ILR BRIEFLY

COVID-19 SERIES
ISSUE 3

COVID-19: STATE LIABILITY PROBLEMS AND SOLUTIONS

"As states reopen and continue to respond to the needs of their citizens and economies, it is important that they consider legal reforms to address the wave of COVID-19 lawsuits that have started to be filed and will continue at the state level. These lawsuits have the potential to disrupt states' carefully-considered reopening efforts and slow their economic recoveries."

U.S. CHAMBER
Institute for Legal Reform

COVID-19:
State Liability Problems and Solutions

The United States remains in the midst of the COVID-19 pandemic and a national health emergency. While each state has been impacted by and responded to the virus in different ways, all have experienced disruptions and upheaval.

However, many states are beginning phased reopenings, with 46 states either partially reopened or planning to begin reopening soon.[1] As states reopen and continue to respond to the needs of their citizens and economies, it is important that they consider legal reforms to address the wave of COVID-19 lawsuits that have started to be filed and will continue at the state level. These lawsuits have the potential to disrupt states' carefully-considered reopening efforts and slow their economic recoveries.

The policy suggestions in this paper are meant to provide a broad overview of solutions that may be beneficial to states' responses to the COVID-19 pandemic and the follow-on wave of lawsuits. Because laws and constitutional considerations widely differ from state to state, each suggestion must be evaluated on a state by state basis.

This *ILR Briefly* edition provides policy suggestions related to topics in the following categories:

CORE LIABILITY PROTECTIONS	ADDITIONAL LITIGATION HOT SPOTS	LITIGATION DRIVERS	JUDICIAL PROCEDURE
Exposure Liability	Data Privacy and Security	Lawsuit Lending and Litigation Funding	Sanctions
Healthcare Liability	Insurance Litigation	Trial Lawyer Advertising	Pleading Standards
Product Liability	State False Claims Acts	Public Nuisance	Discovery Proportionality
			Judgment Interest
			Joint and Several Liability
			Venue
			Appeal Bond Caps
			Jury Participation

COURTS HAVE BEEN DISRUPTED

All states have suspended in-person proceedings in the courts. Thirty-four states suspended in-person proceedings statewide, and 16 suspended them at the local level.[2] Some have partially resumed normal operations.

LEGISLATIVE SESSIONS HAVE BEEN DISRUPTED

At the time of writing, three state legislatures are holding special sessions, while the legislatures in 13 states remain suspended, 15 states are in regular session or have lifted their suspensions, and 19 states have adjourned or were not in session this year.[3]

Core Liability Protections

EXPOSURE LIABILITY

Throughout the country, businesses are responding to the challenges presented by the COVID-19 pandemic. Essential businesses remain open and are facing operational challenges including supply chain disruptions, exponentially increased demand, and heightened sanitation requirements. Businesses that are currently closed are facing extreme financial hardships. And essential and non-essential businesses alike face the threat of devastating lawsuits alleging exposure to COVID-19 through their operations.

State policymakers should provide all businesses and non-profit organizations that make reasonable efforts to adhere to government guidance with protections from lawsuits alleging injuries or damage as a result of exposure to COVID-19. As states work to restart their economies, this will give businesses and others the direction and confidence needed to swiftly and safely return to serving their communities.

SOLUTIONS

Legislation providing a safe harbor for businesses that follow government guidelines should include:

- Liability protections with respect to claims concerning actual or alleged exposure to COVID-19, so long as a business or other entity substantially complied with applicable government standards and guidance related to COVID-19 exposure at the time the actual or alleged exposure occurred.
- An exception allowing liability where clear and convincing evidence shows that a business was grossly negligent, intended to inflict harm, engaged in willful misconduct, or intentionally committed a crime.
- Effective dates that ensure these protections are in force for the entire pandemic, from when infections were first detected until the risk of the viral transmission is low enough that such protections are no longer warranted.

Early examples of exposure liability protections were included in a relief bill enacted in North Carolina on May 4, 2020,[4] and an executive order issued in Alabama four days later.[5] Under North Carolina's law, essential businesses are protected from civil liability for harms alleged to have been caused by contracting COVID-19 while a person was doing business with or employed by the essential business. It does not apply to harms caused by gross negligence, reckless misconduct, or intentional infliction of harm, and it does not preclude workers' compensation claims for employees of essential businesses. The protections under this bill are applicable from March 27, 2020, when North Carolina Governor Roy Cooper issued an Executive Order declaring certain businesses as essential to the state's response to COVID-19,[6] until the state's COVID-19 emergency declaration is rescinded or expires. North Carolina's exposure liability protections are a step in the right direction, however the protections provided are limited to the duration of the emergency. Governor Cooper has initiated "Phase 1" of North Carolina's reopening,[7] but non-essential businesses that are allowed to reopen may not have the protections they need to reopen confidently, and they may not be able to remain open if they are devastated by a lawsuit despite operating legally and in good faith.

