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COVID-19 and Unprecedented: Litigation Insights, Issue 27

This 27th edition of *Unprecedented*, our weekly update on COVID-19-related litigation, sees us start with a discussion of a trend toward class actions, with later discussions on two key areas -- insurance coverage disputes and higher education refund claims. In between, we also discuss developments in constitutional challenges to shutdown orders, including a Michigan decision limiting Governor Whitmer's ability to take unilateral action that suggests courts may be reluctant to preserve broad executive powers as pandemic-related restrictions enter their eighth full month. And we also incorporate our thoughts on everything from wrongful death claims to patent litigation.

We hope you enjoy reading.

COVID-19 Task Force

spilman
thomas & battle

Class Action Lawsuit Trends

"As businesses learn how to reopen safely and strive to stay in compliance, legal experts in a recent survey have reported an increase in the number of newly filed class-action lawsuits."

Why this is important: COVID-19 has fundamentally affected the lives of every American. From how students attend school to how individuals work and enjoy their free time, the pandemic has caused all of us to change our behavior. With such sweeping effects, it is not surprising to see the number of class action lawsuits related to the pandemic and shutdowns on the rise. Of the 500 new class actions reported as of May, about 25 percent were business interruption claims against insurance carriers, 25 percent were claims for tuition refunds from education institutions, and 10 percent were claims against gyms and entertainment venues. The remaining class actions were a mix of claims against governments, financial institutions, and other industries in connection with pandemic-related issues. The number of class action lawsuits very likely will continue to rise in the coming weeks and months. Now is the time for businesses to develop plans and procedures to avoid future class action litigation. --- Joseph A. Ford

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Supreme Court Rejects Challenge to Pennsylvania Shutdown Order

"The challenge centered on Democratic Governor Tom Wolf's March 19 order closing all non-life-

sustaining businesses to stem the spread of the coronavirus."

Why this is important: The case of *Friends of Danny Devito*, a first-in-the-nation constitutional challenge to Pennsylvania's business-closure and mass-gathering orders, has ended with a whimper at the Supreme Court of the United States. After denying the petitioners' request for a stay pending appeal in the spring, the Court denied certiorari -- meaning that it won't take up the case on the merits. Those who read into this an unwillingness to question governmental responses to COVID-19 orders, however, are almost certainly mistaken. With the number of constitutional challenges to state responses to the COVID-19 pandemic -- ranging from mass-gathering limitations to business closures -- it seems inevitable that the Court will weigh in. Moreover, members of the Court's conservative wing have already indicated their skepticism of restrictions impacting religious exercise in dissents to the denial of a request for stay pending appeal filed by a California church. The most likely explanation is thus that the Court believed that *Friends of Danny Devito* was simply the wrong vehicle for addressing these significant legal matters. --- Joseph V. Schaeffer

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Judge Denies GW QB's Request for Relief Regarding School Re-Entry Plan

"A Kanawha Circuit judge has denied a high school football player's requests for injunctive relief regarding the state's school re-entry plan and how it affects his ability to earn a college athletic scholarship."

Why this is important: Several challenges to West Virginia's color-coded school reentry plan have been filed. Previously, a Kanawha County parent filed a petition arguing that the map discriminated against students that had chosen in-person classes. Robert Tyler "R.T." Alexander, a senior quarterback at a local high school, moved to intervene. The court denied the motion to intervene, finding that the matters were sufficiently different to prevent intervention. In response, Alexander filed a separate case in the Circuit Court of Kanawha County arguing that it was unfair and unconstitutional to restrict school sports and extracurricular activities while permitting other general community activities. In his request for injunction, Alexander alleged that he was "being denied the opportunity to participate in scheduled football games" as well as "missing a short and irreplaceable window in which to attract the attention of college football recruiters and earn a college scholarship." Alexander asserted he was being denied his constitutional right to "recreational pursuits" as a student pursuant to case law interpreting Article XII, Section 1 of the West Virginia Constitution. Alexander sought injunctive relief to permit practices and games for the remainder of the 2020 high school football season. Undermining the state's discretionary authority during times of crisis would usurp the executive branch's power, according to the Governor. Governor Justice, the West Virginia Department of Health and Human Resources, and the West Virginia Board of Education all opposed the injunction on various grounds, including, among others, that the state's emergency powers permit discretion, Alexander lacked standing, and there is no constitutional right to play sports. Ultimately, the circuit court denied the injunction request on the grounds that the Governor has the authority to issue orders relating to the state's COVID-19 response and "to do otherwise would impede the government's ability to respond during an emergency and during this pandemic." --- Angela L. Beblo

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High Court Strikes Down Whitmer's Emergency Powers; Gov Vows to Use Other Means

"The state's high court ruled 4-3 that a state law allowing the governor to declare emergencies and keep them in place without legislative input - the 1945 Emergency Powers of the Governor Act - is unconstitutional."

