

KD Alert - Covid-19 Liability, Immunity and Insurance

By: Thomas Morante, partner and chair of the KD Insurance Regulatory and Transactional Practice Group, and Yani Contreras, foreign consultant from the KD Florida offices

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A majority of U.S. states have begun the challenging process of reopening their economies, some gradually, some aggressively. Most states are developing phased-in plans to do so in the immediate term. Businesses that have now reopened or are getting prepared for reopening are understandably concerned about being sued by employees, customers, third party contractors, suppliers and/or, for that matter, almost any person due to illness, death, lost wages, or other disruptions caused by COVID-19.

To address this concern, states are pushing the U.S. Congress to adopt legislation or are drafting state bills addressing the perceived need for a shield to afford immunity to businesses reopening. In Oklahoma, for example a bill sponsored by a Republican legislator that would protect businesses from lawsuits arising from the COVID-19, passed the state Senate on May 11th, 2020. The bill would afford protection to businesses from civil lawsuits alleging injury from exposure or potential exposure to COVID-19, provided those businesses are compliant with federal, state and local guidance at the time of the alleged exposure. Such protection would apply in connection with civil actions filed on or after the effective date of the bill (presumably the effective date would be the date the bill becomes law, but it is also possible that the effective date could be retroactive...this is not entirely clear).

Other states, like Alabama, are also working on legislation intended to give businesses immunity from liability against claims that customers became infected with the coronavirus while on the business's premises. The Alabama bill would shield businesses from liability caused by injury, damages, or death suffered by a person because of "actual or alleged contraction of the coronavirus from another patron, an employee, or any individual while on the premises of the business entity."

In Florida, State Senator Jeff Brandes (R) is working on legislation that would insulate companies that follow the COVID-19 guidelines mandated by Florida's Governor, from having to face lawsuits. The business immunity afforded by the proposed legislation is being crafted as a safe harbor so that companies compliant with COVID-19 guidelines would be protected from or otherwise less prone to litigation. The safe harbor, however, would not protect those businesses engaging in intentional misconduct or from gross negligence in operation of their business.

One challenge is that the Florida legislature is not scheduled to meet until March 2021, so businesses seeking to open would need to accommodate their potential liability not knowing if legislation would be adopted affording immunity from suit. An alternative being discussed in Florida to address the timing gap would be expansion of the state's Good Samaritan law, which provides medical providers with immunity from lawsuits in connection with public health emergencies. Expansion of the Good Samaritan law to other types of businesses, would provide limited immunity from suit.

Other states such as Illinois, New Jersey, New York and Pennsylvania adopted executive orders providing immunity from civil liability to healthcare providers for any injury or death that occurs while providing healthcare services in response to COVID-19.

Immunity from suit due to COVID-19 as a consequence of reopening a business, would impact the insurance industry, particularly those carriers issuing comprehensive general liability coverage (GCL) and workers' compensation insurance (WC), among other coverages. GCL policies cover bodily injury caused to third parties on the insured premises. A customer or third-party alleging harm caused by the insured for failing to exercise reasonable care in implementing, enforcing or warning of the risk of potential exposure to coronavirus could be covered by a GCL policy, absent a specific exclusion. To the extent that immunity is granted to businesses for any harm caused by coronavirus, there arguably would be fewer claims made against those businesses under CGL policies. This, in turn translates into fewer claims to be paid, and thus, would afford a benefit to CGL insurers.

On the federal level, the U.S. Chamber of Commerce is lobbying Congress to pass legislation exempting coronavirus claims from negligence litigation. Protecting companies from liability if they abide by the Centers for Disease Control and Prevention (CDC) and state guidelines for social distancing and other measures, may encourage them to open their doors with the necessary protections or perhaps, without all the necessary protections. This is the moral hazard concern. If shielded from lawsuits, would a business opt to incorporate fewer of the required protective measures.

Senate Majority Leader Mitch McConnell along with Senate and House Republicans voiced support for liability protections for health care workers and small businesses as they reopen after being forced to shut down due to the COVID-19 pandemic. Senator McConnell's proposal would expand the immunity already granted to certain businesses by the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures (which granted liability immunity to certain individuals and entities involved in the production, supply, or use of products to combat COVID-19.) The Declaration was issued on March 10, 2020 by the Secretary of Health and Human Services.

In addition, another House Republican has proposed protections for employers, introducing the Employer and Employee COVID Protection Act, which would provide immunity to employers from lawsuits caused by coronavirus; provided such employers are in compliance with federal and state laws regarding reopening their businesses, and further providing certain protective measures for employees.

If additional immunity is granted, debate as to what additional businesses should be covered and the extent of such immunity may be challenged, and Speaker Pelosi indicated that Democrats likely would not support business liability immunity in any new relief bill.