



PROGRAM MATERIALS

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Product Liability and Tort Law Implications of the COVID-19 Crisis

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Product Liability and Tort Law Implications of the COVID-19 Crisis

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Practical Application

Discussion-based approach

- Online retailers.
- Social host liability.
- Product liability.
- Food-borne pathogens.
- “Reasonable care” and heightened standard of care.

Discussion Questions

Big-Box Retailer

- A big-box retailer (that includes a large grocery section) mandates that touch-screen credit card machines used by customers must be disinfected every 30 minutes, but not after every use. Five customers test positive within six days of visiting the store.



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- Considerations:
 - Alternative causation: If someone is shopping in public, and not getting deliveries, many possible sources of infection.
 - Personal responsibility: Is it possible to work the touchpad and keep gloves on?
 - Personal responsibility: Does the store supply wipes (as many retailers do) at various points in the store? Is the obligation to wipe/disinfect also on the patron?

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- Considerations:
 - Concept of a cluster: does a high number of cases in a single location suggest causation, even where alternative causation might be possible? Nursing homes? Hospitals? Transit systems?
 - What is industry standard? Is any other business performing wipedowns after every use?
 - If industry standard is every third use, what is the proof that the industry standard would have prevented this plaintiff's case of COVID-19?

Barber Shop

- A barber shop closes because it is deemed a “non-essential” business under a state mandate. A barbershop employee gets creative, fields calls in the shop and offers to come to customers’ homes for haircuts to keep his business afloat. Two out of twenty of the customers who take up the barber’s offer test positive for COVID-19 ten days after their haircuts. The barber is completely asymptomatic but tests positive for virus antibodies a month later.



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- Considerations:
 - Violation of a stay at home order, and operation of a non-essential business in violation of a state mandate.
 - Hair cutting cannot be done while maintaining 6 feet of clearance.

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- Considerations:
 - Allowing the employee into the shop creates, arguably, apparent authority on behalf of the business to perform the haircuts. A liability issue for the corporate entity.
 - Employer could attempt to argue an *ultra vires* act by the employee, particularly if the employee was pocketing the money. More likely, however, is that the permission to enter the store created apparent authority.
 - Same causation issues are present.

House Party

- Because their state's stay-at-home order is making them stir-crazy, two teenagers (both minors) decide to throw a party at their house with the consent of both their parents. Fifty teenagers attend the party (all minors), ignoring social distancing guidelines. Ten of the teenagers test positive for COVID-19 within two weeks. The parents of the ten partygoers sue the parents of the two teens who threw the party.



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- Considerations:
 - Social Host liability.
 - Statutory in many states (limited to alcohol and drugs).
 - Common Law in other states (most notably NJ).

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- Considerations:
 - Causation problems remain: Deposition questioning of kids who attended a party during social isolation would include many alternative causation questions.
 - “Parents Who Host Lose the Most.”

Religious Services

- A religious congregation publicly ignores their state's mandate to keep gatherings under ten people, holding a special service with one hundred people in attendance. Thirty of the people who attended the service test positive for COVID-19 within two weeks of the service.



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- Considerations:
 - Raises religious freedom/free exercise questions.
 - DOJ has actually backed the religious institutions.
 - Mayor of NYC has criticized mass Hasidic gatherings during this period.
 - In some states, there are charitable and religious immunities to consider.

Religious Services

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- Considerations:
 - Causation remains an issue, but with a cluster of 30 out of 100, it seems more likely that causation issues might be framed.
 - Awkward and potentially politically charged questions to ask, but those who would attend a 100-person gathering might also attend "Liberate" protests and other mass gatherings where social isolation is not strictly followed. Those questions should be posed at depositions.

Grocery Delivery

- The resident of a studio apartment has not left her home in three weeks, and has only received one large delivery of groceries in that timespan. She did not sanitize the items after delivery, since the grocery store assured her that this is done before the order leaves the store. She soon becomes symptomatic, and eventually tests positive for COVID-19.



Grocery Delivery

- The resident of a studio apartment has not left her home in three weeks, and has only received one large delivery of groceries in that timespan. She did not sanitize the items after delivery, since the grocery store assured her that this is done before the order leaves the store. She soon becomes symptomatic, and eventually tests positive for COVID-19.
- Considerations:
 - Eliminates much of the alternative causation issue.
 - Incubation period of 14 days rules out exposure prior to entering the apartment.
 - Grocery store assured her everything was sanitized.
 - Only possible source of infection (unless one can be developed) is the grocery store.
 - Presence of COVID-19 on delivery materials would be a product defect under the ordinary rules of strict liability, so a product was delivered in defective condition at the time of sale.

