*The Orange County Bar Association*
*Covid-19 Task Force Presents*

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# COVID-19 and Litigation Risk Management:
## Strategies for Handling Litigation Stemming from the Pandemic

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Wednesday, May 20, 2020


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# Seminar Materials

# *Global Litigation After the Coronavirus Pandemic Presentation Outline*

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## I. Litigation Related to COVID-19.

Over 750 coronavirus-related lawsuits have been filed in the United States as of early May 2020. More than half of these cases are in California and New York. *See* Matthew Wright, *More than 700 lawsuits have been filed across the US against fitness clubs, SXSW, airlines and prisons as Americans get fed up with coronavirus practices from businesses*, Daily Mail (May 2, 2020). Below, we provide some examples of these lawsuits, and an overview of the types of claims that have been filed.

- Governmental Powers/Constitutional Litigation.
    - Primer: Governmental efforts to contain the spread of infectious diseases, while generally accorded deference by courts, are subject to judicial review and may be enjoined. *See, e.g., Jew Ho v. Williamson*, 103 F. 10, 22–24 (C.C.D. Cal. 1900).
        - In *Jew Ho*, for example, a Federal Circuit Court struck down a quarantine order that had been imposed on a neighborhood in San Francisco, holding that the order was (1) not "a reasonable regulation to accomplish" the goal of preventing

the spread of an infectious disease, and (2) driven by discriminatory animus against Chinese residents. *Id.*

- *In Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the U.S. Supreme Court rejected a challenge to a city ordinance that required certain persons to get smallpox vaccinations. In so holding, the Court observed: "[U]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id.* at 27–28.

- *City of Huntington Beach v. Newsom*, No. 30-2020-01139512-CU-MC-CJC (Filed May 1, 2020). In this action, the City of Huntington Beach (a charter city), the City of Dana Point (a general law city), and local businesses sued California over the closure of Orange County beaches. The lawsuit asserts a violation of the California Constitution and the California Emergency Services Act. Plaintiffs' request for a temporary restraining order was denied, but a preliminary injunction hearing has been set for May 11, 2020.

- *Muller v. Newsom*, No. 30-2020-01139511-CU-PT-CJC (Filed May 1, 2020). In this action, several local city council members, in their individual capacities, filed an emergency petition for a writ of mandate, asserting civil rights violations under the California and Federal Constitutions. Their request for an emergency writ was denied, but a preliminary injunction hearing has been set for May 11, 2020.

- *Bailey v. Governor Jay Robert Pritzker*, No. 2020CH6 (Filed Cir. Ct. of Clay County, Ill. April 23, 2020). In this action, a lawmaker in Illinois challenged a state stay-at-home order on the ground that it violated his right to liberty and obtained an order temporarily restraining the application of the stay-at-home order as to him. The Governor of Illinois has appealed the ruling. *See* Courtney Gousman & Elyse Russo, *Pritzker appeals judge's ruling against Illinois stay-at-home order*, Chicago's Own WGN9 (April 28, 2020).

- *Washington League for Increase Transparency and Ethics v. Fox News, et al.* (Filed Superior Court of Washington, King County). Washington League for Increased Transparency and Ethics, sued Fox News, Fox News Group, Fox News Corporation, Rupert Murdoch, AT&T TV, and Comcast for alleged violations of the Consumer Protection Act, RCW 19.86. The suit alleges that Fox News and other named Defendants willfully and maliciously engaged in a campaign of deception and omission regarding the danger of the international proliferation of the novel Coronavirus, COVID-19. The network has defended against the lawsuit, citing the constitutional right to free speech under the First Amendment to the U.S. Constitution.

- Lawsuits Filed by Churches. Citing the First Amendment, churches in Kansas, New Mexico, Florida, Mississippi, Kentucky, Virginia, California and Texas have challenged state stay-at-home orders. *See* Tom Gjeleten, *Opposing Church Closures Becomes*

*New Religious Freedom Cause*, NPR (April 17, 2020).

- April 14, 2020 Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case, Attorney General William P. Barr. The statement states: "where a state has not acted evenhandedly, it must have a compelling reason to impose restrictions on places of worship and must ensure that those restrictions are narrowly tailored to advance its compelling interest."

- Michigan Gardening Lawsuits. "Michigan residents and landscaping businesses are suing Gov. Gretchen Whitmer (D) for her stay-at-home order, saying the rules infringe on their constitutional rights." Justin Coleman, *Michigan residents, businesses sue governor over stay-at-home order*, The Hill (April 16, 2020).

- Data Privacy Litigation.

  - *Lawsuits Against Zoom*

    - *Cullen v. Zoom Video Communications, Inc.*, No. 20-2155 (Filed N.D. Cal Mar. 30, 2020). Robert Cullen, a resident of Sacramento, brought a putative class action against Zoom, alleging violations of California's Consumer Privacy Act and several other California statutes. In the lawsuit, Cullen asserts that Zoom has "failed to properly safeguard the personal information of the increasing millions of users of its software application ('Zoom App') and video conferencing platform. Upon installing or

upon each opening of the Zoom App, Zoom collects the personal information of its users and discloses, without adequate notice or authorization, this personal information to third parties, including Facebook, Inc. ('Facebook'), invading the privacy of millions of users."

- *Taylor v. Zoom Video Communications, Inc.*, No. 20-2170 (Filed N.D. Cal. Mar. 31, 2020). Plaintiff Samuel Taylor, a resident of Florida, has also brought a putative class action against Zoom for alleged violations of the California Consumer Privacy Act and other California laws. In this lawsuit, Taylor alleges that Zoom provides customer personally identifiable information ("PII") to other "unauthorized third parties for use in targeted advertising." For instance, Taylor asserts that "the iOS version of Zoom's mobile app sent customers' PII to Facebook for use in targeted advertising, without obtaining customers' consent—or even notifying customers of this practice. Zoom provided this PII to Facebook even for Zoom customers who do not have Facebook accounts."

