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COVID-19 Liability: Tort, Workplace Safety, and Securities Law

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COVID-19 Liability: Tort, Workplace Safety, and Securities Law

Although the COVID-19 pandemic is still unfolding, a number of plaintiffs have already filed lawsuits seeking compensation for COVID-19-related injuries. Some stakeholders have expressed concern that the risk of COVID-19-related lawsuits threatens a range of businesses and other entities with substantial financial losses. Those stakeholders claim that this risk may discourage these entities from reopening and adversely affect the economy as the nation attempts to emerge from the pandemic. Some observers are therefore urging Congress to pass legislation insulating businesses, schools, and other organizations from COVID-19-related liability. Others, however, claim that the risk of potential liability arising from COVID-19 is actually minimal, and that enacting a COVID-19 liability shield would remove entities' legal incentives to take steps to prevent the spread of the disease.

Some of the COVID-19-related lawsuits that plaintiffs have filed so far allege that the defendant caused the plaintiff to contract COVID-19 by failing to take reasonable steps to prevent the spread of the disease, such as requiring employees and customers to wear personal protective equipment and enforcing social distancing. These lawsuits generally raise state law tort causes of action, such as negligence or medical malpractice. While several federal and state laws and legal doctrines may limit some entities' exposure to COVID-19-related tort liability, some stakeholders maintain that existing legal provisions do not adequately protect defendants. Several Members of the 116th Congress have therefore introduced bills proposing to insulate defendants from COVID-19-related tort liability under specified conditions. These bills raise an array of legal and practical questions that Congress may want to consider.

Some commentators argue that rather than shielding defendants from liability for COVID-19 transmission claims, Congress should instead require the Occupational Safety and Health Administration (OSHA) to promulgate COVID-19-specific workplace safety standards. OSHA has not issued such standards independently, so some Members of the 116th Congress have introduced several bills that would require OSHA to do so. Nonetheless, there are some existing OSHA workplace safety rules that may apply in the COVID-19 context.

Concerns regarding potential COVID-19-related liability extend beyond situations involving COVID-19 transmission or workplace safety. Some lawsuits instead allege that a business took unlawful actions during the pandemic that caused the plaintiff purely economic harm. For instance, some stockholders allege that certain companies violated federal securities laws by misstating the pandemic's effect on their finances in mandatory disclosure documents. While Congress already has enacted certain statutory safe harbors that may protect public companies from COVID-19-related liability under existing federal securities laws, some stakeholders urge Congress to amend those laws to provide companies greater protection.

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Although the COVID-19 pandemic is still unfolding, a number of plaintiffs have already filed tort lawsuits¹ seeking compensation for personal injuries resulting from alleged coronavirus exposure or a defendant's failure to properly treat COVID-19.² To name just a few examples:

- Relatives of several people who allegedly contracted COVID-19 in the workplace have filed lawsuits alleging that the decedents' employers caused the decedents' deaths by failing to implement appropriate workplace safety measures.³
- Numerous cruise ship passengers have sued cruise lines for allegedly exposing them to the coronavirus or causing them to contract COVID-19 during the voyage.⁴
- Several plaintiffs have sued assisted living facilities or nursing homes, alleging that their relatives died because these facilities negligently exposed them to the coronavirus⁵ and/or failed to timely and adequately diagnose and treat their coronavirus-related conditions.⁶

In addition to tort suits, plaintiffs have also filed other types of lawsuits that allege a variety of other injuries related to the COVID-19 pandemic:

- Many businesses that were shuttered this spring due to COVID-19 have sued their insurers to challenge the insurers' denial of their claims for business interruption coverage.⁷
- Consumers holding tickets for travel or events scheduled for spring 2020, or memberships or season passes at various recreational facilities, have filed suits seeking refunds for cancellations or closures due to the pandemic.⁸

¹ Tort law is the body of law that creates a civil remedy for persons injured by another person's wrongful or culpable conduct. *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019). See also CRS In Focus IF11291, *Introduction to Tort Law*, by Kevin M. Lewis [hereinafter *Lewis*, *Introduction*].

² See, e.g., Janet Adams, *Families File First Wave of Covid-19 Lawsuits Against Companies Over Worker Deaths*, WALL STREET JOURNAL (July 30, 2020).

³ See, e.g., Complaint—Civil Action, Benjamin v. JBS S.A., 2:20-cv-02594 (E.D. Pa. June 2, 2020), ECF No. 1-1 [hereinafter *Benjamin*]; Plaintiffs' First Amended Complaint, Requena v. Pilgrim's Pride Corp., 9:20-cv-00147 (E.D. Tex. Aug. 13, 2020), ECF No. 14; Complaint at Law, Evans v. Walmart, Inc., 2020L003938 (Ill. Cir. Ct. Apr. 6, 2020).

⁴ See, e.g., Amended Complaint and Jury Demand, Hsu v. Princess Cruise Lines Ltd., 2:20-cv-03488 (C.D. Cal. May 29, 2020), ECF No. 25; Second Amended Class Action Complaint for Damages, Archer v. Carnival Corp., 2:20-cv-04203 (C.D. Cal. Aug. 14, 2020), ECF No. 58 [hereinafter *Archer*]; Complaint for Damages, Nevis v. Costa Crociere S.P.A., 0:20-cv-60759 (S.D. Fla. Apr. 14, 2020), ECF No. 1 [hereinafter *Nevis*].

⁵ This report uses the phrase "the coronavirus" to refer to Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), which is the virus that causes the disease COVID-19.

⁶ See, e.g., Complaint, Hendrix v. Arbor Terrace at Cascade, LLC, 1:20-cv-02326 (N.D. Ga. May 29, 2020), ECF No. 1-1 [hereinafter *Hendrix*]; Plaintiff's Complaint at Law, Meskill v. Bridgeview Health Care Ctr. Ltd., 2020L005907 (Ill. Cir. Ct. June 3, 2020); Complaint for Damages: Fraud and Wrongful Death, De Los Angeles v. Life Care Ctrs. of Am., Inc., 20-2-07689-9 (Wash. Super. Ct. Apr. 10, 2020) [hereinafter *De Los Angeles*]; Second Amended Complaint ¶¶ 34-39, Maglioli v. Andover Subacute Rehabilitation Ctr. I, 2:20-cv-06605 (D.N.J. May 29, 2020), ECF No. 1-1 [hereinafter *Maglioli*].

⁷ See, e.g., Complaint, Legacy Sports Barbershop LLC v. Cont'l Cas. Co., 1:20-cv-04149 (N.D. Ill. July 14, 2020), ECF No. 1 (lawsuit alleging wrongful denial of claim under plaintiff's business income or business interruption coverage).

⁸ See, e.g., Complaint, Bess v. Frontier Airlines, Inc., 1:20-cv-1837 (D. Colo. June 22, 2020), ECF No. 1 (lawsuit challenging airline's refusal to issue monetary refunds); Complaint, Leon v. Disney Destinations, LLC, 6:20-cv-1227 (M.D. Fla. July 10, 2020), ECF No. 1 (lawsuit alleging that the defendant theme park breached its contract with annual

- Some college students who completed their spring semesters via remote learning have sued their universities for partial tuition refunds, on the ground that the tuition they paid covered the use of many facilities to which the students no longer had access.⁹
- Some plaintiff employees allege that their employers unlawfully terminated them for contracting COVID-19.¹⁰
- Some stockholders have filed lawsuits alleging that certain public companies violated federal securities laws by misstating the pandemic’s effect on the companies’ finances in mandatory disclosure documents.¹¹

As this litigation landscape continues to evolve, policymakers and commentators are debating whether (1) the potential financial exposure faced by defendants in COVID-19-related lawsuits—particularly COVID-19-related tort suits—might hinder the nation’s recovery from the economic fallout of the pandemic, and (2) Congress therefore should step in and legislate limits on the scope of COVID-19-related claims that plaintiffs may pursue.¹² Some stakeholders maintain that COVID-19 litigation threatens businesses and other organizations with ruinous liability.¹³ These stakeholders further claim that businesses, schools, healthcare providers, and other entities will be unwilling to reopen their businesses—and thereby contribute to the nation’s economic recovery—if doing so will expose them to costly litigation related to coronavirus exposure.¹⁴ Some maintain that these COVID-19 lawsuits are generally meritless, and therefore serve primarily to benefit plaintiffs’ lawyers rather than vindicate injured persons’ legal rights.¹⁵ These stakeholders therefore urge Congress to pass legislation establishing limits on COVID-19-related liability.¹⁶

pass holders).

⁹ See, e.g., Complaint, *Irizarry v. Long Island Univ.*, 7:20-cv-3160 (S.D.N.Y. Apr. 21, 2020), ECF No. 1.

¹⁰ See, e.g., Complaint, *Simone v. Harborview Rehabilitation & Care Ctr. at Doylestown LLC*, 2:20-cv-03551 (E.D. Pa. July 20, 2020), ECF No. 1. A separate CRS product analyzes potential COVID-19-related workplace liability under antidiscrimination laws. See CRS Legal Sidebar LSB10471, *COVID-19 and Workplace Liability: Selected Issues Under Antidiscrimination Laws*, by April J. Anderson.

¹¹ See *infra* “COVID-19-Related Disclosure Obligations.”

¹² Compare, e.g., Alexander Bolton, *Liability shield fight threatens to blow up relief talks*, The Hill (July 30, 2020), available at <https://thehill.com/homenews/senate/509710-liability-shield-fight-threatens-to-blow-up-relief-talks> (statement of Senate Majority Leader Mitch McConnell) (“There is no chance, zero chance, America can get back to normal without . . . liability protection. . . .”), with, e.g., *id.* (statement of Senator Sheldon Whitehouse) (“This is a fake [issue] because there is not a business reopening problem from fear of liability.”).

¹³ See, e.g., U.S. Chamber of Commerce, *Coalition Letter on Coronavirus Liability Protections* (July 30, 2020), available at <https://www.uschamber.com/letters-congress/coalition-letter-coronavirus-liability-protections> (arguing that “COVID-19-related lawsuits and their consequent exorbitant legal costs could . . . cripple businesses, educational institutions, and non-profit organizations both large and small”).

¹⁴ See, e.g., *id.* (claiming that “COVID-19-related lawsuits and their consequent exorbitant legal costs could deter entities from reopening”); Safeguarding America’s Frontline Employees to Offer Work Opportunities Required to Kickstart the Economy Act (SAFE TO WORK Act), S. 4317, 116th Cong. § 2(a)(17) (2d Sess. 2020) (“Individuals and entities potentially subject to coronavirus-related liability will structure their decisionmaking to avoid that liability. Small and large businesses, schools, colleges and universities, religious, philanthropic, and other non-profit institutions, and local government agencies may decline to reopen because of the risk of litigation. They may limit their output or engagement with customers and communities to avoid the risk of litigation.”).

¹⁵ See SAFE TO WORK Act, S. 4317, 116th Cong. § 2(b)(5) (2d Sess. 2020) (proposing to enact a federal COVID-19 liability shield intended to “prevent litigation brought to extract settlements and enrich trial lawyers rather than vindicate meritorious claims”).

¹⁶ See, e.g., U.S. Chamber of Commerce, *supra* note 13 (“[N]ow is the time for Congress to take strong action and provide a national baseline of protection during this national pandemic to stop a growing wave of lawsuits from

Others commentators disagree. Critics of legislative action that would circumscribe COVID-19 liability claim that businesses, schools, healthcare providers, and other organizations in fact face only minimal exposure to COVID-19-related liability.¹⁷ They also contend that shielding defendants from COVID-19-related claims would imperil the public by allowing defendants to commit negligent acts with impunity and removing incentives for businesses to take steps to prevent the disease's transmission.¹⁸

The 116th Congress has introduced various bills in response to this debate. Several legislative proposals would shield certain defendants from COVID-19-related tort liability under specified conditions.¹⁹ Other proposals would not provide businesses with liability shields, but instead would enhance federal workplace safety standards under the Occupational Safety and Health Act of 1970 (OSH Act) to protect against occupational exposure to the coronavirus.²⁰

This report analyzes some of the legal standards governing COVID-19 liability, some of the proposals for federal legislation that would modify those standards, and the legal issues that Congress may consider in deciding whether to implement legislative limitations on COVID-19-related lawsuits. Due to the fluidity of the COVID-19 litigation landscape, however, the report limits its coverage to three specific areas of potential legislative action.

Lawsuits seeking compensation for physical injuries resulting from exposure to the coronavirus or from a defendant's alleged failure to diagnose and treat COVID-19 are most central to the policy debate over whether COVID-19-related liability hinders the nation's economic recovery. Thus, the report begins by discussing how state tort law may expose certain entities to COVID-19-related liability.²¹ The report then identifies various issues Congress may consider when formulating or evaluating proposals to insulate prospective defendants from COVID-19-related tort claims.²²

The report next discusses how federal workplace safety standards might be used as an alternative to legislative limitations on tort claims.²³ This section analyzes existing federal workplace safety standards relevant to COVID-19, as well as proposals to enhance these standards to provide additional safeguards against COVID-19 transmission.²⁴

The report concludes by shifting its focus away from personal injuries to examine a category of lawsuits alleging economic injuries that some commentators worry might proliferate due to COVID-19. Specifically, the report analyzes how the pandemic may expose public companies to

inhibiting our return to a robust economy and healthy citizenry.”).

¹⁷ See, e.g., Bolton, *supra* note 12 (statement of Senator Sheldon Whitehouse) (claiming that plaintiffs have in fact filed relatively few lawsuits seeking compensation for COVID-19-related injuries). See also *infra* “Potential Limits on COVID-19 Liability.”

¹⁸ See, e.g., Todd Ruger, *Health and business concerns clash in COVID-19 liability debate*, CQ (July 22, 2020), available at <https://plus.cq.com/doc/news-5961172?1> (“Consumer and employee advocates and many Democratic lawmakers say the threat of such lawsuits is an important way to make sure employers take steps to keep workers and the public safe . . .”).

¹⁹ See *infra* “Proposals to Modify Existing Law and Issues for Congress.”

²⁰ See *infra* “Proposals to Enhance Workplace Safety Standards.”

²¹ See *infra* “Potential Sources of COVID-19-Related Liability.”

²² See *infra* “Proposals to Modify Existing Law and Issues for Congress.”

²³ See, e.g., Bolton, *supra* note 12 (statement of Yona Rozen, AFL-CIO) (arguing that the Occupational Safety and Health Administration should issue COVID-19-related workplace safety standards).

²⁴ See *infra* “Workplace Safety.”

increased liability risk under federal securities laws, as well as proposals to shield public companies from that risk.²⁵

State Common Law Tort Liability

One particularly salient source of potential COVID-19-related liability for businesses, schools, healthcare providers, and other entities is state tort law,²⁶ which creates a civil remedy for persons injured by another person's wrongful or culpable conduct.²⁷ For example, if a driver causes an automobile accident by carelessly failing to pay attention behind the wheel, the victims of that accident may be able to sue the driver to obtain compensation.²⁸

Traditionally, the creation and development of tort law has been the domain of the states rather than the federal government.²⁹ As a separate CRS product describes, however, Congress periodically passes legislation that alters the applicability or operation of state tort laws.³⁰

This section of this report provides an overview of the tort causes of action that are particularly relevant in the COVID-19 context, the applicable existing laws that limit liability under these tort causes of action, and other substantive and procedural laws that do not directly limit, but can affect, a defendant's liability under these causes of action. In almost all U.S. jurisdictions, tort law derives largely from the common law³¹—that is, from judicial decisions rather than legislation.³² In many jurisdictions, however, state legislatures have codified or altered common law tort principles in various respects.³³ Because tort doctrines are largely a creation of state law, tort law often varies from state to state.³⁴ Thus, this report provides only a broad overview of tort principles that apply in most jurisdictions; the principles discussed in this report may not apply equally in every state.

²⁵ See *infra* “The Federal Securities Laws.”

²⁶ See *supra* notes 3-4, 6 and accompanying text (listing examples of COVID-19-related tort lawsuits that plaintiffs have filed against defendants to date).

²⁷ See, e.g., *Tort*, BLACK'S LAW DICTIONARY (11th ed. 2019). See also Lewis, *Introduction*, *supra* note 1.

²⁸ See, e.g., Bryant Walker Smith, *Automated Driving and Product Liability*, 2017 MICH. ST. L. REV. 1, 66.

²⁹ See, e.g., *Funk v. Belneftekhim*, 14-cv-0376, 2018 WL 4006878, at *1 (E.D.N.Y. May 25, 2018) (characterizing tort law as “a field traditionally occupied by the states”); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262, 2015 WL 6696407, at *15 (S.D.N.Y. Nov. 3, 2015) (describing “general tort law” as “the traditional domain of state authority”).

³⁰ See CRS Legal Sidebar LSB10461, *Federal Legislation Shielding Businesses and Individuals from Tort Liability: A Legal and Historical Overview*, by Kevin M. Lewis [hereinafter Lewis, *Federal Legislation*].

³¹ See, e.g., Mark C. Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 65 CATH. U. L. REV. 537 (2016).

³² See, e.g., *Common Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

³³ See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001-74.507 (Texas statute governing medical liability); *Craig ex rel. Craig v. Oakwood Hosp.*, 684 N.W.2d 296, 308 (Mich. 2004) (explaining that the Michigan legislature has codified the common law elements of a medical malpractice action).

³⁴ See, e.g., Richard C. Ausness, *The Case for a “Strong” Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1219 (1996).

Potential Sources of COVID-19-Related Liability

While there are many tort causes of action a plaintiff could conceivably pursue in a case seeking compensation for COVID-19-related injuries,³⁵ two common law tort doctrines are especially relevant in the COVID-19 context: negligence and medical malpractice.

Negligence

The cause of action that plaintiffs have asserted most frequently in COVID-19-related tort lawsuits is negligence.³⁶ To prevail on a negligence claim in most jurisdictions, the plaintiff must prove:

1. the defendant owed the plaintiff a **duty** of care;
2. the defendant **breached** that duty;
3. the plaintiff sustained an **injury**; and
4. the defendant's breach **caused** the plaintiff's injury.³⁷

As for the duty element, entities generally owe a duty to take reasonable care to avoid injuring others.³⁸ To satisfy the causation element, the plaintiff must generally prove that the defendant's breach of its duty of care "proximately" caused the plaintiff's injury—that is, that the injury naturally and foreseeably followed from the defendant's actions.³⁹

The case of *Benjamin v. JBS S.A.* illustrates how these negligence elements may apply in a COVID-19-related tort lawsuit.⁴⁰ The plaintiff in *Benjamin* alleges that his father, a union steward at a meat processing plant, died of COVID-19-related complications after he was exposed to the

³⁵ See, e.g., *De Los Angeles*, *supra* note 6 ¶¶ 38-49 (raising negligence, fraud, fraudulent concealment, and negligent misrepresentation causes of action based on allegations that a nursing home resident contracted fatal case of COVID-19); *Benjamin*, *supra* note 3 ¶¶ 147-86 (asserting negligence, fraudulent misrepresentation, and intentional misrepresentation claims based on allegations that an employee contracted a fatal case of COVID-19 at work); *Nevis*, *supra* note 4 ¶¶ 54-83 (raising negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligent misrepresentation claims based on allegations that a cruise ship company exposed passengers to the coronavirus).

³⁶ See, e.g., *Benjamin*, *supra* note 3 ¶¶ 147-156 (claim that employer negligently caused employee's death by allegedly failing to employ certain safety measures to prevent the spread of COVID-19); *Hendrix*, *supra* note 6 ¶¶ 34-41 (complaint alleging that assisted living facility negligently caused resident's death by "failing to take . . . precautions designed to prevent the spread of Covid-19"); *Archer*, *supra* note 4 ¶¶ 234-249 (putative class action lawsuit alleging that cruise lines negligently exposed passengers to COVID-19).

³⁷ See, e.g., *J.H. ex rel. A.R. v. R&M Tagliareni, LLC*, 216 A.3d 169, 180 (N.J. 2019); *Knapton ex rel. E.K. v. Monk*, 347 P.3d 1257, 1259 (Mont. 2015); *Bell ex rel. Bell v. Dawson*, 82 A.3d 827, 831-32 (Me. 2013).

