



TRIAL LAWYER GREED IN TIME OF NEED: THE COVID-19 TORT FEST AND HOW TO CURB IT

by Victor E. Schwartz

The COVID-19 pandemic has placed a vice grip on our nation. Tens of thousands have died from the disease and well over a million people have been rendered ill. Businesses have shut their doors and millions are unemployed because of ripple effects of the pandemic. One very small group of Americans, however, perceive the COVID-19 pandemic as a potentially substantial business development opportunity: Trial lawyers.

By no means do all trial lawyers see it that way, only a few. Those few, though, have significant power and resources. They can orchestrate litigation on a national scale and procure “experts” to target an even smaller group of judges in “plaintiff-friendly” jurisdictions to bring COVID-19-related tort claims (places referred to as Judicial Hellholes® by the American Tort Reform Association). In those areas, judges may eschew their role as gatekeepers, permitting unscientific expert testimony and unfounded COVID-19 injury claims to be presented to a jury. When the family of a person who died from COVID-19 or a person that became seriously ill testifies, some jurors’ sympathy may overwhelm the scientific facts, leading to large, unwarranted verdicts.

This LEGAL BACKGROUNDER will help distinguish the valid tort litigation from the baseless chaff. It will show how baseless claims can be defeated in litigation and through reasonable legislative reform.

The Gathering Storm of COVID-19 Tort Litigation

A wise plaintiff lawyer shared the following observation with me when it became clear that COVID-19 would be a pandemic: “Every pandemic death, every COVID-19 illness, and possibly well-grounded fear of illness is a potential lawsuit.”

Thus far, there has been a slow, but steady rain of COVID-19 tort lawsuits, but some plaintiffs’ lawyers have candidly shared that this is just an opening salvo. Those who have studied the history of tort litigation know that asbestos and other major liability onslaughts began with only a few cases. Shrewd plaintiffs’ lawyers want policymakers to believe that COVID-19 will not be a major litigation event. Unlike recent litigations such as Roundup®, where plaintiffs’ lawyers bombard television screens with advertising, they have engaged in little public solicitation of COVID-19 cases.

This is both wise and purposeful. Smart plaintiffs’ lawyers do not want to be seen as taking advantage of a national public health emergency. Also, unlike litigations involving a product, there is not one easy target to vilify. The cause of the harm in COVID-19 is not a product or human-made activity. It is nature, and nature cannot be sued and made to pay damages.

Nevertheless, mass advertising will ensue, as preparations have begun. Personal-injury law firm websites focusing on COVID-19 claims are already sprouting. There is a careful study of psychology occurring. The first messaging of the advertising campaign will seek to shore up in the minds of the public (*i.e.* potential jurors) that the suffering of a “victim” of COVID-19 is someone else’s fault. The second part will name targets who should bear responsibility. This paper identifies four potential targets, aside from lawsuits targeting healthcare providers:

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(1) any business where a person could contract COVID-19; (2) neighbors who negligently expose fellow neighbors and guests to COVID-19; (3) manufacturers or sellers of products viewed as protecting people from COVID-19; and (4) manufacturers of drugs that appear useful in curing or reducing the symptoms of COVID-19.

1. Any Place of Business Where a Person Could Contract COVID-19. Lawsuits have already been brought against businesses where an employee or patron allegedly contracted COVID-19. For example, Walmart was sued where an employee allegedly contracted COVID-19 at work and later died.¹ Cruise lines are facing scores of individual lawsuits and at least one class action by passengers alleging the company negligently exposed them to COVID-19, including those who do not allege that they actually were diagnosed with COVID-19. Those suits are just a peek at what is likely to come. Any business where customers or visitors are in a confined space, or there is an outbreak of COVID cases, could give rise to a potential COVID-19-related lawsuit. Plaintiffs' lawyers are likely to target large businesses, however, because small restaurants and stores are less likely to have "adequate" insurance and more likely to invoke jury empathy, making it harder to win a case.

A major barrier to such claims is that a plaintiff will have difficulty proving specific causation. Of all the places the plaintiff has been, of all the objects he or she touched, and of all the people the plaintiff has been near, how can the plaintiff prove that his or her illness came from a visit to a particular place of business? As a practical matter, this should present a considerable challenge, but, again, Judicial Hellholes® jurisdictions may open the door to such claims. Moreover, experience in mass tort and class action litigation shows that businesses are often prone to settling cases regardless of the merits, due to the cost of litigation and the harm caused by adverse publicity.

2. Lawsuits Targeting Neighbors Who Negligently Expose Fellow Neighbors and Guests to COVID-19. The second category of litigation targets may appear an unlikely one, but a carefully planning plaintiffs' lawyer group believes that the target is worth exploring. This is why: homeowners' liability insurance coverage. If a homeowner's negligent spread of COVID-19 to a guest is deemed covered by insurance, it could bring about significant recoveries that make the widespread pursuit of such cases very attractive.

