

COVID-19 TASK FORCE

Expect Insights

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COVID-19 and Unprecedented: Litigation Insights, Issue 26

This 26th edition of *Unprecedented*, our weekly update on COVID-19-related litigation, sees us returning to now-familiar topics involving liability protection for businesses, wrongful death lawsuits (particularly those involving long-term care facilities), tuition refunds, and, of course, constitutional challenges to emergency and public health orders.

The article on take-home COVID-19 cases, however, bears particular scrutiny as it highlights a possibility that we have been discussing from some of our earliest issues -- that plaintiffs might try to hold businesses responsible not just for the infection of their employees, but also their employees' families. Also notable is the staying power of constitutional challenges, which continue to be filed (and find success!) despite some earlier setbacks.

We hope you enjoy reading.

[COVID-19 Task Force](#)



[Pennsylvania Can Resume Limiting Crowd Sizes During Pandemic, Appeals Court Says](#)

"U.S. District Judge William Stickman IV in Pittsburgh, an appointee of President Donald Trump, had ruled against the state's size limits on indoor and outdoor gatherings, saying they violate citizens' constitutional rights to assemble."

Why this is important: A Pennsylvania-based federal judge sent shockwaves through the legal community involved in challenges to COVID-19 shutdown orders when he struck down key Pennsylvania restrictions as unconstitutional. Now, the Third Circuit Court of Appeals has temporarily restored the mass-gathering restrictions pending a decision on the merits of the Commonwealth's appeal. Although this move might suggest skepticism of the underlying order by the appellate court, the more likely explanation is a desire by the Third Circuit to preserve the status quo on an issue with potential public health implications. What it means for the time being, however, is that the Wolf administration can continue to enforce mass-gathering restrictions and the battle over those restrictions' constitutionality is far from over. --- [Joseph V. Schaeffer](#)

[Bills OK'd by Michigan House Protect Employers from COVID-19](#)

Lawsuits

"If the bills are enacted, workers would be unlikely to win if they sued their employers for getting sick, unless there's proof the business failed to follow COVID-19 safety guidelines, according to the bill."

Why this is important: The Michigan House of Representatives has passed two bills that would protect businesses from "frivolous lawsuits" that could cost substantial amounts of money, possibly even forcing a business to declare bankruptcy. Michigan House Bill 6030, if enacted, would make it more difficult for employees to have standing, a constitutionally or legislatively defined requirement that a person have an actual interest in the subject matter of the litigation. Under this bill, an employee would only have standing if they are "COVID-19 positive and require hospitalization for 24 hours, or if the illness forced them to miss 14 days of regular activity or death." Michigan House Bill 6031 further protects employers by granting them immunity from all lawsuits alleging COVID-19 exposure provided the business has complied with all federal and state statutes, executive orders, and public health guidance at the time of the employee's exposure. Additionally, employees are receiving increased protection under Michigan House Bill 6032, which precludes employers from firing or retaliating against employees who contract COVID-19. The Michigan Senate must still pass these bills before they officially become law. However, if these bills are passed they could provide other state legislatures with a model to limit the COVID-19 liability of businesses within their borders. --- [Kellen M. Shearin](#)

[Roy Moore Leads a Lawsuit Against COVID-19 Restrictions, Including Mask Mandate, in Alabama](#)

"A group unhappy with the coronavirus restrictions placed on Alabamians filed it and there's a familiar name at the helm of that suit: Former Chief Justice Roy Moore."

Why this is important: Never far from the news cycle, former Chief Justice Roy Moore and his affiliated legal nonprofit, the Foundation for Moral Law and Roy Moore, have filed a lawsuit challenging COVID-19 restrictions that have been put in place by the Alabama government over the past six months. According to a public statement issued by Moore and the nonprofit, they are seeking "damages, a temporary restraining order, and a permanent injunction" (sic) against the Governor of Alabama and the State Health Officer from "issuing mandates which exceed their authority." It appears that the lawsuit attacks nearly all of Alabama's COVID-19 emergency measures, including stay-at-home orders, social distancing, mask requirements, and travel restrictions. According to Moore, such emergency measures are unconstitutional and unnecessary, despite COVID-19, because the United States has withstood disease and pestilence before without mandatory stay-at-home orders and mask-wearing laws. Although this lawsuit will undoubtedly grab headlines, it remains one of many filed since the onset of the pandemic challenging the various emergency acts invoked by state leaders. Given that at least one other state supreme court (Michigan) has proven receptive to a similar lawsuit challenging the Governor's authority to invoke emergency acts, it will be interesting to see whether the Alabama court system will prove equally sympathetic to Moore's latest legal undertaking. --- [James E. Simon](#)

[Lawsuit Over Commercial Coverage May Impact COVID-19 Litigation](#)

"The decision includes two pages discussing the admissibility of evidence under the Daubert standard; however, its rationale with respect to the meaning of what is a 'direct physical loss' to property may be far-reaching in COVID-19 litigation."

