

COVID-19:

General & Employers Liability Claims

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Theories of Recovery in Underlying Litigation

Negligence: Viable Causes of Action

1. Breach of Duty: Does a duty exist?

- Infected employees (at premises)
- Infected family members (not at premises)

2. Causation: Is the risk foreseeable?

- Timing of infection
 - February 2020 (perhaps not foreseeable)
 - April 2020 (perhaps foreseeable)
 - Future dates?
- Derivative exposure (chain of infection from the directly exposed individual)

3. Damages: Was there actual damages to a third party?

- Insuring agreements to cover “property damage,” “bodily injury,” “personal injury”
- Mental anguish?

Theories of Recovery in Underlying Litigation

- **Workers' Compensation**

Underlying defendants are seeking dismissal of negligence claims, arguing that workers' compensation is the exclusive remedy available to plaintiffs.

- **Public Nuisance**

Some plaintiffs have filed suits alleging public nuisance, as opposed to negligence, to avoid the exclusive remedy of workers' compensation.

Actual Cases So Far

- ***Tyson Foods*** — Three cases were filed in Texas alleging gross negligence for Tyson's alleged failure to protect its employees. Tyson does not subscribe to workers compensation insurance but rather provides its own injury settlement program.
- ***Amazon (NY) & McDonald's (CA, IL)*** — Plaintiffs primarily seeking injunctive relief under a theory of public nuisance, alleging that steps taken by employers to prevent spread of the disease were inadequate. Complying with the injunctive relief sought would require the employers to pay for measures that mitigate the spread of COVID-19.
- ***Walmart (IL)*** — Wrongful death complaint alleging negligence & recklessness. Walmart filed a motion to dismiss on June 25 on the grounds that the lawsuit is barred by the exclusive remedy provision of the Illinois Workers' Compensation Act.
- ***Benjamin vs. JBS (PA)*** — Wrongful death complaint alleging that defendant beef processing plant exposed employee to COVID-19 by failing to take protective measures. Defendants assert that claims are barred by the Workers' Compensation Act.
- ***Built Brands LLC (UT)*** — Personal injury lawsuit alleging negligence, willful misconduct, reckless infliction of harm, and gross negligence. One plaintiff was employed by defendant (direct exposure); the remaining two plaintiffs were members of the employee's household (derivative exposure). This case, filed on May 13, 2020, is the first COVID-19 exposure case seeking recovery for persons who were not exposed at the defendant's facility.

GL Coverage Questions

- **Insuring Agreement**

- **“Occurrence”**

- Is transmission of a virus an accident?
 - Number of Occurrences?

- **“Bodily injury” or “property damage/loss of use” –**

Claims against insured businesses include:

- Negligent failure to disinfect
 - Negligent failure to protect & separate customers/employees
 - Negligent failure to require facemasks
 - Negligent failure to follow other CDC/state/local mandates

GL Coverage Questions

- **Exclusions**

- Pollution

- Is a virus a pollutant? state law dependent*

- Communicable disease (CG 21 32 05 09)

- Fungi / Bacteria/ Contaminant

- Impaired property

- Employers liability

Expected Claims

- **EPL Claims**

- Bodily injury by employees from infection at work
- Discrimination
- Harassment
- ADA

Expected Claims

- **Vulnerable businesses**

- Universities, boarding schools
- Summer camps
- Prisons/ Jails
- Transportation Industry
 - Cruise ships
 - Airlines

Preview of COVID-19 Liability Survey

(VERY) Preliminary Results (as of Sept. 1st))

- **Mirror Survey to First Party BI/EE Survey from Spring/Summer 2020**
- **Goal is 10,000+ responses from all 50 states.**
- **Balancing gender, age, race & socioeconomic in all 50 states.**
- **Survey closes October 1st.**

If a nursing home was accused of causing the premature death of a 73 year-old Caucasian female who tested positive for COVID-19 while in quarantine and then died two weeks later of heart failure, *I would presume the virus caused her death* unless someone could prove to me otherwise.

Surrogate Jurors:

SD:	6%
D:	13%
N:	21%
A:	42%
SA:	18%

If a retired otherwise healthy father of a waiter died of COVID-19 lung failure which the family believes came from the 18 year-old son's job, in the family's wrongful death suit against the restaurant I would start out leaning in favor of finding liability against the restaurant.

Surrogate Jurors:

SD: 7%

D: 14%

N: 24%

A: 37%

SA: 18%

I believe prisons and jails have an obligation to exercise a high degree of caution to protect inmates from COVID-19 exposure and would be willing to award damages to inmates who get sick or die if the prisons and jails failed to do so.

Surrogate Jurors:

SD: 3%

D: 11%

N: 27%

A: 38%

SA: 21%

If a restaurant's negligent hygiene practices caused multiple people to get sick from COVID-19, I would not hesitate to award damages to those injured even if the restaurant was in financial distress because of the coronavirus shutdown.

Surrogate Jurors:

SD: 9%

D: 11%

N: 29%

A: 34%

SA: 17%

COVID-19 Liability Survey

- **Survey will be completed by October 1st**
- **Final Results published in November**
- **Follow up survey Q2 2021**

Conclusions/ Questions

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