

Legal Lessons from the Pandemic and Emergency Preparedness in the USA

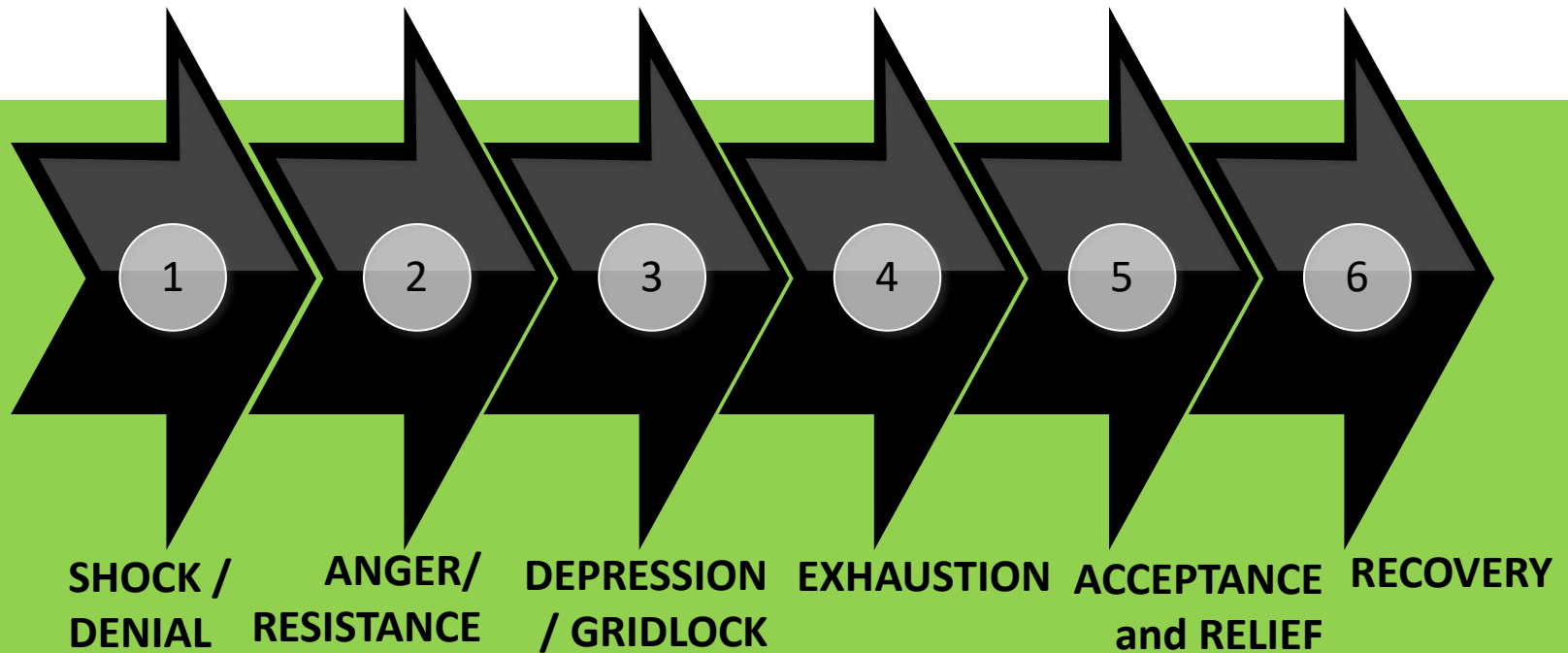
Peter J. Kirsch



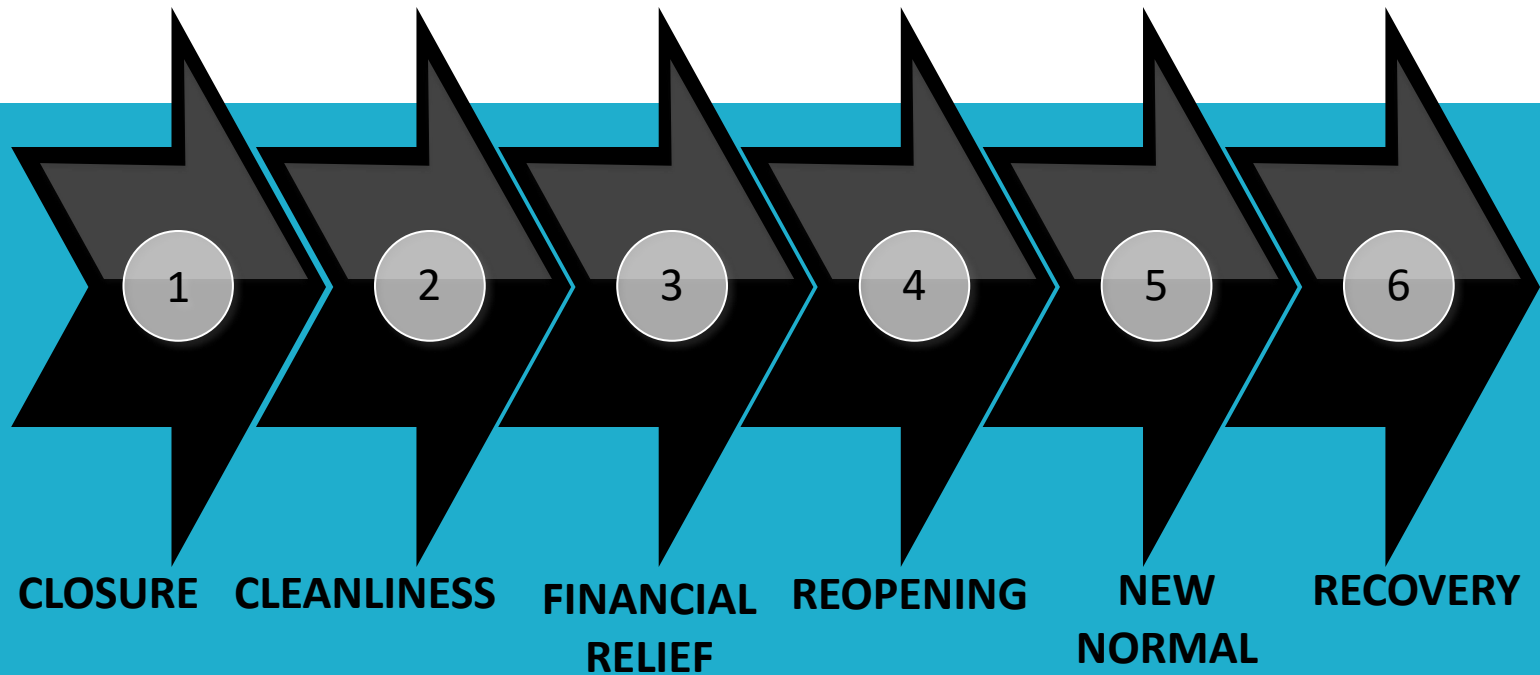
Agenda

- 1 Immediate Crisis Response
- 2 Financial and Regulatory Relief
- 3 Reopening
- 4 Lessons Learned

Stages of Pandemic Reaction



Stages of Pandemic Action



Overarching Legal Principles in USA

- ▶ Federal jurisdiction with respect to safety of air travel is exclusive and preempts state and local decisions. *Air Transport Ass'n of America, Inc. v. Cuomo*, 520 F.3d 218, 224–25 (2d Cir. 2008).
- ▶ Closure of airports for public health concerns would violate obligation to keep airport open and available for the public. *Grant Assurance 19*, 49 USC 47107(a)(8)
- ▶ Legal restrictions generally not suspended during pandemic
 - Revenue use
 - Privacy
- ▶ Broader legal authority to close non-aeronautical activities
- ▶ Airline Deregulation Act, 49 USC 41713
 - Airports cannot regulate airlines
 - Airports cannot take action that would regulate passengers
- ▶ Airports are not public health agencies and are limited in use of funds for the operating cost of the airport. 49 USC 40116



