



# Impacts of COVID-19 on Litigation Economic Damages

April 13, 2021

# Before We Begin...



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# Today's Presenters



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# Agenda

- Hypothetical Scenarios:
  - Real estate – sinking commercial building
  - Healthcare – surgery center
  - Food & beverage – restaurants

# Introduction

- Analysis of COVID-19-related losses and what you can do about it
- How damages differ for a temporary business interruption vs. a permanent business interruption
- How to prove in a court of law what you are owed, and by whom
- Best practices and strategies for working with outside accountants and other experts

# SINKING BUILDING HYPOTHETICAL



# Assumed Facts

- Sally, LLC sold an office building to Barry, Inc. for \$100M, with a closing date of 2/15/20
- Sally failed to disclose a consultant's report showing the building had started to sink due to local soil conditions, and would continue to sink
- By 12/31/20, when sinking had become obvious, over half of the commercial tenants had given notice to terminate long-term leases

# Assumed Facts

- Many tenants planned on downsizing due to COVID, but two tenants wanted to move to cheaper, larger spaces
- The 1st-floor restaurant had closed due to local order, but reopened by the time Barry filed fraud and breach-of-contract complaint



# Damages Claims

- Barry has asked for a legal and economic analysis of his damages claims for an upcoming mediation
- The mediator has asked the parties to focus on two questions:
  - How is she supposed to evaluate the impacts of losses due to COVID, as distinguished from sinking?
  - What is the appropriate way to determine damages, assuming that liability is established?

# Legal Issues Related to Potential Damages

- Causation (Substantial Factor)
- Reasonable methodology for determining damages



# Buyer's Alternative Remedies

- Fraud damages
  - Difference between the “actual value” from the buyer and the “actual value of that which he received” **plus** “loss of profits” proximately caused by the fraud (Civ. Code § 3343)
- Rescission
  - Restores original positions (Civ. Code §§ 1689, 1692)
- Contract damages
  - Difference in purchase price and value, plus expenses and consequential damages (Civ. Code § 3306)

# Measure of Damages

“Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty.’

‘The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation.’”

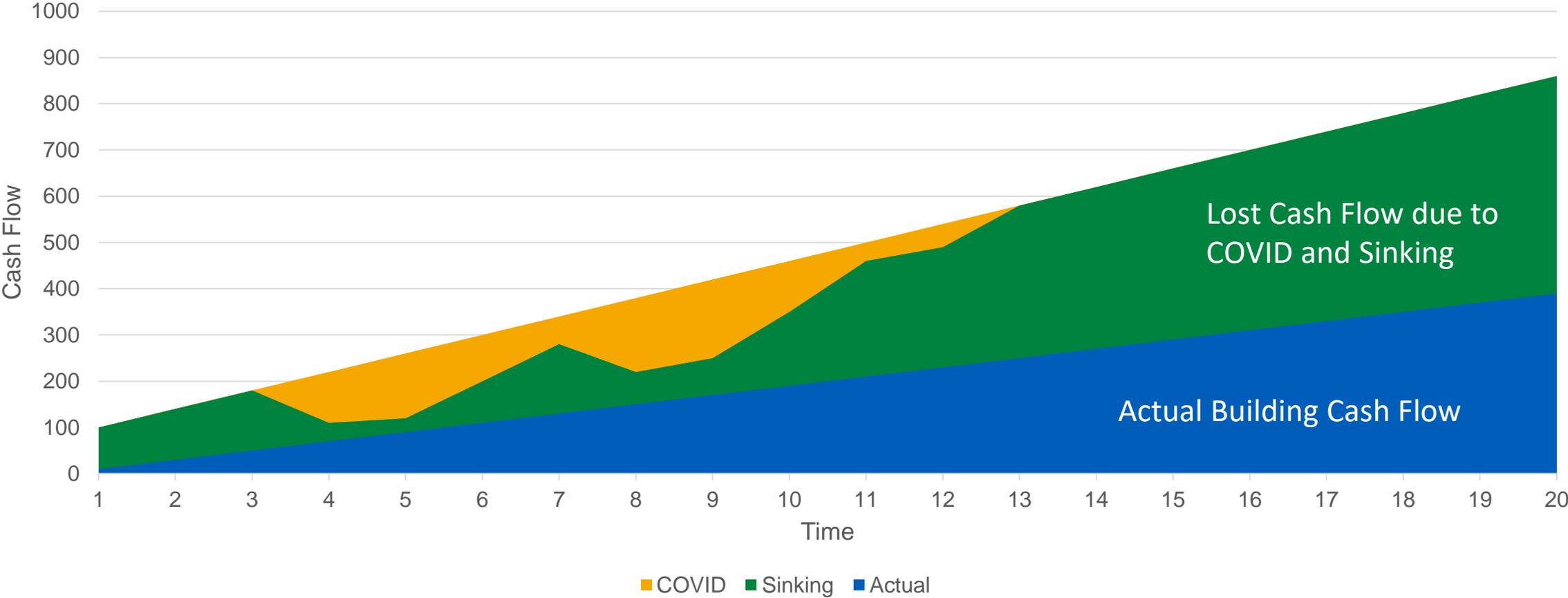
*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 396-397

# COVID vs. Sinking

- Damage Expert Challenge: key to separate COVID from the sinking
  - COVID:
    - Studies on how COVID has impacted lease rates and cap rates
    - Quick primer on cap rates
    - Is damage temporary or permanent?
  - Sinking:
    - An engineering/construction expert is key
    - Not all tenants will be impacted equally
    - Is damage temporary or permanent?

