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COVID-19: ASSESSING THE LEGAL RISK OF INFECTIOUS DISEASES

Coronavirus Resources
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Covid-19

Severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) – better known as the coronavirus – has turned our world upside down in a matter of weeks. The infectious disease caused by this newly emerged virus, Covid-19, has taken thousands of lives and sickened hundreds of thousands. The resulting public health crisis threatens to become an economic catastrophe, as governments weigh the need for populations to shelter in place against the financial cost of shutting down most businesses. The risk of lawsuits due to exposure to this infectious disease may add to the economic difficulties businesses are now facing. This article assesses that risk based on principles developed in past infectious disease litigation and the known characteristics of the coronavirus.

LIABILITY AND PANDEMIC

Soon after shelter-in-place and lock down orders were issued in this Country, the question of when and how to restart the economy was raised. Predicting when we return to a fully functioning economy is almost impossible. But even now, some businesses in all jurisdictions have been deemed essential and continue to operate. Employers, business owners, landlords and their underwriters will all struggle with the issue of how to operate in this new environment. One looming problem is the possibility of being sued if a customer or client becomes infected with the coronavirus and believes that it can be traced back to that business.

Assessing, and limiting, potential liability is already one aspect of the pandemic. On March 24, 2020, New York Governor Andrew Cuomo signed an Executive Order limiting the malpractice exposure of health care workers treating Covid-19 patients. The Order directs that an action against healthcare professionals providing medical services in response to the outbreak can only be maintained if gross negligence is established, a higher standard than traditional malpractice and general negligence claims. Limiting liability is a means by which governments can encourage essential

services and businesses to remain open or to reopen. Grocery stores, pharmacies and others providing essential services may eventually seek similar protection.

Predicting how liability issues arising from the coronavirus will be handled is difficult, at best. Changes in all aspects of society have come at such a rapid pace during the pandemic that what was unimaginable last week is today's norm. But the past can be a guide.

Our practice includes defending cases involving three of the major pathogens – bacteria, fungi and viruses. We obtained a defense verdict in a multi-plaintiff trial involving coccidioidomycosis, better known as Valley Fever, a fungal infection endemic to parts of the Southwest and served as lead defense counsel in federal Multi-District Litigation following the 2012 hantavirus outbreak in Yosemite National Park. Relying on this experience, we offer the following assessment.

WHAT IS THE BASIS OF LIABILITY?

Any individual or group asserting a claim as a result of Covid-19 faces a basic problem: Coronavirus is a biological pathogen, not man made. People can carry the virus and transmit it, but is that alone a basis for liability? Becoming infected at a place of business, absent more, may be insufficient to support a claim.

In some cases, defendants may argue that the doctrine of *ferae naturae* acts a defense. *Ferae naturae* is a common law defense limiting the liability of property owners for injuries caused by "animals of a wild nature or disposition." In the 2016 case of *Union Pacific Railroad v. Nam*i, the Texas Supreme Court applied the doctrine to reverse a $725,000 verdict in favor of a railroad worker who became ill with the West Nile virus at a job site with an obvious mosquito issue. The Texas Supreme Court determined that the doctrine applied to insects, including the mosquitoes that are the vector for the virus.

Based on this doctrine, the common law does not require the owner or possessor of land to anticipate the presence of or guard an invitee against harm from animals *ferae naturae*. It has particular application in regard to zoonotic diseases, where transmission is from animal to human, such as West Nile or hantavirus. Even if the doctrine is not extended to viruses and transmission is person-to-person, a type of "Act of God" argument is sure to be made in future coronavirus litigation, to limit man's liability for the consequences of the natural world.

Plaintiffs have been most successful in infectious disease cases where negligence directly contributes to exposure or the spread of the pathogen. Legionnaires disease, also known as legionellosis, is a form of atypical pneumonia caused by legionella bacteria. Improper maintenance of hot water tanks, hot tubs, and cooling towers of large air conditioners can cause it to spread. When an outbreak of Legionnaires disease is traced back to a single facility that shows signs of a maintenance failure in these systems, a typical premises liability analysis applies.

Similarly, food borne illnesses involving the E. coli or salmonella bacteria can typically be prevented through proper food safety protocols. Improperly cooked food or the mishandling of romaine lettuce can allow these bacteria to be spread to the consumer. Often, these types of adulterated food cases are subject to strict products liability theories, a more difficult standard for defendants. But the basis for these cases are similar to those involving negligence, i.e., defendants have knowledge of the risk of spreading an infectious disease and fail to follow standard practices to prevent it.

Other plaintiffs have tried failure to warn theories. Where an infectious disease, such as coccidioidomycosis, is endemic to an area, plaintiffs may argue that a defendant has an obligation to warn outsiders of its presence.

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In regard to the coronavirus, a common negligence theory may apply. Social distancing, not allowing employees to remain at work when ill, even crossing that six foot barrier we are advised to maintain are now arguably part of the general standard of care. If a single nursing home or similar facility becomes a "hot spot," evidence of failure to follow these now well known public health practices could lead to liability.

EVIDENTIARY ISSUES AND A COMPARISON TO OTHER INFECTIOUS DISEASES

Absent some form of legislated immunity or a court expansively applying the concepts behind the *ferae naturae* doctrine, coronavirus cases may proceed on a negligence/premises liability theory against many typical defendants. But what barriers will exist from an evidentiary standpoint?

