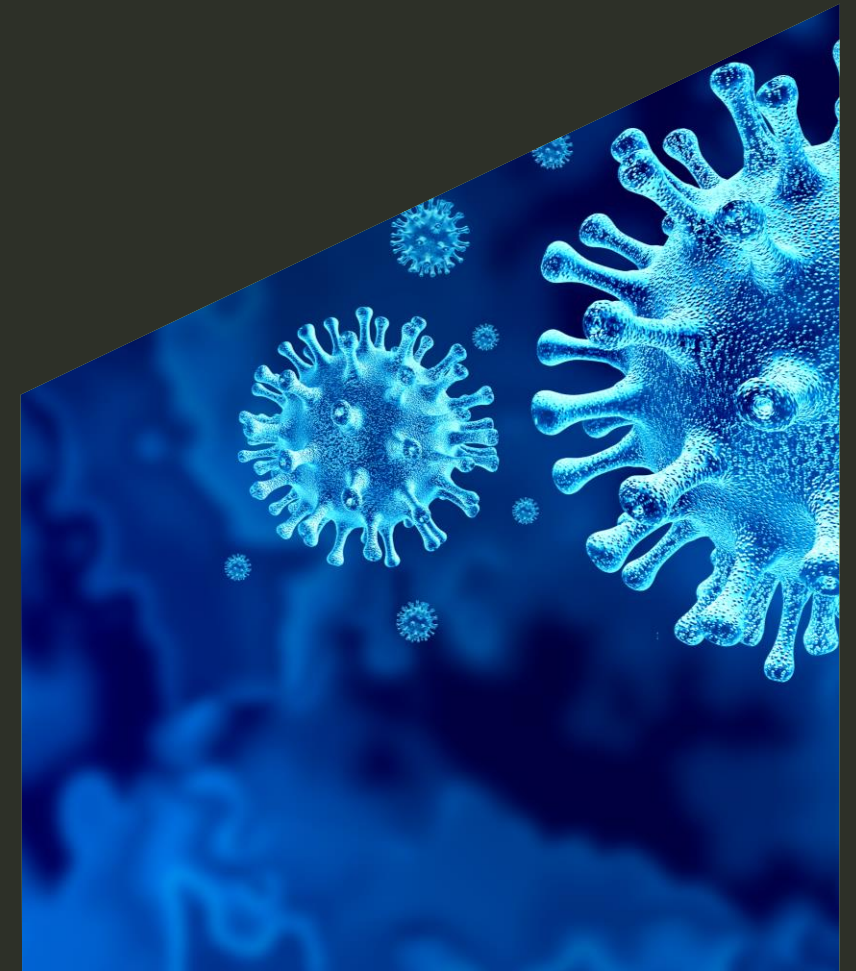




PROACTIVE STRATEGIES TO IMPLEMENT NOW IN ORDER TO PROTECT YOUR BUSINESS AND AVOID LITIGATION

- Force majeure—understanding key trends & updates
- Preventing litigation risks stemming from price gouging
- Monitoring COVID-19-related business interruption insurance litigation
- Practical implications for litigation during COVID-19 and beyond

Thursday, August 6, 2020



SPEAKERS



TERRY DEE

Partner

McDermott Will & Emery

Terry Dee focuses his practice on product liability and product-related class actions, antitrust and other complex litigation. He has tried cases in federal and state courts throughout the country, including Illinois, Ohio, Washington, DC, Maryland, Arizona and Missouri, and has handled numerous commercial arbitrations. Terry has served as lead counsel in joint defense groups in federal multi-district litigation and multi-party litigation, crafting the national strategy and coordinating the joint defense of those cases. Terry also provides pre-marketing advice to McDermott clients developing products in the health, medical device and pharmaceutical industry, to assess and manage potential risk areas.



MEGAN THIBERT-IND

Partner

McDermott Will & Emery

Megan Thibert-Ind represents clients involved in complex business litigation, including healthcare disputes, bankruptcy and adversary proceedings, post-acquisition suits, contractual claims, and tax controversies. She represents clients in litigation pending in federal and state courts throughout the country, and has handled numerous matters before the American Arbitration Association and other alternative dispute resolution tribunals.

