crowell moring

GLOBAL COVID-19 AND SPORTS; THREATS AND RESPONSES EXPOSURE CLAIMS AND LIABILITY MITIGATION CONSIDERATIONS

Chalana Damron[i]
Thomas P. Gies[ii]
Kristof Roox[iii]
Laurence Winston[iv]
August 15, 2020

I. Introduction

The COVID-19 pandemic has devastated organized sports across the globe. Major sporting events have been cancelled or postponed, beginning with the Tokyo Olympics, now rescheduled for 2021. In Britain, sponsors of the Open Championship, the world's oldest professional golf tournament, cancelled the event for only the fourth time in its 150-year history. Even the Tour de France was postponed and will now take place at end of August with draconic safety measures. The Canadian Football League canceled its upcoming season for the first time since 1919. In the United States, both professional and collegiate sports came to a sudden halt in March, after a member of a National Basketball Association (NBA) team tested positive just before a scheduled game. The remainder of the NBA season was put on hold, as was the schedule for the National Hockey League (NHL). At the collegiate level, the pandemic caused the cancellation of all winter/spring competitions, including both the men's and women's NCAA basketball tournaments. These are two of the marquee events on the U.S. collegiate sports calendar, and the principal source of revenue for the NCAA.

Professional and collegiate sports leagues have taken unprecedented steps to resume operations while limiting infection spread and reducing liability exposure. Continued uncertainty about the appropriate standard of care and constantly evolving guidance on recommended preventative measures continue to frustrate these efforts.

This monograph will summarize some of the more significant steps taken by the sports world to respond to the pandemic, in the context of ongoing efforts to mitigate virus exposure liability facing event sponsors, sporting leagues and teams, and employers.

II. General Principles of Legal Liability For Exposure Injury in the United States

A. Introduction

Plaintiffs, such as athletes or spectators who contract COVID-19, may seek to bring claims against leagues, sports teams, and event organizers, under theories of negligence, gross negligence, or intentional torts. While COVID-19 exposure litigation is as novel as the virus itself, the general principles of tort liability are firmly established in United States jurisprudence. These principles present significant challenges for both parties and will undoubtedly be hotly contested in future COVID-19 exposure lawsuits.

B. Negligence

1. Claims of negligence may be one of the most common types of claims brought in personal injury lawsuits. In these cases, plaintiffs allege that the defendant failed to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. While this behavior often consists of actions, negligence can also be established when a defendant failed to act when there was a duty to do so. To prevail in a negligence lawsuit, plaintiffs must prove the following four key elements to establish liability: duty, breach of duty, injury, and causation.

    (a) Duty: The first element of a negligence claim is establishing that the defendant owed the plaintiff a duty of care. This duty of care could be established by the defendant's relationship to the plaintiff. For example, business owners often owe a duty of care to a customer.

    (b) Breach of Duty: If there is a duty, the second element of a negligence claim is establishing that the defendant breached that duty. This element will depend on the appropriate standard of care – meaning, the degree of care a reasonable person should have exercised. To this end, a plaintiff may be able to establish a breach of a standard of care if a defendant fails to take steps to reduce the risk of the spread of COVID-19 recommended by government agencies, or if the defendant fails to take preventative steps that most others in the same industry have taken. If an industry has an inconsistent patchwork of preventative steps in place, plaintiffs will likely have more difficulty establishing breach of duty because the standard of care may be relatively unsettled.

(c) Injury: A plaintiff must prove that they suffered an injury.

(d) Causation: A plaintiff must demonstrate a link between the breach of the duty and the accident that caused plaintiff's injuries. This may be difficult to prove if a plaintiff is unable to point to a "causation moment" and establish that COVID-19 was contracted on defendant's premises. For example, proof of a causal link may be more easily established when a plaintiff resides in a nursing home or has been grounded aboard a cruise ship. In contrast, it will likely be difficult to establish that a plaintiff contracted COVID-19 as a result of a sporadic or short-term interaction.

C. Gross Negligence

1. This cause of action will turn on the degree to which the defendant has diverged from the appropriate standard of care. To bring a claim of gross negligence, a plaintiff must establish defendant's lack of care that goes beyond negligence but demonstrates reckless disregard for the safety or lives of others. A plaintiff who can establish gross negligence may be entitled to a greater amount of damages.

D. Intentional Torts

1. Intentional torts can only result from an intentional act of the defendant. Defamation is a classic example of an intentional tort. Depending on the type of tort alleged, general or specific intent will need to be proven.

E. Damages

1. Generally, there are two types of damages imposed for a breach of some duty or violation of some right – compensatory and punitive.

(a) Compensatory Damages: Intended to compensate the injured party for loss or injury.

(b) Punitive Damages: Awarded to punish a wrongdoer for gross negligence or intentional torts.

III. Exposure Liability During the COVID-19 Pandemic

A. Introduction

The general principles summarized above frame the discussion of the exposure liability risk facing U.S. event organizers, including sponsors of sporting competitions. Liability risk is one of many concerns facing sporting event sponsors as they resume operations. Sporting event sponsors obviously wish to protect the health and safety of their participants and other stakeholders. One of their principal challenges is to minimize virus spread while staging competitions under commercially-viable conditions in a manner that minimizes the financial and reputational risk of litigation. In addition to addressing various operational and commercial considerations that are beyond the scope of this summary,[v] sporting event sponsors are anticipating exposure-related legal claims from various constituencies, including employees and other staff, individual teams, players, patrons, media representatives, and vendors. Continued uncertainty about the transmission of the virus causing COVID-19 affects dozens of decisions that must be made in developing resumption plans. A primary focus of these plans is identification of and adherence to the rapidly evolving standard of care, informed by governmental responses and industry developments.

B. Governmental Responses in the United States

1. Early Actions

(a) State and local public health authorities began issuing shelter-in-place, "stay at home" and/or business closure orders in February, shortly after the January 30 announcement by the World Health Organization (WHO) that COVID-19 constituted a public health emergency.[vi] In the United States, California was one of the leaders in this effort. Governor Newsom supplanted a series of county-level public health orders by promulgating a state-wide public health emergency on March 4. The Governor that day announced several measures to control the spread of the virus in an attempt, among other goals, to avoid overwhelming the state's hospitals and other health care facilities.[vii]

(b) More than 45 states announced COVID-19 public health orders in February and March. Hundreds of similar orders have been issued by counties, cities and other local government entities. These early proclamations required most businesses to shut down and imposed strict limitations on almost all aspects of both commercial activity

and personal travel. The cumulative effect of these orders has been characterized as the national "lockdown." Most of these orders contained exceptions for employees working for businesses deemed "essential" under a series of guidance documents issued in March by the Cybersecurity and Infrastructure Security Agency of the U.S. Department of Homeland Security.[viii]

(c) Many of the orders included unprecedented quarantine restrictions for individuals entering a state from other jurisdictions. For example, in March, Rhode Island Governor Raimondo issued an executive order imposing a 14-day quarantine on individuals entering the State from other jurisdictions.[ix]

(d) At the federal level, beginning on January 15, the U.S. Department of State issued a series of international travel restrictions and advisories, culminating in a March 19 ban on all international travel.[x]

(e) President Trump declared a national emergency on March 13, two days after the WHO's declaration that COVID-19 had reached the pandemic stage.[xi]

(f) On April 16, the White House announced its Guidelines for Opening Up America Again. The Guidelines set forth a conceptual framework for a phased-approach for state governments to follow, at their discretion, in lifting their lockdown orders. The goal has to facilitate the reopening of business and other personal activity, using criteria tied to reductions in the number of COVID-19 cases, positive tests, hospitalizations and deaths.[xii]

2. Federal government regulatory initiatives

(a) The Center for Disease Control and Prevention (CDC) has been the federal government's principal public-facing entity responsible for coordinating the government's response to the pandemic. Beginning in March, CDC has issued hundreds of guidance documents with technical information and recommendations for managing activities across the economy, including hospitals and other health care providers,[xiii] businesses and employers generally,[xiv] schools and childcare services,[xv] colleges and other institutions of higher learning,[xvi] first responders and law enforcement personnel,[xvii] gatherings and community events,[xviii] parks, sports and recreation,[xix] correctional and detention

facilities,[xx] and retirement communities and independent living facilities.[xxi] Among CDC's more significant recommendations containing best practices that will define the standard of care in virus exposure litigation include: its guidance on cleaning and disinfecting protocols,[xxii] its recommendations for testing in various environments following a virus diagnosis, [xxiii] and a recent (August 6) recommendation on why people should wear masks as a way to minimize infection spread,[xxiv] CDC has also issued several advisories regarding contact tracing and other monitoring strategies for businesses,[xxv] in addition to a series of industry-specific guidance documents addressing specific concerns presented in industry sectors including restaurants and bars, small businesses, and construction.[xxvi] CDC has also published guidance listing considerations for election polling locations during the pandemic.[xxvii]

