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COVID-19 AGGREGATE LITIGATION: THE SEARCH FOR THE UPSTREAM WRONGDOER

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ABSTRACT

COVID-19 has generated large numbers of cases (including thousands of class actions) in which the plaintiffs claim that the defendants caused economic or health-related harm. Surprisingly, far from being sympathetic to plaintiffs, courts have been very cautious, recognizing that in many such cases the defendant is simply reacting in good faith to a pandemic that it did not create. This article focuses on three categories of cases that have already generated numerous rulings: business interruption insurance claims; tuition reimbursement actions; and suits against prisons and immigration detention facilities. These three categories of cases line up on a continuum based on whether the proximate cause of the harm is COVID itself or the wrongdoing of the defendants. At one end, the business interruption insurance cases have received hostile treatment from almost all courts that have considered those claims. The underlying insurance policies almost universally require "physical loss or damage" to property, a requirement that is hard to square with losses caused by a pandemic. The tuition refund cases have seen mixed success, with many (but certainly not all) courts granting motions to dismiss after finding no contractual commitment to in-person teaching. Cases raising COVID health and safety issues at prison and immigration detention facilities are the strongest of the three categories, given the clear legal duty of government officials to protect the health of those in their custody. Furthermore, these injunction cases are textbook class actions because of the presence of overarching common questions. Yet, even in this context, many courts have declined to order (or uphold on appeal) injunctive relief, finding that the officials involved have attempted in good faith to protect their populations from COVID. After discussing the three-above categories, this article also briefly examines consumer, labor, and securities fraud COVID-related cases, showing that they too can be assessed by focusing on whether COVID or the defendant is the true proximate cause of the harm. Finally, the article identifies two trends in COVID cases: (1) the courts' rigorous enforcement of arbitration clauses; and (2) the general unwillingness of defendants to settle COVID-related claims (except in isolated instances in which defendants have lost motions to dismiss or motions for class certification).

I. INTRODUCTION

No one could have predicted that, in early 2020, a pandemic would change the face of the planet. In addition to causing massive numbers of deaths and other serious injuries, COVID-19 (hereafter COVID) has had devastating economic consequences for millions of people in the United States and throughout the world. Just focusing on the United States, as of [December 1, 2021], the number of deaths from COVID is about [780,000]—exceeding the total number of

American deaths from the 1918 Spanish flu pandemic.[1] Today, however, Americans are far more litigious; the Spanish flu pandemic led to very few lawsuits,[2] but COVID has resulted in thousands of lawsuits in the United States alone, including more than a thousand class actions.[3] These include, among other categories: business interruption insurance claims; claims against colleges and universities seeking tuition refunds for switching from in-person to on-line classes; claims seeking refunds for canceled travel plans, canceled entertainment events, and gym closures; class actions against prisons and immigration detention facilities for COVID health risks to confined populations; various labor and employment claims related to COVID; consumer-related claims, such as price gouging; and securities fraud suits against companies for false claims of a vaccine or cure or false statements relating to the financial impact of COVID.[4] One source has identified approximately 20 different categories of lawsuits alleging injuries from COVID.[5]

COVID-related litigation is so widespread that myriad websites have been established to track the ever-changing landscape of the litigation, often broken down by categories of cases.[6] But the raw data and broad categories used to organize such statistical information do not reflect the fact that COVID-related cases vary dramatically in strength. Some lawsuits allege—to use one scholar's terminology—wrongful "upstream conduct of the defendant,"[7] with COVID providing merely the context of the wrongdoing. Others, however, are primarily about the harm caused by COVID itself, and often involve defendants who themselves are trying to grapple in good faith with the pandemic.

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[1] *COVID Has Killed About as Many Americans as the 1918-19 Flu*, US NEWS (Sept. 20, 2021), https://www.usnews.com/news/health-news/articles/2021-09-20/covid-has-killed-about-as-many-americans-as-the-1918-19-flu (last visited Nov. 14, 2021); *CDC COVID Data Tracker*, CENTER FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Nov. 14, 2021).

[2] Mark Jensen, *The 1918 Flu Pandemic And High Court Jurisprudence*, LAW360 (Mar. 27, 2020, 3:16 PM), https://www.law360.com/articles/1257426/the-1918-flu-pandemic-and-high-court-jurisprudence (last visited Nov. 14, 2021) (noting that only five lawsuits were filed involving the 1918 pandemic).

[3] Littler Mendelson, *COVID-19 Labor & Employment Litigation Tracker*, LITTLER - INSIGHT (Nov. 12, 2021), https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker (last visited Nov. 14, 2021) (4,257 lawsuits and 439 class actions filed against employers due to labor and employment violations related to coronavirus); *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases in 2020*, PIERCE ATWOOD (Mar. 9,2021), https://www.pierceatwood.com/alerts/class-action-litigation-related-covid-19-filed-and-anticipated-cases-2020 (last visited Nov. 14, 2021) (more than 1400 class actions filed in 2020).

[4] *See, e.g.*, PIERCE ATWOOD, *supra* note 3; HUNTON ANDREWS KURTH, *supra* note 4 (describing these and numerous other categories and listing scores of cases).

[5] HUNTON ANDREWS KURTH, *supra* note 4.

[6] *See, e.g*., *Id*.; LITTLER MENDELSON, *supra* note 3; Rachel Bailey, *An Updated Analysis of Litigation Caused By COVID-19*, Lex Machina (Oct. 6, 2020), https://lexmachina.com/blog/an-updated-analysis-of-litigation-caused-by-covid-19/ (last visited Nov. 14, 2021).

[7] Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831-32 (1997) (using the "upstream" and "downstream" terminology); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 2.01 cmt. c (AM. LAW INST. 2010) (referring to "'upstream' matters focused on the generally applicable conduct of those opposing the claimants in the litigation").

COVID cases are, of course, a recent phenomenon. The first reported instance of COVID in the United States occurred in January 2020,[8] and the World Health Organization did not declare COVID to be a global pandemic until March 2020.[9] Thus, many of the COVID-related lawsuits have not advanced significantly, if at all. Nonetheless, there have been a surprising number of important rulings in some categories of cases. For instance, the Judicial Panel on Multidistrict Litigation (JPML) has addressed several requests for centralization in COVID-related cases, primarily in business interruption insurance cases. Numerous courts have ruled on class certification in the prison and immigration detention context, with a smattering of class certification rulings in other areas. And there have been numerous rulings on motions to dismiss or requests for preliminary or permanent injunctive relief.

At first blush, one might expect that the difficult circumstances faced by plaintiffs in COVID-related cases—including serious health and economic consequences—would lead courts to be highly sympathetic, rejecting motions to dismiss and freely certifying such cases as class actions. In fact, however, the response of the courts to COVID claims has been cautious and measured, with courts looking skeptically at lawsuits in which the real proximate cause is COVID itself rather than the defendant.

It is beyond the scope of this essay to address the case law relating to all of the myriad categories of COVID cases. Rather, to exemplify the wide variety of COVID cases, I focus in Section II of this article on three categories of COVID-related cases that are frequently brought as putative class actions: (1) business interruption insurance cases; (2) college and university tuition refund cases; and (3) suits by prisoners and immigration detainees alleging the failure of authorities to protect them against COVID. I examine business insurance interruption cases and tuition reimbursement cases because of the sheer number of such cases[10] and because courts in those cases have already issued numerous rulings on motions to dismiss. I focus on the prison and immigration detention cases because: (1) as with the insurance and tuition cases, courts have already issued numerous rulings, and (2) courts in those cases focus on structural relief and thus provide a useful contrast to the first two categories, which focus on economic damages.

These three categories of cases line up on a continuum based on whether the proximate cause of the harm is COVID itself or the wrongdoing of the defendants. At one end, the business interruption insurance cases have consistently received hostile treatment from most courts because the contractual language of the policies cannot plausibly be read to cover a pandemic. The tuition refund cases have seen mixed success, with several (but not all) courts dismissing the cases on the

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[8] *First Travel - related Case of 2019 Novel Coronavirus Detected in United States*, CENTER FOR DISEASE CONTROL AND PREVENTION (Jan. 21, 2020), https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html (last visited Nov. 14, 2021).

[9] Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, ACTA BIOMED 2020; Vol. 91, N.1: 157 (Mar. 2020).

[10] *See, e.g.*, Julianna Thomas McCabe, *COVID-19 Class Actions Update*, CARLTON FIELDS (Dec, 15, 2020) https://www.carltonfields.com/insights/expect-focus/2020/covid19-class-actions-update (last visited Nov. 14, 2021) (noting business interruption insurance and tuition reimbursement represent 25 percent of all COVID-related class actions); https://www.expertinstitute.com/resources/insights/universities-sued-for-covid-19-refunds-following-campus-closures/ (last visited Nov. 29, 2021) (noting that more than 70 colleges and universities have been sued for tuition refunds relating to COVID).

pleadings after finding no contractual commitment to in-person teaching in the event of a pandemic. The prison and immigration detention cases are the strongest of the three categories, given the clear legal duty of institutions to protect the health of those in their custody. Yet, even in this context, numerous courts have declined to order injunctive relief, finding that the relevant officials have attempted in good faith to protect their populations from COVID.

Although the primary focus of this article is on the three above-discussed categories, Section III looks briefly at several other categories of COVID cases in which few judicial rulings have been issued to date—consumer, labor and employment, and securities fraud cases. Applying the lessons learned from the insurance, tuition, and prison/immigration cases, it is possible to predict how the cases in these other categories will fare. Finally, Section IV notes two other important trends in COVID litigation: (1) the courts' rigorous enforcement arbitration clauses and class action waivers in the COVID context, and (2) the general unwillingness thus far of most defendants to agree to classwide settlements (except in isolated instances in which defendants were unsuccessful in securing pretrial dismissal).

II. COVID LITIGATION IN THE THREE SELECTED CATEGORIES

A. Business Interruption Insurance Cases

Business interruption insurance cases represent approximately 25 percent of all COVID-related class actions.[11] The underlying insurance policies are designed to provide covered business entities with a source of income when such parties are forced to temporarily close after sustaining a covered loss.[12] Absent clear language showing that the insurer intended to cover business losses during a pandemic, there is a strong argument that the true wrongdoer is not the insurance company but COVID itself. Plaintiffs in those cases seek insurance coverage based on contract provisions that typically require "a direct physical loss or damage to *property*," something would not seem to contemplate losses from a pandemic.[13] Moreover, as discussed below, in some of the cases, policyholders have sued despite being insured under policies that expressly exclude losses caused by "any virus." Because the contracts appear to refute the notion that insurers intended to provide coverage for a pandemic, it is not surprising that many courts have dismissed these cases early on, without even reaching the issue of class certification. Of the few courts that have taken up class certification, only one has certified a class outside of the settlement context, and that certification was overruled on interlocutory appeal.[14] There have been several motions requesting the JPML to centralize business interruption insurance cases for efficiency purposes under 28 U.S.C. § 1407, but most such requests have been denied.

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[11] McCabe, *supra* note 11.

[12] *See, e.g.*, Business Interruption Insurance, The Hartford, https://www.thehartford.com/business-insurance/business-interruption-insurance (last visited Nov. 6, 2021) (providing a description of business interruption insurance on The Hartford website; the post notes that such insurance "can help replace income you lose if you can't open temporarily after a covered loss, like property damage").

[13] *See, e.g.*, Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885, 888 (9th Cir. 2021) (so holding).

[14] Elegant Massage, LLC v. State Farm Mutual Auto Ins. Co., 506 F. Supp. 3d 360, 365 (E.D. Va. Dec. 9, 2020), *rev'd,* State Farm Mutual Automobile Insurance Co. v. Elegant Massage, LLC., 2021 WL 4202678, (4th Cir. Sept. 2, 2021).

This Subsection first considers merits rulings in business interruption insurance cases. It then discusses aggregation rulings, *i.e.,* centralization rulings by the JPML and the one ruling (reversed on appeal) granting class certification.

1. Rulings on Motions to Dismiss

By far the largest number of COVID-related class actions resolved on the merits are business interruption insurance cases. As noted, defendants have prevailed in virtually every case that has reached the motion to dismiss stage. Moreover, every federal circuit to address the issue (the Sixth, Eighth, Ninth, and Eleventh Circuits) has sided with the defendants. Notwithstanding the tragic economic losses suffered by many of the named plaintiffs and putative class members, the courts have almost universally refused to depart from what they deem to be the clear language of the insurance policies.

For instance, in *Mudpie, Inc. v. Travelers Casualty Insurance Company of America,*[15] the Ninth Circuit unanimously affirmed the district court's dismissal of business interruption insurance claims brought by plaintiff, the owner of a children's store, for itself and a putative class of all retailers in California that purchased business interruption insurance coverage from Travelers Casualty Insurance Company (Travelers). The court had no difficulty rejecting plaintiff's argument that the policy language covering "'direct physical loss of or damage to' property" could not be stretched to cover losses stemming from COVID.[16] The court cited and quoted numerous decisions supporting its conclusion, including an Eighth Circuit decision in a non-class case, *Oral Surgeons, P.C. v. Cincinnati Insurance Company.*[17] In addition, the *Mudpie* court relied on language in the Travelers policies providing that the company would not " 'pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.'"[18] According to the court, "Mudpie does not plausibly allege that 'the efficient cause,' *i.e.,* the one that set others in motion, was anything other than the spread of the [COVID-19] virus throughout California, or that the virus was merely a remote cause of its losses." Put another way, the court viewed COVID itself as the proximate cause of the alleged losses.

