DO NOT BOAST ABOUT TOMORROW: LESSONS WE CAN LEARN FROM TODAY'S COVID-19 COURT CASES TO PREPARE FOR FUTURE DISASTERS

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ABSTRACT

Over the course of the last year, lawyers across America, including in North Dakota, have been forced to appear in courtrooms remotely through teleconference or video conferencing because of the COVID-19 pandemic. Not only that, attorneys used to that comfortable and familiar practice of sitting across tables from one another at depositions, or engaged in the shuttle diplomacy of a mediation, are now staring at computer screens hitting the Share Screen button in Zoom to ask a witness about an important exhibit, or responding to a too low, or too high, counteroffer delivered by the mediator. More important, though, than any new norms of practice that attorneys have adjusted to, is the impact the COVID-19 pandemic has had on our current, or potential, clients. Whether it's an insurance company disputing coverage for losses that a restaurant or pub suffered when a government order mandated they shut their doors, putting them on the brink of financial ruin, or a force majeure clause leading one party to a contract to pull out of that big business deal, courts across the country are seeing lawsuits dealing with the impacts left in the wake of the COVID-19 pandemic. This article discusses several important cases that have addressed some of the emerging issues and questions involving the law and the COVID-19 pandemic. It is incumbent on us as lawyers to be aware of these cases, and advise our clients accordingly, in order that we, and they, not only learn from these decisions, but plan for and navigate the minefields of future disasters. Because in a post-pandemic world, the question is not if the next disaster will come, but when.

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I. INTRODUCTION

In a February 25, 2021 podcast of The Axe Files with David Axelrod, Fareed Zakaria discussed his latest book, "Ten Lessons for a Post-Pandemic World."[1] Zakaria is a well-known journalist, commentator, author, global thinker, and host of CNN's Fareed Zakaria GPS.[2] Zakaria's interview with Axelrod caused an epiphany of sorts, at least for me. Of course, Zakaria's point and the driving thesis of his book is well-taken: we live in a post-pandemic world with a changed landscape. As of April 16, 2021, more than 2.5 million people worldwide have died of the COVID-19 virus, including 1,475 reported deaths in North Dakota,[3] and 569,653 reported deaths in the United

1. *See* David Axelrod, *The Axe Files with David Axelrod*, CNN AUDIO, Ep. 431 – Fareed Zakaria (Feb. 25, 2021), https://www.cnn.com/audio/podcasts/axe-files.

2. *See Fareed Zakaria*, CNN, https://www.cnn.com/profiles/fareed-zakaria-profile#about (last visited May 10, 2021).

3. *See Coronavirus Cases,* N.D. DEP'T OF HEALTH, https://www.health.nd.gov/diseases-conditions/coronavirus/north-dakota-coronavirus-cases (last visited Apr. 16, 2021).

States.[4] It's not just a post-pandemic world, though. We confront a myriad of challenges ranging from pandemics, domestic terrorism, cyber warfare like the Colonial Pipeline attack, international conflict, and an endless barrage of weather events, like the arctic blast that crippled Texas in late February that shut down its electric grid and caused at least forty deaths.[5] The economic impact of this unusual winter storm could top $200 billion, which is more than hurricanes Harvey and Ike.[6] According to CBS News:

> The Perryman Group, a Texas-based economic research firm, projected that Winter Storm Uri could end up costing a total of $195 billion on the low end and as much as $295 billion. Those figures include lost income as well as long-term reduction in economic output stemming from factories and businesses that closed during the storm.[7]

Here is the epiphany I had listening to Zakaria discussing the changed landscape of a post-COVID world with Axelrod while driving to work in Fargo, North Dakota, that cold winter morning. It isn't just a post-pandemic world we live in and have to plan for. It's a world with seemingly historic catastrophic events lurking around every corner, inflicting not only death, but pain and devastation on the biggest of corporations to the smallest of businesses. This invariably trickles down and causes pain and suffering on the very real human level in the form of lost jobs, missed paychecks, unemployment, and a feeling of hopelessness at events beyond our control. If you are not inclined to believe in such things, and want to chalk these disasters or even the COVID-19 pandemic up to coincidence or freak events, caveat emptor – buyer beware – do you really want to risk your business or livelihood on it? Proverbs warns us, "Do not boast about tomorrow, for you do not know what a day may bring."[8]

While we do not know what a day may bring, we can certainly take steps to prepare for it. If what is past is prologue, the question becomes how do we guard against future events so they aren't some prewritten and unavoidable

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4. *See Map: Track Coronavirus Deaths around the World*, NBC NEWS, https://www.nbcnews.com/news/world/world-map-coronavirus-deaths-country-COVID-19-n1170211 (last visited Apr. 16, 2021).

5. Krista M. Torralva, *Will Texas Ever Figure out How Many People Died in the Winter Storm*, DALLAS MORNING NEWS (Mar. 1, 2021), https://www.dallasnews.com/news/2021/03/01/will-texas-ever-figure-out-how-many-people-died-in-the-winter-storm/.

6. Irina Ivanova, *Texas Winter Storm Costs Could Top $200 Billion – More than Hurricanes Harvey and Ike*, CBS NEWS (Feb. 25, 2021), https://www.cbsnews.com/news/texas-winter-storm-uri-costs/.

7. *Id*. The article points out that Hurricane Harvey, which hit Houston in 2017, "ranks with Hurricane Katrina in 2005 as the most destructive storm in U.S. history, causing $125 billion of physical damage in Texas and Louisiana." *Id*.

8. *Proverbs* 27:1.

destiny?[9] In short, how do we learn our lesson, at least legally, to be better prepared for the next time something like COVID-19, or another disaster, strikes?

We can look at those cases related to the COVID-19 pandemic that have worked their way through the courts. Start with the fact that the actual virus itself and its spread, from a legal standpoint, was not the proximate cause of the many closures and financial losses that have hammered everyone from those big box retailers to the mom and pop pizza shops in downtown Fargo and West Fargo. As aptly noted in *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*,[10] government-mandated closures and restrictions have played a critical role in why businesses are not open and have thus incurred losses as a result of COVID-19.[11] There's another important lesson in *Henderson*, which falls in line with Zakaria's post-pandemic world. When confronting questions ranging from insurance coverage protecting against losses to force majeure clauses, the catastrophic events causing the devastation may not physically impact your property or business asset at all. As we've learned from the COVID-19 pandemic, your business can be absolutely fine in the fact that it's physically standing and able to operate. However, that doesn't mean you'll be able to operate or open your doors, even with a perfectly good building.

II. DOES A PHYSICAL LOSS OCCUR WHEN YOUR BUILDING IS FINE, BUT YOU STILL CAN'T OPEN YOUR DOORS? IT DEPENDS ON WHO YOU ASK

In *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, the United States District Court for the Northern District of Ohio raised a critical distinction.[12] Specifically, it wasn't a microorganism, like the COVID-19 virus, that actually closed the restaurants in question, but government orders mandating that businesses, including the impacted restaurants, either close or placed severe restrictions on their capacity.[13] Because of the

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9. This famous line, "What is past is prologue," is from Shakespeare's "The Tempest." In Act 2, Scene 1, Antonio utters the oft-quoted line that everything that has happened had led him and Sebastian to the act they were about to commit. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1, l. 289. The same words are inscribed on the statue, the "Future," located outside the National Archives in Washington, D.C.

10. *See* Henderson Rd. Rest. Sys, Inc. v. Zurich Am. Ins., No. 1:20 CV 1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021).

11. *Id.* at *1. To be clear, this article and the author are not critiquing or taking any position on the government-ordered closures based on public health data and controlling the spread of COVID-19.

12. *Id.* at *14-15.

13. *Id.* "Zurich argues that COVID-19 'indirectly' caused Plaintiffs to close their restaurants. But this is not entirely accurate. There was 'no known or presumed infected person(s) with COVID-19 at any of the Insured Premises at any time from March 15, 2020 to April 27, 2020. Thus, it was

government orders, restaurants, like the plaintiffs in *Henderson*, had to lay off staff and suffered significant financial losses.[14] On March 24, 2020, the Henderson restaurants tendered claims to Zurich under a commercial insurance policy.[15] Zurich denied coverage in late April 2020.[16] The relevant language in the policy provided coverage for the actual loss of business income as follows:

> A. Coverage
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> We will pay for the actual loss of "business income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at a "premises" at which a Limit of Insurance is shown on the Declarations for Business Income. The loss or damage must be directly caused by a "Covered cause of loss". We will not pay more than the applicable Limit of Insurance shown on the Declarations for Business Income at that "premises."[17]

The policy also provided for coverage if the restaurants suffered losses caused "[b]y order of civil authority that prohibits access to the 'premises' or 'reported unscheduled premises.' This additional coverage section required that the civil authority's order result from its "[r]esponse to direct physical loss of or damage to property within one mile from the 'premises' . . . ."[18] Among the exclusions in the policy were losses caused by microorganisms, like viruses.[19] The question before the court came down to the interpretation of the insurance policy, which is nothing more than a fundamental contract

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clearly the government's orders that caused the closures." *Id*. at *14 (citation omitted). The Court noted that the parties stipulated to certain facts, including, "None of the Plaintiffs' Insured Premises were closed as a result of the known or confirmed presence of SARS-CoV-2 or COVID 19 at any of the Insured Premises." *Id*. at *4. The restaurants brought three claims against Zurich, breach of contract (Count I), bad faith denial of coverage (Count II), and a claim for declaratory relief (Count III). *Id*. at *3.

14. *Id*. at *1. The restaurants also speculated "[t]hat some of their restaurants may never reopen due to new seating capacity restrictions, and those that have reopened have reduced staffing and suffered financial loss." *Id*. For a state-by-state survey of closures and restrictions, as of March 11, 2021, see Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP (Apr. 19, 2021), https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html.

