

**House Committee on Judiciary**  
**Testimony in Support of Business Liability Protections Related to COVID-19**  
**Cary Silverman, Partner, Shook, Hardy & Bacon L.L.P.**  
**On Behalf of the American Tort Reform Association and Kansas Chamber**

**Wednesday, May 13, 2020**

Chairman Patton and members of the Committee, thank you for the opportunity to testify in support of legislation that will provide assurance to businesses that they will not face unwarranted lawsuits or excessive liability as they reopen or make vital products to aid in the COVID-19 response. I am testifying today on behalf of the American Tort Reform Association (ATRA), a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that support fairness, balance, and predictability in civil litigation, and the Kansas Chamber. I am a partner in the Shook, Hardy & Bacon L.L.P. law firm, where my practice focuses on tort, product liability, consumer law, and civil justice reform.

As doors open and operations move back toward “normal,” schools, daycare centers, offices, retailers, religious institutions, factories, farms, and others need assurance that, if they do the right thing, they will not be hit with lawsuits alleging that they should have done something more to protect others from the virus. As I will also discuss today, businesses that have ramped up production of medical supplies and protective equipment, or made products that they do not ordinarily produce to aid the state’s response to COVID-19, also place themselves at risk of lawsuits.

These concerns are not hypothetical. The first lawsuits targeting health care providers, employers, retailers and other businesses for COVID-related injuries have already been filed.<sup>1</sup> Already, a Kansas nursing home faces a surge of claims stemming from exposure to COVID-19.<sup>2</sup> Many more are to come.<sup>3</sup> For example, a coalition of national law firms specializing in mass tort litigation has formed a “Coronavirus Litigation Task Force” to identify targets and theories for litigation.<sup>4</sup> Plaintiffs’ lawyer-affiliated websites provide a roadmap for suing for contracting COVID-19 at work.<sup>5</sup> Another website, “Top Class Actions,” informs readers that “If you believe that your rights were violated by a company as a result of the coronavirus pandemic, you may be entitled to

---

<sup>1</sup> Amanda Bronstad, *As Businesses Reopen, Lawsuits Loom Over COVID-19 Exposure*, Law.com, May 1, 2020; Shayna Jacobs, *771 Lawsuits — and Counting: Wave of Virus Litigation Hits Businesses Across the U.S.*, Wash. Post, May 1, 2020; see also Alina Selyukh, *Walmart Faces Lawsuit Over Workers’ Death from Coronavirus Complications*, NPR, Apr. 7, 2020.

<sup>2</sup> The cases, all filed in the Wyandotte County District Court by two law firms against Big Blue Healthcare dba Riverbend Post-Acute Rehabilitation, include *Eaton*, 2020-CV-000293 (filed May 11, 2020); *Jackson*, 2020-CV-000278 (filed May 1, 2020); *Campbell*, 2020-CV-000277 (filed May 1, 2020); *Harris*, 2020-CV-000270 (filed Apr. 27, 2020); *Baskins*, 2020-CV-000265 (filed Apr. 24, 2020); *Brown*, 2020-CV-000267 (filed Apr. 24, 2020); *Block*, 2020-CV-000266 (filed Apr. 24, 2020); *Long*, 2020-CV-000261 (filed Apr. 23, 2020).

<sup>3</sup> Angie Ricono, *Is Liability the Next Pandemic?*, KCTV News 5, May 12, 2020 (reporting over 700 COVID-19 lawsuits were filed in April nationwide, including lawsuits against a Kansas City, Kansas nursing home).

<sup>4</sup> See Press Release, *Milberg, SPG, and Greg Coleman Launch Coronavirus Task Force*, Mar. 27, 2020; Sanders Phillip Grossman: A National Law Firm, *COVID-19 (Coronavirus) Lawsuits*, <https://www.spglawfirm.com/covid-19-coronavirus-lawsuits/> (outlining various types of COVID-19 lawsuits, including negligence claims targeting health care facilities, businesses, commercial property owners, cruise ships, and nursing homes).

<sup>5</sup> See, e.g., Work Injury Source, *Does Workers’ Compensation Cover Coronavirus (COVID-19)*, Work Injury Source, Mar. 14, 2020, <https://workinjurysource.com/workers-compensation-and-coronavirus>.

compensation.”<sup>6</sup> More personal injury lawyers will advertise for COVID-19 claims in the weeks and months ahead.<sup>7</sup>

We support a balanced approach to legislation that protects businesses from unwarranted and excessive liability, encourages businesses to follow best practices for reopening, and holds those who act recklessly or engage in misconduct responsible for causing harm.

