

5-1-2021

## Going Viral?: Discouraging the Premature Use of Civil Liability Strategies as a Response to COVID-19

Michelle L. Richards

Follow this and additional works at: [https://scholars.unh.edu/unh\\_lr](https://scholars.unh.edu/unh_lr)



Part of the [Law Commons](#)

---

### Repository Citation

Michelle L., *Going Viral?: Discouraging the Premature Use of Civil Liability Strategies as a Response to COVID-19*, 19 U.N.H. L. Rev. (2021). available at: [https://scholars.unh.edu/unh\\_lr/vol19/iss2/8](https://scholars.unh.edu/unh_lr/vol19/iss2/8)

This Article is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact [sue.zago@law.unh.edu](mailto:sue.zago@law.unh.edu).



Michelle L. Richards

## Going Viral?: Discouraging the Premature Use of Civil Liability Strategies as a Response to COVID-19

19 U.N.H. L. REV. 491 (2021)

**ABSTRACT.** In addition to the myriad of issues caused by the COVID-19 pandemic in the United States, the virus has also placed our legal system in a position of creating problems that can contribute to the spread of this pandemic. Despite the fact that the United States has been mired in the COVID-19 pandemic and vaccine strategies have been recently developed to provide protection from this virus, much is still unknown about the etiology of this virus and how to effectively control its spread. As a result, public health agencies at the federal, state, and local levels have only been able to issue guidance protocols and best practices that reflect current knowledge of the virus and how to combat the spread as opposed to public health mandates. Regardless, as individuals return to work and other non-health care businesses, those guidance protocols have taken center stage as the basis for lawsuits filed by these individuals challenging the COVID-19 health and safety practices of those respective institutions. These lawsuits call upon the judicial system to determine whether those evolving best practices and guidance should and can be used as a form of an enforceable “standard of care” and creates a significant opportunity for judges to legislate inconsistent and arbitrary social health policies from the bench. In a corollary fashion to these claims, there has also been an effort to provide protection from liability through the use of waivers and immunities to those who wish to conduct certain activities conducive to the spread of COVID-19. However, the use of waivers, assumption of risk doctrines, and immunities to protect businesses from exposure may ultimately lead to inconsistency in interpretation of those guidance protocols and also creates incentives to disregard those guidance protocols and best practices. In short, the premature use of the legal system through liability claims and immunities to address safety and health concerns by individuals and institutions trying to operate during the pandemic has the potential for contributing to the spread of this disease and caution must be taken to avoid setting a risky precedent in dealing with future public health crises.

**AUTHOR.** Michelle L. Richards, Associate Professor of Law Detroit Mercy School of Law, J.D. 1994 – University of Detroit Mercy School of Law, B.A., 1991 – Michigan State University. The author gratefully acknowledges the support of her amazing husband and family, the generous guidance and assistance of Professors Cara Cunningham Warren & Richard Broughton (Detroit Mercy Law) and Professor Christine Coughlin (Wake Forest Law), and the work of research assistant Livia Khemmoro (2021). Many thanks also to Derek Kaufman and the University of New

Hampshire Law Review.

I. INTRODUCTION..... 494

II. THE IMPOSITION OF CIVIL LIABILITY FOR TRANSMISSION OF A  
CONTAGIOUS DISEASE LIKE COVID-19 WITHOUT RELIABLE  
INFORMATION ON CAUSATION AND TRANSMISSION IS  
PROBLEMATIC AND IS NOT AN EFFECTIVE STRATEGY FOR  
CONTROLLING THE SPREAD OF A CONTAGION. .... 497

III. IMMUNITIES ARE UNNECESSARY AND INEFFECTIVE TO  
CONTROL THE SPREAD OF A CONTAGIOUS DISEASE. .... 507

IV. WAIVERS OF LIABILITY WILL NOT EFFECTIVELY PROTECT THE  
USER UNLESS A STANDARD OF CARE IS PROPERLY ESTABLISHED  
AND CAN ULTIMATELY LEAD TO INCREASED SPREAD OF  
INFECTION. .... 514

V. THE COURTS SHOULD NOT BECOME THE ARCHITECTS OF  
RELIABLE AND ENFORCEABLE PUBLIC HEALTH POLICY. .... 517

VI. CONCLUSION ..... 521

## I. INTRODUCTION

COVID-19 is the most deadly pandemic to hit the United States in more than one-hundred years. It is described as “the defining global health crisis of our time and the greatest challenge we have faced since World War II.”<sup>1</sup> As of March 2021, there were more than 28 million reported cases of COVID-19 and more than 500,000 deaths in the United States as a result of the virus.<sup>2</sup> In fact, the United States is responsible for more than one-quarter of the global infection and death totals.<sup>3</sup> Fortunately, the rate of infection has finally started to fall in the United States with the introduction of vaccine therapies.

Up until the inauguration of the new administration, the federal government had made little effort to coordinate with state and local governments to contain the spread of this virus.<sup>4</sup> Rather, over the last year or so, every state was forced to independently engage in some level of mitigation strategy to address the COVID-19 pandemic. Some states engaged in a more lenient response to the virus, keeping public places open and not requiring face masks or social distancing.<sup>5</sup> Other states responded in a more rigid fashion, imposing public health restrictions in order to limit the spread of this virus,<sup>6</sup> including stay-at-home orders, rules on wearing face

---

<sup>1</sup> *COVID-19 Pandemic: Humanity Needs Leadership and Solidarity to Defeat the Coronavirus*, UNITED NATIONS DEVELOPMENT PROGRAMME (last accessed Aug. 9, 2020), <https://www.undp.org/content/undp/en/home/coronavirus.html> [<https://perma.cc/P9LN-XJQW>].

<sup>2</sup> *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)*, JOHNS HOPKINS UNIVERSITY CORONAVIRUS RESOURCE CENTER (last accessed Nov. 25, 2020), <https://coronavirus.jhu.edu/map.html> [<https://perma.cc/ZK6F-HAT3>]. It should be noted that these numbers are based on the COVID-19 tests conducted by public and private laboratories. Experts have opined that the actual number of infections and deaths attributed to COVID-19 would be much higher if robust testing was conducted in the United States.

<sup>3</sup> *Id.*

<sup>4</sup> Staff, *The United States Leads in Coronavirus Numbers, But Not Pandemic Response*, SCIENCE (Apr. 1, 2020), <https://www.sciencemag.org/news/2020/04/united-states-leads-coronavirus-cases-not-pandemic-response> [<https://perma.cc/GS3P-W39J>] (“... the U.S. pandemic response remains a work in progress—fragmented, chaotic, and plagued by contradictory messaging from political leaders. ‘We don’t have a national plan,’ says epidemiologist Michael Osterholm of the University of Minnesota, Twin Cities. ‘We are going from press conference to press conference and crisis to crisis ... trying to understand our response’”).

<sup>5</sup> Adam McCann, *States with the Fewest Coronavirus Restrictions*, WALLETHUB (July 21, 2020), <https://wallethub.com/edu/states-coronavirus-restrictions/73818/> [<https://perma.cc/MN68-KJC7>].

<sup>6</sup> Adam McCann, *Most Aggressive States Against the Coronavirus*, WALLETHUB (Apr. 7, 2020), <https://wallethub.com/edu/most-aggressive-states-against-coronavirus/72307> [<https://perma.cc/M82Z-THNR>].

masks, social distancing rules, hand-washing protocols, limitations on the number of people allowed in a particular space, cleaning requirements and protocols, and a myriad of other rules.<sup>7</sup> States and their respective citizenry continue to fight internally about the ability and propriety of governors, local municipalities, or public health departments to enact and enforce executive orders for mask mandates, isolation, business closures, and social distancing.<sup>8</sup> With no unified, national approach to combating the spread of COVID-19, until just recently, the country was in a very dangerous place relative to the rate of infections.

Throughout most of the last year or so, a combination of the pressure placed on state and local governments to reopen businesses, schools, and other establishments and the effort of federal, state, and local agencies to provide some public health strategies and guidance to assist in achieving some return to normalcy without increasing the transmission rate of the contagion, led to the use of the legal system and use of those strategies and guidance as a form of an enforceable “standard of care.” For example, with the imposition of some COVID-19 workplace safety guidelines issued by the Center for Disease Control (“CDC), employees filed numerous lawsuits against their employers requesting injunctive relief and damages for a failure to follow those CDC guidelines and provide safe workplace environments.<sup>9</sup> Though many of those lawsuits include claims against nursing homes, hospitals, and other health care centers for a failure to contain the spread of COVID-19 or malpractice arising out of COVID-related care, this Article focuses on liability claims against non-health care businesses and other institutions.<sup>10</sup>

In a corollary fashion to the filing of COVID-19 liability claims, there has also been an effort to provide protection from liability through the use of waivers and immunities to those who wish to conduct certain activities conducive to the spread of COVID-19. In fact, since March 2020, there has been pressure on Congress to

---

<sup>7</sup> *Id.*

<sup>8</sup> Phil McCausland, ‘We’re Fighting our Own State’: Southern Mayors Push Back on State Coronavirus Response, NBC NEWS (July 18, 2020, 12:27 PM), <https://www.nbcnews.com/news/us-news/we-re-fighting-our-own-state-southern-mayors-push-back-n1234280> [<https://perma.cc/U554-S7J9>].

<sup>9</sup> See Alexia Elejalde-Ruiz, *Chicago-Area McDonald’s Workers Score a Court Victory, as Judge Orders Some Local Restaurants to do Better on COVID-19 Protections*, CHICAGO TRIBUNE (June 25, 2020), <https://www.chicagotribune.com/coronavirus/ct-mcdonalds-covid-class-action-injunction-20200625-conh7goijshazba3zpxrgg63qq-story.html> [<https://perma.cc/V3UE-QVRA>]; Order to Show Cause, *Hernandez v. VES McDonald’s*, No. RG20064825 (Cal. Super. Ct. June 22, 2020).