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- Considerations:
 - Resident might still have an independent duty to clean, and not to rely upon the assurance provided by the store.
 - Case would be bolstered by evidence of other claims arising from the store, or records of employee sickness (ordinarily shielded from discovery).

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- Considerations:
 - Query as to whether privacy shields as to Personal Health Information will give way to litigation needs.
 - Some of the large meat processors made a similar argument as to HIPAA, that they cannot guarantee a safe work force while simultaneously blinding themselves to the health conditions of employees working the line.

Small Retailer

- A small mom-and-pop shop is owned by a sole proprietor, who is also the store's only employee. Because of this, she has to stay behind the cashier counter at all times while her store is open. What are her obligations with respect to disinfecting the door handles at the store entrance?



Small Retailer

- A small mom-and-pop shop is owned by a sole proprietor, who is also the store's only employee. Because of this, she has to stay behind the cashier counter at all times while her store is open. What are her obligations with respect to disinfecting the door handles at the store entrance?
- Considerations:
 - Picture suggests the best solution, have a street side window.
 - Impractical to clean the handle after every use with but one employee.
 - Might be possible to shift the obligation to the customer by providing wipes on a stand outside the store.

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- Considerations:
 - Require masks and gloves.
 - At a chain retail store in Michigan, a security guard was shot for suggesting to a patron that he needed a mask, so enforcement of any obligation is both difficult and could be life threatening to employees.

Hospital Allocation of PPE

- A private healthcare system encompasses five different hospitals of roughly the same size. One of the hospitals has an unusually larger number of COVID-19 cases than the other four, but the system insists that each hospital receive the same budget for personal protective equipment. 15% of the staff at the hospital impacted most by COVID-19 patients eventually test positive.



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- Considerations:
 - Raises questions of worker's compensation immunities - often hospital employees are employees of the specific hospital, and not the hospital system. Does the immunity extend to the parent system?

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- Considerations:
 - Intentional Act? New Jersey, in a case called *Laidlow*, frames the issue as follows:
 - The first question is whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury.
 - If yes, the court must then determine whether, if the employees' allegations are proven, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the Workers' Compensation law.

Hospital Allocation of PPE

- A private healthcare system encompasses five different hospitals of roughly the same size. One of the hospitals has an unusually larger number of COVID-19 cases than the other four, but the system insists that each hospital receive the same budget for personal protective equipment. 15% of the staff at the hospital impacted most by COVID-19 patients eventually test positive.
- Considerations:
 - Question is not necessarily budgeting, but whether the hospital in question was impacted by the budgeting.
 - Inquiry is necessary into the practices, work arounds and procedures of the hospital.
 - Obviously alternative causation can also be explored.

PPE Manufacturer

- A manufacturer of protective face masks includes a pocket for an N95 filter in their product, but does not include the filter in the product itself. The masks are advertised as a “protective covering against airborne pathogens” but does not go into further detail. A class-action lawsuit is later brought by consumers who bought the mask but wore it without the protective filter, and eventually contracted COVID-19.



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- Considerations:
 - Duty to warn
 - Warnings must be conspicuous and understandable.
 - Manner of communicating warnings is governed by an industry standard, ANSI Z535.
 - Mask provides some protection as a covering, but doesn't provide fullest protection without the insert.
 - Problem here is that, generally, the mask protects others from you, not the other way around.
 - Alternative causation.

Meat Supplier

- Epidemiologists discover several dozen new positive cases of COVID-19 are linked to a national meat supplier, suggesting the victims contracted the virus as a food-borne pathogen.



Meat Supplier

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- Considerations:
 - Able to pinpoint where in the supply chain food became contaminated?
 - Increased frequency of machinery cleaning—what is reasonable/practicable under the circumstances?

Meat Supplier

- Epidemiologists discover several dozen new positive cases of COVID-19 are linked to a national meat supplier, suggesting the victims contracted the virus as a food-borne pathogen.
- Considerations:
 - Does the analysis change if the employees who allegedly contaminated the product were asymptomatic at the time of transmission?

Meal Delivery

- A local restaurant offering delivery service fails to provide “reheating instructions” designed to destroy the pathogen.