### **Requiring an Actual Injury**

Nationwide, there are over 1.4 million confirmed cases of COVID-19 as of May 13, including about 7,200 cases in Kansas. By the end of the pandemic, all of us will likely have been exposed to COVID-19. The vast majority of people who are diagnosed with COVID-19, however, will experience no more than flu-like symptoms. We have already seen individual and class action lawsuits filed on behalf of people who may have been exposed to COVID-19, but did not contract the illness.<sup>8</sup> These lawsuits may allege negligence, or assert creative claims such as fear of disease and infliction of emotional distress, and creatively seek damages for emotional harm, lost income during a period of quarantine, medical monitoring costs, or punitive damages.

Exposure-only claims will be attractive to some plaintiffs’ lawyers because of the sheer number of people who will be exposed to the virus. Bringing thousands of individual claims or a class action may pressure even the largest business to settle regardless of the merits. We have also unfortunately seen, in other contexts, “nuisance” lawsuits filed against small businesses where there is no true injury. Small business owners are often compelled to settle because they realize that hiring a lawyer and fighting in court will cost more than paying the lawyers’ demand. In today’s fragile environment, a single lawsuit accusing a business of negligently exposing a person to COVID-19 could mean financial ruin for a business that is trying to get back on its feet.

For these reasons, we support legislation that does not permit lawyers to file claims on behalf of individuals who allege no more than exposure to COVID-19, a diagnosis of COVID-19 without illness, or common flu-like symptoms. Just as a person would not sue for contracting the flu at work or while visiting the supermarket, there should not be lawsuits filed on behalf of people whose COVID-19 experience is similar to millions of Americans. This approach would affect the ability of those who were hospitalized for COVID-19 or otherwise experienced a serious illness to file a lawsuit, which would need to meet other tort law requirements. If a person deliberately exposed another to the virus, this minimal injury requirement would not apply.

---

<sup>6</sup> Melissa LaFreniere, *A Complete Guide to Coronavirus Lawsuits & Legal Issues*, Top Class Actions, May 8, 2020.

<sup>7</sup> See, e.g., The Barnes Firm: Injury Attorneys, *Coronavirus Lawyer Helping Families*, <https://www.thebarnesfirm.com/covid-19-lawyer/> (“Thousands of American were wrongfully exposed to the deadly COVID-19 virus. Who’s responsible? What can be done? Why wasn’t my family protected from COVID-19?”); Gomez Trial Attorneys, Practice Areas Coronavirus Lawyer, <https://www.thegomezfirm.com/practice-areas/coronavirus-attorney/> (suggesting negligence and gross negligence claims where there are “clusters” of COVID-19 positive individuals, among other types of COVID-19-related lawsuits).

<sup>8</sup> See, e.g., Amanda Bronstad, *Lieff Cabraser Files First Class Action Over Quarantined Grand Princess Cruise Ship*, Law.com, Apr. 8, 2020; Joyce Hansen, *Princess Cruise Lines Hit by Wave of COVID-19 Suits*, Law360, Mar. 17, 2020.

## **Providing Assurance to Businesses and Others That They Will Not be Sued When a Person Contracts COVID-19**

Businesses operating during the pandemic and those who own or manage property are concerned that they may face lawsuits by guests, customers, tenants or others blaming them for a person contracting COVID-19. These concerns will rise as Kansas's economy reopens.

Cases alleging that a person contracted COVID-19 at a business or other property should not be treated in the same manner as an ordinary slip-and-fall lawsuit. It is not possible to eliminate the potential for exposure to COVID-19 on a person's property. Kansas residents are well aware of that inherent, unavoidable risk. The expectations for how businesses should operate and our knowledge of the virus is continually developing, evolving, and changing. While plaintiffs' in these lawsuits will certainly face challenges in proving the source of exposure or cause of the illness, as discussed earlier, the cost of defending a single lawsuit could force already struggling small businesses to shut down.

We support legislation that would address these concerns by providing a higher standard for COVID-19 exposure claims than ordinary premise liability claims. A business or other premise owner should not be subject to liability in COVID-19 exposure claims unless the business knew of a substantial and unnecessary risk that visitors would be exposed to COVID-19 on its property and failed guard against or warn of it. In other words, a business that knows an employee has COVID-19 but does not send him or her home, ignores the risk, or takes no action to disinfect a property after learning of a COVID-19 diagnosis would be subject to liability. Speculative claims questioning whether a business should have realized, or realized earlier, that a visitor or worker had COVID-19, or hypothetically could have taken some additional action that might have reduced the exposure of others, would not present a viable claim.

### **Encouraging and Rewarding Compliance With Public Health Guidance**

The vast majority of those who operate schools, religious institutions, supermarkets, restaurants, office buildings, entertainment venues, hotels, nursing homes, and daycare centers will carefully follow public health guidance for operating as safely as possible during the pandemic. Federal agencies such as the Centers for Disease Control and Prevention and Occupational Safety and Health Administrative have issued written guidance for operating as safely as possible during the pandemic. In addition, state agencies, such as the Kansas Department of Health and the Environment, Kansas Department of Labor, and Kansas Department of Aging and Disability Services have issued guidance for business reopening generally and for many specific industries and occupations.

