

CLASS ACTIONS IN THE AGE OF COVID-19

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CLASS ACTION PROCESS

Class Action Rules:

Fed. R. Civ. P. 23.

Wis. Stat. § 803.08.

2018 Amendment to Wis. Stat. § 803.08 makes process nearly identical.

Federal case law will inform proceedings under state statute.

Federal judges see many more class actions than state judges.

3

RULE 23 ELEMENTS

Plaintiff must satisfy:

All four provisions of Fed. R. Civ. P. 23(a).

At least one of the three provisions of Fed. R. Civ. P. 23(b).

How they do so:

Through motion and possible evidentiary hearing.

Settlement classes.

4

COVID-19 BASICS

Novel coronavirus that has been around for only 6 months.

9,030,328 confirmed cases worldwide (as of June 22, 2020).
469,378 deaths worldwide.

Symptoms range from asymptomatic to severe illness and death.

Transmission:

Person to person.

Respiratory droplets when infected person coughs, sneezes, talks, yells, or sings.

Touching of surfaces with virus and then touch your mouth, nose, or eyes.

Two to 14-day incubation period.

5

EFFECT ON BUSINESS OPERATIONS EMPLOYEE CLAIMS

Employees who become ill with COVID-19 due to workplace exposure might assert against employer:

Claim for Negligence.

Violation of Wisconsin's Safe Place Statute (Wis. Stat. § 101.11).

Wage Claims.

Age/Race Discrimination Claims.

6

EFFECT ON BUSINESS OPERATIONS EMPLOYEE CLAIMS

Possible Reasons:

Failure of employer to maintain premises as safe as the nature of the premises reasonably permits (e.g., OSHA, CDC, and DHS guidelines).

Lack of written plan for handling COVID-19 in workplace with clear instructions for how you expect employees to act.

Deeming “non-essential” work “essential.”

Not enforcing guidelines vis-a-vis other employees who have COVID-19.

7

EFFECT ON BUSINESS OPERATIONS INVITED GUESTS

Invited guests (e.g., the UPS Driver, mail delivery person, a customer, members of the public who drop in during open hours, the mechanic who comes to repair something on the premises, etc.) are protected just like employees from your failure to reasonably keep guests safe.

No duty to trespassers, but the Safe Place Statute applies broadly to “frequenters” of any place of employment. *See Wis. Stat. § 101.11.*

8

EFFECT ON BUSINESS OPERATIONS COMMERCIAL CLAIMS

False advertising about effectiveness of PPE, sanitizers, air cleaners, and barriers.

Products liability based on ineffectiveness of PPE, sanitizers, air cleaners, and barriers.

An injury claim but is fundamentally different from the invited guest and employee claims.

Do not involve direct exposure to virus at company premises.

9

EFFECT ON BUSINESS OPERATIONS COMMERCIAL CLAIMS

Breach of contract based on failure to deliver product due to lockdowns.

Cancellation and refund claims: refund class actions already filed against gym franchises, hotels, airlines, and universities.

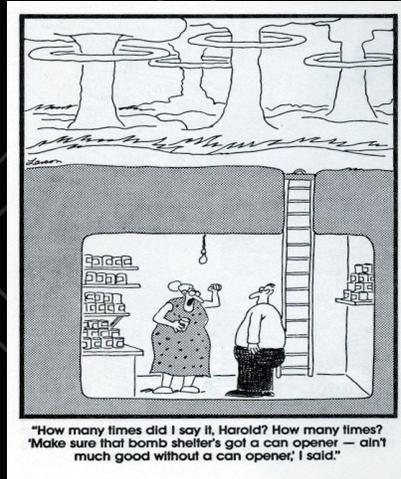
Price gouging:

Brought in wake of consumer product shortages that led to price hikes.

Likely to follow future spike in cases that affects supply of any product.

10

MITIGATION TECHNIQUES



Plan ahead.

MITIGATION TECHNIQUES

Assign one or more individuals to lead COVID-19 approach:

Must keep abreast of constant changes in disease knowledge.

