

**ALSB JOURNAL OF BUSINESS LAW & ETHICS PEDAGOGY**  
**VOLUME 3; ISSUE 1**  
**FALL 2020**

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## **CONTENT & OPINIONS**

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## FROM THE EDITOR

### **Unprecedented Times: A History of Adapting to Educational Challenges**

*The new semester had barely begun as a highly virulent viral infection created havoc on college campuses everywhere, spurring mitigation efforts. Some institutions closed completely; others halved class sizes and quarantined symptomatic students. Public gatherings were prohibited and athletic competitions cancelled. Movie theaters, bowling alleys, and churches shuttered; restaurants limited indoor dining. Students were advised to avoid groups and refrain from class attendance if feeling ill. Masks and social distancing were ordered by health authorities, and travel restrictions between city centers established and enforced.*

Although descriptions in the preceding paragraph aptly align with our experience of the continuing COVID-19 pandemic, the events are actually derived from 102-year-old historical accounts by college students, faculty, and administrators during the 1918 influenza pandemic. The similarities are concurrently remarkable and unremarkable as individuals globally sought to contend with—and adapt to—the unimaginable crisis of their respective time.

Historical similarities also suggest that the learning environment of both 1918 and 2020 was characterized by the ability to adjust, to reinvent, and to innovate. Smaller indoor class sizes, outdoor field trips and open-air classrooms, journaling, hybrid instruction (by phone in 1918 or by computer in 2020)—these are some of the learning-within-a-pandemic creations that are evident in both periods. Although higher education students, faculty and administrators of these 20<sup>th</sup> and 21<sup>st</sup> century crises are separated by a hundred years of change, examples of pandemic college learning shows that the mixing of innovative traditional and non-traditional learning tools and modes is virtually timeless.

Among the many lessons of the current crisis is knowledge that there is an element to learning that transcends method, approach, or venue, and the authors of this Volume 3 Issue 1 deftly capture this essence in their work. This issue of the *Journal of Business Law & Ethics Pedagogy* provides classroom ideas and resources for teaching that are innovative and simultaneously malleable to the multiple learning platforms many of us have recently adopted. Some of the exercises and concepts found in these articles are inspired by the current crisis; all will provide students with enhanced ability to make connections between their studies, business operations, and the world in which they live and work.

In *Business Continuity in Light of Coronavirus Disruption—A Group Exercise*, author Nanci Carr shows how crisis can create opportunity—even in the classroom—through a study of business disruption. This practical exercise focuses on allowing hospital-based employees to begin working remotely, and examines the requisite logistical and legal issues associated with such a transition. Covering a variety of topics, such as consent, liability, and HIPAA regulations, Professor Carr's lesson helps students make a vivid direct correlation between the COVID-19 crisis and its impact on business operations.

Author Tonia Hap Murphy has developed a valuable compendium of resources and their application in her article *Law in the Time of Coronavirus: How and Why to Cover COVID-19 Disruptions in a Business Law or Legal Environment Course*. Including a virtual textbook range of business law topics, Professor Murphy presents engaging and immersive examples that capture the “silver lining” of our current crisis—understanding a connection between real world current challenges and the lessons we take with us from these issues to apply in the future.

In the essay *Getting Our Hands Dirty: Making the Problem of Dirty Hands Work for Us*, author Barry Sharpe suggests using the concept of dirty hands to introduce students to some of the more complex aspects of ethical thinking. Because the idea that an action may be both justified and wrong is difficult to reconcile, Professor Sharpe believes that the paradoxical nature of dirty hands is a useful framework to reconsider ethical theories and their often hasty, “cookie-cutter” application. Student encounters with messy moral landscapes helps to broaden their ethical toolbox for challenges and more thoughtful decision-making in both life and work.

Using the analogy of a flowing river, author Nancy White illustrates how cases and law move through the court system in *The River of Case Law and the Engagement Ring*. Including a short lecture (<4 mins.) and a well-organized exercise (with teaching notes), Professor White provides students with an opportunity to understand the complexities of how cases are decided and how precedents are created and applied. Focusing on the law of the “engagement ring” and other gifts given in contemplation of marriage, *The River of Case Law* is an engaging (pun intended) look at the consistency and structure of our legal system.

Authors Susan Willey and Cheryl Black present a practical, multifaceted project in their article *Speaking Their Language: Assigning Infographics and Videos as “Digital Deliverables” to Teach Legal Environment of Business Students About Social Media Policy*. In this highly engaging exercise, students are asked to analyze a corporate media policy, create an infographic and training film, and apply the policy to various workplace scenarios. Drawing on Generation Z’s affinity for social media, the importance of digital deliverables, and the need for projects that align with many learning platforms, Professors Willey and Black have created a versatile lesson that combines knowledge and technical skills in a unique and innovative way.

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Christine Ladwig  
EDITOR-IN-CHIEF

# Law in the Time of Coronavirus: How and Why to Cover COVID-19 Disruptions in a Business Law or Legal Environment Course

*Tonia Hap Murphy\**

## **ABSTRACT**

The 2020 COVID-19 pandemic presented an array of legal challenges for businesses. Students have a natural interest in relating the virus that has upended their lives to classroom material. This article contains guidance and several detailed exercises for covering coronavirus-related issues in Business Law/Legal Environment courses. The links to over fifty resources, including video clips, court rulings, government and law firm advisories, news reports, law reviews, company press releases and actual contracts, enable professors to incorporate coverage of the pandemic in a knowledgeable, sensitive and effective manner—integrating legal concepts with broader practical and strategic questions.

**KEY WORDS:** BUSINESS LAW, PEDAGOGY, TRAUMATIC EVENTS, PANDEMIC, COVID-19, LAW AND STRATEGY, QUARANTINE AND DUE PROCESS, FRAUD, NEGLIGENCE, TRADEMARK DILUTION, CONTRACTS, FORCE MAJEURE, MATERIAL ADVERSE EFFECTS

## **I. Introduction**

Businesses face an array of legal challenges connected with the 2020 pandemic and accompanying shutdowns. Among them are issues relating to:

- Civil Procedure
- Constitutional Law
- Privacy
- Criminal Law
- Fraud
- Negligence
- Product Liability
- Intellectual Property
- Contracts
- Consumer Protection
- Worker Protection
- Employment Discrimination
- Bankruptcy
- Mergers and Acquisitions
- Corporate Governance
- Insurance

This list looks like the Table of Contents for a Business Law or Legal Environment textbook. The coronavirus crisis presents current, engaging, understandable examples to use in class throughout a Business Law or Legal Environment course.

### **A. Pedagogical Considerations**

Students have a natural interest in relating the coronavirus that has upended their lives<sup>1</sup> to coursework.<sup>2</sup> Professors should seize upon this interest and the intersections between the COVID-19 pandemic and course material. In doing so, they should be mindful that at least some students have suffered traumatic events in connection with the virus—their own serious illness, illness or death of a loved one, severe financial instability<sup>3</sup> or other difficult personal situations. The academic literature advises professors to engage the issues with sensitivity and a respectful tone. “[T]hread[ing] an important current event into their class as a real-time case illustration of the course material” helps students begin to “intellectually process” the events.<sup>4</sup>

### **B. Materials and Approach to Classroom Coverage**

Part II of this paper provides materials and specific suggestions for covering coronavirus-related issues connected with Business Law and Legal Environment course topics. It links to over fifty resources for use in the classroom. These curated resources include video clips, court rulings, advisories from government agencies and law firms, news reports, law review articles, legal blogs, company press releases and actual contracts.

I chose these resources because they are concise, easily understood, authoritative and readily available online. Some resources provide background information so that a professor can approach these issues knowledgeably. Professors may assign some as readings. They provide timely examples and serve as the basis for engaging classroom discussions, debate, research projects and written assignments.

Classroom coverage focuses on practical and strategic questions related to how businesses “prevent legal problems and resolve conflict.”<sup>5</sup> Professors may use these materials to achieve learning outcomes such as:

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*Murphy was named winner of the 2020 Charles M. Hewitt Master Teacher Competition based on her presentation of a version of these materials. Thanks to Professors Dan Cahoy and Robert Battalio for pointing me to helpful materials on intellectual property and corporate governance issues.*

<sup>1</sup> Commentators suggest that the impact of the 2020 coronavirus pandemic on members of Generation Z—those born between the mid-1990s and mid-2000s—is akin to the impact on earlier generations of such momentous events as World War II, the Vietnam War, Watergate, and September 11. See, e.g., Amanda Shafer, *How Will the Coronavirus Pandemic Shape Gen Z? University Students Share their Thoughts*, USA TODAY (Apr. 10, 2020), <https://www.usatoday.com/story/opinion/2020/04/10/coronavirus-pandemic-may-forever-shape-how-gen-z-views-world-column/2960084001/> (“For my generation, Gen Z, the COVID-19 pandemic will leave a scar on us. The question is how will it shape our view of the world?”).

<sup>2</sup> See, e.g., Tunku Varadarajan, *Going to School on the Coronavirus*, WALL ST. J. (Apr. 26, 2020, 3:54 PM), <https://www.wsj.com/articles/going-to-school-on-the-coronavirus-11587930877> (noting that in response to student demand, Stanford University developed and launched in ten days an integrative course, “Covid-19 Elective,” open to students from all majors and covering topics including immunology, crisis management, and economic effects). Legal studies scholars have long recognized the pedagogical value of tying course material to current events. E.g., Corey A. Ciocchetti, *Connect and Thrive: Perspectives from a Newly Tenured Professor*, 28 J. LEGAL STUD. EDUC. 385, 392 (2011); Adam Epstein, *Go for the Gold by Utilizing the Olympics*, 29 J. LEGAL STUD. EDUC. 313, 313-14 (2012).

<sup>3</sup> Half of Americans aged eighteen to twenty-three report that they or a family member lost a job or took a pay cut due to the pandemic shutdowns. *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know about Gen Z So Far*, PEW RES. CTR. (May 14, 2020), <https://www.pewsocialtrends.org/essay/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far/>.