Agenda

1 Immediate Crisis Response

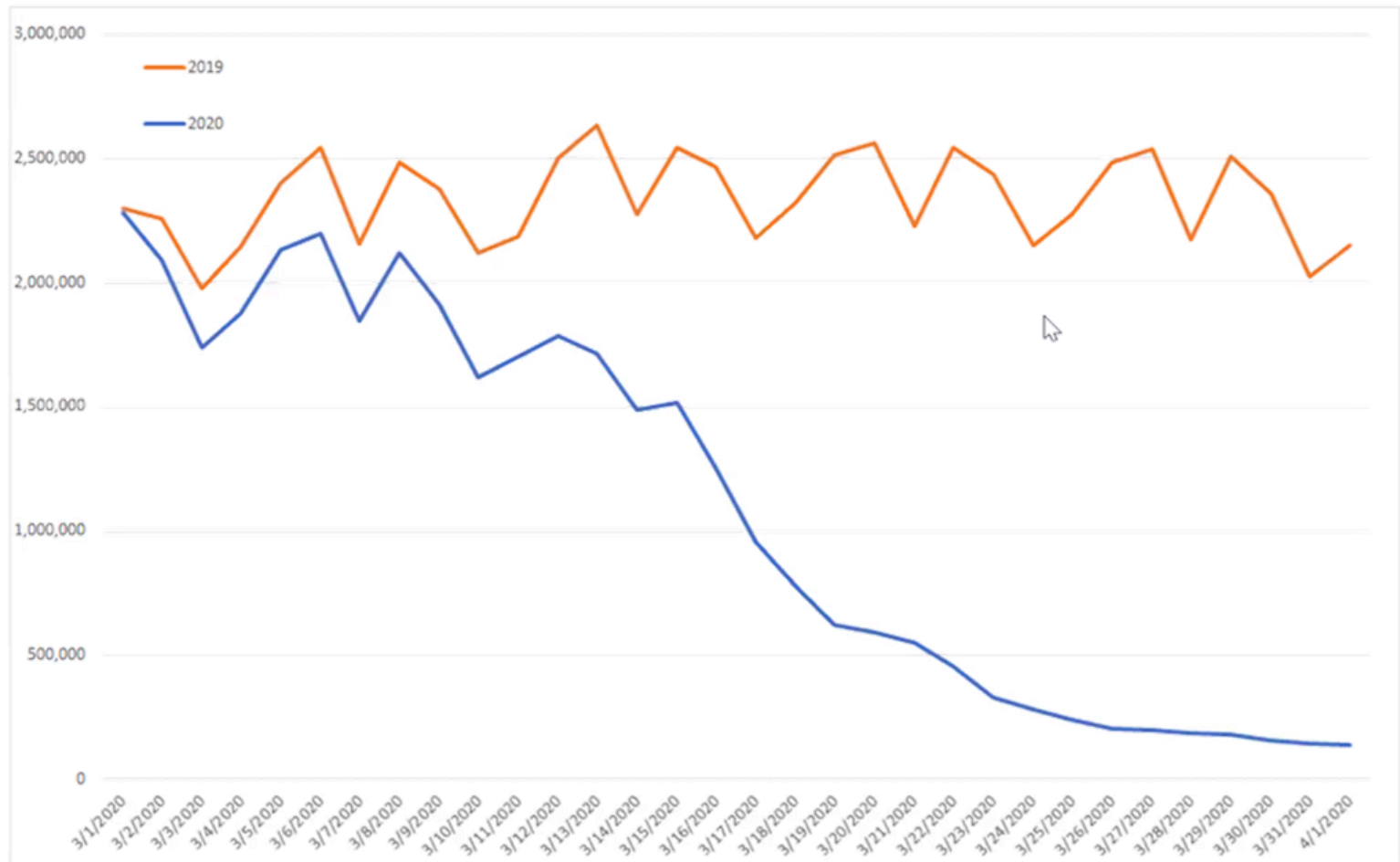


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Spring 2020 Airline Traffic



AMERICAN ASSOCIATION
OF AIRPORT EXECUTIVES



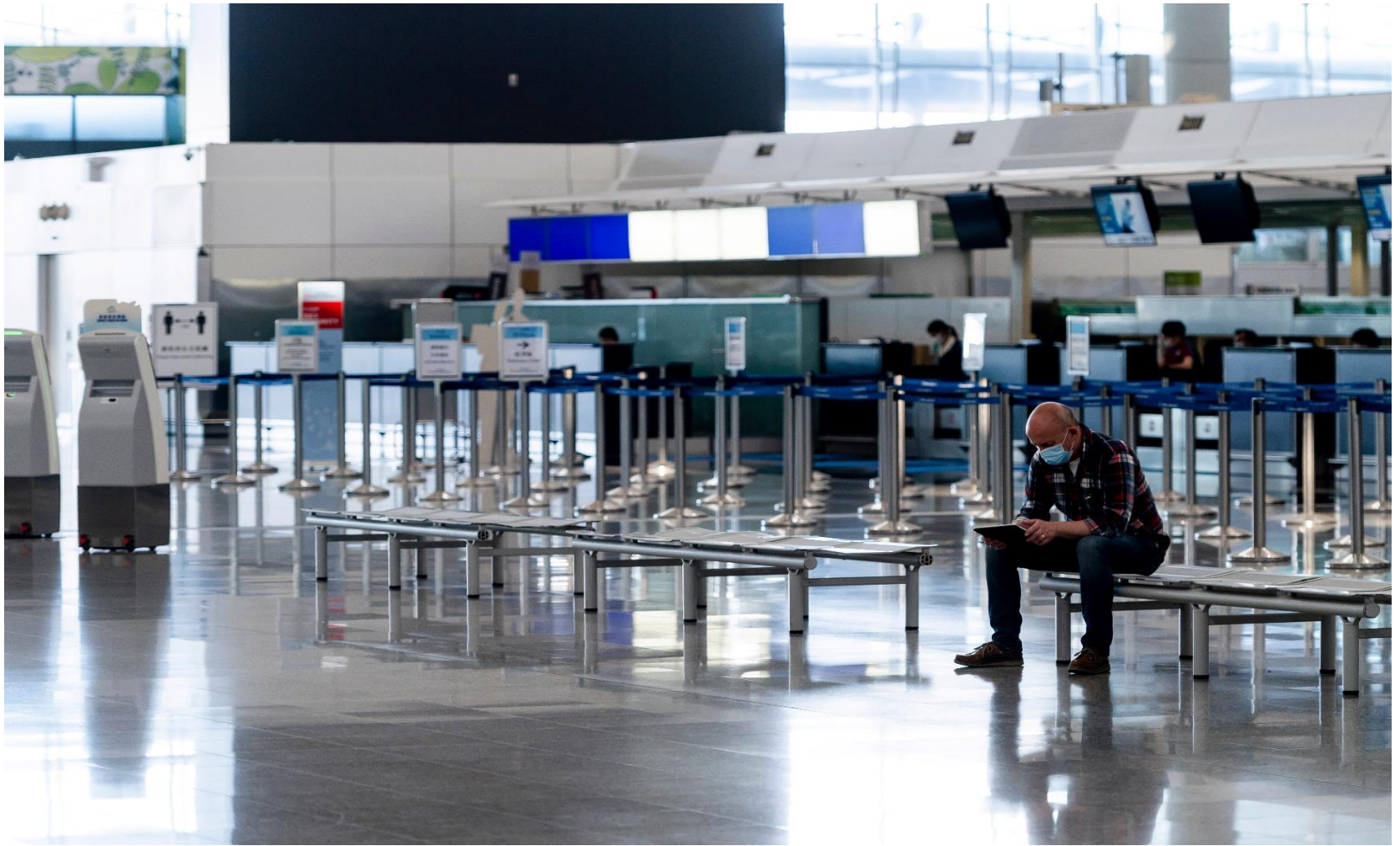


Early Pandemic Questions – March–April 2020

- ▶ Can we close parts of the terminal or airport?
 - Federal grant obligations
 - 49 USC 47107(a)(8)
- ▶ Can we limit access to the airport terminal to prevent transmission of virus?
- ▶ Where and how can we park unused aircraft?
- ▶ How do we treat our own employees when most workers are staying home?
- ▶ Who do we talk to and coordinate with?



Terminal Mothballing





Health and Cleanliness

Health and safety of passengers

Facility cleanliness

Employees

Aircraft Parking



Source: <https://www.bloomberg.com/news/features/2020-04-16/coronavirus-travel-what-happens-to-planes-grounded-by-covid-19>





Concession Relief >>



Official Legal Direction / Guidance

- ▶ Fast moving
- ▶ Not always consistent
- ▶ Often lacked practical application
- ▶ Rarely coordinated among agencies
- ▶ Need to return to fundamental legal principles



Early Coordination Challenges

Emergency
(not safety)
Management

Financial
Management

Regulatory
Compliance

Personnel
and Union
Coordination

Operations

Safety
Management



Who Is In Charge?



Transportation
Security
Administration



State and Local
Public Health
Agencies





Legal Effect of Directives

- ▶ White House/ President
- ▶ Federal public health agencies
- ▶ Governors
- ▶ State and local public health agencies
- ▶ FAA, TSA and aviation agencies

- ▶ And the courts



Agenda

2 Financial and Regulatory Relief



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Financial Relief



Federal Financial Relief Packages

- ▶ CARES – COVID 19 Aid, Relief and Economic Security Act of 2020 (\$10B)
https://www.faa.gov/airports/cares_act/
- ▶ CRRSA Coronavirus Response and Relief and Supplemental Appropriations Act of 2020 (\$2B)
<https://www.faa.gov/airports/crrsaa/>
- ▶ ARPA American Rescue Plan Act of 2021 (\$8B)
https://www.faa.gov/airports/airport_rescue_grants/
- ▶ BIL Infrastructure Investment and Jobs Act of 2021
<https://www.congress.gov/bill/117th-congress/house-bill/3684/text>



