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COVID-19 and Unprecedented: Litigation Insights, Issue 30

In this 30th issue of *Unprecedented*, our weekly update on COVID-19-related litigation, we continue to see cases challenging shutdown orders and capacity limits from restaurant and other business owners, including a possible lawsuit from Disney. We also touch on the increase in OSHA whistleblower complaints, yet another rising side effect in the wake of the COVID-19 pandemic. It also should come as no surprise that COVID-19-related insurance coverage cases are continuing to be filed, as policyholders fight for coverage under business interruption and other provisions, along with lawsuits against higher education institutions for reimbursement of fees. Finally, in a particularly egregious negligent exposure claim, we discuss a lawsuit filed by a Miami nurse, in which she alleges that a doctor purposely infected her with COVID-19. One thing is certain as we move through our 30th litigation update -- COVID-19 continues to present an array of legal issues and shows no signs of slowing down anytime soon.

We hope you enjoy reading.

COVID-19 Task Force

spilman
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Workers Fired, Penalized for Reporting COVID Safety Violations

"Whistleblower complaints filed with OSHA increased by 30% between February and May, to 4,101, according to an August report by the Department of Labor's Office of the Inspector General that criticized the agency's handling of the complaints."

Why this is important: As employers encourage employees back to work, employees worry that proper workplace safety measures protecting against COVID-related risks have not been implemented. Despite their concerns, employees fear retaliatory measures if they resist what they feel are unsafe, unhealthy conditions. Here, a shop foreman at a New Jersey manufacturing company was fired after refusing to return to work because he feared becoming infected and endangering his family after the company refused to implement safety measures such as wearing masks and maintaining social distancing. He filed an action under New Jersey's whistleblower law that prohibits employers from firing, demoting or otherwise retaliating against workers who refuse to take part in activities they believe are incompatible with public health and safety mandates. Other avenues employees may pursue when seeking justice against retaliation include "wrongful discharge" claims in state court and

whistleblower complaints through the Occupational Safety and Health Administration. With the rise in whistleblower complaints related to COVID-19, workers have criticized whistleblower protections as weak and demand action. Advocates have urged OSHA to adopt mandatory COVID safety standards for workplaces, however the agency has so far declined to do so. A few states and cities have stepped in to help whistleblowers by putting in place statewide workplace safety standards related to COVID-19, yet these laws are described as "the exceptions." As the pandemic continues, employers should stay up-to-date on their state's whistleblower laws and any measures that may result from increased pressure on the federal government to protect employees from retaliation for raising safety concerns or refusing to work in a location they believe is unsafe. --- Victoria L. Creta

Disney Considers Coronavirus-Related Lawsuit to Force California's Theme Parks Open

"The California Attractions and Parks Association, which includes Disneyland, Universal Studios Hollywood, and others, says that 'all options are on the table.'"

Why this is important: Despite the number of challenges to COVID-19-related restrictions, there has yet to be a challenge brought by a company with the name recognition and resources of Disney -- number 49 on the most recent Fortune 500 ranking. This is a sign that even industry heavyweights are facing a financial impact from COVID-19 and, indeed, Disney Executive Chairman Robert Iger quit California Governor Newsom's economic task force over a dispute on a path forward before laying off about 28,000 employees. Despite its size, though, Disney is facing the same obstacles faced by litigants with much fewer resources: a legal standard that gives substantial deference to government officials, and a judiciary that is generally hesitant to second guess public health measures. Even so, Disney's enormous resources give it the ability to pursue every legal theory, every tactical advantage, and every possible appeal should it desire to bring suit. Its entry into COVID-19-related litigation would accordingly be a milestone if it occurs. --- Joseph V. Schaeffer

Illinois Restaurant Sues Over COVID-19 Indoor Service Ban

"Despite the governor's warning that state police are prepared to penalize violators, operators at restaurants including Fozzy's Bar and Grill near Rockford; Lockport Stagecoach in Will County; and Ki's Steak and Seafood in West Suburban Glendale Heights have made public their decisions not to comply."

Why this is important: The service industry has been among the hardest hit by the COVID-19 pandemic, with governments ordering restaurants and bars to close for indoor service early in the pandemic. While the transition to outdoor dining has helped to minimize the pain, a fast-approaching winter season leaves restaurants and bars wondering how they will survive with indoor occupancy limits ranging from 25-50 percent of their maximum. It is perhaps no surprise that some restaurants and bars are in open revolt -- defying occupancy limits and face covering limits. For them, the issue is the certainty of economic pain versus the uncertainty of COVID-19 infections, with the policy concerns behind each now playing out in the form of legal arguments in the Illinois courts. --- Joseph V. Schaeffer

Lawsuit Filed Against Petition Attempting to Halt COVID-19 Restrictions in Louisiana and Ruling Favors Governor in Lawsuit Over Bar Closures

"Governor John Bel Edwards is still ignoring a petition from lawmakers that would halt all the state's COVID-19 rules for a week."

