Liability Protections in Coronavirus Relief Legislation

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Earlier today, Sen. John Cornyn, R-Texas, joined by Senate Majority Leader Mitch McConnell, R.-Ky., introduced the SAFE TO WORK Act, which would provide substantial and comprehensive liability protection from coronavirus-related claims for businesses, educational institutions, nonprofit organizations, health care providers and employers. The bill also expands the product liability protections already afforded by the Public Readiness and Emergency Preparedness (PREP) Act and includes several employment-related provisions. This is the long-awaited Senate leadership liability protection proposal that is expected to be considered by Congress over the next several weeks as part of the overall Phase 4 pandemic relief package. The following is a summary and brief analysis of the proposed legislation.

Creation of Narrow, Exclusive Coronavirus-Related Exposure Cause of Action

The bill creates an exclusive federal cause of action for claims alleging that a plaintiff contracted COVID-19 from an exposure to the virus caused by a defendant. That cause of action would limit liability to certain narrow circumstances and preempt all state laws that would otherwise apply to such lawsuits.

Specifically, the legislation would require a plaintiff asserting a coronavirus exposure claim to prove by clear and convincing evidence that: (a) the defendant business, educational institution or nonprofit organization did not make "reasonable efforts" to comply with applicable mandatory government health guidance; (b) the defendant engaged in gross negligence or willful misconduct; (c) those wrongful actions actually exposed the plaintiff to the coronavirus; and (d) the exposure actually caused the plaintiff to contract the coronavirus.

These requirements are intended to protect defendants in several respects. As an initial matter, the new federal cause of action requires a standard of proof — clear and convincing evidence — that is more exacting than the preponderance-of-evidence standard traditionally used in civil cases. The bill also creates a "safe harbor" for those entities that undertake reasonable efforts to comply with mandatory government guidance on coronavirus safety matters, protecting them from exposure actions. In addition, a defendant cannot be held liable unless it engaged in gross negligence or willful misconduct. And finally, the statute incorporates stringent causation requirements, ensuring that this essential element of all tort claims is satisfied.

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Rather than leaving core concepts in the federal cause of action to state-law-based interpretations, the bill defines several key terms. For example, "reasonable efforts" to comply with applicable mandatory government health guidance is clarified in multiple respects. If there are various government guidelines that conflict (such as conflicting federal and state commentary on the same issue), the defendant would have the right to "safe harbor" protection so long as it complies with one of the conflicting guidelines. Moreover, if a defendant has a written or published policy on coronavirus exposure issues that complies with or exceeds any health guidance provided by the government, the defendant is presumed to have complied with government guidance. The plaintiff may be able to rebut this presumption, but the plaintiff must plead "particular facts giving rise to the strong inference that the person or entity was not complying with the written or published policy." On the other hand, the absence of any written or published policies by the defendant does not create any presumptions.

The bill also sets forth its own definitions of "gross negligence" and "willful misconduct." "Gross negligence" is an act or omission that is in reckless disregard of a legal duty, the consequences to another party and applicable government health guidance. And under the bill, "willful misconduct" would be an act or omission taken "intentionally to achieve a wrongful purpose," "knowingly without legal or factual justification" and "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."

Finally, the bill also includes a one-year statute of limitations that accrues on the date of the alleged exposure. This statute of limitations is shortened from the usual two-year (and sometimes three-year) state tort law statute of limitations period for personal injuries.

The purpose of these provisions is to protect businesses, educational institutions and nonprofit organizations from potentially bankrupting lawsuits at a time when they have attempted to provide essential services under challenging circumstances, all while trying to observe sometimes conflicting and frequently changing government guidance on how best to shield employees and customers from exposure risks. The protections under the bill also are designed to address the scientific challenges of proving exactly how or where a plaintiff contracted the disease.

Coronavirus-Related Medical Liability Cause of Action

The bill similarly creates an exclusive federal cause of action for any coronavirus-related medical liability claims against health care providers (broadly defined to include both practitioners and health care facilities). Any individual who receives medical services during the federally declared coronavirus state of emergency — including services related to diagnosing, preventing or treating the coronavirus and other services impacted by the virus — and suffers personal injury resulting from a health care provider's care is barred from suing under state law and can only bring a suit if he or she can satisfy this narrow cause of action.

In order to prevail under the new federal cause of action, a plaintiff must prove by clear and convincing evidence that a health care provider engaged in gross negligence or willful misconduct and that his or her alleged personal injury directly resulted from the gross negligence or willful misconduct of the health care provider. Like the exposure cause of action, the medical liability cause of action also imposes a "clear and convincing" standard of proof and limits liability to gross negligence and willful misconduct as defined under the statute. The legislation also specifies that any omissions resulting from a resource or staffing shortage do not qualify as gross negligence or willful misconduct.

Like the coronavirus exposure claim, this cause of action is also subject to a one-year statute of limitations, which accrues when the alleged harm from a medical provider occurred.

Federal Jurisdiction Provisions

Since the exposure and liability causes of action arise under federal law, any lawsuits involving such claims can be brought in or removed to federal court. The bill also provides that coronavirus-related actions initiated before its enactment can be removed to federal court within 30 days after it is signed into law.