15. *Henderson*, 2021 WL 168422, at *2. A copy of the insurance policy is at available at ECF Doc. 12-1.

16. *Henderson*, 2021 WL 168422, at *2.

17. *Id*. (emphasis added).

18. *Id*.

19. *See id*. at *3 (quoting the policy, "We will not pay for loss or damage consisting of, directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread, or any activity of 'microorganisms' . . . .").

law issue, albeit one with far-reaching consequences for thousands of business owners and their employees.[20]

Zurich's argument for denying coverage was two-fold. First, Zurich argued the policy it issued to the restaurateurs did not provide coverage because their economic losses were not caused by "physical loss of or damage to property."[21] Second, Zurich argued that even if there was a direct physical loss to the restaurateurs' property, the microorganism exclusion applied to preclude coverage.[22] Or, to quote the court, "Simply summarized, Zurich argues that the underlying cause of loss was COVID-19; that COVID-19 is a microorganism; and that the Microorganism exclusion applies."[23] The plaintiffs offered a competing view of the contract, arguing that "Zurich could have easily drafted the Policy language to limit coverage to physical or structural alteration/damage to tangible property," but did not.[24] Thus, under the contract, covered losses included "an inability to possess" their real property – the restaurants – as the government orders caused them to effectively lose that property.[25]

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20. In North Dakota, the interpretation of an insurance policy is a question of law. W. Nat'l Mut. Ins. Co. v. Univ. of N.D., 2002 ND 63, ¶ 7, 643 N.W.2d 4 (citing Center Mut. Ins. Co. v. Thompson, 2000 ND 192, ¶ 14, 618 N.W.2d 505) ("The interpretation of an insurance policy is a question of law . . . ."). In *Dakota Gasification Co. v. Sure Steel, Inc.*, 458 F. Supp. 3d 1121 (D.N.D. 2020), the court explained the well-established standard from the North Dakota Supreme Court when interpreting insurance policies. The court stated:

> We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract. While we regard insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage. We will not strain the definition of an undefined term to provide coverage for the insured. We construe insurance contracts as a whole to give meaning and effect to each clause, if possible. The whole of a contract is to be taken together to give effect to every part, and each clause is to help interpret the others.

Id. at 1127 (quoting Borsheim Builders Supply, Inc. v. Manger Ins., Inc., 2018 ND 218, ¶ 8, 917 N.W.2d 504); *cf. Henderson*, 2021 WL 168422, at *9 (explaining the contract interpretation standard used by the court, which applied Ohio law to the Zurich policy). Other than regarding insurance policies as contracts of adhesion, the standard for interpreting an insurance contract harkens to the North Dakota Supreme Court's standard for interpreting any contract, insurance or otherwise. *See, e.g.*, Lario Oil & Gas Co. v. EOG Resources, Inc., 2013 ND 98, ¶ 5, 832 N.W.2d 49 ("Interpretation of a contract is a question of law, . . . A contract must be read and considered in its entirety so that all of its provisions are taken into consideration to determine the true intent of the parties. Words in a contract are construed in their ordinary and popular sense.") (quoting Irish Oil and Gas, Inc. v. Riemer, 2011 ND 22, ¶ 11, 794 N.W.2d 715).

21. *Henderson*, 2021 WL 168422, at *4.

22. *Id.*

23. *Id.* Zurich also argued the government orders did not prohibit access to their restaurants because they were permitted to continue take-out and delivery services. *Id.*

24. *Id.* at *5.

25. *Id.* A decisive question was whether or not the government orders resulted in a direct physical loss to the restaurants. The Court held that it did, citing favorably to cases standing for that proposition. *See* N. State Deli, LLC, v. Cincinnati Ins. Co., No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Ct. Oct. 7, 2020) (holding the ordinary meaning of the phrase "direct physical

The restaurateurs prevailed because they drilled down into the language of the contract. At least that's what the court concluded. Physical loss, in relation to the restaurants and coverage under their insurance policies, did not require actual physical damage to the property because that requirement was not in the parties' contract.[26] "Plaintiffs argue that they lost their real property when the state governments ordered that the properties could no longer be used for their intended purposes – as dine-in restaurants. The Policy's language is susceptible to this interpretation. Zurich does not focus on the language in the Policy."[27] The policy stated that Zurich would provide coverage for any "direct physical loss of or damage to real property."[28] The court held that this language was ambiguous, and the restaurateurs' interpretation of the policy was reasonable.[29] The restaurateurs argued that "physical loss of" the real property was different from "damage to real property."[30] The court agreed, latching onto the word "or" separating the terms "physical loss of" and "damage to real property."[31] Physical loss did not require physical damage to the real property. The restaurateurs physically lost their properties –

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loss" included an "inability to utilize or possess something in the real, material or bodily world, resulting from a given cause without the intervention of other conditions"); Cajun Conti LLC v. Certain Underwriters at Lloyd's, No. 2020-02558, 2020 WL 8484870, at *1 (La Dist. Ct. Nov. 4, 2020) (denying the insurer's dispositive motion because "[t]he restaurant had to drastically change its operations to exclude sit-down patrons" who were the majority of the restaurant's customers). The type of contract at issue in *Henderson*, similar to other COVID-19 related cases, was an insurance policy. Like North Dakota, in Ohio, the law provides that if a policy is reasonably susceptible of more than one interpretation, it must be construed strictly against the insurer and in favor of the insured. *See* King v. Nationwide Ins. Co., 519 N.E.2d 1380, 1383 (Ohio 1988). Because Zurich's policy was susceptible of more than one interpretation, it was construed liberally in favor of the insureds, i.e., plaintiffs. *Henderson*, 2021 WL 168422, at *12; *cf.* Spring Glen Apartments LLP v. Arch Specialty Ins. Co., 307 F. Supp. 3d 975, 979 (D.N.D. 2018).

26. *Henderson*, 2021 WL 168422, at *12. After reviewing the meanings of the key, undefined terms at issue in the policy, as provided by the Merriam-Webster dictionary, the court found "[t]hat the Plaintiffs have shown that their business operations were suspended by direct physical loss of or damage to property at the premises." *Id.* at *13.

27. *Id.* at *10. The court went on to distinguish the cases relied on by Zurich, focusing on the language of the disputed policy.

> Here, Zurich's policy does not expressly limit coverage to physical loss to property; it extends coverage to direct physical loss of property as well. There is no reason to believe that the Ohio Court of Appeals would have interpreted the Zurich Policy language as it did the homeowners' policy in *Mastellone*. The distinct Policies used different language and were applied to different facts.

Id. The North Dakota Supreme Court regularly employs the same contract law analysis as *Henderson*. *See e.g.*, Horob v. Zavanna, LLC, 2016 ND 168, ¶¶ 10-15, 883 N.W.2d 855 (explaining that the actual language in the lease specifically addressed the question before the Court).

28. *Henderson*, 2021 WL 168422, at *10.

29. *Id.*

30. *Id.*

31. *Id.* The court stated:

> Zurich's Policy provides that it will pay for "direct physical loss of or damage to 'real property[.]'" Based on this language, Plaintiffs argue that physical loss of the real property means something different than damage to the real property, and this is a valid argument. Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction "or"? Plaintiffs argue that they lost their real property when the

they lost the physical right to use and control their property and operate their businesses as intended, which is inherent in the very concept of owning property – because of the governments' orders requiring them to close their doors as non-essential businesses, or otherwise severely restricting their operations.

The takeaway is that the language in the policy and familiar principles of contract law will apply, at least in most cases.[32] The corollary to this, particularly post-*Henderson* and in a post-pandemic world, is that how parties to similar contracts define terms like "direct physical loss of or damage to real property" becomes critically important. Business owners should be having discussions with their insurance agents, and maybe more importantly, their lawyers, to make sure they are covered for another potential shutdown – whether that shutdown is caused by government order in a public health emergency or a total failure of the power grid like the one that recently devastated Texas.[33] Recent events, like the COVID-19 pandemic and power grid failures, serve as a cautionary reminder that even if your building is not physically impacted, that does not necessarily mean that you can physically open your doors and carry out the purpose of the business.

> state governments ordered that the properties could no longer be used for their intended purposes – as dine-in restaurants. The Policy's language is susceptible to this interpretation.

Id. (citation omitted).

32. The *Henderson* court took issue with the Southern District of Mississippi's decision in Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am., No. 2:20-CV-00087, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020). The *Henderson* court stated:

> Given this court's explanation, it is difficult to understand why the Real Hospitality court relied on Total Intermodal to support the insurer's approach to the phrase 'loss of.' Moreover, by accepting the 'logical' approach of the insurer's interpretation of 'loss of' as a 'permanent dispossession,' the Real Hospitality court construed Travelers' policy language – language chosen by Travelers – in Travelers' favor. As shown below, the standard definitions of the word 'loss,' a word not otherwise defined by Zurich's policy, is not limited to '*permanent* dispossession.' The word lost does not always involve permanency, and real property can be lost and later returned or restored. If a term is not defined in the policy, the Court must look to the plain meaning of the words, not persuasive authority from other courts. Zurich's Policy did not require a permanent 'loss of' property and permanency is not embodied in the definition of loss. Adding this requirement would only be interpreting an ambiguous term in favor of the insurer – something Ohio law does not permit.

Henderson, 2021 WL 168422, at *12. The court's rationale in rejecting *Real Hospitality* finds support in *Sec. Nat'l Ins. Co. v. H.O.M.E., Inc.*, 312 F. Supp. 3d 777 (D.N.D. 2018).

33. Texas wasn't the only state impacted by power grid failures and rolling blackouts. In mid-February 2021, parts of North Dakota, South Dakota, and Minnesota experienced rolling blackouts during the region's coldest stretch of weather this winter.

