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FOCUS

President's Message

Larry Venturelli

This year has really flown by and I cannot believe that my term as your President is coming to an end this quickly. Since this is my last newsletter to you as your President, I want to thank everyone for an amazing, mostly virtual, year. I am so grateful to the Members, the Sponsors, the Board and the best ACC Chapter Administrator we could ask for, Lynne Durbin, for support of our chapter and attendance at our events. Also, I would like to give a special shout out to Raissa Kirk for all her help with the Newsletter this year.

This has certainly been a challenging year with difficult decisions being made to cancel our Annual Golf/Spa event and all other events going virtual for the entire year. I hope that 2021 will give us a chance to hold in person events again with the necessary precautions in place. As this goes to press, I hope many of you were able to attend the Cocktail Party social sponsored by Womble Bond Dickinson via Zoom.

I hope that you continue to take a break from the daily grind to attend our virtual luncheons as the year closes out. Some recent luncheons to note have been DLA Piper's unique presentation of Something to Report – A Lesson in Cross-border Investigations and Gordon Feinblatt's webinar on Reviewing Commercial Leases – Tips for the General Practitioner. In addition, thank you to all who contributed to the Baltimore community through the Pro Bono Senior Estate Planning Clinic at the Keswick Multi-Care Center in partnership with the Bar Association of Baltimore City Senior Legal Services and the Exelon Pro Bono Program.

Lastly, I attended the virtual ACC Annual Meeting, and while it was in a different format, the event continued to provide great content with the ability to review it on demand. In addition, I appreciated that it was spread out through a few more days, which allowed me to transition between work and the meeting. Of course, I still missed seeing all of you, attending the evening events and walking around the exhibit hall.

It has been a pleasure serving this Chapter, and I hope to see all of you in-person in 2021!

Stay Safe!

Yours truly,
Larry Venturelli

If you ever want to share any ideas or comments with the board, here is the current list of officers and directors:

Larry Venturelli—President

Board Members:

Dan Smith
President elect and Treasurer

Kimberly Neal—Secretary

Cory Blumberg

Taren Butcher

Dee Drummond

Joseph Howard

Raissa Kirk

Danielle Noe

Shane Riley

Kristin Stortini

Michael Wentworth

Matthew Wingerter

Prabir Chakrabarty
Immediate Past President

Lynne Durbin
Chapter Administrator

Upcoming Event

December 10, noon to 1:30 pm

2021: The Year Ahead for Employers

Jackson Lewis sponsor

More Than Coffee and Hoagies

By Joshua H. Shields

When Michael Eckhardt joined Wawa in 2005 from a law firm, the firm's partners teased him that he would soon get bored being an in-house lawyer for a coffee-and-hoagie shop. Fifteen years later, he can confidently say they couldn't have been more wrong.

Now Wawa's senior vice president – chief risk officer, general counsel, and secretary, Eckhardt has helped the iconic mid-Atlantic convenience store chain navigate class action lawsuits, restructure from a C corporation to an S corporation, and expand into the new market of Florida, which included designing and financing a tug-barge to bring gasoline from refiners in the Gulf.

He has worked on table top exercises on the company's key operational risks, and is now part of a team handling the evolving COVID crisis. He's anything but bored.

Associates are essential

Wawa, which has more than 36,000 associates in 900 stores across six states and Washington, DC, was declared an essential provider from the outset of the pandemic. Eckhardt and his team responded to a mix of local and state safety protocols and regulations while also adjusting to changing business demand.

The company, already known for its clean and tidy stores, implemented a "clean force" that sanitized customer touchpoints. It installed plexiglass immediately and instituted a company-wide mask and glove mandate by mid-April.

A PTO relief plan was rolled out to ensure every associate had two weeks of coverage in case they or a family member were exposed to the virus. That policy provided the flexibility to close a store if a case was confirmed in that store. "We close minute one," Eckhardt says, explaining that the stores undergo a deep clean and contact tracing for potential exposure before reopening.

Each Wawa store has prominent signage, including on the company's ubiquitous digital displays, that remind customers about local mask ordinances. Associates are taught to de-escalate a situation if a customer does not comply, Eckhardt noted that industry groups strongly prefer the de-escalation method, which has been part of the Wawa training since 2018.

Eckhardt knows that the backbone of Wawa is its associates — in fact, associates own 40 percent of the privately-held, US$10 billion company. "Corporate is there to support our store teams," he explains. Associates are automatically enrolled in an ESOP, or employee stock ownership plan, after they work for Wawa for one year, reach 1,000 hours of work, and are over age 18.

"When you walk into a Wawa, you're often talking to an owner," Eckhardt points out. Eight to 12 percent of an associate's wage is invested in the ESOP, leading to a long tenured workforce that provides opportunities that don't exist at other companies (and a chance for many associates to retire early).

When Wawa first expanded beyond the mid-Atlantic to Florida, the company moved whole store management teams, some with managers with over 20 years of experience, to open the new stores.

Embracing change while balancing short- and long-term risk

The company has not permitted recent operational challenges to detract from the company's focus on strategic risks. "As a management team, we're trying to balance the short-term goals of running the business and being there for our community today, while also preparing for our future and constantly innovating," Eckhardt explains.

He notes that Wawa has teamed up with Tesla to install electric charging stations at certain Wawa stores as electric cars gain market share. With travel plans and commutes disrupted by the pandemic, Wawa is looking at non-fuel stores that have opened in metro centers like Washington, DC, Philadelphia, and Vienna, VA, to compete with fast-casual chains. The company is piloting a drive-through concept that will require a reworked menu to get customers through the line in the industry-gold standard of four minutes.

The company is embracing change in other areas as well, from meal delivery to digital connections with their customers.

Eckhardt credits Senior Legal Counsel Tara Gibbons for coordinating the legal review with the delivery app companies like Uber Eats and DoorDash to bring the chain's hoagies to customers. The option existed in about a third of stores before the pandemic, but Gibbons worked quickly to enable the Company's digital team to expand the option and answer other questions, such as how to deliver alcohol in jurisdictions where it's permitted.

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The company can never rest on its laurels because of its competition. At breakfast, Wawa spars with McDonald's for breakfast sandwiches and Dunkin and Starbucks in the coffee market. At lunch, it's up against Subway or Chick-fil-a. And it's also competing for customers in the convenience store space with 7/11 and other regional brands.

Data protection is another area where the chain needs to carefully evaluate risk. Kathy Dickinson, Wawa's associate general counsel, works very closely with the marketing department to understand what technology is available for gathering and protecting data, while also being mindful that there is an "ick" factor to harvesting too much data.

In December 2019, Wawa announced a security incident that affected customer payment card information at its stores after discovering malware on Wawa's systems. Wawa made the announcement to its customers nine days after discovering the malware, removing it from Wawa's system, and notifying regulators.

The legal team has always needed to move swiftly to support innovation, which is a key pillar of Wawa's corporate ethos. What started as a convenience store and grocery in New Jersey morphed into a gasoline hoagie shop hybrid and is now becoming more focused on healthier food and products. The legal department will continue to support the business as it evolves.

Being prepared for "the bread truck"

Eckhardt draws on the tenure of his legal department — his direct reports have 44 years of Wawa experience amongst them, showing that it's not only the store associates who tend to stick around for a long time. He knows that his team can step up if he's "hit by the bread truck" as they say around headquarters.

Eckhardt has always been familiar with Wawa; he grew up in Philadelphia, and moved to nearby Bucks County, PA, for high school, where Wawa stores seem to be on every other block. After becoming disillusioned by politics while an undergrad in Washington, DC, at American University, he had a conversation with an older friend who was pursuing law school. "It was one that made you think about your life and where I wanted to end up," he reflects.

Knowing that he wanted to be near his large family, which was back in Philadelphia, he decided going to law school in the City of Brotherly Love would give him the best shot at landing a job close to home after graduation.

After earning his degree from Temple, he worked at firms in Philadelphia until a fateful January day when the head of the labor and employment group walked into his office and shut the door. Instead of delivering bad news as Eckhardt expected, the partner urged him to apply for a position with Wawa.

After starting his in-house role in 2005, he was promoted to general counsel in 2011. His role has expanded over the years. Wawa CEO Chris Gheysens promoted him to the company's 10-person management team in 2014 and created a legal and risk department, which includes quality assurance, risk management, safety, loss prevention, internal audit — "all the stuff nobody seems to want," Eckhardt jokes. It's a job he relishes, and one that keeps him occupied with much more than coffee and hoagies.

Getting to know… Michael Eckhardt

Is there one thing that you miss from before COVID, and is there one thing that you don't miss?

