ATRA

Responding to the Coming Lawsuit Surge:

Policy Prescriptions for Addressing COVID-19 Tort Litigation

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Each day, thousands of people in the United States are contracting coronavirus. The virus is devastating families, stretching the ability of health care providers to help those who become sick, and crippling businesses and the economy. Manufacturers have ramped up production of medical supplies and protective equipment and are investigating treatment options and developing vaccines.

Some personal injury lawyers, however, view individuals exposed to COVID-19 as a large new pool of plaintiffs, and health care providers and businesses that aid in the response effort or provide essential services as defendants to cast blame. Personal injury law firms are already recruiting individuals to "sue now" even if they have not contracted the disease. The first lawsuits targeting health care providers, employers, retailers and other businesses for COVID-related injuries have been filed. Many more are to come.

States should proactively adopt legislation that distinguishes legitimate claims from no-injury lawsuits. States can place reasonable constraints on the types of lawsuits that pose an obstacle to the coronavirus response effort, place businesses in jeopardy, and further damage the economy. This paper explores tort liability concerns related to the COVID-19 pandemic and considers potential solutions.

Concern 1: Many businesses will face lawsuits by customers or visitors alleging that the business negligently exposed them to coronavirus. These lawsuits will include individuals who did not contract coronavirus, experienced symptoms similar to a common flu, or experienced no symptoms at all.

Explanation: Prompted by plaintiffs' lawyers, many people may sue a wide range of employers, retailers, health care providers and others alleging that they were negligently exposed to coronavirus, regardless of whether they experienced a serious injury. The lawsuits are likely to allege that a business or health care provider knew or should have known of an employee, customer, or patient infected with coronavirus and failed to take sufficient action to prevent its transmission to others. These lawsuits will claim that exposure to coronavirus led a person to experience emotional distress stemming from fear of contracting the disease, the expense of visiting a doctor or testing, or economic loss due to quarantine.

For example, at least two law firms have filed individual lawsuits on behalf of guests on the Grand Princess Cruise ship.[1] These lawsuits do not allege that the passenger developed coronavirus, but claim emotional harm and seek punitive damages. The lawsuits each seek at least $1 million. In addition, the Lieff Cabraser law firm has filed a class action lawsuit against the cruise line on behalf of every passenger on that voyage.[2]

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[1] *See* Joyce Hansen, Princess Cruise Lines Hit by Wave of COVID-19 Suits, *Law360*, 3/17/20; Amanda Bronstad, Mikal Watts Sues Princess Cruise Lines Over COVID-19 Outbreak, *Law.com*, 3/16/20; Amanda Bronstad, Lawyer Suing for Cruise Ship Passengers: 'This is Norovirus on Steroids', *Law.com*, 3/11/20.

[2] Complaint, *Archer v. Carnival Corp.*, No. 3:20-cv-02381 (N.D. Cal. filed Apr. 8, 2020); *see also* Amanda Bronstad, Lieff Cabraser Files First Class Action Over Quarantined Grand Princess Cruise Ship, *Law.com*, 4/8/20. Of the nine named plaintiffs, the Complaint identifies only one who was diagnosed and treated for COVID-19.

Solution: Legislation can avoid a crippling surge of coronavirus lawsuits that will further strain businesses and the economy by stopping lawyers from suing on behalf of individuals who did not develop COVID-19, were asymptomatic, or experienced common flu-like symptoms. This legislation can provide that no civil action may be filed alleging injury resulting from exposure to coronavirus unless the plaintiff experienced a serious physical injury or death.

"Serious physical injury" might be defined as an injury with the result of in-patient hospitalization of at least 48 hours. Alternatively, the federal Public Readiness and Emergency Preparedness Act (PREP Act), which provides liability protections to certain manufacturers of protective equipment during a pandemic, offers a more restrictive definition. The PREP Act defines "serious physical injury" as an injury that "(a) is life threatening; (b) results in permanent impairment of a body function or permanent damage to a body structure; or (c) necessitates medical or surgical intervention to preclude permanent impairment of a body function or permanent damage to a body structure."[3]

This measure would sift out no-injury lawsuits, lawsuits for purely emotional harm, lawsuits by individuals who were quarantined for public health reasons, or lawsuits on behalf of those who experienced common symptoms. This legislation would not affect the need for a plaintiff to meet other requirements for a claim, such as the need to show a defendant's wrongful conduct caused his or her injury.