> The blackouts follow the directives of Southwest Power Pool (SPP), an electric grid operator serving 14 central U.S. states, including North Dakota, South Dakota and the western edge of Minnesota. SPP has gone in and out of Energy Emergency Alert Level 3, its most serious emergency status, in response to unprecedented strains on the regional grid prompted by the frigid weather in southern states.

Rolling Blackouts Could Continue in Dakotas, Minnesota as Winter Tests Region's Power Grid, INFORUM (Feb. 16, 2021) https://www.inforum.com/news/6889472-Rolling-blackouts-could-continue-in-Dakotas-Minnesota-as-winter-tests-regions-power-grid.

III. TOO EARLY FOR CELEBRATING: A DIFFERENT JUDGE IN THE SAME DISTRICT DISAGREES WITH *HENDERSON* IN *EQUITY PLANNING CORP*. DECISION

Businesses should hold off on popping the champagne corks in light of *Henderson*. For starters, the court rightfully recognized that each contract must be interpreted based on the actual language in the contract. Unless your contract has the same, or very similar language, *Henderson* may not be helpful.[34] Thus, there exists the need to carefully examine your contracts. What's more, the court noted again, rightfully so, that Zurich could have included language in its policies that excluded losses caused by government-mandated closures.[35] Or, to extrapolate, language that excluded losses caused by any event, *i.e.*, power grid failure, domestic terrorism, etc. The court, whether intentionally or not, invited Zurich, other insurers, and anyone else with a contract that contains similar provisions, to do just that. "Going forward, Zurich could undoubtedly include an exclusion for government closures in its policies. But the Policy that Plaintiffs purchased did not contain such an exclusion."[36] Insurers and others have likely taken note of this caveat from Judge Polster and have since included such language in their contracts. Alternatively, insurance companies may clarify that a covered loss requires actual physical damage to an insured's building.

It should also be noted that not every judge in the Northern District of Ohio agrees with Judge Posner's decision. In *Equity Planning Corp. v. Westfield Insurance Co.*, Judge Barker, who is also a judge in the Northern District of Ohio, granted the insurer's motion to dismiss based on her reading of the same language – "direct physical loss of or damage to" – in a commercial

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34. What is helpful, though, at least for existing contracts is that well-established – to the point the United States Supreme Court describes it as "vanilla" – legal maxim that ambiguities in contracts, including insurance contracts, are interpreted against the drafter of the contract.

> Here, because Zurich's Policy is susceptible of more than one interpretation, it must be construed liberally in favor of the insureds, i.e., Plaintiffs. Zurich has not cited any Ohio law constraining this Court to its interpretation of the Policy. And because there is more than one interpretation, the Policy must be construed liberally in Plaintiffs' favor. As further explained below, when the Policy is liberally construed in Plaintiffs' favor, it provides coverage for Plaintiffs' lost business income.

Henderson, 2021 WL 168422, at *12; *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1428 (2019) (Kagan, J., dissenting) ("But even if the Court is right to view the agreement as ambiguous, a plain-vanilla rule of contract interpretation, applied in California as in every other State, requires reading it against the drafter . . . ."); Northstar Founders, LLC v. Hayden Cap. USA, LLC, 2014 ND 200, ¶ 47, 855 N.W.2d 614 ("Ambiguous language must be construed against the drafter."); Tank v. Citation Oil & Gas Corp., 2014 ND 123, ¶ 28, 848 N.W.2d 691 ("An oil and gas lease is often construed most favorably to the lessor because the lessee usually drafts the lease and has more experience drafting the lease to give himself an advantage.").

35. *Henderson*, 2021 WL 168422, at *15.

36. *Id.*

insurance policy.[37] Lacking from *Equity Planning Corp*., though, is any sort of disputation of *Henderson*'s analysis of: (1) the fact the business owner effectively lost their real property when the government ordered that properties could no longer be used for their intended purposes, as dine-in restaurants; and (2) the insurer could have excluded losses caused by government-mandated closures. Not only was this absent in *Equity Planning Corp*., based on Judge Barker's parsing of key meanings and undefined terms in the contract, it was not even a factor. Arguably, the parties contemplated a covered loss when a civil authority (the government) issued orders that mandated closures of their businesses. While the court recognized, like *Henderson*, that the contract did not define the disputed terms, the court held the contract was not ambiguous.[38] "The absence of definitions does not necessarily make terms ambiguous."[39] According to Judge Barker, direct physical loss requires actual physical damage to the insured's structure.[40]

What makes the *Equity Planning Corp*. decision, and the arguments offered by the defendant, Westfield, so dangerous for unsuspecting business owners or other insured parties counting on coverage, is that life-altering damages are just as likely to be caused by a hurricane that physically destroys your business or an insured asset as they are a mass power grid failure, or global pandemic that leaves your business unable to operate. In other words, a massive natural disaster like a hurricane could physically destroy the building where your business operates, leaving it functionally unable to operate, whether for a certain time period or permanently. In that event, according to *Equity Planning Corp*., no problem, you're covered. However, if a global

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37. *See* Equity Plan. Corp. v. Westfield Ins. Co., No. 1:20-CV-01204, 2021 WL 766802, at *13 (N.D. Ohio Feb. 26, 2021) ("However, the Court respectfully disagrees with the *Henderson Road* court's determination that the policy language 'direct physical loss of or damage to' is ambiguous."). Judge Barker casually brushes off several decisions from Ohio trial courts that either rely on *Henderson*, or echo its rationale in finding "[t]hat whether COVID-19 and/or Ohio's orders caused property damage is a question of fact. As such, a reasonable jury could find that [the insured] was entitled to coverage," because the judge does not find them persuasive. *See id*. at *14. Judge Barker's attempt to dismiss these cases is particularly interesting because she herself recognizes there are literally half a dozen cases on point that disagree with her. *Id*. at *15 ("With the exception of these six cases [], none of the rest of the cases speak directly to the interpretation of the phrase 'direct physical loss of or damage to' under Ohio law and have no impact on the Court's decision.").

38. *Id*.

39. *Id*.

40. *Id*. at *14. In disagreeing with *Henderson*, the court stated:

> As discussed at great length above, when read together, the plain, ordinary meanings of "direct," "physical," "loss," and "damage" clearly indicate that coverage is triggered when an insured property experiences some kind of tangible, material destruction or deprivation in full, or tangible, material harm in part. Moreover, this Court's reading of "direct physical loss of or damage to" comports with the "period of restoration" language, which emphasizes the tangible, physical character of restoration following a Covered Cause of Loss.

Id. (citing MIKMAR, Inc. v. Westfield Ins. Co., No. 1:20-CV-01313, 2021 WL 615304 (N.D. Ohio Feb. 17, 2021)).

pandemic kills northwards of 500,000 people in America alone, and in the name of public health and preventing further loss of life, the government issues orders requiring your business to shut its doors and/or restricts your operations leaving you functionally unable to actually run your business and make a living, then you're not covered. Similarly, like the COVID-19 pandemic, if a massive power grid failure leaves the building where your business is located physically fine but unable to actually operate because of no power, then you are likewise not covered.

In this post-pandemic world, the risk of leaving that decision – of any contract's interpretation, insurance policy or otherwise – in the hands of the court is inherently risky for all parties given the different outcomes reached by the Northern District of Ohio in *Henderson* compared to *Equity Planning Corp*. The same facts, and presumably the same law, were applied, yet two judges in the same district reached a different conclusion.

IV. DOES A NEW PARADIGM OFFERED BY *WAYFAIR*, AND TREATING COVID-19 AS A NATURAL DISASTER LIKE A BLIZZARD, CHANGE THE OUTCOME IN *EQUITY PLANNING CORP*., AND RESULT IN A HOLDING LIKE *HENDERSON*?

Under the latter two scenarios above – despite the impact on your business being the exact same under all three situations: hurricane, power grid failure, or global pandemic – you may be left without insurance coverage for your loss, at least if the court in your case adopts *Equity Planning Corp*. and not *Henderson*. Such a massive catastrophic power outage, like those caused by the power grid failures in Texas, could not, under *Equity Planning Corp*., cause "a harm that adversely affects the structural integrity of its property" as required under state law.[41] Would the outcome have been any different had plaintiffs in *Equity Planning Corp*. argued that *Henderson* got it right because the COVID-19 pandemic is a "natural disaster" just like a hurricane, blizzard, or tornado? Several courts, including the Supreme Court of Pennsylvania, have held just that: that the COVID-19 pandemic qualifies as a natural disaster. "We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster."[42] In *Friends of Danny DeVito v. Wolf*,[43]

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41. *Id*. at *7.

42. Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 370 (Pa. 2020), *cert. denied sub nom*. Republican Party of Pennsylvania v. Degraffenreid, 141 S. Ct. 732 (2021).

43. 227 A.3d 872 (Pa. 2020), *cert. denied*, 141 S. Ct. 239 (2020). For the curious, this Danny DeVito is not the celebrated actor known for his work in, among other things, "It's Always Sunny in Philadelphia," but a political candidate for Pennsylvania's 45th legislative district. *See* Michael Tanenbaum, *Pa. Political Hopeful Danny DeVito Wants to Challenge Coronavirus Lockdown in U.S. Supreme Court*, PHILLYVOICE (Apr. 28, 2020), https://www.phillyvoice.com/pennsylvania-coronavirus-lockdown-danny-devito-us-supreme-court-COVID-19/. DeVito was defeated in his race by Democrat Anita Kulik on November 3, 2020. *See 2020 Pennsylvania State House- District*

the Supreme Court of Pennsylvania discussed, quite convincingly, what COVID-19 had in common with natural disasters like hurricanes or wild fires.

