

Hearing on
“Examining Liability During the COVID-19 Pandemic”

Questions for the Record for Prof. David Vladeck
Submitted May 19, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. What role would clear, science-based workplace safety requirements issued by expert federal agencies such as the Occupational Health and Safety Administration (OSHA) and Centers for Disease Control and Prevention (CDC) play in protecting businesses from liability?

Answer:

As I noted in my written testimony, every state recognizes that regulatory compliance may be a defense against liability. The strength of the defense, however, depends on the rigor, specificity, scope, and timeliness of the underlying regulation. For instance, compliance with OSHA workplace standards promulgated prior to the advent of the pandemic would not provide a defense to employers who failed to take precautions needed to safeguard workers from the spread of the virus. On the other hand, if OSHA promulgates a workplace standard to protect workers in the meatpacking industry from the virus’s spread, then compliance with that OSHA standard would provide a very strong defense to liability.

CDC guidance differs from OSHA regulations in two ways. One is that CDC guidance documents are recommendations that, unlike OSHA regulations, lack the force of law. The other difference is that CDC guidance has too often been watered down to the point it lacks the specificity and details businesses need to ensure that they are doing precisely what is needed to ensure that workers and consumers are protected from the virus’s spread. Nonetheless, compliance with CDC guidance would be a defense to liability in every jurisdiction; the strength of that defense would depend on the specificity of CDC’s guidance.

2. You testified that the Supreme Court’s modern federalism case law “strongly suggests that immunity legislation, untethered to an ongoing federal regulatory program, could not be justified under the Commerce Clause.” You further explained that you saw no “basis for Commerce Clause jurisdiction to basically wipe away state court standards without substituting some sort of robust federal program instead.”
 - a. Would approval by the federal government of state-issued workplace safety standards, as opposed to the creation of a robust federal regulatory program, cure the Constitutional problems you identified with immunity legislation?

Answer:

The question is an intriguing one, but difficult to answer. There are mechanisms under the Occupational Safety and Health Act for OSHA to approve state regulations that are as strong as, or stronger, than parallel OSHA standards. 29 U.S.C. § 667. And in some cases, states may impose standards based on localized conditions. *Id.* At present, twenty-two states have state plans. *See*

<https://osha.gov/stateplans>. As best as I can tell, the only state-OSHA that has issued Covid-19 guidance is Cal/OSHA. See <https://www.dir.ca.gov/covid19/>. Because OSHA and the twenty-two state-OSHAs regulate worksites, most of the claims that might be made by employees would presumably be funneled to state workers' compensation systems. But assuming, for instance, that a worker had a claim against an employer in California for failing to take adequate precautions to stem the spread of the virus and for some reason that worker was not required to submit the claim to workers' compensation, then the employer would have a robust regulatory compliance claim if the employer adhered to followed Cal/OSHA's regulation.

Notwithstanding OSHA's nominal approval of Cal/OSHA's Covid-19 guidance (I could find nothing that suggested OSHA actually reviewed the guidance), my answer is that federal regulatory approval of a state regulation would not justify wiping away any personal injury claim that the worker had under state law. As I explained in my testimony, the Commerce Clause power may be exercised only when "an activity" "substantially affects" interstate commerce. Even if one could characterize intrastate liability litigation as an "activity" (and that proposition is doubtful), there is no evidence that the trickle of tort cases that have been filed have had any impact whatsoever on interstate commerce.

- b. Would the creation of a federal legal standard of care (for example, gross negligence), as opposed to the creation of a robust federal regulatory program, cure the Constitutional problems you identified with immunity legislation?

Answer:

The creation of a federal standard of care would do little to cure the Constitutional problem with immunity legislation, but might exacerbate it. An immunity bill that purported to wipe away some aspects of state liability rules would at least keep some of state law intact. Substituting a federal standard would force the homogenization of the law and deprive the states of their Tenth Amendment right to set rules regarding liability on their own. Nor would a federal standard of care address the serious Commerce Clause problems I identified in my written testimony. And, as I will explain in response to your next question, the term "gross negligence" is has many meanings, and, in any event, what constitutes "gross negligence" is a question of fact, not law.

