Nonessential Businesses and Liability Waivers in the Time of COVID-19

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INTRODUCTION

As states are beginning to gradually reopen,[1] nonessential businesses, such as restaurants and gyms, have begun to operate in some states[2] and will soon open in others.[3] Researchers have estimated that partial or full reopening could cause "an additional 15,000 or 73,000 deaths, respectively."[4] Lawsuits are bound to follow.

Employees' on-the-job injuries are likely to be covered by Workers' Compensation schemes. Some state legislatures are even considering expanding employee protection and access to benefits.[5] Proposed measures include protections by placing "a disputable presumption, as specified, that the injury arose out of and in the course of the employment,"[6] and "adding coronavirus-related illnesses or death to the list of on-the-job injuries covered under the

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1. Jasmine C. Lee, Sarah Mervosh, Yurira Avila, Barbara Harvey, Alex Leeds Matthews, Lazaro Gamio, Nadja Popvich, Allison McCann, & John Keefe, *See How All 50 States Are Reopening*, N.Y. TIMES (last visited Aug. 9, 2020), https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html [https://perma.cc/U43L-UG52].

2. Noha Higgins-Dunn & William Feuer, *Texas and Florida gyms reopen with more sanitizer, fewer customers and warnings of new outbreaks*, CNBC (last visited May 23, 2020), https://www.cnbc.com/2020/05/23/coronavirus-texas-and-florida-gyms-reopen-with-more-sanitizer-fewer-customers-and-warnings-of-new-outbreaks.html [https://perma.cc/Z4S4-CVGJ].

3. Sarah Mervosh & Amy Harmon, *All 50 States Are Now Reopening. But at What Cost?*, N.Y. TIMES (May 20, 2020), https://www.nytimes.com/2020/05/20/us/coronavirus-reopening-50-states.html [https://perma.cc/M62R-P7MF] (noting that Georgia has opened many businesses but restaurants are only at 15 percent normal traffic).

4. *Id.* (citing a forecast by the University of Pennsylvania's Penn Wharton Budget Model).

5. S.B. 1159 (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB1159.

6. *Id*.

state's worker's compensation program."[7]

In several states, such as New York, healthcare providers have also become protected from coronavirus related liability.[8] But businesses face potential tort liability from customers, who believe they were exposed to the virus at particular business establishments, and accordingly, those businesses might try to use waivers to protect themselves from such customer claims. Consumers are already familiar with being asked to sign waivers by gyms, ski resorts, and whitewater rafting companies. In the age of COVID-19, however, one can imagine having to sign a waiver before entering school, attending rallies,[9] hair salons,[10] etc. The talk of liability shields has also become part of the Congressional coronavirus relief measures.[11] A proposed bill, while making an exemption for worker compensation schemes, seeks to limit any personal injury lawsuit in which the plaintiff claims exposure to COVID-19 by "businesses, services, activities, or accommodations" except for cases involving gross negligence or willful conduct.[12]

But even before any federal intervention, COVID-19 liability waivers have become pervasive.[13] What would these waivers mean

7. Melody Gutierrez, *California Workplace Safety Rules Are Likely to Change Due to Coronavirus Fears*, L.A. TIMES (July 24, 2020), https://www.latimes.com/california/story/2020-07-24/california-workplace-safety-rules-changes-coronavirus-legislation [https://perma.cc/7AN2-RQY8].

8. S.B. S8835, (N.Y. 2020) https://www.nysenate.gov/legislation/bills/2019/s8835.

9. In June 2020, President Trump's campaign planned an in-person rally in Oklahoma. However, in order to sign up and attend the event, rally goers were asked to sign an online liability waiver not to sue in case of contracting COVID-19. The waiver read in part: "By attending the rally, you and any guests voluntarily assume all risks related to exposure to Covid-19 and agree not to hold Donald J. Trump for President, Inc.; BOK Center; ASM Global; or any of their affiliates, directors, officers, employees, agents, contractors or volunteers liable for any illness or injury." *See* Jenny Gross, *Trump Supporters Must Waive Right to Sue Over Virus to Attend Rally*, N.Y. TIMES (June 11, 2020) https://www.nytimes.com/2020/06/11/us/politics/trump-rally-coronavirus.html [https://perma.cc/WVF4-DRJ3].