As a family, we miss traveling terribly. We love seeing different parts of the country and different parts of the world. As baseball fans, we have attended games at all but five of the major league stadiums. We were planning to knock Toronto, Detroit, Cincinnati, and Cleveland off the list this summer. Hopefully this is a possibility next year.

I feel conflicted about my commute — while it's 35 minutes of driving through horse country, that is 70 minutes I get back every day. At the same time, I do miss it because it gave me the ability to plan for the day on the way in and decompress on the drive home. Now, because everyone thinks everyone is always working, you are getting texts at 6 am when you are trying to ride the Peloton for 30 minutes in the morning.

Do you have any free time right now?

My free time is in the morning. I will read the *Wall Street Journal* and ride on my spin bike. We're walking more as a family now and spending quality time together. There is always a positive side of any situation — we just need to look for it and we try to remind our two teenagers of that daily.

ACC News

Legal Risk Assessment in a PandemicPresented by the ACC Credentialing Institute

December 1-3

This intensive, live virtual 12-hour course will provide hands-on instruction on how to conduct an effective, siloed COVID-19 legal risk assessment, as well as develop a COVID-19 compliance and crisis management plan. Participants will not just be instructed about how to conduct a legal risk assessment, they will work together in teams to create one and to present it to their cohorts.

ACC In-house Counsel Certification Program

December 7-17

The In-house Counsel Certification Program covers the core competencies identified as critical to an in-house career. This virtual training is a combination of self-paced online modules and live virtual workshops. The workshops will be conducted over a two-week period, four days a week for three hours each day.

Maryland Enacts Series of New Employment Laws

By Judah L. Rosenblatt, Jackson Lewis P.C.

Amid the COVID-19 pandemic, the Maryland General Assembly passed several pieces of legislation governing the workplace that became law without Governor Larry Hogan's signature.

The new laws, which took effect on October 1, 2020, do the following:

- Prohibit employers from using facial recognition technology in the hiring process;
- Ban workplace discrimination based on hairstyles and textures commonly associated with race;
- Ban employers from asking job applicants about their salary histories;
- Prohibit retaliation against employees who inquire about their wages; and
- Require covered employers to provide 60 days' written notice prior to certain reductions in operations.

Facial Recognition Technology for Applicants

House Bill 1202 prohibits employers from using facial recognition technology during pre-employment job interviews without the applicant's consent.

To use facial recognition technology during an interview, an employer must obtain an applicant's written consent through a waiver that includes the applicant's name, the date of the interview, and a statement that the applicant consents to the use of facial recognition technology during the interview and that the applicant has read the waiver.

Hairstyle Discrimination

House Bill 1444 prohibits employers from discriminating against individuals based on hairstyles and textures commonly associated with race.

The new law expands the definition of "race" under Maryland's Fair Employment Practices Act to include traits associated with race, including "hair texture, afro hairstyles, and protective hairstyles." Protective hairstyle is defined to include "braids, twists, and locks."

This new law follows similar antidiscrimination laws enacted in several other states in recent years.

Salary History Ban

House Bill 123 imposes several restrictions on employers regarding inquiring about or using an applicant's salary history during the hiring process.

The law prohibits employers from seeking an applicant's wage history from the applicant or the applicant's agent, or from the applicant's current or former employer. Employers are also prohibited from relying on an applicant's wage history in screening or considering the applicant for employment or in determining wages for the applicant.

However, the law provides one exception: After an employer makes an initial offer of employment with an offer of compensation to an applicant, an employer may rely on any wage history that the applicant voluntarily provides to increase the initial wage offered to the applicant or to confirm the wage history to support a higher offer. Regardless, an employer may only rely on the salary history provided by an applicant if the wage offered does not result in an unlawful pay differential based on sex or gender identity.

Additionally, employers must provide an applicant with a wage range for an open position upon request.

Finally, employers may not retaliate against or refuse to interview, hire, or employ an applicant because the applicant did not provide wage history or requested a wage range. Employers also may not retaliate against an applicant for bringing a claim under this law.

Revisions to Equal Pay for Equal Work Law

House Bill 14 expands Maryland's Equal Pay for Equal Work law to prohibit employers from taking any adverse actions against an employee for disclosing or asking about the employee's own wages. Previously, the law only prohibited employers from taking any adverse action against an employee for inquiring about another employee's wage.

The law further forbids employers from requiring an employee to sign a waiver that purports to deny the employee's right to disclose or discuss the employee's wages.

Maryland Mini-WARN Law

House Bill 1018 revises Maryland's Economic Stabilization Act (mini-WARN law) to require covered employers to provide 60 days' written notice prior to certain reductions in operations. Covered employers include employers with at least 50 employees who have operated an industrial, commercial, or business enterprise in Maryland for at least one year. Previously, compliance with the mini-WARN law had been voluntary.

Under the revised mini-WARN law, covered employers must provide 60 days' written notice, before initiating a reduction in operations, to: (a) all employees at the workplace that is subject to the reduction in operations (including those individuals who work fewer than 20 hours on average each week or have worked for the employer for fewer than six months in the immediately preceding 12 months at the workplace that is subject to the reduction in operations); (b) each exclusive representative or bargaining agency that represents employees at the workplace that is subject to the reduction in operations; (c) the Maryland Dislocated Worker Unit; and (d) all elected officials in the jurisdiction where the workplace that is subject to the reduction in operations is located.

Additionally, the required notice must contain the following information: (a) the name and address of the workplace where the reduction of operations is expected to

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occur; (b) the name, telephone number, and email address of a supervisory employee who may be contacted for further information; (c) a statement that explains whether the reduction in operations is expected to be permanent or temporary and whether the workplace is expected to shut down; and (d) the expected date when the reduction in operations will begin.

Judah L. Rosenblatt

Author:

Judah L. Rosenblatt is an attorney in the Baltimore office of Jackson Lewis P.C. where he advises and represents employers in a broad range of employment law matters, including recruitment and hiring, employee counseling and coaching, leave administration, disability accommodation, worker classification, reductions-in-force, wage and hour compliance, and FMLA compliance. Jackson Lewis has over 900 workplace law attorneys in 62 offices. For more information on the issues raised in this article or any workplace law matters, you can reach Mr. Rosenblatt at Judah.Rosenblatt@jacksonlewis.com.

Disregard Compliance at Your Peril: Compliance Officer Paid As Whistleblower

By Thomas E. Zeno and Holly Drumheller Butler, Miles & Stockbridge

No company wants to become the subject of a whistleblower complaint because the company failed to identify and remedy a compliance problem. How much more disagreeable if the whistleblower turns out to be a company's former Compliance Officer! That situation ended up costing a company $18 million under the federal False Claims Act. The federal government received $15.21 million; state governments received $2.79 million; and the whistleblower received $2.65 million of the federal share. In addition, the company, Merit Medical Systems, Inc. (MMS), must pay attorneys' fees due to the whistleblower's counsel, as well as enter into a five-year Corporate Integrity Agreement with the government. The seemingly obvious lesson is instructive for every company: don't ignore your compliance officer.

The Compliance Problem

The press release from the Department of Justice alleged MMS's "Local Advertising Program" was a front for illegal kickbacks to healthcare providers. The program offered millions of dollars in purported educational grants and other kinds of support designed to encourage purchase and use of the company's products. Although the program supposedly operated to increase awareness of its products, MMS allegedly paid selected providers "to reward past sales, induce future sales, and steer business" away from competitors.

Disregarding the Compliance Officer

In his amended complaint, the whistleblower/Compliance Officer describes how MMS disregarded his concerns despite his certification as a Compliance and Ethics Professional, his expertise teaching and working in compliance for more than a decade, and his medical degree. When he reported the issues about potential kickbacks and off-label sales to management, his advice was "nearly always given only token respect." An anonymous tip of fraud eventually prompted MMS's Board of Directors to investigate off-label promotion, but an ensuing policy change was ignored by sales and marketing. The Compliance Officer considered the culture so hostile that he resigned. He also alleged that another officer had been "run out" of MMS for making similar complaints.

Takeaway

Of course, concerns expressed by a Compliance Officer may not always be correct. On the other hand, a company's Board of Directors should not need to rely upon an anonymous complaint in order for the concerns of a trained Compliance Officer to reach its attention. Further, simply instituting a policy change is not sufficient to remedy a problem or rectify the tone at the top. A company's Board of Directors must establish compliance procedures to ensure that change is implemented.

The insightful comment of Gregory Demske, Chief Counsel of the Health and Human Services – Office of Inspector General, summed up the lesson to be learned. No "company's compliance program can be effective without commitment and support from the company's leaders. . . . As happened here, ignoring your compliance officer's concerns . . . is a great way to become a defendant."