<sup>10</sup> Debra Cassens Weiss, *Nearly 800 COVID-19 Lawsuits Have Been Filed, According to Law Firm’s Tracker*, ABA JOURNAL (May 4, 2020, 4:41 PM), <https://www.abajournal.com/news/article/nearly-800-covid-19-lawsuits-have-been-filed-according-to-law-firms-tracker> [<https://perma.cc/9TBD-TCHN>].

issue temporary immunities to businesses and educational institutions to protect them from lawsuits by their employees, students, customers, and the general public if they reopen while the coronavirus is still active in their communities.<sup>11</sup> Whether Congress will eventually issue a form of federal immunity remains to be seen. It is clear, however, that while some Republicans indicated that coronavirus liability protections are a “top priority,” these protections have garnered significant opposition from congressional Democrats, labor unions, and other groups.<sup>12</sup> As of this writing, more than 20 states have passed broad legislation to provide liability protections to non-healthcare businesses against COVID-19 related lawsuits.<sup>13</sup> Bills to create similar protections for these entities are currently pending in at least 10 additional states.<sup>14</sup>

This Article demonstrates that civil litigation, as well as waivers and immunities, are ineffective uses of the legal system against a virus we know very little about and, in the case of COVID-19, can actually promote the spread of a contagious disease. Historical experiences with infectious disease liability claims can help guide the manner and methods by which we utilize potential liability claims arising out of COVID-19 to encourage conduct that is consistent with containing the spread of the virus. Part I will show that the imposition of tort liability for negligent transmission of a contagion like COVID-19 is not feasible until

---

<sup>11</sup> Donald McLean, Nadia Patel, *Congress Weighs Federal Liability-Relief Legislation to Encourage Business Re-Openings*, JD SUPRA (June 18, 2020), <https://www.jdsupra.com/legalnews/congress-weighs-federal-liability-38092/> [<https://perma.cc/E2MM-M7HN>].

<sup>12</sup> Ana Swanson and Alan Rappeport, *Businesses Want Virus Legal Protection. Workers are Worried.*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/business/economy/coronavirus-liability-shield.html?searchResultPosition=1> [<https://perma.cc/3DL4-BVTC>]. See Tom Krisher & Mark Sherman, *Businesses Ask Patrons to Waive Right to Sue if They Get Ill*, ASSOCIATED PRESS (June 16, 2020), <https://apnews.com/article/62c2ed6ebc0dc3528718dd4197478667> [<https://perma.cc/5WUB-67NR>]. See also Carolyn Casey, *5 States Grant Businesses Immunity from Liability for Covid-19 Claims*, EXPERT INSTITUTE (June 30, 2020), <https://www.expertinstitute.com/resources/insights/5-states-grant-businesses-immunity-from-liability-for-covid-19-claims/> [<https://perma.cc/ZVE5-H7RK>].

<sup>13</sup> King & Spalding, *COVID-19 Survey of State Liability Reform*, (last accessed 2/28/2021) <https://www.kslaw.com/pages/covid-19-survey-of-state-liability-reform> [<https://perma.cc/S3V4-ZPQ3>]. See also Andrea Cox, Lauren Schoeberl & David Waxman, *Liability Uncertainty Remains for Businesses Even After COVID-19 Civil Immunity Laws are Enacted*, JD SUPRA (Oct. 23, 2020), <https://www.jdsupra.com/legalnews/liability-uncertainty-remains-for-93265/> [<https://perma.cc/C226-Z7EG>]; David Sparkman, *States Forge COVID-19 Liability Shields*, EHS TODAY (Dec. 3, 2020), <https://www.ehs.today.com/covid19/article/21149476/states-forge-covid19-liability-shields>.

<sup>14</sup> King & Spalding, *supra* note 14, Casey, *supra* note 13.

clear and reliable public health protocols upon which businesses can rely are devised by the federal agencies specializing in those areas. Part II will discuss how the use of immunities to insulate businesses from tort liability claims has the potential to disincentivize businesses from following “best practices” and could ultimately cause an increase in infection rates across the country. Part III of this Article will demonstrate that, without those reliable protocols in place, the use of waivers and reliance on assumption of risk doctrines to protect businesses from exposure may ultimately lead to inconsistency in interpretations in and among states that could further contribute to the spread of this disease. Finally, Part IV will show that allowing claims for liability to perpetuate in the judicial system without the benefit of comprehensive and reliable public health protocols in place creates the potential for judges to legislate inconsistent and arbitrary social health policies. In absence of clear guidance from agencies like the CDC and the Occupational Safety and Health Administration (“OSHA”), the judiciary should not treat this as an opportunity to act but should exercise caution until more can be understood about this particular virus.

## **II. THE IMPOSITION OF CIVIL LIABILITY FOR TRANSMISSION OF A CONTAGIOUS DISEASE LIKE COVID-19 WITHOUT RELIABLE INFORMATION ON CAUSATION AND TRANSMISSION IS PROBLEMATIC AND IS NOT AN EFFECTIVE STRATEGY FOR CONTROLLING THE SPREAD OF A CONTAGION.**

The use of the legal system to impose liability for the transmission of an infectious or contagious disease to another person began in the late 1800s. The origin of the contagious disease rule can be traced back to England and was focused on protecting individuals from the spread of infectious disease as a “goal of a healthy society.”<sup>15</sup> Although the extension of civil liability to individuals initiated with cases involving the spread of disease through hogs and sheep,<sup>16</sup> courts soon extended the principles of negligence liability to control the spread of disease from human to human in the case of smallpox.<sup>17</sup>

In the United States, the imposition of tort liability for what amounts to the

---

<sup>15</sup> Marcia Baran, *Tort Liability for the Transmission of Genital Herpes: A New Legal Duty?* R.A.P. V. B.J.P., 428 N.W. 2d 103 (Minn. Ct. App. 1988), 12 HAMLIN L. REV. 91, 100–01 (1988).

<sup>16</sup> See *Demetz v. Benton*, 35 Mo. App. 559 (1889) (allowing hogs to transmit disease can be negligence); *Johnson v. Wallower*, 18 Minn. 288 (1872) (liability imposed for sale of horse with contagious disease and subsequent transmission of disease to other animals).

<sup>17</sup> See *Hendricks v. Butcher*, 129 S.W. 431 (1910) (court imposed negligence liability for breach of duty on everyone who “conduct[s] himself as not to communicate this disease to them, after he becomes aware he is afflicted with it.”).

transmission of a contagious disease goes back more than a century and includes claims arising from the transmission of smallpox, tuberculosis, scarlet fever, and typhoid fever.<sup>18</sup> Although the most common theory of liability in contagion cases was and is negligence, claims for intentional infliction of emotional distress, fraud, and assault or battery were also used in pursuing defendants for transmitting an infectious or contagious disease.<sup>19</sup>

In the 1980s, the legal system was used in the United States to control the spread of more modern contagious diseases, HIV and AIDS. The human immunodeficiency virus (“HIV”) is the virus that can lead to acquired immunodeficiency syndrome (“AIDS”) and was declared a global, viral pandemic in 2006.<sup>20</sup> The use of tort liability claims to remedy injuries and death related to HIV exposure began to appear about six years after the first case of AIDS in the United States was reported in 1981.<sup>21</sup> Liability for transmission of HIV was imposed through the use of battery, negligence, and intentional or negligent infliction of emotional distress.<sup>22</sup> Several courts have also found a duty on the part of an infected person to protect his or her sexual partners from contracting the virus. For example, in *John B. v. Superior Court*, the court held that the “tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection and would extend at least to those situations where the actor, under the totality of

---

<sup>18</sup> Glen P. Smith, *Casenotes: Torts — Causes of Action Exist for Negligence, Intentional Infliction of Emotional Distress, and Fraud for Transmission of a Sexually Communicable Disease between Unmarried Partners*. *B.N. v. K.K.*, 312 Md. 135, 538 A.2d 1175 (1988), 18 U. BAL. L. REV. 613, 614, n.8 (1989) (citing *Earle v. Kuklo*, 98 A.2d 107 (1953) (tuberculosis); *Skillings v. Allen*, 143 Minn. 323 (1919) (scarlet fever); *Hendricks v. Butcher*, 129 S.W. 431 (1910) (smallpox); *Kliegel v. Aitken*, 94 Wis. 432 (1896) (typhoid fever)).

<sup>19</sup> *Id.* at 614–15 nn.9–12.

<sup>20</sup> *About HIV*, CENTER FOR DISEASE CONTROL (last modified Nov. 3, 2020), <https://www.cdc.gov/hiv/basics/whatishiv.html> [<https://perma.cc/AXH9-E3P3>]. Since the first cases of AIDS were reported in 1981, HIV has grown to pandemic proportions, resulting in an estimated 65 million infections and 25 million deaths. As of the end of 2018, the most recent year for which information is available, an estimated 1.2 million people in the United States have HIV. As a result, curbing the spread of the disease was and still is an enormous public health concern.

<sup>21</sup> Bonnie E. Elber, *Negligence as a Cause of Action for Sexual Transmission of AIDS*, 19 U. TOL. L. REV. 923, 923, n.4 (1988) (“[A]t least 30 civil & criminal cases have been filed accusing people of trying to transmit the virus including but not limited to assault charges for deliberately transmitting the virus by biting or spitting, attempted murder after a man spit on two police officers, contested wills when the AIDS victim leaves his assets to others than relatives, third party suits seeking damages because the AIDS victims are impoverished and unable to pay damages.”)

<sup>22</sup> Dustin J. Lee, *Injections, Infections, Condoms, and Care: Thoughts on Negligence and HIV Exposure*, 25 CORNELL J.L. & PUBL. POL’Y 245, 253–54 (2015).

the circumstances, has *reason to know* of the infection.”<sup>23</sup> Further, in *Doe v. Johnson*, the court held that a defendant “who has had unprotected sexual encounters with multiple partners does not have a legal duty to inform a plaintiff of his or her past sexual activity” unless they have actual knowledge of a possible HIV-positive status through either a diagnosis, symptoms associated with HIV, or the HIV-positive status of a past sexual partner.<sup>24</sup>

With respect to COVID-19, although some lawsuits have already been filed, no one really knows the potential for liability claims arising out of the transmission of the COVID-19 virus. Because it is difficult to prove where someone was infected, at least one legal expert testified before the U.S. Senate’s Judiciary Committee in May 2020 that, “[t]hose cases haven’t materialized, and I doubt they will.”<sup>25</sup> However, less than two months later, new wrongful death and gross negligence cases arising out of COVID-19 were filed by families against employers.<sup>26</sup> These cases are “part of an unfolding liability threat facing U.S. companies of all industries as many resume operations after having employees work remotely or being shut down altogether for months.”<sup>27</sup> In July 2020, it was predicted that, “[t]he amount of litigation on the horizon is enormous.”<sup>28</sup>

Businesses, schools, places of worship, and other entities’ attempts to stay open amid the COVID-19 pandemic have created uncertainties as to the amount of litigation COVID-19 will ultimately foster. As they are filed, these lawsuits will require the courts to consider the risk of transmission is attributable to the operation of those environments and reliably evaluate the efforts to mitigate that risk. However, the courts are woefully ill-equipped to make these evaluative decisions without more guidance and, although the country is almost one year into the coronavirus crisis, experts continue to determine how the virus is transmitted

---

<sup>23</sup> John B. v. Superior Court, 137 P.3d 153, 161 (Cal. 2006).

