Responses of Larry Leroy "Lee" Tyner, Jr.

To Questions for the Record

From Senator Grassley

Senate Judiciary Committee hearing on "Examining Liability During the COVID-19 Pandemic"

Questions to Mr. Tyner

- [1] As with any issue, Congress needs to strike the proper balance when examining liability around COVID-19. If Congress and states are drawing certain lines to protect businesses from limitless liability, how do we also protect those who've been exposed to COVID-19 by a business or employer that was *clearly* reckless? In other words, how do we protect *legitimate* claims against *truly* bad actors? Are any states doing a particularly good job of striking this balance? If so, how?

Response:

I am not the right person to testify about comparisons between state law tort systems. But I can speak more broadly to this question. The common law and many statutory schemes distinguish reckless or willful conduct (often referred to as gross negligence) from simple negligence. Certainly there are gray areas, but our courts have a great deal of experience at defining which behaviors cross these lines. Using familiar standards like gross negligence would allow our court systems to hold truly bad actors accountable.

The challenge with applying simple negligence (the reasonable person standard) to impose liability in the context of the COVID-10 pandemic is that there is no playbook for how to return to campus. This is complicated by the number of things we have to do to operate a residential campus. Not only are there unlikely to be timely federal, state, and local governmental standards to follow across the vast operations of a higher education institution, but there will not even be widely accepted "best practices." We have never faced this present challenge. Thousands of colleges are crafting plans for reopening that do not have the benefit of iterations from prior years or from the experiences and shared learnings of others. And what we thought we knew about the virus a few weeks ago is changing.

With no clear standards or accepted best practices, we do not know how the negligence standard might be applied in two or three or four years to second-guess the hundreds of decisions colleges and universities must make to re-open as a residential community. This uncertainty is having a chilling effect on university decisions, and the litigation that will result will place an additional strain on institutions pushed to their fiscal limits by the pandemic and its fallout.

Another challenge is how difficult it is for colleges and universities to control the behavior of our students and campus visitors. This is where we are more like a small cities, with public, outdoor spaces, campus greens and quads, and miles of sidewalks and streets or drives. Many campuses are "open," meaning that they are not bounded by fences with controlled access to the campus. To what extent can universities, any more than a host community, mandate and enforce wearing masks or social distancing on campus? What about the students who live and/or socialize off campus? The primary public health interventions to prevent the spread of COVID-19 depend on individual behaviors, and universities are no better at controlling those behaviors than municipal governments.

Consequently, colleges and universities are in the position of having to make scores of time-sensitive decisions – with potentially far-reaching implications – about reopening when guidance and standards are constantly evolving and also vary (and sometimes conflict) from place to place and when they cannot guarantee that even their best efforts will prevent COVID-19 transmission. Accordingly, there needs to be a federal safe harbor that assures colleges and universities that if they in good faith follow applicable public health orders, they will not be subject to after-the-fact, speculative lawsuits related to COVID-19 exposure.

I trust that our federal and states' judicial systems have sufficient experience to distinguish between bad actors and good actors. But the courts need the support of the legislative branch – the voice of reasoned public policy – to ensure they have the authority to make that determination, and act accordingly, in a way that recognizes that entities should not be penalized for COVID-19 exposure absent decision-making or conduct that is akin to gross negligence.

Although they have yet to be tested, Congress should look at the new laws passed in North Carolina and Utah that limit liability for COVID-19 exposure. But I also urge that Congress not view these as a substitute for national legislation, insofar as a patchwork of state laws provides scant assurance to universities, which draw students, employees, and visitors from around the country and the world. Many state legislatures are not in session and cannot provide the relief needed in time for the fall classes or the decisions colleges must make now to re-open in August. This is a national problem requiring a national solution.

- [2] Some unethical trial lawyers file bogus lawsuits—or simply send vague demand letters to small businesses—without the intention of ever pleading their claim before a judge or jury. Instead, they just want a quick payment from their target. Are you concerned about *frivolous* litigation and demand letters related to COVID-19? Should Congress do a better job of deterring these shakedowns, and if so, how?

Response:

Yes, we are certainly concerned about meritless COVID-19 lawsuits that seek to use the uncertainty around the standard of care and the certainty of litigation costs to leverage a quick pay-out rather than vindicate the rights of those who have been wronged by bad actors. But we're not taking a position on tort reform writ large. Rather, we are asking Congress to create a timely, targeted, and temporary safe harbor for COVID-19 exposure liability that allows the threat of speculative litigation in the context of the uncertainty related to COVID-19 exposure. One bill-drafting option, though certainly not the only one, is to require heightened pleading of facts in a complaint seeking redress for COVID-19 exposure, with swift dismissal of the claim being the result if a complaint fails to state its claim in sufficient factual detail. Another would be to create a safe harbor, and affirmative defense that would shield a university from liability for simple negligence if the university followed applicable local and state public health orders.

- [3] In 2005, Congress achieved reforms to the class action litigation system, which help ensure compensation for *real* victims, instead of lining the pockets of lawyers. Are you concerned that COVID-19 will unleash a wave of new, tenuous class action cases? And are there specific reforms Congress should consider with regard to class actions?