In two unpublished opinions handed down the same day as *Mudpie,* the Ninth Circuit similarly rejected business interruption insurance claims.[19] In one of those cases, the court looked at the governing laws of the ten states at issue, finding nothing in any of those laws that would salvage the claims.[20]

Similarly, in *In re Zurich American Insurance Company,*[21] the Sixth Circuit held, in the context of more than a dozen restaurant operators seeking coverage for lost income, that "'a pandemic-triggered government order, barring in-person dining at a restaurant' does not qualify

[15] *Mudpie,* 15 F.4th at 885.
[16] *Id.* at 890.
[17] *Id.* discussing *Oral Surgeons,* 2 F.4th 1141 (8th Cir. 2021), and other cases.
[18] *Id.* at 891.
[19] Chattanooga Pro. Baseball LLC v. Nat'l Casualty Co., No. 20-17422, 2021 WL 4493920 (9th Cir. Oct. 1, 2021); Selane Prod., Inc. v. Continental Casualty Co., No. 21-55123 (9th Cir. 2021).
[20] *Chattanooga,* No. 20-17422, 2021 WL 4493920.
[21] *In re* Zurich Am. Ins. Co., No. 21-0302, 2021 WL 4473398 (6th Cir. Sept. 29, 2021).

as 'a direct physical loss of or damage to the property' under Ohio law."[22] The court reaffirmed its prior holding, rendered only a few days earlier, in a case involving a single restaurant.[23] In the earlier case, the court explained the fatal flaw the with plaintiff's argument:

> Whether one sticks with the terms themselves (a "direct physical loss of" property) or a thesaurus-rich paraphrase of them (an "immediate" "tangible" "deprivation" of property), the conclusion is the same. The policy does not cover this loss. The restaurant has not been tangibly destroyed, whether in part or in full. And the owner has not been tangibly or concretely deprived of any of it. It still owns the restaurant and everything inside the space. And it can still put every square foot of the premises to use, even if not for in-person dining use. Think of the different potential sources of the restaurant's lost income—the virus and the State's shut-down orders—and whether either one created a "direct physical loss of or damage to" property. The novel coronavirus did not physically affect the property in the way, say, fire or water damage would. No one argues that the virus physically and directly altered the property.[24]

Likewise, in *Gilreath Family & Cosmetic Dentistry, Inc.,*[25] the Eleventh Circuit rejected a putative class claim that it was entitled to business interruption insurance coverage for loss of business to its dentistry operations stemming from COVID. In finding that there was no "direct physical loss or damage" as required by the policy, the court noted derisively that plaintiff "has alleged nothing that could qualify, *to a layman or anyone else*, as physical loss or damage."[26]

Although courts in these cases understand the serious losses suffered by plaintiffs, they also understand their duty to apply the plain language of the insurance policies, and not to simply look for a deep pocket. As one court explained in a suit brought as an individual action:

> The Court understands and is sympathetic to Plaintiff's circumstances. Plaintiff, like countless others, has suffered enormous loss as a result of the COVID-19 pandemic, threatening not just Plaintiff's livelihood, but the continued vibrance and success of our local communities. Notwithstanding this reality, however, the Court is not free to rewrite the terms of the Policy and is obligated to enforce the terms thereof as written.[27]

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[22] *Id.* at 1 (citations omitted).
[23] Santo's Italian Café v. Acuity Ins. Co., __F.4th __ (6th Cir. Sept. 22, 2021).
[24] *Id.* at __. *Accord Bridal Expressions LLC v. Owners Ins. Co.,* __F.4th __ (6th Cir. Nov. 30, 2021) (rejecting business interruption insurance loss claim by a bridal shop on behalf of a putative class, stating that ""[w]hat was true for the restaurant in *Santo's Italian Café* [*supra* note 23] is true for the bridal shop today"; the court rejected plaintiff's effort to plead around the earlier precedent by alleging that COVID was in fact present on the property).

[25] Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co., No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021).
[26] *Id.* at 2 (emphasis added).
[27] J.G. Optical, Inc. v. Travelers Cos., Inc., No. CV205744ESMAH, 2021 WL 4260843 (D.N.J. Sept. 20, 2021).

At bottom, this overwhelming case law rejecting business interruption insurance claims is premised on the notion that the applicable policies—by their terms—were never intended to cover a pandemic such as COVID, and thus the insurers did not breach their contracts by denying coverage. The true upstream wrongdoer in these cases was COVID itself, not the insurance companies that properly refused to cover the claims.

To be sure, a few courts have allowed such claims to survive a motion to dismiss, reasoning that (1) the language requiring "direct physical loss" is ambiguous and could encompass the COVID-related claims, (2) the virus exclusion does not apply when the real cause of the harm is a government shutdown order, or (3) a showing of actual contamination of the premises could satisfy the "direct physical loss" requirement.[28] But those decisions are outliers, and are unlikely to be widely followed (even in district courts outside the Sixth, Eighth, Ninth, and Eleventh Circuits) given the strong, well-reasoned federal appellate authority rejecting such claims.[29]

2. Rulings on Aggregation

a. Judicial Panel on Multidistrict Litigation

Although the JPML has not considered many COVID cases overall, it has considered seven requests for centralization in business interruption insurance cases and has denied five (roughly 70 percent) of them.[30] This percentage contrasts significantly with the JPML's overall recent statistics of granting a majority of motions for centralization.[31] Indeed, despite the obvious efficiency of granting MDL treatment when cases are spread throughout the country,[32] in the business interruption insurance cases, the JPML has rejected centralization except in situations in which the scope of the cases was geographically narrow.

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[28] *See, e.g., Elegant Massage,* , 506 F. Supp. at 360 (finding the phrase "direct physical loss" to be ambiguous and to potentially cover COVID-related claims, and further ruling that the virus exception did not apply because a government shutdown was the direct cause of the loss); Lindenwood Female Coll. v. Zurich Am. Ins. Co., No. 4:20CV1503 HEA, 2021 WL 5050065 (E.D. Mo. Nov. 1, 2021) (agreeing that no physical loss of or damage to property occurred but denying finding ambiguity because of an amendment removing contamination from the policy's definition of non-coverage); Blue Springs Dental Care, LLC. v. Owners Ins. Co., 488 F. Supp. 3d 867, 869 (W.D. Mo. Sept. 21, 2020) (finding that plaintiff plausibly alleged that they were deprived of the use of their dental offices by the COVIDvirus "physically attach[ing] itself" to their clinics (citing Studio 417, Inc. v. Cincinnati Insurance Co., 478 F. Supp. 3d 794, 796 (W.D. Mo. Aug. 12, 2020)); KC Hopps Ltd. V. Cincinnati Ins. Co., No. 20-cv-00437, 2021 WL 4302834, *5–8 (W.D. Mo. Sept. 21, 2021) (distinguishing *Oral Surgeons* on the grounds that laintiff's allegations include physical presence of COVID on premises analogous to contaminants such as harmful fungi or bacteria covered under the policy; jury later found in favor of the insurance company.),

[29] *See, e.g.,* Zwillo V, Corp. v. Lexington insurance Co. 504 F. Supp. 3d 1034 (W.D. Mo. Dec. 2, 2020) (refusing to follow two earlier cases in the same federal district, *Blue Springs, Studio 417*, and *KC Hopp*, both cited in footnote 30, noting that "this Court respectfully disagrees with those cases[,]" 504 F. Supp. 3d at 1043).

[30] This contrasts with the JPML's overall record, which has been to grant a majority of requests for centralization. *See* U.S. JUD. PANEL ON MULTIDIST. LITIG., Calendar Year Statistics: January through December 2020 (Dec. 31, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf (JPML granted 26/45 requests in 2020 and 21/40 requests in 2012; in only three years between 2011 and 2020 did the JPML deny more requests than it granted) (last visited Nov. 14, 2021.

[31] *See* U.S. JUD. PANEL ON MULTIDIST. LITIG., *supra* note 32.

[32] , *e.g.,* In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, 148 F. Supp. 3d 1367 (J.P.M.L. 2015) (centralizing, in the Northern District of California, 63 actions from district courts throughout the country and noting that potentially related actions had been filed in more than 60 different districts).

The first case the JPML considered was *In re COVID-19 Business Interruption Protection Insurance Litigation.*[33] In that case, the JPML was asked to centralize 15 federal cases pending in federal courts around the country asserting declaratory judgment and breach of contract claims against providers of commercial property insurance. The JPML also received notice of 263 related actions. In total, the claims spanned 48 federal districts, and involved collectively more than 100 insurers. Plaintiffs and the putative classes all claimed that the policies at issue provided coverage for business losses caused by the COVID pandemic. The JPML denied centralization, noting that "[t]here is no common defendant in [the] actions," and that the individual cases involved either a single insurer or insurer-group, "*i.e.*, related insurers operating under the same umbrella or sharing ownership interests."[34] The JPML further noted that "[m]anaging such a litigation would be an ambitious undertaking for any jurist, and implementing a pretrial structure that yields efficiencies will take time."[35] The time-consuming nature of an MDL was especially concerning to the JPML because "[m]any plaintiffs [were] on the brink of bankruptcy as a result of business loss due to the COVID-19 pandemic and the government closure orders."[36] Thus, the JPML believed that individual litigation would be the most expeditious approach, an odd conclusion given that it was *the plaintiffs* who were requesting centralization. The JPML further declined to create insurer-specific MDLs, but held out such a possibility for future cases.[37]

In four other instances, the JPML also denied centralization of groups of cases alleging wrongful denial of business interruption claims, reasoning that separate handling of the cases by multiple judges would achieve more rapid resolution.[38] Importantly, all of those cases involved only a single insurer. To be sure, in two groups of cases, the JPML did agree to centralize business interruption insurance cases, but both cases involved a relatively small geographical scope.[39]

The JPML never discussed the merits of the cases. Thus, it is difficult to determine whether the JPML's reluctance to centralize these cases in all but the most limited circumstances reflected the Panel's own skepticism about the merits. In any case, the JPML was doubtful that, in most situations, centralization would be the most efficient way to proceed.

b. Class Certification Rulings

Because of the overwhelming success defendants have had in getting the cases dismissed outright prior to a ruling on class certification, there are virtually no class certification opinions in

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[33] *In re* COVID-19 Bus. Interruption Prot. Ins. Litig., 482 F. Supp. 3d 1360 (J.P.M.L. 2020).
[34] *Id.* at 1362.
[35] *Id.* at 1363.
[36] *Id.*
[37] *See In re* Checking Acct. Overdraft Litig., 626 F. Supp. 2d 1333 (J.P.M.L. 2009); *In re* AndroGel Prod. Liab. Litig., 24 F. Supp. 3d 1378 (J.P.M.L. 2014); *In re* Auto Body Shop Antitrust Litig., 37 F. Supp. 3d 1388 (J.P.M.L. 2014).
[38] *See, e.g., In re* Certain Underwriters at Lloyds of London COVID-19 Business Interruption Protection Insurance Litigation, 492 F. Supp. 3d 1355 (J.P. M.L. 2020*); In re* Cincinnati Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig., 492 F. Supp. 3d 1347 (J.P.M.L. 2020); *In re* Hartford COVID-19 Bus. Interruption Prot. Ins. Litig., 493 F. Supp. 3d 1358 (J.P.M.L. 2020); *In re* Travelers COVID-19 Bus. Interruption Prot. Ins. Litig., 492 F. Supp. 3d 1341 (J.P.M.L. 2020).
[39] *In re* Society Ins. Company COVID-19 Bus. Interruption Prot. Ins. Litig., 521 F. Supp. 3d 729 (N.D. Ill. 2021) (involving only six midwestern states); *In re* Erie COVID-19 Bus. Interruption Prot. Ins. Litig., 482 F. Supp. 3d 1360 (J.P.M.L. 2020) (reviewing 13 actions in five districts and 12 related actions in eight districts).

this area. There is, however, an interesting ruling by the Fourth Circuit in *State Farm Mutual Auto Insurance Company v. Elegant Massage, LLC*.[40] In that case, the district court, after becoming one of the rare courts to deny a motion to dismiss a business interruption insurance case stemming from COVID, went on to certify a Rule 23(b)(3) class action *sua sponte*.[41] Even if the court, contrary to the great weight of authority, thought that the business interruption insurance cases were plausible on the merits, its approach of certifying a class before even receiving plaintiffs' motion for class certification was indefensible. Not surprisingly, on State Farm's application for interlocutory review under Rule 23(f), the Fourth Circuit summarily reversed the grant of class certification. Although the court "express[ed] no opinion as to whether a Rule 23(b)(3) class is appropriate in [the] case," it ruled that the district court may only exercise its discretion whether to grant class certification "once it is asked to do so, and its discretion is bounded by the requirements of Rule 23."[42] Although the Fourth Circuit did not address the district court's ruling denying State Farm's motion to dismiss, the Circuit was clearly unhappy with the district court's approach to aggregating the claims, and it offered no language suggesting that class certification might ultimately be viable or appropriate.

