Florida Businesses Need COVID-19 Liability Protections

After weeks of business closures and stay-at-home orders aimed at curbing the spread of COVID-19, most states including Florida are beginning the gradual process of reopening. Businesses, however, face substantial uncertainty and ever-changing guidance in how to safely and expediently reopen while in the midst of an ongoing pandemic. A large part of that uncertainty stems from the threat of legal liability from customers and employees alike who might assert claims that a business exposed them to COVID-19 or failed to take adequate action to guard against the risk of exposure.

Unfortunately, that risk of legal liability is not theoretical, as the pandemic is proving to be fertile ground for lawsuits. These lawsuits span from disputes about whether COVID-19 triggers business interruption insurance coverage[1] to whether an employer has failed to provide sufficiently safe working conditions to prevent the virus's spread[2] to whether universities must issue partial tuition refunds to students who have been forced to shift their coursework online.[3] Unsurprisingly, nursing homes have become targets for lawsuits premised on their response to the pandemic.[4]

But this is just the start, and the next wave of litigation will be personal injury tort actions premised on customers' claimed COVID-19 exposure while patronizing a business. Although all lawsuits will face the substantial hurdle of showing the customer's illness was caused by the business's conduct, even weak legal claims may stigmatize the business and be persuasive to juries, on top of being costly to defend. If the goal of reopening Florida is to jumpstart the economy, Florida's businesses need greater assurance that they may do so without risking an onslaught of litigation tied to COVID-19.

Below we discuss the most likely legal basis for customers' COVID-19 exposure claims. We then outline several legislative options for limiting COVID-19 liability.

---

[1] *See, e.g.*, *Café Int'l Holding Co. v. Chubb Ltd.*, No. 1:20-cv-21641-MGC (S.D. Fla. 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. 2:20-cv-03619 (C.D. Cal. 2020).

[2] *See, e.g.*, *Rural Cmty. Workers Alliance v. Smithfield Foods, Inc.*, No. 5:20-cv-06063 (W.D. Mo. 2020).

[3] *See, e.g.*, *Egleston v. Univ. of Fla. Bd. of Trs.*, No. 1:20-cv-106 (N.D. Fla. 2020).

[4] *See, e.g.*, *Marshall v. Accordius Health LLC*, No. 20-cvs-728 (N.C. Super. Court 2020); Nikki Ross, *Coronavirus: Morgan & Morgan plans lawsuit against Opis Coquina Center*, Daytona Beach News-Journal, May 14, 2020, https://www.news-journalonline.com/news/20200514/coronavirus-morgan--morgan-plans-lawsuit-against-opis-coquina-center.

Current Law on Communicable Disease Liability

COVID-19 presents a novel circumstance for tort liability in Florida and elsewhere.[5] But other states have recognized the possibility of such an action; as the Supreme Court of Pennsylvania reasoned, "To be stricken with disease through another's negligence is . . . no different from being struck with an automobile through another's negligence."[6] For example, in an 1884 case, the court found a defendant liable for the negligent transmission of whooping cough after the defendant took his children infected with the highly contagious disease to the plaintiff's boardinghouse, infecting the plaintiff's child and causing the plaintiff's business to lose profits.[7]

Although there is no Florida case on point, it is likely that a customer asserting a cause of action for negligent transmission of COVID-19 would attempt to state a claim for negligence based on premises liability.

To state a claim for negligence, a plaintiff must prove: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff was injured as a result of that breach; and (4) the injury was proximately caused by the defendant's breach.[8] With respect to the first element, the duty of care, Florida courts have recognized a special relationship exists between businesses and their customers.[9] A business has two duties of care to its customers: (1) a duty to warn of perils that were known or should have been known to the business owner and which the customer could not discover; and (2) a duty to keep the premises reasonably safe.[10] Even where a risk is obvious, a business owner has a duty to maintain the safety of the premises.[11]

There is no analogous Florida case which would illustrate how this standard would apply when a customer claims a business failed to keep its premises reasonably safe from COVID-19.