Retroactivity

The bill's liability provisions would apply retroactively both to claims that accrue before its enactment and to cases filed before its enactment.

Other Procedural Protections and Provisions

Pleading Requirements. The bill imposes heightened pleading standards for all coronavirus-related claims. A plaintiff is required to plead each element of his or her claim with particularity, which includes listing all places and persons he or she visited during the 14-day-period before the onset of his or her first coronavirus symptoms. In addition, a plaintiff must file an affidavit by a physician or medical professional — who did not treat the plaintiff — attesting that the plaintiff suffers from the alleged injury and that, in the medical expert's opinion, the injury was proximately caused by the defendant. The plaintiff must also file all relevant medical records detailing the injuries alleged to have been caused by the defendant.

The bill also requires that the plaintiff file separate statements accompanying the complaint that provide specific information about the nature of damages suffered and specific facts bearing

on the required state of mind for each defendant. The bill also includes a number of provisions to protect defendants from litigation expenses while dispositive motions are being considered. Specifically, the legislation provides that no discovery may be conducted while motions to dismiss are pending, that any denial of a motion to dismiss can be appealed immediately and that the stay of discovery will remain in effect while interlocutory review is underway.

The bill also has several provisions that apply to class actions and federal multidistrict litigation proceedings (MDLs) involving coronavirus-related claims. First, the bill designates class actions alleging coronavirus causes of action as opt-in classes — *i.e.*, a person can only become a member of a proposed class asserting a coronavirus-related cause of action if he or she affirmatively elects to do so. In addition, the bill also provides that the fee arrangement with the class counsel must be disclosed and, if the litigation is being financed by a third party, that the financing agreement must be disclosed as well. With respect to MDL proceedings, the bill provides that an MDL judge may not hold a trial in a coronavirus-related matter unless all parties to the action consent.

Damages. The bill establishes several limitations on damages amounts and allocations. For example, the bill restricts the effects of joint and several liability by providing that a defendant "shall be liable solely for the portion of the judgment that corresponds to the relative and proportionate responsibility of that person or entity." This limitation will ensure that the payment obligations of any judgment are distributed fairly among defendants and that a defendant with deeper pockets will not be left on the hook to pay the entire judgment even though it is only partially at fault.

The bill also limits damages to economic losses, provides that punitive damages may be awarded only for willful misconduct and creates a cap on punitive damages that may not exceed the amount of compensatory damages awarded.

Demand Letter Cause of Action

The bill creates a cause of action that defendants may bring against persons who send demand letters regarding meritless coronavirus issues. In such actions, the damages may include the costs incurred in responding to the demand letter as well as punitive damages if the court determines that the sender of the demand letter knew or acted in reckless disregard of the fact that such claim was meritless. The bill also authorizes the Department of Justice to seek civil penalties against persons deemed to be engaging in a pattern or practice of sending demand letters regarding meritless coronavirus-related claims.

Other Provisions

Product Liability Section. The bill amends Section 319F–3(i)(1) of the Public Health Service Act to include new products (for example, new types of personal protective equipment) for which the Food and Drug Administration indicates it will exercise its discretion not to enforce regulatory requirements in order to facilitate access to the products. The bill also amends the PREP Act to limit the authority of the Secretary of Health and Human Services to restrict liability protections under the act to certain modes of distribution of covered products.

Employer Protections. The bill provides a broad safe harbor provision for employers that comply with relevant government health guidance. If an employer relied on and generally followed relevant government health guidance, then the employer shall not be liable under any "federal employment law" for any claim related to coronavirus exposure.[1]

The bill provides a number of other clarifications and liability limitations for employers. The bill allows actions against employers regarding the conduct of coronavirus tests only for instances of gross negligence or intentional misconduct. The bill also clarifies that requiring an independent contractor or another entity's employee to comply with certain coronavirus-related requirements (*e.g.*, submitting to testing, wearing personal protective equipment) shall not be evidence of an employment relationship. And finally, the bill also amends the Worker Adjustment and Retraining Notification Act to limit its applicability to employees who lost their jobs during, and due to, COVID-19.

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In sum, the proposed legislation would provide relief to American businesses, educational institutions, nonprofit organizations and health care providers in the midst of the ongoing pandemic. By moving coronavirus-related lawsuits into federal court and codifying what are viewed as common sense liability protections (*e.g.*, creating a "safe harbor" for businesses that heed mandatory government health and safety guidance), the proposed legislation would limit the prospect of vexatious litigation while preserving the rights of injured individuals to pursue legitimate claims against grossly negligent defendants.

[1] "Federal Employment Law" under the bill includes: the Occupational Safety and Health Act of 1970; the Fair Labor Standards Act of 1938; the Age Discrimination in Employment Act of 1967; the Worker Adjustment and Retraining Notification Act; Title VII of the Civil Rights Act of 1964; Title II of the Genetic Information Nondiscrimination Act of 2008; and Title I of the Americans With Disabilities Act.