



Post-Pandemic Litigation Series

New Era, New Litigation: Lawsuits You Can Expect in the Post-Pandemic Environment

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Seyfarth Shaw LLP

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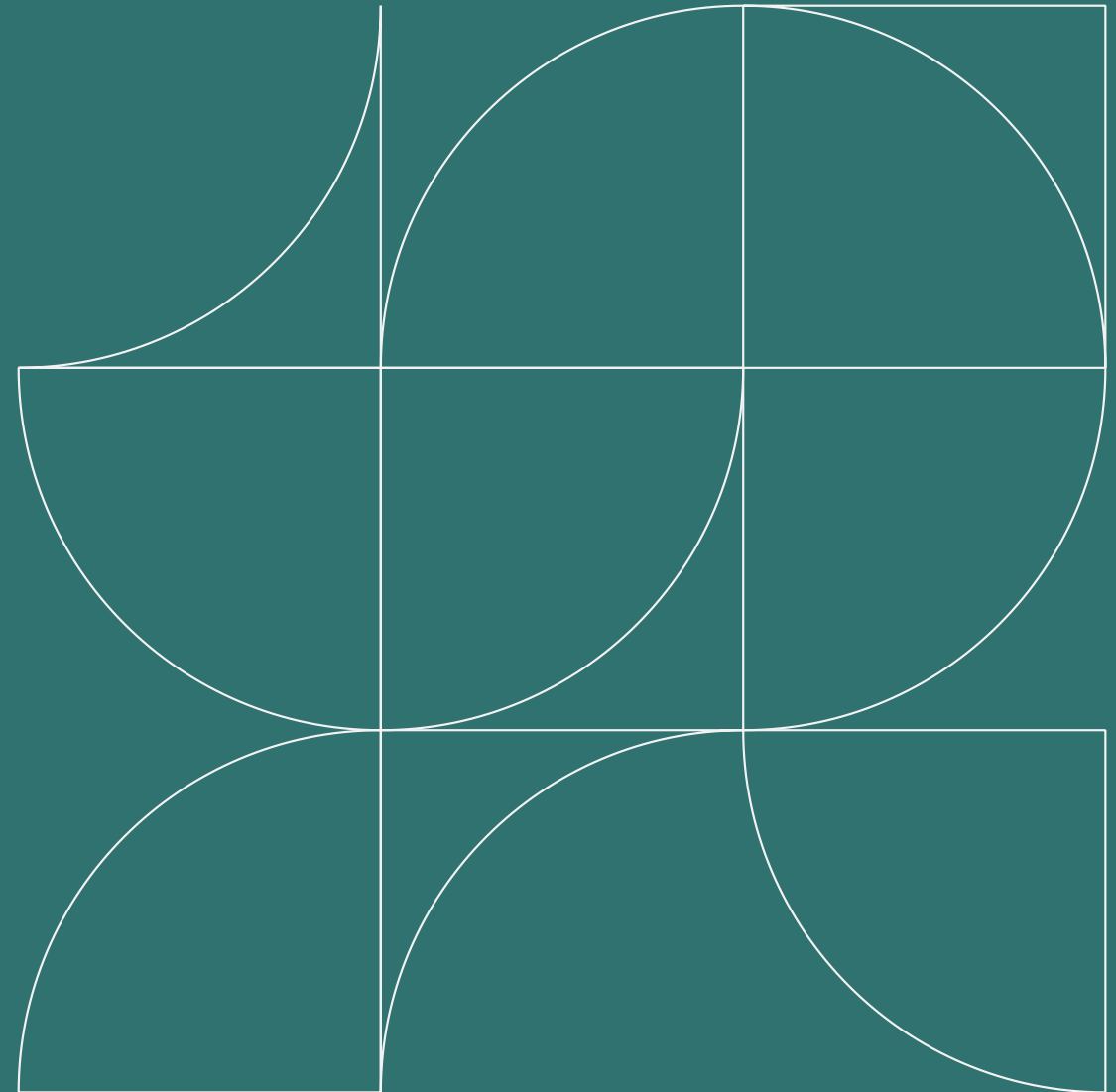
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Agenda

- 1 | Bankruptcy and Financial Services
 - 2 | Class Actions and TCPA
 - 3 | Construction, Real Estate and Commercial Litigation
 - 4 | Health Care, Life Sciences and Pharmaceutical
 - 5 | Securities Litigation & Enforcement
 - 6 | Trade Secrets and Cybersecurity/Privacy
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Bankruptcy and Financial Services

