COVID-19 LIMITING YOUR "EXPOSURE"

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Introduction

As of this paper's publication, Congress has yet to enact tort immunity provisions shielding all businesses and individuals from claims arising from COVID-19 exposure. As businesses are allowed to reopen, several states have enacted legislation or issued executive orders to provide businesses and individuals with tort immunity from claims or suits of employees or customers based upon COVID-19. This paper will discuss the states' varying approaches to COVID-19 tort immunity and will provide examples of the current state legislation and executive orders instituted to curb the anticipated wave of COVID-19 tort claims. Next, this paper will discuss existing hurdles to COVID-19 tort liability where no statutory immunity otherwise exists and anticipated theories or strategies the plaintiff's bar may employ to overcome those hurdles. Next this paper will offer "best practices" that businesses may use to limit exposure to COVID-19 tort claims. Finally, this paper will discuss the impact of the pandemic on claims and litigation management and will likewise offer perspectives on potential juror perceptions of COVID-19 actions and the various liability theories.

State Approaches Toward Providing COVID-19 Tort Immunity

Currently Arkansas and Alabama have issued executive orders establishing broad COVID-19 tort immunity for businesses. Roughly ten other states including Georgia, Iowa, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Utah and Wyoming, have either already enacted broad-based COVID-19 immunity legislation or have such legislation pending. Additional states including Arizona, Connecticut, Illinois, Kentucky, Massachusetts, Michigan, New Jersey, New York, Nevada, Rhode Island, Vermont, and Wisconsin have implemented some form of COVID-19 premises liability protection for nursing homes and other long-term care facilities.

Some states such as North Carolina initially sought to limit COVID-19 immunity protection only to "essential businesses," such as grocery stores and restaurants, though pending legislative efforts seek to expand immunity protection to all businesses for harm caused by COVID-19 exposure.

Most states that have broadly applied COVID-19 immunity protection to apply as long as "safety rules" or guidelines were followed at the time of the alleged exposure and the exposure did not result from "reckless or intentional conduct." This approach essentially codifies traditional common law "assumption of risk" defenses. Some states'

immunity provisions such as Arkansas and Louisiana have limited employee exposure claims to those remedies found under the state's workers' compensation system.

The state immunity legislation and executive orders are generally applied retroactively such that immunity applies for any exposure incident occurring after the state's initial pandemic emergency declaration. Similarly, most state COVID-19 immunity provisions contain "sunset" provisions such that immunity protection ends whenever the corresponding state pandemic emergency declaration is lifted or until further legislative review.

State- Based COVID-19 Immunity Derived from Executive Orders

Arkansas

On June 15, 2020, Governor Asa Hutchinson issued Executive Order 20-33 which provides businesses immunity from COVID-19 suits in the event . The Order does not apply to willful or reckless conduct and does not bar workers' compensation claims. The Order is effective until January 2021 when it will be reviewed by the Arkansas General Assembly.

Alabama

On May 8, 2020, Governor Kay Ivey issued a proclamation providing businesses, hospitals and public entities and its members immunity from COVID-19 suits. The proclamation does not apply to reckless or intentional conduct and protects businesses from emotional distress claims. The proclamation has no effect on existing benefits, such as workers' compensation.

State-Based Legislation Efforts for COVID-19 Immunity

Georgia

On June 29, 2020, the Georgia General Assembly delivered the "Georgia COVID-19 Pandemic Business Safety Act" for approval to Governor Brian Kemp. O.C.G.A. § 51-16-1 et seq. The Act provides immunity for ordinary negligence claims and creates a rebuttable presumption that a claimant assumed the risk of contracting COVID-19 where certain actions are taken by the defendant entity or individual. Evidence of posted warnings or disclaimer/exculpatory agreements are expressly addressed in the Act. Such warnings are deemed admissible to prove assumption of the risk of exposure on premises while any failure to post COVID-19 warnings is not admissible in proving a COVID-19 liability claim. Immunity may be defeated based on a showing of "gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm."

Iowa

On June 18, 2020, Governor Kim Reynolds signed the "COVID-19 Response and Back-to-Business Limited Liability Act." The Act provides businesses, schools, and nonprofits immunity against claims for civil damages for COVID-19 unless the exposure resulted in hospitalization or death—or unless the claimant can prove actual malice or intent to cause harm. Immunity protection is retroactive to January 1, 2020.

Kansas

On June 8, 2020, Governor Laura Kelly signed House Bill 2016 into law which shields businesses from liability as long as they can prove they substantially complied with applicable regulations and guidance. Immunity protection is retroactive to March 12, 2020 and expires on January 26, 2021.