In Alabama, Governor Kay Ivey issued a first-of-its-kind executive order that provides businesses, charities, educational institutions, and others with a safe harbor from liability related to COVID-19 transmission. The safe harbor is retroactive to March 13. The order will not shield against liability in cases of wanton,

reckless, willful, or intentional misconduct proven by clear and convincing evidence. The order includes a severability provision, so that if a court limits the order's scope, plaintiffs will instead be required to prove by clear and convincing evidence that a covered entity did not reasonably attempt to comply with then-applicable public health guidance. Finally, the order limits the availability of non-economic and punitive damages in certain COVID-19-related cases.

States should continue to build upon the examples set by North Carolina and Alabama by providing exposure liability protections through legislation or executive actions that are appropriately tailored to their legal environments. Allowing businesses to reopen safely, both for the businesses and the public, is critical to the country's economic and social recovery.

HEALTHCARE PROVIDERS AND FACILITIES LIABILITY

The threat of legal liability could undermine states' efforts to ensure that their citizens have access to necessary healthcare during the COVID-19 pandemic. In some states, existing laws recognize the burdens that are placed on certain services during times of crisis and offer liability protections to government employees, healthcare providers, and others who respond to disasters and state emergencies.[8] State policymakers should ensure that similar protections are afforded to all healthcare workers, facilities, and other first responders during the COVID-19 public health emergency. Depending on the state, implementing these protections may be possible via executive action, legislation, or both.

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SOLUTIONS

Any policy proposal to protect healthcare workers and facilities should include:

- Liability protections for healthcare facilities and workers arranging for or providing assessment, diagnosis, or treatment of COVID-19 or other care impacted by actions or decisions made in response to the COVID-19 pandemic.
- An exception allowing healthcare workers and facilities to be held liable if it is proven by clear and convincing evidence that harm was caused by gross negligence, willful misconduct, or intentional infliction of harm.
- A time limitation that links these protections to the relevant state disaster declaration but specifies that the protections still apply to alleged harms that occurred before their sunset.

Some states may have unique constitutional provisions to take into account when providing liability protections. For example, Arizona's constitution includes provisions that disallow the abrogation of any right of action or limitations on the amount of damages that can be recovered.[9] As a result, Arizona Governor Doug Ducey issued an executive order that worked within these constitutional limitations by creating a presumption that healthcare providers who provide medical services in response to COVID-19 acted in good faith and are protected from civil liability. The exact arrangement of medical liability protections will vary in each state, depending on its unique constitutional and political considerations.

Many states have already taken action to address medical liability. Over 20 states have provided some medical liability protections through legislation and/or executive orders.[10] Any executive action or legislation should take into account the strain placed on the healthcare system as a whole by the COVID-19 pandemic and resulting resource and staffing shortages. New York's governor was the first to provide protections to frontline workers and facilities via an executive order that applied only to liability arising out of direct COVID-19 treatment.[11] The New York legislature then solidified and expanded upon these protections, applying them to other healthcare services impacted by the state of emergency.[12] Other states should work to grant similarly comprehensive liability protections or expand their existing liability protections to account for the COVID-19 pandemic's effects on the overall healthcare system.

The role of frontline medical workers who are risking their lives to fight the COVID-19 pandemic cannot be overstated. These liability protections will help to bolster personnel who provide necessary healthcare during the pandemic. It is imperative that state policymakers work to ensure that they are not subject to litigation that is deaf to the challenges these workers face on a day-to-day basis during this crisis.

PRODUCT LIABILITY

Liability Shields—PPE and Countermeasures

State healthcare workers and first responders are facing shortages of personal protective equipment (PPE), including respirators, surgical masks, gloves, and gowns as they combat the COVID-19 pandemic. In response, many manufacturers, producers, and other businesses are repurposing their production and distribution capacity or making other efforts to provide much-needed PPE.

> *"Many states have already taken action to address medical liability. Over 20 states have provided some medical liability protections through legislation and/or executive orders."*

To support this transition and ensure that adequate PPE is available to both frontline workers and the general public, state policymakers should supplement the liability protections afforded to certain products and practices by the federal Public Readiness and Emergency Preparedness (PREP) Act.[13]

SOLUTIONS

In particular, states should:

- Limit the potential legal liability of anyone who produces, labels, distributes, donates, or uses PPE in good faith.
- Extend those protections to hand sanitizers, disinfecting products, and other protective equipment and countermeasures recommended by the Centers for Disease Control and Prevention (CDC) or other federal authorities.
- Also extend those protections to users of recommended protective equipment and countermeasures, and to all lawful means of distributing those materials.

At least four states have already provided protections related to PPE through legislation, and Alabama has provided protections by executive order, though the exact form and scope of these protections differ.[14] Alaska provided civil liability protections for healthcare providers and

manufacturers of PPE relating to the issuance, provision, or manufacturing of PPE in good-faith response to the COVID-19 health emergency. While this provision is a good example of PPE liability protections, it could be improved by clarifying that liability protection extends to PPE donations and by expanding the PPE definition to include the additional equipment and products recommended by the CDC.

