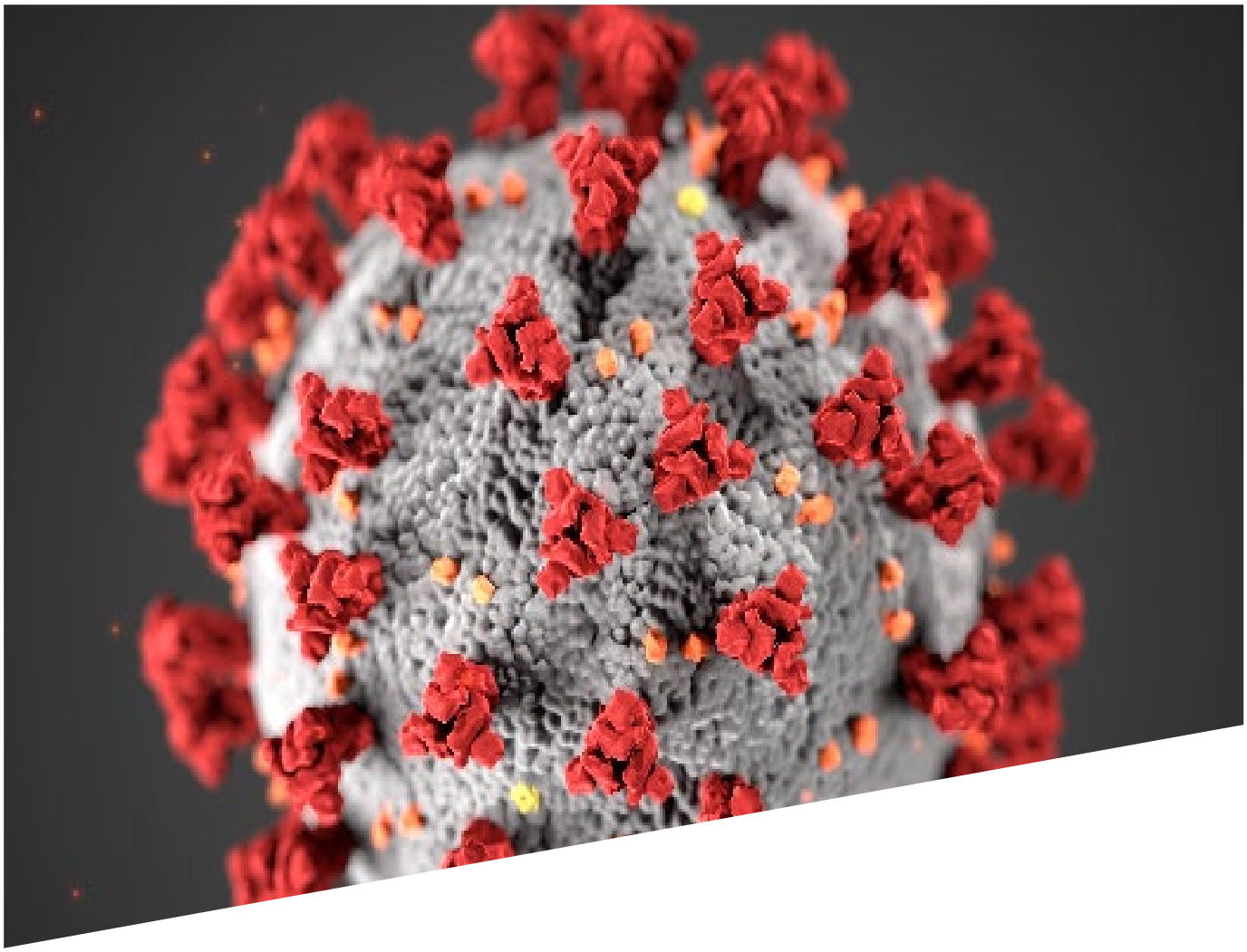

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COVID-19: BUSINESS & LEGAL CONSIDERATIONS

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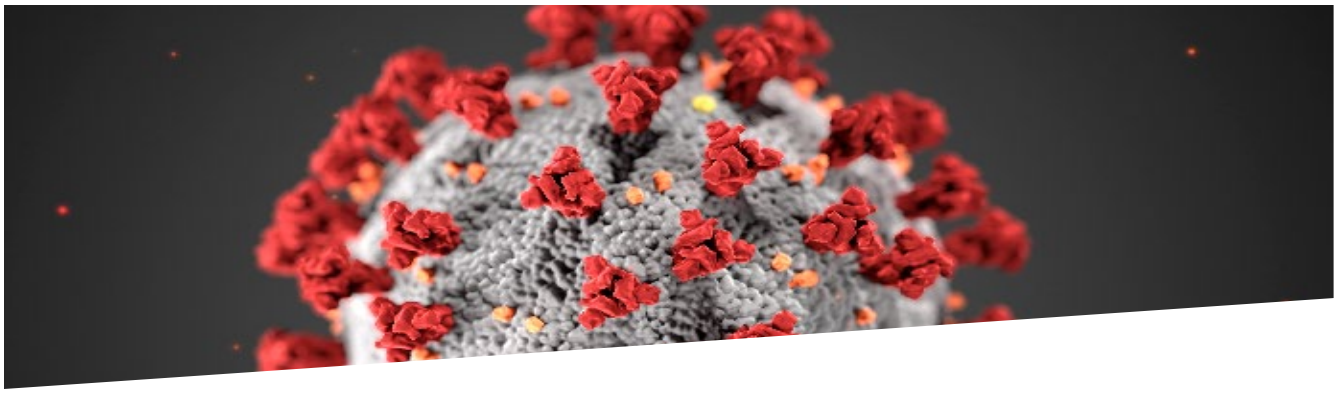


TABLE OF CONTENTS

HHS Declares Liability Immunity for Certain COVID-19 "Countermeasures"; Response Act Expands Protections for Mask Makers
By: Kathleen Ingram Carrington & Mitchell K. Morris

Earlier this week, we discussed current trends and future implications of COVID-19 on businesses operating in the products arena, noting the most direct impact so far on the pharmaceutical and medical device spaces. Recognizing the potential liabilities this products sector could face in the future, on March 17, 2020 the Secretary of Health and Human Services ("Secretary") issued a "PREP Act Declaration" proclaiming legal immunity for manufacturers and suppliers of certain products used to combat COVID-19. The following day, Congress passed, and the President signed, the Families First Coronavirus Response Act, H.R. 6201, which expands protections for makers of masks not previously covered under the PREP Act. Businesses in these spaces should be aware of these developments.

WHAT IS THE PREP ACT?
The Public Readiness and Emergency Preparedness Act ("PREP Act"), 42 U.S.C. § 247d-6d, is the federal authority that allows the Secretary to issue declarations immunizing certain individuals and entities from liabilities arising from the administration or use of countermeasures to diseases, threats and conditions determined by the Secretary to constitute a present, or likely future, public health emergency.[1] It was enacted on December 30, 2005 and is an amendment to the Public Health Service Act.

WHAT IS THE COVID-19 DECLARATION?
The Secretary's March 17, 2020 Declaration ("COVID-19 Declaration") provides certain individuals and entities ("Covered Persons") with immunity from suit and liability under Federal and State law against "all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure" by way of a Recommended Activity, except for willful misconduct.

Many of these terms have specific meanings under several federal acts and regulations. The discussion below addresses these terms and may aid businesses in assessing whether the Declaration applies to them.

WHAT ARE THE RECOMMENDED ACTIVITIES COVERED BY THE COVID-19 DECLARATION?
The PREP Act allows the Secretary to declare that certain undertakings will enjoy immunity when Covered Persons engage in them with respect to Covered Countermeasures. Under the COVID-19 Declaration, the Secretary has declared "the manufacture, testing, development, distribution, administration, and use of the Covered Countermeasures" are Recommended Activities.[2]

WHAT IS A COVERED COUNTERMEASURE?
The COVID-19 Declaration defines covered countermeasures as any antiviral, drug, biologic, diagnostic, device, or vaccine "used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product."[3] Coverage, however, is limited to three categories of countermeasures: (1) "qualified pandemic or epidemic products," (2) "security countermeasures," or (3) drugs, biological products, or devices authorized for investigational or emergency use."[4] Each category is defined in other federal acts.[5]

WHO IS A COVERED PERSON?

"Manufacturers," "distributors," "program planners," "qualified persons," and their officials, agents, and employees are immune from liability under the COVID-19 Declaration.[6] These terms are defined in the PREP Act (42 U.S.C. § 247d-6d(i)) and are broad in their reach. For example, "distributor" covers persons and entities "engaged in the distribution of drugs, biologics, or devices, including but not limited to manufacturers; repackers; common carriers; contract carriers; air carriers; own-label distributors; private-label distributors; jobbers; brokers; warehouses, and wholesale drug warehouses; independent wholesale drug traders; and retail pharmacies." And "manufacturer" includes contractors, subcontractors, parents, subsidiaries, affiliates, successors, and assigns of a manufacturer, as well as suppliers or licensers of products, intellectual property, services, research tools, or components used to design, develop, test, investigate, or manufacturer Covered Countermeasures.

The Secretary has also extended coverage to persons authorized "to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures, and their officials, agents, employees, contractors and volunteers" under delineated circumstances, and those "authorized to perform an activity under an Emergency Use Authorization" under the Federal Food, Drug, and Cosmetic Act.[7]

WHAT IMMUNITY IS AFFORDED UNDER THE COVID-19 DECLARATION?

The Secretary has declared that the liability immunity set forth under the PREP Act "and conditions stated in this Declaration" are in effect for the Recommended Activities, i.e. "the manufacture, testing, development, distribution, administration, and use of the Covered Countermeasures."[8] Under the PREP Act, the scope of immunity extends to "any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure," and protects Covered Persons "from suit and liability under Federal and State law."[9] Willful conduct is the sole exception to immunity.[10]

Losses covered by the Declaration include death, personal injury (physical, mental, or emotional), fear of personal injury, property damage, and "business interruption loss."[11] Significantly, coverage "applies without regard to the date of the occurrence, presentation, or discovery of the loss."[12]

The PREP Act sets forth certain conditions better defining what constitutes a causal relationship for purposes of coverage as well as exceptions to those conditions.[13] Moreover, it includes a rebuttable presumption that immunity will apply to Covered Persons engaged in Recommended Activities pertaining to Covered Countermeasures: "[T]here shall be a rebuttable presumption that any administration or use, during the effective period of the emergency declaration … of a covered countermeasure shall have been for the category or categories of diseases, health conditions, or threats to health with respect to which such declaration was issued."[14] In other words, a claimant will have to come forward with evidence sufficient to overcome the presumption that an individual or entity is not entitled to the immunity afforded by the COVID-19 Declaration in order to move forward with suit.

As a final note on this section, the PREP Act generally covers the distribution of Covered Countermeasures "by donation, commercial sale, or any other means of distribution"; however, the Act allows the Secretary to limit immunity "only to a particular means of distribution."[15] The Secretary has done that here. The COVID-19 Declaration limits immunity for distribution pursuant to: "(a) Present or future federal contracts, cooperative agreements, grants, other transactions, interagency agreements, memoranda of understanding, or other federal agreements; or (b) Activities authorized in accordance with the public health and medical response of the Authority Having Jurisdiction to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures following a Declaration of an emergency."[16] Distribution entities should closely consider these provisions in assessing whether the COVID-19 Declaration provides them with immunity.

WHAT IS WILLFUL MISCONDUCT?

The COVID-19 Declaration does not afford immunity to Covered Persons engaged in willful misconduct. The PREP Act defines willful misconduct as "an act or omission that is taken (i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification; and (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit."[17] A plaintiff bears the burden of proving willful misconduct by clear and convincing evidence.[18]

WHAT IS THE EFFECTIVE TIME PERIOD FOR IMMUNITY UNDER THE COVID-19 DECLARATION?

Currently, Covered Persons are afforded immunity through October 1, 2024.[19] This time period may be extended for certain distributors based on government contracts and other agreements identified in the COVID-19 Declaration.[20] Further, manufacturers have until October 1, 2025 to arrange for the disposal of their Covered Countermeasures, as well as other Covered Persons who may need to take action to limit the administration or use of Covered Countermeasures once the pandemic is over.[21] These time periods—and any other provisions in the COVID-19 Declaration—are subject to change, as the Declaration may be amended "as warranted."[22]

HOW HAS CONGRESS EXPANDED PROTECTIONS FOR MAKERS OF FACE MASKS?