Disclaimer: This is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge, its other lawyers or ACC Baltimore.

Authors:

Thomas E. Zeno

Holly Drumheller Butler

Thomas E. Zeno and **Holly Drumheller Butler** co-lead the White Collar, Fraud and Government Investigations Practice of Miles & Stockbridge. During his more than 25 years with the United States Attorney's Office for the District of Columbia, Zeno investigated and prosecuted economic crimes involving healthcare, financial institutions, credit cards, computers, identity theft and copyrighted materials. Drumheller Butler has over 20 years of experience counseling clients in government and internal investigations, corporate compliance and complex commercial litigation.

Mergers and Acquisitions in the COVID-19 Era

By Jacqueline A. Brooks, Partner and Swata J. Gandhi, Counsel, Saul Ewing Arnstein & Lehr LLP

In early September 2020, LVMH Moet Hennessy Louis Vuiton SE, the owner of Louis Vuitton backed out of its merger agreement with Tiffany & Co. LVMH was to acquire Tiffany in a transaction worth more than $16B. According to a complaint filed by Tiffany, the Merger Agreement provided that LVMH was to obtain antitrust clearance and assume all financial risk related to adverse industry trends or economic conditions. At the initial outside date of August 24, 2020, LVMH had not filed for antitrust approval in three of the required jurisdictions. As a result, Tiffany extended the outside date for closing the transaction. LVMH claimed that it was unable to close on the transaction by the outside closing date because the Ministre de l'Europe et des Affaires Etrangéres purportedly advised LVMH to put off closing the transaction. Tiffany sued claiming that LVMH was attempting to evade its contractual obligations to pay the agreed upon price for Tiffany. LVMH countersued and claimed that not only did the French government advise LVMH to put off the completion of the merger, but also claimed that Tiffany had suffered a material adverse change to its business triggering LVMH's right to walk away as a result of the COVID-19 global pandemic and Tiffany's "mismanaged business that over the first half of 2020 hemorrhaged cash for the first time in a quarter century, with no end to its problems in sight…."

While most deals don't die in such public circumstances, COVID-19 continues to change and challenge M&A deals. From how due diligence is conducted and new considerations in due diligence, to material adverse effect claims as in the LVMH/Tiffany case, and the impact of the Paycheck Protection Program on M&A transactions , practitioners are being required to pivot to help protect clients and/or reframe M&A deal terms and processes as a result of the global pandemic.

Due Diligence Practices

Engaging in purchasing or selling a business is a material decision for both purchaser and seller and an important aspect of making that decision is for the purchaser to be able to properly and thoroughly conduct its due diligence on the target. COVID-19 has wreaked havoc on this process. Companies must now consider whether projections, that are based on a pre-COVID world, are reliable or merely speculative and how to measure the causes of changes in revenue – is it core fundamentals, competitive pressure or other internal or external factors that impact revenues and profits vs purely COVID related impacts.

Other considerations in due diligence have also arisen. Normal aspects of the target's business, such as business continuity, status of existing contracts, working capital, regulatory compliance and current litigation could all be thrown into disarray due to COVID-19, making the performance of the due diligence process on the target much more challenging. For example, if the seller had a PPP loan, the purchaser will need to consider the effect of the loan proceeds on working capital balances and the parties will need to negotiate the normalization of the working capital to adjust for the PPP loan. And lest we forget, the various state quarantine or travel restrictions can interfere with site visits and in-person meetings.

In addition to a target's business, COVID-19 has added to and/or changed the scope of the employment law related due diligence to be conducted by a purchaser. These include employee pay, employee leaves of absence, terminations or location closures and health and safety considerations.

Although wage and hour considerations are a common discussion point during due diligence because of the significant liabilities from penalties and damages, in a COVID-19 world, purchasers should pay additional attention to determine if a target may have incurred liability by not taking the appropriate actions as it moved into a predominantly remote workforce. For example, employees who are deemed exempt and not entitled to overtime, may need to have their classifications reviewed and/or their duties revised for a work-from-home environment which could have reduced the level of responsibility of such employees. Additionally, parties should be on the look-out for salary practices which could have violated the salary basis requirements thus making certain exempt employees eligible for overtime. Pandemic related pay cuts and austerity measures could have affected an employees' exempt status as well.

Further to this point, purchasers should pay close attention to paid and unpaid leave benefits they may be assuming – including those placed into effect by the federal Families First Coronavirus Response Act and any state or local regulations. These laws have created new leave entitlements for employees affected by COVID-19 and there may be little guidance on the implementation of these benefits. Accordingly, seller's implementation practices should be carefully reviewed to ensure there is no unintended exposure for the purchaser.

In addition to the usual review of the Worker Adjustment and Retraining and Notification Act (and its state counterparts) and a target's policies and practices on hiring and firing, COVID-19 has ushered in layoffs, furloughs, and austerity termination measures that could result in additional risk. Purchasers should not only examine past practices, but should also drill down into any changes by the seller as a reaction to the global pandemic. These may include the timing and justification for terminations as well as new benefits promised to employees that may transfer to purchaser such as new severance practices or even re-employment promises.

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Finally, a purchaser must be keenly aware of any health and safety measures that have been installed by a seller as a result of COVID-19. There are several areas that a purchaser should explore in conducting this review including: the rates of infection amongst employees, the percentage and roles of employees present on site, is the business considered essential, employee concerns related to health and safety ,compliance with laws and modification of the work environment, if any. Purchasers must understand whether the measures are based on federal, state or local guidelines or regulations or company policy. The local nature of many regulations requires a careful review and understanding of compliance of these measures and any related guidance. Additionally, purchasers must understand the nature of the safety measures enacted and whether the purchaser, independently agrees that these would constitute a safe environment or need to bolstered and tracked.

If, conducting due diligence is insufficient for the purchaser to feel protected, it may want to consider obtaining or requiring that the seller provide it with representations and warranties insurance. Parties seeking representations and warranties insurance need to understand how COVID-19 is being viewed by underwriters and what areas of inquiry underwriters are requiring as part of their process. More often than not, insurers are proposing exclusions for COVID-19 exposures; increasing due diligence in ares of operations, facilities, supply chain, distribution networks, and business continuity plans; excluding coverage of COVID-19 specific representations, and asking COVID-19 specific questions to identify known impacts of COVID-19 on the target and any steps taken to address COVID-19 issues. The potential reaction and coverage may vary depending on the class and type of business in the M&A transaction, the types of known COVID-19 related issues uncovered during due diligence and the issuer of the representations and warranties policy.

Material Adverse Effect/Material Adverse Change

For acquisitions that have been agreed to but not closed, if a purchaser wants to terminate a transaction, a major question during COVID-19 may be whether the pandemic and its effect on the transaction or the target business will be considered a material adverse effect or material adverse change ("MAE/MAC"). The concept of a purchaser having an out for an MAE/MAC is not novel and, unlike other clauses such as force majeure, has not been treated as boilerplate. Rather, it has often been the subject of heavy negotiations. Whether, in circumstances such as those faced by LVMH/Tiffany, the purchaser will be able to walk away from a transaction as a result of a global economic downturn resulting from a global pandemic is going to be subject to the individual facts faced by the parties, the precise definition of MAE/MAC in the agreement and applicable state law.

In Delaware, the jurisdiction where the LVMH/Tiffany suit is filed, there has only been one case where Delaware courts found in favor of the purchaser exercising the right to terminate due to MAE/MAC, and that was in the pre-COVID era.[1] The court in that case considered facts and circumstances of that case, and in its ruling confirmed that there was a high bar to be overcome in seeking to void a merger agreement for an MAE. There must be both a quantitative and qualitative analysis of whether "there has been an adverse change in the target's business that is consequential to the company's long term earnings power over a reasonable period, which one would expect to be measured in years rather than months."[2] Whether courts will change their analysis because of a heretofore inconceivable circumstance, that is, the existence of a global pandemic is yet to be determined. However, based on the previously articulated standard, we do not think this will be an easy argument won by purchasers and will remain subject to more facts and circumstances than just COVID-19 alone.

It should be noted that most transactions with disputes as to an MAE/MAC never see the inside of a courtroom. The parties often negotiate a mutually satisfactory (or mutually unsatisfactory) resolution. Additionally, well-negotiated MAE/MAC clauses usually contain exclusions for events that have an effect on the market which affect like companies similarly from the definition of MAE/MAC. This doesn't mean that the existence of COVID-19 should be ignored.