<sup>24</sup> Doe v. Johnson, 817 F.Supp. 1382, 1393 (W.D. Mich. 1993).

<sup>25</sup> Tom Hals, *Companies Fear Coronavirus Liability Lawsuits. So Far, Few Exist*, REUTERS (May 15, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-lawsuits/companies-fear-coronavirus-liability-lawsuits-so-far-few-exist-idUSKBN22R1OV> [<https://perma.cc/TF9X-E7TH>] (quoting David Vladeck at U.S. Senate Judiciary Committee hearing on liability shields for businesses).

<sup>26</sup> Janet Adamy, *Families File First Wave of Covid-19 Lawsuits Against Companies Over Worker Deaths*, WALL STREET JOURNAL (July 30, 2020 3:30 PM), <https://www.wsj.com/articles/families-file-first-wave-of-covid-19-lawsuits-against-companies-over-worker-deaths-11596137454> [<https://perma.cc/5LML-WY8E>].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (quoting Harold H. Kim, president of the U.S. Chamber Institute for Legal Reform).

and by whom.<sup>29</sup> This information is critical to the ability of state and local governments to “devise reopening strategies to protect public health while getting economies going again.”<sup>30</sup> Should individuals contract the virus while engaging in work or school activities, the question then becomes whether failure to follow those “strategies” should provide a foundation for liability. It must be acknowledged that “public health laws have often put judges in the position of assessing the reasonableness of restrictions on individual and economic liberty.”<sup>31</sup> However, the judicial assessment of the “necessity, effectiveness, and scientific rationale” has typically relied on reliable scientific information gleaned from experts.<sup>32</sup> Without that information, courts are left to rely on the pleadings of the parties to evaluate the propriety of behavior of a particular entity relative to an allegation of transmission.

In the past, the imposition of civil liability as a method of controlling the spread of infection was effective when the courts were able to rely on more than a “guideline” or “strategy” as a standard of care. For example, in the context of HIV and AIDS, before statutes providing for civil and criminal liability were enacted and civil liability claims were filed, the causative factors and methods of the transmission were identified.<sup>33</sup> In fact, it took more than five years from the date of the first reported case of AIDS in the United States for either civil or criminal cases to be filed for the negligent or intentional transmission of the virus.<sup>34</sup> During that time, courts struggled for years to determine the standard of care that should govern these actions and who carries the burden. As some have noted, sexually active individuals assume the risk that they may contract sexually transmitted

---

<sup>29</sup> Daniela Hernandez et al., *How Exactly Do You Catch Covid-19? There is Growing Consensus*, WALL STREET JOURNAL (updated June 16, 2020 10:39 AM), <https://www.wsj.com/articles/how-exactly-do-you-catch-COVID-19-there-is-growing-consensus-11592317650> [<https://perma.cc/B5Y6-QQFZ>].

<sup>30</sup> *Id.*

<sup>31</sup> Lindsay F. Wiley, *Public Health Law and Science in the Community Mitigation Strategy for Covid-19*, 7 J. L. & BIOSCI., Jan.–June 2020 at 1.

<sup>32</sup> Rothstein, *supra* note 32 (citing Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 246 (2015)). See also Wendy K. Mariner et al., *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341 (2009); LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* (3d ed. 2016).

<sup>33</sup> Elder, *supra* note 22.

<sup>34</sup> *Id.*

diseases like HIV.<sup>35</sup> To that end, the question arose as to whether the entirety of responsibility for transmission of HIV should rest upon the shoulders of HIV-positive individuals.<sup>36</sup> Further, courts wrestled with whether actual or merely constructive knowledge of HIV-positive status was required in order to impose liability. Ultimately, courts followed the reasoning as described in *Doe v. Johnson*,<sup>37</sup> which weighed the benefit of limiting transmission by allowing liability to attach with merely constructive knowledge against requiring only actual knowledge in order to avoid the “perverse and socially undesirable incentives against testing and treatment of the disease.”<sup>38</sup> Finally, a few states have enacted either general laws imposing a statutory duty to exercise reasonable care to prevent transmission of an infectious disease or liability for willfully spreading a contagious disease, or more specific laws applicable to certain contagions like AIDS or venereal disease.<sup>39</sup>

As of today, nearly every state has enacted a statutory duty that provides for either or both civil liability and criminal liability against an individual for the negligent or intentional transmission of HIV and AIDS.<sup>40</sup> Further, some courts expanded the duty to include those instances in which an individual has actual knowledge that they are infected, as well as when “a defendant ha[s] knowledge of symptoms of an infectious disease.”<sup>41</sup> However, in all instances, the means of transmission of the HIV and AIDS virus were established by the public health expert communities and the allegations of transmission were relative to a particular and identifiable individual.

---

<sup>35</sup> Katherine A. Kelly, *The Assumption of Risk Defense and the Sexual Transmission of AIDS: A Proposal for the Application of Comparative Knowledge*, 143 U. PA. L. REV. 1121, 1156, n.175 (1995) (citing Walter F. Zenner, Casenote, *The Interrelationship Between Design Defects and Warnings in Products Liability Law: Abbot v. American Cynamid Co.*, 11 CEO. MASON U. L. REV. 171, 182 (1989)).

<sup>36</sup> See *Doe v. Johnson*, 817 F.Supp. 1382 (W.D. Mich. 1993).

<sup>37</sup> *Id.*

<sup>38</sup> Dustin J. Lee, *Injections, Infections, Condoms, and Care: Thoughts on Negligence and HIV Exposure*, 25 CORNELL J. L. & PUB. POL’Y 245, 261, n.98 (2015) (citing *John B. v. Superior Court*, 137 P.3d 153, 161 (Cal. 2006)).

<sup>39</sup> McCann, *supra* notes 6, 7.

<sup>40</sup> See James Myhre & Dennis Sifris, *HIV Criminal Laws by State*, VERY WELL HEALTH (May 24, 2020), <https://www.verywellhealth.com/hiv-criminal-laws-by-state-48705> [<https://perma.cc/L2U4-X87N>] (noting criminal liability for negligent or intentional transmission of HIV and AIDS); *State Laws That Address High-Impact HIV Prevention Efforts*, CENTER FOR DISEASE CONTROL (last updated Aug. 28, 2020), <https://www.cdc.gov/hiv/policies/law/states/index.html> [<https://perma.cc/TN3R-R4PK>] (noting civil liability for negligent or intentional transmission of HIV and AIDS).

<sup>41</sup> *Johnson*, *supra* note 37, at 1389 (emphasis omitted).

Similarly, in matters involving claims against businesses or other entities for the transmission of any infectious disease, reliable knowledge of the source and nature of the contagion and the existence of clear and articulated, scientific protocols to insulate against transmission of that contagion prove to be critical to the viability of a plaintiff's claim for negligence. For example, in Legionnaires' disease cases up until 2015, many cases were dismissed at the summary judgment stage for the plaintiff's failure to identify a standard of care.<sup>42</sup> However, in 2015, an industry standard was promulgated by the American Society of Heating, Refrigerating, and Air Conditioning Engineers ("ASHRAE") and in 2016, the CDC and its partners developed a toolkit to facilitate the implementation of the ASHRAE Standard.<sup>43</sup> Once that was done, it became "less difficult" to establish "the standard of care" for those plaintiffs.<sup>44</sup> Similarly, in matters involving norovirus, a virus which causes more than 19 million cases of acute gastroenteritis in the United States every year, it is "almost always the result of an identified population becoming infected through a common, readily identified source."<sup>45</sup> As such, if several individuals from a common population, like a cruise ship or restaurant, become ill at the same time, it is more likely that a claim has merit as the "cluster of cases may represent a failure to implement basic food safety and public health guidelines."<sup>46</sup>

Some have suggested that a better comparison for COVID-19 transmission

---

<sup>42</sup> See *Vellucci v. AllState Ins. Co.*, 66 A.3d 215 (N.J. Super. Ct. App. Div. 2013); *Flaherty v. Legum & Norman Realty*, 281 Fed. Appx. 232 (4th Cir. 2008); Brett Wilson, *As Legionnaires' Disease Cases Surge, Lawsuits Pile Up*, CIRCLE OF BLUE (Nov. 7, 2019) <https://www.circleofblue.org/2019/world/as-legionnaires-disease-cases-surge-lawsuits-pile-up/> [<https://perma.cc/2FTQ-SPY2>].

<sup>43</sup> Memorandum from the Department of Health & Human Services Director of Quality, Safety, and Oversight Group to State Survey Agency Directors (June 2, 2017), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/QSO17-30-HospitalCAH-NH-REVISED-.pdf> [<https://perma.cc/8LRQ-QN53>].

<sup>44</sup> Brett Wilson, *As Legionnaires' Disease Cases Surge, Lawsuits Pile Up*, CIRCLE OF BLUE (Nov. 7, 2019), <https://www.circleofblue.org/2019/world/as-legionnaires-disease-cases-surge-lawsuits-pile-up/> [<https://perma.cc/2FTQ-SPY2>] ("With the growing number of guidelines and regulations, and a purported standard in ASHRAE Standard 188, plaintiffs' attorneys may find it less difficult to establish what they argue as the standard of care in the prevention of Legionella amplification in a building that causes an exposure and illness...").

<sup>45</sup> Patrick S. Schoenberg, *Assessing Personal Liability from COVID-19*, RISK MANAGEMENT (May 1, 2020), <https://www.rmmagazine.com/2020/05/01/assessing-personal-injury-liability-from-covid-19/> [<https://perma.cc/Y535-XFZH>].

<sup>46</sup> Schoenberg, *supra* note 46; Hayley Peterson, *Chipotle Customers Sue for \$74,000 After They Got Sick Eating There*, BUSINESS INSIDER (July 31, 2017 1:50 PM), <https://www.businessinsider.com/chipotle-norovirus-lawsuit-2017-7> [<https://perma.cc/Z5HV-AV3Z>].

claims is influenza.<sup>47</sup> With respect to influenza, the reality is that it is rare for this virus to become the basis for civil litigation because it is “ubiquitous and expected.”<sup>48</sup> It has been noted that, “much like coronavirus, it is difficult to track where or how someone became infected with influenza, which creates evidentiary barriers to liability claims.”<sup>49</sup> Despite the similarity to the problems with claims for influenza transmission relative to establishing the necessary evidentiary proofs, it is likely that liability claims for transmission of COVID-19 will be far more prevalent than those for influenza.