One standard definition of "gross negligence" is this: "an act or omission, which is more than ordinary negligence, but less than willful or intentional misconduct. Gross negligence refers to a person's conduct where an act or failure to act creates an unreasonable risk to another because of the person's failure to exercise slight care or diligence." See, e.g., *Steinberg v. Sahara Sam's Oasis, LLC*, 142 A.3d 742, 755 (N.J. 2016). The decision as to whether the conduct was ordinary negligence or gross negligence or worse is ordinarily a decision of fact for a jury, not the judge. Otherwise the 7th Amendment's guarantee that "the right of trial by jury shall be preserved" would be rendered a dead letter.

3. What sorts of conduct would be protected if Congress immunized businesses from all but gross negligence and intentional misconduct?

Answer:

This question is also difficult to answer because, as I have tried to make clear, there is no clear dividing line between the various forms of negligent or tortious conduct, and the decision where the line is to be drawn is ordinarily made, case-by-case, by a jury after trial. After all, the 7th Amendment guarantees that “the right of trial by jury shall be preserved,” and the question as to the severity of the defendant’s conduct is ordinarily one of fact. Even if the facts were undisputed and a judge could determine whether the conduct was negligent or worse—which would be a rare occurrence—the judge could make that determination only after extensive pleading and briefing. For this reason, an immunity bill that drew a line between negligence and gross negligence and intentional misconduct would not immunize businesses from *litigation* at all.

Equally problematic is the fact that in many states the dividing line between negligence and gross negligence is not the magnitude of the harm, but is instead the defendant’s state of mind. Immunizing negligence not only licenses irresponsible behavior, but it does so even when the harm caused may be substantial. Make no mistake—negligent conduct kills, maims and injures. And here, irresponsible conduct will spread the virus, infect the innocent, and lead some to their deaths. Congress ought not to give a green light to the irresponsible; they can kill as easily as the venal.

Full Committee Hearing: Examining Liability During the COVID-19 Pandemic
Questions for the Record
May 13, 2020

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

Professor Vladeck:

The 7th Amendment guarantees all Americans the right to a trial by jury in civil cases.

1. How would providing immunity to employers affect employees' 7th Amendment rights?

The point of conferring immunity on employers would be to wipe away whatever rights employees have, including rights that exist at common law, which are subject to the jury trial guarantee of the 7th Amendment to the United States Constitution. In other words, if the underlying rights are nullified by immunity, the 7th Amendment's guarantee that "the right of trial by jury shall be preserved" would also be rendered a dead letter.

As I discussed in my written testimony, any effort by Congress to eradicate these state-created rights would raise serious constitutional questions. For reasons laid out in my written testimony, I doubt that Congress has the authority under the Commerce Clause to enact immunity legislation, especially in the absence of any evidence that litigation relating to Covid-19 is an "activity," and that "activity" has a "substantial affect" on interstate commerce. Even apart from the Commerce Clause problems, a statute that simply erases state law-rights in an area that historically been the province of the states without providing some *quid pro quo*, would likely violate the Due Process Clause of the 5th Amendment to the Constitution, as well as the Tenth Amendment, which "reserved to the States" all "powers not delegated to the United States by the Constitution."

But the damage to the 7th Amendment would not necessarily stop at actions brought under *state* common and statutory law, especially if Congress's goal is to insulate businesses from *any* legal liability that might be traced to Covid-19. Depending on how an immunity statute was framed, it might also nullify rights conferred on employees by *federal* statutes that guarantee trial by jury, either *explicitly*, *see, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 253-55 (1994) (discussing the 1991 amendments to Title VII of the Civil Rights Act of 1964), or *implicitly* on the ground that the 7th Amendment requires a jury trial in any case that include statutory claims for damages. *See generally Lorillard v. Pons*, 434 U.S. 575, 583-85 (1978) (Age Discrimination in Employment Act); *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974) (noting that the Court has "often found the Seventh Amendment applied to causes of action based on statutes" and providing multiple examples).

I cite these examples because a grant of immunity that covers federal statutes would give employers a license to violate a range of federal statutes designed to protect workers, but

nonetheless justify these otherwise illegal actions based on economic complications caused by Covid-19. Consider two examples. Suppose an employer needs to reduce payroll. Immunity could open the door for the employer to fire older workers, women workers, Black workers, Hispanic workers, and workers with disabilities, notwithstanding federal antidiscrimination laws that forbid employers from taking adverse employment action based on race, gender, disability and age. Without employer immunity, aggrieved workers would be able to sue and have a right to a jury trial, which, as I mentioned, is a powerful disincentive to employers thinking about taking such actions.

