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POLICY BRIEF
COVID-19 RESPONSE

Legal Liability and COVID-19 Recovery

Tyler Cowen and Trace Mitchell

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As hope of a quick end to the COVID-19 pandemic fades, both policymakers and analysts are shifting focus to restarting the economy. As of late April, more than 26 million Americans had filed for unemployment.[1] Estimates of the cost of every month of partial shutdown are as high as $1.07 trillion in forgone GDP growth. The longer the shutdown continues, the greater is the risk of irreversible declines in business solvency that, in addition to all of their other costs, would hamper future US public health capabilities.[2]

Some states are already in the process of reopening. Whether or not these reopenings are premature, they are underway, and Congress and state legislatures need to have the best possible plans ready. One key question concerns legal liability in retail and workplace settings. How can government policies restore some of America's GDP and employment while avoiding the most egregious instances of harm to workers and customers?

Policymakers are just now starting to consider the issue of legal liability and injury compensation. Singapore recently passed legislation absolving businesses of certain legal obligations (including temporary debt relief) in the face of the COVID-19 pandemic. The British government has set up a fund to compensate the families of healthcare workers who pass away from the disease.[3] In the US, Senate Republicans, including majority leader Mitch McConnell, have said that liability protection will be "absolutely essential" in discussions around future recovery legislation.[4]

Without greater clarity, it will be difficult for many businesses, universities, nonprofits, and other organizations to resume face-to-face operations.[5] The Occupational Safety and Health Administration (OSHA) has advised businesses to follow Centers for Disease Control and Prevention (CDC) guidelines, but it has not said that this will protect them from an OSHA citation. It is also

unclear whether simply following CDC guidelines will be an adequate shield against legal liability. Many on-the-job injury claims will be diverted to state workers' compensation systems, but the rest will need to be adjudicated either by the courts or by some other administrative agency.[6] The ongoing legal uncertainty will be particularly burdensome for smaller, more poorly capitalized entities.

Risk from reopening cannot fall to zero, but investments in safety by employers can bring real gains in many cases. Ideally, a plan should both minimize risk and encourage employers' safety investments. In essence, policymakers should (1) limit liability in the short term to cases of recklessness, (2) use direct regulation to prohibit some obviously risky options, and (3) create and fund a COVID-19 compensation program while capping liability for covered entities.

To understand how this combination of options might work in practice, consider the simple example of the restaurant. Many states are allowing partial reopenings of restaurants, albeit with social distancing, which might comprise outdoor seating, limited seating within the restaurant, or both. Yet some practices that would be very dangerous in the current situation, such as open buffets, have been made illegal per se. This arrangement takes some of the highest-risk problems off the table, and for the better.

It is still necessary, however, for these businesses to have stronger liability protection, so that restaurants may proceed with greater certainty, and also solvency. While the number of future COVID-19 transmissions in restaurants is unlikely to be zero, restaurants can only do so much to limit risk, vulnerable individuals still can opt to stay away and indeed are likely to do so, and tracing particular cases to particular restaurants is very difficult. For all of those reasons, we do not expect the traditional liability system to perform well in the case of restaurants, and we wish to limit its applicability, while of course keeping other safeguards in place. In essence, our proposal takes that commonsense approach to restaurants and applies it to the economy more broadly.

OPTIONS FOR ASSIGNING LIABILITY

Traditional Remedies

In tort law, liability standards range from strict liability—holding businesses and other institutions responsible for anything that occurs on their property regardless of their actual culpability—to full waiver—absolving institutions of any responsibility no matter what their actions.[7] Each extreme places the entire risk on one party of the transaction, and neither standard is widely applicable. This leaves negligence and recklessness, where the burden of taking precautions is shared.

