

Managing Tort Liability in a Pandemic

THIS WEBINAR WILL BEGIN SHORTLY

Tuesday, May 12, 2020

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WELCOME

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Today's Panel



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- I. Lessons Learned: Litigation Stemming from the 9/11 Attacks
- II. COVID-19 Litigation: Trends and Expectations
- III. Existing Safe Harbor Programs Limiting Tort Liability
- IV. Status of COVID-19 Liability Protection

**Lessons Learned:
Litigation Stemming from the 9/11 Attacks**



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Legal Landscape: Before September 11, 2001

- Victims of 1993 and 1995 terrorist attacks on the World Trade Center brought claims against manufacturers of fertilizer used in explosive devices for:
 - negligence for failing to design, manufacture and sell a less detonable product;
 - products liability design defects because the fertilizer was unreasonably dangerous and defective; and
 - failure to warn.
- Defendants moved to dismiss to failure to state a claim. District Court granted the motion. Third Circuit Court of Appeals affirmed, holding:
 - Manufacturers owed no duty of care to property owners.
 - Manufacturers did not proximately cause bombing.
 - Manufacturers had not duty to warn that products could be altered to cause harm.
 - Owner could not establish that building would not have been bombed but for the failure to warn.

“WTC bombing was not a natural or probable consequence of any design defect in defendants’ products. In addition, the terrorists’ actions were superseding and intervening events breaking the chain of causation.”

Port Auth. of NY and NJ v. Arcadian Corp., 189 F.3d 305 (3d Cir. 1999).



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The Legal Landscape: After September 11, 2001

- Claims filed against Port Authorities, security companies, Boeing and others.
- Defendants sought dismissal, arguing no duty to Plaintiffs existed because Defendants could not have reasonably anticipated the actions of the terrorist.
- District Court found that:
 - Airlines and security companies have a duty to secure against terrorists.
 - Terrorist hijacking was a foreseeable hazard.
 - Failure of manufacturers to design impenetrable cockpit door was a proximate cause of crashes.

The danger of a plane crashing as a result of a hijacking was "the very risk that Boeing should reasonably have foreseen."

In re September 11 Litigation, 280 F.Supp.2d 279 (S.D.N.Y. 2003)



Aimee Ghosh

The Legal Landscape: After September 11, 2001

- Litigation against Port Authority of New York and New Jersey related to 1993 World Trade Center bombing.
- Plaintiffs argued that Port Authority negligently failed to provide adequate security.
- Jury found Port Authority partly liable.
- Appellate Court affirmed verdict, holding defendant had duty to provide “reasonable” mitigation measures.
- Decision overturned by NY Court of Appeals on sovereign immunity grounds, not on whether the terrorist threat was foreseeable.

“The jury had before it evidence that the risk reasonably to be perceived by defendant was of an event potentially monstrous . . . And, in view of the extensive nature of foreseeable harm, it would appear indisputable that the jury could have fairly concluded that [defendant failed to] reasonably minimize the risk of harm”

Nash v. Port Auth. of NY and NJ, 51 A.D.3d 337 (N.Y. App. Div. 2008), *overruled by In the Matter of World Trade Center Bombing Litig. V. Port Auth. Of NY and NJ*, 957 N.E.2d 733 (N.Y. 2011)

COVID-19 Litigation: Trends and Expectations

Class actions involving recurring fees and failure to refund during COVID-19



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- **Gyms**

- *E.g., Namorato v. Town Sports International* (S.D.N.Y. Mar. 26, 2020); *Barnett v. Fitness International LLC* (S.D. Fl. Mar. 30, 2020); *Jampol v. Blink Holdings Inc.* (S.D.N.Y. Apr. 2, 2020); *Delvecchio v. Town Sports International LLC* (D. Mass. Apr. 5, 2020); *Hunt v. Fitness Evolution Inc.* (N.D. Cal. Apr. 10, 2020); *Weiser v. Corepower Yoga LLC* (C.D. Cal. Apr. 15, 2020)

- **Music Events**

- *E.g., Rutledge v. Do Lab Inc.* (Cal. Super. Ct. Mar. 24, 2020); *McMillan v. StubHub Inc.* (W.D. Wis. Apr. 2, 2020); *Alcaraz v. StubHub Inc.* (N.D. Cal. Apr. 14, 2020); *Hansen v. Ticketmaster* (N.D. Cal. Apr. 17, 2020)

