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Liability Protections Are Critical to Ensuring Economic Recovery

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KEY TAKEAWAYS

The COVID-19 pandemic is likely to create a surge in tort litigation accusing businesses of improper pandemic mitigation measures.

It is important for the reopening of our national economy that businesses be able to operate without undue fear of frivolous lawsuits.

The White House and Congress should therefore work together to establish effective and appropriate liability limits.

A surge in COVID-related product liability and other tort litigation could dampen the national recovery. Such suits, brought by members of the rapacious plaintiffs' bar, are already being filed and will no doubt be very expensive to defend, forcing many businesses to settle even meritless claims for substantial sums to avoid the risk inherent in such litigation.[1] White House economic advisor Larry Kudlow has said that liability protections are critical in order to avoid "trial lawyers putting on false lawsuits" that will cripple business across the country, and Senate Majority Leader Mitch McConnell has warned that failure to include liability protections in any future pandemic stimulus legislation constitutes a "red line" that cannot be crossed.

The need for liability protection in the face of a potential tidal wave of tort litigation accusing businesses of improper pandemic mitigation measures

seems obvious, especially in light of the havoc that even the specter of such litigation can wreak on recovery efforts. After 9/11, for instance, a number of critical anti-terrorism projects were put on hold by the mere threat of litigation as security vendors refused to enter into critical security contracts for fear they would be held financially accountable for damages caused by terrorists. That worry was a primary consideration for many businesses as courts seemed open to arguments that companies should be held liable for damages based on theories of "negligent" implementation of anti-terrorism measures.

Similar fears stymied initial efforts to jump-start the 2004 biological and chemical defense countermeasure program known as Project BioShield. In that case, plaintiffs' lawyers filed waves of personal injury lawsuits alleging the use of defective vaccines and other disease-treatment measures.

SAFETY ACT and PREP Act

In both cases, Congress concluded that the only way to keep vital security markets open and viable was to enact liability mitigation statutes. With regard to the anti-terrorism marketplace in the aftermath of 9/11, Congress responded by passing the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act of 2002.[2] Passed as part of the law creating the Department of Homeland Security (DHS), the SAFETY Act offered liability protections to companies that deployed programs, services, and tools to protect against terrorist attacks. SAFETY Act protections would be available only to companies that could prove that their products or services were "effective" and "useful" against terrorist threats.

The SAFETY Act affords companies two different levels of protection. The first is for companies that earn a "Designation" award, which caps liability at an amount of insurance the applicant is asked to carry. The second is for companies that earn a "Certification," which enables the recipient company to seek immediate dismissal of any tort claims that have been filed against it. Certification awards are generally given only to companies offering the most effective technologies or programs, while designation awards are given to companies offering technologies or programs that are well-documented but require further proof of their "effectiveness."

The SAFETY Act, which is administered by DHS, has proven to be highly successful, spurring the deployment of over 1,000 well-vetted security services and technologies, including numerous security plans in disparate facilities such as mass transit systems, important real estate properties, and even sports stadiums.

In 2005, in response to concerns about vaccine and drug injury lawsuits—including, significantly, for claims potentially arising out of the use anti-pandemic vaccines—Congress enacted the Public Readiness and Emergency Preparedness (PREP) Act.[3] The PREP Act, much like the SAFETY Act, limits liability, except that it is focused on providing such protection to drugs, biological products, or devices that have been approved, licensed, or cleared by the Food and Drug Administration (FDA) or have been cleared for "emergency use" and are distributed or used to counter a specific threat, including pandemics.

The protections against liability provided by the PREP Act are currently available to a wide variety of COVID-19 response and mitigation measures, ranging from drugs to infection tests. Congress has already expanded the scope of the PREP Act in response to the current pandemic, specifically by amending the statute to extend liability protections to manufacturers of vitally needed respirators and face masks. Similar to those of the SAFETY Act, PREP Act protections apply not just to the manufacturers of drug or medical devices, but also to any entity involved in distributing or using them. Therefore, with the activation of the PREP Act by the Secretary of Health and Human Services, a wide swath of the health care industry, from pharmaceutical research laboratories all the way down to first responders and volunteer medical aides that do everything from assisting patients in donning respirators to handing out anti-COVID drugs, already enjoy significant liability protections.

