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Stay Shut Down or be Sued? The Risk to Businesses from COVID-19 Premises-Liability Claims

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After months of governmental orders that required all non-essential businesses to close their doors, many companies are eager (or even desperate) to re-open and begin generating revenue. But they are wary of potential liability if their customers, guests, employees, or vendors contract the coronavirus (COVID-19) while on their property. Lawsuits have already been filed against cruise lines, arguing that even passengers who did not contract COVID-19 were subject to emotional harm. Congressional efforts to shield companies from liability have predictably stalled, and, while other states have passed legislation or issued executive orders limiting liability for some companies (mostly those in the healthcare industry), Texas has not. What risks do Texas companies who decide to re-open face?

The claim that companies are most likely to face is one for premises liability. Premises liability applies when a person's injury is due to a dangerous condition on the property, as opposed to contemporaneous negligent activity.[1] Think of a customer slipping and falling on a wet floor. Under Texas law, companies owe a duty of care to all visitors on their property, but the extent of their duty depend on the visitor's status. Companies owe the highest duty to invitees (such as customers and employees)[2] and the lowest duty to trespassers.[3] The duty owed to licensees (such as household members and social guests) falls between those poles.[4] Nevertheless, the distinction between the duties owed is not important for this alert, because, even when the company's duty of care is at its highest, visitors who were infected with COVID-19 face several obstacles to recovery.

Duty to Protect Customer and Employees from COVID-19

The threshold issue is whether companies even owe a duty to reduce or eliminate their risk of catching COVID-19. Property owners owe invitees a duty "to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known."[5] In the context of COVID-19, the "premises condition" could be characterized in two ways: (1) infected persons on the premises; or (2) the virus itself living on counters, door handles, and other surfaces. But either characterization runs into problems.

First, imposing a duty on companies to protect visitors against other persons infected with COVID-19 is not permitted by current case law. As a general rule, a person has no duty to aid or protect another from harm caused by a third party, regardless of the gravity of the

potential harm or the insignificance of the effort or expense of providing aid or protection.[6] The Texas Supreme Court has recognized a few exceptions to that general rule, one of which is that property owners owe a duty to protect invitees against *criminal* acts of third parties when they know or should know of an unreasonable and foreseeable risk of harm.[7] The risk is foreseeable when previous crimes have been committed on or near the premises.

That exception, however, would not apply in this context, because going to a public place while infected with COVID-19, standing alone, is not a crime. Asymptomatic persons may be able to spread the virus to others without even knowing they are carrying the disease. And persons infected with COVID-19 can spread the disease even if they are adhering to all social-distancing rules and other public health guidelines. Even non-compliance with those rules and guidelines may not be criminal.

Visitors will also have difficulty showing that the company owed a duty to eliminate COVID-19 lingering on surfaces. To prevail on a premises-liability claim, the visitor must demonstrate that the property owner knew or should have known about the dangerous condition.[8] A company, however, is highly unlikely to know that COVID-19 is present on any given surface, and proving that the company should have known of the virus's presence will be difficult, if not impossible. To be sure, COVID-19's spread to surfaces is foreseeable. But the Texas Supreme Court has held it is not enough to show that the property owner knew that a dangerous condition could be reasonably expected to occur in the future.[9] Rather, the visitor must show that (1) the condition (COVID-19's presence on the surface) actually occurred; and (2) the condition existed for long enough for the property owner to discover it through a reasonable inspection.[10]

But there are no methods of conducting a reasonable inspection for COVID-19 living on surfaces. Several academic laboratories and private companies are developing tests, but they can be very expensive and provide only a limited amount of useful information, if any at all. More important, the tests take days to receive results, which may make them moot given the limited time the virus can live on surfaces. By then, people may have already been infected.

Showing that COVID-19 was a dangerous condition about which the company should have been aware is not the visitor's only challenge. Texas courts may decide not to impose a duty at all, because the risk of contracting COVID-19 is open and obvious to all. Under Texas law, a company's duty to visitors is not absolute; it is not an insurer of their safety. "When [visitors] are aware of dangerous premises conditions—whether because the danger is obvious or because the landowner provided an adequate warning—the condition will, in most cases, no longer pose an unreasonable risk because the law presumes that [visitors] will take reasonable measures to protect themselves against known risks, which may include a decision not to accept the invitation to enter the landowner's premises."[11] For

example, Texas courts have held that property owners owed no duty to warn about the risks of slipping on a patch of ice[12] or sitting on a cliff's edge[13].

By now, the risk of contracting COVID-19 is commonly known and appreciated, and the company could argue that the visitor could have protected themselves by not entering the premises at all. The company's argument will be stronger if its business is not an essential one.