³⁸ See, e.g., *Feld v. Borkowski*, 790 N.W.2d 72, 75 (Iowa 2010) ("As a general rule, our law recognizes that every person owes a duty to exercise reasonable care to avoid causing injuries to others."); *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011) ("[G]eneral negligence law imposes a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff."); *Herrera v. Quality Pontiac*, 73 P.3d 181, 195 (N.M. 2003) ("The finder of fact must determine whether Defendant breached the duty of ordinary care by considering what a reasonably prudent individual would foresee, what an unreasonable risk of injury would be, and what would constitute an exercise of ordinary care in light of all surrounding circumstances . . .").

³⁹ See, e.g., *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000) ("An indispensable element of a negligence claim is that the act complained of must be the proximate cause of the plaintiff's injuries. A negligent act is the proximate cause of an injury if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.") (internal citations omitted).

⁴⁰ See *Benjamin*, *supra* note 3.

coronavirus at work.⁴¹ According to the plaintiff, the decedent's employer owed its employees a duty to provide them a safe working environment.⁴² The plaintiff claims that the employer breached that duty by, among other things, failing to provide its employees personal protective equipment, failing to enforce social distancing guidelines, and failing to sanitize its facilities.⁴³ Those alleged breaches, according to the plaintiff, proximately caused his father to become infected with the coronavirus and die of COVID-19.⁴⁴ The plaintiff has therefore sued the plant owners and operators for negligence,⁴⁵ as well as other tort causes of action.⁴⁶ The defendants have filed motions to dismiss the case, which remain pending as of the date of this report.⁴⁷

Medical Malpractice

Medical malpractice is another tort cause of action that some plaintiffs have asserted in COVID-19-related lawsuits.⁴⁸ Medical malpractice occurs when a healthcare provider injures someone by providing substandard medical care.⁴⁹ Because medical malpractice is a variant of negligence, the elements a plaintiff must prove to prevail in a medical malpractice action are usually similar to the negligence elements.⁵⁰ Specifically, the plaintiff must establish:

1. The appropriate **standard of care** governing the healthcare provider's conduct;
2. That the healthcare provider **breached** that standard of care;
3. That the plaintiff sustained an **injury**; and
4. That the healthcare provider's breach of the applicable standard of care **proximately caused** the plaintiff's injury.⁵¹

A medical malpractice suit differs slightly from an ordinary negligence action, however, to the extent that the applicable standard of care is the level of care, skill, and treatment that a reasonably prudent healthcare professional would provide under the circumstances.⁵²

⁴¹ See *id.* ¶¶ 3, 10, 95-97.

⁴² See *id.* ¶ 153.

⁴³ See *id.* ¶ 154.

⁴⁴ See *id.* ¶¶ 154-155.

⁴⁵ See *id.* ¶¶ 147-156.

⁴⁶ See *id.* ¶¶ 157-186.

⁴⁷ See Memorandum of Law in Support of Motion to Dismiss of Defendants JBS USA Food Company, JBS USA Holdings, Inc., JBS Souderton, Inc., and Pilgrim's Pride Corporation Pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), Benjamin v. JBS S.A., 2:20-cv-02594 (E.D. Pa. June 16, 2020), ECF No. 15 [hereinafter *Benjamin Motion to Dismiss*]; Memorandum of Law in Support of Motion to Dismiss of Defendant JBS S.A. Pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), Benjamin v. JBS S.A., 2:20-cv-02594 (E.D. Pa. Sept. 16, 2020), ECF No. 36. This report discusses certain aspects of the defendants' motion to dismiss below. See *infra* "Workers' Compensation Laws."

⁴⁸ See, e.g., *Maglioli*, *supra* note 6 ¶¶ 34-39.

⁴⁹ See, e.g., *Austin v. Wells*, 919 So.2d 961, 962 (Miss. 2006) (medical malpractice action alleging that doctor failed to properly treat complications arising from surgical procedure).

⁵⁰ See, e.g., *Quinby v. Plumsteadville Family Practice, Inc.*, 907 A.2d 1061, 1070 (Pa. 2006) (stating that "medical malpractice is a form of negligence" and a medical malpractice plaintiff must therefore "demonstrate the elements of negligence").

⁵¹ See, e.g., *Craig ex rel. Craig v. Oakwood Hosp.*, 684 N.W.2d 296, 308 (Mich. 2004); *Smith v. Parrott*, 833 A.2d 843, 847 (Vt. 2003); *Nold ex rel. Nold v. Binyon*, 31 P.3d 274, 285 (Kan. 2001).

⁵² See, e.g., *Saunders v. Dickens*, 151 So.3d 434, 441 (Fla. 2014) ("The duty element requires a physician to act within the standard of professional care. The standard of professional care is a level of care, skill, and treatment that, in consideration of all surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably

Maglioli v. Andover Subacute Rehabilitation Center I illustrates how the medical malpractice doctrine can apply in the COVID-19 context.⁵³ The plaintiffs in *Maglioli* allege that their father, a patient at a rehabilitation center, contracted and ultimately died from COVID-19.⁵⁴ According to the plaintiffs, the doctors, nurses, and other healthcare professionals at the facility breached the prevailing standard of care by failing to prevent, diagnose, and treat their father's illness.⁵⁵ The plaintiffs claim that this alleged breach proximately caused their father's death.⁵⁶ The defendants deny these allegations.⁵⁷

Potential Limits on COVID-19 Liability

Several existing federal and state laws and doctrines may mitigate the COVID-19-related liability risk that certain defendants might otherwise face.

Federal Statutes

As another CRS product discusses in greater detail, Congress has enacted various federal statutes that shield private parties from tort liability under specified circumstances.⁵⁸ Many of those statutes aim to encourage private parties to engage in socially desirable activities that liability risks might otherwise discourage them from conducting, such as developing vaccines⁵⁹ or donating food.⁶⁰ As explained below, several of these statutes may insulate certain defendants from COVID-19-related tort liability under certain conditions.

The PREP Act

For example, subject to various exceptions and conditions, the Public Readiness and Emergency Preparedness (PREP) Act shields manufacturers, distributors, healthcare providers, and other entities from liability for certain injuries they inflict while using or administering specified medical products designated as "covered countermeasures" during a public health emergency.⁶¹ As a separate CRS product explains, the PREP Act may therefore shield various entities from certain COVID-19-related tort claims.⁶² For instance, the PREP Act may immunize healthcare

prudent health care providers. In short, it is to provide the care that a reasonably prudent physician would provide.") (internal citations omitted).

⁵³ See *Maglioli*, *supra* note 6 ¶¶ 34-39. The plaintiffs in *Maglioli* also raise ordinary negligence claims. See *id.* ¶¶ 26-33, 40-42.

⁵⁴ See *id.* ¶¶ 1, 15.

⁵⁵ See *id.* ¶ 37.

⁵⁶ See *id.* ¶ 38.

⁵⁷ See Answer to Plaintiffs' Second Amended Complaint and Affirmative Defenses to Complaint, *Maglioli v. Andover Subacute Rehabilitation Ctr. I*, 2:20-cv-06605 (D.N.J. June 3, 2020), ECF No. 4.

⁵⁸ See Lewis, *Federal Legislation*, *supra* note 30.

⁵⁹ See, e.g., National Swine Flu Immunization Program of 1976, Pub. L. No. 94-380, 90 Stat. 1113 (1976); National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3743 (1986).

⁶⁰ See Bill Emerson Good Samaritan Food Donation Act, Pub. L. No. 104-210, 110 Stat. 3011 (1996).

⁶¹ See, e.g., 42 U.S.C. § 247d-6d(a)(1) ("[A] covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if an [emergency declaration] has been issued with respect to such countermeasure."). See also *id.* § 247d-6d(i)(1) (defining "covered countermeasure"); *id.* § 247d-6d(i)(2) (defining "covered person").

⁶² See CRS Legal Sidebar LSB10443, *The PREP Act and COVID-19: Limiting Liability for Medical Countermeasures*, by Kevin J. Hickey.

providers who administer certain respiratory protective devices during the COVID-19 emergency from claims arising from the use of those devices.⁶³

The CARES Act

Subject to several conditions and exceptions, Section 3215 of the CARES Act shields individual volunteer healthcare professionals from liability for acts or omissions they commit while providing COVID-19-related healthcare services during the COVID-19 public health emergency.⁶⁴ Section 3215 does not protect defendants that are not “individuals” (such as hospitals),⁶⁵ nor does it apply to acts or omissions that healthcare professionals commit while they are providing COVID-19-related healthcare services for profit.⁶⁶

The Volunteer Protection Act

Subject to various conditions and exceptions,⁶⁷ the Volunteer Protection Act of 1997 (VPA)⁶⁸ shields individuals who volunteer for nonprofit organizations or governmental entities from liability for certain acts or omissions.⁶⁹ The VPA may therefore protect certain volunteers from liability for negligently spreading the coronavirus.⁷⁰ Like Section 3215 of the CARES Act, however, the VPA would not protect defendants that are not “individuals” (such as nonprofit organizations)⁷¹ or non-volunteers⁷² from COVID-19-related liability.

State Laws and Doctrines

Besides these existing federal protections, existing state laws may also insulate various defendants from COVID-19-related tort liability.

State Law COVID-19 Liability Shields and Executive Orders

Several states have passed laws or promulgated executive orders that purport to shield certain defendants from COVID-19-related tort liability under specified conditions.⁷³ To date, states that have done so have primarily granted time-limited protections to their health care sectors.⁷⁴ In

⁶³ See 42 U.S.C. § 247d-6d(i)(1)(D) (defining “covered countermeasure” to include, among other things, “a respiratory protective device that is approved by the National Institute of Occupational Safety and Health” which the Secretary of Health and Human Services “determines to be a priority for use during a public health emergency”).

⁶⁴ See Pub. L. No. 116-136 § 3215, 134 Stat. 281 (2020) (codified at 42 U.S.C. § 234 note).

⁶⁵ See *id.* § 3215(d)(2).

⁶⁶ See *id.* § 3215(a)(1), (d)(4).

⁶⁷ See, e.g., 42 U.S.C. § 14503(a)(1)-(4), (g).

⁶⁸ Pub. L. No. 105-19, 111 Stat. 218 (1997) (codified as amended at 42 U.S.C. §§ 14501-14505).

⁶⁹ See 42 U.S.C. § 14503(a) (establishing that a “volunteer of a nonprofit organization or governmental entity” is not “liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if” certain conditions apply).

⁷⁰ See *id.*

⁷¹ See *id.* § 14505(6) (“The term ‘volunteer’ means *an individual . . .*”) (emphasis added); *id.* § 14503(d) (“Nothing in this section shall be construed to affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.”).

⁷² See *id.* § 14505(6) (defining “volunteer” for the purposes of the VPA).

⁷³ See CRS Legal Sidebar LSB10508, *COVID-19 and Liability Limitations for the Health Care Sector*, by Wen W. Shen.

⁷⁴ See, e.g., Shani Rivaux et al., *The Economic Recovery: States Offer Varied Liability Protections for Businesses*,

general, these liability shields, at minimum, insulate individual health-care professionals—including non-volunteers—from liability related to COVID-19 care provided during the emergency period.⁷⁵ The protection generally does not extend to acts of willful or criminal misconduct, gross negligence, and reckless misconduct.⁷⁶ Beyond this baseline, state liability shields vary in scope. Some, for instance, also extend liability protections to health-care facilities and entities, such as hospitals and nursing homes, or to activities related to non-COVID-19 care if the potential immunity holder’s pandemic response affected that care.⁷⁷

As the incidence of COVID-19 continues to rise, a few states have also provided broader immunity protections to businesses beyond the health care sector.⁷⁸ These time-limited liability shields generally insulate businesses from tort liabilities related to coronavirus exposure.⁷⁹ Most protections provided to date are conditioned upon the businesses’ substantial compliance with the applicable federal, state, or local guidelines, and do not extend to acts of gross negligence or reckless misconduct.⁸⁰ As with the liability shields for the health care sector, the specific scope of the protection varies among states. One state, for instance, has conditioned the immunity protection on the businesses’ implementation of a plan to reduce the transmission of COVID-19.⁸¹ Other than exceptions for willful misconduct and reckless or intentional infliction of harm, another state has provided immunity protection from exposure liability without additional conditions.⁸²

Sovereign Immunity

Besides these COVID-19-specific protections, some states also offer more general liability protections to certain state entities. For instance, part of the COVID-19 liability debate concerns whether and to what extent Congress should shield educational institutions from COVID-19 transmission claims.⁸³ Under the law of some states, however, some public educational institutions, such as school districts or state universities, may enjoy sovereign immunity⁸⁴ from certain tort lawsuits.⁸⁵ Thus, a state or local entity’s current exposure to COVID-19-related tort

PILLSBURY WINTHROP STRAW PITTMAN LLP (July 13, 2020) (noting that 30 states have provided some form of liability protection to health care providers).

⁷⁵ See Shen, *supra* note 73.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See, e.g., Y. Peter Kang, *9 States with COVID-19 Biz Immunity, And 3 That May Follow*, LAW360, available at <https://www.law360.com/articles/1287005/9-states-with-covid-19-biz-immunity-and-3-that-may-follow> (June 26, 2020) (noting that as of June 26, 2020, Iowa, Louisiana, Kansas, Oklahoma, North Carolina, Wyoming, Utah, Arkansas, and Alabama have provided liability shields to businesses either through legislation or executive orders).

⁷⁹ See *id.*; see also, e.g., H.B. 826, 2020 Reg. Sess. (La. 2020).

⁸⁰ See, e.g., H.B. 826, 2020 Reg. Sess. (La. 2020).

⁸¹ See H.B. 118, Session Law 2020-89, 2019 Sess. (N.C. 2020).

⁸² See S.B. 3007, 2020 3d. Spec. Sess. (Utah 2020).

⁸³ See Letter from AASA *et al.* to Speaker Pelosi *et al.* re: Targeted Liability Coverage During the COVID-19 Pandemic (July 8, 2020), available at [https://aasa.org/uploadedFiles/AASA_Blog\(1\)/LEA%20COVID-19%20Liability%20Coverage%20NSBA%20AASA%20AESA%202020%20final%20.pdf](https://aasa.org/uploadedFiles/AASA_Blog(1)/LEA%20COVID-19%20Liability%20Coverage%20NSBA%20AASA%20AESA%202020%20final%20.pdf) (arguing that “[s]chools must have protection from unfair lawsuits”). See also, e.g., Open Schools Responsibly Act, H.R. 7710, 116th Cong. (2d Sess. 2020).

⁸⁴ “Sovereign immunity” is “[a] government’s immunity from being sued in its own courts without its consent.” *Immunity*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁸⁵ See, e.g., *O.S. v. Kan. City Pub. Schs.*, No. 13-0261-CV-W-DGK, 2013 WL 5636664, at *2 (W.D. Mo. Oct. 16, 2013) (explaining that “[i]n Missouri, public entities such as schools, school districts, and school boards are immune

liability may depend in part on whether the state has waived or preserved the entity's immunity from such claims.⁸⁶

Workers' Compensation Laws

State laws can also abrogate tort liability for certain defendants by providing an alternate compensation scheme. For instance, all states have enacted workers' compensation laws that, subject to various conditions, pay certain employees who sustain injuries at work.⁸⁷ While the specifics of those laws vary from state to state,⁸⁸ workers' compensation statutes generally allow an injured employee to obtain compensation without the burden of litigating a full-fledged tort lawsuit or proving that the employer was at fault.⁸⁹ In exchange for that remedy, however, workers' compensation laws usually abrogate certain common law tort causes of action that the injured employee might otherwise be able to assert against the employer.⁹⁰ With exceptions that can vary from jurisdiction to jurisdiction,⁹¹ workers' compensation laws typically bar injured workers from bringing tort lawsuits against their employers by making workers' compensation the exclusive remedy for workplace injuries.⁹² State workers' compensation laws may therefore

from most tort claims," but noting that "the Missouri legislature and courts have grafted several exceptions to the general tort immunity principle"); *S.N.B. v. Pearland Indep. Sch. Dist.*, 120 F. Supp. 3d 620, 631 (S.D. Tex. 2014) ("Under the Texas Tort Claims Act, which represents the sole waiver of governmental immunity for torts, the only permissible state tort claim that citizens can bring against a school district in Texas is a claim for misuse of a motor vehicle."); *Franklin v. Hamm*, No. 7:06-CV-121-HL, 2008 WL 2512658, at *4 (M.D. Ga. June 20, 2008) (holding that Georgia law rendered school district immune from plaintiff's tort claim); *Rector & Visitors of Univ. of Va. v. Carter*, 591 S.E.2d 76, 78 (Va. 2004) (holding that public university enjoyed sovereign immunity from tort claims under Virginia law).

⁸⁶ *Cf.*, e.g., *Franklin*, 2008 WL 2512658, at *4 (explaining that the Georgia legislature may waive the sovereign immunity that departments of the Georgia state government might otherwise enjoy).

⁸⁷ *See*, e.g., Michael S. Jacobs, *Towards a Process-Based Approach to Failure-to-Warn Claims*, 71 N.C. L. REV. 121, 184 n.241 (1992) ("In all states, workers' compensation laws provide to employees injured in the course of their employment an exclusive statutory remedy against their employers [that] . . . establishes schedules of compensation levels appropriate for each type of injury.").

⁸⁸ *See*, e.g., Philip D. Oliver, *Once is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a Third Party*, 58 FORDHAM L. REV. 117, 126 n.25 (1989) ("Workers' compensation statutes vary from state to state.").

⁸⁹ *See*, e.g., Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 846 (1987) ("[U]nlike tort law, workers' compensation is a no-fault system. As long as the injury arises from his employment and occurs in the course thereof, a worker is entitled to compensation. Compensation does not depend on a showing that the employer was at fault . . .").

⁹⁰ *See*, e.g., Jean C. Love, *Actions for Nonphysical Harm, Relationship Between Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857, 874-75 (1985) ("Workers' compensation is a compromise between employers and employees, whereby workers relinquished their common law remedies for employment-related injuries in exchange for limited benefits that are paid promptly, efficiently, and without proof of fault.").

⁹¹ *See*, e.g., *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332, 1353 (E.D. Va. 1987) (observing that "[m]any states have recognized an intentional tort exception to workers' compensation exclusivity rules"). *See also* Avi Weitzman et al., *Employer Liability and Defenses from Suit for COVID-19-Related Exposures in the Workplace 5*, GIBSON DUNN (May 4, 2020), available at <https://www.gibsondunn.com/wp-content/uploads/2020/05/employer-liability-and-defenses-from-suit-for-covid-19-related-exposures-in-the-workplace.pdf> ("While New York has a narrow exception to the exclusive remedy doctrine, other states have broader exceptions . . .").

⁹² *See*, e.g., *Mead v. Western Slate, Inc.*, 848 A.2d 257, 260 (Vt. 2004) ("Subject to certain limited exceptions, Vermont's workers' compensation statute provides the exclusive remedy for workplace injuries. The statute represents a public policy compromise in which the employee gives up the right to sue the employer in tort in return for which the employer assumes strict liability and the obligation to provide a speedy and certain remedy for work-related injuries.") (internal citations and quotation marks omitted); *Fuller v. Tenn. Valley Auth.*, 1:04-cv-113, 2006 WL 8442978, at *2 (E.D. Tenn. May 12, 2006) (explaining that under Tennessee law, "workers' compensation laws provide the exclusive

bar employees who contract COVID-19 in their workplaces from suing their employers. To that end, employer-defendants have invoked the workers' compensation bar as a defense in several cases in which employees allege that their employers negligently caused them to contract COVID-19.⁹³ Further litigation will likely reveal whether that defense ultimately succeeds.

