

## PRODUCT LIABILITY

# ALERT

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## Product Liability and Tort Law Implications of the COVID-19 Crisis

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The novel coronavirus (or “COVID-19”) presents unprecedented challenges for the Social Contract in the United States, and all over the world. Here at home, a large number of Americans are sheltered indoors and will be for an extended period of time. Feeding and providing for the needs of those Americans puts unusual and unplanned-for strains on supply chains and retailers—not only for delivery giants like the large online retailers, but also for local supermarkets and restaurants. COVID-19 thus threatens not only our health, but established norms for our individual and collective rights and duties, including the role of the legal system and potentially the standards for resolving disputes involving product liability and tort law.

### **CORONAVIRUS REALITIES RELEVANT TO PRODUCT LIABILITY**

Presumably many, if not all, of the readers have at least a basic knowledge of COVID-19’s spread across the world—a predicate for discussing potential risks in strict liability and tort. Current medical knowledge suggests that COVID-19 may be contagious before a person knows he or she is infected<sup>1</sup>. If contracted, there may be an extensive incubation period, lasting weeks in some cases<sup>2</sup>. Further confounding public health efforts, the CDC has also estimated that as many as 25 percent of people who contract the virus

may never experience symptoms at all, and are unwittingly spreading the virus, believing they are healthy<sup>3</sup>.

Perhaps the most alarming aspect of this virus is that infections are not limited to person-to-person contact. The virus can survive on surfaces outside the human body for days, exposing others to infection. A recent study published in the *New England Journal of Medicine* found that COVID-19 can live up to 24 hours on cardboard surfaces and up to 72 hours on plastic, further aiding its explosive spread around the world and raising the specter of liability associated with contaminated products<sup>4</sup>.

Heeding warnings of public health experts, countless people across the globe have adopted “shelter-in-place” practices, working or continuing their education from home, only venturing into the outside world when absolutely necessary. With such a dramatic shift in daily living, more people are turning to internet-based delivery services, particularly for grocery and restaurant delivery. Although there is presently no evidence to suggest that the virus is spread through food or drink, the bags, boxes and other containers that carry these deliveries could also

<sup>1</sup> <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html>

<sup>2</sup> <https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html>

<sup>3</sup> <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us>

<sup>4</sup> [https://www.nejm.org/doi/full/10.1056/NEJMc2004973?query=featured\\_home](https://www.nejm.org/doi/full/10.1056/NEJMc2004973?query=featured_home)

be carrying the active contagion on their surfaces—even if the contaminating contact was days earlier.

### POTENTIAL LITIGATION ISSUES

As the nature and extent of the virus become clearer over time, we can anticipate a surge in litigation in the wake of COVID-19, with potentially many cases claiming contaminated food packaging. These cases will present unique challenges of proof that are not always present (or analogous) in established contaminated food case law. For example, there are signature incubation periods and symptoms for food-borne pathogens like salmonella and e-coli, whereas COVID-19 presents a more elusive incubation timeframe and may not always manifest with consistent symptoms. Tracing the source of one's infection, whether in a densely populated urban center like New York City—or even in more rural regions—is not going to be simple in the ordinary course. Alternative causation arguments will abound, particularly as many of the people who have contracted COVID-19 will be, and are, asymptomatic yet contagious. Proving causation will therefore likely be the most common challenge faced by plaintiffs bringing lawsuits against major suppliers, distributors, and retailers.

In the realm of product liability, the presence of an unexpected contaminant (*e.g.*, a virus), can often be deemed a defect under the law of most states. Where an item of food or drink intended for human consumption is sold, an implied warranty is commonly imposed on the manufacturer that the item is fit for human consumption and free from any harmful or unwholesome substances, when it leaves the manufacturer's control<sup>5</sup>. Of course, a plaintiff has to prove the existence of the defect at the time it left the hands of the defendant<sup>6</sup>. Questions of due care are usually immaterial, as are questions of whether the defect can be eliminated with the use of reasonable

care. This is in the category of true “strict liability,” a form of manufacturing defect.