Louisiana

On June 13, 2020, Louisiana Governor John Bel Edwards signed into law House Bill 826, which grants liability protections to businesses from claims filed by both customers and employees related to COVID-19 exposure. House Bill 826 is retroactive to the date that Louisiana declared its state of emergency related to the coronavirus. The Bill provides that a business is not liable for damages for injury or death related to actual or alleged exposure to COVID-19 in the course of business operations unless it "failed to substantially comply with the applicable coronavirus procedures established by the federal, state or local agency which governs the business," and the injury or death was caused by "gross negligence or wanton or reckless misconduct." If more than one set of procedures or guidelines applies to the business, it must only "substantially comply" with one of them. Moreover, under House Bill 826, an employee who contracts COVID-19 in the workplace has no tort remedy against the employer unless the exposure resulted from an "intentional act."

Mississippi

On July 8, 2020, Mississippi Governor, Tate Reeves, signed into law Senate Bill No. 3049, the "Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act." The Act provides immunity from civil damages for injuries or death resulting from exposure to COVID-19. In order to qualify for immunity the defendant must be able to show that she attempted "in good faith to follow applicable public health guidance…" The Act also extends immunity to persons acting "in the time before applicable public health guidance was available." A claimant may rebut the presumption of immunity with "clear and convincing evidence" that a defendant acted with "actual malice or willful, intentional misconduct." The Act is retroactively effective to March 14, 2020, and extends until one (1) year after the end of the emergency declaration. However, protections extend in perpetuity for acts, omissions, or injuries that occur while the Act is in effect.

North Carolina

North Carolina's COVID-19 liability immunity provision was included in Senate Bill 704, which was approved by Governor Ray Cooper on May 4, 2020. Senate Bill 704 provides immunity to any entity deemed "essential" in the governor's emergency orders, retroactive to March 27, 2020. Grocery stores, restaurants, hardware stores, pharmacies, banks, and professional offices have been deemed "essential businesses" for purposes of immunity protection. North Carolina's immunity provision expressly provides that it does not bar regulatory actions, criminal charges or workers' compensation claims based on COVID-19 exposure. Like other states, there is no immunity afforded against gross negligence, recklessness or intentional harm. The immunity provisions remain in effect until the state's emergency orders expire or are rescinded.

Oklahoma

Oklahoma's Senate Bill 1946 signed into law by Governor Kevin Stitt on May 21, 2020, provides immunity to individuals and business from liability for any claim by a person who was exposed to COVID-19 so long as applicable official safety guidance was followed at the time of the alleged exposure. Applicable safety guidance includes guidelines issued by the Centers for Disease Control and Prevention, the Occupational Safety and Health Administration, the Oklahoma State Department of Health, the Oklahoma Department of Commerce, state or federal regulations, or a presidential or gubernatorial executive order. Where two or more sources of applicable guidance conflict with one another, a business or individual will still be able to maintain immunity from civil liability if they follow at least one source of applicable guidance.

Utah

Utah's Senate Bill 3007 provides immunity to all persons and premises from liability for injury resulting from exposure to COVID-19, unless there was willful misconduct or reckless or intentional infliction of harm. The bill was signed into law by Governor Gary Herbert on May 4, 2020.

Wyoming

Wyoming's Senate File 1002 was signed into law by Governor Mark Gordon on May 20. 2020. S.F. 1002 provides immunity from COVID-19 claims to any person or business "acting in good faith" which follows safety instructions for the duration of the public health emergency. The bill will expire on June 30, 2021.

Theories of COVID-19 Liability

Existing Hurdles for COVID-19 Tort Claims

Even without immunity protections, COVID-19 tort liability cases by customers or employees premised on traditional negligence or premises liability theories face significant hurdles.

In states recognizing the "exclusive remedy doctrine," most employee exposure tort claims would be barred unless the plaintiff could prove an exception to the doctrine. The "exclusive remedy doctrine" generally provides that a state's worker's compensation system offers the only avenue for recovery for injuries or death sustained while "on-the-job."

Customer-based COVID-19 tort claims also face significant hurdles given the unique nature of the virus. The virus' highly contagious nature and lengthy incubation period from exposure date until onset of symptoms would presumably make it difficult for customers to prove both duty and causation elements required for ordinary negligence actions. While cases of exposure involving confined or custodial settings such as cruise ships or nursing homes would theoretically be easier to prove, even those settings would present challenges to the plaintiff's bar in states recognizing the "assumption of risk."

Plaintiff Bar's Efforts to Overcome Hurdles to COVID-19 Tort Claims

In attempting to overcome the perceived hurdles to COVID-19 tort liability, the plaintiff's bar is attempting to use state and federal safety regulations and guidelines as a sword to establish liability. While federal or state administrative guidance generally does not give rise to a private cause of action in tort, the plaintiffs' bar is nevertheless attempting to argue regulatory noncompliance to establish claims for public nuisance and to establish breach of duty to protect the health and safety of employees.

