AVOIDING RUDDERLESS LITIGATION: ASSESSING THE STANDARD OF CARE FOR COVID CLAIMS

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The COVID-19 pandemic has left a wide-ranging spectrum of devastation in its ongoing wake. Businesses have fought through mandated closures, constantly changing guidance, inability to secure PPE and cleaning supplies, and staffing issues to open and continue to serve their customers. Waiting on the other side of that fight are hundreds of already filed lawsuits, and the threat of an avalanche of more, claiming injury and damage due to exposure to the virus. Among the first issues to be addressed is the standard of care Courts will apply to those claims to determine whether appropriate care was rendered by the business.

As of mid-January 2021, there were 24.3 million confirmed cases of coronavirus in the United States, resulting in 402,000 deaths. Worldwide, there were 96.2 million cases and 2.06 million deaths.

While it seems an eternity, it has been a little over a year since the coronavirus first appeared. It is important to remember a few seminal dates regarding the virus and efforts to mitigate its spread. On January 9, 2020, the World Health Organization ("WHO") announced that there was a mysterious coronavirus-related pneumonia centered in Wuhan, China. On January 21, 2020, the CDC confirmed the first U.S. coronavirus case in the United States in a Washington state resident who had returned

from Wuhan. On January 31, 2020, the WHO declared a global public health emergency, and the United States followed with a declaration of a public health emergency on February 3, 2020. The CDC and OSHA (*Guidance on Preparing Workplaces for COVID-19*) issued initial guidelines on March 9, 2020.

Since the appearance of coronavirus, the WHO, CDC, and others have "followed the science" to learn about the disease and its transmission and offered guidance for preventing its spread. Some of that guidance has been unhelpful, and on occasion it has been wrong. For example, on January 14, 2020, the WHO issued a now-infamous tweet claiming that Chinese authorities had "found no clear evidence of human-to-human transmission of the novel #coronavirus." Thereafter, guidance from the WHO and CDC was equivocal about the efficacy of wearing masks to inhibit the spread of the virus. The business community has struggled to adapt to this changing guidance and to establish and follow best practices to protect their employees and customers. With litigation continuing to be filed alleging exposure to coronavirus, businesses are now faced with the task of determining what standard of care will be applied, and what burden of proof will be required. To date, a legislative answer to this quagmire has proven elusive, though efforts to find a solution are ongoing.

In the absence of a statutory definition, the determination of standard of care under the common law is informed from a variety of sources to determine what a "reasonable" business should have done to mitigate the risk of exposure. It is likely that Courts will look to governmental safety regulations to determine the standard of care. Such reliance is well established. *See In Re City of New York,* 522 F.3d 279, 285-286 (2d Cir. 2008) (governmental safety regulations can shed light on the appropriate standard of care); *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1014 (3d Cir. 1992) (holding OSHA regulations were relevant to the standard of care). In *Ebaseh-Onofa v. McAllen Hospitals, L.P.*, 2015 WL 2452701 (Tex. Ct. App., May 21, 2010), which involved the death of a nurse from H1N1, plaintiff argued that the standard of care was determined by the CDC's purported requirement that healthcare workers wear n95 masks when treating patients suspected of having the virus.

Analysis of litigation already commenced informs us as to the thinking of the plaintiff's bar on the standard of care issue. In May 2020, a lawsuit was filed in Philadelphia County, Pennsylvania, arising out of the death of a union steward at a meat processing plant due to respiratory failure caused by COVID-19. In the Complaint, plaintiff cited the January 31, 2020, WHO declaration, and the CDC and OSHA guidelines issued on March 9, 2020. The Complaint alleged that the employer: (1) failed to provide sufficient personal protective equipment; (2) forced workers to work in close proximity; (3) forced workers to use cramped and crowded work areas, break areas, restrooms, and hallways; (4) discouraged workers from taking sick leave in a manner that had sick workers in fear of losing their jobs; and (5) failed to properly provide testing and monitoring for individuals who may have been exposed to the virus that causes COVID-19. Interestingly, plaintiff also alleged that after the spread of H1N1 in 2009, meat processing plants were on notice of the danger of the airborne spread of the virus. Plaintiff specifically alleged that the employer ignored guidance from the CDC and OSHA by not mandating: (1) use of masks and PPE; (2) social distancing guidelines; (3) that workers who were feeling ill report their symptoms to their superiors; (4) that workers who were feeling ill stay at home from work and self-quarantine. It was further alleged that the plant violated OSHA regulations, including OSHA 1910.132, related to the use of PPE.

In Florida, legislation has been introduced to provide certainty and guidance to businesses subject to litigation for COVID-19 exposure and transmission. The proposed legislation would provide liability protections where a business made a good faith effort to substantially comply with authoritative or controlling government-issued health standards or guidance at the time the cause of action accrued. The bill contains strict pleading requirements, mandating that a Complaint be plead with particularity and include an Affidavit attesting that the plaintiff's COVID-19 related damages/injury occurred as the result of the defendant's acts or omissions. Further, before discovery is permitted, the Court is required to determine whether the business made such a good faith effort. If so, the defendant is immune from civil liability. Even if a good faith effort was not found, however, a plaintiff would be required to prove their case with a burden of at least gross negligence, established by clear and convincing evidence.

Similar legislative efforts are underway in other states and in the federal government. Clear minded proponents argue that while businesses should not be exempt from liability for intentional acts or disregard of current (or then-current) guidelines, the concept of reasonableness requires protection for businesses who acted in good faith in attempting to prevent the spread of the virus. Absent specific federal or state legislation, businesses will be mired in a web of potential liabilities and standards of care.

In the meantime, even without knowing the standard of care that will eventually be applied, there are some simple strategies that businesses should employ to mitigate the threat of litigation and future exposure. They should gather and retain all documents that were relied upon when forming workplace safety policies, be they federal, state and/or local governmental executive orders, public health authority recommendations and/or agency guidance. Since those orders and recommendations often changed, maintaining those records is critical to support the rationale behind company-issued protocols and policies that were contemporaneous with such health and safety guidance. Similarly, each iteration of workplace policies must be kept establishing compliance with changing governmental directives. Communications must also be retained to demonstrate that policies were clearly and effectively disseminated to employees, customers, vendors, and other invitees. Lastly, any documentary evidence of workplace posters, fliers, trainings, PPE, etc., should also be maintained to further evidence good faith attempts at compliance and distribution of information.

Given the unprecedented threats that faced all businesses, there is reason for some cautious optimism that factfinders will be somewhat sympathetic to corporate defendants, at least those who are able to show good faith attempts when attempting to comply with changing governmental guidance. While we await further direction from the legislative and judicial branches, we remain mindful of Jerry Garcia's advice that we must "keep truckin' on."

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