<sup>4</sup> Judith A. Clair et al., *Teaching through Traumatic Events: Uncovering the Choices of Management Educators as They Responded to September 11<sup>th</sup>*, 1 ACAD. MGMT. LEARNING & EDUC. 38, 44 (2002). See also, e.g., Sarah DeBacher & Deborah Harris-Moore, *First, Do No Harm: Teaching Writing in the Wake of Traumatic Events*, 34 COMPOSITION F. (Summer 2016) (considering teaching after Hurricane Katrina); Sean Ross Meehan, *Education after an Earthquake: Emerson’s Lessons in Panic and Pedagogy*, 11 PEDAGOGY 247, 250 (2011) (considering teaching after the Great Recession, noting “intellect [should] not be divorced from lived experience.”).

<sup>5</sup> See Marc Lampe, *A New Paradigm for the Teaching of Business Law and Legal Environment Classes*, 23 J. LEGAL STUD. EDUC. 1, 10 (2006) (emphasis in original) (advising such a practical, managerial focus).

- Students further their understanding of course topics through the application of real-life examples.
- Students gain knowledge of strategic options for businesses navigating the coronavirus crisis. Notably, savvy businesses will have engaged in scenario planning<sup>6</sup> and drafted contracts carefully.
- Students will recognize that law provides a framework for dealing with crises and unexpected situations.
- Students will recognize that law provides stability but also allows for change, particularly with new legislation.

Professors may evaluate student progress toward these objectives via scoring of debate participation or written assignments, or via exam questions drawing on these materials.

The 2020 pandemic will long be remembered.<sup>7</sup> Pandemic-related lawsuits will proceed over a period of years.<sup>8</sup> As they are resolved, students will have the advantage of evaluating companies' strategic decisions in hindsight. Accordingly, these examples are durable and will be of continuing interest in our courses.

## II. Course Topics and Materials

This section gathers resources and offers specific suggestions on classroom coverage, exercises and assignments. Materials are arranged roughly in order of the typical Business Law or Legal Environment textbook.

### A. Civil Procedure

Many courts and agencies tolled statutes of limitations<sup>9</sup> and document filing deadlines and, for the first time, moved to remote proceedings. Professors might mention these procedural changes in class—an example of the

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<sup>6</sup> The management literature advises formalized processes for scenario planning. Rather than trying to predict what crises will arise, ask instead “What would we do if such-and-such happened?” See, e.g., ARIE DE GEUS, *THE LIVING COMPANY* 41 (1997). Regrettably, “Most managers find it tiresome, at the moment when they are busy spending a few hundred million dollars buying a concession or extending a refinery, to stop and spend time ‘thinking about the unthinkable.’” *Id.* at 52. Professors might explicitly note this connection with students’ management studies. For more on managing during disruption and on scenario planning, see Joshua S. Gans, *Keep Calm and Manage Disruption*, 57 MIT SLOAN MGMT. REV. 83, 84 (2016) (noting that companies fail by being reactive rather than adaptable); Peter Schwartz, *Winning in an Uncertain Future through Scenario Planning*, in *DELIVERING TOMORROW: LOGISTICS 2050, A SCENARIO STUDY* 27, 27 (Deutsche Post AG ed., 2012) (noting that in this era of global interconnectedness, “The magnitude of the economic, political, social, environmental, and technological changes encountered by nearly every organization in the world is unprecedented.”).

<sup>7</sup> See, e.g., Randy Brown, *If COVID-19 Is like Past Pandemics, We Could Face Decades of Economic Fallout*, FORBES (Apr. 16, 2020), <https://www.forbes.com/sites/randybrown/2020/04/16/if-covid-19-is-like-past-pandemics-we-could-face-decades-of-economic-fallout/#197b31493b81> (“[T]hese effects can last for decades and have wide-ranging impacts on trade, wages and asset returns.”); Shayna Jacobs, *771 Lawsuits—and Counting: Wave of Virus Litigation Hits Businesses across the U.S.*, WASH. POST (May 1, 2020, 5:51 PM), [https://www.washingtonpost.com/world/national-security/771-lawsuits--and-counting-wave-of-virus-litigation-hits-businesses-across-the-us/2020/05/01/6f7c015c-89c3-11ea-9dfd-990f9d9cc71fc\\_story.html](https://www.washingtonpost.com/world/national-security/771-lawsuits--and-counting-wave-of-virus-litigation-hits-businesses-across-the-us/2020/05/01/6f7c015c-89c3-11ea-9dfd-990f9d9cc71fc_story.html) (observing that court rulings from pandemic cases “will likely influence business deals for years to come”); Charles C. Mann, *Pandemics Leave Us Forever Altered: What History Can Tell Us about the Long-Term Effects of the Coronavirus*, ATLANTIC (June 22, 2020), <https://www.theatlantic.com/magazine/archive/2020/06/pandemics-plagues-history/610558/> (“But the lesson seems more that humans confronting unexpected disaster engage in a contest for explanation—and the outcome can have consequences that ripple for decades or centuries.”).

<sup>8</sup> “An incident or accident that takes less than a minute to unfold on the street or in a boardroom may take several years to be revisited and examined in a courtroom.” INST. FOR ADVANCEMENT OF AM. LEGAL SYS., *CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21<sup>ST</sup> CENTURY ANALYSIS* 1 (2009). The most recent statistics for federal civil suits show that the median time from filing the complaint in the district court to a final order by the appeals court is 30.1 months. *U.S. Courts of Appeals—Median Time Intervals for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2019*, U.S. COURTS, [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b4a\\_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2019.pdf). In state courts, recent statistics show the mean time from filing the complaint to final disposition was 306 days. The mean time for disposition of tort cases was 486 days. STATE JUSTICE INST. *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 28 (2013). Obviously, time to disposition can vary widely from jurisdiction to jurisdiction, and some individual cases take much longer than the median or mean time.

<sup>9</sup> For information on tolling in all states, see Patrick T. Uiterwyk, *State Chart Regarding Tolling of Statutes of Limitations During COVID-19 Pandemic*, NELSON MULLINS (Mar. 27, 2020), <https://www.nelsonmullins.com/storage/PLLEdLH0yX9SjG3YPDCVU6gwbqfSjA9Q9audPs5Z.pdf>. One agency that tolled various deadlines is

legal system adjusting to a difficult situation<sup>10</sup>—perhaps asking students if they think these changes were appropriate. Among other potential challenges, because of varying tolling treatment in different states,<sup>11</sup> parties may expect choice-of-law battles related to tolling.<sup>12</sup> Further, courts may face a deluge of lawsuits once pandemic-related restrictions are lifted.<sup>13</sup>

Students might also consider the desirability of continuing use of technology for remote proceedings after the pandemic ends, in the interest of efficiency and lower costs. For example, a court might hold a status conference by telephone, saving lawyers and litigants a trip to the courthouse. On the other hand, remote jury trials are unlikely to continue. Scholars at the Brennan Center for Justice observe:

Courts hear a broad range of cases, both civil and criminal, for which remote proceedings are likely to pose very different challenges, benefits, and trade-offs. Relevant factors include a case's complexity and time-sensitivity, the stakes of a win or loss, the kind of fact-finding that the case requires, and whether detained individuals or self-represented litigants are involved.<sup>14</sup>

As many students by now have considerable experience as participants in remote classes, they may have strong opinions about the appropriate use of remote court proceedings.

## B. Constitutional Law

In attempting to modulate spread of the virus, government at all levels acted decisively, ordering individuals to stay home, some to quarantine, and businesses to close or restrict operations. Are such actions constitutional? Professors may refer to the coronavirus situation in connection with several constitutional law concepts.

The materials below provide background. Note that even though this coronavirus is novel,<sup>15</sup> and most regard the quarantines and shutdown orders as unprecedented, there is a body of case law that is relevant and adaptable to the current situation. For example, as discussed below, there have been prior quarantine cases connected with tuberculosis and Ebola. These cases provide a legal framework for considering restrictions associated with coronavirus.

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the U.S. Patent and Trademark Office. *See USPTO Announces Extension of Certain Patent and Trademark-Related Timing Deadlines under the Coronavirus Aid, Relief, and Economic Security Act*, USPTO (Mar. 31, 2020), <https://www.uspto.gov/about-us/news-updates/uspto-announces-extension-certain-patent-and-trademark-related-timing> (extending time for filing patent appeals and payment of certain fees, among other changes).

<sup>10</sup> Prior “disaster emergencies” have prompted tolling of statutes of limitations. For example, the governor of New York suspended state statutes of limitations for lawyers and litigants “directly affected” by the September 11 terrorist attacks until Nov. 8, 2001. Mark C. Dillon, *An Overview of Tolls of Statutes of Limitations on Account of War: Are They Current and Relevant in the Post-September 11th Era?*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 315, 319 (2010). Tolling was justified due to destruction of law offices, court facilities, and evidence, among other problems. The governor of Louisiana tolled statutes of limitations after the devastation of Hurricane Katrina in 2005. *Id.* at 364.

<sup>11</sup> *See Uiterwyk, supra* note 9.

<sup>12</sup> Christine M. Kingston et al., *Tolling of Statutes of Limitations in Massachusetts During COVID-19 Pandemic—Effect, Ethical Pitfalls, and Best Practices*, NELSON MULLINS (Apr. 1, 2020), [https://www.nelsonmullins.com/idea\\_exchange/insights/tolling-of-statutes-of-limitations-in-massachusetts-during-covid-19-pandemic-effect-ethical-pitfalls-and-best-practices](https://www.nelsonmullins.com/idea_exchange/insights/tolling-of-statutes-of-limitations-in-massachusetts-during-covid-19-pandemic-effect-ethical-pitfalls-and-best-practices).

<sup>13</sup> *CA Judicial Council Adopts Rules Concerning Statute of Limitations, Evictions and Judicial Foreclosures, and Remote Accessibility in State Court Proceedings in Response to COVID-19 Pandemic*, SEYFARTH (Apr. 8, 2020), <https://www.seyfarth.com/news-insights/ca-judicial-council-adopts-rules-concerning-statute-of-limitations-evictions-and-foreclosures-and-remote-accessibility-for-state-court-proceedings-in-response-to-covid-19-pandemic.html> (“While courts and litigators have seen an understandable reduction in the amount of claims being brought over the past month, and while that reduction should now continue for at least 90 days, California may see a flood of claims filed as soon as the Shelter-in-Place order is lifted.”).