For pending transactions that are being negotiated or new transactions, purchasers and sellers should consider specific language to expressly address COVID-19 as it relates to the MAE/MAC provision. Since it is rare for the courts to find a MAE/MAC clause to have been triggered, it is unlikely one will exist unless specifically addressed in the clause. There are many options to consider for both purchasers, and sellers, ranging from excluding COVID-19 from the agreement or attempting to place a certain level of impact of the global pandemic on economic conditions before the MAE/MAC is triggered. The position taken by a party will turn on whether the party is the purchaser or seller. In drafting the provision, parties will be challenged to agree upon the following conditions: whether the impact of COVID-19 is an industry trend or a company specific condition and the division of responsibility in such a situation, the point at which the impact of COVID-19 should be considered consequential and/or as having a long term impact on the business of a company and whether to include specific financial or operational impacts in the definition or exclusions to the definition of MAE/MAC.

Paycheck Protection Program and the Employee Retention Tax Credit

The Paycheck Protection Program ("PPP"), administered by the U.S. Small Business Administration, is a loan program that originated from the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The PPP helps businesses keep their workforce employed

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[1] Akorn, Inc. v. Fresenius KABI AG, Quercus Acquisition, Inc. and Fresenius SE & Co. KGGA, 198 A.3f 724 (2018).
[2] Id., quoting Hexion Specialty Chems. Inc. v. Huntsman Corp., 964 A.2d 715, 738 (Del. Ch. 2008).

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during the COVID-19 pandemic by providing the businesses with eight weeks of cash-flow assistance through 100% federally-guaranteed loans.

The Employee Retention Tax Credit ("ERTC") also originates from the CARES Act and is a refundable tax credit equal to 50% of certain wages paid to employees up to a maximum amount of $10,000 per employee, so the maximum ERTC for wages paid to any employee is $5,000. The ERTC is not as generous as the PPP because the PPP generally allows employers to obtain loan forgiveness on an employee's salary in an amount up to $20,833.

The CARES Act has provided relief for millions of Americans and multitudes of businesses over the last 6-7 months, however it has added complexity to M&A transactions. Unlike other business related loans that may simply be paid at the closing of a transaction, sellers who have received a PPP loan and who are contemplating the sale of their businesses, will need to consider whether engaging in such a transaction would be considered a breach under their PPP loan agreement – and therefore risk a seller's ability to have the loan forgiven. Additionally, sellers must consider what happens if consent is not received or if the loan is not forgiven prior to the closing of such a transaction. Will a purchaser refuse to close under such circumstances or agree to assume the loan and therefore receive the forgiveness?

In the SBA's guidance dated October 2, 2020 , the Small Business Administration ("SBA") addressed the process required of a seller who is involved in an M&A transaction and is the recipient of a PPP loan. The SBA has advised that the seller must notify its lender before the closing of any M&A transaction and provide the lender with copies of the purchase and/or merger documents.

Notice Only

If the M&A transaction results in 50% or less of the equity or assets of the company being sold, the seller has repaid the PPP loan or the seller has submitted its forgiveness application to the lender and either the SBA remits funds to the lender in full satisfaction of the loan or the seller has repaid any remaining balance of the loan, then the seller need only provide notice to the lender of the transaction.

Notice and Consent of PPP lender

If the M&A transaction results in 50% or more of the equity or assets of the company being sold, then in addition to providing notice, the seller must obtain the prior written consent of the lender, submit its forgiveness application AND fund an interest bearing escrow account, controlled by the lender, with the outstanding balance of the PPP loan. Upon forgiveness, and after deducting any unforgiven amount, the funds held in escrow would be released by the lender to the seller.

Notice and Consent of PPP lender and SBA

In all other circumstances, the seller must obtain the consent of the PPP lender and the SBA. The SBA has indicated that it will not provide its consent unless the purchaser assumes seller's obligations under the PPP loan As a practical matter, this may mean that the closing of an M&A transaction will be delayed since purchasers may not want to agree to assume all of the seller's obligations under the PPP loan. Accordingly, purchasers may want to postpose the closing until the seller is in a position to obtain the lender's consent, submit the forgiveness application to the lender and escrow the outstanding balance of the loan. However, delays in the timeline increases the risk that the purchaser walks away from the transaction or the occurrence of an MAE/MAC. Additionally, depending on the purchaser's leverage, the seller may believe that it is unable to avoid having the PPP loan repaid in full at closing, losing out on the economic benefit of the PPP loan forgiveness.

What happens if both purchaser and seller have PPP loans? The SBA has stated that if both parties had separate PPP loans, then in the case of a purchase of equity, the seller and the new owner will be required to segregate and delineate the funds and expenses to demonstrate compliance by both PPP borrowers. In the case of a merger, the successor will be required to segregate and delineate the funds and expenses and demonstrate compliance with respect to both PPP loans. In either of these situations, it may be better to delay the transaction until each borrower has spent its PPP loan proceeds or submitted its loan forgiveness application.

Employee Retention Tax Credits ("ERTC")

One of the considerations in claiming an ERTC is that if a party obtains a PPP loan, it cannot also claim an ERTC. This poses additional challenges in a transaction where a seller obtained a PPP loan and the purchaser claimed the ERTC (or vice versa). The conflict in this situation is that the closing of the M&A transaction could result in the purchaser becoming ineligible to claim the ERTC and the allocation of that risk. It is unclear whether the purchaser would no longer be able to claim ERTC as of closing or at all and repay any previously claimed ERTCs. In such a case, a purchaser may insist on the repayment of a PPP loan or wait to close until the loan is forgiven.

This article aims to highlight some of the ways in which COVID-19 is transforming M&A transactions but we have yet to see the full impact of the pandemic on economies much less in the world of M&A. The only certainty is that these issues will continue to evolve and change alongside changes in society, the impact on business operations and how business reacts to the short and long term effects of the impact of the pandemic.

Jacqueline A. Brooks

Swata J. Gandhi

[3]The guidance is effective as of October 2, 2020 and is subject to any subsequent changes in guidance issued by the SBA.

Flatten the Curve (No Not That One): 3 Ways to Evaluate Your Company's Corporate Liability Health

By Christopher M. Corchiarino, Goodell DeVries

1. Review your form contract provisions. There are myriad boilerplate contract provisions that are reflexively used. When I ask clients the purpose of a particular provision, the answer is often, "this is the way we have always done it." There was likely a purpose behind each provision when initially drafted, but that purpose's time may have long since passed. For example, a choice of venue provision may have selected a court favorable to the company in the past, but the judges and potential jurors for that jurisdiction may have changed such that the venue is no longer favorable. A contract may have choice of law provision, but with the passage of time, significant adverse developments in the precedential case law could have occurred, rendering the law of a particular jurisdiction unfavorable. Indemnification provisions, additional insured, confidentiality, and others may have once made sense in one situation but are now obsolete, out of context, or the wording outdated. A regular review of "standard" contract provisions can reduce liability exposure in the future. During this process, an attorney who handles litigation can provide insight into how the provisions are received in the courtroom and whether such provisions remain relevant.

2. Review your insurance coverage. Many businesses spend time shopping for liability coverage based on cost and the business' operations at the time the policy was first shopped around. A new business, limited on resources, might only be able to afford a policy with low limits that erode with defense costs. The insurance is then placed on a *set it and forget it* mode by the company and the insurance broker, and the same coverage is renewed each year without evaluating developments in the company's operations or resources that would merit new policy terms and coverage. This is a mistake. The coverage may exclude cyber or directors and officers liability coverage or the limits of coverage are now too low. As a business grows and product lines or services expand, insurance coverage may need to be revisited. Too often these discussions do not occur until after a lawsuit is filed because companies fall back on merely relying on their insurance broker, who may not have been properly apprised of company developments or needs since the policy originated.

An insurance broker's liability generally will only attach when the broker is hired to obtain a policy that covers certain risks and the broker fails (1) to obtain a policy that covers those risks, and (2) to inform the company that the policy does not cover the risks sought to be covered. *Int'l Bhd. of Teamsters v. Willis Corroon Corp.*, 369 Md. 724, 737, 802 A.2d 1050, 1057-58 (2002). See 3 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3d § 46:59 (1997); 16A JOHN ALAN APPLEMAN & SEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 8831 (1981 & 2002 Supp.); Robin C. Miller, Annotation, *Liability of Insurance Agent or Broker on Ground of Inadequacy of Liability-Insurance Coverage Procured,* 60 A.L.R.5th 165 (1998). Analyzing an insurance broker's liability, a court will evaluate "whether the policy was a new one or a renewal; how much reliance was justifiably placed in the agent or broker by the insured; the nature of any past dealings between the insured and the broker, agent, or insurer; what information the insured was given about the policy; how difficult it would have been for the insured to learn of and appreciate any discrepancy; and whether any conduct on the part of the broker, agent, or insurer reasonably served to preclude an investigation by the insured." *Int'l Bhd. of Teamsters*, 369 Md., at 740.