Why this is important: The foiled kidnapping attempt against Michigan Governor Gretchen Whitmer obscured a significant legal development affecting that state's response to the COVID-19 pandemic. In a 4-3 decision, a divided Supreme Court of Michigan held that Governor Whitmer could not continue or reauthorize a state of emergency under the Emergency Management Act without a resolution of both houses of the state legislature. And the majority further held that the State Emergency Powers of the Governor's Act was unconstitutional under the non-delegation doctrine, which limits how and to what extent a legislature may delegate power to the executive. The decision is an immediate and significant

victory for advocates of small and limited government, although it does not rule out further measures in response to the COVID-19 pandemic. It just requires that it must go through the legislature -- a potentially difficult task given the increasingly political dimension to governmental responses. --- Joseph V. Schaeffer

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Auditor General DePasquale Discovers Inconsistencies, Puzzling Decisions in Business Waiver Process

""The waiver program appeared to be a subjective process built on shifting sands of changing guidance, which led to significant confusion among business owners.'"

Why this is important: Pennsylvania Auditor General Eugene DePasquale has issued a report on Governor Tom Wolf's waiver process for relief of his COVID-19 closure order issued on March 19. In the report, DePasquale faulted the Department of Community and Economic Development ("DCED") for inconsistent ruling on waivers. He found that the waiver process was very subjective and based upon shifting guidelines regarding reasons for the waivers. The report found that waive guidance came from outside of the DCED even though DCED was the designated decision maker. The report also noted that many decisions were made without basis only to be later reversed based on appeals. In some respects, it would seem unusual that DePasquale, a Democrat, would issue a report critical of a fellow Democrat. However, DePasquale is running for Congress in a district that leans Republican. The report may be used to show his independence from the Wolf administration. --- Bryan S. Neft

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Man Sentenced to a Year in Jail After Holding Large Parties in Maryland Against Orders

"Shawn Marshall Myers, 42, was convicted on two counts of failure to comply with an emergency order after refusing to break up large parties at his Maryland house."

Why this is important: In Maryland, being popular during COVID-19 can be hazardous to your freedom. Shawn Marshall Myers was sentenced to one year in prison with a $5,000 fine for violating Governor Lawrence Hogan's order prohibiting gatherings of more than 10 people. Additionally, Myers will be on unsupervised probation for three years following his release from incarceration. This sentence represents the maximum penalty allowed under the executive order. On March 22, 2020, police broke up a party at Myers' home with more than 50 people in attendance. Five days later, police returned to Myers' residence to break up another party with over 50 attendees. While at first glance this sentence may seem excessive, there are other factors at play. First, this is not Myers only encounter with the criminal justice system. Myers is a registered sex offender with multiple charges on his record, including conspiracy to commit robbery and theft. Second, this could be a warning to others who want to defy Governor Hogan's executive order. Myers has appealed the decision; it is not apparent on what grounds the appeal is based. If the appeal is based on the severity of the sentence, trial judges are given significant latitude in their sentencing decisions and, absent an abuse of discretion, will not be overturned. Given Myers significant criminal history, it is unlikely that the appellate court will find that the sentence was an abuse of discretion. --- Kellen M. Shearin

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Insurers Gain Early Wins in COVID-19 Business Interruption Lawsuits

"Insurers have succeeded in dismissing COVID-19 business-interruption lawsuits in 17 out of 23 cases heard so far, with a growing number of judges finding that some tangible alteration of a property is required to trigger coverage under commercial property policies."

