



## COVID-19: FEDERAL LIABILITY PROBLEMS AND SOLUTIONS

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# COVID-19: Federal Problems and Solutions<sup>†</sup>

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For example, law firms across the country have brought consumer-fraud class actions challenging the marketing of alcohol-based hand sanitizer; lawsuits alleging unconscionable price increases for household items; breach-of-contract

claims alleging that refund and cancellation practices offered by gyms and ticket services are unfair; and lawsuits against schools and colleges that were forced to shut down as a result of the pandemic. According to one prominent plaintiffs' lawyer,

"[w]e've never been busier."<sup>1</sup> As the public health emergency continues, the trial bar undoubtedly will expand upon these theories and bring a flurry of new, opportunistic lawsuits.

This edition of *ILR Briefly* is divided into two parts. Part I addresses four key liability issues that are—and should be—of the greatest concern to the business community and policymakers:

- Exposure-based claims
- Product liability actions
- Medical liability claims
- Securities litigation

For each type of claim, we discuss the potential liability risks it poses and potential federal legislative solutions to the impending litigation minefield.

Part II addresses potential administrative safeguards with respect to several other potential COVID-19-related sources of liability, such as:

- The federal False Claims Act (FCA)
- The Telephone Consumer Protection Act (TCPA)
- The Worker Adjustment and Retraining Notification (WARN) Act and other federal workplace safety and labor laws
- Securities laws

# Key Liability Concerns and Potential Legislative Solutions

## Exposure-Based Lawsuits

A primary area of interest for plaintiffs' lawyers is likely to be exposure-based lawsuits related to the coronavirus. As illustrated by already-filed lawsuits, employees, consumers, or other third parties are likely to bring lawsuits alleging that they were exposed to COVID-19 in a particular business facility as a result of a company's alleged action or inaction. This concern is not just for "traditional" businesses, but also includes schools, childcare facilities, churches, and charities—virtually anywhere people congregate. The legal theories underlying these claims may range from simple negligence to public nuisance.

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such a business heeded government guidance related to COVID-19 or whether the business was actually the source of any relevant exposure. The brewing litigation storm is a recipe for economic havoc. Businesses that

performed the civic duty of remaining open over the past several weeks to provide their customers essential services (e.g., food, medicine) may face a tidal wave of lawsuits. Other businesses—particularly smaller ones—will be forced to choose between: (1) rolling the dice on being hit with potential exposure litigation; or (2) keeping their operations shut down (and eventually facing bankruptcy), regardless of what governmental guidance they are receiving about reopening.

### NEGLIGENCE LAWSUITS

The plaintiffs' bar has already seized on negligence as a potential avenue for litigation, advertising coronavirus-exposure lawsuits throughout the country.<sup>2</sup> Indeed, numerous exposure-based lawsuits have

already been filed,<sup>3</sup> and as the pandemic continues to unfold, plaintiffs' lawyers likely have their eyes on a wide array of potential targets, including smaller businesses. According to one article, "[t]he concerns are hitting Main Street as some restaurants, movie theaters, and other businesses have reopened in certain states, including Georgia and Texas."<sup>4</sup>

Companies may also face lawsuits by consumers who claim to have developed coronavirus while patronizing their establishments. Plaintiffs who bring such suits will have to establish the threshold element of negligence—i.e., breach of a standard of care owed them by the defendant. Although one might think that compliance with government or industry standards precludes claims for negligence as a matter of law, the laws of many states provide otherwise.<sup>5</sup> In other words, whether the defendant was generally following government advice from the Centers for Disease Control and other relevant federal or state agencies would not suffice to defeat an exposure-based claim, at least in certain jurisdictions.

While plaintiffs will have to pass the hurdle of causation—i.e., that they contracted the

coronavirus as a direct result of the business' act or failure to act—nonetheless, some of these lawsuits will likely withstand motions challenging the admissibility of expert causation opinions, particularly in magnet state courts that apply lax expert requirements.<sup>6</sup> And although federal courts tend to apply more exacting standards for expert evidence

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than their state counterparts, exclusion remains the exception, not the norm.<sup>7</sup>

Some judges generally take the position that the soundness of expert opinions should be decided by juries rather than courts, and some judges may hesitate to dismiss cases that arise from a national emergency, especially where the plaintiff had a serious case of COVID-19. As a result, even expert opinions that are based on questionable science could potentially evade judges' gatekeeping responsibility, landing them in front of

sympathetic juries who may be inclined to help coronavirus victims regardless of whether causation is satisfied.

## **PUBLIC NUISANCE**

Plaintiffs' lawyers may also try to bring exposure-based lawsuits premised on public nuisance. In most states, a public nuisance is an unreasonable interference with a right common to the general public.<sup>8</sup> During the Spanish Flu epidemic, various local government entities declared public gatherings and other mass events to be public nuisances.<sup>9</sup> In addition, the United States has previously sought—and obtained—injunctive relief based on the theory that a defendant's unsanitary and unhygienic conditions constituted a public nuisance.<sup>10</sup>

Plaintiffs may try to exploit these precedents and commence public nuisance lawsuits related to the COVID-19 pandemic. For example, plaintiffs might allege that an individual or company created a situation in which the public was at an increased risk of exposure to COVID-19, such as a large public gathering. Although certain courts have previously cautioned against using public nuisance as a basis for vindicating mass tort actions

(e.g., the New Jersey Supreme Court during the sprawling lead paint litigation),<sup>11</sup> other courts have held differently (e.g., courts overseeing cases related to the opioid crisis).<sup>12</sup> And those that have endorsed the use of public nuisance in such circumstances have employed watered-down causation standards.<sup>13</sup> This critical distinction between public nuisance and simple negligence makes the former a more attractive theory of liability for plaintiffs and increases the likelihood that plaintiffs' lawyers may ultimately pivot to this line of litigation.