- *Ohlweiler v. Zoom Video Communications, Inc.*, No. 20-3165 (Filed C.D. Cal. April 3, 2020). Plaintiff Lisa Ohlweiler, a resident of California, brought this putative class action against Zoom, alleging unfair competition, false advertising, and violation of California's Consumer Privacy Act and other California laws. She alleges in the lawsuit that "Zoom sells the private information of its 200

million users without their knowledge or permission. Zoom also falsely advertises end-to-end encryption." The lawsuit further alleges that Zoom sells information to Facebook without user consent, falsely advertises "that its software is equipped with end-to-end encryption," and "pedals its products knowing that hackers are accessing" the webcams of its users.

- *Drieu v. Zoom Video Communications, Inc. et al*, No. 20-2353 (Filed N.D. Cal. April 7, 2020). Plaintiff Michael Drieu brought this putative class action on behalf of himself and other shareholders of Zoom, alleging that Zoom and several of its officers "made false and/or misleading statements and/or failed to disclose that: (i) Zoom had inadequate data privacy and security measures; (ii) contrary to Zoom's assertions, the Company's video communications service was not end-to-end encrypted; (iii) as a result of all the foregoing, users of Zoom's communications services were at an increased risk of having their personal information accessed by unauthorized parties, including Facebook; (iv) usage of the Company's video communications services was foreseeably likely to decline when the foregoing facts came light; and (v) as a result, the Company's public statements were materially false and misleading at all relevant times."

- *Hurvitz v. Zoom Video Communications, Inc.*, No. 20-3400 (Filed C.D. Cal. April 13, 2020). Plaintiff Todd Hurvitz, a California resident, alleges that "(a) Defendants Facebook and LinkedIn

eavesdropped on, and otherwise read, attempted to read and learned the contents and meaning of, the communications between Zoom users' devices and Defendant Zoom's server; (b) Zoom and LinkedIn disclosed Zoom users' identities to third parties even when those users actively took steps to keep their identities anonymous while using the Zoom platform; and (c) Zoom falsely represented the safeguards in place to keep users' video communications private." The complaint alleges several causes of action, including unjust enrichment, intrusion upon seclusion, violation of the right to privacy under the California Constitution, and violation of numerous other California laws.

- More data privacy litigation is likely.
  - *California Consumer Privacy Act ("CCPA").*
    - The California Attorney General has declined the request of business groups to delay the enforcement of the California Consumer Privacy Act ("CCPA"), and further modified the regulations implementing the CCPA. *See* Joe Duball, *California attorney general's office: No delay on CCPA enforcement amid COVID-19*, IAPP (Mar. 24, 2020).
    - The CCPA (which will begin to be enforced in July) secures "the right of Californians to": (1) "know what personal information is being collected about them"; (2) "know whether their

personal information is sold or disclosed and to whom"; (3) "say no to the sale of personal information"; (4) "access their personal information"; (5) "equal service and price, even if they exercise their privacy rights." Cal. Assem. Bill No. 375 (2017-2018 reg. sess.) (as chaptered June 28, 2018).

- The CCPA provides a private right of action to a "consumer whose nonencrypted or nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information." It also provides for stiff civil penalties of $7,500 for each intentional violation, which a consumer (on an individual or class basis) may prosecute if the California Attorney General does not. *Id.*

- *Europe's General Data Protection Regulation.*

  - Data privacy litigation is likely to increase in Europe, where suits can be brought under the General Data Protection Regulation ("GDPR").

  - Under the GDPR, "an entity is only able to collect personal information about a 'data subject' if it has a legal basis to do so, for example by obtaining the data subject's

consent." Joseph V. DeMarco & Brian A. Fox, *Data Rights and Data Wrongs: Civil Litigation and the New Privacy Norms*, 128 Yale L.J. F. 1016, 1022–23 (2018-2019).

- The GDPR has "provisions governing how data is processed, stored, and transferred and gives data subjects the right to request information about what data is collected and how it is used, to correct information, and even to request the deletion of the data." *Id.*

- The GDPR, like the California Consumer Privacy Act, is enforceable through a private right of action. *Id.*

- *Canadian Laws.* Data protection in Canada falls within both the Federal and Provincial jurisdictions. The Canadian Government has enacted the *Personal Information Protection and Electronic Documents Act* to govern how private companies collect, use, and disclose personal information. *See* Tina Piper, *The Personal Information Protection and Electronic Documents Act - A Lost Opportunity to Democratize Canada's Technological Society*, 23 Dalhousie L.J. 253, 266–69 (2000). Under the Act, personal information about an individual (other than an employee's name, title, business address and telephone number) may not be disclosed. *Id.*

- Consumer Class Action Litigation.

    - *David v. Vi-Jon, Inc. D/B/A Germ-X*, No. 3:20-cv-00424, (Filed S.D. Cal. March 5, 2020). In this putative class action on behalf of consumers of Germ-X, plaintiff asserts that the Germ-X hand sanitizer is falsely "advertised, marketed and sold as a Product that will prevent or reduce infection from the flu and other viruses, including the coronavirus."

    - *Gonzalez v. Gojo Industries, Inc.*, No. 20-888 (Filed S.D.N.Y. Feb. 1, 2020). In this putative class action against the makers of the Purell hand sanitizer, plaintiff asserts that the maker of Purell gave the false "impression to consumers the Products are effective at preventing colds, flu, absenteeism and promoting bodily health and increased academic achievement." Plaintiff further asserts that "when consumers use the Products as intended, they are lulled into a false sense of security as to other scientifically proven measures they should take to achieve the outcomes promoted by defendant."

    - *Mardig Taslakian v. Target Corporation, et al*, No. 20-2667 (Filed C.D. Cal. Mar. 20, 2020). In this putative class action, Plaintiff Mardig Taslakian alleges that Target's hand sanitizer, an alcohol-based hand sanitizer marketed under Target's own brand name up & up, is claimed to be as effective as Purell's hand sanitizer. The suit further alleges that Target misrepresented that the product can "prevent disease or infection from, for example, Coronavirus and flu, along with other claims that go beyond the general intended use of a topical alcohol-based hand sanitizer."

