

COVID-19 TASK FORCE

**Expect
Insights**

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COVID-19 and Unprecedented: Litigation Insights, Issue 21

This 21st edition of *Unprecedented*, our weekly update on COVID-19-related litigation, pairs defense victories with new claims. Lenders obtained the dismissal of a lawsuit claiming agent fees under the PPP program, and insurers obtained yet another dismissal in a case seeking coverage for COVID-19-related business interruptions. Plaintiffs, meanwhile, have sued hospitals for insufficient protective measures, employers for household members' secondary exposure, and universities for campus reopening plans. Disputes over government shutdown and face-covering orders likewise have continued to press on, as have lawsuits over alleged price-gouging. The result is that COVID-19 litigation has touched nearly every aspect of American life, with no signs that it will abate any time soon.

We hope you enjoy reading.

[COVID-19 Task Force](#)



First-in-the-Nation Lawsuit Against National Hospital Chain Alleges Reckless Actions Spread COVID to Patients, Workers, Public

"A lawsuit filed in Superior Court here is the first in the nation to allege that a major national hospital chain - HCA Healthcare, the country's largest for-profit health system - and its hospital in Riverside recklessly facilitated the spread of COVID-19, putting patients, workers and the surrounding community at a heightened risk of infection."

Why this is important: Earlier this month, HCA Healthcare - the U.S.'s largest for-profit health system - was hit with one of the nation's first lawsuits claiming that a hospital chain's reckless actions facilitated the spread of COVID-19 to its workers, patients, and the surrounding community. The plaintiffs are three workers from Riverside Community Hospital who contracted COVID-19 and the daughter of a worker who died after catching the coronavirus. The plaintiffs allege that the hospital and its owner forced employees to work without adequate PPE, forced employees to work despite having COVID-19 symptoms, and failed to frequently or effectively sanitize medical tools or commonly touched surfaces. Hospitals and health systems across the country should follow this case, as similar lawsuits inevitably will be filed nationwide. - [Joseph A. \(Jay\) Ford](#)

[Pa. Attorney General Sues Amazon Seller Over 'Outrageous' \\$75 Hand Sanitizer](#)

"In June, the attorney general's office said it had received more than 5,000 complaints of price hikes during the pandemic."

Why this is important: As Americans rushed to stockpile toilet paper and hand sanitizer during the early days of the COVID-19 pandemic, third-party resellers stepped in to meet demand. For some of those resellers, however, the rush to meet demand may have opened them up to significant liability. The reason is that most states place restrictions on sellers' ability to increase prices once a state of emergency is declared. And they impose significant penalties on violators. Thus, for instance, Pennsylvania's Attorney General is seeking \$830,000 in civil penalties from a company that is alleged to have sold hand sanitizer at markups ranging from 1,500 percent to 2,000 percent. And given the sheer volume of complaints - more than 5,000 as of June, according to the Attorney General's office - this likely represents just the tip of the iceberg. --- [Joseph V. Schaeffer](#)

[Accountants' Suit Over Pandemic Loan Agent Fees Dismissed](#)

"A Florida federal judge dismissed an accounting firm's proposed class suit claiming that agents for loan recipients under the federal Paycheck Protection Program should get a portion of the processing fees received by lenders, finding the coronavirus relief bill and enacting rules create no such entitlement."

Why this is important: This case asks whether the language in the CARES Act, which provides that "agents may not collect fees from the borrower or be paid out of the PPP loan proceeds," should be construed with a Small Business Administration rule, which states that "agent fees will be paid by the lender out of the fees the lender receives from SBA," so as to require lenders to pay agent fees. U.S. District Judge T. Kent Wetherell II found no such obligation, absent an agreement between the accounting firm or agents and the bank. Judge Wetherell interpreted the language to mean that if agents are to be paid a fee, it must be paid by the lender from the fee it receives from the SBA, not that lenders are required to share their fees. This case was one of the first of at least 50 similar cases currently pending, and while the plaintiff accounting firm will be given the opportunity to amend its complaint before a final judgment is entered, Judge Wetherell is apparently skeptical of its ability to do so successfully. --- [Megan W. Mullins](#)

[Farms and Orchards File Lawsuits Fighting Michigan's COVID-19 Executive Orders](#)

"The federal lawsuit filed by attorneys for the Michigan Farm Bureau argues that the mandatory testing violates workers' civil rights because it targets the Latino community."

Why this is important: In early August, the Michigan Department of Health and Human Services ("DHHS") issued an Order mandating companies conduct COVID-19 testing for migrant and seasonal workers, as well as workers in the meat, poultry, and egg processing industries. The DHHS Order follows upon several high-profile COVID-19 outbreaks at meat processing facilities across the country, and the accompanying press release specifically notes the disparate impact on Latinos, which make up 5 percent of Michigan's population but 11 percent of COVID-19 cases. The Michigan Farm Bureau and others have seized upon that language, as well as the absence of any similar requirements outside the nursing home industry, to argue that Latinos are being unfairly targeted. But for its part, DHHS says that the Order is race-neutral and was prompted by 11 identified outbreaks at farms and food-processing plants. The case only serves to highlight Michigan's difficult position - caught between calls to minimize the outbreak and concerns about the disparate impact of the methods it has chosen to do so. --- [Joseph V. Schaeffer](#)

[Bars Must Stay Closed in Broward, Judge Rules in COVID-19 Lawsuit](#)

"The judge's ruling is the latest in a statewide trend of judges upholding the state's right to restrict business activity and require public compliance in the name of public health."