In the realm of premises liability, novel questions of negligence are also presented, guided by existing standards of reasonable care<sup>7</sup>. What steps must be taken to maintain social distancing in the store aisles and at the registers? Must employees wear gloves? Masks? Should stores provide special shopping hours for the most “at-risk” in our population? Should any stores continue to operate on a self-service model at all (such models are a relatively recent innovation—approximately 70 years), or only use curbside pickup and/or home delivery?

Similar questions are presented with distribution and delivery from retailers. If boxes and plastic surfaces can retain COVID-19 contagions, should these surfaces be wiped down prior to placement on the delivery truck? Should they be wiped down again before leaving them by the homeowner's front door? Considering many more people now depend on delivery services—including healthcare providers and those who are already sick—would the added requirement cause a breakdown in efficiency that would do more harm than good? With the current unprecedented shortage of disinfecting agents, should hospitals and other healthcare facilities be prioritized in the distribution of these vital materials?

Given the occasionally conflicting information coming from the Federal and State governments, which sovereign (if any) should set the minimum standard of care? What guidelines should businesses follow? And if they follow different guidelines for their own employees or executives than they do for their customer base, what conclusions could be drawn from that? Hospitals and nursing homes may be held to more heightened standards of care because they house the most vulnerable, but providers still may be receiving conflicting information about what those standards should be.

<sup>5</sup> UCC 2-314; *Hohn v South Shore Servs.*, 141 AD2d 504 (2nd Dept.1988).

<sup>6</sup> *Tardella v RJR Nabisco, Inc.*, 178 A.D.2d 737 (3rd Dept. 1991); *Kotiadis v Gristede Bros.*, 20 A.D.2d 689, 690 (1st Dept. 1964).

<sup>7</sup> *E.g. Basso v. Miller*, 40 N.Y.2d 233 (1976).

There may be legal immunities to consider for care providers, including nursing homes<sup>8</sup>. In New York State, which is the U.S. epicenter of the crisis at the time of this writing, there is a concern about making sure that volunteers can assist in the identification and treatment of affected individuals without concern for tort liability.

Perhaps the most interesting question pertains to the “duty to warn.” If a COVID-19 case is in your workplace, the premises may be shut for a period of time. What then is the duty of the landlord? Does the whole building need to be notified? Or be given the option of isolating? If an online retailer has a COVID-19 case in a delivery fulfillment center, is there a duty to notify customers that their delivery came from a potentially contaminated warehouse? If a service-based business like a yoga studio or a gym has a case, must all who occupied that space be notified? How is the notification campaign to be conducted?

Given an increasing ethos of taking personal responsibility to reduce the spread of the virus through disinfecting, handwashing and social distancing, questions of culpable conduct will almost certainly be present in these cases. But what behavior would rise to the level of culpable conduct? Would it depend (at least in part) on the number of then-known cases in the vicinity, and/or the social distancing mandates then in effect in that location? Reasonable care is the measure of the duty.

## CONCLUSION

We have barely scratched the surface of the potential chain of distribution and liability issues arising from the current national crisis. While the fundamental questions may remain without definitive answers for some time, business leaders may want to pay close attention to their written policies, employee training, vendor contracts, and public communications, among many possible sources of evidence in future cases. Also, while ever-changing Federal and State advisories

and mandates may set a floor for reasonable conduct, businesses may look as well to what competitors are doing. Industry practice can serve to raise the bar for what is acceptable conduct, and often does when practices are challenged in front of juries.

Stay tuned as we strive to keep you informed of developments relevant to these crucial issues for businesses.

*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 websites and publications 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 [www.schnader.com/blog/covid-19-coronavirus-resource-center](http://www.schnader.com/blog/covid-19-coronavirus-resource-center). ♦*

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<sup>8</sup> *E.g.* Emergency standards adopted in New York – <https://www.wsj.com/articles/new-york-moves-to-shield-doctors-from-lawsuits-while-fighting-coronavirus-11585868982>.