> We agree with Respondents that the COVID-19 pandemic qualifies as a "natural disaster" under the Emergency Code for at least two reasons. First, the specific disasters in the definition of "natural disaster" themselves lack commonality, as while some are weather related (e.g., hurricane, tornado, storm), several others are not (tidal wave, earthquake, fire, explosion). To the contrary, the only commonality among the disparate types of specific disasters referenced is that they all involve "substantial damage to property, hardship, suffering or possible loss of life." In this respect, the COVID-19 pandemic is of the "same general nature or class as those specifically enumerated," and thus is included, rather than excluded, as a type of "natural disaster."[44]

This strikes at the cause of loss issue that the courts in *Henderson* and *Equity Planning Corp*. disagreed on. Are some courts elevating form over function, or, stated a bit differently, isn't a rose by another name just as sweet – or, in these cases, not as sweet? Many of the wild fires that have ravaged parts of the western United States are not "natural" at all; they're man-made. Should that make a difference in whether the fires are a "natural disaster," or should the criteria described in *Friends of Danny DeVito* control whether any given catastrophe is a "natural disaster"? As one September 2020 headline read: "California blaze caused by firework at gender-reveal party."[45] Of course, while weather conditions play a role in the proliferation of these wildfires,[46] the questions raised in *Friends of Danny DeVito* are critical ones worthy of consideration. When does an event qualify as a natural disaster, and in answering that question, should we really be focusing on commonalities tied to those events – substantial damage to property, hardship, suffering, or possible loss of life?

These cases, collectively, also present another important question. Is the twentieth century concept of property outdated – and dangerous – in a

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45 Election Results, USA TODAY, (Jan. 5, 2021), https://www.usatoday.com/elections/results/race/2020-11-03-state_house-PA-39125/.

44. *Friends of Danny DeVito*, 227 A.3d at 888-89.

45. In a September 7, 2020 article, it was reported that the El Dorado fire was man-made. "A fire in California that has burned more than 7,000 acres (2,800 hectares) was caused by a firework set off at a 'gender-reveal party', the California Department of Forestry and Fire Protection (Cal Fire) has found." Helen Sullivan, *California Blaze Caused by Firework at Gender-Reveal Party*, GUARDIAN (Sept. 7, 2020), https://www.theguardian.com/us-news/2020/sep/07/california-fire-caused-by-explosive-at-gender-reveal-party.

46. For a thought-provoking read, see Eliza Barclay, et. al., *California's Recurring Wildfire Problem, Explained*, VOX (Sept. 10, 2020), https://www.vox.com/21430638/california-wildfires-2020-orange-sky-august-complex.

twenty-first century post-pandemic world? Ironically, the *South Dakota v. Wayfair, Inc*.[47] case recently decided by the United States Supreme Court arguably supports an updated way of thinking about property that surfaces in these COVID-19 cases. In overruling *Quill Corp. v. North Dakota*,[48] the Court in *Wayfair* recognized that we live in the twenty-first century, which reflects a new marketplace that differs from the past.

> Further, the real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by *Quill* must give way to the 'far-reaching systemic and structural changes in the economy' and 'many other societal dimensions' caused by the Cyber Age. Though Quill was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace.[49]

If a physical presence is not required under the Commerce Clause, should we not also update our thinking as to other areas concerning property and the law, like the court did in *Henderson*? The facts in *Henderson*, *Equity Planning Corp*., and other COVID-19 cases[50] reflect the change in the interstate marketplace discussed in *Wayfair* that requires an updated paradigm. The restaurants in *Henderson* were physically unable to open and operate as a going concern even though their buildings were perfectly fine. The court recognized that. What good is property, though, if a business is unable to actually possess and use the physical space for its intended purpose, like a restaurant, and open to the public? As a result, in *Henderson*, the court held the loss was covered under the same contract terms as in *Equity Planning Corp*. because the governments' orders caused a "direct physical loss of" the restaurant.[51] Considering the same, in 2021, the concept of property and physical loss of property should not be confined as *Equity Planning Corp*.

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47. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

48. Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

49. *Wayfair*, 138 S. Ct. at 2097 (quoting Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)); *see id*. at 2097 ("In 1992, less than 2 percent of Americans had Internet access. Today that number is about 89 percent. When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller. The Internet's prevalence and power have changed the dynamics of the national economy.") (citations omitted).

50. *See, e.g*., N. State Deli, LLC v. Cincinnati Ins. Co., No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 09, 2020); Studio 417, Inc. v. Cincinnati Ins. Co., 478 F. Supp. 3d 794 (W.D. Mo. 2020); Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins. Co., No. 20-2-02212-32, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020).

51. Henderson Rd. Rest. Sys, Inc. v. Zurich Am. Ins., No. 1:20 CV 1239, 2021 WL 168422, at *10-12 (N.D. Ohio Jan. 19, 2021).

would have it for the exact same reasons described by the United States Supreme Court in *Wayfair*.[52]

This paradigm for viewing property rights in a post-pandemic world acts as a counterbalance of sorts to the powers of government that, as we've seen during the COVID-19 pandemic, have expanded. The issue in *Friends of Danny DeVito* was the legality, both statutorily and constitutionally, of the Pennsylvania governor's Executive Order "compelling the closure of the physical operations of all non-life sustaining business to reduce the spread of [COVID-19]."[53] Governor Wolf relied on three statutory grounds for his authority to issue the order.[54] The governor, along with the Pennsylvania Department of Community and Economic Development ("DCED"), decided which businesses within the state were "life-sustaining," and could be open, versus those deemed "non-life sustaining" and were forced to close under the

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52. For example, many law firms are moving away from actual physical paper files. The idea of a "paperless law practice" has been around for years, only gaining traction because of the pandemic. *See* Paul Walker, *Could the Pandemic Finally Deliver a Paperless Law Firm*?, LAW (Nov. 23, 2020, 7:00 AM), https://www.law.com/legaltechnews/2020/11/23/could-the-pandemic-finally-deliver-a-paperless-law-firm/. Many businesses, including the likes of Twitter and Microsoft, are also liberalizing their work from home policies in the wake of this pandemic. *See* Samantha Subin, *The New Negotiation over Job Benefits and Perks in Post-Covid Hybrid Work*, CNBC (Apr. 23, 2021, 3:50 PM), https://www.cnbc.com/2021/04/23/how-post-covid-hybrid-work-will-change-job-benefits-perks.html. With the movement from paper to the cloud, and more employees working from home, it begs the question, do these digital documents now have less value than their physical paper counterparts. Are these documents no longer "property" because there is not a hard, physical copy of them sitting somewhere in a file at the office. If a cyberattack like the one that shutdown the Colonial Pipeline in May 2021 hits a law firm or business like Microsoft, thus leaving them unable to access their documents that exist only in the digital form, those businesses could suffer devastating losses. Those losses, then, notwithstanding any other exception in a policy, could arguably be not covered as there was no actual physical damage to the digital documents under the rationale applied in *Equity Planning Corp*. Similarly, the impacted business's physical premises could be fine without any damages, but the company still unable to operate because they were deprived of access to critical parts of their business in the form of their technology.

53. Friends of Danny DeVito v. Wolf, 227 A.3d 872, 876 (Pa. 2020). The court noted:

> In their Emergency Application, Petitioners contend that the Governor lacks any statutory authority to issue the Executive Order and further claim that it violates their constitutional rights under the United States and Pennsylvania Constitutions. Petitioners claim that the Executive Order places businesses throughout Pennsylvania at extreme risk of financial hardship and threatens the jobs of hundreds of thousands of our citizens.

Id. at 883.

54. *Id*. at 880. The court stated:

> In issuing the Executive Order, the Governor invoked three statutory grounds for his and his administration's authority to do so: the Emergency Management Services Code (the 'Emergency Code'), 35 Pa.C.S. § 7101-79a31; sections 532(a) and 1404(a) of the Administrative Code, 71 P.S. § 532; 71 P.S. § 1403(a); and the Disease Prevention and Control Law (the 'Disease Act'), 35 P.S. § 521.1-521.25.

Id.; *see also id*. at 885 (detailing the Governor's broad-based constitutional and statutory powers, and "[p]rimary responsibility for protecting the public safety and welfare of the people of Pennsylvania in times of actual and imminent disasters where public safety and welfare are threatened. As such, the Governor is vested with broad emergency management powers under the Emergency Code.").

order.[55] To highlight the flexibility and arbitrariness of what businesses were subject to regulation or closure versus which ones continued without restriction, consider this. In some states, like New York, liquor stores and farmer's markets were considered essential businesses that could remain open during some of the worst days of the COVID-19 pandemic, while those businesses deemed non-essential, like realtors or shopping malls, could not.[56] So, tipping a few glasses of Bourbon and picking up some fresh vegetables at the farmer's market was okay, but shopping for a new pair of sunglasses at the mall was out of bounds.

Both the Cities of Philadelphia and Pittsburgh filed amicus curiae briefs supporting Governor Wolf's order.[57] Governor Wolf, like several of his counterparts across the country, argued that Pennsylvania's Constitution and state law tasked the executive branch with responding to public health emergencies and gave him broad powers to do just that.[58] In exercising jurisdiction, the Supreme Court of Pennsylvania, like its judicial counterparts that have addressed COVID-19 related cases, noted the high stakes involved. "We agree that this case presents issues of immediate and immense public importance impacting virtually all Pennsylvanians and thousands of Pennsylvania businesses, and that continued challenges to the Executive Order will cause further uncertainty."[59]

Critical to the Court's analysis were Governor Wolf's broad statutory powers during "disaster situations" under Pennsylvania law, including the power to "issue, amend and rescind executive orders, proclamations and regulations which shall have the force and effect of law."[60] The petitioners argued that the executive's emergency powers in response to a pandemic like

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55. *Id*. A summary of the petitioners' backgrounds underscores the economic and life impacts that COVID-19 wreaked on lives all across our country. *Id*. at 881. Like the restaurateurs in *Henderson*, petitioner Gregory could not effectively conduct her real estate business from home, and DeVito, a candidate for political office that was challenging an incumbent was hampered in campaign efforts because the incumbent's offices could remain open. While *Friends of Danny DeVito* and *Henderson* involved different legal issues brought on by COVID-19, it underscores how far-reaching its impacts were on our society in addition to the death toll and heartbreak suffered by many thousands of families.