When comparing COVID-19 to other infectious disease cases in which liability claims for transmission were made, it becomes clear that plaintiffs will have a difficult time with evidentiary proofs on standard of care, breach, and causation against an employer or business entity for several reasons. First, with the influx of mutations of the COVID-19 virus and the continuing rate of infection within the United States, there is still a lack of standard protocols that can reliably limit transmission of this modern virus in order to establish a proper standard of care. Further, because COVID-19 is a biological pathogen, as opposed to man-made, and there are only general ideas about how the virus is transmitted<sup>50</sup> or who is capable of transmitting the virus,<sup>51</sup> it is inordinately difficult, if not impossible, to

---

<sup>47</sup> Schoenberg, *supra* note 46; Amanda Bronstad, *Lawyer Suing for Cruise Ship Passengers: This is Norovirus on Steroids*, LAW.COM (March 11, 2020 5:50 PM), <https://www.law.com/therecorder/2020/03/11/lawyer-suing-for-cruise-ship-passengers-this-is-norovirus-on-steroids/> [<https://perma.cc/KZ4Q-P46T>].

<sup>48</sup> Schoenberg, *supra* note 46.

<sup>49</sup> *Id.*

<sup>50</sup> Daniela Hernandez et al., *How Exactly Do You Catch Covid-19? There Is a Growing Consensus*, WALL STREET JOURNAL (June 16, 2020) <https://www.wsj.com/articles/how-exactly-do-you-catch-covid-19-there-is-a-growing-consensus-11592317650> [<https://perma.cc/B5Y6-QQFZ>]; Pien Huang, *Aerosols, Droplets, Fomites: What We Know About the Transmission of COVID-19*, NPR (July 6, 2020 6:58 PM) <https://www.npr.org/sections/goatsandsoda/2020/07/06/887919633/aerosols-droplets-fomites-what-we-know-about-transmission-of-covid-19> [<https://perma.cc/2S4Y-5ELX>].

<sup>51</sup> William A. Haseltine, *New Evidence Suggests Young Children Spread COVID-19 More Efficiently Than Adults*, FORBES (July 31, 2020 3:15 PM), <https://www.forbes.com/sites/williamhaseltine/2020/07/31/new-evidence-suggests-young-children-spread-covid-19-more-efficiently-than-adults/?sh=3b275d9519fd> [<https://perma.cc/69V3-LWEV>]; Andrew Joseph, *We Don't Actually Have That Answer Yet: WHO Clarifies Comments on Asymptomatic Spread of Covid-19* (June 9, 2020), <https://www.statnews.com/2020/06/09/who-comments-asymptomatic-spread-covid-19> [<https://perma.cc/8GKQ-HGER>]; Mary Van Beusekom, *Evidence of Prolonged COVID-19 Virus Shedding Noted in China*, CENTER FOR INFECTIOUS DISEASE RESEARCH AND POLICY (May 18, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/05/evidence-prolonged-covid-19-virus-shedding-noted-china> [<https://perma.cc/RQ26-X7XU>].

determine when someone is behaving unreasonably in light of COVID-19 to establish a breach.<sup>52</sup> Finally, without more research and reliable protocols to limit transmission, there is an inability to trace a particular plaintiff's infection to a single source in order to establish causation.

Additionally, a review of the public health mandates and other mitigation strategies propounded by public health officials relative to COVID-19, such as six feet social distancing and the use of face masks or coverings, reveal a great deal of shifting as experts continue to build their knowledge of the complexities of this virus and its propensity for transmission. For instance, the use of face masks or coverings and social distancing guidelines have changed and evolved throughout the last several months.<sup>53</sup> Most importantly, although the CDC and OSHA have each issued suggested safety practices for businesses and employers to follow relative to COVID-19, both either explicitly or implicitly suggest that they should not form the basis for a standard of care for tort liability.<sup>54</sup> Within the latest OSHA guidance documents, there is a disclaimer that uses the following language:

---

<sup>52</sup> Schoenberg, *supra* note 46.

<sup>53</sup> Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, UCSF PATIENT CARE (June 26, 2020), <https://www.ucsf.edu/news/2020/06/417906/still-confused-about-masks-heres-science-behind-how-face-masks-prevent> [https://perma.cc/22M8-JVDF]; Nicole Wetsman, *Masks May Be Good, But the Messaging Behind Them Has Been Very Bad*, THE VERGE (Apr. 3, 2020 9:56 AM), <https://www.theverge.com/2020/4/3/21206728/cloth-face-masks-white-house-coronavirus-covid-cdc-messaging> [https://perma.cc/79D9-262E]; Hilda Bastian, *Social Distancing Has Become the Norm. What Have We Learned?*, WIRED (May, 8, 2020 8:00 AM), <https://www.wired.com/story/social-distancing-has-become-the-norm-what-have-we-learned> [https://perma.cc/8JF5-4NWK]; Sharon Begley, *Social Distancing Is Controlling COVID-19; Now Scientists Need to Figure Out Which Measures Are Most Effective*, STAT NEWS (Apr. 9, 2020), <https://www.statnews.com/2020/04/09/social-distancing-controlling-covid-19-which-measures-are-most-effective/> [https://perma.cc/Q6QD-WAYR]; *Should You Wear Two Masks to Prevent the Spread of COVID-19? The Short Answer from an Infectious Disease Specialist*, Cleveland Clinic, (Feb. 12, 2021), <https://health.clevelandclinic.org/should-you-wear-two-masks-to-prevent-the-spread-of-covid-19> [https://perma.cc/Z5QR-KKLD].

<sup>54</sup> See, e.g., *Guidance for Business and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CENTER FOR DISEASE CONTROL (last updated Jan. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> [https://perma.cc/T2LV-8MSK]; *Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19*, CENTER FOR DISEASE CONTROL (Apr. 8, 2020) [https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf?fbclid=IwAR1jBLSw6zePB\\_4wo6WAnbAor\\_oajX3XG3EVGNm-YmpW9glw4-mqxvKgPpE](https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf?fbclid=IwAR1jBLSw6zePB_4wo6WAnbAor_oajX3XG3EVGNm-YmpW9glw4-mqxvKgPpE) [https://perma.cc/6YUU-K2PB]; Occupational Safety and Health Administration, *Guidance on Returning to Work and Guidance on Preparing Workplaces for COVID-19*, (OSHA 3990-03 2020).

This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.<sup>55</sup>

Further, the CDC guidelines only provide, “[t]his guidance is based on what is currently known about the transmission of SARS-CoV-2, the virus that causes coronavirus disease 2019 (COVID-19),” and that it “*may* help prevent workplace exposures to SARS-CoV-2 in non-healthcare settings.”<sup>56</sup>

At this time, most civil liability claims for personal injuries or wrongful deaths arising out of alleged COVID-19 transmissions filed by employees against their employers request injunctive relief, damages, or both for a failure to follow those CDC guidelines and provide safe workplace environments.<sup>57</sup> Just as in ordinary and gross negligence claims, COVID-19 plaintiffs are required to establish duty and breach of that duty owed to the plaintiff by the defendant, a causal link between plaintiff’s injury and defendant’s conduct, and damages.<sup>58</sup> In the case of gross negligence, the plaintiff must show a willful or reckless disregard for plaintiff’s welfare. As one court stated, conduct that “represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it” constitutes gross negligence.<sup>59</sup> In order to establish liability arising out of the transmission of a contagion like COVID-19, the plaintiffs in these cases must first establish that defendants violated the standard of care required by this virus and that defendant’s alleged violation caused the plaintiff or plaintiff’s decedent to

---

<sup>55</sup> OSHA, *supra* note 55, at 2.

<sup>56</sup> See e.g., *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CENTER FOR DISEASE CONTROL (last updated Jan. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> [<https://perma.cc/T2LV-8MSK>] (emphasis added).

<sup>57</sup> See Sebastian Martinez Valdivia & Dan Margolies, *Workers Sue Smithfield Foods, Allege Conditions Put Them at Risk for COVID-19*, NPR (Apr. 24, 2020 4:29 PM), <https://www.npr.org/2020/04/24/844644200/workers-sue-smithfield-foods-allege-conditions-put-them-at-risk-for-covid-19> [<https://perma.cc/5P3R-EENM>]; Tom Hals, *U.S. Workers Hit McDonald’s With Class Action Over COVID-19 Safety*, REUTERS (May 19, 2020 3:18 PM), <https://www.reuters.com/article/us-health-coronavirus-mcdonald-s-lawsuit/u-s-workers-hit-mcdonalds-with-class-action-over-covid-19-safety-idUSKBN22V2V8> [<https://perma.cc/W5M6-6RCD>]; Complaint, *Palmer v. Amazon.Com, Inc.*, Case 1:20-cv-02468 (E.D.N.Y. 2020).

<sup>58</sup> RESTATEMENT (SECOND) OF TORTS § 281 (1965).

<sup>59</sup> *Saltz v. First Frontier, L.P.*, 782 F.Supp.2d 61, 75 (S.D.N.Y. 2010), *aff’d*, 485 F. App’x 461 (2d Cir. 2012).

contract the virus.<sup>60</sup> Regardless, of the fluid nature of the guidance and mitigation strategies offered by agencies such as the CDC and OSHA, the claims that have been filed to date continue to use those guidelines and strategies as a “standard of care” by which to question and evaluate the propriety of the respective behaviors of the defendants in each matter.