<sup>14</sup> Douglas Keith & Alicia Bannon, *Principles for Continued Use of Remote Court Proceedings*, BRENNAN CTR. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/principles-continued-use-remote-court-proceedings>. *See also Remote Criminal Court Proceedings During COVID-19*, JUSTIA (May 2020), <https://www.justia.com/covid-19/impact-of-covid-19-on-criminal-cases/remote-criminal-court-proceedings-during-covid-19/> (discussing constitutional concerns, including right to confront witnesses).

<sup>15</sup> *What Does “Novel” Coronavirus Mean?*, BATON ROUGE GEN. (Mar. 24, 2020), <https://www.brgeneral.org/news-blog/2020/march/what-does-novel-coronavirus-mean/>.

Federal government power to regulate public health matters is well settled and derives from the **Commerce Clause**.<sup>16</sup> States and localities exercise their **police powers**.<sup>17</sup>

Challenges of quarantine or shutdown orders as a violation of **substantive or procedural due process rights** have failed. “Courts have consistently upheld the constitutionality of quarantine as a public health measure.”<sup>18</sup> In *Best v. St. Vincents Hospital*, a federal district court upheld a New York quarantine order against a tuberculosis patient. The court treated deprivation of liberty as a fundamental right, but upheld involuntary confinement because the state had a compelling interest in protecting the public.<sup>19</sup> The court observed that, of course, the government must consider whether there are any less restrictive measures.<sup>20</sup> Further, the government must follow prescribed procedures for implementing quarantine.<sup>21</sup> In another case, *Hickox v. Christie*, another federal court upheld a New Jersey quarantine order against a nurse returning from caring for Ebola patients in Africa.<sup>22</sup> The *Hickox* court observed the “broad discretion” of public health authorities.<sup>23</sup> It noted that quarantine orders will be struck down only if they are “arbitrary and unreasonable in relation to their goal of protecting the public health.”<sup>24</sup>

Shutdown restrictions in 2020 have caused objections connected with **freedom of religion, freedom of assembly, the right to privacy** (as abortion clinics have been ordered closed), the **right to keep and bear arms** (as gun shops have been ordered closed) and the **right to interstate travel and alleged unreasonable search and seizure** (as some states have stopped cars at their borders and ordered temporary quarantines of travelers). Scholars suggest all these restrictions are likely to be upheld. “[P]ublic health emergencies can justify many restrictions on constitutional rights (and important statutory rights), especially when those restrictions are parts of across-the-board restraints, rather than targeting the right for special constraint.”<sup>25</sup>

Successfully characterizing **shutdown restrictions as a taking** is unlikely. Exercise of police power normally does not qualify as a taking.<sup>26</sup> Consider assigning students to read the Somin piece in note 26, asking them to take a position on whether businesses should be compensated. Professor Somin reviews relevant precedents, before concluding that even though coronavirus shutdown orders “impose severe—sometimes even ruinous—limitations on the owner’s use of their property,” compensation under the takings clause is unlikely.<sup>27</sup> Somin laments this result:

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<sup>16</sup> See Jennifer Jolly-Ryan, *Balancing Interest and Risk of Error: What Quarantine Process Is Due after Ebolamania*, 96 NEB. L. REV. 100, 117-18 (2017).

<sup>17</sup> *Id.* at 115-17. See also generally Ed Richards, *The Coronavirus and the Constitution*, VOLOKH CONSPIRACY (Feb. 10, 2020, 8:01 AM), <https://reason.com/2020/02/10/the-coronavirus-and-the-constitution/> (recounting history of government measures to address public health crises and legal standards).

<sup>18</sup> *Best v. St. Vincents Hosp.*, 2003 U.S. Dist. LEXIS 11354, \*20 (S.D.N.Y. July 2, 2003).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*23.

<sup>21</sup> *Id.* at \*27-31.

<sup>22</sup> 205 F. Supp. 3d 579 (D.N.J. 2016).

<sup>23</sup> *Id.* at 591.

<sup>24</sup> *Id.* See also generally Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J. L. & POL’Y 1, *passim*, 30 (2018) (noting that as of 2018 the U.S. Supreme Court had not considered a quarantine case in more than a century and cautioning that courts should not give “blanket deference” to public health authorities).

<sup>25</sup> Eugene Volokh, *Can an Epidemic Justify Temporarily Forbidding Abortions (Except to Protect Life or Health of the Woman)?*, VOLOKH CONSPIRACY (Mar. 25, 2020), <https://reason.com/2020/03/25/can-an-epidemic-justify-temporarily-forbidding-abortions-except-to-protect-life-or-health-of-the-woman/> (noting restrictions leave substitutes for exercise of these rights, such as online communication, or only delay their exercise and also closely target behavior that risks disease transmission); Eugene Volokh, *Restrictions on Interstate (and Intrastate) Travel in an Epidemic*, VOLOKH CONSPIRACY (Apr. 4, 2020), <https://reason.com/2020/04/04/restrictions-on-interstate-and-intrastate-travel-in-an-epidemic/>.

<sup>26</sup> See Ilya Somin, *Does the Takings Clause Require Compensation for Coronavirus Shutdowns?*, VOLOKH CONSPIRACY (Mar. 20, 2020, 10:20 PM), <https://reason.com/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/>.

<sup>27</sup> *Id.*

As the Supreme Court put it in *Armstrong v. United States* (1960), '[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' That is exactly what is happening in the coronavirus shutdowns: owners and employees of the shuttered enterprises are bearing a hugely disproportionate share of the burden of protecting the population as a whole against the virus.<sup>28</sup>

Recent rulings in a Pennsylvania case bear out scholars' predictions that constitutional challenges to government shutdown efforts, at least as they impact businesses, are unlikely to succeed. In *Friends of Danny DeVito v. Wolf*,<sup>29</sup> four Pennsylvania businesses and Danny DeVito (a state legislative candidate, not the *Taxi* actor) challenged the governor's shutdown order as an abuse of the state's police powers, violating their substantive and procedural due process rights and as a taking for which compensation was due. The Pennsylvania Supreme Court rejected all these claims,<sup>30</sup> and the U.S. Supreme Court denied certiorari.<sup>31</sup>

While constitutional challenges by businesses have failed, two 2020 Supreme Court cases indicate a better chance that shutdowns violate the First Amendment when they impact the free exercise of religion. In May, in *South Bay United Pentecostal Church v. Newsom*,<sup>32</sup> the Supreme Court issued a 5-4 ruling denying a California church's request to enjoin enforcement of an order limiting attendance at places of worship to the lower of 25% of capacity or 100 attendees. The ruling was unsigned. In a concurrence, Justice Roberts observed that "Similar or more severe restrictions apply to comparable secular gatherings."<sup>33</sup> When officials seek to protect public health and safety, "in areas fraught with medical and scientific uncertainties," Roberts wrote, they are entitled to "especially broad" latitude.<sup>34</sup> In November, in *Roman Catholic Diocese v. Cuomo*,<sup>35</sup> the Supreme Court ruled 5-4 to temporarily enjoin a New York order limiting attendance at religious services in the areas most severely affected by the pandemic at no more than ten persons. The majority cautioned, "[E]ven in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty."<sup>36</sup> The majority took special note of the fact that the New York order would permit larger groups of people at "essential" and even "non-essential" businesses and schools, so that they are treated "less harshly" than churches and other houses of worship.<sup>37</sup> Scholars and practitioners will debate the correct legal analysis and whether the different factual situations in these cases justified the varying results or whether they are due primarily to the new makeup of the Court. "Up to twenty" similar cases seeking to remove limitations on houses of worship are pending in lower courts around the country.<sup>38</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> 227 A.3d 872 (Pa. 2020).

<sup>30</sup> *Id.* at 876.

<sup>31</sup> *Friends of Danny DeVito v. Wolf*, 141 S. Ct. 239 (Oct. 5, 2020).

<sup>32</sup> 140 S. Ct. 1613 (2020).

<sup>33</sup> *Id.* (Roberts, J., concurring). Justice Kavanaugh, joined by Justices Thomas and Gorsuch, filed a vigorous dissent. *Id.* at 1614 (Kavanaugh, J., dissenting).

<sup>34</sup> *Id.*

<sup>35</sup> 208 L. Ed. 2d 206 (Nov. 25, 2020). This case was decided by the Court as currently constituted, including the newest Justice, Justice Barrett.

<sup>36</sup> *Id.* at 210..

<sup>37</sup> *Id.* at 208-09. Justice Roberts, joined by Justices Breyer and Sotomayor, dissented, finding a temporary injunction unnecessary due to the Governor's revision of the Order at issue. *Id.* at 218 (Roberts, J., dissenting). Justice Sotomayor, joined by Justice Kagan, further dissented, finding that the Order met constitutional requirements because "comparable secular institutions face restrictions that are at least equally as strict." *Id.* at 222 (Sotomayor, J., dissenting).

<sup>38</sup> Stephanie Yang et al., *Supreme Court's Ruling Blocking Cuomo's Covid-19 Order Could Influence Other Cases*, WALL ST. J. (Nov. 26, 2020, 5:13 PM), <https://www.wsj.com/articles/supreme-courts-ruling-blocking-cuomos-covid-19-order-could-influence-other-cases-11606428800>.

### C. Privacy Statutes

Many retail stores decided to take temperatures of customers before allowing them to enter. Temperature taking devices, especially those that employ facial recognition, could violate state biometric privacy laws. Businesses must pay careful attention to obtaining prior consent of customers and follow appropriate policies regarding retention of the information. In the event that individually-identifiable information is breached, the law may require notice to all affected individuals and the business may be liable for statutory damages. Relevant laws vary considerably state to state.<sup>39</sup> Assign students to read the article cited in note 39 and prompt them to think about the practical and legal challenges these state statutes present, especially for companies operating nationally.

