performance. The absence of such proof is significant.").
[81] *See Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *60 (Del. Ch. Oct. 1, 2018) ("It is not the court's role to rewrite the contract between sophisticated market participants, allocating the risk of an agreement after the fact, to suit the court's sense of equity or fairness."); Eric Fidel, *Akorn: Establishing a Material Adverse Effect*, ABA (January 16, 2019) *available at* http://bit.ly/akornaba.
[82] *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14, 71 (Del. Ch. 2001).
[83] *Id.*
[84] *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *55-*56 (Del. Ch. Oct. 1, 2018).
[85] *See, e.g.*, Lina Saigol, *Return of the MAC? Coronavirus could be the new negotiating leverage in deals*, MarketWatch (March 3, 2020) *available at* https://www.marketwatch.com/story/return-of-the-mac-coronavirus-could-be-the-new-negotiating-leverage-in-deals-2020-03-02.
[86] *See, e.g.*, Laurence C. Strauss, *Cruise Stocks Are Rallying. Don't Get Your Hopes Up That It'll Last.*, Barron's (March 10, 2020) *available at* https://www.barrons.com/articles/cruise-stocks-join-relief-rally-the-outlook-is-still-murky-51583859304?mod=RTA (discussing, among other things, Goldman Sachs research note downgrading the cruise line industry's long-term outlook); Allstair Bates*, How Coronavirus Could Play Out for Cruise Operators*, Barron's (Feb. 1, 2020) *available at* https://www.barrons.com/articles/how-coronavirus-could-play-out-for-cruise-operators-51580561100 (summarizing analyst report with best and worst case scenarios for the cruise line industry in the aftermath of the coronavirus and discussing some factors, such as new regulations, that might prevent a rebound); Sebastian Pellejero and Costas Paris, *Cruise Operators Warn of Severe Coronavirus Impact on Industry*, The Wall Street Journal (March 6, 2020) *available at* https://www.wsj.com/livecoverage/coronavirus?mod=article_inline (warning of a "possibly irreversible" downturn in the cruise industry).
[87] *See, e.g.*, *Aluya v. Mgmt. & Training Corp.*, 671 F. App'x 970, 971 (9th Cir. 2016) (a landowner has a duty to warn of any known "hidden danger" including microscopic parasites); *Munn v. Hotchkiss Sch.*, 24 F. Supp. 3d 155, 163 (D. Conn. 2014) (boarding school had duty to inform about known risks of school trip) *aff'd*, 724 F. App'x 25 (2d Cir. 2018).
[88] *Faheen, By & Through Hebron v. City Parking Corp.*, 734 S.W.2d 270, 273 (Mo. Ct. App. 1987).
[89] *Frieder v. Long Island R.R.*, 966 N.Y.S.2d 835, 840 (Sup. Ct. 2013).
[90] *See* World Health Organization, *WHO Director-General's opening remarks at the media briefing on COVID-19 - 3 March 2020*, *available at* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---3-march-2020 ("Globally, about 3.4% of reported COVID-19 cases have died. By comparison, seasonal flu generally kills far fewer than 1% of those infected.").
[91] *Munn v. Hotchkiss Sch.*, 24 F. Supp. 3d 155, 163, 178, 181 (D. Conn. 2014), *aff'd*, 724 F. App'x 25 (2d Cir. 2018)
[92] *Arcabascio v. Bentivegna*, 38 N.Y.S.3d 72, 73 (N.Y. App. Div. 2016) ("Employers have a common-law duty to provide their employees with a safe place to work."). In addition to common law, other statutes – state and federal – may come into play, but often with elements very similar to common law. For instance, the Federal Employers' Liability Act applies to certain employers (primarily railroads); its elements are similar to common law negligence but are applied less stringently. *See Curran v. Long Island R.R. Co.*, 161 F. Supp. 3d 253, 257, 260 (S.D.N.Y. 2016) (applying FELA to a claim by a railroad employee against the railroad and concluding that "Given FELA's permissive standards and the record evidence here, the jury would have a reasonable basis to conclude that LIRR was negligent in allowing the heat kink to form, which played at least some part in Plaintiff's injuring his back while repairing that very heat kink."). The New York state uniform fire prevention and building code act, codified at "N.Y. Labor Law § 200 imposes a duty on owners and general contractors to provide a safe place to work." *See Minall v. Pyramid, Inc.*, 875 F. Supp. 228, 230 (S.D.N.Y.