10. Suzanne Barlyn & John McCrank, *Sign Here First: U.S. Salons, Gyms, Offices Require Coronavirus Waivers*, REUTERS (June 1, 2020) https://www.reuters.com/article/us-health-coronavirus-disclaimers-busine/sign-here-first-us-salons-gyms-offices-require-coronavirus-waivers-idUSKBN238298 [https://perma.cc/4TXS-P8FQ].

11. Ana Swanson & Alan Rappeport, *Businesses Want Virus Legal Protection. Workers Are Worried.*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/business/economy/coronavirus-liability-shield.html [https://perma.cc/Z4SL-C9F4].

12. SAFE TO WORK Act, S. 4317, 116th Cong. § 122 (2020), https://www.cornyn.senate.gov/sites/default/files/SAFETOWORKAct.pdf.

13. For a sample waiver *see* appendix. Sample wavier form available at

for both consumers and business owners? Liability waivers have routinely been called disfavored by courts. Should they be enforceable with regards to COVID-19 injuries? Or should they be considered void as against public policy, leaving business owners to face liability?

This essay seeks to answer these questions. It briefly examines the ecosystem of liability waivers. By limiting tort liability, waivers limit the protections and compensation provided by tort law. That is why, at least with respect to essential services such as hospitals, waivers of liability are typically declared void as against public policy. By contrast, courts will often enforce waivers employed by nonessential business, such as gyms, leaving users of those facilities unprotected by tort law.

In a forthcoming *Cardozo Law Review* article, I argue that waivers that aim to exculpate business owners from liability for bodily injuries and wrongful deaths not related to inherent risks of the activities should be deemed void as against public policy.[14] Waivers seek to take away the right to sue in court and exclude the ordinary operation of the legal system. In addition, such waivers limit the states regulatory role and interest in protecting and promoting safety through tort law. Hence, I argue for the court's public policy interventions in the limited fashion proposed in my article.

That argument, however, is addressed to normal times. The COVID-19 situation is anything but normal; it is a different beast that mandates a different approach. If courts could be counted on to consistently enforce waivers for all businesses (so long as the waivers are narrowly tailored to cover liability for risks of coronavirus infection), waivers would be appropriate for this situation. Yet, the law on liability waivers is not consistent across the U.S. More realistically, legislatures should grant carefully circumscribed immunities from coronavirus exposure tort liability.

This essay proceeds as follows. It first revisits the uncertain landscape of liability waivers, which in tort law are typically studied under the rubric of the assumption of risk defense. Next, it describes the law of express and implied assumption of risk, and the challenges associated with each. It argues that the traditional approach, which calls for striking down waivers only with respect to "essential" services, is inappropriate for risks related to COVID-19. Instead, it calls on the

https://clandrealty.com/wp-content/uploads/2020/04/Hold_harmless_covid19_Seller_Byer-1.pdf.

14. Zahra Takhshid, *Assumption of Risk in Consumer Contracts and the Distraction of Unconscionability*, CARDOZO L. REV. (forthcoming 2021).

legislatures to address the uncertainty the waivers already carry with them—here with respect to negligently exposing someone to COVID-19. Providing a limited liability shield outside of the employee-employer relationship can allow businesses and services to function without the risk of being sued by patrons for an invisible virus.

The immunity, however, must come with an important caveat: business owners must live up to the rules laid out by officials to provide a safe environment for consumers. If a state determines that providing such safety is not feasible, then it should not be the businesses who would bear the cost. Nor should consumers be expected to participate in the market at risk of exposure in unsafe environments. Instead, partial shutdown for businesses and services that are unable to function under the expected safety conditions is a better alternative to liability waivers.[15] To prevent inconsistent risk coverage across states, it is imperative for the federal legislature to intervene and provide mandatory safety guidelines for businesses to the extent possible.[16] As such shutdowns are essential for the protection of the society, the businesses that are forced to close should be able to receive compensation from the government such as relief packages. Moreover, given the nature of implied assumption of risk, the defense should be conditioned in the context of potential coronavirus litigation to further ensure that businesses adhere to safety requirements.