SPEAKERS



BRYAN BROWNING
Senior Legal Counsel
Lenovo

Bryan Browning is Senior Legal Counsel at Lenovo, where he manages complex commercial, products, and class action litigation globally for the company and provides risk mitigation and business consultation services. Prior to joining Lenovo, Bryan was a shareholder at Bassford Remele, P.A. in Minneapolis, Minnesota.

Bryan was selected by the Hispanic National Bar Association as a recipient of the 2017 Top Lawyers Under 40 Award, and a 2016 Attorney of the Year by Minnesota Lawyer. He has been named a Rising Star by Super Lawyers every year since 2012, and has been recognized by a number of organizations for his commitments to the legal profession and greater community.



TRACY O'FLAHERTY
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Tracy O'Flaherty is Vice President, Deputy General Counsel at Groupon, Inc. (www.groupon.com) where she leads the Global Litigation, Compliance, Employment and Regulatory functions. In addition, Tracy serves as the Executive Sponsor of the LEARN initiative of Groupon's Diversity & Inclusion function to combat racism and serves as the Executive Sponsor of Groupon's Woman@Groupon Business Resource Group. Prior to Groupon, Tracy was the Vice President, Associate General Counsel at Baxter Healthcare Corporation leading the Global Litigation, Employment and Benefit functions. She also served as a member of Baxter's Global Leadership Team and the Global Human Resources Leadership Team. She led Baxter's Legal Department Diversity & Inclusion initiatives and served on the Global D&I committee. Prior to joining Baxter, Tracy was a partner at Winston & Strawn, LLP.



FORCE MAJEURE—UNDERSTANDING KEY TRENDS & UPDATES

- Force Majeure Clauses
- Common Law Doctrines
- Force Majeure and COVID-19: Recent Trends
- What Courts Have Said
- Key Takeaways

INTRODUCTION: FORCE MAJEURE CLAUSES

- **Force Majeure Clauses**

- Impacts rights and obligations if unforeseen event beyond the parties' control occurs.
- Contract-specific, Fact-specific, Strictly Construed (NY law)

- **Common Law Doctrines**

- Impossibility of Performance
 - Must be “objectively impossible” from event “that could not have been foreseen or guarded against”
 - Financial hardship, even to the point of insolvency, is generally not enough
- Impracticability
 - Performance made impracticable—not necessarily impossible—by unforeseen circumstance
 - Many jurisdictions treat impracticability as synonymous with impossibility
- Frustration of Purpose
 - Non-performance excused where unforeseeable event renders the contract valueless

FORCE MAJEURE AND COVID-19: RECENT TRENDS

● **Current litigation**

- Landlord-tenant disputes – Rent payments
- Event-space litigation-- Deposits
- Airline class actions -- Refunds
- Education class actions – Refunds

● **Theories**

- Breach of Contract, Equitable Principles (restitution, good faith/fair dealing, conversion)
- Affirmative Defenses: Force Majeure, Common Law Doctrine Defenses

WHAT COURTS HAVE SAID

- Rent Cases

- ***In re Hitz Rest. Grp.*, 2020 WL 2924523 (Bankr. N.D. Ill. June 3, 2020)** (governor’s order following COVID-19 “unambiguously” triggered the force majeure clause, but only partial relief).

- Deposit Cases

- ***NetOne, Inc. v. Panache Destination Mgmt., Inc.*, 2020 WL 3037072 (D. Haw. June 5, 2020)** (Force majeure applied but failure to return deposit was not a breach of contract)

- Settlement Agreement Cases

- ***Lantino v. Clay LLC*, 2020 WL 2239957 (S.D.N.Y. May 8, 2020)** (extreme financial hardship did not excuse non-payment under doctrine of impossibility)

- Forseeability

- ***Belk v. Le Chaperon Rouge Co.*, No. 1:18CV1954, 2020 WL 3642880, at *11 (N.D. Ohio July 6, 2020)**
(Reasonably foreseeable that COVID could impact business as of March 12 , 2020 Settlement Agreement)

KEY TAKEAWAYS

- **Decisions Reflect Contract-Specific, Fact-Specific Nature of Analysis**
 - Specific language of force majeure clause (refund cases)
 - What was known about COVID-19 at time of contracting (foreseeability)
- **Consider Your jurisdiction**
 - Courts in different jurisdictions may construe force majeure clauses differently
 - Jurisdictions with less developed force majeure law tend to look to NY law and strict construction
- **Impact of Regulators or State Laws on Impact of Force Majeure Clause**
 - How do statements by regulators impact rights and obligation under contract (airline industry)
 - Impact of incorporating state law requirements into contracts
- **Importance of Adequate Notice**
 - Detail how event made performance impossible and mitigation steps



