



# Helping Manufacturing & Automotive Industry Companies Navigate the COVID-19 Pandemic”

April 16, 2020

# Today's Speakers



**Jennifer Dukarski**  
Attorney  
Butzel Long



**Andrew Tait**  
Managing Director  
Strategic Consulting  
Marsh/JLT Specialty



**David Carlson**  
US Manufacturing &  
Automotive Industry  
Leader  
Marsh

# Agenda

- Welcome & Overview of Current Landscape – *David Carlson, Manufacturing & Automotive Industry Practice Leader, Marsh*
- Defense Production Act/Legislative Update & Their Impacts – *Jennifer Dukarski, Attorney, Butzel Long*
- Pandemic Supply Chain Resiliency – *Andrew Tait, Managing Director, Marsh/JLT Specialty*
- Open Forum/Q&A
- Closing Remarks – *David Carlson*

# Overview of Current COVID-19 Landscape

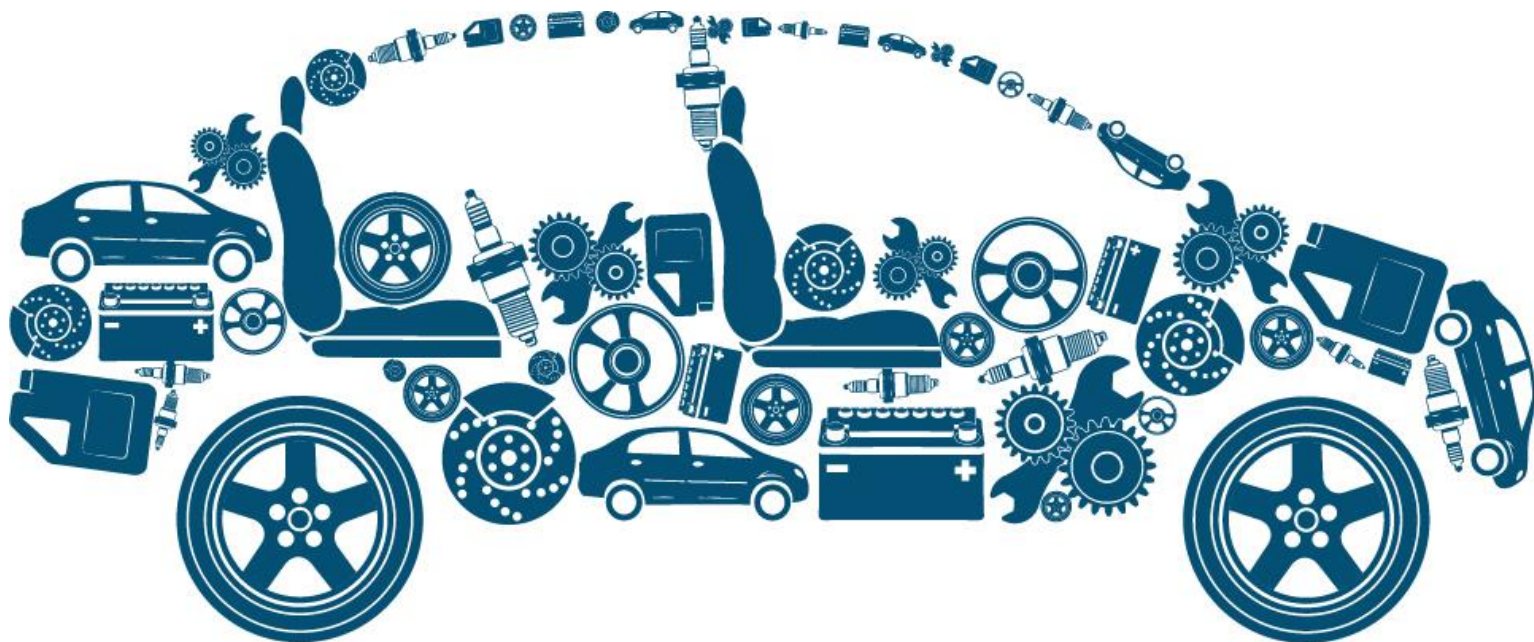


David Carlson, US Manufacturing & Automotive Practice Leader  
Marsh

# Defense Production Act/Legislative Update & Their Impacts



Jennifer Dukarski, Attorney  
Butzel Long



# Managing the Various Impacts of COVID-19: The Defense Production Act

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Managing the Various Impacts of COVID-19: The Defense Production Act

# **THE DEFENSE PRODUCTION ACT**



# These are Challenging Times...

- During World War II, the Arsenal of Democracy mobilized. In 1950, at the start of the Korean War, the Defense Production Act (DPA) was passed to provide for the civil defense and to prepare for war mobilization.
- *The Purpose of the DPA:* “To promote industrial resources preparedness in the event of domestic or foreign threats to the security of the United States.”