Tonya Esposito





Trends

- Post-pandemic related financial services litigation filed to-date concerns primarily SBA loan processing and stimulus check garnishment.
- Additional CARES Act litigation is anticipated. For example:
 - claims and/or enforcement actions related to consumer mortgage foreclosures and debt collection;
 - claims alleging violations of the Fair Credit Reporting Act; and/or,
 - claims alleging violations of the Fair Debt Collection Practices Act.
- Chapter 11 filings are on the rise (particularly in the retail sector)

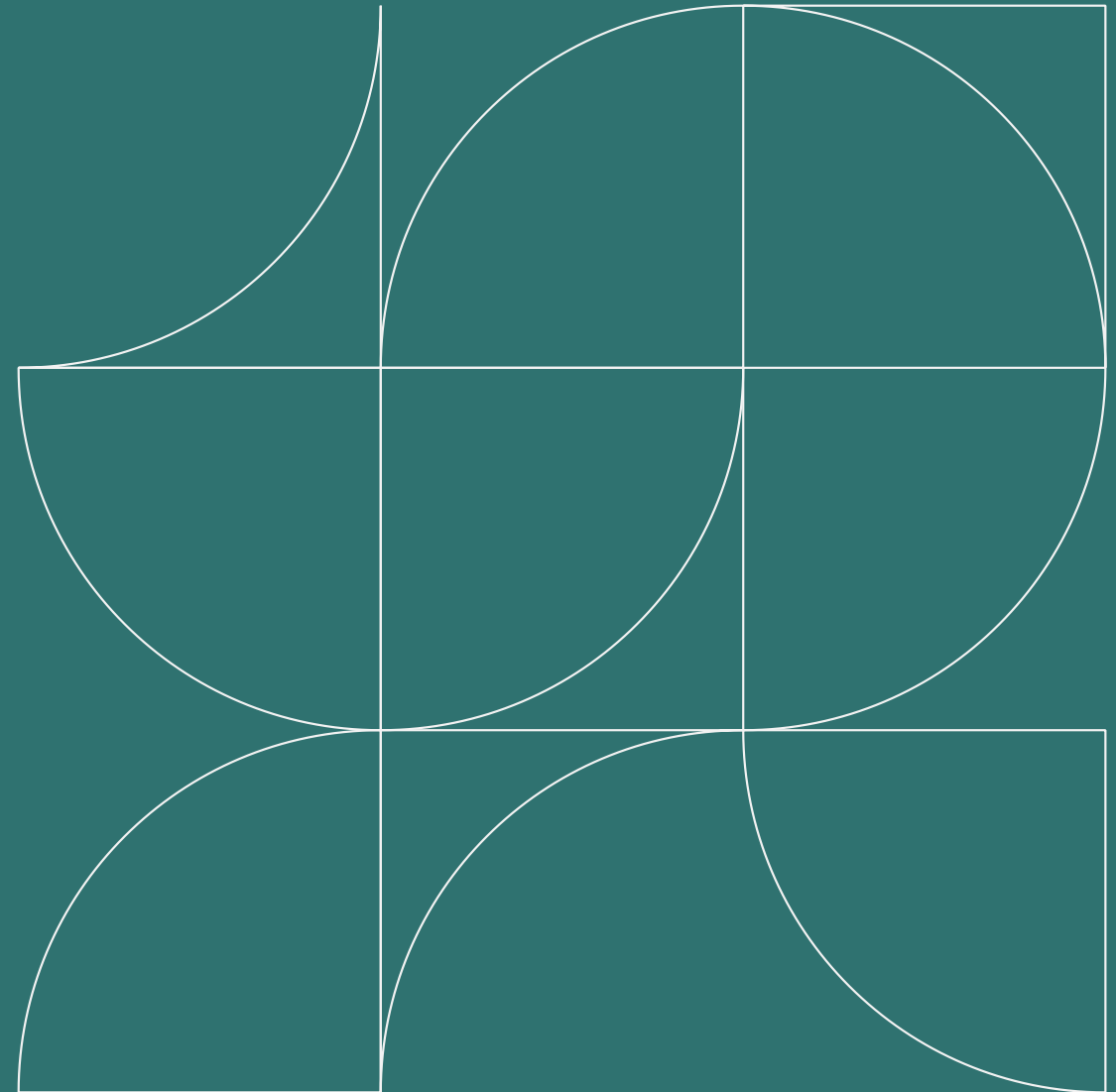


How to Prepare

- Keep accurate records on consumer accounts
- Evaluate and revise protocols regularly and in tandem with the evolving regulatory landscape and train employees.
- Review and revise business continuity plans (including pandemic plans) and procedures.
- Consider adaptation of consumer product portfolios to customer needs for security, safety, and flexibility.
- If your company is contemplating filing for bankruptcy, it may be advisable to wait as long as possible if you are in receipt of a PPP loan