On March 18, 2020, the President signed into law, effective no later than 15 days after enactment, the Families First Coronavirus Response Act ("Response Act"), H.R. 6201. Among other things, it amends the Prep Act's definition of Covered Countermeasures to include "personal respiratory protective device[s]" that are (1) "approved by the National Institute for Occupational Safety and Health" ("NIOSH"); (2) "subject to the emergency use authorization issued by the Secretary on March 2, 2020, or subsequent emergency use authorizations"; and, (3) "used during the period beginning on January 27, 2020, and ending on October 1, 2024, in response to the public health emergency declared on January 31, 2020, pursuant to section 319 as a result of confirmed cases of 2019 Novel Coronavirus[.]" See Sec. 6005, "Treatment of personal respiratory protective devices as covered countermeasures." While face masks approved by the FDA were already covered under the PREP Act, masks approved only by NIOSH, which are more numerous, were not. The statutory amendment effectively extends PREP Act liability immunity to the NIOSH-approved masks.

WHAT ARE THE SIGNIFICANT TAKE-AWAYS FROM THE COVID-19 DECLARATION AND RESPONSE ACT AMENDMENT?

Overall, the COVID-19 Declaration and Response Act amendment should provide covered businesses with some reassurance as they continue the fight against COVID-19. As one article said, "[t]he clear import of the declaration is to clear the way for science-based organizations and public health professionals to take control of the situation immunized from legal second-guessing."[23] However, notwithstanding the broad range of persons and activities covered by the Declaration, there are strict requirements as to what constitutes a covered product or device. Further, those businesses in distribution should closely consider the regulations identifying which distribution methods will receive immunity protection, as the COVID-19 Declaration expressly limits covered distribution methods.

Ultimately, pharmaceutical and medical supply and device companies should continue using reasonable care and best practices in the design, manufacture, distribution, and sale of their products, notwithstanding the potential availability of immunity under the COVID-19 Declaration.

[1] 42 U.S.C. § 247D-6D(B); U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, PUBLIC HEALTH EMERGENCY: PUBLIC READINESS AND EMERGENCY PREPAREDNESS ACT, AVAILABLE AT HTTPS://WWW.PHE.GOV/PREPAREDNESS/LEGAL/PREPACT/PAGES/DEFAULT.ASPX (LAST ACCESSED MAR. 18, 2020).
[2] 85 FED. REG. 15198-01 § III.
[3] 85 FED. REG. 15198-01 § VI.
[4] ID.
[5] FOR THE DEFINITION OF "QUALIFIED PANDEMIC OR EPIDEMIC PRODUCT," SEE 42 U.S.C. § 247D-6D(I)(7); FOR "SECURITY COUNTERMEASURE," SEE 42 U.S.C. § 247D-6D(C)(1)(B); AND FOR REGULATIONS PERTAINING TO AUTHORIZATION FOR MEDICAL PRODUCTS FOR USE IN EMERGENCIES, SEE 21 U.S.C. § 360BBB-3.
[6] 85 FED. REG. 15198-01 § V.
[7] ID.
[8] 85 FED. REG. 15198-01 § IV.
[9] 42 U.S.C. § 247D-6D(A)(1), (2)(B).
[10] 42 U.S.C. § 247D-6D(D)(1).
[11] 42 U.S.C. § 247D-6D(A)(2)(A).
[12] ID.
[13] 42 U.S.C. § 247D-6D(A)(3)-(5).
[14] 42 U.S.C. § 247D-6D(A)(6)
[15] 42 U.S.C. § 247D-6D(A)(5), (B)(2)(E).
[16] THE COVID-19 DECLARATION PROVIDES DEFINITIONS FOR "AUTHORITY HAVING JURISDICTION" AND "DECLARATION OF EMERGENCY" AS USED IN THE DECLARATION. SEE 85 FED. RED. 15198-01 § VII.
[17] 42 U.S.C. § 247D-6D(C)(1)(A).
[18] 42 U.S.C. § 247D-6D(C)(3).
[19] 85 FED. RED. 15198-01 § XII.
[20] ID.
[21] 85 FED. REG. 15198-01 § XIII.
[22] 85 FED. REG. 15198-01 § XV.
[23] BECK, JAMES M., DRUG & DEVICE LAW: WE FINALLY HAVE SOMETHING TO SAY ABOUT COVID-10 (MAR. 18, 2020), AVAILABLE AT HTTPS://WWW.DRUGANDDEVICELAWBLOG.COM/2020/03/WE-FINALLY-HAVE-SOMETHING-TO-SAY-ABOUT-COVID-19.HTML (LAST ACCESSED MAR. 18, 2020).

Kathleen Ingram Carrington
(601) 985-4429
Kat.Carrington@butlersnow.com

Mitchell K. Morris
(804) 762-6042
Mitchell.Morris@butlersnow.com

Revisiting "Is 'The Government Said I Could' A Civil Liability Defense?" During COVID-19
By: Kathleen Ingram Carrington, Xan Ingram Flowers, Mitchell K. Morris & Jorge A. Solis

Late last year we covered[1] a decision finding a mine operator could not be held liable for unpermitted discharges under the Clean Water Act because it had properly disclosed them to the state permitting authority, which "chose not to list them in the Permit." S. Appalachian Mountain Stewards v. Red River Coal Co., Inc., 420 F. Supp. 3d 481, 495–96 (W.D. Va. 2019). The court reasoned that the mine had "done what" the permitting authority "has told it to do," and "should be able to rely upon the clear directives of its regulators without being subjected to liability." Id. at 497. In the court's view, although the federal government "disagree[d] with what" the state permitting authority required, "it would be unfair to place [the mine] in the middle of a battle between federal and state regulators." Id.

We explained that, as a matter of fundamental fairness, the same principles should apply to any business operating pursuant to the "directives" of state or federal regulators. That is, companies should not be subject to civil liability when acting pursuant to, or in accordance with, active government supervision or guidance.

Fast forward to the "new normal" of the COVID-19 era. State and federal regulators are telling the public what to do and not do at unprecedented levels, and the messages seem to change daily.

In light of this unparalleled and everchanging intervention, supervision, and associated uncertainty, now more than ever people should be entitled "to rely upon the . . . directives of . . . regulators without being subjected to liability." After all, "the point of due process—of the law in general—is to allow citizens to order their behavior," and "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him [or her] to punishment." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417–18 (2003) (citations omitted).

The Case for Non-Liability

The Supreme Court has long recognized a constitutional prohibition against "an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." Raley v. State of Ohio, 360 U.S. 423, 426 (1959). It has similarly held that "[o]rdinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach." United States v. Laub, 385 U.S. 475, 487 (1967).

Thus, in United States v. Pa. Indus. Chemical Corp., 411 U.S. 655 (1973), the Court overturned an industrial defendant's criminal conviction resulting from its reliance on the U.S. Army Corps of Engineers' interpretation of a federal pollution law. The Court ruled that the defendant "had a right to look to the Corps of Engineers' regulations for guidance" because the Corps is the "responsible administrative agency." Id. at 674. Although the Corps' "rulings, interpretations, and opinions" are not legally controlling, the Court found "they do constitute a body of experience and informed judgment to which litigants may properly resort for guidance." Id.

On the civil side, the Court has noted the "interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." Heckler v. Cmty. Health Servs. of Crawford Cty., Inc., 467 U.S. 51, 61, n.13 (1984). Thus, in FCC v. Fox Television Stations Inc., 567 U.S. 239 (2012), the Court precluded the Federal Communications Commission ("FCC") from levying civil forfeiture penalties for indecency against broadcasters who had relied upon preexisting FCC policy, and, therefore, lacked fair notice of the FCC's new interpretation.[2]

The applicability of the foregoing principles to state action in the form of imposing civil tort liability should not be subject to debate. See State Farm, supra.[3] Indeed, the Supreme Court recognized decades ago that "state regulation can be as effectively exerted through an award of damages as through some form of preventive relief," and that "[t]he obligation to pay compensation . . . is designed to be[] a potent method of governing conduct and controlling policy." Cipollone v. Liggett Grp. Inc., 505 U.S. 504, 521 (1992) (citation omitted).

Application During COVID-19

We previously covered[4] the U.S. Secretary of Health and Human Services' ("HHS") March 17, 2020 declaration of immunity for manufacturers and suppliers of certain products used to combat COVID-19. Since that time, a number of states have declared varying levels of COVID-19 immunity for health care providers,[5] and Congress is debating potential immunity for businesses against civil claims arising from employee and customer transmission of COVID-19.[6] It remains unclear, however, whether and when such legislation will pass and, if it does, what the scope of any such immunity will look like.

Businesses that are not covered by existing express immunity should consider whether and how they may be able to raise "the government said I could (or couldn't)" as a defense to potential claims arising in connection with the COVID-19 pandemic.

Among the regulators at the forefront of the federal government's COVID-19 response are the Food and Drug Administration ("FDA") and Centers for Disease Control and Prevention ("CDC"). Both agencies have issued extensive "guidance" on a multitude of subjects that either already are, or may become, the target of civil litigation.

FDA Guidance

Take hand sanitizers, for example. The CDC's Coronavirus website states that "[e]veryone should . . . [w]ash your hands often," and "[i]f soap and water are not readily available, use a hand sanitizer that contains at least 60% alcohol."[7] The FDA, meanwhile, acknowledges "that some consumers and health care professionals are currently experiencing difficulties accessing alcohol-based hand sanitizers," and that, "[i]n response to the demand for alcohol-based sanitizers, certain entities that are not currently regulated by FDA as drug manufacturers" are producing "hand sanitizer products for the public's use."[8]

Thus, the FDA has declared that it "does not intend to take [enforcement] action against firms that prepare alcohol-based hand sanitizers for consumer use and for use as health care personnel hand rubs for the duration of the [COVID-19] public health emergency" so long as the product is manufactured as set forth in the FDA's guidance document.[9]

Of course, the FDA's guidance document contains all of the usual bureaucratic disclaimers, including: "Contains Nonbinding Recommendations"; "[D]oes not establish any rights for any person and is not binding on FDA or the public"; and, "[Does] not establish legally enforceable responsibilities . . . and should be viewed only as recommendations, unless specific regulatory or statutory requirements are cited."[10] But, the fact remains, the FDA—the supreme federal regulatory authority over food and drugs—is effectively telling businesses: "If you do it this way, we won't come after you for breaking the law."

While hand sanitizers with prior FDA approval may well be subject to HHS's March 17 immunity declaration if all other requirements are met, non-approved products subject to the aforementioned FDA guidance likely are not. As a matter of fundamental fairness, entities to whom the FDA's guidance applies that are preparing hand sanitizer should not be exposed to tort liability for acting in accordance with that guidance. Cf. St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting) ("Our Government should not by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do.").

Compounding pharmacies also have been the subject of recent FDA guidance.[11] Recognizing "that due to the COVID-19 pandemic, some compounders are currently experiencing difficulties obtaining PPE [personal protective equipment]," the FDA has declared that it "does not intend to take enforcement action . . . when drugs intended or expected to be sterile are compounded without standard PPE provided" that they are compounded as set forth in the guidance document.[12]

Predictably, the compounder guidance contains the same qualifiers as the hand sanitizer guidance.[13] But, again, due process-rooted fundamental fairness dictates that the FDA's guidance must mean something to those who rely upon it. Compounders should not be subject to tort liability as a result of having deviated from standard PPE requirements during the pandemic as provided for by the FDA. See, e,g., Allergan USA, Inc. v. Prescribers Choice, Inc., 364 F. Supp. 3d 1089, 1105–06 (C.D. Cal. 2019) ("[T]he Court should not ignore the FDA's . . . guidance it provides for outsourcing facilities . . . If the FDA is allowing outsourcing facilities to manufacture and distribute drugs during an interim period . . . the Court is hesitant to hold Defendants liable for complying with the FDA's guidance.").

CDC Guidance

The CDC is "the nation's health protection agency," tasked with, among other things, "fight[ing] disease and support[ing] communities and citizens to do the same."[14] In this role, the CDC issues guidance for the public's benefit.

Regarding COVID-19, the CDC has issued more than 100 guidance documents on a broad range of topics—cleaning and disinfecting households, guidance for manufacturing workers and employers, mitigation and prevention guidance for retirement communities, and guidance for reopening buildings after prolonged shutdown, to name a few.[15] While the CDC's guidance documents appear to include fewer express qualifiers than the FDA's, most of them nevertheless are identified either as "interim" guidance subject to change or have been updated with new guidance since their initial issuance.