# These are Challenging Times...

- The DPA matters today because:
  - Its priority and allocation powers may affect your current business
  - Its productive capacity and supply authorities could provide compelling federal benefits to businesses working with the federal government in the COVID-19 response



# Trump Invokes the Defense Production Act

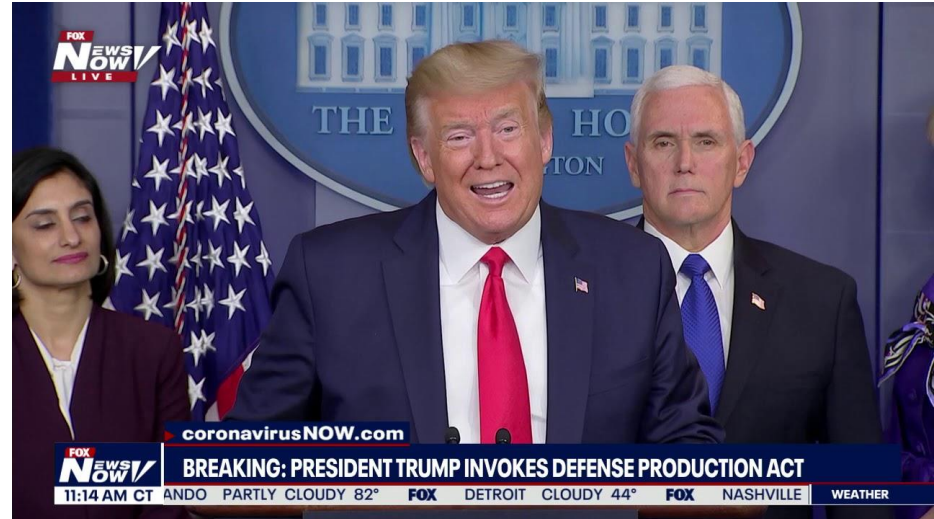
- On March 18, 2020, President Trump announced that he will consider using the Defense Production Act (DPA) to respond to the critical shortages of personal protective equipment and medical equipment including masks and ventilators



"This would ensure we have the materials we need at the ready, rather than wait for disruptions in the global supply chain to subside ... I view it -- in a sense as a wartime president."

# Trump Invokes the Defense Production Act

- March 27, 2020: President Trump orders General Motors to manufacture ventilators
- April 2, 2020: Trump invokes the DPA to clear up supply chain issues found in the manufacturing of ventilators and N95 masks
- April 3, 2020: Trump invokes the anti-hoarding and price gouging provisions of the DPA



# What is the Defense Production Act?

## **Section 4512** (50 U.S.C. § 4512 ):

- Authorizes the President to **require acceptance and performance** of contract or orders and to allocate materials, services, and facilities as he deems necessary or appropriate to promote the national defense.
- The President cannot use the powers to control the general distribution of materials in the civilian market unless he finds (1) that material is **scarce and critical** / essential to the national defense, and (2) that **requirements cannot be met** without creating a significant dislocation of the normal distribution channels

# What is the Defense Production Act?



## **Section 4512:**

- Allows for the **prevention of hoarding** beyond the reasonable demands of consumption. The President can publish the amount deemed reasonable.

## **Section 4513:**

- Penalties for failure to comply can include **fines of \$10,000 and one year imprisonment**.

## **Section 4514:**

- **Wage and price controls** must have the prior authorization of a joint resolution of Congress.

# What is the Defense Production Act?

## **Section 4517:**

- Allows for the strengthening critical industrial components of the U.S. that may be essential for the national security strategy including maintaining **reliable sources of supply** and restricting solicitations accordingly.

## **Section 4531 - 4534:**

- Allows the President to **provide economic incentives** to secure domestic industrial capabilities essential to meet national defense and homeland security requirements.
- Allows the President to authorize the **guarantees of loans or the provision for loans** by private institutions for the creation, maintenance, expediting, expanding, or restoration of production.

# How Could the DPA be used? Personal Protective Equipment (PPE)

- Under **Title I**, the President could prioritize domestic production of PPE to ensure sufficient national stockpiles, and allocate them according to the needs of the emergency.
- Under **Title III**, the federal government could use authorized incentives to expand domestic capacity for PPE manufacturing to meet the needs of the emergency.
- Under **Title VII**, the President could establish voluntary agreements with private industry—which might normally be subject to anti-trust statutes—to coordinate industry PPE production.