Class Actions and TCPA

Kristine Argentine





Trends in Consumer Class Actions

- **Business Interruption Coverage** – businesses have banded together to challenge insurance denials
- **Breach of Contract/Unjust Enrichment** – Universities, membership-based businesses, ticket refunds, event cancellations and service interruptions
- **Consumer Fraud** – Material misrepresentations or omissions, product labeling, false advertising, price gouging, PPP loans



What's Coming Next

- **New Waves of Similar Class Actions:** Tuition refunds, membership cases, PPE and other product misrepresentation and false labeling claims
- **Biometric Privacy Cases:** New technology creates new risks under the various consumer privacy laws
- **Retailer Refund Cases:** Policies surrounding returns, refunds, etc.
- **Telephone Consumer Protection Act:** Developments in law, high statutory damages, and the desire for reaching customers remotely
- **ADA Claims by Customers:** Accessibility of stores, requirements for masks, etc.
- **COVID Exposure Claims**

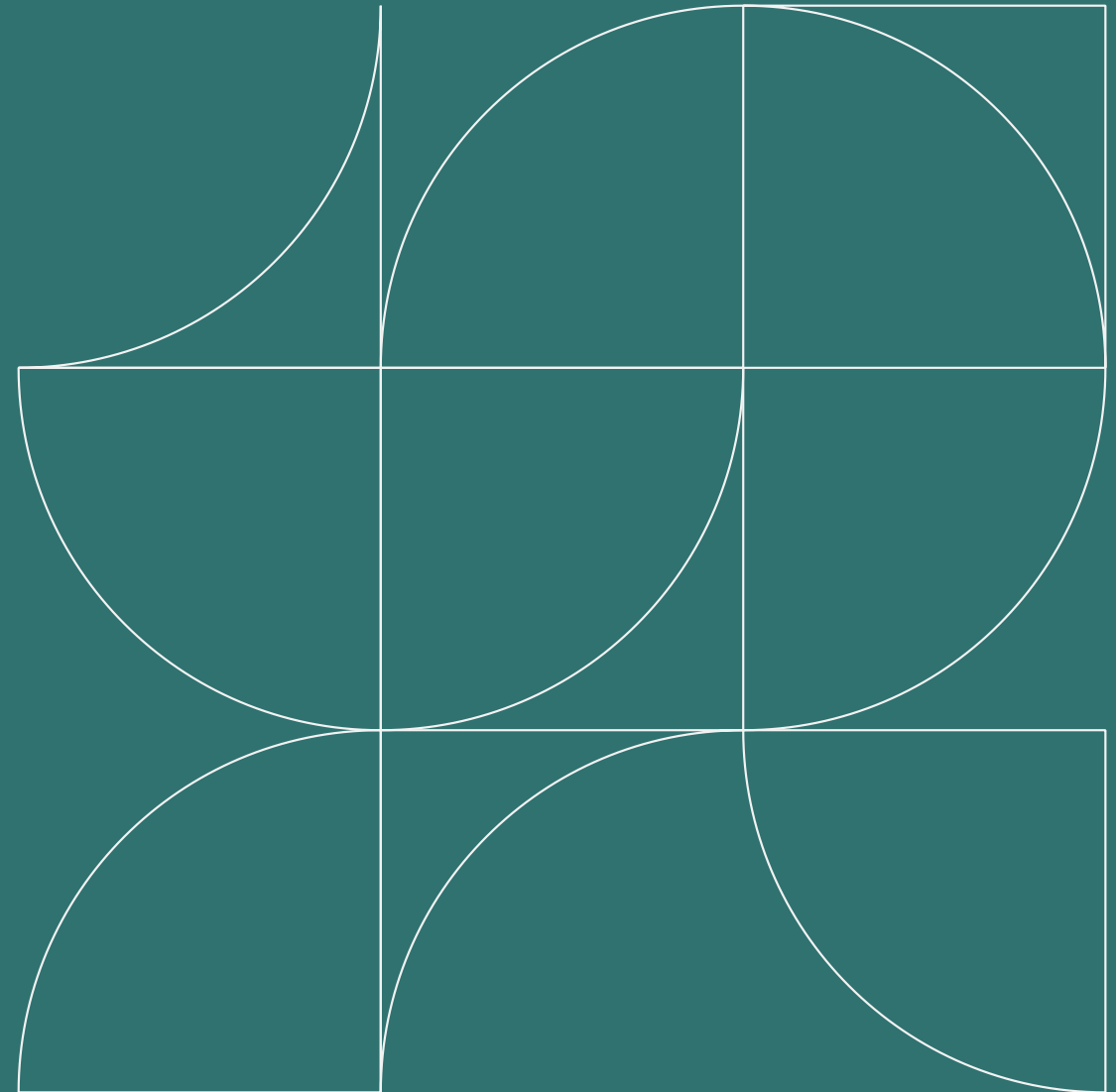


Mitigate Your Risk:

- **Review policies, contracts and procedures** to determine reasonableness under circumstances
- Consider **arbitration provisions** and **class action waivers**
- Review marketing materials and labels and consider “**reasonable consumer**” interpretation
- Consider current laws before using **new technology** for marketing or safety measures
- **Follow, document, and revise** procedures as federal, state, and city guidance evolves

Construction, Real Estate and Commercial Litigation

Rebecca Woods





Trends

- Increase in challenges to enforceability of contracts grounded in (1) force majeure clause claims and (2) common law arguments of impossibility, impracticability, and frustration of purpose
 - Patchwork of outcomes across the country dependent on jurisdiction; lobbying efforts driven by big business for legislative relief to bring more uniformity
- Increase in lawsuits against contracting counterparties for nonpayment
 - Corresponding increases in bankruptcies/receiverships, distress sales, contract renegotiations
- Increases in insurance claims on all product lines (CGL, property, EPLI, D&O, reps & warranties, etc.)
 - Insurance coverage lawsuits will increase as insurers' claims processing reflect market distress; premiums will increase as insurance market hardens; exclusions for virus/pandemic claims will become universal