There has already been litigation arising from the alleged failure to adhere to the CDC's COVID-19 recommended best practices, and such litigation can be expected to continue. Generally, courts are equating CDC guidance with a threshold standard of care and are reaching decisions based on whether there is evidence of guidance compliance.

For example, one federal court denied an attempt by workers in a Missouri meat processing plant to obtain a preliminary injunction regarding the plant's alleged failure to adequately protect them consistent with applicable joint guidance issued by the CDC and OSHA. See Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 2020 WL 2145350 (W.D. Mo. May 5, 2020). Although primarily finding the case should be dismissed because OSHA had primary jurisdiction, the court, "to aid in any appellate review," found the plant operator "has taken substantial steps to reduce the potential for COVID-19 exposure at the Plant and appears to the Court to be complying with the Joint Guidance regarding the same." Id. at *11. "Thus, Plaintiffs are not substantially likely to prove [the operator] breached any duty." Id.

Another federal court denied a homeless woman's motion for a temporary restraining order to prevent the City of St. Louis from closing a tent encampment that allegedly posed a health risk to occupants and the public. See Frank v. City of St. Louis, — F. Supp. 3d —, 2020 WL 2116392 (E.D. Mo. May 2, 2020). Noting "the CDC's guidance that encampments should not be cleared '[u]nless individual housing units are available,'" the court found that the City "has taken pains to bring its public health initiative in line with the CDC's guidance by ensuring that it has an individual housing unit available for every displaced resident of the encampments." Id. at *3–*4. Ultimately, the court declined to interfere with the City "taking the steps it reasonably deems necessary to slow the spread of Covid-19," i.e., by abiding by CDC guidance. Id. at *5.

On the other hand, a federal court in the District of Columbia partially granted a temporary restraining order regarding a psychiatric facility's failure to follow certain CDC guidance applicable to the facility to protect its residents. See Costa v. Bazron, No. CV 19-3185 (RDM), 2020 WL 2025701 (D.D.C. Apr. 25, 2020). The court extended the TRO in a later opinion and expanded the facility's compliance obligations in light of additional CDC guidance that the facility was not adequately following. See 2020 WL 2410502 (D.D.C. May 11, 2020). Acknowledging "the exercise of professional judgment" may, under certain circumstances, provide a viable reason for not following CDC guidance, the court found such was not the case here, thus warranting judicial intervention. Id. at *4.

In sum, the trend thus far suggests that compliance with CDC guidance may serve as a shield to civil liability, while the decision not to follow CDC guidance invites risk, notwithstanding that CDC guidance, standing alone, is not mandatory. Litigants should remain mindful of due process-based arguments for non-liability when acting in accordance with CDC directives. During this unprecedented pandemic, surely the CDC's expert guidance "constitute[s] a body of experience and informed judgment to which" would-be "litigants may properly resort for guidance." Pa. Indus. Chem. Corp., 411 U.S. at 674.

Good faith attempted compliance with CDC guidelines should be especially relevant to claims asserting novel theories of liability. For example, as Congress has recognized in debating expanded immunity, businesses may face claims by non-employees alleging COVID-19 transmission on their premises.

The notion of a premises owner being held liable because a person allegedly transmitted a previously unknown virus on its premises is, to be sure, novel at best. Such claims will be subject to many defenses ranging from duty to causation. Due process provides another arrow in the quiver. How can a business be said to have "fair notice"—indeed, any notice—that it could be held liable for such claims, especially when attempting in good faith to adhere to CDC guidelines? See State Farm, 538 U.S. at 417; see also Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 999–1000 (2019) (Gorsuch, J., dissenting) (noting "fair notice problem" posed by "retrospective[]" application of "novel duty").[16] Under such circumstances, a compelling argument exists that "[e]lementary notions of fairness . . . dictate that" there should be no liability for alleged virus transmission by third parties. State Farm, 538 U.S. at 417.

Conclusion

There are many other examples of COVID-19-related governmental directives that arguably may provide a shield to tort claims. Pursuant to long-recognized due process principles, litigants should be entitled to reasonably rely on regulatory guidance, and, in appropriate cases, assert it as complete defense to civil liability. Litigants should remain mindful of these principles and the defenses they may support as they attempt to navigate the unchartered waters that lay ahead.

[1] Mitchell K. Morris, Is 'The Government Said I Could' A Civil Liability Defense?, Law360 (Oct. 11, 2019), available at https://www.butlersnow.com/2019/10/is-the-government-said-i-could-a-civil-liability-defense/ (last accessed May 21, 2020).

[2] See also, e.g., United States v. Hoechst Celanese Corp., 128 F.3d 216, 227 (4th Cir. 1997) (affirming district court decision declining to find defendant liable for regulatory violations where defendant "did not have fair notice of EPA's interpretation of the" applicable standards).

[3] See also, e.g., Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 434–35 (1994) ("A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment."); Sessions v. Dimaya, 138 S.Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part) ("Perhaps the most basic of due process's customary protections is the demand of fair notice," which applies "in civil cases affecting a person's life, liberty, or property").

[4] Kathleen Ingram Carrington & Mitchell K. Morris, HHS Declares Liability Immunity for Certain COVID-19 "Countermeasures"; Response Act Expands Protections for Mask Makers, Product Lines (March 19, 2020), available at https://www.butlersnow.com/2020/03/hhs-liability-immunity-covid-19-countermeasures/ (last visited May 21, 2020).

[5] See, e.g., Y. Peter Kang, 6 States With COVID-19 Medical Immunity, And 2 Without, Law360 (April 17, 2020); Matthew Santoni, Pa. Gives Civil Immunity To COVID-19 Health Care Providers, Law360 (May 6, 2020).

[6] Y. Peter Kang, Sens. Say Safety Regs Must Precede COVID-19 Biz Immunity, Law360 (May 12, 2020).

[7] See Centers for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others, available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited May 20, 2020).

[8] U.S. Food & Drug Admin., Temporary Policy for Preparation of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency (COVID-19) (updated Apr. 15, 2020), available at https://www.fda.gov/media/136289/download (last accessed May 19, 2020) at 3.

[9] Id.

[10] Id. at 1-2.

[11] U.S. Food & Drug Admin., Temporary Policy Regarding Non-Standard PPE Practices for Sterile Compounding by Pharmacy Compounders not Registered as Outsourcing Facilities During the COVID-19 Public Health Emergency (Apr. 2020), available at https://www.fda.gov/media/136841/download (last accessed May 19, 2020).

[12] Id. at 4.

[13] See id. at 1-2.

[14] Centers for Disease Control & Prevention, CDC Organization, available at https://www.cdc.gov/about/organization/cio.htm (last accessed May 14, 2020).

[15] Centers for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19) Communication Resources: Guidance Documents, available at https://www.cdc.gov/coronavirus/2019-ncov/communication/guidance-list.html?Sort=Date%3A%3Adesc (last accessed May 14, 2020).

[16] For a more in-depth discussion of Justice Gorsuch's dissent in DeVries, see Mitchell K. Morris, Justices' Asbestos Decision Poses Fair Notice Problem, Law360 (April 25, 2019), available at https://www.butlersnow.com/2019/04/justices-asbestos-decision-poses-fair-notice-problem/ (last accessed May 21, 2020).

Kathleen Ingram Carrington

(601) 985-4429

Kat.Carrington@butlersnow.com

Xan Ingram Flowers

(205) 297-2249

Xan.Flowers@butlersnow.com

Mitchell K. Morris

(804) 762-6042

Mitchell.Morris@butlersnow.com

Jorge A. Solis

(205) 297-2216

Jorge.Solis@butlersnow.com

Further Guidance: My Employee (May) Have COVID-19. What Do I Record for OSHA?
By: James H. (Jay) Bolin, Xan Ingram Flowers, Anna Little Morris & Timothy M. Threadgill

Earlier this Spring, OSHA instituted employer recording requirements to document employees who contract COVID-19. Those requirements have been updated multiple times since their inception. Below, Butler Snow provides the most recent guidance for employers navigating their COVID-19 recording requirements as outlined in OSHA's May 19, 2020 Enforcement Guidance.[1]

All Employers Must Record Work-Related Cases of COVID-19

Formerly, OSHA announced that it would not enforce 29 C.F.R. § 1904 (the regulation requiring employers to record "work-related" illnesses) for COVID-19 cases unless there was objective evidence reasonably available to the employer indicating that the illness was work-related.[2]

However, OSHA's May 19 update announced that OSHA will now enforce 29 C.F.R. § 1904 against all employers in all industries.[3] As of May 19, 2020, all employers should record cases of COVID-19 if all three of the following conditions are met:

1. The case is a confirmed case of COVID-19;
2. The case is "work-related" as defined by 29 C.F.R. § 1904.5; and
3. The case involves one or more of the "general recording criteria" found in 29 C.F.R. § 1904.7.[4]

Employers Must Undertake a Reasonable Investigation Into Work-Relatedness

Recognizing the difficulty in determining whether a case of COVID-19 is "work-related," OSHA's most recent update clarifies requirements for a "reasonable" investigation into whether an employee's contraction of COVID-19 is work-related. To complete a "reasonable" investigation, employers should:

1. Ask their employee how they believe they contracted COVID-19;
2. With due consideration for the employee's privacy, discuss work-related and non-work-related activities that could have led to them contracting COVID-19; and
3. Review the employee's work environment for potential exposure.

Additionally, OSHA provided guidance on evidence that will indicate that contraction is likely work-related, including if several workers who work closely together all contract COVID-19, if (absent any alternative explanation) contraction follows close exposure to a customer or coworker with COVID-19, and if (absent any alternative explanation) the employee's job duties include frequent, close exposure to the general public.

OSHA also provided evidence that will indicate that contraction is not work-related, including if the employee is the only one in the vicinity who contracted the virus and their job duties do not involve frequent contact with the general public, and the employee had frequent close contact with a non-coworker with COVID-19 while that person was likely contagious.

Finally, any new information the employer learns after making a determination about work-relatedness may be taken into account later in determining if the work-relatedness determination was reasonable.

As advised in previous articles, employers who have an employee with a confirmed COVID-19 diagnosis should be careful to document all information relied upon in the work-relatedness determination in order to establish that the analysis was conducted in good faith.

[1] At the time of publication, OSHA has published no additional guidance since the May 19, 2020 update.

[2] This exception did not apply, however, to employers in the healthcare, emergency response, or correctional institution industries; all of those industries have been required to record COVID-19 cases throughout the pandemic.

[3] Employers 10 or fewer employees and certain employers in low hazard industries do not have recording obligations under existing OSHA regulations. Such employers "need only report work-related COVID-19 illnesses that result in a fatality or an employee's in-patient hospitalization, amputation, or loss of an eye." See 29 C.F.R. §§ 1904.1(a)(1), 1904.2.

[4] Under 29 C.F.R. § 1904.7, an injury or illness is recordable if it results in any of the following (the "general recording criteria"): death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness or if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional.

James H. (Jay) Bolin

(601) 985-4595

Jay.Bolin@butlersnow.com

Xan Ingram Flowers

(205) 297-2249

Xan.Flowers@butlersnow.com

Anna Little Morris

(601) 985-4487

Anna.Morris@butlersnow.com

Timothy M. Threadgill

(601) 985-4594

Tim.Threadgill@butlersnow.com

The FCRA in the Time of COVID-19 – Legislative and Regulatory Updates
By: Diana M. Comes

The COVID-19 pandemic is not only a global health crisis, but it is also causing an economic crisis as businesses furlough workers or shut down completely in order to comply with "Safer at Home" or "Shelter in Place" orders and promote social distancing. In the United States, in March 2020 alone, more than 10 million people filed for unemployment benefit.

Financial institutions of all sizes have stepped up to help their customers. Many have offered to defer mortgage payments and work with their customers on other outstanding loans and lines of credit. Federal regulators have ordered Fannie Mae and Freddie Mac to offer homeowners flexibility, including reduced or paused payments for up to 12 months, in light of the crisis. The FDIC has also encouraged financial institutions to offer payment accommodations to borrowers affected by COVID-19.