For instance, a plaintiffs' lawyer might solicit numerous cases by advertising "Have you or a loved one contracted COVID-19 because a neighbor exposed you to the illness? Call now." Plaintiffs' lawyers appreciate many individuals may not be inclined to sue a neighbor (as compared to a large corporation), but if they can be made to realize that the neighbor will be unlikely to pay the actual judgment, the temptation to call a trial lawyer's 1-800 number will be manifest.

But would homeowners' insurance cover this type of risk of injury? The answer naturally depends on a policy's language, although many policies limit coverage to accidents involving direct physical injury (e.g. a slip and fall) that suggests claims would not be covered. In any event, elite trial lawyers will promote editorials, op-eds, and media commentary to try to make insurers pay. If trial lawyers face defeat on the insurance coverage path, they may still proceed with negligence claims involving wealthy individuals.

3. Manufacturers and Sellers of Products Viewed as Providing Protection from COVID-19. There is a certain irony in the tendency of the plaintiffs' bar to sue manufacturers of products that protect people from harm. Unfortunately, some judges help facilitate such claims by allowing so-called "experts" to testify that the safety device itself caused the harm. For example, plaintiffs' lawyers target manufacturers of safety devices because the real "wrongdoer" is not an attractive or viable target. Respirator manufacturers are often named as defendants in asbestos litigation because many manufacturers of asbestos-containing products are bankrupt. The lawyer is looking for a collateral "deep pocket" to sue.

COVID-19 presents a similar situation. Nature cannot be sued, so the manufacturer of a device intended to prevent or reduce harm, such as a ventilator or safety mask, may be targeted instead. Fortunately, manufacturers of NIOSH-approved respirators obtained some liability protections in the Coronavirus Aid, Relief, and Economic Security (CARES) Act enacted in March 2020, which extended the Public Readiness & Emergency Preparedness

¹ See Kate Gibson, *Walmart Sued by Family of Worker Who Died of COVID-19 Complications*, CBS News, Apr. 8, 2020, <https://www.cbsnews.com/news/coronavirus-walmart-sued-for-wrongful-death-by-family-of-worker-who-died-of-covid-19-complications/>.

(PREP) Act of 2005 to these products. But most safety equipment does not have special liability protections and plaintiffs' lawyers are looking for ways to circumvent these protections when they apply.

Even if a manufacturer clearly labels its masks as not intended to protect a user from COVID-19, plaintiffs' lawyers may contend that the size of the product's sales must have alerted the manufacturer that consumers at least believed it would protect the user. Already, plaintiffs' lawyers have filed consumer class actions against makers of hand sanitizer, using similar theories. Hopefully, judges will see through this charade and appreciate that opening the door of liability through marginal claims against manufacturers of safety devices is against the public interest.

4. Manufacturers of Drugs that Appear to Cure or Reduce the Symptoms of COVID-19. Drug companies have long been a target of the plaintiffs' bar. Billions of dollars have flowed from manufacturers of drugs to plaintiffs' lawyers and their clients. Some of the drugs did not contain adequate warnings, but others did and were later shown not to be defective. For example, Bendectin[®], which alleviated nausea and vomiting during pregnancy, was alleged for many years to cause birth defects, to the point the manufacturer stopped selling it.² The birth-defect claims were ultimately proven false, yet for decades society lost out on the leading medicine that could help many expectant mothers.

The Bendectin[®] lesson is relevant to claims against manufacturers of drugs that may cure or alleviate the symptoms of COVID-19 and manufacturers of vaccines that may prevent the disease. Lawsuits will be brought. The PREP Act shield does not provide complete protection. The PREP Act authorizes the Department of Health and Human Services to issue a declaration to provide immunity from liability to approved countermeasures against disease outbreaks when there has been an emergency health threat. But these declarations must be clear and precise, including how long the conferred immunity will last. Manufacturers must navigate a complicated process to qualify for the PREP Act's liability shield, and it is not available for many products. There is also an exception to immunity where a defendant is found to have engaged in willful misconduct. Trial lawyers can be expected to search for every loophole.

The heading of this section refers to drugs that "appear" to be intended to cure or alleviate COVID-19. In the COVID-19 crisis, favorable publicity has sometimes arisen about drugs that the manufacturer has never suggested will provide an effective virus treatment. Nevertheless, if sales of that drug are abnormally high, some judges may allow a claim by a person who took the drug, did not get better, and suffered or died from COVID-19. The theory here would be that the drug company should have known that its product was being used for an unintended purpose. Some judges may allow claims to proceed even if the company explicitly stated its product does not treat COVID-19. Similar theories were at the heart of the Fen-phen litigation, where plaintiffs made improper use of a drug yet obtained millions in settlements. In the situation of COVID-19, judges should dismiss claims against drug companies where the company has made no claim that a drug provides an effective treatment for COVID-19.