Wisconsin enacted PPE protections that include donations and PPE that is sold at cost, and its broader definition of "emergency medical supplies" includes both traditional PPE and cleaning supplies. While this statute could also be improved, it is important that Wisconsin's protections recognize the costs to manufacturers of producing and distributing medical and protective supplies and allow the supplies to be exchanged for compensation.

As businesses of all sizes continue to step up and help with the U.S. response to the spread of the COVID-19 virus and shortages of critical PPE, it is essential that this strong response continue. Liability protections related to PPE will improve both the availability and sustainability of PPE production.

Statutes of Repose

In connection with PPE liability protections, states should apply statutes of repose to products manufactured, sold, or distributed in response to the COVID-19 public health emergency. Statutes of repose are commonly applied to products, recognizing that these products are subject to wear and deterioration over time, and that after a certain number of years the useful life of that product ends and that injuries allegedly stemming from the use of that product are likely not the result of a defect at the time of sale. A specific statute of repose should apply to COVID-19 products, due to the unprecedented and difficult circumstances under which they are being manufactured and sold.

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SOLUTIONS

States should enact legislation that includes:

- A statute of repose for products, starting at the time of initial sale to consumers, which precludes a product liability claim after the statutory period has elapsed. Many statutes of repose are 10, 12, or 15 years. Under the circumstances brought about by COVID-19, a shorter statute of repose may be warranted due to the extensive use these products will experience immediately after sale.
- An exception for any products that are specifically warranted to have a useful life longer than the statute of repose period.

Roughly half of states in the U.S. have traditional product liability statutes of repose.[15] Businesses that serve their communities by providing in-demand supplies during the pandemic should not be forced to defend lawsuits many years in the future, when life has returned to normal and businesses have reverted to their traditional manufacturing roles. States can prevent this type of litigation by enacting COVID-19-specific statutes of repose.

Additional Litigation Hot Spots and Recommendations

While exposure, healthcare, and product liability may comprise the bulk of COVID-19-related lawsuits brought by plaintiffs' lawyers, there are other areas of law that the trial bar could seek to exploit to expand liability.

DATA PRIVACY AND SECURITY SAFE HARBORS

Digital platforms are increasingly important for work, health, and personal and social activities, and some have come under scrutiny regarding their privacy standards and practices. States with data privacy statutes or that are considering data privacy laws should offer relief to businesses that are answering high demand for their services and keeping Americans connected despite physical distancing.

While many policy considerations contribute to effective state privacy laws,[16] these suggestions may be implemented temporarily to address increases in litigation against digital service companies that have become even more vital for consumers during the COVID-19 pandemic.

SOLUTIONS

States could offer:

- Notice and cure periods that allow businesses to receive notice of alleged violations and a reasonable opportunity to cure the alleged violations.
- Reasonable safe harbors for businesses that are complying with security requirements.
- Caps on damages and civil penalties to ensure continued operation and uninterrupted services.

> *"Businesses should be afforded a safe harbor for complying with cybersecurity standards, which should be flexible and process-based so that they are able to keep up with changing times and security concerns."*

As digital platforms experience higher demands and retool their products to provide free services for those staying at home, there may be new privacy issues that develop or are discovered. Businesses should have an opportunity to resolve these issues before they are subject to costly enforcement actions or litigation. Technology platforms are also responding to fast-paced changes in security recommendations due to increases in demand and hacker activity. Businesses should be afforded a safe harbor for complying with cybersecurity standards, which should be flexible and process-based so that they are able to keep up with changing times and security concerns. Ohio's cybersecurity law, for example, contains a safe harbor provision for businesses complying with well-known federal and international security standards.[17]

Lastly, damages and civil penalties for privacy or security violations should be capped, even if only temporarily. These services have become necessities for many individuals and families striving to stay connected and engaged despite pandemic physical distancing requirements. Enormous damage awards or civil penalties could threaten the level of service that these businesses provide.

INSURANCE LITIGATION PROTECTIONS

Insurance providers are experiencing the same disruptions and shutdowns as other businesses, with physical office locations shuttered and many employees working from home. However, insurance claims are increasing in volume across several areas of coverage.[18] Many states have strict requirements that insurers must meet in responding to claim notices that they receive, including deadlines for responses. If these deadlines are not met, insurers can be subject to "bad faith" lawsuits which in many states come with high penalties.

SOLUTIONS

In light of the increased claims volume and disruptions that insurance providers are facing, states should consider:

- Temporary extensions of the time allowed to answer a demand letter for insurance claims.
- Presumptions of "good faith" on the part of insurers that fail to meet deadlines as the result of a COVID-19-related business disruption, or decisions or actions taken in response to the pandemic.

> *"States should consider reasonable measures that will shield well-intentioned businesses from excessive FCA liabilities and focus enforcement on actual fraud."*

An extension would benefit both insurers and consumers. Insurers will be protected from abusive plaintiffs' attorneys who send demand letters to office locations that are closed in order to run out the clock on insurers' response deadlines and generate "bad faith" lawsuits. Consumers would benefit as extensions would allow them to work with insurance providers to investigate claims thoroughly but safely and in ways that respect COVID-19 health guidance. Discouraging abusive bad faith lawsuits will also limit the need to increase future premiums to address increased litigation costs. Only plaintiffs' attorneys who seek to file abusive bad faith actions would be disadvantaged by such an extension.