Data furnishers have obligations to furnish accurate information to consumer reporting agencies under the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq. If a customer misses a payment due to the COVID-19 crisis, they might be worried about how that missed payment may affect their credit score. Credit scores are used by credit furnishers of all stripes to determine the interest rates and other terms that a customer or borrower will be offered. Payment history accounts for 35% percent of a customer's credit score.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, passed by Congress and signed into law on March 27, 2020., contains a provision explicitly addressing the FCRA, as Butler Snow previously reported. Section 4021 of the CARES Act amends Section 623(a)(1) of the FCRA (15 U.S.C. § 1681s-2(a)(1)).

Now, a furnisher of data to the consumer reporting agencies that allows its customers to defer payments, make partial payments, modify credit terms, or makes other arrangements for its customers affected by COVID-19, should not report the account as delinquent, but should continue reporting it as current, unless the account was delinquent before the COVID-19-related deferral or modification, and has not been subsequently brought current. These new reporting requirements are retroactive to January 31, 2020 and do not apply to charged-off accounts.

The relevant language is as follows:

(F) Reporting information during COVID-19 pandemic.—

(i) Definitions – In this subsection:

(I) The term "accommodation" includes an agreement to defer 1 or more payments, make a partial payment, forbear any delinquent account, modify a loan or contract, or any other assistance or relief granted to a consumer who is affected by the coronavirus disease 2019 (COVID-19) pandemic during the covered period.

(II) Covered period.—The term "covered period" means the period beginning on January 31, 2020 and ending on the later of—

(aa) 120 days after the date of enactment of this subparagraph; or

(bb) 120 days after the date on which the national emergency concerning the novel coronavirus disease (COVID-19) outbreak declared by the President on March 13, 2020 under the National Emergencies Act (50 U.S.C. § 1601 et seq.) terminates.

(ii) Reporting – Except as provided in clause (iii), if a furnisher makes an accommodation with respect to 1 or more payments on a credit obligation or account of a consumer, and the consumer makes the payments or is not required to make 1 or more payments pursuant to the accommodation, the furnisher shall—

(I) report the credit obligation or account as current; or

(II) if the credit obligation or account was delinquent before the accommodation—

(aa) maintain the delinquent status during which the accommodation is in effect; and

(bb) if the consumer brings the credit obligation or account current during the period described in item (aa), report the credit obligation or account as current

(iii) Exception – Clause (ii) shall not apply with respect to a credit obligation or account of a consumer that has been charged-off.

Although courts have generally held that there is no private right of action for consumers against data furnishers under 15 U.S.C. § 1681s-2(a), enforcement of that section is given to state and federal governmental agencies under 15 U.S.C. § 1861s-2(c) and (d).

On April 1, 2020, however, the Consumer Financial Protection Bureau issued a Statement on Supervisory and Enforcement Practices Regarding the Fair Credit Reporting Act and Regulation V in Light of the CARES Act. In its statement, the CFPB advised that "[t]he Bureau supports furnishers' voluntary efforts to provide payment relief, and it does not intend to cite in examinations or take enforcement actions against those who furnish information to consumer reporting agencies that accurately reflects the payment relief measures they are employing."

The CFPB also advised that it "does not intend to cite in an examination or bring an enforcement action against a consumer reporting agency or furnisher making good faith efforts to investigate disputes as quickly as possible, even if dispute investigations take longer than the statutory timeframe" of 30-45 days.

In addition to these actions, a number of lawmakers have introduced bills that would further modify the FCRA during the COVID-19 pandemic. For example, on April 7, 2020, Rep. Katie Porter (D-CA) introduced H.R.6470 to amend the FCRA to institute a 1-year waiting period before medical debt will be reported on a consumer's credit report and to remove paid-off and settled medical debts from credit reports that have been fully paid or settled, among other things. On April 3, 2020, Rep. Joe Neguse (D-CO) introduced H.R.6451 to amend the FCRA to prohibit debt from medically necessary procedures related to COVID-19 from being included on credit reports. And on March 27, 2020, Rep. Gregory Murphy (R-NC) introduced H.R.6413 to amend the FCRA to prohibit consumer reporting agencies from including any adverse item of information on the consumer report of an individual with respect to debt related to a COVID-19 related illness. Butler Snow is actively monitoring these and other bills.

Diana M. Comes

(901) 680-7340

Diana.Comes@butlersnow.com

Practical Advice for Business: How to Deal with Coronavirus Impact on Commercial Transactions
By: Timothy S. Perry

Supply shortages, stressed customers, government actions, and other disruptions during the COVID-19 crisis are affecting you. Your suppliers may be failing to deliver goods and services to you as promised. You may find it increasingly hard to meet your own contracts with your customers.

Businesses are now sending notices claiming force majeure to excuse performance, or claiming impossibility, impracticability or legal frustration as reasons to excuse performance.

If you are considering sending such a notice or if you receive such a notice, here are some suggestions on how to proceed. Because in this event, your business is entering an area where legal advice is valuable. Contact us if you feel the complexity or amount at risk warrants it.

First, look at your legal paperwork because force majeure depends on and varies widely with the contract language. The essence of force majeure is events that are beyond your control. Each circumstance needs a detailed look at the contract, lease, purchase order, or other legal paperwork.

What does the contract give as examples of force majeure?

"National Emergency", "Government action", or such may well be satisfied now by President Trump's declaration of national emergency and various state decrees;

"Act of God" is more often thought of as physical damage from disasters or weather events but may be expanded given the magnitude of this pandemic so this reason needs careful analysis of the law;

"Health emergencies" or "epidemics" or "disease" all seem applicable given the World Health Organization's determination that this is a "pandemic" and the multiple federal and state level disease-fighting actions

How does the claimed force majeure cause the inability or serious hindrance to perform, not just a more time-consuming or expensive performance?

What steps must the business take to mitigate the injury to the other party?

What notice must be provided and when?

Second, keep records of how the force majeure impacts the business and the steps, such as searching for other sources of supply, you take to mitigate damage to you.

Third, assess what the impact of a force majeure is under the contract. Sometimes it is just a delay in performance with a termination of the contract only in the event of a long delay.

Some states recognize defenses of impossibility, impracticability (UCC 2-615), or frustration. These defenses are different from force majeure and normally do not need to be mentioned in the contract to create a remedy. So especially if your contract is silent on force majeure, you'll need guidance on how to show these defenses are available to your business, a question which will vary state by state.

Butler Snow has experience in these areas and is ready to assist your response to any problem. Contact your Butler Snow attorney or respond to this email should you have questions or need assistance in preparing for a disruption to your business.

For information on how you should prepare your employees and workplace for Coronavirus, click here.

Timothy S. Perry

(678) 515-5054

Tim.Perry@butlersnow.com

Beyond the Return to Work Plan: Additional Steps to Mitigate Employee COVID-19 Related Claims
By: Jennifer Aaron Hataway

COVID-19 and the related stay-at-home orders have impacted every employer differently. Some were able to shift to a telework model, while others modified their workplace operations or closed their doors completely. But, as the country moves towards reopening the economy amid the continuing threat of COVID-19, every employer is now grappling with not only how to protect employees from infection but also their business from liability. Even employers who have prepared and implemented well-designed return to work plans[1] are questioning: **What other steps can we take to protect our business from employee claims related to COVID-19?** We have a few suggestions:

Remain Up to Date on Guidance and Best Practices. If COVID-19 has taught us anything it is to expect the unexpected. Depending upon the location of your workplace, spikes in infection rates could require you to revise your return to work plan to comply with additional state and local guidance or industry best practices. Further, our knowledge of the symptoms, prevention, transmission and treatment of COVID-19 is evolving. A return to work plan must also evolve. Revisions may be necessary to eliminate those practices no longer deemed effective or to implement different strategies. For example, on June 10, 2020, OSHA published guidance regarding the use of masks in the workplace[2] instructing employers to ensure employees know how to properly wear masks and which type of mask is appropriate. Employers must continue to monitor OSHA, CDC and state and local government websites to ensure that new guidance, such as OSHA's guidance on face masks, is integrated into their COVID-19 prevention strategies.

Communicate Prevention Strategies and Seek an Acknowledgement. We are frequently asked by employers whether, to limit their potential liability, they can or should ask employees to sign advance waivers of liability before bringing them back to the workplace. We generally recommend against doing so as such waivers are disfavored in most jurisdictions, if not completely void as against public policy due to the unequal bargaining position of the parties. Further, employees are generally limited to the exclusive remedy of workers' compensation laws for work-related injuries and illness arising out of the course and scope of employment. Most state's workers' compensation laws prohibit the enforcement of a waiver by an employee of a future worker's compensation claim. Finally, a waiver may create the impression that the employer does not intend to make an effort to protect its employees. In short, advance waivers of liability may not be an option to minimize employer liability in this situation.

Instead of requiring a waiver upon return to the workplace, employers should consider distributing a written communication to employees explaining the return to work mitigation measures it has employed to reduce the spread of COVID-19. Clearly communicating the measures the employer has taken (and those it expects employees to take) both documents the employer's commitment to employee safety and reassures nervous employees. The communication should designate a contact person to report any concerns, illness or non-compliance with the mitigation measures. The employer could also consider including in the employee communication an agreement by the employee to comply with any new processes or procedures introduced into the workplace. The communication could then require the employee to acknowledge that the employee is aware of the measures taken by the employer but understands and accepts the risk that he or she could still contact COVID-19 in the workplace.

Inform Employees of Positive COVID-19. Employers should continue to advise employees of any positive COVID-19 cases in the workplace.[3] Without revealing the identifying of the infected employee, employers should advise employees of any positive cases. Doing so is recommended by the CDC and it is entirely possible that OSHA may find that an employer's failure to notify employees of a confirmed COVID-19 case is a violation of the General Duty Clause.

Respond Appropriately to Employee Concerns. Employees should have a clear channel to direct any concerns about returning to the workplace and should not be retaliated against for doing so. The best way to mitigate claims is to remain engaged with employees and address concerns before they become complaints. If an employee brings forward a concern surrounding COVID-19, it could implicate several employment laws, including the Americans with Disabilities Act, OSHA, Title VII of the Civil Rights Act, the Fair Labor Standards Act, and the National Labor Relations Act. Employers should promptly address any issues as they arise and seek the assistance of counsel when necessary. Of course, an employer who receives notice of a lawsuit by an employee or a complaint by a governmental agency should also notify its counsel immediately. It will be important in the defense of any claim or response to any investigation to preserve documents demonstrating the employer's COVID-19 return to work plan and safety measures.

As always, if you have concerns or specific questions about how to mitigate the risk of returning employees to the workplace, please reach out to an experienced labor and employment attorney for assistance.

[1] For general information about implementing a return to work plan focused on traditional infection prevention and hygiene practices as well as engineering, administrative and work practice control measures can mitigate the risks that employees become infected in the workplace, please see https://www.butlersnow.com/2020/05/covid-19-webinar-return-to-work-strategies-for-employers/; https://www.butlersnow.com/2020/05/ramping-up-to-return-to-the-workplace-in-the-post-pandemic-environment/; https://www.butlersnow.com/2020/04/the-potential-costs-of-an-unsafe-workplace-in-the-era-of-covid-19/. Please contact our Labor and Employment section to seek specific legal advice regarding your return to work plans.

[2] https://www.osha.gov/SLTC/covid-19/

[3] https://www.butlersnow.com/2020/04/steps-employers-should-take-when-responding-to-an-employees-covid-19-diagnosis/

Jennifer Aaron Hataway

(225) 325-8733

Jennifer.Hataway@butlersnow.com

The Potential Costs of an Unsafe Workplace in the Era of COVID-19
By: Sara Anne T. Quinn

As the CDC and OSHA continue to update and modify their recommendations for best practices and their mandates for safe workplaces related to the COVID-19 pandemic, it may feel like a daunting task to not only keep up with the changes but to actually enforce the new safety procedures in the workplace. However, failure to follow these rules could lead to both a sick workforce and some expensive consequences for employers. In addition to state and federal enforcement of workplace safety requirements through OSHA and other agencies, employers may also open themselves up to private "enforcement" through workers compensation actions and wrongful death and personal injury claims filed by individual employees or their survivors. At this point, the ball is already rolling for employment litigation related to COVID-19 and allegedly unsafe workplaces, and we can safely assume it will only pick up speed.

