

COVID-19 TASK FORCE

Expect Insights

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COVID-19 and Unprecedented: Litigation Insights, Issue 20

This 20th edition of *Unprecedented*, our weekly update on COVID-19-related litigation, finds both plaintiffs and defendants with reasons to celebrate. Insurance carriers avoided consolidation of coverage disputes in multi-district litigation, while business owners saw a federal court complaint in Missouri survive a motion to dismiss. Tennessee's legislature moved forward with a bill providing liability protections from COVID-19 lawsuits, while plaintiffs continued to press the scope of liability for COVID-19-related injuries. And a recent order from the Supreme Court of Virginia extended a moratoria on evictions, while a vigorous dissent gave landlords hope that the courts' deference to tenants is wearing thin. Each of these cases shows that the law governing COVID-19-related claims is still very much developing.

We hope you enjoy reading.

[COVID-19 Task Force](#)



[JPML Won't Centralize All COVID-19 Insurance Cases](#)

"Noting the fact that the cases involve more than 100 insurers and a wide variety of different policy forms, the JPML concluded that an 'industry-wide MDL in this instance will not promote a quick resolution of these matters.'"

Why this is important: The Judicial Panel on Multidistrict Litigation (the "JPML") recently rejected two petitions to centralize hundreds of lawsuits filed by businesses seeking insurance coverage for losses suffered in connection with COVID-19. The petitions were filed in April, when about 20 business interruption coverage cases had been filed in federal courts across the country. Now, more than 450 such cases are pending in federal courts. In denying the petitions, the JPML noted that these cases "share only a superficial commonality" and that the cases involve "different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states." The JPML further indicated, however, that smaller, single-insurer MDLs may be appropriate. Specifically, the JPML stated that the lawsuits against The Hartford, Cincinnati Insurance Co., various underwriters at Lloyd's of London, and Society Insurance Co. may be suitable for centralization and asked counsel for those insurers to submit findings on the issue by August 26. Whether the cases proceed in a centralized MDL or in various courts across the country, litigation over business interruption coverage is far from over. --- [Joseph A. \(Jay\) Ford](#)

[Lt. Gov. Forest Drops Lawsuit Against Gov. Cooper Over COVID-19 Safety Orders, AG Stein Says](#)

"He argued that the governor should have consulted with the 10-member Council of State before officially putting them into action and also said Cooper violated state law by enacting a quarantine without a court order."

Why this is important: Plaintiffs around the country have challenged the legal underpinnings for shutdown orders on any number of theories ranging from constitutional violations to procedural improprieties. With the exception of religious freedom and Second Amendment claims, however, most of the lawsuits have found little success. The same held true for Lt. Gov. Forest's lawsuit against Gov. Cooper, with a North Carolina court denying a request for injunction based on the legislature having given Gov. Cooper broad discretionary powers. Perhaps seeing the writing on the wall, Lt. Gov. Forest withdrew his lawsuit and turned the issue of Gov. Cooper's powers over to the North Carolina voters -- in an election where Lt. Gov. Forest just so happens to be Gov. Cooper's Republican challenger. --- [Joseph V. Schaeffer](#)

[Aurora Meat Plant Sued After Butcher's Wife Dies of COVID-19](#)

"In a suit filed in Kane County, the estate of Esperanza Ugalde argues the Aurora Packing Company was aware of the COVID-19 danger and 'actively created' increased risks by not enacting any type of prevention plan or giving employees personal protective equipment."

Why this is important: Ricardo Ugalde, a longtime employee at the Aurora Packing Plant in Kane County, Illinois, believes his employer is to blame for his wife's death from COVID-19-related complications. Erika Iniguez, the Ugaldes' daughter, has filed a wrongful death case against Mr. Ugalde's employer for the death of Mrs. Ugalde. The plaintiff claims that the meat packing plant knew of the dangers associated with operating during the COVID-19 crisis and failed to enact any type of prevention plan or to provide employees with personal protective equipment, continuing to require employees to work "shoulder to shoulder" without even giving them masks. In late April, Mr. Ugalde became ill with COVID-19, and shortly thereafter Ms. Ugalde fell sick too, dying on May 2, 2020. This precedent-setting case pushes the boundaries of consistently adhered to liability principles, including foreseeability, causation, and superseding causes. If this plaintiff is successful, it may change the landscape of employer liability for decades to come. --- [Risa S. Katz-Albert](#)

[State AG Threatens Lab with COVID-19 Fraud Lawsuit](#)

"In a letter to the attorney for the firm, Joshua Weiss, an assistant attorney general, claims that it frequently took nine days and more for Sonora Quest to process COVID-19 tests. Weiss said that was longer than consumers were being promised - and violates the Arizona Consumer Fraud Act."