PREVENTING LITIGATION RISKS STEMMING FROM PRICE GOUGING

- Risks Stemming from Price Gouging
- Navigating Federal Regulations and State Laws
- Understanding Your Exposure
- Proactively Defending Your Business
- Strategies to Implement Now

RISK STEMMING FROM PRICE GOUGING

- Demand for personal protective equipment, foods, and other essential supplies have risen dramatically, placing significant pressures on supply.
- Normally it would not be problematic to increase prices in response to higher consumer demand.
- But with state emergency declarations, such price increases may lead to hefty civil fines.
- Manufacturers and resellers, especially of products in high demand, should be prepared for state and federal enforcers to aggressively scrutinize prices charged during the Covid-19 pandemic.

NAVIGATING FEDERAL REGULATIONS & PATCHWORK OF STATE LAWS

Federal Regulations

- No federal law, but there have been several federal regulatory actions:
 - National Anti-Price Gouging Executive Order
 - DOJ COVID-19 Hoarding and Price Gouging Task Force
 - Congressional Anti-Price Gouging Bills

Patchwork of State Laws

- About 40 states have explicit laws prohibiting price gouging during declared emergencies.
- Other states prosecute under general prohibitions against unfair or deceptive trade practices.
- Some states specify a precise price increase that qualifies as price gouging.
- Most states are not limited to consumer sales.
- Most states provide exceptions for increases.

UNDERSTANDING YOUR RISK OF EXPOSURE

- Private rights of action may be available to plaintiffs that allege they are injured by price gouging.
- Many states provide serious penalties in the form of potential jail time, substantial fines, or prohibitions of future sales.
- State statutes typically indicate a civil penalty amount “per violation.”
- Even in states without price gouging laws, state attorneys general and governors are taking action, including civil and criminal penalties.

PROACTIVELY DEFENDING YOUR BUSINESS

- In response to various entities attempting to sell 3M-brand N95 respirators at inflated prices, 3M has filed a number of lawsuits alleging federal and state trademark law violations, among other claims.
- 3M is the largest producer of N95 respirators in the U.S., and it confirms it has not raised its prices in response to the Covid-19 pandemic.
- But it alleges various sellers have misled buyers into believing they were authorized 3M distributors or otherwise affiliated with 3M and that 3M authorized their increased prices.
- Some of the affected buyers include:
 - The HHS Strategic National Stockpile
 - New York City procurement officials

FOUR STRATEGIES TO IMPLEMENT NOW

1. Monitor continuously evolving laws and regulations.
2. Identify your potential risks.
 - Impact of downstream pricing
3. Be cognizant of exceptions to price gouging laws and keep documents and records sufficient to demonstrate that the price increase is based on increased costs.
4. Expect outreach from enforcement agencies, especially sellers of scarce and essential products.
 - Quick response may help stem formal action
 - Resellers take care not to over-accumulate



MONITORING COVID-19-RELATED BUSINESS INTERRUPTION INSURANCE LITIGATION

- Business Interruption Insurance MDL
- Types of Policies
- Legal Issues & Decisions
- Impact on the Insurance Market

BUSINESS INTERRUPTION INSURANCE MDL

- To date more than 200 business interruption insurances cases filed in state and federal courts
- First wave of cases primarily from service industry (restaurants, night clubs, retail, transportation)
- Filed by Plaintiffs' PI and class action lawyers
- Traditional policyholder counsel waiting to file claims

MDL STATUS

- Plaintiffs' Counsel cases—moved for consolidation
 - Disagree on location (IL, CA, PA, FL, WA), but agree on consolidation
- Policyholder Counsel—against consolidation
- Insurance Industry—against consolidation
- Arguments for Consolidation:
 - Facilitates quick resolution; expedites the discovery process; reduces costs; reduces disruptions to carriers' businesses; allows policyholders to pool resources for limited experts
- Arguments Against Consolidation:
 - Different policy language; different state insurance laws; different shutdown orders across the country; different underlying facts at every business; different types of policyholders
- July 30, 2020 Hearing

TYPES OF POLICIES

- All Risk or All Peril Policies (“all risks of physical loss or damage”)
 - Time Element Coverage
 - Loss of use/Lost profits
 - Civil Authority or Ingress/Egress Coverage
 - Government action or damage that hinders access to business
 - Extra Expense Coverage
 - Additional costs during disruption
- Specialty Policies
 - Travel, education, etc.