B. Tuition Refund Cases

Somewhere in the middle of the spectrum are numerous class actions that have been filed by students against colleges and universities seeking refund of tuition payments and fees on the grounds that the schools conducted courses online instead of in-person, starting in the spring of 2020. Moving to remote teaching was not unique conduct by a few colleges and universities. More than 4,000 colleges and universities went to online teaching because of the virus, and more than 25 million students have been impacted.[43] There can be no serious dispute that the schools were motivated by compelling health considerations, and in many instances by direct government shutdown orders. Indeed, in colleges across the country, the transition to online learning occurred in the middle of the spring semester of 2020, when the risks of COVID became clear. Were it not for COVID, there can be little doubt that every school targeted in the tuition reimbursement lawsuits would have provided the same in-person instruction they were providing prior to the pandemic. In reality, the colleges and universities were confronting a pandemic they did not cause, and were trying to provide education to students in the face of serious health risks and government shutdowns. Online instruction was a solution necessitated by COVID, not by any wrongdoing or greed on the part of the schools.[44] To my knowledge, no evidence has been produced in any of the cases that any college or university chose this route twith the intent o profit at the expense of its students. Indeed, most schools returned to live teaching in the fall of 2021, even though the virus

[40] State Farm Mut. Auto. Ins. Co. v. Elegant Massage, LLC, No. 21-255, 2021 WL 4202678 (4th Cir. Sept. 2, 2021).
[41] *Id.*
[42] *Id.*
[43] Anjelica Cappellino, *More Than 70 Universities Sued for Refunds Following COVID-19 Campus Closures*, Expert Institute (Sep. 9, 2021), https://www.expertinstitute.com/resources/insights/universities-sued-for-covid-19-refunds-following-campus-closures/ (last visited Nov. 14, 2021).
[44] *See, e.g.*, Dougherty v. Drew Univ., No. 21-00249, 2021 WL 1422935, *6 (D.N.J. Apr. 14, 2021) ("Because the University's decision 'to go to online instruction in March 2020] was supported by public health concerns and compliance with the law, it was fair and not arbitrary. The experience of other institutions, commercial, education, and judicial, suggest that Drew University was not some sort of unreasonable outlier here …. I note the lack of any allegation that the University possessed other, better options. For this reason, too, I lack a basis to fault the University's decision to pursue virtual learning.").

continued to rage with the Delta variant.[45] Schools looking for an excuse to continue online teaching for economic reasons could have cited continuing COVID risks (including the Delta variant) and the need to protect students, but they have not done so.

Thus, these cases are not intuitively attractive. As one court noted: "[S]uing a university for adjusting to the COVID-19 pandemic to safeguard the health of its students and faculty is not the most desirable case."[46] Unlike the business interruption insurance cases, however, plaintiffs can allege a commitment to in-person teaching based not only on the language of a contract per se but also on a host of other marketing and course materials. If the schools provided an unwavering commitment—by contract or through course or marketing materials—to provide in-person teaching, regardless of the circumstances, then such cases might have at least arguable merit. (Plaintiffs in business interruption insurance cases, by contrast, are almost invariably relegated to the plain language of the governing insurance policy because of integration clauses.) But, as discussed below, in many of the tuition refund cases, plaintiffs cannot point to any language whereby schools guaranteed in-person teaching.[47] Plaintiffs' claims for tuition reimbursement are especially difficult for the fall of 2020 (as opposed to the spring of 2020) if plaintiffs paid their tuition knowing that classes would continue to be entirely online. (Of course, even in the cases in which courts have denied motions to dismiss, surviving summary judgment and trial is a whole different matter, given the implausibility that any school would guarantee in-person teaching regardless of what is going on in the world.) In short, while not as challenging for plaintiffs as the business interruption insurance cases, the tuition reimbursement cases are nonetheless difficult for plaintiffs, given the apparent absence of any wrongdoing on the part of the schools.

Thus far, there have been no rulings by the Judicial Panel on Multidistrict Litigation regarding centralization of such claims. There have, however, been numerous decisions on motions to dismiss, as well as a handful of decisions on class certification.

1. Rulings on Motions to Dismiss

Numerous courts have granted motions to dismiss in tuition reimbursement cases. Not surprisingly, those courts have found no language in either specific contracts or in marketing or course material promising in-person instruction. Indeed, in some instances, the contracts explicitly reserved to the schools the authority to modify programs and curriculums without subjecting themselves to lawsuits.

For example, in *Zagoria v. New York University*,[48] plaintiff sued New York University (NYU) on behalf of a putative class of students, raising claims of breach of contract, unjust enrichment, and money had and received. Plaintiff sought a refund of all tuition and fees paid as a result of NYU's decision to go to remote teaching in the spring of 2020 for all courses. In

[45] Anne Donnen, *Will Campuses Return to Normal in Fall 2021?*, Best Colleges (Apr. 27, 2021) https://www.bestcolleges.com/blog/college-campuses-covid-19-guidelines-fall/ (noting that schools were "racing" to return to in-person teaching) (last visited Nov. 14, 2021).

[46] Rosado v. Barry University, 499 F. Supp. 3d 1152, 1154 (S.D. Fla. Sept. 7, 2021).

[47] Plaintiffs' arguments are better with respect to services not provided, such as closing dorm rooms and cafeterias after students paid for those benefits for the entire semester, but the prospective recoveries are much more limited than for tuition reimbursement.

[48] Zagoria v. New York Univ., No. 20CIV3610GBDSLC, 2021 WL 1026511 (S.D.N.Y. Mar. 17, 2021).

dismissing the breach of contract claim, the district court reasoned that there was no contractual provision guaranteeing in-person instruction, and it found nothing in NYU's marketing and recruitment materials supporting such a guarantee. Moreover, the court found that plaintiff's argument was undermined by his "voluntary election to enroll in online courses during the 2020 Summer session with the knowledge that those courses would be conducted remotely."[49] The court also dismissed the unjust enrichment claim, noting that unjust enrichment claims cannot be brought when there is a valid, enforceable contract. "Here, it is undisputed that the parties have a valid contract that governs the relationship between NYU and its students."[50] That same reasoning also compelled dismissal of the money had and received claim, which also does not apply when there is a contract covering the subject matter. As the court explained, "Plaintiff's relationship with NYU is contractual in nature, and the terms of the contract are well established."[51]

Similarly, in *Michel v. Yale University*,[52] the court dismissed breach of contract, unjust enrichment, and Connecticut Unfair Trade Practices Act claims brought by a Yale student on behalf of a putative class seeking tuition refunds because the university shifted from in-person to online instruction in the spring of 2020. The court noted that Yale was not alone in transitioning to online instruction: "[C]olleges and universities across the country closed their doors in the middle of the Spring 2020 semester and migrated course instruction from in-person classrooms to virtual ones," and "[m]any of these institutions … chose not to refund any portion of students' tuition or fees."[53] In rejecting the breach of contract claim, the court noted "Yale's right [under the school's undergraduate regulations] to temporarily suspend—at its 'discretion and judgment'—its operations in response to emergencies."[54] As a result, "the exercise of that authority cannot constitute a breach" of contract.[55] Moreover, the regulation "expressly commits the decision of whether to issue a refund to the University's discretion."[56] And in refusing to find Yale's decision not to refund tuition wrongful, the court said that it "cannot infer that Yale acted with 'dishonest purpose or moral obliquity' simply because it exercised its discretion in a manner that appears to be economically imbalanced to [plaintiff]."[57] Put another way, the court failed to see how Yale's conduct was wrongful. The court also rejected plaintiff's unjust enrichment and Connecticut Unfair Trade Practices claims, the former because it incorporates plaintiff's flawed breach of contract claim, and the latter because plaintiff failed to allege any deceptive practice.

Several other courts have similarly dismissed suits seeking tuition refunds for remote teaching as a result of COVID.[58] In some cases, courts have relied on "reservation of rights"

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[49] *Id.* at 5.
[50] *Id.*
[51] *Id.* at 6.
[52] Michel v. Yale Univ., No. 3:20-CV-01080 (JCH), 2021 WL 2827358 (D. Conn. July 7, 2021).
[53] *Id.* at 3.
[54] *Id.* at 7.
[55] *Id.*
[56] *Id.* at 8.
[57] *Id.*
[58] *See, e.g.*, Barkhordar v. President & Fellows of Harvard Coll., No. 1:20-CV-10968-IT, 2021 WL 2535512 (D. Mass. June 21, 2021) ("[E]ven assuming … that Harvard could reasonably expect that students would understand from general promotional material that they had contracted for in-person instruction and on-campus access during normal times, Spring 2020 was not a normal time."); Hassan v. Fordham Univ., 515 F. Supp. 3d 77 (S.D.N.Y. 2021); Gociman v. Loyola Univ. of Chicago, No. 20 C 3116, 2021 WL 243573 (N.D. Ill. Jan. 25, 2021); Ovoque v. DePaul Univ., 20

clauses that allow colleges and universities to make changes or academic programs in the sole discretion of the school.[59] Like the above cases, plaintiffs could not identify binding commitments guaranteeing in-person instruction, either in individual contracts or in catalogues or other promotional materials.

The decisions are not unanimous, however. Several courts have refused to dismiss breach of contract and unjust enrichment claims, finding it premature to hold that students' expectations of in-person instruction were unreasonable and unsupported.[60] They have done so by focusing on (1) the fact that the school in question normally has both online and in-person instruction and charges less for the former; and/or (2) various statements in the school's marketing and course materials implying that instruction will be in person. These courts emphasize, however, that plaintiffs will need to come forward with evidence in support of their claims or risk an adverse summary judgment ruling.

For instance, in *Metzner v. Quinnipiac University*,[61] the court denied a motion to dismiss, emphasizing that "Quinnipiac charges students significantly less for online degree programs" and that in its marketing and course materials, the school touted its "'state-of-the-art facilities,' 'outdoor spaces,' 'classroom and immersive experiential learning,' and 'the beauty of New England.'"[62] The court cautioned, however, that "discovery may ultimately defeat Plaintiffs' ability to demonstrate the existence of an express or implied contract" based on marketing and course materials.[63]

Similarly, in *Ford v. Rensselaer Polytechnic Institute*,[64] the court denied a motion to dismiss in a tuition refund suit, relying heavily on the fact that "defendant's publications describe a (mandatory) on-campus learning experience that is integral to attending its school."[65] The court also noted that the school "made some bold claims—or plausibly, promises—about its in-person programming and hammered repeatedly on the benefits of those programs in an assortment of circulars and even in its catalog."[66] In ordering that the case proceed to discovery, the court

C 3431, 2021 WL 679231 (N.D. Ill. Feb. 21, 2021); Burt v. Bd. of Trustees of Univ. of Rhode Island, 523 F. Supp. 3d 214 (D.R.I. Mar. 4, 2021).

[59] *See, e.g.,* Dougherty v. Drew Univ., No. CV2100249KMESK, 2021 WL 1422935 (D.N.J. Apr. 14, 2021) (finding that "[t]he transition to virtual education and accompanying campus closure represent a change in the University's academic program that falls within [the] reservation's scope").

[60] Plaintiffs, however, have been almost uniformly unsuccessful in alleging conversion; even courts allowing contract or unjust enrichment claims to go forward reason that a conversion claim cannot succeed because it requires proof of dominion over personal property, which cannot be satisfied given that the failure to provide in-person education is not property and the tuition payments are not an isolated fund . *See, e.g.,* Amable v. New Sch., No. 20-CV-3811 (KMK), 2021 WL 3173739 (S.D.N.Y. July 27, 2021)*;* Hassan v. Fordham Univ., 515 F. Supp. 3d 77 (S.D.N.Y. 2021); Ford v. Rensselaer Polytechnic Inst., 507 F. Supp. 3d 406 (N.D.N.Y. 2020). Similarly, claims based on "educational malpractice" have failed because of the great deference afforded to colleges and universities in determining the precise educational methods to utilize. Metzner v. Quinnipiac Univ., 528 F. Supp. 3d 15 (D. Conn. 2021); Hassan v. Fordham Univ., 515 F. Supp. 3d 77; Gociman v. Loyola Univ. of Chicago, No. 20 C 3116, 2021 WL 243573 (N.D. Ill. Jan. 25, 2021).

[61] Metzner v. Quinnipiac Univ., 528 F. Supp. 3d 15 (D. Conn. 2021).

[62] *Id.* at 33.

[63] *Id.* at 34.

[64] Ford v. Rensselaer Polytechnic Inst., 507 F. Supp. 3d 406 (N.D.N.Y. 2020).

[65] *Id.* at 414.

[66] *Id.* at 416.

recognized that the school's "shutdown was necessitated by acts of nature and government well beyond its control," and that "it may have been in an impossible position."[67] Yet, despite its recognition that defendant was trying to deal with a difficult situation, the court noted that "plaintiffs did not ask for their lives to be disrupted on a mass scale either."[68] Other cases with similar reasoning can be found.[69] In addition, some courts have denied motions to dismiss with respect to fees, while dismissing the more potentially lucrative claims for tuition reimbursement.[70]

Taken as a whole, these cases pose a major uphill battle for plaintiffs. Even those courts that refuse to grant motions to dismiss caution that plaintiffs have a long road to recovery. And absent clear evidence that the colleges and universities are reneging on actual promises to provide in-person instruction, it is difficult to imagine many of these cases surviving summary judgment and trial.

