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Testimony from:

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In response to HB 7 and SB 72, related to “Civil Liability for Damages Relating to COVID-19”

January 14, 2021

Chairman and members of the committee,

My name is Marc Hyden, and I am the director of state government affairs for the R Street Institute, which is a nonprofit, nonpartisan, public policy research organization. Our mission is to engage in policy research and outreach to promote free markets and limited, effective government. While our work covers areas ranging from public health to cybersecurity, we began as a think tank dealing with issues of risk, risk transfer and insurance. That is why HB 7 and SB 72 are of special interest to us.

The United States is still in the grip of a debilitating pandemic that has led to the deaths of nearly 400,000 Americans—over 23,000 of which have occurred here in Florida.¹ While the impact on human life is of primary concern, there have been many other bitter consequences from the pandemic and the pandemic-related restrictions. In fact, they effectively derailed an American economy that was reaching record levels. Unemployment has gone up, pay has gone down and public debt has increased.

Even though Florida re-opened its economy sooner than many other states, businesses are still struggling and the economic recovery is tenuous at best. Matters could turn worse. Private businesses could become further hamstrung by COVID-19-related frivolous lawsuits—exacerbating the already difficult economic environment.

As it stands, Florida businesses are exposed to COVID-19 liability lawsuits. For instance, if someone contracts COVID-19 and suspects that they were exposed to it at a specific store, then they can sue for damages. This would initiate a long, expensive series of legal proceedings. The nature of this threat is unique. After all, the virus is highly contagious and can survive in a wide range of settings, which means that we should be clear that conventional standards of liability might not apply.

But the impacts on business and commerce are not the only reason why we should worry: the prospect of massive, out-of-control tort litigation poses a danger to public health. A bad tort system could make one of the most potent techniques against the virus—contact tracing—nearly unusable for this pandemic and those in the future. Nearly all public health experts believe that letting people know if,

¹ Coronavirus in the U.S.: Latest Map and Case Count, *New York Times*, Jan. 12, 2021.

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

when and where they might have been exposed to the virus is a key to dealing with the pandemic.² This, in turn, relies on providing timely, accurate information to people who have been exposed to the virus. And excessive tort liability can make this impossible. As scholars Daniel Hemel and Daniel B. Rodriguez write in the *Journal of Law and Biosciences*:

[I]magine that a barber tests positive for COVID-19 a day after she cut several clients' hair. Ideally, the barbershop owner would reach out to the positive barber's recent clients and alert them of a potential coronavirus exposure, thus allowing them to self-isolate and seek testing themselves. With fears of liability looming large though, the owner of the barbershop might balk at this step, worried that those telephone calls and emails to customers could be invitations for lawsuits. After all, if the barber and the barbershop owner stay mum, customers who frequent the shop only once every two months might never learn about the site of their exposure (and thus, might never sue). The course that the barbershop might take in order to shield itself from liability is exactly the opposite of what, from a public health perspective, society should want it to follow.³

The proposal these two scholars make—a general liability shield for businesses that inform customers—is a good idea, but if the business acts with gross negligence, they should absolutely be held accountable. What we must avoid is punishing businesses that take proper and prudent actions and follow public health guidelines. Unfortunately, however, the mere risk of tort liability is enough to cause problems: the high costs of legal defense and protracted timeframes of court hearings will almost certainly result in some businesses paying out settlements even though they did nothing wrong.

For the largest employers, this may simply reduce their ability to pay employees, return profits to shareholders or invest in their futures. For small businesses, however, a single \$10,000 settlement can result in closure and loss of jobs. And it is bad for public health anyway. If Florida follows many other states' leads, this does not have to be the case. No less than 16 other states provide some form of COVID-19 liability protections.⁴ Florida should do the same.

In fact, the R Street Institute supports the concept of extending COVID-19 liability protections to businesses that adhere to public health regulations and act in good faith. As is outlined in HB 7 and SB 72, we believe that plaintiffs should have to prove first that companies failed to comply with public health guidelines in order to have standing. If they cannot demonstrate this, the presiding judge ought to dismiss the case and save innocent businesses the financial heartache of funding a protracted legal defense.

The bottom line is that companies should not be held liable when they have followed best practices for issues that are out of their control—like contracting COVID-19. As such, Florida should give special

² Matt J Keeling, et al. "Efficacy of contact tracing for the containment of the 2019 novel coronavirus (COVID-19)." *Journal of Epidemiology and Community Health*. October 2020; 74(10): 861–866
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7307459/>

³ Daniel Hemel and Daniel B. Rodriguez. "A public health framework for COVID-19 business liability," *Journal of Law and the Biosciences*, Volume 7, Issue 1, January-June 2020, Isaa074,
<https://doi.org/10.1093/jlb/Isaa074>

⁴ David Sparkman, States Forge COVID-19 Liability Shields, *EHS Today*, Dec. 3, 2020.
<https://www.ehstoday.com/covid19/article/21149476/states-forge-covid19-liability-shields>

consideration to COVID-19 liability protection legislation and examine these bills as well as other potential ways to reduce liability and improve public health.

Respectfully submitted,

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