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Customer Connection

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Committee Leadership

In This Issue

Leadership Notes

Letter from Editors and Committee News

Welcome to the issue of *Customer Connection* that we never expected to edit. COVID-19 has swept the world unannounced and notwithstanding the numerous industries decimated by its effects and the response thereto, our industry, Retail and Hospitality, may truly never be the same. With this issue, we explore responding to the crisis, defending your clients, answering insurance inquiries and assessing the future of our industry. We also provide you with our continuing series regarding Mode of Operation theory and, in this issue, focus on Colorado.

While the Spring issue of *Customer Connection* usually contains a piece about just how important it is to attend the Retail and Hospitality Seminar, we are sure that you were just as disappointed as we were that this worthwhile event was cancelled. Of course, cancellation of the event was the proverbial "right call" under these circumstances; but, on a personal note, we missed seeing and catching up with each and all of you. Next year's event will only be that much better.

Given these uncertain times, please be sure to keep up with the various Substantive Law Groups (SLGs) which can be reviewed at the DRI website, www.dri.org. As you likely know, SLGs are smaller groups equipped to focus upon specific legal topics such as Premises Liability, Negligent Security, Franchising, Technology, Amusement, Food Safety, Employment and Insurance—as well as many others. If you are interested in being active in an SLG please contact the SLG Chair, Shawn Libman. SLGs are constantly working on various events and writing opportunities for SLG members. Another easy way to follow our Committee news lies within our online community found on the DRI website. You can sign up to receive live email updates or get daily/weekly digest emails from the online forum. This is an excellent resource and we hope you take advantage!

It is our mission at *Customer Connection* to address the latest topics benefiting your daily practice. Is there some topic you want to know more about? Are there any recent experiences that your colleagues could benefit from? Do you have a notable win that should be celebrated? Please let us know—we would more than happy to share!

We want to thank all article authors, content editors and the Newsletter Committee for their hard work and attention to detail—not to mention short deadlines. If you find what you see here helpful, please let us—and the author(s)—know.

The day will come when we will get to see each other and personally share the various experiences, war stories and anecdotes that make this practice and our Committee so rewarding. In the meantime, take a break from the fifteen Zoom meetings and conference calls you'll host from your home office over the next two days or so, and enjoy reading this issue!

Feature Articles

A Wave of Waivers

Managing the Risk of Reopening During a Pandemic

By Steven A. Adelman

Much of my practice involves helping entertainment and sports event operators manage their risk. Usually, that work involves routine issues like overenthusiastic dancing, severe weather or bad guys with weapons. That was before. The COVID-19 pandemic creates entirely new risks as well as a tsunami of unintended consequences.

Meet the New Hazards

Examine the old safety and security risks through the new infectious disease lens. Moshing and crowd surfing are now completely unacceptable violations of social distancing that could cause mass contagion, just like the widespread practice at general admission shows of people crowding against the stage barricade. Those activities will have to be banned and strictly enforced for the foreseeable future.

A forecast of severe storms now presents more than a temporary inconvenience before a soggy crowd can resume watching an event. This scenario now compels outdoor event producers to consider cancelling in advance, based only on a forecast, due to the inability to shelter patrons in a confined space or evacuate them while maintaining six feet between evacuees.

For all events, the risk of allowing someone intent on causing harm to slip through undetected now competes against the reasonable reluctance to make security guards pat down patrons at ingress. The risk of opening events during coronavirus, when there is insufficient testing, no contact tracing and no vaccine on the horizon, begets a whole additional parade of horribles. Enter lawyers bearing exculpatory agreements.

The Enforceability of Waivers for Entertainment Events

The humble Waiver of Liability form has long been a preferred means by which purveyors of risky entertainment try to mitigate their liability. Offerings as diverse as ski schools, college football programs, paintball emporiums, motorbike racetracks and baseball stadiums compel invitees to disclaim their right to sue as a condition of entry or participation.

Yet, exculpatory agreements have long been disfavored on public policy grounds and are narrowly enforced. As a threshold matter, one can contractually shield themselves only from ordinary negligence, not intentional, willful or wanton misconduct. Even as to negligence claims, a court will typically consider four issues:

1. Is there a duty to the public?
2. What is the nature of the service performed?
3. Was the waiver fairly entered into?
4. Was the scope and intent of the waiver expressed in clear and unambiguous language?

The first consideration relates to whether the business performs some essential public function, in which case it owes special duties to the public. Although people starved for opportunities to play may now disagree about their importance to our quality of life, recreational activities including those in retail and hospitality arenas are not generally held to the same high standard. This is the reason waivers of liability for recreational activities usually clear the first hurdle for enforceability of exculpatory contracts.

The second issue relates to the first by asking if a service is "essential" or a "matter of practical necessity." Again, only the bottom layers of Maslow's hierarchy of needs are legally resistant to waivers.

The third issue is theoretically dicey, because many liability waivers are adhesion contracts, take-it-or-leave-it propositions based on completely unequal bargaining power (*i.e.*, all versus none). Once again, however, the legal presumption that recreation, fine dining and consumer therapy are not essential services rescues waivers in this context because prospective patrons are free to walk away if they do not like the conditions.