## SOLUTIONS

Whether couched in terms of simple negligence or public nuisance, exposure-based lawsuits could undermine the economic and social recovery of our country if they are not limited to legitimate circumstances. To address these concerns, Congress should enact federal legislation providing some basic liability protections for individuals and businesses against personal injury claims related to actual or alleged exposure to COVID-19. Such legislation should have two primary components.

### *Liability Protection for Those Following Government Standards*

First, legislation should provide protection to individuals and businesses from exposure-related lawsuits, provided they were relying on and generally followed applicable government standards and guidance related to the coronavirus. This federal minimum (or "floor") for liability

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protection would avoid a checkerboard of disparate standards regarding exposure-based COVID-19 lawsuits and promote a degree of uniformity and predictability. A reasonable exception to the liability protections provided could be made for cases involving gross negligence or willful misconduct. Limiting exposure-based lawsuits in this manner would discourage lawsuits against businesses that heeded government guidance related to

the coronavirus while preserving the ability of individuals with meritorious claims arising out of actual misconduct to obtain relief.

### *Federal Jurisdiction Based on Minimal Diversity*

Second, basic liability protections passed by Congress should establish federal jurisdiction over all coronavirus exposure lawsuits

where the parties are minimally diverse (that is, where any plaintiff's citizenship differs from any defendant).<sup>14</sup> Such a provision would allow for more coordination (where appropriate) with respect to discovery and other expensive aspects of litigation and avoid the prospect that certain magnet state courts will dictate the national norms in such larger-scale interstate litigation.

Given the sheer number of COVID-19 cases in the United States, lawsuits alleging exposure to the virus are inevitable. As a result, and to mitigate the risk of spurious litigation that would frustrate the nation's economic and health response to the pandemic, Congress should enact commonsense liability protections that would still allow legitimate claims to proceed as appropriate.

# Product Liability

Manufacturers, sellers, donors, and users of products that protect against, treat, or test for COVID-19 may also be the target of litigation. Plaintiffs' lawyers have already filed labeling- and advertising-based class actions related to the COVID-19 pandemic, including lawsuits challenging the marketing of alcohol-based hand sanitizers.<sup>15</sup> The gist of these lawsuits is that hand-sanitizer manufacturers are falsely advertising the products as preventing the flu and other viruses, including COVID-19.

As the pandemic continues, however, plaintiffs' lawyers are likely to turn their attention to more traditional defect-based product liability theories focused on products being used to prevent, treat, or test for COVID-19, including ventilators, respirators, and essential personal protective equipment. Although the Public Readiness and Emergency Preparedness Act (PREP Act) will protect against some of these lawsuits, many essential products and classes of businesses are currently outside that statute's reach and vulnerable to litigation abuse.

The PREP Act was enacted in 2005 to incentivize contributions of critical resources in times of crisis. The PREP Act authorizes the Secretary of Health and Human Services (HHS) to issue a declaration immunizing individuals and entities ("covered persons") from liability associated with

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the use of medical "countermeasures."<sup>16</sup> A "covered person" under the PREP Act is a person who manufactures or distributes a countermeasure; a program planner of a countermeasure; or a qualified person who prescribes, administers, or dispenses a countermeasure.<sup>17</sup> "If all requirements of the PREP Act and the declaration are met, immunity covers claims for loss sounding in tort or contract, as well as claims for loss relating to

compliance with local, state, or federal laws, regulations, or other legal requirements."<sup>18</sup>

On March 10, 2020, the HHS Secretary issued a Declaration under the PREP Act related to the COVID-19 pandemic, triggering a range of countermeasures by certain covered persons.<sup>19</sup> "Any drug, device, or biological product that is approved, cleared, or licensed by the FDA and is used to diagnose, mitigate, prevent, treat, cure, or limit the harm of COVID-19 is a covered countermeasure."<sup>20</sup>

In addition, any drug, device, or biological product authorized for emergency use with respect to COVID-19

under an Emergency Use Authorization (EUA), described in Emergency Use Instructions (EUI) issued by the Centers for Disease Control, or being researched under certain investigational provisions to treat COVID-19 is also a covered measure.<sup>21</sup> The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) amended the PREP Act to add respirators, which may not be medical devices, to the list of covered countermeasures,

as long as they are approved by the National Institute for Occupational Safety and Health and the Secretary of HHS determines their use to be a priority during a public health emergency.<sup>22</sup>

## **SOLUTIONS**

The liability protections delineated by the Declaration would cover a wide range of scenarios that might ordinarily support claims for product liability against manufacturers and sellers of pharmaceuticals or medical devices. However, it is unclear whether the PREP Act covers other critical personal protective equipment and other materials necessary to combatting the coronavirus. In addition, it is unclear whether the PREP Act applies to the corporate “Good Samaritans” that are trying to donate (rather than manufacture or sell) essential equipment. And the law currently does not protect end-users of these critical products from potential liability either, even if they are acting in accordance with government standards and guidance. Congress should expand the reach of the PREP Act to cover these additional products and classes of individuals and businesses and make clear that these expansions are retroactive to the beginning of the pandemic.