- *Ajzenman et al v. Office of the Commissioner of Baseball et al*, No. 20-3643 (Filed C.D. Cal. April 20, 2020). In this putative class action, New York residents Matthew Ajzenman and Susan Terry-Bazer have sued major league baseball teams, Ticketmaster, and Live Nation (among others) for allegedly refusing "to refund money to MLB's fans who purchased tickets for the 2020 MLB season." The suit further alleges that "baseball fans are stuck with expensive and unusable tickets for unplayable games in the midst of this economic crisis," and asserts causes of action for violation California's Unfair Competition Law, violation of California's Consumer Legal Remedies Act, civil conspiracy, and unjust enrichment under the common law.

- *Rudolph v. United Airlines Holdings, Inc. et al*, No. 20-2142 (Filed N.D. Ill. Mar. 30, 2020). In this proposed class action, Plaintiff Jacob Rudolph alleges that United Airlines violated Illinois consumer protection because it "refuses to issue monetary refunds to passengers with canceled flights." The lawsuit further claims that "United represents it will only rebook and/or provide travel vouchers, which expire in one year from the original ticket date."

- Securities Litigation.

  - *Douglas v. Norwegian Cruise Lines et al*, No 20-21107 (Filed S.D. Fla. March 12, 2020). In this case, a group of investors have filed an action against Norwegian Cruise Line, alleging that the company "was employing sales tactics of providing customers with unproven and/or

blatantly false statements about COVID-19 to entice customers to purchase cruises."

- *McDermid v. Inovio Pharmaceuticals, Inc. et al.*, No. 20-1402 (Filed E.D. Pa. March 12, 2020). In this case, investors filed a securities action against a pharmaceutical company, alleging that the company's value skyrocketed after its CEO claimed it was ready to test a COVID-19 vaccine and that shares of the company's stock fell after there was skeptical of tweet of the company's representation.

- Labor/Employment Litigation.

  - *Rural Community Worker's Alliance et al v. Smithfield Foods, Inc. et al*, No. 20-6063 (Filed W.D. Mo. April 23, 2020). An unnamed worker at Smithfield's Milan, Missouri plant and a workers' rights group have sued Smithfield (one of the largest meat producers in the United States) for declaratory and injunctive relief. They assert that Smithfield has created a public nuisance and breached its duty to provide a safe workplace, alleging that Smithfield "(1) provides insufficient personal protective equipment; (2) forces workers to work shoulder to shoulder and schedules their worktime and breaks in a manner that forces workers to be crowded into cramped hallways and restrooms, (3) refuses to provide workers sufficient opportunities or time to wash their hands, (4) discourages workers from taking sick leave when they are ill and even establishes bonus payments that encourage workers to come into work sick, and (5) has failed to implement a plan for testing and contact-tracing workers who may have been exposed

to the virus that causes COVID-19."

- *Scott v. Hooters III Inc.*, No. 20-882 (Filed M.D. Fla. April 16, 2020). In this putative class action, plaintiffs Asthon Scott and Amanda Seales, on behalf of themselves and on behalf of other individuals similarly situated, have sued Hooters, alleging that Hooters violated "the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. (the 'WARN Act') when it terminated Plaintiffs and the putative class members on March 25, 2020, without providing any advance written notice whatsoever." They seek to recover two-months of pay damages and benefits for workers in Florida who were not given at least a 60-day notice before layoffs.

- Wrongful Death Litigation.

  - *Toney Evans, Special Administrator of the Estate of Wando Evans v. Walmart Inc. et al.*, No. 2020L003938, (Filed Cir. Ct. of Cook County, Ill. April 6, 2020). The estate of Wando Evans (who was an associate at a Wal-Mart store) alleges that the company was aware that there were employees who were showing symptoms of COVID-19 but failed to take adequate preventive measures to keep employees safe, including such measures as providing enough cleaning and sterilizing to keep workers and shoppers free of infection.

- Insurance Litigation.

  - *Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill v. Certain Underwriters at Lloyd's, London, et al.* (Filed Civ. Dist.

Ct. Orleans La. Parish March 13, 2020). In this case, a New Orleans restaurant filed a state court declaratory judgment action against its insurance carrier. In the complaint, the restaurant asserted that the insurer must cover the restaurant's coronavirus-related losses pursuant to an "all risks" property insurance policy.

- *French Laundry Partners, LP dba The French Laundry v. Hartford Insurance Co.* (Filed Cal. Superior Court Napa Mar. 2020). In this action, The French Laundry asserts that its insurance company must provide coverage for business that has been interrupted by the coronavirus pandemic.

- Commercial Business Litigation. Here are some examples:

  - Some businesses are invoking "force majeure" clauses in their contracts due to the impact of the coronavirus; litigation concerning the scope and application of force majeure clauses is likely to follow. See, e.g., Alaric Nightingale & Alex Longley, *When God Appears in Contracts, That's 'Force Majeure': QuickTake*, Bloomberg (Feb. 6, 2020).

  - Numerous commercial tenants are refusing to pay rent while their businesses are closed due to governmental restrictions. See, e.g., Matthew Kang, *The Cheesecake Factory Tells Landlords Across the Country It Won't Be Able to Pay Rent on April 1*, Eater LA (Mar. 25, 2020).

- Lawsuits Against China.

    - In five different class actions that were filed against China in California, Florida, Nevada, Pennsylvania, and Texas, small businesses and other plaintiffs allege damages related to the coronavirus. *See* John B. Bellinger III, *Suing China over the coronavirus won't help. Here's what can work*, The *Washington Post* (April 23, 2020).

    - Two States (Missouri and Mississippi) have sued China as well, alleging that China did not do enough to stop the coronavirus outbreak. *See* Kathryn Watson, *Missouri and Mississippi sue China over coronavirus*, CBS News (April 22, 2020).

- Public Readiness and Emergency Preparedness ("PREP") Act Immunity Coverage Litigation.

    - The PREP Act authorizes the Secretary of the Department of Health and Human Services to issue a declaration (PREP Act declaration) that provides immunity from liability (except for willful misconduct) for claims of loss caused, arising out of, relating to, or resulting from administration or use of countermeasures to diseases, threats and conditions determined by the Secretary to constitute a present, or credible risk of a future public health emergency to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures.

- On April 14, 2020, the Department of Health and Human Services, Office of the General Counsel, released an advisory opinion (which is non-binding and lacks the force or effect of law) regarding PREP Act immunity.