LEGAL ISSUES & DECISIONS

Legal Issues

- Physical Damage
 - Required?
 - Is closing business physical?
 - Virus on surfaces?
- Virus Exclusion
 - 2006-2008 SARs epidemic
 - Regulatory estoppel?

Decisions

- PI/TRO Context
 - *Social Life Magazine v. Sentinel Insurance Co. Limited*, Index No. Civ. 3311 (VEC) (SDNY May 14, 2020)
- Claim Denial
 - *Gavrilides Management Co. et al. v. Michigan Insurance Co.*, (Michigan trial court, July 1, 2020)

IMPACT ON THE INSURANCE MARKET

- Insurance Industry Reaction
 - Business Interruption Insurance related to pandemics difficult
 - Impossible to get renewal of Business Interruption Insurance related to COVID-19
 - Pressures from re-insurers
 - Actuarial issues: can't rate risk without better understanding of the virus/vaccine
- Government Reaction
 - State legislation to require coverage
 - Federal legislation akin to National Flood Insurance Act
 - EU/UK Backstop program



PRACTICAL IMPLICATIONS FOR LITIGATION DURING COVID-19 AND BEYOND

- Virtual Discovery, Hearings, Trials, ADR, and Investigations During COVID-19
- Is Virtual Litigation Here to Stay?

VIRTUAL DISCOVERY

● Pros and Cons

- Keep making progress in litigation
- Eliminating traveling costs
- Ability to video record
- Loss of control and the ability to react during in-person questioning
- Limits on-site document collection/review
- Working from home may increase preservation and collection burdens

● Best Practices

- Consider logistical and practical implications of working from home on document collection
- Stipulate not to communicate with the witness while on the record
- Organize exhibits in advance and practice file-sharing
- Connect to audio by phone to reduce WiFi issues
- Have email accessible as a backup in case of IT problems

VIRTUAL HEARINGS

- **Pros and Cons**

- Saving time and costs associated with going to court for routine proceedings
- More agreement among parties as courts put pressure on parties to stipulate
- Remote hearings present technological challenges, such as poor audio quality, internet connection issues
- At the state level, some courts have been slow to implement the technology
- Telephonic hearings can lead to participants speaking at the same time

- **Best Practices**

- For substantive hearings, ask if Zoom (rather than telephone) is an option
- Connect to audio by phone to reduce problems from slow Wi-Fi connections
- Stay muted unless you are speaking
- Look for ways to be illustrative and provide helpful guidance to the court through demonstratives

TRIAL BY ZOOM—MAY IT PLEASE THE CAMERA?

● Pros and Cons

- Seeing witnesses head-on and up close improves factfinder's ability to assess witness credibility
- Despite virtual breakout rooms, virtual jury deliberations pose a challenge
- It's more difficult for the factfinder to review virtual exhibits

● Best Practices

- Do a dress rehearsal
- Consider sending pre-packaged hardcopy exhibits to the court in advance
- Think about ways to keep the factfinder engaged remotely
- Consider your backup plan for technical failures or witness unavailability



VIRTUAL ARBITRATIONS AND MEDIATION

- **Benefits**

- Eliminates travel costs
- Virtual platforms can simplify logistics
- Breakout rooms allow mediators to engage in meaningful settlement discussions
- Reduces value of chest pounding

- **Challenges of virtual ADR**

- Presents some security issues
- Social interactions that contribute to successful resolutions is limited
- IT problems can derail the day
- Easier to walk away