# The Extent of the Act

## ***Can I be forced to produce goods?***

Possibly, but unlikely in some situations.

Under *U.S. v. K&F Packing and Food Corp.*, the DPA was held to be constitutional and the company was compelled to produce.

But manufacturers haven't been asked to stray from core products.

# The Extent of the Act: Government Indemnification

***Will the government indemnify me if a product harms others?***

Probably not.

*In Hercules Inc. v. U.S.*, the DPA did not provide the basis for an indemnification claim where the manufacturer produced the defoliant known as “Agent Orange.”

# The Extent of the Act: Loss of Existing Contracts

***Will I be compensated by the government for the loss of other contracts?***

Probably not.

In *Kearney & Trecker Corp. v. U.S.*, the government required a manufacturer to expedite delivery of a machine which frustrated a sale to third party. The court found that there was no “taking” under the just compensation clause of the 5<sup>th</sup> Amendment nor of the third party contract. It was merely a “frustration of expectations.”

Managing the Various Impacts of COVID-19: The Defense Production Act

# **A POSSIBLE VISION OF A DIVERSIFIED FUTURE**

# When General Motors becomes General Ventilators

This potential future could leave us in a “new normal” where diversification into the healthcare field remains...

- Will you have a role in the new, diversified supply chain?
- Will companies ever restore 2019/2020 production levels?



# Traditional Legal Issues Are Continuing

- Intellectual Property Disputes
  - Do you have the rights to produce new products?
  - What happens if you develop new technology during this time using someone else's background intellectual property?
  - Could you be compelled to produce an infringing part?

## Volunteers 3D-Print Unobtainable \$11,000 Valve For \$1 To Keep Covid-19 Patients Alive; Original Manufacturer Threatens To Sue



(Mis)Uses of Technology

from the *patents-are-more-important-than-patients* dept

Tue, Mar 17th 2020 1:35pm – Glyn Moody

Techdirt has just written about the extraordinary **legal action** taken against a company producing Covid-19 tests. Sadly, it's not the only example of some individuals putting profits before people. Here's a story from Italy, which is currently seeing **more new coronavirus cases and deaths** than anywhere else in the world. Last Thursday, a hospital in Brescia, in the north of Italy, needed supplies of special valves in order to use breathing equipment to help keep Covid-19 patients alive in intensive care (**original in Italian**). The manufacturer was unable to provide them because of the demand for this particular valve. The Metro site explains **what happened**

## SoftBank Owned Patent Troll, Using Monkey Selfie Law Firm, Sues To Block Covid-19 Testing, Using Theranos Patents



Patents

from the *and-that's-not-even-all-the-insane-parts* dept

Mon, Mar 16th 2020 3:19pm – Mike Masnick

Honestly, I wasn't sure how to begin this story or how to fit all the insanity into the title. It's a story involving patents, patent trolling, Covid-19, Theranos, and even the company that brought us all WeWork: SoftBank. Oh, and also Irell & Manella, the same law firm that once claimed it could **represent a monkey** in a copyright infringement dispute. You see, Irell & Manella has now **filed one of the most utterly bullshit patent infringement lawsuits you'll ever see**. They are representing "Labrador Diagnostics LLC" a patent troll which does not seem to exist other than to file this lawsuit, and which claims to hold the rights to two patents (US Patents **8,283,155** and **10,533,994**) which, you'll note, were originally granted to Elizabeth Holmes and Theranos -- the firm that shut down in scandal over medical testing equipment that appears to have been oversold and never actually worked. Holmes is **still** facing federal charges of wire fraud over the whole Theranos debacle.

# Traditional Legal Issues Are Continuing

- State Consumer Protection Acts
  - Price Gouging
  - Deceptive Advertising
  - Unfair Competition
- Federal Trade Commission
  - FTC Warning letters (25+)

## FTC Coronavirus Warning Letters to Companies

### FTC AND FDA WARNING LETTERS

The Federal Trade Commission and U.S. Food and Drug Administration (FDA) have sent warning letters to companies allegedly selling unapproved products that may violate federal law by making deceptive or scientifically unsupported claims about their ability to treat or cure coronavirus (COVID-19). See [press release](#).