In the context of negligent transmission of sexually transmitted diseases, Florida courts have emphasized that transmission must be foreseeable by the defendant; in other words, "[t]he linchpin of liability for imposing a legal duty to avoid negligent transmission of a sexually transmissible disease is the defendant's knowledge that he or she harbors the disease. A duty will not lie where the defendant is unaware of the condition, since the risk created by his or her sexual activity is unforeseen."[12] Similarly, in COVID-19 cases, if a business knows one or more of its

---

[5] Florida law does recognize "negligent transmission of a sexually transmissible disease" as a "variant" on the traditional tort of negligence. *See, e.g.*, *Kohl v. Kohl*, 149 So. 3d 127, 135 (Fla. 4th DCA 2014). Florida courts have also considered whether a communicable disease allegedly contracted at work is compensable under worker's compensation. *Anderson v. Anderson*, 60 So. 2d 160, 160 (Fla. 1952). But the transmission of a respiratory disease like COVID-19 as the basis of a negligence action against a business appears to be a matter of first impression in Florida.
[6] *Billo v. Allegheny Steel Co.*, 195 A. 110, 114 (Pa. 1937).
[7] *Smith v. Baker*, 20 F. 709 (S.D.N.Y. 1884).
[8] *Denson v. SM-Planters Walk Apartments*, 183 So. 3d 1048, 1050 (Fla. 1st DCA 2015).
[9] *See Ramirez v. M.L. Mgmt. Co.*, 920 So. 2d 36, 38 (Fla. 4th DCA 2005).
[10] *Denson*, 183 So. 3d at 1050.
[11] *De Cruz-Haymer v. Festival Food Mkt., Inc.*, 117 So. 3d 885, 888 (Fla. 4th DCA 2013).
[12] *Kohl*, 149 So. 3d at 135.

employees has tested positive for COVID-19, the plaintiff may be able to show that the risk of injury—contraction of COVID-19 by customers—was reasonably foreseeable.

The success of such a claim, however, will likely come down to whether the plaintiff has satisfied the element of proximate causation. To establish proximate cause for any negligence action, the plaintiff must prove that the defendant's negligence more likely than not caused the plaintiff's injury.[13] The mere possibility of causation is not enough; there must be a "reasonable basis for the conclusion that it is more likely than not that the [defendant's] conduct . . . was a substantial factor" in bringing about the plaintiff's injury.[14]

It remains to be seen how a plaintiff will show that his contraction of COVID-19 more likely than not came from exposure on the business's premises—and not at the post office, at home, or elsewhere. Although establishing proximate causation will be difficult, it will not be insurmountable, particularly if the plaintiff can offer persuasive expert testimony on the point.[15]

[13] *Aragon v. Issa*, 103 So. 3d 887, 892 (Fla. 4th DCA 2012); *see, e.g.*, *Sudbeck v. Sunstone Hotel Props., Inc.*, No. 2:04-cv-1535, 2006 WL 2728624, at *8 (D. Ariz. July 26, 2006) (finding plaintiff failed to establish proximate cause and reasoning that even where the evidence established that plaintiff contracted Legionnaires' disease sometime prior to July 8, 2002, and stayed at the defendant's resort between June 25 and 27, 2002, i.e., within the incubation period of the Legionella pneumophila bacteria, and even where there was evidence that Legionella bacteria were found in water samples collected at the resort in May 2003, "it would be sheer speculation to say that it is more likely than not that the bacteria was present at the resort in June 2002 when [plaintiff] was a guest").

[14] *Murphy v. Sarasota Ostrich Farm/Ranch, Inc.*, 875 So. 2d 767, 769 (Fla. 2d DCA 2004).

[15] *Cf., e.g.*, *Russell v. Call/D, LLC*, 122 A.3d 860, 872-73 (D.C. App. 2015) (absent expert testimony, plaintiff could prove no more than the "bare possibility" that he contracted Legionnaires' disease from sewage-contaminated water at his apartment complex).

