

COVID-19 TASK FORCE

**Expect
Insights**

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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 4

Welcome to the fourth issue of the 2021 edition of *Unprecedented*. For decades, asbestos lawyers have dealt with so-called secondary exposure claims where plaintiffs allege that they were injured by asbestos fibers carried home on a spouse or parent's clothing. That claim has now made its way to COVID-19 exposure cases, with a California couple alleging that the husband transmitted COVID-19 to his wife after exposure at work. The employer has moved to dismiss, colorfully arguing that allegations must be "tethered to this planet." And though the plaintiffs argue that they took extreme precautions to avoid exposure, we share the employer's skepticism: COVID-19 cases, more than other exposure cases, suffer from the thorny causation problem of proving that the plaintiff contracted the disease from one potential exposure rather than the myriad other potential exposures. Because a favorable ruling for the plaintiffs could open up the floodgates to other cases, however, this remains one to watch. In the meantime, continue on for discussion of litigation over workplace safety, government orders, insurance coverage, and more.

[Joseph V. Schaeffer](#), Editor of *Unprecedented*

[COVID-19 Task Force](#)



New York Sues Amazon Over COVID-19 Workplace Safety

"New York Attorney General Letitia James sued Amazon, claiming the massive e-commerce company's 'flagrant disregard for health and safety requirements' during the coronavirus pandemic put the lives of workers and the general public at risk."

Why this is important: Amazon faces additional litigation in New York regarding its allegedly inadequate response to COVID-19 positive workers. Originally, Amazon filed its own lawsuit in New York federal court claiming New York officials lacked legal authority to sue Amazon because federal workplace safety laws took precedence over state laws. Despite this filing, New York Attorney General Letitia James filed a lawsuit last week against Amazon regarding two specific sites in New York that she claims failed to adequately clean, contact trace, or close after employees became ill with COVID-19. The lawsuit also claimed Amazon retaliation against certain workers who reported substandard conditions internally or to the press. The dueling lawsuits have yet to be reconciled and will provide

interesting legal insight into how federal and state laws interplay when it comes to COVID-19 protections and liability. This case is also interesting in that it was filed the same week that Amazon workers in an Alabama site will vote to unionize. This is the first attempt to unionize an Amazon site, and could reverberate to other sites. --- [Chelsea E. Thompson](#)

Judge Upholds Miami-Dade County Curfew After Second Strip Club Lawsuit

"In the ruling against the club, U.S. District Judge Robert N. Scola Jr. deferred to local officials in developing such safety rules during the COVID-19 pandemic."

Why this is important: This case primarily highlights the range of businesses that have been impacted by the pandemic. When we hear about the drastic reduction in income for the service industry sector, for instance, our first thought is probably not about the plight of exotic dancers. But they, too, have been impacted and have sued to ameliorate the effects of the pandemic-related restrictions. And, that's the secondary reason for highlighting this case. Curfews have remained rare as a governmental response to the COVID-19 pandemic, particularly where they conflict with statewide policy. This led to an adverse ruling against this same county curfew only a few months ago. But after an appellate court reinstated the curfew pending appeal, the trial court here found that the statewide restrictions were just open enough for the curfew to survive this newest challenge. That ruling only emphasizes how, even a year into the pandemic, the law is still developing. --- [Joseph V. Schaeffer](#)

Federal Judge Asks Ohio Supreme Court for COVID-19 Ruling

"Neuro-Communication, which had purchased an all-risk policy from Cincinnati, submitted a business interruption claim in March, which the insurer denied on the basis that it did not involve a direct physical loss to the property."

Why this is important: A federal judge in Ohio has certified a question to the Ohio Supreme Court regarding whether an insurance policy Cincinnati Insurance Company issued to an audiology company, Neuro-Communication Services, Inc., affords coverage for the pandemic losses Neuro-Communication sustained. The question presented is whether COVID-19 causes physical loss or damage to property under state law. Cincinnati Insurance Company requested this certification in order to alleviate uncertainty about business interruption claims.