As another example, suppose an employer wants to save money by requiring employees to work a 12-hour shift but pay them for only 8 hours of work. Ordinarily, that conduct would violate the federal Fair Labor Standards Act and state law. But once again, broadly framed immunity legislation might block the workers' claims and deprive them not just of their rightful pay, but also of their right to a jury trial.

2. Would the prospect of having to face a jury incentivize employers to provide safe workspaces for their employees?

I have no doubt that the prospect of facing a jury trial would provide considerable incentives to employers to ensure that their employees have safe working conditions. Providing that incentive is the point of liability rules: They protect the reasonable by shielding them from liability, and they punish the irresponsible by ensuring that wrongdoers pay the costs of the harm they inflict on others and by deterring irresponsible actions by others.

In the midst of this pandemic, employers who fail to provide safe workplaces are acting irresponsibly. After all, federal law already imposes the general duty that employers "shall" provide employees a place of employment that is "free from recognized hazards that are causing or likely to cause death or serious physical harm." 29 U.S.C. § 654. State tort and worker protection laws reinforce that general mandate, although many workplace safety claims may be consigned to state workers' compensation authorities. But any employer who fails to act responsibly and take reasonable precautions to safeguard workers from the virus's spread would think twice if there was even a possibility that workers injured or rendered ill from workplace contamination had the right to go to court and have their claims decided by a jury of their peers.

Your question about juries is an important one that should not be overlooked. The right to a jury trial was a key issue during the ratification debates over the adoption of the Constitution. Those who favored ratification had to pledge that the jury trial right would be guaranteed. The 7th Amendment was intended to preserve the democratic roots of the jury trial by ensuring that in the United States juries are, with few exceptions, the deciders of last resort. The 7th Amendment does more than guarantee jury trials, it also provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The point is that the 7th Amendment guarantees

that the American people will help shape the liability rules that they pay for and must abide by.

To be sure, critics of the common-law process often condemn the jury system; they speak of runaway juries and attack the democratic underpinnings of the jury guarantee. That view ignores the history of the 7th Amendment and is based on a mischaracterization of how our judicial system works. Juries have no roving commission to do as they see fit. No case is submitted to a jury unless the presiding judge has concluded that there is adequate proof of liability to justify a verdict in the plaintiffs' favor. And there is always the availability of appellate review. Juries play a pivotal role in our justice system, but there are guardrails to ensure fair outcomes. To attack the jury system is nothing less than an attack on a core guarantee of the Constitution.

David Vladeck
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Questions for the Record
Submitted May 19, 2020

QUESTIONS FROM SENATOR BOOKER

1. You testified that “Congress should refrain from undermining how states choose to protect their citizens, as states have done since our nation’s founding.” Can you explain how the states have been able to address, at a local level, laws designed to cabin legal liability, such that a sweeping federal prohibition is unnecessary?

Answer:

States have broad authority to fashion liability rules as they see fit. Although I haven’t researched what each of the fifty states and the District of Columbia has done in terms of considering whether to accord immunity by legislation, executive action, or other legal means, there are a few examples that illustrate that the States are actively considering whether conferring immunity is appropriate. More generally, I would refer you and your staffs to the website maintained by the National Conference of State Legislatures, which keeps a comprehensive database on state actions relating to Covid-19. (*See* <https://www.ncsl.org>).

Let’s start with state laws that grant “immunity” in one form or another to businesses or employers. As best as I can tell, only two states, North Carolina and Utah, have passed legislation that provides targeted immunity to businesses. Utah (SB 3007) confers immunity against “premises liability”—that is immunity for businesses if anyone were to allege to have contracted Covid-19 on their premises. Similarly, North Carolina (SB 704) has enacted legislation that provides immunity to “essential businesses” if a customer or employee alleges to have contracted on their premises. There are, in addition, immunity bills targeted at certain business sectors pending in many other state legislatures. I am not in a position to forecast whether any of those bills will be enacted into law.

There are also about ten states and the District of Columbia that have issued time-limited executive orders conferring immunity on either individual health care providers or facilities that provide health care, or both. For example, Arizona issued an executive order that confers immunity on both individual providers and facilities that is limited to actions “in support of the State’s public health emergency for COVID-19” and is limited to actions taken within sixty days of the expiration of the order. Arizona’s order, like most state orders, is limited to claims of negligence, and exclude claims for gross negligence and reckless or willful misconduct. Arkansas, New Jersey, New York, North Carolina, Utah, and Washington, D.C., have issued similar orders, although Utah’s order does not expire for claims of exposure to the virus asserted against health care facilities.