## **Coverage for Products Not Subject to EUAs**

A key point of uncertainty is whether a product approved or cleared for use by the FDA or the EPA—but which does not have a COVID-specific clearance or approval—is covered by the PREP Act. Congress should provide that a product need not be subject to an EUA to receive PREP Act protection. Rather, any product approved, licensed, or cleared by the FDA or the EPA—for example, hand sanitizers and EPA-registered disinfectants (which remain critical products during the ongoing pandemic)—and that the Secretary of HHS determines to be a priority for use during a public health emergency should be deemed to be a covered countermeasure. Such a modest expansion of the PREP Act would incentivize further production of products that are instrumental to our national response to the coronavirus and protect those who have already been part of the response.

## **Covered Persons**

The PREP Act only covers manufacturers, distributors, and program planners of countermeasures, as well as qualified individuals who prescribe, administer, or dispense such countermeasures. It is unclear whether companies not ordinarily involved in

manufacturing and selling personal protective equipment, ventilators, or respirators would qualify for PREP Act protection. Congress should expand the definition of covered persons to protect additional classes of individuals and entities using countermeasures, including—for example, businesses and individuals who donate products that otherwise meet the requirements of a countermeasure but that are not normally engaged in the manufacture or distribution of medical products or countermeasures. Similarly, Congress should extend PREP Act protection to ultimate end-users of countermeasures who act in accordance with government standards and guidance. These expansions of the PREP Act would both incentivize contributions of critical medical products during the ongoing pandemic and promote their essential usage.

The protections already provided by the PREP Act can serve as a powerful tool in some of the cases likely to be filed against manufacturers and sellers of critical medical products. However, it potentially leaves out critical products, as well as classes of individuals and businesses that merely seek to contribute to the coronavirus response without fear of being sued.



# Medical Liability

Although medical liability is a creature of state law, there is a compelling interest in limiting the liability exposure of those who are on the front lines of the pandemic. As one prominent health care defense attorney observed, “If a provider is saying, ‘I can’t provide care because I’m afraid of being sued,’ that’s a problem.”<sup>23</sup> Notably, Section 3215 of the CARES Act provides that physicians and other health care professionals who provide volunteer medical services during the public health emergency related to COVID-19 cannot be held liable for providing such services that relate to the diagnosis,

prevention, or treatment of COVID-19, or the assessment or care of a patient related to an actual or suspected case of COVID-19.<sup>24</sup> The protection is not absolute, providing exceptions for cases involving gross negligence, recklessness, or willful or criminal misconduct.<sup>25</sup>

However, the protections of the CARES Act are limited to the provision of voluntary health care services by individual health care professionals; the law does not include any

liability protection for hospital systems or compensated health care providers. There is a compelling reason for extending such protections to health care providers as well as health care facilities whose jobs require that they render COVID-19 medical services, particularly given that those jobs oblige

*“ There is a compelling reason for extending such protections to health care providers as well as health care facilities whose jobs require that they render COVID-19 medical services, particularly given that they are being forced to put their own lives at risk. ”*

them to put their own lives at risk. Indeed, several states have already recognized as much, carving out their own liability protections for health care providers. For example, a recently enacted law in New York not only offers liability protections to “health care providers for the treatment of coronavirus patients but provides a legal haven for any medical care given by a provider impacted by the COVID-19 outbreak.”<sup>26</sup> Similarly, Illinois Governor J.B. Pritzker recently issued COVID-19

Executive Order No. 17, which provides civil protection for health care facilities, providers, and volunteers rendering assistance to the state by providing health care services in response to COVID-19.<sup>27</sup> For health care facilities, “rendering assistance” is defined broadly, covering such actions as cancelling or postponing elective procedures, increasing the number of beds, and preserving protective equipment.<sup>28</sup>

## SOLUTIONS

As Congress assesses additional rounds of COVID-19-related legislation, it should seriously consider extending the protections that

currently apply to volunteer health care providers to health care facilities and compensated health care providers as well. It should also make clear that any such new provisions are retroactive to the beginning of the pandemic. These individuals and entities are indispensable to our nation’s response to the ongoing pandemic, and they should be able to carry out their critical roles without fear of being the subject of frivolous lawsuits.

# Federal Securities Litigation

The COVID-19 pandemic is likely to spawn event-based securities class actions. These are cases typically filed when a public company's stock declines following a negative event—e.g., a recall of a product from the market or a public crisis. However, past crises have precipitated event-based securities class actions and the coronavirus pandemic will likely encourage similar lawsuits. For example, plaintiffs' lawyers filed a spate of securities class actions in the wake of the financial crisis, with the percentage of filings increasing by nearly 20 percent in 2008 alone.<sup>29</sup>

Securities fraud claims should not succeed simply because a company's stock fell after the pandemic. For one thing, the element of loss causation requires proof that the drop in a company's stock price was caused by purported fraud rather than market forces.<sup>30</sup> At least with respect to lawsuits arising out of a company's alleged misstatements regarding the economic impact of the coronavirus, convincing a jury that the decline in a company's stock price was more a function of alleged fraud than a result of the global

pandemic and concomitant turbulent market will be difficult. The requirement of scienter—i.e., that the defendant acted with a “wrongful state of mind”<sup>31</sup>—will also be a significant challenge for plaintiffs given the

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lack of information regarding the virus and its implications for economic activity in the United States.