One of the first cases to garner attention is a wrongful death suit filed against Walmart in an Illinois state court earlier this month. Wando Evans worked as an associate at a Walmart store in Evergreen Park, Illinois. Evans died of complications related to COVID-19 on March 25, and his estate filed suit on April 1, less than two weeks later. The suit claims that Walmart did not follow the recommended safety procedures, and that such conduct was "willful and wanton misconduct" on the part of Walmart, leading to Evans and other employees contracting the virus. In fact, a second employee of the store died of COVID-19-related causes only days after Evans. Specifically, the suit alleges that Walmart failed to provide adequate protective equipment, training, and warnings that other employees were experiencing symptoms. It also alleges that the store did not properly clean and sterilize, screen new workers for symptoms, or implement social distancing guidelines.

Since the Walmart case was filed, other similar cases have been filed alleging that employers are not adequately protecting their employees. Just this past week, the New York State Nurses Association filed three suits on behalf of health care workers alleging unsafe conditions, and the Transport Workers Union of America filed suit against the Miami-Dade County's Department of Transportation alleging a lack of safety precautions for transportation workers. These cases are just the beginning. And as more and more of the workforce begin returning to the office, these cases will likely expand beyond essential workers into all types of workplaces.

CAN AN EMPLOYEE BRING A WRONGFUL DEATH CLAIM?
While employers have always had an obligation to provide a safe workplace, employers have not faced wrongful death and personal injury lawsuits frequently because these claims are usually precluded in the employment context. Most states have laws providing that workers compensation claims are the exclusive remedy for on-the-job injuries, even death, where such injury was not intentional. However, we may see a trend of plaintiffs claiming that employers' failures to follow workplace safety measures regarding COVID-19 were so egregious, they rendered the injury or death intentional or willful, making the claims viable.

Proving that an employer willfully or intentionally allowed or caused an employee to contract COVID-19 will not be an easy burden for a plaintiff to meet, but there are a few reasons that filing a wrongful death or personal injury suit instead of or, where allowed, in addition to, a workers' compensation claim is appealing to a plaintiff. These reasons include:

1. Higher Potential Recovery. First and foremost, while workers' compensation benefits are capped, a lawsuit has the potential for a much higher recovery for a worker or their family. In a wrongful death or injury case, a plaintiff could potentially seek economic damages, such as medical expenses, funeral expenses, loss of income, loss of future earning, and loss of the value of any other services they provided to the household. A plaintiff may also seek non-economic damages, such as compensation for pain and suffering and loss of consortium to a surviving spouse. Plaintiffs may also make claims of emotional distress based on contracting the virus or working conditions related to the virus. And in some states, a plaintiff may even be able to seek punitive damages related to these claims.

2. Publicity. COVID-19 coverage is saturating the media, and plaintiffs' lawyers may try to use this to their advantage. A wrongful death or personal injury suit filed in court is public record, and plaintiffs may use this as a tool, both to bring the situation more attention and as a bargaining chip in settlement negotiations.

3. Settlement. Even though it may be difficult to prove an employer intentionally allowed or caused an employee to contract COVID-19, lawyers may file a suit strong enough to avoid immediate dismissal in hopes that an employer will be willing to settle quickly to avoid drawn-out litigation or extended media coverage of the case.

WHAT CAN EMPLOYERS DO ABOUT IT?

As states begin reopening beyond essential business, employers will be faced with balancing the benefits and risks of having their on-site workforce back. Employers who closely follow the recommended workplace safety practices and successfully prevent COVID-19 from entering the workplace in the first place won't face any wrongful death or personal injury claims, making prevention the ultimate defense. But, even where precautions are taken, COVID-19 is highly contagious and can sneak in. Therefore, it is critical to have well-documented policies which are followed in practice.

FOLLOW THE CDC'S GUIDANCE FOR BUSINESSES AND EMPLOYERS

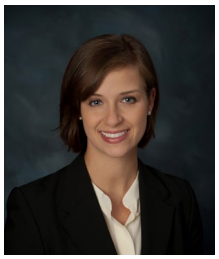
By following the CDC's recommended safety practices, and updating them as the recommendations are updated, employers are not only actually doing their best to keep their workers healthy, but are establishing a clear defense against any claims that the employer was willfully or intentionally failing to protect workers. The CDC's Guidance for Businesses and Employers includes recommendations on cleaning and disinfecting, social distancing, and other strategies for reducing transmission, such as identification of employees with symptoms and immediate separation of those individuals from other workers. A more in-depth discussion of recommended workplace safety procedures can be found on the Butler Snow Coronavirus Hub here. As OSHA begins enforcing workplace safety related to COVID-19, it is possible that the CDC guidelines will be considered less like recommendations and more like a baseline requirement for workplace safety.

TALK TO YOUR EMPLOYEES

Another key way to avoid litigation is to communicate with your employees about COVID-19. This includes educating them about how to reduce the spread of COVID-19, a practice recommended by the CDC, to make sure everyone individually is doing their part. Communication also includes notifying workers of confirmed cases in the workforce. COVID-19 is making a tightrope walk out of the competing requirements of protecting employee privacy and protecting employee safety. However, without identifying the COVID-19-positive individual, notice of a confirmed case is not only a best practice, it may be considered a requirement under OSHA's general duty clause. Furthermore, by keeping employees informed, employers are fostering a sense of trust and transparency in the workplace. Employees and families of employees who genuinely trust their employer and have felt cared for, seen and heard by their employers are far less likely to sue their employers amid the heightened stress and emotional times created in this COVID-19 pandemic.

PLEASE CONTACT US WITH QUESTIONS AND CONCERNS

Recommended workplace practices surrounding COVID-19, both related to workplace safety recommendations and how those affect employee rights, are ever changing as our knowledge of COVID-19 increases and as social distancing measures are both being implemented and relaxed. Recommendations will continue to evolve as more lawsuits are filed and more agency enforcement actions clarify agencies' understanding of best practices as well. Butler Snow attorneys continue to stay abreast of these changes. Please continue to check the Butler Snow Coronavirus Hub for the most up-to-date information. If you have any questions about how to implement workplace safety practices and avoid litigation, please contact any of Butler Snow's Labor & Employment attorneys for advice. Additionally, if you have been threatened with or served with any suit alleging a workplace COVID-19 injury, you should seek advice of counsel immediately.



Sara Anne T. Quinn

(615) 651-6740

SaraAnne.Quinn@butlersnow.com

Revisiting Waivers of Liability in the COVID-19 Era
By: Sarah Smyth O'Brien & Jorge A. Solis

During the early stages of the COVID-19 pandemic in the United States, we wrote an article discussing the potential benefits and limitations of waivers of liability for businesses considering ways to protect against potential liability for COVID-19 exposure claims. We explained that, despite the uncertainties of whether such a waiver would be enforced by courts, sound legal principles in this area of law could provide much-needed guidance to businesses and industries committed to continuing essential operations. Since our initial publication, discussions around potential liability of businesses for COVID-19 exposure claims have grown, and some states have even sought to limit liability for such claims by proclamation and legislation. We have closely monitored emerging trends in the area of liability waivers. Based on the developments we have observed, we saw it fit to revisit the topic of waivers in this brief update.

We have observed that a significant number of wide-ranging industries are considering use of liability waivers as they reopen business operations. In our first article, we focused on the types of businesses that traditionally rely on liability waivers as part of their regular operations. These included proverbial recreational industries, like sports clubs, gyms, summer camps, and homeowners' associations with pool and other recreational facilities. While these still make up a significant portion of businesses looking to use waivers, they are by no means the only businesses interested in liability waivers. Other sectors, particularly the services industries, are also considering such waivers. For example, businesses that require employees to go into customers' homes or business sites to provide cleaning, plumbing, or internet services, as well as some medical services for home-bound patients, are among those considering use of waivers to limit exposure claims from their customers, clients, and patients. More specifically, the industries where the ability to enforce and observe strict social distancing guidelines is toughest, like beauty salons or physical therapy and doctors' offices, are among those where the topic of liability waivers has been trending.

As discussed in our first article, we are compelled to reiterate that waivers of liability may not be appropriate in every circumstance. Rather, there are some limitations to keep in mind if your business is considering liability waivers for potential COVID-19 exposure claims. For example, businesses should carefully consider the status of the person signing the waiver. In most states, a waiver signed by an employee that prospectively waives liability arising out of a negligent act of the employer will not be enforceable. This is because liability waivers in the employment context generally implicate the public interest and are therefore void as a matter of public policy. See, e.g., Brown v. Soh, 280 Conn. 494, 503 (2006). Similarly, waivers signed by parents on behalf of minors are unenforceable in some states because they, too, may violate public policy. See, e.g., Rutherford v. Talisker Canyons Fin., Co., LLC, 445 P.3d 474 (2019). And, in some states, waivers signed by consumers may not be enforceable to the extent they purport to waive the product suppliers' strict liability for defective products. See Wheelock v. Sport Kites, Inc., 839 F. Supp. 730, 737 (D. Haw. 1993) ("there is a strong policy against allowing product suppliers to disclaim liability for injuries caused by defects in products they place on the market."). The enforceability of a waiver of liability may also be governed, or limited, by statute or regulation. For example, some states will not enforce a waiver of liability for conduct that is covered under a premises liability statute, especially if governed by comprehensive state regulations and involving a matter of public concern such as rental of housing. See, e.g., Stanley v. Creighton Co., 911 P.2d 705, 708 (Colo. App. 1996).

In some jurisdictions, a waiver will also be unenforceable in personal injury cases if the injury is caused by a failure to comply with safety laws and regulations. Slowe v. Pike Creek Court Club, Inc., No. CIV.A. 08C-08-029PLA, 2008 WL 5115035, at *6 (Del. Super. Ct. Dec. 4, 2008) (declining to enforce liability waiver "[b]ecause . . . the state's involvement in regulating public pools suggest[s] that enforcing the liability waiver in this case could impermissibly release [the defendant] from liability for violating a statutory duty."); cf. 46 U.S.C. § 30509 (providing that the owner or agent of certain water vessels cannot limit by contract its liability for negligence to its passengers). Lastly, some states, such as Connecticut, Montana, Virginia, and Louisiana, will generally not enforce liability waivers at all. See, e.g., Hanks v. Powder Ridge Restaurant Corp., 276 Conn. 314, 326 (2005); Mont. Stat. § 28-2-702; Hiett v. Lake Barcroft Cmty. Ass'n, Inc., 244 Va. 191, 195 (1992); La. Civ. Code Ann. art. 2004.

Despite the limitations above, liability waivers are valuable tools for businesses concerned about exposure claims, and there is no evidence that their usefulness in preventing liability and deterring litigation is eroding. Once you and the legal professional advising you determine a liability waiver may be appropriate for your business, be sure to keep the following principles in mind as your attorney drafts these waivers and as you ask your customers to sign them:

Liability waivers are contracts—the parties to them should think of them as such. Because courts apply traditional rules of contract formation, construction, and interpretation, waivers should be drafted in clear, unambiguous, and specific terms. This requires the drafting party to consider carefully the activity or conduct the parties will engage in, the attendant risks of that activity or conduct, and the rights that are being waived. These should be clearly expressed in the waiver. See, e.g., Slowe, 2008 WL 5115035, at *3 ("The liability waiver therefore is not 'crystal clear' in releasing [the defendant] from [the plaintiff's] claim that it was negligent."). Like most contracts, the waiver should be signed by the person waiving liability (e., the customer or client).

Almost uniformly, liability waivers cannot be used to prospectively waive liability for injuries arising out of intentional, reckless, or grossly negligent conduct. Waivers should not be so broad as to incorporate conduct that the person signing cannot waive—this may make the entire waiver unenforceable. Instead, limit the language in the waiver to cover liability arising out of specific conduct which, in most states, will be ordinary negligence. Alack v. Vic Tanny Int'l of Missouri, Inc., 923 S.W.2d 330, 337 (Mo. 1996) (declining to enforce a waiver of liability that purported to waive "any and all claims").

The waiver should also be fairly bargained between the parties. This will require the party signing the waiver to understand the conduct and risks covered by the waiver and to willingly sign it. To reduce arguments of ambiguity, a waiver can be placed on a separate page from other provisions with large font that is easy to read.

The law of each state is different. Whether a waiver will be enforceable in your state and under particular circumstances will require the legal professional drafting the waiver to carefully assess the law in your state to ensure full compliance with all applicable laws.

As clients reopen their businesses and resume operations during these unchartered times, our firm is committed to monitoring and advising them on this and other relevant topics. Please consider reaching out to any of the members of our Tort, Transportation, and Specialized Litigation Group if you have questions about waivers of liability or other emerging trends.

