

July 28, 2020

Dear Senator or Representative:

We understand that Congress is considering providing a “liability shield” to protect certain businesses from lawsuits alleging that their negligent operations caused customers or employees to be infected with COVID-19. The Center for Science in the Public Interest<sup>1</sup> writes to urge Congress to reject this call for COVID-19 legal immunity.

First, it would incentivize harmful conduct, which is counterproductive to keeping essential businesses operating and the recovery of our economy. A liability shield would decimate incentives for businesses to take reasonable steps to reduce infections: it thus poses a substantial risk to public health. Second, it deprives people of redress for negligent conduct. Last, it is unnecessary. The law already adequately shelters businesses that take reasonable precautions to protect employees and the public from contracting COVID-19.

We value and fully support the efforts of businesses to provide Americans with critical products and services during this health crisis. However, they must do so while operating reasonably safely. Unsafe operations have already resulted in business closures and the further spread of COVID-19, which causes fatalities, threatens supply chains, puts workers’ and the public’s health and safety at risk, harms our economy, and further burdens health care workers. Legal accountability provides an essential incentive for businesses to take reasonable measures.

Importantly, existing law already shields companies from non-meritorious lawsuits. State tort law already provides companies with sufficient legal protection and takes into account the context in which any potentially tortious act occurs. To bring a successful claim, any plaintiff would need to establish that a company was negligent, which, according to the Second Restatement of Torts,<sup>2</sup> takes into account the magnitude of risk, the importance of the companies’ operations, industry customs, regulatory guidance, information gaps, and the existence of an emergency.<sup>3</sup> Since our country’s founding, courts and juries have properly made exactly this sort of fact-specific determination, which gives due regard to difficult circumstances in an emergency situation and the important roles businesses play during this crisis.<sup>4</sup>

In addition, other existing legal structures already limit companies’ exposure to liability—including targeted coronavirus immunity in numerous states, worker’s compensation coverage, damage caps, federal immunity provided to vaccine manufacturers, and liability insurance.<sup>5</sup> Companies that follow administrative regulations and guidance, adopt industry best practices, and take reasonable precautions will have better outcomes and considerable legal protection.<sup>6</sup> But a liability shield improperly protects companies that fail to take such reasonable measures, and would deprive victims of the fact-finding tools to ferret out bad actors and seek reasonable compensation for their losses.

We all need grocery stores, food supply chains, medical supply companies, and nursing homes to provide essential services and remain in business. But if grocery stores fail to follow

July 28, 2020

Page 2

reasonable protective measures, such as requiring social distancing, providing protective gear for their employees, and requiring employees to stay home when sick,<sup>7</sup> not only will the employees get sick, but also more customers will get sick,<sup>8</sup> which will result in the overburdening of our health care system, greater loss of life, the inability of the grocery store to be able to provide essential services, and further economic harm.

Nowhere is this clearer than in the meatpacking industry where the failure to follow acceptable practices resulted in numerous plant closures and the deaths of at least 170 workers.<sup>9</sup> A liability shield would gut any incentive these companies have to adequately protect their workforce. A more effective way to keep these plants open and operating is to implement the necessary measures to keep meatpacking plant employees healthy and able to work, such as through an Emergency Temporary Standard created by the Occupational Health and Safety Administration (OSHA), and such steps should be required by Congress.

Another example is provided by medical products companies. We greatly need more testing capacity to detect COVID-19 infections and the presence of antibodies to bring the COVID-19 crisis under control and to assist with the prudent reopening of businesses and our economy. However, there are many tests that make false promises or are of poor quality.<sup>10</sup> It would be counterproductive to ending this health crisis to remove incentives for companies to produce reliable tests. Unreliable tests could lead to individuals with COVID-19 entering the workplace, healthy individuals staying home, or a false-sense of security. They can also obscure the actual extent of the health threat, leading to erroneous policy decisions.

Finally, nursing homes are another example showing that a liability shield would be poor policy. Hundreds of nursing homes have high numbers of COVID-19 infections and fatalities.<sup>11</sup> Many nursing homes have previously been cited for violations of regulations meant to control the spread of infections.<sup>12</sup> Nursing homes may fail to improve their handling of patients if they face no accountability for negligence. Inspectors for the Department and Health and Human Services already found at least nine nursing home's that failed to take appropriate steps to prevent the spread of COVID-19 and put residents in "immediate jeopardy."<sup>13</sup>

Indeed, it is the failure to take reasonable measures to protect employees and the public that has led, and will continue to lead, essential businesses to close<sup>14</sup> and has resulted in further community spread of COVID-19.<sup>15</sup> That is the true threat to business operations and to our safe economic recovery. We strongly oppose any legislation that would immunize businesses that fail to operate in a reasonably safe manner during the COVID-19 pandemic.