- Potential PREP Act immunity for product liability claims?

## II. Global Forums for Aggregate Litigation.

Many of the potential claims that could be brought are susceptible to class or aggregate treatment. The United States is no longer the only venue option for such claims.

- *Canada.* Canada has "well-established class action regimes at [the] federal level and in most of its provinces." David Scott, et al., *Global Trends in Private Damages: The Future of Collective Actions*, 13 Competition L. Int'l 137, 147 (2017). Canada's class action procedure allows both individuals and corporations to bring class actions for a wide variety of claims where the representative plaintiff can establish the certification or authorization criteria. These certification criteria include a class of two or more persons, issues that are common to the class, and that the class action is the preferable procedure. Most jurisdictions in Canada have low certification thresholds.

- *Australia.* Australia likewise has an established collective action procedure, "particularly at [the] federal level and in some states." *Id.* at 148. The Australian collective action procedure "is widely used for product liability and securities litigation," although there have also been some "competition damages class actions." *Id.*

- *The United Kingdom.* The UK has enacted the Consumer Rights Act, which "permits private-enforcement actions for violations of competition law,and authorizes the Competition Appeals Tribunal to bless opt-out suits." Zachary D. Clopton, *The Global Class Action and Its Alternatives*, 19 Theoretical Inq. L. 125, 132–33 (2018).

- *The Netherlands.* The Netherlands has adopted a class procedure known as the "Wet Collectieve Afwikkeling Massaschade (WCAM)." *Id.* at 133–34. The WCAM permits global class settlements, irrespective of the country where the plaintiff-claimant is domiciled. For instance, "one of the earliest settlements to use the WCAM process involved approximately 11,000 insurance policy holders from across Europe, the United States, and Thailand." *Id.*

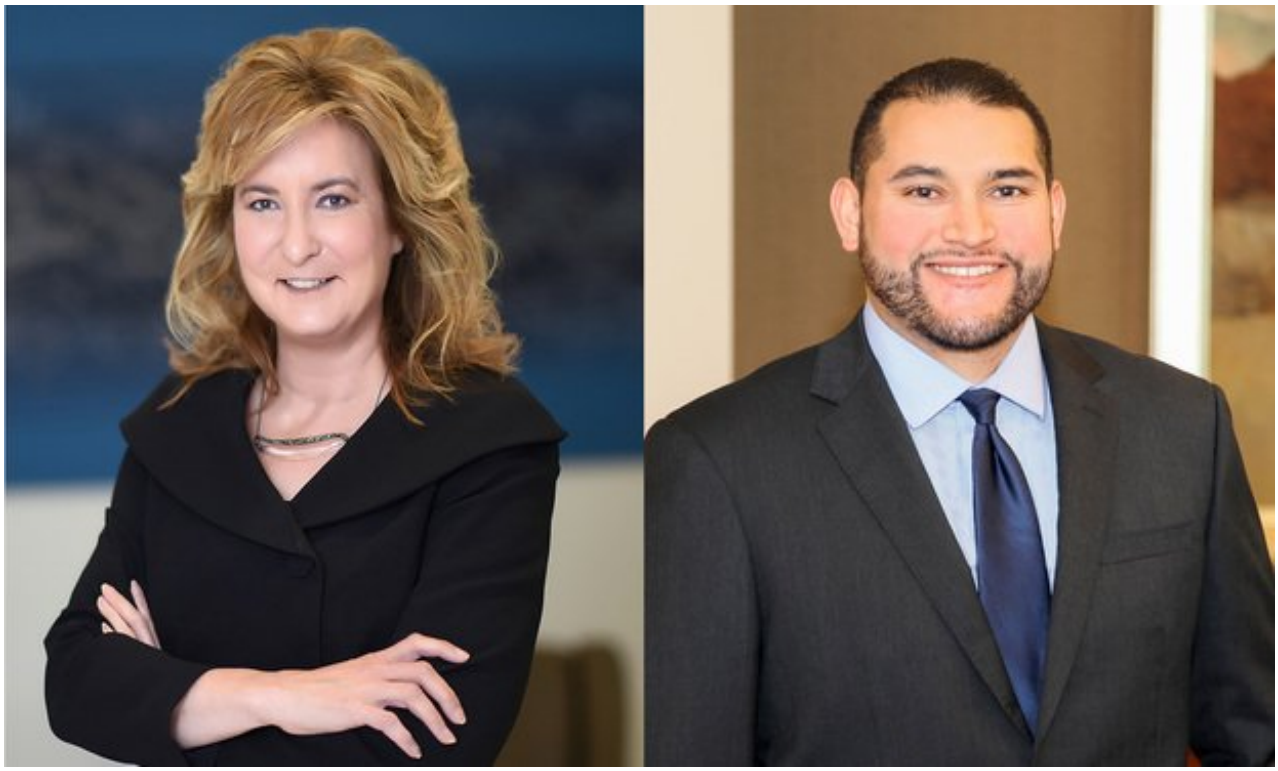
- *Germany.* Germany has established procedures "for bringing collective or representative claims in certain fields of law," including a "mechanism for collective actions, certain trade associations and consumer protection organisations to seek injunctions on behalf of their members to prevent unfair competition." David Scott, et al., *Global Trends in Private Damages: The Future of Collective Actions*, 13 Competition L. Int'l 137, 142 (2017).

- *France.* France has introduced a class action regime for specific types of claims, including "competition, health, discrimination, environment, privacy and data protection law." *Id.* at 144. France's system allows claims to be brought only "by licensed consumer associations on behalf of consumers who opt-in to the claim"; the claims must "rely on a previous regulatory finding of infringement." *Id.*

# Global Litigation After the Coronavirus Pandemic

law.com/therecorder/2020/03/30/global-litigation-after-the-coronavirus-pandemic

By Mary-Christine ("M.C.") Sungaila and Marco A. Pulido



L-R: Mary-Christine "M.C." Sungaila, Marco A. Pulido, of Haynes and Boone.