The last issue, that the parties' intent was expressed in clear and unambiguous language, is obviously a fact-specific determination which gets enforcement of waiver disputes past summary judgment. Matters of concern include a title to the document which simply states its purpose ("Waiver of Liability" seems to work), a list of reasonably foreseeable risks being waived (to include whatever mishap the plaintiff actually suffered) and a succinct statement of the risks being assumed or rights being disclaimed. As a matter of law, clarity is good. Lawyers who have not yet weaned themselves off legalese, fine print and Dickensian page lengths can get hung up on this prong of the four-part test.

Just Because You Can Doesn't Mean You Should

As I advise clients who are considering when and how to restart their events, I often remind them that even after a municipal official lifts a stay-at-home order, it remains each professional's duty to reasonably evaluate their clients' own circumstances. Until otherwise prescribed, every public accommodation should require at least six feet of social distancing space between patrons everywhere throughout the venue and require every patron and worker to wear face coverings and keep their hands sanitary. As usual, however, the devil is in the details.

Crowd management will be a huge issue. Gaff tape drawing lines on the floor, rope and stanchions to mark waiting areas, bike rack and temporary fencing for outdoor line control as well as helpful hosts and ushers providing information and modeling healthy behavior can all help enforce social distancing in retail stores, restaurants and event spaces. Additionally, reopening plans will need to include a plan to maintain social distancing not only in the main public areas, but also at inevitable choke points such as points of ingress and egress, in hallways and inside and outside restrooms.

Likewise, education and instilling a sense of duty to each other will require a massive collective effort by every business seeking to reopen while they minimize the potential to spread an infection. Unfortunately, the science of COVID-19 and measures discussed here have become politicized, making widespread compliance unlikely and enforcement potentially dangerous.

There are countless other practical problems and unintended consequences to plan for before one can say they are reopening a venue that is reasonably safe under the current circumstances. The industry association for which I am Vice President recently released *The Event Safety Alliance Reopening Guide.* Because even one missed surface can be deadly, our document for event professionals is 29 single-spaced pages of granular details.

A final challenge will be persuasion, which brings us back to waivers of liability. Even prospective patrons eager to get out of their homes will have to be coaxed back into retail and hospitality venues that are crowded with strangers. Lawyers will be tempted to approach this problem legally, urging their clients to thrust exculpatory language into patrons' hands before they cross the threshold. I think this would be a pyrrhic victory. Some patrons would sign, yielding some legal protection, but more patrons would take their business somewhere that didn't make them sign away their right to safe premises as a condition of spending scarce dollars at this establishment.

There is an old expression, "if all you have is a hammer, everything looks like a nail." This is a time for lawyers to see the present situation not from our tidy offices above the fray, but from the perspective of our clients, who are scrambling for their very survival. These clients must focus on earning their patrons' trust before they can receive their patrons' business. The least we can do is to support their efforts without getting in their way.

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1. Brigance v. Vail Summit Resorts, Inc., 883 F.3d 1243 (10th Cir. 2018).
2. Feleccia v. Lackawanna College, 215 A.3d 3 (Pa. 2019).
3. McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (2005).
4. Eder v. Lake Geneva Raceway, Inc., 187 Wis. 2d 596, 523 N.W.2d 429 (1994).
5. Rountree v. Boise Baseball, LLC, 154 Idaho 167, 296 P.3d 373 (2013).
6. E.g., Brigance, 883 F.3d at 1250.
7. Retail and hospitality employers could compel their employees and independent contractors to return to work or face termination, but they might also face the sort of personal injury and wrongful death suits that have already begun. See, e.g., Evans v. Walmart, 2020 WL 1697022 (Ill. Cir. Ct.), Complaint filed April 6, 2020.
8. https://www.eventsafetyalliance.org/esa-reopening-guide

How Should Your Business Defend COVID-19 Premises and Product Liability Suits?

By Daniel Strecker

Personal injury claims arising from infection by COVID-19 are a concern to businesses, premises owners/tenants, manufacturers, distributors, and retailers. Many thousands of hospitalizations and deaths have already occurred. It is an open question whether patients who survive, including those with milder cases, will experience long-term effects after the acute stages resolve. For these reasons, and because high transmission rates could lead to multi-plaintiff actions, the potential for significant damages exists. Unsurprisingly, claims have already been filed: In *Archer v. Carnival Corporation, et al.* (N.D. Cal. No 3:20-cv-02381), the class-action Plaintiffs allege they contracted COVID-19 as a result of Defendants' allegedly negligent

failure to guard adequately against a risk of shipboard viral infection.

However, plaintiffs must do more than prove someone became sick—they must prove negligence, a product defect, or a breach of warranty, as well as causation. At every turn, defendants will have valuable defenses at their disposal.

Premises Liability Defenses

Plaintiffs may sue landlords, restaurants, retailers, and other businesses, claiming they contracted COVID-19 on their premises. To establish negligence, plaintiff must typically show the defendant created the condition or had actual or constructive notice of it. This is true not only for slip and falls, but also alleged toxic conditions like mold. *See White v. Indian Oaks, LP*, 2009 WL 692739 (Cal. App. 2009) (citing *Litwack v. Plaza Realty Investors, Inc.*, 835 N.Y.S.2d 151 (N.Y. App. Div. 2007) (granting summary judgment where landlord did not create or have notice of mold condition)); *Caldwell v. Curioni*, 125 S.W.3d 784 (Tex. App. 2004).