Sincerely,



Peter Lurie, M.P.H., M.D.  
President and Executive Director



Laura MacCleery  
Policy Director

## Notes

<sup>1</sup> The Center for Science in the Public Interest is a nonprofit organization that advocates for and educates consumers on issues of food safety, nutrition, transparent advertising, and health. We have been actively engaged during this pandemic, supporting food workers, food security, safe food, and reliable food supply chains, and calling out unproven treatments and opportunistic fraudulent schemes.

<sup>2</sup> Restatement (Second) of Torts, § 281

<sup>3</sup> *Id.* §§ 282, 283, 285, 292, 293, 295A, 296.

<sup>4</sup> There are other significant impediments to bringing a successful tort action. For example, it will be prohibitively difficult for most individuals to prove that they contracted an illness at a specific location and that they would not have caught the illness had the business taken additional precautions. *Id.* §§ 430–431.

<sup>5</sup> Laura Strickler & Adiel Kaplan, *Nursing Home Industry Pushes for Immunity from Lawsuits During Coronavirus Emergency*, NBC News (April 27, 2020), <https://nbcnews.to/2zw4UjF>; Russell Gold & Leslie Scism, *States Aim to Expand Workers' Compensation for Covid-19*, WSJ (April 27, 2020), <https://on.wsj.com/2yWotkP>; *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, Center for Justice and Democracy (June 20, 2019), <https://bit.ly/3f9Em8q>; 42 U.S.C. § 300aa-22.

<sup>6</sup> For example, the CDC and OSHA recently issued joint guidance for meat processing facilities with recommendations on how to control the spread of COVID-19. The Department of Labor and OSHA issued a related statement saying that “courts often consider compliance with OSHA standards and guidance as evidence in an employer’s favor in litigation” and that they would consider supporting a company in litigation that has “demonstrated good faith attempts to comply with the [guidance] and is sued for alleged workplace exposures.” Kate O’Scannlain & Loren Sweatt, *Statement of Enforcement Policy Regarding Meat and Poultry Processing Facilities*, Dep’t of Labor & OSHA (April 28, 2020), <https://bit.ly/2zCgdH6>.

<sup>7</sup> The Families First Coronavirus Response Act only required companies with fewer than 500 employees to provide paid leave, which excludes large grocery chains. CSPI has called on Congress to expand the paid sick leave benefits to employers with over 500 employees. See *National Poll: Grocery Shoppers Want Staff to Wear Masks, Have Access to Paid Sick Leave*, CSPI (April 7, 2020), <https://bit.ly/2Yf4zMz>. According to a national survey commissioned by CSPI, 95 percent of Americans feel sick leave benefits are important or very important for preventing the spread of COVID-19. *Id.*

<sup>8</sup> Anna North, “I did not sign up for the military. I signed up for Walmart,” VOX (April 23, 2020), <https://bit.ly/3bGRQWZ>; Quentin Fottrell, “Your Boss Is Playing God”: My Grocery Store Banned Face Masks for Staff. I Don’t Want to Contract Coronavirus. How Can I Stay Safe?, MarketWatch (April 6, 2020), <https://on.mktw.net/2KIy01H>.

<sup>9</sup> Leah Douglas, *Mapping Covid-19 outbreaks in the food system*, Food & Environment Reporting Network (April 22, 2020, updated July 28, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>

<sup>10</sup> Steve Eder *et al.*, *Antibody Test, Seen as Key to Reopening Country, Does Not Yet Deliver*, NY Times (April 19, 2020), <https://nyti.ms/2VOkEaB>.

<sup>11</sup> Jon Kamp & Anna Wilde Mathews, *Coronavirus Deaths in U.S. Nursing, Long-Term Care Facilities Top 10,000*, WSJ (April 22, 2020), <https://on.wsj.com/3f40FMw>; Debbie Cenziper *et al.*, *Hundreds of Nursing Homes with Cases of Coronavirus Have Violated Federal Infection-Control Rules in Recent Years*, Washington Post (April 17, 2020), <https://wapo.st/3aPCw96>.

<sup>12</sup> Debbie Cenziper *et al.*, *Hundreds of Nursing Homes with Cases of Coronavirus Have Violated Federal Infection-Control Rules in Recent Years*, Washington Post (April 17, 2020).

<sup>13</sup> Charles Ornstein & Topher Sanders, *Nursing Homes Violated Basic Health Standards, Allowing the Coronavirus to Explode*, ProPublica (April 24, 2020), <https://bit.ly/3fcbwEq>.

<sup>14</sup> Taylor Telford & Kimberly Kindy, *As they Rushed To Maintain U.S. Meat Supply, Big Processors Saw Plants Become Covid-19 Hot Spots, Worker Illnesses Spike*, Washington Post (April 25, 2020).

<sup>15</sup> Caitlin Dickerson & Miriam Jordan, *South Dakota Meat Plant Is Now Country’s Biggest Coronavirus Hot Spot*, NY Times (April 15, 2020), <https://nyti.ms/2yNDZjc>.