Meal Delivery

- A local restaurant offering delivery service fails to provide “reheating instructions” designed to destroy the pathogen.
- Considerations:
 - Obligation of the restaurant to know the science behind the temperature/time it takes to destroy virus as opposed to simply reheating?

Grocery Store

- A grocery store fails to mandate the use of masks and gloves for staff and shoppers.



Grocery Store

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- Considerations:
 - Sliding scale of liability?
 - “Mandated” that customers bring their own PPE?

Grocery Store

- A grocery store fails to mandate the use of masks and gloves for staff and shoppers.
- Considerations:
 - “Highly encouraged”?
 - “Recommended”?

Online Retailer

- An online retailer wants to begin a regular testing regimen at one of their large distribution centers, and proposes a health questionnaire to be distributed to employees at the center.



Online Retailer

- An online retailer wants to begin a regular testing regimen at one of their large distribution centers, and proposes a health questionnaire to be distributed to employees at the center.
- Considerations:
 - What questions are permissible under the circumstances, and what would constitute unreasonable violation of the employees' right to health privacy?

Online Retailer

- An online retailer wants to begin a regular testing regimen at one of their large distribution centers, and proposes a health questionnaire to be distributed to employees at the center.
- Considerations:
 - The company also would like to implement contactless temperature checks to be administered at the beginning of shifts—what other physical measures may permissibly be taken to stop the spread of the virus, and what would potentially violate the employees' right to physical privacy?

OSHA Guidelines

- OSHA sets forth new guidelines intended to mitigate the spread of COVID-19 in certain contexts (warehouses, food processing, etc.). These guidelines include mandatory training in the use of PPE—both to protect the workers and eventual consumers of the products in the supply chain.



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- OSHA sets forth new guidelines intended to mitigate the spread of COVID-19 in certain contexts (warehouses, food processing, etc.). These guidelines include mandatory training in the use of PPE—both to protect the workers and eventual consumers of the products in the supply chain.
- Considerations:
 - Will the failure of OSHA to provide training due to lack of instructors give rise to a claim made by a consumer who contracts COVID-19 from a contaminated product?

Rideshare

- A plaintiff brings a claim against a rideshare service alleging that she contracted COVID-19 while a passenger using the service.



Rideshare

- A plaintiff brings a claim against a rideshare service alleging that she contracted COVID-19 while a passenger using the service.
- Considerations:
 - Does she have an actionable claim against her driver?
 - Against the rideshare company?

DIY Hand Sanitizer

- Due to an increased demand, a liquor distillery supplements their usual product by manufacturing alcohol-based hand sanitizer.



DIY Hand Sanitizer

- Due to an increased demand, a liquor distillery supplements their usual product by manufacturing alcohol-based hand sanitizer.
- Considerations:
 - Normally a manufacturer is charged with being an expert in the field, but due to the speed at which sanitizers and PPE are being made, much is going into the stream of distribution without the ordinary testing.
 - Strict liability appropriate under the circumstances, or should courts look at a negligence standard for emergency response?

Closing thoughts

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PRODUCT LIABILITY

ALERT

APRIL 6,
2020

Product Liability and Tort Law Implications of the COVID-19 Crisis

By Carl J. Schaerf and W. McKinney Brown

The novel coronavirus (or “COVID-19”) presents unprecedented challenges for the Social Contract in the United States, and all over the world. Here at home, a large number of Americans are sheltered indoors and will be for an extended period of time. Feeding and providing for the needs of those Americans puts unusual and unplanned-for strains on supply chains and retailers—not only for delivery giants like the large online retailers, but also for local supermarkets and restaurants. COVID-19 thus threatens not only our health, but established norms for our individual and collective rights and duties, including the role of the legal system and potentially the standards for resolving disputes involving product liability and tort law.

CORONAVIRUS REALITIES RELEVANT TO PRODUCT LIABILITY

Presumably many, if not all, of the readers have at least a basic knowledge of COVID-19’s spread across the world—a predicate for discussing potential risks in strict liability and tort. Current medical knowledge suggests that COVID-19 may be contagious before a person knows he or she is infected¹. If contracted, there may be an extensive incubation period, lasting weeks in some cases². Further confounding public health efforts, the CDC has also estimated that as many as 25 percent of people who contract the virus

may never experience symptoms at all, and are unwittingly spreading the virus, believing they are healthy³.