Company	Date
 Earthley Wellness (dba Modern Alternative Mama LLC)	4/9/2020
 Free Speech Systems LLC	4/9/2020
 Genesis II Church of Health and Healing	4/8/2020
 CBD Online Store	4/7/2020
 Savvy Holistic Health dba Holistic Healthy Pet	4/7/2020
 Ananda, LLC DBA Ananda Apothecary	4/6/2020

**Michigan AG sends cease and desist letter to Menards for price gouging during coronavirus (COVID-19) outbreak**

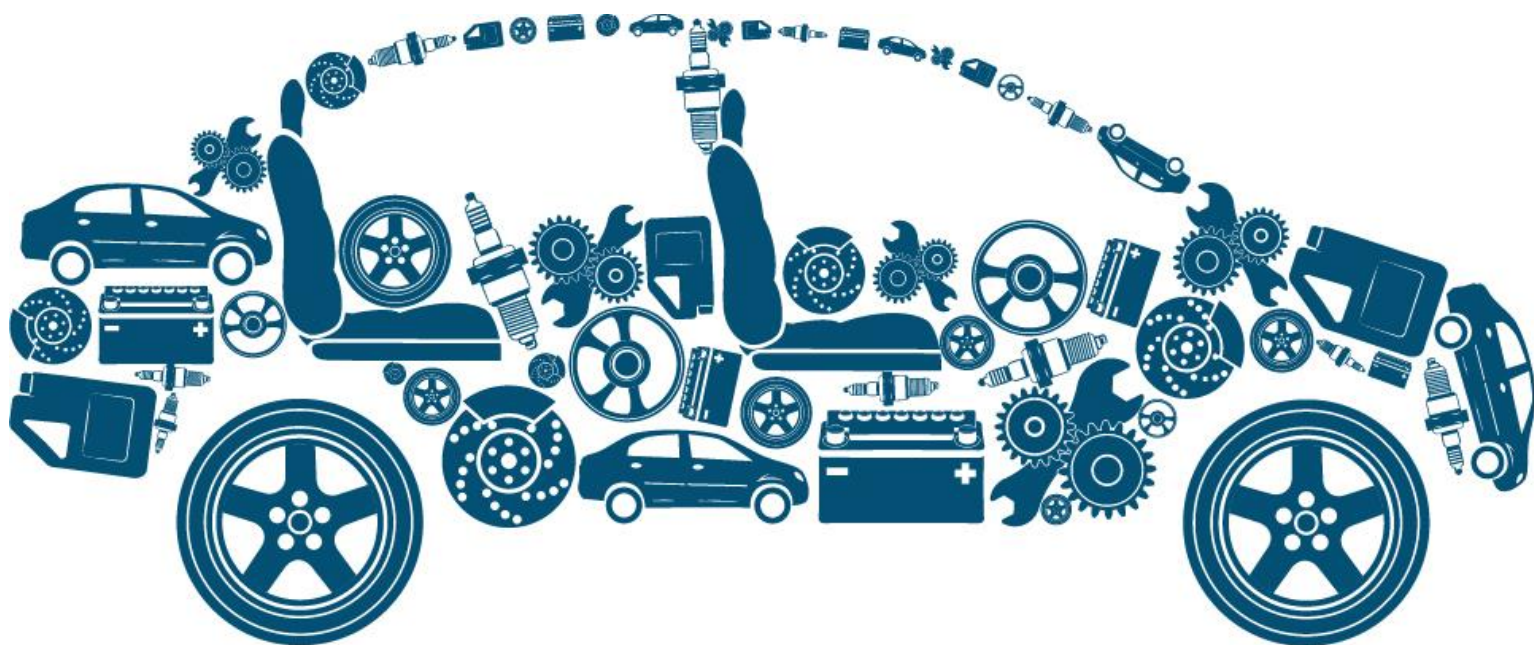
18 complaints received



# If Diversifying, Be Prepared

- Intellectual Property
- End User Liability Risks (The PREP Act)
- Contractual Risks
- Regulatory Requirements





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Thank you!

