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COVID-19 Negligence Claims Looming For Hospitality Industry

By **Jessica Kelly** (April 29, 2020, 5:39 PM EDT)

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As the world continues to battle the COVID-19 pandemic and its consequences, the legal landscape that will unfold as a result of such a crisis is largely unknown. There is no modern precedent for the scope of the virus's impact across the globe. We can, however, review existing legal principles to try to anticipate how courts might treat certain types of claims arising from COVID-19 infections and injuries.

In this article, we will discuss potential COVID-19-related negligence claims, specifically pertaining to the hospitality industry. We have chosen to focus on hotels and restaurants because of the unique role such industries are playing in this crisis.

While most U.S. companies are either shut down or only allowing employees to work from home, many restaurants remain open for takeout and delivery, providing essential food service to the public.

Some hotels are also open, usually to the extent they are being used to provide rooms for: (1) the essential workforce, such as first responders, medical personnel, pilots and workers maintaining the infrastructure, and (2) so-called vulnerable populations, such as the homeless, people who are self-quarantining, and victims of domestic abuse.

Some hotels are actually being used as "sanctuary" hotels, meaning that they have been taken over entirely by local, state or federal governmental entities for exclusive use in providing emergency shelter for the essential workforce or vulnerable populations.

While many owners of hotels and restaurants may elect to close down entirely during the crisis, for those who remain open, what duty of care do such owners now owe to their guests and customers in order to avoid legal liability, and how will plaintiffs prove such claims?

Generally speaking, in order to prove a negligence claim, a plaintiff must demonstrate that (1) the defendant owed the plaintiff a duty of care, (2) the defendant failed to meet that duty, (3) the defendant's failure to meet its duty caused the plaintiff's harm, and (4) the plaintiff was injured or suffered damages as a result of such failure. Identifying the duty of care is highly fact-specific.

In the hospitality industry, hotels and restaurants have a duty to protect guests and customers from unreasonable risk of physical harm, but what is "unreasonable" will depend on the circumstances. Hotels and restaurants are not guarantors of their guests' and customers' well-being, but they must provide a

standard of care that a guest or customer would reasonably expect in terms of safety and services during their visit or stay.

While it is too early to review any published decisions on COVID-19-related negligence claims, past litigation over outbreaks of other infections and diseases may provide insight into how courts may identify the duty of care owed by hospitality facilities during this time.

Legionnaires' disease, a potentially lethal form of bacterial pneumonia, provides one example. Legionnaires' is transmitted through inhalation of infected water vapor from sources such as pools, spas and hot tubs.

In the summer of 2019, an outbreak of Legionnaires' at an Atlanta hotel led to the temporary closure of the hotel and numerous lawsuits against hotel ownership and management, including its general manager, for failing to adopt or follow a water management plan to prevent the spread of the Legionella bacteria.

Reported case law arising from other Legionnaires' outbreaks establishes that hotels, in most circumstances, have a duty of care to follow standard maintenance protocols to prevent Legionnaires' and/or routinely check the water sources for presence of the bacteria. Plaintiffs still must prove, usually through expert testimony, that the exposure was caused by a water source that was under the hotel's control and that such exposure was the proximate cause of the plaintiff's infection.[1]

Similarly, owners and operators of restaurants owe a duty to their customers to exercise care in food preparation and presentation to avoid injury or illness, in compliance with applicable laws and regulations. In some circumstances, plaintiffs who have suffered illness or injury from food poisoning may rely on reasonable inferences, such as other patrons falling ill from eating the same meal and proof of unsanitary conditions at the restaurant, as evidence that contamination caused their harm.[2]

From these examples, we understand that hotel and restaurants can be liable for illness or injury if they fail to employ industry and government standard procedures for cleaning and safety.

If, by contrast, hotels and restaurants adhere to generally understood and accepted industry standards, they will usually not face liability. Under the current, unprecedented circumstances, however, when the hospitality industry is operating in the midst of a pandemic, how will courts set the applicable duty of care?

As providers of essential services, hotels and restaurants can be assured that inevitably some portion of their guests or patrons will be sick or carrying the virus. Certain hotels are taking in front-line workers, vulnerable populations and individuals needing quarantine. Restaurants and delivery services are interacting with members of the public. Yet, there is generally no tort immunity for these businesses.[3]

Moving forward, hotels and restaurants that are still operating should follow all guidance from local, state and federal officials on how to keep patrons and customers safe. They should also perform due diligence to learn the best practices during the pandemic for their particular business in their particular location.

Resources and guidance from industry-specific trade groups, like the American Hotel and Lodging Association and the National Restaurant Association, are extremely helpful to the process of establishing procedures that may help avoid future liability, as are the state or local analogues of such industry trade groups.[4]

For example, all hotel and restaurant employees should wear masks, as recommended by the Centers for Disease Control and Prevention, and follow the social distancing and essential services orders issued at the state level.[5] The best procedures for regular cleanings and disinfecting, however, are in large measure up to the owner or operator to determine and will depend on the circumstances.

For a hotel with single-digit occupancy, operators may decide to wait several days before allowing cleaning staff to enter a room to allow the virus time to die. For hotels with large numbers of COVID-19 guests (such as the so-called sanctuary hotels), cleanings might need to meet the standards developed by the Global Biorisk Advisory Council and the 2008 Guidelines for Disinfection and Sterilization in Healthcare Facilities promulgated by the CDC for the sanitation of facilities and equipment exposed to the coronavirus.[6]

For other businesses, meeting such a high standard for cleaning might not be necessary in order to avoid liability. It should also be noted that hotels accepting recovering COVID-19 patients must comply with privacy rules under the Health Insurance Portability and Accountability Act.[7]

Best practices for customer interactions in the restaurant industry are quickly emerging as well. While there is not yet any evidence that COVID-19 can be transmitted through food, customers have come to expect that restaurants will accept payment over the phone or via nontouch platforms like Apple Pay or Venmo and will provide curbside pickup.

