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ALERT

By Richard M. Tomich

Attorneys tasked with defending COVID-19 exposure claims should first determine which, if any, legislation, executive orders, or other regulations potentially apply, as keeping abreast of these developments can help guide the defense's case.

Legislation Affecting COVID-19 Exposure Claims

When the U.S. went into shutdown mode due to COVID-19 in mid-March 2020, virtually all individuals, industries, and businesses were affected by the virus in one form or another. Unfortunately, fast forwarding to the

present, the vast ramifications of this novel coronavirus only continue to grow. In addition to the serious health concerns of this global pandemic, many businesses have closed or downsized with countless workers now out of a job. Businesses that remain open are attempting to recoup losses from mandated closures and scaled-back operations while trying to survive. These entities must also address the new reality of conducting operations with a constantly changing landscape for what is required and recommended to protect against the spread of COVID-19 as it pertains to employees in the workplace as well as the public.

COVID-19 exposure claims against businesses and employers are becoming more prevalent at a rapidly increasing rate. In response to this trend, there has been an influx of new coronavirus legislation at the state and federal levels with a focus on immunity for businesses and employer safety measures. These legislative devel-

opments have resulted in the emergence of legal issues, including the applicability of the regulations and insurance coverage concerns. As we navigate through this unprecedented era, it is vital that defense lawyers be mindful of such matters and their effect on claims.

State Legislation—Passed Laws

In light of the ongoing public health emergency that has put a stranglehold on our country and to prevent further economic hardships, several states have passed laws providing businesses with potential immunity from COVID-19 exposure claims. These laws, which have a broader reach than the immunity that initially targeted health care providers and first responders, are detailed below.

North Carolina

On May 4, 2020, Governor Ray Cooper signed the North Carolina 2020 COVID-19



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Recovery Act into law, which provides the following immunity provision:

(a)(1) An essential business that provides goods or services in this State shall have immunity from civil liability to any customer or employee for any injuries or death alleged to have been caused as a result of the customer or employee contracting COVID-19 while doing business with or while employed by the essential business....

(b) The immunity from civil liability provided in this section shall not apply if the injuries or death were caused by an act or omission of the essential business constituting gross negligence, reckless misconduct, or intentional infliction of harm. This section does not preclude an employee of an essential business from seeking an appropriate remedy under Chapter 97 of the General Statutes (N.C. Workers' Compensation Act) for any injuries or death alleged to have been caused as a result of the employee contracting COVID-19 while employed by the essential business.

North Carolina 2020 COVID-19 Recovery Act, Senate Bill 704, Article 48, "Limited Business Immunity," §66-460 General Statutes.

Businesses, not-for-profit organizations, educational institutions, and governmental entities deemed to be "essential businesses" are afforded the opportunity of immunity. These include: businesses operating in the federal critical infrastructure sectors; healthcare and public health operations; human services operations; essential infrastructure operations; essential government operations; stores that sell groceries and medicine; food, beverage production, and agriculture businesses; organizations that provide charitable and social services; religious entities; media; gas stations and transportation businesses; financial and insurance institutions; home improvement, hardware, and supply stores; critical trades; mail, post, shipping, logistics, delivery, and pick-up services; educational institutions; laundry services; restaurants for consumption off-premises; supply businesses for other essential businesses and people to work from home; transportation; home-based care and services; residential facilities and shelters; professional services; manufacture, distribution, and sup-

ply chain companies for critical products and industries; defense and military contractors; hotels and motels; funeral services; and retail businesses. North Carolina 2020 COVID-19 Recovery Act, Senate Bill 704, Article 48, *Limited Business Immunity*, §66-462 General Statutes; North Carolina Executive Order No. 121, Section 2, *COVID-19 Essential Businesses and Operations*.

This protection applies retroactively to acts or omissions occurring on or after the issuance of the North Carolina COVID-19 essential business executive order on March 27, 2020, and it expires when the COVID-19 emergency declaration is rescinded. North Carolina 2020 COVID-19 Recovery Act, Senate Bill 704, Article 48, *Limited Business Immunity*, §66-461 General Statutes. The immunity is not absolute as it does not cover gross negligence, reckless misconduct, or intentional infliction of harm, nor does it prevent workers' compensation claims related to COVID-19, regulatory actions, or criminal proceedings. However, this law is more expansive when compared to the immunity provided by many states to only health care providers.