The global coronavirus pandemic and the accompanying nationwide and statewide government shutdowns have caused unprecedented disruptions to businesses around the world. The impact "of the coronavirus on small business owners is staggering and likely to be substantial." Kerry Hannon, *How The Coronavirus Is Impacting Small Business Owners*, Forbes (March 23, 2020). Larger, multinational companies, too, have had to rethink and reorganize their employment, business, and operating policies in response to the worldwide pandemic. Riley de Leon & Jen Geller, *Here's what every major company is doing about the coronavirus pandemic*, CNBC (March 13, 2020). In its wake, the coronavirus pandemic will give rise to a myriad of claims and lawsuits, including some that are likely to transcend state and national borders.

In this article, we outline some of the claims that companies have begun to see, as well as potential actions on the horizon. We also examine existing aggregate and class litigation frameworks around the world that may gain renewed attention as claimants and companies look to resolve their disputes and move forward after the pandemic.

## Existing & Potential Coronavirus-Related Claims

Litigation stemming from the coronavirus pandemic has already begun to percolate across several industries.

- *Insurance Litigation.* The insurance industry has already begun to see litigation related to the coronavirus. In *Oceana Grill v. Certain Underwriters at Lloyd's, London*, for example, a New Orleans restaurant filed a state court declaratory judgment action against its insurance carrier, alleging that the insurer must cover the restaurant's coronavirus-related losses pursuant to an "all risks" property insurance policy. See *Cajun Conti LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill v. Certain Underwriters at Lloyd's, London*, *et al.* (Filed Civ. Dist. Ct. Orleans La. Parish March 13, 2020). Likewise, famed Chef Thomas Keller of The French Laundry has filed a lawsuit against his insurance company, claiming that he is entitled to recover for business that has been interrupted by the coronavirus pandemic. See Heather Lalley, *Chef Thomas Keller files suit against his insurer in business interruption dispute*, Restaurant Insider (March 26, 2020).
- *Consumer Litigation.* Manufacturers of cleaning products and hand sanitizers may also find themselves the target of consumer litigation. In California, for example, consumers have filed a putative class action in the Southern District of California, alleging that the Germ-X hand sanitizer is falsely "advertised, marketed and sold as a Product that will prevent or reduce infection from the flu and other viruses, including the coronavirus." *David v. Vi-Jon, Inc. D/B/A/ Germ-X*, No. 3:20-cv-00424, Docket No. 1 (Filed S.D. Cal. March 5, 2020). Similar consumer class actions have been filed against the manufacturer of the Purell hand sanitizer. See Alicia Victoria Lozano, *Maker of Purell accused of 'misleading' customers in class-action lawsuit*, NBC News (March 2020).
- *Securities/Shareholder Litigation.* Actions by shareholders, including securities claims, are likely to follow too, as investors scrutinize the responses and representations of companies during and after the coronavirus outbreak. For instance, a group of investors have filed an action in the Southern District of Florida against Norwegian Cruise Line, alleging that the company "was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises." See *Douglas v. Norwegian Cruise Lines et al*, No. 1:20-cv-21107-RNS, Docket No. 1 at 7 (Filed S.D. Fla. March 12, 2020). A federal securities action has also been filed against a pharmaceutical company whose "stock value skyrocketed after its CEO claimed it was ready to test a COVID-19 vaccine, but a single skeptical tweet caused shares to plummet over two days." Matthew Santoni, *Inovio Investors Sue After COVID-19 Vaccine Claims Busted*, Law 360 (Mar.13, 2020); *McDermid v. Inovio Pharmaceuticals*, Inc. et al., No. 2:20-cv-01402, Docket No. 1 (Filed E.D. Pa. March 12, 2020).

These early lawsuits are likely to be just the tip of the iceberg. Many more are likely to come:

*Data Privacy Litigation.* Data privacy has become a "hot" issue in recent years, one that may give rise to unexpected governmental enforcement actions or liability for companies who may be collecting or using data in coronavirus-related efforts. See Sara Morrison, *Is slowing the spread of coronavirus worth compromising your privacy?*, Vox (March 26, 2020) (observing that some companies are "offering their data analysis services to try to track or stop the spread of the virus").

Amid the coronavirus outbreak, the California Attorney General has declined the request of business groups to delay the enforcement of the California Consumer Privacy Act ("CCPA"), and further modified the regulations implementing the CCPA. Joe Duball, *California attorney general's office: No delay on CCPA enforcement amid COVID-19*, IAPP (March 24, 2020); Glenn A. Brown & Elliot Golding, *California Attorney General Proposes Further Modifications to Proposed CCPA Regulations*, National Law Review (March 14, 2020). The CCPA (which will begin to be enforced by the California Attorney General in July) secures "the right of Californians to": (1) "know what personal information is being collected about them"; (2) "know whether their personal information is sold or disclosed and to whom"; (3) "say no to the sale of personal information"; (4) "access their personal information"; (5) "equal service and price, even if they exercise their privacy rights." Cal. Assem. Bill No. 375 (2017-2018 reg. sess.) (as chaptered June 28, 2018).

The CCPA provides a private right of action to a "consumer whose nonencrypted or nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information." It also provides for stiff civil penalties of $7,500 for each intentional violation, which a consumer (on an individual or class basis) may prosecute if the California Attorney General does not. Id.

Data privacy litigation is also likely to increase in Europe, which has data-privacy protection laws that resemble the CCPA. See Erdem Buyuksagis, *Towards a Transatlantic Concept of Data Privacy*, 30 Fordham Intell. Prop. Media & Ent. L.J. 139, 176 (2019). For example, "under the European Union's General Data Protection Regulation (GDPR), an entity is only able to collect personal information about a 'data subject' if it has a legal basis to do so, for example by obtaining the data subject's consent." Joseph V. DeMarco & Brian A. Fox, *Data Rights and Data Wrongs: Civil Litigation and the New Privacy Norms*, 128 Yale L.J. F. 1016, 1022–23 (2018-2019). The GDPR has "provisions governing how data is processed, stored, and transferred and gives data subjects the right to request information about what data is collected and how it is used, to correct information, and even to request the deletion of the data." Id. Further, the GDPR, like the California Consumer Privacy Act, may also be enforced through a private right of action. Id.

