

COVID-19 TASK FORCE

**Expect
Insights**

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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 3

Welcome to the third issue of the 2021 volume of *Unprecedented*. Those who watched the Super Bowl last night would have seen several signs of the times: recognition of the 7,500 **vaccinated** healthcare workers in attendance, plus a halftime show that left viewers wondering whether the masks were costume or public health measure. The fact is that COVID-19 remains a reality and will for some time to come. As we report this week, businesses continue to struggle under COVID-19 emergency orders and are pursuing even long-shot claims for compensation against their governments and insurers. Employees also continue to file whistleblower or tort claims against their employers, and shareholders have started to pile on with securities fraud claims. And, all this caused some governments to revisit discussions about immunities from COVID-19 claims -- a proposal that's desired as fiercely by business as it's opposed by labor.

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

[COVID-19 Task Force](#)



Actor Sues Netflix Over COVID-19 Work Conditions

"He now claims his firing runs afoul of California's Whistleblower Retaliation statutes, which protects employees from retaliation after reporting legal violations to authorities."

Why this is important: On January 15, 2021, Timothy Hearl became the first actor to sue entertainment employers over COVID-19 working conditions. Hearl was hired to play a monster for a drive-in live entertainment experience called *Stranger Things: The Drive Into Experience*. The drive-in show allows fans of the Netflix series to navigate their vehicles through the fictional town of Hawkins, Indiana, in 1985, where actors re-create scenes from *Stranger Things'* third season. Hearl sued Netflix along with other defendants, alleging that he was fired after expressing concerns about the risk of COVID-19 exposure during rehearsals that were held indoors and subsequently filing a complaint with the California Occupation Safety and Health Administration. The lawsuit alleges violation of the California Whistleblower Retaliation statutes, which protect employees from retaliation after reporting legal violations to authorities. In response to the lawsuit, a *Stranger Things* production source says that there have been no positive COVID-19 cases among actors during their active service of performance.

One reason that the entertainment industry has not witnessed worker lawsuits related to COVID-19 is because labor unions have been involved in issuing guidelines about on-set safety and recommending production pauses. However, the Hearl lawsuit demonstrates the possibility of litigation if producers do not keep up with these standards. All employers should review OSHA guidance issued on January 29, 2021, pursuant to President Biden's executive order, which discusses COVID-19 prevention programs, including how to conduct a hazard assessment, how to isolate workers potentially infected, and uses of PPE and ventilation. --- [Kayla I. Russell](#)

COVID Rules Closed His Downtown Durham Bar. Now He Wants the City and NC to Pay.

"We are being punished for compliance,' with the state's executive orders, Slater said in an interview."

Why this is important: The Atomic Fern is small private club/bar in downtown Durham, North Carolina with board games (!) and the distinction of being named the third "geekiest" bar in North America. But, it has much in common with many bars and restaurants across the country: The Atomic Fern has been forced to close as a result of the pandemic. Months behind on the rent, the owner has now been locked out of the building. He has filed a lawsuit seeking damages from the city and state under a theory of discrimination in executive orders mandating bar closures (but not providing for protections from landlords and utility companies) and asserting a taking without compensation. The legal theories are likely to fail, as conceded by the bar's attorney, but the importance here is in recognizing the palpable desperation and frustration of small business owners who find themselves reduced to quixotic windmill-tilting in seemingly uneven and shifting environments of changing pandemic metrics and governmental action to address the public health issues. For these business owners, almost one year into the crisis, things still feel that they might get worse before they get better. --- [Rayford K. \(Trip\) Adams III](#)

Tyson Seeks Dismissal of COVID-Related Lawsuit

"Tyson is seeking a dismissal, saying the lawsuit is barred by Iowa's new COVID-19 Response and Back-to-Business Limited Liability Act and former President Donald Trump's designation of meatpacking plants as critical infrastructure with a responsibility to continue to operate during the coronavirus pandemic."

Why this is important: Tyson Foods, Inc. has been named as a defendant in a number of COVID-19-related lawsuits over the past several months. In one such case brought by the family of a former employee at the meatpacker's Storm Lake, Iowa plant, Tyson recently argued that the case should be dismissed based on Iowa's COVID-19 Response and Back-to-Business Limited Liability Act, which protects businesses from COVID-19 related lawsuits, unless the plaintiff can demonstrate that the company acted with actual malice and intentionally and recklessly endangered workers' safety. Additionally, Tyson argued that the former employee's claim must be adjudicated through the state's workers' compensation system. Tyson further argued that President Trump's declaration of meatpackers as critical infrastructure employees shields the company from liability because doing otherwise would undermine the emergency declaration. At least one Iowa court has ruled against Tyson's theory already, but it remains to be seen how this particular court will receive Tyson's arguments. The decision will certainly influence the future of COVID-19-related litigation. --- [Joseph A. \(Jay\) Ford](#)

South Dakota Lawmakers Propose Bill to Make COVID-19 Lawsuits Harder to File

"South Dakota lawmakers are hoping to head off a flood of post-COVID-19 litigation by introducing legislation that would make it harder for people who contracted the disease to sue."