Utah

On May 4, 2020, a Utah immunity law signed by Governor Gary Herbert took effect that states:

- (2)...a person is immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by the person, or during an activity managed by the person. Immunity as described in this Subsection (2) does not apply to: (a) willful misconduct; (b) reckless infliction of harm; or (c) intentional infliction of harm.

Utah Senate Bill 3007, 78B-4-517 Utah Code Annotated, Section 1(2).

A "person" includes an individual; association; institution; corporation; company; trust; limited liability company; partnership; political subdivision; a government office, department, division, bureau, or other body of government; and any other organization or entity. Utah Code 68-3-12.5(18). The Utah law arguably seems to apply to all individuals and businesses, thereby providing a far-reaching prohibition on COVID-19 related claims. Despite this protection, conduct that is deemed

willful, reckless, or intentional eliminates the immunity, and there is no immunity defense for workers' compensation claims, Utah Occupational Diseases Act claims, and Utah Occupational Safety and Health Act claims. Also, what constitutes a premises "operated" and an "activity managed" is not defined and is open to interpretation. Another uncertainty is the timeframe for which the immunity applies. Therefore, the immunity passed by the Utah legislation appears to be somewhat vulnerable to attack from the opposition.

Wyoming

In Wyoming, Governor Mark Gordon signed a COVID-19 immunity law on May 20, 2020, that provides:

- (a) During a public health emergency... any health care provider or other person, including a business entity, who in good faith follows the instructions of the state, city, town or county health officer in responding or who acts in good faith in responding to the public health emergency is immune from any liability arising from complying with those instructions or acting in good faith. This immunity shall apply to health care providers who are retired, who have an inactive license or who are licensed in another state without a valid Wyoming license and while performing as a volunteer during a declared public health emergency.... This immunity shall not apply to acts or omissions constituting gross negligence or willful or wanton misconduct.

Wyoming Senate File 1002, Wyoming Statute 35-4-114(a).

Unlike the prior state laws highlighted in this article, the immunity offered to people and businesses in Wyoming does not specifically identify that the immunity applies for COVID-19 exposure claims. Rather, Wyoming offers immunity to those acting in good faith and/or who follow government instructions in responding to a public health emergency as long as they do not act with gross negligence or willfully or wantonly. "Public health emergency" is noted to be an occurrence or imminent threat of an illness or health condition caused by an epidemic or pandemic disease, a novel and highly fatal infectious agent, or a biological toxin that poses a substantial risk of a sig-

nificant number of human fatalities or incidents of permanent or long-term disability. Wyoming Statute 35-4-115(a)(i).

The COVID-19 pandemic presumably meets the definition for a public health emergency, especially considering that coronavirus appears to be the driving factor for passing this immunity law. However, whether exposure claims are covered

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is not clear, the specific type of government instructions to comply with are not defined, no immunity timeframe is given, and there is uncertainty as to what exactly may be considered “responding” in “good faith” to a public health emergency. Regardless, it appears that to secure immunity against COVID-19 claims in Wyoming, an individual or business must meet additional burdens of conduct and compliance other than simply operating as normal.

Oklahoma

Oklahoma Governor Kevin Stitt signed a wide-ranging immunity clause into law on May 21, 2020, that declares:

(B) A person or agent of the person who conducts business in this state shall not be liable in a civil action claiming an injury from exposure or potential exposure to COVID-19 if the act or omission alleged to violate a duty of care of the person or agent was in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure.

If two or more sources of guidance are applicable to the conduct or risk at the time of the alleged exposure, the person or agent shall not be liable if the conduct is consistent with any applicable guidance.

Oklahoma Senate Bill 1946, Section 1B.

A “person” is defined as an individual, firm, partnership, corporation, or association. Oklahoma Senate Bill 1946, Section 1A(3). There is no limitation as to the type of business. Similar to Utah, the immunity set forth by Oklahoma legislation arguably can protect all individuals and businesses for claims related to COVID-19 exposure or potential exposure. Also, other than the law only applying to civil matters (not criminal), there is no exclusion of immunity for certain types of civil claims or actions. As a result, the immunity, which serves a defense for actions filed on or after the effective date of the law (May 21, 2020), may cover all civil, COVID-19 exposure claims brought after said time with the exception of COVID-19 related workers’ compensation claims.