Why this is important: A Broward County, Florida Judge issued an order August 18, 2020 upholding the authority of the Governor's current order keeping closed bars that do not predominantly make their money by serving food. This ruling is a critical point in the pandemic because while not truly final, it functionally extends until an appellate court reviews the current rules put into effect that limit bars' ability to make ends meet for the foreseeable future. Likely to be the basis of an appeal is the inherent inconsistency of allowing theme parks to open while keeping bars closed. The constitutional analysis of the Broward County Judge included the conclusion that constitutional rights to conduct commercial activity can be limited to protect the public health. This conclusion may come under attack because of the disparate treatment bars are receiving compared to other establishments serving primarily entertainment needs, such as the state's major amusement parks. --- [Risa S. Katz-Albert](#)

Governor to Withdraw Lawsuit Against Atlanta Over Masks, COVID-19 Guidelines

"Kemp said court-ordered mediation over the issue had stalled, so he would issue a new executive order with 'relevant language' that would address the issue."

Why this is important: Georgia Governor Kemp attracted national attention in July when he filed a lawsuit against Atlanta Mayor Bottoms over her authority to issue city-wide face-covering requirements and mass-gathering restrictions. After a stalled mediation, however, the lawsuit has fizzled out, with Governor Kemp announcing his intent to withdraw the complaint. Part of the reason seems to be that the dispute was not as significant as presented in the media: beyond the face-covering requirement, Mayor Bottoms' mass-gathering restrictions were mostly voluntary. Even so, the lawsuit highlights both the tension between state and local efforts to address the COVID-19 pandemic, as well as the increasingly political dimension that has attached to face-covering requirements. --- [Joseph V. Schaeffer](#)

Judge Won't Throw Out Class-Action COVID-19 Lawsuit Over Ball State Moving Classes Online

"In asking for the case to be thrown out, Ball State noted that it implemented virtual learning on March 16, following orders and guidance from local, state and federal government officials."

Why this is important: Indiana's Ball State University faces litigation over its decision to transition to remote learning in spring 2020 due to COVID-19. The student plaintiffs allege unjust enrichment and breach of contract, arguing that the university breached its duty to provide an in-person education. Ball State moved to have the lawsuit dismissed, asserting that it moved classes online following orders and guidance from state and local government officials, including an executive order from Governor Eric Holcomb. The court denied Ball State's motion to dismiss the lawsuit. Other universities have faced lawsuits from students related to COVID-19, including Duke University, but two class action lawsuits filed by Duke students were dismissed after North Carolina Governor Roy Cooper signed a law providing immunity to North Carolina institutions of higher education that shifted classes online from legal claims to recover spring 2020 tuition, fees, or room and board expenses. --- [Sarah E. Kowalkowski](#)

Federal Judge Tosses San Antonio Barbershops' Lawsuit Against State Farm Over COVID-19 Losses

"Senior U.S. District Judge David A. Ezra said he sympathizes with the plaintiffs, but he granted the insurer's motion to dismiss the case."

Why this is important: Restaurants, barbershops, and other businesses relying on in-person interactions have been particularly hard-hit by the COVID-19 pandemic and government orders limiting

their operations to stop the spread. For that reason, those businesses have been at the vanguard of efforts to force insurance carriers to cover pandemic-related losses under business interruption policies. But so far, plaintiffs' successes have been few and far between. The reason, as a group of San Antonio barbershops recently discovered, is that courts have interpreted the policies' "direct physical loss" clauses as requiring something more than the mere surface presence of the novel coronavirus. But plaintiffs seem to be undeterred: as the barbershops' attorney noted, her clients' policies required "direct physical loss to property," whereas other policies required "direct physical loss of or damage to the properties." For her other clients, this represented an opening to coverage in either case. And for carriers, it's a sign that the coverage disputes are far from over. --- [Joseph V. Schaeffer](#)

Woman Sues Lockport Company Over COVID-19 Infection

"A woman's lawsuit said a Lockport-based manufacturer failed to protect her husband from a COVID-19 infection but the company's owner disputed that claim."

Why this is important: Secondary exposure cases have been common to certain industries for years, with plaintiffs alleging that they contracted an illness or disease from a household member who worked among a particular product. Now, secondary exposure cases are making their way into the realm of COVID-19 litigation, with an Illinois woman among the first plaintiffs to allege that she contracted the illness because of insufficiently protective measures at her husband's place of employment. Proving these claims, however, is expected to be difficult. The standard of care is likely to be in dispute, particularly for infections that occurred at the beginning of the pandemic. Causation likewise may be difficult to prove, given the multiple possible points of exposure. But for businesses faced with the cost of defending these claims, the prospect of dismissal months down the line will be of little comfort. --- [Joseph V. Schaeffer](#)

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