2. Class Certification Rulings

There have been few class certification rulings thus far in the tuition reimbursement context, and they provide no basis, standing alone, for any generalizations. One court granted class certification [71] and another denied class certification because of definitional issues.[72] A third rejected a defendant's aggressive efforts to circumvent a full-blown class certification proceeding by moving to strike class allegations on the pleadings.[73]

In *Cross v. University of Toledo,*[74] an Ohio state court case, the court granted certification of three classes—a tuition class, a room and board class, and a fee class—all relating to the spring 2020 semester. The classes included all individuals who were charged or paid for the costs or fees at issue, and the court raised no concern about the inclusion of non-students who actually paid the costs on a student's behalf. The court found that the requirements of Ohio's class action rule (which is similar to the Federal Rule) were all met. The court concluded that the question of whether reimbursement of costs and fees was appropriate was the same for the class as a whole, and that "a class action would achieve economies of time, expense and effort, as well as promote a uniformity of decisions relative to similarly situated persons."[75]

In *Little v. Grand Canyon University,*[76] the court denied class certification but did so solely because of concerns about the class definition, not about whether common issues were present. The class was defined to "include[] persons who could not have been harmed by Defendant's allegedly unlawful conduct," such as "employees, parents, friends, relatives, or anyone else who

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[67] *Id.* at 422.
[68] *Id.*
[69] *See, e.g., In re* Boston Univ. COVID-19 Refund Litig., 511 F. Supp. 3d 20 (D. Mass. Jan. 7, 2021); Omori v. Brandeis Univ., No. CV 20-11021-NMG, 2021 WL 66443 (D. Mass. Jan. 7, 2021) (relying on the fact that the school charged less for online programs).
[70] *See, e.g.*, Dougherty v. Drew Univ., No. CV2100249KMESK, 2021 WL 1422935 (noting that, unlike tuition claims, claims for fees do not "go to the core of the university's pedagogical mission").
[71] Cross v. Univ. of Toledo, 2021 Ohio Misc. LEXIS 43 (Ohio Ct. Claims April 26, 2021).
[72] Little v. Grand Canyon Univ., No. CV-20-00795-PHX-SMB, 2021 WL 4263715 (D. Ariz. Sept. 20, 2021).
[73] Gibson v. Lynn Univ., Inc, No. 20-CIV-81173-RAR, 2021 WL 1109126 (S.D. Fl. Mar. 23, 2021).
[74] *Cross*, 2021 Ohio Misc. LEXIS 43.
[75] *Id.* at 12.
[76] *Little v. Grand Canyon Univ.*, No. CV-20-00795-PHX-SMB, 2021 WL 4263715.

potentially paid for tuition on behalf of a student, even though "[s]uch third parties, unlike students, have not entered into contracts with [Grand Canyon University]."[77] Such parties, the court held, would lack standing to sue because they were not parties to the contract. As a result, the class was "overbroad in that the definition includes numerous individuals who lack standing to sue."[78] Plaintiff did not propose alternative definitions, and the court "decline[d] to craft new definitions on its own without proposed alternative definitions from Plaintiff."[79]

In *Gibson v. Lynn University, Inc.*,[80] the court rejected defendant's motion to strike the class action allegations. The court noted that it was rare to reject a class action without considering a motion brought by plaintiff, and it "disagree[d] [with defendant] that it would be impossible for Plaintiff's proposed class to satisfy the commonality and predominance requirements."[81] The court noted that "it appears that questions concerning what the operative contractual terms are between Lynn and its students may be capable of class-wide proof," and the court was not "convinced that Plaintiff's contractual claims would necessarily require delving into the individual state of mind of each student."[82] The court was "also unpersuaded that the potential for individualized damages issues makes class certification impossible in this case."[83] While plaintiff's burden was minimal because of the defendant's aggressive strategy of trying to circumvent a full-blow class certification proceeding, the court certainly suggests that there were non-frivolous arguments supporting class certification.

Courts that have dismissed tuition reimbursement claims under Rule 12(b)(6) have no occasion to address class certification. Moreover, although the class certification decisions to date yield few insights, my prediction is that courts that allow such cases to go forward beyond a motion to dismiss will opt to certify class actions as well. Class certification would seem to follow as a matter of course, because presumably the contracts, marketing, and course materials are the same (or very similar) for all or most class members. Indeed, the ruling in *Gibson v. Lynn University* denying defendant's motion to strike class allegations followed the court's ruling, four months earlier, denying defendant's motion to dismiss. Although there might be some individualized issues if class members in a particular case are relying on specific promises or representations made only to them, the cases typically rely on widely disseminated marketing and course materials, or on a two-tiered pricing system for online and in-person classes, and those facts are almost certainly the same for the class as a whole. Thus, courts that are persuaded to deny motions to dismiss in tuition refund cases are also highly likely to grant class certification.

C. Prison and Immigration Detention Cases

It is the duty of the "government to provide conditions of reasonable health and safety to people in its custody."[84] Based on that duty, convicted prisoners, pretrial detainees, and detained

[77] *Id.* at 2.
[78] *Id.*
[79] *Id.* at 3.
[80] *Gibson v. Lynn Univ., Inc.,* No. 20-CIV-81173-RAR, 2021 WL 1109126.
[81] *Id.* at 4.
[82] *Id.* at 5.
[83] *Id.*
[84] Roman v. Wolf, 977 F.3d 935, 943 (9th Cir. 2020), *citing* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989). *Accord, e.g.*, Helling v. McKinney, 509 U.S. 25, 35 (1993) (holding that prisoner exposure

immigrants have all filed putative class action lawsuits alleging that officials have failed to protect them from COVID. For convicted prisoners, the Eighth Amendment's cruel and unusual punishment clause applies to health risk claims. There are two elements to such a claim: an objective component and a subjective component. Under the objective component, a prisoner must show "an objectively intolerable risk of harm."[85] The subjective component requires a showing that the prison official acted with "deliberate indifference."[86] For federal pretrial detainees raising health risk claims, the Fifth Amendment Due Process Clause applies, and for state pretrial detainees, the Fourteenth Amendment Due Process Clause applies, but in all three scenarios the same two-part objective/subjective test is controlling.[87] Moreover, Fifth Amendment Due Process health risk claims by immigration detainees are also governed "under the same rubric as Eighth Amendment claims brought by prisoners."[88] Thus, it is not surprising that the rulings in the prison context and those in the immigrant detention context employ virtually identical reasoning.

With respect to the objective prong, courts agree "that infectious diseases generally and COVID-19 specifically can pose a risk of serious and fatal harm" to detained populations.[89] Where courts are sharply divided is whether the plaintiffs have made a sufficient showing of the subjective element—deliberate indifference—to warrant preliminary or permanent injunctive relief. To show deliberate indifference, plaintiffs must show that the official "knows of and disregards an excessive risk to inmate health or safety," and this showing requires proof of a "state of mind more blameworthy than negligence."[90] In short, the critical focus is on the wrongdoing of the defendant. In many of the COVID prison and immigration detention cases, courts have addressed class certification before deciding the injunction issues,[91] or they have addressed class certification and preliminary injunctive relief in a single order.[92]

This Subsection first considers class certification issues in prisoner and immigrant detention cases. It then examines the judicial decisions regarding the appropriateness of injunctive relief.

1. Class Certification

The court's task at class certification is informed by well-established authority. A case alleging mistreatment or unsafe conditions in a prison or immigration detention facility is a

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to second-hand smoke can form the basis of an Eighth Amendment claim against prison officials); Farmer v. Brennan, 511 U.S. 825, 832 (1994) (government is constitutionally required to "provide humane conditions of confinement," including "tak[ing] reasonable measures to guarantee the safety of the inmates") (citation omitted).

[85] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[86] *Id.*; *Helling,* 509 U.S. at 29-30.

[87] *See, e.g.,* Cuoco v. Moritsuga, 222 F.3d 99, 106 (2d Cir. 2000*);* Fernandez-Rodriguez v. Licon-Vitale, 470 F. Supp. 3d 323 (S.D.N.Y. 2020).

[88] Villegas v. Metropolitan Gov't, 709 F.3d 563 (6th Cir. 2013).

[89] Smith v. De Wine, 476 F. Supp. 3d 635 (S.D. Ohio 2020).

[90] Farmers, 511 U.S. at 835, 837–38.

[91] *See, e.g., Busby v. Bonner,* 466 F. Supp.3d 821 (W.D. Tenn. 2020) (prison case); *Malam v. Adducci,* 475 F.Supp.3d 721 (E.D. Mich. 2020) (immigration detention case).

[92] *See* Torres v. Milusnic, 472 F. Supp. 3d 713 (C.D.Cal 2020) (granting class certification and preliminary injunction); Maney v. Brown, 516 F. Supp. 3d 1161 (D.Or. 2021) (ordering a preliminary injunction to give vaccines while granting class certification); Money v. Pritzker, 453 F. Supp. 3d 1103 (N.D.Ill. 2020) (failed commonality of class certification and injunction denied for failure to show deliberate indifference).

"textbook example of a claim that belongs as a class action."[93] Because class members seek solely injunctive relief, the applicable class is an injunctive class under Rule 23(b)(2), rather than the more exacting Rule 23(b)(3) class, which applies in suits for damages. Although federal courts have become increasingly hostile to class actions in the past two decades,[94] that hostility is not evident in the COVID prisoner or immigration cases. Those cases involve situations in which the alleged wrongdoing of the defendants is front and center, given that their job is to protect a vulnerable population.

Courts that have addressed the issue have overwhelmingly granted class certification in COVID-related prison cases. As the court noted in *Ahlman v. Barnes,*[95] "[f]ederal judges *around the country* have provisionally certified similar classes of detainees bringing claims arising from the COVID-19 pandemic."[96] In some cases, the defendants offered only weak, pro-forma objections.[97]

The four Rule 23(a) requirements are normally satisfied with little difficulty. First, numerosity under Rule 23(a)(1) is a given in these cases, which typically involve hundreds or thousands of class members.[98] Second, commonality under Rule 23(a)(2) is easily established, even after the Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*,[99] which raised the bar for plaintiffs in showing commonality.[100] For instance, in *Valentine v. Collier,*[101]the court noted that "all class members are subject to the policies … that leave them at high risk of contracting COVID-19,"[102] and that "[s]ome form of coordinated emergency relief was necessary to keep Plaintiffs and other inmates safe."[103] In *Criswell v. Boudreaux,*[104] the court found commonality satisfied because "all members of the Proposed Class 'are subject to the same practices and lack of policies' related to social distancing, testing, and legal visits," and because an overarching issue

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[93] *See Ed Besson, Top 15 High Court Class Action Rulings Of the Past 15 Years, LAW360* (June 29, 2015), *https://www.*law360.com/articles/671772 (interview with Professor Samuel Issacharoff, in which he also describes *Brown v. Plata,* 563 U.S. 493 (2011), a class action that successfully demonstrated prison overcrowding, as "[t]he most significant class action case from [the Supreme Court]").

[94] *See* Robert Klonoff, *The Decline of Class Actions,* 90 Wash. U. L. Rev. 729 (2013).

[95] Ahlman v. Barnes, 445 F. Supp. 3d 671 (C.D. Cal. 2020).

[96] *Id.* at 684 (citing cases) (emphasis added). *Accord, e.g.,* Criswell v. Boudreaux, 2021 U.S. Dist. LEXIS 56141 (E.D. Cal. Mar. 24, 2021) ("[S]everal district courts have provisionally certified classes of detained and incarcerated individuals seeking preliminary injunctive relief related to their conditions of confinement and detention during the COVID-19 pandemic.").

[97] *See, e.g.,* Malam v. Adducci, 475 F. Supp. 3d 721 (E.D. Mich. 2020) (granting class certification where defendant conceded a number of the requirements); Criswell v. Boudreaux, 2020 WL 5235675, 15 (E.D. Cal. 2020) ("Defendant does not meaningfully oppose plaintiffs' argument" for certifying a Rule 23(b)(2) class).

[98] *See, e.g.,* Maney v. Brown, 516 F. Supp. 3d 1161, 1173 (D. Or. 2021) (finding numerosity based on a class of 10,400 members). Moreover, "'where the relief sought is 'only injunctive or declaratory,' the numerosity requirement is somewhat relaxed, and 'even speculative or conclusory allegations regarding numerosity' are sufficient to permit certification." Fraihat v. U.S. Immig. and Customs Enf't, 445 F. Supp. 3d 709, 736–37 (C.D. Cal.2020) (citing Sueoka v. United States, 101 F. App'x 649, 653 (9th Cir. 2004)), *rev'd on other grounds,* Fraihat v. U.S. Imigr. and Customs Enf't, 16 F.4th 613 (9th Cir. 2021).

[99] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[100] See Klonoff, *supra* note 94, at 774–76.

[101] 2020 WL 3419999 (S.D. Tex. 2020).

[102] *Id.* at 9.

[103] *Id.* at 6.

