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# COVID-19 May Lower Bar For Distressed M&A Defenses

**Law360** on **October 28, 2020**

Beyond its devastating human toll, the COVID-19 pandemic has had a historic impact on the U.S. economy, causing tens of millions of Americans to lose employment and numerous businesses to temporarily or permanently shutter.

This presents an environment ripe for distressed M&A activity. Will U.S. antitrust law stand in the way of the economic forces spurring such consolidation?

U.S. antitrust enforcers have historically viewed industry consolidation suspiciously, considering it better to let troubled businesses naturally run their course. But does that view apply in the context of a rapid economic downturn, particularly where the underlying cause is an environmental health crisis?

On one hand, the American consumer benefits from competition, no matter how fleeting it may be. On the other hand, denying consolidation prolongs excess capacity and duplicative overhead costs, which drag profits and waste resources and, potentially, the overall economic health and recovery of that industry.

There are two existing doctrines — the failing firm and flailing firm defenses — that nod in favor of, and could support, consolidation in a crisis. Still, the antitrust agencies have erected high hurdles to satisfying those defenses. They are rarely tried and even more rarely successful.

As COVID-19 has changed so much of American life, the moment demands revisiting those doctrines and asking afresh whether antitrust law should be more welcoming of distressed M&A.

*Originally published October 28, 2020, "COVID-19 May Lower Bar For Distressed M&A Defenses," Law360.*

**Related Professionals**

- **Colin Kass**
  Partner
- **Michael E. Callahan**
  Partner
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