

PRESENTED AT

Webcast

May 15, 2020

Coronavirus Goes to Court

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I. INTRODUCTION

COVID-19 has sickened millions and killed hundreds of thousands, world-wide. COVID-19's sudden appearance and the dramatic shutdown of the world in response to it have forced quarantines, shuttered businesses, and thrown markets and the economy into dizzying tailspins. Predictably, COVID-19 has been fertile ground for litigation of all types.

There are four primary types of COVID-19 litigation:

- 1) Claims against businesses that deal with captive populations. These include claims against nursing homes, cruise ships, airlines, hospitals, restaurants, day care centers, and hotels.
- 2) Claims by employees against their employers for failing to adequately protect the employees from other employees or members of the public who may have the virus.
- 3) Claims related to business disruptions caused by the virus.
- 4) Claims against insurers for failing to cover virus-related liabilities.

No doubt, it will be years before all COVID-19 claims percolate through our legal system. The jury is still out on how our legal system ultimately will respond to COVID-19 claims, but we have seen enough at this point to begin making some preliminary general observations.

II. THIS PANDEMIC IS NOT COMPLETELY UNPRECEDENTED AND UNEXPECTED

Statements by politicians and news reporters consistently emphasize the unprecedented, unexpected nature of the COVID-19 pandemic. But the pandemic is not nearly as unprecedented and unexpected as many seem to believe. It is said that those who do not learn history are doomed to repeat it. Our politicians and other decision-makers in the heart of the storm of this pandemic would be well-advised to study the history of pandemics and to learn the lessons that this history teaches us.

There are at least 4,500 species of mammals, and each species carries many of the myriad types of viruses and bacteria on the planet. When humans began domesticating farm animals over 10,000 years ago, we probably contracted the measles virus from cows and the tuberculosis bacteria from goats. We probably contracted a bacteria that led to whooping cough from pigs, glanders from horses, and typhoid fever from pigs. As we began transporting goods by ship, we carried rats with the plague bacteria around the world. So-called "wet markets" in China and elsewhere, in which caged animals are put in close proximity to each other, have led to the rapid spread of infections among animals. When infections are transmitted from animals to humans, there is the potential for pandemics. Global air travel now exponentially accelerates the spread of pandemics.

Perhaps the earliest recorded epidemic in history occurred in 430 B.C., when two-thirds of Athens' population was killed by what was probably typhoid fever. In A.D. 541, the Justinian plague began to spread throughout the Mediterranean world, and resurgences of that plague over the next 200 years ultimately killed more than 25 percent of the world's population. In the 14th Century, "the Black Death" plague, spread by fleas on rats, killed over 75 million people – 60 percent of Europe's population. In the

16th and 17th Centuries, 90 percent of some native American populations were killed by Smallpox and other diseases brought to the Americas by Europeans.

The pandemic with the greatest number of casualties in history, however, occurred only 100 years ago – a mere second ago on history’s slow-moving clock of time. As of the date of this paper, the global infection total for Coronavirus is estimated to be over 4 million, a relative fraction of the world’s current total population of over 7.5 billion people, and the global death total from Coronavirus is estimated to be near 300,000. By way of comparison, the Spanish flu of 1918 infected about 500 million people worldwide – *about one third of the world’s population at the time*, and the Spanish flu killed between 50 million and 100 million – about 3 percent of the world’s population at the time. Photos from 1918 depicting mass groups of people wearing masks, long before the term “social distancing” came into vogue, would look eerily familiar to people today.

In *The Great Influenza*, the authoritative book on the Spanish flu of 1918, historian John Barry describes manifestations of the violent symptoms of the Spanish flu in a group of U.S. Navy sailors:

The blood that covered so many of them did not come from wounds, at least not from steel or explosives that had torn away limbs. Most of the blood had come from nosebleeds. A few sailors had coughed the blood up. Others had bled from their ears. Some coughed so hard that autopsies would later show that they had torn apart abdominal muscles and rib cartilage. And many of the men writhed in agony and delirium; nearly all of those able to communicate complained of headache, as if someone were hammering a wedge into their skulls just behind the eyes, and body aches so intense they felt like bones breaking. A few were vomiting. Finally, the skin of some of the sailors had turned unusual colors; some showed a tinge of blue around their lips or fingertips, but a few looked so dark one could not tell easily if they were Caucasian or negro. They almost looked black.

Barry, *The Great Influenza* 2 (Viking 2004).

In that same book, Barry describes the incredible death toll from the Spanish flu:

One cannot know with certainty, but if the upper estimate of the death toll is true as many as 8 to 10 percent of all young adults then living may have been killed by the virus. And they died with extraordinary ferocity and speed. Although the influenza pandemic stretched over two years, perhaps two-thirds of the deaths occurred in a period of twenty-four weeks, and more than half of those deaths occurred in even less time, from mid-September to early December 1918. Influenza killed more people in a year than the Black Death of the Middle Ages killed in a century; it killed more people in twenty-four weeks than AIDS ... killed in twenty-four years.

Barry, *The Great Influenza* 4-5 (Viking 2004).

Statements by politicians and news reporters consistently emphasize how deadly and contagious COVID-19 is, but the lethality and rate of contagion for COVID-19 again are not as unprecedented as many seem to believe, particularly when compared to diseases and viruses other than seasonal influenza – “the common flu.”

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First appeared as part of the conference materials for the
2020 Coronavirus Goes to Court session

"Coronavirus Goes to Court"