(b) CDC guidance documents regarding reopening the workplace closely track longstanding guidance issued by the National Institutes on Occupational Health, which articulates a "hierarchy of controls" intended to reduce the risks associated with various types of occupational hazards.[xxviii]

(c) The Occupational Safety and Health Administration (OSHA) has issued numerous regulatory guidance documents, emphasizing specific measures that employers should take in order to reduce the risk of infection spread in the workplace.[xxix] Much of this guidance relies on a statutory provision in the OSH Act known as the "general duty clause," which provides that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[xxx] OSHA has been criticized in some quarters for its failure to issue a temporary emergency mandatory standard for employers operating during the pandemic, and for its failure to take other action to enforce the general duty clause. As with CDC, OSHA's initiatives have been labeled as recommendations and not mandates, a matter that will likely be a significant issue in exposure litigation.

(d) The Equal Employment Opportunity Commission (EEOC) has issued more than a dozen guidance documents attempting to clarify employer obligations and employee rights under the federal employment discrimination laws enforced by the Commission. In March, EEOC published comprehensive guidance for pandemic

preparedness under the Americans With Disabilities Act.[xxxi] Much of EEOC's subsequent guidance focuses on permissible employer actions with respect to testing for COVID-19 and conducting medical inquiries under the ADA and related statutes.[xxxii]

3. State and local public health orders.

(a) States, counties and local governments continue to issue a virtual blizzard of orders addressing the conditions for re-opening during the pandemic. Most states have issued orders setting forth a three or four phased reopening strategy. Some states moved relatively quickly from the initial phase, issuing orders that eased restrictions to permit a wide range of businesses to reopen. Government officials in other states have moved more slowly, in response to emerging information about the continued spread of the virus. Most of these orders continue to restrict the size of permissible large gatherings, and make distinctions between and among the types of businesses that are permitted to reopen, and the conditions that must be met before moving to the next stage.

(b) Recent spikes in COVID-19 cases and the identification of "hot spots" in various parts of the country have led some states to delay moving to the next phase of their reopening plans; still others have retreated from earlier positions that permitted reopening on a wider scale. A number of states and local governments have imposed quarantine rules for travelers from other jurisdictions, notably including the States of New York, Connecticut, and New Jersey, and the City of Chicago.[xxxiii] These orders generally require individuals arriving from designated locations to self-quarantine for 14 days.

(c) Recent state and local public health orders have been further informed by updated guidance issued by the WHO, including a significant update, issued on July 9, with new information provided by epidemiologists on how the virus is transmitted.[xxxiv] This guidance stresses the role of aerosol transmission and de-emphasizes prior guidance suggesting that a significant risk of transmission comes from contact with surfaces that may have become contaminated.

C. Legal Theories and Claims Asserted in COVID-19 Exposure Litigation

1. Thousands of COVID-19 related lawsuits have been filed to date in federal and state courts across the country. Lex Machina reports more than 4000 cases filed in federal courts alone, through July 31, 2020. *See* Attachment B. Some of these cases involve commercial contract disputes or insurance coverage matters that are beyond the scope of this discussion.

2. For our purposes, the most significant cases involve negligence and related tort claims brought against various types of facility operators, employers, event sponsors, retailers and hospitality industry businesses. Plaintiffs in such cases allege that the defendant failed to take appropriate steps to protect the plaintiff customer, participant or employee. The general tort law principles summarized above, including questions involving causation, burden of proof, assumption of the risk, and availability of damages, will all apply to COVID-19 exposure litigation.

3. Many of these complaints feature detailed allegations about the defendant's failure to follow federal and state government orders and other regulatory guidance. Typical allegations include claims that the defendant failed to comply with specific regulatory requirements, failed to provide employees with face masks or personal protective equipment (PPE) that would mitigate the risk of infection, failed to enforce social distancing and other strategies recommended by CDC, NIOSH and OSHA, and failed to notify employees of infections involving co-workers. A principal theme of these complaints is that the business was focused on profit at the expense of its employees, guests or customers. Noteworthy complaints making these allegations have been filed against several meat packing companies, cruise ship operators, major retailers, manufacturers, transportation companies, hospitals, nursing homes, and other businesses that have been affected by virus "hot spot" outbreaks.

4. One complaint filed against a meat packing firm alleges 27 specific acts and omissions that constitute gross negligence, including failure to: implement a workplace hazard assessment, implement testing and workplace contact tracing, implement effective screening and monitoring strategies, prevent sick or symptomatic employees from entering the workplace, isolate and send home sick or symptomatic workers, configure communal work environments so that works are spaced six feet apart, modify the alignment of work stations, install physical barriers, implement appropriate cleaning, sanitation and disinfection practices, provide all employees with appropriate personal protective equipment, including face

coverings or respirators, require employees to wear face coverings, provide sufficient hand washing or hand sanitization stations, slow production to operate with a reduced work force, implement appropriate engineering or administrative controls to promote social distancing, educate works on revised sick leave or incentive policies, ensure adequate ventilation in work areas, implement a system for workers to alert their supervisors if they are experiencing COVID-19 symptoms, or if they have had close contact with a suspected or confirmed COVID-19 case, encourage or require workers to stay home when sick, and failing to warn workers that persons suspected of being exposed to COVID-19 were permitted to enter the facility without adequately quarantining or testing negative prior to entry.

COVID-19 exposure presents a special type of litigation risk. Virus infection, like other situations in which people may become ill or even die following an exposure to a toxic substance in the workplace, creates the prospect of "take home" claims filed by household members and neighbors of individuals who arguably became infected at work. Manufacturers and other businesses were deluged with such claims arising out of the widespread historical use of asbestos in a variety of environments. These claims are not barred by workers compensation, and can be challenging to defend because they typically involve sympathetic plaintiffs. Crowell & Moring has published a white paper summarizing many of these issues, a copy of which is included as Attachment A

5. Public nuisance.

(a) This is an ancient tort theory recognized in the common law of England. Parties who were adversely affected by a defendant's action that interfered with recognized, ongoing rights of the public could bring suit against the defendant to seek an equitable remedy. A classic example is a situation in which someone physically blocked a public road and thus impeded the rights of the traveling public. Successful plaintiffs in such claims were entitled to a remedy of abatement, which required the defendant to take appropriate steps, at its cost, to remove the nuisance.

(b) In recent decades in the U.S., this tort has been used more frequently in various "mass tort" situations, including disputes involving environmental pollution, climate change, tobacco, and exposure litigation involving substances such as lead paint. More recently, public nuisance claims have been asserted by both private plaintiffs and governments in response to the opioid crisis. Sophisticated plaintiffs' lawyers find such cases to be attractive, because of their relatively relaxed causation requirements, the

availability of substantial damages (and often attorney's fees), in addition to the abatement remedy. These cases also present many defendants with formidable reputational risk.

6. Employment claims.

   (a) Businesses have been sued in hundreds of cases making COVID-19 related claims under various employment protection statutes and common law theories. Principal categories of these claims include:

      (i) Discrimination against, and failure to accommodate, individuals with disabilities that may affect their ability to work on-site

      (ii) Employment discrimination based on recognized protected categories, e.g., age, sex, religion, national origin

      (iii) Retaliation and 'whistleblower' claims

      (iv) Violation of federal and state paid leave laws

      (v) Violation of the Worker Adjustment and Retraining Notification Act ("WARN Act") and similar state laws

      (vi) Traditional labor law disputes brought by labor unions

   (b) Many of these cases are framed as class actions under various statutory provisions. The specific details of the issues presented by these claims are beyond the scope of this presentation. As a general observation, plaintiffs in many of these cases argue that the employer's violation of the operative statutory requirements was part of a pattern of conduct if ignoring the public health and environmental health and safety regulations summarized above, in a way that is generally similar to the standard of care theories summarized above.

