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January 10, 2022

## Unprecedented: COVID-19 Litigation Insights, Volume 3, Issue 1

Welcome to our third volume of *Unprecedented*. While we would like to retire this publication because COVID-19 has been eradicated and all litigation has withered away, we all know that is not the case. If anything, COVID-19 has presented new challenges for 2022 and our goal is to provide insights and guidance that will help you prepare for issues that are to come.

The impact of whistleblowers, insurance issues, business interruption cases, gross negligence cases, and biometric privacy lawsuits are trending this month. Read more below.

At the bottom of this e-newsletter, we have included a survey. If you have the time, we encourage you to let us know how you find this information. Is it useful? Is the format easy to read? What changes would you like to see? We want to make this publication as helpful as possible and your input is essential.

Thank you for reading and here's to a healthy and prosperous 2022!

[James E. Simon](#), Co-Editor of *Unprecedented*

and

[Joseph A. \(Jay\) Ford](#), Co-Editor of *Unprecedented*

[COVID-19 Task Force](#)

**spilman**  
thomas & battle

## **Whistleblower Lawsuit Filed Against Ruffs Dale Company**

*"A former quality assurance director at a Ruffs Dale in-home care company contends in a federal lawsuit he was fired after reporting allegations that covid-relief funds were misappropriated and staff-training documents were falsified."*

**Why this is important:** Bryan Kantorczyk is seeking back pay and future potential earnings, and other monetary damages for emotional distress, mental anguish, and inconvenience, from his former employer, Gene Cook Supports Inc., in a federal whistleblower lawsuit. Gene Cook Supports provides in-home care and support to children and adults with intellectual and developmental disabilities, and Kantorczyk alleges he was fired just a day after he reported the wrongdoings of Gene Cook Supports to regulatory agencies during a routine audit of services. Specifically, Kantorczyk reported that (1) Gene Cook Supports awarded senior officials \$25,000 bonuses with money from a federal hazard pay grant in 2020 that was earmarked for staff hazard pay, (2) Gene Cook Supports improperly spent money from a federal low-interest loan received as part of a COVID-relief effort to purchase property, and (3) staff was not properly trained to meet state and federal guidelines, but was directed to submit documents that misrepresented their status. Gene Cook Supports has not responded to Kantorczyk's allegations, but intends to respond in court. --- [Victoria L. Creta](#)

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## **NHL Sues Insurers Over Covid-19 Reimbursements**

*"The parties allege that the companies – Factory Mutual Insurance Company, The Cincinnati Insurance Company, Starr Surplus Lines Insurance Company, Lexington Insurance Company, and Federal Insurance Company – have refused to reimburse more than US\$1 billion worth of losses caused by Covid-19."*

**Why this is important:** The COVID-19 pandemic has impacted nearly every business. Sports franchises and venues are no exception, and while many leagues were able to eventually re-open arenas to spectators, the damage was done. For the 2019/2020 NHL season, the league recorded a 14 percent decrease in revenue compared to a year earlier, largely due to decreased fan attendance.

The NHL (like many businesses) claims it expected coverage under business interruption policies and recently filed suits seeking coverage for COVID-related losses in California state court. The league claims coverage for "massive losses" its teams faced due to the pandemic, including losses from "when a communicable disease physically alters the air and surfaces within the clubs' arenas, making them unfit for their intended use." Additionally, the NHL claims specific coverage for losses related to a "communicable disease" and have argued that the government shutdown caused losses due to restricted access to insured arenas.

The carriers sought dismissal because there were no allegations of physical loss or property damage, which is a threshold requirement to trigger coverage -- an argument that has proven to be very successful in courts across the country.

This case is important because the NHL may succeed in making arguments in California state court that have been rejected across the country. It will be interesting to see if the NHL can draw nuances and distinctions from other cases to trigger coverage -- or at least extend the matter beyond the motion to dismiss stage. If successful, the NHL may "break the ice" on triggering coverage for these claims. --- [Julian E. Neiser](#)

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## **7th Circuit Affirms Dismissal of 4 COVID-19 Business-Interruption Lawsuits**

*"The appellate panel affirmed decisions by three U.S. District Court judges in Chicago that found a dental practice, jewelry store, bar and restaurant and hotels in Illinois and Texas were not entitled to coverage from their commercial property insurers for business income lost because of the coronavirus pandemic."*

**Why this is important:** In a continuing trend, a 7th Circuit Court of Appeals panel, in four separate decisions, joined four other appellate courts in ruling that SARS-CoV-2 ("COVID") does not cause a direct physical loss or damage that triggers coverage under a commercial insurance policy. The 7th Circuit encompasses Illinois, Indiana, and Wisconsin. This ruling comes as no surprise. It follows the majority of

rulings throughout the United States, supporting insurers' denial of business interruption coverage claims arising out of COVID, despite numerous lawsuits filed against insurers alleging such losses.