This is an important step given the hundreds of claims seeking coverage for business interruption that have been filed throughout the country. The majority of courts throughout the nation have upheld denials of such claims. This decision likely will result in the same outcome. However, an Ohio Supreme Court decision on this issue has the potential to bring clarity to the numerous claims that are pending in Ohio for business interruption due to COVID-19. --- [Laura E. Hayes](#)

Lawsuits Tossed Challenging West Virginia Gov. Jim Justice's COVID-19 Executive Orders

"Seemingly closing the books on legal efforts to overturn Gov. Jim Justice's executive orders during the COVID-19 pandemic, two federal courts dismissed challenges to the governor's authority under states of emergency."

Why this is important: Over the past several months, West Virginia Governor Jim Justice has been facing litigation regarding his executive orders requiring the wearing of facemasks in indoor public places and other business reopening guidelines. Earlier this month, U.S. District Court Judge Robert C. Chambers entered an order dismissing with prejudice a lawsuit challenging the constitutionality of the executive orders brought by restaurant owners. Judge Chambers found that the executive orders are

neither arbitrary nor unreasonable and that "there is a rational basis for the orders and that they bear a real and substantial relation to this public health crisis." U.S. District Court Judge John Preston Bailey dismissed similar challenges in January. While Governor Justice undoubtedly will continue to face litigation relating to his exercise of executive power during the pandemic, it seems likely that those challenging the Governor will need to focus on issues other than the indoor face covering requirement and business reopening guidelines. --- [Joseph A. \(Jay\) Ford](#)

Arizona Lawmakers Closer to COVID-19 Lawsuit Protections for Businesses

"It's seen as a higher bar for a plaintiff to prove than in other civil tort lawsuits."

Why this is important: The Arizona Legislature is close to passing a bill, Senate Bill 1377 ("SB 1377"), which would help protect a person or "provider" whenever the Governor declares a state of emergency due to a pandemic. The term "provider" includes businesses, property owners, government agencies, and health professionals, among others. SB 1377 states that a person or provider who acts in "good faith" to protect another person "from injury from the public health pandemic" is not liable for damages for failing to protect that person unless it can be proven "by clear and convincing evidence that the person or provider failed to act or acted with willful misconduct or gross negligence." Good faith is established if the person or provider "relied or reasonably attempted to comply with applicable published guidance related" to the pandemic. Besides being applicable to any future pandemics, SB 1377 will apply retroactively to any claims after March 10, 2020. While not impossible, this would make it very difficult for a person to succeed in a pandemic-related claim. The clear and convincing standard is the highest burden of proof in a civil trial. Furthermore, by requiring either willful conduct or gross negligence a person would have to prove that they were injured by more than mere inadvertence. Although SB 1377 has not yet been enacted, it illustrates that lawmakers are concerned with the potential for many of these COVID-related lawsuits once the pandemic ends. --- [Kellen M. Shearin](#)

Soundview Cinemas Loses Lawsuit Against Insurance Company

"Driscoll found in his decision that Soundview made no inquiry to the brokers or its insurance company regarding specific insurance coverage that would apply to 'these unprecedented times.'"

Why this is important: In a continuing nationwide trend, a New York State lawsuit filed by a movie theater against both its insurer and its insurance broker for economic losses sustained during the COVID-19 pandemic shutdown has been dismissed. The movie theater, Soundview, had an insurance with Ohio-based Great American Insurance Group. The policy provided business interruption coverage resulting from direct physical loss of or damages to the property. Soundview proceeded under a theory that the government shutdown of its theater constituted a "direct physical loss of or damage to the property" which would trigger the business interruption coverage. Justice Timothy Driscoll, of the New York Supreme Court's Commercial Division, in following the trend of opinions nationwide, found otherwise, and determined that business interruption coverage was not triggered by the shutdown. Justice Driscoll also found that Soundview had made no earlier inquiry to either its insurance broker, or to Great American, regarding procurement of insurance which would provide such coverage in the event of a shutdown. He likewise noted that practically, there was no such available coverage to be obtained in the market place prior to the pandemic.

This is apparently a first such ruling in New York State. While similar rulings have been the norm nationwide, this ruling is significant if one considers that amount of commerce in New York State, and that it will likely be a catalyst for other similar rulings in pending New York litigation. --- [Glen A. Murphy](#)

Lawsuit Blames Man's COVID-19 Death on Commingling

[Residents at California Assisted-Care Facility](#)

"A woman has filed a lawsuit alleging her 88-year-old father died from COVID-19 last year after staff at a Culver City assisted-care facility allowed residents to commingle and failed to enforce social distancing."