### D. Criminal Claims including Fraud and Cyber Crimes

Seventy-nine percent of respondents to a survey by the Association of Certified Fraud Examiners observed increased fraud during the pandemic.<sup>40</sup> The FBI, Homeland Security, Health and Human Services, the Federal Trade Commission, and state and federal police are working to see that unscrupulous sellers are criminally prosecuted for fraud. There is also the possibility of tort claims brought by victims.

Assign students to view a six-minute video by the Department of Justice,<sup>41</sup> in which U.S. Attorney Grant Jaquith describes a litany of fraud schemes, including fake tests and cures, promised protective equipment never delivered, solicitation of donations to sham charities and attempted identity theft (1:10-2:42). He also lists relevant criminal statutes, including RICO, consumer protection statutes, and prohibitions against price gouging, extortion, and identity theft (5:00-5:30).

Students may be familiar with the phenomenon of “Zoom-bombing”—hacking into closed, password-protected Zoom meetings. They may be surprised to learn that that it violates the Computer Fraud and Abuse Act,<sup>42</sup> which prohibits knowingly accessing a computer without authorization.<sup>43</sup>

### E. Negligence

The highest profile negligence **cases have been brought by cruise passengers against cruise lines**. Have students view a short television news report showing conditions inside a ship and an interview of an irate passenger.<sup>44</sup> After viewing that news report, students may sense that the cruise lines likely will be liable. But liability may not be so clear. Class discussion or a written assignment can focus on the legal standards, the facts to be developed in discovery, the likelihood that the plaintiffs will prevail and recommended actions by the cruise line, such as the advisability of settlement.

**Appendix A** includes detailed instructions for a written research assignment on one cruise line case, *Nevis v. Costa Crociere, S.P.A.*, that implicates not only the topic of negligence but also contract issues. Students

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<sup>39</sup> See Megan Herr et al., *U.S. Privacy Law Implications with the Use of No-Contact Temperature Taking Devices*, JDSUPRA (Apr. 27, 2020), <https://www.jdsupra.com/legalnews/u-s-privacy-law-implications-with-the-89554/>.

<sup>40</sup> *Fraud in the Wake of COVID-19: Benchmarking Report*, ASS'N CERTIFIED FRAUD EXAMINERS (Dec. 2020), [https://www.acfe.com/uploadedFiles/ACFE\\_Website/Content/covid19/Covid-19%20Benchmarking%20Report%20December%20Edition.pdf](https://www.acfe.com/uploadedFiles/ACFE_Website/Content/covid19/Covid-19%20Benchmarking%20Report%20December%20Edition.pdf) (attributing increased fraud to such factors as financial pressures on perpetrators and lower budget and physical restrictions on anti-fraud staff).

<sup>41</sup> See *Pick Six to Stop Fraud*, U.S. DEPT. JUST. (Apr. 24, 2020), <https://www.justice.gov/usao-ndny/video/pick-six-stop-covid-19-fraud>.

<sup>42</sup> 18 U.S. Code § 1030.

<sup>43</sup> See, e.g., Eugene Volokh, *Zoombombing and the Law*, VOLOKH CONSPIRACY (Apr. 7, 2020, 4:20 PM), <https://reason.com/2020/04/07/zoombombing-and-the-law/> (discussing threatened federal prosecution under the CFAA and possible state criminal claims).

<sup>44</sup> See *Lawsuit Filed Against Cruise Ship that Passengers Say Was a “Ticking Coronavirus Time Bomb”*, WSBTV (Apr. 11, 2020, 8:41 PM), <https://www.wsbtv.com/news/local/atlanta/lawsuit-filed-against-cruise-ship-that-passengers-say-was-ticking-coronavirus-time-bomb/6TLXFUDKFBFPDEXSIHGJLVV7BU/> [hereinafter *News Report*].

begin work on the group assignment as the course covers the textbook chapter on negligence. The assignment is due after the course covers contract legality. Students start with primary documents--the Complaint,<sup>45</sup> the Passage Ticket contract,<sup>46</sup> and an edited Supreme Court case on the appropriate negligence standard in this admiralty case.<sup>47</sup> The assignment directs students to several secondary resources that provide factual background<sup>48</sup> and introduce relevant legal issues.<sup>49</sup> Students are encouraged to do further research.

Students advise the cruise line on the merits of the case and possible defenses. They make specific recommendations on how the cruise line should respond to the lawsuit. Among other strategic choices, students evaluate the wisdom of settling the suit.<sup>50</sup> Parties settle because litigation is “expensive, time-consuming, and distracting.”<sup>51</sup> If students conclude that the case against the cruise line is weak, they may be less inclined to advise settlement. They might counsel vigorous defense rather than settlement to forestall future suits brought by passengers who develop any illness. Students might favor settlement if they are concerned about ongoing publicity, costs of defense and/or the risk of an unfavorable verdict.

Along with the cruise line assignment, Appendix A includes a grading rubric. Strong papers evidence understanding of relevant course material. They also address questions in some detail and evidence critical thinking about the case and strategic options for the cruise line. They are buttressed by appropriate research. They are well-written in terms of structure, clarity, grammar and spelling.

Thirty-seven student groups submitted cruise line papers in my Business Law course<sup>52</sup> in the fall semester 2020. Given the special challenges of that COVID-impacted semester, I did not conduct any formal survey of students regarding this assignment, but they generally seemed engaged and appropriately examined the key legal issues: whether the cruise line breached its duty, whether plaintiffs can prove causation-in-fact, whether plaintiffs themselves were negligent, whether admiralty statutes limit available remedies for negligent acts that occurred on the high seas,<sup>53</sup> and whether the plaintiffs’ injuries are actually due to an Act of God rather

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<sup>45</sup> Complaint, *Nevis v. Costa Crociere, S.P.A.*, No. 0:20-cv-60759-RAR (S.D. Fla. Apr. 14, 2020).

<sup>46</sup> *Passage Ticket Contract*, COSTA CRUISES, <https://www.costacruises.com/general-conditions/contract.html#:~:text=Passage%20Ticket%20Contract,is%20your%20passage%20ticket%20contract.&text=By%20accepting%20or%20using%20this,important%20and%20binding%20upon%20you> (last visited Dec. 30, 2020).

<sup>47</sup> *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

<sup>48</sup> See Jacquie McNish et al., *Cruise Ships Set Sail Knowing the Deadly Risk to Passengers and Crew*, WALL ST. J. (May 1, 2020, 11:21 AM), <https://www.wsj.com/articles/cruise-ships-set-sail-knowing-the-deadly-risk-to-passengers-and-crew-11588346502>. That report begins: “Early in March, the world’s cruise-ship operators had ample evidence to believe their fleet of luxury liners were incubators for the new coronavirus. Yet they continued to fill cruise ships with passengers, endangering those aboard and helping spread Covid-19 to the U.S. and around the globe.”

<sup>49</sup> See Greg Allen, *Even with COVID-19 Cases, Suing Cruise Lines Is ‘Extraordinarily Difficult,’* NPR (Apr. 22, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/22/840525310/even-with-covid-19-cases-suing-cruise-lines-is-extraordinarily-difficult> (noting assumption of risk, issues of causation, questions regarding cleaning protocols and other precautions taken by the cruise line, forum selection clauses in passenger contracts, and the Death on the High Seas Act, which limits certain available damages); Amanda M. Waide & Christina Hull Eikhoff, *Litigation Advisory: Is the COVID-19 Outbreak an “Act of God”? Why It May Matter for your Contracts*, ALSTON & BIRD (Mar. 25, 2020), <https://www.alston.com/en/insights/publications/2020/03/is-the-covid-19-outbreak-an-act-of-god/>.

<sup>50</sup> Only about four percent of cases proceed to trial. Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 288 (1999). In federal civil cases, only about one-third result in any judicial ruling on the merits—either on a dispositive motion, such as a motion to dismiss or for summary judgment, or at a trial on the merits. *Id.* at 289. The lack of court rulings is sometimes problematic: providing “less chance for the public to engage and learn from the court’s resolution of claims.” Brooke Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1822 (2015). See also Doré, *supra*, at 294 (noting settlement precludes development of such “public goods” as “the development of precedent that binds nonparties and guides future conduct”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 358 (2013) (noting that without judicial decisions, “the result will be to reduce the effectuation of important policies in many contexts.”). In the pandemic context, scholars observe the dearth of high court rulings on appropriate limits on public health authorities’ power to order quarantines. See Parmet, *supra* note 24, *passim*.

<sup>51</sup> 1 KATHRYN E. SPIER, LITIGATION 268 (2007); see also Miller, *supra* note 50 at 357 (discussing strategic concerns).

<sup>52</sup> The introductory Business Law course at Notre Dame is a three-credit course required of all business students. It is typically taken in the sophomore year, but actually includes first-year students through seniors. After an introductory unit on the American legal system, Constitutional law, torts and criminal law, the course turns to coverage of contracts, sales under the Uniform Commercial Code and agency.

<sup>53</sup> See generally Stephen M. Calder, *An Overview of Maritime Law*, at 23-25, PA. BAR INST. (Apr. 2012), [https://www.pbior.org/docs/default-source/default-document-library/7091maritimelawcalder.pdf?sfvrsn=f3c05e4f\\_0](https://www.pbior.org/docs/default-source/default-document-library/7091maritimelawcalder.pdf?sfvrsn=f3c05e4f_0). Thus, the Nevises argue that the cruise line committed negligent acts before setting sail—for example, in failing adequately to screen passengers for illness or in deciding to launch at all.

than the defendants' negligence.<sup>54</sup> In giving practical advice to the cruise line, the groups were almost unanimous: the cruise line should negotiate a quick settlement,<sup>55</sup> given apparently damning facts and ongoing publicity, among other reasons.

