THE OHIO COUNCIL OF
Retail Merchants
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TESTIMONY REGARDING SUBSTITUTE HOUSE BILL 606

Before the House Civil Justice Committee

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May 19, 2020

Good afternoon Chairman Hambley, Vice Chairman Patton, Ranking Member Brown and members of the House Civil Justice Committee. My name is Eve Stratton. I am an attorney with the law firm Vorys, Sater, Seymour and Pease LLP. I also serve as a board member of the Ohio Council of Retail Merchants, and am testifying today on the Council's behalf. The Council appreciates the opportunity to address the Committee on Substitute House Bill 606.

Council Represents Retail and Wholesale Interests

The Council has been serving the interests of Ohio's retail and wholesale industries since 1922 and has over 7,000 members. Unquestionably, the retail industry is vitally important to Ohio's economy. Last year, the retail industry accounted for approximately $39.2 billion of Ohio's annual Gross Domestic Product and supported 1.5 million jobs, which is roughly one in four of all Ohio jobs – more than any other industry.

Retail Has Been Hardest Hit by the Pandemic

Because of the COVID-19 pandemic, all non-essential businesses in the State were closed by Executive Order since late March. More than 1.1 million Ohioans are

now unemployed and unquestionably, it is Ohio's retail industry that has borne the economic brunt of the pandemic and the State's response. Small, medium, and large retailers have been forced to close and, as a result, have furloughed or laid off tens of thousands of employees. Customers have been unable to shop for anything but "essential" goods. The uncertainty surrounding the continued spread and economic fallout from COVID-19 and ongoing concerns about health and safety mean that customers may not soon be returning to retail stores even as the stores and businesses now reopen.

Importance of Liability Protection

The retail industry needs some measure of certainty in order to function effectively and efficiently and to say that we are sailing in uncharted waters – and likely will be for some time – is an understatement. Many are facing serious financial loses and bankruptcies have already started, both large retailers and small. The wave of lawsuits has also started, with over 1,000 already filed across the country. One lawsuit, even if it does not have merit, may be enough to tip the balance to final closure of a business. That is why Substitute House Bill 606 is so important to retailers, as well as to other businesses and service providers.

Substitute House Bill 606

Substitute House Bill 606 provides an anchor of certainty as retailers and businesses navigate between the difficult balance of facing financial ruin by remaining closed and the reality of lawsuits and claims of liability premised on vague or unknown "standards of care" when (if) they reopen. The sub bill provides protection against suits by anyone who has been affected by the transmission of the COVID-19 virus. That is

critically important.

Balancing Protection for Service Providers and Protection of the Public

The protection for retailers and other businesses and service providers afforded by Substitute House Bill 606 is not absolute. Rather, the bill strikes a balance between protecting businesses and protecting the public.

1) Actions that are Reckless, Malicious, or Wanton Are Not Protected

The bill does not protect against the conduct of the actor if its acts are manifestly outside the scope of its responsibilities, malicious, in bad faith, or done in a wanton or reckless manner.

2) Recklessness and Bad Faith Are Difficult Standards by Which to Measure Conduct, as is Whether Conduct is Manifestly Outside the Scope

Recklessness is a legal concept developed over decades and pertains to the society standard of care that is expected. Large bodies of law exist over litigation as to what is "reckless."

With COVID-19, what are "substantial and unjustifiable risks" that cause a retailer to be reckless? Nobody knows. The issue will likely be whether the retailer took all reasonable measures to prevent the spread and transmission of the virus.

As Ohio is reopening and restarting, retailers have many questions about what to do and what standards to comply with. For example, will a retailer be found reckless if a customer contracts – or claims to have contracted – COVID-19 after visiting the store? What if the retailer followed all of the state requirements and recommendations? What if it followed only some of the recommendations? Does it matter which of the recommendations were followed or how closely? What if the retailer doesn't prohibit a

customer who is coughing from entering the store and then another customer contracts (or claims to have contracted) COVID-19? How will a retailer know if it is acting in "bad faith" by opening its doors and not requiring shoppers to wear masks? Is a business acting "manifestly outside" its responsibilities if it produced PPE (perhaps in response to or even at the invitation of the State) when it has never produced PPE before?