In many states, however, plaintiffs must show more than a mere general awareness that a condition may be present; instead, plaintiffs must show notice of the specific condition at issue. *See Moore v. Wal-Mart Stores, Inc.*, 3 Cal. Rptr. 3d 813 (Cal. App. 2003) (rejecting "mode of operation" theory that would alleviate obligation to prove notice of specific condition); *Piacquadio v. Recine Realty Corp.*, 646 N.E.2d 795 (N.Y. 1994) ("[A] 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused" the injury). Therefore, plaintiffs cannot avail themselves of the general knowledge of the pandemic and its risks to establish notice. That is why, for example, the Plaintiffs in *Archer* allege that the cruise line was aware of a specific risk in the form of sick persons on board. Similarly, to overcome the notice hurdle, a plaintiff may have to prove, for example, that the business was *previously* aware of an infected employee or customer yet failed to take reasonable precautions, such as sanitizing, closing, or issuing warnings.

Plaintiffs may attempt to overcome notice requirements by pointing to alleged failures to comply with local or other health laws, codes, and regulations, including those enacted to combat COVID-19, to invoke the concept of negligence *per se:* that defendant was negligent solely by virtue of violating the law. In some states, however, plaintiffs may be limited in key respects. In New York, violation of local law, executive directives, and administrative guidance, as opposed to violation of legislative statute, is not negligence *per se*, only evidence of negligence. Compare *Elliott v. City of New York*, 747 N.E.2d 760 (N.Y. 2001) (violation of local ordinances and administrative codes is only evidence of negligence) with *Alphin v. La Salle Diners, Inc.*, 98 N.Y.S.2d 511 (N.Y. Sup. Ct. 1950) (violation of food safety statute could constitute negligence per se in tainted food case). Many COVID-19 regulations, such as social distancing and takeout/delivery-only restrictions, are not legislative acts. In Illinois, even violations of a statute is only evidence of negligence, with defendant still able prove it nevertheless acted reasonably. *See Bier v. Leanna Lakeside Property Ass'n*, 711 N.E.2d 773 (Ill. 1991). For this reason businesses should be aware of and implement directives from all applicable authorities to avoid evidence of negligence and maximize the ability to show they acted reasonably.

Product Liability Defenses

Plaintiffs may likewise sue businesses, including online retailers, claiming they contracted COVID-19 from contaminated products, including takeout/delivery food, that the businesses sold. Such claims could be attractive to plaintiffs, since the obligation to prove negligence, including notice, may be dispensed with in favor of a "strict" liability or breach of warranty approach. *See Jacob E. Decker & Sons v. Capps*, 164 S.W.2d 828 (Tex. 1942) (breach of implied warranty); *Tardella v. RJR Nabisco, Inc.,* 576 N.Y.S.2d 965 (N.Y. App. Div. 1991) (negligence, strict product liability, or breach of warranty); *Warren v. Coca-Cola Bottling Co. of Chicago*, 519 N.E.2d 1197 (Ill. App. Ct. 1988) (breach of warranty and strict product liability).

However, plaintiffs must do more than show mere correlation in time between contact with defendants' allegedly contaminated products and contracting COVID-19. *See Farroux v. Denny's Restaurants, Inc.*, 962 S.W.2d 108 (Tex. App. 1997); *Valenti v. Great Atlantic & Pac. Tea Co.*, 615 N.Y.S.2d 84 (N.Y. App. Div. 1994); *Warren*, *supra* (mere fact of injury following encounter with product is insufficient); *Minder v. Cielito Lindo Restaurant*, 136 Cal. Rptr. 915 (Cal. App. 1977) (collecting cases, including Arkansas and Missouri, that claim requires more than showing illness followed encounter with product). Among other common requirements, the plaintiff will have to show the product was contaminated when it left the defendant's possession. *See Tiffin v. Great Atlantic & Pac. Tea Co.*, 162 N.E.2d 406 (Ill. 1959); *Tardella*, *supra*. That may be a difficult hurdle given the ubiquity of the virus and its ready transmission where, for instance, an online retailer entrusts deliveries to a mail service or

products are left on customers' doorsteps. *See Tiffin*, *supra* (discussing challenges of proof where product passes through many hands after leaving manufacturer). Others in the plaintiff's vicinity may have contact with the product, serving as vectors for subsequent contamination (difficult to disprove if many carriers are asymptomatic).

A defendant can prevail by showing facts, including safety procedures, rendering remote the possibility that contamination led to the plaintiff's illness. *See Tardella*, *supra*; *Warren*, *supra*. Therefore, as a first-line defense to product liability claims, businesses should be aware of and implement directives from all applicable authorities relating to the outbreak. Indeed, absent evidence to the contrary, an affirmative showing of compliance and other precautions could be sufficient to secure pre-trial dismissal. Compare *Payano v. Hempstead Union Free Sch. Dist.*, 863 N.Y.S.2d 61 (N.Y. App. Div. 2008) (granting summary judgment to food poisoning defendant that affirmatively established safety procedures) and *Warren*, *supra* (same), with *Amit v. Hineni Heritage Ctr.*, 856 N.Y.S.2d 146 (N.Y. App. Div. 2008) (denying summary judgment in food poisoning case where defendant failed to establish safety procedures).