The Element of Proximate Causation

Finally, the common law standards that govern the relevant causes of action may themselves mitigate a defendant's tort liability exposure in the COVID-19 context. As discussed above,⁹⁴ to prevail on a negligence claim, the plaintiff must usually prove by a preponderance of the evidence that the defendant proximately caused his injury.⁹⁵ Because the coronavirus is both highly contagious and invisible to the naked eye, however, a person who contracts COVID-19 may have difficulty determining whether he or she became infected at work, at the store, on public transportation, from a loved one, or from some other source.⁹⁶ As a result, some COVID-19 plaintiffs may be unable to prove that they got sick because of the defendant's actions or omissions, rather than because of some other cause.⁹⁷ Thus, COVID-19's inherent characteristics may naturally mitigate the liability risk that some defendants face.

That said, some practitioners maintain that litigants may be able to use genetic "fingerprinting" technology to prove whether a person became infected with the coronavirus from a particular source.⁹⁸ Moreover, plaintiffs who allegedly became infected in a structure with minimal opportunities for ingress and egress—such as a cruise ship⁹⁹ or a nursing home¹⁰⁰—may find it easier to rule out alternate sources of infection.

remedy to a worker injured on the job, meaning the employee is precluded from seeking tort damages for the injury").

⁹³ See, e.g., *Benjamin Motion to Dismiss*, *supra* note 47, at 1 (arguing that the court should dismiss the plaintiff's claims "because the Pennsylvania Workers' Compensation Act . . . provides the sole and exclusive means of recovery against employers for any injuries that are alleged to have occurred within the scope of employment"); Defendant Walmart, Inc.'s Section 2-619 Motion to Dismiss 1, *Evans v. Walmart Inc.*, 2020 L 003938 (Ill. Cir. Ct. June 25, 2020) (arguing that "[a]ll of Plaintiff's claims . . . are barred by the exclusive-remedy provisions of the Illinois Workers' Compensation Act").

⁹⁴ See *supra* "Negligence."

⁹⁵ See, e.g., *Russell v. K-Mart Corp.*, 761 A.2d 1, 5 (Del. 2000).

⁹⁶ See, e.g., Daniel Hemel & Daniel Rodriguez, *We can't stop the pandemic unless we change liability law*, WASH. POST (July 28, 2020) ("A customer who alleges that she was exposed to the virus at a particular establishment would need to show she 'more likely than not' contracted covid-19 there, and not from a family member or stranger or at some other establishment. That will be hard . . .").

⁹⁷ See, e.g., Ruger, *supra* note 18; Adamy, *supra* note 2.

⁹⁸ See Adam Dinnell, *Genetic "Fingerprinting" May Be Key In Virus Exposure Suits*, LAW360, <https://www.law360.com/articles/1267057/genetic-fingerprinting-may-be-key-in-virus-exposure-suits> (Apr. 27, 2020) ("[H]ow can you pinpoint the actual source [of the coronavirus] when every form of human contact . . . may be an exposure pathway? . . . Part of the answer may lie in genetic sequence-based typing . . . This matching process allows scientists to draw conclusions about how someone may have contracted the illness.").

⁹⁹ See *supra* note 4 and accompanying text.

¹⁰⁰ See *supra* note 6 and accompanying text.

Other Existing Laws that Could Affect COVID-19-Related Liability

In addition to substantive laws that create or limit the relevant causes of actions, other existing laws—including those pertaining to tort remedies and the procedures that govern tort lawsuits—can also affect COVID-19-related liability.¹⁰¹

Laws Governing Tort Remedies

In a typical tort lawsuit, in addition to proving the elements of a cause of action, the plaintiff must also prove the amount of damages she seeks to recover.¹⁰² There are several types of potential monetary damages, including compensatory damages and punitive damages.¹⁰³ Compensatory damages—which can include economic and noneconomic damages—attempt to make a plaintiff “whole” by providing her with enough money to cover the actual amount of the injury or loss.¹⁰⁴ Economic damages generally compensate the plaintiff for pecuniary losses.¹⁰⁵ In a COVID-19-related tort suit, economic damages could include the cost of diagnostic testing and medical treatments, rehabilitation expenses, and lost wages.¹⁰⁶ Noneconomic damages attempt to compensate the plaintiff for nonpecuniary losses—such as pain and suffering—that are more difficult to quantify.¹⁰⁷ Punitive damages are damages awarded in addition to compensatory damages that are solely intended to punish the defendant for her conduct.¹⁰⁸ Such damages are typically unavailable unless the plaintiff can prove that the defendant engaged in, for instance, “outrageous conduct”¹⁰⁹ or is guilty of “malice, willfulness or wanton disregard for the rights and safety of others.”¹¹⁰

Once the overall amount of a plaintiff’s damages is determined, several common law doctrines may affect the amount of those damages for which a particular defendant is liable. Under the doctrine of joint and several liability, for instance, each tortfeasor is responsible for the entire amount of damages awarded in a judgment.¹¹¹ A defendant that pays the entire judgment then typically has a right to sue others who allegedly contributed to the plaintiff’s injury—i.e., “joint tortfeasors”—to obtain their contribution to the judgment.¹¹² The collateral source rule, on the other hand, allows a plaintiff to recover full damages from a defendant even if the plaintiff has

¹⁰¹ See, e.g., Georgene Vairo, *The Role of Influence in the Arc of Tort “Reform,”* 65 EMORY L.J. 1741, 1745 (2016); Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U. J.L. & POL’Y 119, 130-31 (2007).

¹⁰² Lewis, *Introduction*, *supra* note 1.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See, e.g., *Smith v. Chapman*, 564 P.2d 900, 903 (Ariz. 1977).

¹¹⁰ See, e.g., *Freeman v. Anderson*, 651 S.W.2d 450, 452 (Ark. 1983).

¹¹¹ See Davies, *supra* note 101, at 135 n.71; see also, e.g., *Am. Motorcycle Ass’n v. Superior Court*, 578 P.2d 899, 903-05 (Cal. 1978) (reviewing the common law principles of joint and several liability).

¹¹² See, e.g., *Sitzes v. Anchor Motor Freight, Inc.*, 389 S.E.2d 678, 685-89 (W. Va. 1982) (reviewing the development of the right to contribution among joint tortfeasors). Many jurisdictions that provide a right of contribution also limit a tortfeasor’s contribution amount based on the degree of fault attributable to that tortfeasor. See *id.*

received compensation for their injuries from other sources, such as insurance or gratuitous payments.¹¹³

Constitutional and statutory limitations may cap or otherwise restrict the amount and types of damages that a plaintiff may recover.¹¹⁴ The Supreme Court, for instance, has held that the Due Process Clause of the Fourteenth Amendment prohibits courts from imposing “grossly excessive” punitive damages.¹¹⁵ Many states have also enacted caps that limit the amount of noneconomic or punitive damages recoverable by plaintiffs in tort cases generally, and more specifically in medical malpractice cases.¹¹⁶ Some states have statutorily modified the collateral source rule to allow certain types of compensation that a plaintiff receives from other sources, such as insurance proceeds, to reduce a defendant’s liability.¹¹⁷ Some states have eliminated joint and several liability completely while others have eliminated it for noneconomic damages.¹¹⁸ Certain federal liability shields that provide various exceptions to immunity, such as the PREP Act and the VPA, also include restrictions on noneconomic or punitive damages awards.¹¹⁹

Procedural Rules

In addition to substantive laws, tort lawsuits are subject to procedural rules that govern where, when, and how a tort lawsuit may proceed.¹²⁰ While they do not create substantive liabilities or remedies, these procedural rules can nevertheless have an important effect on tort liabilities by affecting a plaintiff’s ability to file and prevail in a lawsuit.¹²¹ Procedural rules can, for instance, establish certain requirements that a plaintiff must satisfy prior to filing a suit, the standards governing various pleadings and motions, and the timing and scope of permissible discovery.¹²² A heightened pleading standard that requires a plaintiff to assert more specific allegations in a

¹¹³ See Davies, *supra* note 101, at 142 n.107; see also, e.g., *Bozeman v. State*, 879 So. 2d 692, 697-98 (La. 2004) (reviewing the common law principles underlying the collateral source rule).

¹¹⁴ See *infra* notes 115-119 and accompanying text.

¹¹⁵ See, e.g., *Campbell v. State Farm Mut. Auto. Ins. Co.*, 538 U.S. 408, 412, 416-18 (2003) (holding that an award of \$145 million in punitive damages, where the compensatory damages were \$1 million, was constitutionally excessive). The Supreme Court has held that as a matter of federal maritime common law, in a case with “no earmarks of exceptional blameworthiness” such as intentional or malicious conduct, a 1:1 ratio of punitive to compensatory damages sets the upper limit of punitive damages. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008).

¹¹⁶ See Davies, *supra* note 101, at 139-42 (describing caps on noneconomic damages in medical malpractice cases); see also Ctr. for Justice and Democracy at New York Law School, *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary> (June 20, 2019) (summarizing state law caps on compensatory damages and noting that a few states, instead of capping only noneconomic damages, have caps on total damages in medical malpractice cases); Kristine Cordier Karnezis, Annotation, *Validity of State Statutory Cap of Punitive Damages*, 103 A.L.R. 5TH 379 (2002).

¹¹⁷ See Davies, *supra* note 101, at 142-44.

¹¹⁸ See *id.* at 144-45.

¹¹⁹ See 42 U.S.C. § 247d-6d(e)(8) (limiting noneconomic damages to “an amount directly proportional to the percentage of responsibility of a defendant for the harm to the plaintiff”); *id.* § 14504 (similar limitation on a volunteer’s liability for noneconomic damages); *id.* § 14503(f) (prohibiting award of punitive damages against a volunteer unless the plaintiff establishes “by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed”).

¹²⁰ See CRS Legal Sidebar LSB10118, *Tort and Litigation Reform in the 115th Congress*, by Kevin M. Lewis.

¹²¹ See, e.g., *id.*

¹²² See, e.g., CRS In Focus IF11557, *Congress, the Judiciary, and Civil and Criminal Procedure*, by Joanna R. Lampe.

complaint, for example, may subject the complaint to early dismissal if a court concludes that the complaint's allegations do not meet the requisite standard.¹²³

The procedural rules that apply to a tort lawsuit depend on the forum in which the suit is proceeding. In general, state courts have original jurisdiction—or the power to preside in the first instance—over state law tort suits.¹²⁴ However, plaintiffs may also bring cases based entirely on state law in federal courts.¹²⁵ Under the federal courts' "diversity jurisdiction," a plaintiff may generally file a state law tort suit in federal court if the amount in controversy exceeds \$75,000 and the suit is between citizens of different states or between a citizen of a state and an alien.¹²⁶ For the subset of tort suits meeting these requirements, the plaintiff has the initial choice of bringing the case in state or federal court. If the plaintiff chooses to file in state court, however, the defendant may have a statutory right to "remove" the case to a federal court.¹²⁷ This right to remove is subject to certain limitations and conditions, including the consent of all defendants that have been served with the complaint.¹²⁸

Suits proceeding in state courts are subject to each state's own procedural rules, which vary from state to state.¹²⁹ In contrast, civil cases proceeding in federal district courts under diversity jurisdiction are subject to the Federal Rules of Civil Procedure (FRCP).¹³⁰ The FRCP, promulgated by the Supreme Court pursuant to the Rules Enabling Act, addresses procedural issues at all steps of civil litigation in federal district courts, from the initiation of a civil case to the issuance of final judgments.¹³¹ Rule 8 of the FRCP, for instance, sets forth the general requirements that govern a plaintiff's complaint and other pleadings. It requires "a short and plain statement of the claim showing that the pleader is entitled to relief."¹³² Under this requirement, a plaintiff must allege enough facts that, if accepted as true, would "state a claim to relief that is plausible on its face."¹³³ Under the FRCP, only certain specified matters—such as fraud or mistake—are subject to a heightened pleading standard that requires a plaintiff to plead these matters with "particularity."¹³⁴ Rule 26, as another example, generally gives parties, subject to

¹²³ See, e.g., *Khalik v. United Air Lines*, 471 F.3d 1188, 1193 (10th Cir. 2012) (affirming dismissal of plaintiff's Title VII claims for employment discrimination because plaintiff made only "general assertions of discrimination and retaliation, without any details whatsoever of events leading up to her termination").

¹²⁴ See U.S. DEP'T OF JUSTICE, OFFICE OF THE U.S. ATTORNEYS, *Introduction to the Federal Court System*, <https://www.justice.gov/usao/justice-101/federal-courts> (last visited Aug. 10, 2020).

¹²⁵ See *id.*

¹²⁶ 28 U.S.C. § 1332(a). In contrast, cases "arising under" federal law (commonly known as "arising under" or "federal question" jurisdiction) are not subject to these limits and may be generally filed in federal court. See U.S. CONST. Art. III, § 2, cl. 1.

¹²⁷ 28 U.S.C. § 1441(a).

¹²⁸ *Id.* § 1446(b)(2)(A).

¹²⁹ See, e.g., Stephen N. Subring & Thomas O. Main, *Breaking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 531-33 (2016).

¹³⁰ See 19 FED. PRAC. & PROC. JURIS. § 4508 (3d ed.).

¹³¹ Lampe, *supra* note 122.

¹³² FED. R. CIV. P. 8(a)(2).

¹³³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹³⁴ See FED. R. CIV. P. 9(b)-(c); see also, e.g., *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (explaining that the particularity standard typically requires the plaintiff to plead "the who, what, when, where, and how" of the alleged fraud or mistake).

consideration of certain factors, the right to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”¹³⁵

In general, Congress possesses ample authority to modify the jurisdiction, structure, and procedures of the federal courts.¹³⁶ As discussed in greater detail below,¹³⁷ Congress’s authority “[t]o constitute Tribunals inferior to the supreme Court,”¹³⁸ augmented by the Necessary and Proper Clause,¹³⁹ “carries with it congressional power to make rules governing the practice and pleading in those courts.”¹⁴⁰ Congress has exercised these authorities to modify the procedural rules that govern a specified set of civil actions.¹⁴¹ Under the PREP Act, for instance, the liability shield that bars most tort suits arising from the use and administration of certain specified medical products¹⁴² does not extend to death or serious physical injury proximately caused by willful misconduct.¹⁴³ For this subset of lawsuits, the PREP Act designates the U.S. District Court for the District of Columbia as the exclusive forum to adjudicate these suits.¹⁴⁴ In addition to limiting jurisdiction over these cases to one federal district court, the PREP Act also modifies the applicable pleading and discovery rules for these suits.¹⁴⁵ As to pleadings, the PREP Act imposes certain additional requirements on a complaint, including heightened pleading standards,¹⁴⁶ a verification requirement,¹⁴⁷ and certain documentation requirements.¹⁴⁸ The PREP Act also prohibits the parties from initiating discovery until the court resolves any motions to dismiss the complaint filed by a defendant,¹⁴⁹ and only allows the parties to obtain discovery regarding matters “directly related to the material issues contested in such action.”¹⁵⁰

¹³⁵ See FED. R. CIV. P. 26(b)(1).

¹³⁶ See *Patchak v. Zinke*, 138 S. Ct. 897, 906-07 (2018).

¹³⁷ See *infra* “Article I, Section 8, Clause 9.”

¹³⁸ U.S. CONST. art. I, § 8, cl. 9.

¹³⁹ See *infra* “The Necessary and Proper Clause.”

¹⁴⁰ *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

¹⁴¹ See 42 U.S.C. § 247d-6d(e).

¹⁴² See *supra* “The PREP Act.”

¹⁴³ 42 U.S.C. § 247d-6d(d). In the COVID-19 context, the PREP Act’s liability shield would not, for instance, extend to willful misconduct related to the use of a respiratory protective device—a designated “covered countermeasure” under the law—if the misconduct proximately causes death or serious physical injury. See *id.* § 247d-6d(i)(1)(D).

¹⁴⁴ *Id.* § 247d-6d(e)(1).

¹⁴⁵ See *id.* § 247d-6d(e).

¹⁴⁶ *Id.* § 247d-6d(e)(3) (requiring a complaint to specify (1) each act or omission, by each covered person sued, that is alleged to constitute willful misconduct relating to the covered countermeasure administered to or used by the injured person; (2) facts supporting the allegation that such alleged willful misconduct proximately caused the injury claimed; and (3) facts supporting the allegation that the person injured suffered death or serious physical injury).

¹⁴⁷ *Id.* § 247d-6d(e)(4)(B) (requiring a plaintiff to verify a complaint by affidavit under oath, stating that the pleading is true to the knowledge of the affiant, except as to matters specifically identified as being alleged on information and belief, and that as to those matters the plaintiff believes it to be true).

¹⁴⁸ *Id.* § 247d-6d(e)(4)(C) (requiring a complaint to be filed with two documents: (1) a physician affidavit certifying and explaining the basis of the physician’s belief that the injured person suffered the serious physical injury or death alleged in the complaint and that such injury or death was proximately caused by the administration or use of a covered countermeasure; and (2) certified medical records documenting such injury or death and such proximate causal connection).

¹⁴⁹ *Id.* § 247d-6d(e)(6)(A).

¹⁵⁰ *Id.* § 247d-6d(e)(6)(B).

Proposals to Modify Existing Law and Issues for Congress

As plaintiffs continue to file tort lawsuits seeking compensation for physical injuries resulting from exposure to the coronavirus or treatment of COVID-19, the 116th Congress has introduced various bills in response to this debate. Several legislative proposals would shield certain defendants from COVID-19-related tort liability under specified conditions.¹⁵¹ One such proposal that has attracted a significant amount of attention¹⁵² is the Safeguarding America’s Frontline Employees to Offer Work Opportunities Required to Kickstart the Economy Act (SAFE TO WORK Act), which is the liability protection component of the Health, Economic Assistance, Liability Protection and Schools Act (HEALS Act).¹⁵³ Subject to various conditions and exceptions,

- Subtitle A of Title I of the SAFE TO WORK Act would protect various individuals and entities from liability for certain lawsuits alleging that the defendant caused the plaintiff to become exposed to the coronavirus;¹⁵⁴
- Subtitle B of Title I would shield healthcare providers from various forms of coronavirus-related medical liability;¹⁵⁵

¹⁵¹ Bills pending in the 116th Congress that propose to establish certain COVID-19 liability protections include (but are not necessarily limited to):

- The Safeguarding America’s Frontline Employees to Offer Work Opportunities Required to Kickstart the Economy Act (SAFE TO WORK Act), S. 4317, 116th Cong. (2d Sess. 2020);
- The Open Schools Responsibly Act, H.R. 7710, 116th Cong. (2d Sess. 2020);
- The Get America Back to Work Act, H.R. 7528, 116th Cong. (2d Sess. 2020);
- The Pandemic Liability Protection Act, H.R. 7179, 116th Cong. (2d Sess. 2020);
- The Protecting Reopening Businesses Recovering from COVID-19 Act, S. 3915, 116th Cong. (2d Sess. 2020);
- The Coronavirus Provider Protection Act, H.R. 7059, 116th Cong. (2d Sess. 2020);
- The Service Assurance Act of 2020, H.R. 6976, 116th Cong. (2d Sess. 2020);
- The Protecting Protein Production and Consumer Access Act of 2020, H.R. 6883, 116th Cong. (2d Sess. 2020);
- The Employer and Employee COVID Protection Act, H.R. 6844, 116th Cong. § 2(a)-(b) (2d Sess. 2020);
- The Facilitating Innovation to Fight Coronavirus Act, S. 3630, 116th Cong. § 2 (2d Sess. 2020);
- The Coronavirus Public Safety and Economic Recovery Act, H.R. 6664, 116th Cong. § 4 (2d Sess. 2020); and
- A bill to require a particular jury instruction in Federal civil actions that include a claim for damages based on negligence arising from the transmission of COVID-19, H.R. 6601, 116th Cong. (2d Sess. 2020).

This report discusses many of these proposals below. *See infra* “Designing the Proposal.”

¹⁵² *See, e.g.*, Bolton, *supra* note 12; Adamy, *supra* note 2.