7. Workers' compensation.

   (a) Workers' compensation is an important aspect of COVID-19 exposure litigation. As a general rule, the exclusive remedy for an individual injured at the workplace is a claim for workers' compensation under rules adopted in each state. Employees with injuries or illnesses covered by workers compensation are barred

from filing negligence actions or asserting other tort claims against their employer. The exclusive remedy doctrine does not preclude employees for filing tort claims against third parties alleged to have contributed to the injury or illness.

(b) There are several recognized exceptions to the exclusive remedy doctrine. Plaintiffs' lawyers are making aggressive use of these exceptions in pleading their COVID-19 complaints in order to pursue the more lucrative remedies available in tort claims. The scope of these exceptions varies by state law, and the resolution of the dispute over the exclusive remedy doctrine is a material event in workplace exposure litigation. Among the most common exceptions being invoked by plaintiffs' lawyers include:

(i) Fraudulent concealment

(ii) Intentional torts

(iii) Willful or serious misconduct

(iv) Gross negligence

(c) State government responses to COVID-19

(i) Several states have responded to COVID-19 through various measures creating a presumption that a person who contracts COVID-19, while working at a worksite at which there has been an outbreak of the virus, may pursue aa claim for workers' compensation. At least six states have enacted various types of presumption statutes. Four states have used executive branch authority to implement presumption policies for first responders and health care workers in response to COVID-19. Four other states have taken executive action to provide a presumption of coverage to other essential workers like grocery store employees.[xxxv] The purpose of these enactments is to make it easier for employees to receive financial compensation, in recognition of the fact that workers' compensation programs in most states operate on a no-fault strict liability system.

8. Immunities.

(a) Several states have enacted measures providing immunity from COVID-19 litigation. These enactments are intended to protect certain categories of businesses from the risk and cost of litigation. Many of these protections protect hospitals, other health care providers, and first responders, based on the notion that businesses in these industries must remain open during the pandemic and that they should not be penalized for taking steps to protect the public interest in fighting the spread of the virus.

(b) Other states have enacted broader liability protections for businesses that make a good faith effort to comply with existing federal and state regulatory requirements, and which take additional prevention measures. For example, on August 5, Georgia enacted the "COVID-19 Pandemic Business Safety Act," which provides immunity from suit for any business that, among other things, posts a notice at the entrance to its premises advising individuals of the inherent risk associated with the virus, and that the individual is assuming any and all risks of infection.[xxxvi]

(c) Nevada has recently taken a different approach, enacting a law, that provides protection against COVID-19 exposure claims for businesses including hotels and casinos, on the condition that they implement robust worker protection measures. This law is the first of its kind in the U.S., and may be a harbinger. Plaintiffs in future lawsuits may argue that Nevada's worker protection measures are an example of the current standard of care, in pursuing claims against businesses that have not adopted such measures.[xxxvii]

IV. Risk Mitigation Principles

A. Introduction

1. Liability waivers and releases are exculpatory contractual provisions whereby one party relinquishes the right to recover for injuries caused to a participant that arise out of the known and unknown risks in an activity. While not bullet proof, a well-drafted waiver may be an effective way to limit liability for claims arising out of the transmission of the virus causing COVID-19, while highlighting compliance with the standard of care and appropriate prevention steps.

The enforceability of liability waivers is a matter of state law and, therefore, varies; however, adhering to the general legal framework on

liability waivers increases the likelihood of enforceability. In addition, COVID-19 acknowledgments may also reduce liability exposure by establishing that Plaintiff assumed the risk of being exposed to COVID-19.

B. **General Legal Framework on Liability Waivers**

1. Waivers should be clear and unambiguous and explain that a signor is waiving rights related to injuries and claims caused by COVID-19.

2. Consumer-facing waivers should be in plain language.

3. Waivers should clearly state the claims or damages being waived.

4. Waivers must be signed.

5. Waivers should be reasonably drafted and not overly broad.

6. Waivers should provide information sufficient for a consumer to provide informed consent. A well-drafted, consumer-facing, COVID-19 waiver will include language explaining that the company has established and follows good standards of care specific to COVID-19. These statements, however, must be truthful. To this end, businesses should ensure that it is complying with the most recent guidance on how to reduce the transmission of COVID-19.

C. Limitations on Liability Waivers

1. Employees: COVID-19 waivers are generally not enforceable against employees. Such waivers are widely viewed as contrary to public policy and in violation of state laws protecting the right of employees to file workers' compensation claims.

2. Third Parties: Waivers are limited to the signor and, generally, do not extend to third parties.

3. Public Policy Exception: Waivers for unavoidable activities are likely unenforceable under the public policy exception. Liability waivers governing more voluntary activities are more likely to be enforced.

4. Liability waivers generally cannot exculpate liability for gross negligence, intentional and reckless conduct.

D. Acknowledgments/Notices

1. In litigation, an assumption of risk defense sometimes bars a plaintiff's right to recovery if the defendant can demonstrate that the plaintiff voluntarily and knowingly assumed the risk.

2. COVID-19 acknowledgements and notices are important tools that businesses may use to limit liability in the event of litigation, as they provide evidence establishing that a plaintiff has knowledge of a risk and voluntarily assumed that risk. U.S. law generally limits the assumption of the risk defense to specific risks that were disclosed and understood; the defense generally is not extend to risks that were unknown.

V. State of Play in U.S. Professional Sports

A. Introduction

1. The world of sports began to re-emerge from the pandemic lockdown in late May and early June. Measures taken to date illustrate the daunting challenges faced by sporting event sponsors in trying to operate successfully and safely during the pandemic.

B. Various Approaches to Resumption

1. Professional sports leagues in the U.S. have adopted different strategies to protect players, coaches, and others involved in presenting their games. These differences reflect a variety of different dynamics in the major sports leagues, including issues such as geography and labor relations.

2. Both men's and women's professional basketball leagues decided to adopt what has been called the "bubble" strategy. Both leagues identified sites for resumption of the seasons, and implemented numerous protocols to protect participants once they arrived. In the NBA, for example players, coaches, and others traveled to designated areas near Orlando, Florida in early June. Players and other participants were required to self-quarantine upon their arrival. Creation of an effective bubble requires ongoing attention to a variety of measures intended to keep the virus out of the environment in which participants live and work, ranging from robust sanitation measures for hotels and arenas, to detailed protocols to ensure the participants do not risk infection by leaving designated areas. Both leagues have resumed play to conclude the seasons that were interrupted in March. The WNBA resumed its season on July 25, and the NBA began hosting games on July 31. To date, the bubble strategy appears to have

been successful. There are relatively few reports of positive cases or COVID-19 related hospitalizations, and both leagues have been able to resume their schedules without interruption or cancellation.

3. The National Hockey League (NHL) negotiated agreements with its players' union and other participants, including officials, adopting a "two hub city" approach for resumption of the 2019-2020 season. This approach featured re-locating all of its remaining regular season games, and the Stanley Cup playoffs, to arenas in Toronto and Edmonton. Regular season play resumed at the end of May. The NHL operating plan has considerable similarities with professional basketball's bubble strategy, with detailed protocols for reducing the risk of virus spread, including periodic testing of players and other participants. The NHL's plan notably includes a limit of 52 people for each team's travel party. The NHL season has continued with no reported event cancellations or postponements.

4. Professional soccer established a bubble strategy, with the Women's Professional Soccer League resuming play in late June, in an eight-team tournament held in Utah. Men's professional soccer (MLS) resumed its season with a pre-season tournament beginning on July 8, at a "bubble site" in Orlando, Florida.

5. The NASCAR automobile racing organization resumed its season on May 17. NASCAR has adopted a "traveling pod" strategy, by which the sport conducts races at various tracks on its nation-wide circuit under conditions that protect team members and other participants. Like team sports, no fans have been permitted at NASCAR events. The organization has implemented social distancing and testing protocols and has placed a limit on the number of individuals from each racing team who can be present at the track. The NASCAR schedule has continued without interruption, as the organization has been successful in limiting virus spread among its traveling participants.

6. Men's professional golf resumed tournament play in the middle of June, and the LPGA resumed its season at the end of July. Because golfers compete in events located around the country, the various professional golf sponsors have also adopted a "traveling pod" strategy, intended to limit the risk of exposure for players, caddies, officials, and other participants at each location. Both the men's and women's tours have continued their revised schedules without interruption, and a relatively small number of competitors have been sidelined after positive COVID-19

test results. Both the U.S. Open and The Masters tournament are scheduled to take place, in September and November, respectively. The U.S. Women's Open has been rescheduled to December. As with the regular tour events, all of these major tournaments will take place without fans.