Even if a consensus on a proper standard of care for a pandemic virus like COVID-19 can be reached, the plaintiff must also be able to establish breach and causation. Proving a breach of duty will also be a challenge. First, because of the lack of rapid testing for COVID-19 and the possibility that one could carry the virus but have no symptoms, it is possible that an individual will not have knowledge, either actual or constructive, that they have the virus and are spreading it.<sup>61</sup> In fact, many experts have warned that without rapid testing, individuals who will ultimately test positive may contribute to the spread of the virus while they are awaiting their test results. As such, absent that knowledge that has been seen in a few cases thus far in which the infected person was aware of their COVID-19-positive status and communicated that status to their employer, it is unlikely that a breach of a duty on the business entity can be established.<sup>62</sup> Efforts to establish causation in COVID-19 cases are similarly challenged by the nature of the virus and our ability to employ meritorious mitigation strategies that have benefitted other infectious disease crises. As one expert has noted, “[t]he unprecedented transmissibility of this virus will generally make causation guesswork at best, and guesswork is insufficient for pleading in a tort case.”<sup>63</sup>

In the case of an infectious disease or contagion, a plaintiff must trace the cause of their infection back to a particular and identifiable entity. This requirement is somewhat more challenging in food-borne illness claims than it is in Legionnaire’s

---

<sup>60</sup> David Goguen, J.D., *Coronavirus: Can I Be Liable for Getting Someone Else Sick?*, NOLO <https://www.nolo.com/legal-encyclopedia/coronavirus-can-i-be-liable-for-getting-someone-else-sick.html> [https://perma.cc/ZC8R-3USU].

<sup>61</sup> *No Signs of Coronavirus? Here’s Why You Could Still Be Carrying (and Spreading) It*, HEALTH ESSENTIALS (May 6, 2020), <https://health.clevelandclinic.org/studies-show-carriers-with-mild-or-no-symptoms-are-key-part-of-covid-19-spread/> [https://perma.cc/WS2N-NJJC].

<sup>62</sup> Shelby Simana, *Coronavirus Negligence: Liability for COVID-19 Transmission*, BILL OF HEALTH – HARVARD LAW PETRIE-FLOM CENTER (Apr. 14, 2020), <https://blog.petrieflom.law.harvard.edu/2020/04/14/coronavirus-negligence-liability-for-covid-19-transmission> [https://perma.cc/8GDT-AYQW].

<sup>63</sup> *Examining Liability During the COVID-19 Pandemic*: Hearing Before the U.S. Senate Committee on the Judiciary, 116th Cong. 12 (May 12, 2020) (testimony of David C. Vladeck), <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20Testimony.pdf> [https://perma.cc/7R74-XDND].

disease lawsuits because of the ability to more readily identify and trace an individual's illness to a particular source of the virus.<sup>64</sup> However, with COVID-19, that kind of tracing is nearly impossible because of the manner in which the virus is transmitted, namely person-to-person, and the rapid growth rate of infections in the United States.<sup>65</sup> In other words, because transmission of coronavirus can occur through interactions with co-workers, friends, family, or unknown, infected individuals, establishing a breach of a duty and causation against a particular defendant will, in all likelihood, prove to be an exercise in futility.<sup>66</sup>

At present, there is no agreement on the manner of transmission of COVID-19. There are also no comprehensive protocols put in place with the ability to identify a single source of a pathogen and trace it to demonstrate that a defendant knew of the risk of spreading the particular disease and failed to follow standard practices to prevent it. Until information and technology is cohesive and agreed upon, civil liability lawsuits should not be successful for any plaintiff. Similar to the situation with Legionnaire's disease and HIV and AIDS transmission claims, the evidentiary barriers to proving liability for COVID-19 claims will remain high. This may only change once more information is ascertained about the etiology of this virus and coordinated efforts to provide the public with reliable health practices are properly elevated to a uniform standard of care. Without more information to establish a standard of care or causation, the use of civil liability as a mitigation strategy against a contagion like COVID-19 is wholly ineffective.

### III. IMMUNITIES ARE UNNECESSARY AND INEFFECTIVE TO CONTROL THE SPREAD OF A CONTAGIOUS DISEASE.

As the country has struggled to reopen businesses, schools, and other places of public gathering, the concern about the transmission of COVID-19 has led these same entities to fear they will be a litigation target even if they adhere to the "best practices" suggestions proffered by the CDC, OSHA, or their own state or local

---

<sup>64</sup> PHILLIP CHEN O'NEILL, A REVIEW OF TORT LIABILITY'S ROLE IN FOOD AND MEDICAL PRODUCT REGULATION (2012).

<sup>65</sup> *No Signs of Coronavirus? Here's Why You Could Still Be Carrying (and Spreading) It*, HEALTH ESSENTIALS (May 6, 2020), <https://health.clevelandclinic.org/studies-show-carriers-with-mild-or-no-symptoms-are-key-part-of-covid-19-spread/> [<https://perma.cc/WS2N-NJJC>].

<sup>66</sup> Joseph J. Orzano & Michael E. Jusczyk, *Causation Defenses to Premises Liability Claims Involving Alleged Exposure to COVID-19*, SEYFARTH (June 4, 2020), <https://www.seyfarth.com/news-insights/causation-defenses-to-premises-liability-claims-involving-alleged-exposure-to-covid-19.html> [<https://perma.cc/F3VJ-5SCB>].

government referenced in the preceding section. As noted above, several states have either legislated immunities for non-healthcare entities or provided it to healthcare-related entities through executive order.<sup>67</sup> Congress is currently debating the provision of immunity at a federal level to provide businesses across the country protection from liability for COVID-19 related claims.<sup>68</sup> Although a business' fear of liability is certainly understandable, the arguable protection which immunities may provide is outweighed by the manner in which they will likely contribute to the spread of the virus. To that end, neither of these "legal protections" are warranted or necessary and will promote the continued spread of the contagion if implemented at either the state or federal level.

The concept of legal immunities from liability stems from the 1982 case of *Harlow v. Fitzgerald*, in which the Supreme Court adopted the modern standard for qualified immunity. Under this standard, immunity shields executive officials from civil liability so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>69</sup> When considering the imposition of qualified immunity, the *Harlow* court stressed the importance of balancing the need for providing a sufficient remedy for a violation of law against the need preventing the social cost that derives from suits against government employees.<sup>70</sup> Although qualified immunity is most often associated with the actions of governmental actors, those immunities have gradually been extended by statute to private actors acting in compliance with articulated standards and who appear to be "engaged in state action" or "acting under the color

---

<sup>67</sup> See King & Spaulding, *supra* note 14. See also *Fact Sheet: State COVID-19 Health Care Immunity Laws*, CENTER FOR JUSTICE & DEMOCRACY n.1 (June 25, 2020), <https://centerjd.org/content/fact-sheet-state-covid-19-health-care-immunity-laws> [<https://perma.cc/QX6V-8HZM>] (noting that the American Association for Justice is tracking these laws. Most are Executive Orders. As of June 23, 2020, the list included: Alabama, Arizona, Arkansas, Connecticut, D.C. (legislation), Georgia, Hawaii, Illinois, Iowa, Kansas (executive order expired, done through legislation), Kentucky (legislation), Maryland (emergency declaration), Massachusetts (legislation), Michigan, Mississippi, New Jersey (both), New York (both), Nevada, North Carolina (legislation) Oklahoma (legislation), Pennsylvania, Rhode Island, Utah (legislation), Vermont, Virginia, Wisconsin (legislation), and Wyoming (legislation)).

<sup>68</sup> McClean, *supra* note 12. See also Y. Douglas Yang, *With Immunity and Justice For All? Congress Weighs Unparalleled Tort Reform for Businesses in Light of COVID-19 Pandemic*, SHEPPARD MULLIN (Aug. 10, 2020), <https://www.laboremploymentlawblog.com/2020/08/articles/coronavirus/unparalleled-tort-reform-businesses-exposure/> [<https://perma.cc/R65R-EPGY>].

<sup>69</sup> *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>70</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

of law.”<sup>71</sup>

Just like the problems with permitting the use of civil liabilities without a well-developed standard of care, the push for protections from that liability in the form of immunities in response to a contagion or other crisis is not new. As noted by one trial lawyer association executive in reference to the risk of coronavirus-related lawsuits, “the current push for liability protections reflected a long-standing effort by corporations to secure more legal protection in times of crisis, including after the Sept. 11, 2001, attacks and swine flu epidemic.”<sup>72</sup> Relative to that epidemic, legal immunity against tort liability was given to swine flu vaccine manufacturers and others by the United States Department of Health and Human Services (“HHS”) Secretary under the Public Readiness and Emergency Preparedness Act (“PREP Act”) unless they acted with willful misconduct.<sup>73</sup> Similarly, the Support Anti-Terrorism by Fostering Effective Technologies Act, better known as the SAFETY Act, provides both limitations to liability and immunities to entities who can demonstrate that their security products and services were useful relative to responding to terrorism.<sup>74</sup> In each case, the grant of immunity was statutory and in furtherance of protection of a non-governmental entity who was acting under color of law to provide a valuable, societal benefit.

Even at the earliest stage of the COVID-19 pandemic, federal immunities were in place that followed the framework of previous PREP Act declarations issued in response to Ebola, Zika, influenza, anthrax, botulinum, and smallpox over the past decade.<sup>75</sup> For example, in March 2020, HHS issued a COVID-19 Declaration under the authority of the PREP Act that was retroactively effective beginning February 4, 2020.<sup>76</sup> The Declaration provides:

Subject to other provisions of [the PREP Act], a covered person shall be immune from

---

<sup>71</sup> See generally MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 1 (Kris Markarian ed., 3d ed. 2014).

<sup>72</sup> Swanson, *supra* note 13 (quoting Linda Lipsen, CEO of American Association for Justice: “They have been doing this for decades,” she said. “Every time there is a crisis, that’s what they do.”).

<sup>73</sup> See Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influence Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680.

<sup>74</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

<sup>75</sup> Kelley P. Doran et al., *COVID-19 Liability Immunity – What You Need to Know Now*, NAT’L L. REV. (Apr. 6, 2020), <https://www.natlawreview.com/article/covid-19-liability-immunity-what-you-need-to-know-now> [<https://perma.cc/26SW-A4YF>].