Proposed Liability Protections for Businesses

Several states have already proposed or enacted legislation designed to protect businesses and others from COVID-19 liability, including Alabama,[16] Arizona,[17] North Carolina,[18] Oklahoma,[19] and Utah.[20]

Proposed solutions generally fall into one of three categories: (1) legislation barring any cause of action premised on transmission or exposure to COVID-19; (2) legislation authorizing such a cause of action with a heightened burden of proof and/or triggered only upon conduct that amounts to gross negligence, recklessness, or intent to harm; and (3) legislation authorizing a cause of action only when a defendant failed to comply with a duty of care imposed by a governmental rule or regulation.

Option 1: No Cause of Action

One option would be to bar any common law tort cause of action for COVID-19 exposure. Example language is provided below.

> There is no recognized common law tort for, or related to, the wrongful transmission from one individual to another of an airborne respiratory disease. To the extent that such a tort may have existed in the common law, it is hereby abrogated. . . . .

This would effectively address businesses' concerns in that any negligent transmission claim raised by a customer would be subject to swift dismissal. However, such a law would implicate the constitutional right to access to courts. The Florida Legislature may abolish a common law cause of action in only two circumstances: (1) where it authorizes a reasonable

[16] Ala. SB 330 (2020) (proposing civil immunity for businesses and others for claims of "actual, alleged, or feared exposure to or contraction of Coronavirus from the premises of a [business] or otherwise related to or arising from its operations, products or services provided on or off-premises").
[17] Ariz. HB 2912 (2020) (proposing temporary immunity unless the business acted with gross negligence and requiring COVID-19 claims to be proven by clear and convincing evidence).
[18] N.C. Session Law 2020-3 (providing immunity from civil liability for essential businesses so long as the claimed injuries did not arise from gross negligence, reckless misconduct, or intentional inflection of harm).
[19] Okla. SB 1946 (2020) (establishing immunity from civil liability for businesses if the business was in compliance or acted consistent with federal or state regulations).
[20] Utah SB 3007 (2020) (proposing immunity from civil liability except where conduct amounts to willful misconduct, reckless infliction of harm, or intentional infliction of harm).

alternative to the abolished cause of action; or (2) where it can demonstrate an overpowering public necessity for abolishing the cause of action.[21]

Here, the proposed legislation would eliminate any common law tort related to the wrongful transmission of COVID-19, without offering an alternative. Consequently, the legislation would pass constitutional muster only if it was justified by an overpowering public necessity, which should be developed through the legislative record.

Option 2: Cause of Action with Heightened Burden of Proof or Limited to Certain Defendant Conduct

Another option would be to authorize a cause of action but constrain its application to more culpable defendant conduct and/or require a heightened burden of proof to prevail.

A. Requiring Clear and Convincing Evidence

A cause of action premised upon a customer's contraction of COVID-19 on a business premises could be predicated upon a heightened burden of proof—clear and convincing evidence. Example language is provided below.

> To the extent that common law premises liability can be defined to include transmission of a communicable respiratory disease occurring on the premises, the injured party must prove by clear and convincing evidence all of the following additional elements of the cause of action:
>
> (a) The transmission actually occurred on the premises to the exclusion of any other reasonable means of transmission
>
> (b) The property owner had actual knowledge of the infection in the affected person prior to the transmission to the injured person;
>
> (c) The premises owner had the legal authority and actual ability to exclude the known infected individual from the premises prior to the time of transmission;
>
> (d) It is unlikely that the injured party did or would have contracted the communicable respiratory disease by other means; and
>
> (e) The injuries sustained are a direct and proximate cause of the transmission.

[21] *Warren v. State Farm Mut. Auto. Ins. Co.*, 899 So. 2d 1090, 1097 (Fla. 2005); *Berman v. Dillard's*, 91 So. 3d 875, 877–78 (Fla. 1st DCA 2012).

Ordinarily, in order for a plaintiff to prevail on a claim of negligence, the "greater weight of the evidence"—meaning "the more persuasive and convincing force and effect of the entire evidence in the case"—must support the plaintiff's claim.[22] Practically speaking, this means that the evidence must more likely than not confirm the plaintiff's case.[23]

In contrast, under the clear and convincing evidence standard, "the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."[24]

Requiring plaintiffs to prove their claims with clear and convincing evidence would decrease the likelihood that plaintiffs would pursue frivolous claims.