Response:

We appreciate Congress' efforts to ensure fairness in the class action litigation system. And while we anticipate that the COVID-19 pandemic will inspire some predatory litigation, we also expect that there are

likely to be bad actors whose actions could result in injury to their employees and patrons. We believe that Congress could do a great service by enacting legislation that provides protections for good actors but does not allow bad actors to shirk responsibility for grossly or willfully negligent behaviors. Heightened pleading standards and/or an affirmative defense, such as what I described in my answer to the previous question, can be helpful in this regard.

In addition, I note that class action litigation appears to be ill-suited for addressing COVID-19 exposure issues on a college campus. There are hundreds, and perhaps thousands, of decisions and actions that may be made on a single college campus, differently impacting perhaps tens of thousands of the institutions' students, faculty, staff and visitors – each having their own chronology of movement and interaction among people on campus and off, as well as their own levels of attentiveness to shared responsibility for abiding by community norms to minimize COVID-19 spread. This presents particular challenges for certifying a class, in addition to the facts that the virus can be transmitted easily, and yet it is difficult to pinpoint the locus of transmission. Congress should keep this in mind if it undertakes to dissuade speculative class action lawsuits.

Thank you for your questions. I would be happy to speak with you further at your convenience and provide any assistance I can.

Responses of Larry Leroy "Lee" Tyner, Jr.

To Questions for the Record

From Senator Ernst

Senate Judiciary Committee hearing on "Examining Liability During the COVID-19 Pandemic"

Question for Mr. Tyner:

- Iowa State University, the University of Northern Iowa, and the University of Iowa have been closed for in-person classes just like TCU. These universities want to open in-person during the fall semester but they need to know what standard of care they have to apply and what liability issues they will encounter as both employer and educator. How would a federal preemption to these types of suits help Universities know what steps they need to take to reopen in-person?

Response:

As they sensibly and safely move to reopen, colleges and universities certainly should and will make good faith efforts to comply with applicable local, state, and federal public health standards. The problem is that colleges and universities, like others, are confronted with a variety of advice and guidelines offered by well-meaning sources as they contemplate whether and how to safely reopen this fall. So America's colleges and universities are essentially being left to decide for themselves what to do, and are thus exposed to the prospect of endless second-guessing.

So, as I noted in my testimony, the more than 4,000 colleges and universities in the U.S. – which generate about $650 billion in economic impact – are currently facing a "cliff problem." We all want to safely resume our educational, research, medical service, cultural, athletics, and economic development activities as soon as possible. However, until and unless institutions know what standard of care to follow and the attendant legal liabilities we may encounter, they will be hesitant to approach that reopening "cliff."

Without some clarity on the standards of care, we need temporary, limited liability protections for colleges and universities, to encourage them to act upon their good faith, reasoned decision-making to reopen their campuses, and in turn, America. They face enormous transactional costs associated with defending against speculative legal claims around alleged COVID-19 issues, even when they have done everything within their power to keep students, employees, and visitors safe. In addition, these coronavirus-related litigation costs will almost certainly contribute to the permanent closure of institutions that otherwise would have continued to operate as educators and employers. School closures can be devastating for students (our future workforce), employees (our current workforce), and the surrounding communities that rely economically on those institutions.

It's important to emphasize, too, that the unprecedented nature of the COVID-19 pandemic poses unique challenges for colleges and universities. Unlike most traditional businesses, we must consider the best way to address safety concerns across *multiple* operational settings with practical limits on an institution's ability to monitor and control community members' individual choices and compliance with shared expectations and obligations towards each other.

Accordingly, I urge Congress to create an immediate and temporary safe harbor from COVID-19 exposure liability that will permit colleges and universities that in good faith follow applicable public health guidance and that are otherwise acting sensibly and carefully, to begin to reopen. I want to be clear: we are not seeking to avoid responsibility or to immunize colleges and universities for their own or others' bad acts. The safe harbor should not shield gross negligence or willful misconduct. Bad actors also will be held to account by states and municipalities using police and regulatory powers. For employees, the workers compensation system also provides additional important protections. But, as you correctly state, colleges and universities are in urgent need of certainty around the standard of care *and* the legal liability they face regarding COVID-19 exposure claims.

COVID-19 is a national problem requiring a national solution. Colleges and universities draw individuals from all over the country (and the world) and could face potential personal injury liability in every state. We appreciate that some governors and state legislatures have taken steps to create liability safe harbors in their own states – and we hope that any federal law does not preempt state laws that provide *more expansive* safe harbors. Unfortunately a patchwork of state executive orders and laws gives us scant assurance as we try to make critical reopening decisions in the coming months. Many state legislatures are not in session and cannot provide the relief needed in time for the fall classes or the decisions colleges must make now to re-open in August.

Although tort law is primarily a state matter, it is well-established that Congress can use its power to regulate interstate commerce to promulgate regulatory schemes that temporarily replace current federal and state statutory and common law liabilities for COVID-19. For example, as this recent opinion piece from *The Wall Street Journal* explains, "[f]ederal law has provided tort liability protections to firearms makers and for nuclear power. Congress also enacted laws to limit liabilities arising out of Y2K – like Covid-19, a specific event that was thought to have potentially calamitous economic consequences."[1]

Thank you for your question. I would be happy to speak with you further at your convenience and provide any assistance I can.

[1] Luttig, J. Michael and David B. Rivkin, Jr., "Lawsuits Needn't Block Recovery," *The Wall Street Journal*, May 20, 2020, https://www.wsj.com/articles/lawsuits-neednt-block-recovery-11589993211.