7. Major League Baseball (MLB) has taken a somewhat different approach. The 2020 season has begun with what might be called a "regional pod" strategy, featuring a revised schedule intended to minimize the amount of inter-city travel. The challenges confronted by MLB are discussed below.

8. Professional tennis has yet to resume its tournament schedule in the U.S. The men's ATP calendar was scheduled to reopen on August 13, at an event in Washington, D.C. That event was postponed due to continued uncertainty regarding the virus. This country's most important event, the U.S. Open, is set to begin on August 31 at its traditional venue in New York City, without fans. Numerous players have decided to opt out of this competition because of concerns about the virus.

C. Basic concepts of prevention

1. All professional sports sponsors, of both team and individual sporting events, have developed operating plans intended to reduce the risk of virus spread. These plans incorporate recommendations issued by CDC and other public health entities. Principal features of these plans include:

   (a) Periodic testing of players and other event participants

   (b) Symptom monitoring protocols, including regular body temperature screening

   (c) Detailed social distancing protocols

   (d) Cleaning and disinfectant protocols

   (e) Limited access to sporting facilities

   (f) A ban on spectators

   (g) Actions plans to respond to any positive COVID tests or other evidence of infection by a player or other participant in the event, including quarantines

(h) Various forms of contact tracing

(i) Protocols negotiated between the leagues and players' unions to permit players to opt-out of participation in individual cases where they fear infecting themselves or family members.

D. Specific challenges – Protecting the Bubble

1. Sporting event sponsors continue to be challenged by state and local government public health orders, many of which prohibit mass gatherings of more than a few people. The sports world is also affected by the state and local quarantine orders described above, which make it extremely difficult for participants, particularly people traveling from international locations. Sponsors have had some success in obtaining exceptions from some of these orders. As an example, the United States Golf Association obtained a waiver of the New York quarantine order for participants in the upcoming U.S. Open, to be held in Westchester County, New York.

2. Managing the inherent risk associated with travel is another principal concern. Leagues and teams have developed detailed protocols covering all aspects of travel, ranging from transportation to airports or (in the case of Major League Baseball) train stations, to hotel accommodations.

3. Sports leagues and teams continue to focus on sanitation and disinfectant strategies for their venues, including training rooms, lockers, dugouts, media rooms, and other facilities.

4. All the leagues have adopted protocols for body temperature monitoring and other symptoms of COVID-19. Teams have generally assigned medical directors and trainers to monitor the ongoing health of players and other participants.

5. Social distancing is a core component of the resumption strategy. The nature of some sports, which inevitably require close contact between competitors, continues to present challenges for teams and players.

6. Periodic COVID-19 testing is at the heart of most operational plans. Leagues have adopted different approaches to testing frequency as well as mechanisms for addressing issues associated with the delay in reporting results. Sports leagues continue to wrestle with the challenges presented

by testing validity. There have been numerous situations of players and other participants who have been temporarily banned from the competitions after testing positive, only to find out later that it was a false positive. Sporting event sponsors, like other businesses, also remain challenged by the practical implications of the delay between testing and notification of results. These implications are particularly important because of the significant number of individuals who will test positive while being asymptomatic.

7. Following negotiations with labor unions, leagues have implemented detailed protocols for the proper response to a positive test. These protocols require the player to quarantine for a specific period of time, the duration of which has changed as a result of recent public health guidance. These plans also require testing and additional medical monitoring of teammates and others.

8. Professional sports leagues are coordinating with public health agencies in conducting contact tracing. The specific role of leagues and teams in this function varies, depending on numerous factors. The success (or lack thereof) of contact tracing is likely to be a significant issue in COVID-19 exposure litigation.

9. Each of these measures, and dozens more, present challenges that must be met in order for a defendant to demonstrate compliance with the standard of care.

E. Major League Baseball – A Case Study

1. As of this publication, Major League Baseball (MLB) continues to operate its revised schedule for the 2020 season, which launched on July 23. More than most professional leagues, MLB has been particularly challenged by the virus.

2. MLB spring training was abruptly shut down in March, as the virus spread across the country. After lengthy negotiations with the labor union representing its players, MLB implemented a detailed operating plan, running more than 130 pages, governing this year's schedule. The MLB plan includes the features described above, with modifications deemed appropriate for the sport. Among other things, MLB decided to play the 2020 season with no fans in attendance.

3. MLB's schedule was challenged from the beginning. The Canadian government barred the Toronto Blue Jays from playing games at their home venue, because of concerns that travel to and from the U.S. would increase the risk of virus spread in Ontario. This required MLB to readjust early season schedules, and ended with Toronto deciding to play its home games in Buffalo, the site of its top minor league team.

4. The MLB schedule was further impacted by an outbreak among players and staff of the Miami Marlins, which occurred during the opening week of the schedule. Numerous games had to re be rescheduled as a result of a quarantine and other preventive measures imposed in response. At the high point of the outbreak, as many as 20% of MLB games were postponed.

5. Outbreaks have affected other teams, including the St. Louis Cardinals, the Milwaukee Brewers and the Cincinnati Reds.

6. It remains to be seen whether MLB can complete its scheduled 60 game season for all of its teams, in order to be properly prepared for the revised post-season playoff system, leading up to the World Series. Any additional outbreaks would make it extremely difficult to finish a full season.

F. The NFL

1. After negotiations with the union representing its players, the NFL agreed to a series of protocols intended to reduce virus spread, in adopting its plan to carry on with the 2020 season. Among other things, the league and the union agreed to cancel pre-season games for the first time in modern NFL history.

2. The NFL has not revised its position that it intends to play a full regular season beginning on September 10, when the Kansas City Chiefs, the defending Super Bowl champions, are scheduled to open their season. The NFL is currently planning on hosting games under COVID-19 protocols that would permit attendance by a substantially reduced number of spectators, i.e., 22% of normal stadium capacity. In most NFL stadiums, that rule contemplates attendance of roughly 15,000 fans.

VI. State of Play – Professional Sports in the European Union

A. EU/Domestic Law – General Rules

1. Tort liability for exposure is a matter of domestic law in the European Union. The EU has no uniform/harmonized tort law. As in the United States, where there are significant differences among the 50 states with respect to tort law principles, including burdens of proof, defenses, and damages, there are material differences on many of these issues across Europe.

2. In general, liability for exposure claims is less of a concern than in the United States. There is a comparative limited possibility for class actions in the EU. Damages in tort claims are also comparatively limited; as a general rule courts in EU member states do not allow punitive damages. For these and other reasons, there are few relevant precedents to help guide event sponsors.

3. In the EU, liability of the event organizer depends on the *'bonus pater familias* principle': if the sports organization has taken the necessary precautions and did everything to follow the COVID-19 safety measures, it is unlikely that the organization can be held liable.

4. The availability of liability waivers is another significant difference between the EU and the United States. The general rule in the EU is that a party may not contract for an exclusion or restriction of legal liability caused by its own negligence/fraud.

B. Possible liability issues if players are employees

1. Statutory duty: Employers are obligated by statute to guarantee a safe and healthy work environment. Violations of these statutes include criminal sanctions.

2. Courts in EU jurisdictions recognize the voluntary assumption of risk defense in some circumstances. General requirements for this defense include a showing that the party was fully aware of the risks involved with the activity before engaging in it. In order to increase its chances of success with this defense in the event of claims arising from the pandemic, the employer should demonstrate having complied with all (COVID-19 specific) health and safety measures.

3. An open issue in the EU is whether a professional sportsman's refusal to play, despite implementation of appropriate safety measures by the team, might be a breach of the player's contract. To date, EU professional sports teams have not generally adopted the approach taken by US professional leagues that have permitted players to opt-out of playing during the pandemic.

C. Prevention techniques in the EU

1. There are no EU-wide uniform prevention techniques. Measures are taken on a national basis and might differ in each EU jurisdiction. There are even differences at regional level. The general theme is that there is a shift in responsibility: there are specific government guidelines, but it is up to the governing bodies and sports associations to assess the risk and to ensure that there is a safe environment for players. In other words, the prevention techniques are sports association specific. For example, the safety measures in de Tour de France differ from the UEFA's Return to Play protocol for the Champions League.

Most EU professional sporting events have a significant restriction in spectators. In some EU jurisdictions no fans are allowed to attend soccer games. Also the Champion League games were played behind closed doors. The Bundesliga, the first top-flight European league to resume play since the COVID-19 lockdown, accepted limited spectators. Maximum 300 people wearing masks were allowed in the stadium divided into "zones". Players stayed in quarantine during 1 week before the start of the games and balls were disinfected before and after each game.