At bottom, the nature of the ongoing pandemic and the multiple substantive elements of federal securities law claims will likely impact the trajectory of these lawsuits in the federal courts. In addition, corporate disclosures relating to performance, projections and the potential impact of the virus

often will be viewed in hindsight; and the context—that is, the specific disclosures and factual circumstances underlying each case—may significantly affect potential liability. Careful attention to the drafting of disclosures can help avoid potential liability, especially those surrounding forward-looking statements.

## SOLUTIONS

Although these defenses and practices should help minimize potential liability, defeating meritless securities lawsuits will not come without tremendous costs, including expensive motion practice and potentially burdensome discovery. The impact of any potential wave of frivolous securities class actions could be mitigated by sensible federal

legislation with the key provisions outlined below.

### *Exclusive Federal Jurisdiction*

The legislation should provide that securities lawsuits involving alleged fraud related to COVID-19 would have to be brought in federal court. Although Congress has already vested exclusive federal jurisdiction over claims arising under the Securities Exchange Act, plaintiffs can choose to

bring Securities Act claims in federal court or state court.<sup>32</sup> And although defendants generally may remove any federal claims filed in state court to federal court, Congress expressly prohibited defendants from removing lawsuits brought exclusively under the Securities Act from state court to federal court.<sup>33</sup>

Keeping all COVID-19 securities lawsuits in the federal court system—including those that involve ancillary state-law claims—is appropriate for multiple reasons. In the first place, federal judges are likely to have greater expertise to understand and properly vet federal securities claims than their state counterparts. In addition, claims filed in—or removed to—federal court would be governed by federal procedural rules, which require more careful pleading than many states’ rules. And vesting exclusive jurisdiction over COVID-19-related securities lawsuits would protect out-of-state companies from local biases that have long plagued certain state courts.

### ***Staying all Proceedings Until the Expiration of the President’s Emergency Declaration***

Legislation should also provide for a temporary stay of

proceedings until a certain period after the date on which the President rescinds his declaration of a national emergency. This stay would be separate from and in addition to the generally applicable stay pending motions to dismiss that obtains under the Private Securities Litigation Reform Act (PSLRA). Such a stay would ensure that American businesses are able to focus

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on pressing health and economic recovery issues rather than responding to potentially meritless securities class actions with early motions to dismiss, answers, or discovery.

### ***Heightened Pleading Standard***

Pursuant to the PSLRA, the complaint in a securities fraud action must “with respect to each act or omission ... state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”<sup>34</sup> The purpose of this provision was

“to curtail the filing of meritless lawsuits.”<sup>35</sup> According to its drafters, the PSLRA was designed to eliminate the “race to the courthouse” in which plaintiffs “filed frivolous suits without any research into their validity.” The PSLRA has successfully provided federal judges with an important tool to help weed out frivolous securities suits. Extending the particularity requirement to all elements of securities fraud claims would provide an additional level of protection against meritless COVID-19 lawsuits.

Recent statements by prominent plaintiffs’ lawyers denying any plans to bring reflexive COVID-19-related securities lawsuits

are encouraging,<sup>36</sup> but it remains to be seen whether those representations will hold true—especially considering the fact that multiple COVID-related securities cases have already been filed.<sup>37</sup> In reality, and if past crises are any lesson, the singular event of the coronavirus itself, which has wreaked havoc on the stock market, is likely to generate significant securities litigation activity, including frivolous claims, unless Congress intervenes.

# Other Potential COVID-19 Litigation and Regulatory Solutions

## False Claims Act

The FCA generally provides that any person who knowingly submitted false claims to the government is liable for triple the government's damages plus a minimum penalty of between \$11,665 and \$23,331.<sup>38</sup> A key feature of the FCA is that the United States is not the only entity that can bring suit under the statute; in addition, private *qui tam* relators may also sue on behalf of the federal government and recover generous bounties.<sup>39</sup> When a relator brings a lawsuit, the United States can intervene if it seeks to pursue the case itself, allow the suit to continue privately, or move to dismiss.<sup>40</sup> The COVID-19 pandemic is likely to lead to an increase in FCA lawsuits.

Attorney General William Barr has announced that the Department of Justice (DOJ) will “prioritize the investigation and prosecution of Coronavirus-related fraud schemes” and established a national hotline

for whistleblowers to report suspected fraud.<sup>41</sup> This is likely to interest the plaintiffs' bar, which is eager to enter the fray,

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as exemplified by multiple law firms urging would-be relators to come forward and pursue *qui tam* actions relating to COVID-19.<sup>42</sup> The problem is that plaintiffs' lawyers are likely to bring lawsuits that veer far away from the kinds of fraudulent schemes highlighted by the Attorney General (e.g., price-gouging, phishing emails or texts, and fake cures), saddling American businesses with vexatious litigation. For example, law firms may

specifically target those on the front lines in fighting the COVID-19 pandemic, such as nursing homes and hospitals, alleging hyper-technical (i.e., non-safety-related) violations of conditions of participation in Medicare and Medicaid and other federal programs. Alternatively, the plaintiffs' bar might turn its attention to lenders of federal money under the recently enacted CARES Act, who relied in good faith on representations made by those receiving the money.