Therefore, not only should a company audit its existing insurance coverage, it must also "read and examine an insurance policy to determine whether the coverage desired has been furnished." *Int'l Bhd. of Teamsters*, 369 Md. At 740. Attorneys experienced in representing clients in the courtroom have firsthand knowledge about liability trends. Consideration should be given to including litigation counsel on the team conducting the insurance audit.

3. Designate the right registered agent. This is one of the most basic and easily fixable issues. It is common knowledge that in Maryland business organizations must have a resident agent. *See e.g.* Md. Corp & Assoc. Code Ann. §§ 4A-210(a)(2) (limited liability company); 2-108(a)(2) (corporations); and 7-205 (a)(2) (foreign entities). I frequently represent businesses that put the registered agent on the backburner soon after formation. In one instance, my client's founder was listed as the registered agent and remained the registered agent years after his out-of-state retirement. Another client's registered agent had been deceased for three years. This is a dangerous proposition that can lead to a default judgment.

Once a lawsuit is filed, a company is generally served through its registered agent. Md. Rule 2-124(h). However, "if a good faith attempt to serve the resident agent has failed, service may be made upon any member or other person expressly or impliedly authorized to receive service of process." *Id.* In the case of *Noummy v. Malik*, 2019 Md. App. LEXIS 330 (Spec. App. Apr. 18, 2019), a plaintiff tried unsuccessfully to serve a company's registered agent and office manager. When those efforts failed and no one else was identified to receive service, the lawsuit was served on the receptionist. Receptionists are not always trained to appreciate the importance and time sensitivity of service of a lawsuit; worse, the receptionist may be a temp unfamiliar with the company's internal processes. In these circumstances, a receptionist could unknowingly place the newly served lawsuit in a stack of documents, where it could be forgotten,

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and a default will get entered. In *Noummy*, after a default was entered, the company tried unsuccessfully to set it aside. The Maryland Court of Special Appeals upheld the default finding that the company's "receptionist—who was presumably charged with accepting communications received in the ordinary course of business and ensuring that they make it to the right person—was reasonably calculated to give the [company] fair notice of the lawsuit." *Noummy*, 2019 Md. App. LEXIS at 11-12.

Once a default is entered, the company is at a disadvantage. "A proper return of service is *prima facie* evidence of valid service of process," and although "the presumption of validity can be rebutted," "a mere denial of service is not sufficient." *Wilson v. Md. Dep't of the Env't,* 217 Md. App. 271, 285, 92 A.3d 579 (2014). The court has "broad discretion to vacate an order of default before it becomes an enrolled, final judgment." *Peay v. Barnett*, 236 Md. App. 306, 317 (2018). There is a short window of opportunity, as the plaintiff can seek a final judgment within 30 days after the order of default is entered, if a motion to vacate has not been filed. Md. Rule 2-613. Thereafter, if a motion to vacate is not filed or is denied, the court, upon request, may enter a judgment by default. Rule 2-613(f). Vacating an order of default "is an adverse finding on liability, [where] the defendant does not enjoy the same opportunity once the default judgment is entered." *Franklin Credit Mgmt. Corp. v. Nefflen*, 208 Md. App. 712, 733, 57 A.3d 1015 (2012) (quoting Wells v. Wells, 168 Md. App. 382, 393 (2006)). I have helped many clients fend off a default judgment, but it is often an avoidable expense.

The registered agent should be a responsible person that is present with regular frequency at the address provided for the registered agent. The task of checking and updating a registered agent is quick, easy, and should not be overlooked.

While COVID is an important issue, companies must also be vigilant to use proactive risk management to flatten the curve of corporate liability. Take the next few weeks to review the basics and slow the spread of corporate liability.

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Christopher M. Corchiarino

Snap to It: "Snap Removal" and Federal Jurisdiction

By Cheryl Zak Lardieri and Tommy Tobin, Perkins Coie LLP

It often is more favorable for a defendant to litigate a case in federal court rather than state court. Federal courts, however, are courts of limited jurisdiction. A mechanism called "snap removal" may allow defendants to litigate cases in federal court when removals ordinarily would not be permitted.

Generally, cases in federal court must either raise a federal question or be between parties with complete diversity, meaning that the parties on one side of the case hail from different states than the opposing parties. But even when there is complete diversity, if any defendant is a citizen of the state where the action is pending (that is, the forum state), removal may be prohibited. The forum defendant rule, codified at 28 U.S.C. § 1441(b)(2), provides that a case "otherwise removable solely on the basis of diversity of jurisdiction . . . may not be removed if any of the parties in interest *properly joined* and served as defendants is a citizen of the State in which such action is brought." (Emphasis added.)

But what happens when an in-state defendant in a diversity case is *not* "properly joined and served?" That's where snap removal comes in. Quick-acting defendants across the country have been increasingly able to remove cases from state to federal court when, for example, they are served prior to their forum co-defendants being served, or in some instances, the unserved in-state defendant itself can remove. While Maryland's federal courts are deeply divided on the issue, defendants should be aware that snap removal can be a useful tool to remove cases even when an in-state defendant is named.

Recent Federal Court Trends Nationwide

The Second, Third, and Fifth Circuits have come out strongly in favor of snap removal. The decisions from the Second and Third Circuits allowed removal from the in-state defendants themselves before service, while the Fifth Circuit did not directly address that issue. The Sixth and Seventh Circuits also have approved of snap removals, albeit in footnotes.

The Second Circuit's recent case of *Gibbons v. Bristol-Myers Squibb Co.* is illustrative. 919 F.3d 699, 702 (2d Cir. 2019). In that product liability case, plaintiffs filed suit against Bristol-Myers Squibb ("BMS") and Pfizer in Delaware state court. Both BMS and Pfizer are incorporated in Delaware, which normally would prevent them from removing the case to federal court under the forum defendant rule. With the advent of online court dockets, however, it is not uncommon for defendants to become aware that a lawsuit has been filed against them prior to being served with the complaint. Such was the case here, and BMS and Pfizer removed the case to federal court. Plaintiffs filed a

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motion for remand, arguing that because BMS and Pfizer were sued in their home state, removal was barred. The Second Circuit disagreed, holding that Section 1441(b)(2)'s language is "unambiguous." The court explained that "[e]very exercise in statutory construction must begin with the words of the text," and the words in Section 1441(b)(2) make clear that the forum defendant rule is "inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable under Section 1441(a) so long as a federal district court can assume jurisdiction over the action." 919 F.3d at 705; *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018) (in accord).

Earlier this year, the Fifth Circuit followed the Second and Third Circuits, concluding that the statute's "plain meaning" permits removal by a forum defendant until that defendant has been "properly joined and served." *Texas Brine Co. LLC v. Am. Arbitration Ass'n. Inc.*, 955 F.3d 482, 486 (5th Cir. 2020).

Even with the persuasive reasoning from the appellate level, the nation's district courts have splintered on the issue of snap removal both across and within circuits. Many courts, especially after the Second, Third, and Fifth Circuits' rulings, agree that the language of Section 1441(b)(2) "unambiguously" permits removal of an unserved in-state defendant. Other courts, however, have taken a more purpose-driven approach. These courts find that literal interpretation of the statute would create an "absurd" process through which in-state defendants could bypass the forum defendant rule, which could not have been the purpose of Congress. They explain that the purpose underlying removal in diversity cases was to protect out-of-state defendants from potential prejudices in the state courts of the plaintiff's home state, but when the defendant is sued at home, removal is unnecessary. They also explain that the purpose for the "joined and served" language in Section 1441(b)(2) was to prevent plaintiffs from fraudulently joining forum defendants but never serving them solely to defeat federal jurisdiction. When the forum defendants are served, fraudulent joinder is not an issue and therefore removal is inappropriate.

What Does This Mean for Maryland?

The Fourth Circuit has not ruled on the propriety of snap removals, and courts within the District of Maryland are split. Some judges have adopted the statutory construction rationale, ruling that the plain language of Section 1441(b)(2) permits removal when the forum defendant removes before being served, while other judges have applied the purpose-driven rationale and remanded the cases back to state court.

Rulings from Judge Russell, Judge Bennett, and the late Judge Titus have each expressed approval of snap removals based on the literal language of the statute. For example, a 2015 opinion from Judge Russell found that "the inquiry ends with the plain language" of the statute, meaning that because the in-state defendant, Johns Hopkins Hospital, had not yet been served, it could remove the matter to federal court. *Al-Ameri v. The Johns Hopkins Hosp.*, No. CV GLR-15-1163, 2015 WL 13738588, (D. Md. June 24, 2015).

