

The Coming Plague (of Litigation)

Speculation on how the virus that has paralyzed all of us for two months (and counting) will unleash waves of legal activity that will wash over the court system for decades.

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In a month, a year, or even by the time this article is published, New Jersey's dockets will be thick with COVID-19-related litigation like crabgrass in a suburban lawn. Some forms of this litigation will wilt away at the first sign of an energetic defense. Others will grow deep roots and be fixed parts of the landscape, with their own numbers on our Case Information Statement, sustaining some firms and lawyers for years. And still other cases could call for the creation of a vehicle akin to the September 11th Victim Compensation Fund. This article will speculate on how the virus that has paralyzed all of us for two months (and counting) will unleash waves of legal activity that will wash over the court system for decades.

The first and most devastating sites of COVID-19 infection were our nation's nursing homes. From the early cases in Kirkland, Washington, to the dozens dead at the Andover Subacute and Rehabilitation Center in New Jersey, no demographic group has suffered



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more in this pandemic than the elderly. As a result, the long-term care industry faces years of court battles.

It is true that retroactive to March 9, 2020, the State of New Jersey granted immunity to health care professionals and facilities, but that legislation leaves nursing homes vulnerable to lines of attack from plaintiffs' attorneys. The law provides:

[A] health care professional shall not be liable for civil damages for injury or death alleged to have been sustained as a result of an act or omission by the health care professional in the course of providing medical services in support of the State's response to the outbreak of coronavirus disease during the

public health emergency and state of emergency declared by the Governor in Executive Order 103 of 2020.

If press reports are to be believed, then it is possible that scores of elderly died in nursing homes because staff simply failed to provide "medical services in support of the State's response to the outbreak of coronavirus disease." If a nursing home operator failed to recognize the presence of COVID-19 in its facility, failed to treat the disease, or, worse still, recognized the disease and failed to properly alert staff and family members to the unfolding disaster, then it is far from clear that the immunity statute will protect those facilities.

As of early May 2020, state figures reveal that 509 long-term care facilities in New Jersey have reported 4,151 deaths from COVID-19. Outrage over the deaths, and the lack of information provided to family members of the conditions within the facilities, have led to State officials “naming and shaming” the perceived worst offenders, and criminal charges may be pursued. Plaintiffs’ counsel have a ready-made list of villains to put in front of a jury. On the one hand, the institutionalized elderly and infirm are unlikely to have lost earnings that can support large jury verdicts. But at the same time, the outrage generated by the headlines could still be simmering in the minds of jurors two to three years from now, when any of these cases might come to trial (if trials are being conducted by that time).

At the time of this writing, one class action suit has already been filed in New Jersey on behalf of at least 83 deceased residents of one nursing home. The defendants in that case are the facility, the facility’s owners and caregivers, and plaintiff claims the defendants failed to take proper precautions after the deaths in Kirkland, Washington, put the entire industry on notice of the danger it was facing. A plaintiffs’ counsel will argue on opening, “you saw a brushfire coming, you ran a facility full of dry brush, and you did nothing to protect them.” The potency of these claims in



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front of a jury should not be underestimated.

While this pandemic could lead to wholesale changes in the nursing home industry, a mass of claims could also threaten it (and its insurers) with financial ruin. Depending on the scale of the litigation and the industry’s resources, a September 11th Victim Compensation Fund-type solution, or at a minimum a centralized multi-county litigation, could be the result.

In banking, the Paycheck Protection Program (PPP), administered by the Small Business Administration (SBA), is potentially sowing fertile ground for future litigation. Thousands of businesses applied for and received millions of dollars in these supposedly forgivable loans. Unfortunately (or perhaps fortunately for litigators), the roll-out of this program has been followed by the publication of SBA guidelines that suggest “forgivable”

might have a different meaning than the loan applicants were led to believe. The business community will not easily let the federal government get away with taking back this lifeline. These loans will not be coming due for several months, but early suits alleging banks botched the PPP roll-out or favored bigger clients to the detriment of smaller ones suggest this hastily-drafted program could end up being a lifeline to litigators.

It will come as a surprise to no one that the loss of over 20 million jobs in a single month will generate employment litigation. Someone will claim that his or her employer used COVID-19 as a pretext to take discriminatory employment action. Other workers have claimed, and will continue to claim, that they were required to work under dangerous circumstances without proper protections, and they either got

COVID-19 as a result or passed the disease on to family members. The plaintiff's bar has already gotten to work in the lab to support these claims, with reports surfacing that genetic testing could support proof that a plaintiff contracted the disease from a specific source. Leaving aside a plaintiff's difficulty in proving a discrete act of disease transmission and getting around the workers' compensation bar, these claims have already been asserted and will only grow.

Congress has unsurprisingly seen the coming wave, and segments of the legislature are seeking to include in future COVID-19-related legislation a broad immunity for employers who bring back workers into what everyone hopes will be a "re-started" economy. The outcome of that battle will have some effect on how this catastrophe will play out in the courts, but no act of Congress can stop it entirely.

Another practice area that has already seen an uptick is insurance coverage. Virtually every business has suffered a slowdown or complete cessation over the past few months, and the financial impact is staggering. Businesses and their attorneys are looking to their insurance carriers for "business interruption" coverage, and countless suits have already been filed over whether COVID-19 caused a

"direct physical loss of or damage to" the insureds' property. While carriers who adopted the "virus exclusion" language promulgated by the Insurance Services Office after the 2003 SARS epidemic are likely in a strong defense position, those that did not will be more exposed. Either way, this battle will be fought on many fronts, and this issue could define the health of the insurance industry for a generation. And as a side note, as much as people want to pretend this pandemic and lockdown were unimaginable, insurance leaders certainly envisioned it.

A final practice area that will be impacted by COVID-19 is one that also saw a bump in activity after the 2008 financial meltdown: legal malpractice.

In March and April 2020, lawyers around the country found themselves in crisis talks with distressed clients looking for answers to questions that had not been asked since the 1918 Spanish Flu pandemic or had never been asked before: Will I be liable if I have my employees come to the warehouse? Am I reading this Supreme Court omnibus order regarding deadlines correctly, and is my appellate deadline stayed?

Everything was so new and so panicked that even the best and most cautious lawyers, when pressed for an answer, may have relied on only their instincts in

ways that they never did before. And some of them will be perceived to have gotten it wrong.

While a malpractice claim based on a lawyer's judgment may be more easily defended, other less defensible claims, which are likely occurring as you read this, are those caused by hoarding and dabbling. Being only human and having bills to pay, many lawyers will succumb to the temptation to practice outside of their practice areas if that is where the work is. A litigator will take a crack at corporate work to prop up her numbers; or a matrimonial lawyer will advertise bankruptcy services. We lawyers would not want a psychiatrist to remove our tonsils, and we should be just as wary of moving beyond our specialty.

While today's lawyers sympathize with the unfortunate class of 2020 law school graduates, who will be deprived of a graduation and may not be able to join the bar this year, all indications are that they will have plenty of litigation to keep them busy once they join the profession.

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