Men's professional golf resumed in Europe in early July, with a modified schedule beginning with 6 events scheduled at venues in England and Wales. One of the many steps taken by the European Tour in response to the virus was a decision to hold some of the events at the same venue. Virus player protection protocols include a "buddy system" in which contestants are generally required to have close contact after competition with a designated small group of caddies and other players, in order to reduce the risk of virus spread. This is an adaption of the "cohort strategy" being used in many workplaces around the globe.

2. The Belgian approach for the event industry is worth mention, as an example of an approach that might be successful in minimizing virus spread. A COVID Event Risk Model was developed in partnership with scientific experts, specialized researchers and the Alliance of Belgian

Event Federations. It is an educational and risk management model for event organizers and an advisory model for the authorities. Event organizers can use this model to gain an insight into the COVID - 19 safety risks of any event. This is indicated using a green, orange, or red safety label. This label can be used as reference by local governments when granting permits. The label that is awarded is just a guidance. The final decision-making authority for this resides with the municipal/city authorities.

The COVID Event Risk Model comes with a COVID Event Risk Model Protocol that enables event organizers to assess whether a, event can fulfil the required parameters. The COVID Event Scan primarily evaluates the event from the perspective of the public. For more specific guidelines for participants, artists/performers, employees and suppliers, sector-specific protocols are in place which also provide practical instructions on how to organize a COVID-safe event.

D. Challenges and Opportunities:

1. The COVID-19 pandemic outbreak has affected the EU and its Member States in a dramatic manner with an unprecedented impact. Sport is an important economic sector in the EU, with a share in the national economies, which is comparable to agriculture, forestry and fisheries combined. The sport-related GDP is 279.7 billion euro. This equals 2.12% of total GDP in the EU. Every 47th euro is generated by the sports sector. Sport is employment intensive, meaning that it generates more employment than its share in GDP. Sport-related employment in the EU was 5.67 million persons. That equals 2.72% of total EU employment. Every 37th employee works in the sports sector.

   The COVID-19 pandemic results in dramatic lost revenues for teams, event organizers, athletes, sponsors, employees, broadcasters etc. Discussions arise about insurance coverage for annulled events, renewal of insurance policies, refunding of tickets and sponsorship fees, etc. There has even been early litigation about the financial consequences of broadcasting rights for cancelled games. Another dimension with an impact on sports integrity should not be lost out of sight: sanitary measures imposed during the pandemic hinder doping controls. Will there still be a level playing field when the competitions resume?

2. However, the sanitary crisis is also an **opportunity to innovate, to rethink policies and to reassess priorities** in the long run:

a) The present-day crisis urges us to address priorities linked to health and physical fitness.

b) Event organizers will be forced to rethink their business model and come up with alternative or parallel digital initiatives. A good example is the digital music festival "Tomorrowland Around the World". In lieu of their real life event, Tomorrowland opted to still bring fans together through an online event. Taking place on an island called Pāpiliōnem, the virtual world showcased 60 artists performing on 8 stages that featured different styles of music, mirroring the real Tomorrowland. They even had extra activities such as influential speakers, cocktail recipes and even a library.

To make it all happen, Tomorrowland had to create 4 large green screen studios around the world. Camera wise, there were six 4K cameras used, as well as a number of virtual cameras – meaning up to 38 angles could be used at the mainstage. There were 280,000 virtual people in the crowds, each having their own attributes like flags and lights. To render the entire virtual world, it took ten different render farms working 24/7. They ended up with around 300TBs of raw footage.

VII. State of Play – Special Considerations in the United Kingdom

A. General Principles

1. In the current environment, an institution that is bringing sports players back (such as the Premier League in England) has a duty to create a safe environment for them to operate in. When the Government gave the go-ahead for sports to restart contact training in May, they said that it was *up to governing bodies and associations to assess the risk and ensure there was a safe environment for players, which is a significant shift in responsibility.*

2. Sports governing bodies have a duty to ensure the safety of sports participants following *Watson v British Board of Boxing Control Limited and Another [2000] EWCA Civ 2116.* This would apply when designing the playing rules and associated safety regulations and protocols.

3. The UK Government expects sports governing bodies to develop playing and safety protocols pertaining to each sport. COVID-19, as a now known risk, must be addressed in those protocols. As part of this, risk assessments need to be carried out for all personnel involved in the sporting activity to ensure that they are reasonably safe.

4. Under the Health and Safety at Work Act 1974, professional clubs, as employers of the players, have a duty to provide a safe environment for players to work within, and if it was found that a player had contracted COVID-19 as a result of returning to training and playing their club could be liable. A breach of the legislation can give rise to criminal liability.

5. Further, clubs could be liable in negligence where they fail to discharge their duties owed to players (under their employer/employee relationship) to ensure that they are safe in the workplace.

B. Early Government Action

1. Government guidance was centered around doing risk assessments and putting the principal responsibility on the authorities, the leagues and the clubs. This involved risk assessments specifically related to the transmission of COVID -19 and its implementation before any return to work. Any return to work protocols needed to address requirements for employees in ensuring their own safety and that of their colleagues and moreover, a safe working environment including the regular cleaning of equipment and the workplace. These need to be specific and applicable to each sport and workplace although there are obviously likely to be common themes, for example, across contact sports on the one hand, and non-contact sports on the other.

2. Technically speaking, it is possible that governing bodies could be liable for effectively encouraging something that is not safe. The legal cases generally revolve around contact sports like boxing, where the British Boxing Board of Control was found to owe a duty of care to participants. It appears highly arguable that , say, the Premier League owes a duty of care to its players and as such would need to be very careful with the approach it takes and to carry out thorough and detailed risk assessments which are bespoke to the sport of football and to the "workplace" including at training and football grounds. Such considerations would similarly apply to other sports governing bodies.

3. But primarily, the liability will sit with clubs who have an employment relationship with the players. Like every other employer in the country

they have a statutory duty under the Health and Safety at Work Act 1974, obliging them to provide a safe work environment. That obligation is potentially a serious one. Ultimately, clubs could be criminally liable for not providing a safe work space and in a worst-case scenario, for corporate manslaughter. This only applies in very rare circumstances, but it is certainly something clubs will need to be aware of in ensuring that they take all reasonable steps to mitigate the risks of players contracting COVID-19.

4. In terms of exploring potential avenues for recovery of damages for someone who has been exposed to COVID-19 resulting in sickness / death, it is likely to be necessary to consider whether the organizers negligently failed to: (i) cancel the event which resulted in the infection; or (ii) whether the organizers failed to put in place appropriate mitigation / protections if the event was not cancelled. In addition, the claimant would need to demonstrate: (i) that a duty of care was owed to him/her (this of course will be different depending on whether the individual was a participant or a spectator); (ii) whether there was a breach of duty by not following the relevant regulations, protocols or guidelines; and (iii) causation which may be difficult (e.g. could a claimant prove they did not have the virus before the event which is further complicated by the long incubation period of COVID-19 which may be up to two weeks?). If the above was demonstrated, it may well be arguable that the claimant would be entitled to damages including all reasonably foreseeable losses (e.g. loss of income).

C. <u>Legal Defences</u>

1. There are likely to be a number of possible legal defences that may be arguable in COVID-19 related claims, whether in claims from players, other staff or spectators.

2. The first and most obvious is that there was no breach of duty. This is likely to depend on the protocols that were in place and a defendant's compliance with them which will include all steps taken to mitigate the risks of infection.

3. The second is causation, which as highlighted above, may be difficult to prove by reason of the incubation period of the virus, particularly in the case, say, of spectators who may have attended a sporting event for only a few hours up to two weeks prior to any illness.

4. Thirdly, that there has been a voluntary assumption of risk and/or contributory negligence:

(a) Voluntary assumption of risk operates as a complete defence where the injured party was fully aware of the risks involved with the activity before engaging in it.

(b) Contributory negligence is a partial defence covering situations where, in the context of a negligent act by the defendant and as a result of failing to take care of themselves, the injured party has been caused harm. The defence operates to apportion liability between the claimant and defendant on the basis of what is fair and reasonable.