STATE FALSE CLAIMS ACT DEFENSES

As healthcare facilities and financial institutions take on the responsibility of administering many types of government aid released in response to the COVID-19 pandemic, they also take on increased risk of litigation under states' False Claims Acts (FCA). States should consider reasonable measures that will shield well-intentioned businesses from excessive FCA liabilities and focus enforcement on actual fraud.

SOLUTIONS

In particular, states should integrate the following components into their state FCA, either generally or with respect to COVID-19-related claims:

- Compliance credits for businesses with robust compliance programs.
- A requirement that the state attorney general approve *qui tam* cases before filing or dismiss *qui tam* cases after filing if they are not in the best interest of the state.

The U.S. Department of Justice recognizes companies' efforts to comply with the law as it enforces the federal FCA, but states have been slow to provide similar assurances to businesses that invest in compliance initiatives.[19] Georgia requires *qui tam* complaints under the state FCA to be pre-approved by its attorney general.[20]

Litigation Drivers

Litigation drivers include tools and tactics that the trial bar uses in order to generate lawsuits and inflate verdicts or settlements. Some of these tactics may also present risks to consumers who are exploited by attorneys attempting to win large fee awards.

> *"As a result of business shutdowns and other activity limits during the COVID-19 pandemic, individuals who experience income disruption or wage loss may be drawn to lawsuit lenders' promised cash advances."*

Delays for litigants can result in greater returns on investment for litigation funders, and a flood of litigation that slows down states' economic recovery and reopening will benefit funders by presenting them with more opportunities to invest.[22]

LAWSUIT LENDING AND LITIGATION FUNDING REGULATION

Lawsuit lenders and litigation funders offer to provide financing that supports litigation in exchange for a portion of the plaintiffs' recovery. The funding arrangements come in two forms, the first of which is consumer-facing lawsuit lending. Lawsuit lenders offer immediate cash to plaintiffs in personal injury lawsuits, and their loans often come with a sky-high interest rate that can exceed 200 percent, leaving borrowers who win their case or receive a settlement with little or no recovery. Plaintiffs who lose their cases or do not receive a settlement are not obligated to repay their loan, allowing lawsuit lenders to call this process "non-recourse funding" and claim it is not subject to safeguards applicable to other money lenders. As a result of business shutdowns and other activity limits during the COVID-19 pandemic, individuals who experience income disruption or wage loss may be drawn to lawsuit lenders' promised cash advances. State lawmakers should ensure that consumers who are struggling financially are not taken advantage of by lawsuit lenders.

The second form of financing, third party litigation funding, involves businesses or individuals that invest in high-dollar litigation. These investors front money to plaintiffs' law firms in exchange for an agreed-upon cut of any settlement or money judgment. Litigation funding by a third party raises questions about who truly controls the litigation—the law firm's funder or the client—and the fair apportionment of discovery costs. Third party litigation funders seek to increase share prices during times of upheaval, such as pandemics.[21]

SOLUTIONS

States should consider legislation to regulate lawsuit lending and third party litigation funding. Legislative proposals should:

- Clarify that consumer lawsuit lending falls within the ambit of states' existing fair-lending laws and:
  - cap the interest that consumer lawsuit lenders can charge at the state's usury rate;
  - prohibit lawsuit lenders from assigning funding agreement rights to other parties;
  - require consumer lawsuit lenders to make the same disclosures regarding their loans as the other providers of consumer credit; and
  - subject consumer lawsuit lenders to the state's existing regulations governing other providers of consumer credit.

- Require any party that is receiving financing for litigation from a third party to disclose this relationship and provide a copy of the lending agreement to the court and all parties.
- Require funded parties to pay the costs of their requested third-party discovery.

The need for such regulation has already been recognized in several states. Arkansas,[23] Indiana,[24] Nevada,[25] and West Virginia[26] have all passed legislation within the past five years regulating lawsuit lenders and protecting consumers. Wisconsin requires the disclosure of third party funding agreements.[27] Litigation financing protections will serve the citizens of these states well during the COVID-19 pandemic and prevent financiers from taking advantage of desperate consumers or negatively impacting states' economic recoveries by driving questionable litigation that threatens businesses' health.

TRIAL LAWYER ADVERTISING

In the wake of a public health crisis, accurate information about health concerns and the products and services mobilized to address those concerns may become a matter of life and death. Lawsuit advertising reform legislation is aimed at protecting consumers and patients from false or materially misleading claims made by attorneys soliciting potential clients. As trial lawyers attempt to attach liability to those who have continuously provided solutions and aid in response to the COVID-19 pandemic—in the form of pharmaceuticals, medical devices, protective equipment, and the like—it is vital to prevent lawsuit advertisements from misleading consumers and patients.