I. LIABILITY WAIVERS AND ASSUMPTION OF RISK

Liability waivers, also referred to as exculpatory clauses, are contractual agreements in which the would-be plaintiff agrees "in advance of the occasion of her injury to waive the right she would otherwise enjoy of suing the defendant for negligence should the defendant carelessly injure her."[17] In torts and personal injury lawsuits, they arise when the defendant makes the affirmative defense of assumption of risk. Liability waivers function as a form of express assumption

15. For example, after months of reopening, the Mayor of New York City announced in October that the city plans to close nonessential businesses in areas where they have seen rising coronavirus positivity rate. *See* Dana Rubinstein, Daniel E. Slotnik, Eliza Shapiro & Liam Stack, *Fearing 2nd Wave, N.Y.C. Will Adopt Restrictions in Hard-Hit Areas,* N.Y. TIMES (Oct. 4, 2020), https://www.nytimes.com/2020/10/04/nyregion/nyc-covid-shutdown-zip-codes.html [https://perma.cc/R4PF-4DEW].

16. Center for Disease Control and Prevention (CDC) currently provides advisory, non-compulsory guidelines. CDC, *Guidance for Businesses & Employers* (May 6, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html [https://perma.cc/ZV2J-9VCT].

17. JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 185 (2012).

of risk.

A. EXPRESSLY ASSUMING THE RISK: AN OVERVIEW

Negligence law recognizes the defense of express assumption of risk. According to the Restatement (Second) of Torts § 496B, "[w]here such an agreement is freely and fairly made[] between parties who are in an equal bargaining position, and there is no social interest with which they interfere, it will generally be upheld."[18] The social interest caveat has emerged as the public policy defense: if the exculpatory agreement is ruled to be against public policy, then it will not be enforced.

What is a violation of public policy in this context? There is no one-size-fits-all definition. However, many courts[19] have relied on the California Supreme Court's decision in *Tunkl v. Regents of the University of California* to analyze when waivers of liability are in violation of public policy.[20] In that case, a patient—Mr. Tunkl—brought a personal injury lawsuit against a hospital for injuries suffered after a surgery.[21] When the hospital tried to enforce the liability waivers Mr. Tunkl had signed as part of the admission process, the court declared the exculpatory clause void as against public policy.

Justice Tobriner spelled out a six-factor test to determine transactions that involve public interest:

> [1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject

18. RESTATEMENT (SECOND) OF TORTS § 496B cmt. b (AM. LAW INST. 1965).

19. *See, e.g.*, Morgan v. S. Cent. Bell Tel. Co., 466 So. 2d 107, 117 (Ala. 1985); Banfield v. Louis, 589 So. 2d 441, 446 (Fla. Dist. Ct. App. 1991); Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 110 Wash. 2d 845, 852 (Wash. 1988); Kyriazis v. Univ. of W. Virginia, 192 W. Va. 60, 65 (W. Va. 1994); Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977).

20. Tunkl v. Univ. of Cal., 383 P.2d 441 (Cal. 1963).

21. The injuries resulted in the death of Mr. Tunkl halfway through the litigation.

to the risk of carelessness by the seller or his agents.[22]

Although *Tunkl*'s list of factors was presented as nonexclusive, many jurisdictions that have adopted its test or have been influenced by its analysis equate "public interest" with the provision of essential services, as opposed to recreational activities.[23] For recreational activities, plaintiffs will normally be deemed to have expressly assumed the risk incorporated in the boilerplate language of their tickets or contracts of admissions.[24]

Due to the one-sided boilerplate nature of such contracts and admission tickets, plaintiffs frequently invoke the contract law defense of unconscionability to argue that express waivers of tort liability are unconscionable.[25] In *Williams v. Walker-Thomas Furniture Co.*[26] the D.C. Circuit Court defined unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[27] However, the defense is not as successful as one would hope in this context. For courts that prefer to step aside from interfering with private contracts, the high bar required to label one as unconscionable does not fit ski-lift tickets or a private gym membership contract; given that these are non-essential activities,[28] and do not give rise to "oppression" or "unfair surprises" elements a court would be looking for in an unconscionability defense.[29] The unconscionability defense appears to have only pushed more courts into upholding the waivers of liability.[30]

The U.S. seems to be an exception in allowing such waivers of

22. *Tunkl*, 383 P.2d at 446 (stating that the factors are not exclusive and are only to provide a guideline).