That is not the course the cruise line took. During the summer and fall of 2020, the parties wrangled over procedural issues, including the appropriate corporate entities to be served and whether federal district court in Florida had jurisdiction over the case (in light of a forum selection clause in the ticket contract).<sup>56</sup> The defendants never reached the point of filing an Answer. On September 22, 2020, the plaintiffs voluntarily dismissed the case, indicating they intend to refile in an Italian court. The federal court dismissed the case without prejudice, so that it can be refiled later.<sup>57</sup>

The fact that the company did not quickly settle likely would not surprise most experienced lawyers and businesspeople. Defendants will seek to delay paying large sums of money, especially when the plaintiff's case is not entirely clear and the defendant has possible arguments. They may hope the plaintiff will tire of a lengthy process and agree to a smaller settlement. The *Nevis* case thus gives professors opportunities to enhance coverage of negligence and contract issues and gives students a feel for the procedural complexities (and slowness!) of litigation in real time.

Another set of negligence **cases may be brought against businesses after their reopening** if customers contract the virus and attribute their illness to exposure at the business. Such plaintiffs likely face an uphill battle: causation-in-fact is an obvious issue, as are comparative negligence and assumption of risk. The costs of defending such suits could be ruinous, especially for small to mid-sized businesses.

There is a move afoot to preempt such liability. The desirability of immunity for business is a topic ripe for classroom debate. **Appendix B** contains a debate instructions handout.<sup>58</sup> Before class, assign students to read the resources in this note,<sup>59</sup> providing a good look at arguments of various stakeholders.

As indicated in the handout, before class, students individually craft arguments for and against preemption legislation. In class, randomly assign students to a side (for preemption v. against preemption). Provide teams five or ten minutes to decide on their best arguments. Each team then has two to three minutes to present, followed by a minute or two of rebuttal. After argument presentations, the class may vote for the winning side. The professor may score student performance using a grading rubric<sup>60</sup> to assess organization, strength of argument, attention to counterargument and presentation style.

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<sup>54</sup> See Grading Rubric, Appendix A.

<sup>55</sup> Groups did offer varying views of desirable settlement terms, especially with regard to the dollar amount to be paid. Nuisance payment? Medical bills? Something more generous? Strong papers also addressed other terms, such as confidentiality agreements and nondisparagement clauses. Nondisparagement clauses are standard in litigation settlement agreements. See Tonia Hap Murphy, *Nondisparagement Clauses in Severance Agreements: A Capstone Contracts Exercise*, 34 J. LEGAL STUD. EDUC. 5, 18 (2017).

<sup>56</sup> See, e.g., Defendants' Motion to Dismiss Based on Forum Selection Clause and the Doctrine of *Forum Non Conveniens*, *Nevis v. Costa Crociere, S.P.A.*, No. 0:20-cv-60759-RAR (S.D. Fla. Sept. 3, 2020).

<sup>57</sup> Order, *Nevis*, No. 0:20-cv-60759-RAR (S.D. Fla. Sept. 22, 2020).

<sup>58</sup> Professor Alexander describes best practices for classroom debate exercises. See Mystica M. Alexander, *The Flipped Classroom: Engaging the Student in Active Learning*, 35 J. LEGAL STUD. EDUC. 277, 286-88 (2018).

<sup>59</sup> Jim Tankersley & Charlie Savage, *Businesses Seek Sweeping Shield from Pandemic Liability Before They Reopen*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/28/business/businesses-coronavirus-liability.html>; Eugene Volokh, *Should Congress Preempt Coronavirus Liability for Businesses that Reopen?*, VOLOKH CONSPIRACY (Apr. 13, 2020), <https://reason.com/2020/04/13/should-congress-preempt-coronavirus-liability-for-businesses-that-reopen/>; Editorial, *Stopping a Lawsuit Epidemic*, WALL ST. J. (April. 23, 2020, 7:07 PM), <https://www.wsj.com/articles/stopping-a-lawsuit-epidemic-11587683263>.

<sup>60</sup> A useful rubric is available at *Debate Grading Rubric*, CAL. STATE UNIV. NORTHRIDGE, <http://www.csun.edu/~ds56723/phl1338/hout338rubric.htm> (last visited December 30, 2020).

## F. Product Liability

Savvy companies **warn against the misuse of their products** during the pandemic. For example, the maker of Lysol warned against ingestion or injection of its products as treatment for coronavirus.<sup>61</sup>

Companies switching to produce masks, ventilators and other medical equipment rather than their usual products may face liability concerns, especially as such manufacturing changes were made quickly. They may have **immunity from product liability** under various federal laws enacted during prior crises including the Project Bioshield Act of 2004<sup>62</sup> and state laws such as the California Emergency Services Act.<sup>63</sup> Have students read the article cited in this note.<sup>64</sup> Classroom discussion or a written assignment might focus on these questions:

- Should a company voluntarily<sup>65</sup> shift its production to new products (for example, General Motors manufacturing ventilators and face masks),<sup>66</sup> even at risk of greater legal liability? Why or why not? Students should consider ethical as well as legal concerns.

Is it appropriate for the federal government or states to shield companies that do so from legal liability? Why or why not?

## G. Intellectual Property

Connections drawn between the coronavirus and Corona® beer offer an opportunity to discuss **trademark dilution by blurring or tarnishment** under the Lanham Act.<sup>67</sup> Have students read the article cited in this note,<sup>68</sup> which shows humorous memes and concludes they are likely fair use as parody and therefore not actionable. Consider also whether the manufacturer of Corona® beer might have a claim against sellers of t-shirts tying the beer brand to the virus. Such shirts appeared online in spring 2020. A shirt for sale on the Redbubble.com website read “I Have the Corona Virus,” with “Corona” in the brand’s familiar blue Gothic typeface and topped by a yellow crown, as on the beer label.<sup>69</sup> Another, on the Inkteeshop.com website, depicts

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<sup>61</sup> *Improper Use of Disinfectants*, RB.COM, <https://www.rb.com/media/news/2020/april/improper-use-of-disinfectants/>.

<sup>62</sup> Pub. L. No. 108-276, 42 U.S.C. §201.

<sup>63</sup> CAL. GOV’T CODE §8550.

<sup>64</sup> Richard Cassetta et al., *U.S. Liability Considerations for Product Manufacturers Shifting Production to New Products to Assist in Pandemic Response*, JDSUPRA (Apr. 23, 2020), <https://www.jdsupra.com/legalnews/u-s-liability-considerations-for-99082/>.

<sup>65</sup> Note the possibility that the federal government could compel companies to manufacture certain products related to national security (such as vaccine components) under the Defense Production Act of 1950, Pub. L. 81-774, 50 U.S.C. ch. 55. See Will Feuer, *Biden Will Invoke Defense Production Act to Boost Covid Vaccine Production, Advisor Says*, CNBC (Dec. 28, 2020, 2:17 PM), <https://www.cnn.com/2020/12/28/biden-will-invoke-defense-production-act-to-boost-covid-vaccine-production-advisor-says.html>.

<sup>66</sup> See *GM Expands Medical Projects and Charitable Deliveries to Hospitals*, GM (Apr. 19, 2020), <https://plants.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2020/apr/0419-coronavirus-update-14-ppe.html>.

<sup>67</sup> 15 U.S. Code § 1125.

<sup>68</sup> Julie Tolek, *The Novel Coronavirus and Trademark Dilution*, CALDWELL, <https://caldwellip.com/2020/04/23/the-novel-coronavirus-and-trademark-dilution/>.

<sup>69</sup> Screenshot on file with author. This shirt was available in April 2020 but in December 2020 was no longer offered. For information on the beer brand’s logo, see *Corona Extra*, LOGOS-WORLD.NET, <https://logos-world.net/corona-extra-logo/> (last visited Dec. 30, 2020) (noting Gothic-style typeface, crown modeled on that in the Cathedral of Our Lady of Guadalupe, and blue and yellow colors used),

a masked beer bottle bearing the label “Corona virus,” again with the familiar Gothic typeface and color.<sup>70</sup> Recent court rulings suggest that the fair use defense would very likely extend to the sellers of these shirts.<sup>71</sup>

While the manufacturer of Corona® beer may argue some trademark or product disparagement claims and may fear “brand damage,”<sup>72</sup> should the company pursue a legal claim against anyone tying its beer brand to the virus? Ask students how they would recommend the company proceed. A communications director released a statement on behalf of the company: “Consumers, by and large, understand there’s no linkage between the virus and our beer business.”<sup>73</sup> The company reportedly asked that a New Zealand bar stop discounts on Corona® beer “while the pandemic lasts.”<sup>74</sup> Students might consider whether the company should issue a more light-hearted response. In that vein, after Chick-fil-A unsuccessfully fought the effort of a “kale enthusiast” to register a trademark on “Eat More Kale”—a play on the restaurant’s slogan “Eat Mor Chikin”—it good-naturedly issued this statement: “Cows love kale, too.”<sup>75</sup>

Another intellectual property topic concerns the **tension between IP rights of inventors versus the need for broad and cost-effective availability of coronavirus treatments and diagnostics**. Should vaccine manufacturers be compelled to license their products to the government? Should generic products be allowed immediately? Have students read one or both articles cited in this note<sup>76</sup> as preparation for class discussion.

## H. Contracts

Businesses face many contract questions in light of the coronavirus pandemic. Most notably, are they **discharged from contractual obligations**? As preparation for classroom coverage, have students read the law firm advisory cited in this note,<sup>77</sup> which discusses the issues and surveys important precedents with a practical focus. In a brief lecture, distinguish among three situations: (1) the contract is objectively impossible to perform; (2) the contract is excused due to commercial impracticability; or (3) the contract is excused pursuant to the terms of a force majeure clause.

Government shutdown restrictions may make a particular contract **objectively impossible to perform**. For example, if a state shutdown order prohibits gatherings of more than ten people, it is illegal for a

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<sup>70</sup> <https://inkteeshop.com/product/the-coronavirus-beer-corona-beer-virus-womens-t-shirt/> (last visited Dec. 30, 2020).