"As trial lawyers attempt to attach liability to those who have continuously provided solutions and aid in response to the COVID-19 pandemic—in the form of pharmaceuticals, medical devices, protective equipment, and the like—it is vital to prevent lawsuit advertisements from misleading consumers and patients."

SOLUTIONS

Legislation should contain provisions that:

- Clarify that the state's consumer protection statutes apply with full force and effect to attorney and legal services advertising.
- Require ads to state that they are legal in nature, not medical or public service announcements, and that patients should seek a medical opinion prior to making any health-related decisions based on information in the ad.
- Prohibit the use of misleading medical or healthcare terms and language, which includes terms such as recall, health alert, and medical alert, among others.
- Prohibit the display of emblems or logos of federal or state government agencies in a way that suggests affiliation with or the sponsorship of that agency.

It is fully consistent with the First Amendment to address misleading advertising practices.[28] While attorneys are of course free to truthfully advertise the availability and terms of their legal services, U.S. Supreme Court decisions have upheld restrictions on attorney advertising that unduly influences individuals who are injured or distressed.[29] The government is also permitted to place constraints on commercial speech if there is a significant government interest, such as a consumer or patient health concern, and the restriction is

tailored to serve that interest.[30] Reasonable safeguards on advertising that prevent confusion and danger are both constitutional and commonplace for many products and services.

Even before the COVID-19 crisis increased the focus on dissemination of accurate public health information, misleading attorney advertisements posed a health risk. For example, reports filed with the Food and Drug Administration (FDA) indicate attorney advertising caused patients taking anticoagulants to discontinue their prescribed medication, leading to deaths, strokes, and other negative health events.[31]

Authorities have already begun working to address these risks. In late 2019, the Federal Trade Commission (FTC) sent letters to some of those involved in publishing misleading advertisements and noted that "… any claims about the risks or dangers of a drug or device must be supported by competent and reliable scientific evidence."[32] Attorney advertising laws containing provisions similar to those recommended above have been enacted in Texas,[33] Tennessee,[34] and West Virginia.[35]

These protections are even more important now, as families and individuals spend more time at home with their televisions on and as they look for information to help them navigate the COVID-19 pandemic and its aftermath.

PUBLIC NUISANCE LITIGATION LIMITS

Plaintiffs' attorneys are attempting to expand the theory of public nuisance far beyond its traditional bounds. Their efforts to date have focused on, among other issues, lead paint, climate change, and opioids. Due to the extremely contagious nature of the COVID-19 virus, its long incubation period, and apparent rate of asymptomatic transmission, proving the cause of an infection or injury may be difficult for some plaintiffs.[36] Plaintiffs' attorneys may attempt to use the theory of public nuisance to circumvent the usual causation requirements for tort liability. In fact, cases raising public nuisance in connection to COVID-19 exposure have already been filed.[37]

> *"Even before the COVID-19 crisis increased the focus on dissemination of accurate public health information, misleading attorney advertisements posed a health risk."*

SOLUTIONS

States can prevent these tenuous tort claims from multiplying by passing legislation that:

- Clearly defines what constitutes a public nuisance under state law and limits remedies to injunctive relief.
- Disallows the use of public nuisance claims premised on exposure to and/or infection by COVID-19.

Public nuisance is considered a litigation driver because, in its expanded form, it would allow plaintiffs' attorneys to bring suits that ordinarily would not have merit, increasing the volume of litigation that recovering businesses will face while decreasing the likelihood that those businesses actually caused the alleged harms. State policymakers should not allow plaintiffs' attorneys to use novel legal theories to pressure businesses into windfall settlements that result in fees for attorneys, little benefit to the public, and harm to states' economic recoveries.

Judicial Procedure and Court Efficiency

Even with sensible liability protections in place, the combined weight of built-up litigation paused in response to the pandemic, actions that would have been filed but for court closures, and COVID-19-related lawsuits may threaten courts' ability to timely and fairly adjudicate civil disputes. States should implement procedural reforms that will discourage frivolous lawsuits and allow courts and parties to litigation to more quickly identify and resolve both tenuous and legitimate cases.

ENHANCED SANCTIONS

Unfortunately, when crises occur there are those who seek to take advantage of the situation to profit at the expense of others. State authorities are working in various ways to prevent bad actors from further harming those experiencing hardships due to the pandemic, including individuals and businesses. As part of these efforts, courts should more closely scrutinize potentially frivolous lawsuits. Many states lack effective mechanisms to deter frivolous lawsuits and to make victims of lawsuit abuse whole again—a vulnerability that may be exploited in COVID-19 litigation if not addressed.

SOLUTIONS

States can improve their mechanisms for addressing frivolous lawsuits by:

- Removing safe harbors that allow frivolous lawsuits to be filed without consequence; approximately one-third of states mirror the Federal Rules of Civil Procedure and allow frivolous claims to be withdrawn or corrected within 21 days of service without penalty.[38]
- Ensuring parties injured by frivolous lawsuits recover their reasonable expenses, including attorneys' fees and costs, in order to make these victims of lawsuit abuse whole again.