One caveat is that in order to obtain immunity, individuals and businesses must be “in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure.” “Guidance” is defined as written guidelines related to COVID-19 issued by the Centers for Disease Control and Prevention, the Occupational Safety and Health Administration of the United States Department of Labor, and the Oklahoma State Department of Health. Oklahoma Senate Bill 1946, Section 1A(2). Of significance, the law notes that an individual or business can claim immunity if they are in compliance with any applicable guidance, not all sources of guidance. Nonetheless, the non-specific description as to exactly what regulations, orders, or guidance provisions are considered applicable unfortunately leaves the issue up for debate and will likely be a source of contention. An additional gray area is the silence on whether the law is retroactive for acts or omissions that allegedly occurred prior to the enactment of the law. Similarly, no mention is made as to when the immunity protection expires. These issues can certainly lead to confusion and uncertainty for

both sides in litigating a COVID-19 exposure claim.

Besides the aforementioned law, on May 15, 2020, the Oklahoma COVID-19 Product Protection Act was enacted to provide immunity to those individuals and entities that design, manufacture, label, sell, distribute, donate, or use disinfecting and cleaning supplies or personal protective equipment during and in response to the COVID-19 public health emergency. The act applies to civil actions alleging personal injury, death, or property damage caused by or resulting from the product’s manufacturing or design, a failure to provide proper instructions and/or sufficient warnings, or the selection, distribution, or use of such a product. Oklahoma Product Protection Act, Senate Bill 1947, Section 1C and 1D. However, key requirements must be met to be eligible for the immunity. The person or entity must not make the product or equipment in the ordinary course of business; act with a deliberate intention to cause harm; or have actual knowledge that the product was defective when put to the use for which the product was manufactured, sold, distributed, or donated, and act with deliberate indifference to or conscious disregard of a substantial and unnecessary risk that the product would cause serious injury to others. Oklahoma Product Protection Act, Senate Bill 1947, Section 1E.

Kansas

Kansas Governor Laura Kelly signed the COVID-19 Response and Reopening for Business Liability Protection Act into law on June 8, 2020, which notes:

(a) Notwithstanding any other provision of law, a person, or an agent of such person, conducting business in this state shall be immune from liability in a civil action for a COVID-19 claim if such person was acting pursuant to and in substantial compliance with public health directives applicable to the activity giving rise to the cause of action when the cause of action accrued.

COVID-19 Response and Reopening for Business Liability Protection Act, House Bill 2016, Section 11(a).

The protection afforded by this act applies retroactively to any cause of action accruing on or after March 12, 2020, and expires on January 26, 2021. COVID-19

Response and Reopening for Business Liability Protection Act, House Bill 2016, Section 11(b) and 15(a). While time constraints for asserting the immunity are transparent and the act arguably applies to COVID-19 claims that are not within the workers' compensation realm, the remainder of the act is likely to elicit disputes concerning the requirements for and scope of immunity. Specifically, with no mention of whether exposure claims are covered and definitions lacking for "conducting business," "substantial compliance," and "public health directives," arguments can easily arise as to what type of claim may be subject to the immunity.

The act goes further to give immunity from liability for civil, product liability claims to those who design, manufacture, label, sell, distribute, provide, or donate qualified products in response to the COVID-19 public health emergency. The product must be provided:

- a) at the specific request of or in response to a written order or other directive finding a public need for a qualified product issued by the governor, the adjutant general, or the division of emergency management; and (b) the damages are not occasioned by willful, wanton, or reckless disregard of a known, substantial, and unnecessary risk that the product would cause serious injury to others.

COVID-19 Response and Reopening for Business Liability Protection Act, House Bill 2016, Section 12(a) and 12(b). Forming a similar pattern, ambiguities for terms contained in the product liability provision including "written order" and "other directive finding a public need" can only lead to more uncertainty pertaining to the viability of claims and defenses.

Louisiana

On June 13, 2020, the State of Louisiana enacted an immunity provision signed by Governor John Bel Edwards that reads:

No natural or juridical person, state or local government, or political subdivision thereof shall be liable for any civil damages for injury or death resulting from or related to actual or alleged exposure to COVID-19 in the course of or through the performance or provision of the person's, government's, or political subdivision's business operations unless

the person, government, or political subdivision failed to substantially comply with the applicable COVID-19 procedures established by the federal, state, or local agency which governs the business operations and the injury or death was caused by the person's, government's, or political subdivision's gross negligence or wanton or reckless misconduct. If two or more sources of procedures are applicable to the business operations at the time of the actual or alleged exposure, the person, government, or political subdivision shall substantially comply with any one applicable set of procedures.

