

Is a Violation of a COVID-19 Order the Basis For Civil Liability?

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Thinking about ignoring your state or local COVID-19 shutdown orders? Think again. Social-distance measures may create a new source of liability for businesses operating during the COVID-19 pandemic. Infection-based litigation is normally limited to businesses operating in the healthcare sector. But, social-distancing measures to stop the spread of infection may expand that litigation to other sectors.

State and local governments across the country are taking extraordinary measures to combat the spread of COVID-19, a novel coronavirus that can cause life-threatening respiratory illness. Those measures encourage and even mandate "social distance" between people to limit physical transmission of the virus.

Hard-hit states like New York, New Jersey, Pennsylvania and California have been aggressive in their responses, shuttering businesses, confining people to their homes, and requiring people to stay six feet apart. Common mandates include: quarantines, business and school closures, stay-home orders, curfews, travel restrictions, occupancy limits and physical-distance mandates, among other things.

Meanwhile, federal agencies, such as the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA), have been issuing extensive guidance on how to mitigate the spread of the virus.

What does this mean for businesses looking to minimize their liability? In many states, violation of a law can constitute "negligence per se." What that means is that the law sets the standard of care, not the jury. To establish negligence, the plaintiff only needs to convince the jury that the defendant violated the law, i.e., the "stay-home" order. This essentially relieves a plaintiff from the burden of having to prove that the defendant failed to act reasonably under the circumstances. The court can adopt a law, such as a "stay-home" order, as the standard of care where the purpose of that law is:

1. to protect a class of persons which includes the one whose interest is invaded, and;
2. to protect the particular interest which is invaded, and;
3. to protect that interest against the kind of harm which has resulted, and;
4. to protect that interest against the particular hazard from which the harm results.

Restatement (Second) of Torts, § 286.

What would a negligence per se case for violating a social-distancing measure look like? Say a yoga studio decides to stay open despite a business closure order. Unfortunately, a number of yogis become seriously ill with COVID-19 at the same time five days later. If the business is in a negligence per se jurisdiction, the plaintiff can rely on the "stay-home" order to prove the case. The business ignored a law that was specifically meant to protect persons from COVID-19, and customers became ill as a result.

If you violate a COVID-19 mandate, does that mean your case will be lost? Not necessarily. Some jurisdictions that recognize negligence per se only allow legislative, as opposed to executive, mandates to define the standard of care. The vast majority of social-distancing mandates have been issued by executives rather than legislatures. And, some jurisdictions also require that the legislature express a clear intent to impose private civil liability as opposed to some other consequence, such as a fine. Finally, not all jurisdictions

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recognize negligence per se. In many states, violation of a law designed to protect against a particular harm is only evidence of negligence, rather than automatic negligence per se.

What about non-infectious disease cases? Say that one of the yogis enters the studio and promptly trips and falls over their own yoga mat. The customer would not have been injured if the business complied with the closure order. Has this turned an easy-to-defend slip-and-fall case into a slam-dunk negligence per se win for a careless customer? Likely not. That is because the type of harm suffered is not the type of harm that is targeted by social-distancing measures.

Most businesses appear to be taking the threat seriously and shifting their practices to protect their fellow citizens. And, because of the nature and current incidence of COVID-19, it may prove difficult to causally link an infection to a particular failure to social distance. There will be obvious issues of contributory and comparative negligence too. Didn't those yogis flout the social-distances mandates too, and when was the last time they washed their hands?

If you have any inquiries in regard to the potential for civil liability arising out of a violation of a government stay-at-home order or other COVID-19 order, contact Robert Devine (deviner@whiteandwilliams.com; 856-317-3647), James Burger (burgerj@whiteandwilliams.com; 856-317-3656) or Douglas Weck (weckd@whiteandwilliams.com; 856.317.3665).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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