¹⁵³ *See* S. 4317, 116th Cong. (2d Sess. 2020). The Delivering Immediate Relief to America’s Families, Schools and Small Businesses Act, which Majority Leader McConnell proposed as an amendment to the UIGHUR Act of 2019 (S. 178, 116th Congress) on September 8, 2020, included the SAFE TO WORK Act as one of its titles. *See* S. Amdt. 2652 to S. 178, 116th Cong. §§ 2001-2301 (2d Sess. 2020). On September 10, 2020, the Senate voted 52-47 not to invoke cloture on that amendment. *See* 166 CONG. REC. S5532-33 (daily ed. Sept. 10, 2020). The RECOVERY Act, S. 4537, 116th Cong. §§ 111-171 (2d Sess. 2020), also incorporates the SAFE TO WORK Act as one of its subtitles.

¹⁵⁴ *See* S. 4317, 116th Cong. §§ 121-122 (2d Sess. 2020). *See also id.* § 3(4) (defining “coronavirus exposure action”).

¹⁵⁵ *See id.* §§ 141-142. *See also id.* § 3(7) (defining “coronavirus-related medical liability action”).

- Subtitle C would modify the substantive and procedural rules that govern certain COVID-19-related lawsuits;¹⁵⁶
- Subtitle D would insulate employers from COVID-19-related liability under specified federal employment laws;¹⁵⁷ and
- Title II would modify certain liability protections in the PREP Act.¹⁵⁸

This bill and other legislative proposals to shield defendants from COVID-19-related tort liability implicate a wide array of legal considerations.

Source of Constitutional Authority

Perhaps the most fundamental question is which provision of the U.S. Constitution (if any) authorizes Congress to enact federal legislation abrogating state tort liability in the COVID-19 context.¹⁵⁹ Because the Framers of the U.S. Constitution structured the federal government as a government of limited powers, there are limits on the types of legislation that Congress may constitutionally enact.¹⁶⁰ As another CRS report explores in depth,¹⁶¹ Congress may not enact a particular law unless an enumerated power in the Constitution authorizes Congress to pass it.¹⁶² Thus, when evaluating any particular proposal to shield entities from COVID-19-related tort liability, Congress must consider not only whether the proposal falls within one of Congress's enumerated powers, but also how to structure the proposal so that it does not exceed Congress's legislative authority.

The Commerce Clause

The Constitution's Commerce Clause, for instance, authorizes Congress to pass legislation to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁶³ The Supreme Court has interpreted the Commerce Clause to empower Congress to enact three types of federal legislation:

1. Laws regulating the **channels** of interstate or foreign commerce;
2. Laws regulating either
 - a. the **instrumentalities** of interstate or foreign commerce or
 - b. **persons or things** in interstate or foreign commerce; and
3. Laws regulating activities that **substantially affect** interstate or foreign commerce.¹⁶⁴

¹⁵⁶ See *id.* §§ 161-164.

¹⁵⁷ See *id.* §§ 181-184.

¹⁵⁸ See *id.* § 201. See *supra* "The PREP Act."

¹⁵⁹ See generally CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis.

¹⁶⁰ See, e.g., *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("Congress' authority is limited to those powers enumerated in the Constitution The Constitution [withholds] from Congress a plenary police power that would authorize enactment of every type of legislation.").

¹⁶¹ See Nolan, *supra* note 159, at 1-24.

¹⁶² See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

¹⁶³ U.S. CONST. art. I, § 8, cl. 3.

¹⁶⁴ See, e.g., *Morrison*, 529 U.S. at 608-09.

Congress's power to regulate activities in the third category includes some authority to regulate purely *intrastate* activities "that are part of an economic 'class of activities' that have a substantial effect on *interstate* commerce."¹⁶⁵ For instance, the Supreme Court held in *Gonzales v. Raich* that Congress may constitutionally prohibit the purely *intrastate* production and consumption of marijuana if it concludes that leaving those activities unregulated could undercut federal regulation of the *interstate* market for marijuana.¹⁶⁶ However, Congress's power to regulate intrastate activities that substantially affect interstate commerce generally does not extend to *noneconomic* activities.¹⁶⁷ Thus, to illustrate, the Supreme Court ruled in *United States v. Morrison* that the Commerce Clause does not empower Congress to create a federal civil remedy for victims of intrastate gender-motivated violence¹⁶⁸ because committing gender-motivated violence is not an economic activity.¹⁶⁹

When evaluating whether a particular federal statute constitutes a permissible exercise of Congress's Commerce Clause power, courts examine:

1. Whether the activity that the statute regulates **relates to commerce or some sort of economic enterprise**;
2. Whether the statute contains an "**express jurisdictional element**"—that is, a provision that explicitly limits the statute's application to activities in or affecting interstate commerce;
3. Whether Congress made **express findings** or assembled a **legislative record** detailing the regulated activity's effect on interstate commerce; and
4. Whether the relationship between the regulated activity and interstate commerce is **too attenuated** to be substantial.¹⁷⁰

None of these considerations is necessarily dispositive, however. Courts have periodically upheld Commerce Clause legislation that did not include an express jurisdictional element¹⁷¹ or did not contain factual findings regarding the regulated activity's effect on interstate commerce.¹⁷²

¹⁶⁵ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (quoting *Perez v. United States*, 402 U.S. 146, 151 (1971)) (emphasis added).

¹⁶⁶ *See id.* at 22, 26 ("[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act (CSA)] The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality.").

¹⁶⁷ *See, e.g., Morrison*, 529 U.S. at 611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based on the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.").

¹⁶⁸ *Id.* at 601-02.

¹⁶⁹ *See id.* at 617 ("We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."). *See also United States v. Lopez*, 514 U.S. 549, 551, 561 (1995) (holding that the Commerce Clause did not authorize Congress to prohibit individuals from possessing firearms in school zones because possessing a gun near a school "has nothing to do with 'commerce' or any sort of economic enterprise").

¹⁷⁰ *See, e.g., Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068-69 (D.C. Cir. 2003); *Norton v. Ashcroft*, 298 F.3d 547, 555-59 (6th Cir. 2002).

¹⁷¹ *See, e.g., Rancho Viejo*, 323 F.3d at 1068 ("[T]he absence of an express jurisdictional element is not fatal to a statute's constitutionality under the Commerce Clause.").

¹⁷² *See, e.g., id.* at 1069 ("[N]either findings nor legislative history is necessary.").

Conversely, the mere fact that a federal statute includes such findings or an express jurisdictional element does not necessarily guarantee that the law constitutes valid Commerce Clause legislation.¹⁷³

As relevant here, courts have applied these principles when considering constitutional challenges to federal laws shielding defendants from liability. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA),¹⁷⁴ which prohibits plaintiffs from filing specified lawsuits against firearm manufacturers or sellers based on the plaintiff’s or another person’s unlawful misuse of a firearm.¹⁷⁵ Congress specifically limited the PLCAA’s applicability to manufacturers, products, and sellers with a connection to interstate or foreign commerce.¹⁷⁶ The PLCAA also included a factual findings provision expressing Congress’s determination that “imposing liability on an entire industry for harm that is solely caused by others” would “constitute[] an unreasonable burden on interstate and foreign commerce.”¹⁷⁷

The City of New York challenged the PLCAA’s constitutionality in court, arguing that the Commerce Clause did not authorize Congress to enact the law because civil litigation against gun manufacturers is a non-commercial activity.¹⁷⁸ The U.S. Court of Appeals for the Second Circuit (Second Circuit) rejected the City’s Commerce Clause challenge.¹⁷⁹ The court observed “that the firearms industry is interstate—indeed, international—in nature.”¹⁸⁰ Citing Congress’s factual findings regarding the effect that the covered litigation would have on interstate and foreign commerce, the court opined that “Congress rationally perceived a substantial effect on the industry of the litigation that the [PLCAA sought] to curtail.”¹⁸¹ Emphasizing that Congress had limited the statute’s applicability to defendants and activities with an interstate commerce nexus, the court determined that “the PLCAA raises no concerns about Congressional intrusion into ‘truly local’ matters.”¹⁸² The court therefore ruled that the PLCAA did not exceed Congress’s

¹⁷³ See, e.g., *Morrison*, 529 U.S. at 614 (“The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”); *Norton*, 298 F.3d at 557 (“[A] jurisdictional element does not guarantee that a particular enactment will pass muster.”).

¹⁷⁴ See Pub. L. No. 109-92 §§ 1-4, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-7903).

¹⁷⁵ See 15 U.S.C. § 7902(a) (“A qualified civil liability action may not be brought in any Federal or State court.”); *id.* § 7903(5) (defining “qualified civil liability action” to include, with various exceptions, “a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party”); *id.* § 7903(4) (defining “qualified product” to include, among other things, certain firearms).

¹⁷⁶ See, e.g., *id.* § 7903(2) (“The term ‘manufacturer’ means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product *in interstate or foreign commerce* . . .”) (emphasis added); *id.* § 7903(4) (“The term ‘qualified product’ means a firearm . . . *that has been shipped or transported in interstate or foreign commerce.*”) (emphasis added); *id.* § 7903(6) (defining “seller” to require a connection to interstate or foreign commerce).

¹⁷⁷ *Id.* § 7901(a)(6). See also *id.* § 7901(b)(4) (stating that one of the PLCAA’s purposes was “[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce”).

¹⁷⁸ See *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392-93 (2d Cir. 2008).

¹⁷⁹ See *id.* at 393-95.

¹⁸⁰ *Id.* at 394.

¹⁸¹ *Id.* at 395.

¹⁸² *Id.* at 394 (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000)).

Commerce Clause authority.¹⁸³ Other courts later adopted the Second Circuit’s reasoning to reject similar constitutional challenges to the PLCAA.¹⁸⁴

The PLCAA cases suggest that statutory liability protections that are explicitly tailored to apply only to defendants who operate in interstate commerce, or to economic activities that substantially affect interstate commerce, may be more likely to survive judicial scrutiny than a statutory liability protection that applies to defendants engaging in intrastate, noneconomic activities.¹⁸⁵ An express jurisdictional element limiting the statute’s application to persons or activities with a connection to interstate commerce may further bolster the law’s constitutional validity.¹⁸⁶ Including factual findings about COVID-19-related litigation’s effect on interstate commerce could also make it more difficult for plaintiffs to successfully challenge the legislation.¹⁸⁷

The SAFE TO WORK Act, for example, contains several elements that could potentially render the bill less vulnerable to Commerce Clause challenges.¹⁸⁸ First, the bill contains explicit factual findings about the effect that unregulated COVID-19-related litigation could have on interstate commerce.¹⁸⁹ Secondly, Subtitle A of Title I of the bill only applies to individuals and entities who are “engaged in *businesses, services, activities, or accommodations*”¹⁹⁰—a term that the bill defines to include activities connected to interstate or foreign commerce.¹⁹¹

¹⁸³ *Id.* at 395 (“Congress has not exceeded its authority in this case . . .”).

¹⁸⁴ *See* *Adames v. Sheahan*, 909 N.E.2d 742, 765 (Ill. 2009) (“We agree with the decision of the Court of Appeals in *City of New York v. Beretta* . . . [T]he PLCAA is a valid exercise of the federal power to regulate interstate commerce”); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140 (9th Cir. 2009) (“Congress carefully constrained the [PLCAA]’s reach to the confines of the Commerce Clause.”).

¹⁸⁵ *See, e.g., Morrison*, 529 U.S. at 611; *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068 (D.C. Cir. 2003); *City of New York*, 524 F.3d at 394-95.

¹⁸⁶ *See, e.g., Rancho Viejo*, 323 F.3d at 1068 (quoting *United States v. Lopez*, 514 U.S. 549, 561-62 (1995)).

¹⁸⁷ *See, e.g., City of New York*, 524 F.3d at 395; *Rancho Viejo*, 323 F.3d at 1069.

¹⁸⁸ *See generally* S. 4317, 116th Cong. (2d Sess. 2020).

¹⁸⁹ *See, e.g., id.* § 2(a)(12) (“One of the chief impediments to *the continued flow of interstate commerce* as [the COVID-19] public health crisis has unfolded is the risk of litigation.”) (emphasis added); *id.* § 2(a)(14) (“These lawsuits *pose a substantial risk to interstate commerce*”) (emphasis added); *id.* § 2(a)(16) (“The aggregation of each individual potential liability risk poses a substantial and unprecedented *threat to interstate commerce*”) (emphasis added); *id.* § 2(a)(17) (“The accumulated economic risks for these potential defendants *directly and substantially affects interstate commerce*.”) (emphasis added); *id.* § 2(a)(18) (“Lawsuits against health care workers and facilities pose a similarly dangerous *risk to interstate commerce*.”) (emphasis added); *id.* § 2(b)(6) (stating that “*protect[ing] interstate commerce* from the burdens of potentially meritless litigation” is one of the SAFE TO WORK Act’s purposes) (emphasis added).

¹⁹⁰ *See id.* § 122(a) (emphasis added).

¹⁹¹ *See id.* § 3(2) (“The term ‘businesses, services, activities, or accommodations’ means any act by an individual or entity, irrespective of whether the act is carried on for profit, that *is interstate or foreign commerce*, that *involves persons or things in interstate or foreign commerce*, that *involves the channels or instrumentalities of interstate or foreign commerce*, that *substantially affects interstate or foreign commerce*, or that is otherwise an act subject to regulation by Congress as necessary or proper to carry into execution Congress’s powers to regulate interstate or foreign commerce or to spend funds for the general welfare.”) (emphasis added). The last clause of this definition, however, could potentially include acts that are not connected to interstate or foreign commerce. As discussed below, the SAFE TO WORK Act purports to invoke the Constitution’s Necessary and Proper Clause to regulate those non-commerce-related activities. *See infra* “The Necessary and Proper Clause.”

The Spending Clause

The Spending Clause, which authorizes Congress to “lay and collect Taxes, Duties, Imposts and Excises, to pay the debts and provide for the common Defence and general Welfare of the United States,” is another source of constitutional authority that Congress could potentially invoke to enact COVID-19 liability shield legislation.¹⁹² Subject to various limitations, the Spending Clause empowers Congress to indirectly regulate activities that it cannot regulate directly under the Constitution by imposing conditions on federal funds.¹⁹³

The Supreme Court’s decision in *South Dakota v. Dole* illustrates how Spending Clause legislation works.¹⁹⁴ In that case, the State of South Dakota challenged the constitutionality of a federal law that encouraged states to raise their minimum drinking ages to 21 by withholding a percentage of federal highway funds from states with lower minimum ages.¹⁹⁵ South Dakota argued—and the Court assumed for the sake of argument—that the Twenty-First Amendment to the U.S. Constitution¹⁹⁶ would bar Congress from regulating drinking ages directly.¹⁹⁷ Nevertheless, the Court ruled that the Spending Clause allowed Congress to *indirectly* regulate drinking ages by imposing conditions on federal funds.¹⁹⁸

Congress has also occasionally exercised its spending power to shield particular entities from liability. For example, the Paul D. Coverdell Teacher Protection Act of 2001 (Coverdell Act)¹⁹⁹ insulates certain educators and school officials from liability for some acts or omissions they commit while disciplining students or maintaining classroom order.²⁰⁰ The Coverdell Act expressly states that it “only appl[ies] to States that receive funds under” a federal law intended to strengthen and improve elementary and secondary schools, and “shall apply to such a State as a condition of receiving such funds.”²⁰¹ At least one court has upheld the Coverdell Act as a valid exercise of Congress’s Spending Clause authority.²⁰² This case suggests that Congress could potentially require states, as a condition to receiving certain federal funds (such as COVID-19 relief funds), to modify their tort laws to protect specified entities from COVID-19-related liability.

¹⁹² See U.S. CONST. art. I, § 8, cl. 1.

¹⁹³ See Nolan, *supra* note 159, at 4-6, 28-35.

¹⁹⁴ 483 U.S. 203 (1987).

¹⁹⁵ See *id.* at 205.

¹⁹⁶ The Twenty-First Amendment repealed the Eighteenth Amendment, which (among other things) prohibited the manufacture, sale, and transportation of intoxicating liquors. Compare U.S. CONST. amend. XXI § 1, with U.S. CONST. amend. XVIII § 1.

¹⁹⁷ See 483 U.S. at 205-06.

¹⁹⁸ See *id.* at 212 (“Even if Congress might lack the power to impose a national minimum age directly, we conclude that encouragement to state action found in [the challenged minimum drinking age law] is a valid use of the spending power.”).

¹⁹⁹ See 20 U.S.C. § 7941. *But see id.* § 7946(a), (d) (creating various exceptions and limitations to the Coverdell Act’s liability protections).

²⁰⁰ See *id.* § 7946(a) (“[N]o teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if . . . the actions of the teacher were carried out . . . in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school . . .”).

²⁰¹ *Id.* § 7944.

²⁰² See *Dydell v. Taylor*, 332 S.W.3d 848, 851-57 (Mo. 2011) (“The Coverdell Act is a permissible exercise of Congress’ spending power.”).

As another CRS product explains in detail,²⁰³ however, there are several critical limits to Congress's Spending Clause authority.²⁰⁴ Of particular relevance here is the requirement that the funding condition cannot be coercive—that is, Congress may not subject so much money to the condition that the state has no real choice but to assent to it.²⁰⁵ Put another way, the funding may incentivize a state to accede to the condition, but may not effectively force the state's hand.²⁰⁶

A significant point follows from this principle: Whereas a liability shield that Congress enacted under the Commerce Clause would (if valid) apply uniformly in all jurisdictions, a liability shield that Congress enacted under the Spending Clause might not apply nationwide if certain states opted to forgo federal funding instead of modifying their tort laws. Thus, even though invoking the Spending Clause to enact COVID-19 liability legislation may allow Congress to regulate intrastate, noneconomic activities that might fall outside the Commerce Clause's reach, Spending Clause legislation might not have a uniform, nationwide effect.

The Necessary and Proper Clause

The Constitution's Necessary and Proper Clause could also potentially supplement Congress's authority to enact a federal COVID-19 tort liability shield.²⁰⁷ That Clause authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution” its other enumerated powers, as well as “all other Powers vested by th[e] Constitution in the Government of the United States, or in any Department or Officer thereof.”²⁰⁸ The Necessary and Proper Clause is not an independent grant of legislative authority *per se*,²⁰⁹ but rather allows Congress to pass laws that are “convenient,” “useful,” or “conducive” to the “beneficial exercise” of its enumerated powers.²¹⁰

The SAFE TO WORK Act purports to invoke the Necessary and Proper Clause as an auxiliary source of constitutional authority to limit COVID-19-related liability.²¹¹ The bill's findings section states that “establishing temporary rules governing liability for certain coronavirus-related tort claims is a necessary and proper means of” executing Congress's Commerce Clause power given “the national scope of the economic and health care dangers posed by the risks of coronavirus-related lawsuits.”²¹² The bill also finds that COVID-19-related tort lawsuits “risk

²⁰³ See Nolan, *supra* note 159, at 28-35.

²⁰⁴ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases.”) (internal citations omitted).

²⁰⁵ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581-82 (2012) (“In this case, the financial ‘inducement’ Congress has chosen is more than ‘relatively mild encouragement’—it is a gun to the head. . . . The threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce . . .”). See also Nolan, *supra* note 159, at 32-35.

²⁰⁶ See Nolan, *supra* note 159, at 32-35.

²⁰⁷ See U.S. CONST. art. I, § 8, cl. 18.

²⁰⁸ *Id.* For deeper analysis of the Necessary and Proper Clause, see Nolan, *supra* note 159, at 20-24.

²⁰⁹ See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (“The [Necessary and Proper Clause] is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted ‘foregoing’ powers of [Article I, Section 8 of the Constitution] and ‘all other Powers vested by this Constitution.’”) (quoting U.S. CONST. art. I, § 8, cl. 18).

²¹⁰ *United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 413, 418 (1819)).

²¹¹ See S. 4317, 116th Cong. § 2(b) (2d Sess. 2020) (“Pursuant to the powers delegated to Congress by article I, section 8, clauses 1, 3, 9, and 18 . . .”) (emphasis added).

