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## Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 10

Welcome to the tenth issue of the 2021 edition of *Unprecedented*. The big news from the past two weeks was the Center for Disease Control's announcement of new guidance allowing fully vaccinated individuals to go unmasked in nearly all circumstances. The announcement was unexpected and sent governments and businesses scrambling to respond. Some governments, like my home state of Pennsylvania, reacted the same day to conforming their own requirements to the new CDC guidance. Others are taking a wait-and-see approach. Complicating matters is that individual counties and cities have adopted their own face covering requirements. And though some businesses have announced that they will change their face covering policies to match the CDC guidance, others are likely to keep them in place for the foreseeable future, or at least until vaccination rates increase a bit further. All of this means that we are not out of the woods yet, but we seem to be getting close.

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

[COVID-19 Task Force](#)



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### **Page Addresses Lawsuit Filed by Missouri Attorney General Challenging St. Louis County COVID-19 Restrictions**

*"Vaccines are widely available to all adults – it's past time for St. Louis County to lift these restrictions, and that's why I filed suit today."*

**Why this is important:** It is a testament to the enduring nature of the COVID-19 pandemic that lawsuits over public health measures are still being filed more than 14 months after they were first widely implemented. This lawsuit is unusual, however, because it was filed by a state Attorney General against a local county that is attempting to enforce measures, such as face covering requirements and mass gathering restrictions, that have been rolled back at the state level. Also interesting is the Attorney General's specific reference to the universal availability of vaccines as a reason for why the restrictions must end. Particularly now that the CDC has removed its face covering recommendation for fully vaccinated individuals in almost all circumstances, it is likely that vaccine availability will become a recurring political argument for why restrictions are no longer necessary. It is also equally likely that, at least in the short-term, we will see additional clashes between state and local governments on the wisdom of that approach and the speed in which it is implemented. --- [Joseph V. Schaeffer](#)

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## **Washington Co. Man Sues Former Employer, Says He was Fired for Calling Off with Covid**

*"However, a couple days later, the company's vice president, Michelle Cezrneick, contacted Matyjasek and told him, 'Don't be a [expletive], come to work,' the lawsuit said."*

**Why this is important:** A former employee of Kellington Protection Services, David Matyjasek, has filed a lawsuit against his employer alleging a violation of the Family First Coronavirus Response Act ("FFCRA"). Matyjasek experienced COVID-19 symptoms, including a fever, and was advised by his doctor to quarantine for 14 days. He alleges that the company's vice president and the owner told him to come back to work, despite how sick he was, or else he would be fired, and threatened him with a 75 percent pay cut. Matyjasek was fired from his employment within a few weeks. The FFCRA requires employers to provide employees with up to 80 hours of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined and/or experiencing COVID-19 symptoms and seeking medical diagnosis. Depending on whether Kellington Protection Services is a covered employer under the FFCRA, and whether Matyjasek is an eligible employee, it will be interesting to see how the Pennsylvania Western District Court will hold employers responsible. --- [Victoria L. Creta](#)

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## **Courts Skeptical on COVID-19 Tuition Lawsuits**

*"The courts thus far have proven somewhat more open to considering lawsuits alleging that colleges have breached their contracts with students and families -- though those cases will rise or fall based on situation-specific facts of how clearly a college promised that the education would be delivered in person."*

**Why this is important:** If you have been following *Unprecedented*, then you likely have seen stories about students suing colleges and universities for reimbursement of tuition payments because of the transition to virtual, online learning caused by the COVID-19 pandemic. While some of those cases have survived the motion to dismiss stage of litigation, the consensus seems to be that students face an uphill battle in succeeding on these claims. This is because courts traditionally give institutions of higher learning broad discretion to determine the quality of education they provide, and as a result, courts often dismiss claims for educational malpractice. The tuition lawsuits that have seen preliminary success tend to argue that the institution breached a specific contractual promise to provide a certain type of education, often contained in the institution's promotional materials. Even in those cases, however, some courts have refused to distinguish between claims for breach of contract and claims for educational malpractice. Furthermore, even if a student establishes liability on his or her claim, he or she still has to quantify, and prove, the damages they suffered as a result of not having an in-person education. --- [Joseph A. \(Jay\) Ford](#)

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## **Restaurants' COVID-19 Suit Against Insurer Can Proceed**

*"Physical damage is not necessarily visible to the eye, a federal district court said last week, in refusing to dismiss a COVID-19 business interruption lawsuit filed by Alabama restaurants."*

**Why this is important:** A federal District Court in northern Alabama has denied an insurer's Motion to Dismiss, noting the fact that just because the COVID-19 virus has not visibly physically altered a

restaurants' property, it does not mean that coverage necessarily is not available for impacts to the property that are invisible to the naked eye.