It is not difficult to foresee lawsuits asking these questions and claiming that the retailer had a "duty of care" or ignored "unjustifiable risks" – all of which hinges on what a retailer knew or should have known and whether its actions were sufficient to prevent the virus's transmission to others. Nor is it difficult to foresee lawsuits seeking to place a business's activities beyond the scope of its responsibilities – and how will the business's responsibilities be defined?

Standards in Ohio law are based on the long development of societal norms and expectations. In the brave new world wrought by the COVID-19 pandemic, there are no norms or expectations against which to measure whether a retailer has been reckless or acted in bad faith. The State's orders and recommendations have changed and evolved on a monthly, and then weekly, and now sometimes, a daily basis. At first, the general public did not need to wear masks. Then it became customers would be required to wear masks when shopping, but now it's a "recommendation." Even the "science" and predictions over the virus and its spread change daily.

Changing science, shifting governmental orders, the lack of equipment and other issues means that what is expected of retailers (and what is expected of the rest of us when we visit a retailer) is unclear. Until these matters settle and standards of conduct emerge and solidify, retailers and other businesses and service providers need more

certainty. That shifting standard can be assisted if the ever-changing orders and recommendations are not allowed as the basis for creating duties by which to measure conduct for civil liability.

Orders Should Not Create a New Duty as a Basis for Liability

A recently filed wrongful death suit against a meat packing plant cited the CDC guidelines as its basis for imposing liability on the business. The language added in the sub bill as to what is not allowed as evidence of a duty provides better clarity for the reckless and bad faith standards. Liability is basically premised upon a duty to act. Expressly stating that a government order – like the Governor's executive orders, the State Director of Health's orders, and similar orders of local health agencies and federal agencies and officials – does not create a duty of care remains a great area of uncertainty. If the duty to act based on those orders is removed, then the basis for civil liability is also removed.

Further, the orders should not create a substantive legal right against a person. This is crucial because it is probable that lawsuits will look to hold a retailer or others liable for failing to abide by not just the "requirements" the order sets forth, but the recommendations as well, and no case law yet holds a business, store, or premises liable for lawsuits for contracting a virus-type illness on the premises.

This would not affect criminal or regulatory penalties that exist in the law or orders. Those protections will still exist to ensure compliance and enforcement. But it should be left to the government entities to regulate, not lawsuits creating "regulation by litigation" as a civil cause of action premised on wide-sweeping, unprecedented, and constantly changing (even nationally and state-by-state) actions taken by the

government to stop the spread of the virus. These orders should not become fodder for creating wide-spread duties as the basis for civil claims in the uncharted waters of civil liability coming out of the pandemic.

Once the legislature through its lawmaking process creates rules and standards of conduct, perhaps even based on some of the prior orders or recommendations, regarding coronavirus issues, then clear standards that can form the basis for civil liability can be established. Because there is no case law or statutes that have yet defined these coronavirus orders or recommendations to be the law, there is no existing right or expectation yet created that would prevent the retroactive application of this bill.

Concluding Comments

Uncertainty of the law is a very difficult landscape in which to operate our businesses. We have been successful as a country because we have a solid and predictable legal system. To allow the wild west of lawsuits to add yet another obstacle to successful recovery would be a huge stumbling block to those efforts. Like the uncertainty caused by COVID-19, retailers seek to avoid the legal uncertainty that surrounds reopening their stores, their shops, their markets, and their myriad other businesses. Substitute House Bill 606 provides much-needed certainty about what standard of care retailers (and other service providers) would have during the COVID-19 pandemic.

Members of the Committee, this concludes my prepared remarks. The Council appreciates your time and attention to Substitute House Bill 606. On behalf of the Council, I would be happy to answer any of your questions.