The examples of both the PREP Act and the SAFETY Act are instructive, vividly demonstrating that:

- Fear of litigation has previously crippled business efforts to stem the fallout from public emergencies like terrorist attacks or pandemics,
- Congress has successfully intervened in order to mitigate those concerns, and
- Templates exist that offer liability protection paving the way for much-needed goods and services during public emergencies while still allowing victims to seek legal redress and compensation in appropriate circumstances.

Crucial Need for Additional Liability Protections

Unfortunately, neither the SAFETY Act nor the PREP Act addresses the crippling effects posed by potential litigation accusing businesses of "negligently" reopening in the wake of the COVID-19 pandemic. The

SAFETY Act does offer liability protections for recovery and mitigation plans, including plans related to screening for and reducing the threat of biological threats including viruses. However, its protections apply only when there has been an "act of terrorism" and, despite the broad definition of "terrorism" under the act, is unlikely to apply to a naturally occurring zoonotic disease like COVID-19.

Moreover, while the PREP Act explicitly applies to pandemics like the current COVID-19 situation, its protections apply only to vaccines, countermeasures, and devices, as well as the administration thereof. The PREP Act does not apply to the drafting and implementation of needed anti-pandemic policies like disinfecting processes, disease surveillance programs, or social distancing measures. Given that such measures will be integral to the success of post-peak pandemic recovery efforts, additional liability protections will be needed to stop those efforts from being subjected to unproductive and unnecessary litigation. Further, given that the PREP Act does not apply to most anti-pandemic products outside the scope of the FDA's jurisdiction, many valuable anti-pandemic tools are vulnerable to product liability litigation.

Congress should enact specific liability mitigation protections that minimize or eliminate the greatest litigation threats that are likely to hinder the restarting of the U.S. economy. The most effective action Congress can take would be to create a mirror of the SAFETY Act that addresses pandemic protections left unaddressed by the PREP Act or existing state liability statutes. This is advisable because the SAFETY Act has already successfully vetted tools and policies that have been used to combat man-made biological threats and provides a ready-made and easy-to-replicate template for evaluating companies that are attempting to implement effective pandemic recovery and mitigation tools and processes, providing liability protection to those companies that are properly vetted.

Many small businesses that are not in the health care field, such as restaurants, bars, movie theaters, and the like, will likely not have the resources, expertise, or awareness to avail themselves of any administrative review procedure. It is important for the reopening of our national economy that such businesses also be able to operate without undue fear of lawsuits, and any liability-limiting statute should account for them too.

What These Additional Protections Should Include

Core components of this pandemic SAFETY Act–like liability protection statute should include the following:

1. It should apply to all businesses without regard to size or for-profit or not-for-profit status;

2. The liability limits should require the dismissal of claims based on negligent implementation of pandemic mitigation or response measures, as well as product liability claims for the development or sale of anti-pandemic tools not covered by the PREP Act;

3. Businesses should be able to obtain these protections through one of two methods:

    a. They can proactively apply for the protections through a SAFETY Act–like review process administered either by DHS or the Department of Health and Human Services, which, if a "Certification" is granted, should result in automatic and immediate dismissal or, if a "Designation" is granted, should result in an automatic cap on damages; or

    b. The business can demonstrate to a presiding judge even before being required to file its answer to a complaint that it was implementing reasonable pandemic mitigation strategies at the time of the injury in question, with "reasonable" being defined as following pandemic mitigation strategies as set forth in regulations, best practices, or guidance issued by federal or state health officials;

4. Liability protections granted for pandemic mitigation measures through the application process should be retroactive to the time when first implemented, including for mitigation measures implemented before the submission of any application;

5. Liability protections should not apply when:

    a. A plaintiff can demonstrate that the business committed willful misconduct in the course of implementing its procedures or

    b. A plaintiff can demonstrate that the defendant committed fraud during the application process for administrative review.