Why this is important: As most in the insurance industry are aware, when COVID-19 established a presence in America, a flood of business owners began running to the courthouse to seek business-interruption insurance coverage for their pandemic-related losses. At the height of the pandemic in May, nearly 70 business-interruption insurance coverage lawsuits were being filed a week, and parties on all

sides began entrenching for what many expected to be a series of drawn-out battles. However, as the smoke clears from the early salvos, it turns out that insurers have won a decisive series of victories in getting these cases dismissed. Across the country, judges have been granting motions to dismiss these lawsuits, generally based on the lack of a direct physical loss to the property. Although the various business plaintiffs have undoubtedly suffered economic losses from the pandemic, courts have been reluctant to find that business-interruption insurance provisions can be invoked in the absence of tangible physical damage to the insured property. Of course, with more than 1,000 of these lawsuits still pending, it is too early to declare that that the insurers have won the war, but business plaintiffs should be alarmed by this slate of early dismissals and aware that they may need to adapt and adjust their arguments if they are going to surmount the motion to dismiss stage and ultimately litigate their cases on the merits. --- James E. Simon

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Panel Consolidates Some COVID-19 Business Interruption Cases

"The MDL ruling follows the panel's decision in August in which it said that centralizing all the COVID-19 business interruption litigation would not work because of differences between policies, among other factors, but that combining ligation against individual insurers may be feasible."

Why this is important: For the last seven months, businesses in the United States have filed numerous lawsuits against their own insurance companies seeking business interruption coverage under their policies. This type of coverage is typically a subset of the property damage coverage in a commercial general liability policy. Some of these litigants have sought to have the U.S. Judicial Panel on Multidistrict Litigation decide these disputes rather than litigate them across multiple states. However, in line with the Panel's decision in August, the Panel has decided that it would consolidate only those cases pending against the Wisconsin insurer, Society Insurance Company. Society Insurance Company has 34 cases filed against it, with 22 pending in the United States District Court in Chicago. By contrast, the other insurers (Cincinnati Insurance Co., Hartford Financial Services Group, Certain Underwriters at Lloyd's, and Travelers Cos.,) for which the Panel rejected consolidation, have lawsuits pending in 29 federal district courts in 19 states. The Panel reasoned that it would be inefficient to consolidate these cases because of the varying policy language and laws of those states. This decision is important because it represents a significant win for the insurance industry. It allows for these cases to be decided on a case-by-case basis by an array of judges interpreting the laws of his or her state instead of these cases being decided by one panel. As we have seen over the past few months, in a tidal wave of decisions, courts in the United States are overwhelmingly interpreting the various insurance policies to find that business interruption coverage is not afforded in the COVID pandemic. It is anticipated that judges dealing with this issue across the 19 states involved in this matter will come to the same conclusion. --- Laura E. Hayes

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65 Atlantic City Firefighters Exposed to COVID-19 Followed 'Ineffective' Approach

"Filed by Local 198, the suit calls the approach to handling the virus 'ineffective,' and 'jeopardized the health and safety of all firefighters, their families, and the general public.'"

Why this is important: Since the beginning of the COVID-19 pandemic, employers and unions have had to decide how and when to bargain regarding protections for essential employees. One issue that has frequently come up has been whether the parties must bargain regarding those protections when operating under an existing collective bargaining agreement. This was the problem faced by the union representing firefighters in Atlantic City when several of its members tested positive for COVID-19 in late September. To prevent the spread of COVID-19 to other firefighters, Atlantic City implemented a rapid testing program for firefighters in contact with a coworker who tested positive. If the firefighter tested negative, Atlantic City ordered him or her to return to work. The union objected that firefighters in contact with a coworker who tested positive should self-isolate for 14 days whether or not his or her test was negative because of the risk of a false negative. It appears the union and Atlantic City could not reach an agreement because the union sued and alleged Atlantic City's testing strategy violates the parties' collective bargaining agreement. The union claims that agreement required Atlantic City to

"protect the safety of Firefighters." Under the National Labor Relations Act (which does not apply to state government employers like Atlantic City), unless the parties' collective bargaining agreement has a procedure for modifying the agreement, the employer generally has no duty to bargain with the union regarding any mid-term modifications to the agreement. And if a subject is covered by the agreement or the union waived bargaining about the subject, an employer may unilaterally implement changes to employment terms without bargaining. Neither tactic -- stonewalling or unilateral changes -- is the most practical because any time saved bargaining may be wasted in litigation or grievances. Except in the most extreme cases where an employer must immediately act, there is also little downside because meeting with a union that represents an employer's employees does not create a duty to bargain where it does not exist under the National Labor Relations Act. --- Mitchell J. Rhein

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Coronavirus-Related Deaths in Nursing Homes Prompt Lawsuits and Questions About Who's Responsible

"They will have to decide whether and how to apportion responsibility for the deaths of the nation's most medically vulnerable population among long-term care operators who were scrambling in the midst of the chaos and confusion during the worst public health emergency in a century."

