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Litigation Priorities and the Crisis

As governments at all levels seek to address the present emergency, the state and federal judiciaries are struggling to maintain a proper mix of availability and caution, balancing constitutional requirements and the need to resolve urgent and important matters on the one hand with the imperatives of public health and social distancing on the other. Seeking to strike this balance, most (but not all) state court systems and federal district and circuit courts have modified their rules to defer non-essential proceedings and in many cases extend non-essential deadlines.

Businesses and boards have asked whether the courts remain open to address urgent fiduciary and contract disputes, notably including those that may arise as a result of the pandemic. The answer, generally and so far, is yes, thanks to the herculean efforts of the judiciary. The Delaware Court of Chancery and Supreme Court have issued standing orders to prioritize urgent matters and to provide for virtual rather than in-person hearings of time-sensitive matters, and continue to fulfill Delaware's historical role as arbiter of expedited corporate disputes. Most other courts have similarly adjusted their protocols in an effort to remain available to resolve matters requiring urgent attention.

The corollary is also true: non-urgent litigation should be disfavored. We have observed with dismay a flood of filings from certain corners of the bar, even (indeed especially) in the past week—after declarations of national, state, municipal and judicial emergency—alleging insubstantial federal proxy disclosure violations (in respect of stockholder votes not yet even scheduled), or demanding near-term inspection of corporate books and records in support of imagined and plainly non-exigent derivative lawsuits, or otherwise pressing facially non-essential legal business. Whatever might be said about this sort of litigation in normal times, it seems plain that it should be suspended in circumstances, such as we have today, where responding will divert time, attention, and resources from the business of managing through a worldwide emergency. We do not think deadlines created by litigation of this sort should or will be permitted to further burden an already overtaxed legal system. We are advising clients accordingly and urging our litigation colleagues and adversaries to avoid opportunism in a time of crisis.

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