1995); *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 44 F. Supp. 3d 409, 431 (S.D.N.Y. 2014) ("Because section 200 is a codification of common law negligence, courts analyze the claims simultaneously.").
[93] *See Edison v. United States*, 822 F.3d 510, 521 (9th Cir. 2016) (citing Restatement (Second) of Torts § 343A) (When "knowledge of the hazard is inadequate to prevent injury," in rare circumstances a duty to "remedy the hazard" may be applied).
[94] *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 44 F. Supp. 3d 409, 433 (S.D.N.Y. 2014) ("Where a plaintiff's claim arises out of the condition of the premises, a party is liable if [it] failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice [but] notice of generalized dangers, as opposed to the specific dangerous condition giving rise to the injury, is insufficient."); *Haceesa v. United States*, 309 F.3d 722, 732 n.7 (10th Cir. 2002) ("Assume, for example, that his employer negligently provided an unsafe workplace by ordering Haceesa to work in conditions posing a high hantavirus infection risk. This hypothetical defendant would be an "original tortfeasor" . . . and would be responsible not only for injuries resulting from his own tortious conduct but also for injuries caused by the subsequent medical negligence of the Government and San Juan Regional.").
[95] *See, e.g.*, *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 44 F. Supp. 3d 409, 429 (S.D.N.Y. 2014) ("Socha has raised a triable issue of fact as to whether Hillmann, Ambient, and Weston had the authority to "avoid or correct" the use of inadequate respiratory equipment.").
[96] *Id.* at 434-35.
[97] *See Coming Attractions Bridal & Formal, Inc. v. Texas Health Res.*, 63 Tex. Sup. Ct. J. 490 (Feb. 21, 2020).
[98] *Edison v. United States*, 822 F.3d 510, 521 (9th Cir. 2016).
[99] *See, e.g.*, CDC, *Keeping the Workplace Safe* (March 10, 2020), *available at* cornavirus.gov; CDC, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020 available at* https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html; *see also* coronavirus.gov and *infra* n.112.
[100] *Edison v. United States*, 822 F.3d 510, 523 (9th Cir. 2016).
[101] *See, e.g.*, Jennifer Elias, *Google tells more than 100,000 North American employees to stay home amid coronavirus fears*, CNBC (March 10, 2020) *available at* https://www.cnbc.com/2020/03/10/google-tells-all-north-american-employees-to-stay-home.html; William Feuer, *Seattle Seahawks stadium employee tests positive for coronavirus, officials say*, CNBC (March 6, 2020) *available at* https://www.cnbc.com/2020/03/06/coronavirus-in-seattle-stadium-employee-tests-positive.html?&qsearchterm=seahawks (infected employee has not returned to stadium and premises were thoroughly sanitized, but not closed); Hallie Golden, *Amazon, Microsoft and Facebook advise employees to work from home*, The Guardian (March 5, 2020) *available at* https://www.theguardian.com/world/2020/mar/05/amazon-microsoft-facebook-advise-employees-work-from-home-coronavirus-washington (Facebook closed offices after employee contracted virus; Amazon and Microsoft encouraged employees to work remotely); City of Austin Cancels SXSW March Events (March 6, 2020) *available at* https://www.sxsw.com/2020-event-update.
[102] *See Breitfeller v. Playboy Entm't Grp.*, No. 05-cv-405, 2006 WL 1639830, at *2 (M.D. Fla. June 8, 2006) ("While industry standards may be evidence of a duty, an entity cannot be found negligent for the nebulous proposition that they failed to adhere to industry standards or failed to adopt them as policies."); *Pierce v. Platte-Clay Elec. Co-op.*, 769 S.W.2d 769, 772 (Mo. 1989) ("[E]vidence of industry standards is generally admissible as proof of whether or not a duty of care was breached. However, compliance with an industry's own safety codes or standards is never a complete defense in a case of negligence.").
[103] *Munn v. Hotchkiss Sch.*, 24 F. Supp. 3d 155, 178 (D. Conn. 2014), *aff'd*, 724 F. App'x 25 (2d Cir. 2018).
[104] *See generally Miranda v. Bomel Constr.*, 115 Cal. Rptr. 3d 538, 544 (2010) ("Insects are a part of life's burdens and it is reasonable to conclude a person cannot be held responsible for their existence. Where one has not fostered an environment designed to cultivate such predators they are simply part of the inherent risks of living.").
[105] *Cf. In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 44 F. Supp. 3d 409, 433–34 (S.D.N.Y. 2014) ("[T]he statutory duty to maintain a reasonably safe workplace implies a duty to make timely and adequate inspections for dangers that may reasonably be discovered.").
[106] *See Brunelle v. Signore*, 263 Cal.Rptr. 415 (Ca. Ct. App. 1989). The court reasoned that if liability could attach for such an unforeseeable injury, the courts would be endorsing an immeasurable scope of liability for landowners. *Id.*
[107] *Butcher v. Gay*, 34 Cal.Rptr.2d 771 (Cal. App. 1994).
[108] *Coyle v. Historic Mission Inn Corp.*, 234 Cal.Rptr.3d 330 (Cal. App. 2018).
[109] *See* CDC, *Keeping the Workplace Safe* (March 10, 2020) *available at* coronavirus.gov; CDC, *Interim Guidance for Businesses and Employers* (Feb. 26, 2020) *available at* http://bit.ly/38wEudn.
[110] *Union Pac. R.R. Co. v. Nami*, 498 S.W.3d 890, 893-94, 899 (Tex. 2016) (holding that employer cannot be held responsible for owning land where wild animals live).
[111] *E.g.*, Paayal Zaveri, *Salesforce is suspending non-essential travel for its nearly 50,000 employees and 'enhancing' its 'office protocols' to fight the coronavirus spread*, Business Insider (March 2, 2020) *available at* https://www.businessinsider.com/salesforce-