It will be interesting to see if defenses such as assumption of risk and contributory negligence will play a role in defending claims brought by customers if they choose to order takeout but do not follow other recommended steps, such as washing hands and wiping down to-go containers before consuming meals.

Most importantly, facilities should be monitoring the health and well-being of their employees who are interacting with customers, even from a distance. If an employee becomes ill, the employee should not return to work for at least two weeks or longer depending on doctor recommendations.

The facility may also want to temporarily close to make sure no other employees fall ill and potentially expose the public. For additional information, the CDC has provided some general guidance on food safety and COVID-19.[8]

As for potential liability, plaintiffs bringing tort claims against a hotel and restaurant arising from a COVID-19 infection will have a difficult time proving the third element of negligence: causation. The sheer number of people who have or had COVID-19 in the United States, many of whom are or were asymptomatic, the ease with which COVID-19 spreads, and the fact that the disease has at least a two-week incubation period, will make it difficult for plaintiffs to prove that their infection resulted from exposure at a particular facility.

Proof may be easier if there are high concentrations of infected individuals who visited the same facility, but plaintiffs will still have to demonstrate that the infection arose as a result of the facility's negligence and not just exposure to other guests. This does not mean, however, that plaintiffs will not sue, and that defendants who have not followed established laws, regulations and guidance, as well as best practices for their particular industry, will not still have a difficult legal battle on their hands.

In sum, the hospitality industry is facing a double-edged sword.

On the one hand, facilities that remain open during the pandemic may be exposing themselves to increased claims. Owners and operators should confirm that the potential increased risk of claims by staying open will not invalidate liability coverage in their insurance policies.

On the other hand, facilities that stay closed will suffer significant business losses, which are unlikely to be covered by business interruption insurance (although certain states have filed legislation to override policy exclusions).[9]

The hospitality industry can protect itself from negligence claims arising from COVID-19 by following the emerging guidance and regulations from local, state and federal officials and implementing the new safeguards for the protection of the public and employees. In certain circumstances, difficult decisions, such as closing a facility, may be preferable to remaining open and potentially being liable for negligence.

The industry must also be careful not to lose sight of the safety and service policies and procedures that were in place pre-COVID-19. While COVID-19 requires hypervigilance, it cannot be at the expense of other duties to provide safe and secure lodging and food service.

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[1] See Hopkins v. Booth, No. 16-CV-1020V(F), 2017 WL 5574027, at *8 (W.D.N.Y. Nov. 20, 2017), report and recommendation adopted,No. 16-CV-1020, 2018 WL 451822 (W.D.N.Y. Jan. 17, 2018) (denying motion to dismiss punitive damages claim); Sudbeck v. Sunstone Hotel Properties, Inc., No. 2:04-CV-1535 JWS, 2006 WL 2728624, at *6 (D. Ariz. July 26, 2006) (plaintiff could not prove that it was more likely than not that he contracted Legionnaires' as a result of staying at the hotel).

[2] See Stachulski v. Apple New England, LLC, 191 A.3d 1231, 1240 (N.H. 2018) (plaintiff proffered sufficient evidence that hamburger caused his salmonella infection to sustain jury verdict); Sarti v. Salt Creek Ltd., 85 Cal. Rptr. 3d 506, 521 (Ct. App. 4th 2008), as modified on denial of reh'g (Nov. 26, 2008) (expert testimony linking the particular kind of food poisoning involved (Campylobacter) and the particular unsanitary conditions found at the restaurant was reasonable inference).

[3] Some states and municipalities are designating hotels for alternative housing for COVID-19 patients who no longer need hospital care but need a place to quarantine and should indemnify the hotel for such use. See https://whdh.com/news/temporary-housing-opens-in-revere-for-residents-to-safely-quarantine-recover-from-covid-19/. Massachusetts has also filed a bill to provide statutory immunity to hotels that are designated by the department of public health as "health care facilities" during the COVID-19 pandemic. See An Act to provide liability protections for health care workers and facilities during the COVID-19 Pandemic, available at https://malegislature.gov/Bills/191/S2640.

[4] See AHLA Covid-19 Member FAQs, available at https://www.ahla.com/covid-19-member-faqs; Coronavirus Information and Resources, available at https://restaurant.org/Covid19.

[5] See CDC's Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (Covid-19), available at 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.

[6] See William A. Rutala, Ph.D., M.P.H., et al., Guideline for Disinfection and Sterilization in Healthcare Facilities, 2008, available at https://apic.org/Resource_/TinyMceFileManager/Academy/ASC_101_resources/Guidelines-APIC-CDC-WHO/CDC_HICPAC_Disinfection_and_Steril_2008.pdf.

[7] See e.g. Laura E. Jehl, Privacy, HIPAA, Security and GDPR – COVID-19 Considerations, National Law Review (March 12, 2020), available at https://www.natlawreview.com/article/privacy-hipaa-security-and-gdpr-covid-19-considerations.

[8] See CDC's Food Safety and the Coronavirus Disease 2019 (COVID-19), available at https://www.fda.gov/ food/food-safety-during-emergencies/food-safety-and-coronavirus-disease-2019-covid-19.

[9] See, e.g., An Act Concerning Business Interruption Insurance, available at https://malegislature.gov/Bills/191/SD2888.