

COVID-19 TASK FORCE

Expect Insights

December 21, 2020

COVID-19 and Unprecedented: Litigation Insights, Issue 36 and Final Issue of 2020

Welcome to this 36th issue of *Unprecedented*. When we published our [first issue](#) on March 24, our understanding of the type of litigation to come out of the COVID-19 pandemic was much like our understanding of the virus itself: limited by the absence of any modern comparison. Almost a year later, of course, we have a much better sense of which lawsuits represented a real trend and which were mere outliers. And so, we have used this final issue of 2020 to offer a broader commentary on the types of litigation that have defined this first year of the COVID-19 pandemic.

When we return in 2021, we will do so on a biweekly publication schedule. Our commitment to bringing you the latest trends in COVID-19-related litigation, however, will remain unchanged. Until then, we wish you the happiest of holidays and a wonderful new year.

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

[COVID-19 Task Force](#)



Challenges to Executive Actions

For most Americans, the legal legacy of the COVID-19 pandemic will be the executive actions that state and local officials took to curb the spread. These were often unprecedented: stay-at-home orders, travel restrictions, face covering mandates, and shutdowns based on a business or activity's "essential" status. And, they frequently prompted legal action challenging the authority underpinning them.

For the most part, the legal challenges took several forms (frequently in some combination):

1. "Free-exercise" challenges alleging that the executive actions infringed on the free-exercise of religion under the First Amendment to the U.S. Constitution, the Religious Freedom Restoration Act ("RFRA"), or state-equivalents to RFRA
2. "Gun-rights" challenges alleging that executive actions closing firearms-related businesses infringed on the right to bear arms under the Second Amendment to the U.S. Constitution and state equivalents

3. "Procedural due process" challenges alleging that executive actions were taken without giving affected persons and businesses the notice and opportunity to be heard required under the Fifth or Fourteenth Amendments to the U.S. Constitution and state equivalents
4. "Substantive due process" challenges alleging that executive actions were arbitrary and unreasonable under the Fifth or Fourteenth Amendments to the U.S. Constitution and state equivalents
5. "Equal protection" challenges alleging that executive actions treated certain persons and businesses differently than their similarly situated counterparts
6. "Statutory authority" challenges alleging that governments overstepped the authority conferred by statute

Of these different types of challenges, free-exercise challenges to occupancy limits on religious gatherings have, by far, fared the best. Although the lower courts were initially split on whether these occupancy limits were laws of general and neutral application, a First Amendment standard that determines the level of scrutiny to be applied, the trend has been toward applying a strict scrutiny under which the limitations generally fail. And after declining to weigh in on the issue during the summer, just over a month ago, a new U.S. Supreme Court with Justice Amy Coney Barrett applied this heightened scrutiny to measures from New York State.

The remaining types of challenges had, at best, mixed records. Gun-rights challenges had early success rolling back orders closing firearms-related businesses, but there were too few to suggest an enduring trend. Statutory-authority challenges also found occasional success, most notably in Michigan, but generally affected *how* rather than *what* governments exercised in the way of authority. The remaining challenges -- due process (procedural and substantive) and equal protection -- generally fared poorly. Indeed, courts generally have deferred to governments' use of executive actions to address the COVID-19 pandemic. There are signs, however, that courts are growing more skeptical as the pandemic continues. A ruling this fall from the U.S. District Court for the Western District of Pennsylvania struck down a number of Pennsylvania's executive actions, including its business restrictions, as arbitrary and unreasonable, and Justice Alito has been using the U.S. Supreme Court's so-called "shadow docket" to criticize unchecked executive authority. A new year thus may very well bring increased skepticism from the courts in response to continued use of executive actions. In our view, however, the more likely outcome is that the challenges to executive actions dry up as widening distribution of the vaccine eliminates their necessity.

Wrongful Death and Personal Injury Litigation

The COVID-19 pandemic has disproportionately impacted certain segments of society, with nursing homes and long-term care facilities being perhaps the most notable. It is therefore no surprise that nursing homes have been a particular target for wrongful death and personal injury lawsuits. But those expecting the COVID-19 pandemic to trigger a wave of wrongful death and personal injury litigation will be disappointed. The lawsuits are only a small fraction of the total number of infections.