suspending-travel-coronavirus-safety-protocols-employees-2020-3 ("Facebook has asked employees to stop bringing social guests to work and is cutting down on its on-site job interviews, while Amazon and Twitter have suspended all non-essential employee travel both in the U.S. and overseas as well.").

[112] On March 9, 2020, New York City Mayor Bill De Blasio encouraged all employers to "allow more employees to telecommute" in order to free up space on public transit so that people are not "packed like sardines" in subway cars. *See* New York City, *Transcript: Mayor de Blasio Updates New Yorkers on City's COVID-19 Response* (March 9, 2020) *available at* https://www1.nyc.gov/office-of-the-mayor/news/129-20/transcript-mayor-de-blasio-new-yorkers-city-s-covid-19-response.

[113] *Staats v. Vintner's Golf Club*, 236 Cal. Rptr. 3d 236, 243 (Ct. App. 2018).

[114] *Union Pac. R.R. Co. v. Nami*, 498 S.W.3d 890, 897 (Tex. 2016) ("[An] owner owes an invitee no duty of care to protect him from wild animals indigenous to the area unless he reduces the animals to his possession, attracts the animals to the property, or knows of an unreasonable risk and neither mitigates the risk nor warns the invitee.").

[115] *Miranda v. Bomel Constr. Co.*, 115 Cal. Rptr. 3d 538, 549 (Ct. App. 2010).

[116] *See Nuwintore v. Mgmt. & Training Corp.*, No. 13-cv-967, 2018 WL 3491676, at *5 (E.D. Cal. July 19, 2018).

[117] *Koerner v. City*, 974 N.Y.S.2d 407, 408 (App. Div. 1st Dep't 2013) ("[P]laintiff failed to proffer any evidence that the fungus existed at the school at all, other than speculation based on plaintiff's unusual infection").

[118] *Cleghorne v. City of New York*, 952 N.Y.S.2d 114, 117 (App. Div. 1st Dep't 2012).

[119] *Sellars v. City of New York*, 975 N.Y.S.2d 712, at*1, *3 (Sup. Ct. 2013).

[120] *In re Young's case*, 64 Mass. App. Ct. 903, 905, 833 N.E.2d 646, 649 (2005) ("Here, the IME considered and ruled out all likely causes other than workplace exposure from a contaminated instrument.").