On the other hand, rulings from Judge Blake, Judge Bredar, Judge Chuang, and Judge Hollander remanded cases where snap removal was attempted. For example, Judge Blake recently called snap removals "an apparent loophole in the forum defendant rule" through which the defendant was attempting to avoid "adjudication in Maryland state court" in defiance of "common sense," which would lead to "absurd results contrary to the purpose of the statute." *Teamsters Local 677 Health Servs. & Ins. Plan v. Friedman*, No. CV CCB-18-3868, 2019 WL 5423727, at *3 (D. Md. Oct. 23, 2019).

What Does This Mean for Defendants?

Snap removal may offer a mechanism for moving a case from state to federal court even with an in-state defendant but taking advantage of this process requires several considerations.

- How Quickly Can Defendant Act?

Snap removal is only available before an in-state defendant is "properly joined and served." Timing is crucial, as this avenue is closed immediately upon proper service. Accordingly, defendants should assess whether an in-state defendant has been served and whether snap removal is appropriate in the case at hand. In a multi-defendant lawsuit where one of the defendants is a forum defendant, a foreign defendant should consider whether it is in a position to, and whether it is advantageous to, remove prior to service upon the in-state defendant.

To have snap removal as an option, companies may wish to monitor online state court dockets to learn when they have been sued. This can be done by subscribing to various docket monitoring services, such as Courthouse News Service. Care should be taken to ensure compliance with other removal deadlines, namely the 30-day removal clock of 28 U.S.C. § 1446(b)(1), which requires, in part, removal within 30 days of the receipt "through service or otherwise" of a copy of the initial pleading.

- Would a Federal Forum Be Preferable?

When a lawsuit is filed in state court, the defendant should quickly consider whether a federal forum would be more advantageous. In making that determination, defendants should consider the type of case involved, the judges in the competing courts, the pace in which cases move in the courts, and the procedural and evidentiary rules that would govern in each court. As discussed herein, removal is not necessarily limited to when a federal question is involved or when there is complete diversity without a forum defendant. Snap removal may be a means through which a defendant, even an in-state defendant, also may have its case heard in federal court.

- Potential Judge Assignment

Given the deep division in Maryland's federal courts on the issue of snap removal, defendants should give careful consideration regarding the prior rulings

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of the potential assigned judge and the judge's prior opinions regarding snap removal.

- Appeal

Appellate rulings on snap removals are exceedingly rare. One reason for the dearth of such authority is that an order remanding a case generally is not appealable. 28 U.S.C. § 1447(d). However, courts are able to certify interlocutory appeals pursuant to 28 U.S.C. § 1292(b). Even litigants facing long odds at the district court level might consider removing and then requesting a certified interlocutory appeal, especially in jurisdictions like the Fourth Circuit, which has not yet ruled on the practice.

- Proposed Legislation

Earlier this year, the House introduced a bill entitled the "The Removal Jurisdiction Clarification Act of 2020," H.R. 5801 that effectively would do away with snap removals. If the bill were to pass as drafted, federal courts would be required to remand snap removal cases if (1) the in-state defendant is served "within 30 days after filing of the notice of removal … or within the time specified by State law for service of process, whichever is shorter;" and (2) a motion to remand is timely filed.

In-house and outside counsel should monitor this legislation and any amendments to it, especially if the bill is reintroduced in the next Congress.

Conclusion

Snap removal can be an intriguing opportunity for defendants, including in-state defendants, to remove cases to federal court based on the language of 28 U.S.C. § 1441(b)(2). To date, every circuit to directly rule on snap removals has approved of the practice. The Fourth Circuit, however, has not spoken to snap removals, leading to a deep division within Maryland's federal court. Taking advantage of snap removal requires quick-thinking and rapid response, and defendants should keep snap removal as an option even when an in-state defendant is named.

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The Next Wave of COVID-19 Coverage Litigation

By Rhonda D. Orin and Daniel J. Healy, Anderson Kill LLP

As the world enters into the next phase of the coronavirus pandemic, the same is happening with the coverage litigation that has followed in its wake. A second wave of litigation is underway that builds upon lessons learned since the pandemic began.

Overview of the First Wave

The first wave of cases was rapid-fire. More than 1,200 cases were filed between March and October by policyholders across the country. Many plaintiffs were restaurants, bars, hair salons and entertainment venues that had suffered staggering interruptions to their businesses. They were disputing denials of their claims for business interruption coverage that they had received from their first-party property insurance companies.

The initial complaints focused almost exclusively on the governmental shutdowns. They made clear, either by affirmative allegations or omission, that there had been no known instances of the virus on the policyholders' own premises. Instead, they alleged that the shutdowns deprived the plaintiffs of the use of their premises, which severely impaired their business operations. They alleged that this circumstance triggered coverage under their property insurance policies and the actual presence of the virus was not required.

A number of courts agreed with the policyholders, but the majority did not. The majority adopted a narrow interpretation of a threshold requirement that can be found in many property insurance policies: "direct physical loss of or damage to property."

1. Was the Actual Presence of the Virus Required?

This view, which became apparent quickly, was that there could be no property coverage unless—at the very least—the virus was on the insured premises. Some courts went further, finding that the mere presence of the virus was not enough; instead, structural alteration of the property was required. They then held that property had not been structurally altered by the presence of the virus, as it could be decontaminated without needing to be rebuilt.

From the policyholders' perspective, these holdings disregarded the policy language and basic principles of insurance and contract law.

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First, the provisions that establish coverage for governmental shutdowns invariably specify that there is no requirement of damage to the insured premises. In fact, the very purpose of those provisions is to establish coverage when the insured premises had not been physically damaged. The provisions establish coverage when a policyholder is deprived of access to its property by a governmental order, even when it arises entirely from physical damage to other property that happens to be nearby.

Second, these rulings disregard the plain meaning of "physical loss of or damage to property." There necessarily is a difference between "loss" and "damage," as: (1) the words are different; and (2) they are separated by the word "or." It is hornbook law that courts are required to give independent meaning to all words in a contract. Thus, the courts should have given independent meaning to the words "loss of . . . property" and recognized that the physical function of insured properties was lost by the governmental shutdowns, regardless of whether they were "damaged."

Third, the insurance companies are the drafters of their own policies. They provide the policies in pre-printed format to their policyholders and give them no opportunity to negotiate or re-write the terms. If the insurance companies meant to limit coverage to "structural alteration," then that is what they should have said. Since they did not do so, the policies should not be interpreted as if those words were there.

Fourth, the words that the insurance companies used are much broader than "structural alteration." Structural alteration is merely one type of "direct physical loss of or damage to property." There can be a "loss of or damage to property" through many causes other than structural alteration, such as the presence of harmful or hazardous substances or odors that prevent property from performing its function. Examples abound in the case law, ranging from the presence of carbon monoxide[1] to ammonia[2] to asbestos fibers[3] to smoke[4] to cat urine[5] to even the odors of an illegal methamphetamine lab.[7] Although there were no structural alterations in any of these cases, in all of them "direct physical loss of or damage to property" was found.

2. Did a "Virus Exclusion" Apply?

The other principal barrier to coverage identified in the first wave of coverage litigation was the presence in the policies of a virus exclusion. Some property insurance policies contain such an exclusion, although it appears in widely varying forms. Sometimes the exclusion explicitly bars coverage for pandemics, viruses or any agent that threatens harm to human health. Other times, the word "virus" is simply tacked on to an exclusion about other issues, such as mold, bacteria or other substances. Still other times, the word is added to an existing exclusion for pollution or contamination. Many courts found that such exclusions would bar coverage even if the policyholders had overcome the lack of "physical damage" or structural alterations.

As a threshold matter, policyholders see the existence of such exclusions as proof that viruses, in fact, constitute "physical loss of or damage to property." There would be no need, ever, to exclude coverage for them if such coverage did not otherwise exist. That holding is compelled by the structure of "all risk" property insurance policies—they cover any risks they do not expressly exclude. Thus, under fundamental principles of insurance law, any policy that does not effectively exclude coverage for viruses covers them. A substantial number of property policies fit into this category.

Regarding the exclusions themselves, policyholders submit that coverage cannot be barred simply by tacking on the word "virus" in a context that makes no sense. That is what happened, they say, when "virus" was added to exclusions for mold, bacteria and other substances that can grow on or in property. A virus, which is brought onto property by third parties and does not grow or expand once it is there, is a completely different entity. It does not logically belong on that list.

