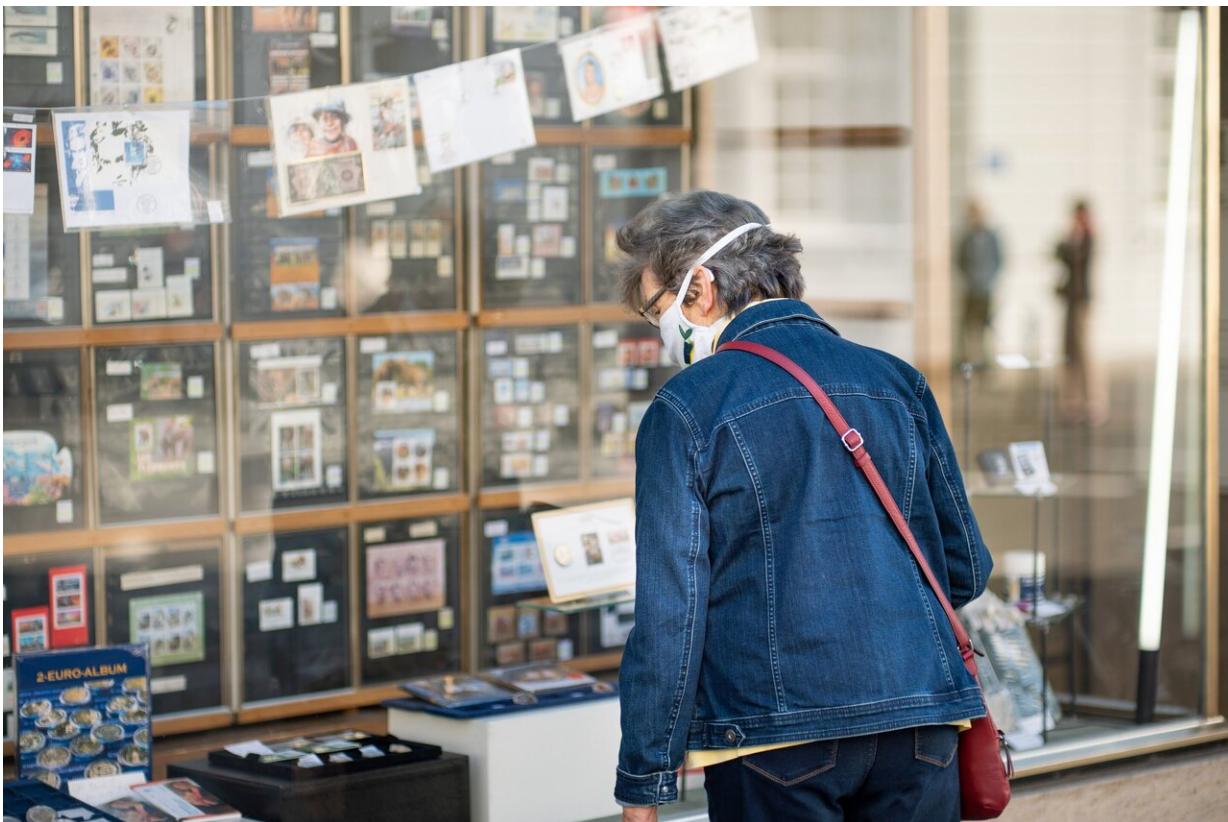


# Why shielding businesses from coronavirus liability is a bad idea

December 10 2020, by Timothy D. Lytton



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Congress [may be close to a deal](#) on another coronavirus bailout, but Senate Republican demands for liability protections for businesses [remain a major obstacle](#).

Senate Majority Leader Mitch McConnell [has long warned of an "avalanche"](#) of lawsuits that will stymie economic recovery efforts if Congress does not grant companies sweeping immunity from civil liability for failure to adequately protect workers and customers from infection.

[My research](#) on the role of civil lawsuits in reducing foodborne illness outbreaks suggests that fears of excessive litigation are unwarranted. What's more, the modest liability exposure that does exist is important to ensuring businesses take reasonable coronavirus precautions as they resume normal operations.

## How not to be careless

As a general matter, businesses are subject to civil liability for [carelessness](#) that causes injury to others. The law defines carelessness as a failure to exercise "reasonable care."