[104] Criswell v. Boudreaux, 2020 WL 5235675 (E.D. Cal. 2020).

existed regarding "whether defendant's failure to reduce overcrowding and to provide testing exposes class members to a heightened risk of serious illness and death in violation of the Eighth and Fourteenth Amendments."[105]

Third, typicality under Rule 23(a)(3) is readily satisfied because the class representatives are carefully selected by class counsel from the larger prison population, and they normally raise no unique or atypical issues or claims.[106]

Fourth, adequacy of representation under Rule 23(a)(4) is readily satisfied. The class representatives in the prison cases have presented no concerns in terms of their willingness and ability to advocate for the class, and they have not had disabling conflicts of interest.[107] Similarly, class counsel have easily passed the adequacy threshold, with courts highlighting the class action experience of class counsel.[108]

The requirements for Rule 23(b)(2) have also been easily satisfied in prison cases. Courts have recognized that the prison cases seek broad injunctive and declaratory relief, precisely what Rule 23(b)(2) is designed to accomplish. As one court succinctly noted, "Defendants' actions and inaction apply to the class generally[.]"[109]

Courts in immigration detention cases have similarly had no difficulty finding that the requirements of Rule 23(a) and Rule 23(b)(2) have been met.[110] They have found numerosity, typicality, and adequacy of representation satisfied with little analysis.[111] Likewise, courts have had no difficulty identifying important common questions. For instance, in *Fraihat v. U.S. Immigration & Customs Enforcement,*[112] the court explained that "the common question driving this case is whether Defendants' system-wide response—or lack of one—to COVID-19 violates Plaintiffs' rights."[113] It noted that "[o]ne shared factual question is … what, if any, nationwide measures ICE has taken in response to COVID-19 to protect the health of vulnerable immigration detainees and whether those measures are legally sufficient. The existence, scope, and adequacy of those measures are central to all of Plaintiffs' claims."[114]

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[105] *Id.* at 13.

[106] *See, e.g., id.* at 14; Maney v. Brown, 516 F. Supp. 3d 1161, 1176 (D. Or. 2021) ("Both representatives are currently [adult in custody] and are subject to substantial risk of exposure to COVID-19, and challenge the same process regarding Defendants' failure to prioritize vaccine doses to [adults in custody]"); Busby v. Bonner, 466 F.Supp.3d 821, 833 (W.D.Tenn. 2020) (also finding typicality satisfied).

[107] *See, e.g., Maney*, 516 F. Supp. 3d at 1776*; Busby*, 466 F. Supp. 3d at 833; Torres v. Milusnic, 472 F. Supp. 3d 713, 745 (C.D. Cal 2020).

[108] *See Maney*, 516 F. Supp. 3d at 1776; *Busby*, 466 F. Supp. 3d at 833; *Torres*, 472 F. Supp. 3d at 745.

[109] *Maney*, 516 F. Supp. 3d at 1777.

[110] *See, e.g.,* Malam v. Adducci, 475 F. Supp. 3d 721 (E.D.Mich. 2020) (granting noncitizen detainees in ICE custody class certification); Savino v. Souza, 453 F. Supp. 3d 441, 450 (D. Mass. 2020) (same); Coreas v. Bounds, 2020 WL 5593338, 14 (D. Md. 2020) (same).

[111] *See, e.g.*, Fraihat. U.S. Immigr. and Customs Enf't, 445 F. Supp. 3d 709 (C.D. Cal.2020), *rev'd on other grounds*, Fraihat v. U.S. Immigr. and Customs Enf't, 16 F.4th 613 (9th Cir. 2021).; Gayle v. Meade, 2020 WL 3041326, at 1 (S.D. Fla. 2020).

[112] *Fraihat*, 445 F. Supp. 3d 709, *rev'd on other grounds*, 16 F.4th at 651 (vacating preliminary injunction and all order premised on it as "considerably more" than the inherent risks of COVID must be shown).

[113] *Id.* at 737.

[114] *Id.*

In the rare cases in which the Rule 23 issues have squarely reached the appellate courts, those courts have upheld class certification, sometimes in very conclusory rulings.[115] For instance, in *Roman v. Wolf,*[116] the Ninth Circuit concluded in a single paragraph that the district court did not err in certifying a class of all Adelanto detainees. According to the Ninth Circuit, "[t]he alleged due process violations exposed *all* Adelanto detainees to an unnecessary risk of harm, not only those who are uniquely vulnerable to COVID-19 or who are not subject to mandatory detention."[117] Citing *Brown v. Plata,*[118] as well as Ninth Circuit authority, the court referenced strong precedent upholding the suitability of class certification under Rule 23(b)(2) for constitutional attacks relating to inmate health and safety, such as "prison overcrowding."[119]

To be sure, there are isolated cases denying class certification in prison and immigration detention COVID cases. For instance, in *Money v. Pritzker,*[120] the court found that commonality was lacking because any decision on whether vulnerable inmates should be transferred or released "'would require 'individualized safety assessments' and 'approve[d] home sites.'"[121] In *C.G.B. v. Wolf,*[122] the court denied class certification in a suit by a putative class of transgender people seeking immediate release from immigration detention facilities because of the risk of COVID, reasoning that class members differed in age and medical conditions and were dispersed at numerous detention facilities. And in *Thakker v. Doll,*[123] the court declined to certify a class of immigration detainees across central Pennsylvania because the class representatives and class members "are housed at different facilities," are "subject to different infection control procedures," and "allege a wide variety of medical conditions that give rise to vastly differing COVID-19 risk profiles."[124]

2. Merits Rulings[125]

[115] The only exceptions are cases in which the appellate court has overturned an injunction; in that situation, the court has sometimes vacated the corresponding class certification order. *See, e.g., Faour Abdallah Fraihat v. U.S. Immigration and Customs Enforcement,* 977 F.3d 935, __ (9th Cir. 2021) (vacating class certification order not because of failure to satisfy Rule 23 but because class certification was premised on the granting of a classwide preliminary injunction).

[116] Roman v. Wolf, 977 F.3d 935 (9th Cir. 2020).

[117] *Id. at 944* (emphasis in original).

[118] Brown v. Plata, 563 U.S. 493, 502 (2011).

[119] *Roman*, 977 F.3d at 941.

[120] Money v. Pritzker, 453 F. Supp. 3d 1103 (N.D. Ill. 2021).

[121] *Id.* at 1127 (citation omitted).

[122] C.G.B. v. Wolf, 464 F. Supp. 3d 174 (D.D.C. 2020).

[123] Thakker v. Doll, 336 F.R.D. 408 (M.D. Pa. 2020).

[124] *Id.* at 416. *See also, e.g.*, Wragg v. Ortiz, 462 F. Supp. 3d 476 (D.N.J. 2020) (denying class certification because "the Court would be required to engage in an intensive, multi-step individualized inquiry as to whether each prisoner met the criteria for conditional release").

[125] In this context, unlike the business interruption and insurance and tuition refund cases, the prison and immigration detention cases usually proceed directly to preliminary injunctive relief, without prior motions to dismiss. It would be virtually impossible for a prison or immigration detention facility to successfully argue that a COVID-related complaint should be dismissed on the pleadings, given the extensive allegations that normally accompany such complaints and the clear legal duty of the institutions to protect their populations.

As noted,[126] prisons and immigration detention facilities are responsible for protecting the health and safety of their populations.[127] Here, COVID is the situation that poses the risk, but in that sense, the duty of the prison or immigration detention facility is no different than it would be to protect their populations from dangerous chemicals or second-hand smoke, both of which are well established situations requiring protection of inmates.[128] Put another way, based on the evidence, prison and immigration officials can clearly be upstream wrongdoers, with COVID merely serving as the context of the wrongdoing. Not surprisingly, therefore, plaintiffs have been successful in securing injunctive relief if they can show that the government officials were deliberately indifferent to maintaining a safe environment. Yet, as discussed below, even in prison and immigrant detention cases, plaintiffs have frequently failed to secure injunctive relief because some courts—including a number of appellate courts—have determined that the officials acted in good faith by taking specific steps to address the dangers imposed by COVID.

As noted,[129] in both prison and immigration detention cases, the courts have almost all found the objective component of relief to be satisfied because "an inmate can face a substantial risk of serious harm in prison from COVID-19 if a [facility] does not take adequate measures to counter the spread of the virus."[130] Moreover, numerous courts have found the subjective "deliberate disregard" test to be satisfied as well and have ordered robust relief. For example, in *Torres v. Milusnic,*[131] the court—after certifying a class of prisoners at Lompoc federal prison age 50 or over or those suffering from specified underlying conditions—determined that preliminary injunctive relief was warranted. The court found that the Lompoc federal prison "fail[ed] to take reasonable measures to promptly review and grant requests for compassionate relief or move for compassionate relief on behalf of Lompoc inmates to reduce the inmate population at Lompoc" and that this failure to act "demonstrate[d the prison's] deliberate indifference to inmates' risk of severe illness or death from COVID-19."[132] The court ordered broad preliminary injunctive relief, including requiring the facility to determine prisoner eligibility for home confinement and adopting criteria for compassionate release. Similarly, in *Martinez-Brooks v. Aster,*[133] the court held that Danbury federal prison "acted with deliberate indifference to the risk posed by COVID" by "fail[ing] to transfer medically vulnerable prisoners from … Danbury to home confinement 'in any meaningful numbers. ...'"[134]

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[126] *See* __, *supra.*

[127] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989).

[128] *See, e.g.,* Helling v. McKinney, 509 U.S. 25, 35 (1993) (holding that prisoner exposure to second-hand smoke can form the basis of an Eighth Amendment claim against prison officials); Thomas v. Bryant, 614 F.3d 1288, 1317 ("repeated use of chemical agents on Thomas and McKinney violated the Eighth Amendment").

[129] *See* __, *supra.*

[130] Chunn v. Edge, 465 F. Supp. 3d 168, 200 (E.D.N.Y. 2020); *accord, e.g.,* Fernandez-Rodriguez v. Licon-Vitale, 470 F. Supp. 3d 323, 351 (S.D.N.Y. 2020) ("Many courts have found that prisons exposed to the novel coronavirus present conditions that meet the objective prong of the constitutional analysis.") (citing cases); Smith v. DeWine, 476 F. Supp. 3d 635, 662 (S.D. Ohio 2020) ("This Court agrees with the other district courts across the country who have found COVID-19 to be an objectively intolerable risk of harm to prisoners when it enters a prison.") (citing authority).

[131] Torres v. Milusnic, 472 F. Supp. 3d 713 (D. Or. 2020) (magistrate ruling), *aff'd by the district court*, Torres v. Milusnic, 2021 WL 3829699 (D. Or. 2021).

[132] *Id.* at 740.

[133] Martinez-Brooks v. Aster, 459 F. Supp. 3d 411 (D. Conn. May 12, 2020).

[134] *Id.* at 441. *Accord, e.g.,* Torres v. Milusnic, 472 F. Supp. 3d 713 (C.D.Cal 2020); Cameron v. Bouchard, 462 F.Supp.3d 746, 778–79 (E.D. Mich. 2020) (given the "medically-vulnerable population's unique, specific, and life-threatening susceptibility to COVID-19—paired with the communal nature of jail facilities, the Court finds that home confinement or early release is the only reasonable response").

As with the prison cases, numerous district courts have granted wide-ranging injunctive relief in immigration detention cases. For instance, in *Gayle v. Meade*,[135] the district court's preliminary injunction included numerous requirements: "providing [the class representatives] and the class members with unrestricted access to hand soap, hand sanitizer, and disposable hand towels"; "[p]roviding cleaning supplies for each housing area," including "CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning," "provid[ing] new gloves and masks for each inmate" when "they are cleaning or performing janitorial services"; "provid[ing] all inmates and staff members with masks" and with education on their proper use; increasing the frequency of "cleaning and disinfecting of all common areas and surfaces"; "[l]imiting transportation of detainees to only instances regarding immediately necessary medical appointments and release from custody"; and providing education and posting signage regarding ways to protect against COVID.[136]

In some instances, federal appellate courts have largely upheld the preliminary injunction rulings of the district courts. For example, *Roman v. Wolf*[137] was brought as a putative class action on behalf of 1,370 detainees at the Adelanto Immigration and Customs Enforcement Process Center (Adelanto) alleging that they were placed at grave risk of contracting COVID. After certifying a class, the district court issued a preliminary injunction requiring numerous safety measures to address COVID-related risks, including sanitation measures and social distancing. The Ninth Circuit held that the district court did not abuse its discretion in ordering preliminary injunctive relief, given the district court's detailed factual findings (including lack of quarantining, unsanitary conditions, and lack of social distancing) that the government did not challenge as clearly erroneous. The appellate court found that Adelanto's "inadequate response reflected a reckless disregard for detainee safety."[138]

Similarly, in *Zepeda Rivas v. Jennings*,[139] immigration detainees filed a class action challenging conditions at Messa Verde Detention Facility and Yuba County Jail. The district court granted preliminary injunctive relief, concluding that plaintiffs showed a likelihood of success as of the time the court's temporary restraining order was entered. On appeal, the Ninth Circuit affirmed. It cited the district court's finding that "COVID-19 posed grave health risks," making the facilities "a 'tinderbox' of COVID-19 transmission," and it highlighted the district court's conclusion that the facility had taken only "modest measures in response to the pandemic," even

[135] Gayle v. Meade, 2020 WL 3041326 (S.D. Fla. 2020).

[136] *Id.* at 23. *Accord, e.g.,* Ahlman v. Barnes, 445 F. Supp. 3d 671, 694 (C.D.Cal 2020) (granting injunction requiring compliance with CDC guidelines for social distancing and sanitary practices while denying request for release); Maney v. Brown, 516 F. Supp. 3d 1161, 1185 (D. Or. 2021) (ordering "that Defendants shall offer all AICs ... a COVID-19 vaccine"); Chatman v. Otani, 2021 WL 2941990, (D. Haw. 2021) (requiring greater intake screening, social distancing measures, and sanitary living conditions).

[137] *Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2020) (per curiam).

[138] *Id.* at 943. The court did, however, vacate parts of the district court's order requiring specific measures tailored to conditions at Adelanto in April 2020. The court indicated that the government was taking specific steps to address COVID risks, including COVID testing of all Adelanto detainees, and that the injunction thus "no longer reflect[ed] the current realities at Adelanto." *Id.* at 945.