### SOLUTIONS

To mitigate the risk of frivolous COVID-19 *qui tam* actions, the DOJ should apply heightened scrutiny to FCA lawsuits related to the coronavirus brought by private relators. The Attorney General could adopt a policy providing that the federal government will not countenance—indeed, will seek to dismiss—*qui tam* lawsuits that are based on mere technical violations



of federal regulations or are otherwise at odds with federal policies intended to mitigate the effect of the pandemic.

Further, federal agencies have sought to encourage lending under the CARES Act by declaring that banks and other lenders will be held harmless for alleged improprieties

committed by borrowers in connection with obtaining federal money.<sup>43</sup> That important federal policy would be frustrated if private law firms could proceed with litigation against lenders based on their good-faith reliance on attestations made by borrowers. While the allegedly fraudulent borrower could

remain liable under the FCA, a lender should be immune from FCA liability under the hold harmless policy. Accordingly, the Attorney General should adopt a policy making clear that any such lawsuits would be directly at odds with federal policy and, as appropriate, be the subject of swift motions to dismiss.

## Telephone Consumer Protection Act

“Congress enacted the TCPA to address certain practices that invade consumer privacy and threaten public safety.”<sup>44</sup> The TCPA generally prohibits automated voice calls and text messages to wireless telephone numbers and other specific recipients, with various enumerated exceptions.<sup>45</sup> However, the TCPA expressly exempts from its reach calls for “emergency purposes”<sup>46</sup>—i.e., “calls made necessary in any situation affecting the health and safety of consumers.”<sup>47</sup> The FCC recently declared that “the COVID-19 pandemic constitutes an ‘emergency’ under the Telephone Consumer Protection Act ... and that consequently hospitals, health care providers, state and local health officials, and other government officials may lawfully communicate information about the novel coronavirus as well as

mitigation measures without violating federal law.”<sup>48</sup>

Although the FCC has rightfully protected hospitals, doctors, and government entities from TCPA liability arising out of automated COVID-19-related calls, it has left a host of other businesses vulnerable to lawsuit abuse, including grocery store delivery companies and even manufacturers and providers of “home test kits.” These companies remain acutely at risk under the TCPA because they have no choice but to rely on phone and text messages for communicating with consumers, who have largely been relegated to their homes indefinitely during the ongoing pandemic. In addition, financial institutions seeking to place COVID-19-related calls to their customers regarding mortgage payments and other essential activities are also left out of the

declaratory ruling. As a recently filed petition urging the FCC to expand its declaration explains: “If financial institutions cannot freely communicate with consumers, it will thwart the directives issued by the [Consumer Financial Protection Bureau] and the Federal banking agencies encouraging financial institutions to ‘work constructively’ with consumers impacted by COVID-19. Constructive engagement with consumers is best achieved by proactive communication via automated phone call or text message by the institution.”<sup>49</sup>

The potential for exorbitant statutory damages in TCPA class actions risks further economic devastation for businesses already hit hard by the ongoing pandemic. The TCPA sets statutory damages at a minimum of \$500 per violation and authorizes three

times that amount for any willful violation.<sup>50</sup> “Just considering the base damages amount of \$500 per violation available under the TCPA, it is easy to see how those damages can multiply, especially when the damages are set at a flat \$500 for prohibited autodialed or prerecorded calls or facsimiles ... .”<sup>51</sup>

## SOLUTIONS

In short, American companies face the prospect of sweeping statutory damages based on hyper-technical violations of a federal law that the FCC has recognized is designed to promote “public safety.” At a time when the vast majority of the American populace has been ordered to stay home due to the COVID-19 emergency,

hampering businesses’ ability to communicate with consumers is unwise and should be discouraged. Accordingly, the FCC should expand its limited declaratory ruling, making clear that businesses beyond those providing medical services are also covered by the “emergency” exception set forth in the TCPA.

## The WARN Act and Other Labor Laws

The WARN Act requires “covered” employers to provide 60 days of advance notice of certain plant closings and mass layoffs.<sup>52</sup> The statute provides a private cause of action under which an aggrieved employee can obtain back pay and benefits, including the cost of medical expenses incurred during the employment loss, which would have been covered under an employee benefit plan if the employment loss had not occurred.<sup>53</sup> In grappling with the unprecedented economic burdens imposed by the ongoing COVID-19 pandemic, many businesses have been forced to undertake cost-cutting measures, including implementing temporary or permanent employee layoffs. More than 30 million Americans have already filed for unemployment benefits.<sup>54</sup> These layoffs could potentially

open the door to a wave of class action litigation alleging violations of the WARN Act, which would further burden American businesses attempting to stay afloat during the current crisis.<sup>55</sup> In addition, multiple other federal statutes deal with workplace safety issues as well as liability for other workplace-related conditions.<sup>56</sup>

## SOLUTIONS

The U.S. Department of Labor (DOL) recently issued a set of Frequently Asked Questions pertaining to the applicability of the WARN Act related to the ongoing pandemic.<sup>57</sup> However, that document raises more questions than it answers, particularly with respect to the applicability of two potential exceptions to liability: the “unforeseen business circumstances” and “natural

disasters” exceptions.<sup>58</sup> Notably, California Governor Gavin Newsom recently issued an executive order that actually suspended some of the requirements under California's analogous WARN Act and ordered the state's labor agency to issue guidance on the suspension.<sup>59</sup> The administration should implement similar regulatory changes, waiving federal WARN Act requirements during the pendency of the COVID-19 pandemic. If necessary, Congress could buttress those protections with federal legislation. In addition, DOL could provide additional clarifications, guidance, and protections under the other statutes under its purview that deal with workplace safety issues as well and other workplace-related conditions impacted by the COVID-19 pandemic.