D Waivers of Liability

(i) This seems currently to be a bigger issue the US and Canada particularly in respect of college football (i.e. colleges asking students to sign them) and NFL https://www.dailymail.co.uk/news/article-8419813/Report-Ohio-State-players-sign-coronavirus-waiver.html. Under English law, it is likely to be arguable that 'disclaimers', in so far as they exclude or restrict liability for death or personal injury resulting from negligence, will be void by reason of s. 2(1) of the Unfair Contract Terms Act 1977, and, in so far as they exclude or restrict liability for other types of loss (such as financial loss), they are subject to the statutory requirement of reasonableness. Consequently, if a player caught COVID through playing and could show the club had been negligent letting them train or play, it is likely that the waiver would be ineffective. It may work, however, by potentially reducing the amount of liability itself for other causes of action. But ultimately the starting point is that a party cannot exclude or restrict liability through its own negligence for personal injury or death.

(ii) Consequently, clubs in the UK should not have high hopes of being able to rely successfully on disclaimers and waivers irrespective of whether they have been agreed by the player.

D. Other considerations

(a) Duties to spectators.

(i) There have been anecdotal reports that in the days leading up to the lockdown, a number of people contracted COVID-19 whilst attending major sporting events. In particular, infection hotspots were identified in Cheltenham, following the Cheltenham Festival, and concerns about the impact of 3,000 Atletico Madrid fans attending a Champions League match in Liverpool.

(ii) Medical evidence is presently inconclusive as to whether or not these events have acted as a means of spreading the virus. However, as in the United States, the concerns raised by these events, as potential "super-spreader situations", should serve as a warning that very specific and detailed risk assessments need to be carried out before allowing capacity crowds back to sporting events.

(iii) Consistent with the conservative approach suggested in this outline, many professional sports including football, rugby, golf and cricket have resumed in the UK, but without spectators. It remains to be seen when spectators will be permitted to return and the Government has already postponed a pilot scheme due to a resurgence of COVID-19. Obviously, this remains a critical issue for all professional sports and it is highly unlikely that spectators will be allowed to return in their full numbers until a vaccine is found.

(b) Insurance. The practical consequence in the COVID-19 context is that existing policies may not cover the current pandemic and premiums for appropriate top-up insurance are likely to be costly, even if such losses would be insurable. It is easy to envisage that a player who contracts the disease at the training ground or during a match and whose career is severely affected by the consequences of the disease will suffer financial losses. Even if a player recovers, their performance (and consequent earning potential) may be impaired for many months. Insurance premiums may therefore be unaffordable for some clubs.

(c) Punitive damages. Such damages are generally not available in the UK unless the tort is deliberate such as in cases of deceit or defamation, and even then only very rarely. It is highly unlikely that they would be awarded in cases of negligence. In general, UK

does not recognize claims for "gross negligence" as in the United States.

VIII. State of Play - U.S. Collegiate Sports

A. Special Considerations:

1. As the world grapples with navigating the pandemic, U.S. colleges and universities are exploring various issues, such as: Will colleges and universities open college campuses? Can colleges and universities mandate that student athletes to return to campus while, at the same time, requiring the rest of student body to engage in virtual learning due the risk of COVID-19 transmissions?

   As it pertains, specifically, to collegiate sports, the experience to date is that athletic conferences and schools, when presented with the same data, and the same reality, have come to differing conclusions about whether to resume sports competition.

2. Waiver vs. Acknowledgements

   (a) A number of schools have required or encouraged athletes to sign forms acknowledging the health risks of playing during the pandemic and, in some cases, formally waiving liability.

   (b) Ohio State example ("Buckeye Pledge"): Ohio State University has rolled out their "Buckeye Pledge" which calls upon athletes to "take responsibility for my own health and help stop the spread of COVID-19." The university contends that the pledge is neither a waiver nor legally binding. However, failure to uphold the pledge could result in "immediate removal of athletic participation privileged."

   (c) The National Collegiate Athletic Association ("NCAA") has banned conventional liability waivers but has permitted schools to have athletes sign pledges stating that the athlete would adhere to health and safety protocols such as wearing masks.

3. College Athlete Pandemic Safety Act: U.S. Senators Richard Blumenthal (D-CT) and Cory Booker (D-NJ) introduced legislation on June 30, designed to prohibit schools from making participation or receipt of an athletic scholarship conditioned on the signing of COVID-19 waiver.

B. Current Status

1. *College football*. The COVID-19 turmoil is best illustrated by current planning for the Fall 2020 U.S. college football season. As of the date of this publication, there is a major split in the way U.S. major colleges are approaching the upcoming season.

(a) Two of the five major conferences – the Big 10 and the Pac 12 – have announced there will be no football this year. These two have been joined by other conferences, including the Mid-American Conference and the Ivy League, who have also canceled their seasons. These cancellation decisions followed several instances of positive tests among college football players.

(b) By contrast, three of the other five major conferences - the Atlantic Coast Conference, the Southeast Conference and the Big XII – have announced their plans to play a modified schedule of games this fall. Other, smaller conferences have also announced plans to play football this fall. The question of whether fans will be admitted to any of these games remains an open question.

2. *Other fall sports*. As with football, many U.S. collegiate athletic conferences have cancelled schedules for other fall sports, including soccer, volleyball, cross-county and other, non-revenue sporting events.

IX. Concluding Comments

A. As the sports industry continues to resume operations, refine re-opening strategies, and welcome employees and staff, individual teams, players, patrons, media representatives, and vendors, uncertainty remains. Continuing governmental guidance, state and federal legislation, will all inform the appropriate standard of care in exposure liability litigation. The sports industry should continue to adopt operational plans to resume events in a methodological way that makes room for continuous improvement while taking into consideration available guidance from public health officials and other experts. This approach will help position the industry to avoid costly and protracted litigation.

crowell moring

We will continue to closely monitoring this rapidly evolving landscape.

---

[i] Ms. Damron is a counsel in the firm's Mass Tort, Product, and Consumer Litigation Group, and she represents clients in a diverse array of litigations, including commercial, antitrust, class action, and product liability.
[ii] Mr. Gies is a founding partner of the firm's labor and employment practice group, and a member of the firm's Coronavirus Working Group, advising clients on a variety of issues regarding the pandemic.
[iii] Mr. Roox is co-managing partner of Crowell & Moring's Brussels Office, and a partner in the Intellectual Property Group, with a focus on IP litigation.
[iv] Mr. Winston is a partner and co-head of Crowell & Moring's International Dispute Resolution Group in the firm's London office.
[v] For example, this discussion does not address commercial contract issues facing sporting event sponsors, an area that presents numerous other liability and reputational risk concerns.
[vi] https://www.who.int/docs/default-source/coronaviruse/transcripts/ihr-emergency-committee-for-pneumonia-due-to-the-novel-coronavirus-2019-ncov-press-briefing-transcript-30012020.pdf?sfvrsn=c9463ac1_2
[vii] https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/
[viii] https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce
[ix] The Governor's original proclamation was limited to people entering Rhode Island from New York, an action that was widely criticized by Governor Cuomo and others, and subsequently rescinded. https://governor.ri.gov/documents/orders/Executive-Order-20-14.pdf
[x] https://travel.state.gov/content/travel/en/international-travel/International-Travel-Country-Information-Pages/Italy.html
[xi] https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/
[xii] https://www.whitehouse.gov/openingamerica/#phase-two
[xiii] https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html
[xiv] https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html
[xv] https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-schools.html
[xvi] https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-ihe-response.html
[xvii] https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-law-enforcement.html
[xviii] https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/considerations-for-events-gatherings.html
[xix] See, e.g., guidance for public pools, waterparks and related operations. https://www.cdc.gov/coronavirus/2019-ncov/community/parks-rec/aquatic-venues.html, and suggestions for summer camps and other childcare operations. https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/summer-camps.html
[xx] https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html
[xxi] https://www.cdc.gov/coronavirus/2019-ncov/community/retirement/considerations.html
[xxii] https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html
[xxiii] https://www.cdc.gov/coronavirus/2019-ncov/community/worker-safety-support/hd-testing.html
[xxiv] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html
[xxv] https://www.cdc.gov/coronavirus/2019-ncov/community/contact-tracing-nonhealthcare-workplaces.html