²¹² *Id.* § 2(a)(23).

diverting taxpayer money provided under the CARES Act and other coronavirus legislation from its intended purposes to the pockets of opportunistic trial lawyers,²¹³ and that curtailing those lawsuits is therefore necessary and proper to executing Congress’s Spending Clause power.²¹⁴

Article I, Section 8, Clause 9

Finally, Article I, Section 8, Clause 9 of the U.S. Constitution empowers Congress “[t]o constitute Tribunals inferior to the supreme Court”²¹⁵—that is, to create lower federal courts like the U.S. District Courts and the U.S. Courts of Appeals.²¹⁶ The Supreme Court has interpreted this clause, in conjunction with the Necessary and Proper Clause discussed above,²¹⁷ to empower Congress to pass statutes governing how lawsuits proceed in the lower federal courts.²¹⁸ As a later section of this report discusses,²¹⁹ the SAFE TO WORK Act proposes to invoke Article I, Section 8, Clause 9 and the Necessary and Proper Clause²²⁰ to create special procedural rules that apply to coronavirus-related actions in the federal district courts.²²¹

Designing the Proposal

Apart from deciding which enumerated power to invoke if it decides to pursue a COVID-19 liability shield, Congress would also likely consider what types of limitations the legislation would establish. That decision would in turn likely lead Congress to address the questions addressed below.

What Sorts of Claims Would the Legislation Foreclose?

If Congress opts to prohibit plaintiffs from pursuing certain COVID-19-related claims in court, it may first consider which claims to cover. Subject to various exceptions,²²² for instance, the SAFE TO WORK Act would bar plaintiffs from pursuing “any coronavirus exposure action” against specified businesses and organizations.²²³ The bill in turn defines “coronavirus exposure action”

²¹³ *Id.* § 2(a)(15).

²¹⁴ *See id.* § 2(a)(24) (“Because Congress must safeguard the investment of taxpayer dollars it made in the CARES Act and other coronavirus legislation, and ensure that they are used for their intended purposes and not diverted for other purposes, establishing temporary rules governing liability for certain coronavirus-related tort claims is a necessary and proper means of carrying into execution Congress’s power to provide for the general welfare of the United States.”).

²¹⁵ U.S. CONST. art. I, § 8, cl. 9.

²¹⁶ *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992). *See also* U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”) (emphasis added).

²¹⁷ *See supra* “The Necessary and Proper Clause.”

²¹⁸ *See Willy*, 503 U.S. at 136 (“Article I, § 8, cl. 9, authorizes Congress to establish the lower federal courts. From almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws ‘necessary and proper’ to their establishment, also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.”) (quoting U.S. CONST. art. I, § 8, cl. 18); *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (discussing “the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules”).

²¹⁹ *See infra* “If Any Lawsuits Were Permitted, What Other Rules Would Apply to the Covered Lawsuits?”

²²⁰ *See S.* 4317, 116th Cong. § 2(b) (2d Sess. 2020) (“Pursuant to the powers delegated to Congress by article I, section 8, clauses 1, 3, 9 and 18 . . . of the Constitution of the United States . . .”) (emphasis added).

²²¹ *See id.* § 163.

²²² *See id.* § 122(a)(1)-(3). *See also infra* “What Must the Defendant Do to Qualify for the Liability Shield, and Would the Liability Shield Have Exceptions?”

²²³ *See S.* 4317, 116th Cong. § 122(a) (2d Sess. 2020) (providing that, subject to specified exceptions, “no individual or

to include (with certain exceptions) actions in which the plaintiff alleges that “an actual, alleged, feared, or potential for exposure to coronavirus” caused a person to suffer “personal injury or risk of personal injury.”²²⁴ Thus, for example, the bill would likely bar a customer who allegedly contracted COVID-19 at a grocery store from filing a tort action against that store unless the customer could establish one of the exceptions discussed below.²²⁵ The SAFE TO WORK Act would bar various other claims as well, including certain coronavirus-related medical liability claims against health care providers.²²⁶

Who Would the Liability Shield Protect?

A COVID-19 liability shield could cover either a broad or narrow set of potential defendants. Some legislative proposals pending in the 116th Congress, for instance, propose to insulate only a limited subset of entities from COVID-19 liability, such as schools,²²⁷ healthcare providers,²²⁸ employers,²²⁹ nonprofit organizations,²³⁰ or meat processing facilities.²³¹ Other bills pending the 116th Congress, including the SAFE TO WORK Act,²³² propose to protect a significantly wider assortment of defendants from COVID-19 liability.²³³

entity engaged in businesses, services, activities, or accommodations shall be liable in any coronavirus exposure action”). *See also id.* § 3(13) (defining “individual or entity”); *id.* § 3(2) (defining “businesses, services, activities, or accommodations”).

²²⁴ *Id.* § 3(4). *See also id.* § 3(16) (defining “personal injury” to include “actual or potential physical injury,” “death,” “mental suffering, emotional distress, or similar injuries”).

²²⁵ *See infra* “What Must the Defendant Do to Qualify for the Liability Shield, and Would the Liability Shield Have Exceptions?”

²²⁶ *See S.* 4317, 116th Cong. § 142(a) (2d Sess. 2020) (providing that, subject to specified exceptions, “no health care provider shall be liable in a coronavirus-related medical liability action”); *id.* § 3(7) (defining “coronavirus-related medical liability action” to include civil actions against a health care provider alleging harm caused by the provider’s acts or omission in the course of “arranging for or providing coronavirus-related health care services”). The SAFE TO WORK Act also proposes to limit certain entities’ liability under specified labor, employment, and civil rights laws. *See id.* §§ 181-184.

²²⁷ *See* Open Schools Responsibly Act, H.R. 7710, 116th Cong. (2d Sess. 2020).

²²⁸ *See* Coronavirus Provider Protection Act, H.R. 7059, 116th Cong. (2d Sess. 2020); Facilitating Innovation to Fight Coronavirus Act, S. 3630, 116th Cong. § 2 (2d Sess. 2020). *See also* Pandemic Liability Protection Act, H.R. 7179, 116th Cong. (2d Sess. 2020) (proposing to cover both healthcare and food providers).

²²⁹ *See* Employer and Employee COVID Protection Act, H.R. 6844, 116th Cong. § 2(a)-(b), (e)(3) (2d Sess. 2020).

²³⁰ *See* Service Assurance Act of 2020, H.R. 6976, 116th Cong. (2d Sess. 2020).

²³¹ *See* Protecting Protein Production and Consumer Access Act of 2020, H.R. 6883, 116th Cong. (2d Sess. 2020).

²³² *See S.* 4317, 116th Cong. § 122(a) (2d Sess. 2020) (creating a liability shield for any “individual or entity engaged in businesses, services, activities, or accommodations”); *id.* § 3(13) (defining “individual or entity” to include “(A) any natural person, corporation, company, trade, business, firm, partnership, joint stock company, educational institution, labor organization, or similar organization or group of organizations; (B) any nonprofit organization, foundation, society, or association organized for religious, charitable, educational, or other purposes; or (C) any State, Tribal, or local government”); *id.* § 3(2) (“The term ‘businesses, services, activities, or accommodations’ means any act by an individual or entity, irrespective of whether the act is carried on for profit, that is interstate or foreign commerce, that involves persons or things in interstate or foreign commerce, that involves the channels or instrumentalities of interstate or foreign commerce, that substantially affects interstate or foreign commerce, or that is otherwise an act subject to regulation by Congress as necessary and proper to carry into execution Congress’s powers to regulate interstate or foreign commerce or to spend funds for the general welfare.”).

²³³ *See* Protecting Reopening Businesses Recovering from COVID-19 Act, S. 3915, 116th Cong. § 4 (2d Sess. 2020) (proposing to shield any “business or COVID-19 medical entity” from COVID-19 transmission claims under specified conditions); Get America Back to Work Act, H.R. 7528, 116th Cong. § 2 (2d Sess. 2020) (proposing to shield any “person” from COVID-19 transmission liability under specified circumstances and defining “person” to include a broad array of entities).

If Congress decides to structure a COVID-19 liability bill as Commerce Clause legislation, the bill's constitutionality may depend on which defendants and activities Congress opts to protect.²³⁴ As discussed above, the Commerce Clause may grant Congress greater flexibility to regulate lawsuits against entities that conduct economic activities that occur in or substantially affect interstate commerce.²³⁵ If Congress wants to protect entities that engage in purely intrastate, noneconomic activities, it might consider structuring the bill as Spending Clause legislation.²³⁶

What Must the Defendant Do to Qualify for the Liability Shield, and Would the Liability Shield Have Exceptions?

None of the COVID-19 liability bills currently pending in the 116th Congress proposes to categorically bar all COVID-19-related tort suits in all circumstances.²³⁷ Some bills, for instance, would only protect defendants that comply with specified health and safety guidelines.²³⁸ Many proposals also contain exceptions that would allow plaintiffs to pursue COVID-19-related tort lawsuits under specified conditions, such as if the plaintiff can prove that the defendant committed gross negligence or willful misconduct.²³⁹

To illustrate, Subtitle A of Title I of the SAFE TO WORK Act would allow plaintiffs to pursue coronavirus exposure actions if they can prove by clear and convincing evidence²⁴⁰ that:

1. The defendant was not making reasonable efforts to comply with applicable government standards and guidance pertaining to COVID-19;²⁴¹

²³⁴ See *supra* “The Commerce Clause.”

²³⁵ See *supra* “The Commerce Clause.”

²³⁶ See *supra* “The Spending Clause.”

²³⁷ See *supra* note 151.

²³⁸ See, e.g., Open Schools Responsibly Act, H.R. 7710, 116th Cong. § 3(a) (2d Sess. 2020) (proposing to protect specified schools from COVID-19-related liability, but only “if the school or institution was in compliance with applicable guidelines issued by the State and the Centers for Disease Control [and] Prevention”). The “March to Common Ground” framework that the Problem Solvers Caucus unveiled on September 15, 2020 similarly proposes to grant liability protections to “entities which follow enhanced OSHA guidelines.” See March to Common Ground: Bipartisan COVID Relief Framework, available at https://problemsolverscaucus-gottheimer.house.gov/sites/problemsolverscaucus.house.gov/files/wysiwyg_uploaded/PSC%20March%20to%20Common%20Ground%20COVID%20Framework%209.15.20_0.pdf. Alternatively, two law professors recommend granting “[a] safe harbor from tort liability for businesses that inform customers about potential exposures” to COVID-19. Hemel & Rodriguez, *supra* note 96.

²³⁹ See, e.g., Protecting Protein Production and Consumer Access Act of 2020, H.R. 6883, 116th Cong. § 2(b) (2d Sess. 2020) (specifying that certain liability protections shall “not apply if the harm was caused by an act or omission constituting willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious flagrant indifference to the rights or safety of the individual harmed by the entity”); Service Assurance Act of 2020, H.R. 6976, 116th Cong. § 2(b) (2d Sess. 2020) (similar); Coronavirus Provider Protection Act, H.R. 7059, 116th Cong. § 2(b)(1) (2d Sess. 2020) (similar); Get America Back to Work Act, H.R. 7528, 116th Cong. § 2(c) (2d Sess. 2020) (similar).

²⁴⁰ See *Evidence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “clear and convincing evidence” as “[e]vidence that the thing to be proved is highly probable or reasonably certain,” and describing the clear and convincing evidence standard as “a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials”).

²⁴¹ See S. 4317, 116th Cong. § 122(a)(1) (2d Sess. 2020). See also *id.* § 3(1) (defining “applicable government standards and guidance”); *id.* § 122(b) (governing reasonable efforts to comply with applicable government standards and guidance).

2. The defendant engaged in gross negligence or willful misconduct that caused the plaintiff to be exposed to the coronavirus;²⁴² and
3. That coronavirus exposure caused the plaintiff to sustain a personal injury.²⁴³

If Any Lawsuits Were Permitted, What Other Rules Would Apply to the Covered Lawsuits?

To the extent Congress decides not to bar certain COVID-19-related tort suits, Congress nonetheless may opt to modify other rules that can affect a defendant's liability.²⁴⁴ Subtitle C of Title I of the SAFE TO WORK Act, for instance, would create exclusive federal causes of action for coronavirus-related exposure²⁴⁵ and medical liability²⁴⁶ actions, and modify certain substantive and procedural rules that apply to these suits.²⁴⁷ The bill would, for example, modify certain rules²⁴⁸ to limit the amounts that might be awarded as noneconomic and punitive damages, render the collateral source rule inapplicable, and limit a defendant's liability to only the portion of the judgment that corresponds to that defendant's proportionate responsibility.²⁴⁹ The bill would also displace state statutes of limitations and generally require plaintiffs to file coronavirus exposure or medical liability actions within one year after the date of the alleged injury.²⁵⁰ While the bill would not designate federal court as the exclusive forum to adjudicate these actions, the bill would modify several procedural rules²⁵¹ to make it easier for a plaintiff to file a coronavirus-related action in,²⁵² or for a defendant to remove such a case to,²⁵³ federal court. Once the action is proceeding in federal court, the bill would subject the action to several modified rules,

²⁴² See *id.* § 122(a)(2). See also *id.* § 3(10) (defining "gross negligence"); *id.* § 3(19) (defining "willful misconduct").

²⁴³ See *id.* § 122(a)(3). See also *id.* § 3(16) (defining "personal injury").

²⁴⁴ See *supra* "Other Existing Laws that Could Affect COVID-19-Related Liability."

²⁴⁵ See S. 4317, § 121(a) (116th Cong. 2020).

²⁴⁶ See *id.* § 141(a).

²⁴⁷ See *id.* §§ 162-163.

²⁴⁸ See *supra* "Laws Governing Tort Remedies."

²⁴⁹ See S. 4317, § 162(b)(1), (b)(2) (generally limiting compensatory damages to economic damages but allowing a court to award noneconomic and punitive damages if the trier of fact determines that the injury at issue was caused by the defendant's willful misconduct); *id.* § 162(b)(2)(B) (prohibiting courts from awarding punitive damages in coronavirus-related actions that exceed the award of compensatory damages); *id.* § 162(b)(3) (rendering the collateral source rule inapplicable by reducing the amount of any monetary damages by any compensation the plaintiff received from another source related to the injury at issue); *id.* § 162(a) (largely eliminating joint and several liability by limiting a defendant's liability to only the portion of the judgment that corresponds to the defendant's proportionate responsibility).

²⁵⁰ See *id.* §§ 121(c), 141(c).

²⁵¹ See *supra* "Procedural Rules."

²⁵² Because the bill would create exclusive federal causes of action for these tort suits, these tort suits would no longer be subject to the limits of diversity jurisdiction. See *supra* note 126; *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1101-02 (7th Cir. 1994) (holding that where Congress manifested an intent to create a new federal cause of action by certain statutory provisions, those provisions create "arising under" jurisdiction). This means that these suits could be filed or removed to federal courts regardless of, for instance, the amounts in controversy or the citizenship of the parties. See *supra* note 126 and accompanying text.

²⁵³ See, e.g., S. 4317, § 161(b)(1) (116th Cong. 2020) (allowing a defendant to remove a coronavirus-related action without the consent of all defendants).

including heightened pleading standards for a complaint²⁵⁴ and limits on the scope of pre-trial discovery.²⁵⁵

How Long Would the Shield Remain in Place, and Would It Apply Retroactively?

Congress may also consider how long it wants the liability protections to remain in place. The liability protections in the Protecting Reopening Businesses Recovering from COVID-19 Act, for example, would apply until the COVID-19 public health emergency ends.²⁵⁶ The Open Schools Responsibly Act, by contrast, would sunset on a fixed date: January 31, 2025.²⁵⁷

A related question is whether the liability shield would apply to injuries or activities that occurred before its enactment. As another CRS product explains, Congress may (subject to various constraints) pass civil legislation that applies retroactively.²⁵⁸ For example, Subtitle A of Title I of the SAFE TO WORK Act would apply to coronavirus-related injuries that occurred as early as December 1, 2019.²⁵⁹

How Would the Federal Law Interact with State Law?

A federal COVID-19 liability law could also expressly specify the extent to which the statute preempts—that is, displaces—state law.²⁶⁰ For instance, subject to various exceptions (including exceptions for certain governmental enforcement actions and intentional discrimination claims),²⁶¹ Subtitle A of Title I the SAFE TO WORK Act would explicitly “preempt[] and supersede[] any Federal, State, or Tribal law . . . related to recovery for personal injuries caused by actual, alleged, feared, or potential for exposure to coronavirus.”²⁶² Subtitle A would not, however, displace state laws that afford defendants greater protection from tort liability than the

²⁵⁴ See, e.g., *id.* § 163(a) (requiring a plaintiff to plead with particularity each element of the plaintiff’s claim, including all places and persons the allegedly injured person visited during the 14-day period before the onset of the first coronavirus symptoms); *id.* § 163(b) (requiring the complaint to include statements setting forth the factual basis for the damages the plaintiff seeks and the facts giving rise to a strong inference that the defendant acted with the requisite state of mind); *id.* § 163(c) (requiring a plaintiff to verify the complaint and to file certain medical records and physician affidavit with the complaint).

²⁵⁵ See, e.g., *id.* § 163(e) (prohibiting the parties from conducting discovery until the court has resolved the defendant’s motion to dismiss, and permitting discovery only on matters directly related to material issues contested in the coronavirus-related action). These discovery limitations, as well as certain pleading requirements described in note 254, *supra*, are similar to those imposed by the PREP Act. See *supra* notes 146-150 and accompanying text.

²⁵⁶ See S. 3915, 116th Cong. § 4(a) (2d Sess. 2020) (specifying that the bill’s liability protections apply “[d]uring the covered period”); *id.* § 3(3) (“The term ‘covered period’ means the public health emergency declared by the Secretary of Health and Human Services under section 319 of the Public Health Service Act . . . on January 31, 2020, with respect to COVID-19.”).

²⁵⁷ H.R. 7710, 116th Cong. § 3(e) (2d Sess. 2020).

²⁵⁸ See CRS In Focus IF11293, *Retroactive Legislation: A Primer for Congress*, by Joanna R. Lampe.

²⁵⁹ See S. 4317, 116th Cong. § 3(4)(A)(iii)(II)(aa) (2d Sess. 2020). See also Open Schools Responsibly Act, H.R. 7710, 116th Cong. § 3(d) (2d Sess. 2020) (“This section shall take effect as if enacted on January 31, 2020, and applies with respect to a claim for harm if the act or omission that caused such harm occurred on or after such date.”).

²⁶⁰ For background on the federal preemption of state law, see CRS Report R45825, *Federal Preemption: A Legal Primer*, by Jay B. Sykes and Nicole Vanatko.

²⁶¹ See S. 4317, 116th Cong. § 121(b)(2)-(6) (2d Sess. 2020).

²⁶² *Id.* § 121(b)(1).

SAFE TO WORK Act.²⁶³ Other COVID-19 liability bills pending in the 116th Congress contain similar preemption provisions.²⁶⁴

Other Constitutional Issues

Some critics argue that federal legislation limiting COVID-19-related tort lawsuits would violate the constitutional guarantees of due process or equal protection. The following subsections of this report evaluate those arguments.

Due Process

The Fifth Amendment’s Due Process Clause forbids Congress from depriving any person “of life, liberty, or property, without due process of law.”²⁶⁵ Some commentators argue that the Due Process Clause forbids Congress from extinguishing COVID-19 victims’ state law tort remedies without creating a substitute federal remedy to compensate them, such as a COVID-19 compensation fund.²⁶⁶ These commentators base that argument on the Supreme Court’s 1978 decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*,²⁶⁷ in which the Court considered a due process challenge to a federal statute capping the nuclear industry’s aggregate liability for a single nuclear incident at \$560 million.²⁶⁸ In exchange for that liability limitation, the law

1. required companies covered by the liability cap to purchase the maximum amount of liability insurance available on the private market;²⁶⁹
2. required nuclear reactor owners, in the event of a nuclear incident, to contribute money to compensate victims;²⁷⁰ and

²⁶³ See *id.* § 121(b)(2) (“Nothing in this subtitle shall be construed to affect the applicability of any provision of any Federal, State, or Tribal law that imposes stricter limits on damages or liabilities for personal injury caused by, arising out of, or related to an actual, alleged, feared, or potential for exposure to coronavirus, or otherwise affords greater protection to defendants in any coronavirus exposure action, than are provided in this subtitle. Any such provision of Federal, State, or Tribal law shall be applied in addition to the requirements of this subtitle and not in lieu thereof.”).