Negligence

Under a negligence standard, a firm would be liable for damages if its behavior fell below that of "a reasonable man under like circumstances."[8] This is a fairly subjective standard and provides businesses little guidance about how to avoid negligence, particularly in the uncertainty of an unprecedented pandemic.[9] It thus may prove difficult for courts to provide meaningful and consistent guidance on permissible risk. Given the complexity of the current situation, questions surrounding COVID-19 risk and liability will likely require input from specialized experts, and it is here that we look to the regulatory process—for instance, when deciding that restaurants should not be allowed to offer buffet service.

Adopting a negligence standard might not provide sufficient clarity in an environment with enhanced risk, as is the case currently. The relatively low standard (compared with recklessness) and the uncertainty of judicial decision-making are likely to make a negligence rule less than optimal in a high-risk environment. Regulation at the local level would likely do a better job of creating the appropriate amount of safety and predictability. "Provide hand-sanitizing stations" would be an easier rule for business to deal with than the uncertainty of litigation.

Recklessness

A recklessness standard for liability shifts some of the risk away from the business, and it would likely be the superior option at this time. Under a recklessness standard, an organization is only liable for damages if it knew or should have known that its conduct would likely cause significant harm to others.[10] This is a much higher standard than negligence and imposes liability upon a firm only in the most egregious situations.[11] While the recklessness standard might still involve litigation and findings of fact by juries, the higher bar provides more legal certainty than a negligence standard because it requires a plaintiff to prove that an entity's actions were so inappropriate that the entity either knew or should have known that its conduct would probably harm others.

So, to continue with the example from above, a restaurant serving cold salads in a socially distanced environment would likely not be liable under a recklessness standard. But if a hand-washing station were regularly out of running water, or if a restaurant promised temperature checks for those entering but the relevant equipment was not working, the restaurant could be liable.

To illustrate the difference between negligence and recklessness, if a restaurant handed out normal-looking masks that it genuinely believed were in working order, but those masks turned out to be faulty, it might be liable under negligence but would likely not be liable under recklessness. However, if the restaurant issued obviously fraudulent, nonworking masks to its employees, it very well could be liable under both negligence and recklessness.

Recklessness is likely to be the most appropriate standard for COVID-19 liability. A recklessness standard provides aggrieved parties with a meaningful form of redress in the worst and most explicit cases, while not pretending to cover harder-to-measure or vaguer risks. Furthermore, organizations still have an incentive to take base-level precautions. For instance, even under a recklessness standard, a meat processing plant would likely be liable if it paid sick workers a bonus for showing up to work. At the same time, the recklessness standard would likely reduce the amount of litigation, as potential plaintiffs would have to meet a fairly high standard to win, thus discouraging frivolous cases.

However, given the pace of reopening in many states and cities, we do not think liability law can be optimally rejiggered sector by sector to produce the ideal results in the short term. For the sake of legal clarity, local regulators can make speedy adjustments to changing circumstances, as indeed they have been doing. If a very serious danger arises in some particular sector, as happened with cruise ships, for instance, we look to regulators rather than the passage of new laws, if only for reasons of speed.

That said, over longer time horizons, the passage of new, sector-by-sector laws is appropriate. For example, when Congress passed the Coronavirus Aid, Relief, and Economic Security Act, it exempted volunteer healthcare professionals from liability because they are an essential part of addressing the crisis, and furthermore they already bear a high burden of disease risk.[12] That policy decision seems to have worked well.

Looking forward, we also see the need for special legislation (and not just regulation) to address liability in sectors such as nursing homes, a major source of fatalities during the COVID-19 crisis. It could be that the entire mode of operation for many current nursing homes is plagued with so much risk that, given the contagiousness of the virus, the vulnerability of their populations, and current casualty levels, courts will likely find recklessness in almost every case.

Still, for the vast majority of American businesses, a recklessness standard will allow a short-term bounce-back while minimizing many of the obvious risks. The risk posed by reopening sports arenas is very different than the risk posed by reopening a coffee shop and may require a higher standard of liability to ensure that appropriate precautions are taken. A “simple” recklessness standard may not be optimal in each and every case, and we recognize the need for longer-term legal adjustments.