[xxvi] https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/business-employers/bars-restaurants.html, https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-small-business.html, https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/construction-workers.html
[xxvii] https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html
[xxviii] https://www.cdc.gov/niosh/topics/hierarchy/default.html
[xxix] https://www.osha.gov/SLTC/covid-19/
[xxx] Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1).
[xxxi] https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act. This document updated guidance issued by EEOC in 2009, in connection with the H1N1 virus pandemic.
[xxxii] https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=
[xxxiii] New York COVID-19 Travel Advisory https://coronavirus.health.ny.gov/covid-19-travel-advisory; City of Chicago Emergency Travel Order, https://www.chicago.gov/city/en/sites/covid-19/home/emergency-travel-order.html.
[xxxiv] https://www.who.int/news-room/q-a-detail/q-a-how-is-covid-19-transmitted
[xxxv] https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx#:~:text=State%20Response%20to%20COVID%2D19,-States%20are%20taking&text=A%20common%20approach%20is%20to,and%20covered%20under%20workers'%20compensation.&text=Six%20states%20have%20enacted%20legislation,for%20arious%20types%20of%20workers.
[xxxvi] http://www.legis.ga.gov/Legislation/20192020/195211.pdf
[xxxvii] http://gov.nv.gov/News/Press/2020/Gov__Sisolak_signs_Senate_Bill_4,_first-in-the-nation_legislation_protecting_Nevada_workers_and_businesses/

crowell moring

Attachment A

Workplace Injury Claims

The COVID-19 pandemic presents companies with unprecedented risks and challenges in conducting what once were normal business operations. As organizations reopen or expand their current operations and employees return to work, employers will face significant potential risk and liability from the possible transmission of COVID-19 in the workplace. These risks extend beyond traditional employment and worker's compensation claims. As we have seen with the handful of COVID-19 workplaces lawsuits filed already, tort claims are poised to enter into the mix of legal issues employers will face as part of the "new normal."

Potential Issues and Risks

- **Tort Claims by Employees.** One threshold question is whether employees contracting COVID-19 could bring tort claims against their employers. In many states, workplace illnesses and injuries are subject to worker's compensation exclusivity provisions, which limit claims for on-the-job injuries and illnesses to worker's compensation coverage. However, it is not entirely clear whether COVID-19 will be a covered injury or illness in all states. Some states, via legislation and/or regulation, are taking steps to deem COVID-19 covered by worker's compensation laws, at least with respect to certain occupations at high risk of job-related infection (e.g., nurses and first responders). But whether infected employees' claims would be subject to worker's compensation exclusivity provisions remains an open question in many states. If the claims are not subject to the worker's compensation exclusivity bar, employers could potentially face the full range of negligence and other tort-related claims from employees sickened by the virus.

- **Intentional Torts.** One means by which the plaintiff's bar seeks to circumvent worker's compensation exclusivity bars in many states is to allege that an employer committed an intentional tort that resulted in the employee's injury. The standard for what constitutes intentional tortious conduct for these purposes varies from state to state. Nevertheless, employees may allege that employers knowingly and/or intentionally exposed them to other employees they knew to be infected, by failing to require quarantine of infected employees; disregarding NIOSH workplace hazard reduction standards; failing to adequately sanitize facilities and maintain appropriate social distancing and related protocols intended to inhibit the spread of the virus; ignoring employment law obligations; refusing to provide adequate personal protective equipment; failing to conduct appropriate temperature monitoring and COVID-19 testing; disregarding OSHA and CDC guidance; and requiring sick employees to come into work. The legal standard for asserting intentional tort claims to avoid worker's compensation exclusivity provisions tends to be quite high; generally, a plaintiff must allege that the employer intended the injury, or that the injury was certain to occur from the employer's behavior.

Still, aggressive plaintiff's lawyers are likely to assert intentional tort claims to try to maximize potential recoveries.

- **"Take-Home" Claims.** In asbestos and other mass tort litigation involving workplace exposures, practitioners are very familiar with "take-home" litigation. In these cases, a family member or household resident contends that the worker encountered toxic substances (e.g., asbestos, lead, beryllium, benzene) in a workplace, brought those materials home on clothing or otherwise, and caused exposures in the home. Take-home lawsuits have existed in the asbestos world for many years and have resulted in extensive litigation over the existence and scope of a duty to the non-employee plaintiff, the timing of "foreseeability" evidence, and the efforts of an employer to protect against take-home disease.
  The COVID-19 pandemic will almost certainly produce take-home litigation. Not only will employers face workers' compensation and possibly tort lawsuits brought by their own employees, but family members of employees may also contend that the worker carried the virus home and introduced the disease to others.

- **Public Nuisance.** Some employees who claim to have contracted COVID-19 at their workplace may seek to avoid the worker's compensation law bar by alleging that their employer's business constitutes a "public nuisance" that contributed to the community spread of COVID-19. Plaintiffs may claim that the spread of COVID-19 from the employer's facility constitutes an injury to the public at large, but that they have suffered special harm, and therefore have standing to sue for damages and/or injunctive relief. Employee plaintiffs may also allege that they contracted COVID-19 during off-hours from nuisance conditions arising from or existing at the employer's facility – for example, by contact with a fellow employee outside of working hours – in an effort to avoid the worker's compensation bar. Similar claims have been asserted in the past for a variety of toxic substances like asbestos and mold.

Steps to Reduce Risks

Businesses addressing COVID-19 workplace issues should be prepared to address the risks and concerns listed above. Specific strategies should include consideration of the following:

- **Document the State of Knowledge.** The rapidly changing nature and widely varying recommendations relating to coronavirus will create litigation fodder for plaintiff attorneys who want to contend that an employer "should have known" early in the pandemic that coronavirus could spread in the workplace. To help defend against litigation, employers would be wise to document and date carefully the incoming knowledge from federal and state governments and health officials, along with formal guidance provided to workplaces, to build a future timeline to protect against overly-aggressive claims of early knowledge. Clear and rapid dissemination of information and policies to employees will also help create a record of prompt compliance with the changing conditions. Training managers and non-managers as to the employer's

measures will also help reduce risks. Employers may need to designate a safety or medical official or other key employee to serve as the gathering point for information receipt and dissemination. That person may need to serve as a key company witness later, so his or her capacity for testifying is a consideration.

- **Follow Good Workplace Practices.** The best defense against workplace injury claims is a workforce free of disease. The same practices that would protect employees from disease are those that would also protect family members and others. Following CDC, EEOC and OSHA guidelines is important, and perhaps critical if certain liability protection measures are legislatively adopted. Adherence to NIOSH "hierarchy of controls" workplace hazard standards, social distancing, robust cleaning and disinfecting protocols, hand-washing, use of masks and gloves, and worksite testing when available have become the tools we use today to protect workers. To protect workers and assist in defending litigation, companies may also want to instruct employees to engage in disinfection and cleaning practices, both following activities that could lead to exposure and before leaving work, and provide the means to do so. Similar practices are already well established in OSHA standards and elsewhere for workers handling toxic substances. Employers should consult federal and state instructions and consult with local health officials or experts in the field to determine the best course. Companies should also continue to pay close attention to relevant state and local government closure, shelter-in-place and "reopening" orders, many of which will be relevant in establishing the standard of care. If the company performs testing on employees, the results could, and likely will, identify workers who are infected. In such cases, the company should explicitly follow applicable medical and workplace standards to prevent the spread of the infection. As reliable testing becomes more widely available, the employer's ability to defend litigation would be enhanced by introducing COVID-19 testing to the worksite. Presumably, public health and other regulatory guidance will continue to require infected workers to stay at home and would require quarantine of workers in close contact with an infected worker. Such protections would have the added benefit of cutting off the causation chain, as well, and would thus add to the employer's defense as a proactive company if litigation ensues.

- **Adopt New Practices to Prevent Spread.** The drastic changes in workplace practices resulting from COVID-19 will also help a company defend against claims and litigation if implemented promptly and effectively. Many businesses have already adopted new practices to prevent the spread of COVID-19 from workers to customers, and vice-versa. Social distancing for customers and workers alike, where possible, is becoming a common business facility measure. Depending on the application, such as with close work stations, businesses and manufacturing facilities may need to follow recommended practices by installing plexiglass or other physical barriers, as grocery stores, pharmacies, and similar places have already done. Signage that encourages safe practices like social distancing and mask-wearing is also part of a package of workplace protections in many locations. In addition, training programs to instruct workers on proper measures to prevent the spread of the virus are important. To help defend against negligence and

intentional tort claims, employers should not only implement such measures where so advised, but should also document the implementation with photographs and other evidence needed for litigation.

