GIBSON DUNN

Constitutional Implications of Government Regulations and Actions in Response to the COVID-19 Pandemic

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I. Overview

The COVID-19 pandemic is having an unparalleled effect on a wide range of businesses, many of which are subject to government-mandated shutdowns and other restrictions throughout the United States. In addition, while federal lawmakers negotiate the contours of a $2 trillion aid deal—the largest in modern history—they and some state legislators are also debating requiring particular companies or industries, rather than taxpayers or bondholders at large, to bear the burden of bailout efforts.

These and other governmental responses to this pandemic raise significant constitutional considerations. For example, government-mandated shutdowns could constitute regulatory takings that require just compensation under the Fifth Amendment. State interference with contractual obligations presents issues under the Contracts Clause. And all government economic regulation is ultimately subject to the requirements of the Due Process and Equal Protection Clauses of the federal Constitution.

Although case law, not surprisingly, does not anticipate these particular government actions, the constitutional analyses courts have applied in other contexts provide a framework for considering the constitutionality of proposed and actual legislative and executive action during the current crisis.

II. Regulatory Takings

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Clause applies to the States via the Fourteenth Amendment. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017). Regulations imposed by the government, including public health and safety regulations, may amount to a taking, where, although there is no physical appropriation, the regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The Supreme Court has divided regulatory takings into two types, categorical (or *per se*) takings, and partial takings. *See Murr*, 137 S. Ct. at 1942–43.

Given that many of the restrictions imposed to combat the spread of COVID-19 are both expansive and being rapidly rolled out, it is possible that some businesses may find themselves subject to a potential categorical regulatory taking. A categorical (or *per se*) regulatory taking "applies to regulations that completely deprive an owner of *all* economically beneficial use of her property." *Lingle*, 544 U.S. at 538 (brackets omitted). This is an "extraordinary circumstance," because "[a]nything less than a complete elimination of value, or a total loss, is a non-categorical taking." *Sherman v.*

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Town of Chester, 752 F.3d 554, 564 (2d Cir. 2014) (internal quotations omitted).

Temporary deprivations are typically not considered to be categorical takings, even if lengthy. Rather, categorical takings require that the "regulation permanently deprive[] [the] property of all value." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002); *see also id.* at 341–42 (nearly three-year moratorium on development imposed to conduct an impact study did not constitute a categorical taking). That said, an indefinite moratorium may constitute a potential categorical regulatory taking, as some courts have found. *See, e.g.*, *Monks v. City of Rancho Palos Verdes*, 84 Cal. Rptr. 3d 75 (Cal. App. 2008) (moratorium prohibiting construction on certain properties due to an indeterminate future landslide constituted a categorical taking).

Any takings claims would more likely be evaluated within the framework of a partial regulatory taking. In *Penn Central Transportation Co. v. City of New York*, the Supreme Court set forth a three-factored, fact-specific inquiry to determine whether a law or regulation constitutes a "partial taking": (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct and reasonable investment-backed expectations; and (3) the character of the governmental action. 438 U.S. 104, 124 (1978). Whether a partial regulatory taking has occurred depends on "an intensive *ad hoc* inquiry into the circumstances of each particular case." *Sherman*, 752 F.3d at 565. Even takings temporary in duration may be actionable as partial takings. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012). And "[o]nce the government's actions have worked a taking of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* (internal quotation marks omitted).

Rather than announcing "definitive rules," the Supreme Court has instead made clear that regulatory takings claims are driven by "factual inquiries, designed to allow careful examination and weighing of all relevant circumstances." *Murr*, 137 S. Ct. at 1942. Under the *Penn Central* test, a regulatory taking claim may be asserted where a business can show, for example, severe economic losses suffered in an industry where sweeping regulations are highly unexpected. Perhaps ironically, though, the broader the shutdown, the less likely it is to constitute a regulatory taking, as the purpose of the Takings Clause is to "prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 1943. Still, the lines drawn between essential and non-essential businesses matter, and if drawn arbitrarily or unreasonably, government-mandated shutdowns can effect regulatory takings.

Given the nature of the COVID-19 pandemic and the need for government action to combat it, the government will argue that a government-imposed shutdown should be presumed reasonable as a lawful and valid exercise of police powers. But those powers are not without limits. A government's exercise of its police powers must be valid and "reasonably necessary for the accomplishment of the government's purpose." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962). To evaluate the reasonableness of a regulation, courts will look, for example, to "the nature of the menace against which [the regulation] will protect, the availability and effectiveness of other less drastic protective steps, and the loss which [the property owner] will suffer from the imposition of the ordinance." *Id.*at 596. This fact-intensive inquiry will vary based on the scope and breadth of the COVID-19 regulations, the infection rate in the area at issue, the type of businesses subject to closure, the foreseeable risks that those business could spread COVID-19, and the specific losses suffered.