Issues of Speculation and Causation

Whether an action is grounded in negligence or product liability, the inherently speculative nature of proving COVID-19 transmission will present a further hurdle to plaintiffs. Absent specific testing of the premises or an allegedly offending product, any plaintiff may have difficulty adducing other than speculation that the premises or product was even contaminated. *See Williams v. White Castle Sys.*, 772 N.Y.S.2d 35 (N.Y. App. Div. 2004) (dismissing food poisoning case for lack of non-speculative basis that food was contaminated); *Vuletic v. Alivotvodic*, 392 N.E.2d 663 (Ill. App. Ct. 1979) (granting summary judgment when plaintiff could only speculate that product was contaminated); *Minder*, *supra* (discussing challenge of proving contamination in the absence of testing). While the scientific evidence will take time to develop, it is also unclear whether, for how long, and under what conditions the virus can survive in the open and on surfaces, such as on a product during the multi-day course of a delivery.

Plaintiffs in *Archer*, *supra*, may have an advantage in this regard: cruise ships are by nature closed systems isolated from external infection. This will not be the same for the average plaintiff, given the ubiquity of disease vectors, including asymptomatic spreaders and the potential for contracting the virus from other sources. It would behoove a plaintiff—and will no doubt pose a challenge—to show that, for example, multiple persons besides the plaintiff also became ill with COVID-19 after encounters with the product or premises. Compare *Amit*, *supra* (denying summary judgment in food poisoning case where a dozen other persons became sick after same meal) with *Payano*, *supra* (granting summary judgment to food poisoning defendant that established lack of other illnesses). *See also Minder*, *supra* (multiple illnesses may support inference of liability). In *Archer*, a class action, this is what the Plaintiffs are endeavoring to establish.

For the same reason, plaintiffs may have difficulty showing causation, an essential element in any negligence or product liability suit. The mere possibility of causation by the product as opposed to something else will not suffice. *See Smith v. Landry's Crab Shack, Inc.*, 183 S.W.3d 512 (Tex. App. 2006) (insufficient merely to show product "could" have caused illness); *Warren*, *supra* ("The mere possibility of a causal connection is insufficient ...."). Plaintiffs will have to show they contracted COVID-19 as a result of their encounter with a defendant's allegedly contaminated premises or product, and not from another source. Speculation that because the contact occurred prior to the infection it must have caused the infection will not suffice. See *Farroux*, *supra*; *Warren*, *supra* (mere fact of injury following encounter with product is insufficient); *Valenti*, *supra* (mere correlation in time between encountering alleged defect, worm in can of beans, and symptoms is insufficient); *Minder*, *supra* (collecting cases from multiple jurisdictions).

Conclusion

Businesses should be aware of the potential pandemic-related claims and their defenses. By doing so, they may enact policies that will avoid incidents now and lay the groundwork for future defenses should claims nevertheless arise. A knowledge of the hurdles plaintiffs must overcome will permit defense attorneys to advocate most effectively on their clients' behalf.

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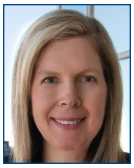
Business Interruption Coverage and COVID-19

By Stephanie F. Glickauf



As of the writing of this article, there are hundreds of thousands of COVID-19 infections in the United States with tens of thousands of resulting deaths. Across the country, states and municipalities have declared states of emergency and are setting in place various restrictions which range from curfews to shelter-in-place orders. Unsurprisingly, these actions have had a great effect on businesses throughout the country, hitting the retail and hospitality industries the hardest.

Claims for business interruption coverage are pouring into insurers all over the country. Lawsuits have already been filed in this regard in states including Louisiana, Illinois, California and Texas, and insurers are left scrambling to figure out what is covered and what is not. All of these initial suits have stemmed from closures in the retail and hospitality industry, mostly restaurants who are experiencing catastrophic losses due to the virus. The suits are there, but do they have any bite?

As is usually the case, in order to evaluate any type of insurance coverage claim, we must start with the policy. Most business interruption policies provide coverage for the following (or something substantially similar):

> . . . actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be *caused by direct physical loss of or damage to property* at premises which is described in the Declarations . . . .

(emphasis added).

On March 13, 2020, a declaratory judgment action was filed in a Louisiana state court by a restaurant seeking a declaration of coverage for Coronavirus-caused losses under a business interruption policy. This was the first of such suits in the country. The suit alleges that the insured restaurant was issued an "all risk" policy by Lloyds with business interruption coverage. While the complaint does not delve into the relevant policy language, the argument appears to be that contamination of the insured premises by the Coronavirus is a direct physical loss since the virus lingers on surfaces and requires remediation to clean the surfaces of the establishment.

The most oft cited case in support of the argument that the presence of something intangible, like COVID-19, in a structure, satisfies the "direct physical loss of or damage to" requirement, is *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*. While this is a New Jersey case, it addresses both New Jersey and Georgia law.