Must fully and completely communicate company expectations.

MITIGATION TECHNIQUES

Written reminders:

No one feeling ill or with an ill family member should be at work.

Temperatures over 100.4 degrees are “send them home” events (assuming you can and do take temperatures).

6-feet apart for proper social distancing, so consider design of each workspace.

To mask or not to mask in the workplace.

Handwashing for 20 seconds and/or applying hand sanitizer with 60% or more alcohol.

Rules for coughing and sneezing.

Need for written policies and employee acknowledgement of those policies.

13

MITIGATION TECHNIQUES

Employer should provide supplies (tissue, hand sanitizer, and disinfecting wipes).

Work with cleaning vendors to ensure they are CDC-compliant.

Cancel or reschedule large company events.

Workflow direction and bathroom proximity rules.

Limit all non-essential work travel.

Encourage employees to avoid non-essential personal travel.

14

MITIGATION TECHNIQUES

Send home any employees presenting with symptoms.

Discipline employees who violate the established COVID-19 rules.

Be reasonable on workarounds for those employees struggling with working in a particular area, being required to come to the office, or having to travel for work.

Rely on technology – imperfect as it may be.

Limit invited guests and establish reasonable alternatives for daily visitors.

Consider requiring all guests to advise on COVID-19 exposure.

15

MITIGATION TECHNIQUES

Get out in front:

Of customer deliverables.

Incentives for customers.

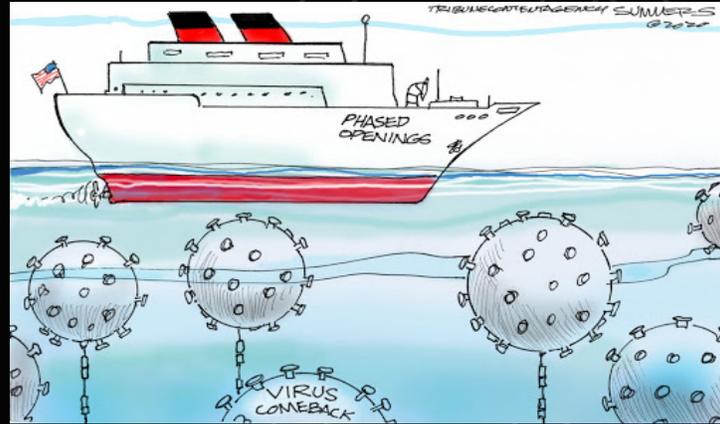
Communicate effectively.

Establish alternative paths to revenue during COVID-19.

Be realistic.

16

MITIGATION TECHNIQUES



Be reasonable.

17

CAUSATION AND COVID-19: THE PERFECT DEFENSE?

If a defendant acted intentionally and injury is “almost certain to occur from the actor’s conduct,” Wisconsin law deems that intentional conduct. Wis. JI-Civil 2001.

If the defendant’s conduct merely created a risk of harm, which may or may not have resulted, then the conduct was negligent. *Id.*

Plaintiffs seeking to hold a defendant liable for negligent acts must prove there is a causal connection between the defendant’s actions and the plaintiff’s injury.

18

PROVING CAUSATION

Wisconsin civil jury instructions provide that “someone’s negligence caused the injury if it was a substantial factor in providing the injury.” Wis. JI-Civil 1500.

Conduct is a substantial factor if it has such an effect in producing the harm as to lead a reasonable person to regard the conduct as a cause of the harm. *Retzlaff v. Soman Home Furnishings*, 260 Wis. 615 (1952).

Conduct need not be the sole factor, the primary factor, only a substantial factor. *Schnabl v. Ford Motor Co.*, 54 Wis.2d 345 (1972).

19

THE CAUSATION PROBLEM

Lengthy incubation period – a lot can happen in 14 days.

Plaintiffs must not only present evidence that they were exposed at a particular business, have to also rule out other sources of exposure.

Successful businesses may be targets.

Is the business response to COVID-19 really the problem?