<sup>71</sup> See generally Michael Handler, *What Can Harm the Reputation of a Trademark? A Critical Re-Evaluation of Dilution by Tarnishment*, 106 TRADEMARK REP. 639, 683-90 (2016) (reviewing cases); see also Ron Coleman, *Trademark Rights, Speech Rights*, LIKELIHOOD OF CONFUSION (Mar. 22, 2008), <https://www.likelihoodofconfusion.com/trademark-rights-speech-rights/> (discussing court ruling dismissing trademark infringement claim against man who sold parody “Walocaust” and “Wal-Qaeda” t-shirts bearing a smiley-face logo similar to the Wal-Mart logo).

<sup>72</sup> But see Nat Ives, *Echo of Coronavirus Didn’t Keep Beer Drinkers from Corona*, WALL ST. J. (Dec. 21, 2020, 5:46 PM), <https://www.wsj.com/articles/echo-of-coronavirus-didnt-keep-beer-drinkers-from-corona-11608590773> (reporting sales figures indicating Corona-brand beer sales for 2020 are “essentially unchanged” from 2019 figures).

<sup>73</sup> See Jonathan Walfisz, *Corona Beer or Coronavirus? How a Brand Should Handle Potentially Damaging Mixups*, WORLD TRADEMARK REV. (Feb. 3, 2020), [https://www.google.com/search?q=Jonathan+Walfisz%2C+Corona+Beer+or+Coronavirus%3F+How+a+Brand+Should+Handle+Potentially+Damaging+Mixups%2C+WORLD+TRADEMARK+REV&rlz=1C1GGRV\\_enUS750US753&oq=Jonathan+Walfisz%2C+Corona+Beer+or+Coronavirus%3F++How+a+Brand+Should+Handle+Potentially+Damaging+Mixups%2C+WORLD+TRADEMARK+REV&aqs=chrome..69i57l1167109j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=Jonathan+Walfisz%2C+Corona+Beer+or+Coronavirus%3F+How+a+Brand+Should+Handle+Potentially+Damaging+Mixups%2C+WORLD+TRADEMARK+REV&rlz=1C1GGRV_enUS750US753&oq=Jonathan+Walfisz%2C+Corona+Beer+or+Coronavirus%3F++How+a+Brand+Should+Handle+Potentially+Damaging+Mixups%2C+WORLD+TRADEMARK+REV&aqs=chrome..69i57l1167109j0j7&sourceid=chrome&ie=UTF-8).

<sup>74</sup> *Id.*

<sup>75</sup> See Christina Park, *Chick-fil-A Fails to Stop “Eat More Kale” Trademark*, FORBES (Dec. 15, 2014, 5:35 PM), <https://www.forbes.com/sites/christinapark/2014/12/15/chick-fil-a-fails-to-stop-eat-more-kale-trademark/#592aa11a2adf>.

<sup>76</sup> James M. Cooper & Bashar Malkawi, *We Need to Relax Intellectual Property Rules to Fight this Virus*, THE HILL (Apr. 6, 2020), <https://thehill.com/opinion/judiciary/490742-we-need-to-relax-intellectual-property-rules-to-fight-this-virus> (“Extreme health issues can and should justify such extreme measures that violate IP rights,” including compulsory licensing to government and other companies with payment to be determined at a later time, price controls, and easing entry of generic products); Donato Paoli Mancini, *Big Drugmakers under Pressure to Share Patents Against Coronavirus*, FIN. TIMES (Mar. 31, 2020), <https://www.ft.com/content/b69afd98-a8af-40d9-b520-4231d9cac68f> (discussing WHO’s consideration of policies to encourage an “intellectual property pool” for coronavirus treatments, vaccines, and diagnostics, which would allow governments and generic drug manufacturers to manufacture and sell at low prices).

<sup>77</sup> Angelo A. Stio III et al., *Your Contracts in a Coronavirus World*, PEPPER HAMILTON (Mar. 16, 2020), <https://www.pepperlaw.com/publications/your-contracts-in-a-coronavirus-world-2020-03-16/>.

planned wedding reception for 250 to occur, so the contract between the bridal couple and the hall is discharged. New York Governor Cuomo's order shutting Broadway shows<sup>78</sup> discharged contracts with ticketholders.

If a shutdown renders a contract merely very difficult to perform (such as a retail store's mortgage contract), the issue is whether the contract is excused due to **commercial impracticability** or **frustration of purpose**. Those defenses are famously difficult to prove. Even though the U.S. has not faced a pandemic of this magnitude for a century, there is a likelihood that judges will regard this pandemic as foreseeable, precluding these defenses.

Rather than depending on successfully making a commercial impracticability defense, shrewd companies routinely include **force majeure** clauses in their contracts. Boilerplate force majeure clauses typically mention "Acts of God." Would a pandemic qualify? Stio *et al.* conclude, "An argument can be made either way on whether the unprecedented coronavirus pandemic is an Act of God."<sup>79</sup>

The foregoing raises **practical and strategic questions for businesses**. Obviously, in the future lawyers are likely to specifically mention "pandemic" in standard force majeure clauses. One resource suggests mentioning "plague, epidemic, pandemic, outbreaks of infectious disease or any other public health crisis, including quarantine or other employee restrictions."<sup>80</sup> For now, businesses experiencing difficulties performing contractual duties, or dealing with other parties' possible failure to perform, may wisely seek to avoid the costs and uncertainties of litigation. It may be better to agree to delay performance, add more flexible terms or simply settle. If businesses fear that another party experiencing financial difficulties may fail to pay for goods and services, they could require prepayment, perhaps into an escrow account.

Students may have great personal interest in such issues. **As colleges went to virtual instruction in spring 2020, many students vacated their off-campus apartments and moved home. Would they be discharged from their obligations to pay rent to their landlords?** Obtain a rental contract from a popular nearby apartment complex. Some students may never have examined a detailed written contract. Ask them to read it carefully. Raise the discharge issue. Most lease agreements do not contain a force majeure clause. Indeed, an example on file with the author notes explicitly that the "Resident will not be released from the contract for any reason," including leaving school or ill health, or even death, among other listed reasons.<sup>81</sup> Discussion might then turn to rationales underlying the legal rules and their "fairness."

Students may take personal interest in **contract remedies** such as **ticketholder rights when concerts or sporting events are postponed or canceled**. Ticketholders may be dismayed to realize that their ticket contract precludes refunds when the event is postponed rather than canceled. Generally, courts uphold such contract terms. Some ticketholders may challenge such terms as unconscionable, and some state statutes may require refunds. How should event sponsors handle this situation? Have students read the sources cited in this note<sup>82</sup> in preparation for class discussion.

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<sup>78</sup> Kate Erbland, *New York Governor Shuts Down All Broadway Shows as Other Institutions Close over COVID-19 Fears*, INDIEWIRE (Mar. 12, 2020, 2:22 PM), <https://www.indiewire.com/2020/03/broadway-shows-shut-down-by-new-york-governor-order-1202217199/>.

<sup>79</sup> Stio *et al.*, *supra* note 77.

<sup>80</sup> Pepper Hamilton LLP, *Drafting Force Majeure Clauses to Provide for Pandemic-Related Contingencies*, JDSUPRA (Mar. 24, 2020), <https://www.jdsupra.com/legalnews/drafting-force-majeure-clauses-to-20016/>.

<sup>81</sup> Housing Contract ¶ 8, Peak Campus Management, LLC (on file with author).

<sup>82</sup> Julie Bédard *et al.*, *Coronavirus/COVID-19: Implications of Event Postponement and Cancellation*, SKADDEN (Apr. 3, 2020), <https://www.skadden.com/insights/publications/2020/04/covid19-implications-of-event-postponement>; Ben Sisario & Graham Bowley, *Angry Fans Say First the Concerts Were Canceled, Then the Refunds*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/arts/music/ticketmaster-refunds-coronavirus.html>.

## I. Consumer Protection

Price gouging for products in short supply may violate various consumer protection statutes. The Ohio Attorney General brought one such case.<sup>83</sup> Assign students to view the Complaint,<sup>84</sup> which alleges that defendants sold N-95 masks for \$36.34 each, when the price pre-pandemic was approximately \$2.00. Ask whether students believe that the sellers violated the Ohio statute (reminding them that the Complaint contains only *allegations*), and how they would recommend the defendants proceed. This case settled a few days after filing.<sup>85</sup> The seller did not admit wrongdoing (“just charging what the market would bear”), but issued refunds to buyers, provided masks to the state for distribution to health care workers and paid \$1,500 to the state as reimbursement for costs of investigation.<sup>86</sup>

## J. Worker Protection

The coronavirus implicates numerous worker protection statutes, creating various obligations for employers. Have students read the short articles cited in this note,<sup>87</sup> giving advice on shutdowns and remote working, employee screening, communicating with employees about coworkers who have tested positive, protecting employees through distancing and other issues.

The Occupational Safety and Health Act general duty clause requires employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>88</sup> One expert expects “more discrimination, retaliation or whistleblower claims will result from the COVID-19 pandemic rather than Occupational Safety and Health Act or workers’ compensation claims.”<sup>89</sup> Wage and hour claims may arise if companies fail to pay appropriately for remote work.<sup>90</sup> Suits may arise under the Worker Adjustment and Retraining Notification Act of 1988<sup>91</sup> or similar state laws<sup>92</sup> if companies fail to handle mass layoffs appropriately.

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<sup>83</sup> See Vince Grzegorek, *Ohio Sues Chagrin Falls Man for Hoarding, Price Gouging on Thousands of N95 Masks*, CITYBEAT (Apr. 14, 2020, 11:11 AM), <https://www.citybeat.com/news/blog/21128428/ohio-sues-chagrin-falls-man-for-hoarding-price-gouging-on-thousands-of-n95-masks>.

<sup>84</sup> Complaint, *Ohio v. Salvan*, No. \_\_\_\_ (Franklin Cty, Ohio Apr. 13, 2020). The Complaint is available at <https://www.clevescene.com/media/pdf/state-v-salwan-complaint.pdf> (last visited Dec. 31, 2020).