Concern 2: Plaintiffs' lawyers will attempt to circumvent the workers' compensation system and bring tort lawsuits against employers for exposure to coronavirus at work.

Explanation: Many employers have operated during all or part of the coronavirus pandemic. These lawsuits may target companies that remained open while they received mixed-messages from government officials and before a state-issued shutdown order. They may also target essential businesses that continued to operate during the pandemic.

Employees may attribute their development of coronavirus to exposure at work. In limited circumstances, when this occurs, employees may be eligible for workers' compensation (the requirements will vary from state to state, but generally an employee would need to show a clear link between job responsibilities and a higher risk of exposure than the general population, a specific exposure at work, and rule out other possibilities of exposure outside of work). While no-fault workers' compensation is intended to serve as the exclusive means for an employee to receive compensation for a work-related injury, these laws typically carve out claims based on an employer's intentional torts.[4] In some states, an intentional act includes an action or omission that is "substantially certain" to result in an injury. With increasing frequency, plaintiffs' lawyers have used this exception to attempt to bring tort claims that are not constrained by the liability limits of workers' compensation.[5]

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[3] 42 U.S.C. § 247d-6d(i)(10).

[4] *See* Shawn McParland Baldwin & Dennis N. Ventura, Workers' Compensation Acts and Exceptions to the Exclusivity Bar: A 50 State Survey, June 2016.

[5] *See* Kristen Beckman, Plaintiffs Challenge Exclusive Remedy with Intentional Tort Claims, *Business Insurance*, 3/22/17.

Some plaintiffs' law firms and lawsuit-generating websites are already suggesting that employees can use this escape hatch to bring coronavirus-related lawsuits against their employers.[6] They may allege, for example, that given knowledge regarding the spread of coronavirus, an employer knew it was likely that employees would be exposed but remained open and required employees to work. Already, lawyers have filed what is believed to be the first wrongful death lawsuit alleging that a retail worker was exposed to coronavirus as a result of an employer's willful and wanton misconduct. That claim is pending in Cook County,[7] a jurisdiction that ATRA has repeatedly named a "Judicial Hellhole."[8]

Solution: For purposes of tort claims against employers alleging work-related injuries from exposure to coronavirus, legislation may provide that an employee can only file a claim outside the workers' compensation system when an employer intended to injure an employee. A plaintiff would need to show clear and convincing evidence of a specific intent to harm an employee to proceed in the tort system. This approach may not be needed in jurisdictions in which courts consistently apply a similar high standard for work-related tort claims, restricting lawsuits to injuries that stem from truly intentional acts.

Concern 3: Health care providers are bracing for a surge of medical liability actions related to care provided during the coronavirus.

Explanation: Health care providers must make difficult decisions when a pandemic threatens to overwhelm facilities, staff, and medical equipment. Doctors and hospitals may need to exercise greater caution in admitting patients that do not appear to have an immediate medical need, discharge patients earlier than usual to open beds for coronavirus patients, postpone elective procedures, and make hard decisions regarding allocation of limited resources, such as ventilators.

Solution: Legislation should provide health care providers with greater discretion to make decisions about medical care without exposure to liability during a pandemic or other health emergency. Decisions should be made based on patient and public health, not fear of lawsuits.

Legislation should limit the liability of health care practitioners and facilities, such as hospitals and clinics in certain lawsuits alleging a patient's injury or death occurred because of negligent care during the COVID-19 outbreak. Rather than apply a bare negligence standard, the legislation should apply a gross negligence standard when the act or omission occurred in the course of providing medical services in good faith in support of the state's response to COVID-19. A gross negligence standard is common in state statutes limiting the liability of Good Samaritans or others who provide aid to a person in an emergency or on a voluntary basis. Alternatively, the legislation could impose liability for reckless conduct, applying when a health care provider's conduct shows deliberate indifference to a known risk of harm to a patient's health or safety.