Causation

Even if property owners owe a duty to reduce or eliminate a risk of catching COVID-19, that visitor will likely have difficulty proving that the breach of the duty proximately caused his injuries. To be a proximate cause, the company's inaction must have been a substantial factor in bringing about the COVID-19 infection and without which the infection would not have occurred.[14] The infection must also have been foreseeable.[15] Those requirements "cannot be established by mere conjecture, guess, or speculation."[16]

COVID-19's very nature presents an obstacle for a visitor seeking to prove proximate causation because of the lengthy incubation period (up to 14 days) between exposure to the virus and the development of symptoms. Even if he had been scrupulously following the shelter-in-place orders, it will be difficult for the visitor to pinpoint exactly when and where he was exposed to the virus and, thus, who is responsible. The visitor must also prove that additional reasonable safety measures would have made a difference.[17] In other words, the visitor would have to show that he more likely would *not* have contracted COVID-19 had the company taken more stringent measures. That will be difficult, to say the least.

Proportionate Liability

Moreover, the company can assert that the visitor's own choices caused or contributed to causing the COVID-19 infection. Although the common law defense of assumption of the risk no longer exists in Texas, the same concept remain relevant under Texas's Proportionate-Responsibility Statute.[18] The visitor's recovery may be reduced by demonstrating that he bore some portion of the responsibility for catching COVID-19.[19] The visitor may be precluded from recovering at all if the jury finds that he bore more than 50% of the responsibility.[20] The company will have a strong argument that the visitor is at fault if he did not comply with the governmental regulations and public-health guidelines (including not wearing a facemask).

Bottom Line

Although persons asserting premises-liability claims based on COVID-19 infections face considerable challenges, companies can take steps to further reduce their risk of liability.

First and foremost, they should adhere to any regulations by the state or local government, as well as the guidance published by the Centers for Disease Control. If the courts do impose a duty on property owners to reduce or eliminate the risk of catching COVID-19, they may find that violating the applicable regulations and guidelines was negligence per se, that is, conclusive proof that the owner did not exercise reasonable care.[21] Among other measures, companies should consider:

- Performing temperature screenings on any persons entering the premises and denying access to those running a fever;
- Sending home any employees who have symptoms, reside with a person showing symptoms, or have recently traveled to areas with outbreaks;
- Requiring all persons entering the premises to wear face coverings;
- Requiring and facilitating social distancing by all persons present on the premises;
- Promoting good hygiene and sanitation practices; and
- Posting displays emphasizing the risk of contracting COVID-19 and stating the required and recommended safety measures.

Companies should also adopt a compliance policy that will allow them to verify and document that they are complying with those regulations and guidelines. Those regulations and guidelines are periodically updated, so companies should designate a point persons to monitor any revisions and ensure that they are promptly implemented.

Additionally, companies should consider having all visitors (if feasible) sign a release in exchange for permission to enter the premises. So long as certain criteria are satisfied, releases that relieve a party in advance of liability for its own negligence are enforceable under Texas law, and an effective release is "an absolute bar to any right of action on the released matter."[22] Consult with an attorney to ensure that the release for your business complies with Texas law.

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[1] *See Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010); *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).

[2] *Del Lago Partners*, 307 S.W.3d at 767.

[3] *State v. Shumake*, 199 S.W.3d 279, 285 (Tex. 2006).

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[4] *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 554 (Tex. 2002).

[5] *Del Lago Partners*, 307 S.W.3d at 767.

[6] *Black + Vernooy Architects v. Smith*, 346 S.W.3d 877 (Tex. App.—Austin 2011, pet. denied) (en banc).

[7] *Del Lago Partners*, 307 S.W.3d at 767; *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.3d 749, 756 (Tex. 1998).

[8] *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000).

[9] *Id.* at 102; *E.I. DuPont de Nemours & Co. v. Roye*, 447 S.W.3d 48, 62 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd).

[10] *See CMH Homes*, 15 S.W.3d at 102–03; *Roye*, 447 S.W.3d at 62.

[11] *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 203 (Tex. 2015).

[12] *Nethery v. Turco*, No. 05-16-00680-CV, 2017 WL 2774448, at *2 (Tex. App.—Dallas June 27, 2017, no pet.).

[13] *See City of Waco v. Kirwan*, 298 S.W.3d 618, 623 (Tex. 2009).

[14] *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005).

[15] *Id.*

[16] *Id.*

[17] *See Tex. Health Res. v. Pham*, No. 05-15-01283-CV, 2016 WL 205732, at *5–6 (Tex. App.—Dallas Aug. 3, 2016, no pet.).

[18] Tex. Civ. Prac. & Rem. Code Ann. §§ 33.001–.017.

[19] *Id.* § 33.012(a).

[20] *Id.* § 33.001.

[21] *See, e.g., Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985).

[22] *See Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.3d 505, 508 (Tex. 1993).

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Bill Drabble focuses his practice on representing property owners, landlords, tenants and developers in real estate litigation before courts throughout North Texas, including disputes over land sales, breaches of lease agreements, premises-liability claims and other disputes involving commercial and residential properties. He also handles a wide variety of intra-company disputes, such as prosecuting and defending claims for breaches of shareholder or company agreement, breach of fiduciary duty claims against directors and officers, and contests for control over the company. Bill's practice also includes appeals. He was the principal author of briefs filed in the Fifth Circuit, intermediate appellate courts and the Texas Supreme Court.

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