<sup>85</sup> Vince Grzegorek, *Chagrin Falls Man Reaches Settlement with Ohio Attorney General in N95 Mask Price Gouging Lawsuit*, SCENE (Apr. 23, 2020, 3:43 PM), <https://www.clevescene.com/scene-and-heard/archives/2020/04/23/chagrin-falls-man-reaches-settlement-with-ohio-attorneys-general-office-in-n95-mask-price-gouging-lawsuit>.

<sup>86</sup> *Id.*

<sup>87</sup> Amanda Robert, *Can Companies Be Held Liable when their Employees Fall Ill with the Coronavirus?*, ABA J. (Mar. 19, 2020, 11:30 AM), <https://www.abajournal.com/web/article/attorneys-advise-companies-on-potential-coronavirus-related-liability>; Peter Susser & Tahl Tyson, *What Are Companies’ Legal Obligations Around Coronavirus?*, HARV. BUS. REV. (Mar. 4, 2020), <https://hbr.org/2020/03/what-are-companies-legal-obligations-around-coronavirus> (“Unprepared employers may be exposed to lawsuits related to workers compensation, invasion of privacy, discrimination, unfair labor practice, and negligence.”).

<sup>88</sup> 29 U.S.C. § 654.

<sup>89</sup> Robert, *supra* note 87.

<sup>90</sup> Mitchell Boyarsky & Jillian Hart, *COVID-19 Calls for Increased Monitoring of Remote Workforce*, N.Y. L.J. (Oct. 30, 2020, 4:33 PM), <https://www.law.com/newyorklawjournal/2020/10/30/covid-19-calls-for-increased-monitoring-of-remote-workforce/?slreturn=20210001133505>.

<sup>91</sup> Pub.L. 100–379, 29 U.S.C. §§ 2101–2109. For an explanation of the Act’s requirements and exceptions, see *WARN Act Compliance Assistance*, U.S. DEPT. OF LAB., <https://www.dol.gov/agencies/eta/layoffs/warn>.

<sup>92</sup> Elyssa Sternberg, *States May Have Additional Layoff Notice Requirements under “Mini-WARN” Statutes*, SHEPPARDMULLIN (Mar. 30, 2020), <https://www.laboremploymentlawblog.com/2020/03/articles/coronavirus/layoff-notice-under-mini-warn-statutes/>.

### **K. Employment Discrimination**

The coronavirus implicates various employment discrimination statutes. An EEOC advisory addresses such questions as whether employers can take employee temperatures or require them to stay home, can report employees who test positive to a public health agency and required accommodations.<sup>93</sup> A *Forbes* article considers issues under Title VII of the Civil Rights Act of 1964, concluding:

An employer might be able to reject a job applicant because they recently traveled from a country that has had a coronavirus outbreak, such as China. . . . But if this has a disparate impact on those who are ethnically Chinese or whose national origin is China, it could be an unlawful hiring practice under Title VII.<sup>94</sup>

Both these resources would serve as appropriate reading assignments to introduce discrimination issues.

### **L. Bankruptcy**

Many companies large and small declared bankruptcy amid the coronavirus shutdown. Congress acted quickly with changes in bankruptcy law to ease the crisis, including temporary debt threshold increases for small business under Chapter 11. Assign students to read the short articles cited in this note<sup>95</sup> and then discuss desirability of the proposed additional changes.

### **M. Corporate Governance**

The SEC issued guidance on required **disclosures of risks and material effects by publicly traded corporations**. It notes that “while it may be difficult to assess . . . the effects COVID-19 has had on a company, what management expects its future impact will be, how management is responding to evolving events, and how it is planning for COVID-19-related uncertainties can be material to investment and voting decisions.”<sup>96</sup>

Ask students to read this SEC guidance. Once firms file 10-K or 10-Q reports for 2020, ask students obtain filings for a variety of firms (Procter & Gamble, maker of Clorox and Charmin? Marriott International, Inc.?) from SEC.gov. What did the firms report?

Finance scholars advise, “[M]anagers have a strong incentive to be fully revealing and relatively exhaustive in addressing the SEC’s required disclosures,” and “most large companies are quite exhaustive in their discussion of risks.”<sup>97</sup> These authors found, however, that very few firms mention pandemic risk in their 2018 filings, failing to foresee the devastating possibilities. For example, neither Southwest Airlines Co. nor Bed Bath and Beyond, Inc. mention pandemics.<sup>98</sup> Consider having students examine pre-pandemic and 2020 filings for the firms they choose.

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<sup>93</sup> *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC (Apr. 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

<sup>94</sup> Tom Spiggle, *Coronavirus Scapegoating: Employment Discrimination against Asian Americans*, FORBES (Apr. 20, 2020), <https://www.forbes.com/sites/tomspiggle/2020/04/20/coronavirus-scapegoating-employment-discrimination-against-asian-americans/#3729429b4470>.

<sup>95</sup> Kenneth Ayotte & David Skeel, *Bankruptcy Law Needs a Boost for Coronavirus*, WALL ST. J. (Mar. 30, 2020, 6:53 PM), <https://www.wsj.com/articles/bankruptcy-law-needs-a-boost-for-coronavirus-11585608800> (urging further changes in bankruptcy code to “flatten the bankruptcy curve”); Todd A. Burgess & Trinitee G. Green, *Coronavirus Changes Everything, Including the U.S. Bankruptcy Code*, NAT’L L. REV. (Mar. 31, 2020), <https://www.natlawreview.com/article/covid-19-changes-everything-including-us-bankruptcy-code> (describing recent changes in the law).

<sup>96</sup> *Coronavirus (COVID-19): CF Disclosure Guidance*, SEC DIV. CORP. FIN. (Mar. 25, 2020), [https://www.sec.gov/corpfin/coronavirus-covid-19\\_](https://www.sec.gov/corpfin/coronavirus-covid-19_)

<sup>97</sup> See Tim Loughran & Bill McDonald, *Management Disclosure of Risk Factors and COVID-19 2* (April 13, 2020), <https://ssrn.com/abstract=3575157>.

<sup>98</sup> *Id.*

## **N. Mergers and Acquisitions**

Acquisition agreements typically contain a **Material Adverse Effect (MAE) clause**, allowing a buyer to terminate the acquisition in the event of substantial deterioration of the seller's business. A general economic slowdown normally does not justify termination. Particular terms are vigorously negotiated, and whether coronavirus-related damage to a seller's business justifies a buyer's termination of the acquisition is highly fact-specific. But in general, "courts have been reluctant to find the occurrence of an MAE . . . [entitling] a buyer to escape its contractual obligations."<sup>99</sup>

Consider this example in class. Sycamore Partners filed suit in Delaware Chancery Court, seeking a declaratory judgment that it is not obligated to complete its acquisition of L Brands, parent of Victoria's Secret, pursuant to the MAE clause in its agreement.<sup>100</sup> Sycamore points to L Brands' alleged failure in March and April 2020 to "conduct the Business in the ordinary course consistent with past practice," by furloughing most employees, reducing new inventory and failing to pay rent, among other actions.<sup>101</sup> The Sycamore agreement MAE clause, unusually, specifically addressed pandemics, which may strengthen Sycamore's position.<sup>102</sup>

## **O. Insurance**

Cases here present opportunity to discuss **freedom of contract** and **contract interpretation**. Companies may challenge denial of claims under "business interruption" or other policies. Again, in this context, there are legislative efforts to prevent insurers from denying coverage. To orient discussion, have students read the *Wall Street Journal* article cited in this note.<sup>103</sup>

## **III. Conclusion**

It is sometimes difficult to come up with engaging, relatable, relevant classroom examples. These landed in our laps. Even if we do not plan to address legal and strategic issues connected with the coronavirus pandemic, students will raise them on their own.

The materials here equip us to incorporate coverage in a knowledgeable and effective manner—integrating legal concepts with broader practical and strategic questions. Just as every person was affected by the 2020 pandemic, so too was most every business, as these materials suggest. These examples will enhance our courses well beyond the current crisis.

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<sup>99</sup> Daniel K. Tracey & Kevin J. Stanfield, *MAE and Force Majeure Clauses in the Midst of COVID-19*, WYRICK (Apr. 3, 2020), <https://www.wyrick.com/news-insights/mae-and-force-majeure-clauses-in-the-midst-of-covid-19> (reviewing legal standards and providing practical advice).

<sup>100</sup> Verified Complaint, *SP VS Buyer LP v. L Brands, Inc.*, No. 2020-0297 (Del. Ch. Apr. 22, 2020).

<sup>101</sup> *Id.* at 12-14.

<sup>102</sup> See Alison Frankel, *Sycamore Partners Invokes MAE Clause in Bid to Escape Victoria's Secret Deal*, REUTERS (Apr. 22, 2020, 5:20 PM), <https://www.reuters.com/article/us-otc-mae/sycamore-partners-invokes-mae-clause-in-bid-to-escape-victorias-secret-deal-idUSKCN2243CK> (reviewing Delaware law and assessing Sycamore case).

<sup>103</sup> Brody Mullins & Ted Mann, *Restaurants vs. Insurers Shapes Up as Main Event in D.C. Lobbying Fight*, WALL ST. J. (Apr. 19, 2020, 7:56 PM), <https://www.wsj.com/articles/restaurants-vs-insurers-shapes-up-as-main-event-in-d-c-lobbying-fight-11587288600> (noting that most business interruption policies specifically exclude losses from pandemics).

## Appendix A Cruise Line Negligence Research Assignment

In April 2020, aggrieved passengers filed a lawsuit against the owner of a cruise ship they called a “ticking coronavirus time bomb.” Read the Complaint in *Nevis v. Costa Cruise Lines, Inc.*,<sup>104</sup> containing *allegations* of fact and legal claims of negligence, negligent and intentional infliction of emotional distress, and negligent misrepresentation. Also view this news report about conditions on the ship.<sup>105</sup>

During the summer and fall of 2020, the parties wrangled over procedural issues, including the appropriate corporate entities to be served and whether federal district court in Florida had jurisdiction over the case (in light of a forum selection clause in the ticket contract). The defendants never reached the point of filing an Answer. On September 22, 2020, the plaintiffs voluntarily dismissed the case, indicating they intend to refile in an Italian court. The federal court dismissed the case without prejudice, meaning there has been no ruling on the merits and that it can be refiled later.