B. Limiting Liability to Intentional Conduct, Recklessness, and Gross Negligence

Another option, which could be proposed as a standalone solution or in conjunction with the use of the clear and convincing evidence standard, would be to limit COVID-19 liability to defendant conduct that is more culpable than negligence. Example language is provided below.

> The immunity provided [for businesses] shall not apply if the damage was caused by an act or omission constituting gross negligence, recklessness or conduct with an intent to harm . . . .

"Gross negligence" means conduct "that a reasonable, prudent person would know is ***likely*** to result in injury to another"; this is contrasted with simple negligence, which is "conduct which a reasonable and prudent person would know ***might possibly*** result in injury to persons."[25] Recklessness is the next level of culpability, representing conduct which a person knows results in a ***substantially greater*** risk of harm.[26] In contrast to both, intentional conduct occurs when a person is substantially certain or intends that harm will result.[27] Limiting liability to gross negligence, recklessness, and intentional conduct would ensure only the most culpable defendant conduct related to COVID-19 is the subject of costly litigation.

---

[22] Fla. Std. Jury Instr. (Civ.) 401.3, 401.21.
[23] *Gross v. Lyons*, 763 So. 2d 276, 280 n.1 (Fla. 2000).
[24] *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994).
[25] *Boston ex rel. Estate of Jackson v. Publix Super Mkts., Inc.*, 112 So. 3d 654, 658–59 (Fla. 4th DCA 2013) (internal quotation marks, omissions, citations, and alterations omitted; emphasis added).
[26] *Dyals v. Hodges*, 659 So. 2d 482, 484 (Fla. 1st DCA 1995).
[27] Restatement (Second) Torts § 500 comment f.

Option 3: Limited Cause of Action Tied to Compliance with Applicable Governmental Standards

A third option would essentially allow liability to attach only if the defendant business failed to comply with an applicable governmental rule or regulation regarding COVID-19 prevention or containment. Example language is provided below.

> As applied to any action in tort, unless such duties are specifically required by an applicable governmental rule or regulation and can reasonably be performed with existing and available resources, a property owner does not have the legal duty to:
>
> (a) Warn persons entering the premises of the danger of contracting a communicable respiratory disease;
>
> (b) Screen persons entering or remaining on the premises for communicable respiratory disease;
>
> (c) Bar or remove persons known to have a communicable respiratory disease from the premises;
>
> (d) Enforce social distancing or other rules of behavior;
>
> (e) Furnish or require personal protective equipment or anti-bacterial or anti-viral supplies; or
>
> (f) Close the business or substantially impact business operations merely because of the general danger that individuals may contract a communicable respiratory disease while on such premises.

Florida recognizes a somewhat similar defense in the context of products liability. Under the "government rules defense," a product manufacturer or seller is not liable if, at the time the claimed defective product was sold or delivered to the plaintiff, the product complied with relevant federal or state codes, statutes, rules, regulations, or standards designed to prevent the type of harm at issue.[28]

Under the legislation proposed above, liability would not attach at all for the business's purported failure to comply with one of the enumerated duties, unless that enumerated duty was imposed by a governmental rule or regulation.

But the viability of such an option is questionable given the ever-shifting and vague guidelines provided to businesses concerning prevention and containment of COVID-19. There is also the question of what level of compliance is required of a defendant before the defendant's conduct is immune. Absent concrete, easy-to-follow guidelines, immunity premised upon compliance with governmental rules or regulations will likely not offer much immunity at all.

[28] *See* § 768.1256(1), Fla. Stat.

Further, even with such a safe harbor in place, enterprising plaintiff's attorneys will test the limits of the cause of action.

Recommendation

To restore Florida's economy, it is critical to remove the cloud of fear of liability hanging over the business community. The Florida Justice Reform Institute recommends that the Florida Legislature adopt legislation either abrogating any common law tort action premised on COVID-19 (Option 1) or authorizing only a limited cause of action subject to a heightened burden of proof—clear and convincing evidence—and defendant conduct that is grossly negligent, reckless, or intended to cause harm (Option 2).