In *Gregory Packaging*, the insured sought business interruption coverage under a commercial property policy. An unsafe amount of ammonia had released from a refrigeration system into one of the Gregory Packaging facilities. Gregory Packaging was a New Jersey company, but the facility was located in Georgia. The insurer denied coverage for the loss on the basis that Gregory Packaging did not suffer "direct physical loss of or damage to Covered Property."

The New Jersey Court first looked to New Jersey law since the policy was issued to Gregory Packing in New Jersey. The New Jersey courts define "physical damage" as "a distinct, demonstrable, and physical alteration" of a property's structure. The court then determined that, while structural alteration provides the most obvious sign of physical damage, a property can sustain physical loss or damage without experiencing structural alteration. Since ammonia was a dangerous gas which rendered Gregory Packaging's buildings uninhabitable, the Court found that this constituted a "direct physical loss" sufficient to trigger business interruption coverage.

Georgia law was also examined because the facility at issue was located in Georgia. In reaching the conclusion above, the New Jersey court relied on a Georgia Court of Appeals case, *AFLAC Inc. v. Chubb & Sons, Inc.*, which was tasked with determining whether problems related to computer programs as a result of Y2K was "direct physical loss or damage" so as to be covered under a business interruption policy. The Georgia Court of Appeals in *AFLAC* defined "direct physical loss or damage" as requiring "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." The Georgia Court of Appeals found that AFLAC had not sustained physical loss or damage because its alleged property damage was merely a defect in its computer systems that had "existed from the time the systems were created by design."

The *Gregory Packaging* court, in applying the standard set out in *AFLAC, Inc.*, found that the ammonia discharge was occasioned by a fortuitous event which produced an actual change in the content of the air in Gregory Packaging's facility. Before the ammonia discharge, the facility was in a satisfactory state for human occupancy and continued build-out, but after the ammonia discharge its state was unsatisfactory and required remediation. Thus, the Court found that the ammonia discharge caused "physical loss of or damage to" the Gregory Packaging facility under Georgia law.

The *Gregory Packaging* case gives a very broad definition of "direct physical loss" which will, no doubt, be used by restaurants and retail establishments in making these claims due to COVID-19.

The next high-profile suit that was filed was *French Laundry Partners, LP d/b/a The French Laundry v. Hartford Fire Insurance Company, et al.* This suit was filed in the Napa County Superior Court. There, the restaurant group is making similar allegations to those in the *Cajun Conti* case, but it also seems to be contending that because access to the restaurant is prohibited by an order of civil authority due to the virus in the immediate area, the "Civil Authority" coverage in their policy will be triggered.

Civil Authority coverage forms typically read as follows:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.
>
> Civil Authority Coverage for Business Income will begin 72 hours after the time of the first action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.
>
> Civil Authority Coverage for Extra Expense will begin immediately after the time of the first action of civil authority that prohibits access to the described premises and will end:
>
> (1) Four consecutive weeks after the date of that action; or
>
> (2) When your Civil Authority Coverage for Business Income ends;
>
> whichever is later.

A covered cause of loss causing damage to property is still required for an insured business, such as a restaurant or retail establishment, to obtain coverage under the typical Civil Authority coverage form. Thus, the same argument that was made in the *Cajun Conti* case about the virus staying on surfaces, is being or will likely be made in the *French Laundry* case. However, instead of physical damage at the actual property, the argument that will be made is that the virus is said to be "in the area." For any entity making a claim under the Civil Authority coverage form, the coverage is typically limited to a period which will most likely be shorter than the actual period of closure.

One last thing to remember is that many policies contain an exclusion for viruses and bacteria. It does not appear that any of the policies in the cases cited above contained any such provisions. Thus, each policy should be investigated thoroughly.

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The Future of Retail & Hospitality Practices and Claims in Response to COVID-19

By Curt L. Rome and Dorinda Varley


At the start of 2020, there unsurprisingly existed few guidance or practice standards concerning retail stores and hospitality venues in the event of a pandemic. Months later, however, in response to COVID-19, temporary guidance has been issued by the Center for Disease Control and Prevention ("CDC"), the Environmental Protection Agency ("EPA"), the Food and Drug Administration ("FDA"), the World Health Organization ("WHO"), and the Occupational Safety and Health Administration ("OSHA").

While OSHA's temporary guidance is intended to protect retail employees, it also protects retail customers. OSHA has issued the following temporary guidance.

> "As appropriate, such as at customer service windows and, if feasible, cash registers lanes, use physical barriers to separate retail workers from members of the general public.
>
> "Use rope-and-stanchion systems to keep customers from queueing or congregating near work areas."
>
> "Whenever possible, direct customers to self-checkout kiosks to minimize worker interaction with customers."
>
> "Establish protocols and provide supplies to disinfect frequently-touched surfaces in workplaces and public facing areas, such as points of sale. For example, wipe down credit card terminals and pens/styluses between each customer."
>
> "Consider restricting the number of customers allowed inside the facility at any point in time. Some stores have implemented this by specifying hours dedicated to vulnerable populations."
>
> "Employers should consider options for increasing in-store pickup or delivery to minimize the number of customers shopping in store facilities."

The CDC has also issued temporary guidance. In line with OSHA's guidelines, the CDC recommends that businesses take the below steps to protect employees and customers.

