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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 8

Welcome to the eighth issue of the 2021 edition of *Unprecedented*. Perhaps the biggest news from these last two weeks was the decision to [suspend](#) administration of the Johnson & Johnson vaccine pending investigation into blood clots experienced by six of the vaccine's millions of recipients. Beyond its impact on achieving the Biden administration's vaccination goals, it has also prompted significant discussion about its potential to cause an uptick in vaccine hesitancy. That could have impacts on public health measures meant to slow the spread of COVID-19, which could in turn have broader impacts on the economy. The exact consequences remain to be seen, however, and we continue to track impacts from the COVID-19 pandemic on mass gatherings, insurance coverage, and even the right to a speedy trial. Join us as we discuss these and other issues.

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

[COVID-19 Task Force](#)



Judge Declines to Dismiss Lawsuit Over Indoor Dining Ban Involving Illinois Restaurant

"While Grischow decided not to dismiss the case, she did not reach a decision on the merits of their argument."

Why this is important: Even as many states are reopening, lawsuits over executive power to control the COVID-19 pandemic continue to work their way through the courts. What is interesting about this lawsuit is that it has been allowed to proceed at all. In the early days of the COVID-19 pandemic, most courts were highly deferential to executive authority and plaintiffs typically lost their challenges. But, courts have increasingly taken a more jaundiced view as the COVID-19 pandemic has dragged on and allowed these claims to proceed. That does not mean, of course, that plaintiffs will prevail: even as she denied Illinois Governor Pritzker's motion to dismiss, the trial judge noted that the plaintiff carried a heavy burden of demonstrating arbitrary and unreasonable conduct. That determination, though, may take months or even years to resolve—meaning that the scope of executive power may not be clear until well after the COVID-19 pandemic is (hopefully) over. --- [Joseph V. Schaeffer](#)

Businesses Filing More COVID Lawsuits and the Stakes are Higher

"The anniversary of COVID-19 shutdown orders brought an upturn in both the number of business-interruption lawsuits against insurers and the amount of damages they are claiming."

Why this is important: For over a year, various businesses have filed lawsuits seeking coverage from their insurance companies for business interruption coverage due to the pandemic. The primary argument for coverage has been that COVID-19 alters the physical surface that it is on and amounts to property damage such that coverage is triggered. In addition, some businesses are claiming that either the virus exclusion in its policy does not apply or its policy does not contain a virus exclusion. Therefore, coverage should be afforded.

Initially, these businesses were filing individual suits. However, a new wave of lawsuits are emerging and these lawsuits are more sophisticated and are presenting different theories of recovery. Also, instead of individual businesses filing suit, businesses are grouping together to file class actions seeking a great deal of money. Although these new lawsuits are bigger and more sophisticated, the plaintiffs in these lawsuits will still have an uphill battle because insurance companies have been mostly prevailing in the first wave of COVID-19 coverage lawsuits. In fact, in recent weeks, the ratio of wins for the insurance industry is increasing. According to this article, in the last three weeks insurers have won almost nine out of 10 cases decided.

In addition, it appears that at least one federal appellate court will side with the insurance industry on COVID-19 coverage lawsuits as well. The first federal appellate court to take up one of these cases is the Eighth Circuit Court of Appeals, which heard arguments last week. During oral argument, the three-judge panel seemed very skeptical that the virus causes physical damage such that business interruption coverage is triggered. The Eighth Circuit decision on this issue is likely to be used by other litigants to advance their position in future cases.

Recent CDC findings are also giving insurance companies even more ammunition to battle these lawsuits. The CDC announced that the virus is primarily spread through droplets in the air. The risk of contracting the virus through objects is low, according to the CDC. However, in this new wave of lawsuits, policyholders are contending that just because the virus spread is primarily airborne does not mean that the virus cannot cause property damage. These new lawsuits are focused on whether COVID-19 is similar to mold, which contaminates the air. The plaintiffs' attorneys are arguing that policyholders have prevailed in mold lawsuits, so they should prevail in COVID-19 lawsuits as well.