[121] *Browning-Ferris Indus. v. W.C.A.B. (Jones)*, 617 A.2d 846, 851 (Pa. Commw. Ct. 1992) ("[T]he evidence of record is sufficient for a reasonable mind to accept as adequate proof of the fact that Decedent had been exposed to hepatitis B in the course of his employment and that the resulting fulminant hepatitis infection was a substantial contributing factor in his death.").

[122] *Edison v. Mgmt. & Training Corp.*, No. 12-cv-2026, 2018 WL 3491675, at *4 (E.D. Cal. July 19, 2018) (court considered that risk of valley fever was "all over the news").

[123] *See* Department of Labor, *COVID-19; Overview*, https://www.osha.gov/SLTC/covid-19 ("[M]ost American workers are not at significant risk of infection."); Amanda Eisenberg, *Cuomo, de Blasio urge calm in wake of New York's first confirmed coronavirus case*, http://bit.ly/3220link (March 2, 2020); C-Span, *Coronavirus Task Force Briefing (March 9, 2020) available at* https://www.c-span.org/video/?470172-1/coronavirus-task-force-briefing ("the risk of contracting coronavirus to the American public remains low . . . . the risk of contracting the coronavirus for the average American remains low").

[124] *See supra* n.123 ; Jesse Pound, *'America should stay at work,' despite coronavirus, Larry Kudlow says*, CNBC (Mar. 6, 2020) *available at* https://www.cnbc.com/2020/03/06/america-should-stay-at-work-despite-coronavirus-larry-kudlow-says.html.

[125] *See supra* n.17; *see also supra* n.11 and 12 and accompanying text (in under a month, JetBlue went from seeing "no meaningful impact" to seeing an impact on demand "worse than what we saw after 9/11").

[126] *See Aluya v. Mgmt. & Training Corp.*, 671 F. App'x 970, 971 (9th Cir. 2016) (a landowner has a duty to warn of any known "hidden danger" including microscopic parasites).

[127] *See* Charisse Jones, *Coronavirus outbreak leads CVS to say it will deliver medications to customers for free*, USA Today (March 9, 2020) *available at* https://www.usatoday.com/story/money/2020/03/09/coronavirus-cvs-deliver-medications-no-extra-cost/5002329002/; *cf.* NYU Langone Health, *Alerts: For Patients*, alertsnyulangone.org/patients (hospital system encouraging patients with flu like symptoms to use a virtual urgent care service).

[128] *Miranda v. Bomel Constr. Co.*, 115 Cal. Rptr. 3d 538, 549 (Ct. App. 2010).

[129] *Coyle v. Historic Mission Inn Corp.*, 234 Cal.Rptr.3d 330 (Ct. App. 2018).

[130] *Methodist Hosp. of Indiana v. Ray*, 558 N.E.2d 829, 829 (Ind. 1990). Hospitals and nursing homes are especially prone to allegations that they did not adequately protect patients, staff, and even the public. Still, courts have been reluctant to hold hospitals liable for the "emotional distress" of those afraid of contracting a communicable disease. *See Lopez v. New York City Health & Hosps.*, 647 N.Y.S.2d 267, 268 (1996) (affirming dismissal of claim by wife whose husband contracted HIV and collecting citations).

[131] *See Ginsburg v. City of Ithaca*, 839 F. Supp. 2d 537, 542 (N.D.N.Y. 2012). A crisis of Cornell students committing suicide led the city of Ithaca to undertake a bridge redesign and reconstruction to stem the tragedies. *Id.* The court noted that the redesign clearly failed, and allowed the suit to go forward. *Id.*

[132] CDC, *Keeping the Workplace Safe* (March 10, 2020) *available at* coronavirus.gov.

[133] David Cook, 14 *New York Practice Series: New York Law of Torts* § 6:4 (Westlaw 2019) (New York courts have looked at factors like "proliferation of claims and ability of courts to cope," "social utility of the conduct and the reticence of the courts to intervene and regulate that conduct," "likelihood that liability will result in unlimited or insurer-like liability,"

among other things that point away from courts expanding liability to private parties for matters better suited to policy making arms of the government).