The same is true for efforts to fit the coronavirus into pollution or contamination exclusions. Those exclusions bar coverage for releases by policyholders into the ambient environment, such as the outside land, water and air. The pandemic presents the opposite situation: *i.e.*, someone brings the virus into the insured property, thereby causing loss of or damage to the premises. There is no issue here of releases of harmful substances by the policyholder through its business operations or, practically speaking, at all.

Moreover, it is well recognized in many jurisdictions, including by the highest court in New York State, that exclusions

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[1]*Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658 (Mass. Super. Aug. 12, 1998) (holding carbon monoxide contamination constituted direct physical loss despite no tangible damage to the structure of the insured property).

[2]*Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-04418, 2014 WL 6675934, at *7 (D.N.J. Nov. 25, 2014) (holding release of ammonia in manufacturing facility constituted direct physical loss because it "physically rendered the facility unusable for a period of time"). Anderson Kill, the authors' law firm, represented Gregory Packaging in this case.

[3]*Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (holding that asbestos contamination, which did not cause any "tangible injury to the physical structure of [the] building," nonetheless constituted "direct physical loss" under an all-risk policy because "a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants").

[4]*Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 15-01932, 2016 WL 3267247 (D. Or. June 7, 2016) (theater sustained physical loss or damage to property when the wildfire smoke infiltrated the theater and rendered it unusable for its intended purpose), vacated as moot, 2017 WL 1034203 (D. Or., 2017).

[5]*Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (finding that physical loss includes changes to property that "exist in the absence of structural damage," such as cat urine odor).

[6]*Farmers Ins. Co. of Oregon v. Trutanich,* 858 P.2d 1332 (Or. Ct. App. 1993) (pervasive odors from methamphetamine laboratory are a direct physical loss).

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for pollution or contamination cannot even apply to indoor releases of harmful substances by policyholders. The exclusions apply only to releases into the outside environment. Thus, under any approach to these exclusions, they do not apply here.

The Onset of the Second Wave

There have been many decisions favorable to coverage in recent weeks, which suggest that the tide is starting to turn.

1. New Views of Loss or Damage

A number of courts recently have rejected the narrow interpretation of "direct physical loss of or damage to property" and denied motions to dismiss COVID-19 complaints. This trend began in August in the Western District of Missouri. In *Studio 417, Inc. v. Cincinnati Ins. Co.*, 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), the court denied such a motion. It ruled that the complaint had adequately pled a "direct physical loss" because the virus is a physical substance and it allegedly "attached to and deprive[d] Plaintiffs of their property..." Other decisions in that district have held the same.

An increasing number of courts have been following suit. The most recent decision, on October 26, was handed down in *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, Case No. 200700375 (Pa. Ct. Com. Pl. Oct. 26, 2020), by a Pennsylvania state court. The court rejected the insurance company's motion to dismiss as asserting, without the development of facts, that the virus cannot constitute a direct physical loss. It apparently was persuaded the policyholder's arguments, which included the following: "A virus is made up of atoms just like water, smoke, asbestos, or, even, a tree that may have fallen during the last storm. Just like smoke, water, asbestos, or that tree, as soon as it lands on a surface, it alters that surface. While any of these items can be cleaned from that surface, its effect is nevertheless physical in nature."

Probably the most significant decision in any coverage lawsuit thus far is the October 9 decision of a North Carolina state court to grant partial summary judgment to the policyholder in *North State Deli, LLC v. The Cincinnati Ins. Co.*, No. 20-CVS-02569 (N.C. Super. Oct. 9, 2020) (Order Granting Plaintiffs' Rule 56 Motion for Partial Summary Judgment).

That court squarely recognized—exactly as policyholders submit—that "loss" and "damage" are different and independent grounds for coverage. It ruled in the policyholder's favor on coverage and rejected the insurance company's claim that only structural alteration counts:

> Cincinnati's argument that the Policies require physical alteration conflates "physical loss" and "physical damage." The use of the conjunction "or" means-at the very least-that a reasonable insured could understand the terms "physical loss" and "physical damage" to have distinct and separate meanings. The term "physical damage" reasonably requires alteration to property. [citation omitted]. Under Cincinnati's argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. <u>But the Court must give meaning to both terms</u>.

Id. at 7 (emphasis supplied).

2. Challenges to the Virus Exclusions

Last month, the Middle District of Florida questioned whether the word "virus" makes any sense in the context of a mold and bacteria exclusion. In *Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co., Ltd.*, 620CV1174ORL22EJK, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020), the court rejected the insurance company's contention that such an exclusion necessarily bars coverage for COVID-19 losses. It held:

> Additionally, it is not clear that the plain language of the policy unambiguously and necessarily excludes Plaintiff's losses. The virus exclusion states that Sentinel will not pay for loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of "fungi, wet rot, dry rot, bacteria or virus." (*Id.*). <u>Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping</u> of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.

Id. at *4 (emphasis added).

That court also found that the extraordinary nature of the COVID-19 pandemic rendered all of the precedent cited by the insurance company inapplicable:

> Importantly, none of the cases 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.

Id. at *4.

Other courts have recently held the same. For example, in *Optical Services v. Franklin Mutual Ins. Co.*, No. BER-L-3681-20 (N.J. Sup. Ct. Aug. 13, 2020), a state court in New Jersey held in August that policyholders had alleged a direct covered loss because the shutdown orders produced a "loss of physical functionality." The court denied the insurance company's motion to dismiss on grounds that this is an unprecedented legal issue, with no applicable legal authority.

The same is true for an Ohio state court in *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. Com. Pl. Sept. 29, 2020), and a Pennsylvania state court in Ridley Park *Fitness v. Philadelphia Indem. Co.*, No. 200501093 (Pa. Ct. Com. Pl. Aug. 13, 2020).

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Conclusion

When a major coverage issue arises, such as the environmental and asbestos issues in the early 1980s, it can take decades for the law to become settled. More than 40 years after the filing of the first asbestos coverage dispute, such cases are still around today. Over those 40 years, the positions adopted by the courts changed repeatedly—even dizzyingly at times. And the consensus that eventually emerged varies state-by-state and issue-by-issue.

Moreover, while those disputes seemed overwhelming at the time, early signs suggest they will be dwarfed by the impact of the coronavirus pandemic. Asbestos disputes focused on one segment of our society and economy; environmental disputes focused on another. But the pandemic focuses—ruthlessly—on them all.

So with history as our guide, the only certainty thus far is that COVID-19 coverage litigation is in its infancy. It is far too early for insurance companies to announce there is no coverage for these claims. It is also too early for policyholders to forego pursuing them. Instead, we should all fasten our seatbelts; it's going to be a long and bumpy ride.

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Scoping Out Covenants Not to Compete: Emergence of the "Janitor Rule"

By Parker E. Thoeni and Paul D. Burgin, Shawe Rosenthal

When employees depart from their employment to work for competitors or customers, their post-termination actions are often impacted by restrictive covenants contained in employment agreements they have signed during their employment.

Restrictive covenants take many forms and commonly include covenants not to compete. In Maryland, restrictive covenants are generally disfavored because they are restraints on trade. Accordingly, Maryland courts scrutinize restrictive covenants by applying a stringent set of enforceability requirements before considering whether a restrictive covenant has been breached.

It is generally recognized that employers can enforce restrictive covenants to protect customer goodwill and confidential information ("protectable interests"). Courts look first to the face of the agreement to determine whether it is supported by adequate consideration and whether the restrictions are sufficiently limited in scope to be enforceable. If the agreement is not facially overbroad, the court will move on to an analysis as to whether the scope of the agreement is sufficiently limited under the circumstances. If the court finds an agreement overbroad, it may apply the "blue pencil" rule to strike offending language, but if the overbreadth cannot be cured by striking offensive language, then the restrictive covenant will not be enforced. This article will explore the recent federal case law that scrutinizes the scope of covenants not to compete.[1]

I. A Prohibition on Employment With a Competitor "In Any Capacity" is Found Facially Overbroad

The first set of cases involve disputes between ImpactOffice, LLC and several former employees. The *ImpactOffice* cases all track generally the same fact pattern. *Levin v. ImpactOffice*, Civ. No. TDC-16-2790, 2017 WL 2937938 (D. Md. July 10, 2017); *ImpactOffice, LLC v. Siniavsky*, Civ. No. TDC-15-3481, Civ. No. TDC-16-1851, 2017 WL 1410773 (D. Md. Apr. 19, 2017) ("Siniavsky"); *Paul v. ImpactOffice, LLC*, Civ. No. TDC-16-2686, 2017 WL 2462492 (D. Md. June 6, 2017) ("*Paul*"); *Chapman v. ImpactOffice*, Civ. No. TDC-16-1851, 2017 WL 1410773 (D. Md. Apr. 19, 2017). Members of the ImpactOffice sales team executed agreements during their employment that placed restrictions upon their disclosure of confidential information, post-employment solicitation of customers, and post-employment competition. The sales employees then departed to commence work for ImpactOffice competitor W.B. Mason. At issue in each case was the enforceability of generally similar covenants not to compete and non-solicitation agreements. The covenants not to compete prohibited employment with a competitor in any capacity.