Defenses Against the Gathering Storm of COVID-19 Tort Litigation

1. Common Law Defenses. There are important common law defenses against COVID-19-related tort litigation. As discussed previously, a lack of specific causation may provide a strong defense to many claims. If a plaintiff sued a homeowner, grocery, museum, or a restaurant, how can that plaintiff prove that particular entity caused the exposure that resulted in injury? After all, we know that COVID-19 lurks almost everywhere, so how can a claim be proven?

At a Senate Judiciary Committee hearing on May 12 titled, "Examining Liability During the COVID-19 Pandemic," witnesses suggested that such claims "cannot" be proven. In the abstract, the point is well made. When judges act as proper gatekeepers, speculative COVID-19 tort claims will be dismissed for a failure to prove specific causation.³ On the other hand, if judges let so-called "experts" opine that a person's presence in one

² See Victor E. Schwartz & Christopher E. Appel, *Roundup Cases May Be a New Example of an Old Problem: The Post Hoc Fallacy*, WLF LEGAL BACKGROUNDER, Aug. 9, 2019, <https://www.wlf.org/2019/08/09/publishing/roundup-cases-may-be-a-new-example-of-an-old-problem-the-post-hoc-fallacy/> (discussing Bendectin[®] litigation).

³ See Victor E. Schwartz, *In re Zolof MDL Judge's Rejection of Causation Testimony Provides Helpful Lesson for Bench and Bar*,

place was the specific cause of exposure that resulted in illness or death, litigation could quickly devolve into a free-for-all. For example, federal district court Judge Vince Chhabria applied a permissive gatekeeping approach to expert causation evidence in the Roundup MDL (even where he expressed serious doubt about the validity of such evidence), and now Roundup litigation advertising runs day and night.⁴ It is up to the trial judges of America to act as diligent gatekeepers to prevent baseless COVID-19 claims from being a litigation hailstorm in our courts.

Assumption of risk can also be an effective defense against COVID-19 claims if a plaintiff both knowingly and voluntarily exposed himself or herself to the virus. Unfortunately, in a number of jurisdictions, the assumption of risk defense only serves to reduce a plaintiff's damages, not eliminate a claim. In the context of COVID-19 claims, however, the public policy of encouraging people to wear protective masks and keep safe distances strongly suggests that plaintiffs who fail to do so should not be allowed to bring successful COVID-19 tort claims.

2. COVID-19 Federal Tort Reform. While tort law is generally a state-law subject, federal tort reform has been enacted under Democratic (General Aviation Recovery Act, Clinton 1994) and Republican Administrations (Teacher Protection Act, G.W. Bush, 2002) in situations that had far less national emergency implications than COVID-19. Importantly, business in the United States is entwined in interstate commerce; states can only provide limited protection.

Congress should consider closing gaps and loopholes in the PREP Act. The National Childhood Vaccine Injury Act, on the other hand, has provided an adequate liability protection for vaccine manufacturers. Action needs to be taken to assure that manufacturers of COVID-19 vaccines have reasonable protection from liability. If this action is not undertaken, it could chill the development and availability of COVID-19 vaccines.

Congress should also consider legislation to protect all entities that comply with COVID-19 public health guidelines. Businesses look to the Centers for Disease Control and Prevention and other authorities for guidance on how to operate as safely as possible during the pandemic. They should be encouraged and rewarded when they do so. These liability protections should be in place during the crisis.

3. COVID-19 State Tort Reform. States can follow the compliance approach suggested above, but they may also do more to address COVID-19 exposure and product liability claims. Alabama, Alaska, Kentucky, North Carolina, and Utah for example, have already adopted broader reforms. As the late U.S. Supreme Court Justice Louis Brandeis famously remarked, the states are "laboratories of democracy." Their specific needs will no doubt vary, but they should work to adopt an approach that best addresses COVID-19 impacts within their borders.

Conclusion

In the coming months, there will be battles in Congress, state legislatures, the courts, and the media over the validity of tort claims related to COVID-19. Will plaintiff lawyers who orchestrate litigation be regarded by the public as heroes or as opportunists who seek to exploit a worldwide pandemic? This LEGAL BACKGROUNDER offers some insights that will hopefully assist the public and policymakers in answering that question.

WLF LEGAL BACKGROUNDER, May 13, 2006, https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/legalbackgrounder/051316LB_Schwartz.pdf (discussing sound gatekeeping efforts by federal district court judge Cynthia Rufe rejecting plaintiffs' proffered expert evidence in multi-district litigation (MDL) involving anti-depressant drug Zoloft®).

⁴ See *supra* note 2 (discussing *In re Roundup Prods. Liab. Litig.*, 390 F. Supp. 3d 1102 (N.D. Cal. 2018)).