# Securities Laws

As discussed above, plaintiffs' lawyers may seek to bring meritless securities lawsuits related to COVID-19, most notably including potential event-based lawsuits challenging a company's post-pandemic statements that are allegedly rendered false due to the fast-moving changes to the health and business environment.

There is also a risk of litigation based on alleged mis-statements (and alleged auditor failures) in financial statements themselves. After all, financial statements are heavily reliant on current market conditions and projections, all of which are tremendously uncertain due to the pandemic and therefore are highly susceptible to second-guessing in litigation if things do not turn out in accordance with the estimates embodied in the financial statements.

## SOLUTIONS

Beyond the legislative solutions discussed above, which would generally apply to any COVID-19-related securities lawsuits, the Securities and Exchange Commission (SEC) and the Public Company Accounting Oversight Board (PCAOB) might consider using their own respective regulatory authorities with respect to financial

statements and auditor opinions in particular. For example, a reasonable solution would be for the SEC and PCAOB to require inclusion in financial statements and audit opinions of the equivalent of "black box" warnings stating that due to the tremendous uncertainties flowing from the pandemic and its effect on the economy, the elements of financial statements that are determined on the basis of projections of future business or market conditions or by applying "mark to market" standards (and whatever else) are much more difficult to determine, and therefore users of the financial statements should exercise special caution. While this would not necessarily preclude all litigation, it would make it somewhat more difficult to establish reliance as well as impact on market price for these types of securities lawsuits.

Furthermore, the SEC could utilize the rulemaking authority conferred in the PSLRA<sup>60</sup> that indicates: "In addition to the exemptions provided for in this section [which is the section dealing with forward-looking statements], the Commission may, by rule or regulation, provide exemptions from or under any provision of this title, including with respect to liability

that is based on a statement or that is based on projections or other forward-looking information, if and to the extent that any such exemption is consistent with the public interest and the protection of investors, as determined by the Commission."<sup>61</sup> This authority could be used, for example, to bar liability for statements about a company's plans or prospects for getting back to business, resuming sales or profitability, or other statements as long as suitable warnings were attached.

Alternatively, the SEC could characterize all such statements as opinions necessitating proof of subjective knowledge of falsity as well as eliminate, or limit, the ability of plaintiffs' lawyers to seize upon vague pre-pandemic statements of emergency preparedness to argue that the company misrepresented its readiness and therefore is liable for stock price drops post-pandemic.

Finally, the SEC could address unjustified financial statement and/or auditor opinion-based liability by limiting circumstances in which a lawsuit could be filed; for example, by requiring subjective knowledge of falsity.

# Conclusion

While the focus of the American public has been on mitigating the health consequences of the COVID-19 pandemic, some plaintiffs' lawyers have made clear that they have different plans: burdening American businesses with meritless and abusive civil litigation. The impact of the approaching litigation storm could be tempered to some degree by various legislative measures: limiting liability for exposure-based COVID-19 lawsuits; imposing commonsense procedural

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safeguards against COVID-19-related securities class actions; expanding the scope of the

PREP Act; and limiting liability for healthcare personnel and facilities on the front lines of the nation's pandemic response. In addition to these solutions, the federal government should consider various administrative remedies to minimize the risk of vexatious litigation on other fronts, including with respect to COVID-19-related lawsuits brought under the FCA, the TCPA, the WARN Act, and the securities laws.