Insurers, and insureds, should be mindful that this is a very early ruling on a Motion to Dismiss. It is also worth noting that this ruling is contrary to a majority trend of rulings in favor of insurers throughout the United States.

In the lawsuit, three Alabama restaurants filed suit against their insurer, The Cincinnati Insurance Company ("Cincinnati"), alleging business interruptions claims due to COVID-19. Cincinnati argued the restaurants had not identified physical loss or damage to the restaurants' property needed to trigger coverage. In the initial pleadings stage of the lawsuit, Cincinnati filed a Motion to Dismiss the restaurants' complaints, asserting that the restaurants failed to state a claim for which relief can be granted (what is known as a Rule 12(b)(6) motion). A 12(b)(6) motion is a high hurdle for the party seeking to prevail and the court will give the defending party the benefit of any doubt on legal or factual issues. In this instance, Cincinnati asserted that the restaurants had not pleaded a direct physical loss under the terms of the insurance policy. In this instance, the court looked to policy language that indicated in the court's mind that an insured could suffer physical loss without physical alteration of property because the policy excluded from coverage some expenses incurred because of invisible substances like vapor and fumes. This court likewise indicated that it found no binding authority that addresses "this unusual situation." Cincinnati argued that COVID-19 could be cleaned from the restaurants' surfaces (like dust) with no physical loss of property. Nevertheless, the court noted that while Cincinnati may still prevail at a later stage in the litigation, a dismissal at this point was premature. A copy of the Court's Order may be found at 2021 WL 1816960. --- [Glen A. Murphy](#)

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## **COVID-19 Test Maker Wants Lawsuit Dropped**

*"Gelt Trading, representing investors in the class action lawsuit against Co-Diagnostics, claims that the company's stock prices rose due to the company's claim that its coronavirus test showed 100% sensitivity in multiple evaluations, 'a staggering claim that appeared to set Co-Diagnostics apart from other competitors developing COVID-19 tests,' the lawsuit states."*

**Why this is important:** As is becoming more and more common these days, a class action lawsuit has sprung up regarding a company's stock rising rapidly to startling heights, only to plummet as rapidly as Icarus from Greek mythology. In this case, the company in question was Co-Diagnostics, a Utah-based coronavirus test manufacturer that once claimed its test was 100 percent accurate. When this claim proved to be untrue, the stock price plummeted, and disappointed investors subsequently filed (and successfully certified) a class action lawsuit based on Co-Diagnostics' alleged purposeful misrepresentations designed to artificially inflate its stock price so that its officers and directors could sell their stock at a profit. Co-Diagnostics is now seeking to dismiss the class action, asserting that its representations were never misleading -- an argument that will most certainly be tested as the case proceeds. --- [James E. Simon](#)

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## **Bar Owner Charged with Selling Fake Coronavirus Vaccine Cards in One of the First Cases of Its Kind**

*"The 59-year-old California man is accused of selling the forgeries for \$20 each."*

**Why this is important:** Forged vaccination cards are a new crime drawing the attention of state and federal agencies. Though the vaccines are currently available to any American over 12 years old, some individuals are profiting off the nearly one in four Americans who refuse to get the vaccination by offering forged vaccination cards for sale. This became front page news recently, as a bar owner in Northern California was one of the first to be arrested for selling forged vaccination cards out of his bar. Undercover agents with the California Department of Alcoholic Beverage Control were able to buy multiple forgeries from the bar owner during the month of April. The owner subsequently was arrested and has been charged with three felonies (carrying an unregistered firearm, forgery of a government seal, and identity theft of Pfizer, CVS and the U.S. Centers for Disease Control and Prevention) and one misdemeanor (creating a false medical record). It is not known how many forged vaccination cards he sold, but they were cheap, at only \$20/card, and a search of the bar produced over 30 blank cards and a lamination machine.

This is not an isolated incident. A Long Island CVS employee stole eight pre-filled and more than 50 blank vaccination cards from work and has been charged with petit larceny and criminal possession of a forged instrument. An eBay account was found by *The Washington Post* to have sold over 100 forged

vaccination cards in two weeks. And, State Capitol Police in Connecticut seized a box of fake vaccination cards at an anti-vaccination rally in April. These incidents are on the rise, just as instructions and templates for creating forged vaccination cards are proliferating on conspiracy websites, social media websites, e-commerce platforms and anti-vaccination forums.