[139] Zepeda Rivas v. Jennings, 845 F. App'x 530 (9th Cir. 2020) (per curiam).

though "COVID-19 posed a serious health-risk to all detainees—not only those in high-risk categories."[140]

On the other hand, a number of district courts have found—based on the conduct of prison and immigration detention officials to address COVID—that those officials did not act with deliberate indifference. Again, the rulings adverse to prisoners are supported by extensive fact finding. Although these courts use different formulations, the thrust of each decision is that the facility acted in good faith by taking specific, identifiable steps to reduce the health risks of COVID. For instance:

- "The evidence shows that [prison] officials have been acting urgently to prevent COVID-19 from spreading and from causing harm. [They] … have imposed dozens of measures … [and] are 'trying, very hard, to protect inmates against the virus and to treat those who have contracted it' …."[141]

- "There is no dispute … that Defendants have enacted various policies in response to the risks posed by COVID-19," and "[t]he very fact that Defendants have enacted such policies supports that they have not been subjectively indifferent to the risks posed by COVID-19 to plaintiffs …."[142]

- "[T]he warden has implemented a number of policy changes," which "show that the prison's good faith efforts to improve its response—even if it was initially deficient … — is enough to demonstrate that a petitioner is unlikely to succeed in showing deliberate indifference."[143]

In addition, notwithstanding voluminous district court findings supporting deliberate indifference, several federal courts of appeal have reversed district court injunctions in both prison and immigration detention cases. In each case, the rationale for reversal has been the same: Contrary to the district court's findings, the evidence showed that the prisons were indeed making substantial efforts to protect the safety of their residents, which belied a claim that they were "deliberately indifferent" to the health and safety of the institutions. In some instances, the appellate decisions have provoked vigorous dissents—which attempt to refute the notion that the officials were genuinely taking adequate and effective measures to combat COVID in their institutions. These appellate decisions are thorough and are worth examining in some detail.

In *Wilson v. Williams*,[144] inmates at Elkton Federal Correctional Institution sought a preliminary injunction to reduce the population and allow for proper social distancing. The district court agreed, stating that "[o]ne only need look at Elkton's testing debacle for one example. ... Additionally, Elkton has altogether failed to separate its inmates at least six feet apart, despite clear

[140] *Id.* at 534.
[141] Chunn v. Edge, 465 F. Supp.3d 168, 202–03 (E.D.N.Y. 2020) (citations omitted).
[142] Lucero-Gonzales v. Kline, 464 F. Supp. 3d 1078, 1090 (D. Ariz. 2020).
[143] Fernandez-Rodriguez v. Licon-Vitale, 470 F. Supp. 3d 323, 353–54 (S.D.N.Y. 2020); *accord, e.g.*, Plata v. Newsome, 445 F. Supp. 3d 557, 564 (N.D. Cal. 2020) (noting numerous measures to protect the health of prisoners); Alcantara v. Archambeault, 462 F. Supp. 3d 1073, 1076–77 (S.D. Cal. 2020) (noting steps to protect health of immigration detainees).
[144] Wilson v. Williams, 455 F. Supp. 3d 467 (N.D. Ohio 2020).

CDC guidance."[145] The Sixth Circuit reversed, noting that "while the harm imposed by COVID-19 on inmates at Elkton 'ultimately [is] not averted,' the BOP has 'responded reasonably to the risk' and therefore has not been deliberately indifferent to the inmates' Eighth Amendment rights."[146] Chief Judge Cole dissented, reasoning that "the BOP's failure to make use of its home confinement authority at Elkton, even as it stared down the escalating spread of the virus and a shortage of testing capacity, constitutes sufficient evidence for the district court to have found that petitioners were likely to succeed on their Eighth Amendment claim."[147]

Soon thereafter, the Sixth Circuit reversed another preliminary injunction. In *Cameron v. Bouchard*, five pretrial detainees or prisoners brought a putative class action claiming that the Oakland County, Michigan Jail was deliberately indifferent to the risks posed by COVID-19 at the jail. The district court agreed that plaintiffs were likely to succeed in showing deliberate indifference and ordered the facility to adopt myriad protective measures. On appeal, the Sixth Circuit reversed.[148] It held that plaintiffs could not satisfy the deliberate indifference standard because "the steps that jail officials took to prevent the spread of COVID-19 were reasonable."[149] The court described those steps in great detail; they included circulating a mailing to staff about proper cleaning procedures; halting all visitation; quarantining new arrestees for 14 days; quarantining anyone with COVID symptoms; offering masks and medical treatment to all prisoners; canceling group activities; giving prisoners access to a disinfectant that works against COVID; providing COVID testing access to all prisoners; and several other measures. The court again found that such steps showed that plaintiffs were unlikely to succeed on the merits.[150] Chief Judge Cole dissented, reasoning that the majority had improperly reweighed the factual findings by the district court, which included specific incidents in which inmates were exposed to serious safety risks.[151] As one example, Chief Judge Cole noted evidence that officials altered their practices for the sole purpose of an inspection of the jail only to return to unsafe practices when the inspection concluded.[152] As another example, he noted that the record showed "that officials threatened to punish complaining inmates by transferring them to areas of the Jail that were infested with COVID-19."[153] He also noted that "common areas are rarely—if ever—cleaned" and "that use of personal protective equipment by Jail officials has been, at best, sporadic," and that inmates were moved between cells "without regard for whether an inmate [was] symptomatic …."[154]

In *Valentine v. Collier*,[155] a putative class action was brought by inmates against the Wallace Pack Unit (Pack Unit), a state geriatric prison run by the Texas Department of Criminal

[145] *Id.* at 479. Elkton facility expected to receive only 25 tests a week, despite having 2,400 inmates. Id. at 471.
[146] Wilson v. Williams, 961 F.3d 829, 841 (6th Cir. 2020) (citation omitted).
[147] *Id.* at 847.
[148] Cameron v. Bouchard 815 Fed.Appx. 978, 983 (6th Cir.2020).
[149] *Id.* at 985.
[150] The court noted that the facts were similar to those in *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), in which the Sixth Circuit vacated a preliminary that had required various steps to prevent inmates from COVID-19, finding that the steps taken by the prison showed that plaintiffs were not likely to succeed on the merits. It rejected plaintiffs' arguments in *Cameron* for attempting to distinguish *Wilson.*
[151] *Cameron*, 815 Fed.App'x at 990.
[152] *Id.* at 991.
[153] *Id.* at 991–92.
[154] *Id.* at 991.
[155] Valentine v. Collier, 455 F. Supp. 3d 308 (S.D. Tex. 2020).

Justice and comprised of inmates over age 65 and others with significant health issues. The complaint alleged, *inter alia,* that the prison—in violation of the Eighth Amendment—failed to provide hand sanitizer or disposable paper towels, did not enforce six feet social distancing, and failed to provide inmate janitors with clean masks and gloves. The district court granted a preliminary injunction. Two days later, the Fifth Circuit unanimously stayed the preliminary injunction pending appeal.[156] The Fifth Circuit concluded that "the evidence shows that [the Texas Department of Criminal Justice (TDCJ)] has taken and continues to take measures—informed by guidance from the CDC and medical professional—to abate and control the spread of the virus."[157] Plaintiffs thereafter applied to the Supreme Court to vacate the Fifth Circuit's stay, but the Court denied the application without comment.[158] Justice Sotomayor, writing for herself and Justice Ginsburg, filed a "statement" (not a dissent) "to highlight the disturbing allegations presented below"—including the dramatic increase in the number of inmates testing positive for COVID—and to note their expectation that "courts will be vigilant in protecting the constitutional rights of those like applicants[.]"[159]

The district court subsequently granted class certification,[160] and thereafter conducted an 18-day bench trial on plaintiffs' request for a permanent classwide injunction. After the trial, the district court issued lengthy findings detailing the continued safety issues at the prison and held that a permanent injunction was warranted. Again, the Fifth Circuit rejected the district court's analysis, this time overturning the permanent injunction.[161] It determined that the prison had in fact taken numerous important steps to protect the inmates, noting that "this litigation generally and the district court's careful management and expedited handling of the case played a role in motivating the prison officials into action and saved countless lives."[162]

In *Swain v. Junior,*[163] a class of medically vulnerable inmates challenged the conditions at Miami's Metro West Detention Center and alleged that prison officials displayed deliberate indifference by not practicing social distancing when feasible and failing to provide adequate cleaning or personal sanitation supplies. The district court granted a preliminary injunction, finding that the rate of COVID infections in the prison had increased significantly and that social distancing was not occurring. It ordered numerous measures, including (among others) social distancing to the extent feasible and ensuring that "all inmates have access to testing, protective masks, cleaning and hygiene supplies, and adequate medical care."[164] In a split decision, the Eleventh Circuit reversed. Quoting testimony by an expert commissioned by the district court, the appellate court noted that prison officials "'should be commended for their commitment to protect the staff and the inmates.'"[165] At bottom, the court "simply [could not] conclude that, when faced with a perfect storm of a contagious virus and the space constraints inherent in a correctional

[156] Valentine v. Collier, 956 F.3d 797 (5th Cir. 2020).
[157] *Id.* at 802.
[158] Valentine v. Collier, 140 S. Ct. 1598 (2020).
[159] *Id.* at 1598, 1601.
[160]Valentine v. Collier, 2020 WL 3491999 (S.D. Tex. 2020).
[161] Valentine v. Collier, 993 F.3d 270 (5th Cir. 2021).
[162] *Id.* at 289.
[163] Swain v. Junior, 961 F.3d 1276 (11th Cir. 2020).
[164] *Id.* at 1284.
[165] *Id.* at 1288 (quoting expert report).

facility, the defendants here acted unreasonably by 'doing their best.'"[166] Judge Martin dissented, arguing that the "repeated failures to enact adequate social distancing measures documented in the declarations [submitted by plaintiffs] are sufficient to demonstrate a systemic, institutional pattern of deliberate indifference."[167]

In *Mays v. Dart,*[168] a class of present and future detainees at Cook County Jail sued claiming that the facility failed to provide them with "reasonably safe living conditions as the pandemic rages."[169] In granting a preliminary injunction, the district court mandated procedures to ensure social distancing throughout the prison. The prison had opposed, arguing that it had "taken substantial steps to implement social distancing, and that further steps were impossible."[170] The district court focused solely on social distancing, and did not address other responses that the prison made to COVID. The Seventh Circuit unanimously reversed. It found that the district court "erred by narrowly focusing … almost exclusively on social distancing instead of considering the totality of facts and circumstances, including all of the Sheriff's conduct in responding to and managing COVID-19."[171] It noted that such "substantial efforts" included opening shuttered divisions of the Jail, creating new single-cell housing, and decreasing the capacity of dormitories," as well as "extensive other measures to prevent and manage the spread of COVID-19 at the Jail."[172]

Finally, in *Faour Abdallah Fraihat v. U.S. Immigration and Customs Enforcement,*[173] plaintiffs filed a putative class action challenging deliberate indifference to medical needs at the approximately 250 U.S. Immigration and Customs Enforcement (ICE) facilities nationwide. After certifying two nationwide subclasses involving individuals with heightened risk factors, the district court issued a preliminary injunction mandating numerous COVD-related measures, including tracking all detainees with risk factors, making prompt custody determinations for detainees with risk factors, and issuing a comprehensive Performance Standard covering COVID- related issues. In a lengthy split decision, the Ninth Circuit reversed. The court noted that "ICE in the spring of 2020 (and earlier) took steps to address COVID-19."[174] In particular, ICE "provided a detailed set of directives on a host of topics relevant to mitigating the risks of COVID-19."[175] Moreover, while the district court cited specific problems in individual detention centers, "the circumstances at individual detention facilities could not justify the broad, nationwide relief that plaintiffs pursued."[176] Judge Berzon dissented, arguing that "ICE did little to carry out the broad, deferential directives issued in April [2020], and the coronavirus spread exponentially among the medically vulnerable members of the Plaintiff subclasses."[177]

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[166] *Id.* at 1289.
[167] *Id.* at 1301.
[168] Mays v. Dart, 974 F.3d 810 (7th Cir. 2020).
[169] *Id.* at 813.
[170] *Id.* at 817.
[171] *Id.* at 819.
[172] *Id.* at 820. The court did, however, affirm portions of the district court's order embodied in an earlier temporary restraining order issued by the district court relating to "sanitation, testing, and providing facemasks," noting that those requirements did not raise the same safety issues as mandating social distancing. *Id.* at 824.
[173] Fraihat v. U.S. Immigr. and Customs Enf't, 16 F.4th 613 (9th Cir. 2021).
[174] *Id.* at __.
[175] *Id.* at 637.
[176] *Id.* at 645 (emphasis in original).
[177] *Id.* at __.

Taken as a whole, these district court and appellate court decisions in both the prison and immigration detention settings reveal judges struggling with whether prison or immigration detention officials were taking sufficient steps to reduce the risks of COVID at their facilities. District judges, hearing the evidence first-hand, have in many cases agreed with the need for injunctive relief, although plaintiffs have not been universally successful. At the appellate level, however, the courts are far more willing to give deference to prison and immigration detention officials, finding that their efforts were made in good faith in the face of an ever-changing and challenging pandemic. One can credibly argue that the appellate courts failed to give sufficient deference to the findings of the district courts, but one thing is certain: the focus of both the district courts and the appellate courts is on whether the defendant institutions and officials have engaged in wrongdoing or were instead trying their best to address the health of their populations during a difficult pandemic. Moreover, the appellate decisions, like the district court opinions, are exhaustive, with extensive citation to, and analysis of, the trial records. In the end, the point on which all of the judges in these cases agree is that the focus must be on whether the facilities have engaged in wrongdoing sufficient to justify injunctive relief.