Louisiana Act 336, House Bill 826, Section 1(A) R.S. 9:2800.25, *Limitation of liability for COVID-19*.

The law is retroactive to March 11, 2020, but an expiration date is not identified. Louisiana Act 336, House Bill 826, Section 3. Liability can be avoided unless a "person" engaged in "business operations" fails to comply with a set of "applicable COVID-19 procedures" and acts with gross negligence, wantonly, or recklessly. This phrasing appears to be somewhat questionable as it allows for an interpretation that a defendant could either violate applicable guidelines or act with gross negligence/wantonly/recklessly, but not both, and still qualify for immunity. Additionally, "person," "business operations," and "applicable COVID-19 procedures" are not defined in the act. Thus, consistent with what appears to be a common theme among the states who have passed COVID-19 immunity clauses, the Louisiana law arguably leaves the application of the immunity open to interpretation.

Protection against product liability claims was also given to those persons that design, manufacture, label, or distribute personal protective equipment in response to and during the COVID-public health emergency as well as those persons who use, employ, dispense, or administer personal protective equipment. Louisiana Act 336, House Bill 826, Section 2(A) and (B) R.S. 29:773, *Limitation of liability for Personal Protective Equipment During the COVID-19 Public Health Emergency*. The protection is afforded for claims of injury and death related to the personal protective equipment with similar requirements of compliance with a set of applicable COVID-19

procedures and avoiding gross negligence, wanton, and reckless conduct. The same ambiguities will inevitably have to be addressed for product liability claims as they will for other claims against businesses.

Iowa

Governor Kim Reynolds signed an Iowa bill into law on June 18, 2020, that gives busi-

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to give immunity from liability for civil, product liability claims to those who design, manufacture, label, sell, distribute, provide, or donate qualified products in response to the COVID-19 public health emergency.

nesses liability protections retroactively to January 1, 2020, as follows:

A person (defined as an individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity) shall not bring or maintain a civil action alleging exposure or potential exposure to COVID-19 unless one of the following applies: 1) The civil action relates to a minimum medical condition (defined as a diagnosis of COVID-19 that requires inpatient hospitalization or results in death). 2) The civil action involves an act that was intended to cause harm. 3) The civil action involves an act that constitutes actual malice.

Senate File 2338, Sec. 5. 686D.3, *Actual injury requirement in civil actions alleging COVID-19 exposure* and Iowa Code 4.1(20).

A person who possesses or is in control of a premises, including a tenant, lessee, or occupant of a premises (defined as

any real property and any appurtenant building or structure serving a commercial, residential, educational, religious, governmental, cultural, charitable, or health care purpose) who directly or indirectly invites or permits an individual onto a premises, shall not be liable for civil damages for any injuries sustained from the individual's exposure to

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COVID-19, whether the exposure occurs on the premises or during any activity managed by the person who possesses or is in control of a premises, unless any of the following apply to the person who possesses or is in control of the premises: 1) The person who possesses or is in control of the premises recklessly disregards a substantial and unnecessary risk that the individual would be exposed to COVID-19. 2) The person who possesses or is in control of the premises exposes the individual to COVID-19 through an act that constitutes actual malice. 3) The person who possesses or is in control of the premises intentionally exposes the individual to COVID-19.

Senate File 2338, Sec. 6. 686D.4, *Premises owner's duty of care—limited liability*.

A person in this state shall not be held liable for civil damages for any injuries sustained from exposure or potential exposure to COVID-19 if the act or omission alleged to violate a duty of care was in substantial compliance or was consistent with any federal or state statute, regulation, order, or public health guidance related to COVID-19 that was applicable to the person or activity at issue at the time of the alleged exposure or potential exposure.

Senate File 2338, Sec. 7. 686D.5, *Safe harbor for compliance with regulations, executive orders, or public health guidance*.