Why this is important: In another of many business interruption decisions favorable to insurers, the Eleventh Circuit has recognized the primary issue in claims alleging business interruption, which is the insured must experience direct physical loss or damage to property as a threshold issue. This lawsuit, while not a COVID-19 claim, was a first-party claim made by an insured (a Miami restaurant) for damages allegedly resulting from the daily cleaning of dust and debris generated by nearby roadway construction. The damages alleged were for cleaning costs, lowered sales, and the replacement of an awning/roof system. Employing the same rationale found in similar COVID-19 decisions, the District Court determined

that neither the claim for cleaning, nor the claim for lowered sales, were covered losses. This was because the Court found no direct physical loss (tangible damage) to the property attributed to the dust. The Court examined the claim for the roof/awning system, but found the insured's experts' testimony to be unreliable. As a result, summary judgment was entered for the insurer at the District Court level. The matter was appealed by the insured and the District Court's decision was upheld by the Eleventh Circuit. The Eleventh Circuit Court also noted that "[u]nder Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical'". This is an important ruling for insurers in Florida, and elsewhere, as insurers have been arguing that even if you can show premise contamination (by dust or by COVID-19), an insured cannot show direct physical loss or damage if the contamination can be cleaned away. --- [Glen A. Murphy](#)

Businesses Could Face Billions of Dollars in Lawsuits from Employees Who Brought Covid-19 Home to Relatives

"Around 9 percent of the roughly 200,000 Covid-19 deaths in the U.S. are believed to stem from take-home infections - and the lawsuits could cost businesses up to \$21 billion if fatalities reach 300,000."

Why this is important: Cases of workers bringing home COVID-19 to their family members continue to pile up in courts across the country. Unlike claims of contracting an illness while at work, these claims by family members of employees are not barred by workers' compensation laws. This opens the door for enormous liability, which would ordinarily be capped under workers' compensation laws. Additionally, as these cases mount, parties will be reluctant to settle until several test cases have been tried to juries, a situation unlikely to occur soon with the backlog of criminal jury trials from the COVID-19 shutdown taking priority of the court's docket. This will mean many litigants living with a lot of uncertainty for a long time.--- [Risa S. Katz-Albert](#)

Mercer Student Sues University Over Online Courses During COVID-19 Pandemic

"A Mercer University senior, in a federal lawsuit filed against the Macon school earlier this month, claims that she and other students are entitled to refunds for tuition and fees paid for in-person, spring-semester courses before the school switched to online-only classes because of the coronavirus outbreak."

Why this is important: A Mercer student alleges that the university's switch to distance learning during the coronavirus outbreak amounts to a breach of contract. She claims that students paid "for a first-rate education" and "in-person educational experiences" and received "sub-par" learning options compared to regular course offerings. Interestingly, she cites the personal choice to not memorize material for class and the option to consult books and materials during exams as a failure on the university's part to assist in the development of strong study skills. Moreover, she states the ability to receive a pass-fail grade was not paid for and expected despite a petition signed by 492 Mercerians in support of a pass-fail grading system. Whether or not the federal court recognizes this breach of contract claim or upholds the university's discretion to providing safe and suitable educational instruction and breach of contract defenses will create strong precedent for students who received, and universities that offered, online instruction during the pandemic. --- [Victoria L. Creta](#)

Judge Denies Injunction in Lawsuit Over Religious Gathering Limits

"Doing so 'would present a high risk of harm to the state of Colorado as well as the public in general,' the judge wrote in her decision."

Why this is important: Since the death of George Floyd sparked a wave of widespread and enduring protests, we have seen a number of lawsuits arguing that the lack of a law enforcement response in those cases undermines the state's ability to enforce mass-gathering limitations in other cases. At least some of those arguments have been raised by churches, which even before the protests were arguing

that mass-gathering limitations were, without justification in public health, treating them differently than big-box retailers and other essential businesses. What is interesting here is not just the continuation of those arguments, tied now explicitly to the lack of enforcement against protests, but also the citation to positive case law for churches -- the County of Butler order from Pennsylvania striking down several of that state's COVID-19 orders and several decisions from across the country finding discrimination against churches on First Amendment grounds. Those recent precedents notwithstanding, though, the Colorado federal court presiding over this case denied the church's motion for a temporary restraining order. And in doing so, it brought home the primary lesson from COVID-19 litigation so far: namely, there is no consensus, with courts across the country reaching different conclusions on what seem to be similar facts. --- [Joseph V. Schaeffer](#)

Lawsuit Filed Against Avalon in Vets Home COVID-19 Death

"It alleges that Drayer, 70, of Volcano, died due to substandard care and nonexistent safety practices."

Why this is important: The trend of wrongful death lawsuits filed around the country continues, as the family of a veteran who died from COVID-19 in a Hawaii veterans home has sued the facility for wrongful death. The lawsuit alleges that the veteran died due to "substandard care and nonexistent safety practices" in the facility. The lawsuit asserts that the facility owed a duty of care to the veteran, which it breached, causing the veteran's wrongful death. One of the allegations is that the veteran tested positive for the virus on August 28, but his family was not notified about his positive test result until August 31. Since the first case was reported at the facility in August, 71 residents and 35 employees of the facility have contracted the virus. It is important for nursing homes and hospitals, even so more than other entities, to monitor evolving regulatory requirements and best practices to minimize the risk of future liability. --- [Kayla I. Russell](#)

Class-Action Lawsuit Against Middlebury Seeks Spring Tuition Refund

"Although the college refunded students a prorated portion of fees for spring room and board, the plaintiff seeks an additional refund for the 'failure to provide services' that are ordinarily covered by tuition and mandatory fees."

Why this is important: A Middlebury College student seeks to certify a class action suit for tuition and fees paid for an in-person semester prior to the coronavirus pandemic. Although the college refunded students a prorated portion of fees for spring room and board, the plaintiff seeks an additional refund for the failure to provide services and use of facilities like the library, sports facilities, in-person labs, and health services. If a federal judge certifies the suit's class action status, the case will be tried by jury. If a judgment is found against the college, it may have to tap into its endowment fund to repay the students creating a precedent that can threaten the financial health of other colleges and universities. --- [Victoria L. Creta](#)

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