As plaintiff's attorneys change theories regarding coverage, it will be interesting to see what develops. However, as with the first wave of COVID-19 business interruption coverage, it is likely that the insurance industry will prevail in the majority of this second round of lawsuits as well. --- [Laura E. Hayes](#)

Bill Protecting Pennsylvania Businesses from COVID-Related Lawsuits Advances in Harrisburg

"Supporters of House Bill 605 contend it would prevent frivolous lawsuits from clogging up an already backlogged court system while providing plaintiffs and defendants a speedy remedy that saves legal costs."

Why this is important: Though state legislatures have been discussing immunity for certain COVID-19-related lawsuits since almost the beginning of the pandemic, Pennsylvania's House Bill 605 takes a different approach. It would not confer immunity, but rather refer most lawsuits alleging personal injury or death from COVID-19 exposure to an arbitration panel made up of three Pennsylvania attorneys. The idea is to remove these cases from the courts' regular dockets and minimize the burdens of litigation by

placing them on this arbitration fast track. But, plaintiffs can avoid arbitration under House Bill 605 by attesting that the personal injury or death resulted from the defendant's failure to comply with public health directives in effect at the time of the alleged misconduct. Any party can also take a de novo appeal to the trial court, albeit at its own costs. Positions on the bill are unsurprisingly split, and the trial bar is already suggesting a legal challenge if it makes its way past Governor Wolf's desk. Whatever the outcome, though, the advancement of House Bill 605 shows that the consequences of litigation from COVID-19 continue to weigh on legislators' minds. --- [Joseph V. Schaeffer](#)

West Virginia Supreme Court Mulls COVID-19 Impact on 3-Term Speedy Trial Rule in 2 Cases

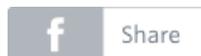
"The West Virginia Supreme Court heard Rule 19 arguments in two cases involving application of the three-term speedy trial rule while considering last year's COVID-19 court closures mandated by them."

Why this is important: The right to a speedy trial is a constitutional provision of which most (if not all) Americans are aware. However, West Virginia's Supreme Court will soon have to decide how to balance this right with the stark reality that COVID-19 made it impossible to have speedy trials in 2020. Two criminal cases, including a murder case, are currently on appeal where the defendants urge that they are entitled to dismissal with prejudice because their cases were not tried within three court terms, regardless of whether COVID-19 had caused the court systems to grind to a halt. At oral argument, the Supreme Court justices indicated that they were cognizant of the pandemic's wide-ranging effects, but were wary about setting a broad rule that courts could dispense with constitutional rights based on judicial emergencies that result in court terms not being considered "full terms" (a standard that the state was proposing). Whichever way the Court rules, it will face a Solomon-esque decision if it seeks to "split the baby" and reach a solution that both protects Sixth Amendment rights and allows judicial latitude for extraordinary (but long-lasting) circumstances. --- [James E. Simon](#)

Supreme Court Hands Tony Evers Another Defeat, Rules He Can't Limit Bars and Restaurants Without Legislature

"In a 4-3 decision, the conservative majority ruled Evers should have sought to limit capacity in bars and restaurants through a legislative process known as rulemaking — siding with a lawsuit brought by an Amery bar and Pro Life Wisconsin and was first filed by the Tavern League of Wisconsin, which dropped out of the legal fight after a lower court sided with Evers."

Why this is important: It has been a tough couple of weeks for Wisconsin Governor Evers at his state's Supreme Court. A few weeks ago, the Court held that he lacked the authority to continue in perpetuity certain public health orders without legislative consent, which had the effect of striking down face covering requirements in that state. And last week, the Court held that his administration's emergency orders setting mass gathering restrictions were invalid because they did not go through the state rulemaking process. Though this issue was technically moot by the time it reached the Court, the ruling limits the executive's ability to take unilateral action in response to future public health emergencies. The cumulative impact of Wisconsin Supreme Court's decisions has been instead to place far more power in the state legislature. --- [Joseph V. Schaeffer](#)



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