"The owners of 12 establishments sued the governor last month for ordering them to close after pictures were posted online of college students in Morgantown packing bars without masks."

Why this is important: As the country enters the eighth month of COVID-19 shutdowns, businesses and lawmakers are becoming increasingly frustrated with COVID-19 restrictions, and are looking to the court system to resolve their grievances. In Louisiana, state lawmakers filed a petition to halt the state's COVID-19 regulations and end the state of public health emergency, claiming that the restrictions were unnecessary and crippling Louisiana's economy. In response, the Governor of Louisiana filed a lawsuit for declaratory judgment and injunctive relief, claiming that the legislators' petition was "reckless, irresponsible, and unconscionable," and seeking to have a court confirm that the petition was unconstitutional.

While that Louisiana lawsuit remains pending, business owners in West Virginia have already lost one legal attempt to lift restrictions. In Morgantown, West Virginia, a dozen bars and restaurants that were temporarily shut down after violating social distancing restrictions filed a lawsuit against Governor Jim Justice, claiming that the state's actions violated their constitutional "right to do business." This lawsuit was summarily dismissed by federal judge John Bailey, who rejected the businesses' constitutional arguments and found that the public interest overwhelmingly supported enforcement of COVID-19 restrictions. While it is unclear how judges in other states such as Louisiana will rule on these issues, one thing is certain: as long as the pandemic restrictions are in play, we will continue to see increasingly creative legal attempts to have the restrictions lifted. --- James E. Simon

Beacon Center Joins Federal Lawsuit Over Eviction Ban

"Seven Memphis landlords filed a lawsuit trying to end the federal ban on evictions for unpaid rent."

Why this is important: Tennessee has joined a growing list of states addressing constitutional challenges to a sweeping policy introduced by the Center for Disease Control and Prevention in September 2020. The policy is an eviction moratorium that limits landlords' ability to evict tenants based on non-payment of rent in certain circumstances. Specifically, the policy precludes eviction for non-payment of tenants who provide written declarations about their circumstances, if the tenant certifies that they have used their best efforts to secure government assistance in paying rent, they make below a specific threshold ($99,000 per year if filing for taxes individually), that their inability to pay rent results from a substantial loss of household income or other limited issues, that the tenant is using best efforts to pay as much rent as possible, that if evicted, they would become homeless or end up in a shelter, and that they understand the rent is still due and can be demanded in full on January 1, 2021 when the moratorium ends. The moratorium instituted by the CDC is aimed at curtailing the spread of COVID-19, and is arguably part of their powers to adopt regulations to stop the spread of contagious disease across state lines. However, such a sweeping rule is not narrowly tailored, and may arguably not be permitted action under the CDC's statutory authority. Additionally, individual states have rolled back some of the apparent tenant protections, with the Texas Supreme Court clarifying in September that landlords may challenge the veracity of the declaration and may demand proof from the tenant. Finally, if the moratorium remains as it stands, there likely will be a veritable flood of evictions filed in January 2021 as landlords file to claim months of late rent and tenants still cannot pay in the COVID-era economy. If a constitutional challenge succeeds, it may force other entities, such as Congress, to provide new protections, potentially including additional funding for rental payment assistance. --- Risa S. Katz-Albert

Judge in North Carolina Favors Policyholders in COVID-19 Closure Lawsuit

"Superior Court Judge Orlando F. Hudson Jr. ruled that closure orders that restricted the use of a group of 16 restaurants in the Raleigh-Durham area constituted a 'direct physical loss' that was covered by the policy."

Why this is important: In a surprising ruling, and the first of its kind, a North Carolina judge ruled that Cincinnati Insurance Company owed coverage for business interruption caused by COVID-19 to 16 North Carolina restaurants. Despite physical damage to the property being absent, the judge held that the closure orders that restricted use of the restaurants were a "direct physical loss." He stated that "Cincinnati's argument that the policies require physical alteration conflates 'physical loss' and 'physical damage.'" He opined that: "The use of the conjunction 'or' means - at the very least - that a reasonable insured could understand the terms 'physical loss' and 'physical damage' to have distinct and separate meanings."

Of the 1,183 similar lawsuits that have been filed in this country, judges have granted motions to dismiss to insurance companies in 26 cases. The basis of these dismissals has been either the lack of physical damage or that coverage was excluded under the insurance policy due to an exclusion for viruses. The all-risk policy at issue in this case purportedly did not contain such a virus exclusion. Therefore, according to the restaurants' attorney, the judge was allowed to find coverage. Cincinnati Insurance Company is appealing this decision.