> "Remind customers to maintain 6 feet distance from workers and other customers with verbal announcements on the loudspeaker and written signage."
>
> "Encourage customers to use touchless payment options, when available. Minimize handling cash, credit cards, reward cards, and mobile devices, where possible."
>
> "Provide remote shopping alternatives for customers, including click-and-collect, delivery, pick-up, and shop-by-phone to limit customers in the establishment."
>
> "Clean frequently touched shelving, displays, and in-reach refrigerator units nightly when closed to the public."

In the last two months, many stores have successfully adopted and implemented these temporary guidelines. If you've been to a store recently, you've also noticed the changes in your shopping experience as retailers work to create a safer environment for employees and customers.

Grocery stores, such as Publix, have adjusted store hours "to conduct preventative sanitation and to restock shelves." Grocers are also encouraging customers to utilize contactless cards and mobile pay apps. With these apps, customers are offered the option of a touch-free checkout. In compliance with OSHA's temporary guidelines, grocers have also installed physical plexiglass barriers between the cashiers and the customers.

Retail stores, in line with recent CDC guidelines, are cleaning more frequently. Target has stationed a team member at each store entrance to ensure carts are clean and available in an orderly fashion. Target is also "cleaning checkout lanes after each transaction."

Some stores have added a pickup option, while other stores have modified their pickup option to conform with the new guidelines. Best Buy previously offered in-store pickup, but in response to COVID-19 and the temporary guidelines, Best Buy has modified the pickup option to create a contactless curbside pickup. The contactless curbside pickup allows a customer to remain in their vehicle while items that they purchased online are placed in the trunk of their car.

Other stores have recently added delivery options. Only days ago, Walmart announced Express Delivery, a service that delivers store items to customers' doors in less than two hours. All of Walmart's delivery and pickup options are now contactless services.

For those that OSHA deems vulnerable, some retailers are offering special hours. COVID-19 has been deemed particularly dangerous for those described as high-risk individuals (i.e. the population more vulnerable to COVID-19). The CDC defines high risk individuals as those "people 65 years and older, people with chronic lung disease or moderate to

severe asthma, people who have serious heart conditions, people who are immunocompromised, people with severe obesity, people with diabetes, people with chronic kidney disease undergoing dialysis, and people with liver disease." In order to offer people 65 years and older a safer shopping experience, stores such as Target, Walmart and Publix, have created specials hours specifically for people 65 years and older.

Technology has allowed retail stores to quickly adopt and comply with the temporary guidance provided by governmental agencies, in order to remain open to the public, while also making the shopping experience as safe as possible for everyone during this pandemic. This type of response would not have been possible during prior viral outbreaks.

To the extent they have remained open; restaurants have adopted similar measures concerning social distancing and touchless payments. Many are offering curbside service or take out with limited person-to-person contact. Entertainment venues have largely closed and are now re-opening on a limited basis with guidelines in place.

While states are starting to re-open their economies at different rates, they will obviously want to do so safely. You may anticipate that many of the guidelines above that are designed to keep shoppers and employees safer such as contactless payment, routine disinfecting, using rope and stanchions to keep customers away from work areas may remain for some time, but strict social distancing and crowd limitations are unsustainable for many businesses. Many entertainment businesses cannot operate at a profit without crowds at or near capacity. Likewise, most restaurants cannot remain open with 25% or 50% capacity.

Questions remain as to whether we will return to the shopping and entertainment experiences that we knew. Indeed, it seems that society wishes to regain a sense of normalcy. When we do, how do we live with COVID-19 or future novel virus outbreaks? How do we manage liability of stores and hospitality venues when the public decides to transition back to enjoying their retail and hospitality venues for entertainment and not just necessity? How will state legislatures and courts in the various states handle a potential claim asserted by a shopper, diner, concert goer, sports spectator or an amusement park attendee who allegedly contracts COVID-19 or a similar virus from their store or venue?

The problem retail and hospitality businesses face is an invisible and sometimes undetectable risk since patrons can be asymptomatic carriers of the virus. Therefore, screening of employees and customers with temperature checks may prove ineffective and the required use of masks or face coverings may not be foolproof.

One answer may be legislative relief for businesses frequented by the public in the form of tort immunity. Employees of businesses that have remained open have been labeled heroes in many instances. The notion of immunity for businesses that have remained open has been discussed in Washington. Similarly, several states have already proposed legislation requiring insurers to cover COVID-19 while providing immunity or limiting bad faith for insurers who contribute to a business compensation fund. Could there be legislative relief for retail and hospitality businesses?

Shortly before publication, Louisiana Governor John Bel Edwards signed into law a bill that grants liability protections for COVID-19 claims brought by customers. To bring a successful claim, customers must establish that business "failed to substantially comply with the applicable COVID-19 procedures established by the federal, state, or local agency" and that the injury was caused by the business's "gross negligence or wanton or reckless misconduct." Employees of a business have no tort remedy for a COVID-19 claim unless the exposure resulted from an "intentional act."