23. *See, e.g.*, Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981); Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 924 (Minn. 1982); Reed v. Univ. of N. Dakota, 1999 ND 25, ¶ 26, 589 N.W.2d 880, 887 (N.D. 1999).

24. *See e.g.*, Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 316 (N.J. 2010) (upholding a gym's liability waiver); Slowe v. Pike Creek Court Club, Inc., No. CIV.A. 08C-08-029PLA, 2008 WL 5115035, at *2 (Del. Super. Ct. Dec. 4, 2008); Beaver v. Grand Prix Karting Ass'n, Inc., 246 F.3d 905, 910 (7th Cir. 2001).

25. Defendants try to prepare waivers with clear and unambiguous language to also avoid some of the aspects of an unconscionability defense. In addition to ensuring knowledge of risk, this is another reason why business owners will be motivated to include language that covers COVID-19 exposure risks in their waivers.

26. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

27. *Id.* at 449.

28. *See, e.g.*, Avant v. Cmty. Hosp., 826 N.E.2d 7, 10 (Ind. Ct. App. 2005); *Stelluti*, 203 N.J. at 316.

29. *See, e.g.*, Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1376 (Mass. 1980).

30. For a complete analysis of this argument *see* Takhshid, *supra* note 14.

liability to operate. Many other jurisdictions have by legislation barred the application of exculpatory agreements to claims of negligence for personal injury.[31] By contrast, courts in the U.S. tend to uphold boilerplate waivers of personal injury liability in connection with recreational activities,[32] leaving many extreme bodily injuries, and at times deaths, unredressed. I have elsewhere argued that the essential/non-essential binary is ill-suited to liability waivers that aim to waive liability for bodily injures.[33] Negligence law in the context of bodily injuries and wrongful deaths should be nonwaivable. Only inherent risks of activities are those that should be considered risks "knowingly and willingly" assumed.[34]

B. COVID-19 AND EXPRESS ASSUMPTION OF RISK

Although courts in the U.S. look more favorably on liability waivers, it remains difficult to predict precisely when they will or will not enforce them. Some courts have not adopted the *Tunkl* test and have issued rulings more favorable to plaintiffs, even for injuries arising out of non-essential activities.[35] Moreover, each case has a different story, and even courts that have adopted the *Tunkl* test can come out in favor of plaintiffs. That is what still encourages plaintiffs to file lawsuits. While such pro-plaintiff decisions that redress bodily harms might be applauded in general, what could they mean when a plaintiff wants to argue that she has contacted COVID-19 as a result of the negligence of a gym operator or an Uber driver?

One may argue that making a successful negligence claim will not be easy. Can a plaintiff who has fallen ill with COVID-19 easily prove the breach of duty of a business owner with no precedent for illustrating what it means to be a reasonably prudent person to get rid of an invisible virus from its premises? More challenging will be proving actual and proximate causation. Given the invisible nature of the virus,

31. *See* Unfair Contract Terms Act 1977, c. 50 §2 (1) (UK), https://www.legislation.gov.uk/ukpga/1977/50 (stating that the defense of volenti no longer applies to "death or personal injury resulting from negligence."). For the French legal system, *see* Cour de cassation [Cass.][supreme court for judicial matters] 2e civ., Nov. 4, 2010, Bull. civ. II, No. 176 (Fr.).

32. On criticism of boilerplate contracts, *see generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012); Gregory Klass, *Boilerplate and Party Intent*, 82 L. & CONTEMP. PROBS. 105 (2019); Blake Morant, *Contracts Limiting Liability: A Paradox with Tacit Solutions*,69 TULANE L. REV. 715 (1995).

