Challenges in litigating COVID-19 negligent exposure cases: Not a plaintiff's paradise

By J. Kevin Morrison and Noah A. Phillips

The extent of the devastation caused by the COVID-19 pandemic, to both life and health, continues to be carefully calculated and assessed by governments and public health agencies since the outbreak of the virus. As expected, the legal establishment has also kept a close watch over the effects of the pandemic on the legal system, paying particular attention to the rate of increase in pandemic-related tort litigation and to the types of lawsuits most likely to account for that increase.

The majority of COVID-19 negligence lawsuits allege that an employee, their family members, or a customer had contracted the virus and suffered severe illness or death due to the negligent failure of the defendant to adopt or enforce safety protocols recommended by public health agencies or to adequately protect against exposure through safety policies and practices. However, as viral infections and deaths soared in the last few years of the pandemic, there has not been a corresponding surge in these cases. Widespread fears that the pandemic would bring a nationwide tidal wave of negligence lawsuits by the victims of the virus, which would threaten the viability of struggling business and further burden an underfunded court system, have been largely quelled by various trial court rulings, appellate decisions, and legislation.

While the factual circumstances underlying COVID-19 negligence lawsuits may be as novel as the virus itself and often present issues of first instance in the courts, the majority of the legal defenses that bar these suits, typically as early as the pleading stage, are not based on equally novel legal principles. And where time-tried defenses have failed to dismiss these cases, an emerging body of legislation has developed to fill the gaps. A review of the most common claims and defenses which litigators can expect to face when litigating COVID-19 negligence lawsuits, primarily in California courts, is provided below.

The first type of fact pattern most commonly seen in exposure cases consists, predictably, of customers alleging they contracted the virus at a place of business they patronized. Plaintiffs generally allege contracting the virus due to the businesses' failure to adopt or enforce safety protocols recommended by public health agencies. The prevalence of the virus, the high rate of transmissibility, and an ever-changing standard of care, however, present too many challenges in these types of cases to merit their filing. Proving the plaintiff contracted the virus at a particular business (as opposed to anywhere else) is the main reason these cases are rare. Instead, most cases brought by consumers target cruise lines, where it is more plausible to prove the defendant is responsible for causing exposure to the virus. Nonetheless, these cases face challenges in addition to causation, including issues of duty and a reliable standard of care as guidance from the CDC related to safety protocols has been in constant flux. *See, e.g.*, *Hachinsky v. Princess Cruises*, 2:20- CV-02963 (C.D. Cal.); *Birkenholz v. Princess Cruises*, 2:20-cv-02963 (C.D. Cal.); and *Estate of Madden v. Southwest Airlines*, 1:21-cv-00672-SAG (D. Md.); *Iniguez v. Aurora Packing*, 20-L-000372 (Ill. Cir.).

Another class of cases that have dominated the landscape of COVID-19 litigation are brought by employees who allege they contracted the virus at work due to an employer's negligence in adopting or enforcing safety practices and who seek to circumvent the workers' compensation system; specifically, the exclusive remedy defense. This defense simply bars employee tort claims against an employer for injuries sustained at work unless the worker alleges intentional conduct by the employer or that the employer acted with the belief or knowledge that injury was substantially certain to occur. To avoid this statutory preemption, some cases have creatively alleged an employer's failure to adopt or enforce safety protocols is conduct that meets the intentional conduct exception. *See, e.g.*, *Diaz v. Fruit Harvest Family, Inc.*, 20CECG03608 (Cal. Sup.); *Barker v. Tyson*, 21-223 (E.D. Pa.); *Evans v. Walmart*,

2020L003938 (Ill. Cir.). But these cases have not found a sympathetic interpretation of the statutory exception and courts have deemed the conduct, albeit reckless or grossly negligent, not intentional. *See, e.g.*, *Diaz*; *Barker*.