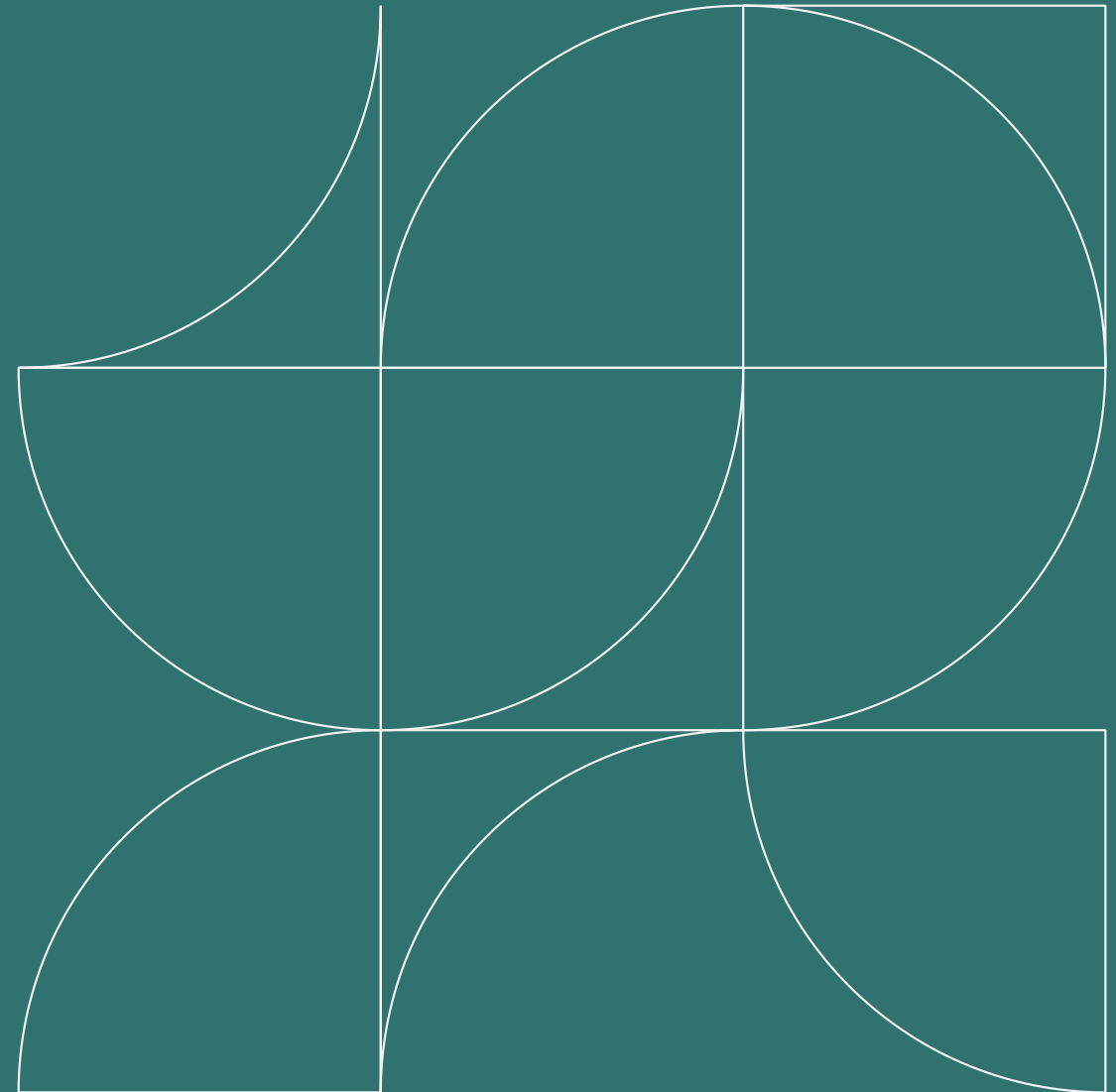


Girding for those trends

- Review contracts for possible renegotiation/renewal changes to provisions, principally: (1) force majeure clauses, (2) limitations of damages, (3) indemnity, (4) insurance coverage requirements (policy limits, additional insureds), and (5) litigation provisions (venue, mandatory mediation and/or arbitration, prevailing party provisions).
- Bolster access to credit and cash position to weather contracting counterparty nonpayment and denial of insurance claims
- Ensure insurance program optimizes properly scaled coverage protections (and vet insurers -- some will fail in next two years)
- Mind legislative developments for economic protections and relief

Health Care, Life Sciences and Pharmaceutical

Jesse Coleman





Trends in Health Care Litigation

- **False Claims Act**
 - Provider Relief Fund/CARES Act payments
 - Stark/Anti-Kickback changes and waivers
 - Government investigations/qui tam lawsuits
 - Private billing fraud actions
- **Data Security**
 - HIPAA and HITECH OCR waivers
 - Risks with the rise of telemedicine
- **FDA Regulatory Changes**
 - Diagnostic testing
 - Medical device regulation
 - Treatments and clinical trial procedures



Health Care Litigation (cont.)

- **Administrators and distributors of COVID-19 countermeasures**
 - PREP Act
 - State-level immunities
- **Medical Staff and Credentialing**
 - Waivers in licensing and privileging requirements
 - Long-term consequences