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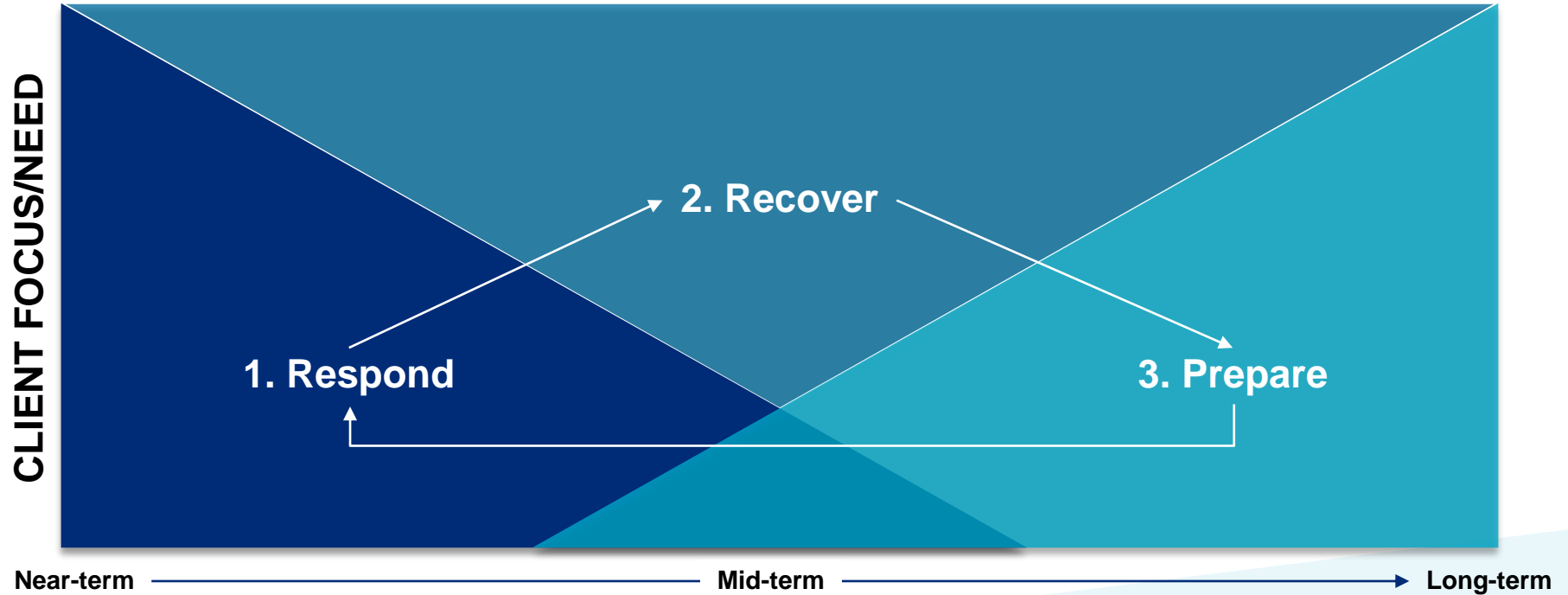
# Pandemic Supply Chain Resiliency



Andrew Tait, Managing Director, Strategic Risk Consulting  
Marsh/JLT Specialty

# While you Respond - Prepare to Recover

The crisis is fluid and organizations may find themselves in each stage simultaneously



## THE MOVING TIMELINE

# Coronavirus Response, Recovery, and Preparedness

## Immediate Actions



### People

- Communicate regularly with employees to ease anxiety.
- Be prepared to amend policies and plans based on evolving advice from governments and health officials.
- Listen to concerns.
- Strategize on workforce planning and mid to long term impact of any decisions



### Operations

- Protect critical operations.
- Adjust working patterns/shifts.
- Understand critical suppliers' expected impacts.
- Monitor resilience of suppliers' suppliers.
- Communicate with Customers.
- Decision making processes on shutdown priorities.



### Reputation

- Communicate regularly with all stakeholders.
- Provide clear rationale for decisions.
- Focus on decisions that will be viewed as the “right ones” over long term.



### Finance

- Monitor COVID-19 related spending.
- Model revenue impacts.
- Understand government backstop and its relevance to your business.

# Coronavirus Response, Recovery, and Preparedness

## Longer Term Vision and Actions



### People

- Continue to communicate regularly with employees to ease anxiety – until it is completely over.
- Plan return to work – considering potential new constraints to address.



### Operations

- Continue to protect critical operations.
- Prioritize start-up activities based on value to company and inventories/demands.
- Reload supply chains based on global product movement.
- Refocus supply chain modelling to expedite decision making.



### Reputation

- Communicate regularly with all stakeholders.
- Document decision making.
- Re-engage with clients, considering their issues.



### Finance

- Monitor COVID-19 related spending.
- Model revenue impacts and return to normal changes.

# Q&A/Open Forum



David Carlson, US Manufacturing & Automotive Practice Leader  
Marsh



## Q&A/Open Forum

- **Are you engaging in the production of medical / PPE or other products covered by the DPA? If so, how is your company approaching this process?**
- **What health & safety protocols are you implementing as part of manufacturing as an “essential” business?**
- **What are you most concerned about when it comes to restarting your manufacturing operations, distribution centers, critical business centers, and office environments?**
- **How has your supply chain been impacted as a result of COVID-19?**
- **What are the long-term implications that you see for supply chain, business continuity and crisis management protocols?**

# Thank You!



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For more information on the COVID-19 Pandemic visit [Marsh's Pandemic Risk Resource Center](#) or contact your Marsh representative.



Marsh is one of the Marsh & McLennan Companies, together with Guy Carpenter, Mercer, and Oliver Wyman.

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