In addition to the executive actions already discussed, the legislatures in several other states, including Alabama, Alaska, Louisiana, Michigan, Missouri, North Carolina, Ohio and Oklahoma are considering legislation to immunize individual health care providers or facilities or both.

The point of this summary is simply that states have, are, and will continue to consider whether conferring immunity on the array of businesses, workers, consumers, and others

who have been affected by Covid-19 is warranted based on the conditions in their states. There has never been uniformity in our liability system because states are free to determine for themselves what system works best for their state. There is no reason for Congress to override what the states have done and may do, simply to arrogate to itself decisions that have traditionally been by the states.

There is an additional reason why Congress should be reluctant to simply override decisions made by the states. Liability rules are intimately related to a state's criminal law; after all, claims of gross negligence, recklessness, or willful wrongdoing are all subject to civil liability in every state; but in every state, misconduct that is intentional, reckless, or wanton is also a crime. For this reason, federal efforts to displace state liability rules will collide head on with the longstanding rule that the states, and not the federal government, get to decide on matters relating to a state's police powers. *See, e.g., United States v. Morrison*, 529 U.S. 598, 614-18 (2000); *United States v. Lopez*, 514 U.S. 549, 552-59 (1995).

2. Proponents of liability protection are urging Congress to provide “a safe harbor for companies following CDC or state/local health department guidance . . . so long as the companies' actions do not amount to gross negligence, recklessness, or willful misconduct.” Can you explain why a “gross negligence” standard is not a workable framework to address the type of wrong-doing that harms employees and consumers alike?

Answer:

This is an issue that I touched on briefly in my written testimony, but I appreciate the opportunity the respond is more depth. As my testimony makes clear, the “safe harbor” approach that some have suggested is unworkable because rests of a fiction about the nature of liability rules in the United States. The proposal's unstated but essential foundation is that there are clear lines, apparent from the start, that divide negligent misconduct from gross negligence, recklessness, or willful misconduct. That foundation is a mirage.

In preparing for the hearing, I focused on the liability rules of two states—South Carolina and Texas. I will start with those states, but will, of course, address the liability rules in the great state of New Jersey as well.

The leading case differentiating negligence from gross or reckless negligence in the South Carolina is the Supreme Court's ruling in *Berberich v. Jack*, 709 S.E. 2d 607 (2011). The facts were disputed. Berberich entered into a contract with Jack to work on her home, but a dispute arose about Jack's use of an automatic sprinkler to water her lawn. *Id.* at 609-10. Berberich alleged that he asked Jack to turn the sprinklers off while he was working, but Jack insisted that she control the sprinkler system. *Id.* at 610. At some point, Berberich climbed a ladder to caulk a tall bay window when the sprinklers came on. *Id.* Berberich contended that as he came down the ladder, he slipped on a wet rung, fell to the ground, and was seriously injured. He asked Jack to call for an ambulance but she refused. *Id.* He collapsed, but was able to call an ambulance. *Id.* He sustained a number of serious but not life-threatening injuries. Jack asserts that Berberich did not fall at her house and that she was unaware that an ambulance came to her house. *Id.*

Berberich brought a negligence claim against Jack, alleging that his injuries “were directly and proximately caused by the negligence, willfulness, wantonness and recklessness” of Jack, and asked for actual and punitive damages. *Id.* At trial, Jack asked for punitive

damages, and a jury charge “on the definitions of recklessness, willfulness and wantonness,” which the court rejected. Because South Carolina is a comparative negligence state, he also asked the Judge “to instruct the jury that ordinary negligence is not a defense to a heightened degree of wrongdoing, so that his negligence could not be compared to Jack’s allegedly reckless, willful and wanton conduct.” *Id.* The jury returned a verdict finding Berberich 75% negligent and Jack 25% negligent, leaving no recovery for Berberich.