Imagine that you are advising the cruise line on how to handle the case when it is refiled. Address the substance of the negligence claims, and not any procedural issues. Assume that Italian law is consistent with relevant American negligence and contract law. Draft a report to the executive team, addressing these questions:

*How might the cruise line defend this suit? Are the elements of negligence met? What defenses may apply? What facts must be developed in discovery? Consider the Passage Ticket Contract.<sup>106</sup> Does the Contract (see especially ¶¶ 3 and 7) provide the company any protection? Are the relevant contract terms legal and enforceable?*

*Are the plaintiffs likely to prevail? How certain are you of your assessment?*

*Specifically, how would you recommend the cruise line respond to the lawsuit? Vigorously defend the case? Settle? What might be attractive settlement terms? What may be advantages or disadvantages of the approach you suggest?*

You will work in groups of three or four students. You may choose your own group, or I can assist in assigning you to a group. Sign up for groups on Google Forms by 11:55 p.m. on [Insert Date]. We will cover the topic of negligence in class on [Insert Date]. Groups can begin to work in earnest on this assignment after that date. I expect all group members to contribute fairly to the project. If a group is having problems in that regard, please let me know and I will reach out to the uncooperative student[s].

Each group submits its report as a **Word document, eight or fewer pages in length, double-spaced**—one submission per group. It is due by **11:55 p.m. on [Insert Due Date]**. So that I can grade the projects anonymously, please put **only your university ID number and not your names** on the Word document.

I will grade this assignment using the rubric below. Strong submissions evidence understanding of relevant course material. They address all questions in some detail and evidence critical thinking about the case and

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<sup>104</sup> Complaint, *Nevis v. Costa Crociere, S.P.A.*, No. 0:20-cv-60759-RAR (S.D. Fla. Apr. 14, 2020).

<sup>105</sup> See *News Report*, *supra* note 44.

<sup>106</sup> *Passage Ticket Contract*, COSTA CRUISES, <https://www.costacruises.com/general-conditions/contract.html#:~:text=Passage%20Ticket%20Contract,is%20your%20passage%20ticket%20contract.&text=By%20accepting%20or%20using%20this,important%20and%20binding%20upon%20you> (last visited Dec. 30, 2020). This link goes to the current version of the Ticket Contract, which mentions COVID-19 specifically in ¶15 (e)-(f). The version agreed to by the Nevises had no reference to COVID-19.

strategic options for the cruise line. They cite reliable sources of information to support claims using APA or MLA format. They are well written, including structure, clarity, grammar and spelling. Consider taking advantage of the excellent resources offered by the University Writing Center as you prepare this paper.

Please let me know if you have questions as you are working on the project. You may find these resources helpful as you begin this assignment (but additional research is encouraged):

*Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) –excerpted below. This case establishes that admiralty law rather than state law applies when passengers are injured on the high seas and establishes “reasonable care” as proper negligence standard.

*Cruise Ships Set Sail Knowing the Deadly Risk to Passengers and Crew*,  
<https://www.wsj.com/articles/cruise-ships-set-sail-knowing-the-deadly-risk-to-passengers-and-crew-11588346502>

*Even with COVID-19 Cases, Suing Cruise Lines Is ‘Extraordinarily Difficult’*,  
<https://www.npr.org/sections/coronavirus-live-updates/2020/04/22/840525310/even-with-covid-19-cases-suing-cruise-lines-is-extraordinarily-difficult>

Textbook at [Insert page number] on *force majeure* clauses

*Is the COVID-19 Outbreak an “Act of God”? Why It May Matter for Your Contracts*,  
<https://www.alston.com/en/insights/publications/2020/03/is-the-covid-19-outbreak-an-act-of-god/>.

**KERMAREC v. COMPAGNIE GENERALE TRANSATLANTIQUE**  
**Supreme Court of United States –358 U.S. 625 (1959)**

MR. JUSTICE STEWART delivered the opinion of the Court.

On November 24, 1948, the respondent's vessel, the S. S. *Oregon*, was berthed at a pier in the North River, New York City. About noon on that day Joseph Kermarec came aboard to visit Henry Yves, a member of the ship's crew. The purpose of the visit was entirely personal, to pay a social call upon Yves and to give him a package to be delivered to a mutual friend in France. In accordance with customary practice permitting crew members to entertain guests aboard the vessel, Yves had obtained a pass from the executive officer authorizing Kermarec to come aboard. As he started to leave the ship several hours later, Kermarec fell and was injured while descending a stairway.

On the theory that his fall had been caused by the defective manner in which a canvas runner had been tacked to the stairway, Kermarec brought an action for personal injuries in the District Court for the Southern District of New York, alleging unseaworthiness of the vessel and negligence on the part of its crew. . . . [The judge] instructed the jury that Kermarec . . . could recover only if the defendant had failed to warn him of a dangerous condition within its actual knowledge and only if Kermarec himself had been entirely free of contributory negligence.

The jury returned a verdict in Kermarec's favor. Subsequently, the trial court granted a motion to set the verdict aside and dismiss the complaint, ruling that there had been a complete failure of proof that the shipowner had actually known that the stairway was in a dangerous or defective condition. A divided Court of Appeals affirmed.

...

The District Court was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law.

...

It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew. [The Court then held that the District Court erred in instructing the jury that the shipowner owed a higher burden and that any contributory negligence by Kermarec barred recovery. Rather, any contributory negligence would only mitigate damages.]

...

We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case. It follows that in the present case the judgment must be vacated and the case remanded to the District Court with instructions to reinstate the jury verdict and enter judgment accordingly.

*It is so ordered.*

**Rubric for Grading Cruise Ship Negligence Research Assignment**

<p><b>Evaluates strength of negligence case.</b><sup>107</sup></p>	<p><b>Does not meet expectations.</b> Fails to identify important defenses and/or fails to give adequate analysis. <i>5 points.</i></p>	<p><b>Meets expectations.</b> Addresses and discusses multiple defenses. <i>8 points.</i></p>	<p><b>Exceeds expectations.</b> Addresses all relevant defenses and provides detailed and accurate analysis of each. <i>10 points.</i></p>
<p><b>Addresses Passage Ticket Contract terms.</b><sup>108</sup></p>	<p><b>Does not meet expectations.</b> Inadequate discussion of contract issues. <i>3 points.</i></p>	<p><b>Meets expectations.</b> Addresses contract issues. <i>4 points.</i></p>	<p><b>Exceeds expectations.</b> Outstanding analysis of contract issues. <i>5 points.</i></p>
<p><b>Explores and recommends strategic options for cruise line.</b> Evidences practical reasoning about advantages and disadvantages of recommended approach[es].</p>	<p><b>Does not meet expectations.</b> Fails to make specific recommendations and/or fails adequately to analyze advantages and disadvantages of recommended actions. <i>6 points.</i></p>	<p><b>Meets expectations.</b> Suggests specific actions and discusses some advantages and disadvantages. <i>8 points.</i></p>	<p><b>Exceeds expectations.</b> Outstanding analysis evidences a high degree of engagement with the assignment. <i>10 points.</i></p>
<p><b>References reliable resources to support claims.</b></p>	<p><b>Does not meet expectations.</b> Paper would benefit from additional support. <i>3 points.</i></p>	<p><b>Meets expectations.</b> Paper references appropriate sources. <i>4 points.</i></p>	<p><b>Exceeds expectations.</b> Independent research adds depth to analysis. <i>5 points.</i></p>
<p><b>Well written.</b> Clear and organized discussion, starting with clear thesis. Professional tone. Avoids convoluted words and phrases, overly long sentences and paragraphs, typographical, grammatical and spelling errors.</p>	<p><b>Does not meet expectations.</b> Significant issues impede readability and clarity. Paper would benefit from significant revision. <i>4 points.</i></p>	<p><b>Meets expectations.</b> A few issues, but overall paper is readable and clear. <i>6 points.</i></p>	<p><b>Exceeds expectations.</b> Paper is very well written with no notable errors. <i>8 points.</i></p>

<sup>107</sup> Students should address whether cruise line acted reasonably under the circumstances, given available information; whether passengers can prove cause-in-fact; assumption of risk; and comparative negligence.

<sup>108</sup> Students should engage difficulty of defining “Act of God” and limitation of remedies under Death on the High Seas Act.

## Appendix B

### Preemption of Liability for Reopening Businesses Debate Instructions

**Resolved:** Congress should preempt coronavirus-related negligence liability for businesses that reopen.

Pro: \_\_\_\_\_ Con: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Issue:** Businesses eager to reopen after coronavirus-related shutdowns are concerned about possible negligence liability after reopening, in the event that customers contract the virus and attribute their illness to exposure at the business. Such plaintiffs would likely face an uphill battle: Causation-in-fact is an obvious issue, as are comparative negligence and assumption of risk. The costs of defending such suits could be ruinous.

There is a move afoot to preempt such liability. Should Congress act to immunize businesses? In crafting argument for and against such legislation, think about possible stakeholders, possible broad effects of preemption, and appropriate parameters. What might this legislation look like? Should it offer only qualified immunity, so that customers could recover in certain situations?

List and briefly explain in writing the best arguments on both sides of the debate. The following resources may be helpful as you craft arguments and consider appropriate parameters:

Eugene Volokh, *Should Congress Preempt Coronavirus Liability for Businesses that Reopen?*, VOLOKH CONSPIRACY (Apr. 13, 2020), <https://reason.com/2020/04/13/should-congress-preempt-coronavirus-liability-for-businesses-that-reopen/>.

Jim Tankersley & Charlie Savage, *Businesses Seek Sweeping Shield from Pandemic Liability Before They Reopen*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/28/business/businesses-coronavirus-liability.html>.

Editorial, *Stopping a Lawsuit Epidemic*, WALL ST. J. (April. 23, 2020, 7:07 PM), <https://www.wsj.com/articles/stopping-a-lawsuit-epidemic-11587683263>.