Perhaps the most alarming aspect of this virus is that infections are not limited to person-to-person contact. The virus can survive on surfaces outside the human body for days, exposing others to infection. A recent study published in the New England Journal of Medicine found that COVID-19 can live up to 24 hours on cardboard surfaces and up to 72 hours on plastic, further aiding its explosive spread around the world and raising the specter of liability associated with contaminated products⁴.

Heeding warnings of public health experts, countless people across the globe have adopted “shelter-in-place” practices, working or continuing their education from home, only venturing into the outside world when absolutely necessary. With such a dramatic shift in daily living, more people are turning to internet-based delivery services, particularly for grocery and restaurant delivery. Although there is presently no evidence to suggest that the virus is spread through food or drink, the bags, boxes and other containers that carry these deliveries could also

¹ <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>

² <https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html>

³ <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us>

⁴ https://www.nejm.org/doi/full/10.1056/NEJMc2004973?query=featured_home

be carrying the active contagion on their surfaces—even if the contaminating contact was days earlier.

POTENTIAL LITIGATION ISSUES

As the nature and extent of the virus become clearer over time, we can anticipate a surge in litigation in the wake of COVID-19, with potentially many cases claiming contaminated food packaging. These cases will present unique challenges of proof that are not always present (or analogous) in established contaminated food case law. For example, there are signature incubation periods and symptoms for food-borne pathogens like salmonella and e-coli, whereas COVID-19 presents a more elusive incubation timeframe and may not always manifest with consistent symptoms. Tracing the source of one's infection, whether in a densely populated urban center like New York City—or even in more rural regions—is not going to be simple in the ordinary course. Alternative causation arguments will abound, particularly as many of the people who have contracted COVID-19 will be, and are, asymptomatic yet contagious. Proving causation will therefore likely be the most common challenge faced by plaintiffs bringing lawsuits against major suppliers, distributors, and retailers.

In the realm of product liability, the presence of an unexpected contaminant (*e.g.*, a virus), can often be deemed a defect under the law of most states. Where an item of food or drink intended for human consumption is sold, an implied warranty is commonly imposed on the manufacturer that the item is fit for human consumption and free from any harmful or unwholesome substances, when it leaves the manufacturer's control⁵. Of course, a plaintiff has to prove the existence of the defect at the time it left the hands of the defendant⁶. Questions of due care are usually immaterial, as are questions of whether the defect can be eliminated with the use of reasonable

care. This is in the category of true “strict liability,” a form of manufacturing defect.

In the realm of premises liability, novel questions of negligence are also presented, guided by existing standards of reasonable care⁷. What steps must be taken to maintain social distancing in the store aisles and at the registers? Must employees wear gloves? Masks? Should stores provide special shopping hours for the most “at-risk” in our population? Should any stores continue to operate on a self-service model at all (such models are a relatively recent innovation—approximately 70 years), or only use curbside pickup and/or home delivery?

Similar questions are presented with distribution and delivery from retailers. If boxes and plastic surfaces can retain COVID-19 contagions, should these surfaces be wiped down prior to placement on the delivery truck? Should they be wiped down again before leaving them by the homeowner's front door? Considering many more people now depend on delivery services—including healthcare providers and those who are already sick—would the added requirement cause a breakdown in efficiency that would do more harm than good? With the current unprecedented shortage of disinfecting agents, should hospitals and other healthcare facilities be prioritized in the distribution of these vital materials?

Given the occasionally conflicting information coming from the Federal and State governments, which sovereign (if any) should set the minimum standard of care? What guidelines should businesses follow? And if they follow different guidelines for their own employees or executives than they do for their customer base, what conclusions could be drawn from that? Hospitals and nursing homes may be held to more heightened standards of care because they house the most vulnerable, but providers still may be receiving conflicting information about what those standards should be.

⁵ UCC 2-314; *Hohn v South Shore Servs.*, 141 AD2d 504 (2nd Dept.1988).

⁶ *Tardella v RJR Nabisco, Inc.*, 178 A.D.2d 737 (3rd Dept. 1991); *Kotiadis v Gristede Bros.*, 20 A.D.2d 689, 690 (1st Dept. 1964).

⁷ *E.g. Basso v. Miller*, 40 N.Y.2d 233 (1976).

There may be legal immunities to consider for care providers, including nursing homes⁸. In New York State, which is the U.S. epicenter of the crisis at the time of this writing, there is a concern about making sure that volunteers can assist in the identification and treatment of affected individuals without concern for tort liability.