<sup>76</sup> 42 U.S.C. § 247d-6d (2020).

suit and liability under federal and state law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure if a Declaration has been issued with respect to such countermeasure.<sup>77</sup>

A “covered countermeasure” is a “qualified pandemic or epidemic product,” or a “drug... biological product... or device... that is... authorized for emergency use” by the Food, Drug, and Cosmetic Act.<sup>78</sup> This liability protection includes health care providers, drug manufacturers, and other entities involved in the pharmaceutical response to COVID-19.<sup>79</sup> The PREP Act strikes a balance by encouraging those on the healthcare frontline to diligently work to combat a novel virus like COVID-19. By providing immunity protection to those involved in that work, as well as providing a relief measure build into the Act for eligible claimants in the form of a federally-funded Countermeasures Injury Compensation Program, the PREP Act also develops countermeasures.<sup>80</sup> This relief measure allows the payment of benefits, including out-of-pocket expenses, medical expenses, lost wages, and death benefits to individuals who suffer an injury or death as a result of the administration or use of a countermeasure, thereby negating the necessity of formal legal action. It should also be noted that many states have granted similar COVID-19 liability protections for health care workers, health care facilities, and nursing homes.<sup>81</sup>

Though the immunities given to health care entities are palatable for a novel virus like COVID-19, the more concerning liability protections and immunities are those that have been expanded to non-healthcare entities. As stated above, as of this writing, a majority of states have either passed laws that grant immunity from

---

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 42 U.S.C. § 247d-6d (2020). *See also Countermeasures Injury Compensation Program (CICP)*, HEALTH RESOURCES & SERVICES ADMINISTRATION (last reviewed Nov. 2020), <https://www.hrsa.gov/cicp/> [<https://perma.cc/E7RZ-B282>].

<sup>81</sup> *See Fact Sheet: State COVID-19 Health Care Immunity Laws*, CENTER FOR JUSTICE & DEMOCRACY n.1 (June 25, 2020), <https://centerjd.org/content/fact-sheet-state-covid-19-health-care-immunity-laws> [<https://perma.cc/QX6V-8HZM>] (citing The American Association for Justice is tracking these laws. Most are Executive Orders. As of June 23, 2020, the list included: Alabama, Arizona, Arkansas, Connecticut, D.C. (legislation), Georgia, Hawaii, Illinois, Iowa, Kansas (executive order expired, done through legislation), Kentucky (legislation), Maryland (emergency declaration), Massachusetts (legislation), Michigan, Mississippi, New Jersey (both), New York (both), Nevada, North Carolina (legislation) Oklahoma (legislation), Pennsylvania, Rhode Island, Utah (legislation), Vermont, Virginia, Wisconsin (legislation), and Wyoming (legislation)). *See also* King & Spalding, *supra* note 14.

COVID-19-related claims or have proposed legislation in the works.<sup>82</sup> In some states, like Louisiana, North Carolina, Oklahoma, Utah, and Wyoming, the governors have signed legislation that goes “far beyond the immunity that several states granted to health care providers at the onset of the coronavirus pandemic.”<sup>83</sup> Language contained within the blanket immunity provisions in Louisiana, Utah, Oklahoma, and Wyoming apply to all businesses or premises owners.<sup>84</sup> In North Carolina, immunities apply not only to “essential businesses,” “emergency response entities,” and health care providers, but also to essentially everyone in the state, unless they were grossly negligent or acted intentionally to spread COVID-19.<sup>85</sup> Finally, in September of 2020, Ohio enacted a COVID-19 civil immunity law which provides broad immunity to individuals, businesses, schools, and health care providers for injuries or death caused by “heedless indifference to the consequences of their actions” related to COVID-19.<sup>86</sup>

In addition to the fact that these immunities are being expanded beyond healthcare entities, of equal concern is that the requirements to take advantage of these immunities are either not clearly articulated or there are no requirements at all. As a result, the balanced demanded by *Harlow* in providing immunities cannot be evaluated as non-healthcare entities will avoid the social costs imposed by liability claims without demonstrating they qualify for that benefit. For example, although North Carolina law dictates that businesses provide “reasonable notice of actions taken...for the purpose of reducing the risk of transmission to individuals

---

<sup>82</sup> Jim Sams, *Four States Pass Laws Giving Business Immunity from COVID-19 Claims*, CLAIMS JOURNAL (June 1, 2020), <https://www.claimsjournal.com/news/national/2020/06/01/297332.html> [<https://perma.cc/VV3R-3XVD>]; Andrea Cox, Lauren Schoeberl & David Waxman, *Liability Uncertainty Remains for Businesses Even After COVID-19 Civil Immunity Laws Are Enacted*, JD SUPRA (Oct. 23, 2020), <https://www.jdsupra.com/legalnews/liability-uncertainty-remains-for-93265/> [<https://perma.cc/C226-Z7EG>].

<sup>83</sup> Sams, *supra* note 83.

<sup>84</sup> See S.B. 1946, 57th Leg., 2d Reg. Sess. (Okla. 2019); S.B. 3007, 63d Leg., 3d Spec. Sess. (Utah 2020); S.F. 1002, 2020 Leg., Spec. Sess. (Wyo. 2020); S.B. 508, 2020 Leg., Reg. Sess. (La. 2020); S.B. 491, 2020 Leg., Reg. Sess. (La. 2020); H.B. 826, 2020 Leg., Reg. Sess. (La. 2020); Zachary Kessler, *States Pursue and Enact Liability Shield Legislation as Reopening Continues*, GRAVEL TO GAVEL (June 17, 2020), <https://www.gravel2gavel.com/states-liability-shield-legislation-reopening-covid-19/> [<https://perma.cc/PRA8-FCYY>].

<sup>85</sup> Act of July 2, 2020, ch. 99E, N.C. S.L. 2020-89 H.B. 118 (2020) (“No person [which is defined to include individuals, corporations and other entities] shall be liable for any act or omission that does not amount to gross negligence, willful or wanton conduct, or intentional wrongdoing.”).

<sup>86</sup> Cox, Schoeberl, & Waxman, *supra* note 83.

present on the premises,” there is no specific guidance for businesses to follow.<sup>87</sup> Rather, the law leaves those entities to use their “common sense” to determine what actions are required and under what authority.<sup>88</sup> In Oklahoma, businesses must comply with “written guidelines related to COVID-19 issued by the Centers for Disease Control and Prevention, Occupational Safety and Health Administration of the United States Department of Labor, Oklahoma State Department of Health, the Oklahoma Department of Commerce, or any other state agency, board or commission.”<sup>89</sup> Wyoming merely provides immunities to businesses who “follow the instructions of a state, city, town, or county health officer” or “who acts in good faith in responding to the public health emergency.” Louisiana requires compliance with “applicable COVID-19 procedures” issued by the federal, state, or local agency governing the business operations, and if there are two or more sources of procedures, only “substantial compliance” with one set is required.<sup>90</sup> Finally, in Utah, businesses receive immunity from COVID-related liability without the need to make *any* affirmative showing whatsoever of compliance with public health guidelines.<sup>91</sup>

The standard that would apply to the immunity from liability currently being proposed by Republicans at the federal level is equally concerning. Republicans have specifically indicated they want a five-year blanket liability shield, retroactive to December 2019, for businesses, health care providers, universities, and schools.<sup>92</sup> Some have suggested that this immunity will still require some form of affirmative showing of compliance with applicable COVID-19 health and safety guidelines provided by the CDC, OSHA, or a new governmental office to review and issue COVID-19 liability protections, similar to what was done under the SAFETY Act

---

<sup>87</sup> N.C. S.L. 2020-89, *supra* note 86; Jeffrey P. MacHarg, *North Carolina Significantly Expands Limited Liability Against COVID-19 Transmission Claims*, FOX ROTHSCHILD LLP (July 8, 2020), <https://www.foxrothschild.com/publications/north-carolina-significantly-expands-limited-immunity-against-covid-19-transmission-claims/> [<https://perma.cc/7KNT-HBKY>].

<sup>88</sup> MacHarg, *supra* note 88.

<sup>89</sup> S.B. 1946, 57th Leg., 2d Reg. Sess. (Okla. 2020).

<sup>90</sup> H.B. 826, 2020 Leg., Reg. Sess. (La. 2020).

<sup>91</sup> S.B. 3007, 63d Leg., 3d Spec. Sess. (Utah 2020).

<sup>92</sup> Christina Jewett & Melissa Bailey, *Next Showdown in Congress: Protecting Workers vs. Protecting Employers in the Pandemic*, KAISER FAMILY FOUNDATION (July 13, 2020), <https://khn.org/news/next-showdown-in-congress-protecting-workers-vs-protecting-employers-in-the-pandemic/> [<https://perma.cc/9DR6-YM86>].

liability protection program.<sup>93</sup> At this stage, however, there has been no movement from the current administration relative to any extension of immunities for liabilities related to COVID-19.

Apart from the fact that immunities to non-healthcare entities are not in line with the demands of qualified immunity as dictated by the Supreme Court in *Harlow*, legal immunities for non-healthcare related businesses that are dependent upon a determination of compliance with agency guidelines for COVID-19 are unnecessary. First, as detailed above, because there is no uniform and reliable standard of care for COVID-19 at this time due to the novelty of the virus, transmission liability cases filed against businesses will be very hard to prove, as plaintiffs will struggle to establish a duty, breach, and causation.<sup>94</sup> As those cases will ultimately fail to satisfy the burdens required under law, the defendants in those cases simply do not need the protections of immunities or waivers of liability. The same holds true even if the guidance provided by the CDC, OSHA, or state or local agencies is regarded as a standard of care by which to evaluate the conduct of a particular defendant, as in Oklahoma or Louisiana. In those instances, businesses that make reasonable efforts to comply with that guidance should not be concerned about liability exposure, which renders the provision of immunities unnecessary.<sup>95</sup> In other words, if the manner in which immunities are granted to businesses and other entities for COVID-19-related claims is by evaluation of their conduct relative to the requirements of federal, state, or local agencies, it makes more sense to allow liability claims to move forward because the analysis is exactly the same. Proceeding in that manner will encourage the continued development of reliable and appropriate standards of care and incentivizes businesses to exercise reasonable care in a manner consistent with those standards, both of which contribute to the ability to contain the spread of the virus.

The grant of blanket immunity from liability for COVID-19-related claims, as in Utah, North Carolina, Wyoming, and currently proposed by the Republicans at the

---

<sup>93</sup> Brian E. Finch et al., *COVID-19: Congress and States Debate New Liability Protections for Reopening Businesses*, PILLSBURY (June 2, 2020), <https://www.pillsburylaw.com/en/news-and-insights/liability-shield-reopening-covid-19.html> [<https://perma.cc/4YKT-BPC2>].

<sup>94</sup> Jim Sams, *Four States Pass Laws Giving Business Immunity from COVID-19 Claims*, CLAIMS JOURNAL (June 1, 2020), <https://www.claimsjournal.com/news/national/2020/06/01/297332.html> [<https://perma.cc/VV3R-3XVD>].