This legislation would need to be broad enough to cover care provided to non-COVID-19 patient care that may be impacted by limited staff, bed space, or equipment as a result of the pandemic, but not so broad

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[6] *See, e.g.,* Work Injury Source, https://workinjurysource.com/workers-compensation-and-coronavirus/ (last visited 4/6/20).

[7] *See* Complaint, *Evans v. Walmart, Inc.*, No. 2020-L-3938 (Cook County, Ill. Cir. Court, filed Apr. 4, 2020); *see also* David McAfee, Walmart Hit With Employee Wrongful Death Suit Over Covid-19, *Bloomberg Law*, 4/6/20.

[8] *See* American Tort Reform Foundation, Judicial Hellholes 2019-20, at 32-34 (2019).

that it applies to medical treatment that is unaffected by the pandemic.

Concern 4: **Manufacturers are quickly making products to aid in the coronavirus effort. Lawsuits may target manufacturers of these critically needed supplies. Without legislative protection, companies are exposed to product liability lawsuits if a product is alleged to have a manufacturing or design flaw, or lacks sufficient instructions or warnings regarding the product's risks or limitations.**

Explanation: Companies that make protective equipment, such as masks and gloves, are ramping up production to address shortages. In some cases, businesses that do not ordinarily make medical or other supplies have shifted production to help. For example, automakers are making ventilators and respirators.[9] Breweries and distilleries are producing hand sanitizer.[10] In this environment, prototype analysis, testing, and quality control may not be at ordinary, nonemergency levels. A federal law limits the liability of manufacturers of certain products in response to a pandemic or other emergency to actions alleging willful misconduct, but many companies that are contributing to the effort will not quality for this protection. A health care provider who develops COVID-19 and cannot file a lawsuit against his or her employer given workers' compensation exclusivity may be enticed by a plaintiffs' attorney to bring a product liability claim against a mask manufacturer, for example.

Solution: Legislation can limit the liability of businesses that design, manufacture, sell, or donate protective equipment, medical devices, drugs, or other products for use by health care providers and facilities (and possibly the general public) in response to a declared public health emergency. It may also be worthwhile to consider whether this protection or similar protection should extend to businesses that provide property or services to aid in the coronavirus response, such as hotels or other facilities that provide space to treat COVID-19 patients.

Option A: No liability except for an injury that results from reckless, willful, or intentional misconduct.

Option B: No punitive damage awards.

Option C: Subject actions related to products made in response to the coronavirus effort to the liability limitations of the state tort claims act. This option would effectively deputize the manufacturer as a state actor, as it is acting to benefit the state. According to a survey of state law, at least 33 states have adopted a tort claims act that cap the amount of damages that may be recovered from judgments against the states, and at least 29 states (often in combination with a cap) prohibit a judgment against the state from including punitive

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[9] Allison Aubrey, Automaker Retools With Health Supply Companies to Make Masks, Ventilators, NPR.org, 3/24/20.

[10] Thomas Buckley, Distilleries and Breweries Pivot to Producing Hand Sanitizer, *Bloomberg Businessweek*, 3/24/20.

damages.[11] Damages caps are often set between $100,000 and $1 million. This option is not viable in states that do not limit compensatory damages in tort claims against the state.

Concern 5: Is there an opportunity to enact proactive legislation that reduces liability concerns for health care providers, manufacturers, and employers during future pandemics or other emergency situations?

Explanation: As the coronavirus epidemic illustrates, enacting legislative reforms during a pandemic, natural disaster, or other crisis is especially challenging. During a health or other emergency, the legislature may be unable to meet, face significant restrictions, or have competing priorities. In addition, laws that retroactively limit liability may face constitutional challenges from the plaintiffs' bar. State laws provide governors with the power to declare a state of emergency and give governors special powers during that period. These laws, however, may either not be broad enough to allow a governor to unilaterally limit liability or his or her authority to do so may be uncertain.

Solution: States can amend their emergency powers laws to provide a menu of liability protections that a governor could implement through a declaration as needed to aid in the state's response. State legislatures can use the federal PREP Act as a model for state legislation. This federal law authorizes the Secretary of the Department of Health and Human Services to issue a declaration that provides immunity from liability (except for willful misconduct) to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of "qualified countermeasures" for claims of loss caused, arising out of, relating to, or resulting from the administration or use of the countermeasure.[12] A state law could authorize the governor to provide liability protection for a broader range of conduct that is necessary to assist the state's response to a declared emergency, including health care providers, volunteers, and those that make, sell, or donate medical equipment or supplies, protective gear, and medications to aid the state's response.