# Endnotes

- † This edition of *ILR Briefly* was prepared by John Beisner and Jordan Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP.
- 1 Xiumei Dong, *The Coming Wave Of COVID-19 Class Actions*, Law360 (Apr. 21, 2020).
- 2 *Newland & Newland, LLP Helps Clients Seek Compensation for Viral, Bacterial, and Toxic Illness*, Newland & Newland, LLP (Mar. 13, 2020), <https://www.newlandlaw.com/press-releases/newland-newland-llp-helps-clients-seek-compensation-for-viral-bacterial-and-toxic-illness>; see also, e.g., The Editorial Board, *Stopping a Lawsuit Epidemic*, Wall St. J. (Apr. 23, 2020).
- 3 See, e.g., *Evans v. Walmart, Inc.*, No. 2020L003938 (Ill. Cir. Ct. Cook Cty. filed Apr. 6, 2020); *Archer v. Carnival Corp. & PLC*, No. 4:20-cv-02381-PJH (N.D. Cal. filed Apr. 8, 2020); *de los Angeles v. Life Care Ctrs. of Am. Inc.*, No. 20-2-07689-9 (Wash. Super. Ct. King Cty. filed Apr. 10, 2020).
- 4 Amanda Bronstad, *As Businesses Reopen, Lawsuits Loom Over COVID-19 Exposure*, Law.com (May 1, 2020).
- 5 *Berretta v. Tug Vivian Roehrig, LLC*, 259 F. App'x 343, 344-45 (2d Cir. 2007) (noting that "a possible tortfeasor may not rely solely upon its adherence to industry standards, customs, or practices as a *per se* defense to a negligence claim"); *Cerretti v. Flint Hills Rural Elec. Coop. Ass'n*, 837 P.2d 330, 336 (Kan. 1992) ("[C]onformity with an industry-wide standard is not an absolute defense to negligence. While it may be evidence of due care, compliance with industry standards, or standards legislatively or administratively imposed, does not preclude a finding of negligence where a reasonable person would have taken additional precautions under the circumstances."); *Pierce v. Platte-Clay Elec. Coop., Inc.*, 769 S.W.2d 769, 772 (Mo. 1989) (en banc) ("[W]e again hold that ... compliance with an industry's own safety codes or standards is never a complete defense in a case of negligence.").
- 6 For instance, Missouri Appeals Court Judge Kurt S. Odenwald has observed that out-of-state plaintiffs flock to St. Louis City court because the "jury pool [is] much more friendly, and they see that the requirements for expert-witness testimony in Missouri is less than [that required by other jurisdictions under] *Daubert*." Oral Args. Tr. 52:13-18, *Estate of Fox v. Johnson & Johnson*, No. ED104580 (Mo. Ct. App. May 10, 2017); see also *Walsh v. BASF Corp.*, 191 A.3d 838, 844 (Pa. Super. Ct. 2018) (employing the *Frye* standard of review to expert testimony instead of the federal *Daubert* standard), *appeal granted*, 203 A.3d 976 (Pa. 2019) (per curiam) (table).
- 7 See, e.g., *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001) (Rule 702, which governs the admissibility of expert testimony, "clearly 'is one of admissibility rather than exclusion'" (citation omitted)).
- 8 See, e.g., 58 Am. Jur. 2d Nuisances, Public Nuisance § 189 (2020).
- 9 See, e.g., *Globe Sch. Dist. No. 1 of Globe, Gila Cty. v. Bd. of Health of Globe*, 179 P. 55 (Ariz. 1919) (noting that public health board had declared that gatherings of people during Spanish Flu epidemic were a public nuisance); *Benson v. Walker*, 274 F. 622, 623 (4th Cir. 1921) (county declared traveling fairs and circuses a "menace to the health of the people" during the Spanish flu epidemic).
- 10 *United States v. Rainbow Family*, 695 F. Supp. 314 (E.D. Tex. 1988).
- 11 *In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).
- 12 *In re Nat'l Prescription Opiate Litig.*, 406 F. Supp. 3d 672 (N.D. Ohio 2019).
- 13 See *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 543 (Ct. App. 2017) (actively promoting lead-based paints for interior use was a "substantial factor in bringing about" the alleged injuries); see also *N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 492-93 (E.D.N.Y. 2003) ("Causation analysis in an equitable action seeking to enjoin an alleged public nuisance action differs in several significant respects from causation analysis in an action based strictly on negligence toward a specific individual.").
- 14 28 U.S.C. § 1332(d)(2)(A)-(C).
- 15 See, e.g., *David v. Vi-Jon Inc.*, No. 3:20-cv-00424-CAB-AGS (S.D. Cal. Mar. 5, 2020); *Taslakian v. Target Corp.*, No. 2:20-cv-02667-ODW-JPR (C.D. Cal. filed Mar. 20, 2020); *Jurkiewicz v. Gojo Indus., Inc.*, No. 5:20-cv-00279-BYP (N.D. Ohio filed Feb. 9, 2020); *Miller v. Gojo Indus., Inc.*, No. 4:20-cv-00562-SO (N.D. Ohio Apr. 16, 2020).
- 16 42 U.S.C. § 247d-6d(a)(1).
- 17 42 U.S.C. § 247d-6d(i)(2).