Financial Questions – Spring and Summer 2020

- ▶ Can we continue to collect concession rent and MAG?
- ▶ Is this a *force majeure* event?
- ▶ Can we give financial relief to some or all concessions?
 - How do we choose?
- ▶ *Should* we give financial relief to some or all concessions?
- ▶ What about relief to airlines and other users?
- ▶ How do we spend our federal relief funds?
- ▶ Personnel, union and policy implications of relief to furloughed employees



Bankruptcies

- Hertz / Dollar
- Advantage
- Trans States
- RavnAir
- Virgin Atlantic
- Interjet (MX)
- LATAM
- Thai
- Avianca
- Philippine
- Norwegian





Extrinsic Financial Considerations

- ▶ Bond covenants
- ▶ Contractual commitments (parity, most-favored-nation)
- ▶ Prohibitions on ‘gifts of public funds’



Regulatory Relief

- ▶ Regulatory discretion
 - Use of airport space and revenue for pandemic-related purposes
 - Direct payments for pandemic relief to air carriers and others
 - Use of airport movement areas for parking
 - Partial closure
 - Distinctions among concessionaires
- ▶ Direct relief
 - Deadline waivers
 - Revenue flexibility (aeronautical vs non-aeronautical use)
- ▶ No relief
 - Passenger health regulation
 - Interference with airline-passenger relationship