Lawsuits have been filed against employers in several jurisdictions alleging that employers "knowingly" or "intentionally" disregarded regulatory COVID-19 guidance or safety provisions. These suits attempt to overcome COVID-19 immunity laws by alleging either reckless or intentional conduct on the part of employers to take advantage of the intentional tort immunity exceptions. These suits commonly allege that employees were forced against their will to work in unsafe conditions when the virus was known or reasonably believed to exist on site.

Currently there are a handful of cases filed in which the plaintiff or class of plaintiffs rely on alleged violations of safety standards promulgated by the Occupational Safety & Health Administration ("OSHA"). While OSHA has not yet published a specific federal COVID-19 workplace standard, the OSHA "General Duty Clause," requires that

employers provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." In the context of COVID-19, OSHA has advised employers to follow guidelines from the CDC, such as sanitizing surfaces and ensuring social distancing.

Courts have only recently begun to decide whether they should weigh in on OSHA-based COVID-19 claims. In *Rural Community Workers Alliance v. Smithfield Foods, Inc.,* No. 5:20-CV-06063 (W.D. Mo. May 5, 2020), workers at a Smithfield Foods meat processing plant argued that their employer failed to follow OSHA and CDC guidelines designed to protect employees. Specifically, the complaint alleged that employees were not provided recommended social distancing accommodations, handwashing breaks and face coverings. The complaint further alleged that Smithfield's sick-leave policy penalized workers for missing work even when exhibiting Covid-19 symptoms. The complaint asserted a "public nuisance" cause of action. The federal court dismissed the case primarily on jurisdictional grounds citing an ongoing OSHA investigation and the agency's rapidly evolving guidelines in response to the pandemic. *Id.*

An Illinois state court, however, recently refused to dismiss a class action suit brought by a proposed class of Chicago-based McDonald's employees who claimed that McDonald's failed to provide PPE equipment or safety policies to protect workers during the ongoing pandemic. *Massey v. McDonald's Corp*., 2020-CH-04247 (Cir. Ct. Cook County June 3, 2020).

Limiting the Risk of COVID-19 Tort Claims

The most obvious way for businesses and nonprofits to limit the risk of a COVID-19 claim is to adopt the recommendations and guidance offered by the CDC and local state health departments in attempting to prevent or control the spread the disease. Those resources provide specific steps businesses should consider taking to protect both employees and visitors to their premises. Implementation of these protocols in a procedures manual together with posted warnings about the risks of COVID-19 at points of entry may establish evidence to support application of the "assumption of risk" defense in the event of a COVID-19 related lawsuit. Where practical, executed liability waivers should be requested of visitors as a condition of entering the business premises.

Impact of COVID-19 on Claims and Valuation

Most civil trial dockets have been greatly impacted by the pandemic. Trial dockets in state courts where technology and resources often lag behind their federal counterparts have ground to a halt in many states. Given that trial dates and potential jury verdicts drive case resolution and settlements, many plaintiff's law firms have suddenly become "cash poor" and are therefore more receptive to resolving claims at lower valuations. Plaintiff lawyers previously espousing protection of the 7th amendment right to jury trial on advertising and letterhead now push for mediation and/or arbitration to fast track their

cases. Many plaintiff's firms with multiple claims or suits against certain insurers are seeking to explore global claim resolution efforts. Finally, many more claims are expected to be resolved in the current climate without formal litigation as claimants suffer from the impacts of job losses or other economic hardship due to the pandemic.

The Impact of the Pandemic on Juries

There are differing opinions on how juries will view COVID-19 tort actions as well as the plaintiffs that file those actions as a result of the pandemic. One view is that the pandemic has reminded individuals of their vulnerability to illness and death. Reinforcing these psychological reminders of the virus and its impact on jurors' lives through traditional "profits over people" or safety violation rhetoric at trial may result in a greater likelihood of a punitive verdict against corporate defendants.

The alternate viewpoint is that the juries will be highly suspicious of individual COVID-19 tort claims. Unlike asbestos exposure cases or medical malpractice cases, the prevalence of the virus and its effects touch the entire population. Accordingly, jurors may take a suspicious view of an individual plaintiff's efforts to seek recovery for personal grievances and injuries caused by matters that affect the country and local communities.

As pointed out by the district judge in the *Smithfield Foods* decision, the guidelines and recommendations offered by government agencies have been quickly and constantly evolving. There is some belief that because public information regarding the virus has evolved so frequently as more is learned about the virus, juries may be less likely to hold businesses and individuals liable as long as there was some effort to control or prevent the spread of the disease.

Finally, the effectiveness of traditional safety-based "reptile tactics" of plaintiff lawyers may miss the mark where essential workers or corporations employing those essential workers are the target defendants.