Sarah Smyth O'Brien

(720) 330-2395

Sarah.OBrien@butlersnow.com

Jorge A. Solis

(205) 297-2216

Jorge.Solis@butlersnow.com

Which Court Will Be the First to Decide Whether Business Interruption Insurance Policies Cover Losses Due to COVID-19?
By: Pamela L. Ferrell

Since March, businesses across the country have closed to comply with various local and state orders entered suspending business operations to prevent the spread of COVID-19. Some of these businesses have filed insurance claims seeking coverage for the losses associated with the suspension of business. Historically, some insurance policies address coverage associated with viruses and actions taken by the government, but the coverage issues created by the Shelter-in-Place orders are novel in most jurisdictions. In the recently filed lawsuits, the policy language the businesses are invoking vary, but the arguments for coverage are similar. Accordingly, the ultimate determination of whether the lost business income will be covered under the policies will depend upon the specific policy at issue and prior precedent in the jurisdiction where the case is pending.

The below cases are examples of some of the lawsuits that have been filed since the pandemic started.

Sharecropper LLC d/b/a Ollie Irene v. Farmers Insurance Exchange, Inc. d/b/a Farmers Insurance was filed in the Tenth Judicial Circuit of Alabama (Jefferson County District Court) on April 7, 2020. Ollie Irene is a James Beard nominated restaurant in Mountain Brook, Alabama. Ollie Irene alleges a loss of business income due to declarations and orders entered by state and local authorities prohibiting any restaurant, bar, brewery or establishment that offers food or drink to permit on-premises consumption of food or drink. As a result, Ollie Irene filed an insurance claim seeking coverage for business interruption on March 25, 2020.

The insurance claim was denied, and Ollie Irene sued its insurer, Farmers Insurance, seeking a declaration that the loss is covered under the policy. Specifically, Ollie Irene contends the policy covers losses caused by "acts or decisions of a governmental body" and direct physical losses to the restaurant, thus, the claim is covered because the local and state orders impaired the value and function of the restaurant. The complaint alleges the insurer denied the claims claiming there was no direct physical loss or damage to the restaurant and the policy excludes loss or damage caused by or resulting from any virus. Ollie Irene, however, contends the virus exclusion is not applicable because its claim is not based on the presence of COVID-19 in the restaurant, the claim is based on the direct physical loss caused by the lawful exercise of the government's police power.

Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Insurance USA Inc. was filed in the United States District Court for the Central District of California on April 21, 2020, and alleges claims for breach of contract and bad faith. Musso & Frank has been in operation for over 100 years and is the first restaurant to have a star on the Hollywood Walk of Fame.

The restaurant alleges the emergency orders entered in Los Angeles prohibiting restaurants from serving food and alcohol on premises, forced it to suspend its operations because it had never offered "to go" food, resulting in an immediate loss of business income triggering coverage under the policy. Specifically, Musso & Frank alleges that the insurer breached the contract by denying its claim because the loss is covered under the endorsement for loss of business income caused by an act of civil authority and the virus exclusion is not applicable. Musso & Frank further contend the insurer acted in bad faith by not fairly investigating the claim before issuing the denial.

The K's Inc. v. Westchester Surplus Lines Insurance Co. is a class action filed in the Northern District of Georgia on April 22, 2020, alleging Westchester wrongfully denied coverage for suspension of Sissy K's business due to COVID-19. Sissy K's is located in Boston, Massachusetts, and offers drinks, dancing, karaoke, and live music. Sissy K's alleges it closed in response to local and state orders related to COVID-19, so it filed a claim for lost business income with Westchester. After the claim was denied, the class action was filed seeking a declaratory judgment that the presence of COVID-19 caused a direct physical loss to the property and the suspension of operations by civil authority is covered. Sissy K's also seeks the court to declare coverage exists under the "extra expense" and "sue and labor" provisions of the policy. In contrast to other similarly filed actions, the Westchester policy does not contain a virus exclusion.

Chickasaw Nation Department of Commerce v. Lexington Insurance Co., et al. was filed in the District Court of Pontotoc County in Oklahoma on March 24, 2020. The plaintiff is an Indian tribe that operates multiple commercial businesses in Oklahoma. The plaintiff alleges it sustained direct physical loss or damage due to COVID-19 because its businesses cannot be used for their intended purpose. The plaintiff seeks a declaration that its insurance policies cover the losses and expenses related to the COVID-19 pandemic.

Big Onion Tavern Group, LLC, et al. v. Society Insurance, Inc. was filed in the United States District Court for the Northern District of Illinois on March 27, 2020, arising from the denial of insurance claims related to COVID-19. The plaintiffs allege they are owners and operators of restaurants and movie theaters in Chicago that closed to comply with local and state orders related to COVID-19. The parties seek a declaration that their insurance policies cover the business losses associated with the closures. In support of coverage, the plaintiffs contend prior Illinois cases have held that the presence of a dangerous substance is a covered direct physical loss, and the policies at issue do not exclude losses caused by a virus. The plaintiffs also allege the insurer acted in bad faith by denying the claims before they were filed and by not investigating each claim. Specifically, the plaintiffs allege that the insurer issued a memorandum indicating that its policies would likely not provide coverage for losses due to a "governmental imposed shutdown due to COVID-19 (coronavirus)" because the suspension of business due to the closure orders does not constitute a "direct physical loss."

As the pandemic continues across the country, an uptick in these filings is anticipated. Accordingly, insurers and businesses should closely monitor these early lawsuits because they will likely set the stage for future litigation.

Pamela L. Ferrell

(678) 515-5011

Pamela.Ferrell@butlersnow.com

What About Me? Liability Considerations and Protections For Businesses Outside the Drug and Device Space in the COVID-19 Era
By: Kathleen Ingram Carrington & Mitchell K. Morris

It's been nearly six months since the HHS Secretary declared COVID-19 a public health emergency. As communities emerge from quarantine, businesses are on high alert regarding potential COVID-19 liability. Some businesses have already been afforded protection—suppliers of so-called COVID-19 countermeasures may have immunity under the Secretary's Prep Act[1] Declaration,[2] medical providers and nursing homes may have immunity under various state laws and declarations,[3] and others may have defenses based on regulatory guidance.[4]

So what about everyone else? This article explores who else may be exposed to liability and what defenses may be available to them.

Am I Exposed?

While many states have been busy considering legislation intended to protect businesses vulnerable to COVID-19 liability, only a handful of states so far have actually passed their proposed legislation. One such state is Utah, which passed a law affording civil immunity to any "person" for claims of exposure to COVID-19 while on the person's premises, unless the person engaged in willful misconduct or reckless/intentional harm.[5] North Carolina passed a similar law, but limited its reach to "essential businesses" and claims from a "customer or employee."[6] And in Oklahoma, immunity is tied to the business acting "in compliance or consistent with federal or state regulations" or other applicable guidance.[7]

Other states are taking a more focused approach. For example, Louisiana's legislative package includes a provision specifically immunizing restaurants from suit "for injury or death due to COVID-19 infection transmitted through the preparation and serving of food and beverage products by the restaurant," whether via dine-in, takeout, drive-through, or delivery, unless it occurred through gross negligence / intentional misconduct.[8] And Mississippi, the most recent state to pass COVID-19 legislation, is attempting to immunize persons who design, manufacture, sell, or otherwise distribute "a qualified product in response to COVID-19" for injury related to that product.[9]

While these legislative efforts are positive steps for businesses, progress is both slow and uncertain, leaving businesses in most states still vulnerable.

Causation

A cognizable negligence claim arising from COVID-19 will require proof of both general causation, i.e. that COVID-19 can be transmitted and contracted in the manner alleged, and specific causation, i.e. that the plaintiff did in fact contract COVID-19 as pled. The substantial unknowns and conflicting information regarding the spread of COVID-19, including how long the virus survives on various surfaces or lingers in the air in different atmospheric conditions, and the incubation period between exposure and symptom onset will make a plaintiff's burden of proof especially difficult to meet.

Several cases illustrate the problems COVID-19 plaintiffs will face on causation. In Korte v. Mead Johnson & Co., 824 F. Supp. 2d 877 (S.D. Iowa 2010), the court granted summary judgment on claims alleging that bacteria in the defendant's infant formula caused their child to develop bacterial meningitis. While the defendant conceded general causation, it successfully disputed specific causation based on the absence of a temporal relationship between the infant's ingestion of the product and the onset of infection and the plaintiffs' failure to rule out other possible sources of infection.

In Parker Land and Cattle Company, Inc. v. United States, 796 F. Supp. 477 (D. Wyo. 1992), the court granted summary judgment on a rancher's claim that its cattle died after contracting a bacterial infection from the defendants' elk and bison. Although the court found the defendants were negligent in managing their herds and that some of its animals were infected with the relevant bacteria, the plaintiff failed to meet its burden of proving the defendants' infected elk and bison were the actual cause of the outbreak.

Finally, in *Ebaseh-Onafa v. McAllen Hospitals, L.P., 2015 WL 2452701* (Tex. Ct. App. May 21, 2015), a hospital obtained summary judgment on claims that the decedent contracted the H1N1 virus while working in the hospital's pediatric ICU. Although the plaintiff's expert testified that there were likely unconfirmed cases of H1N1 in the pediatric ICU because it was spreading in the community at the time, the plaintiff did not demonstrate that the pediatric ICU was actually the source of the decedent's H1N1 rather than the community at large.

As these cases reveal, proving causation in an infection disease case is difficult. The numerous unknowns with COVID-19 will make it even more difficult for claimants to prove any one particular place or product was the source of exposure.

Foreseeability, Notice, and Product Misuse

Another prima facie element of a negligence claim, either as a component of duty or proximate cause, is foreseeability. A compelling argument exists that before the current pandemic, premises owners and non-medical product suppliers could not reasonably foresee the risk of COVID-19 transmission as a consequence of their ordinary operations or use.[10] Nor can it reasonably be said that such businesses heretofore had "fair notice" that they could be held liable for the transmission in a public place of an infectious disease that did not originate from them.[11]

But what if you manufacture a fingerprint scanner that is located in an assisted living facility? Are you protected if someone claims they contracted COVID-19 by placing their bare finger on the scanner to open a door? Does the CDC guidance followed by the assisted living facility shield you? As with most legal answers, it depends. If your product is on a premises with defined guidance, you may have an indemnity claim or third party claim, but the likelihood that you can directly benefit from guidance in the same manner as the premises owner is slim. More likely than not, you'll need to turn elsewhere for protection.

Another consideration: what if you manufacture a non-healthcare product that is used in an unintended / unforeseen manner in a healthcare space? For example, using salon or restaurant sterilizer cabinets to sterilize masks in a walk-in clinic. Products defendants routinely raise the defense of misuse in litigation, and true misuse should provide the anticipated protection here. But the defense won't be available if the manufacturer knows of the misuse and encourages it. The U.S. Food & Drug Administration ("FDA") regulates the labeling and marketing of medical devices, and the known misuse of a non-healthcare product as a medical device could subject the manufacturer to FDA penalties if the misuse violates FDA regulations.[12]

Beware the Nuisance Claim

There are also emerging instances of claimants bringing common law public and private nuisance claims related to COVID-19. For example, McDonalds and Amazon are currently facing nuisance claims "by workers and their family members, who claim that lax workplace safety standards put them in danger of contracting COVID-19."[13] Nuisance claims can be particularly challenging for defendants because they do not always have the same causation and other requirements that negligence claims do. While claims brought by employees against their employers will likely face significant workers compensation or OSHA-related hurdles,[14] those defenses will not be available against nuisance claims brought by non-employees like customers or even neighboring businesses.

Conclusion

The uncertainty of when the COVID-19 era will end comes with it the expectation that additional defense options for products businesses operating during the pandemic will emerge. In the meantime, stay informed, follow applicable guidance, and continue using best practices in your day-to-day operations.