Under current tort law, however, such responsible behavior does not preclude lawsuits claiming that a business should have taken some additional or different action to reduce the chance of exposure or that the business should not have operated at all. These cases, litigated years later, will be viewed in hindsight, rather than under the constantly developing knowledge and evolving practices that we live with today. We support legislation that provides businesses with a defense to liability if they complied

with written guidance, or an executive order or regulation, that addressed the activity at issue and was applicable at the time of the alleged exposure. Businesses that try their best to follow public health guidance would not be liable in lawsuits alleging that they could have responded differently or not operated at all.

### **Protecting Those That Aid in the Response to COVID-19 from Lawsuits**

Many businesses and organizations have stepped up to provide goods, services, and facilities to aid in the state's response to the COVID-19 pandemic. Manufacturers are ramping up production of critical products. For example, Winfield-based S & Y Industries, which normally builds 100 to 200 circuit boards per month for ventilators has orders to fill 2,500 boards by summer and is pushing to turn out components 20 hours per day.<sup>9</sup> Two Shawnee companies – Hans Rudolph Inc. and Everseal Gasket Inc. – have significantly increased their production of masks used by patients with ventilators and valves used in reusable respirators, respectively.<sup>10</sup> Wichita's Groover Labs is making cloth masks and face shields.<sup>11</sup>

Kansas businesses that do not ordinarily make medical supplies and equipment are converting their plants to make face masks, gowns, ventilators and other critically needed items.<sup>12</sup> For example, Spirit Aerosystems, which typically produces materials for commercial and defense aircraft, has converted a facility in Wichita, putting 700 of its employees to work making 22,000 ventilators for the U.S Strategic National Stockpile and is also delivering ventilators to state and private hospitals in need.<sup>13</sup> Many Kansas breweries and distilleries are now making hand sanitizer.<sup>14</sup>

As these examples show, some manufacturers have quickly increased their production of critical products in response to the crisis, which could lead to compromised quality control. Others are making products they do not ordinarily produce to help, posing a risk of a flaw in the product's design, instructions, or warnings. Experience in mass tort litigation also has unfortunately shown that businesses that make protective equipment are often named as co-defendants in lawsuits targeting others.

---

<sup>9</sup> Daniel McCoy, *Winfield Supplier Ramping up to Help Meet Ventilator Demand*, Wichita Business Journal, Mar. 23, 2020.

<sup>10</sup> Leah Wankum, *Shawnee Companies Ramp Up Production of Ventilation Masks and Valves to Meet COVID-19 Demand*, Shawnee Mission Post, Apr. 2, 2020.

<sup>11</sup> Groover Labs, *COVID-19 Face Shields*, <https://www.grooverlaps.org/face-shields>.

<sup>12</sup> Bryan Lowry & Kevin Hardy, *Kansas, Missouri Manufacturers Step Up to Enlist in COVID-19 Fight But Face Red Tape*, Kansas City Star, Apr. 13, 2020.

<sup>13</sup> Press Release, *Vyair Medical and Spirit Aerosystems Partner to Greatly Increase Ventilator Production in Response to COVID-19 Pandemic*, May 4, 2020.

<sup>14</sup> Denise Neil, *Wichita Brewing Company Now Making Thousands of Gallons of Hand Sanitizer as Demand Keeps Growing*, Wichita Eagle, Apr. 3, 2020; *Wichita Brewing Company Makes Hand Sanitizer for Those on the COVID-19 Front Lines*, KWCH-12, Apr. 1, 2020; Adam Blake, *One Bottle at a Time, Trolley House Converts to Making Hand Sanitizer*, Emporia Gazette, Mar. 28, 2020; *Reiger & Co. Hand Sanitizer to be Offered for Online Purchase, Pickup in JoCo*, KMBC 9 News, Mar. 26, 2020; *Dodge City's Boot Hill Distillery Begins Producing Hand Sanitizer*, KWCH-12, Mar. 24, 2020.

Those who aid in the state and the public during a pandemic or other emergency should have some assurance that their good intentions will not backfire and invite lawsuits. We support legislation that would limit the liability of those who make, sell, or donate products in response to COVID-19 to instances in which the business knew of a defect in the product and disregarded a substantial risk that it would cause serious injury. This liability protection would apply to those who provide critical products for use by the government, health care providers, first responders, or essential businesses, or that make personal protective equipment or disinfecting supplies available to the general public.

\* \* \*

Thank you again for the opportunity to testify in support of the need for limit on liability for businesses operating during COVID-19 and those that provide products that are vital to Kansas's COVID-19 response.