- **Use Monitoring Strategies to Limit Workplace Exposure.** Plaintiffs should face a considerable hurdle in proving that they contracted COVID-19 from a workplace exposure (although various worker's compensation laws and regulations are being revised to adopt presumptions that workers in various "front-line" occupations contracted the disease at work). The transmission of coronavirus is decidedly difficult to trace in any context. Attributing the disease to one family member, and to that member's workplace, creates a chain of causation issues. Nevertheless, companies should carefully monitor employees in the workplace to document that at any given time (1) there was no disease identified in the facility, and/or (2) the worker was not in close contact with those who may have had the disease. Photographs and video of worker distancing, warning signs, physical barriers, employees wearing masks, floor markings, and so on, with their dates preserved, could serve as critical evidence to help defeat plaintiffs' efforts to speculate about the causation chain.

- **Seek Expert Advice.** Before reopening factories, stores, offices, and other facilities, a company could consider retaining experts in industrial hygiene, employment law and human resources, worker protection, and other relevant fields to inspect facilities and give them a "clean bill of health" before allowing workers to return. Although such measures would not likely immunize the company from liability, engaging experts prior to readmitting employees (and customers) to the company's facilities would likely impress upon a court and a jury the company's commitment to worker health and safety.

- **Assess Existing Legislative Liability Protections.** Certain workplaces (particularly those in health care-related fields) may be able to avail themselves of existing liability protections under the Public Readiness and Emergency Preparedness (PREP) Act, which extends liability protection to any "covered person" with respect to all "claims for loss" caused by, arising out of, relating to, or resulting from the "administration" or "use" of a "covered countermeasure" if an emergency declaration has been issued with respect to that countermeasure.

- **Seek Legislative Solutions For Liability Protection.** Bills circulating in Congress and in some states would enact some form of liability protection for businesses as they reopen from COVID-19-ordered closures. [Note that a number of states have already extended immunity to health care providers]. According to news reports, some measures would include liability protection for employers in the absence of gross negligence or reckless or wanton misconduct. Among the measures being considered, according to recent articles in the Washington Post and Wall Street Journal, is a federal government fund to pay out COVID-19-related claims. A similar compensation fund, called the Countermeasures Injury Compensation Program, exists under the PREP Act. Liability

protection legislation is likely to be hotly contested at both the federal and state level, however.

Why Crowell & Moring?

Litigation Experience. Crowell & Moring has an experienced litigation team focused on defense of personal injury, employment, and occupational exposure claims. We defend our clients in class actions and other high-stakes litigation. Our firm has defended workplace injury and "take-home" litigation for more than 20 years in the asbestos, beryllium, benzene, and other toxic substances contexts. Our litigators have extensive experience defending high-profile intentional tort claims and public nuisance lawsuits brought by private litigants and governmental authorities. Some of our key representations and wins include:

- **Occupational and Environmental Exposure.** We have extensive experience in defending high-stakes litigation over alleged occupational and environmental exposures, including:
    - Defending a major defense contractor in personal injury lawsuits alleging occupational, take-home, and environmental exposure to beryllium, defeating class certification after a four-day evidentiary hearing in an action seeking lifetime medical monitoring for chronic beryllium disease.
    - Defending two of the nation's largest chemical manufacturers against 25 plaintiffs' claims of occupational asthma as a result of exposure to isocyanates and ethylene diamine in the manufacture of the Gore-Tex® waterproof membrane. After a nine-week trial, the jury returned 75 defense verdicts for the two companies and a co-defendant. We successfully defended the verdicts twice on appeal, establishing the "sophisticated user" defense as the law of Maryland.
    - Together with Louisville co-counsel, defending thousands of personal injury and property damage claims brought by workers and neighbors at a Superfund site in southeastern Kentucky. We defended bellwether plaintiff claims of multiple myeloma, childhood leukemia, and other illnesses in a 52-day jury trial in federal court that led to a mass settlement of more than 550 plaintiffs' cases. We won a week-long arbitration of a tort action alleging "outrageous conduct."
    - Defending a transportation company in several high-profile class actions and mass actions, including achieving and upholding on appeal summary judgment in a putative class action litigation seeking medical monitoring following chemical exposures and successfully obtaining dismissal of claims arising from natural disasters on duty and preemption grounds.
    - Achieving and upholding on appeal the dismissal of numerous coal companies in class actions alleging global warming in federal district and appellate courts, and before the U.S. Supreme Court.

- **Take-Home Claim Defense.** We have defended a number of firm clients in dozens of asbestos cases alleging take-home disease. We routinely develop and present industrial hygiene, medical, and workplace experts to demonstrate the lack of foreseeability and causation in these cases. Our asbestos team also briefed and won two key "no duty" cases before the Delaware Supreme Court – *Riedel v. ICI Americas, Inc.*, 968 A.2d 17 (Del. 2009), and *Price v. E. I. du Pont de Nemours & Co.*, 26 A.3d 162 (Del. 2011). Both were household asbestos claims against employers.

- **Appellate Expertise.** In 2015, we developed and wrote an amicus brief, in conjunction with Arizona counsel, supporting defendants' contention that Arizona should not depart from its "duty" approach to take-home cases and should reject foreseeability as a standard. The defendants won on appeal, including before the Arizona Supreme Court.

- **Class Action and MDL Experience.** We are recognized as one of the premier class action practices in the nation. We represent clients in cutting-edge and high-profile class actions in courts across the country. Our cases span industries and issues – from automotive consumer class actions for GM, to iPhones and iPad class actions for AT&T, to antitrust class actions for the Blue Cross Blue Shield companies, to nationwide wage & hour and pay equity cases, to MTBE exposure cases for major oil companies. We handle class actions in state and federal court as well as centralized multidistrict litigation proceedings. We have defended certified class actions in jury and bench trials. We also have extensive experience handling class action appeals at all levels, including the U.S. Supreme Court. And while our focus is on devising strategies to defeat class certification, we also excel at crafting creative class settlements and guiding them through the court approval process.

crowell moring

Attachment B

Federal District Court

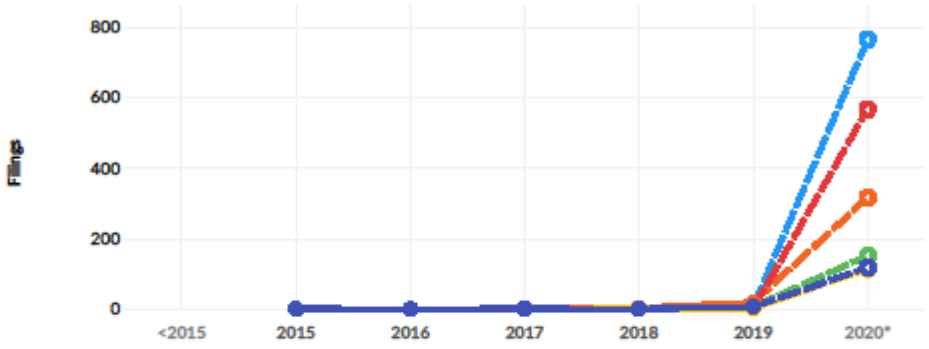
Cases

Showing 4,158 federal district court cases; generated from a separate document search.; sorted by most recent docket activity.

Manage password accounts

Summary

Case Filings (Top 6 by Focus Order)



	<2015	2015	2016	2017	2018	2019	2020*
Contracts	0	1	0	0	0	8	765
Employment	1	0	0	1	3	19	313
Torts	0	0	0	0	1	6	151
Insurance	0	0	0	0	0	2	568
Trademark	0	1	0	0	1	2	114
Securities	0	1	0	1	0	6	117

* 2020 numbers are year-to-date. Open dots are full-year estimates.

Cases by Type

Case Types	Cases
Contracts	774
Employment	337
Torts	158
Insurance	570
Trademark	118
Securities	125
Environmental	16
Consumer Protection	96
Trade Secret	52
Patent	44
Tax	5
Copyright	35

Courts

C.D.Cal.	381	9%
S.D.N.Y.	366	9%
N.D.Cal.	211	5%
S.D.Fla.	206	5%
N.D.Ill.	166	4%
Other Courts	2,828	68%

District Judges

Timothy J. Savage	52	1%
Robert Gary Klausner	46	1%
Nora Barry Fischer	37	1%
Dale S. Fischer	32	1%
Otis D. Wright II	31	1%
785 Other Judges		

4,158 Federal district court cases

Lex Machina

Case Types	Cases
Antitrust	17
Product Liability	39
ERISA	37
Bankruptcy	1
Remaining Federal	1,896

Case Status

Open: 3,215 (77%) Terminated: 943 (23%)