A similar provision asserts business liability protections for product liability claims against entities that design, manufacture, label, sell, distribute, or donate household disinfecting or cleaning supplies, personal protective equipment, or a qualified product (defined as personal protective equipment, medical equipment/devices, medical supplies, medications, and tests for coronavirus) in response to COVID-19. Senate File 2338, Sec. 9. 686D.7, *Supplies, equipment, and products designed, manufactured, labeled, sold, distributed, and donated in response to COVID-19*.

The immunity offered by the Iowa law appears to be one of the more comprehensive and business-friendly protections in the country. If an individual did not require hospitalization or die, a claim for COVID-19 cannot be brought. Even were a hospitalization or death to result, if a business did not expose that individual to COVID-19 through malice, intentional acts, or reckless disregard or if the business complied with government directives as to COVID-19, it should not be subject to liability. Nonetheless, like the other states, it is anticipated that the scope, application, and terms of this law may be challenged.

Mississippi

On July 8, 2020, Mississippi Governor Tate Reeves signed into law Senate Bill No. 3049 known as the "Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act" that sets forth:

- (1) A person (defined as an individual, state and political subdivisions, association, educational entity, for-profit or nonprofit entity, religious organization or charitable organization), or agent of that person, who attempts in good faith to follow applicable public health guidance (defined as written guidance related to the COVID-19 state of emergency that is issued by an executive agency or regulatory agency of the federal government or an executive agency of the State of Mississippi) shall be immune from suit

for civil damages for any injuries or death resulting from or related to actual or alleged exposure or potential exposure to COVID-19 in the course of or through the performance or provision of its functions or services.

- (2) A person, or agent of that person, shall be immune from suit for civil damages for injuries or death resulting from or related to actual or alleged exposure or potential exposure to COVID-19 in the course of or through the performance or provision of its functions or services in the time before applicable public health guidance was available.
- (3) An owner, lessee, occupant or any other person in control of a premises (defined as any physical place serving a commercial, residential, educational, religious, governmental, cultural, charitable or health care purpose), who attempts, in good faith, to follow applicable public health guidance and directly or indirectly invites or permits any person onto a premises shall be immune from suit for civil damages for any injuries or death resulting from or related to actual or alleged exposure or potential exposure to COVID-19.

Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act, Senate Bill 3049, Section 3.

This act provides similar protections for product liability claims, is retroactive to March 14, 2020, and extends until one year after the end of the COVID-19 state of emergency. Lawsuits for an alleged injury arising from COVID-19 must be brought no later than two years after the cause of action accrues. However, any civil liability arising out of acts or omissions or related to an injury that occurred during the time-frame of the act shall be subject to the provisions in perpetuity. Also, if a plaintiff shows, by clear and convincing evidence, that a defendant, or any employee or agent thereof, acted with actual malice or willful, intentional misconduct, the defendant is not entitled to immunity. The "clear and convincing evidence" standard is a tall hurdle to clear for a plaintiff and is sub-

jective in nature. Similarly, the immunity requirement for a business or defendant to “in good faith follow applicable public health guidance” lacks objectivity. As a result, these matters will likely be the subject of debate. *Mississippi Back-to-Business Liability Assurance and Health Care Emergency Response Liability Protection Act*, Senate Bill 3049, Section 5-8.

Georgia

In Georgia, Governor Brian Kemp signed the Pandemic Business Safety Act into law on August 5, 2020, that states:

No healthcare facility, healthcare provider, entity, or individual, shall be held liable for damages in an action involving a COVID-19 liability claim against such healthcare facility, healthcare provider, entity, or individual, unless the claimant proves that the actions of the healthcare facility, healthcare provider, entity, or individual, showed: gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm.

Pandemic Business Safety Act, Senate Bill 359, O.C.G.A. 51-16-2.

With the protection identified above that applies to causes of action accruing until July 14, 2021, the Georgia act went a step further to provide an additional, potential “assumption of risk” defense to businesses that face a COVID-19 claim as follows:

(a) Except for gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm, in an action involving a COVID-19 liability claim against an individual or entity for transmission, infection, exposure, or potential exposure of COVID-19 to a claimant on the premises of such individual or entity, there shall be a rebuttable presumption of assumption of the risk by the claimant when:

(1) Any receipt or proof of purchase for entry, including but not limited to an electronic or paper ticket or wristband, issued to a claimant by the individual or entity for entry or attendance, includes a statement in at least ten-point Arial font placed apart from any other text, stating the following warning:

‘Any person entering the premises waives all civil liability against this premises owner and operator for any injuries caused by the inherent risk associated with contracting COVID-19 at public gatherings, except for gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm, by the individual or entity of the premises.’; or

(2) An individual or entity of the premises has posted at a point of entry, if present, to the premises, a sign in at least one-inch Arial font placed apart from any other text, a written warning stating the following:

‘Warning Under Georgia law, there is no liability for an injury or death of an individual entering these premises if such injury or death results from the inherent risks of contracting COVID-19. You are assuming this risk by entering these premises.’