²⁶⁴ See, e.g., Get America Back to Work Act, H.R. 7528, 116th Cong. § 2(b) (2d Sess. 2020) (“The laws of a State or any political subdivision of a State are hereby preempted to the extent such laws are inconsistent with this section, unless such laws provide greater protection from liability.”); Open Schools Responsibly Act, H.R. 7710, 116th Cong. § 3(c) (2d Sess. 2020) (similar).

²⁶⁵ U.S. CONST. amend. V. The Fourteenth Amendment contains a similar Due Process Clause that applies to the states. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

²⁶⁶ See Testimony of Professor David C. Vladeck, Georgetown University Law Center, Before the Senate Judiciary Committee, Examining Liability During the COVID-19 Pandemic 18 & n.2, available at <https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20Testimony.pdf> [hereinafter *Vladeck Testimony*] (“[T]he extinguishing of state law claims, with no federal substitute, likely violates the Due Process Clause . . . [T]he Supreme Court has strongly suggested that eliminating state liability law without any quid pro quo would violate Due Process. That is exactly what [COVID-19] immunity legislation would do.”) (internal citations omitted). Cf. Y. Peter Kang, *Injury Attys Undaunted by COVID-19 Nursing Home Immunity*, LAW360, <https://www.law360.com/health/articles/1292459/injury-attys-undaunted-by-covid-19-nursing-home-immunity> (July 15, 2020) [hereinafter Kang, *Undaunted*] (“It’s rare that governments can establish immunity without some kind of quid pro quo . . . I just don’t see how [COVID-19 immunity legislation] qualifies.”) (quoting Robert Peck, Center for Constitutional Litigation PC).

²⁶⁷ See *Vladeck Testimony*, *supra* note 266, at 18 n.2.

²⁶⁸ See 438 U.S. 59, 62-67 (1978).

²⁶⁹ See *id.* at 65.

²⁷⁰ See *id.* at 66 (“[A] new provision was added requiring, in the event of a nuclear incident, each of the 60 or more reactor owners to contribute between \$2 and \$5 million toward the cost of compensating victims.”).

3. forced prospective defendants to waive all legal defenses they might otherwise be able to assert against lawsuits resulting from a nuclear accident.²⁷¹

The law further required the federal government to indemnify defendants for certain liability that the statutorily-mandated private insurance did not cover.²⁷² In this way, the law created a pool of federal indemnity funds, private insurance proceeds, and monetary contributions from nuclear reactor owners to compensate victims in the event of a nuclear incident, but capped the size of that pool at \$560 million per incident.²⁷³ The statute expressly stated, however, that if a nuclear accident resulted in damages that exceeded the \$560 million liability ceiling, Congress would take whatever actions it deemed “necessary and appropriate” to protect the public from that accident’s economic consequences.²⁷⁴

Various organizations and individuals challenged the statute on due process grounds.²⁷⁵ Among other arguments,²⁷⁶ the challengers maintained that the law’s liability cap unconstitutionally “fail[ed] to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates.”²⁷⁷

The *Duke Power* Court first opined that it was “not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law” that might otherwise be available to plaintiffs “or provide a reasonable substitute remedy.”²⁷⁸ The Court determined it did not need to resolve that question,²⁷⁹ however, because even if the Due Process Clause did impose such a requirement, the challenged statute “provide[d] a reasonably just substitute for the common-law or state tort law remedies it replace[d].”²⁸⁰ The Court therefore rejected the plaintiffs’ due process challenge.²⁸¹

Some commentators cite *Duke Power* to support their view that Congress cannot limit defendants’ COVID-19-related liability exposure without providing plaintiffs some alternative

²⁷¹ *See id.* at 65.

²⁷² *See id.*

²⁷³ *See id.* at 67 (“[L]iability in the event of a nuclear incident causing damages of \$560 million or more would be spread as follows: \$315 million would be paid from contributions by the licensees of the 63 private operating nuclear power plants; \$140 million would come from private insurance (the maximum now available); the remainder of \$105 million would be borne by the Federal Government.”).

²⁷⁴ *See id.* at 66-67 (“In its amendments to the Act in 1975, Congress also explicitly provided that ‘in the event of a nuclear incident involving damages in excess of [the] amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude’”) (quoting 42 U.S.C. § 2210(e) (1975)).

²⁷⁵ *See id.* at 67-68. The challengers also raised equal protection arguments. *See id.* at 68. This report analyzes equal protection principles below. *See infra* “Equal Protection.”

²⁷⁶ *See* 438 U.S. at 82-87.

²⁷⁷ *Id.* at 87-88.

²⁷⁸ *Id.* at 88.

²⁷⁹ *See id.* (“[W]e need not resolve this question here”).

²⁸⁰ *Id.*; *see also id.* at 90-91 (“We view the congressional assurance of a \$560 million fund for recovery, accompanied by an express statutory commitment, to ‘take whatever action is deemed necessary and appropriate to protect the public from the consequences of’ a nuclear accident, to be a fair and reasonable substitute for the uncertain recovery of damages of this magnitude from a utility or component manufacturer, whose resources might well be exhausted at an early stage At the minimum, the statutorily mandated waiver of defenses establishes at the threshold the right of injured parties to compensation without proof of fault and eliminates the burden of delay and uncertainty which would follow from the need to litigate the question of liability after an accident.”) (emphasis and internal citations omitted).

²⁸¹ *See id.* at 93 (“This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the [challenged statute]. Nothing more is required by the Due Process Clause.”).

remedy to compensate them for their injuries.²⁸² However, as explained, the Supreme Court did not hold in *Duke Power* that Congress cannot eliminate a common law remedy without providing an alternate remedy in its place.²⁸³ Rather, the Court concluded that it did not need to decide that question because, even if that is what the Constitution requires, the statute at issue met that test.²⁸⁴ It is therefore possible that the Due Process Clause does not in fact prohibit Congress from extinguishing tort remedies without providing plaintiffs a reasonably just substitute remedy.

In any event, several courts have rejected similar due process arguments in the context of challenges to the PLCAA's constitutionality.²⁸⁵ Certain plaintiffs, citing *Duke Power*,²⁸⁶ argued that the PLCAA violated due process by unconstitutionally extinguishing their common law right to compensation through the tort system without providing an alternate remedy.²⁸⁷ Several courts disagreed,²⁸⁸ emphasizing that the PLCAA did not provide manufacturers and sellers complete immunity from firearm-related tort claims, but instead contained various exceptions that allowed certain claims to proceed.²⁸⁹ Thus, the courts ruled, Congress did not have to provide the plaintiffs some alternate remedy to compensate them for the loss of their tort claims.²⁹⁰

Most of the COVID-19 liability proposals pending in the 116th Congress do not categorically immunize defendants from all COVID-19-related tort claims; instead, they contain various exceptions that allow plaintiffs to pursue COVID-19 claims under specified conditions.²⁹¹ The PLCAA cases therefore suggest that Congress may enact those proposals without contravening

²⁸² See *Vladeck Testimony*, *supra* note 266, at 18 n.2 (arguing that *Duke Power* “strongly suggest[s] that eliminating state liability law without any quid pro quo would violate Due Process”).

²⁸³ See 438 U.S. at 88.

²⁸⁴ See *id.* (“It is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.”). See also *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1144 (9th Cir. 2009) (characterizing *Duke Power* as “reiterat[ing] that it was an open question whether a legislature may abolish a common-law recovery scheme without providing a reasonable substitute remedy”).

²⁸⁵ This report discusses the PLCAA above. See *supra* “The Commerce Clause.”

²⁸⁶ See *Gilland v. Sportsmen’s Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693, at *19 (Conn. Super. Ct. May 26, 2011).

²⁸⁷ See, e.g., *id.* at *18 (“The plaintiffs assert that the PLCAA has wholly eliminated their common-law rights, and those of other firearms violence victims, against particular tortfeasors who have caused them harm, without providing any alternate remedy, thereby depriving them of their due process right of redress in the courts.”); *Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 390 (Alaska 2013) (similar); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 324 (Mo. 2016) (similar).

²⁸⁸ See, e.g., *Delana*, 486 S.W.3d at 324 (“The PLCAA does not violate Appellant’s federal due process rights.”); *Kim*, 295 P.3d at 390-91; *Gilland*, 2011 WL 2479693, at *18-20.

²⁸⁹ See *Gilland*, 2011 WL 2479693, at *20 (“The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule. Some claims are preempted, but many are not.”) (quoting *Ileto*, 565 F.3d at 1143); *Kim*, 295 P.3d at 390-91 (reasoning that “the PLCAA only limited, not eliminated, common law remedies” by “immuniz[ing] a specific type of defendant from a specific type of suit”) (quoting *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 398 (2d Cir. 2008)). See also *Delana*, 486 S.W.3d at 324 (holding that even though the PLCAA defeated the plaintiff’s negligence claim, the statute did not unconstitutionally “eliminate a remedy” because it did not foreclose the plaintiff’s state law negligent entrustment claim).

²⁹⁰ See, e.g., *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 177 n.8 (D.C. Ct. App. 2008) (“Because . . . Congress did not deprive injured persons of all potential remedies against manufacturers or sellers of firearms that discharge causing them injuries, we need not consider the plaintiffs’ subsidiary claim that due process at least requires Congress to supply an alternative remedy before it may eliminate a cause of action . . .”).

²⁹¹ See *supra* “What Must the Defendant Do to Qualify for the Liability Shield, and Would the Liability Shield Have Exceptions?”

the Due Process Clause, even if the federal government does not provide an alternate remedy or source of compensation.

To the extent this doctrinal question remains unsettled, however, Congress could potentially increase the likelihood that any particular COVID-19 liability-shield law withstands judicial scrutiny by narrowing its scope. A statute that bars only certain lawsuits against particular defendants—without foreclosing other potential avenues for plaintiffs to obtain compensation for their injuries—may be more likely to survive a due process challenge than a broader liability shield.²⁹²

Equal Protection

Some critics suggest that a federal²⁹³ COVID-19 liability shield could violate the U.S. Constitution’s guarantee of equal protection of the laws.²⁹⁴ According to these critics, such laws may improperly single out a particular group of people—namely, people who have suffered COVID-19-related injuries—and treat them unequally by eliminating their legal right to obtain compensation through the tort system.²⁹⁵ For the following reasons, however, the COVID-19 liability bills that Congress has introduced to date do not appear to violate COVID-19 victims’ equal protection rights.

When adjudicating an equal protection challenge to a federal statute, a court first assesses whether the law draws distinctions between people based on suspect grounds (such as race, national origin, or religion) or burdens the exercise of fundamental constitutional rights.²⁹⁶ If the law does neither of those things, the court applies a highly deferential standard called “rational basis” review, under which the court will reject the equal protection challenge “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”²⁹⁷

²⁹² Cf. *Kim*, 295 P.3d at 390-91 (emphasizing that the PLCAA merely “immunizes a specific type of defendant from a specific type of suit”) (quoting *City of New York*, 524 F.3d at 398); *Gilland*, 2011 WL 2479693 at *20 (“The PLCAA does not deny tort victims all redress; rather, it selectively preempts certain actions.”); *Delana*, 486 S.W.3d at 324 (holding that, even though the PLCAA defeated the plaintiff’s negligence claim, the statute did not unconstitutionally “eliminate a remedy” because it did not foreclose the plaintiff’s state law negligent entrustment claim).

²⁹³ This report does not analyze whether any particular *state law* COVID-19 liability shield would violate equal protection guarantees provided by that *state’s* constitution.

²⁹⁴ See U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). “Although the Fourteenth Amendment’s Equal Protection Clause applies by its terms only to the States, the Supreme Court has long recognized that equal protection principles bind the federal government (by what has been termed ‘reverse incorporation’) through the Fifth Amendment’s Due Process Clause.” *E.g.*, *Morrissey v. United States*, 871 F.3d 1260, 1268 n.6 (11th Cir. 2017) (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)).

²⁹⁵ Cf. *Kang, Undaunted*, *supra* note 266 (“[One attorney] said plaintiffs[’] lawyers in states with immunity laws could also opt to lodge constitutional challenges, because the families of residents killed by the virus could claim the laws and orders violate their equal protection rights. ‘You can’t just immunize [nursing homes] from liability because you’re basically wiping out a class of people who have been harmed,’ he said. ‘I think ultimately a lot of those laws are going to be found unconstitutional.’”).

²⁹⁶ See, e.g., *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277 (9th Cir. 2004) (“Laws alleged to violate the constitutional guarantee of equal protection are generally subject to one of three levels of ‘scrutiny’ by courts: strict scrutiny, intermediate scrutiny, or rational basis review. Strict scrutiny is applied when the classification is made on ‘suspect’ grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association. Laws are subject to intermediate scrutiny when they discriminate based on certain other suspect classifications, such as gender.”) (internal citations omitted).

²⁹⁷ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

Several courts have applied that deferential standard to reject equal protection challenges to the PLCAA.²⁹⁸ The plaintiffs in those cases argued that the PLCAA violated their equal protection rights by either

1. treating persons injured by defendants in the firearms industry less favorably than persons injured by defendants in other industries;²⁹⁹
2. violating firearms victims' fundamental right of access to the courts;³⁰⁰ or
3. depriving the plaintiffs of their fundamental property rights in their state law tort causes of action against the defendants.³⁰¹

The courts rejected each of these arguments. They first observed that the PLCAA did not draw distinctions based on a suspect classification like race.³⁰² The courts then concluded that a statute that merely abrogates a particular cause of action “does not impede, let alone entirely foreclose, general use of the courts by would-be plaintiffs,” but merely “immunizes a specific type of defendant from a specific type of suit.”³⁰³ Nor did the PLCAA implicate the plaintiffs' property rights, as plaintiffs do not hold a property right to a cause of action they have not yet reduced to a final, unreviewable judgment.³⁰⁴ The courts accordingly evaluated the PLCAA under rational basis review.³⁰⁵ Applying that deferential standard, the courts reasoned that Congress could have rationally concluded that barring the lawsuits covered by the PLCAA was a suitable way to facilitate interstate and foreign commerce.³⁰⁶ The courts therefore rejected the plaintiffs' equal protection challenges.³⁰⁷ These cases suggest that Congress could likewise limit the scope of COVID-19-related liability without contravening equal protection principles.

²⁹⁸ See *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140-41 (9th Cir. 2009); *Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 391-92 (Alaska 2013); *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693, at *20-22 (Conn. Super. Ct. May 26, 2011).

²⁹⁹ See *Gilland*, 2011 WL 2479693, at *20 (“The plaintiffs contend that that PLCAA violates the equal protection guarantee of the Fifth Amendment by . . . depriving certain victims of firearm industry wrongdoing of their right to a remedy, while other persons may still recover, so long as the tortfeasor sold a product other than firearms . . .”).

³⁰⁰ See *Kim*, 295 P.3d at 391 (“The Estate argues the PLCAA . . . violates the fundamental right of access to the courts.”).

³⁰¹ See *Ileto*, 565 F.3d at 1141 (analyzing the plaintiffs' argument that “they have a vested property right in their accrued state-law causes of action”).

³⁰² See *Kim*, 295 P.3d at 392 (“[T]he PLCAA does not implicate . . . a suspect class . . .”); *Ileto*, 565 F.3d at 1141 (determining that the plaintiffs “fail[ed] to identify . . . any suspect classification common to those adversely affected by the PLCAA”).

³⁰³ *Kim*, 295 P.3d at 390 (quoting *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 398 (2d Cir. 2008)). Cf. *Gilland*, 2011 WL 2479693, at *22 (holding that the PLCAA “does not violate” the “right to seek redress through the courts”).

³⁰⁴ See *Ileto*, 565 F.3d at 1141 (“Plaintiffs . . . argue that greater scrutiny is required because they have a vested property right in their accrued state-law causes of action. Plaintiffs' premise is incorrect: ‘We have squarely held that although a cause of action is a species of property, a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained.’”) (quoting *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001)).

³⁰⁵ See, e.g., *Kim*, 295 P.3d at 392 (“[R]ational basis review applies to the Estate's equal protection challenge.”).

³⁰⁶ See *Ileto*, 565 F.3d at 1140-41 (“We have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected.”); *Kim*, 295 P.3d at 392 (“Here, Congress found certain types of tort suits threatened constitutional rights, destabilized industry, and burdened interstate commerce. Protecting constitutional rights and interstate commerce is a legitimate purpose and barring certain types of tort suits while allowing others is a rational way to pursue this legitimate purpose.”).

³⁰⁷ See, e.g., *Gilland*, 2011 WL 2479693, at *22 (holding that Congress's “decision to treat persons injured by firearms differently” did “not violate the plaintiffs' right to equal protection”).

Relatedly, evidence indicates that COVID-19 may disproportionately affect racial and ethnic minorities.³⁰⁸ Thus, it is possible that a federal statute creating a COVID-19 liability shield could have a more significant effect on these groups. Under Supreme Court precedent, however, a statute that has a racially disproportionate impact, but does not draw race-based distinctions on its face, generally does not violate the constitutional equal protection guarantee unless the legislature passed that statute for an intentionally discriminatory purpose.³⁰⁹ Thus, just as a plaintiff would probably not be able to successfully argue that a federal COVID-19 liability shield unconstitutionally discriminates against victims of COVID-19-related torts, a plaintiff probably would not be able to argue successfully that such a shield unconstitutionally discriminates on the basis of race or ethnicity.

Workplace Safety

In addition to legislation that would create liability shields against possible COVID-19-related tort liability, the 116th Congress has introduced legislation³¹⁰ proposing to enhance federal workplace safety protections under the Occupational Safety and Health Act (OSH Act).³¹¹ These bills address certain COVID-19-specific risks that may give rise to tort liability. This section of the report provides an overview of the OSH Act standards relevant to the coronavirus—including how such standards interact with relevant state law—and proposals that would bolster workplace safety protections.

Congress enacted the OSH Act in 1970 to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions”³¹² The law seeks to reduce the frequency and severity of work-related injuries and illnesses by promoting a “comprehensive, nationwide approach” to workplace safety.³¹³ The OSH Act authorizes the Secretary of Labor (Secretary) to promulgate occupational safety and health standards, and provides for workplace inspections and investigations to ensure compliance with these standards and the law itself.³¹⁴ The OSH Act further authorizes the Secretary to issue citations and penalties if the employer does not comply.³¹⁵ The Secretary has delegated this authority under the OSH Act to the Assistant Secretary of Labor for Occupational Safety and Health, who acts as the administrator for the Occupational Safety and Health Administration (OSHA).³¹⁶ The OSH Act does not confer a

³⁰⁸ See, e.g., *Health Equity Considerations and Racial Ethnic Minority Groups*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 24, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

³⁰⁹ See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact.”).

³¹⁰ See *infra* “Proposals to Enhance Workplace Safety Standards.”

³¹¹ 29 U.S.C. §§ 651-678.

³¹² *Id.* § 651(b).

³¹³ See S. REP. NO. 91-1282, at 4 (1970) (“[T]he chemical and physical hazards which characterize modern industry are not the problem of a single employer, a single industry, nor a single state jurisdiction. The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern.”).

³¹⁴ 29 U.S.C. §§ 655, 657.

³¹⁵ *Id.* §§ 658, 666.