Why this is important: Arizona's Consumer Fraud Act, like many states' consumer protection statutes, prohibits, among other things, the use of deception, fraud, and false promises. If a testing facility purports to offer COVID-19 testing results within a certain timeframe, and fails to deliver those results within that timeframe, it may be subject to consumer lawsuits under a number of state laws. There are several areas of concern with delayed testing results, including that individuals infected with the virus may unknowingly spread it to others while awaiting their test results. The ability to conduct timely contact tracing may also be obstructed when testing results are delayed. Furthermore, a testing facility that delivers a false or fraudulent promise regarding its testing turnaround time may benefit financially, as consumers may be more likely to choose that testing facility over another. --- [Tai Shadrack Kluemper](#)

[Virginia Supreme Court Grants Temporary Moratorium on Evictions](#)

"Virginia's Supreme Court has granted a request from Gov. Ralph Northam to temporarily stop evictions"

proceedings, extending protections for tenants who can't pay their rent through the beginning of September."

Why this is important: Millions of Americans have lost their jobs during the COVID-19 pandemic and, with them, the ability to pay their rents or mortgages. States have responded by placing moratoria on eviction proceedings -- sometimes through action of the courts and sometimes through executive order. And though these moratoria have been challenged in court, they have so far stood up to scrutiny. A recent order from the Supreme Court of Virginia, however, reveals a judiciary that is deeply divided over its role during the COVID-19 pandemic. Dissenting from the Court's extension of an eviction moratorium, three of its members took the majority to task for assuming functions of the other two branches and preferring one set of litigants over another -- potentially to the detriment of landlords' constitutional rights. --- [Joseph V. Schaeffer](#)

[NJ Lawsuit Targets Immigration Court Hearings During COVID-19](#)

"New Jersey immigration lawyers say in a lawsuit against the U.S. Justice Department that required in-person immigration hearings unnecessarily puts their lives at risk during the coronavirus pandemic and seek an injunction barring in-court proceedings."

Why this is important: In-person proceedings in the Newark, New Jersey Immigration Court shut down in March due to the COVID-19 pandemic. On June 24, 2020, the Department of Justice's Executive Office for Immigration Review announced that it planned to reopen the Newark Immigration Court, and allow in-person hearings for cases involving un-detained individuals, beginning July 14, 2020. On July 31, 2020, the New Jersey Chapter of the American Immigration Lawyers Association, Michael DiRaimondo, Brian O'Neill, and Elizabeth Trinidad, filed a complaint for injunctive and declaratory relief, seeking to enjoin the Department of Justice from requiring attorneys to appear in-person for hearings. The plaintiffs allege that "[b]y . . . compelling attorneys to appear in person at significant risk to their personal health and to the detriment of the overall public health, Defendants have engaged in arbitrary and capricious action in violation of the Administrative Procedure Act." Additionally, the plaintiffs allege the Department of Justice's actions "constitute a state-created danger to the health of immigration attorneys, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States." If the plaintiffs' attempt to enjoin the Newark Immigration Court's in-person requirement is successful, similar lawsuits could follow. For a copy of the complaint, click [here](#). --- [Wesley A. Shumway](#)

[Federal Judge Rules Against Insurers in Kansas City COVID-19 Lawsuit](#)

"The lawsuit was filed in April by three Kansas City-area restaurants that were shut down for 11 weeks because of the coronavirus, and a company that runs hair salons."

Why this is important: A hair salon and four restaurants in the Kansas City metropolitan area sued Cincinnati Insurance Company in the United States District Court for the Western District of Missouri, seeking coverage under their property insurance policies (all written by Cincinnati) for their losses caused by closure orders issued by civil authorities in Missouri and Kansas. Cincinnati moved to dismiss, but the judge presiding over the case has denied that motion, thereby allowing discovery to proceed before later dispositive motions are briefed and argued. This case highlights some of the weaknesses that can exist for insurance companies in these disputes: The policies in question were "all risk" property insurance policies, which cover every risk of loss not explicitly excluded. The policies failed to define the critical terms "physical loss" and "physical damage." Finally, the policies did not include any sorts of virus-related exclusions. Relying on the very forgiving standard that applies to motions to dismiss (i.e., all alleged facts are taken as true), the possibility that the policies could be ambiguous on the operative terms (due to the lack of definitions for those terms), the probability that discovery will provide more concrete facts upon which to decide the case later, and the probability that case law will continue to develop, the judge found that it was best to let the case proceed for now. Those interested in how such cases can be litigated at the discovery and summary judgment stages should pay close attention to this one. --- [Don C.A. Parker](#)

Controversial Tennessee Bill Raising Legal Bar for COVID-19 Lawsuits Clears First Hurdles During Special Session

"A controversial Tennessee bill to provide sweeping legal protections from COVID-19 lawsuits filed against businesses, schools, churches and other nonprofit entities easily cleared its first hurdles in Republican-run Senate and House committees."

Why this is important: Tennessee's COVID-19 liability bill would require plaintiffs to prove "gross negligence or willful misconduct" in order to assert a claim based on injuries from COVID-19. Opponents argue that the bill unfairly shifts responsibility for injuries onto innocent parties, while also arguing that the protections are unnecessary given the difficulty plaintiffs will have proving that they contracted COVID-19 at any particular location. For supporters of the bill, however, the point is not in the proof but in the filing -- they fear that plaintiffs will overwhelm businesses with marginal claims intended to coerce settlement. --- [Joseph V. Schaeffer](#)

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