<sup>95</sup> John Culhane, *Trump and McConnell's COVID-19 Liability Protections Are Completely Unnecessary*, SLATE (May 8, 2020), <https://slate.com/news-and-politics/2020/05/trump-mcconnell-covid-19-liability-immunity-plan.html> [<https://perma.cc/FGE2-USWD>].

federal level, will actually promote the spread of the contagion.<sup>96</sup> In this case, businesses do not have to demonstrate compliance with any public health guidelines regarding COVID-19 in order to receive immunity, but rather only need to show that plaintiff's claims arise out of COVID-19 transmission or contact. As a result, there is no incentive to take steps to comply with the current public health mandates at the federal, state, and local level designed to provide protections from the virus and contain the spread of the infection because those businesses will ultimately be insulated from liability regardless of their conduct. As some have noted, "[i]t sends precisely the wrong message to businesses and to landlords and to people out there who should be concerned that they do everything they can that's reasonable to protect their customers and protect their employees."<sup>97</sup> As noted by one expert in his testimony before the United States Judiciary Committee Hearing in May 2020:

[T]he better path is to abandon efforts to give immunity to those who act unreasonably, and instead to require our expert public health agencies to provide detailed, expert guidance to businesses on how to open safely and responsibly, assist states and localities to work with businesses on safe business practices, and find positive ways to support the reopening of our economy.<sup>98</sup>

#### **IV. WAIVERS OF LIABILITY WILL NOT EFFECTIVELY PROTECT THE USER UNLESS A STANDARD OF CARE IS PROPERLY ESTABLISHED AND CAN ULTIMATELY LEAD TO INCREASED SPREAD OF INFECTION.**

Another attempt to insulate businesses from exposure to tort claims arising out of COVID-19 transmission is through waivers of liability. For example, for Donald Trump's Re-election Rally held in June 2020 in Tulsa, Oklahoma, the online registration form contained this message:

By clicking register below, you are acknowledging that an inherent risk of exposure to COVID-19 exists in any public place where people are present. By attending the Rally,

---

<sup>96</sup> It bears noting that some have also criticized the liability limitations and immunities given to healthcare providers, arguing that, "[h]ealth workers, first responders and many other workers and employers have acted heroically in this crisis, but it cannot be assumed that everyone did. The truth must be left a way to come out. That's what courts are for." See *Legal Immunity for COVID-19 Issues is a Terrible Idea*, SOUTH FLORIDA SUN-SENTINEL (May 13, 2020 4:13 PM), <https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-coronavirus-legal-immunity-florida-20200513-a4vhp2gm5brnlo2rsi4fu5re4-story.html> [<https://perma.cc/manage/create?folder=8822>].

<sup>97</sup> Marty Johnson, *Utah Governor Signs Bill Protecting Businesses from Coronavirus Lawsuits*, THE HILL (May 5, 2020 3:29 PM), <https://thehill.com/homenews/state-watch/496217-utah-governor-signs-bill-protecting-businesses-from-covid-19-lawsuits> [<https://perma.cc/38HR-DYAM>] (quoting House Minority Leader Brian King's (D) statements to The Salt Lake Tribune).

<sup>98</sup> Vladeck, *supra* note 64, at 21.

you and any guests voluntarily assume all risks related to exposure to COVID-19 and agree not to hold Donald J. Trump for President, Inc.; BOK Center; ASM Global; or any of their affiliates, directors, officers, employees, agents, contractors, or volunteers liable for any illness or injury.<sup>99</sup>

Other businesses, schools, and entertainment venues also actively utilized waivers in an effort to protect themselves from anticipated COVID-19-related claims. As the fall semester began, colleges and universities asked students and others to sign liability waivers for a return to campus. For example, the Ohio State University football program asked players to sign waivers for on-campus voluntary workouts.<sup>100</sup> Additionally, COVID-19 liability waivers are appearing for customers to sign in order to get a haircut, ride a roller coaster, or workout at a gym, either as an actual form that details the terms of the waiver or as signage that indicates an implicit waiver of liability that provides a general warning that people enter at their own risk.<sup>101</sup> Visitors to Disney's website will see cautionary language which reads, "[a]n inherent risk of exposure to COVID-19 exists in any public place where people are present."<sup>102</sup> Guests of the Disney Parks agree to "voluntarily assume all risks related to exposure to COVID-19."<sup>103</sup> Even salons and spas are asking customers to submit to a temperature check at arrival and then sign a waiver agreeing not to sue if they contract COVID-19 attributable, in their belief, to the salon environment.<sup>104</sup> Notably, both Mississippi and North Carolina required bar exam test-takers to sign a waiver acknowledging that the test-taker "voluntarily assumes all risk of exposure to or infection with COVID-19 by attending the July 2020...bar examination, and the

---

<sup>99</sup> Rosie Perper, *Trump is Making Rally Attendees Sign a Waiver so if They Catch the Coronavirus and Die, It's on Them Not Him*, BUSINESS INSIDER (June 11, 2020 10:57 PM), <https://www.businessinsider.com/trump-campaign-requiring-people-to-sign-coronavirus-waiver-tulsa-rally-2020-6> [<https://perma.cc/WMG5-KAEA>].

<sup>100</sup> Heather Dinich, *Ohio State Players, Parents Asked to Sign Coronavirus Risk Waiver*, ESPN (June 14, 2020), [https://www.espn.com/college-football/story/\\_/id/29311945/ohio-state-football-players-parents-asked-sign-covid-19-risk-waiver](https://www.espn.com/college-football/story/_/id/29311945/ohio-state-football-players-parents-asked-sign-covid-19-risk-waiver) [<https://perma.cc/9V4J-ZXZS>].

<sup>101</sup> Kate Gibson, *COVID-19 Liability Waivers Now a Part of Going to Hair Salons, Gyms, Theme Parks, and More*, CBS NEWS (June 12, 2020 9:10 AM), <https://www.cbsnews.com/news/covid-19-liability-waivers-now-part-of-going-to-hair-salons-gyms/?ftag=CNM-00-10aab6j&linkId=90712983> [<https://perma.cc/LW6X-N954>].

<sup>102</sup> DISNEY (last visited February 10, 2021), <https://disneyworld.disney.go.com/experience-updates/> [<https://perma.cc/CR5X-K363>].

<sup>103</sup> *Id.*

<sup>104</sup> Tom Krisher & Mark Sherman, *Businesses Ask Patrons to Waive Right to Sue If They Get Ill*, ASSOCIATED PRESS (June 16, 2020), <https://apnews.com/article/62c2ed6ebc0dc3528718dd4197478667> [<https://perma.cc/5735-VGRD>].

possibility that such exposure or infection may result in personal injury, illness, permanent disability, and death.”<sup>105</sup>

As an initial matter, it is possible that those waivers are not enforceable at all. As a basic premise, liability waivers are generally disfavored and are construed against the drafter.<sup>106</sup> In some states, like Louisiana, Montana and Virginia, waivers of liability are not allowed at all.<sup>107</sup> New York will enforce a liability waiver only where it does not violate the public’s interest, the language clearly expressed the intention of the parties, and the provisions are clear and coherent.<sup>108</sup> In the case of COVID-19, with what little information is known relative to its etiology and transmission, it is hard to imagine how a business would be able to properly explain what they are doing to mitigate the risks so that an individual could make the decision to assume those risks.<sup>109</sup> Additionally, there are also circumstances that waivers would likely not cover, for example, where someone who signs a waiver gets infected and then spreads the virus to family members, coworkers, or neighbors. In that instance, some have opined that waivers would not cover that liability because the injured person did not sign the waiver.<sup>110</sup>

Although there is no indication that private entities will fail to follow public health mandates and guidelines issued by agencies, waivers create an incentive for those entities to ignore those mandates, which would contribute to the further spread of the virus. As some have noted, “liability waivers open the door for corporations to skirt protocols like erecting Plexiglas barriers, providing face masks and other protective equipment, and keeping people the proper distance apart without suffering any repercussions.”<sup>111</sup> As waivers relate to schools, agreements that require students or faculty to assume the risk of returning to campuses are

---

<sup>105</sup> Stephanie Francis Ward, *Two States Introduce COVID-19 Waivers for July Bar Exams*, ABA JOURNAL (June 2, 2020 3:42 PM), <https://www.abajournal.com/web/article/liability-waivers-may-not-mean-much-but-two-states-include-them-for-july-in-person-bar-exam> [<https://perma.cc/5RGL-U8BQ>].

<sup>106</sup> 8 WILLISTON ON CONTRACTS § 19.21 (4th ed. through Nov. 2020) (stating that “Contract provisions releasing or limiting liability for claims that have not yet arisen are generally not favored” and “exculpatory provisions must clearly, unambiguously, and unmistakably inform the party relinquishing its rights of exactly what is being waived”).

<sup>107</sup> Arthur Caplan & Brendan Parent, *The Risks of COVID-19 Waivers*, NEWSDAY (July 7, 2020), <https://www.newsday.com/opinion/coronavirus/arthur-caplan-brendan-parent-covid-19-coronavirus-liability-waivers-1.46494358> [<https://perma.cc/AW5C-ZC7A>].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Krisher & Sherman, *supra* note 105.

<sup>111</sup> *Id.*

intended to “relieve colleges of their ‘duty of care’ over students and make even ‘reasonable’ attempts to protect students from harm unnecessary in order to disprove a negligence claim.”<sup>112</sup>

In all, the use of waivers to protect potential defendants in COVID-19-related claims are unnecessary. When balanced against the real risk that those waivers of liability will reduce the desire for businesses to comply with applicable federal, state and local public health mandates and guidelines that can help lower the risk of COVID-19 transmission amid a growing pandemic, they are not worth the paper they are written on.

#### **V. THE COURTS SHOULD NOT BECOME THE ARCHITECTS OF RELIABLE AND ENFORCEABLE PUBLIC HEALTH POLICY.**

Health policies in the United States are largely a product of the executive and legislative branches of federal and state governments. However, over the last twenty to thirty years, the judicial branch has played a more active role in this area. Historically, when courts were faced with the resolution of cases involving social policy issues like environmental protection, prison reform, and school desegregation, the limitations of the judiciary were seen by some as having a negative effect on policy making.<sup>113</sup> On the other hand, others have acknowledged the “profound effect” the courts can have on matters of public health which presents opportunities to advance public health goals and principles within the courts.<sup>114</sup> As seen in the Medicaid rate-setting issues of the 1990s, Big Tobacco litigation in the late 90s and early 2000s, and the current opioid crisis, the pressure of the increased filing of COVID-19-related lawsuits across this country will have an enormous impact on public health policy. However, when federal administrative agencies charged with setting public health protocols have specifically stated that their own recommendations for proper standards of conduct are not intended to be “legal

---

<sup>112</sup> Greta Anderson, *Colleges Seek Waivers from Risk-Taking Students*, INSIDE HIGHER ED (Aug. 3, 2020), <https://www.insidehighered.com/news/2020/08/03/students-asked-sign-liability-waivers-return-campus> [<https://perma.cc/RU3T-9ALR>].