33. Takhshid, *supra* note 14.

34. *Id.*

35. *See, e.g.*, Dalury v. S-K-I, Ltd., 670 A.2d 795, 799 (Vt. 1995) (finding for plaintiff who was injured as a result of a ski accident).

it seems challenging to prove that, but for defendant's negligence, plaintiff would have been COVID-19 free, unless we have a case involving gross negligence or reckless behavior.

Let us stipulate scenarios where plaintiffs are able to make a successful negligence case. A defendant who has secured a written waiver will then try to invoke it to invoke the express assumption of risk defense. If the waiver is declared void, there is a serious risk in the present economic climate of forcing businesses to close. In essence, this may not be a bad approach to decide whether to continue to shut down businesses to ensure absolute safety. However, in time of crisis when states and the federal government are encouraging businesses to re-open, such calls should be guaranteed with adequate peace of mind, especially for small businesses who are already on the verge of bankruptcy due to the COVID-19 disruption. In other words, it is the responsibility of the government to ensure the safety of citizens when it is both encouraging businesses to open in such dangerous conditions and seeking to benefit from the financial growth the businesses bring about for the states and the society. Should the state, on the other hand, decide instead that it is not safe to reopen, it should make that decision only taking into account all of the consequences of a continued shutdown, one of which is economic setbacks.[36]

It is thus best for the legislatures to address the problem. As long as nonessential businesses have been following necessary safety procedures and guidelines laid out by their local authorities, or possibly the federal government, and have not been reckless or grossly negligent,[37] they should be immune from liability associated with COVID-19 infections. Any employer-employee litigation should also be exempt from this liability shield to ensure full employee protection. Coronavirus has made workplace safety an absolute necessity, but many employees lack the negotiating power to demand that workplaces be kept safe. Only by employees retaining their right to sue employers who fail to meet standards or ordinary care in protecting

36. Economists have also argued that the social cost of falling ill with COVID-19 are greater than its individual costs, making state interventions to ensure and promote safety more apt than reliance on individual careful behavior. *See* Zachary Bethune & Anton Korinek, *COVID-19 Infection Externalities: Trading Off Lives vs. Livelihoods*, CEPR Discussion Paper No. DP14596, https://ssrn.com/abstract=3594218.

37. One example of reckless behavior and negligence per se may be the conduct of a barber who had been giving haircuts for weeks in violation of lockdown orders and later tested positive with COVID-19. *See* Josiah Bates, *A New York Barber Who Defied Orders and Kept Cutting Hair Tests Positive for COVID-19*, TIME (May 16, 2002), https://time.com/5837829/new-york-barber-covid-19/ [https://perma.cc/P3DB-H6G9].

employees from COVID-19 infections will those employers have sufficient incentive to adopt such safeguards.

Such targeted tort reform legislation would not be an anomaly.[38] Many states supplement their common law of torts with statutes that modify that common law.[39] Without commenting on the merits of such regulations, one vivid example is the Communication Decency Act § 230(c) that removed some of the tort liability for internet service providers to avoid the chilling effect lawsuits may have on them. [40] Of course, as time has passed, the new ecosystem of internet mandates a revision of the text.[41] The COVID-19 immunity legislation can also be limited to the duration of the public health crisis.

II. IMPLICITLY ASSUMING THE RISK

Unlike express assumption of risk, which is typically in the form of a writing, implied assumption of risk refers to circumstances under which "one can infer from a particular plaintiff's conduct that she has made a certain kind of informed choice, such that she now loses her right to complain about a danger that has been realized in the form of an injury to her."[42] This defense, which can prevent plaintiff from recovering any compensation, was largely abolished first by the rise of workers' compensation statutes in employer-employee contexts and later with a wave of comparative fault statutes.[43]

38. Aysha Bagchi, *Getting the Law of Wrongs Right: John Goldberg on Reforming How We Think About Tort Law, Including in the Age of COVID-19* (Apr. 7, 2020), https://today.law.harvard.edu/getting-the-law-of-wrongs-right/ [https://perma.cc/K2SW-49LB] (transcribing an interview between the author and John C. P. Goldberg, a professor at Harvard Law School).

39. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Mark A. Geistfeld, *Tort Law in the Age of Statutes,* 99 IOWA L. REV. 957 (2014).

40. 47 U.S.C. § 230(c)(2) (2018).

41. *See generally* Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 208 (2018) ("The CDA immunity doctrine, born over two decades ago, is at odds with the world as it is today. Internet intermediaries are structuring online content, conduct, and the entire networked environment in ways that the current doctrine does not contemplate. The consequences of this failing are troubling and require reform."); Benjamin C. Zipursky, *The Monsanto Lecture: Online Defamation, Legal Concepts, and The Good Samaritan*, 51 VAL. U. L. REV. 1 (2016) (calling for a closer look at tort law principles in libel law—specifically the republication rule—in regulating speech and interpreting 230(c) that would not result in total immunity).

42. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 450 (4th ed. 2016).

43. Some states also abolished the implied assumption of risk through judicial decisions. *See, e.g.*, Perez v. McConkey, 872 S.W.2d 897, 905 (Tenn. 1994); Churchill v. Pearl River Basin Dev. Dist., 757 So. 2d 940, 943 (Miss. 1999); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Wilson v. Gordon, 345 A.2d 398, 402 (Me. 1976).

However, the defense is still alive in many states in recreational activity settings.[44] California's high court reinforced a binary primary-secondary implied assumption of risk defense in *Li v. Yellow Cab Co.* and modified later in *Knight v. Jewett*.[45] Primary assumption of risk was exemplified by the court in those risks inherent in sports in which the defendant has no duty towards the plaintiff.[46] And secondary implied assumption of risk as "those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty."[47]

How can implied assumption of risk be part of the COVID-19 liability discussion? Unlike the express assumption of risk, which can put businesses at risk of bankruptcy, relying on implied assumption of risk for exposure to COVID-19 could create a dangerous environment in which businesses, assuming immunity from liability for negligence, feel no obligation to adhere to safety measures such as social distancing or disinfecting equipment. Thinking that any outside activity means implicitly assuming the risk of exposure can put customers at grave risk. Therefore, it is necessary for the legislature to make sure implied assumption of risk, especially in recreational activities, is not a valid defense for business owners who do not abide by safety measures.[48]

44. One court described the current situation of implied assumption of risk doctrine in courts as the following: "Borrowing Justice Antonin Scalia's memorable phrase concerning a similarly limited but resurgent doctrine in another area of law, assumption of the risk survives '[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.'" Barillari v. Ski Shawnee, Inc., 986 F. Supp. 2d 555, 562 (M.D. Pa. 2013) (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993)).

45. *See* Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

46. *Jewett*, 834 at 703.

47. *Id*.

48. This article is concerned with business activities. Other activities, such as attending a birthday party, a wedding, or a campaign rally, will continue to be activities with high risk of exposure until a vaccine is available. Therefore, any activity outside of a business transaction is a matter of individual choice and individuals should continue to be vigilant of implicitly assuming the risk of exposure to COVID-19 by participation. And should the host provide the attendees with an express liability waiver, the validity of the waiver will continue to depend on the related tort law theories without a legislative intervention. On why, in general, waivers that seek to waive liability for personal injuries and wrongful deaths should be void as against public policy *see* Takhshid, *supra* note 14.

CONCLUSION

As businesses have begun to reopen, governments should anticipate a possible wave of COVID-19 related personal injury lawsuits. To address the challenge and its likely economic impact, legislatures should provide limited immunity for nonessential businesses to remove the need for liability waivers, while enacting clear safety guidelines for business owners to ensure consumer safety. This way, consumers can also rest assured that their favorite restaurant is taking the necessary precautionary steps in mitigating the risks of exposure. Any such immunity should not extend to gross negligence and reckless behavior. Beyond that, one is assuming the new normalcy: the reasonable risk of exposure to an invisible virus that can be fatal.