Why this is important: Nursing homes and assisted care facilities were the sites of the earliest COVID-19 outbreaks in the United States, and they have been among the businesses hardest hit by lawsuits. What makes this case interesting is the focus on commingling and social distancing because of the lines it would require a fact finder to draw about patient care and social interaction. The companion allegations of poor mask adherence seem far simpler to define and to prove, and it seems likely that these will become the focus of the case as it continues. --- [Joseph V. Schaeffer](#)

[Lawsuit Seeks to Limit In-Person L.A. County Civil Trials because of COVID-19 Risk](#)

"A number of public interest attorneys filed a lawsuit seeking to halt in-person traffic and eviction trials held in Los Angeles County, claiming COVID-19 prevention protocols are failing after two court interpreters who were infected died in recent weeks."

Why this is important: A group of legal aid organizations filed a lawsuit seeking to stop in-person traffic and eviction trials held in Los Angeles County, California. The lawsuit claims that COVID-19 safety protocols are failing as two court interpreters who contracted COVID-19 died recently. The lawsuit accuses the courts of prioritizing the "continuity of nonessential operations over community safety and human life." The lawsuit alleges that the court's facilities are built and administered in a way that makes it impossible to maintain a safe social distance, especially in crowded and poorly ventilated courtrooms and hallways. While the Los Angeles County courts have implemented some safeguards such as plexiglass shields in courtrooms to separate attorneys, limiting public access to the courts, and using remote access platforms, the lawsuit alleges that the precautions do not go far enough to protect the public. Since the pandemic began, courts have responded in varied ways in an effort to balance justice and public health. In most jurisdictions, state supreme courts have allowed local courts to set its own rules for reopening. During this uncertain time, the importance of technology has grown and will continue to grow. --- [Kayla I. Russell](#)

[Northwell Health Sues Property Insurers for Denial to Pay Losses Suffered Due to COVID-19](#)

"Northwell said it is covered for these losses under an 'all risk' policy through property insurers Lexington in Boston and Interstate in Chicago."

Why this is important: Yet another business is attempting to recoup losses it sustained due to the pandemic. Northwell Health in New York is suing its insurers, Lexington in Boston and Interstate in Chicago, for breach of contract claiming that its "all risk" insurance policy provides coverage for the hundreds of millions of dollars it lost due to the pandemic. Northwell contends that Lexington and Interstate ignored the documentation that Northwell provided of its losses due to reduction of revenue for procedures deemed elective and the suspension of ambulatory physician practices. Northwell claims that it was forced to pay to clean and disinfect its premises as well. As the largest healthcare provider in New York, Northwell allegedly sustained significant losses when New York became the epicenter of the pandemic last spring.

In its lawsuit, Northwell claims that the initial denial letter only addressed a pollution or contamination exclusion in the insurance policy. The complaint further alleges that Lexington and Interstate wrongfully contend that the pollution exclusion negates the Interruption by Communicable Disease and Decontamination Cost coverage that Northwell bargained and paid for in the policy. Accordingly,

Northwell argues that its insurers breached their contracts.

This lawsuit is significant because more and more courts are finding that coverage does not exist for these types of claims. However, every insurance policy is different and the policy provision Northwell cites might provide coverage. If so, this would be one of the rare cases in which insurance coverage would be afforded to a COVID-19 related claim. --- [Laura E. Hayes](#)

Montana Governor Signs Virus Lawsuit Liability Shield

"Under the liability protection measure, businesses and health care providers, including assisted living facilities, could not be sued by individuals exposed to the coronavirus on their premises, except in cases of 'gross negligence' or when they intentionally spread the virus."

Why this is important: Multiple states, led primarily by those with Republican majorities, have adopted or are considering legislation to protect businesses and health care providers from COVID-19 litigation. Montana's law is in most regards typical: it provides immunity except in cases of gross negligence or intentional conduct. But also contained within Montana's new law is a provision exempting businesses from upholding federal or state requirements for face coverings and temperature checks. Though progress on vaccinations will hopefully make these measures unnecessary, it will be interesting to see if they affect case numbers in Montana or find themselves subject to a legal challenge. --- [Joseph V. Schaeffer](#)

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