



Key Defenses to COVID-19 Premises Liability Basic Negligence Claims

General Background

The threat posed to a multitude of businesses by COVID-19 personal injury lawsuits has been extensively documented. Stores, commercial offices, entertainment venues, bars, restaurants and other companies operating out of “brick and mortar” locations are uniquely exposed to liability claims stemming from alleged exposure to the coronavirus at premises they own and/or operate. Indeed, according to many authorities, the estimated cost of related COVID-19 personal injury litigation could exceed multiples of billions of dollars. It is consequently critical for such companies to understand the core elements of a COVID-19 premises liability negligence claim and the essential defenses that may exist to them.

The Basic Elements of Premises Liability Negligence

A premises liability claim seeking recovery for injuries allegedly sustained due to COVID-19 exposure is almost certain to allege basic negligence. The core elements of any premises liability negligence claim are: (1) the property owner or operator’s **duty** to maintain the location in a **reasonably safe condition**; (2) **breach** of that obligation; (3) **causing injury** to the claimant.¹

Baseline Defenses

A. First “Duty and Breach” Defense: Keep Property in a “Reasonably” Safe Condition

The duty to maintain a reasonably safe property does not require an owner or operator to eliminate *all* possibility of injury to visitors, customers or invitees. Rather, the “reasonableness” standard requires owners and operators to keep the property free from potential hazards given the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.² This is a

¹ See e.g., *Christopher v. Father's Huddle Cafe, Inc.*, 57 Mass App Ct 217, 222 (Mass App Ct 2003) (“To be liable for negligent conduct, one must have failed to discharge a duty of care owed to the plaintiff, harm must have been reasonably foreseeable, and the breach or negligence must have been the proximate or legal cause of the plaintiff’s injury.”); *Diamond v. Waffle House, Inc.*, 2018 WL 4390719 (ED Ky 2018) (“It is axiomatic that to state a claim for negligence [a plaintiff] must establish duty, breach thereof and injury.”)

² *Basso v. Miller*, 40 NY2d 233 (1976) (a property owner must “act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.”); *Moore v. Wal-Mart Stores, Inc.*, 111 Cal App 4th 472 (Cal Ct App 2003) (applying general rule that store owners “owe the patrons a duty to exercise reasonable care in keeping the premises reasonably safe.”)

fact specific standard and is always predicated upon the specific content in which the claim is presented.

In the COVID-19 context, property owners and businesses can likely satisfy this reasonableness standard by demonstrating a track record of compliance with all relevant industry guidelines and standards that have been adopted during the pandemic.

This could include:

- Comply with protocols and recommendations adopted by experts, risk control groups and leading safety groups;
- Continuously monitor and fully comply with state and federal advisories, guidelines, orders, regulations and recommendations;
- Draft and implement written policies and procedures in line with all applicable guidelines, including enforcement of mask-wearing requirements, social distancing rules, periodic sanitizing of common spaces, etc.;
- Implement procedures to ensure that employees are screened for symptoms regularly and are instructed to stay home if they experience symptoms. This may include daily temperature checks prior to clocking in and surveys that employees must complete stating whether they have come into contact with a confirmed case or have traveled to any high-risk areas, as defined by the CDC or state authorities; and
- Install signage redirecting visitor foot traffic to avoid congestion and reminding visitors to adhere to social distancing rules.

B. Second “Duty and Breach” Defense: **Lack of Notice**

Owners and operators are only obligated to keep their property reasonably safe from hazards **actually known** or **discoverable upon reasonable inspection**. These “notice” rules are commonly referred to as “actual notice” and “constructive notice.”

Actual notice could exist, for example, where the property owner or operator receives notification that an invitee, guest or other individual was carrying the coronavirus while present at the subject premises. In that circumstance, the owner or operator would need to take reasonable steps to mitigate any potential for further exposure such as facilities cleaning and possibly contact tracing. Again, following response plans recommended by industry, state and federal authorities, as well as leading safety groups, would serve as prospective liability defenses to actual notice of a COVID-19 hazard. However, without specific notice of a positive test or some other concrete indication of viral presence, it will be difficult for claimants to show actual notice in support of a negligence claim.