<sup>113</sup> Gerard Anderson, *The Courts and Health Policy: Strengths and Limitations*, 11(4) HEALTH AFFAIRS 95 (1992), (<https://www.healthaffairs.org/doi/full/10.1377/hlthaff.11.4.95>) (citing D.L. Horowitz, *The Courts and Social Policy* (Washington: The Brookings Institution 1977); and R.S. Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington: The Brookings Institution, 1983)).

<sup>114</sup> Jonathan N. Kromm et al., *Public Health Advocacy in the Courts: Opportunities for Public Health Professionals*, 124(6) PUB. HEALTH REPORTS 889 (2009).

obligations,” “standards,” or “regulations,” but rather are intended to be “advisory” in light of what is currently known about COVID-19,<sup>115</sup> the judiciary should exercise restraint and not be baited into legislating public health policies from the bench.

A general concern about court-directed public health policy is the fact that courts cannot seek out the cases they hear in order to become involved in the policy-making process. Rather, they are faced with litigation in their courtroom and must respond to the specific and subjective facts and legal issues presented by the dispute. As noted by some looking at the opioid multi-district litigation, “[c]ourts are hard-wired for litigation,’ through which facts can come to light.”<sup>116</sup> Because of the lack of ability to select the “best case” that presents the greatest opportunity to craft strong social policy, any positive impact or change to public policy that comes about as a result of a particular piece of litigation is placed at risk due to a lack of confidence in the manner in which that impact or change came about.

In truth, there have already been indications of risk for judicial creation and enforcement of public health policies that are inconsistent with positions taken by federal agencies like the CDC and OSHA. For example, in May 2020, in a class action filed in Illinois, McDonald’s and franchise owners were accused of disregarding expert recommendations and government guidance on how to protect workers and customers from spread of disease. The court issued a preliminary injunction based on state and local safety guidelines before any inspection or report was completed by OSHA.<sup>117</sup> Although the defendants argued that the court should wait and defer to OSHA, the Illinois Department of Health, or county or city public health agencies to investigate the claims of the plaintiffs in order to prevent inconsistent safety requirements during a rapidly evolving pandemic, the court ruled anyway and relied on the Illinois Governor’s Executive Order and Illinois public safety guidelines on social distancing to issue and enforce the injunction.<sup>118</sup> A similar ruling was made in a case filed against McDonald’s in California in which the court issued a preliminary injunction that did not reference any public health mandates

---

<sup>115</sup> OSHA & CDC Guidance, *supra* note 55.

<sup>116</sup> See Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html> [<https://perma.cc/Y7WQ-DC6X>] (quoting University of Georgia Law Professor Elizabeth C. Burch).

<sup>117</sup> Alexia Elejalde-Ruiz, *Chicago-area McDonald’s Workers Score a Court Victory, as Judge Orders Some Local Restaurants to do Better on COVID-19 Protections*, CHICAGO TRIBUNE (June 25, 2020), <https://www.chicagotribune.com/coronavirus/ct-mcdonalds-covid-class-action-injunction-20200625-conh7goij5hazba3zpxrgg63qq-story.html> [<https://perma.cc/V3B8-Q7LS>] (referring to *Massey et al. v. McDonald’s Corp. et al.*, No. 2020-CH-04247 (Ill. Cir. Ct. 2020)).

<sup>118</sup> *Id.*

or protocols whatsoever.<sup>119</sup>

The danger, as noted by at least one lawyer in the case, is that the judge's ruling becomes a "floor" for public health policy within the respective state:

This is nothing less than an attempt to force upon the judiciary the responsibility for managing the public health response to COVID-19. If plaintiff's lawsuit is entertained, it will unleash a flood of similar litigation as any person who believes COVID-19 should be handled differently than what public health authorities allow will file suit against their employer or any business with which they may have some tangential contact.<sup>120</sup>

Equally concerning is that this court's order becomes a blueprint for handling COVID-19 transmission cases across the country in which courts are encouraged to enforce state and local public health mandates, while the federal agencies charged with issuing those types of public health regulations have indicated it is too early to do so.

It bears noting that there are rules currently in place which current rules dictate that jurisdiction over these claims should rest with the administrative agencies in charge of the creation and enforcement of public health policy. In fact, a few courts have shown restraint in ruling on COVID-19-related claims of public nuisance and negligence that would require interpretation and enforcement of the federal public health mandates.<sup>121</sup> In the *Smithfield Foods* case, the court dismissed the case under the primary-jurisdiction doctrine, which allows a district court to refer claims to an administrative agency that has concurrent jurisdiction over an issue, and ruled that OSHA had jurisdiction over the workers' claims in that case.<sup>122</sup> Because the judge concluded that that the issue was within the special competence of OSHA, the agency would investigate the complaint as opposed to the issuance of any relief order from the court.<sup>123</sup>

Similarly, in June 2020, six workers sued Amazon in New York federal court for public nuisance for its alleged failure to comply with health and safety guidelines that led to a death and injury of those warehouse workers and their families due to

---

<sup>119</sup> Order to Show Cause, *Hernandez v. VES McDonald's*, No. RG20064825 (Cal. Super. Ct. June 22, 2020).

<sup>120</sup> Amanda Bronstad, *McDonald's Negotiating to Resolve Lawsuit Over COVID-19 Employee Protections*, LAW.COM (May 29, 2020), <https://www.law.com/2020/05/29/mcdonalds-negotiating-to-resolve-lawsuit-over-covid-19-employee-protections/> [<https://perma.cc/X77Q-T4EL>].

<sup>121</sup> See Order Granting Defendants' Motion to Dismiss, *Rural Community Workers Alliance v. Smithfield Foods Inc.*, No. 5:20-CV-06063-DGK (W.D. Mo. 2020).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

COVID-19 transmission.<sup>124</sup> On November 2, 2020, the court issued an order dismissing without prejudice the workers' claims that Amazon's alleged inaction posed a public nuisance and that the company breached its duty to provide a safe workplace.<sup>125</sup> The court held that, under the primary-jurisdiction doctrine, it is the place of OSHA and not the courts to assess the propriety of Amazon's efforts to mitigate the spread of a contagion like COVID-19 to protect its workers.<sup>126</sup> Notably, within its order, the court stated, "[c]ourts are not experts in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance. Plaintiffs' claims and proposed injunctive relief go to the heart of OSHA's expertise and discretion."<sup>127</sup>

In sum, the construction of public health policy amid a pandemic is an inappropriate use of judicial power. The federal agencies charged with promulgating public health mandates amid a pandemic are reluctant to issue legally enforceable standards of care and are only able to provide guidance as to best practices until they know more about COVID-19.<sup>128</sup> Further, those same agencies should take jurisdiction over matters in which claims of public health nuisance or negligence arising out of COVID-19 are raised under the primary jurisdiction doctrine. Because lawyers are aware that both the CDC and OSHA are not ready to legally enforce their public health guidance protocols through administrative measures, they are asking courts to step in and provide some remedy to individuals who believe their health is at risk. At least one expert noted that "[i]f the federal government isn't going to go in and investigate, I want there to be important lawsuits where we're asking questions about why people are being exposed and dying. This is exactly why the justice system exists."<sup>129</sup> Regardless, at this stage of the pandemic, the courts are in no better position to determine the answers to those questions than the agencies charged with making those evaluations.

By entertaining civil litigation in an effort to provide some remedy to parties adversely impacted by COVID-19 without reliable standards of care or the ability to evaluate causation, judges risk causing confusion by elevating public health recommendations to enforceable law. As acknowledged by Judge Cogan in the

---

<sup>124</sup> Complaint, *Palmer v. Amazon.com, Inc.*, Case: 20-cv-2468 (BMC) (E.D.N.Y. 2020).

<sup>125</sup> *Palmer*, *supra* note 125; Memorandum Decision and Order Granting Defendant's Motion to Dismiss, *Palmer v. Amazon.Com Inc.*, Case 20-cv-2468 (BMC) (E.D.N.Y. 2020).

<sup>126</sup> Memorandum in *Palmer*, *supra* note 126.

<sup>127</sup> *Id.*

<sup>128</sup> CDC and OSHA guidelines, *supra* note 52.

<sup>129</sup> Swanson & Rappeport, *supra* note 13 (quoting Julia Duncan, senior director of government affairs for the American Association for Justice).

*Palmer v. Amazon* litigation:

This case concerns state and federal guidance addressing workplace safety during a pandemic for which there is no immediate end in sight. Regulating in the age of COVID-19 is a dynamic and fact-intensive matter fraught with medical and scientific uncertainty. There is room for significant disagreement as to the necessity or wisdom of any particular workplace policy or practice. Courts are particularly ill-suited to address this evolving situation and the risk of inconsistent rulings is high. Court-imposed workplace policies could subject the industry to vastly different, costly regulatory schemes in a time of economic crisis.<sup>130</sup>

Accordingly, the courts should utilize the primary-jurisdiction doctrine and dismiss these matters until the agencies charged with promulgating governing regulations and public health protocols determine that enough is known about COVID-19 that their suggested guidance is more than just advisory in nature.

**VI. CONCLUSION**

Despite the vaccine efforts and the slowly falling rate of infection, more than a year after COVID-19 was officially declared a pandemic, the virus continues to be an issue within the United States. The lack of a uniform and effective public health response to the virus over the last year threatened the safety of all Americans. Those who feel threatened by the spread of the contagion will continue to look to the courts for some resolution through the filing of civil liability claims against employers, businesses, and other entities that push the judicial system to provide a remedy for those that are injured or adversely affected as a result of COVID-19. In those jurisdictions that have provided immunities or which support the use of liability waivers for those entities, the lack of incentive for businesses to follow the guidance of public health experts has the very real potential of contributing to the spread of the contagion. As noted by one expert, “[t]he entire liability issue may become another unfortunate, but critical, residue left by the pandemic.”<sup>131</sup>

---

<sup>130</sup> Memorandum in *Palmer*, *supra* note 126.

<sup>131</sup> Swanson & Rapoport, *supra* note 13 (quoting Jon Last, President of the Sports and Leisure Research Group).