56. *Governor Cuomo Issues Guidance on Essential Services Under the 'New York State on PAUSE' Executive Order*, N.Y. STATE (Mar. 20, 2020), https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order [hereinafter *Governor Cuomo Issues Guidance on Essential Services*].

57. *Friends of Danny DeVito*, 227 A.3d at 882-83 ("The City of Pittsburgh indicates that even though the southwest region of Pennsylvania has eighteen hospitals, the rapid spread of COVID-19 would likely lead to an overwhelming of the health care resources available to Pittsburghers and residents of the surrounding areas.").

58. *Id*. at 883; *see also id*. at 886 ("The broad powers granted to the Governor in the Emergency Code are firmly grounded in the Commonwealth's police power.").

59. *Id*. at 884.

60. *Id*. at 885 (citing 35 PA. CONS. STAT. § 7301(b)); *see also id*. at 886 (detailing the specific powers of the executive breach once a "state of disaster emergency" is declared). It should be noted that there is a "counterbalance" to the governor's broad authority, including a 90-day time limit on

COVID-19, even if such powers applied to COVID-19 and its aftermath, did not allow the governor to close their businesses.[61] When analyzing the scope of the Governor's powers, the court looked to the definitions of the relevant statutory terms at play, including "disasters." Pennsylvania's Emergency Code defined "disaster" as "a man-made disaster, natural disaster or war-caused disaster."[62] The petitioners argued COVID-19 was not a natural disaster as defined by statute because, among other reasons, "viral illness is not included in the list of applicable disasters," so "COVID-19 cannot be a natural disaster because it is not of the same type of those on the list."[63]

The determinative question before the Pennsylvania Supreme Court was summed up thusly by the court:

> It is beyond dispute that the COVID-19 pandemic is unquestionably a catastrophe that 'results in . . . hardship, suffering or possible loss

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any state of emergency unless renewed by the governor, and the legislature's ability to "terminate a state of disaster emergency at any time." *Id*. That 90-day time limit, and the Pennsylvania Legislature's powers vis-a-vie Governor Wolf to legislatively declare an end to the COVID-19 disaster emergency, ended up before the Supreme Court of Pennsylvania in *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020). In *Scarnati*, "The Pennsylvania Senate and the Pennsylvania House of Representatives adopted a concurrent resolution ordering the Governor to terminate the [COVID-19] disaster emergency." *Id*. at 685. The issue was whether the Legislature's concurrent resolution was "[s]ubject to the presentment requirement embodied in the Pennsylvania Constitution. In common parlance, the question is whether H.R. 836 is subject to the Governor's veto power." *Id*. at 687. The court held that the concurrent resolution was a "legal nullity," *see id*. at 707, because it was not presented to Governor Wolf. "Thus, when the legislature seeks to 'act on behalf of the state' by way of concurrent resolution, that resolution must be presented to the Governor.'" *Id*. at 689. The court held that:

> Based upon the plain text of the statute and upon our canon counseling against the invalidation of statutes on constitutional grounds where possible, we hold that Section 7301(c)'s provision allowing the General Assembly to terminate a state of disaster emergency by concurrent resolution requires presentment of that resolution to the Governor. Because the General Assembly did not present H.R. 836 to the Governor for his approval or veto, the General Assembly did not comply with its own statutory direction in Section 7301(c).

Id. at 698-99. The decision in *Scarnati* is a fascinating one worth a separate article in and of itself discussing what have become tense relationships and pitched political battles in many states – harkening back to the founders' battles between the Federalists and anti-Federalists concerning separation of powers, and checks and balances between the executive and legislative branches – including North Dakota and Minnesota, related to COVID-19 executive orders and disaster declarations. For example, as noted in a January 7, 2021 article, "A sweeping bill sponsored by Sen. Janne Myrdal [], would constrict the governor's wide-ranging emergency authority." Adam Willis & Jeremy Turley, *North Dakota Lawmakers Aim to Curb Governor's Emergency Powers, Executive Orders*, GRAND FORKS HERALD (Jan. 7, 2021, 3:48 PM), https://www.grandforksherald.com/news/government-and-politics/6831622-North-Dakota-lawmakers-aim-to-curb-governors-emergency-powers-executive-orders.

61. *Friends of Danny DeVito*, 227 A.3d at 887.

62. *Id*. (quoting 35 PA. CONS. STAT. § 7102).

63. *Id*. at 888.

> of life.' The issue, then, is whether it nevertheless may not be classified as a 'natural disaster' caused by unforeseen factors based upon the application of the doctrine of ejusdem generis.[64]

As noted earlier, the court agreed with the Governor, holding that COVID-19 qualified as a "natural disaster" under Pennsylvania law.[65] The court emphasized the sheer magnitude of the devastation caused by the COVID-19 pandemic in classifying it as a natural disaster subject to action under the executive's authority. "The COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions. Its presence in and movement through Pennsylvania triggered the Governor's authority under the Emergency Code."[66] This holding, and rationale, echoes *Henderson*. If something – any event, whether a pandemic or otherwise – kills more than 500,000 Americans, like COVID-19 has, how can you not call it a natural disaster under any definition of that term?[67] In future cases involving COVID-19 or any other large-scale disaster, parties should take these holdings, particularly their analyses involving the magnitude of the disaster in terms of its impact on the law, into account.

What also jumps out in these cases is the diametrically opposed arguments of the petitioners in *Friends of Danny DeVito* compared to *Henderson and Equity Planning Corp*. In *Henderson* and *Equity Planning Corp*., the businesses stressed the catastrophic nature of how the pandemic impacted their ability to operate.[68] Conversely, in *Friends of Danny DeVito*, the petitioners urged the court to allow them to operate their businesses and political

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64. *Id*. The court went on to give its definition of ejusdem generis. "Under the statutory construction doctrine of ejusdem generis ('of the same kind or class'), where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." *Id*.

65. *Id*. at 889. The court further held that, "Ejusdem generis must yield in any instance in which its effect would be to confine the operation of a statute within narrower limits than those intended by the General Assembly when it was enacted." *Id*. (citing Dep't of Assess. & Tax. v. Belcher, 553 A.2d 691, 696 (Md. 1989)).

66. *Id*.

67. One could argue that only a natural disaster or catastrophe of the greatest magnitude warrants a $1.9 trillion relief bill, like the one signed by President Joe Biden on March 11, 2021, and the $2.2 trillion relief bill signed by President Donald Trump on March 27, 2020. "This historic legislation is about rebuilding the backbone of the country," said Biden in signing the legislation into law. Jacob Pramuk, *Biden Signs $1.9 Trillion Covid Relief Bill, Clearing Way for Stimulus Checks, Vaccine Aid*, CNBC (Mar. 11, 2021, 12:30 PM), https://www.cnbc.com/2021/03/11/biden-1point9-trillion-covid-relief-package-thursday-afternoon.html; *see* Emily Cochrane & Sheryl Gay Stolberg, *$2 Trillion Coronavirus Stimulus Bill Is Signed Into Law*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/politics/coronavirus-house-voting.html. The stimulus bill signed by President Trump was the largest stimulus package in United States history. *See* Jordan Fabian & Justin Sink, *Trump Signs $2 Trillion Virus Bill, Largest Ever U.S. Stimulus*, BLOOMBERG (Mar. 27, 2020, 3:32 PM), https://www.bloomberg.com/news/articles/2020-03-27/trump-signs-2-trillion-virus-bill-largest-ever-u-s-stimulus.

68. *See* Henderson Rd. Rest. Sys, Inc. v. Zurich Am. Ins., No. 1:20 CV 1239, 2021 WL 168422, at *1 (N.D. Ohio Jan. 19, 2021); Equity Plan. Corp. v. Westfield Ins. Co., No. 1:20-CV-01204, 2021 WL 766802, at *1 (N.D. Ohio Feb. 26, 2021).

campaign, arguing the governor's order violated the law, in part, because the pandemic was not a natural disaster.[69]

Like *Henderson*, the *Friends of DeVito* court rejected the sort of cramped analysis later done by Judge Barker where she relied on what she found to be the absence of any direct physical and structural limitations related to the virus in *Equity Planning Corp*. The Pennsylvania businesses argued that even if COVID-19 was a "disaster," their businesses were not physically declared a "disaster area" and that there had "been no disasters in the areas in which their businesses are located."[70] The court disagreed, pointing out the flaw in the petitioners' reasoning. Real property is vital to the virus's existence. "More fundamentally, Petitioners' argument ignores the nature of this virus and the manner in which it is transmitted. . . . Thus, any location (including Petitioners' businesses) where two or more people can congregate is within the disaster area."[71] The proliferation of the virus and why it has had such a prolonged impact on all aspects of our daily lives and society is its physical nature and its physical impacts, whether on the human body or real property.[72] Think social distancing, wearing masks, virtual school, Zoom meetings, and attendance limits at everything from sporting events at the Fargodome and Alerus Center to President Biden's April 29, 2021 remarks to a Joint Session of Congress.[73] The proliferation of the virus and its impacts is why the United States Congress passed over $4.0 trillion in relief in the form of the two COVID-19 relief bills signed by Presidents Biden and Trump.[74]

If you are deprived of the ability to operate your business by a government order preventing you from actually opening to the public, your property is undeniably impacted. You have suffered a physical loss of your property. The Paycheck Protection Program, popularly called PPP, is direct evidence of that.[75] Even the United States Department of the Treasury's website touts

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69. *Friends of Danny DeVito*, 227 A.3d at 888.