A third category of cases in the context of COVID-19 tort litigation are referred to as "take home" cases. This type of case is perhaps the more likely to succeed past the pleading stage and pose a real threat to defendants. Factual allegations that an employee contracted the virus in the workplace and brought it home, infecting their spouse or children, characterize these cases, and the plaintiffs who bring them are the relatives of the employee, not the employee. While business interests in 30 states have persuaded legislators to adopt laws that require gross negligence to bring these cases, California stands in the minority of states lacking this requirement. In addition to California lacking an immunity statute, an appellate court recently handed down a seminal decision effectively broadening the scope of potential plaintiffs eligible to bring a take home case.

In *See's Candy v. Superior Court of California for Cty. of Los Angeles*, 73 Cal. App. 5th 66 (2021), an employee claimed she contracted COVID-19 at work, brought the virus home and infected her husband, which caused his death. The wife and children sued for the wrongful death of the decedent. Defendant sought to dismiss the lawsuit under the derivative injury doctrine, a subcategory of the exclusive remedy, which bars third-party claims deemed derivative of the employee's injury. Defendant's demurrer to dismiss the case was overruled, however. Defendant then petitioned the appellate court for writ of mandate to reverse the trial court's ruling, attempting to stretch application of the derivative injury doctrine to any injury causally linked to an employee's injury.

The appellate court rejected defendant's interpretation that a "derivative" injury includes any injury caused by an employee's injury. Instead, the court reasoned, the doctrine bars claims legally or logically dependent on the employee's injuries, such as wrongful death, loss of consortium, or bystander emotional distress claims, which are brought by the close relatives of the employee who suffered the illness or death. By contrast, the plaintiffs in *See's Candies* were not relatives suing for the wrongful death of the employee, but for the wrongful death of the spouse of the employee.

Although this recent decision may embolden prospective plaintiffs and invite more litigation, despite the court's interpretation of the derivative injury doctrine, however, "take home" cases will continue to face significant challenges in proving duty, *i.e.*, the existence of a special relationship between defendant and plaintiff, and causation, neither of which were addressed in the *See's Candies* decision.

The other remaining category of negligent exposure cases most commonly seen is where the defendant is usually a nursing home or other health care provider and the plaintiff a patient who died from a COVID-19 infection allegedly caused by lax COVID-19 provisions. Defendants have typically defended these lawsuits by seeking removal to federal court under the Federal Officer Removal statute and by invoking immunity under the Public Readiness and Emergency Preparedness Act, which confers immunity on "covered persons" who deploy "countermeasures" during a public health emergency.

These defenses have generally received unfavorable results in district courts around the nation. Consequently, appeals of these lower court rulings are pending in at least seven circuit courts throughout the country, but some courts have already demonstrated their position. *Jackie Saldana v. Glenhaven Healthcare LLC*, CV205631FMOMAAX (C.D. Cal. Oct. 14, 2020), *aff'd sub nom. Saldana v. Glenhaven Healthcare LLC*, 27 F. 4th 679 (9th Cir. 2022); *Hus Buljic et al. v. Tyson Foods Inc. et al.*, 21-1010, and *Oscar Fernandez v. Tyson Foods Inc. et al.*, 21-1012, in the 8th U.S. Circuit Court of Appeals; *Estate of Joseph Maglioli et al. v. Alliance HC Holdings LLC et al.*, 20-2833, and *Estate of Wanda Kaegi et al. v. Alliance HC Holdings LLC et al.*, 20-2834, in the 3rd U.S. Circuit Court of Appeals.

For instance, the 9th Circuit recently ruled these cases belong in state court, holding that the nursing home had "failed to establish that it was 'acting under' a federal official" and was merely complying with federal regulations, "and had not identified a duty of the federal government that it performed." The circuit court further held the PREP Act only preempts claims based on willful misconduct, not ones based on negligence and recklessness.

Health providers plan to continue their appeals all the way to the Supreme Court, however, as a split among the circuits is likely to develop and large defense law firms have begun to join the fight on behalf of these defendants for fear these rulings could affect a wider range of industries.

In sum, although the reaction from courts and legislators regarding COVID-19 exposure lawsuits has been mixed, the challenges plaintiffs will continue to face in state and federal courts will likely ensure a chilling effect on COVID-19 tort litigation and limit the rise of this type of case. Contrary to early predictions, a sharp increase in pandemic-related tort litigation is unlikely to materialize.

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