In applying this standard, courts consider several factors:

- Did the business take available [cost-effective precautions](#) to prevent injury?
- Did the business comply with [laws or regulations](#) designed to protect public health and safety?
- Did the business conform to [industry standards](#) for health and safety?
- Did the business exercise [common sense](#)?

If the answer to one or more of the questions is no, then a court may conclude that the business was careless and is subject to liability for damages to customers who suffered harm.

In the context of the current pandemic, I believe that reasonable care sets

a clear standard for business owners. Invest in cost-effective precautions like ensuring employees wear masks and provide for social distancing. Follow the latest guidance of health officials and all health and safety regulations. Keep up with what other similar businesses are doing to prevent infection. Use common sense.

Law-abiding, thoughtful [business owners](#) – those who care about the safety of their employees and their patrons—are likely to exercise reasonable care to prevent COVID-19 transmission with or without the threat of a [lawsuit](#).

For example, the owner of a nail salon in Georgia back in April [described her plans for reopening](#). The salon will accept patrons by appointment only, conduct pre-screening telephone interviews for signs of illness and limit the number of people in the salon at any one time. They'll take temperatures before allowing people to enter, require hand-washing, equip employees and patrons with masks and gloves, and sanitize all work areas between appointments.

[Conscientious business owners](#) like this have no reason to fear a lawsuit alleging they failed to take reasonable precautions.

Predictions of ["frivolous" lawsuits](#) appear to be generating unnecessary anxiety among business groups. But they shouldn't. Personal injury lawyers representing victims work on a [contingency fee](#) basis. This means that they earn fees only when they bring cases with a strong enough chance of winning to reach a favorable settlement or a judgment.

Lawyers have no incentive to bring sure losers, and they risk being [disciplined](#) for professional misconduct if they do so. For these reasons, [frivolous lawsuits are rare](#) and highly unlikely in the context of COVID-19 transmission claims against businesses.

## Exaggerated fears

The best available data does not support dire warnings about excessive litigation. As of Dec. 7, [6,571 civil lawsuits have been filed](#) related to COVID-19. Only 37 of these are personal injury claims by business patrons for COVID-19 exposure, and an additional 116 are claims by employees against companies for inadequate protection from infection in the workplace, personal injury or wrongful death.

Most of the claims involved other issues, such as 1,372 insurance disputes over business losses and 1,184 claims for alleged civil rights violations.

If there is any reason to fear excessive litigation, these numbers suggest that the real threat is from lawsuits filed by business owners against their insurance companies and individuals protesting public health measures designed to prevent another economic shutdown—not from personal injury claims.

Even for business owners who fail to take reasonable precautions, the prospect of a personal injury [claim](#) is still remote.

To successfully sue a business for COVID-19 transmission, a patron would have to prove that he or she contracted COVID-19 from the business and not from some other source. However, most people infected with COVID-19 currently have no reliable way of [identifying the source](#) of their infection. The [gap of three to 11 days](#) between infection and illness, the difficulty of [recalling all of one's contacts](#) during that interval and [limited testing](#) for the virus present formidable obstacles to establishing causation.

Moreover, a business would not be liable to patrons who knowingly and voluntarily assumed the risk of infection. Patrons of crowded stores or

businesses where many customers and employees are not wearing masks, for example, would not have viable legal claims even if they can prove carelessness and causation.

As for claims by employees against careless businesses, most of these will be covered by [workers' compensation](#), which precludes employees from filing negligence claims for workplace injuries.

## Sending a strong signal

Because of these considerable challenges, viable legal claims related to COVID-19 are likely to be extremely rare.

Yet even a small number of personal injury lawsuits act as a nudge, encouraging the entire business community to adopt reasonable precautions. This is one of the lessons of civil litigation arising out of [foodborne illness outbreaks](#).

As I document in my 2019 book, "[Outbreak: Foodborne Illness and the Struggle for Food Safety](#)," a handful of high-profile lawsuits against food companies have encouraged businesses at every link along the supply chain to improve their safety practices. That's what happened after lawsuits against [Jack in the Box](#) over contaminated hamburgers in 1993 and [Dole](#) over E. coli in baby spinach in 2006.

Similarly, the prospect of liability for COVID-19 transmission is likely to encourage [business](#) owners to invest in cost-effective precautions, follow the advice of public health authorities, adopt industry safety standards and use common sense.

I believe shielding [business owners](#) from this liability is one kind of immunity that will not help end the current crisis.

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