Agenda

3 Reopening

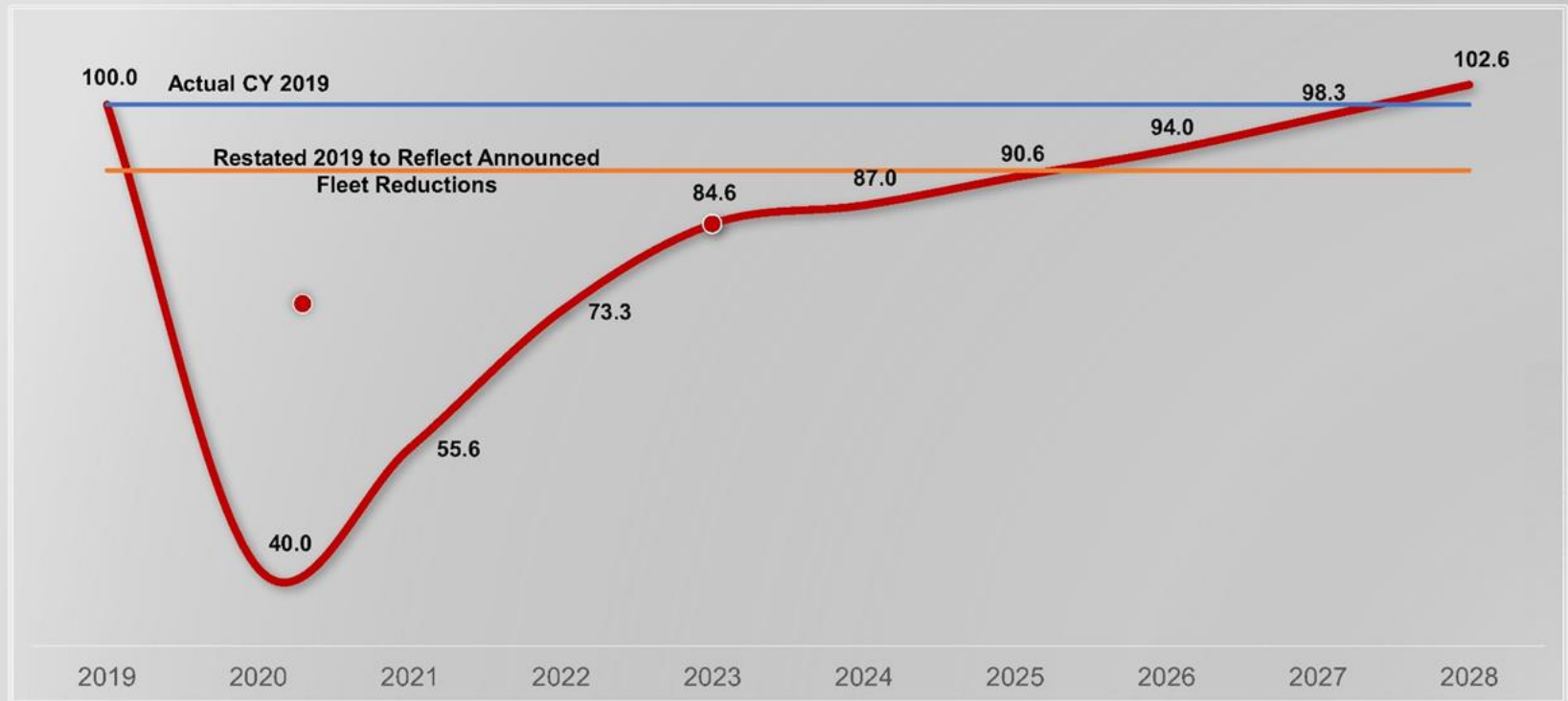


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Domestic Recovery

U.S. Domestic Air Traffic Recovery

2019 Actual = 100

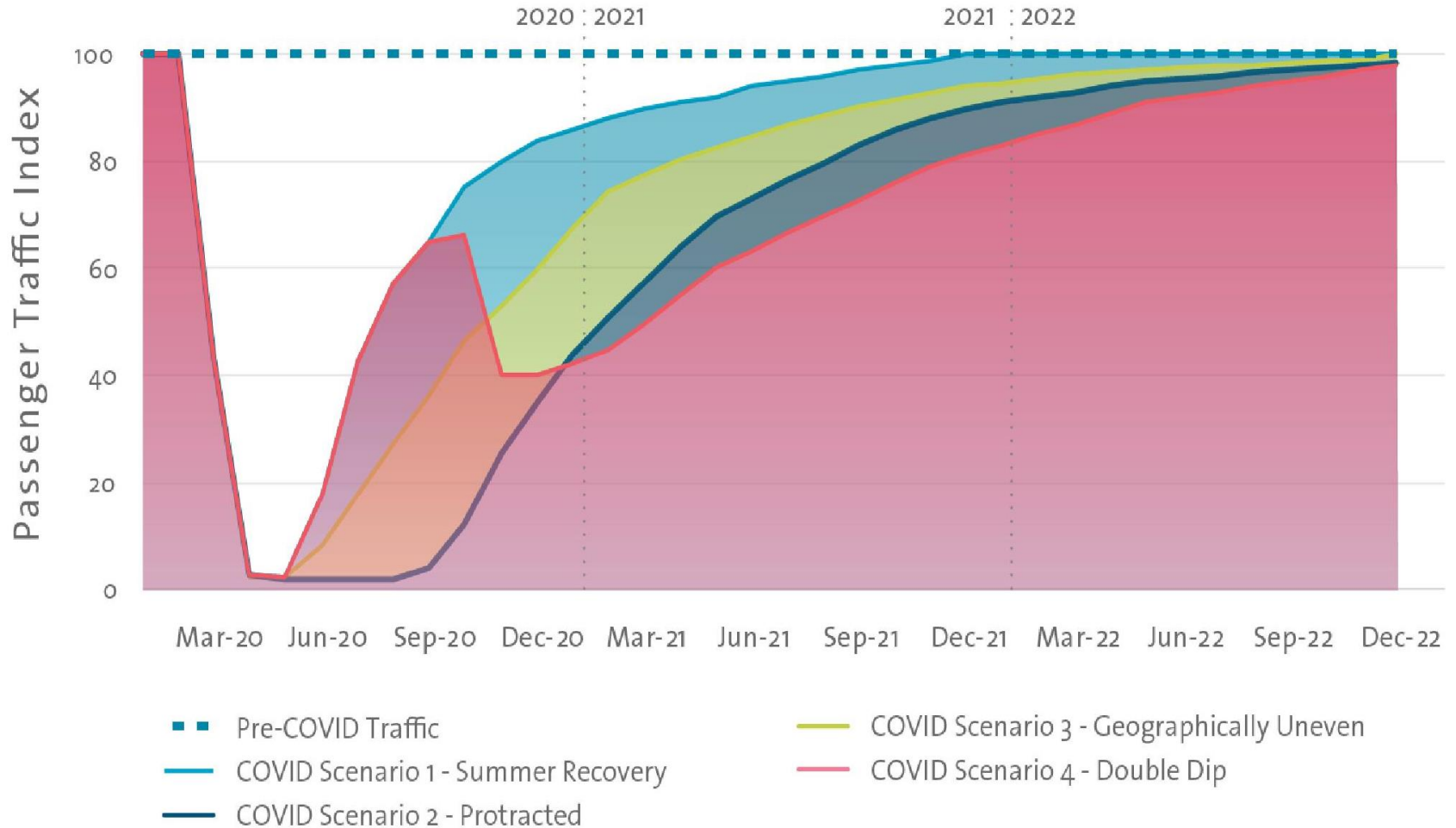


Delta Airport Consultants “Landed in a pandemic departing in a recession” 8/2020



Uncertain Trajectory

Scenarios for Traffic Recovery at a Generic Airport

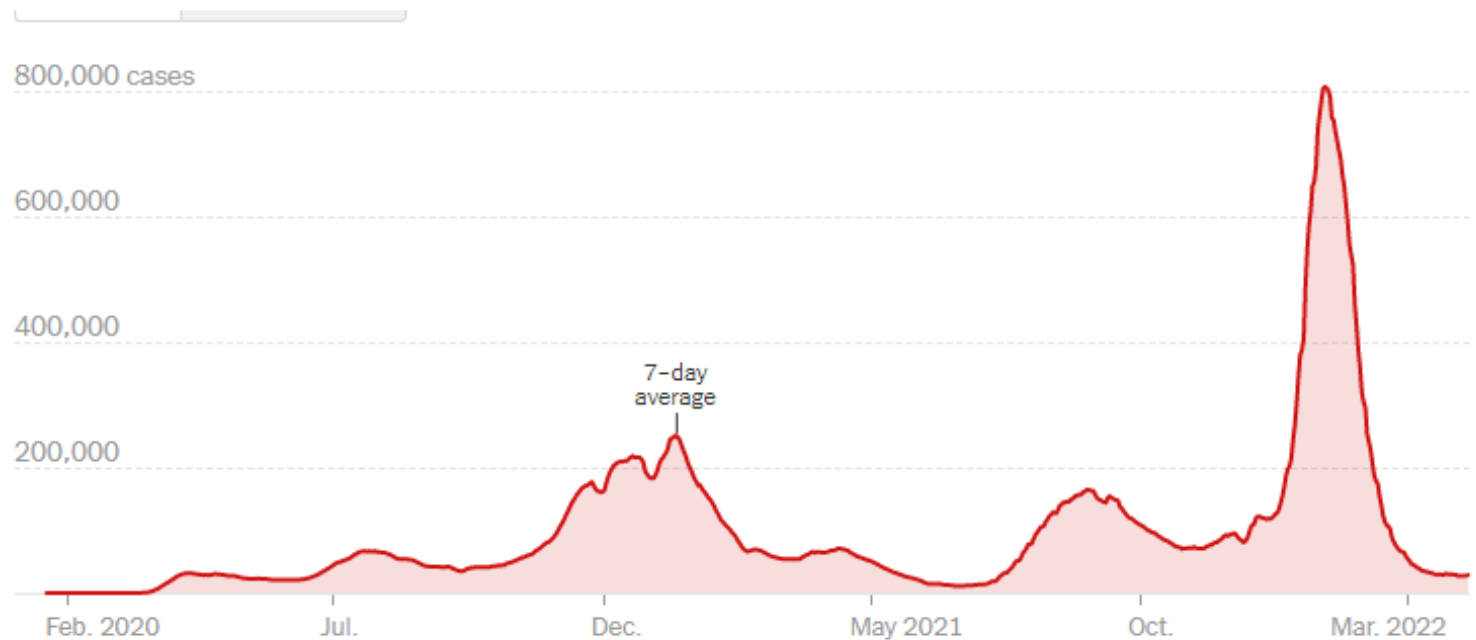


Source: InterVISTAS Briefing Note Update 4/24/20



Reopening Challenges

- ▶ Pandemic surges – not linear recovery
- ▶ Politics overlay everything (!!)
 - Mask mandates
 - Vaccine mandates
- ▶ Deciding which reopens first – passengers or businesses



Agenda

4 Lessons Learned

Considerable literature on pandemic lessons but little legal guidance



Aviation Operations During COVID-19 Business Restart and Recovery

2020 | 01



COVID-19 Recovery Recommendations

Airport Industry Recovery Advisory Panel
June 2020



Runway to Recovery

The United States Framework for Airlines
and Airports to Mitigate the Public Health
Risks of Coronavirus