Another legal approach could be an expansion of merchant's liability or mode of operation statutes and doctrines. In the context of a slip and fall, states typically apply some variation of The Second Restatement of Torts:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

However, this premises liability standard does not fit well with protection of the public from the invisible hazard of a virus. An otherwise seemingly sterile dining room at a restaurant can be contaminated by one patron who has not exhibited any symptoms until well after he or she passes through. Under those circumstances, the "knowledge" element becomes difficult to prove. The same hurdle applies under a traditional negligence standard.

One solution could be a variation of assumption of the risk doctrine. There are almost as many variations of this doctrine as there are states. Some states allow a pre-injury

release of claims. Some prevent the enforcement of a waiver of liability for personal injury before the injury occurs. Others place significant restrictions on such waivers. A tradeoff for businesses to return to operation and supporting the economy could be the application of the assumption of the risk doctrine. However, it may require courts and state legislatures to expand their state-specific applications of the doctrine to provide a balance that is fair to both the business and the consumer. Also, requiring every customer to agree to a waiver of rights before entering a store would come at a cost to retail and hospitality businesses.

Whether legal doctrines can provide a fair standard to evaluate a claim is only one concern for retail and hospitality businesses. Another is the causation defense. In a traditional toxic tort claim, a claimant must not only prove general causation but specific causation as well (*i.e.,* the defendant's premises or product caused the plaintiff's injuries). If we assume that a plaintiff has an avenue for recovery, how do we know the plaintiff contracted COVID-19 from a specific establishment? Guidance from the CDC states that symptoms may not appear for 2 to 14 days after exposure to the virus. This incubation period allows for substantial opportunity for a potential claimant to be exposed at a number of locations. How does the claimant prove that her or she was exposed at a certain place?

Answering the question above may open Pandora's box. Assuming a claimant has an actionable claim and is allowed past the pleading stage, retail and hospitality businesses may be subject to expansive discovery into not only their business practices but their customer base. It is not farfetched to envision claimant requesting a list of all patrons in an effort to verify that COVID-19 was present at or near the same time a claimant was at a venue. Full discovery into all restaurant patrons or amusement park and concert attendees could require disclosure of financial information to trace credit card holders' names and addresses and create privacy concerns.

Businesses are already confronted with the issue of maintaining customer privacy under various state laws concerning consumer privacy such as the ever-evolving California Consumer Privacy Act, Ohio Data Protection Act and similar legislation that is presumably aimed at protecting the disclosure of consumer privacy. If retail and hospitality establishments are required to defend COVID-19 claims, discovery in those matters are going to impact how businesses comply with the various states' data protection laws to say nothing of the cost of providing notice to all customers whose information may be disclosed to the requesting claimant.

Workers' compensation coverage for employee claims is a concern as well. Generally, workers' compensation does not cover general illness such as a cold or flu. However, some states are taking measures to include COVID-19 coverage for first responders, essential workers (which could include some retail employees) and grocery store employees. While states appear to be taking action on this issue, the scope of legislation varies from state to state.

Clearly, retail and hospitality businesses have challenges ahead. Every state and municipality will have different safety standards and timelines for re-opening. In addition to complying with these standards, which are aimed at protecting employees and customers, businesses will face an uncertain litigation landscape if a claim is filed.

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Colorado Rejects Common Law Theories of Premises Liability, Including Mode of Operation Exception to Notice Requirements

By Lily E. Nierenberg

Prior to the enactment of the Premises Liability Act ("PLA"), C.R.S. §13-21-115, the Colorado Supreme Court had adopted a common law exception to the requirement of actual or constructive notice, known as the mode of operation exception. Under this exception, a plaintiff need not prove notice of a specific danger but instead could show that defendant's business practices give rise to a greater risk of the danger. Following the enactment of PLA, the Colorado Supreme Court held that the Act preempts common law negligence theories of premises liability. On that basis, Colorado's federal and state trial courts have rejected the line of cases adopting the mode of operation exception and required proof of a defendant's actual or constructive notice of the specific dangerous condition.

Colorado's Premises Liability Act ("PLA"), C.R.S. §13-21-115, applies to "any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property." C.R.S. §13-21-115(2). The statute was first enacted in 1986 and amended to cure

a constitutional defect in 1990. The PLA codifies distinct duties with respect to whether the plaintiff is an invitee, landowner, or trespasser. *Id.* §13-21-115(3). Under the Act, "an invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known." *Id.* 13-21-115(3)(c).

Prior to the PLA, a negligence claim against a landowner in Colorado similarly required proof of actual or constructive notice of the dangerous condition unless that condition was created by the operator or its agents. *Safeway Stores, Inc. v. Smith*, 658 P.2d 255, 257 (Colo. 1983). With respect to constructive notice, it was further understood that the dangerous condition must exist for enough time and be of such a nature that a landowner by exercise of reasonable care could have discovered it. *Miller v. Crown Mart, Inc.*, 162 Colo. 281 (Colo. 1967).

To soften the notice requirement, some jurisdictions have adopted a so-called mode of operation exception. *See*, *e.g.*, *Martin v. Wal-Mart Stores, Inc.*, No. 90-5245, 1992 U.S. App. LEXIS 1473, *6 (10th Cir. Feb. 6, 1992) (discussing Oklahoma's adoption of the exception and its similarity to other jurisdictions). Under the exception, "when the operating methods of an invitor are such that dangerous conditions, such as spills by patrons, are recurring or easy to anticipate the invitee need not show notice of the specific condition created. " *Id.* at *6. In 1972, Colorado adopted this common law exception in *Jasko v. F. W. Woolworth Co.*, 494 P.2d 839 (Colo. 1972), a negligence case against a pizza shop.