Canadian laws may also give rise to data privacy litigation, including class actions. See *McLean v. Cathay Pacific Airways Limited, BCSC, Vancouver Registry*, VLC-S-S-199228 (involving a worldwide privacy breach class action where the alleged data breach did not occur in Canada and most of the claimants are not from Canada). Data protection in Canada falls within both the Federal and Provincial jurisdictions. The Canadian Government has enacted the *Personal Information Protection and Electronic Documents Act* to govern how private companies collect, use, and disclose personal information. See Tina Piper, *The Personal Information Protection and Electronic Documents Act – A Lost Opportunity to Democratize Canada's Technological Society*, 23 Dalhousie L.J. 253, 266–69 (2000). Personal information about an individual (other than an employee's name, title, business address and telephone number) may not be disclosed. Id.

- *Suits to Enjoin Governmental Action.* Many businesses have been hit particularly hard by quarantine and other governmental orders that require them to close during the indefinite time it takes to contain or mitigate the spread of the coronavirus. Challenges to these orders may soon arise, particularly if competing businesses face varying levels of restrictions depending on governmentally determined "red" or "hot" zones (as opposed to "green" zones) for the coronavirus. Governmental efforts to contain the spread of infectious diseases, while generally accorded deference by courts, are subject to judicial review and may be enjoined. See, e.g., *Jew Ho v. Williamson*, 103 F. 10, 22–24 (C.C.D. Cal. 1900). In *Jew Ho*, for example, a Federal Circuit Court struck down a quarantine order that had been imposed on a neighborhood in San Francisco, concluding that the order was (1) not "a reasonable regulation to accomplish" the goal of preventing the spread of an infectious disease, and (2) driven by discriminatory animus against Chinese residents. Id.
- *Commercial Business Litigation.* Countless business disputes are likely to arise as well. For instance, many commercial tenants are already refusing to pay rent while their businesses are closed due to governmental restrictions. See, e.g., Matthew Kang, *The Cheesecake Factory Tells Landlords Across the Country It Won't Be Able to Pay Rent on April 1*, Eater LA (March 25, 2020). Many businesses are also invoking "force majeure" clauses in their contracts due to the impact of the coronavirus; litigation concerning the scope and application of force majeure clauses is likely to follow. See, e.g., Alaric Nightingale & Alex Longley, *When God Appears in Contracts, That's 'Force Majeure': QuickTake*, Bloomberg (Feb. 6, 2020).
- *Litigation Related to the Coronavirus Aid, Relief and Economic Security ("CARES") Act.* The newly enacted CARES Act is likely to give rise to increased litigation as well. For instance, "small businesses across the country" are already "scrambling to figure out" whether they will be required to comply with new rules expanding paid sick and family leave obligations that are scheduled to go into effect as early as next week; businesses who fail to comply with their new obligations may face new lawsuits. See Charity L. Scott, *How the Coronavirus Paid Leave Rules Apply to You*, The Wall Street Journal (March 27, 2020).

## Aggregate & Class Action Procedures Around the World

Existing and potential coronavirus-related cases (such as consumer or data privacy claims) may well involve claimants from multiple states or countries. Procedures for "collective actions or aggregate litigation in some form have existed … for some time in both common law and civil law countries." Spencer Weber Waller & Olivia Popal, *Fall and Rise of the Antitrust Class Action Fall and Rise of the Antitrust Class Action*, 39 World Competition 1, 37 (March 2016). The Netherlands, for example, has a class procedure that allows the settlement of claims arising from anywhere in the world, not just The Netherlands. Here are some of the class and aggregate litigation procedures outside of the United States that may gain renewed attention following the coronavirus pandemic:

- Canada has "well-established class action regimes at [the] federal level and in most of its provinces." Id. at 147. Canada's class action procedure allows both individuals and corporations to bring class actions for a wide variety of claims where the representative plaintiff can establish the certification or authorization criteria. These certification criteria include a class of two or more persons, issues that are common to the class, and that the class action is the preferable procedure. Most jurisdictions in Canada have low certification thresholds.
- Australia likewise has an established collective action procedure, "particularly at [the] federal level and in some states." Id. at 148. The Australian collective action procedure "is widely used for product liability and securities litigation," although there have also been some "competition damages class actions." Id.
- *The United Kingdom.* The UK has enacted the Consumer Rights Act, which "permits private-enforcement actions for violations of competition law, and authorizes the Competition Appeals Tribunal to bless opt-out suits." Zachary D. Clopton, *The Global Class Action and Its Alternatives*, 19 Theoretical Inq. L. 125, 132–33 (2018). This "U.K. innovation was one of many responses to the European Commission's recommendation for collective actions in Europe." Id.
- *The Netherlands.* The Netherlands has adopted a class procedure known as the "Wet Collectieve Afwikkeling Massaschade (WCAM)." Id. at 133–34. The WCAM permits global class settlements, irrespective of the country where the plaintiff-claimant is domiciled. For instance, "one of the earliest settlements to use the WCAM process involved approximately 11,000 insurance policy holders from across Europe, the United States, and Thailand." Id.
- Germany has established procedures "for bringing collective or representative claims in certain fields of law," including a "mechanism for collective actions, certain trade associations and consumer protection organisations to seek injunctions on behalf of their members to prevent unfair competition." David Scott, et al., *Global Trends in Private Damages: The Future of Collective Actions*, 13 Competition L. Int'l 137, 142 (2017).

- France has introduced a class action regime for specific types of claims, including "competition, health, discrimination, environment, privacy and data protection law." Id. at 144. France's system allows claims to be brought only "by licensed consumer associations on behalf of consumers who opt-in to the claim"; the claims must "rely on a previous regulatory finding of infringement." Id.

In some of these jurisdictions, class or collective action "procedures modify ordinary disclosure rules" and have limited or no discovery. See Rebecca Money-Kyrle & Christopher Hodges, *European Collective Action: Towards Coherence*, 19 Maastricht J. Eur. & Comp. L. 477, 493-94 (2012). "Canadian class proceedings," for instance, "require leave of the court before discovery is sought against any class members other than the representative litigant." Id.