III. OTHER EXAMPLES OF THE IMPORTANCE ON FOCUSING ON THE DEFENDANT'S CONDUCT

The three categories discussed above are not isolated examples. Analyzing whether the defendant is the active wrongdoer (as opposed to acting in good faith in responding to COVID) can provide a useful benchmark in assessing other categories of COVID cases and offering predictions on their fate. In many of the categories, there have been few decisions either on the merits or at the class certification stage. Nonetheless, based on the few rulings that have been rendered—and a review of various complaints that have been filed— it is possible to reflect on the likely success of other categories of cases (in addition to those that are the focus of this article). To illustrate, I focus on consumer, labor, and securities fraud cases.

A. Consumer Claims

Numerous cases have been filed by consumers alleging that defendants have unfairly sought to profit from COVID, in violation of state consumer protection laws and various common law torts. For example, in *Apaliski v. Molekule, Inc.*,[178] plaintiffs alleged that the defendant promoted and sold air purifiers that were touted, *inter alia*, for their effectiveness in "reduc[ing] the risk of infection" of COVID.[179] Customers brought a class action lawsuit citing consumer tests showing that the defendant's purifier "turned in the worst performance on particulates of any purifier, of any size, of any price, that we have tested in the seven years that we have been producing" reports.[180] One of the reports suggested that in certain respects, the "results look worse than what you see with no purifier running at all."[181] The plaintiffs further cited findings by the Better Business Bureau that defendant's myriad advertising claims were "unsubstantiated" and

[178] *See, e.g.,* Class Action Complaint, Apaliski v. Molekule, Inc., No. 1:21-cv-01548 (D. Del. Nov. 17, 2020).
[179] Id. at 31.
[180] *Id*. at 32.
[181] *Id*. at 33.

should be "withdrawn."[182] The parties reached a settlement any ruling on a motion to dismiss.[183] Nonetheless, the alleged wrongdoing (if true) is an example of direct wrongdoing by the defendant, with COVID merely providing the context.

By contrast, courts have refused to allow consumers to bring claims of deceptive advertising tied to COVID when the product label contained clear warnings about the product's limitations. In *Gudgel v. Clorox Co.*,[184] the court dismissed putative class claims alleging that Clorox's packaging and marketing were misleading consumers to believe that one of its bleach products was "suitable for disinfecting during the pandemic" when in fact, it was not.[185] The court relied on the fact that the label in question explicitly warned that the product was "not for sanitization or disinfection" and contained no misleading words or images that would lead a "reasonable consumer" to believe otherwise.[186]

Another example of COVID allegations that were not based on wrongdoing by defendants is *Ranalli v. Etsy.Com, LLC*.[187] In that case, consumers brought claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) as well as common law claims of unjust enrichment, fraud, and misappropriation/conversion against online distributors of face masks. Before the pandemic, the sale of non-medical face masks at issue were subject to sales tax because the masks were classified as "ornamental wear ... and the use for which consumers purchased nonmedical masks ... was not for an exempt purpose."[188] In response to the pandemic, the Governor of Pennsylvania declared a state of emergency, which included an exemption to paying sales tax on purchases of "medical supplies and/or clothing and accessories."[189] According to plaintiffs, defendants failed to comply with the Governor's mandate and charged plaintiffs sales tax on their purchases of face masks.[190] The court granted the distributors' motion to dismiss all claims with prejudice, based on its finding that *"[i]t is clear that collection of the sales taxes was not for profit or revenue* …."[191] The court emphasized that the tax could not have been appropriated for defendants' use because, "once [plaintiff] paid the sales tax, regardless of whether the tax was imposed correctly, it became property of the commonwealth."[192] Put another way, the defendant was not trying to profit from COVID and the regulations adopted as a result; rather, it was attempting in good faith to comply with the evolving tax law changes directed at the pandemic.

The issue of identifying the true wrongdoer is also illustrated by the competing arguments in *Greenberg v. Amazon.Com Inc.*,[193] in which a motion to dismiss by Amazon is currently pending. In *Greenberg*, customers of the online marketplace brought a putative class action alleging negligence, unjust enrichment, and price gouging in violation of the Washington State

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[182] *Id*. at 36.
[183] *See*, Order Granting Preliminary Approval of Class Action Settlement, Apaliski v. Molekule, Inc., C.A. No. 20-1548-RGA (D. Del. Oct. 12, 2021).
[184] *See, e.g.,* Gudgel v. Clorox Co., 514 F. Supp. 3d 1177, 1182 (N.D. Cal. Jan. 1, 2021).
[185] *Id*.
[186] *Id*.
[187] FULL CITE at 1.
[188] *Id*.
[189] *Id*.
[190] *Id*.
[191] *Id*. at 6 (emphasis added).
[192] *Id*.
[193] 2:21-CV-00898 -RSL (W.D. Wa.).

Consumer Protection Act (WCPA).[194] Specifically, plaintiffs identified price increases ranging from 233% to 1,800% on specific products, supplied by both Amazon and third-party vendors, that were in high demand due to the pandemic.[195] Amazon allegedly "reaped blockbuster profits by charging excessive prices throughout the pandemic … taking advantage of desperate consumers[.]"[196] Amazon filed a motion to dismiss arguing, among other things, that judicial interference with free-market functions, especially in times of emergency, fail to consider the difficulty retailers and suppliers faced in "obtaining raw materials or labor to create the products in highest demand."[197] Judicial intervention thus would have a chilling effect on supply and distribution of the products most needed by consumers.[198] The success of this litigation will depend on the court's assessment of whether Amazon is a wrongdoer here (using COVID to reap unconscionable profits) or is simply responding in good faith to overwhelming consumer demand and passing on price increases that Amazon itself incurred.

In sum, like the three categories discussed in Section I above, consumer cases can be assessed by examining whether the defendant is a wrongdoer or is simply attempting to comply with the challenges triggered by COVID.

B. Labor Cases

One COVID litigation tracker indicates that as of October 2020 there were "4,327 lawsuits (including 451 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus."[199] Some observers believe such cases will continue to be filed in significant numbers throughout 2021.[200] But statistics alone are of limited value; overall numbers belie the wide range of COVID-related labor cases—with some alleging serious wrongdoing by employers, but with others involving employers acting reasonably to protect the health of staff and customers.

Cases raising allegations of direct wrongdoing by defendants include those alleging race discrimination, such as claims that hospitals gave African Americans dangerous assignments, *e.g.*,

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[194] *Greenberg v. Amazon.Com Inc.*, *supra* note __, at 50, 53–54.
[195] The complaint alleged the following price increases:
"•Face Masks: Increases up to 1,800 percent, from $4.21 to $79.99;
•Cold Remedies: Increases up to 1,523 percent, from $4.65 to $79.00;
•Toilet Paper: Increases up to1,044 percent, from $17.48 to $200;
•Pain Reliever: Increases up to 233 percent, from $18.75 to $62.40;
•Black Beans: Increases up to 521 percent, from $3.54 to $21.99;
•Baking Soda: Increases of more than 1,500 percent, from $3.08 to $50.00;
•Flour: Increases up to 400 percent, from $22.00 to $110.00;
•Yeast: Increases up to 625 percent, from $7.02 to $50.95; and
•Disinfectant Wipes: Increases of more than 745 percent, from $20.71to $174.96." *Id*. at 2.
[196] *Id*. at 51.
[197] *Id*. at 8.
[198] *Id*. at 8–9.
[199] Litter, *supra* note 3.
[200] *See, e.g.,* JDSUPRA, *supra* note __ (noting that "COVID-19-related employment lawsuits likely will increase in 2021, especially when employers begin recalling some (but not all) laid-off or furloughed employees, increasing hours or shifts for some (but not all) employees, or requiring more employees to report to work in person").

cleaning COVID patients' rooms, while white employees received less dangerous assignments;[201] and allegations that defendants provided inadequate personal protective equipment to the (primarily minority) line employees while providing adequate protective equipment to the (primarily Caucasian) managers.[202] If such allegations can be supported with precise factual allegations (for motions to dismiss) and evidence (for summary judgment), they represent serious misconduct on the part of the defendant, with COVID serving as the particular context of such wrongdoing.

On the other hand, cases can be identified, in which the alleged labor violations are simply reasonable attempts to maintain health and safety. For example, in *Bridges v. Houston Methodist Hospital*,[203] plaintiffs—116 employees of a hospital—complained that (with certain exceptions) they would be terminated if they did not receive a COVID vaccination. In granting defendant's motion to dismiss, the court noted that defendant was not a wrongdoer but was instead trying to protect the safety of patients and staff: "*Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safe*." [204] The court emphasized that "Bridges [the lead plaintiff] can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else."[205]

C. Securities Fraud Cases

In securities suits, courts are likely to hold that statements early in the pandemic about expected positive earnings or the likely limited financial impact of the pandemic cannot be deemed fraudulent because the company could not have anticipated the scope or magnitude of the pandemic.[206] On the other hand, false statements about a company's progress in developing a vaccine or about the ability of a company's drugs to cure COVID—as opposed to mere optimistic predictions about the possibility of such breakthroughs—are examples of more direct wrongdoing.[207]

For example, in *In re Carnival Corp. Securities Litigation*,[208] a class of investors alleged that a cruise line's statements downplaying the risks of COVID, and advertising "full compliance with—and in many cases exceed[ing]—all U.S. and international safety regulations," materially

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[201] Patrick LaKamp, *Workers allege racial discrimination in lawsuit against Mercy Hospital*, The Buffalo News (Aug. 24, 2021), https://buffalonews.com/news/local/workers-allege-racial-discrimination-in-lawsuit-against-mercy-hospital/article_40d57136-0504-11ec-9bea-d335200f90b2.html (last accessed Nov. 14, 2021); Kimberly Hayward et al., v. Catholic Health Systems et al., Docket No.1:21-cv-01033 (W.D.N.Y. Sep 17, 2021).

[202] Smalls v. Amazon, Inc., Docket No. 1:20-cv-05492 (E.D.N.Y. Nov 12, 2020); complaint can be accessed at https://www.classaction.org/media/smalls-v-amazon-inc.pdf.

[203] Bridges v. Houston Methodist Hosp., No. CV H-21-1774, 2021 WL 2399994 (S.D. Tex. June 12, 2021).

[204] *Id.* at 2 (emphasis added).

[205] *Id.*

[206] *See, e.g.*, Berg v. Velocity Financial, No. 20 Civ. 67801, 2021 WL 268250 (C.D. Cal. Jan. 25, 2021) (stating company could not have anticipated in January 2020 "the extent of the coronavirus pandemic, or even the presence of the disease in America, at the time of [the company's initial public offering]").

[207] *See, e.g.*, McDermid v. Inovio Pharmaceuticals Inc., 520 F. Supp. 3d 652 (E.D. Pa. 2021) (finding sufficient allegations that company misled investors about the progress of a vaccine).

[208] No. 1:20-cv-22202-KMM, 2021 WL 2583113 (S.D. Fla. May 28, 2021).

misled investors regarding the potential impact COVID would have on the company's financial health.[209] Despite Carnival's claim of having "protocols, standard and practices for every possible issue you might imagine, including coronavirus,"[210] plaintiffs claimed that the outbreaks of COVID on defendant's ships revealed that Carnival actually "lacked proper policies, procedures, controls, or processes" to effectively keep its passengers safe.[211] Among other things, the cruise line allegedly failed to conduct pre-boarding screening or only required passengers to sign a form stating that they were not sick before boarding.[212] The court found that none of Carnival's statements rose to the level of materially false or misleading because the statements could not be "objectively measured in the face of a rapidly evolving global pandemic."[213] According to the court, many of the statements challenged were goals that were not actually false, and in a number of instances the health protocols called for by plaintiffs *exceeded* what the CDC recommended at the time.[214] The court also noted that "hindsight knowledge [about passengers becoming sick on Carnival cruises] could not be used to assert securities fraud."[215]

By contrast, in *McDermid v. Inovio Pharmaceuticals, Inc.*,[216] the court denied a motion to dismiss the plaintiffs' claims that the company's CEO and CFO misled investors about the company's progress towards developing a COVID vaccine, thereby inflating the company's stock price.[217] The primary statements leading to the lawsuit were made during two nationally televised interviews with the CEO, who claimed that "within three hours of accessing [COVID's genetic sequence] … we were able to construct our vaccine," and that the company had "fully construct[ed] [its COVID] vaccine within three hours."[218] After each of the two interviews, the second being with then-President Trump, the company's stock price increased 7.5% and 69.7% respectively.[219] While the price was inflated, both the CEO and the CFO sold portions of their company stock for the first time in nearly two years.[220] The court held that the issue of whether these statements were misleading to investors, given that the company had only designed a vaccine without actually constructing it, was an issue "of fact inappropriate for resolution at the motion to dismiss stage of the litigation."[221]

Like the consumer and labor cases, the securities fraud suits have turned (and likely will continue to turn) on whether the defendant engaged in direct wrongdoing, as opposed to making statements relating to COVID-19 that were accurate at the time or were accompanied by appropriate disclaimers.