In our view, the absence of significant wrongful death and personal injury litigation has two explanations. The first is that most people who contract COVID-19 thankfully do not experience lasting effects and, therefore, have little in the way of damages. The second is that pinning responsibility for a viral infection on any one defendant is typically exceedingly difficult (and expensive). We see no reason for either of those two limiting factors to change any time soon and, with the further advent of the vaccine, expect wrongful death and personal injury litigation to remain limited and confined.

Refund Demands

The first months following nationwide business closures and travel restrictions prompted a wave of lawsuits demanding refunds of airfare for trips that were canceled, membership fees for gyms that were closed, and tuition, room, and board for colleges that had gone virtual. Though at least some of

these cases remain pending and have significant financial implications for the defendants, their number is unlikely to increase significantly with reopening on the horizon.

Insurance Coverage Disputes

Forced to close by government order or the pandemic itself, thousands of businesses across the United States have sought recourse to business interruption and civil authority coverage in their insurance policies. They have argued that events like the COVID-19 pandemic are the entire reason for why they purchased insurance in the first place. But carriers generally have denied these claims under the physical loss requirement that is standard to most policies: the virus, in the carriers' view, does not qualify as the direct physical loss required to trigger coverage.

For the most part, the courts have shared the carriers' view, dismissing some of the earliest cases disputing the denials of coverage. A minority of courts, however, have allowed the claims to proceed. And the stakes for affected businesses, many of which have experienced devastating financial losses, are high enough that these cases are likely to be litigated for some time to come.

Qui Tam and Consumer Protection Litigation

Anyone who tried to purchase toilet paper or hand sanitizer during the first shutdowns in March remembers how difficult it was to acquire these staples. Scalpers stepped in to meet the demand, selling these essential items at many multiples of their retail prices. And nearly as quickly, government lawyers filed consumer protection lawsuits against any price gouging activity. Though prices have now stabilized, these lawsuits will nonetheless be a legacy of the pandemic.

In contrast to consumer protection lawsuits, which are at their tail-end, qui tam lawsuits are likely just beginning. These types of claims target fraud against the government, and the numerous programs addressing the COVID-19 pandemic have left the fraudulently inclined no shortage of opportunity. Already, reports of Paycheck Protection Program recipients misusing the funds suggests a broader, untapped fraud that will be litigated for years to come.

Landlord-Tenant Disputes

The COVID-19 pandemic has been responsible for millions of job losses and thousands of business closures, with the obvious consequence that thousands of people and businesses have found themselves unable to pay rent. A combination of factors, however, has prevented wide spread evictions. On the residential side, a series of moratoria at the local and federal level have brought a temporary halt to evictions. And on the commercial side, tenants have either vacated voluntarily as their businesses have closed or found accommodations from landlords with few better options. Even so, without further assistance, it is only a matter of time before the moratoria expire and evictions begin in earnest. Landlord-tenant disputes thus present one of the primary growth areas for COVID-19 litigation as we enter 2021.

Labor and Employment Litigation

The labor and employment litigation that has come out of the COVID-19 pandemic is, in many ways, indistinguishable from the litigation that preceded it. Employers have dealt with requirements to supply personal protective equipment ("PPE") for years, just as they have dealt with demands for payment for its donning and doffing. They likewise have faced any number of lawsuits for unlawful firings and withheld wages. The difference here is that PPE requirements now covered businesses that had never

before had to consider them. But even as those businesses learned through a trial-by-fire, lawsuits have been relatively limited and seem unlikely to pick up as the vaccine allows society to return to normality.

Again, we thank you for reading *Unprecedented* for the past 9 months. If there are particular litigation issues or cases you would like for us to review in the future, please [let us know](#). Also, we will be developing more webinars in the next few months that address some of these topics in a more in-depth manner. You can check our [COVID-19 Task Force section](#) on our website regularly to keep up-to-date on all of the materials we are planning and have published.

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Responsible Attorney: Eric W. Iskra, 800-967-8251