Constructive knowledge of a dangerous condition is established if, upon reasonable inspection, a reasonably prudent property owner or operator would have foreseen a probability that the

hazardous condition would result in injury to another.³ Circumstances generally known to promote transmission of the coronavirus, such as communal dining in an overcrowded space, could place a property owner on constructive notice of a hazardous condition. As such, owners that adhere to and enforce the relevant recommended safety protocols may be in a position to negate any inference of prior constructive knowledge and thus defeat a negligence claim.

C. **Third Defense: Absence of Causation**

To successfully establish negligence, a claimant must prove more than a failure to reasonably maintain a property despite notice (actual or constructive) of a hazardous condition. Specifically, the claimant must demonstrate the existence of a **clear causal connection** between the claimed failure to maintain the premises and the injuries alleged.

Establishing causation may be particularly challenging for COVID-19 claimants. They will have to demonstrate illness resulting from exposure to the virus **at a particular time and place** (i.e., a premises owned or within the defendant's control). Satisfying this evidentiary burden will likely require expert testimony and corresponding evidence, including test results and possibly other forensic evidence.⁴ Claimants may also have to establish (with at least some degree of support) that their exposure to the virus at the defendant's premises was the **exclusive source** of their illness.⁵

As such, causation should be a material obstacle to establishing liability in many cases. In fact, many experts have already opined that this may be the most difficult element of a premises liability claim for plaintiffs to successfully prove. Property owners and operators should be mindful of this high causation bar to recovery when faced with any claims.

D. **Fourth Defense: Waivers and Acknowledgments**

A liability waiver or acknowledgement form is essentially a written contract in which the customer or other third party agrees to waive a right to sue or accepts risk for certain injuries they might

³ Williams v. Texas City Ref., Inc., 617 SW2d 823 (Tex Civ App 1981) (“The owner may be charged with knowledge and appreciation of a dangerous condition on his premises only, if upon a reasonable inspection, a reasonably prudent person would have foreseen a probability that the condition would result in injury to another.”); Washington v. J.D. Royer Wholesale Florist, 275 Ga App 407(Ga Ct App 2005) (“[C]onstructive knowledge may be shown by evidence that the alleged hazard was present for such a length of time that it would have been discovered had the proprietor exercised reasonable care in inspecting the premises.”)

⁴ See, e.g., Martins v. Little 40 Worth Assoc., Inc., 72 AD3d 483 (1st Dept 2010) (in an analogous context, holding that “[t]o establish a relationship between an individual's illness and a toxin suspected of causing such illness, a plaintiff must establish (1) his level of exposure to the toxin; (2) general causation—that the toxin could in fact cause the illness, and the level of exposure that would engender such illness (the dose-response relationship); and (3) specific causation—the likelihood that this specific toxin did cause the plaintiff's injury.”)

⁵ Miranda v. Bomel Constr. Co., Inc., 187 Cal App 4th 1326 (Cal Ct App 2010), (“The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony.”)



sustain as contemplated by the agreement. Many businesses now require guests, patrons and invitees to sign COVID-19 “waiver of liability” or “risk acknowledgement” forms before allowing them onto their property. These agreements state that the customer or invitee waives any right to sue and/or acknowledges an assumption of all risk to COVID-19 related injury in exchange for being allowed upon the premises. Businesses also post signs in front of and inside their buildings, stating that all guests and invitees assume full risk of COVID-19 related injury upon entry to the premises.

Whether waiver of liability/acknowledgment forms or assumption of risk signage insulates businesses from premises liability negligence claims is a state-specific question and may ultimately involve even questions of federal law. Companies should consult with their counsel on application, scope and text of any waiver or signage before implementing any process. However, such agreements and/or warning signs could serve as a further defense to COVID-19 premises claims.

Conclusion

As outlined above, businesses have material defenses to possible COVID-19 premises/negligence claims. The key to all of these defenses is implementing and maintaining proper protocols and precautions designed to safely operate businesses in the COVID-19 environment while clearly communicating risks and safety rules to customers, invitees and other third parties. Businesses that strictly implement and adhere to these steps will be in the best possible position to avoid liability exposure as we continue to navigate this constantly evolving landscape.⁶

⁶ This memorandum does not serve as and does not constitute legal advice. It does not establish an attorney-client relationship between the author(s) and the readers. Should you have any questions or concerns regarding the subject matter of this memorandum, please consult with an attorney.