A national vaccination database was declined due to privacy concerns, leaving verification of individual vaccination cards somewhat vulnerable. This vulnerability was exacerbated by different states posting high resolution samples of their vaccination cards online and numerous individuals proudly posting pictures of their completed vaccination cards on social media. In response to the growing threat of forged vaccination cards, the FBI, federal law enforcement officers, and state agencies are cracking down on the dangerous practice. The FBI, for example, issued a public warning that "misrepresenting yourself as vaccinated when entering schools, mass transit, workplaces, gyms, or places of worship" puts "yourself and others around you at risk of contracting COVID-19" and may be penalized under federal law. The CDC has encouraged all states to remove template or sample vaccination cards from webpages, and discouraged properly vaccinated individuals from sharing photos of their vaccination cards online. Attorney generals from 47 states have called on companies like Twitter, eBay and Shopify to eliminate accounts offering forged vaccination cards. Together, there is a push among the federal and state law enforcement agencies to identify, investigate, and eliminate these type of forgery scams. The first line of defense, however, remains for Americans to get vaccinated and keep their properly complete vaccination cards safe from scammers. --- [Chelsea E. Thompson](#)

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## **States Keep Up with Lawsuits Against China for 'Malicious' Role in COVID-19 Pandemic**

*"Legal experts have warned that the cases face long odds because foreign governments are generally granted immunity from domestic suits."*

**Why this is important:** President Trump was notorious for laying the blame for the novel coronavirus at China's feet, frequently and controversially referring to it as the "China Virus." President Biden, by contrast, has taken a less confrontational tone. But, that does not mean an end to efforts to hold China to account for its alleged role in originating the coronavirus. Two deep red states, Mississippi and Missouri, are pursuing lawsuits against China to recover damages for the harm caused by the virus. As the article notes, however, these lawsuits face long odds. A year after they were filed, the states are still working to effect service on defendants. And once service is made, the plaintiff states still will have to overcome the Foreign Sovereign Immunities Act, which generally limits the ability to sue foreign governments in United States courts. Missouri, for its part, has anticipated that hurdle by suing the Chinese Communist Party, and some Republican lawmakers are working to reform FSIA to remove obstacles to these suits. Regardless, these lawsuits are as politically driven as they are legally driven, which could complicate President Biden's foreign policy aims going forward. --- [Joseph V. Schaeffer](#)

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## **Florida AG's Suit Over CDC Cruise Rules to Go Before Judge**

*"McDonald said while passenger operations within the U.S. are currently suspended, any cruise line planning to resume passenger travel must follow the agency's conditional sail order requirements."*

**Why this is important:** The cruise line industry awaits U.S. District Judge Steven D. Merryday's decision on whether to enjoin the CDC's restrictions on the cruise line industry, which has affected approximately 159,000 Floridians whose livelihoods depend on the cruise industry. The Florida Attorney General, Ashley Moody, asserts that the CDC has exceeded its statutory authority in issuing the October 30 Conditional Sailing Order. The Conditional Sailing Order sets forth a plan for reopening the cruise line industry: (1) establishment of laboratory testing of crew onboard cruise ships in U.S. water, (2) simulated voyages designed to test a cruise ship operator's ability to mitigate COVID-19 on cruise ships, (3) a certification process, and (4) a return to passenger voyages in a manner that mitigates the risks of COVID-19. Moody alleges that the CDC's program for cruise lines to resume operations is too strict and taking too long, and has singled out the cruise line industry, while airlines continued to run through the pandemic. In the wake of the CDC's revised COVID mandate for fully vaccinated people, it will be interesting to see what Judge Merryday decides, and whether the CDC can lock down the cruise line industry until companies can complete the four phase process set forth in the Conditional Sailing Order. - -- [Victoria L. Creta](#)

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## **Class Action Lawsuit Over Alleged Breach of Confidential PA COVID-19 Contact Tracing Data**

*"The suit says private health information of thousands of people leaked onto the Internet in a data breach traced to security failures by the contractor's contact tracing employees who did not follow correct safety practices."*

**Why this is important:** A common joke among IT professionals is that nobody is more to blame for password and privacy breaches than the inventor of the Post-it Note. (Incidentally, the gentleman most commonly attributed with the credit for this infamous invention, Spencer Silver, recently passed away on May 8th of this year). The crux of this joke, of course, is that the most sophisticated technological system can often be waylaid by human error and/or laziness, and a recent class action lawsuit filed in Pennsylvania certainly lends credence to this premise. According to the allegations in the lawsuit, a COVID-19 contact tracing contractor hired by the Pennsylvania Health Department made the remarkable decision to store the private health information of thousands of Pennsylvanians on unsecured Google spreadsheets, databases, and documents that could be accessed through Google by any member of the public -- no password or login required. When these records were inevitably accessed by unauthorized individuals, this private health information was freely available for an unspecified period of time, potentially violating the privacy rights of thousands of unsuspecting people. The contractor's official response indicates that it is currently in triage mode, seemingly acknowledging that security breaches did occur and representing that it has established a call center and will be offering free credit monitoring and identity protection services to all those affected. Unfortunately for the contractor (and the Pennsylvania Health Department, which was also sued), the class action plaintiffs appear to be unsatisfied with this solution and will be pursuing all legal remedies available to them. --- [James E. Simon](#)

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