The *ImpactOffice* court held that the covenant was facially overbroad and unenforceable because it was not limited to employment in positions similar to that which the employee held at ImpactOffice, instead prohibiting the employee from employment in any capacity at a competitor. The court's reasoning was that the covenant "focuses on the nature of the competitor rather than the work performed by the former employee. The language of the provision would bar [the employee] from working for an Impact competitor in any position, even if that

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position afforded him no opportunity to take advantage of any personal relationships with customers that he had developed while at Impact."

This scrutiny of the activity prohibited is not unusual in other jurisdictions, and is often referred to as the "janitor rule," a rule that deems facially overbroad and unenforceable a restrictive covenant that would prohibit an employee from becoming even a janitor for a competitor.

2. Maryland State Appellate Courts Historically and Continue to Focus on the Temporal and Geographic Scope of Covenants Not to Compete

In reaching its conclusion, the *ImpactOffice* court relied upon *Deutsche Post Global Mail, Ltd. v. Conrad*, 116 Fed. Appx. 435, 437 (4th Cir. 2004), a Fourth Circuit case interpreting Maryland restrictive covenant law. The *Paul* and *Levin* opinions articulated the *Deutsche Post* standard to determine the enforceability of a covenant not to compete as requiring that the covenant be no broader in scope and duration than is necessary to protect the legitimate interests of the employer. However, the *Deutsche Post* case relied upon *Silver v. Goldberger*, 231 Md. 1 (1963), in which the Court of Appeals held that covenant not to compete "will be sustained if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer." The Maryland case from which the standard was derived focuses on geographic and temporal scope, but the *ImpactOffice* cases[2] take a significantly more liberal approach to the meaning of a reasonable scope, permitting analysis of factors other than geography and duration, specifically, the scope of the activity restricted.

There is certainly room for argument that Maryland law requires a covenant not to compete to be reasonable only as to geography and duration to survive a facial attack on enforceability, and that analysis of the scope of the activity restricted is not warranted. Indeed, the only restrictive covenant case out of the appellate level state courts since the series of *ImpactOffice* cases made no mention of the recent developments, instead specifying on several occasions that the assessment of whether scope is reasonable is limited to "[g]eography and duration" and "time and space." *A.C.L. Computers and Software, Inc. v. Braxton-Grant Technologies, Inc.*, 2018 WL 6271671, at *5 (Md. Ct. Spec. App. 2018) (ultimately finding covenants unenforceable because the employer lacked a protectable interest, but interestingly suggesting without further discussion that covenants, which would have passed muster under the *ImpactOffice* analysis, may have been overbroad on their face) (emphasis added).

3. The Fourth Circuit Has Rejected the "Janitor Rule" When The Protectable Interest Was Confidential Information

In analysis that would reject application of the "janitor rule" in the context of confidential information as the protectable interest, the Fourth Circuit has articulated the rationale for enforcement of a broad covenant not to compete. In *Comprehensive Technologies Intern., Inc. v. Software Artisans, Inc.*, 3 F.3d 730, 739 (4th Cir. 1993), a decision interpreting Virginia law, which was subsequently vacated by a settlement agreement, the court noted that if an employee has access to highly confidential information a restriction on employment with a competitor in any capacity is warranted because the bringing of that confidential information to a competitor in any way would prejudice the interests of the employer and because other legal remedies to protect the confidential information can be inadequate or difficult to prove. Comprehensive Technologies stands in stark contrast to *MCS Services, supra*.

4. The "Janitor Rule" Takes Hold in Maryland's Federal Courts

While the state appellate courts have not begun to examine the scope of activity restricted, the Maryland federal court has begun to do so with increasing regularity. Indeed, the *ImpactOffice* court's analysis was adopted in *Bindagraphics, Inc. v. Fox Group, Inc.*, 377 F.Supp.3d 565, 573 (D. Md. 2019), which found overbroad a restriction that "pertained to any position the employee might take with a competitor, not merely those where he might take advantage of personal relationships with customers." The *Bindagraphics* court held that "the fact that the plain language of the contract prevents Mr. Rodgers from taking any position with a competitor renders this agreement facially overbroad." *Id.*

Similarly, the court in *Aerotek, Inc. v. Obercian*, 377 F. Supp. 3d 539 (D. Md. 2019), found impermissibly overbroad a covenant not to compete prohibiting the employee's employment with a business that competed in the same type of business in which she worked during the two years of employment prior to termination. The court scrutinized the activity restricted, holding that the restriction was facially overbroad because it did not take into account the work the employee would be performing at the competitor. *Id.* (the "proscription [wa]s not tailored to the positions or activities at a competitor that would allow [the employee] to draw upon the goodwill that she generated from Aerotek, [thus]

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[1]Many of the cases cited below contain substantial discussion regarding non-solicitation agreements, as well as the "blue pencil" rule, subjects that are beyond the scope of this article.

[2]The court also referred to three district court cases that have held similar covenants not to compete to be facially overbroad. *Medispec, Ltd. v. Chouinard*, 133 F. Supp. 3d 771 (D. Md. 2015); *Seneca One Finance, Inc. v. Bloshuk*, Civ. No. RWT-16-cv-1848, 2016 WL 5851626 (D. Md. Oct. 5, 2016); *MCS Servs. V. Jones*, Civ. No. WMN-10-1042, 2010 WL 3895380 (D. Md. Oct. 1, 2010) (finding that a covenant not to compete with an employer in any capacity could not be deemed reasonable to protect the employer's confidential information when that interest was adequately protected by a confidentiality agreement).

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it [wa]s overbroad and not reasonably necessary to protect Aerotek's interest in preventing loss of goodwill."). The court, however, found a second restriction in the agreement, which prohibited the employee from engaging in the same type of work she had performed, or in a type of work about which she learned confidential information, during her last two years at Aerotek to be facially permissible.

In yet another case decided after the *ImpactOffice* cases, *SH Franchising, LLC v. Newlands Homecare, LLC*, No. CV CCB-18-2104, 2019 WL 356658, at *1 (D. Md. Jan. 29, 2019), the court held a covenant not to compete to be overbroad in the absence of a limitation on the activity restricted. There, the covenant not to compete prohibited the owner from owning, operating, or otherwise participating in a competitive business in the Tulsa, Oklahoma area for two years after the termination of the franchise agreement. The owner left the franchisor and started what the franchisor claimed to be a competing business in the Tulsa area.

The Court noted that the agreement prohibited the former owner from "working for businesses which provide the same or similar products and services related to the establishment and operation of in-home care agencies." This restriction was deemed overbroad and unenforceable, as "[r]estricive covenants on employment may not be used to bar individuals from entire fields of work simply to limit the employer's competition." Indeed, the restriction would have prevented the owner from working for a competitor in any capacity, without regard for whether that work was at all related to her work for the franchisor. This further emphasizes the Maryland federal court's endorsement of the concept that an enforceable covenant not to compete must also address the scope of activity restricted, and such restrictions should be limited to employment in positions similar to that which the employee previously held.

It is important to note that even if the covenant not to compete appears reasonable with regard to geographic scope, duration, and scope of activity restricted, the employer must still have a protectable interest. In *Premier Rides, Inc. v. Stepanian*, 2018 WL 1035771 (D. Md. Feb 23, 2018), the court held a non-competition clause restricting a former employee from working "in a capacity the same as or similar to the capacity he served" for his previous employer "with any kind of business or enterprise that competes directly or indirectly" with his former employer's business was "wider in scope than reasonably necessary and … not enforceable." The covenant not to compete specified that the restrictions were intended to limit the employee from competing with his former employer. The court found "the circumstances similar to the line of cases where the non-competition restriction [wa]s not justified because it [wa]s trying to prevent competition rather than protect goodwill," thus the "non-competition provision prohibit[ed] more activity than needed to protect [the employer's] legally protected interest." Indeed, in Maryland federal court, an employer does not have a protectable interest in limiting competition and restrictive covenants must stem from an interest in protecting customer goodwill or confidential information.

5. Practice Pointer

Despite the dearth of Maryland appellate decisions adhering to the ImpactOffice approach regarding activities restricted, as well as the appellate state court's propensity to address only the geography and duration of the restriction, practitioners should be mindful of the scope of activity restricted when drafting or litigating cases involving such covenants.

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