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[11] Matthiesen, Wickert & Lehrer, S.C., State Sovereign Immunity and Tort Liability in All 50 States, last updated 4/25/19.

[12] 42 U.S.C. §§ 247d-6d, 247d-6e.

The Path to Protection: Executive Order or Legislation?

ATRA applauds the nation's governors who have stepped up to address liability concerns stemming from COVID-19. As of publication of this white paper, seven governors have limited the liability of health care providers when providing medical care in support of the state's COVID-19 response. These states include Arizona,[13] Connecticut,[14] Illinois,[15] Michigan,[16] Mississippi,[17] New Jersey,[18] and New York.[19] With state legislatures unable to meet, out of session, or facing limited ability to consider legislation, more governors are likely to follow.

These executive orders generally rely on the governor's authority under each state's emergency powers statute to modify or suspend enforcement of state laws that pose an obstacle to the state's ability to respond to a crisis. As discussed earlier, Good Samaritan statutes and other state laws already provide a gross negligence standard for health care providers or others who provide care in an emergency or on a volunteer basis. The executive orders effectively extend these protections to all health care professionals and facilities aiding the state's COVID-19 response effort.

The benefit of this approach is that it swiftly reassures doctors, nurses, and other health care professionals that treating patients when hospitals and clinics are short on beds, ventilators, and staff is not setting them up for a medical malpractice lawsuit. The risk, however, is that this type of executive action has not been tested in court. Plaintiffs' lawyers are certain to challenge the governors' authority to provide this liability protection through use of emergency powers. It may be years before these cases reach the appellate level. If invalidated by a state high court, those who provide medical care during the COVID-19 outbreak will be exposed to liability under a bare negligence standard. For that reason, even in states that provide liability protection through an executive order, it is imperative to enact a legislative backstop.

Thus far, New York[20] and Kentucky[21] have enacted legislation to curb COVID-related liability.

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[13] Ariz. Exec. Order No. 2020-27 (Apr. 9, 2020) (limiting liability of licensed health care professionals, registered volunteer health care professions, emergency medical care technicians, healthcare institutions, and entities operating modular field treatment facilities to gross negligence or reckless or willful misconduct).

[14] Conn. Exec. Order No. 7V (Apr. 7, 2020) (limiting liability of health care professionals and facilities to acts or omissions that constitute a crime, involve fraud, malice, gross negligence, willful misconduct, or would constitute a false claim).

[15] Ill. COVID-19 Exec. Order No. 17 (Apr. 1, 2020) (limiting liability of health care facilities, professionals, and volunteers to gross negligence or willful misconduct).

[16] Mich. Exec. Order No. 2020-30 (Mar. 29, 2020) (limiting liability of any licensed health care professional or designated health care facility to gross negligence).

[17] Miss. Exec. Order No. 1471 (Apr. 10, 2020) (limiting liability of healthcare professionals and facilities to acts or omissions that constitute a crime, fraud, malice, reckless disregard, willful misconduct, or would otherwise constitute a false claim).

[18] N.J. Exec. Order No. 112 (Apr. 1, 2020) (limiting liability of any licensed health care professional or individual granted a temporary license to practice in connection with the state's COVID-19 response to acts or omissions that constitute a crime, actual fraud, gross negligence or willful misconduct).

[19] N.Y. Exec. Order No. 202.10 (Mar. 23, 2020) (limiting liability of medical professionals to gross negligence).

[20] N.Y. S. 7506 / A. 9506 (enacted Apr. 3, 2020) (limiting liability of health care facilities and providers acting in good faith to willful or intentional criminal misconduct, gross negligence, reckless misconduct, or intentional infliction of harm).

[21] Ky. S.B. 150 (enacted Mar. 30, 2020) (providing that health care providers and businesses that make protective equipment in response to COVID-19 that ordinarily do not make such products are generally not subject to liability for ordinary negligence).