Guidance Jointly Issued by the U.S. Departments of Transportation,
Homeland Security, and Health and Human Services

July 2020

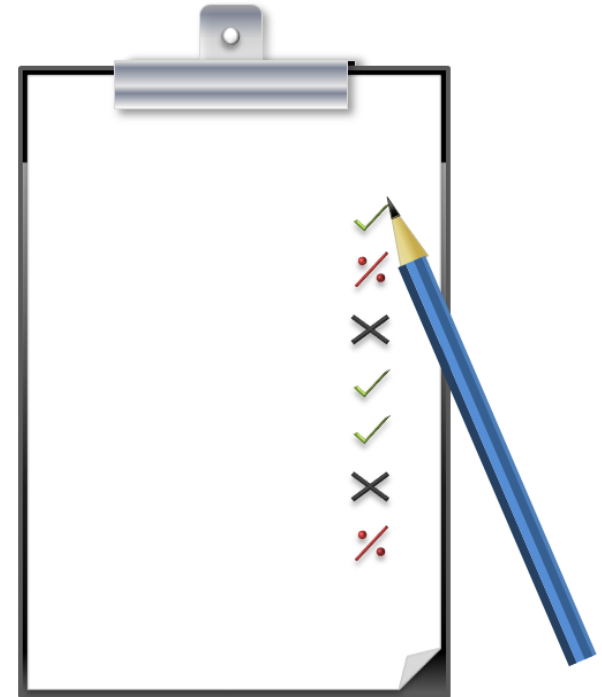


What did we do right? Wrong?



Lessons – Need Better Advance Planning

- ▶ Necessarily unpredictable
- ▶ Early assessment and repeated reevaluation of risk
- ▶ Standard Operating Procedures for next public health crisis
- ▶ Special internal coordinating team
 - Operations
 - Concessions/Tenants
 - Airlines
 - Legal counsel
 - Regulators
- ▶ Point of contact for other agencies
 - Public health
 - Airport and airline regulators
 - Security agencies





Lessons – Understand Regulatory Conflicts

- ▶ Understand scope of legal and contractual authority
 - Airport proprietor
 - Airlines and other service providers
 - Businesses at airport
 - Public health agencies
 - Federal government agencies
- ▶ Understand statutory mission of government actors
- ▶ Reconciling conflicts in statutory missions
- ▶ Identify and anticipate need for regulatory relief



Lessons – Address Other Legal Issues

- ▶ Personnel, union and employment matters
 - Layoffs/ furloughs
 - Work from home
- ▶ Airport proprietor contractual obligations
- ▶ Short term non-financial contractual relief
- ▶ Need for emergency procurement protocols
- ▶ Need for liability assessment
 - Virus transmission
 - Contractual violations
 - Premises liability





Lessons – Legal Policy Issues

- ▶ USA: protocol or policies for protection of personal liberties
- ▶ Understand public health powers (quarantine, removal, etc.)
- ▶ Data protection and privacy
- ▶ Restoring public confidence in safety, cleanliness of facilities





Lessons – Operations and Facility Challenges

- ▶ Point of contact and decision maker on landside operations
- ▶ Decision tree for restrictions on landside operations
- ▶ Different closure, mothballing, reopening accommodation for different users
- ▶ Operational protocols to ensure fair treatment
- ▶ Anticipate and plan for public confusion and opposition
 - Personal liberties
 - USA: freedom of speech, assembly, religion, search-and-seizure
- ▶ Plan for use of different airport facilities
 - Airfield
 - Terminal
 - Ancillary facilities





Lessons – Financial and Tenant Relief Needs

- ▶ Avoiding playing favorites among stakeholders
- ▶ Understand (revise?) terms and conditions of tenant contracts
 - Most favored nation clauses
 - Force majeure
 - Subordination to regulatory mandates
- ▶ Equitable treatment and avoiding unjust discrimination
- ▶ Protect airport proprietor long-term financial viability in the face of demands from stakeholders
- ▶ Distinguish relief to aeronautical and non-aeronautical stakeholders





Forthcoming Resources

- ▶ National Academy of Sciences, Transportation Research Board *Legal Research Digest, Legal Considerations for Airports Responding to Pandemics*
 - Publication expected late 2022
- ▶ American Ass'n of Airport Executives, Airport Consortium on Customer Trust *Recovery Resource Clearinghouse*
- ▶ https://www.aaae.org/aaae/ACT/ACT/Library_Login.aspx





Questions / Discussion

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