- **Ski Resorts**

- *E.g., Kramer v. Alterra Mountain Co.* (D. Colo. Apr. 14, 2020); *Steijn v. Alterra Mountain Co. U.S. Inc.* (C.D. Cal. Apr. 16, 2020)

- **Theme Parks**

- *E.g., Ruiz v. Magic Mountain LLC* (C.D. Cal. Apr. 13, 2020); *Rezai-Hariri v. Magic Mountain LLC* (C.D. Cal. Apr. 10, 2020); *Sea World*

Possible Defenses

- Force majeure clauses
- Impossibility/impracticability

Class actions for price gouging involving retailers charging inflated prices for consumer goods during state of emergency



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- **Third-Party Selling Platforms**

- *E.g., Armas v. Amazon.com Inc.*, Case No. 104631782, in the Eleventh Circuit Court in and for Miami-Dade County, Florida (alleging price gouging related to toilet paper and hand sanitizer)

- **Retailers**

- *E.g., Fisher v. Cal-Maine Foods Inc.* (N.D. Cal. Apr. 20, 2020)

**Tort-Specific Claims:
Current Trends and Expected Targets
in COVID-19 Litigation**

Torts involving products claiming to prevent or treat COVID-19



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- **Hand Sanitizer**

- *E.g., David et al. v. Vi-Jon Inc.*, Case No. 3:20-cv-00424 (S.D. Cal.); *Gonzalez v. Gojo Indus, Inc.*, Case No. 20-cv-888, complaint filed, 2020 WL 560911 (S.D.N.Y. Feb. 1, 2020); *Taslakian, v. Target Corporation, et al.*, Case No. 20-cv-02667, complaint filed, 2020 WL 1367461 (C.D. Cal., March 20, 2020))

- **Personal Protective Equipment**

Torts involving exposure to or failure to adequately warn about potential exposure to COVID-19



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- **Cruise Lines**

- *E.g., Weissberger et al. v. Princess Cruise Lines Ltd.*, Case No. 2:20-cv-02267 (C.D. Cal.); *Sheedy v. Princess Cruise Lines Ltd.* (C.D. Cal. Mar. 13, 2020); *Austin v. Princess Cruise Lines Ltd.* (C.D. Cal. Mar. 17, 2020); *Turner v. Costa Crociere SPA* (S.D. Fla. Apr. 7, 2020); *Archer v. Carnival Corp.* (N.D. Cal. Apr. 8, 2020); *Nedeltcheva v. Celebrity Cruises Inc.* (S.D. Fla. Apr. 14, 2020)

- **Retailers, entertainment venues, other businesses re-opening after shelter-in-place orders are relaxed**

Weaknesses of Tort Claims in the COVID-19 Context



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- **Causation**

- Will plaintiffs be able to show that they contracted COVID-19 at a particular business or location?

- **Standard of Care**

- What is the standard of care alleged to have been breached?

Class Action Procedures: Next Steps



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Many courts have stayed litigation during shelter-in-place orders, and the COVID-19 related class actions that have been filed are still in early stages .

- How do we expect these class action tort claims to advance through the courts?
- What issues are likely to arise?



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Class Action Procedures in COVID-19 Cases

- Consumer Contract Provisions
 - Class action waivers, arbitration clauses
- CAFA removal
- Superiority of class actions vs. individual litigation

Existing Safe Harbor Programs to Manage Tort Liability

Public Readiness and Emergency Preparedness (PREP) Act



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- Provides immunity from liability for claims of loss caused, arising out of, relating to, or resulting from administration or use of “countermeasures” to diseases, threats and conditions.
- Applies to present OR “credible risk of a future public health emergency.”
- Liability protections are available for (1) covered persons, (2) engaging in recommended activities, (3) for covered countermeasures.
- Declaration issued for COVID-19 countermeasures, effective as of Feb. 4, 2020.



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PREP Act and COVID-19

- **Covered Person:** A person or entity that is a manufacturer, distributor, program planner of a countermeasure, or another qualified person who prescribes, administers, or dispenses countermeasures (including volunteers).
- **Recommended Activities:** Manufacture, testing, development, distribution, administration and use of covered countermeasures.
- Recommended Activity must be related to any arrangement with the federal government or part of an authorized emergency response at the federal, regional, state, or local level.
 - Activity can be “authorized” by guidance, requests for assistance etc.
 - HHS COVID-19 emergency declaration qualifies.



