

PRODUCT LIABILITY

ALERT

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Immunity, Preemption of State Laws, and the Exercise of Federal Power in National Emergencies

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As the country begins to strategize on how to safely reopen the economy, debate is beginning to stir as to whether the government should provide immunity to businesses as protection from COVID-19 related litigation. Talking points regarding how to reopen include the President's statement that "the cure cannot be worse than the problem itself." Given the deadly effects of the coronavirus and the devastating impact of the shutdown of the economy, these talking points necessarily raise questions regarding how the government balances the need to protect both lives and livelihoods.

In an interview on April 27, 2020, Senate Majority Leader Mitch McConnell stated his support for liability protections for businesses as they reopen after being forced to shut down due to the COVID-19 pandemic. Senator McConnell's proposal is in addition to immunity already granted to certain businesses by the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 ("the Act"), issued on March 10, 2020 by the Secretary of Health and Human Services. The Declaration provides:

a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures (Covered Countermeasures), except for claims involving willful misconduct

[https://www.federalregister.gov/documents/2020/03/17/2020-05484/declaration-under-the-public-](https://www.federalregister.gov/documents/2020/03/17/2020-05484/declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical-countermeasures)

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The Act allows for very limited administrative remedies through a program administered by the Department of Health and Human Services, but eliminates common law and state law remedies. The declaration defines a "covered countermeasure" as a "qualified pandemic or epidemic product, or a security countermeasure, ... or a drug, biological product or device authorized for emergency use" The Declaration further defines each of the applicable terms in the definition of "covered countermeasure." Whether any specific preemption of state law, whether by Congress or through delegated authority to the Executive, passes muster will ultimately be a question for Article III courts.

As noted, Senator McConnell is now seeking liability immunity for other businesses outside of those engaged in "covered countermeasures." The president of the U.S. Chamber of Commerce said recently that a wave of employee lawsuits amid reopening is "the largest area of concern" for U.S. businesses. If additional immunity is granted, there surely will be fierce debate as to what additional businesses and business related activity should be covered. Indeed, Congressional Democrats are expected to fight the grant of immunity for additional businesses. A spokesman for House Speaker Nancy Pelosi said recently that "the House has no interest in diminishing protections for employees and customers."

Granting only certain businesses immunity could in and of itself lead to litigation. When state governments began to impose business restrictions, questions arose as to how the governments chose which businesses could remain open. For example, a few Pennsylvania state senators have threatened to subpoena the Pennsylvania governor for documents related to the issuance of waivers that allowed certain businesses to remain open.

Even if institutions refuse to reopen in part due to the fear of COVID-19 related litigation, they still may face lawsuits for breach of contract. For example –

- *Rickenbaker v. Drexel University*, No. 20-cv-1358 (D.S.C. Apr. 8, 2020); *Dixon v. University of Miami*, No. 20-cv-1348 (D.S.C. Apr. 8, 2020): assert claims for breach of contract and unjust enrichment seeking the refund of university tuition fees and other costs paid by students.
- *Delvecchio v. Boston Sports Clubs*, No. 20-cv-10666 (D. Mass. Apr. 5, 2020); *Jampol v. Blink Holdings*, No. 20-cv-02760 (S.D.N.Y. Apr. 2, 2020); *Namorato v. New York Sports Clubs*, No. 20-cv-02580 (S.D.N.Y. Mar. 26, 2020); *Barnett v. Fitness International, LLC*, No. 0:20-cv-60658 (S.D. Fla. Mar. 30, 2020); *Labib v. 24 Hour Fitness USA*, No. 3:20-cv-02134 (N.D. Cal. Mar. 27, 2020): assert consumer protection and breach of contract claims based on monthly membership fee collection during sports club closures.

Insurance companies meanwhile have also been confronted with lawsuits. These lawsuits involve claims for business interruption coverage due to the coronavirus pandemic and ensuing shutdown.

Even if the government passes legislation affording businesses protection from COVID-19 related litigation, will the government still provide any recourse to injured workers? Congress potentially could utilize the PREP Act framework to pass legislation that would protect additional businesses and business-related activities. Perhaps this potential legislation could also include a victim compensation fund, similar to the administrative remedy in the PREP

Act and the remedy that was used in the aftermath of September 11th.

Another tool Congress has is the “alternative” remedy. In 1986, Congress enacted the National Childhood Vaccine Injury Act in response to a sharp rise in the number of vaccine-related lawsuits filed against the manufacturers of those vaccines. The costs of defending those lawsuits and the related increases in insurance costs were chasing the manufacturers from the market, causing the price of vaccines to increase markedly and threatening the supply of vaccines. Congress noted that, by the time it was acting, “[T]here [was] only one manufacturer of the polio vaccine, one manufacturer of the measles, mumps, rubella (MMR) vaccine, and two manufacturers of the [diphtheria, pertussis, and tetanus] DPT vaccine.” A special court was established to adjudicate claims, and state law remedies were preempted. This is to be distinguished from vaccine manufacturer protection under the PREP ACT, which may (neither Congress nor the President are finished addressing responses to the crisis) strip common law remedies without providing additional or alternative remedies.

Other critical issues arising from the shelter of our population due to COVID-19 may include, but are by no means limited to:

1. Safety of the food supply;
2. Issues with maintaining the supply chain (trucking, safe delivery); and
3. Retail sales of goods and services (reduced capacity in stores, dedicated shopping hours for the elderly, PPE for staff, requiring PPE for patrons, curbside pickup and remote delivery).

People are only safe in their homes if they can remain fed, and if they have stable living conditions. It can be (and is being) argued that maintaining the supply chain, certainly for food, is an issue of national concern.

On April 28, 2020, President Trump signed an Executive Order, citing the Defense Production Act, mandating that meat processors stay operational, and signaled his intention that liability shields from worker

lawsuits for unsafe conditions be part of the package. <https://www.msn.com/en-us/news/us/trump-plans-to-order-meat-processing-plants-to-stay-open-during-coronavirus/ar-BB13kBRq> Whether liability shields can be passed by virtue of this executive order, without congressional action, is a question raising important issues of separation of powers and federalism.

Although the coronavirus is novel, the tools that the government can use to spur the economy and businesses to life are not. Business may advocate for, and Congress may carefully consider, proposals that would provide immunity from COVID-19 litigation, while also ensuring that customers and workers have fair recourse if injured. The effect of stripping remedies is to shift such obligations to be borne solely by the people. Any remedy needs to consider the scope and duration of the emergency as well as the rights of individuals. We imagine that there would be pushback against anything resembling permanent “tort reform,” not narrowly tailored to the emergency being faced. It is certain that there are remedies that can be looked at, and will be looked at, as we attempt to find a pathway toward rebuilding and restarting our economy. ♦

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government publications and websites for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader’s COVID-19 Resource Center at <https://www.schnader.com/blog/covid-19-coronavirus-resource-center/>

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