The *Jasko* Court discussed that the dangerous condition in that case—pizza on the floor—was created by the defendant's method of extensive selling of pizza on waxed paper to be consumed by the customer while standing, as there were no tables or chairs. 494 P.2d at 840. The Court held that "when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves." *Id.* The Court held that in such a circumstance, "actual or constructive notice of the specific condition need not be proved." Id.

The Colorado Supreme Court applied this exception to a self-service grocery operation in *Safeway Stores, Inc. v. Smith*, *supra*, in 1983. The *Safeway* Court held that the "*Jasko* exception" was properly applied to the grocery store because "the easy access to the merchandise often results in its spillage and breakage," and "a customer's attention understandably is focused on the items displayed rather than on the floor." 658 P.2d at 257. Based on this reasoning, the Court held that rather than actual or constructive notice, a plaintiff must only present "evidence that the nature of the defendant's business gives rise to a substantial risk of injury to customers from slip-and-fall accident, and that the plaintiff's injury was proximately caused by such an accident within the zone of risk." *Id.* at 258.

However, with the adoption of the PLA, the legislature preempted common law negligence standards except where specifically adopted by the Act. In *Vigil v. Franklin*, 103 P.3d 322 (Colo. 2004), a case involving a swimming pool accident, the Colorado Supreme Court was asked to determine whether the PLA preempted the common law open and obvious danger doctrine. The Court focused on the language from C.R.S. §13-21-115(2) which states that landowners "shall be liable only as provided in subsection 3" of the statute, and determined that 'the statute's definition of landowner duty is complete and exclusive, fully abrogating landowner common law duty principles.'" 103 P.3d at 328. The Court further held that the plain language of the Act preempted common law negligence defenses other than those expressly adopted, which did not include the open and obvious defense. *Id.* at 329–31.

This principle from *Vigil*—that the PLA "preempts prior common law theories of liability, and establishes the statute as the sole codification of landowner duties in tort"—applies to the mode of operation exception recognized in *Jasko* and *Safeway*. As indicated above, with regard to invitees, the Act provides that "an invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known." C.R.S. §13-21-115(3)(c). The statute contains no exception for the actual or constructive knowledge requirement. By limiting a landowner's liability to only the circumstances identified in the statute, *Vigil supra*, the PLA should be understood to have eliminated the mode of operation exception.

The policy behind the PLA further supports this interpretation. By its terms, the purpose of the PLA "is to protect landowners from liability in some circumstances when they were not protected at common law..." and "to create a legal climate which will promote private property rights and commercial enterprise and will foster the availability and affordability of insurance." C.R.S. §13-21-115(1.5)(d)-(e). As the Colorado Supreme Court has stated, "[t]he overriding purpose of the premises liability statute is to clarify and to narrow private landowners' liability to persons entering their land..." *Pierson v. Black Canyon Aggregates, Inc.*, 48

P.3d 1215, 1219 (Colo. 2002), *as modified on denial of reh'g* (July 1, 2002).

Courts in the federal district of Colorado and state district court have adopted this reasoning to reject the application of *Safeway* and *Jasko*, including the mode of operation exception, following adoption of the PLA. In *Artesi v. Tomlinson Bros.*, No. 04-cv-02613-MSK-PAC, 2006 U.S. Dist. LEXIS 108272, *6-7 (June 8, 2006), Art. III Judge Marcia Krieger rejected a plaintiff's argument, based on Safeway and Jasko, that he was not required to prove actual or constructive notice of the danger of a 55-foot slide for which there were no reported injuries, stating that both cases preceded the enactment of the PLA. In *Malloy v. Walmart, Inc.*, No. 2018CV30981, 2019 Colo. Dist. LEXIS 95, *1 (Adams Cty. Dist. Ct. Feb. 6, 2019), state district court judge Edward Moss granted a directed verdict for the defendant on the basis that the plaintiff had presented no evidence that the store had actual or constructive notice of a ladder leaning against a column, similarly rejecting the mode of operation exception on the basis that the PLA had preempted common law negligence standards including the mode of operation exception.

Accordingly, under Colorado's Premises Liability Act, an invitee must prove that the defendant had actual or constructive knowledge of the specific dangerous condition, as opposed to evidence of defendant's general business operation giving rise to a greater risk of that danger.

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1. A licensee and trespasser must prove actual notice under the PLA. C.R.S. §13-21-115(3)(a)-(b).

2. Although Artesi did not expressly rely on the mode of operation exception, he argued under Safeway and Jasko that he did not need to prove notice where the defendant or its agents actually created the dangerous condition. The Court rejected this argument but found that Artesi had made a prima facia showing of constructive notice and therefore denied defendant's motion for summary judgment.

3. This case was tried for Walmart by Ashley Larsen and Paul Jordan of Sutton | Booker. Paul Jordan successfully argued the directed verdict motion.