States can look to a proposed federal Lawsuit Abuse Reduction Act, introduced in 2017, as an example of legislation to strengthen sanctions against frivolous lawsuits.[39] The potential for lawsuit abuse in the wake of the pandemic should not be ignored, and legislation that proposes increased sanctions and protections against actions such as price gouging or fraud resulting from the COVID-19 emergency should also protect victims of frivolous lawsuits filed to take advantage of hard-pressed businesses.

HEIGHTENED PLEADING STANDARDS

To better cope with an expected surge in litigation, courts should consider putting in place heightened pleading requirements. More information at the pleadings stage will allow cases to be better organized and for claims to be moved through the court to final decision in an efficient and timely manner.

SOLUTIONS

In heightened pleadings standards exclusively applicable to COVID-19 actions, states should require plaintiffs to include with their complaints:

- Specific information as to the nature and amount of each element of damages and the factual basis for the damages demanded.
- Each act or omission, by each party sued, that is alleged to have resulted in exposure to and/or infection with COVID-19.
- Facts suggesting that the alleged acts or omissions proximately caused the injury claimed.

Examples of heightened pleading standards can be found in federal statutes such as the PREP Act[40] and Y2K Act.[41] Both laws were passed

with the intent to address large numbers of claims that could arise in relation to a particular event or product. The PREP Act is currently playing a role in the country's response to the COVID-19 pandemic.[42] States may also be able to look to existing statutes and court rules for examples of heightened pleadings standards.

DISCOVERY PROPORTIONALITY

Costs associated with discovery place significant burdens on both litigants and the judiciary. It is estimated that normal discovery costs comprise between 50 and 90 percent of the total litigation costs in a given case.[43] The use of e-discovery has grown rapidly,[44] and practitioners sometimes use discovery as a tool to gain an advantage over their opponents by forcing them to consider settlement in order to avoid substantial discovery costs. One estimate placed the cost of e-discovery in 2009 alone at over $4 billion.[45] Discovery imposes additional costs on businesses in the form of labor costs. Employee time spent on e-discovery is time diverted from regular duties. While large businesses may be able to afford to employ specialists dedicated to managing discovery requests, small businesses often cannot. These costs become especially pernicious when considering that COVID-19-impacted businesses may be struggling financially due to government shutdown orders and lack of demand. They may be on the brink of closing their doors, and the costs of broad discovery may force them to do so.

SOLUTIONS

States can make changes to rein in abusive discovery practices, either through amendments to court rules or through legislative action, by bringing their discovery practices in line with those used in federal courts.[46] To determine if discovery is proportional to the needs of the case, the following factors should be considered:

- The importance of the issue at stake in the action.
- The amount in controversy.
- The parties' relative access to relevant information.
- The parties' resources.
- The importance of discovery in resolving the issues.
- Whether the burden or expense of the proposed discovery outweighs its likely benefit.

Recognizing the cost and time burdens that liberal discovery places on litigants and the judiciary, several states have made changes to their discovery rules. For example, Missouri recently passed legislation amending the Missouri Supreme Court discovery rules by requiring that discovery be proportional to the needs of the case based on consideration of factors including the ones listed above.[47] Wisconsin and Oklahoma have also passed legislation that requires these factors to be considered when determining if discovery is proportional.[48]

Proportional discovery is critical to timely and fairly determining the outcome of any civil dispute, and it is especially important in the wake of COVID-19. The circumstances of struggling businesses and the challenges to gathering and

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producing discovery that may arise as the result of remote work, including employees' use of personal devices and non-standard means of communication, should be taken into account to prevent abusive discovery from further worsening the economic harm caused by the pandemic.

JUDGMENT INTEREST

Due to the COVID-19 pandemic and the necessity of social distancing to slow the spread of the virus, courts across the country are suspending trials[49] and tolling statutes of limitations.[50] But while these court disruptions make it difficult for litigants to advance their cases, defendants are still subject to judgment interest for this period. Judgment interest can accrue for both prejudgment and post-judgment time delays. Prejudgment interest is awarded for the time between the injury or loss and the time that judgment is entered (after trial). Post-judgment interest is awarded for the period between the final judgment and the time when the full amount owed is paid. In some states, judgment interest rates are much higher than prevailing market interest rates and may, especially in the context of delays caused by COVID-19, unfairly punish defendants.

> *"In some states judgment interest rates are much higher than prevailing market interest rates and may, especially in the context of delays caused by COVID-19, unfairly punish defendants."*

SOLUTIONS

In order for judgment interest to serve its intended purpose without unjustly penalizing defendants for delays beyond their control, states should:

- Suspend judgment interest during the public health emergency.
- Index judgment interest rates to prevailing market interest rates.

> *"Businesses suffering from financial difficulties as a result of the COVID-19 pandemic may be rendered insolvent if deemed responsible for the consequences of other parties' conduct."*

California has tolled civil statutes of limitations,[51] with the reasoning being that plaintiffs are unable to file suits due to court disruptions and should not be penalized for circumstances outside of their control. In contrast, California's judgment interest rate is 10 percent,[52] much higher than market rates. Yet defendants will continue to be subject to accrued judgment interest at this inflated rate even though they cannot pursue their defense.