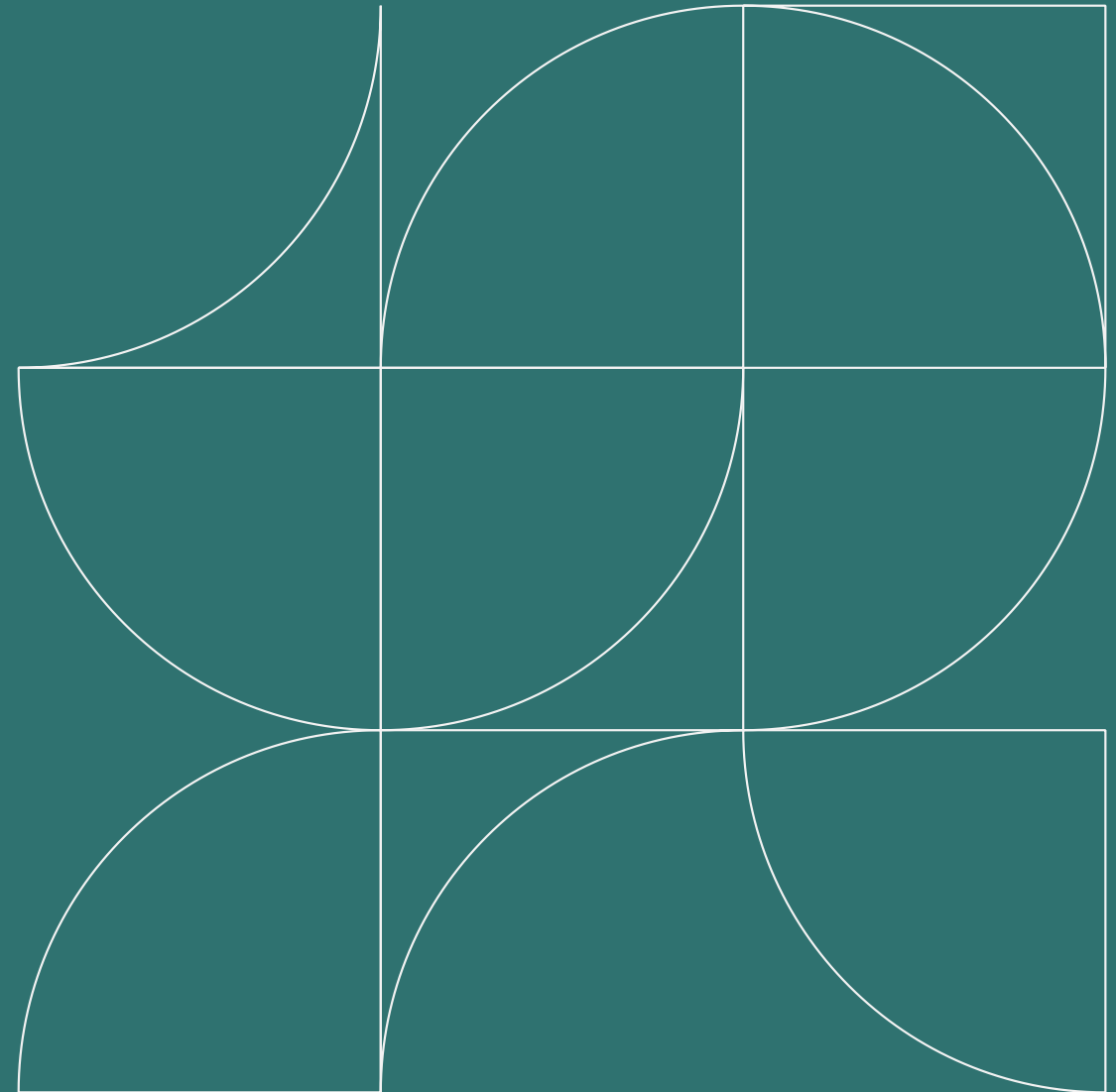


What can companies do to prepare?

- Ensure all government grant expenditures and reimbursement requests are handled properly, documented meticulously.
- Follow HHS regulatory developments regarding Stark and anti-kickback rules.
- Stay up to date in telehealth and telemedicine developments, and track HIPAA/HITECH waivers.
- Ensure compliance and seek protections/immunities under federal agency waivers/state statutes/federal PREP Act.
- Seek collaborative COVID-19 pandemic countermeasure approaches with local, state, and federal regulators.
- Ensure all health care professionals associated with your organization are properly vetted and credentialed.

Securities Litigation & Enforcement

Kate Schumacher





Securities Litigation & Enforcement Trends

- **About a dozen securities class actions have been filed against companies either directly involved with COVID-19 or with a business model heavily impacted by it. These cases involve:**
 - Failure to disclose the adverse impact of the pandemic on defendant's businesses
 - Misrepresentations concerning ability to sell and profit from products in high demand as a result of the crisis
 - Misrepresentations to investors in connection with participation in the Paycheck Protection Program (PPP)
- **The SEC issued COVID-19 guidance and has sought to enforce the same.**
 - The SEC appears to be acting quickly against companies it believes are misrepresenting the capabilities of COVID-19 related products
 - The SEC Division of Enforcement has also been requesting information from recipients of the PPP