The case is important, and widely cited, because it addresses what the Court said is the “troublesome question of the distinctions to be made in the degree of negligence.” *Id.* at 612 (citation omitted). The Court began by noting that “negligence is the failure to use due care,” that is, “the degree of care which a person of ordinary prudence would exercise under the same circumstances.” *Id.* (citation omitted). The Court then made clear that “[r]ecklessness implies the doing of a negligent act knowingly,” that is it is a “conscious failure to exercise due care.” *Id.* (citing cases differentiating negligence from recklessness). The Court then observed that “[i]t is well settled ‘that negligence may be so gross as to amount to recklessness, and when it does, it ceases to be mere negligence and assumes very much the nature of willfulness.’” *Id.* (citations omitted).

Having laid out the distinctions between negligence and recklessness, willfulness and wantonness, the Court reversed the trial court’s decision not to charge the jury will each possible violation of law. Although the Court recognized that “recklessness, willfulness and wantonness are technically distinct from ordinary negligence, they are so ‘inextricably connected and interwoven that to the extent that negligence in its broadest sense is often said to encompass the former variety,’” and that the term “negligence embodies all of these ‘kindred concepts.’” *Id.* at 613 (citations omitted).

In Texas, the leading case on gross negligence is *Wal-Mart v. Alexander*, 868 S.W. 2d 322 (Tex. 1993), decided by the Texas Supreme Court, which reaffirmed and clarified the Court’s prior ruling in *Burk Royalty Co. v. Walls*, 616 S.W. 2d 911, 920 (Tex. 1981). *Alexander* is a classic slip and fall case. In early 1989, Sarah Alexander, who was then 77 years old, walked down a concrete ramp connecting the parking lot of Sam’s Wholesale Club (which was owned by Wal-Mart) to the sidewalk in the front of the store and tripped and fell. Wal-Mart leased the facility, but added the ramp at its own expense, apparently for shopping carts. When the accident occurred, there was a “ridge” between the ramp and the parking lot. 868 S.W. 2d at 324. There was no dispute that Wal-Mart was aware of the ridge before the incident; indeed, the store’s manager had stumbled over the ridge before accident, but he did not consider it a safety hazard.

Ms. Alexander sued Wal-Mart for actual and punitive damages (which would not be available absent proof of gross negligence or willful misconduct). After a trial, the jury award Ms. Alexander \$285,000 for actual damages in \$400,000 in punitive damage. The trial court trimmed \$100,000 off Ms. Alexander’s actual damage claim, but left the punitive damage award in place.

On appeal, the key issue was whether there was adequate evidence to support the jury’s finding of gross negligence. The Court began by reciting the “common law definition of gross negligence set forth in *Burk Royalty*”—namely that “Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the believe that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.” *Id.* at 325. The Court pointed out that neither party objected to the jury being charged with this definition, and that

the definition “is unique to Texas, [because it] combines the two recognized tests for gross negligence in American jurisprudence”: “entire want of care” and “conscious indifference.” *Id.* (citations omitted). The Court added that the “‘entire want of care’ test focuses on the objective nature of the defendant’s conduct, distinguishing gross negligence as being different in degree or quantity from ordinary negligence,” while the “‘conscious indifference’ tests focuses on the defendant’s mental state.” *Id.* (citations omitted). Texas, like most states, adheres to the conscious indifferent component. Quoting from *Burk Royalty*, the Court noted that “[w]hat lifts *ordinary* negligence into *gross* negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages. The plaintiff must show that the defendant was consciously, *i.e.*, knowingly, indifferent to his rights, welfare, and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrated that he didn’t care.” *Id.* (citations omitted; emphasis in original).

In Texas, however, showing a conscious indifference is not enough to make out a gross negligence case. Instead, Texas’s test is a “hybrid” that has both an objective and subjective component. *Id.* To satisfy Texas’s “grossly negligent” standard the plaintiff must show that the conduct at issue imposes an objectively higher risk than ordinary negligence—an extreme degree of risk—and that the defendant had a subjective awareness of the extreme risk created by its conduct. *Id.* The Court drove home “no exact line can be drawn between negligence and gross negligence,” and cited a number of cases showing the difficulty of drawing that line. *Id.* (citations omitted). Ultimately, the Court held that “a gross negligence finding may be upheld on appeal if there is some evidence that a) the defendant’s conduct created an extreme risk of harm; and b) the defendant was aware of the extreme risk.” *Id.* Applying this standard, the Court held that the risk Wal-Mart created by leaving the “ridge” intact was not sufficiently extreme to justify the punitive damage award.