- 18 Advisory Opinion on the Public Readiness & Emergency Preparedness Act & the March 10, 2020 Declaration Under the Act (“HHS Adv. Op.”) at 2, Dep’t of Health & Human Servs. (Apr. 14, 2020) (footnote omitted). Although PREP Act protection is broad, it is not absolute. Specifically, the law creates an exception for “willful” misconduct. To establish this exception, the plaintiff must prove, by clear and convincing evidence, that the act or omission was done: “(i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification; and (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit.” 42 U.S.C. § 247d-6d(c)(1)(A).
- 19 Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198, 15,202 (Mar. 17, 2020); *see also* PREP Act Glossary of Terms, Dep’t of Health & Human Servs., <https://www.phe.gov/Preparedness/legal/prepact/Pages/prep-glossary.aspx#qualified-pandemic-or-epidemic-product> (May 14, 2013).
- 20 HHS Adv. Op. at 3.
- 21 21 C.F.R. pts. §§ 312, 812.
- 22 42 U.S.C. § 247d-6d(i)(1)(D).
- 23 Y. Peter Kang, *6 States With COVID-19 Medical Immunity, And 2 Without*, Law360 (Apr. 17, 2020).
- 24 Pub. L. No. 116-136, § 3215, 134 Stat. at 374-75.
- 25 *Id.*
- 26 Kang, *supra* note 23.
- 27 *See* Robert K. Neiman, *Pritzker Grants Health Care Facilities Civil Liability Immunity During COVID-19 Crisis Absent Gross Negligence or Willful Misconduct*, National Law Review (Apr. 2, 2020).
- 28 Blair Keltner, *CARES Act Limits Liability for Volunteer Health Care Providers While Illinois Limits Liability for Health Care Facilities, Providers, and Volunteers Responding to COVID-19*, JD Supra (Apr. 17, 2020).
- 29 *See Cornerstone Research, Securities Class Action Filings (2008: A Year in Review)* at 2, <http://securities.stanford.edu/research-reports/1996-2008/Cornerstone-Research-Securities-Class-Action-Filings-2008-YIR.pdf>.
- 30 *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005).
- 31 *Id.* at 341.
- 32 *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018).
- 33 *Id.*
- 34 15 U.S.C. § 78u-4(b)(2).
- 35 H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 740.
- 36 Alison Frankel, *Shareholders’ class action lawyers: we’re not rushing to bring COVID-19 cases*, Reuters (Mar. 17, 2020).
- 37 *See, e.g., Douglas v. Norwegian Cruise Lines*, No. 1:20-cv-21107-RNS (S.D. Fla. filed Mar. 12, 2020); *Atachbarian v. Norwegian Cruise Lines*, No. 1:20-cv-21386-RNS (S.D. Fla. filed Mar. 31, 2020); *McDermid v. Inovio Pharm., Inc.*, No. 2:20-01402-GJP (E.D. Pa. filed Mar. 12, 2020).
- 38 31 U.S.C. § 3729(a)(1); Civil Monetary Penalty Inflation Adjustment, 85 Fed. Reg. 1832, 1832-33 (Jan. 13, 2020).
- 39 31 U.S.C. § 3730(b).
- 40 *Id.* § 3730(c)(2)(A).
- 41 Press Release, Office of Pub. Affairs, U.S. Dep’t of Justice, *Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud* (Mar. 20, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>; *see also* Memorandum from the Att’y Gen. to All U.S. Attorneys (Mar. 16, 2020), <https://www.justice.gov/ag/page/file/1258676/download>.
- 42 *See, e.g., What Laws Protect Coronavirus Whistleblowers? Whistleblower Attorneys Publish FAQs for Coronavirus Whistleblowers and Qui Tam Relators*, Kohn, Kohn & Colapinto, LLP (Mar. 16, 2020), <https://www.kkc.com/news/what-laws-protect-coronavirus-whistleblowers-whistleblower-attorneys-publish-faqs-for-coronavirus-whistleblowers-and-qui-tam-relators/>; Qui Tam, False Claims Act, and Whistleblower Blog, Bracker & Marcus LLC, <https://www.fcacounsel.com/false-claims-act-whistleblower-blog/>; *Whistleblower advocate urges formation of coronavirus task force*, Beasley Allen (Mar. 19, 2020), <https://www.beasleyallen.com/news/whistleblower-advocate-urges-formation-of-coronavirus-task-force/>; David W.S. Lieberman, *Whistleblower Lawyers Call for DOJ Coronavirus Fraud Task Force*, Whistleblower Law Collaborative (updated Mar. 31, 2020), [https://www.whistleblowerllc.com/coronavirus\\_fraud/](https://www.whistleblowerllc.com/coronavirus_fraud/).
- 43 Interim Final Rule, SBA No. SBA-2020-0015, 13 C.F.R. pt. 120, at p. 24.
- 44 Declaratory Ruling (“*In re Rules Declaratory Ruling*”) ¶ 3, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (F.C.C. Mar. 20, 2020) (citing 47 U.S.C. § 227).
- 45 *Id.*



- 46 47 U.S.C. § 227(b)(1)(A)-(B).
- 47 47 C.F.R. § 64.1200(f)(4).
- 48 *In re Rules Declaratory Ruling* ¶ 2.
- 49 Petition for Expedited Declaratory Ruling, Clarification, or Waiver of the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Credit Union National Association, Independent Community Bankers of America, Mortgage Bankers Association, and National Association of Federally-Insured Credit Unions at 13, CG Docket No. 02-278 (filed Mar. 30, 2020) (footnote omitted).
- 50 47 U.S.C. § 227(b)(3).
- 51 Becca J. Wahlquist, *The Juggernaut of TCPA Litigation* at 2-3, U.S. Chamber Institute for Legal Reform (Oct. 2013), [http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit\\_WEB.PDF](http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF).
- 52 29 U.S.C. § 2102(a); 20 C.F.R. § 639.2.
- 53 29 U.S.C. § 2104(a).
- 54 Jeff Cox, *US weekly jobless claims hit 3.84 million, topping 30 million over the last 6 weeks*, CNBC (Apr. 30, 2020), <https://www.cnbc.com/2020/04/30/us-weekly-jobless-claims.html>.
- 55 *Id.*
- 56 For example, OSHA requires employers to be responsible for ensuring the availability of personal protective equipment and for training employees on the use of the equipment. The federal government could make clear that PPE recommended specifically to combat the spread of COVID-19 is not subject to the normal OSHA requirements related to workplace personal protective equipment.
- 57 Worker Adjustment and Retraining Notification Act Frequently Asked Questions, Dep't of Labor, <https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/WARN%20FAQ%20for%20COVID19.pdf>.
- 58 *See id.*
- 59 Executive Order N-31-20, Mar. 17, 2020, [https://www.edd.ca.gov/about\\_edd/coronavirus-2019/faqs/WARN.htm](https://www.edd.ca.gov/about_edd/coronavirus-2019/faqs/WARN.htm).
- 60 15 USC 77z-2(g) & 15 USC 78u-5(g).
- 61 *Id.*





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