70. *Id*. at 889.

71. *Id*. at 889-90.

72. The CDC's guidance on how to protect yourself from Covid-19 focuses on physical actions and interactions, like staying 6 feet apart from others, avoiding crowds and poorly ventilated spaces, washing your hands often, and getting the vaccine. *See How to Protect Yourself & Others*, CDC (Mar. 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.

73. It should be noted that, in certain situations, attendance restrictions must be balanced against the United States Constitution. In November 2020, the United States Supreme Court struck down New York's 10-and-25 person occupancy limits on attendance at religious services as violating the First Amendment's protection on the free exercise of religion. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66-69 (2020).

74. *See* Pramuk, *supra* note 67; Cochrane & Stolberg, *supra* note 67; Fabian & Sink, *supra* note 67.

75. For example, in its statement applauding the United States Senate passing the Paycheck Protection Program extension in March 2021, the U.S. Chamber of Commerce described the situation faced by many businesses:

> This bipartisan legislation comes at a time when small business owners are still grappling with the economic effects of the pandemic and extending the Paycheck Protection

PPP as "providing small businesses with the resources they need to maintain their payroll, hire back employees who may have been laid off, and cover applicable overhead."[76] The scope of government intervention serves to underscore that this pandemic has much in common with those other catastrophic disasters emphasized in *Friends of Danny DeVito*, which, as noted by *Henderson*, have left businesses unable to open their doors. That is why the paradigm offered by *Wayfair* for thinking about the twenty-first century marketplace as it relates to property and business in the wake of COVID-19 is so critically important.

V. PROPERTY IS NOT JUST PHYSICAL POSSESSION

The right to use your property as you see fit within, of course, the confines of the law, is fundamental to the very concept of owning property. It is quintessential to that proverbial bundle of sticks that is property ownership that we can actually use our property. "The 'bundle of sticks' metaphor often is used to describe property, with each stick representing a right, privilege,

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> Program, even for just a short time to exhaust existing funding, will help some of the small businesses that need it most. Data from last week's MetLife & U.S. Chamber of Commerce Small Business Index showed that 59% of small businesses still feel as though it will take more than six months for normalcy to return.

U.S. Chamber Applauds Senate Passage of Paycheck Protection Program Extension, U.S. CHAMBER OF COM. (Mar. 25, 2021, 2:15 PM), https://www.uschamber.com/press-release/us-chamber-applauds-senate-passage-of-paycheck-protection-program-extension. Likewise, the American Bankers Association released a statement applauding the bipartisan support for the PPP extension:

> We applaud members of the House and Senate for passing the Paycheck Protection Program Extension Act with strong bipartisan support and urge President Biden to quickly sign it into law. This legislation will help ensure that small businesses that have already applied for a PPP loan will be able to get that loan processed, rather than risk seeing this program end before their paperwork can be completed. It will also provide more time for still-struggling small businesses that have not yet applied for a PPP loan to do so. Banks of all sizes have stepped up during the pandemic to strongly support this unprecedented program and deliver more than $675 billion in PPP loans to small businesses, helping to support millions of jobs in the process.

Rob Nichols, *ABA Statement on Legislation to Extend Paycheck Protection Program*, ABA (Mar. 25, 2021), https://www.aba.com/about-us/press-room/press-releases/aba-statement-on-legislation-to-extend-paycheck-protection-program.

76. *See The CARES Act Provides Assistance to Small Business*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses (last visited Mar. 26, 2021). The Department of the Treasury further explains at its website that,

> The Paycheck Protection Program established by the CARES Act, is implemented by the Small Business Administration with support from the Department of the Treasury. This program provides small businesses with funds to pay up to 8 weeks of payroll costs including benefits. Funds can also be used to pay interest on mortgages, rent, and utilities.

Id. These benefits, like paying interest on mortgages, rent, and utilities are directly related to physical property, and the fact that many small businesses were unable to physically use their property due to the COVID-19 pandemic.

power or immunity."[77] What good is your property if you're unable to use it? The concept of property and your legal rights and interests to property are not limited to merely owning a physical thing. Nor should it be, particularly in the twenty-first century. It is the rights incumbent upon the ownership of that property that must be acknowledged and protected.

> The word "property" has multiple meanings. Sometimes "property" is used simply to refer to the physical object in question—that is, the thing itself. Other times, the word "property" is used with greater accuracy to "to denote the legal interest (or aggregate of legal relations) appertaining to such physical object." When used in the latter sense, "property" is composed of a "complex aggregate of rights (or claims), privileges, powers, and immunities."[78]

As succinctly stated by one California court, the term "property" and its inherent "rights, privileges, powers and immunities include the possession, use and disposition of the thing."[79] Or, "[s]tated another way, 'property' is the sum of all the legally recognized rights, privileges, powers and immunities incident to ownership of the thing."[80]

While courts are tasked, sometimes unenviably, with weighing competing interests, what emerges in comparing these COVID-19 related cases – particularly in a 2021, post-pandemic marketplace – is the idea that property and all of its rights, privileges, powers, and immunities should not be constrained by the idea of property as a finite physical location and nothing more.[81] This was recognized in *North State Deli, LLC v. Cincinnati Ins. Co.*, where the court explained that the right to use property for its intended purpose was fundamental to the right to possess the property:

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77. Pac. Gas & Elec. Co. v. Hart High-Voltage Apparatus Repair & Testing Co., 226 Cal. Rptr. 3d 631, 639 (Cal. Ct. App. 2017) (citing Christopher Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 196 (1996)).

78. *Pac. Gas & Elec. Co.*, 226 Cal. Rptr. 3d at 639 (quoting Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* 26 YALE L.J. 710, 746 (1917)) (citations omitted).

79. *Id.*

80. *Id.* (citing Dickman v. Commissioner, 465 U.S. 330, 334 (1984)).

81. It should be noted that the government's actions in *Friends of Danny DeVito* were not a takings without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution. Friends of Danny DeVito v. Wolf, 227 A.3d 872, 895 (Pa. 2020). The petitioners' takings claim was rejected by the court because of the distinction between the state exercising its police powers and a takings accomplished under the state's eminent domain authority. *Id.* "Respondents point out that there is a critical distinction between the exercise of the police power, as here, and takings pursuant to eminent domain." *Id.* at 893. Relying on this distinction, the court held the State's actions in addressing COVID-19 were "a classic example of the use of the police power to 'protect the lives, health, morals, comfort, and general welfare of the people." *Id.* at 896 (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)).

> Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.[82]

The legal concept of property – that bundle of sticks – is not limited to the mere act of actually possessing property, but the rights and inherent privileges that ownership entails. The sword pierces both sides of business owners with the limited holding of what "direct physical loss of or damage to" property was in *Equity Planning Corp*. and the government's ability to close and restrict the use of one's property in emergency situations for the legitimate reason of protecting public health as held in *Friends of Danny DeVito*.[83] To put it bluntly, for many businesses, you're damned if you, damned if you don't. With the challenges presented by a post-pandemic world coupled with the realities of the emerging "interstate marketplace" as described in *Wayfair*, the law should give consideration, or at least some level of protection, to business owners who are fighting their insurance company on one side, the government on the other, all while dealing with a natural disaster like COVID-19 (or a major electric grid failure, etc.) in trying to make payroll and avoid financial ruin.

Of course, the same principles of law still hold steadfast whether interpreting coverage provisions in an insurance contract, like *Henderson*, the ability of the state to order businesses closed under its statutory emergency

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82. N. State Deli, LLC, v. Cincinnati Ins. Co., No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Ct. Oct. 7, 2020).

83. *See Friends of Danny DeVito*, 227 A.3d 872 at 890 ("Under the exigencies created by the spread of the coronavirus and the critical interests of the public, generally, Petitioners cannot prevail in their arguments. As to the predicate requirements that the interests of the public justify the Governor's assertion of its authority, the nature of this emergency supports it."); *Id*. at 892 ("Faced with protecting the health and lives of 12.8 million Pennsylvania citizens, we find that the impact of the closure of these businesses caused by the exercise of police power is not unduly oppressive. The protection of the lives and health of millions of Pennsylvania residents is the sine qua non of a proper exercise of police power.").

powers in *Friends of Danny DeVito*, or when examining if a force majeure clause excuses contractually-obligated performance due to COVID-19.

VI. FROM FORCED SHUTDOWN TO FORCE MAJEURE, WHEN IS FAILURE TO PERFORM UNDER A CONTRACT EXCUSED BY COVID-19?

The short answer is that like any other contract term, courts – at least in North Dakota – will interpret a contract and any force majeure clause to give effect to the parties' intent.[84] A force majeure clause is "[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled."[85] It seems, then, under this definition of force majeure from *Pennington v. Continental Resources, Inc.* and *Entzel v. Moritz Sport and Marine*, that COVID-19 would qualify as a force majeure event given how some courts, like the Pennsylvania Supreme Court, have described it as a natural disaster. By their definition, natural disasters are beyond the control of the contracting parties. But this question, whether COVID-19 qualifies as a force majeure event, deserves its own discussion and closer attention. While COVID-19 may be a natural disaster, we must ask whether COVID-19 actually prevented performance of the subject contract, or whether a party has other reasons for wanting out of the contract and is using disaster as a pretext.