IV. OTHER IMPORTANT TRENDS IN COVID CASES

[209] *Id.* at 1.
[210] *Id.* at 8.
[211] *Id.* at 2.
[212] *Id.* at 3.
[213] *Id.* at 12.
[214] *Id.* at 15.
[215] *Id.* at 13.
[216] *See, e.g.*, *McDermid*, *supra* note __.
[217] *Id.* at 657–58
[218] *Id.*
[219] *Id.*
[220] *Id.* at 654.
[221] *Id.* at 662.

In this Section, I focus on two other important trends in COVID-related cases: (1) the courts' rigorous enforcement of arbitration clauses, and (2) the paucity of COVID-related classwide settlements, given the thousands of class actions filed in the wake of COVID.

A. Arbitration Clauses

The Supreme Court, in several cases, has made it very difficult for plaintiffs to circumvent arbitration clauses or class action waivers.[222] Outside of the COVID context, courts have not considered the defendant's alleged wrongdoing when determining if the case should be submitted to arbitration.[223] The sole issue is to determine whether the parties in fact contracted for arbitration (and/or waiver of class actions) in the event of a dispute. Not surprisingly, courts have uniformly followed this approach in the COVID context. Courts have enforced class action waivers and arbitration clauses in a number of COVID-related cases, including cruise and airfare contracts, [224] tickets to canceled entertainment events, [225] hosts complaining that Airbnb canceled bookings, [226] gyms that were forced to close, [227] and even disputes regarding CARES Act relief benefits.[228] Although some courts have denied motions to compel arbitration in COVID-related cases, those cases apply settled law without noting any considerations unique to the pandemic.[229]

For example, in *Saperstein v. Thomas P. Gohagan & Company*, [230] following cancelations in response to the pandemic, a cruise line offered its customers two refund options: (1) transfer the reservation and money paid to a similar travel program in 2021 or 2022, or (2) receive travel vouchers for other Gohagan travel programs operating through 2022. Consumers, who were seeking a full refund of monies paid, brought a putative class action alleging intentional misrepresentation, unjust enrichment, and violation of California's Unfair Competition Law. Plaintiffs challenged, on unconscionability grounds, the validity of the arbitration provision included in the Cruise Reservation, claiming that there was no opportunity for meaningful negotiation of the terms and that the contract therefore lacked mutuality.[231] The court held that the

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[222] *See, e.g.,* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013). *See generally* Robert H. Klonoff, *The Decline of Class Actions,* 90 Wash. U. L. Rev. 729, __ (2013) (discussing case law on arbitration clauses and class action waivers).

[223] *See, e.g.,* Selden v. Airbnb, Inc., 4 F.4th 148, 151 (D.C. Cir. 2021) (affirming lower court submitting to arbitration allegations that company allowed property owners to discriminate on the basis of race in violation of the Civil Rights Act); Gilbert v. Indeed, Inc., 513 F. Supp. 3d 374, 382 (S.D. NY Jan. 19, 2021) (granting employer's motion to compel arbitration after finding valid arbitration provisions in employment and incentives contracts despite allegations that employee was sexually harassed, assaulted, raped, and then fired for medical conditions resulting from the trauma.).

[224] Lindsay v. Carnival Corp., No. C20-982 TSZ, 2021 WL 2682566 (W.D. Wa. June 30, 2021); Saperstein v. Thomas P. Gohagan & Co., 476 F. Supp. 3d 965, 967 (N.D. Cal. Aug. 4, 2021).

[225] Snow v. Eventbrite, Inc., No. 3:20-CV-03698-WHO, 2021 WL 3931995 (N.D. Cal. Sept. 2, 2021); Ajzenman v. Office of Commissioner of Baseball, 492 F. Supp. 3d 1067, 1071 (C.D. Cal. Oct. 6, 2021).

[226] Farmer v. Airbnb, Inc., No. 20-CV-07842-JST, 2021 WL 4942675 (N.D. Cal. June 1, 2021).

[227] Williams v. Planet Fitness Inc., No. 20 CV 3335, 2021 WL 1165101 (N.D. Ill. Mar. 26, 2021).

[228] Coronavirus Aid, Relief and Economic Security Act, Pub. L. 116-136. *See* Marselian v. Wells Fargo & Co., 514 F. Supp. 3d 1166, 1170 (N.D. Cal. Jan. 20, 2021).

[229] *See, e.g., In re* StubHub Refund Litig., No. 20-md-02951-HSG, 2021 BL 447763 (N.D. Cal. Nov. 22, 2021).

[230] *Saperstein*, 476 F. Supp. 3d at 969.

[231] *Id.* at 971.

parties entered into a valid agreement to arbitrate "issues of arbitrability, which encompasse[d] the dispute of whether the broader arbitration provision is unconscionable."[232]

Similarly, in *Marselian v. Wells Fargo and Company*,[233] a putative class action was brought against Wells Fargo for its processing of Payback Protection Program loans for businesses under the CARES Act. The bank allegedly prioritized processing loans for larger businesses that required higher loan amounts as a way of maximizing commissions. Plaintiffs alleged that "[a]s a result of Wells Fargo's unfair business practices … thousands of small businesses … did not receive the critical loan proceeds they needed while most at risk."[234] The court found that plaintiff had assented to the terms of an application form that contained an arbitration agreement, and thus it granted defendant's motion to compel arbitration.[235]

These cases, and others like them, reveal that numerous putative class actions relating to COVID may be non-starters because of enforceable arbitration agreements and/or class action waiver clauses.

B. Willingness of Some Defendants to Reach Prompt Classwide Settlements

With thousands of COVID-related class actions pending throughout the country, one might have expected to see large numbers of classwide settlements by defendants fearful of exposing themselves to massive classwide judgments. Thus far, class settlements have been rare, and they have virtually always followed a defeat by defendants either on the merits (denial of motion to dismiss or granting of a preliminary injunction).[236]

As an example of the handful of classwide settlements, Barry University reached a classwide settlement in a tuition reimbursement class. Barry University agreed to create a $2.4 million common fund for the benefit of students, covering various fees, including tuition fees, room and board fees, health fees, and lab and material fees.[237] Under the settlement class members will receive "approximately 60% of their anticipated recoverable damages."[238] In addition to the problems of surviving summary judgment and winning at trial, plaintiffs faced the fact that the Florida legislature had specifically adopted legislation denouncing the tuition reimbursement cases and calling them "'without legal precedent.'"[239] As the court noted, this legislation "may have precluded relief altogether."[240] At the same time, the court—in approving the settlement—recognized the "strong defenses" put forward by Barry University.[241]

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[232] *Id.* at 976–77
[233] *Marselian*, *supra* note __ at 1170.
[234] *Id.*
[235] *Id.* at 1173, 1176.
[236] A rare example of a case (arising in the consumer context) that settled on a classwide basis before a ruling on a motion to dismissed is discussed *supra* at __.
[237] Rosado v. Barry Univ., No. 20-21813-CIV, 2021 U.S. Dist. LEXIS 169196 (S.D. Fla. Sep. 7, 2021).
[238] *Id.* at 6.
[239] *Id.* at 15 (quoting legislation).
[240] *Id.* at 17.
[241] *Id.* at 22.

Columbia University similarly reached a settlement of a putative class action seeking reimbursement for tuition and fees. The district court had previously granted in part and denied in part Columbia's motion to dismiss, allowing claims for fees to go forward but not claims for tuition reimbursement.[242] Under the November 23, 2021 proposed settlement, Columbia will establish a fund with $12,500,000 that, after payment of attorneys' fees, will used to reimburse students the amount of student fees that had been paid for the portion of the spring semester that was conducted remotely.[243] Because the settlement is limited to the recovery of student fees, it is a far cry from the expansive class action suit that was originally brought, which sought not only fees but also the reimbursement of the much higher tuition costs.

In the context of claims seeking reimbursement for cancelled flights, Deutsche Lufthansa AG and a class of passengers settled a case in which the class sought refunds for flights cancelled as a result of COVID. The case had previously survived a motion to dismiss (on plaintiffs' second attempt).[244] In their motion for preliminary approval of the proposed settlement class, plaintiffs noted that numerous airline refund cases had failed to survive a motion to dismiss, and that one that had survived dismissal had nonetheless been voluntarily dismissed.[245] The motion further noted that, while there were some other airline refund cases that had survived a motion to dismiss, the Lufthansa case was the only one known to class counsel to have resulted a settlement.[246]

A rare example of a classwide settlement of a COVID-related labor dispute is *Elva Benson v. Enterprise Holdings, Inc.*[247] The case resolved a class action challenging Enterprise Holding's decision to lay off 964 employees with less than 60-days' notice, allegedly in violation of the Worker Adjustment and Retraining Notification (WARN) Act of 1988.[248] Enterprise had lost in the district court in asserting that the requirements of the WARN Act did not apply because COVID qualified as a "natural disaster." The settlement is a meager one; it creates a $175,000 fund that, after subtracting administrative fees and litigation costs (estimated to be around $23,000-$24,000), will be divided among all of the 964 class members who submit claims. Divided among 964 claimants, this amounts to only about $158 per laid off employee.

In the prison/immigration context, there have been some settlements as well. For instance, in September 2021, in *Chatman v. Otani*,[249] a federal judge in Hawaii preliminarily approved a class settlement in a suit by Hawaii inmates alleging that the state's prisons had failed to protect them against COVID. [update after final approval order is entered.] Two months earlier, the court had issued a lengthy opinion certifying a class action and entering a preliminary injunction, after finding that state officials showed deliberate indifference to the health of the inmate population.[250]

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[242] *In re* Columbia Tuition Refund Action, 523 F. Supp. 3d 414 (S.D.N.Y. 2021).
[243] Stipulation of Settlement at 24, *In re* Columbia University Tuition Refund Action, Docket No. 1:20-cv-03208 (S.D. N.Y. Nov. 23, 2021).
[244] Maree v. Deutsche Lufthansa AG, 2021 WL 267853 (C.D. Cal. Jan. 26, 2021). In their motion for preliminary approval of the proposed settlement class, plaintiffs noted that numerous airline refund cases had failed to survive a motion to dismiss and that one that survived dismissal had nonetheless been voluntarily dismissed.
[245] *Maree*, Motion for Preliminary Approval (Doc. 95) at CMF pages 12-13.
[246] *Id.*
[247] Case No.: 6:20-cv-891-Orl-37LRH (M.D. Fla.), Mot. for Prelim. Approval filed Nov. 29, 2021.
[248] 29 U.S.C. §§ 2101–2109
[249] Civ. No. 21-00268 JAO-KJM (D. Haw. Sept. 9, 2021).
[250] Chatman v. Otani, Civ. No. 21-00268 JAO-KJM (D. Haw. July 13, 2021).

The settlement establishes various "mitigation measures intended to improve COVID-related sanitation, hygiene, and medical monitoring at jails and prisons in Hawaii," and it provides for a five-person monitoring panel to "oversee adherence to COVID-19-related correctional public health standards" and "make real-time recommendations to [the Department of Public Safety] regarding its COVID-19 mitigation efforts."[251] Likewise, in *Gayle v. Meade*,[252] immigrants in three South Florida ICE detention centers reached an agreement with the United States to address COVID-related concerns. The settlement requires ICE to comply with various population requirements, CDC guidelines, and ICE's Pandemic Response Requirements, and provides for judicial oversight (presumptively for six months) to ensure such compliance. Again, the settlement followed prior rulings granting class certification and ordering preliminary injunctive relief.[253]

The paucity of class settlements to date suggests that, for the most part, defendants are vigorously defending COVID cases. Defendants do not appear to be intimidated by the fact that plaintiffs are seeking classwide treatment or the fact that the potential could be massive. Defendants' hardline approach is understandable—given the caution that courts have exercised in COVID-related cases, and the string of victories that defendants have obtained, as described in this article.

V. CONCLUSION

Instead of providing a sympathetic advantage to plaintiffs, COVID has served as a source of caution. Courts understand that the defendants did not cause the pandemic and should only be liable when their own wrongdoing—including their failure to honor the precise terms of a contract as written—is clear. This is an inherently factbound assessment that requires a close look at the defendant's conduct. Courts have declined to hold defendants liable absent strong allegations that defendants engaged in wrongdoing. Moreover, even in some cases alleging serious misconduct, arbitration clauses and class action waivers will frequently prevent aggregation. In some instances, defendants may choose to settle claims on a classwide basis, but the evidence thus far is that defendants will do so only after losing on motions to dismiss and/or class certification. In short, while the flurry of COVID-related class actions initially raised the prospect of massive damages in a wide variety of cases, it appears that, overall, COVID-related litigation is likely to end with a whimper, not with a bang.

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[251] *Chatman*, *supra* note __, at __.

[252] CITE, (S.D. Fla. DATE)

[253] *Id.* at __ (discussing rulings granting a preliminary injunction and granting class certification). For other examples of prison and immigration detention COVID settlements, *see, e.g.*, https://www.thedailyjournal.com/story/news/2021/05/06/nj-federal-lawsuit-inmates-cumberland-county-jail-brown-warren-judge-hillman/4972080001/;https://law.yale.edu/yls-today/news/wirac-class-action-reaches-settlement-landmark-covid-19-case-immigrants https://www.wxxinews.org/coronavirus/2020-08-04/nyclu-reaches-settlement-with-ice-over-covid-19-protections-at-batavia-detention-center.