³¹⁶ Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health (Secretary’s Order 1-2012), 77 Fed. Reg. 3912 (Jan. 25, 2012). The position of Assistant Secretary for Occupational Safety and Health is currently vacant. Under Secretary’s Order 1-2012, it appears that the Secretary of Labor may exercise the authority provided by the OSH Act when an Assistant Secretary for Occupational Safety and Health has not been appointed. See *id.* at 3913 (“No delegation of authority or assignment of responsibility under this

private right of action to enforce the law or the safety and health standards promulgated pursuant to the law.³¹⁷

The OSH Act applies generally to private sector employers and the U.S. Postal Service. By definition, the law does not apply to other federal government entities or to state and local governments.³¹⁸ However, the OSH Act requires federal agencies other than the Postal Service to establish and maintain “an effective and comprehensive occupational safety and health program” that is consistent with the safety and health standards promulgated by OSHA.³¹⁹ In addition, state and local governments may become subject to comparable state safety and health standards if a state assumes responsibility for the development and enforcement of such standards in the state.³²⁰

OSHA Standards

An employer’s duties under the OSH Act flow from two sources. Section 5(a)(2) of the Act requires an employer to comply with detailed safety and health standards promulgated by OSHA.³²¹ Where there is no applicable standard, section 5(a)(1) imposes a general duty on an employer to furnish employment and a workplace “free from recognized hazards that are causing or are likely to cause death or serious harm to his employees.”³²² Courts often refer to Section 5(a)(1) as the OSH Act’s “general duty clause,” and it acts as a catch-all provision that promotes workplace safety.³²³

The OSH Act defines an “occupational safety and health standard” as one that “requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”³²⁴ Some OSHA standards address workplace hazards present across industries. For example, general industry OSHA standards, codified in Title 29, Part 1910 of the Code of Federal Regulations (CFR), address the handling of specified hazardous materials,³²⁵ the use of personal protective equipment,³²⁶ and the design of electrical systems.³²⁷ Other standards focus on workplace hazards in specific industries. These standards appear in various parts of Title

order will be deemed to affect the Secretary’s authority to continue to exercise or further delegate such authority or responsibility.”). The Secretary of Labor has not further delegated his authority under the OSH Act.

³¹⁷ See, e.g., *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991) (“[E]very court faced with the issue has held that [the OSH Act] creates no private right of action.”).

³¹⁸ 29 U.S.C. § 652(5) (defining the term “employer” for purposes of the OSH Act to mean “a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.”).

³¹⁹ *Id.* § 668(a).

³²⁰ See *id.* § 667(c)(6) (requiring so-called “state plans” to include assurances that the state will establish and maintain an occupational safety and health program that is as effective as OSHA’s standards and applies to all state and local employees). See also *infra* “The OSH Act and State Workplace Safety Requirements.”

³²¹ 29 U.S.C. § 654(a)(2).

³²² *Id.* § 654(a)(1).

³²³ See, e.g., *Nat’l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1263 (D.C. Cir. 1973) (describing section 5(a)(1) of the OSH Act as the law’s “general duty clause”).

³²⁴ 29 U.S.C. § 652(8).

³²⁵ 29 C.F.R. §§ 1910.101-1910.126.

³²⁶ *Id.* §§ 1910.132-1910.140.

³²⁷ *Id.* §§ 1910.301-1910.399.

29 of the CFR. For example, OSHA has promulgated specific safety and health standards for the longshoring³²⁸ and construction industries.³²⁹

To establish that an employer has violated a safety and health standard, OSHA must demonstrate by a preponderance of the evidence: (1) the applicability of the standard; (2) the employer's noncompliance with the terms of the standard; (3) employee access or exposure to the violative condition; and (4) the employer's actual or constructive knowledge of the violation.³³⁰

Compliance with an OSHA standard does not relieve an employer from providing its employees with safeguards against other known hazards, however. In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. General Dynamics Land Systems Division*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) observed that the OSH Act's general duty clause still requires an employer to provide a workplace free from recognized hazards.³³¹ Addressing the relationship between OSHA's safety and health standards and the general duty clause, the D.C. Circuit explained: "[I]f an employer knows that a specific standard will not protect his workers against a particular hazard, his duty under section 5(a)(1) will not be discharged no matter how faithfully he observes that standard."³³²

General Duty Clause

Under the OSH Act's general duty clause, employers must provide employment and workplaces free from recognized hazards that cause or are likely to cause death or serious physical harm.³³³ Congress reportedly adopted the general duty clause with the understanding that it would be difficult for safety and health standards to address every conceivable situation.³³⁴ During consideration of the OSH Act, the Senate Committee on Labor and Public Welfare explained:

This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard which could result in such a misfortune. Therefore, to cover such circumstances the committee has included a requirement to the effect that employers are to furnish employment and places of employment which are free from recognized hazards to the health and safety of their employees.³³⁵

To establish a violation of the general duty clause, OSHA must establish by a preponderance of the evidence that: (1) an activity or condition in the employer's workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a

³²⁸ *Id.* §§ 1918.1-1918.106.

³²⁹ *Id.* §§ 1926.1-1926.1442.

³³⁰ See *Jake's Fireworks, Inc. v. Acosta*, 893 F.3d 1248, 1256 (10th Cir. 2018); *Sanderson Farms, Inc. v. Perez*, 811 F.3d 730, 735 (5th Cir. 2016).

³³¹ 815 F.2d 1570, 1571 (D.C. Cir. 1987).

³³² *Id.* at 1577. See also *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004) ("Where the employer has knowledge of an obvious hazardous condition, however, compliance with specific standards failing to address the hazard does not relieve the employer of the responsibility under the general duty clause to provide its employees with a place of employment which is free from recognized hazards.").

³³³ 29 U.S.C. § 654(a)(1).

³³⁴ See S. REP. NO. 91-1282, at 9 (1970).

³³⁵ *Id.*

hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed.³³⁶

Courts have ruled that the general duty clause does not apply if a hazard is so idiosyncratic that the employer could not recognize it or develop a safety program to eliminate it.³³⁷ Courts have also emphasized that an employee does not need to suffer actual harm to find a violation of the general duty clause.³³⁸

OSHA Standards and COVID-19

Currently, none of OSHA's existing occupational safety and health standards specifically address COVID-19 or workplace exposure to airborne pathogens, such as the coronavirus. OSHA has promulgated a bloodborne pathogen standard,³³⁹ but acknowledges that the standard applies only to "human blood and other potentially infectious materials that typically do not include respiratory secretions that may contain SARS-Co-V-2."³⁴⁰ OSHA has, however, identified several more general safety and health standards that it claims are relevant to prevent workplace exposure to the coronavirus:

General Industry Standards

29 C.F.R. pt. 1910, subpt. I (Personal Protective Equipment): general requirements (§ 1910.132); eye and face protection (§ 1910.133); respiratory protection (§ 1910.134); hand protection (§ 1910.138)

29 C.F.R. pt. 1910, subpt. J (General Environmental Controls): sanitation (§ 1910.141)

29 C.F.R. pt. 1910, subpt. Z (Toxic and Hazardous Substances): access to employee exposure and medical records (§ 1910.1020); bloodborne pathogens (§ 1910.1030); hazard communication (§ 1910.1200); occupational exposure to hazardous chemicals in laboratories (§ 1910.1450)

Construction Industry Standards

29 C.F.R. pt. 1926, subpt. C (General Safety and Health Provisions): access to employee exposure and medical records (§ 1926.33)

29 C.F.R. pt. 1926, subpt. D (Occupational Health and Environmental Controls): sanitation (§ 1926.51)

³³⁶ *Fabi Constr. Co. v. Secretary of Lab.*, 508 F.3d 1077, 1081 (D.C. Cir. 2007); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 815 F.2d at 1577.

³³⁷ *See Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) ("Congress intended to require elimination only of preventable hazards. It follows, we think, that Congress did not intend unpreventable hazards to be considered 'recognized' under the clause."); *Gen. Dynamics Corp. v. OSHRC*, 599 F.2d 453, 458 (1st Cir. 1979) ("An employer is not an insurer, and need not take steps to prevent hazards which are not generally foreseeable, including idiosyncratic behavior of an employee, but at the same time an employer must do all it feasibly can to prevent foreseeable hazards, including dangerous conduct by its employees.").

³³⁸ *See Titanium Metals Corp. of Am. v. Utery*, 579 F.2d 536, 542 (9th Cir. 1978) ("[I]t is beyond dispute that an accident need not occur for a violation of § 5(a)(1) properly to be found . . ."); *Nat'l Realty & Constr. Co.*, 489 F.2d at 1267 ("To establish a violation of the general duty clause, hazardous conduct need not actually have occurred, for a safety program's feasibly curable inadequacies may sometimes be demonstrated before employees have acted dangerously.").

³³⁹ 29 C.F.R. § 1910.1030.

³⁴⁰ Occupational Safety & Health Admin., COVID-19: Standards, <https://www.osha.gov/SLTC/covid-19/standards.html> (last visited Aug. 11, 2020).

29 C.F.R. pt. 1926, subpt. E (Personal Protective Equipment and Life Saving Equipment): criteria for personal protective equipment (§ 1926.95); eye and face protection (§ 1926.102); respiratory protection (§ 1926.103)

Agriculture Industry Standards

29 C.F.R. pt. 1928, subpt. I (General Environmental Controls): field sanitation (§ 1928.110).³⁴¹

Some labor organizations and observers have argued, however, that these standards do not adequately protect workers from COVID-19-related risks.³⁴² In March 2020, the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) petitioned OSHA to issue an emergency temporary standard (ETS) that would comprehensively address hazards associated with COVID-19.³⁴³ The AFL-CIO contended:

There is no existing OSHA standard or basic regulatory framework that comprehensively addresses an employer's responsibility to protect workers from infectious diseases. In the absence of a set of mandatory infection control requirements that employers must implement, there is no assurance that all workers will be protected from infectious diseases like COVID-19.³⁴⁴

While a federal safety and health standard usually cannot become effective until OSHA publishes the proposed standard in the *Federal Register* and offers interested parties an opportunity to comment on it, the OSH Act authorizes OSHA to issue an ETS that takes immediate effect upon publication in the *Federal Register*, if the agency determines that employees are exposed to “grave danger . . . from new hazards, and . . . such emergency standard is necessary to protect employees from such danger.”³⁴⁵

In April 2020, the Secretary of Labor indicated that OSHA would not adopt a COVID-19-specific ETS.³⁴⁶ The Secretary maintained that the general duty clause and industry-specific guidance³⁴⁷ issued by OSHA in response to COVID-19 were sufficient to protect workers.³⁴⁸ The AFL-CIO subsequently petitioned the U.S. Court of Appeals for the District of Columbia Circuit for an order directing OSHA to promulgate an ETS.³⁴⁹ In *In re AFL-CIO*, a panel of the D.C. Circuit declined to issue such an order, concluding that the Secretary's decision was entitled to

³⁴¹ *Id.*

³⁴² See Kimberly Kindy, *This Regulation Could Protect Health-Care Workers From the Coronavirus. It Hangs in Limbo*, WASH. POST (Mar. 5, 2020), https://www.washingtonpost.com/national/this-regulation-could-protect-health-care-workers-from-the-coronavirus-it-hangs-in-limbo/2020/03/05/9a066c36-5ef4-11ea-9055-5fa12981bbbf_story.html.

³⁴³ Am. Fed'n of Lab.-Cong. of Indus. Orgs., A Petition to Secretary Scalia for an OSHA Emergency Temporary Standard for Infectious Disease (Mar. 6, 2020), available at <https://aflcio.org/statements/petition-secretary-scalia-osha-emergency-temporary-standard-infectious-disease> [hereinafter *AFL-CIO Petition*]. For additional information on COVID-19 and emergency temporary standards, see CRS Report R46288, *Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19*, by Scott D. Szymendera.

³⁴⁴ *AFL-CIO Petition*, *supra* note 343.

³⁴⁵ 29 U.S.C. § 655(c).

³⁴⁶ Letter from Eugene Scalia, U.S. Secretary of Lab., to Richard L. Trumka, President, AFL-CIO (Apr. 30, 2020), available at <https://aboutblaw.com/Qzv>.

³⁴⁷ See, e.g., Ctrs. for Disease Control & Prevention & Occupational Safety & Health Admin., Meat and Poultry Processing Workers and Employers (July 9, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>.

³⁴⁸ *Id.*

³⁴⁹ Emergency Petition for a Writ of Mandamus, and Request for Expedited Briefing and Disposition, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. May 18, 2020).

considerable deference.³⁵⁰ The panel ruled: “In light of the unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments . . . the OSHA reasonably determined that an ETS is not necessary at this time.”³⁵¹

The OSH Act and State Workplace Safety Requirements

Although OSHA has determined that a COVID-19-specific ETS is not necessary at this time, some states have issued certain occupational safety and health standards that are pertinent to the risks posed by the coronavirus. While the OSH Act outlines a national approach for ensuring workplace safety, it also permits states to assume responsibility for enforcing occupational safety and health standards. Section 18(a) of the act permits states to regulate matters that are not governed by an OSHA standard.³⁵² When OSHA has promulgated federal workplace safety and health standards, section 18(b) of the OSH Act authorizes states to submit state plans for the development and enforcement of their own standards.³⁵³ OSHA will approve a state plan only if it satisfies specified conditions. For example, the plan must provide for the development and enforcement of safety and health standards that “are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated” by OSHA.³⁵⁴ Notably, if OSHA approves a state plan, a state safety and health standard adopted pursuant to that plan may impose requirements that differ from or are more stringent than OSHA’s requirements.³⁵⁵ State standards adopted pursuant to an approved state plan displace the federal standards promulgated by OSHA.³⁵⁶

To be approved by OSHA, a state plan must also include assurances that the state will establish and maintain an occupational safety and health program that applies to all state and local government employees and is as effective as OSHA’s workplace standards.³⁵⁷ Of the 28 OSHA-

³⁵⁰ No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020).

³⁵¹ *Id.* On July 28, 2020, the D.C. Circuit denied the AFL-CIO’s petition for a rehearing by the full court. Order, *In re AFL-CIO*, No. 20-1158 (D.C. Cir. July 28, 2020).

³⁵² 29 U.S.C. § 667(a) (“Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section [6 of the OSH Act].”). *See also* N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587, 592 (3d Cir. 1985) (“Section 18(a) of the OSH Act expressly gives the states authority to regulate matters that are not governed by a standard.”).

³⁵³ 29 U.S.C. § 667(b).

³⁵⁴ *Id.* § 667(c)(2).

³⁵⁵ Although employers in so-called “state plan states” are subject to state, rather than federal, occupational safety and health standards, they remain subject to the OSH Act’s general duty clause. *See Puffer’s Hardware, Inc. v. Donovan*, 742 F.2d 12, 16 (1st Cir. 1984) (“There is nothing in either the language of [the OSH] Act or its history that indicates that Congress intended compliance with the minimum standards of applicable state law to create an exemption from the general duty clause.”).

³⁵⁶ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 100 (1992) (“[A] State may develop an occupational safety and health program tailored to its own needs, but only if it is willing completely to displace the applicable federal regulations.”).

³⁵⁷ 29 U.S.C. § 667(c)(6).

approved state plans, 22 plans cover both private and state and local government employees.³⁵⁸ The remaining six plans cover only state and local government employees.³⁵⁹

California has adopted an aerosol transmissible diseases (ATD) standard that applies to at least some employers.³⁶⁰ Among the employers covered by the standard are healthcare facilities, correctional facilities, and laboratories that perform procedures with materials that contain or are reasonably anticipated to contain airborne pathogens.³⁶¹ Under California's ATD standard, covered employers are required to implement an exposure control plan that addresses various safety and health matters, including identifying and isolating airborne infectious disease cases, and the procedures an employer will use to communicate exposure incidents to employees.³⁶² The ATD standard also requires covered employers to use engineering and work practice controls to minimize employee exposure to airborne pathogens.³⁶³ For example, the standard mandates the development of procedures for cleaning and decontaminating work areas, vehicles, and other equipment.³⁶⁴

In July 2020, Virginia adopted an ETS to protect private sector employees, as well as state and local employees, from workplace exposure to the coronavirus.³⁶⁵ The standard prohibits employers from allowing an employee who is known or suspected to be infected with the virus from reporting to or remaining in the workplace until the employee has been cleared to return to work.³⁶⁶ The standard requires generally that employers ensure that employees observe physical distancing while on duty and during paid break periods on the employer's property.³⁶⁷ The standard also imposes additional engineering and work practice controls based on the exposure risk presented by an employer's hazards or job duties.³⁶⁸

The Interaction Between OSHA Standards and Tort Law

Apart from applying of their own force, OSHA standards may also bear on whether a particular defendant is liable for negligence.³⁶⁹ When evaluating whether a defendant engaged in conduct that fell short of the applicable standard of care, the factfinder may usually consider what a reasonably prudent person would have done under the circumstances.³⁷⁰ In many jurisdictions, a

³⁵⁸ Occupational Safety & Health Admin., State Plans, <https://www.osha.gov/stateplans> (last visited Aug. 11, 2020). The following 22 states and territories have OSHA-approved state plans that cover private and state and local government employees: Alaska; Arizona; California; Hawaii; Indiana; Iowa; Kentucky; Maryland; Michigan; Minnesota; Nevada; New Mexico; North Carolina; Oregon; Puerto Rico; South Carolina; Tennessee; Utah; Vermont; Virginia; Washington; Wyoming. *Id.*

³⁵⁹ *Id.* The following six states and territories have OSHA-approved state plans that cover only state and local government employees: Illinois; Connecticut; Maine; New Jersey; New York; the Virgin Islands. *Id.*

³⁶⁰ CAL. CODE REGS. tit. 8, § 5199.

³⁶¹ *Id.* § 5199(a)(1).

³⁶² *Id.* § 5199(d).

³⁶³ *Id.* § 5199(e).

³⁶⁴ *Id.*

³⁶⁵ 16 VA. ADMIN. CODE § 25-220.

³⁶⁶ *Id.* § 25-220-40.B.5.

³⁶⁷ *Id.* § 25-220-40.D.

³⁶⁸ *See id.* §§ 25-220-50, 25-220-60.

³⁶⁹ *See supra* "Negligence."

³⁷⁰ *See, e.g.,* Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1119 (R.I. 2004) ("To succeed on a general claim for negligence, [the] plaintiff must demonstrate that [the] defendant did not act as a 'reasonably prudent [person] would under the circumstances.'") (quoting *Vanvooren v. John E. Fogarty Mem'l Hosp.*, 321 A.2d 100, 102 (R.I. 1974));

plaintiff may (at least in some circumstances) introduce OSHA standards as evidence of the steps that a reasonably prudent participant in the defendant’s industry would have taken to prevent injuries.³⁷¹ At the same time, however, many courts also hold a defendant’s violation of an OSHA standard does not automatically prove that the defendant acted negligently.³⁷² Thus, if OSHA ultimately promulgates COVID-19-specific workplace safety regulations (or if Congress specifically commands OSHA to do so), those standards may be relevant to—but not necessarily dispositive of—the question of whether a particular defendant is liable for negligently spreading the coronavirus.

Proposals to Enhance Workplace Safety Standards

The 116th Congress has introduced legislation that would direct OSHA to promulgate a new ETS to protect certain health care and other employees from workplace exposure to the coronavirus. The COVID-19 Every Worker Protection Act of 2020 (H.R. 6559/S. 3677), for instance, would command OSHA to issue an ETS that requires employers to develop and implement a comprehensive infectious disease exposure control plan.³⁷³ The standard would also require employers to adopt a policy prohibiting discrimination or retaliation against any employee who reports violations of the control plan or good-faith concerns over a workplace infectious disease hazard to any federal, state, or local government agency, the media, or a social media platform. The 116th Congress has also introduced other bills that would direct OSHA to promulgate an ETS to protect health care employees and other employees that OSHA or the Centers for Disease Control and Prevention have determined to be at elevated risk.³⁷⁴

The Federal Securities Laws

Businesses’ potential COVID-19-related liability exposure is not limited to claims based on disease transmission or unsafe working conditions. Under the federal securities laws, companies that trade their securities on public markets, otherwise known as “public companies,” must disclose material information about a range of evolving business risks, which may include

Bajwa v. Metro. Life Ins. Co., 804 N.E.2d 519, 530 (Ill. 2004) (“In an ordinary negligence case, the standard of care required of a defendant is to act as would an ‘ordinarily careful person’ or a ‘reasonably prudent person.’”) (quoting *Jones v. Chi. HMO Ltd. of Ill.*, 730 N.E.2d 1119, 1130 (Ill. 2000)).