Pandemic Business Safety Act, Senate Bill 359, O.C.G.A. 51-16-3.

This “assumption of risk” provision makes the Georgia immunity law unique when compared to the immunity offered by other states and allows businesses the possibility of a multi-layered defense to a COVID-19 exposure claim. Based on the language contained in this law, it should come as no surprise if businesses in the State of Georgia attempt to place these assumption of risk warnings on receipts and entry/exit signs in an effort to escape liability. On the other hand, in Federal Employers Liability Act (FELA) cases, assumption of risk is not a defense. Therefore, depending on the type of claim asserted by a plaintiff, any assumption of risk defense may not be available, regardless of the contents of the state statute. These issues are important to keep in mind as COVID-19 related claims continue to evolve.

State Executive Orders

Beyond the states that have passed laws on the issue of business immunity, Alabama and Arkansas have enacted protections for businesses through executive orders.

Alabama Executive Order

On May 8, 2020, Governor Kay Ivey issued an Eighth Supplemental Executive Order

that includes a proclamation of civil immunity that sets forth:

a business, health care provider, or other covered entity, shall not be liable for the death or injury to persons or for damage to property in any way arising from any act or omission related to, or in connection with, COVID-19 transmission or a covered COVID-19 response activity, unless a claimant shows by clear and convincing evidence that the claimant’s alleged death, injury, or damage was caused by the business, health care provider, or other covered entity’s wanton, reckless, willful, or intentional misconduct.

Alabama Eighth Supplemental Executive Order, Section I(C)(1).

A “business, health care provider, or other covered entity” is defined as an individual, partnership, association, corporation, health care provider, other business entity or organization, or any agency or instrumentality of the State of Alabama, including any university or public institution of higher education, whether any such individual or entity is for profit or not for profit, including its directors, officers, trustees, managers, members, employees, volunteers, and agents. Alabama Eighth Supplemental Executive Order, Section I(B)(2). The executive order also notes that in those instances where liability is established and the acts or omissions do not result in serious physical injury, the liability of a business shall be limited to actual economic compensatory damages with non-economic or punitive damages not being attainable by a claimant. Punitive damages are only a possibility for a wrongful death claim based on COVID-19. Alabama Eighth Supplemental Executive Order, Section I(C)(2).

Arkansas Executive Order

Arkansas Governor Asa Hutchinson issued Executive Order 20-33 on June 15, 2020, that asserts:

[t]o protect businesses that open or remain open during the COVID-19 emergency, all persons (defined as an individual, entity, organization, group, association, partnership, business, institution of learning, commercial concern, corporation, or company) in the State of Arkansas and the person’s employees, agents, and officers shall be immune

from civil liability for damages or injuries caused by or resulting from exposure of an individual to COVID-19 on the premises owned or operated by those persons or during any activity managed by those persons.

The executive order further declares that the immunity does not exist for willful, reckless, or intentional misconduct. However, it is presumed that a business does not act in that manner if it is in substantial compliance with health and safety directives or acting in good faith while attempting to comply with health and safety directives. Arkansas Executive Order 20-33(1),(2), and (7)(C).

Like Alabama, the Arkansas executive order seeks to provide a safety net to businesses in response to COVID-19 claims if they do not act willfully, wantonly, recklessly, or intentionally. This is very similar language to that contained in the laws passed by the various states. Although these executive orders are not passed laws, businesses in Alabama and Arkansas are likely to use them as defenses to COVID-19 related claims on the basis that they were issued through the powers of the governor. Whether this is disputed by claimants, and if so, in what ways, is something worth keeping an eye on for defense lawyers.