The government would likely assert the defense of public necessity. This defense requires the government to show: (1) an actual emergency, (2) imminent danger, and (3) actual necessity of government action. *See TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1377–79 (Fed. Cir. 2013). This defense is a corollary to the government's ability to abate nuisances without implicating the Takings Clause. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992); *see also Miller v. Schoene*, 276 U.S. 272 (1928) (holding

compensation not required for destruction of privately owned trees to prevent spread of disease to other nearby trees). A bald claim of public necessity, however, may not suffice. In *TrinCo Investment Co.*, for example, the U.S. Forest Service intentionally lit fires directly on and adjacent to the plaintiff's properties, destroying nearly 2000 acres of merchantable timber. The government argued that its actions, undertaken to manage existing wildfires, were protected under the "doctrine of necessity." On appeal from dismissal by the Court of Claims, the Federal Circuit reversed because there were "legitimate questions as to imminence, necessity, and emergency," and "[w]hile there is no doubt that there was a fire, there is also no doubt that at the time [Plaintiff's] property was burned, only approximately 2% of the 2.1 million-acre national forest was in flames." 722 F.3d at 1380.

The applicability of each of these defenses, as with the underlying claim, will depend on the particular facts of a case. That said, businesses should keep in mind that they may have a viable regulatory takings claim and should seek further guidance where appropriate.

III. Other Constitutional Challenges

A. The Contracts Clause

The Contracts Clause presents a potentially promising claim to those business sectors responding to potential federal or state laws that effectively overwrite existing contracts, either by adding obligations or by removing rights, in an effort to have one or more industries and companies bear an outsized portion of the economic burden resulting from the COVID-19 pandemic.

The Contracts Clause states: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. Contracts Clause challenges are subject to the Supreme Court's two-step framework. At the first step, a business challenging a state law must show that the law has "operated as a substantial impairment of a contractual relationship." *Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018). Under this step, courts ask "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). Whether an impairment is substantial turns on several factors, including "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822. Courts are less willing to find a substantial impairment if "the industry the complaining party has entered has been regulated in the past." *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983).

If a business demonstrates a substantial impairment, courts will proceed to the second step, which asks whether the law is "drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1822. Significant and legitimate public purposes include "the remedying of a broad and general social or economic problem." *Energy Res. Grp.*, 459 U.S. at 411–12. And in determining whether an impairment is reasonably and appropriately drawn, courts "defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.*

The Contracts Clause offers businesses a potential avenue for challenging federal or state COVID-19 laws that interfere in their ongoing contractual relationships, particularly for any industries required to fulfill obligations nowhere specified in (or even specifically excluded from) carefully negotiated agreements. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245–47 (1978) (holding law requiring employer to make additional payments operated as substantial impairment of pension plan). These businesses have colorable arguments that shifting to them the financial burdens of the pandemic's economic interruption is not an appropriate or reasonable means of responding to the crisis.

B. The Due Process and Equal Protection Clauses

The Due Process Clauses of the Fifth and Fourteenth Amendments may provide a potential ground for challenging federal and state laws that retroactively deprive businesses of property. Although due process "generally does not prohibit retrospective civil legislation," it may do so if "the consequences are particularly harsh and oppressive." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977). To successfully challenge a retroactive federal or state law as "particularly harsh and oppressive," a business would bear the burden of showing that the law is "arbitrary and irrational." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984); *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Finally, the Equal Protection Clause of the Fourteenth Amendment may provide another viable path to challenge COVID-19 legislation, particularly where regulations place unique burdens on one industry or business sector. That Clause provides that "[n]o State shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. Because state laws responding to the virus will likely be classified as social and economic legislation, courts would subject those laws to rational-basis review—that is, courts would assess whether "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–67 (2001). A similar constraint has been implied against the federal government through the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

Given the nature of rational-basis review, any due process or equal protection challenge to COVID-19 legislation would almost certainly face an uphill climb. Nonetheless, where a state law places a unique burden on an industry or business sector without a clear justification, the Constitution may provide a viable claim.

IV. Conclusion

None of this is to say, of course, that there can be any prejudgment on the constitutionality or unconstitutionality of any contemplated COVID-19 legislation. The analysis under the clauses of the federal Constitution that most readily apply to economic regulation is too fact-specific to draw blanket conclusions. But as the Nation moves through this crisis, it bears remembering that the operations of federal, state, and local governments remain subject to constitutional scrutiny, and regulatory actions that irrationally or unfairly target or prefer one segment of the economy may raise significant constitutional questions.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team.

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