Indiana's Supreme Court suspended both statutes of limitations and interest for a brief period ending on April 6, 2020.[53] Judgment interest accrual should be taken into account as states work to preserve the fairness of their judicial systems during and in the wake of pandemic-related court disruptions.

JOINT AND SEVERAL LIABILITY REFORMS

Where multiple defendants are named in COVID-19-related lawsuits, liability should be allocated fairly and proportionately between them in a manner that ensures that any award is paid by the parties truly at fault for an injury. There are three types of liability apportionment, the first of

which is pure joint liability where a defendant found to be only one percent at fault could be forced to pay 100 percent of a plaintiffs' damages. The second, modified joint and several liability, usually applies joint liability to defendants who are found to be at fault above a specified percentage, and sever liability to all defendants with low fault percentages. The third, pure several liability, holds defendants liable for their own portion of damages and not the conduct of others.

> *"Streamlining the cases filed in certain jurisdictions and appropriately distributing COVID-19 litigation will lead to swifter court decisions and outcomes that will also benefit the body of COVID-19-related case law."*

SOLUTIONS

With regard to COVID-19 lawsuits, states that do not already adhere to pure several liability should:

- Limit a defendant's liability to the percentage of fault attributed to that defendant.
- Allow fact finders to apportion fault among individuals and entities that contributed to the plaintiff's injury regardless of whether they are parties to the litigation.

West Virginia formerly held defendants liable under modified joint and several liability (joint if 30 percent or more at fault), but in 2015, the state instituted pure several liability, with a limited number of exceptions for certain defendants.[54] Businesses suffering from financial difficulties as a result of the COVID-19 pandemic may be rendered insolvent if deemed responsible for the consequences of other parties' conduct. Given the current state of knowledge with respect to COVID-19 and its effects, holding businesses, especially those that are found minimally responsible for an injury, liable for anything other than their own conduct would be manifestly unfair.

VENUE REFORM

States should address forum shopping, a practice where attorneys file lawsuits in jurisdictions that have little or no relation to litigants or the conduct involved in a lawsuit in order to gain a perceived legal advantage, to ensure that courts are able to operate efficiently in the face of COVID-19-related delays and an influx of COVID-19 litigation. Plaintiffs' attorneys steer their clients' cases to forums that are viewed as having pro-plaintiff judges or juries, a reputation for high verdicts, or favorable court procedures or law. These forums could be inundated with COVID-19-related cases, straining available court resources and slowing down resolutions while underutilizing resources that may be available in jurisdictions where cases could be appropriately filed. In order to prevent cases from being crowded together, states can use venue laws or the doctrine of *forum non conveniens* to give courts the power to appropriately manage their caseloads and transfer cases that should be heard elsewhere.

SOLUTIONS

States can specify factors for judges to consider in dismissing or transferring cases to more closely related jurisdictions, including:

- Whether an alternate forum exists in which the claim or action may be tried.
- Where the injury occurred.
- Where the parties are located.
- The location and availability of witnesses.

- The ease of access to evidence.
- The possibility of harassment to the defendant in an inconvenient forum.
- The enforceability of a judgment.
- Whether the litigant is attempting to circumvent the time limit for bringing a claim in another state.
- Which state's law would govern the case.
- The burden on the court and jury of deciding a matter that is not of local concern.

These considerations could also be paired with filing requirements to further relieve burdens on the judiciary. The Texas legislature enacted legislation in 2015 specifying factors for courts to consider under the doctrine of *forum non conveniens* that serves as an example.[55] West Virginia's venue law also provides examples of filing requirements that could be considered.[56] Requiring cases to be filed in jurisdictions where the defendant or plaintiff resides or has their principal place of business, or where the action arose, can further reduce burdens on courts by preemptively reducing the number of filed cases that need to be evaluated by a judge.

Streamlining the cases filed in certain jurisdictions and appropriately distributing COVID-19 litigation will lead to swifter court decisions and outcomes that will also benefit the body of COVID-19-related case law.

APPEAL BOND CAPS

Unreasonable appeal bond rules can effectively deprive defendants of their right to appeal if they cannot afford the appeal bond amount required to stay execution of a judgment and protect their assets during the appeal. This imbalance will only worsen in the wake of the COVID-19 pandemic as individuals and businesses confront financial hardships. This is especially true for small businesses that may be impacted by both excessive appeal bond requirements and the COVID-19 economic crisis. States should ensure that defendants are able to exercise their right to appeal and receive fair access to justice during these trying times.

SOLUTIONS

Appeal bond caps instituted by states should:

- Be set at a fixed, reasonable percentage of a judgment amount and subject to a modest cap that ensures all COVID-19 litigants the ability to appeal a decision.
- Include protections if it is shown by a preponderance of the evidence that an appellant is dissipating or diverting assets in an effort to avoid payment of the judgment.
- Exclude punitive damages from the judgment when calculating a bond amount.
- Clarify that the cap and exception apply to cases involving individual, aggregated, class or otherwise joined claims brought under any theory of liability.