ESTABLISHING A COVID-19 INJURY COMPENSATION PROGRAM

Another administrative option that legislatures could pursue is the establishment of a no-fault, government-run compensation program to pay out to injured parties, while absolving covered organizations of legal liability. This program could be similar to New Zealand’s Accident Compensation

Corporation or the US National Vaccine Injury Compensation Program.[13] Instead of pursuing a claim against a specific business or other entity through the courts, aggrieved parties could petition the program for redress, based on a standard weaker than recklessness on the part of the business. Among its other benefits, this program would grant social recognition to aggrieved parties, and that is one important function of law that a recklessness standard on its own would not supply.

This program would need to be established by a legislative body and should be administered by the Health Resources and Services Administration or its state-level equivalents, as they have specific subject-matter expertise in administering these types of programs.[14]

CONCLUSION

Because of the complexity of the situation, Congress and state legislatures will likely need to adopt a mixture of these options and tailor their solutions to the specific needs of different areas and sectors of the economy. But with reopening already underway, in the short run policymakers should limit COVID-19 liability to reckless behavior, rely on regulation to limit egregious risks, and establish a COVID-19 compensation program for the longer run.

ABOUT THE AUTHORS

Tyler Cowen is the Holbert L. Harris Chair of Economics at George Mason University and serves as chairman and faculty director of the Mercatus Center at George Mason University. With colleague Alex Tabarrok, Cowen is coauthor of the popular economics blog *Marginal Revolution* and cofounder of the online educational platform Marginal Revolution University.

Trace Mitchell is a research associate at the Mercatus Center at George Mason University. Previously, he interned with the Mercatus Center's Academic & Student Programs team. Mitchell is a graduate of Florida Gulf Coast University, where he received a BA in political science. He is currently pursuing a JD at George Mason University's Antonin Scalia Law School. He is also an alumnus of the Mercatus Center's Frédéric Bastiat Fellowship.

NOTES

1. Dion Rabouin, "Unemployment Is Likely Already at Great Depression–Era Highs," *Axios*, April 24, 2020.
2. Christos A. Makridis and Jonathan S. Hartley, "The Cost of COVID-19: A Rough Estimate of the 2020 US GDP Impact" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, April 6, 2020).
3. Berdine Geh et al., "COVID-19: Singapore Government Financial Assistance Measures," *JD Supra*, April 30, 2020; Gemma Mitchell, "Government Will Pay £60,000 to Families of Nurses Who Die in Service," *Nursing Times*, April 28, 2020.
4. Jordain Carney, "McConnell, McCarthy: Liability Protections 'Absolutely Essential' for Next Coronavirus Bill," *The Hill*, May 1, 2020.

5. Tyler Cowen, "What If You Go Back to the Office and Get Covid-19?," *Bloomberg*, April 23, 2020.
6. Mark P. Henriques, Greg Horton, and Sara Tucker, "General Liability Considerations and Potential Exposure in Reopening from COVID-19 Shutdown," *National Law Review*, May 1, 2020.
7. Strict liability would place the entire burden upon organizations and would be particularly onerous for smaller businesses, even if they were not actually at fault. Alternately, a full waiver of liability would remove any incentive for organizations to take efficient precautions to benefit their workers and customers.
8. Restatement (Second) of Torts § 283 (1965).
9. Restatement (Second) of Torts § 328C (1965).
10. Restatement (Second) of Torts § 500 (1965).
11. Restatement (Second) of Torts § 500 (1965).
12. Helaine I. Fingold and Ashley A. Creech, "Legal Liability of Healthcare Providers for Care Provided During COVID-19 Pandemic," *National Law Review*, April 3, 2020.
13. Government of New Zealand, "Accident Compensation Corporation," accessed May 7, 2020, https://www.acc.co.nz/; Health Resources and Services Administration, "National Vaccine Injury Compensation Program," accessed May 7, 2020, https://www.hrsa.gov/vaccine-compensation/index.html.
14. The Health Resources and Services Administration operates the US National Vaccine Injury Compensation Program.