# Hypothetical Scenario – Sinking Building

Building's Real Value was Less Than What the Buyer Paid Initially



When do you anticipate non-essential employees will return to the office at full capacity?

# SURGERY CENTER HYPOTHETICAL



# Assumed Facts

- New Medical Services, Inc. buys, sells and manages outpatient surgery centers
- CEO Don is excited to assemble a group of high-volume SoCal physicians within a new surgery center
- After these physicians sign a term sheet, but before diligence is completed, an unscrupulous competitor solicits these physicians to a new location with false accusations of criminal investigations

# Assumed Facts

- New Medical sues for defamation and tortious interference
- Defendant argues that COVID-related slowdown and closures make any lost profit damages inherently speculative
- Defendant also admits he was misinformed and has offered to issue a retraction and correction

# Legal Issues Related to Potential Damages

- Are future damages barred based on the principle that the success of any new business is inherently speculative?
- What steps can be taken to avoid having your expert's testimony excluded?

# Damages Based on Untested New Businesses

- A plaintiff cannot “obtain a massive verdict based on speculative projections of future spectacular success”
- But estimates of future profits based on comparable businesses acceptable

*Sargon v. USC* (2012) 55 Cal. 4th 747

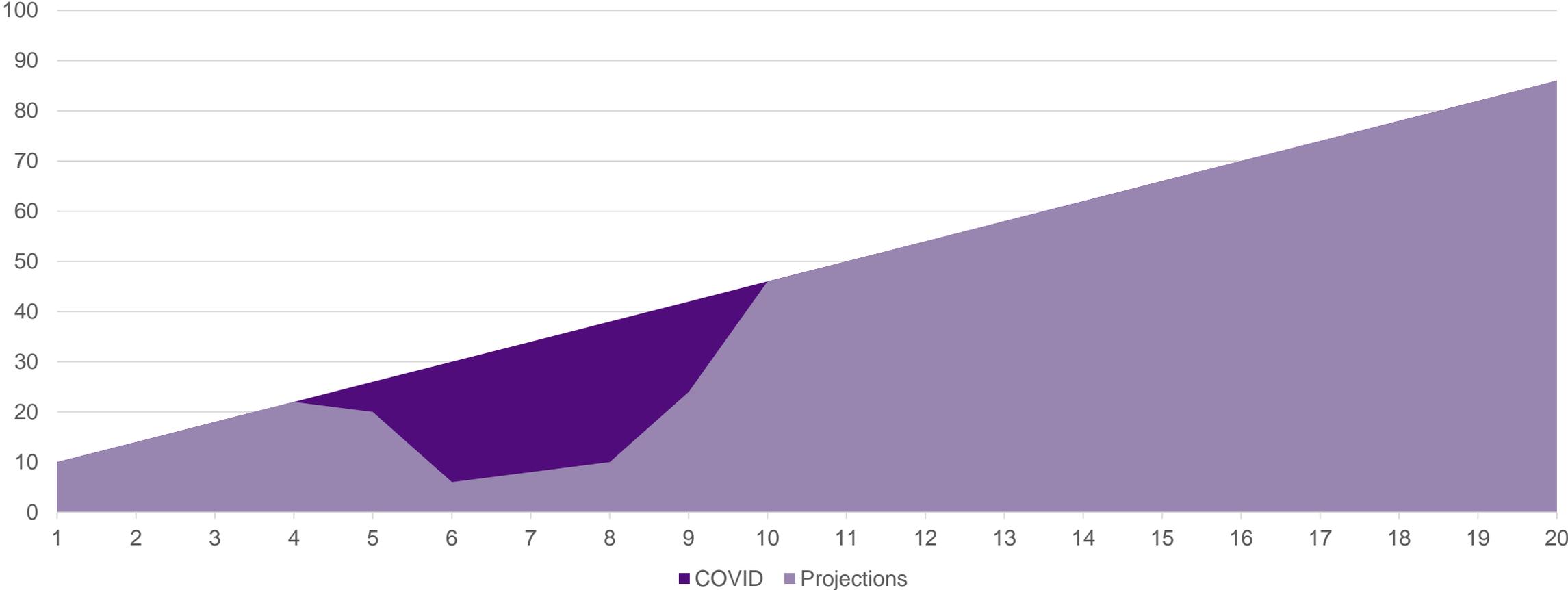


# Damage Expert Issues

- Good news – we have lots of data!
  - Each of the physicians had an established practice
  - The proposed new surgery center had projections
  - Data from the competitor’s surgery center is available
  - Empirical data is available on how COVID has impacted surgery centers
- Things to consider:
  - When the new surgery center would have been able to reopen re: COVID
  - When patient volumes would have returned to “normal”
  - Whether incremental costs increase because of COVID (and whether those costs are temporary or permanent)

# Hypothetical Scenario 2 – Surgery Center

Impact of COVID Only has a Temporary Impact on the Business



Which of the following is an example of a completely new, untested business?