State Legislation—Proposed Bills

Although laws and executive directives have not been passed in every state at this juncture, the vast majority of, if not all, state governments have discussed the unique circumstances facing businesses due to COVID-19, with some states considering proposed business immunity legislation. Arizona (House Bill 2912), Ohio (House Bill 606 and Senate Bill 308), and New Jersey (Assembly Bill 4189) have each introduced business immunity bills. While these proposed pieces of legislation each have their own language, the content and intent of the bills are aligned with that of the passed laws and Executive Orders from the other states. Arizona House Bill 2912; Ohio House Bill 606; Ohio Senate Bill 308; New Jersey Assembly Bill 4189. Also, Tennessee appears to be continuing efforts to consider legislation for liability protections for businesses. Whether these proposed legislative efforts become law, are revised/amended, or are abandoned is to be

determined. Nonetheless, this is more than likely not the end of state legislature efforts of this type. More states may join the party with laws or directives of their own in these fluid and constantly evolving times.

Federal Legislation

Apart from the state legislative efforts, federal government factions have also placed an emphasis on laws addressing business immunity and liability protections for COVID-19 exposure claims. In an attempt to set the structure for the Phase 4 COVID-19 Relief Bill (“Phase 4 Bill”), on May 15, 2020, the U.S. House of Representatives passed the Health and Economic Recovery Omnibus Emergency Solutions Act (“HEROES Act”). H.R.6800 HEROES Act. This proposal was not well received by the U.S. Senate. Led by a push from Senate Majority Leader Mitch McConnell, Republican members of Congress targeted business liability protections for COVID-19 exposure claims to be included in the Phase 4 Bill. It appears that the Senate deemed the HEROES Act deficient in this area.

This impasse resulted in a July 21, 2020, letter sent to congressional leadership from Republican governors requesting the Phase 4 Bill contain civil liability protections for businesses, health care workers, and schools. <https://www.rga.org> (last visited August 21, 2020). Specifically, governors from the following twenty-one states signed the letter: Alabama, Alaska, Arizona, Arkansas, Idaho, Indiana, Iowa, Maryland, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wyoming. On July 27, 2020, in response to the HEROES Act, U.S. Senate Republicans released their Phase 4 Bill relief proposal referred to as the Health, Economic Assistance, Liability Protection, and Schools Act (“HEALS Act”). Senate HEALS Act, S.1624. The HEALS Act creates safe-harbor protection for businesses from liability related to COVID-19 exposure claims if the businesses take reasonable precautions to comply with public health guidelines. The exception is that acts of gross negligence are not protected. Senate HEALS Act, S.1624.

The party-line debate over whether COVID-19 related immunity for busi-

nesses will become federal law and, if so, to what extent, is likely to continue. Although many unknowns remain for this issue, it is worth monitoring as another possible source to support defenses to COVID-19 exposure claims.

Other Considerations— Proposed Legislation for Employer Safety Measures

On the other end of the spectrum from the business immunity legislation is a proposed bill in Illinois referred to as the Personal Protective Equipment Responsibility Act that provides as follows:

- (a) The owner (defined as a person or entity that has legal ownership of the essential employer) and the operator (defined as the person or entity that has operational or managerial control of the essential employer and includes any officer, member or partner of the person or entity that has operational or managerial control of the essential employer) of an employer engaged in an essential business have the duty, jointly and severally, to provide independent contractors and employees with appropriate face coverings and require that independent contractors and employees wear face coverings when maintaining a 6-foot social distance is not possible at all times. When the work circumstances require, the owner and operator have a duty to provide independent contractors and employees with other personal protection equipment in addition to face coverings.
- (b) The personal protective equipment required to be provided under this Section must comply with the standards established under the federal Occupational Safety and Health Act of 1970 for general industry, shipyard employment, marine terminals, longshoring, and construction, as applicable to the employer.
- (c) The personal protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, must

be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, biological hazards, chemical hazards, radiological hazards, or mechanical irritants being encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact.

Personal Protective Equipment Responsibility Act, House Bill 5769, Section 5 and Section 10(a)–(c).