[1] Public Readiness and Emergency Preparedness Act, 42 U.S.C. § 247d-6d.
[2] Kat Carrington & Mitch Morris, "HHS Declares Liability Immunity for Certain COVID-19 "Countermeasures"; Response Act Expands Protections for Mask Makers (Mar. 19, 2020), available at https://www.butlersnow.com/2020/03/hhs-liability-immunity-covid-19-countermeasures/ (last accessed July 13, 2020).
[3] See, e.g., Y. Peter Kang, 6 States With COVID-19 Medical Immunity, And 2 Without, Law360 (April 17, 2020); Matthew Santoni, Pa. Gives Civil Immunity To COVID-19 Health Care Providers, Law360 (May 6, 2020).
[4] Carrington, Kat, et al., Revisiting "Is 'The Government Said I Could' A Civil Liability Defense?" During COVID-19 (May 21, 2020), available at https://www.butlersnow.com/2020/05/revisiting-is-the-government-said-i-could-a-civil-liability-defense-during-covid-19/ (last accessed July 13, 2020).
[5] Utah Code Ann. 1953 § 78B-4-517.
[6] N.C.G.S.A. § 66-460(a)(1), (b).
[7] 76 Okla. Stat. Ann. § 111.
[8] La. R.S. 29:773.
[9] S.B. 3049, available at http://billstatus.ls.state.ms.us/documents/2020/html/SB/3000-3099/SB3049SG.htm (last accessed July 13, 2020).

[10] See, e.g., N.N.V. v. Am. Assoc. of Blood Banks (1999) 75 Cal. App. 4th 1358 (where plaintiff contracted AIDS through blood transfusion, court held not reasonably foreseeable in 1984 that "direct questioning, directed donations and surrogate testing ... would have reduced the risk of AIDS contaminated blood supply"). But see Munn v. Hotchkiss School, 165 A.3d 1167 (Conn. 2017) (public policy did not preclude imposition of duty on school to warn about or protect against foreseeable risk of serious insect-borne disease when organizing trip abroad).

[11] See, e.g., Air & Liquid Sys. Corp. v. DeVries, 139 S. Ct. 986, 999 (2019) (Gorsuch, J., dissenting) (noting "fair notice problem" with newly-announced "duty [defendants] could not have anticipated then and one they cannot discharge now"). See also generally https://www.butlersnow.com/2019/04/justices-asbestos-decision-poses-fair-notice-problem/

[12] The penalties for violating these regulations are steep, and the government is not excusing companies during this pandemic; instead, it's cracking down on regulatory violations. So far, the FDA has issued more than 80 warning letters to companies selling products that they claim may prevent, diagnose, cure, treat, or mitigate COVID-19, and attorneys general at the state and federal level are filing lawsuits when warning letters are failing to deter the misconduct. See U.S. Food & Drug Admin., Fraudulent Coronavirus Disease 2019 (COVID-19) Products, available at https://www.fda.gov/consumers/health-fraud-scams/fraudulent-coronavirus-disease-2019-covid-19-products#Warning%20Letter%20Table (last accessed July 7, 2020).

[13] Vin Gurrieri, Law360, COVID Suits Test 'Public Nuisance' Claim in Workplace Cases (June 9, 2020), available at https://www.law360.com/articles/1281347/covid-suits-test-public-nuisance-claim-in-workplace-cases (last accessed July 13, 2020).

[14] See, e.g., Rural Cmty. Workers All. v. Smithfield Foods, Inc., No. 5:20-CV-06063-DGK, __ F. Supp. 3d__, 2020 WL 2145350, at *1 (W.D. Mo. May 5, 2020) (declining to entertain suit brought meat processing plant workers alleging that the plant "failed to adequately protect [them] from the virus that causes COVID-19" based on "the primary-jurisdiction doctrine to allow the Occupational Health and Safety Administration ("OSHA") to consider the issues raised by this case").

Kathleen Ingram Carrington

(601) 985-4429

Kat.Carrington@butlersnow.com

Mitchell K. Morris

(804) 762-6042

Mitchell.Morris@butlersnow.com

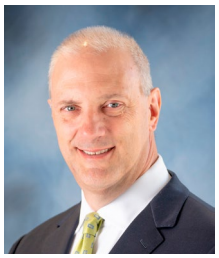
COVID-19: Colleges and Universities Facing Class Action Lawsuits Over Refunds
By: David G. Mayhan

The impacts of COVID-19 closures in the United States first began to materialize a few months ago, in mid-March 2020. Since then, however, over fifty lawsuits have been filed against colleges and universities on behalf of students seeking refunds for tuition and fees due to campus closures in response to COVID-19. The number of such filings is unlikely to stop with fifty: U.S. News and World Report ranks approximately 1,400 schools that are regionally accredited and that offer four-year undergraduate degree programs. The U.S. Department of Education, however, counts over 4,000 colleges and universities nationwide.

These lawsuits involve schools large and small, and from coast to coast. Schools that already have been sued include major public universities like the University of California, Penn State University and Rutgers University. Many private institutions have also been sued for tuition refunds within mere months of the COVID-19 outbreak, including the University of Southern California, New York University, Brown University, Columbia University, Johns Hopkins University, and Vanderbilt University.

Mostly styled as class actions (for more on class actions, click here) and grounded in breach of contract principles, the suits allege that the defendant schools promoted and advertised the value of an in-person, on-campus experience and thus should refund students for failing to deliver on that promise. Tuition per semester can easily exceed $20,000 per student at private schools or for an out-of-state student at a major public university. Some educational institutions have offered reimbursements for portions of room and board and some fees, but not for tuition, as most, if not all, of the defendant schools have maintained their faculty and staff and continued to offer alternative (primarily on-line) education through the spring semester.

Refund claims like these arising from a pandemic are unprecedented in recent times. These lawsuits present complex issues regarding class action lawsuits, to intricate legal theories involving breach of contract, unjust enrichment, and impossibility of performance. Butler Snow attorneys have a wealth of experience in the defense of complex business and class action litigation, as well as representation of institutions of higher learning.



David G. Mayhan
(720) 330-2394
David.Mayhan@butlersnow.com

High Hurdles to Class Actions Remain Even in the Time of COVID-19
By: Kevin C. Baltz

Before 2020, most people only associated the term Corona with a beer. Now, Corona will be at the heart of the American judicial system for years to come. Legal experts anticipate a significant increase in the number of class actions as a direct result of the COVID-19 crisis. In fact, the dam has already started to break for universities (alleged to have failed to refund tuition payments), banks (alleged to have improperly distributed relief funds); music venues and promoters (alleged to have failed to offer refunds for canceled events), and many other industries that are also reeling from the effects of the COVID-19 pandemic.

Class actions are unique because they are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Califano v. Yamasaki, 442 U.S. 682, 700–701 (1979). To achieve class certification, the plaintiff must "satisfy through evidentiary proof" both the four factors listed in Rule 23(a) (numerosity, commonality, typicality, and adequate representation), and at least one of the provisions of Rule 23(b). Comcast Corp. v. Behrend, 569 U.S. 27 (2013) (holding that Rule 23 is not a pleading standard; each requirement must be satisfied "through evidentiary proof.").

So, focusing on Rule 23(a), what hurdles does a plaintiff have to overcome to achieve class certification? Here's a brief primer on the four Rule 23(a) requirements:

> Numerosity. A plaintiff must show that "the class is so numerous that joinder of all members [of the class] is impracticable." Fed. R. Civ. P. 23(a)(1). While the numerosity factor imposes no absolute limitations and is based on the facts of each particular case, this standard does require that the class be sufficiently large such that it would be difficult, if not impossible, to litigate the merits of each individual claim.
>
> Commonality. A class action may be certified only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Here, courts must find that the cases of the numerous plaintiffs have common matters at issues and that the court's findings on those common matters "will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011). Significantly, plaintiffs cannot certify a class unless they can show that they suffered the "same injury" as the potential class member. Id. at 348.
>
> Typicality. A plaintiff's claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." In re American Medical Sys., 75 F.3d at 1078. "A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 542 (6th Cir. 2012)

Adequacy. Finally, before certifying a class, the court must find that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Typically, in considering the adequacy of representation, the court must find that the interests of the class representative coincide with those of the rest of the class and that the class representative and his attorney are prepared to prosecute the action vigorously, tenaciously and with adequate financial commitment. See, g., Ridings v. Canadian Imperial Bank of Commerce Tr. Co. (Bahamas), 94 F.R.D. 147, 154 (N.D. Ill. 1982)

Accordingly, Rule 23(a) sets some high hurdles for any plaintiff seeking to represent a class. While the COVID-19 pandemic has many people suffering similar problems, achieving class certification for those problems is easier said than done.

Kevin C. Baltz

(615) 651-6714

Kevin.Baltz@butlersnow.com

Potential Coronavirus Impact on Commercial Transactions & Real Estate: Thinking Ahead
By: Robert L. Crawford, Robert C. Hutchison, Timothy S. Perry & Craig D. Smith

THIS ARTICLE ALSO APPEARED IN THE MEMPHIS BUSINESS JOURNAL.
As concerns continue to be raised and addressed with respect to the Coronavirus, businesses should be alert to the real potential that they may face commercial challenges from potential disruptions related to its existence, spread and containment. Suppliers may delay delivery of products or raw materials or otherwise fail or be unable to perform contractual obligations or even try to charge higher prices. Your business, in turn, may have difficulty or be unable to meet contractual requirements based on such issues. Your landlord or tenant may have concerns about payment of rent, operating hour requirements, continuous operating covenants or even the ability to hold meetings or operate in the current environment. Customers may be unreasonably demanding in the face of unexpected situations your business faces.

The guideline we suggest is simple: Be fair, but insist that the ones you deal with be fair with you.

Many of these business strains will be ironed out in the regular course of business. But, if you find your business faced with unreasonable situations you cannot tolerate, there are legal doctrines that can come into play in such situations, including contractual provisions (the oft-discussed force majeure clauses), and common law doctrines such as impossibility of performance or frustration of contract or other historic doctrines, as well as legal restrictions on price gouging. For example, if one of your suppliers claims that it cannot deliver necessary product to you on a timely basis and is relieved from performance due to certain specific effects of the coronavirus, you will want to examine the precise language of your contract and determine whether the supplier has a contractual basis to do so, whether any such rights have been properly invoked and the remedies available to you. On the other hand, if your business needs to suspend or delay shipments, or in connection with leasing matters, if you need to suspend operations or occupancy, for similar reasons, you will want to be sure and comply with all of the terms of any force majeure clause in your relevant contract as to ensuring you have a qualifying event, provide proper notice and are aware of all potential consequences of invoking such a provision. In either case, should you not have a contract with a force majeure clause, you should examine all of your rights or obligations otherwise under the law.

Should your business experience any disruptions of such nature, it is critical to examine both your rights and your obligations under your existing contracts and under the law in general.

Robert L. Crawford
(901) 680-7395
Larry.Crawford@butlersnow.com

Robert C. Hutchison
(601) 985-4476
Robert.Hutchison@butlersnow.com

Timothy S. Perry
(678) 515-5054
Tim.Perry@butlersnow.com

Craig D. Smith
(601) 985-4478
Craig.Smith@butlersnow.com

OTHER RESOURCES

Justices' Asbestos Decision Poses Fair Notice Problem
By: Mitchell K. Morris

What is the purpose of a "duty" announced a half-century after it was allegedly breached? A cynical observer — and at least three U.S. Supreme Court justices — might say, at least as to those parties whose alleged breaches occurred many years earlier, that it is less a duty of care, and more a duty to "pay."[1]

Nevertheless, those are the circumstances of the most recent tort duty announced by a majority of the Supreme Court in Air & Liquid Systems Corp. v. DeVries. The case involved two former U.S. Navy sailors who were allegedly exposed to asbestos on Navy ships between 1957 to 1986.

The defendants were manufacturers of equipment delivered to the Navy in "bare metal" condition, to which asbestos materials were later added by the Navy. Departing from the traditional rule, applied by the district court, that a defendant is not liable for "harms caused by later-added third-party parts," the Supreme Court announced a new test under which manufacturers may be liable for failing to warn about other companies' products.[2]

This article analyzes what dissenting Justice Neil Gorsuch called the "fair notice problem"[3] posed by the majority's decision — and discusses its implications for the recovery of punitive damages under the new rule, and the potential recognition at the state level of similarly expanded duties.