# RESTAURANT HYPOTHETICAL



# Assumed Facts

- Two restaurants – one well-regarded with long operating history, the other is relatively new
- Owner “Optimistic LLC” hired a new management company “Lazy Operators” who has performed poorly, leading to lost sales, employee turnover and employment litigation
- Both restaurants closed during COVID
  - One remained closed
  - One opened for take-out/outdoor dining
- Owner is suing management company for losses due to mismanagement

# Issues Related to Potential Damages

- What special considerations will the damages expert face in this scenario?
- Due to the alleged mismanagement of the restaurant management company, how would engagement of an industry expert impact the analysis?

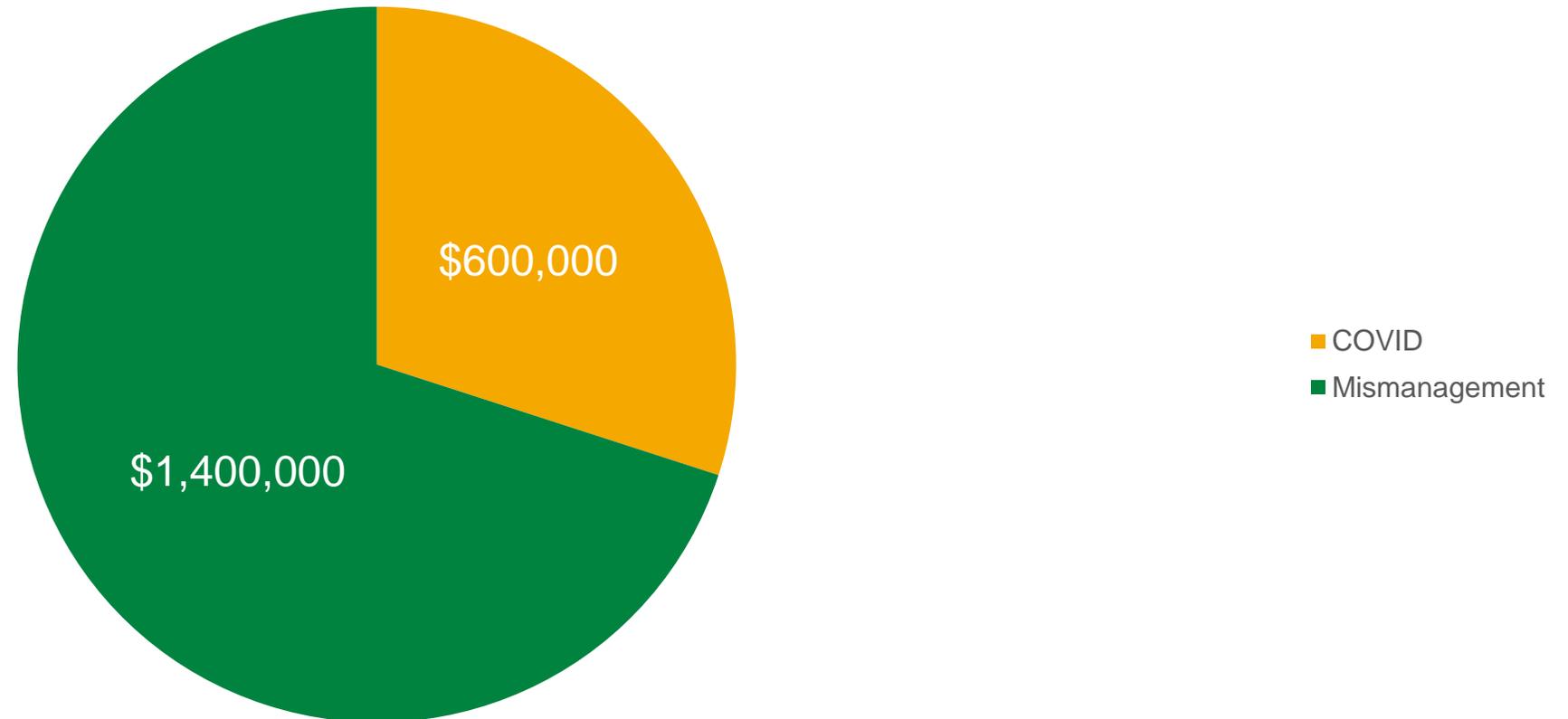


# Damage Expert Issues

- If COVID shutdown kept restaurants from operating, are there any damages?
- How long until the restaurants recover?
- How do you account for the potential for future pandemic-related shutdowns?

# Hypothetical Scenario 3 – Restaurants

**Total Losses Incurred of \$2 Million: the Portion that Needs to be Removed is the Losses Attributable to COVID (\$600,000)**



Which of the following scenarios for dining out are you currently comfortable with?

# Questions?



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