In New Jersey, the lead case differentiating negligence from gross negligence is *Steinberg v. Sahara Sam’s Oasis, LLC*, 142 A.3d 742 (N.J. 2016). Steinberg was severely injured when he fell in a ride simulating surfing in a water park. He sued the water park alleging gross negligence; his claim was that the park failed to provide adequate instructions about how to use the ride safely and to provide sufficient and up-to-date warnings about the serious risks of the ride. The lower courts found that a liability waiver Steinberg signed extinguished his right to file a negligence action and that the evidence did not support a claim for gross negligence. *Id.* at 745.

In reversing and remanding for a new trial, the Supreme Court made clear that the “tort of gross negligence falls on a continuum between ordinary negligence and recklessness, a continuum that extends onward to intentional conduct,” and added that “[r]ecklessness, or reckless disregard, lies between gross negligence and intentional harm.” *Id.* at 753-54 (citations omitted). The Court also ruled that the New Jersey Civil Model Charge defining “gross negligence” accurately reflected New Jersey law. *Id.* at 755. That charge reads as follows: “an act or omission, which is more than ordinary negligence, but less than willful or intentional misconduct. Gross negligence refers to a person’s conduct where an act or failure to act creates an unreasonable risk to another because of the person’s failure to exercise slight care or diligence.” *Id.* (citing cases from California, Iowa, Louisiana, and Virginia adopting the same definition of gross negligence). To drive the point home, the Court said that “[t]o be clear, reckless and willful conduct are degrees of civil culpability greater than gross negligence. Reckless conduct is ‘the conscious disregard . . . to a known or obvious risk of harm to another, whereas ‘willful misconduct implies an intention deviation from a clear duty’ owed to another.” *Id.* (citations omitted).

There are two key threads that tie these cases together. First, there is no clear dividing line between negligence, gross negligence, recklessness, wantonness, and intentional conduct. As the *Steinberg* court put it: “negligence, recklessness and willful conduct fall on a spectrum, and the difference between negligence and gross negligence is a matter of degree.” *Id.* Second, the question whether conduct was negligent or worse is ordinarily not one for the court; it cannot be decided based on pleadings or pre-trial. Instead, because of the 7th Amendment’s jury trial guarantee, the decision about the egregiousness of the wrongful conduct—from negligence to wantonness or intentional acts—is for the factfinder, that is, the jury, not a judge. For these reasons, any proposal based on the notion that Congress can enact immunity legislation that effectively differentiates negligence from gross negligence would be misguided and unworkable.

3. We have heard a lot about the harm of potential lawsuits during the COVID-pandemic, but the reality is that we live in a country of more than 300 million people and there have been less than 1,000 COVID-19 related-lawsuits filed thus far, the vast majority of which are not even for personal injury claims. In some instances, workers are forced to file a lawsuit when corporations refuse to enact policies to protect them. Can you name some examples where lawsuits were filed and a company subsequently took corrective action to improve the deficiencies that made the workplace unnecessarily dangerous for its employees?

Answer:

As the question recognizes, although the virus has taken over 100,000 lives and infected over 1.6 million Americans, there have been no more than a handful of Covid-19 personal injury cases. Nor is there likely to be the tsunami of cases that some fear. The unprecedented transmissibility of this virus makes it difficult, if not impossible, to pin down the source of any individual’s contact with the virus. In the absence of hard proof of causation, cases will not be filed and lawyers, who get paid only if they win, will be reticent to even consider these cases.

Given the scarcity of cases brought by individuals harmed by the virus, there are only a handful of cases to draw from, but there have already been cases that have led to important reforms to protect workers. The most clear-cut example is a case brought by workers at the Smithfield Foods plant in Milan, Missouri, alleging that the meat processing giant was failing to take adequate precautions to protect employees from the coronavirus. Although the district court dismissed the case on the ground that the Occupational Safety and Health Administration (“OSHA”) had “primary jurisdiction” and thus was responsible for ensuring the safe operation of the plant, *see Rural Community Workers Alliance and Jane Doe v. Smithfield Foods*, 2020 WL 2145350 (W.D. Mo. May 5, 2020), the litigation forced Smithfield to make significant changes to the plant operations, and put pressure on OSHA to start inspecting meat and poultry plants—something it had failed to do prior to the attention paid to the lawsuit. And the dismissal was “without prejudice,” which means that if OSHA fails to take action to protect Smithfield’s workers, the court remains open to the plaintiffs to renew their lawsuit.