Fortunately, or unfortunately, depending on your perspective and whether you were a New York art dealer or the auction house that agreed to sell a painting, COVID-19, absent a fairly narrow or restrictive force majeure clause, qualifies as a force majeure event. In *JN Contemporary Art LLC v. Phillips Auctioneers LLC*,[86] the United States District Court for the Southern District of New York dismissed the plaintiff art dealer's breach of contract claim against the defendant auction house, holding that COVID-19 and the resulting government restrictions qualified as a force majeure event excusing performance under the parties' agreement.[87] In June 2019, JN Contemporary Art ("JN") entered into an agreement with an auction house, Phillips Auctioneers ("Phillips"), to sell a painting by artist Rudolf Stingel (the "Stingel

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84. Pennington v. Cont'l Res., Inc., 2019 ND 228, ¶¶ 9-16, 932 N.W.2d 897.

85. *Id.* ¶ 12 (quoting Entzel v. Moritz Sport and Marine, 2014 ND 12, ¶ 7, 841 N.W.2d 774).

86. No. 20-CV-4370, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020).

87. *JN Contemp. Art LLC*, 2020 WL 7405262, at * 13. JN brought several other causes of action. *Id.* at *5. For our purposes, we're concerned with JN's breach of contract claim. The elements, under New York law, for breach of contract are: "(i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages." *Id.* (quoting Nick's Garage, Inc. v. Progressive Cas. Ins. Co., 875 F.3d 107, 114 (2d. Cir. 2017)); *cf.* Three Aces Properties LLC v. United Rentals (N. Am.), Inc., 2020 ND 258, ¶ 10, 952 N.W.2d 64 (stating the elements under North Dakota law for breach of contract).

Painting.")[88] The Stingel Painting was to be sold at auction in May 2020.[89] After COVID-19 began ravaging New York in the spring of 2020, Phillips unilaterally terminated its agreement with JN to auction the Stingel Painting, and JN sued to enforce the parties' contract.[90]

The contract included a force majeure provision, which provided that:

> In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we may terminate this Agreement with immediate effect. In such event, our obligation to make payment of the Guaranteed Minimum shall be null and void and we shall have no other liability to you.[91]

JN used the Stingel Painting, along with its contract and Guaranteed Minimum with Phillips, to obtain a $5 million loan from Muses Funding I LLC ("Muses").[92] As part of the loan agreement, the parties, including Muses, entered a Security Amendment to JN and Phillips' contract.[93] The amendment gave Muses a first-priority lien on the Stingel Painting, and Phillips agreed to pay Muses the Guaranteed Minimum and net sale proceeds from the sale of the painting.[94] The amendment noted the painting would be offered for sale at Phillips' May 2020 auction event.[95]

Like Governor Wolf in Pennsylvania, New York's Governor, Andrew Cuomo, "declared a State Disaster Emergency and issued a series of executive orders restricting and eventually barring all non-essential business activities until June 2020."[96] Subsequently, Phillips announced it was postponing all of its auctions, including the May 2020 auction event that included the Stingel Painting.[97] While the parties discussed their contract and the possibility of auctioning the painting in November 2020, on June 1, 2020, Phillips

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88. *JN Contemp. Art LLC*, 2020 WL 7405262, at *1.

89. The contract provided that the Stingel Painting "shall be offered for sale in New York in our major spring 2020 evening auction of 20th Century & Contemporary Act currently scheduled for May 2020[.]' . . . If the painting were not sold at the auction, Phillips would announce that 'it has been "passed," "withdrawn," "returned to owner," or "bought-in."'" *Id.* at *2.

90. As the court explained, the auction house guaranteed the art dealer a minimum price, the "Guaranteed Minimum," that the Stingel Painting would sell for as part of their contract. The minimum price guaranteed by the Phillips to sell the painting was $5,000,000. *Id.*

91. *Id.* (quoting Paragraph 12(a) of the contract). The contract contained a choice of law clause providing that New York law controlled. *Id.* at *3.

92. *Id.* at *3.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.; see also Governor Cuomo Issues Guidance on Essential Services*, *supra* note 56 (noting that this order did not ban, among other things, the sale of liquor at off sales and farmers markets).

97. *JN Contemp. Art LLC*, 2020 WL 7405262, at *8.

notified JN it was terminating the contract.[98] In its letter to JN terminating the contract, Phillips cited the force majeure clause, invoking it as a result of the COVID-19 pandemic.[99]

Like North Dakota, when interpreting a contract, New York law looks to the intent of the contracting parties as stated in their agreement.[100] Again, like North Dakota, when interpreting the meaning of the contract, New York law requires that "words should be given the meanings ordinarily ascribed to them and absurd results should be avoided."[101] The key language in the contract was the force majeure clause, which is to be "interpreted in accord with [its] purpose, which is to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties."[102] While the force majeure clause did not specifically include a pandemic or public health emergency as an event beyond the control of the parties serving to excuse performance, it did include "natural disaster" as a force majeure event.[103]

In granting Phillips' motion to dismiss, the court held that the force majeure clause – which the court called the "Termination Provision" – allowed Phillips to unilaterally terminate the parties' contract.[104] The court explained that:

> The COVID-19 pandemic and the attendant government-imposed restrictions on business operations permitted Phillips to invoke the Termination Provision. The pandemic and the regulations that accompanied it fall squarely under the ambit of Paragraph 12(a)'s force majeure clause. That clause is triggered when the auction is postponed for circumstances beyond our or your control.[105]

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98. *Id*.

99. *Id*. at *4. The termination letter provided:

> We are hereby giving you notice with immediate effect that: (1) Phillips is invoking its right to terminate the [Stingel Agreement]; (2) Phillips' obligation to make payment of the Guaranteed Minimum to you for the Property is null and void; and (3) Phillips shall have no liability to you for such actions that [are] required under applicable governing law. Our rights to act are as mutually agreed by you and us and are clearly set out in paragraph 12 of the [Stingel Agreement][.]

Id.

100. *See id*. at *5 ("The initial inquiry is whether the contractual language, without reference to sources outside the text of the contract, is ambiguous.").

101. *Id*. at *6 (quoting Mastrovincenzo v. City of New York, 435 F.3d 78, 104 (2d Cir. 2006)).

102. *Id*. (quoting Constellation Energy Servs. of New York, Inc. v. New Water St. Corp., 146 A.D.3d 557, 46 N.Y.S.3d 25, 27 (1st Dep't 2017)); *cf*. Pennington v. Cont'l Res., Inc., 2019 ND 228, ¶ 12, 932 N.W.2d 897.

103. *JN Contemp. Art LLC*, 2020 WL 7405262, at *7-9.

104. *Id*. at *7.

105. *Id*.

Like *Friends of Danny DeVito*, the court concluded that COVID-19 qualified as a natural disaster.[106] The court noted that several other courts, including *Friends of Danny DeVito*, reached the same decision.[107] "It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster."[108]

In the absence of any definition of "natural disaster" in the contract, the court held that the "common meaning of the words natural disaster" included the COVID-19 pandemic. Relying on the Black's Law Dictionary's meaning of the term "natural disaster," which "defines 'natural' as '[b]rought about by nature as opposed to artificial means,' and 'disaster' as 'a calamity; a catastrophic emergency,'"[109] the court stated, "By any measure, the COVID-19 pandemic fits those definitions."[110] The court also pointed to the language in the force majeure clause regarding other circumstances beyond the parties control, which included "not only environmental calamities events such as floods or fires, but also widespread social and economic disruptions such as 'general strikes,' 'war,' 'chemical contamination,' and 'terrorist attack.'"[111] The magnitude of the disaster was reinforced, according to the court, by orders and declarations issued by both the state and federal governments.[112]

However, what is puzzling, and troubling, about the Southern District of New York's decision is the fact that whether Phillips' performance was truly prevented by a force majeure event in the form of the COVID-19 pandemic, and therefore excused, seemingly presented a fact question. In fact, it does not appear Phillips' performance was prevented at all, as it still held the auction in July 2020, only two months after its originally scheduled date.[113] The court began its analysis by noting that it had to interpret the force majeure

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106. *Id*. at *7-9.

107. *Id*. at *7, n. 7 ("Other courts have already determined that the COVID-19 pandemic qualifies as a natural disaster, as that term is defined by statute.") (citing Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 370 (2020) ("We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster."); Friends of Danny DeVito v. Wolf, 227 A.3d 872, 889 (2020)).

108. *JN Contemp. Art LLC*, 2020 WL 7405262, at *7.

109. *Id*. (quoting *Natural Disaster*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

110. *Id*. The court also quoted the Oxford English Dictionary's meaning of "natural disaster," which defines the term as "a natural event that causes great damage or loss of life such as a flood, earthquake, or hurricane." *Id*.

111. *Id*. at *8. This comparison echoes the court's comparison of events qualifying as natural disasters in *Friends of Danny DeVito*. *See supra* text accompanying note 44.

112. *See JN Contemp. Art LLC*, 2020 WL 7405262, at *8. ("The relevant government proclamations buttress this conclusion. Governor Cuomo's Executive Orders declared a 'State disaster emergency.' And, on March 20, the Federal Emergency Management Agency issued a 'major disaster declaration' under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, due to the COVID-19 outbreak in New York.") (citation omitted). Parties addressing a COVID-19 contract issue, whether in the insurance policy context or when dealing with high-priced art, should pay attention to the fact that numerous courts – including the Supreme Court of Pennsylvania in *Friends of Danny DeVito* and the United States District Court for the Southern District of New York in *JN Contemporary Art* – have leaned heavily on government orders and declarations in their analysis.