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PREP Act and COVID-19

- **Covered Countermeasures:** Products, devices, components used to treat, diagnose, cure, prevent, or mitigate COVID-19 or virus transmission.
- Drugs, devices, or products (1) must be used for COVID-19 and (2) must be:
 - Approved by the FDA
 - Authorized under an Emergency Use Authorization
 - Described in an Emergency Use Instruction issued by the CDC; or
 - Used under either an Investigational New Drug Application or Investigational Device Exemption



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PREP Act Liability Protections

- Courts must dismiss claims brought against any entity or individual covered by the PREP Act.
- Claims are consolidated in a three-judge panel in DC.
- Includes, but is not limited to, claims for death, physical, mental, or emotional injury, need for medical monitoring, or property damage/loss.
- **Willful Misconduct:** Immunity from liability under the PREP Act is not available for death or serious physical injury caused by willful misconduct.
 - Willful conduct cannot be found against a manufacturer or distributor for actions regulated by HHS; or
 - Persons who act in accordance with applicable directions, guidelines, or recommendations issued by the HHS regarding administration and use of a countermeasure.



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PREP Act Has Been Tested In Court

- *Parker v. St. Lawrence County Public Health Department*, 102 A.D.3d 140 (2012) upheld PREP Act protections for a county that conducted a school-based vaccination clinic in response to the H1N1 outbreak.
 - School nurse inadvertently vaccinated a kindergartener in the absence of parental informed consent, and parent sued claiming negligence and battery.
 - NY appellate court dismissed the plaintiff's claims, finding that the federal PREP Act preempted the claims under state law and that the breadth of liability immunity provided under the PREP Act precluded the plaintiff's claims of negligence and battery.
- *Kehler v. Hood*, 2012 WL 1945952 (E.D.Mo.), plaintiffs brought third party product liability/failure to warn claims against vaccine manufacturer.
 - Parties subsequently did not dispute that the manufacturer, was protected by the PREP Act, nor did they allege that it engaged in willful misconduct. As a result, the federal Eastern District Court of Missouri dismissed the claim against the manufacturer.



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The SAFETY Act

- Liability mitigation program enacted as part of the Homeland Security Act of 2002 to encourage the development and use of anti-terrorism tools, technologies, services, programs.
- Two levels of protection under the SAFETY Act. Under a “Designation,” third-party tort liability is capped. Under a “Certification,” the award holder receives a presumption of immediate dismissal.
- Awards issued for products, programs, and policies deemed effective and useful after a thorough review by DHS.
- COVID-19 pandemic likely would not trigger SAFETY Act, but SAFETY Act might help in other ways.



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SAFETY Act Protections

Prerequisites for an Award

- The requested award is well-defined:
 - It must cover specific policies, procedures, and/or technologies
- There are well drafted, thorough, and documented policies and procedures.
- Repeatability: There is regular training on how to use the policies and procedures.
- Effectiveness: The “technology” actually works.
- Continuous Improvement: The “technology” is regularly reviewed, updated, and amended as needed.

Potential Applicability to COVID-19

- Implement reasonable virus mitigation measures;
- Strictly follow public health guidance;
- Employ reasonable measures to screen for persons infected with COVID-19;
- Follow COVID-19 incident response procedures;
- Monitor 3d party access that could lead to contamination; or
- Act upon shared public health information

Status Of COVID-19 Liability Protection Statutes



Aimee Ghosh

Some States Have Passed Liability Protections

- Michigan, New York, New Jersey have passed statutes or implemented executive orders
 - BUT – those protections only apply to medical malpractice during the current pandemic
- Utah has passed a liability protection statute providing immunity to premises owners and operators for “damages or injury resulting from exposure to COVID-19” so long as there was no:
 - willful misconduct;
 - reckless infliction of harm; or
 - intentional infliction of harm.



Aimee Ghosh

Will There Be Nationwide Liability Protection?

- Republicans are pushing hard for protections in next stimulus bill
- Senate Majority Leader has called its inclusion a “red line”
- Some Democrats are on board, particularly for protections that apply to small businesses
- BUT, fierce opposition from trial lawyers, others
- Would it be PREP 2, SAFETY Act 2? No one knows yet ...
- One idea: <https://www.heritage.org/courts/report/liability-protections-are-critical-ensuring-economic-recovery>

Thank You

For questions about today's content,
please contact:

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Or visit our COVID-19 Resource Center:

pillsburylaw.com/covid19

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