Why this is important: South Dakota House Bill 1046 has passed through the state house of representatives and was heard February 4, 2021 in the Senate Judiciary Committee. The bill is aimed at stemming the anticipated flood of COVID-19-related litigation by limiting the liability of certain entities for COVID-19 exposure allegations, limiting the liability of medical and dental providers for the delay or cancellation of elective care, limiting the liability of makers of personal protective equipment from liability for cases contracted while using their products, and requiring prospective plaintiffs to demonstrate that their exposure to COVID-19 was intentional or the result of gross negligence. If this bill is enacted without substantial modification, it will severely curtail the ability of individuals sickened by COVID-19 because of their jobs and activities to hold employers and other businesses responsible. --- [Risa S. Katz-Albert](#)

Procaccianti Hotel Group Sues Insurer that Denied 'Devastating' COVID Loss Claim

"One of largest privately held hotel operators in the United States, Rhode Island-based Procaccianti Companies Inc. and its subsidiary TPG Hotels & Resorts Inc. have accused Zurich American Insurance Co. of breaching its contract by refusing to honor its obligations under the \$300-million 'all risk' insurance policy."

Why this is important: The Procaccianti hotel group has now joined the long list of businesses that have sought insurance coverage for the losses they have sustained due to the pandemic. The Procaccianti hotel group is one of the largest privately held hotel operators in the United States owning, managing, and developing properties in more than 130 cities across 31 states, from coast to coast.

It accused its insurer, Zurich American Insurance Co. of breaching its contract, violating Rhode Island Deceptive Trade Practice Laws, and breaching the covenant of good faith and fair dealing when Zurich denied its claim for business interruption coverage.

U.S. District Court Judge William E. Smith is presiding over the case and is faced with the decision of whether the losses caused by COVID-19 constitute a "direct physical loss" and whether the exclusion in the Zurich "all risk" policy for "contamination" prohibits coverage. The majority of other courts in the United States faced with this issue have found that such losses are not covered under the insurance policy. This will likely be the outcome with this case as well. Very few courts have taken the opposite view and held that coverage is afforded under the insurance policy. Therefore, it is likely that Procaccianti's lawsuit will be dismissed, and it will have to look elsewhere to try to recoup its losses. --- [Laura E. Hayes](#)

Shareholder Lawsuit Alleges Tyson Misled About COVID-19 Protocols

"It followed a Dec. 15 letter from New York City Comptroller Scott Stringer to the U.S. Securities and Exchange Commission that asked the regulator to investigate Tyson's health and safety disclosures to investors, which include the \$229 billion New York City Retirement Systems."

Why this is important: Meatpacking company Tyson Foods, Inc., faces a new class action lawsuit brought in the Eastern District of New York by a Canadian shareholder on behalf of all shareholders. The shareholder alleges that Tyson made false or inaccurate health and safety disclosures to investors regarding the COVID-19 pandemic, and seeks unspecified damages. The lawsuit was largely spurred by a December 15, 2020 letter from the New York City Comptroller to the U.S. Securities and Exchange Commission requesting that Tyson's COVID-19 disclosures be investigated, arguing that Tyson had far more deaths and infections among its employees than other comparable meatpacking companies. In response to this letter, Tyson's stock value dropped and this lawsuit was filed. Tyson, therefore, faces

potential liability on two fronts: through a potential SEC investigation and this shareholder class action. Though it is far too soon to know whether the shareholders will prevail, the case is important because it demonstrates another theory under which a publicly traded company may be sued by its stockholders. Of the roughly 20 such cases filed, some involve companies that make PPE or other pandemic-related items, while others are based upon business transactions that were suspended or terminated due to COVID-19. The Tyson case offers a different theory centered on the adequacy or accuracy of a company's disclosures regarding COVID-19 to stockholders, which may lead to increased risk or lower stock prices. This is a broader theory, applicable to more publicly traded companies because it is not tethered to the company's products or anticipated transactions. Given the broader applicability, it is best to keep an eye on the Tyson litigation to see how the shareholders' theory of liability fares in court. --- [Chelsea E. Thompson](#)

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