If the decision is affirmed on appeal, it will be used by others to further their coverage positions against their insurers in an attempt to recoup losses due to COVID-19. According to North Carolina's insurance commissioner, this would have a devastating effect on the insurance industry. The Insurance Information Institute has projected that business continuity losses from COVID-19 may amount to $220 billion to $383 billion per month, and that the total amount reserved for all home, auto and business insurers amounts to only $800 billion. Therefore, covering these losses has the potential of bankrupting insurance companies throughout the United States. --- Laura E. Hayes

Popular Restaurants Suing After Insurance Company Denies COVID-19 Loss Claims

"The restaurants claim they paid for special all-risk insurance and like many other businesses, they feel they should be able to take advantage of it now."

Why this is important: In the months since the start of the pandemic, many businesses have had to close due to government shut down orders. Accordingly, these businesses have sustained significant losses. As a result, they have been seeking coverage under their own insurance policies for these losses. Over a thousand lawsuits have been filed seeking what is known as "business interruption" coverage, which is a subset of property damage coverage. Most of these lawsuits are being dismissed around the country. The basis of the dismissal of these lawsuits has either been because a tangible physical alteration of the property could not be shown such that the property damage occurred or an exclusion in the insurance policy prohibited coverage.

In this case, several restaurants in Charlotte, North Carolina are suing Cincinnati Insurance Company for a denial of their business interruption claims. This lawsuit appears to be identical to the other lawsuits business owners have filed. Accordingly, it is likely to be dismissed. If it is not dismissed and the trial court judge finds coverage, the insurance industry is likely to appeal. As mentioned above, North Carolina's insurance commissioner opined that a ruling forcing insurance companies to pay for COVID 19 losses would bankrupt the insurance industry because the insurance industry did not receive premium payments for such losses. This is a sentiment shared by most people in the insurance industry. --- Laura E. Hayes

Class Action Lawsuit Filed Against UB for Non-Relevant Fees

"A New Jersey lawyer has filed a class action lawsuit against the University of Bridgeport claiming the school billed students for services it wasn't able to provide because of the pandemic."

Why this is important: The University of Bridgeport has joined the list of colleges and universities defending against class actions from students for tuition and fee reimbursements as a result of switching from in-person learning to virtual classes due to the COVID-19 pandemic. Like the other actions described in our previous publications, the complaint filed in state court alleges breach of contract, unjust enrichment, and conversion. The class seeks a pro-rated refund of the tuition and a refund on fees totaling more than $1,700 for services the university was not able to provide because of the pandemic, such as a design fee, a student government fee, and a general fee. Despite the rise in similar complaints, there has been little indication as to how these cases will be decided. Another Connecticut university, Yale, faces similar allegations and has filed a motion to dismiss the case on the grounds that courts cannot judge the academic experience a school offers. It will be interesting to see how the District Court decides on Yale's motion because it likely will indicate how other Connecticut courts will proceed in novel suits against its colleges and universities. --- Victoria L. Creta

Miami Nurse Sues Doctor Colleague, Says He 'Deliberately' Infected Her with COVID-19

"When she questioned him about a cough he had, she says he got in her face and breathed on her and told her 'If I've got it, now you've got it.'"

Why this is important: Failure to ensure a safe work environment for employees continues to be one of the most prevalent types of lawsuits filed related to COVID-19. A Miami nurse practitioner has sued a doctor colleague, along with the medical office and the hospital that owns the medical office, for 'deliberately' infecting her with COVID-19. The lawsuit alleges that the doctor refused to allow the staff to wear masks or take a test for COVID-19 without his approval. The lawsuit further alleges that when she questioned the doctor about a cough he had, he got in her face, breathed on her, and told her "If I've got it, now you've got it." According to the lawsuit, the nurse practitioner was hospitalized after contracting COVID-19 and her two-year-old son also contracted COVID-19. The nurse practitioner is suing for damages in excess of $30,000 and is accusing the doctor of "negligent, intentional, wanton and reckless disregard for the health and safety of others." The number of lawsuits asserting negligence and related tort claims related to COVID-19 likely will continue to rise, so employers should follow this case closely. --- Kayla I. Russell

Coronavirus Litigation Lurks in the Shadows

"The Supreme Court has been wrestling with a steady stream of legal issues related to the coronavirus pandemic, all in the form of emergency applications decided without full briefing or oral argument."

Why this is important: While the coronavirus pandemic remains front and center in American life, coronavirus-related litigation has remained largely on the Supreme Court's shadow docket. The Supreme Court's shadow docket usually results in short, one-sentence opinions, with no explanation of the Court's reasoning, and few dissents. Since mid-May, however, the Court has written a number of opinions and dissents in connection with emergency applications decided without full briefing or oral argument. For example, the Court has declined to issue injunctions for churches arguing that stay-at-home orders are unconstitutionally discriminating against religious freedom. In another series of cases, the Court lifted injunctions requiring additional coronavirus protections for inmates. Perhaps the most publicized decision from the Court's recent shadow docket was its decision to allow the 2020 census count to end in mid-October. Given the nature of the pandemic, it seems likely that we will continue to see important legal questions decided on the Court's shadow docket. --- Joseph A. (Jay) Ford

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