³⁷¹ See, e.g., *Scott v. Matlack, Inc.*, 39 P.3d 1160, 1170 (Colo. 2002) (holding that a jury may “hear evidence of OSH Act regulations as some indication of the standard of care with which a reasonable person in the defendant’s position should comply”); *Alloway v. Bradlees, Inc.*, 723 A.2d 960, 967 (N.J. 1999) (“OSHA regulations are pertinent in determining the nature and extent of any duty of care.”); *Wendland v. AdobeAir, Inc.*, 221 P.3d 390, 395 (Ariz. Ct. App. 2009) (stating that “the majority of courts in . . . jurisdictions that have considered the issue” allow “the admission of OSHA standards as some evidence of the relevant standard of care”).

³⁷² See, e.g., *Scott*, 39 P.3d at 1166 (observing that “a majority of courts . . . have ruled a defendant may not be held negligent merely with proof that he violated an OSH Act regulation”); *Alloway*, 723 A.2d at 967 (“[T]he finding of an OSHA violation does not *ipso facto* constitute a basis for assigning negligence as a matter of law; that is, it does not constitute negligence *per se*.”) (quoting *Kane v. Hartz Mountain Indus., Inc.*, 650 A.2d 808, 815 (N.J. Super. Ct. App. Div. 1994)).

³⁷³ The COVID-19 Every Worker Protection Act of 2020 has also been included in title III, division L of the Heroes Act, H.R. 6800, 116th Cong. §§ 120301-120303 (2d Sess. 2020).

³⁷⁴ COVID-19 Health Care Worker Protection Act of 2020, H.R. 6139, 116th Cong. (2d Sess. 2020); Take Responsibility for Workers and Families Act, H.R. 6379, 116th Cong. (2d Sess. 2020).

COVID-19-related risks.³⁷⁵ If a company omits material information or provides misleading statements, injured investors may seek remedies through civil litigation.³⁷⁶

Duty to Disclose Under the Federal Securities Laws

Disclosure requirements have been described as “the cornerstone of federal securities regulation.”³⁷⁷ The Securities Act of 1933 (“Securities Act”)—often referred to as the “truth in securities” law³⁷⁸—requires companies engaging in primary securities offerings to provide investors with material information about the securities that they offer and the associated risks.³⁷⁹ Similarly, the Securities Exchange Act of 1934 (“Exchange Act”) mandates that public companies provide certain material information in periodic reports filed with the U.S. Securities and Exchange Commission (SEC).³⁸⁰

The SEC’s Regulation S-X³⁸¹ and Regulation S-K³⁸² specify the information that a public company must disclose in its securities offering documents and periodic filings, such as its financial statements,³⁸³ business description,³⁸⁴ and various other items. For example, in the Management’s Discussion and Analysis, or MD&A section of SEC-mandated public reports, public companies must provide a narrative explanation of their financial statements.³⁸⁵ The MD&A section also requires the company to disclose any known trends, events, or uncertainties that are reasonably likely to have a material effect on the publicly-traded company’s financial condition or operating performance beyond what its reported financial statements reflect.³⁸⁶ In the Risk Factors section of SEC-mandated periodic reports, a company must disclose the most significant risk factors that would make an investment in the company speculative or risky, although the rule states that companies should not disclose risks that could apply generically to any security.³⁸⁷ Moreover, the SEC’s Rule 12b-20 also requires the company to disclose “such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.”³⁸⁸

In general, the federal securities laws require companies to disclose information that would be material to an investor’s investment decisions.³⁸⁹ In *Basic, Inc. v. Levinson*,³⁹⁰ the Supreme Court

³⁷⁵ See 15 U.S.C. § 781 (“Registration Requirements for Securities”); *id.* § 78m (“Periodic and other reports”).

³⁷⁶ See *id.* § 77k (“Civil liabilities on account of false registration statement”); § 77l (“Civil liabilities arising in connection with prospectuses and communications”); § 77q (“Fraudulent interstate transactions”); § 78j (“Manipulative and deceptive devices”); *id.* § 78t-1 (“Liability to contemporaneous traders for insider trading”); 17 C.F.R. § 240.10b-5 (Employment of “manipulative and deceptive devices”).

³⁷⁷ See CRS In Focus IF11256, *SEC Securities Disclosure: Background and Policy Issues*, by Eva Su, at 1.

³⁷⁸ *Id.*

³⁷⁹ 15 U.S.C. §§ 77a-77mm.

³⁸⁰ *Id.* §§ 78a-78kk.

³⁸¹ 17 C.F.R. Part 210.

³⁸² *Id.* Part 229.

³⁸³ *Id.* § 210.1-01 (“Application of Regulation S-X”).

³⁸⁴ *Id.* § 229.101 (“Description of business”).

³⁸⁵ *Id.* § 229.303 (“Management’s discussion and analysis of financial condition and results of operations”).

³⁸⁶ *Id.*

³⁸⁷ *Id.* § 229.105 (“Risk factors”).

³⁸⁸ *Id.* § 240.12b-20 (“Additional information”).

³⁸⁹ See Su, *supra* note 377.

³⁹⁰ 485 U.S. 224, 231 (1988).

explained that information is “material” only if there is a “substantial likelihood” that its omission would significantly alter the total mix of information available to investors. Under the securities laws, investors can seek remedies for fraud through civil litigation if they believe a public company’s materially misleading statements or omission of material facts has harmed them.³⁹¹ To establish a fraud claim under the securities laws, a plaintiff must show (1) a material misrepresentation or omission; (2) scienter, or a wrongful, state of mind; (3) a connection with the purchase of a security; (4) reliance on the misstatement or omission; (5) economic loss; and (6) “loss causation,” i.e., a causal connection between the loss and the material representation or omission.³⁹²

In the past, Congress has passed legislation intended to circumscribe shareholders’ ability to pursue certain securities law claims. According to the Supreme Court, Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA)³⁹³ to “curb frivolous, lawyer-driven litigation, while preserving investors’ ability to recover on meritorious claims.”³⁹⁴ In contrast to the notice pleading standard employed in most federal civil actions³⁹⁵—which requires the plaintiff’s complaint only to provide a short and plain statement of the facts giving rise to the claim—the PSLRA specifies that the plaintiff’s complaint “shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”³⁹⁶ In pleading the scienter element of an Exchange Act claim, the PSLRA also requires that the allegations in the complaint not merely give rise to an inference of a wrongful state of mind on the part of the defendant, but a *strong* inference: “the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”³⁹⁷

Additionally, as part of the PSLRA, Congress enacted a two-pronged “safe harbor” for certain forward-looking statements made by issuers of securities to the public. Specifically, the safe harbor for forward-looking statements encourages issuers to disclose forward-looking information, which may be quite valuable to investors, without fear of liability if those statements do not come to fruition.³⁹⁸ A company may benefit from the safe harbor if it satisfies either prong.

³⁹¹ See 17 C.F.R. § 240.10b-5. The SEC also notes that “[i]nvestors who purchase securities and suffer losses have important recovery rights if they can prove that there was incomplete or inaccurate disclosure of important information.” Sec. & Exch. Comm’n, *The Laws That Govern the Securities Industry*, <https://www.sec.gov/answers/about-lawsshtml.html>.

³⁹² See *Chiarella v. United States*, 445 U.S. 222, 227-30 (1980); see also Samuel W. Buell, *What is Securities Fraud*, 61 DUKE L.J. 511, 545 (2011).

³⁹³ Pub. L. No. 104-67, 109 Stat. 737 (1995).

³⁹⁴ *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

³⁹⁵ See *supra* notes 132-133 and accompanying text.

³⁹⁶ 15 U.S.C. § 78u-4(b)(1).

³⁹⁷ *Id.* § 78u-4(b)(2).

³⁹⁸ See H.R. REP. No. 104-369, at 42-43 (1995)(Conf. Rep.).

Under the first prong of the safe harbor, the issuer is not liable for statements that it or its agents “identified as a forward-looking statement, and [are] accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.”³⁹⁹ The safe harbor also protects oral forward-looking statements if the speaker identifies them as such and points to a readily available document discussing the factors that could cause actual results to differ.⁴⁰⁰

Alternatively, under the second prong, a safe harbor exists “if the plaintiff fails to prove that the forward-looking statement . . . was made with actual knowledge . . . that the statement was false or misleading.”⁴⁰¹ Therefore, even in the absence of sufficient cautionary language, courts have also applied the safe harbor to forward-looking statements when a plaintiff’s allegations were insufficient to show actual knowledge as to the falsity or misleading nature of the statement.⁴⁰²

The safe harbor is *not* applicable to statements made in connection with an initial public offering (IPO)⁴⁰³ or tender offer,⁴⁰⁴ or to financial statements prepared in accordance with generally accepted accounting principles.⁴⁰⁵

COVID-19-Related Disclosure Obligations

On March 25, 2020, the SEC’s Division of Corporation Finance (CF) issued guidance to public companies on their disclosure and other securities law-related obligations in light of the COVID-19 pandemic. In that guidance, the SEC counseled companies to “consider the need for COVID-19-related disclosures within the context of the federal securities laws and our principles-based disclosure system.”⁴⁰⁶ The guidance also includes a non-exhaustive list of COVID-19-related business risks to consider, such as (1) COVID-19’s effect on a company’s financial condition, operations, or assets; (2) COVID-19’s effect on a company’s ability to timely account for assets

³⁹⁹ 15 U.S.C. §§ 77z-2(c)(1)(A), 78u-5(c)(1)(A). The first prong of the safe harbor is built upon the less strict “bespeaks caution” doctrine developed in pre-PSLRA case law, under which “courts will ‘dismiss[] securities fraud claims . . . because cautionary language in the offering document negated the materiality of an alleged misrepresentation or omission.” See *Nat’l Junior Baseball League v. Pharmanet Dev. Grp. Inc.*, 720 F. Supp. 2d 517, 533 & n.14 (D.N.J. 2010). Courts have grappled with the circumstances in which a cautionary statement will qualify as “meaningful” under the PSLRA. One court has explained that “[t]he requirement for ‘meaningful’ cautions calls for substantive company-specific warnings based on a realistic description of the risks applicable to the particular circumstances.” *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 372 (5th Cir. 2002). Along these lines, the D.C. Circuit has said that “mere boilerplate,” such as “[t]his is a forward-looking statement: caveat emptor,” “does not meet the statutory standard because by its nature it is general and ubiquitous, not tailored to the specific circumstances of a business operation, and not of useful quality.” *In re Harman Int’l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 102 (D.C. Cir. 2015) (quoting *Asher v. Baxter Int’l Inc.*, 377 F.3d 727, 729 (7th Cir. 2004)).

⁴⁰⁰ 15 U.S.C. §§ 77z-2(c)(2), 78u-5(c)(2); see also *In re SI Corp. Sec. Litig.*, 173 F. Supp. 2d 1334, 1356-57 (N.D. Ga. 2001).

⁴⁰¹ 15 U.S.C. §§ 77z-2(c)(1)(B), 78u-5(c)(1)(B).

⁴⁰² See, e.g., *Williams v. Globus Med., Inc.*, 869 F.3d 235, 245-46 (3d Cir. 2017).

⁴⁰³ An initial public offering, or IPO, is when a company first sells shares to the public. See Sec. & Exch. Comm’n, *Initial Public Offerings (IPO)*, <https://www.sec.gov/fast-answers/answersipohtm.html>.

⁴⁰⁴ A tender offer is “an active and widespread solicitation by a company or third party (often called the ‘bidder’ or ‘offeror’) to purchase a substantial percentage of the company’s securities.” Sec. & Exch. Comm’n, *Tender Offer*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/glossary/tender-offer>.

⁴⁰⁵ 15 U.S.C. §§ 77z-2(b)(2), 78u-5(b)(2); see also *In re Unicapital Corp. Sec. Litig.*, 149 F. Supp. 2d 1353, 1373-74 (S.D. Fla. 2001) (holding that the PSLRA safe harbor does not protect statements contained in an IPO registration statement, but applying the safe harbor analysis to later statements contained in press releases).

⁴⁰⁶ Sec. & Exch. Comm’n, CF Disclosure Guidance: Topic No. 9 (March 25, 2020), available at <https://www.sec.gov/corpfin/coronavirus-covid-19>.

or maintain operations in light of the pandemic; (3) the pandemic’s effect on supply chains, distribution methods, or demand for products; and (4) any COVID-19-related constraints on human capital resources a company may experience, including those caused by travel restrictions and border closures.⁴⁰⁷

While “encourag[ing] companies to provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management,” the guidance also noted that “much of the disclosure that would address the types of considerations noted above would involve forward looking information that may be based on assumptions and expectations regarding future events.”⁴⁰⁸ As the SEC explained,

providing forward-looking information in an effort to keep investors informed about material developments, including known trends or uncertainties regarding COVID-19, can be undertaken in a way to avail companies of the safe harbors in Section 27A [15 U.S.C. § 77z-2] of the Securities Act and Section 21E [15 U.S.C. § 78u-5] of the Exchange Act for this information.⁴⁰⁹

As noted above, these safe harbors, enacted as part of the PSLRA, shield companies from liability for forward-looking statements as long as they are so identified and are accompanied by cautionary language.⁴¹⁰

As of August 28, 2020, the Stanford Law School Securities Class Action Clearinghouse has recorded 16 COVID-19-related securities class actions.⁴¹¹ Shareholders’ COVID-19-related securities claims have almost exclusively involved allegations of securities fraud involving companies’ material misstatements or omissions regarding the effects of COVID-19 on their businesses.⁴¹² In one action, for example, after the *Miami New Times* published leaked emails suggesting that a company may have directed its sales staff to lie to customers about COVID-19 risk, the company’s investors sued the company, alleging that it had made false and misleading statements.⁴¹³ As the shareholders alleged in their complaint: “(1) the Company was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members; and (2) as a result, Defendants’ statements regarding the Company’s business and operations were materially false and misleading and/or lacked a reasonable basis at all relevant times.”⁴¹⁴

Proposals to Amend the Federal Securities Laws

Some commentators propose amending the federal securities laws to impose additional requirements on shareholders who wish to bring COVID-19-related securities litigation. Proposed amendments include: (1) providing for exclusive federal jurisdiction for securities fraud

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ See *supra* note 399 and accompanying text.

⁴¹¹ Stanford L. Sch., *Current Topics in Securities Class Action Filings*, SECURITIES CLASS ACTION CLEARINGHOUSE: A COLLABORATION WITH CORNERSTONE RESEARCH, <http://securities.stanford.edu/current-topics.html>.

⁴¹² See *id.*

⁴¹³ See Kevin LaCroix, *Cruise Line Shareholder Files First Coronavirus-Related Securities Suit*, The D&O Diary (Mar. 13, 2020), <https://www.dandodiary.com/2020/03/articles/securities-litigation/cruise-line-shareholder-files-first-coronavirus-related-securities-suit/>.

⁴¹⁴ Complaint at 7, *Douglas v. Norwegian Cruise Lines*, No. 1:20-cv-21107 (S.D. Fla. Mar. 12, 2020), ECF No. 1.

claims related to COVID-19, which would allow federal judges to handle such claims and limit any state-court biases against out-of-state defendants; (2) staying court proceedings until the President rescinds his national emergency declaration “to ensure that American businesses are able to focus on pressing health and economic recovery issues” as opposed to responding to securities litigation; and (3) expanding heightened pleading standards in all COVID-19-related securities lawsuits to require plaintiffs to state all elements of their claim with particularity.⁴¹⁵ As noted above, the PSLRA already imposes heightened pleading requirements on some elements of securities law claims.⁴¹⁶

Proponents argue that these proposals would decrease public companies’ litigation risk in the event that their stock prices decrease during the pandemic, a time when stock prices are likely to be volatile due to broad economic disruptions.⁴¹⁷ They also argue that, while “[s]ecurities fraud claims should not succeed simply because a company’s stock fell after a pandemic,” “corporate disclosures relating to performance, projections and the potential impact of the virus often will be viewed in hindsight; and the context—that is, the specific disclosures and factual circumstances underlying each case—may significantly affect potential liability.”⁴¹⁸

Others, however, maintain that “COVID-19 itself has not been much of a factor in private securities filings so far.”⁴¹⁹ Data from the Stanford Law School Securities Class Action Clearinghouse supports this analysis. While it is possible that a surge in class actions may still emerge, the database has recorded only 16 COVID-19-related securities class actions as of August 28, 2020.⁴²⁰ These securities class actions have been filed exclusively in federal court.⁴²¹

Moreover, as noted above, shareholders’ COVID-19-related securities claims have almost exclusively involved allegations of securities fraud, and such claims arguably are already limited by the heightened pleading standard to which they are subject.⁴²² As discussed above, under the PSLRA, plaintiffs alleging COVID-19-related securities fraud are required to allege with specificity what statements were allegedly fraudulent, why they were fraudulent, and the facts evidencing the defendant’s wrongful state of mind. Lower courts have disagreed regarding the extent to which heightened pleading standards apply to other elements of securities fraud, such as loss causation, i.e., the causal connection between the loss and the material representation or omission.⁴²³ However, it is possible that Rule 9(b) of the Federal Rules of Civil Procedure, which

⁴¹⁵ See U.S. Chamber Inst. for L. Reform, *COVID-19: Federal Liability Problems and Solutions*, ILR BRIEFLY (May 2020), https://www.instituteforlegalreform.com/uploads/sites/1/ILR_Briefly_COVID19_Series_Federal_Problems_Solutions_May2020.pdf.

⁴¹⁶ See *supra* notes 396-397 and accompanying text.

⁴¹⁷ See U.S. Chamber Inst. for L. Reform, *supra* note 415.

⁴¹⁸ *Id.*

⁴¹⁹ See Alison Frankel, *There is no wave of COVID-19 shareholders’ class actions (yet)*, REUTERS (July 27, 2020), <https://www.reuters.com/article/legal-us-otc-securities/there-is-no-wave-of-covid-19-shareholders-class-actions-idUSKCN24S2IV>.

⁴²⁰ See Stanford L. Sch., *supra* note 411.

⁴²¹ A breakdown by district court of the 16 class actions identified in the Stanford Class Action Clearinghouse is as follows: Four COVID-19-related class actions filed in the Southern District of New York; three filed in the Southern District of Florida; two filed in the Eastern District of New York; two filed in the Northern District of California; one filed in the Central District of California; one filed in the Southern District of California; one filed in the District of Utah; one filed in the Southern District of Indiana; one filed in the Eastern District of Pennsylvania. *Id.*

⁴²² See *id.*

⁴²³ See *Or. Pub. Employees Ret. Fund v. Apollo, Inc.*, 774 F.3d 598, 604 (9th Cir. 2014) (noting that, while “[s]ome of our sister circuits have suggested heightened pleading standards should apply to loss causation,” “[o]ther circuits have suggested that heightened pleading standards do not apply to loss causation”); see also *supra* note 392 and accompanying text.

creates a heightened pleading standard for fraud claims generally, also would apply to elements of securities fraud claims not specifically addressed by the PSLRA.⁴²⁴ For example, in *Oregon Public Employees Retirement Fund v. Apollo Group, Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that Rule 9(b)'s heightened pleading standards applied to loss causation in a securities fraud action.⁴²⁵ As the court explained, "Rule 9(b) clearly states that in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."⁴²⁶ Thus, it is possible that Congress might conclude that existing limitations on securities-fraud lawsuits are sufficient without additional legislation to manage any potential COVID-19-related securities fraud claims.

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⁴²⁴ See *supra* note 134 and accompanying text.

⁴²⁵ See *Or. Pub. Employees Ret. Fund*, 774 F.3d at 604.

⁴²⁶ *Id.* at 605; see also *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011) ("We review allegations of loss causation for 'sufficient specificity,' a standard largely consonant with Federal Rule of Civil Procedure 9(b)'s requirement that averments of fraud be made with particularity.") (quoting *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 119-20 (4th Cir. 2009)).