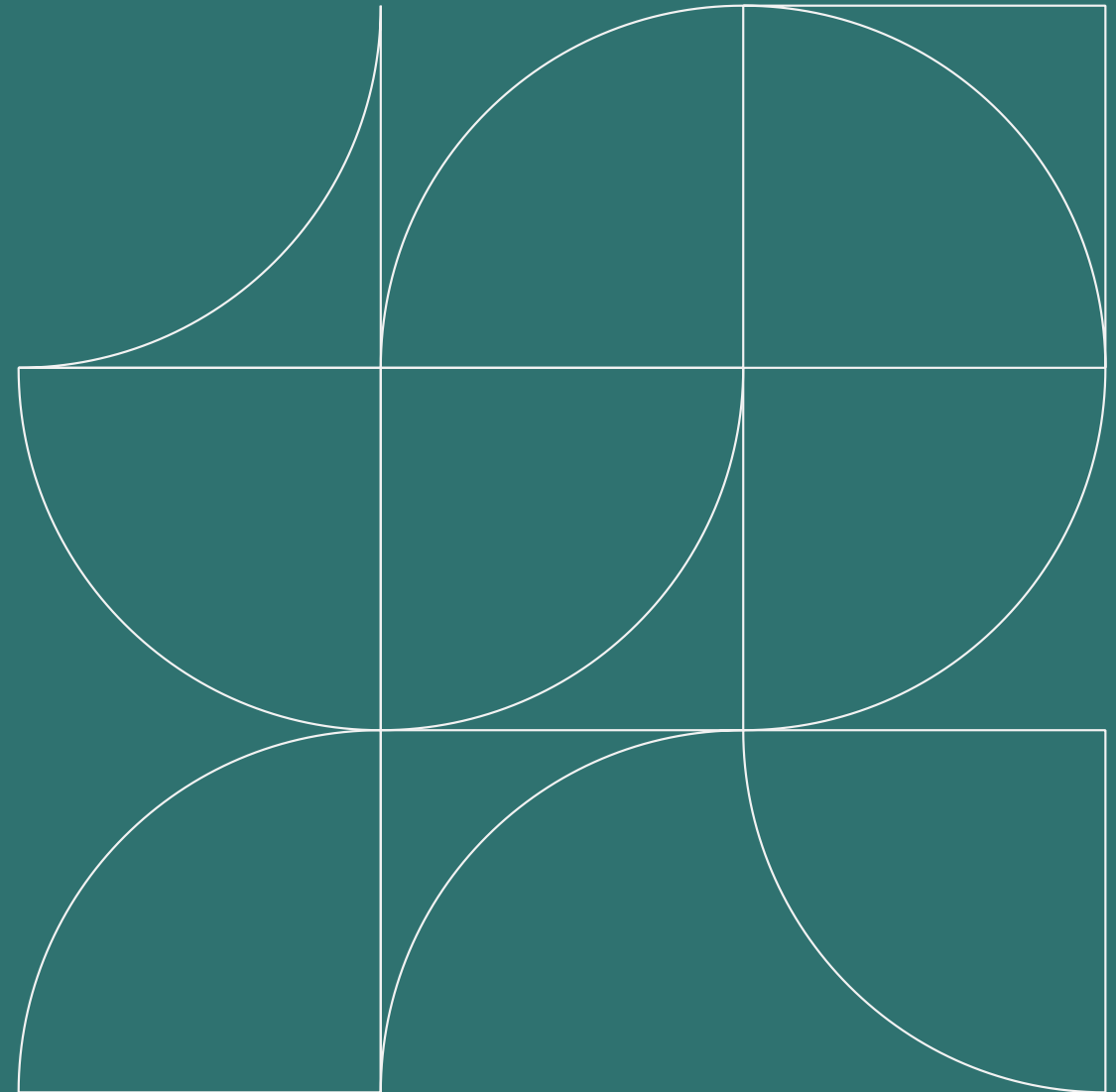


How to Protect Yourself

- **Companies Should Proactively Seek to Mitigate Risk of COVID-19 Securities Suits and Enforcement Actions**
 - Take extra care in making public disclosures when discussing COVID-19 matters and include appropriate cautionary language and caveats
 - Follow SEC guidance and securities laws on disclosures and document compliance with the processes
 - Ensure full documentation of all Management analyses and Board deliberations and analyses related to COVID-19 matters
 - Take reasonable steps as a Board to mitigate risks and proactively address concerns

Trade Secrets and Cybersecurity/Privacy

Richard Lutkus





Cybersecurity, Privacy, and Trade Secrets

- Companies are more focused on how to run the business remotely as opposed to thinking about protecting data. **Expected litigation:**
 - **Cyber:** Data breach litigation related to reduced security operations of remote workers. Data repatriation issues (including legal hold) related to untrusted endpoint use.
 - **Privacy:** Privacy litigation based on mishandling or improper processing of employee and/or customer data without adequate controls
 - **Trade Secrets:** Misappropriation cases (data theft), soliciting customers, data spoliation, etc.