This ruling affirmed decisions by three U. S. District Court Judges that found no coverage for losses for a dental practice, a jewelry store, a bar, and a restaurant, resulting from the coronavirus pandemic. Significantly, Circuit Judge Diane Pamela Wood identified that "[w]hile the impact of the virus on the world over the last year and a half can hardly be over-stated, its impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days," That comprehensive ruling can be found [here](#).

Insurer, American Property and Casualty Insurance Association, filed an amicus brief (a friend of the Court brief) in support of the lead defendant's case (Cincinnati Insurance), noting the 6th, 9th, 8th and 11th Circuit Courts of Appeals also have affirmed dismissals of lawsuits seeking coverage for COVID shutdowns, as have state appellate courts in California and Ohio.

In disposing of some of the plaintiffs' arguments for coverage, the Court noted that insurance policies should be interpreted as the average person would understand them. The gist of coverage for business interruption coverage is a direct physical loss of property. The opinion states "[w]ithout a physical alteration to property, there would be nothing to repair, rebuild or replace." --- [Glen A. Murphy](#)

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## **Iowa Court to See Lawsuit Alleging 'Gross Negligence' by Tyson During COVID-19 Outbreaks**

*"When COVID-19 hit Iowa, it particularly ravaged meat packing plants, where people work in close proximity rendering carcasses."*

**Why this is important:** You may recall our prior coverage of on-going wrongful death litigation involving COVID-19 outbreaks at the Tyson Foods Waterloo, Iowa pork processing facility in March and early April 2020. Late last month, the United States Court of Appeals for the Eighth Circuit ruled that the litigation must proceed in Iowa state court. Tyson and its co-defendants previously attempted to remove the cases to federal court, arguing that the actions challenged by the plaintiffs were taken at the direction of federal officials. Tyson claimed that it was operating its facilities at the request of federal officials to maintain the nation's food supply. The Eighth Circuit disagreed, finding that the fact Tyson "is subject to pervasive federal regulation alone is not sufficient to confer federal jurisdiction." Additionally, the court noted that despite the federal government's comments encouraging Tyson to stay open, Tyson maintained complete control over its operations, as evidenced by the fact that it shut down multiple plants in April 2020.

While applicability of the federal officer removal statute depends on the facts of a given situation, this decision likely deals a blow to future defendants in critical infrastructure sectors seeking to remove cases to federal court. --- [Joseph A. \(Jay\) Ford](#)

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## **Amazon Must Face Biometric Privacy Lawsuit Over COVID-19 Health Checks**

*"Amazon is among the many businesses that have been sued under the Illinois law, which is recognized as one of the strictest in the U.S. addressing biometric privacy."*

**Why this is important:** The Illinois Biometric Information Privacy Act (the "BIPA") requires any company capturing biometric information to obtain informed consent and a release. This legislation, which is well-known to be the most stringent in the country, has been a minefield for businesses operating in Illinois since its passage in 2008, and class actions are on the rise there as a result. We [previously reported](#) on a case action -- "Biometric Info Center of Truckers' Lawsuit Against Union Pacific." In the current lawsuit against Amazon, a former employee alleges that Amazon employees "were exposed to ongoing, serious, irreversible privacy risks – simply by going into work" as a result of mandatory automated temperature checks conducted when employees arrived and proceeded through a scanner at the entrance to the building. Because the employee's identity was linked to the scan and stored in Amazon's employee database, the lawsuit contends that protections accorded by BIPA were triggered and violated. Last week, the U.S. District Court denied Amazon's motion to dismiss the plaintiff's proposed class action. This is a significant defeat for Amazon given that the damages sought by one employee might now be exponentially multiplied. For example, Facebook settled a class action for

violations of BIPA for \$650 million last year. And, there is a growing concern for businesses as to whether traditional business insurance coverages will apply to claims under BIPA and similar statutes as this would require an expansion of coverage terms into a new frontier of biometrics. Companies need to be vigilant of other states adopting similarly stringent legislation and proactively plan for such implementation by adopting procedures designed to obtain informed consent before gathering any biometric data. --- [Lori D. Thompson](#)

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