Outbreaks of legionella bacteria or E. coli are not common. Hantavirus, although it has a fatality rate of 30 to 40%, is extremely rare. When outbreaks of the associated infectious diseases occur, public health officials have established protocols to identify the source. The results of Centers for Disease Control and Prevention, Food and Drug Administration or State and County Health Department investigations often provide the evidence leading to liability in an infectious disease case.

These investigations can identify a single source of the pathogen and then trace it through a supply chain for a food borne illness. An epidemiological investigation can identify an unexpected increase in the disease rate in a given population and use that to find a common site of exposure.

Can this be done with coronavirus? Its difficult. Public health investigators initially attempted to track every case and identify each contact made by the infected individuals. The growth rate of coronavirus infections renders this difficult, if not impossible. With person-to-person transmission, every human interaction is suspect. Its far more difficult to definitively track person-to-person transmissions than food borne or even zoonotic infections. Food is subject to regulations that allows the supply chain to be followed. Zoonotic investigations focus on the locations of vectors and the conditions that allow them to thrive and interact with humans.

As cases of Covid-19 rise, it may become more like influenza in its potential to form the basis for liability. Influenza is a widespread and deadly disease but is rarely the subject of lawsuits.

In the 2019-2020 flu season, CDC preliminarily estimates that the influenza virus caused 400,000–730,000 hospitalizations and 24,000 to 62,000 deaths. Some of those cases certainly were contributed to by the same types of basic public health failures that are contributing to the spread of the coronavirus. But there is more litigation over flu vaccines than the deaths and illnesses actually caused by this virus. Why?

Influenza is both ubiquitous and expected. We have a "flu season." Despite taking so many lives, the average person does not seek to place blame when he or she contracts the flu. Coronavirus is new and novel. Unfortunately, in some scenarios it may become similar to a deadlier version of influenza, an expected seasonal disease. A search for blame, responsibility and liability may likewise become uncommon.

The person-to-person spread of influenza is also not tied directly to one type of negligent act. A failure to remove standing water can create the opportunity for the vector for West Nile virus to multiply. E. coli infections can result from undercooking hamburger. But an asymptomatic carrier of influenza may unknowingly infect many others simply by going to his or her job. Should there be any liability?

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It is difficult to track where someone became infected with influenza. Per the CDC, people with flu can spread it to others up to about 6 feet away. Most experts think that flu viruses spread mainly by droplets made when people with flu cough, sneeze or talk. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. Less often, a person might get flu by touching a surface or object that has flu virus on it and then touching their own mouth, nose, or possibly their eyes. People with flu are most contagious in the first three to four days after their illness begins. Most healthy adults may be able to infect others beginning 1 day before symptoms develop and up to 5 to 7 days after becoming sick.

These characteristics of influenza are similar to what we know about the spread of coronavirus. They make it difficult to truly know where and how an infection occurs and will create evidentiary barriers to liability claims.

HOTSPOTS, CLUSTERS AND THE FUTURE

A comparison to another, less deadly virus may also provide insight. The norovirus causes 19 to 21 million cases of acute gastroenteritis in this Country every year, leads to 1.7 to 1.9 million outpatient visits and 400,000 emergency department visits. Norovirus can be spread person-to-person and through contaminated food and surfaces. It is highly contagious and can be fatal.

The litigation that has been filed in regard to the norovirus is almost always the result of an identified population becoming infected through a common, readily identified source. Hundreds of cruise ship passengers or restaurant customers who are sickened by the norovirus at the same time have sought compensation. Since norovirus can be prevented through standard sanitary practices, a cluster of cases may represent a failure to implement basic food safety and public health guidelines. On the other hand, a single individual who develops gastroenteritis, absent knowledge of others sickened in the same way, is unlikely to sue.

This may be the future of coronavirus claims. Individuals who become infected through community spread have no defendant to sue. A handful of customers of the same store who develop Covid-19 may not be epidemiologically significant and lack evidence of a single source. But when large numbers of individuals on a cruise ship, in a nursing home, hotel or other facility become infected with coronavirus, litigation becomes more likely.

Liability may also develop as a result of the coronavirus in new and unexpected ways. By early in the week of March 30, 2020 there will be over 1 million individuals in this Country who have been tested and know their infection status. This number will expand rapidly and will come to include asymptomatic individuals. Will an asymptomatic individual who tests positive and fails to self-quarantine be subject to civil liability? As testing becomes more widely available will businesses that serve the public be expected to have all of their employees tested? Is there an obligation to warn of hotspots and clusters of coronavirus cases and if so, how specific does the warning need to be?

We already have examples of temperature checks at the door of many facilities. What was once considered an invasion of privacy and intrusive may be the new standard of care. Failure to meet that standard could be the start of an eventual wave of litigation.

But the basic characteristics of this new infectious disease likely serves to limit the number and success of those lawsuits. As Covid-19 unfortunately becomes common and too hard to trace, barriers to proving liability also emerge. This pandemic is new territory for all us, but we believe that the results of litigation regarding prior infectious disease outbreaks will be a guide going forward.