## Conclusion

The global coronavirus pandemic has begun a new wave of litigation, some of which will be global. Preparing now for this new influx of lawsuits may position both small and large companies to be on stronger footing after the dust from the coronavirus pandemic settles.

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# Local Gov'ts Have An Important Role In Fighting Coronavirus

By **Mary-Christine Sungaila and Marco Pulido** (March 15, 2020, 4:13 PM EDT)

Mary-Christine Sungaila

Marco Pulido

On Friday, President Donald Trump declared a national emergency to respond to the coronavirus, a declaration that allows the federal government to streamline aid and resources to state and local governments.[1]

Two days prior, the World Health Organization declared the coronavirus outbreak a global pandemic[2] and the president delivered an Oval Office address outlining the U.S. government's increased efforts to respond to the coronavirus.[3]

Nearly half of all states (including California, New York and Washington) have also declared public health emergencies amid the rise in coronavirus cases.[4] California, for example, declared an emergency earlier this month and has now recommended the cancellation of gatherings of 250 people or more that are scheduled to take place in March.[5]

While much of the current focus is on the responses of the federal and state governments, local governments and public health officials also have important roles to play in the shared goal of mitigating and containing the coronavirus.

In this article, we outline the historical and legal role that local governments and health officials have had in curbing the spread of infectious diseases. We also offer some of the reasons why local partnerships are indispensable to the current efforts of the state and federal governments to address the spread of the coronavirus, as well as any future public health crises.[6]

**Historical and Legal Role of Local Governments and Health Officials**

Medical quarantines have a long historical pedigree in European and American law, although they are rarely used today due to advances of modern medicine.[7] Historically, local and state governments have taken the lead in stopping the spread of infectious diseases through the use of quarantine and isolation measures.[8]

According to a 2018 article by professor Polly Price of Emory University's School of Law:

> [Both of these measures] are used to protect the public by preventing exposure to people who may be infected with a contagious disease. Isolation is used to separate ill persons who have a communicable disease from those who are healthy. Isolation may involve confinement to a healthcare facility or at home. Quarantine, on the other hand, separates and restricts the movement of people who are not sick, but who may have been exposed to a communicable disease. These people may not know they have been exposed to a disease, may have the disease but [do] not show symptoms, may develop the disease at a later date, or they may never develop the disease at all.[9]

In most states, the authority to quarantine was made explicit by legislation granting the power to declare quarantines to the governor as well as to counties and municipalities.[10]

Early U.S. Supreme Court case law confirmed the power of states and local governments to

implement health measures to protect their communities from infectious diseases.[11] In Jacobson v. Massachusetts, for example, the Supreme Court rejected a challenge to a city ordinance that required certain persons to get smallpox vaccinations.[12]

In so holding, the court reasoned: "[U]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[13]

During this era of primary state and local control of public health measures, federal legislation generally called for federal noninterference and cooperation with the states' execution of their quarantine laws.[14]

Over the years, the federal government increased its involvement in public health measures to control the spread of infectious diseases in the nation.[15] In 1944, Congress enacted a key statute, the Public Health Service Act, which provides that:

> [T]he Surgeon General, with the approval of the Secretary [of Health and Human Services], is authorized to make and enforce such regulations as in his [sic] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.[16]

The statute limits federal quarantine power to U.S. entry points and to persons believed to be moving or about to move from a state to another state.[17] And authority to carry out the functions authorized by the Public Health Service Act has been delegated to the Centers for Disease Control and Prevention.[18]

Yet even in the modern era, the CDC has most commonly played a supportive role, with the states taking the lead in quarantine matters.[19] And while the Code of Federal Regulations permits unspecified intervention in the event that measures by state or local health authorities "are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession," it is unclear to what extent this authority would allow the federal government to interfere with state and local measures to prevent the spread of infectious diseases among persons within a given state or locality.[20]

This issue fortunately does not arise often, as governments at all levels usually coordinate their responses to infectious diseases. Indeed, as the CDC has previously observed:

> [The U.S. Department of Health and Human Services] defers to the state and local health authorities in the primary use of their separate quarantine powers. Based on long experience and collaborative working relationships with our state and local partners, CDC anticipates the need to use [its] federal authority to actually quarantine a person will occur only in rare situations, such as events at ports of entry or other time-sensitive settings.[21]

**Reasons Local Governments and Health Officials Must Continue to Have a Seat at the Table**

Although coordination between the federal, state and local governments has most often been the norm in responding to the spread of infectious diseases, the coronavirus has given rise to lawsuits by local authorities against the state and federal governments.[22]

For example, in City of Costa Mesa v. U.S. in the U.S. District Court for the Central District of California, the city won a temporary restraining order to block the planned placement of coronavirus-positive patients in a facility that had been declared uninhabitable for homeless individuals.[23]

In support of its request for a temporary restraining order, the city of Costa Mesa argued (among other things) that the placement was planned to be made without properly communicating with local authorities and did not appear to be founded on any medical reasoning.[24] The case ended soon thereafter, when federal authorities nixed the plan altogether.[25]

As illustrated by the City of Costa Mesa case, local governments and local health officials have an indispensable role to play in the state and federal governments' efforts to combat the current public health crisis and any future ones.

For instance, local authorities hold much of the institutional knowledge that the state and federal governments need to make better-informed decisions. Local governments and health officials are likely to have important insights on, for example, the suitability (or lack thereof) of a particular site for a proposed quarantine or isolation measure; the level of preparedness of the local first responders and the local hospitals; and the overarching steps a given community needs to take to prepare itself to address the potential spread of a new infectious disease in their community.

Further, many localities are authorized to declare emergencies themselves to respond to public health emergencies in their communities.[26] This has happened, for example, in many counties in California.[27] Keeping local authorities informed about the potential spread of an infectious disease in their communities not only allows them to prepare for, and assist with, a coordinated governmental response, but it also allows local authorities to mobilize their own resources toward the common goal of stopping and mitigating the spread of an infectious disease.

**Conclusion**

Local governments and health officials have historically played an important role in combating the spread of infectious diseases. The response to the coronavirus should be no different. Local authorities know their own communities best and have valuable information to share with state and federal governments; this valuable information and input underscores the need to have local authorities at the decision-making table in public health crises such as this.

