

THE OHIO COUNCIL OF

*Retail Merchants*

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**TESTIMONY REGARDING SENATE BILL 308**

**Before the Senate Judiciary Committee**

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Good afternoon Chairman Eklund, Vice Chairman Manning, Ranking Minority Member Thomas, and members of the Senate Judiciary 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 Senate Bill 308

**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**

But 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, means that customers may not soon be returning to retail stores even when the stores 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 losses and bankruptcies have already started, both for large retailers and small. The wave of lawsuits has also started. One lawsuit, even if it does not have merit, may be enough to tip the balance to final closure for a business. That is why Senate Bill 308 is so important to retailers (as well as to other service providers).

### **Senate Bill 308**

Senate Bill 308 provides an anchor of certainty as retailers 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. Quite simply, Senate Bill 308 provides certainty for retailers (and other "service providers" as defined in the bill) that what they do or don't do in response to a disaster declaration will not be second-guessed by lawyers.

#### **1) Protections from disaster response**

First, the bill provides a limited liability to damages that result from a retailer's conduct that are in response to a disaster or that are intended to assist persons to recover

from a disaster. This is broadly defined to account for myriad, and sometimes rapidly changing, activities that service providers have taken in response to COVID-19. These protections are necessary to give these industries a chance to recover without fear of multiple lawsuits closing them again.

## **2) Contribution and indemnity protection for secondary liability**

Second, this limited liability also applies to actions for contribution and indemnification. For example, a customer claims he contracted COVID-19 while shopping in a store and sues the store owner. Senate Bill 308 provides that store owner with limited liability. Looking for a deep pocket, the customer may also sue the property owner (maybe the mall operator) at the same time. The store owner also could sue the property owner for contribution or indemnification, claiming the property owner somehow failed to perform its “duty of care” to the store owner (whatever that is) to keep people safe from the virus. Under Senate Bill 308, the property owner would have the same limited liability with respect to the store owner’s claims as the store owner has with respect to the customer’s claims. This provision is important in order to prevent back-door liability by circumventing the limited liability protections.

## **3) No new cause of action created by the Senate Bill 308**

Third, the bill expressly does not create a new cause of action. And it expressly does not create a new substantive legal right. This is important because the purpose of Senate Bill 308 is to reign in potential civil claims, not to expand them.

### **Balancing Protection for Service Providers and Protection of the Public**

The protection for retailers and other service providers afforded by Senate Bill 308 is not absolute. Rather, the bill strikes a balance between protecting service providers such as retailers and protecting the public.

The bill only protects against liability for acts or omission in response to a disaster or in assisting recovery efforts – and then only during the period of the disaster and for 180 days thereafter.

**1) Actions that are intentional, willful, or wanton are not protected.**

The bill does not protect a service provider if its acts or omissions are shown by clear and convincing evidence to be intentional, willful, or wanton. The “clear and convincing” standard is higher than the negligence or recklessness standard, and this heightened standard of proof is a crucial provision in the bill. Under Ohio law, a person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result. And a person acts recklessly when, with heedless indifference to the consequences, she disregards a substantial and unjustifiable risk that her conduct is likely to cause a certain result.

**2) Negligence and recklessness are omitted because there is not standard yet to measure them by.**

Negligence and recklessness are legal concepts developed over decades of what society expects the standard of care to be. Large bodies of law exist over litigation as to what is “reckless.”

With COVID-19, what “due care” must a retailer exercise to not be negligent? 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 begins to reopen and restart, retailers have many questions about what to do and what standards to comply with. For example, will a retailer be found negligent if a customer contracts – or claims to have contracted – COVID-19 after visiting the store?

What if the retailer followed all of the Restart Ohio 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?

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 hinge on what a retailer knew or should have known and whether its actions were sufficient action to prevent the virus's transmission to others.

But negligence and recklessness 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 negligent, let alone reckless. What the State decrees is expected has changed and evolved on monthly, and then weekly, and now sometimes, a daily basis. 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, and the lack of equipment means that what is expected of retailers (and what is expected of the rest of us when we visit a retailer) is unknown. Until these matters settle and standards of conduct emerge and solidify, clear and convincing evidence provides retailers and other service providers the most certainty.

### **Orders should not create a new duty as a basis for liability**

Finally, there is one area that Senate Bill 308 does not currently cover, but that the Council believes is imperative if Ohio is truly to responsibly restart and reopen. The Council believes that the bill should include a provision expressly stating that a government order – like the Governor’s executive orders, the State Director of Health’s orders, or similar orders of local health agencies – do not create a duty of care. And, further, that the orders do not create any substantive legal right against a person. This is crucial because it is probable that lawsuits will look to hold a retailer liable for failing to abide by, not just the “requirements” the order sets forth, but the recommendations as well.

This does 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 up to the government entities to regulate, rather than leave it to “regulation by litigation” as a civil cause of action for 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 then become the fodder for creating wide-spread duties as a basis for civil claims in the uncharted waters of civil liability coming out of the pandemic.

### **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 will 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. Senate Bill 308 provides much-needed certainty about what standard of care retailers (and other service providers) would have during a disaster.

Members of the Committee, this concludes my prepared remarks. The Council appreciates your time and attention to Senate Bill 308. On behalf of the Council, I would be happy to answer any of your questions.