20

“BUT THIS IS ALL YOUR FAULT”

WHERE DID WISCONSINITES GO AS SOON AS THE LOCKDOWN WAS OVER?



21

WORKER'S COMPENSATION AS A MEANS TO LIMIT CORONAVIRUS CLAIMS

Wis. Stat. Ch. 102 provides a path for employees, temporary employees, and contractors to make liability claims against employers for work-related injuries.

“Right to the recovery of compensation under this chapter shall be the **exclusive remedy** against the employer, any other employee of the same employer and the worker's compensation insurance carrier.” Wis. Stat. § 102.02(2).

Does not apply to third parties outside the employer-employee relationship.

22

OTHER AVENUES TO DEFEATING COVID-19 CLAIMS

Motion to dismiss.

Class certification fight.

Standard of care and mitigation efforts.

Assumption of the risk.

Analyzing damages.

Help from the legislature?

23

NOT HAPPENING ANYTIME SOON



24

INSURANCE ISSUES

This presentation deals with liability insurance for claims by third parties (or employees) against businesses.

Different from first party claims for business interruption or similar losses caused by economic impact of government shutdown orders.

Employee claims fall under Worker's Compensation; Third party liability claims are handled under a company's Comprehensive General Liability (CGL) policy.

25

INSURANCE ISSUES

Two basic kinds of coverage under most CGL policies:

Coverage A: Bodily Injury and Property Damage.

Coverage B: Personal or Advertising Injury.

Confusing name: Coverage B applies to specifically identified types or theories of liability, usually including defamation, invasion of privacy, false arrest or imprisonment, and sometimes deceptive trade practices.

26

INSURANCE ISSUES

Is the claim covered by the insuring agreement?

Coverage A: Is there a “personal injury” or “property damage”?

Definitions of both require that the harm is “not expected or intended from the standpoint of the insured.”

Coverage A: Is there an “occurrence” that triggers coverage?

Usually defined as “an accident, including continuous or repeated exposure to substantially the same general conditions.”

Insurers use “expected or intended” and “accident” to argue against coverage for intentional torts and misconduct worse than negligence.

27

INSURANCE ISSUES

Is the claim covered by the insuring agreement?

Coverage B: Does the complaint allege one of the theories of liability coverage by the policy?

28

INSURANCE ISSUES

Exclusions:

Virus: this will negate coverage; very few CGL policies have it.

Communicable diseases: most versions of this exclusion would negate coverage for a COVID-19 claim. Specific language is CRITICAL.

Organic Pathogens: usually written to cover mold, mildew, fungi, and bacteria. Most versions will not extend to viruses.

29

INSURANCE ISSUES

Exclusions:

Pollution (Total): no coverage for bodily injury or property damage caused by:

“Discharge, dispersal, release, or escape” of a

“Pollutant” usually defined as a “solid, gaseous, liquid or thermal irritant or contaminant.”

Some states have case law holding that a virus is or is not within the pollution exclusion.

Specific language of the policy is CRITICAL.

30

INSURANCE ISSUES

Exclusions:

“Business Risk” Exclusions: the insurer does not want to cover failures of your product or work to do what they were supposed to do.

Damage to your “own work” is not covered.

Damage to your “own products” is not covered.

As usual, specific language of the policy is CRITICAL.

31

INSURANCE ISSUES

Duty to Defend:

Insurer’s duty to defend under a CGL is broader than its duty to pay damages to the plaintiffs on your behalf.

Lesson: **Always** tender any lawsuit to your CGL insurer if you have an arguable claim for coverage.

The insurer may have to defend you until facts are established that demonstrate there is no coverage.

32

CLASS ACTION RESPONSE

Responding to a COVID-19 Class Action:

Consult with your lawyers about tendering the defense of the case to your insurer.

If you decide to tender the defense, do it as soon as possible.

Establish a positive media/public relations position. Class actions are highly visible.

Consider using your in-house public relations department or a consultant even if your standard policy is: "We do not comment on pending litigation."

33

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34