An “essential employer” is an employer engaged in an essential business or operation as designated in a disaster proclamation or any Executive Order issued in furtherance of the disaster proclamation. Personal Protective Equipment Responsibility Act, House Bill 5769, Section 5. Per Executive Order 2020-10 issued by Illinois Governor J.B. Pritzker on March 20, 2020, “essential businesses” include: stores that sell groceries and medicine; food, beverage, cannabis production, and agriculture businesses; organizations that provide charitable and social services; media; gas stations and businesses needed for transportation; financial institutions; hardware and supply stores; critical trades; mail, post, shipping, logistics, delivery, and pick-up services; educational institutions; laundry services; restaurants; supply businesses for other essential businesses and people to work from home; transportation businesses; home-based care and services; residential facilities and shelters; professional services; day care centers; manufacture, distribution, and supply chain for critical products and industries; critical labor union functions, funeral services; and hotels/motels. *Illinois Executive Order 2020-10, Section 1(12)*.

An action is to be brought within three years after accrual and “in an action for damages brought under this Act, the court shall award the injured person or employee 3 times the amount of actual damages resulting from the violation and may award punitive damages, reasonable attorney’s fees and costs to the person, the employee, or the employee’s representative.” Personal Protective Equipment Responsibility Act, House Bill 5769, Section 20(c).

It should come as no surprise that the Personal Protective Equipment Responsibility Act has been scrutinized and opposed by many business and legal defense groups in Illinois. Common arguments in opposition to the bill are that it 1) attempts to abrogate the doctrine that workers’ compensation benefits are to be the exclusive remedy between an injured worker and their employer; 2) allows for limitless relief, including punitive damages and attorneys’ fees; 3) subjects a wide array of individuals to liability; 4) places liability on an owner for hiring an independent contractor, regardless of whether the owner retains control over the independent contractor’s work; and 5) fails to define the exact circumstances that require personal protective equipment to be supplied and the type of equipment to be supplied for each circumstance.

The Personal Protective Equipment Responsibility Act was filed on May 5, 2020, with a first reading and referral to the Rules Committee on May 18, 2020. There has not been a ruling on this bill and continued opposition is expected. Despite its somewhat early stage, it will be wise to track the status of the bill as any increased safety measure responsibilities and potential liability for businesses and employers related to COVID-19 exposure will be of significance for defending claims.

Takeaways from the COVID-19 Legislation

The passed laws, executive orders, and proposed legislation at the state and federal levels can significantly affect the defense of COVID-19 exposure claims. Whether immunity for an insured is a viable option may be the difference between obtaining an early dismissal or summary judgment and remaining in the case through trial. Similarly, whether an insured may have been required to implement increased safety measures to protect against COVID-19 exposure and/or is subject to a multitude of damages may influence the likelihood of a defense verdict.

It appears that there are numerous grounds for opposition to the COVID-19 related legislation enacted to date, including the lack of clear definitions, uncertain scope and applicability, and questionable effective and expiration dates. Also, given the con-

tinuing response by governments to COVID-19, including the numerous executive orders issued by state governors and evolving guidance disseminated by public health authorities, defense counsel must consider the possibility of inconsistencies between state and federal laws/regulations and preemption. Conversely, depending on the facts of the case and the language of the applicable provisions, the protections and requirements offered could be deemed unassailable.

These matters will likely be disputed by plaintiffs and defendants; however, the laws and directives cannot be ignored or underestimated. Rather, they should be addressed as a meaningful component for the outcome of an action. One of the first things a defense lawyer should do when working on a COVID-19 exposure claim is determine which, if any, legislation, executive orders, or other regulations may apply. This will be a key factor in assessing the strengths and weaknesses of a claim and is likely to shape the defense strategy.

Of further significance, when assessing issues created by any potentially applicable laws, executive orders, or other regulations, defense counsel must identify and analyze insurance coverage ramifications that may arise. The immunity provisions offer additional lines of defense for businesses and their insurers. In many instances, the level of conduct that a plaintiff would have to prove to overcome immunity is gross negligence or reckless, intentional, willful, or wanton acts on the part of the defendant. While this could be a difficult burden of proof for a plaintiff to satisfy, if the burden is met, the claim may fall outside of available coverage due to exclusions that are commonplace in policies of insurance for such conduct. Additionally, because governmental entities are expressly included in several states’ new immunity laws, issues could arise regarding the waiver of immunity due to the purchase of insurance, depending on the existence and drafting of immunity-related provisions in the entity’s coverage form.

With the number of COVID-19 exposure claims continuing to increase exponentially across the country, this is an area of law sure to further advance along with the legislation. Being aware of these developments and their effect on claims will provide some clarity during these uncertain times.