Perhaps the most interesting question pertains to the “duty to warn.” If a COVID-19 case is in your workplace, the premises may be shut for a period of time. What then is the duty of the landlord? Does the whole building need to be notified? Or be given the option of isolating? If an online retailer has a COVID-19 case in a delivery fulfillment center, is there a duty to notify customers that their delivery came from a potentially contaminated warehouse? If a service-based business like a yoga studio or a gym has a case, must all who occupied that space be notified? How is the notification campaign to be conducted?

Given an increasing ethos of taking personal responsibility to reduce the spread of the virus through disinfecting, handwashing and social distancing, questions of culpable conduct will almost certainly be present in these cases. But what behavior would rise to the level of culpable conduct? Would it depend (at least in part) on the number of then-known cases in the vicinity, and/or the social distancing mandates then in effect in that location? Reasonable care is the measure of the duty.

CONCLUSION

We have barely scratched the surface of the potential chain of distribution and liability issues arising from the current national crisis. While the fundamental questions may remain without definitive answers for some time, business leaders may want to pay close attention to their written policies, employee training, vendor contracts, and public communications, among many possible sources of evidence in future cases. Also, while ever-changing Federal and State advisories

and mandates may set a floor for reasonable conduct, businesses may look as well to what competitors are doing. Industry practice can serve to raise the bar for what is acceptable conduct, and often does when practices are challenged in front of juries.

Stay tuned as we strive to keep you informed of developments relevant to these crucial issues for businesses.

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader’s COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center. ♦

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

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* See: www.schnader.com/jakarta

⁸ E.g. Emergency standards adopted in New York – <https://www.wsj.com/articles/new-york-moves-to-shield-doctors-from-lawsuits-while-fighting-coronavirus-11585868982>.

Additional Citations

CASE LAW

Ong v. Chipotle Mexican Grill, Inc., 294 F. Supp. 3d 199 (S.D.N.Y. 2018)(discussion of rights and liabilities of a national restaurant chain with respect to food-borne pathogens).

Abraham v. City of New York, 39 A.D.3d 21 (N.Y. App. Div. 2d Dep't 2007)(municipal liability for communicable disease outbreak—government response is discretionary, shielding the municipality from liability).

Smith v. Hogan, 794 F.3d 249 (2d Cir. 2015)(wrongful termination claim involving a sick food line worker during the H1N1 epidemic).

Bourbon v. S.C. Johnson & Son, Inc., 375 F. Supp. 3d 454 (S.D.N.Y. 2019)(product liability claim involving mosquito deterrent spray and its effectiveness against the Zika virus).

Pichardo v. St. Barnabas Nursing Home, Inc., 134 A.D.3d 421 (N.Y. App. Div. 1st Dep't 2015)(discussion of statutory and common law standards of care in nursing homes); see also, [New York Public Health Law § 2801-d](#).

NEWS ARTICLES

A lawsuit alleges slaughterhouse employees weren't given time to wash hands or wipe their noses, as more than 1,800 workers at meat plants across America catch COVID-19 - <https://www.businessinsider.com/meat-industry-workers-catch-covid-19-saying-employers-failed-them-2020-4>

Amazon Confirms First Known Coronavirus Case in an American Warehouse - <https://www.theatlantic.com/health/archive/2020/03/amazon-warehouse-employee-has-coronavirus/608341/>

Need a Haircut? A longing for professional grooming is leading some unshorn citizenry to seek out barbering on the sly - <https://www.nytimes.com/2020/05/06/style/coronavirus-haircuts-barbers.html>

Second lawsuit filed against Bria of Geneva nursing home over coronavirus-related death - <https://www.chicagotribune.com/suburbs/aurora-beacon-news/ct-abn-bria-of-geneva-lawsuit-lucille-james-st-0520-20200519-3ian2ms7pjbqjkqyqlvbxhk7ha-story.html>

Democratic governors hit with flurry of legal challenges to coronavirus lockdowns - <https://www.politico.com/news/2020/05/17/democratic-governors-coronavirus-lockdown-legal-challenges-261428>

Debate emerges: Should businesses be protected from Covid-19 lawsuits? - <https://www.cnn.com/2020/04/29/business/business-liability-congress/index.html>

Lawsuits Pile Up Against Coronavirus Lockdown Measures - <https://www.wsj.com/articles/lawsuits-pile-up-against-coronavirus-lockdown-measures-11587807000>