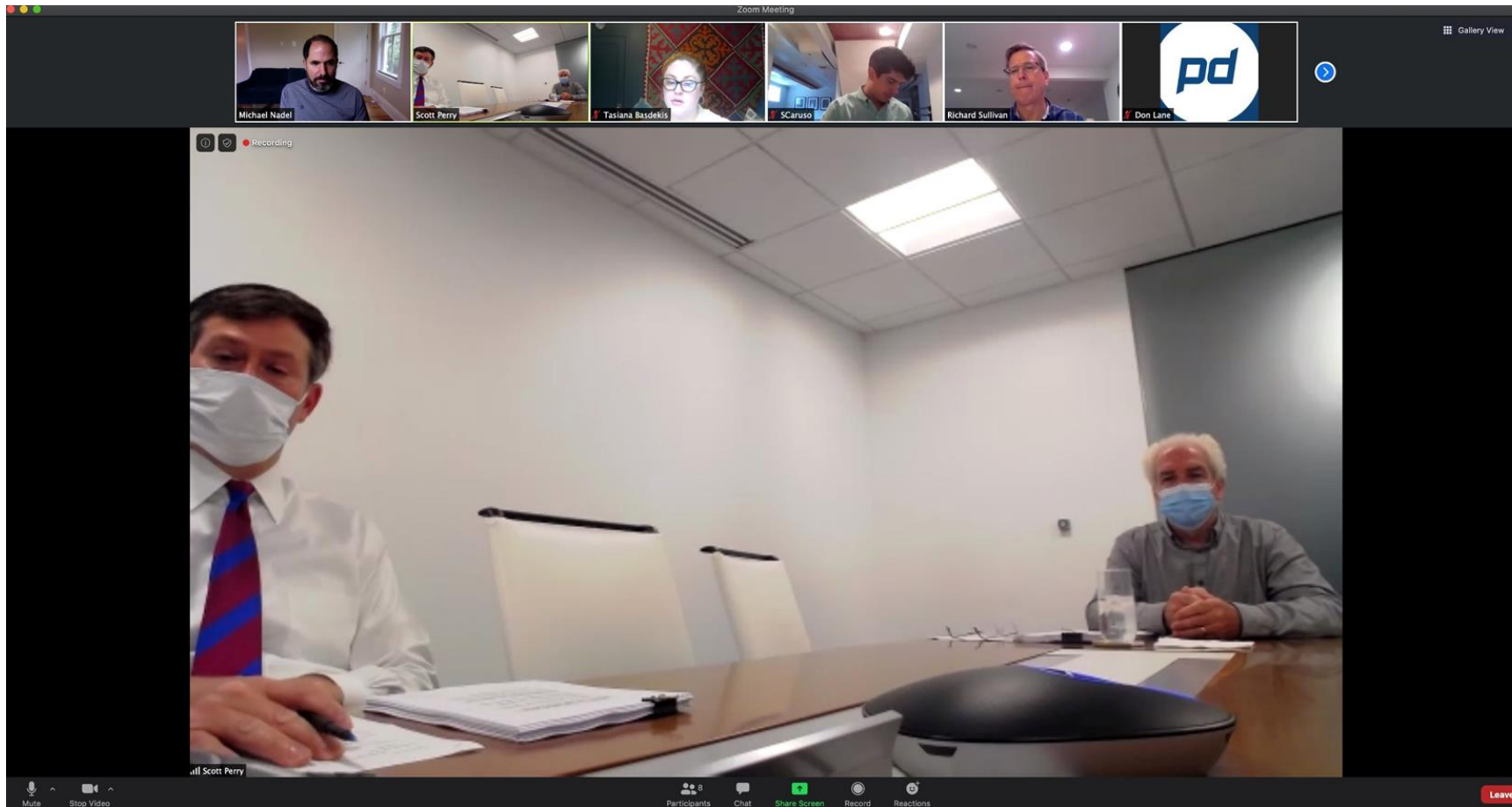
- **Best Practices**

- Consider an initial meeting with all parties to test video and audio quality
- Organize exhibits in advance and practice with the file-sharing feature
- Work out ground rules with mediator regarding participation and walking away

VIRTUAL INVESTIGATIONS

- Technology allows for companies and outside counsel to navigate remote investigations while maintaining investigative integrity, confidentiality, and independence
 - Virtual document collection and review
 - Virtual interviews
 - Virtual reporting
- Best practices
 - Adhere to a strict process, including interviews, memos, document review, etc.
 - Ensure confidentiality and preservation
 - Leave open the option of witness follow-up

ARE VIRTUAL LITIGATION PRACTICES HERE TO STAY?





QUESTIONS?

Reminder: Please use the Zoom Q&A feature to submit your questions. Questions answered during the call will not be attributed to the participant who submitted the question.

THANK YOU FOR ATTENDING

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