6. Any and all Coronavirus-related claims relating to this type of liability protection should be heard exclusively in a federal court, and federal preemption should be applied to any contrary state laws;

7. Liability protections should not automatically preempt regulatory/administrative proceedings brought by government agencies alleging inadequate pandemic mitigation measures or violation of workplace safety laws, but a successful application following the administrative review process could be used as affirmative proof of reasonable behavior in any subsequent regulatory or administrative proceeding; and

8. Liability protections should be available for future pandemics, not just the COVID-19 event.

Additionally, the pandemic liability protections should be integrated into a sorely needed pandemic reinsurance program. A pandemic reinsurance program, similar to the existing Terrorism Risk Insurance Act program,[4] would be beneficial for several reasons, including:

1. It would allow for the creation of an "intermediate" level of liability protections, specifically offering to cap damages at an amount equal to some portion of the pandemic insurance policy limits, and

2. It would allow for insurance premium discounts when entities have implemented pandemic response or mitigation programs vetted through the liability mitigation program.[5]

As noted, the PREP Act seems to limit potential medical malpractice claims dramatically, so a separate federal liability protection statute limiting such claims is not as urgently needed as a pandemic SAFETY Act. For instances where neither the PREP Act nor state medical malpractice reform statutes apply, however, the new "pandemic SAFETY Act" should apply to limit exposure to malpractice claims related to the coronavirus pandemic.

Conclusion

For America's economic recovery to move forward with relatively few hitches, liability limits are essential. Because history has shown how easily the mere threat of lawsuits by aggressive tort lawyers can derail critical recovery efforts, the White House and Congress should work together to establish effective and appropriate liability limits. By modifying existing statutes that limit liability in a way that assures both fewer frivolous tort

suits and effective pandemic mitigation and recovery policies, Washington will have done its part to prevent unscrupulous lawyers from needlessly hindering the economic recovery that Americans so desperately need.

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Endnote

1. See Shayna Jacobs, "771 Lawsuits—and Counting: Wave of Virus Litigation Hits Businesses Across the U.S.," *The Washington Post*, May 1, 2020, https://www.washingtonpost.com/world/national-security/771-lawsuits--and-counting-wave-of-virus-litigation-hits-businesses-across-the-us/2020/05/01/6f7c015c-89c3-11ea-9dfd-990f9dcc71fc_story.html (accessed May 3, 2020).
2. Section 861, Support Anti-Terrorism by Fostering Effective Technologies Act of 2002, in H.R. 5005, Homeland Security Act of 2002, Public Law 107-296, 107th Cong., November 25, 2002, https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf (accessed May 3, 2020).
3. Division C—Public Readiness and Emergency Preparedness Act, in H.R. 2863, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Public Law 109-148, 109th Cong., December 30, 2005, https://www.hsdl.org/?view&did=486752 (accessed May 3, 2020).
4. The Terrorism Risk Insurance Act, now known as the Terrorism Risk Insurance Program Reauthorization Act of 2019, is a reinsurance program designed to support issuance of terrorism insurance policies in the United States. TRIPRA provides a guarantee to insurers that the federal government will pay for terrorism insurance claims losses that exceed a current threshold. Currently, that threshold is $200 million in insured losses, and the U.S. government has the authority to reclaim any payments it has made by requiring insurers to assess policy surcharges. See H.R. 4634, Terrorism Risk Insurance Program Reauthorization Act of 2019, 116th Cong., introduced October 11, 2019, https://www.congress.gov/bill/116th-congress/house-bill/4634 (accessed May 3, 2020), and U.S. Department of the Treasury, "Terrorism Risk Insurance Program," https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/federal-insurance-office/terrorism-risk-insurance-program (accessed May 3, 2020).
5. That intermediate level of protections should be created only when a pandemic reinsurance program is developed; otherwise, due to the current lack of sufficient pandemic insurance, defendants would face liability without any realistic possibility of those losses being offset by insurance policies.