Why this is important: The cases against nursing homes related to the COVID-19 pandemic have begun in earnest across the country. However, 26 states have implemented immunity provisions protecting long-term care facilities and other health care providers from civil negligence lawsuits arising from the COVID-19 pandemic. This has not deterred plaintiff's attorneys from bringing the aforementioned lawsuits, and it is expected that the number of suits will only increase as the calendar turns to 2021. The immunity provisions do not protect against gross negligence or deliberate/reckless conduct, so it is important for long-term care facilities/nursing homes to stay in close contact with their insurance carriers and counsel when they receive notice of a complaint against their employees/facility. Risk managers and supervisors need to be cognizant of these claims so that a proper defense can be mounted when they are inevitably filed in the judicial system. It is unclear how the appellate courts throughout the nation will view the immunity provisions that have already been implemented in the various states. Those appellate rulings could have a profound effect on the volume of cases that are brought against long-term care facilities/nursing homes, so stay tuned as this is a fast moving area of the law. --- Matthew W. Georgitis

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Family of Tyson Employee in Iowa Who Died of COVID-19 Sues Company, Alleging Gross Negligence

"Pedro Cano's family said he worked on the eastern Iowa pork processing plant's line in late March and April without a mask or gloves, according to a lawsuit."

Why this is important: The COVID-19 pandemic has generated a wave of lawsuits targeting businesses. On September 23, 2020, the family of a Tyson Foods meatpacker who died from COVID-19 sued the company for gross negligence and fraudulent misrepresentation. The lawsuit alleges that the pork processing plant failed to implement protective measures for its workers. For example, the lawsuit alleges that the employee worked at the pork processing plant in late March and April "elbow-to-elbow" with other employees, without a mask or gloves and without receiving guidance from his supervisors regarding the threat of COVID-19. The lawsuit states the pork processing plant was closed on April 6, 2020 because of the rapidly spreading infection. According to the Iowa Occupational Safety and Health Administration, at the time the pork processing plant closed, 24 employees had tested positive for the virus, and that number eventually ballooned to 522. Businesses should continue to monitor these lawsuit trends to minimize the risk of future liability. --- Kayla I. Russell

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Trend Shows Judges Refusing to Dismiss Cases Against Universities Demanding COVID-19 Refunds (subscription site)

"Several judges have come out with the first rulings from among hundreds of class actions seeking

refunds for university and college tuition and fees tied to the COVID-19 shutdowns."

Why this is important: Our *Unprecedented* updates have regularly discussed class action lawsuits against colleges and universities, in which students argue that the transition to remote learning entitles them to refunds for allegedly diminished educational value or unused room and board. This article from Law.com puts a number on these lawsuits -- about 200! -- and notes that, so far, most have survived early motions to dismiss (at least in part). What's really interesting here, though, is that courts have looked most kindly upon breach-of-contract claims, in some cases even finding implied promises in the colleges' and universities' promotional materials. By contrast, courts have been more skeptical of claims for so-called "education malpractice," in which students allege that remote learning is of lower quality. Given the financial pressures that COVID-19 has placed on colleges and universities even before issues of refunds, these claims have the potential to significantly impact higher education in the United States. --- Joseph V. Schaeffer

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Pfizer-BioNTech, Regeneron Sued for Patent Infringement with COVID-19 Products

"The San Diego firm alleges that Pfizer and BioNTech, with its investigational COVID-19 vaccine BNT162, and Regeneron's REGN-COV2, were developed using Allele's mNeonGreen fluorescent protein without the company's permission."

Why this is important: As pharmaceutical companies continue to work on developing a COVID-19 vaccine and treatments, three contenders have been hit with a patent infringement lawsuit for the use of a fluorescent protein patented by Allele, which allows researchers to quickly detect how cells are responding to certain treatments. Pfizer and BioNTech, two drugmakers at the forefront of vaccine development, and Regeneron, recently in headlines for Donald Trump's use of the company's antibody cocktail, are alleged to have infringed Allele's patent by testing and developing their drugs by using the protein. Allele claims that none of the three companies have obtained a license allowing them to use the protein, and has asked for "a reasonable royalty," although it is unclear of the amount. At a time when drug development is critical to combat COVID-19, it will be interesting to see how these types of lawsuits are handled. --- Megan W. Mullins