

CORONAVIRUS INFORMATION & UPDATES

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Risk Assessments Need to Account for Public Nuisance Litigation

Communities surrounding colleges and universities have been among the hardest struck by COVID-19 outbreaks this fall.¹ After the University of Georgia welcomed students back for the fall semester, its home county – the state’s smallest – had “the highest two-week total of new cases for any of Georgia’s 159 counties, and one of the highest per capita in the nation.”² The county ultimately saw its COVID-19 deaths more than double in six weeks.³ Researchers have estimated that, nationwide, reopening campuses for in-person instruction “could be associated with more than 3,000 additional cases of COVID-19 per day.”⁴

Attorneys
[Rocky C. Tsai](#)
[Andrew O'Connor](#)
[Jennifer R. Cullinane](#)
[Nathan Guevremont](#)
[Brendan Kearney](#)

In their ongoing COVID-19 risk assessments, school administrators should account for the risk that the potential pool of future litigants may extend beyond their respective student or faculty bodies. Those litigants may include, among others, the cities and states they call home. Plaintiffs have already brought “public nuisance” suits against a range of organizations – from e-commerce employers to fast food franchises – that allegedly contributed to the spread of COVID-19 in the workplace.⁵ The recent litigation over the opioid epidemic illustrates the risk that these public nuisance theories may expand well beyond employment litigation.

Over the past three years, more than 3,000 state and local governments – recruited by contingency fee counsel – have sued the entire prescription opioid medication supply chain, seeking to recover billions of dollars in damages for costs expended to combat opioid abuse, an issue plaintiffs characterized as a national “epidemic” long before the current COVID-19 pandemic. The opioid plaintiffs advanced a novel theory of liability under public nuisance law: Plaintiffs argue that they need not show any one defendant caused any one individual’s addiction (or here, infection); instead, they contend that they need only show that defendants’ conduct, or failure to take adequate measures, contributed in the aggregate to foreseeably increasing rates of opioid abuse (here, infection rates). The menu of monetary relief sought by these plaintiffs included the multi-year funding of the projected costs of “public nuisance abatement” in the form of health care, treatment facilities, and other community services.

The plaintiffs asserting these public nuisance claims were not for the most part individuals seeking recovery for personal injuries, but instead public entities such as municipalities, counties, and hospital districts that incurred costs or lost

¹ Chris Quintana & Mike Stucka, ‘Astonishingly Risky’: COVID-19 Cases at Colleges are Fueling the Nation’s Hottest Outbreaks, USA Today (Sept. 11, 2020, 2:14 PM), <https://www.usatoday.com/story/news/education/2020/09/11/covid-cases-college-us-outbreak-rate-tracker/5759088002/>.

² Michael Stipe, *Athens, Georgia, Was My Home. Its Leaders are Letting Covid-19 Wreak Havoc*, Guardian (Sept. 17, 2020, 7:20 AM), <https://www.theguardian.com/commentisfree/2020/sep/17/coronavirus-georgia-michael-stipe-op-ed-failures>.

³ *Id.*

⁴ Vishwadha Chander, *Colleges Reopenings In-Person Likely Added 3,000 U.S. COVID-19 Cases Per Day: Study*, Reuters (Sept. 22, 2020, 4:13 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-colleges/colleges-reopenings-in-person-likely-added-3000-u-s-covid-19-cases-per-day-study-idUSKCN26D2XJ>.

⁵ Rocky Tsai & Andrew O’Connor et al., *Practical Guidance: Covid-19 Public Nuisance Claims*, Bloomberg Law, <https://www.bloomberglaw.com/product/health/document/X1DMTITG000000> (last visited Oct. 5, 2020).

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revenue because of those individuals. In the COVID-19 context, future public entity plaintiffs may assert analogous claims seeking abatement for alleged aggregate harms. For example, there are already reports that hospitals in hard-struck areas have incurred increased costs associated with taking additional precautions to avoid infection spread, as well as a sharp decline in revenue as more profitable elective procedures are being cancelled en masse.⁶ Similarly, counties and cities have devoted millions of dollars to COVID-19 prevention efforts and suffered untold economic impacts from necessary lockdowns. It is not difficult to imagine potential plaintiffs looking to public nuisance law to recoup those costs.

The scope of such suits may not even be geographically limited to “college towns.” Over the course of time, as students return to their home communities or travel elsewhere, either during regular school breaks or if schools are forced to close as a result of COVID-19 outbreaks, those individuals may carry their infections with them. In the opioid litigation, plaintiffs have repeatedly relied on an expansive theory of aggregate public harm mediated by the alleged “migration” of opioids across jurisdictions via unspecified person-to-person transactions. In the COVID-19 context, future plaintiffs may assert an analogous “migration” theory as a basis for an even wider range of plaintiffs – for example, those located in a neighboring county or state or a hotspot of infections that developed in temporal proximity to a school’s reopening or reclosing – to bring claims against colleges and universities outside their local community.

Finally, in their risk assessments, school administrators should account for the risk that, even in the context of more traditional tort litigation by individuals – whether students, employees, or members of a community – the scope of alleged damages may include a long-term tail. Some reports have indicated that COVID-19 may be associated with lingering cardiovascular, neurological, and other long-term health issues even in individuals who had previously been asymptomatic.⁷ In the past, courts in some jurisdictions have permitted plaintiffs exposed to a toxic substance to bring a claim for medical monitoring damages, even without demonstrating that he or she has a manifest disease, provided the plaintiff can provide evidence of a toxin in his or her body (e.g., through a blood test).⁸ Under this framework, future plaintiffs may include individuals who contend they were exposed to COVID-19 from school-related activities that substantially increased their risk of serious disease, illness, or injury in the future – thus entitling them to medical monitoring.

Any university’s COVID-19 risk assessment should account for the possibility that local and state governments, hospitals, and other community stakeholders may become plaintiffs alleging public nuisance claims against schools that allegedly have inadequately planned for reopening campuses or negligently monitored student activity during the pandemic. To mitigate this risk, colleges and universities should work closely with their counsel to take appropriate measures to reduce potential community exposure, including implementing testing protocols, adopting social distancing policies, and planning forward-looking insurance strategies regarding the multifaceted risks posed by the pandemic. In particular, many universities have carefully negotiated reopening campuses with local governments and state and local health departments, and have sought and followed advice from those governmental authorities in their reopening plans.

⁶ *Hospitals and Health Systems Face Unprecedented Financial Pressures Due to COVID-19*, Am. Hosp. Ass’n (May 2020), <https://www.aha.org/system/files/media/file/2020/05/aha-covid19-financial-impact-0520-FINAL.pdf>.

⁷ *Long-Term Effects of COVID-19*, CDC (Sept. 16, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html>.

⁸ See *Benoit v. Saint-Gobain Performance Plastics Corp.*, 959 F.3d 491, 501 (2d Cir. 2020) (“We conclude that . . . allegations of the physical manifestation of *or clinically demonstrable presence of toxins in the plaintiff’s body* are sufficient to ground a claim for personal injury and that for such a claim, if proven, the plaintiff may be awarded, as consequential damages for such injury, the costs of medical monitoring.” (emphasis added)).

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In turn, many local governments have indicated their goal of having on-campus activities restarted to stanch the economic losses suffered by local businesses. In planning and implementing reopening, academic institutions should consult with state and local authorities, follow their governmental guidance and direction, and create an appropriate record of those consultations as documentation of both ethical conduct and due care by the university.