Appeal bond caps have been addressed in several states, most recently in Kansas in 2018.[57] Kansas implemented two different caps, a $25 million general cap and a $2.5 million cap for small businesses. Though not yet widely used, a percentage cap may be easier to administer as it would not require any inquiry into a business' size. Businesses on the margins of these classifications may also be treated more fairly under a percentage cap.

Any COVID-19-related caps could be instituted for the duration of the pandemic and a reasonable time thereafter. Facilitating COVID-19-related appeals will also speed the resolution of complex and novel issues of law arising from the COVID-19 pandemic and, ultimately, the conclusion of COVID-19-related litigation.

JURY PARTICIPATION

As part of any reopening plan, states must consider how to address the potential for low jury participation following the pandemic. Low response rates to jury summonses were problematic in certain states prior to the COVID-19 pandemic,[58] and these rates are likely to fall even more in its wake. After the 2008 economic crisis, many people experiencing financial hardships did not feel that they could afford to appear for jury duty.[59] A similar reduction in participation can be expected because of the economic hardships people are facing due to COVID-19 shutdowns and the resulting unemployment. The situation may be exacerbated by a lingering unease with large gatherings.

SOLUTIONS

States may want to consider changes such as:

- Temporary remote jury selection options.
- Increased juror compensation, which could take the form of higher per-day payment, reimbursement for costs such as transportation or parking, and/or increased pay for jurors serving on lengthy trials.
- Simplification of the jury summons process in conjunction with increased education and outreach about the importance of jury service using modern mediums such as social media.

Low rates of jury participation can have serious consequences for the fairness of the court system. In the past, plaintiffs' attorneys have urged certain states to reduce jury sizes.[60] This reduces the quality of jury deliberation and debate and should be avoided. Increasing jury response rates has a positive effect on the diversity of jurors and encourages reasoned decisions based on a variety of viewpoints and life experiences.[61] State courts and legislatures should proactively adopt reforms to ensure that a lack of jury participation does not further delay court proceedings and outcomes when courts fully reopen.

"State courts and legislatures should proactively adopt reforms to ensure that a lack of jury participation does not further delay court proceedings and outcomes when courts fully reopen."

Other Areas of Concern

The plaintiffs' bar is advancing policy positions that would be harmful to states' economies and overall recovery efforts, as detailed below. State policymakers should be on guard for such proposals and reject them in the interest of their states' full and lasting recoveries.

WORKERS' COMPENSATION

State workers' compensation systems generally require that an employee making a claim prove that their injury or illness was sustained as a result of their employment. Some states have moved to weaken this requirement for COVID-19-related claims by establishing presumptions that essential workers or first responders were exposed to COVID-19 through their work.[62] The stated purpose of these new presumptions is to ensure that essential workers and first responders receive payment if they contract COVID-19 and are unable to work while subject to quarantine. While this is an admirable goal, workers' compensation presumptions are not the best way to ensure that employees receive needed financial assistance.

Under the federal CARES Act,[63] Pandemic Unemployment Assistance is available to individuals who are otherwise able to work but do not for COVID-19-related reasons, such as being diagnosed with the virus or caring for a family member who has been diagnosed.[64] While this is a form of unemployment insurance, it is available to workers who have not been laid off or furloughed.[65]

States should carefully consider how best to provide for the needs of workers impacted by COVID-19 and account for the availability of federal support before radically altering the traditional balance of workers' compensation regimes. In addition, states should be careful to ensure that any actions taken with respect to workers' compensation do not unfairly prejudice businesses and others by creating a public, false impression that workplaces are inherently dangerous, even when employers are taking reasonable and government-recommended measures to ensure the safety of their workers and customers.

RETROACTIVE LEGISLATION

An aggressive cadre of plaintiffs' attorneys is pressuring insurance companies to provide coverage for business interruptions caused by the COVID-19 pandemic despite clear exclusions of pandemic-related closures in their contracts. They are pursuing this goal via legislation as well as organizing for mass litigation. Legislation that effectively rewrites business-to-business contracts and requires insurers to provide COVID-19-related business interruption has been introduced in at least eight states.[66] In addition, business interruption coverage lawsuits have been filed throughout the country, with several plaintiffs' firms petitioning for multidistrict litigation (MDL) dedicated to business interruption disputes.[67]

Requiring insurers to cover business interruptions would be devastating to insurers' financial health,[68] and there are severe constitutional problems with such proposals.[69] State policymakers should reject these proposals and instead focus on crafting workable, constitutionally sound policies that will help struggling businesses rather than advancing a cure that may, by triggering substantial premium increases, be worse than the disease and leave businesses without coverage for risks traditionally addressed by their insurers.

Conclusion

States are starting to reopen and, while this move provides hope and encouragement to many American citizens and businesses, this early recovery stage is fragile. Sound policymaking can protect the public health, the vitality of businesses, and the communities they serve. If the major liability issues and litigation threats pertaining to COVID-19 are not swiftly addressed and contained, businesses, their employees, and their communities will be further harmed by lawyer-driven litigation.

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