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***Disclosure: The authors served as counsel for the city of Costa Mesa in City of Costa Mesa v. United States.***



[1] Brooke Singman, Trump declares national emergency over coronavirus, says 'we will overcome the threat', Fox News (Mar. 13, 2020), https://www.foxnews.com/politics/trump-declares-national-emergency-coronavirus (last visited Mar. 13, 2020).

[2] World Health Organization, WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020 (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited Mar. 12, 2020).

[3] The White House, Remarks by President Trump in Address to the Nation (Mar. 11, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-address-nation/ (last visited Mar. 12, 2020).

[4] Rosie Perper, et al., 21 states have declared states of emergency to fight coronavirus — here's what it means for them (Mar. 12, 2020), https://www.businessinsider.com/california-washington-state-of-emergency-coronavirus-what-it-means-2020-3 (last visited Mar. 12, 2020).

[5] California Department of Public Health, Gathering Guidance (Mar. 12, 2020) https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Gathering_Guidance_03.11.20.pdf (las visited Mar. 12, 2020).

[6] See Michael R. Ulrich, et al., Quarantine and the Federal Role in Epidemics, 71 S.M.U. L. Rev. 391 (2018) (observing that every "recent United States federal administration has faced a real or potential epidemic, from Reagan and HIV to Obama and Ebola").

[7] Arjun K. Jaikumar, Red Flags in Federal Quarantine: The Questionable Constitutionality of Federal

Quarantine after NFIB v. Sebelius , 114 Colum. L. Rev. 677, 684 (2014).

[8] Polly J. Price, Epidemics, Outsiders, and Local Protection: Federalist Theater in the Era of the Shotgun Quarantine, 19 U. Pa. J. Const. L. 369, 383 (2016).

[9] Polly J. Price, Do State Lines Make Public Health Emergencies Worse: Federal versus State Control of Quarantine, 67 Emory L.J. 491, 496–97 (2018).

[10] Price, supra note 8, at 383.

[11] See, e.g., Gibbons v. Ogden , 22 U.S. 1, 203 (1824) (observing how inspection laws "form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass").

[12] Jacobson v. Commonwealth of Massachusetts , 197 U.S. 11, 13 (1905)

[13] Id. at 27–28.

[14] Hickox v. Christie , 205 F. Supp. 3d 579, 590 (D.N.J. 2016) (citing Morgan's La. & T.R. & S.S. v. Bd. of Health of State of La., 118 U.S. 455, 464–65 (1886)).

[15] See Jaikumar, supra note 7, at 690–93.

[16] Hickox, 205 F. Supp. 3d at 590 (citing 42 U.S.C. § 264).

[17] Price, supra note 8, at 420.

[18] 42 C.F.R. Parts 70 and 71.

[19] Hickox, 205 F. Supp. 3d at 590–91.

[20] Price, supra note 8, at 421.

[21] Control of Communicable Diseases, 82 Fed. Reg. 6890, 6963.

[22] See City of Costa Mesa v. United States , No. 820CV00368JLSJDE, Docket No. 47 (C.D. Cal. Feb. 21, 2020); City of San Antonio v. United States of America, 20-CV-255, Docket No. 2 (Mar. 2, 2020) (denying temporary restraining order but stating that the "United States Government is, in effect, washing its own hands further of this quarantine").

[23] See City of Costa, No. 820CV00368JLSJDE, Docket No. 47 at 4–5.

[24] Id.

[25] Id. at 7 n.7.

[26] See, e.g., AIDS Healthcare Found. v. Los Angeles Cty. Dep't of Pub. Health , 197 Cal. App. 4th 693, 702 (2011) (observing that "the local health officer has a mandatory duty to take measures to prevent the spread of disease, but he or she has the discretion to determine the appropriate measures to be taken in a given case")

[27] See, e.g., Colleen Shalby, et al, California coronavirus spread prompts emergency declarations: What you need to know, Los Angeles Times (Mar. 4, 2020), https://www.latimes.com/california/story/2020-03-04/california-coronavirus-spread-emergency-declarations (last visited Mar. 13, 2020).

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M.C. Sungaila, a partner in Haynes & Boone's Orange County office and anchor of the firm's California appellate practice, has briefed and argued appeals raising cutting-edge and core business issues, and helped secure important rights for women and girls nationally and internationally.
M.C. has repeatedly been named a "Notable Appellate Practitioner" by *Chambers USA,* Chambers & Partners (2013-2018). Clients describe her in one *Chambers* listing as a "gifted appellate lawyer who consistently delivers bottom line results" and praise her for her "great practical sense," "laser" focus on key issues, "excellence in creative thinking," and ability to "advise on the business side just as well as she does on the legal side." She has been repeatedly recognized by the *Daily Journal,* Daily Journal Corporation as one of California's 100 Leading Women Lawyers (2005, 2010-2018), and in 2015 as one of the state's Top Labor & Employment Lawyers. She was a recipient of two back-to- back California Lawyer of the Year (CLAY) awards, including one in 2015 from *California Lawyer* magazine, Daily Journal Corporation, for the precedent-setting franchisor vicarious liability case she argued before the California Supreme Court, *Patterson v. Domino's Pizza*.

M.C. has chaired the International Association of Defense Counsel's Appellate Practice Committee and Amicus Briefs Committee and served on various CLE committees, as an instructor at the IADC Trial Academy, editor of the Defense Counsel Journal, and on the Foundation Board, and is the first recipient of the organization's Richard L. Neumeier Excellence in Service Award. She has also served on the ABA Standing Committee on the American Judicial System, the Standing Committee on Amicus Briefs, the Commission on Racial and Ethnic Diversity, the Practitioner's Reading Committee for the Justice Kavanaugh nomination, and in various leadership roles within the Litigation Section. Locally, she currently serves as a Director at Large on the Orange County Bar Association Board of Directors.

M.C. has also been honored for her sustained commitment to community service and pro bono work, receiving recognition from groups as diverse as California Women Lawyers, Alpha Phi International Fraternity, the Orange County Hispanic Bar Association, Orange County Women Lawyers, the Women Lawyers Association of Los Angeles, and Coastline Community College

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