Katten

LITIGATION ADVISORY

Lions and Tigers and COVID? Oh My!

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How businesses may use the *ferae naturae* doctrine as a defense to coronavirus-related litigation.

As people emerge from stay-at-home orders and businesses reopen, responsible business owners are working hard to ensure the safety of their employees and customers. Despite these precautions, questions of liability will inevitably arise as the coronavirus continues to circulate throughout the community. A recent decision from the Texas Supreme Court, *Hillis v. McCall*, ___ S.W.3d ___, No. 18-1065, 2020 WL 1233348 at *1 (Tex. Mar. 13, 2020), may help to shed light on the potential liability businesses face from COVID-19 infections occurring on their reopened premises. This Katten advisory examines the applicability of the common law doctrine of *ferae naturae* — the law of wild animals — as a defense to liability for businesses reopening during the coronavirus pandemic.

In the recent *Hillis* decision, the Texas Supreme Court faced an appeal from a summary judgment, granted by the trial court but reversed by the intermediate court of appeals, on claims brought against the owner of a bed-and-breakfast by an invitee on the premises. The invitee was injured when bitten by a brown recluse spider. The trial court found that the owner of the B&B owed no duty to warn or protect the invitee against the bite, but the court of appeals found that the business owner had failed to establish the absence of such a duty. The Texas Supreme Court found that the business owner owed no duty to make safe or warn the invitee about the possible presence of venomous spiders on the premises because both the owner and the invitee had seen spiders and knew that the brown recluse was native to the area.

To reach this decision, the Texas Supreme Court applied the doctrine of *ferae naturae* — the common law rules for liability arising from injuries caused by wild animals. A landowner owes a general duty to individuals invited onto the premises "to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not." *Hillis*, 2020 WL 1233348 at *2. But, under the doctrine of *ferae naturae*, a landowner does ***not*** generally owe a duty to protect invitees from injury by indigenous wild animals on the premises. *Id.* at *3. A duty to protect against injury from wild animals will arise, however, if the owner (1) is in actual possession or control of an indigenous wild animal; (2) has introduced nonindigenous animals into the area; or (3) knowingly attracts dangerous animals to the property. *Id.*; see also *Union Pac. R.R. Co. v. Nami*, 498 S.W.3d 890, 897 (Tex. 2016) "[T]he gist of the action is the keeping of the animal after knowledge of its mischievous propensities.") (emphasis in original, internal quotation marks omitted). In addition, an owner might be held liable for injury caused by a wild animal that makes its way inside an artificial structure on the premises:

> a property owner who knows or should know of an unreasonable risk that dangerous indoor pests will bite invitees in his particular building has a duty to alleviate the danger or warn of it if the invitees neither know nor should know of the heightened risk.

Hillis, 2020 WL 1233348 at *4.

In formulating the rule in *Hillis*, the Texas Supreme Court relied heavily on its application of the *ferae naturae* doctrine three and a half years earlier in *Union Pac. R.R. Co. v. Nami*, 498 S.W.3d at 899. In *Nami*, the court held that an employer owed no duty to warn or protect an employee infected with the West Nile virus from the virus-carrying mosquitos on his jobsite. By focusing on the absence of a "duty" in both *Hillis* and *Nami*, the Texas Supreme Court made the question of an owner's potential liability an issue of law to be decided by a judge (likely in a pretrial motion), rather than a question of fact presented to a jury at trial. *See Hillis*, 2020 WL 1233348, at *5; *Nami*, 498 S.W.3d at 899. Though the dissent in *Nami* recognized some variation in the application of *ferae naturae* by courts in other jurisdictions, the majority decisions of the Texas Supreme Court in *Nami* and *Hillis* appear to represent the current, general trend in the law.

Though courts have yet to apply the doctrine of *ferae naturae* to coronavirus-related claims (or to the human-to-human transmission of other diseases), it is a short step from the West Nile virus and spider bites to COVID-19. The widespread, known, inherently uncontrollable danger posed by the coronavirus is similar to the kind of danger posed by indigenous wild animals. In fact, legal commentary cited by the court in *Nami*, 498 S.W.3d at 897 n. 37 (citing GLANVILLE L. WILLIAMS, LIABILITY FOR ANIMALS 336 (1939)), argued for the treatment of "disease germs" as *ferae naturae* in the late-1930's. See WILLIAMS 257 ("Although disease germs are not classed by English legal writers as animals *ferae naturae*, and although, biologically, they are not animals at all, there seems to be no sound juristic reason for keeping them distinct."). When courts inevitably face claims for COVID-19 liability, the reasoning underlying the doctrine of *ferae naturae* would provide well-established rules through which the courts could analyze these issues.

For example, under the well-settled rules of *ferae naturae*, the owner of an exotic animal park in Central Oklahoma could be held liable if a tiger mauled a guest, but he might not be liable to a guest bitten by a coyote on the premises. Because coyotes are indigenous to the area, the park owner would only be liable if he had somehow attracted the coyote or knew of the coyote's presence and failed to warn or protect the guests who did not know.

Similarly, the owner of a business reopening after a stay-at-home order might raise a *ferae naturae* defense to a claim that an invitee became ill with COVID-19 contracted on the premises. As long as the business owner did not "control" or "introduce" the virus to the premises (for example, by allowing or requiring an employee known to be infected to remain on the job) or "attract" those who exhibit a mischievous propensity to transmit the virus (for example, by opening in violation of a stay-at-home order or encouraging patrons to eschew reasonable protective measures like masks), the business owner may be able to avoid liability for coronavirus transmission by arguing — like the B&B owner in *Hillis*—that the risk of COVID-19 harm was well-known to the patron. Moreover, a business owner should be able to mitigate the risk of COVID-19-related liability further by following local, state and federal guidelines, posting warnings (especially if someone known to be infected has visited the premises) and insisting that all persons take reasonable protective measures while on the premises. While it may be inevitable that some COVID-19-related litigation will arise, business owners can protect themselves by taking reasonable precautions to help minimize their litigation risk.

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