Active Defense Mitigation Techniques

- Enact policies and practices that enforce secure handling/processing of organizational data.
- Require remote workers to use organization assets to conduct work rather than home computers, devices, cloud storage.
- Do not allow untrusted “Zero Trust” devices access to organization networks via VPN or otherwise.
- Consider digital fingerprinting technologies to track trade secrets.
- Audit high-risk remote employee workstations with remote data assessment tools like Seyfarth Scout.
- Ensure legal hold compliance through planned data repatriation and “data amnesty” programs.

Available Resources



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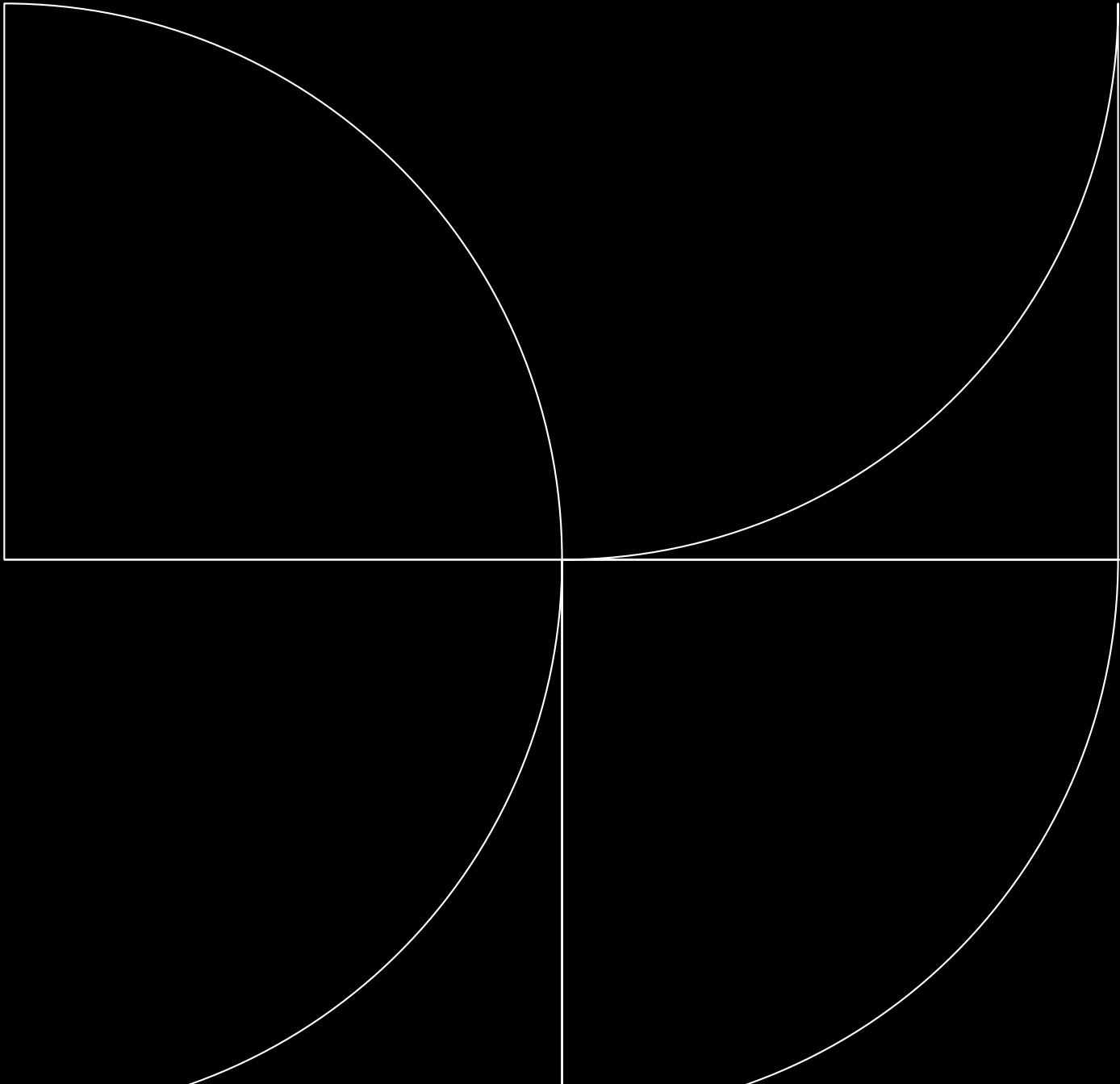
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Coming Soon!



**COVID-19
Litigation Trends**

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thank you