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Fireman's Rule Could Guard Against COVID-19 Product Claims

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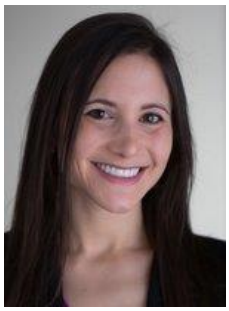

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(April 14, 2020, 5:16 PM EDT) -- With the outbreak of COVID-19, much has been written on potential legal protections for companies supplying necessary medical equipment to those on the frontlines: emergency personnel, medical professionals and other health care providers.

The focus, rightly, has been on the Public Readiness and Emergency Preparedness Act and the Defense Production Act. But there are other potential barriers to recovery for emergency responders who might eventually bring claims against manufacturers, distributors and sellers. One such defense is the fireman's rule, also known as the rescue rule, as adopted by multiple states.

Generally speaking, the fireman's rule, prohibits firefighters, and in some cases police and other emergency responders, from recovering in negligence for injuries sustained in the line of duty. The rule is premised on the notion that society requires the presence and protection of such personnel, that responders in many instances understand the risks associated (think assumption of the risk), and that situations requiring emergency responses are known to be dangerous.

State treatment of the fireman's rule varies. Some, like Tennessee, apply the traditional rule — firefighters and police officers may not recover in negligence "for injuries arising out of risks peculiar to their employment."[1] Others, like California, have applied the traditional rule and indeed extend it to other occupational situations, such as in-home caregivers and veterinary workers, where a plaintiff is hired by defendant and his or her stated injuries flow from "risks that necessitated the employment."[2]

Still others, like New Jersey, have abolished or all but abolished the rule.[3] And New York has modified the rule to create a right of action for firefighters and police officers injured by the negligence or intentional conduct of any person except an employer or co-employee.[4]

Even for those states that follow the traditional common law rule, most, if not all, recognize some exceptions to enable the seeking of tort relief in some settings. For example, exceptions at times exist where a defendant acted willfully or intentionally, acted negligently once emergency personnel arrived on scene, or failed to warn emergency personnel of known dangerous conditions of which the emergency personnel may be unaware.

So what does the fireman's rule have to do with COVID-19?

In this global health pandemic, medical supplies and equipment are in high demand. To meet this demand, companies that already offer medical supplies and equipment are ramping up production, and others, in the spirit of doing social good, are moving into entirely new lines of COVID-19 related business. Emergency management personnel (firemen, police officers, EMTs), health care providers (doctors, nurses, hospital staff), and employees in other affected industries are counting on personal protective equipment while carrying out their important jobs.

Companies in these settings could conceivably face COVID-related claims. A company that provides surgical masks to health care workers might face claims alleging that the masks failed to adequately protect. A company that manufactures ventilators could face claims alleging that its products used by a health care worker did not perform as advertised. And so on.

Might the fireman's rule apply in these fact patterns? The answer will turn largely on a given state's statutory and case law on the rule, the particular use of the emergency product in question and evolving notions of how law should stretch (or not) to address the COVID-19 pandemic. This includes how elastically the rule is applied to extend beyond public employees like firefighters and police officers.

The rationale underlying the fireman's rule is that society needs first responders and that this urgent societal need at times may trump a plea for tort relief. Courts, and ultimately perhaps legislatures, will be left to decide how that policy balance tips here.

Some case law does in fact extend the fireman's rule beyond its original protective scope of responders. In Pinter v. American Family Mutual Insurance Company, for example, an emergency medical technician was injured while providing medical assistance to a passenger who was injured in an automobile accident. The technician filed suit against the driver said to have caused the accident.[5]

Applying the fireman's rule, the Wisconsin Supreme Court affirmed a lower court's decision barring the technician's suit. It reasoned that the EMT was required to arrive at the scene in his professional capacity and to perform his duty to provide emergency care.[6] Other courts have likewise at times applied the rule to nix product liability claims brought by first responders.[7]

As companies increase the volume of existing COVID products, and pivot to produce new products altogether, companies pitching in should analyze available protections, and should explore whether long-standing tort doctrines may step into the legal breach as they step into the emergency relief breach. The fireman's rule is among them.

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[1] Carson v. Headrick, 900 S.W.2d 685, 691 (Tenn. 1995).

[2] Gordon v. ARC Mfg., Inc., 43 Cal. App. 5th 705, 712 (2019).

[3] New Jersey Public Statutes 2A:62A-21.

[4] General Obligations Law § 11-106.

[5] 236 Wis. 2d 137, 141 (2000).

[6] Id. at 155.

[7] See, e.g., Colbert v. Norcold, Inc., 726 Fed. Appx. 956, 958 (4th Cir. 2018) (injured firefighter barred from seeking tort damages under Virginia law from refrigerator manufacturer after a hydrogen leak from one of its products caused a fire).