The Majority's Holding

DeVries arose from the underlying manufacturer defendants' successful assertion at the district court level of the so-called "bare metal defense" under federal maritime law. The U.S. Court of Appeals for the Third Circuit reversed, holding that the manufacturers could be held liable if they "could foresee that the product would be used with the later-added asbestos-containing materials."[4]

The Third Circuit's holding, in turn, conflicted with an earlier decision by the Sixth Circuit, which reached the diametrically opposite conclusion — that a manufacturer "cannot be held responsible for asbestos containing material that … was incorporated into its product post-manufacture."[5] The Supreme Court "granted certiorari to resolve a disagreement among the Courts of Appeals about the validity of the bare-metal defense under maritime law," ultimately settling on a test it described as "fall[ing] between th[e] two approaches" used by the Sixth and Third Circuits.[6]

Specifically, the majority held the manufacturers had a duty under federal maritime law to warn the sailors if (1) their product required incorporation of a part (i.e., asbestos insulation), (2) the manufacturers knew or had reason to know that the integrated product was likely to be dangerous for its intended uses, and (3) the manufacturers had no reason to believe that the product's users would realize the danger.[7]

In other words, the court "resolved" the circuit split by announcing a duty the contours of which had not previously been articulated by any federal appellate court. The newly-announced duty also effectively overruled the Sixth Circuit's decision in Lingstrom, which appears to have been the prevailing federal appellate precedent on the issue for at least the 12 years between its rendering in 2005 and the Third Circuit's 2017 decision in DeVries.[8]

In reaching its holding, the majority "agree[d] with the manufacturers that a rule of mere foreseeability would sweep too broadly," but also "agree[d] with the plaintiffs that the bare-metal defense ultimately goes too far in the other direction."[9] The court stressed that "the product manufacturer will often be in a better position than the parts manufacturer to warn of the danger from the integrated product," and dismissed the burdens associated with such a duty as either "not significant" or unsubstantiated.[10]

Finally, the court invoked the federal maritime law's "special solicitude for the welfare of those who undertake to venture upon hazardous and unpredictable sea voyages."[11]

The Fair Notice Problem

The duty announced by the DeVries majority presents an obvious problem that is at once both practical and deeply philosophical, but which the majority sidestepped entirely. It is, according to Gorsuch, with whom Justices Clarence Thomas and Samuel Alito joined in dissenting, the "fair notice problem."[12] As Gorsuch elaborated:

> Decades ago, the bare metal defendants produced their lawful products and provided all the warnings the law required. Now, they are at risk of being held responsible retrospectively for failing to warn about other people's products. It is a duty they could not have anticipated then and one they cannot discharge now.[13]

It is this quandary — the inability of manufacturers of decades-old products to even attempt to comply with the duty announced by the majority — that led Gorsuch to quip that such manufacturers now "can only pay," which, in his view, "may be the point" of the majority's decision.[14] That is, the point may be to create an avenue of potential recovery against manufacturers who "may be among the only solvent potential defendants left."[15]

While acknowledging the "unfortunate facts of this particular case," the dissenting justices nonetheless questioned: "[H]ow were the [bare metal manufacturers] supposed to anticipate many decades ago the novel duty to warn placed on them today?"[16] Ultimately, this question appears to be one with which the majority was unconcerned. But it is one that cannot simply be ignored, nor should it be.

DeVries leaves open more question than it answers, including (1) whether plaintiffs will be permitted to seek punitive damages in cases alleging breaches of the newly-announced federal maritime duty, and (2) whether states who have yet to resolve the "bare metal" issue will follow the DeVries majority's approach. The unresolved fair notice problem should inform litigants' and courts' treatment of these questions.

Punitive Damages Under DeVries

While the availability of punitive damages in certain maritime cases is a matter of ongoing debate,[17] there is no question that punitive damages are recognized under the general maritime law.[18] Therefore, a strong possibility exists that plaintiffs will seek, or already are seeking, the recovery of punitive damages in cases now governed by DeVries.

For its part, the majority opinion in DeVries neither approves nor disapproves of punitive damages for such claims — it is entirely silent on the matter. The fair notice problem identified by the dissent, however, provides a compelling reason for courts below to disallow punitive damages in such cases, at least insofar as they involve conduct predating the court's decision.

Indeed, it is the concept of "fair notice" that has animated the Supreme Court's jurisprudence imposing due process limitations on punitive damages awards generally.[19] Starting from the proposition that "punitive damages are imposed for purposes of retribution and deterrence,"[20] the Supreme Court years ago recognized that "a decision to punish a tortfeasor by" way of punitive damages "is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment."[21]

In particular, the court has held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice … of the conduct that will subject him to punishment," as well as "of the severity of the penalty that a State may impose."[22]

So what, exactly, is "fair notice," and what are its implications for punitive damages under DeVries? Gorsuch offers his view of the former in his DeVries dissent: "People should be able to find the law in the books; they should not find the law coming upon them out of nowhere."[23] This view should be uncontroversial in a society, such as ours, predicated upon the rule of law.

It is certainly consistent with earlier pronouncements of the court, such as following language cited by the majority in its seminal State Farm Mutual Auto. Ins. Co. v. Campbell opinion: "[T]he point of due process — of the law in general — is to allow citizens to order their behavior."[24]

Whatever the outer limits of constitutional "fair notice" may be, a relatively safe baseline would seem to be a requirement of some advance notice of proscribed conduct so that citizens have an opportunity to "order their behavior" and avoid punishment. As Gorsuch rightly observes, it simply cannot be said that manufacturers in the 1950s, 1960s, 1970s and 1980s had fair notice of any duty "to warn about other people's products" first announced by the court in 2019.

While a majority of the Supreme Court declined to acknowledge this "fair notice problem" in the context of compensatory liability, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate" that it be taken into account with regard to punitive damages.[25] Therefore, courts should disallow punitive damages in cases governed by DeVries involving conduct that predates the court's decision, because at the time of such conduct there was no fair notice of potential punishment for nonconforming behavior.

Nonconstitutional considerations also dictate the disallowance of punitive damages under DeVries for predecision conduct. Under federal maritime law and in general, punitive damages usually require that a defendant have acted with "willful and wanton disregard" for a legal "obligation."[26] Thus, when "an issue is one of first impression or where a right has not been clearly established, punitive damages are generally unavailable."[27]

The reason for this rule is because, under such circumstances, a defendant cannot be deemed to have "abrogate[d] any established legal duty toward" a plaintiff, "and therefore," cannot be founded to have "exhibit[ed] willful and wanton misconduct."[28] The so-called "first impression bar" provides an additional basis to disallow punitive damages under DeVries for predecision conduct.

Beyond DeVries: Implications for State Law

The DeVries majority itself makes clear that the decision does "not purport to define the proper tort rule outside of the maritime context."[29] From the perspective of the dissenting justices, and presumably also of manufacturers "at risk of being held responsible retrospectively for failing to warn about other people's products," this is "a silver lining" that leaves courts "in other tort cases ... free to use the more sensible and historically proven common law rule" of no liability for the products of others.[30]

Litigants before nonmaritime courts considering the viability of the bare metal defense would be wise to raise the fair notice problem identified by the DeVries dissent as a compelling reason not to depart from the traditional rule. In many states the analysis for "determining whether a duty exists" includes "public policies affecting the expansion or limitation of new channels of liability," meaning that "courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree."[31]

The ability of affected persons to have anticipated and attempted to conform to a duty or obligation surely is a relevant consideration to whether such a duty or obligation should be recognized. After all, "the point of due process — of the law in general — is to allow citizens to order their behavior."

At a minimum, the fair notice problem should cause state courts to limit the retroactive application of decisions imposing new duties contrary to traditional common law limitations like the bare metal defense. That is, any such decisions should be applicable only to cases arising from post-decision conduct.[32] In this vein, the Supreme Court long ago held:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. ... The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.[33]

States have, thus, developed various tests for determining whether to retroactively apply civil judicial decisions.[34] A critical factor is often "whether the decision in question established a new principle of law either by overruling past precedent or deciding an issue of first impression, the resolution of which was not clearly foreshadowed."[35]

Therefore, even in jurisdictions where courts may be inclined to abandon traditional doctrines like the bare metal defense or to announce newly expanded duties, defendants still can and should oppose the retroactive application of such decisions, on the grounds that they reasonably could not have anticipated them at the time of the allegedly tortious conduct.

Conclusion

Although Gorsuch was relegated to the dissent in DeVries, the fair notice problem he identifies implicates "[e]lementary notions of fairness enshrined in" American law, and should inform litigants and courts in all cases involving potential departures from established common law rules.

In particular, the fair notice problem should serve as a basis to disallow or limit punitive damages in cases governed by DeVries, and as a reason for state courts to hold differently than the DeVries majority when the same or similar questions come before them.

[1] Air & Liquid Sys. Corp. v. DeVries , 586 U.S. __ (2019), Slip Op. (Dissent) at 8.
[2] Id., Slip Op. (Majority) at 2-4.
[3] Id., Slip Op. (Dissent) at 7.
[4] Id., Slip Op. (Majority) at 4.
[5] Lindstrom v. A-C Prod. Liab. Tr. , 424 F.3d 488, 497 (6th Cir. 2005).
[6] DeVries, Slip Op. (Majority) at 4-6.
[7] Id. at 10.
[8] Indeed, the majority's opinion does not identify any contrary circuit-level authority before or after Lingstrom until the Third Circuit's decision in DeVries.
[9] DeVries, Slip Op. (Majority) at 7.
[10] Id. at 8-9.
[11] Id. at 9 (citations omitted).
[12] Id., Slip Op. (Dissent) at 7.
[13] Id. at 7-8
[14] Id. at 8.
[15] Id.
[16] Id.
[17] Currently before the Supreme Court is The Dutra Group v. Batterton, Docket No. 18-266, which presents the specific question of whether punitive damages may be awarded to a Jones Act seaman (i.e., merchant marine) in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.
[18] See, e.g., Exxon Shipping Co. v. Baker , 554 U.S. 471 (2008); Atl. Sounding Co. v. Townsend , 557 U.S. 404 (2009).
[19] See, e.g., Philip Morris USA v. Williams , 549 U.S. 346, 354 (2007) (describing "lack of notice" as one of "the fundamental due process concerns to which our punitive damages cases refer").
[20] Pac. Mut. Life Ins. Co. v. Haslip , 499 U.S. 1, 19 (1991).
[21] Honda Motor Co. v. Oberg , 512 U.S. 415, 434–35 (1994).
[22] BMW of N. Am. v. Gore , 517 U.S. 559, 574 (1996).

[23] DeVries, Slip Op. (Dissent) at 8.
[24] 538 U.S. 408, 418 (2003) (quoting Haslip, 499 U.S. at 59 (O'Connor, J., dissenting)).
[25] While BMW v. Gore and its progeny involved state action subject to the Fourteenth Amendment, insofar as the federal maritime law or courts are involved, the Fifth Amendment likewise proscribes federal deprivations of "life, liberty, or property, without due process of law." As one Supreme Court justice long ago observed: "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." Malinski v. New York , 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring in part, dissenting in part).
[26] Townsend, 557 U.S. at 424; see also Restatement (Second) of Torts § 908 ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others").
[27] Waits v. Frito-Lay Inc. , 978 F.2d 1093, 1104 (9th Cir. 1992), abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components Inc. , 572 U.S. 118 (2014).
[28] Flores v. Carnival Cruise Lines , 47 F.3d 1120, 1127 (11th Cir. 1995)
[29] DeVries, Slip Op. (Majority) at 10.
[30] Id., Slip. Op. (Dissent) at 8.
[31] See, e.g., Holdampf v. A.C.&S. Inc. (In re N.Y.C. Asbestos Litig.), 840 N.E.2d 115, 199 (N.Y. 2005) (citations omitted).
[32] See, e.g., DiCenzo v. A-Best Prods. Co. , 897 N.E.2d 132, 134 (Ohio 2008) (limiting application of products liability decision to products sold after the decision).
[33] Great N. Ry. Co. v. Sunburst Oil & Ref. Co. , 287 U.S. 358, 365 (1932).
[34] See, e.g., DiCenzo, 897 N.E.2d 132, 136-140 (collecting cases); see also Selective Ins. Co. of Am. v. Rothman, 34 A.3d 769, 773 (N.J. 2012); Heritage Farms, Inc. v. Markel Ins. Co., 810 N.W.2d 465, 479–80 (Wisc. 2012); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 225 (Ga. 2010); Kruchowski v. Weyerhaeuser Co., 202 P.3d 144, 152 (Okla. 2008); Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 351–52 (W. Va. 2009); BHA Investments, Inc. v. City of Boise, 108 P.3d 315, 320 (Idaho 2004); Mandel v. Sickles, 829 F.2d 1120 (Table) (4th Cir. 1987) (S.C. law).
[35] See, e.g., Nestlehutt, 691 S.E.2d at 225.

Mitchell K. Morris

(804) 762-6042

Mitchell.Morris@butlersnow.com