113. *Id*. at *4.

clause based on the reasonable expectation of the parties, and that the force majeure clause only applied if performance of the contract was frustrated by circumstances beyond the control of the parties.[114] If the auction where the Stingel Painting was supposed to be sold was simply converted to a virtual auction and postponed two months, how could the force majeure clause possibly excuse Phillips' performance? It was still able to perform. So, we must ask, did Phillips, and will others, invoke the COVID-19 pandemic and an opportunistic force majeure clause to get out of a contract when the real motivation for doing so are adverse economic conditions and an unfavorable marketplace? Courts should closely examine whether parties are truly unable to perform because of the claimed force majeure event, COVID-19 or otherwise. The force majeure clause is not an escape hatch for adverse market conditions, unless the clause actually provides for that.[115]

When discussing the standard for evaluating a force majeure clause, Judge Cote relied on the 2017 decision in *Constellation Energy Services of New York, Inc. v. New Water Street Corp*.[116] However, in *Constellation Energy Services*, the court denied the defendant's motion to dismiss based on the force majeure clause.[117] The court held that, "[t]he motion to dismiss should be denied because defendant has not shown that the force majeure clause would be an absolute defense."[118] The court held that, as a matter of law, the defendant had not established its failure to perform under the terms of the contract "was an unavoidable result of the storm [Hurricane Sandy], including whether or not the tenants could have been restored to their space sooner, and whether the failure to do so was beyond its control."[119]

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114. *Id*. at *6.

115. In *OWBR LLC v. Clear Channel Commc'ns, Inc*., 266 F. Supp. 2d 1214 (D. Haw. 2003), the court held that, in the wake of the 9/11 terrorist attacks, "Nonetheless, a force majeure clause does not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event." *Id*. at 1223 (citation omitted).

116. *JN Contemp. Art LLC*, 2020 WL 7405262, at *6 (quoting Constellation Energy Servs. of New York, Inc. v. New Water St. Corp., 146 A.D.3d 557, 558 (N.Y. App. Div. 2017)).

117. *Constellation Energy Servs*., 146 A.D.3d at 569. The force majeure clause at issue defined a force majeure event as:

> For purposes of this Agreement and any effective Confirmation, Force Majeure means an event which prevents one Party from performing its obligations hereunder, which event was not (i) within the reasonable control of, or (ii) the result of the negligence of, the Claiming Party, and which, by the exercise of due diligence, the claiming Party is unable to overcome or avoid. Force Majeure shall include, without limitation: a condition resulting in the curtailment or disruption of firm Energy supply or the transmission on the electric transmission and/or distribution system; restraint by court order; any action or non-action by, or the inability to obtain necessary authorizations or approvals from[,] any Authorized Entity; or a Force Majeure event experienced by an Authorized Entity. Force Majeure shall not include loss or failure of either Party's markets or supplies . . . .

Id. at 558.

118. *Id*. at 559.

119. *Id*.

JN pointed to facts that show, or seemingly show, that Phillips could have performed under the terms of the contract as evidenced by the fact that Phillips proceeded with their May 2020 auction "[i]n July 2020 when the Virtual Auction was conducted from London."[120] There also seems to be a question of fact as to the parties' intent regarding the date of the auction, and whether they intended to limit the auction of the Stingel Painting only to the May 2020 date.[121] JN pointed to language in the contract stating the auction was the "major spring 2020 evening auction of 20th Century & Contemporary Act currently scheduled for May 2020"[122] as meaning that the contract did not provide for a specific date, but instead to Phillips' marquee spring evening auction that was rescheduled to July.[123] While Phillips may have ultimately prevailed on the merits, like *Constellation Energy Services*, there were fact issues, and the court should have denied the motion to dismiss. At a minimum, what the parties meant by referencing an auction event, the 20th Century & Contemporary Art auction, tied to the contractual language "currently scheduled for May 2020" was ambiguous. JN offered a reasonable interpretation of the contract, and should have been allowed to introduce extrinsic evidence as to the parties' intent.[124]

While certain circumstances may arise where a motion to dismiss, or summary judgment, is appropriate, it appears this was not one of them. Notwithstanding, the court's analysis of the force majeure clause as it relates to COVID-19 is significant. Parties faced with force majeure provisions in a post-pandemic world need to take heed of cases like *JN Contemporary Art* and draft accordingly. For example, when negotiating certain agreements with oil companies, some landowners have started including language requiring the party relying on the force majeure clause to provide written notice that they are invoking the clause within seven days of the first occurrence of the claimed force majeure event. The relevant language provides: "For the force majeure provision in this paragraph to apply, Grantee must notify Grantor in writing within seven (7) days of the first occurrence of the claimed force majeure event." While this does not eliminate the question of whether COVID-19 or anything else was a force majeure event under a contract, it does start the clock running and puts the burden on the party seeking to use the clause to provide timely notice to the other party.[125]

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120. *JN Contemp. Art*, 2020 WL 7405262, at *8.

121. *Id.*

122. *Id.* at *2.

123. *Id.* at *8.

124. *Cf. Henderson Rd. Rest. Sys, Inc. v. Zurich Am. Ins.*, No. 1:20 CV 1239, 2021 WL 168422, at *10-12 (N.D. Ohio Jan. 19, 2021) (holding the insurance policy was ambiguous, and because it was ambiguous, had to be construed against Zurich, who drafted the contract).

125. The impact of COVID-19 is also presenting itself with regards to criminal dockets and the Speedy Trial Act, *see* 18 U.S.C. §§ 3161–3174. For example, while not directly related to

VII. CONCLUSION

The extent that COVID-19 related cases will impact our legal landscape remains to be seen, but make no mistake, COVID-19 is affecting the law just like it's impacting every other area of our lives, from school to church; from employment, to, obviously, health care. Businesses and litigants should carefully review their contracts and situations with cases like *Henderson*, *Equity Planning Corp.*, *Friends of Danny DeVito*, and *JN Contemporary Art* at the forefront. The question is not if the next natural disaster will occur – in whatever form it takes, whether it's a terrorist attack that keeps you from accessing your business for several weeks or even months, a raging blizzard or hurricane that literally destroys your business's physical location, a cyberattack on the power grid that has a disastrous and undetermined impact on your ability to operate your business, or a global pandemic like COVID-19 – but when. As Zakaria told Axelrod, the post-pandemic world has left us with an

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COVID-19, in a recent case before the United States Court of Appeals for the Eighth Circuit, in *United States v. Johnson*, 990 F.3d 661 (8th Cir. 2021), Johnson appealed her conviction for wire fraud, arguing "her rights under the Speedy Trial Act and Sixth Amendment right to a speedy trial were violated when the district court granted an ends-of-justice continuance based on general congestion of the court's calendar." *Id.* at 663. The Eighth Circuit agreed, reversing and remanding for further proceedings consistent with its opinion. *Id.* The Speedy Trial Act required Johnson's trial start within 70 days of her initial appearance on September 15, 2017. *See id.* at 664 (citing 18 U.S.C. § 3161(c)(1)). Certain events, though, toll the speedy trial clock, which the district court kept tally of. *Id.* Numerous factors, including, now, COVID-19, have caused congestion of the federal dockets, and North Dakota is no exception. Johnson argued that the court granted the continuances requested by the government "merely because of 'general congestion of the court's calendar' as prohibited by Section 3161(h)(7) . . . ." *Id.* at 665. The Speedy Trial Act prohibits continuances based on the general congestion of the court's calendar. *Id.* at 668 (citing 18 U.S.C. § 3161(h)(7)(C)). "The prohibition recognizes that the entire structure of the Speedy Trial Act is intended to eliminate delays caused by crowded dockets." *Id.* (quoting United States v. Nance, 666 F.2d 353, 356 (9th Cir. 1982)). "An 'ends of justice' continuance cannot be granted simply to serve the court's own scheduling needs, as opposed to the needs of the parties." *Id.* (quoting United States v. Gallardo, 773 F.2d 1496, 1503 (9th Cir. 1985)). In granting the fourth continuance, the court noted its "'congested calendar' complicated by 'a judicial emergency for [the] District, which had only one active judge and no *senior* status judges.'" *Id.* at 669. The Eighth Circuit reversed and remanded, holding that, "In accordance with the majority of our sister circuits, we will permit the district court to determine in the first instance whether to dismiss the indictment with or without prejudice by applying the factors set forth in 18 U.S.C. § 3162(a)(2)." *Id.* at 670. Again, while the delays in this case were not caused by COVID-19, litigants in federal court are aware of delays that are related to COVID-19, and, absent other considerations, this is yet another area of the law where COVID-19 is having an impact. While many courts, including the District of North Dakota, have issued administrative orders related to COVID-19, see *Prior COVID-19 Administrative Orders*, U.S. DIST. CT. DIST. OF N.D. https://www.ndd.uscourts.gov/Prior-COVID-Orders (last visited Apr. 16, 2021), many states, as discussed herein, have also issued orders defining what businesses are essential businesses, like New York's law classifying farmer's markets and liquor stores as essential. If farmer's markets and liquor stores are essential and have remained open, it's difficult to argue that courts are unable to function and serve their critical purposes, including those secured by the Speedy Trial Act. These situations related to the Speedy Trial Act and COVID-19 are playing out nationwide. *See e.g.*, Kara Berg, *COVID-19 Shutdowns Push Jury Trials Back, Threaten to Violate Speedy Trial Rights*, LANSING STATE J. (Apr. 9, 2020), https://www.lansingstatejournal.com/story/news/2020/04/09/expert-COVID-19-shutdowns-could-cause-speedy-trial-rights-violations/2939595001/.

ever-evolving landscape that we must face.[126] While Proverbs warns that we do not know what tomorrow may bring, the law tells us that we can, and should, take steps to prepare for it. There are important lessons we must learn from these cases and others like them to help us prepare for that tomorrow, at least from a legal standpoint, to help protect our clients and ourselves. A failure to do so, and learn those lessons, only invites even more disaster.[127]

126. *See* Axelrod, *supra* note 1.

127. A special thank you to the judges and staff with the North Dakota Judicial System, and the staff at Vogel Law Firm and all other firms, that helped attorneys navigate all the challenges the last year brought in dealing with COVID-19. Your hard work, patience, and dedication are greatly appreciated. Thank you for helping keep the doors of justice open and accessible to the public.