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## Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 17

From litigation shields to controversial COVID-19 treatments and fake protection to Metallica and ski resorts to compensable pay, we look at the trending COVID-19 litigation that is rocking the legal world right now. Let us know if you agree with our choices of trending litigation and why it is important. Welcome to issue 17 of *Unprecedented*.

Thank you for reading.

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

and

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

[COVID-19 Task Force](#)



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### **DeSantis May Strip Lawsuit Protection from Businesses Requiring COVID-19 Vaccinations**

*"Thus far, the administration has identified around 120 businesses, big and small, and local governments that it may seek penalties against under the law, according to the Department of Health."*

**Why this is important:** At the onset of the pandemic, many states (including Florida) enacted statutes protecting businesses from liability for employees or customers who contracted COVID-19 on the businesses' premises. These types of statutes are commonly referred to as "litigation shields" and were widely viewed as necessary and beneficial for the economy and businesses to survive. Now, as part of his ongoing fight against vaccine mandates, Governor Ron DeSantis has floated the idea of removing Florida's litigation shield from businesses that enact vaccine mandates. Although the Governor's logic is far from clear, it appears that he may be suggesting that businesses that enact vaccine mandates should be legally responsible for any vaccine-related side effects employees may suffer. Although such an action would have to be approved by the Legislature, and would almost certainly be subject to legal attack, if this idea gains popularity then it may indeed have an intimidating effect on Floridian business owners who disagree with Governor DeSantis' personal beliefs as to vaccines and the pandemic. --- [James E. Simon](#)

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## **Dozens of Lawsuits Seek to Force Hospitals to Treat COVID-19 with Ivermectin**

*"The lawsuits follow much of the same format; families have gotten a prescription for the drug, but hospitals refuse to use it on the patients, many of whom are on a ventilator, close to death."*

**Why this is important:** Ivermectin, a deworming drug primarily used by veterinarians to treat parasites in animals, has emerged as another flashpoint in the divisive social/medical climate brought on by the COVID-19 pandemic. Now, dozens of lawsuits have been filed around the country by COVID-19 patients and their families who have received prescriptions for the drug, but whose hospitals refuse to administer it. Many of the patients are on ventilators and close to death from the virus. Many of the lawsuits were filed by a lawyer from Buffalo, New York. Despite the patients having been prescribed ivermectin by a doctor, it is the hospitals caring for these patients that are refusing to administer the drug, as a medically inappropriate treatment not approved by the FDA to treat COVID-19. (Even Merck, ivermectin's manufacturer, says it should not be used on COVID patients.) The disputes are framed on the plaintiffs' side with ideas like "doctors are not gods" and on the hospitals' side with comments like "hospitals are not restaurants...patients don't order their own treatments." The hospitals raise concerns that medical decisions should not be made by laypeople and judges who can overrule the medical profession; medicine works because physicians and hospitals are trained experts and need to have the final word on what treatment they are willing to give to a patient, not controlled by patient demand backed up by courts. --- [Rayford K. \(Trip\) Adams III](#)

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## **Federal Lawsuit Claims Company Sold Thousands of Fake N-95 Masks to Cleveland Clinic**

*"The complaint states that the Cleveland Clinic issued more than 53,000 of these masks to its workers before learning they were counterfeit."*

**Why this is important:** Q2 Solutions operates multiple retail websites used for the sale of PPE, and an investigation indicates that Q2 Solutions may have sold counterfeit PPE to at least 20 medical facilities. The Cleveland Clinic purchased approximately 400,320 counterfeit 3M branded respirators/masks from Q2 Solutions and to date, has not been repaid for any part of the purchase price of \$1.8 million. The counterfeit nature was discovered at a routine fit testing process for Cleveland Clinic caregivers, where nurses indicated that the masks were too small. The Cleveland Clinic collected and sequestered all the masks and 3M requested pictures of the purported 3M masks sold by Q2 Solutions. Upon investigation, 3M concluded that the masks were counterfeit, and Cleveland Clinic voluntarily abandoned the respirators/masks. The U.S. Department of Homeland Security/Homeland Security Investigations seized the properties, and an action in forfeiture has been filed in the Northern District of Ohio. --- [Victoria L. Creta](#)

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## **Judge Says Metallica's COVID-19 Lawsuit Can Proceed**

*"A Los Angeles state court has refused to dismiss pandemic-related event cancellation litigation filed by heavy-metal band Metallica despite a virus exclusion in its coverage."*

**Why this is important:** In another one of the multiple lawsuits arising out of COVID-19 closings and cancellations, American heavy metal band, Metallica, has managed to get over its first hurdle of surviving a motion to dismiss in a coverage dispute lawsuit with its insurer.

The dispute arose out of the postponement of Metallica's 2020 South American tour. As a result of the cancellations, Metallica sought compensation under its event cancellation coverage for the losses. Lloyds contended that the postponements were a result of the pandemic and asserted the Lloyds' policy virus exclusion. Rather than concede Lloyds' position, Metallica apparently had "dreams of war, dreams of liars, dreams of dragons' fire" and filed suit against Lloyds.

In the lawsuit, the California Superior Court recently held that it could not dismiss a lawsuit over Metallica's canceled South American tour at this early stage, because, applying California's efficient proximate cause doctrine, proximate cause has not been established by Lloyds as to what caused the loss involved. See *Frantic, Inc. v. Certain Underwrites at Lloyds* (No. 21STYCV21403, slip op., at \* 6-7 (Cal. Super. Ct., October 1, 2021). The Superior Court found that a virus exclusion did not bar coverage at the motion to dismiss stage under the efficient proximate cause doctrine because Metallica had alleged its losses were predominantly caused by other factors, such as governmental orders, rather than the virus. Metallica went on to explain that while the virus still exists, travel restrictions and restrictions on social gatherings had lifted and eased, suggesting that it was something more than just the virus/disease that caused the cancellations. While lawyers for Lloyds have yet to comment, Metallica's lawyer pointed out that many concerts and professional sports are being played with fans in the seats, despite the virus.

A motion to dismiss is very preliminary in any lawsuit. Essentially a defendant is stating, "even if everything you say is true, you still have not stated a legal claim." Policy terms, conditions, exceptions and exclusion are significant in insurance coverage litigation. Following additional discovery, one can only anticipate that Lloyds will move for summary judgment. --- [Glen A. Murphy](#)

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## **Judge Tosses Lawsuit from Pass Holders Seeking COVID-19 Refunds from Vail Resorts**

*"That the safety threat came from a deadly virus rather than thinning snow is immaterial — skiing was too dangerous, so Vail closed its resorts."*

**Why this is important:** If you have been following *Unprecedented*, you probably have seen coverage about breach of contract or refund claims arising from colleges' decisions to only offer remote learning in an effort to combat the spread of COVID-19. Those lawsuits largely have been unsuccessful. In a similar vein, a federal judge recently dismissed a lawsuit brought by several season pass holders of Vail Resorts. The plaintiffs alleged that their passes entitled them to "unlimited" skiing, but the resorts suspended operations on March 15, 2020, breaching their contracts with the plaintiffs. The court disagreed, finding that the resorts were within their rights to close the facilities when conditions were no longer safe for skiers: "That the safety threat came from a deadly virus rather than thinning snow is immaterial . . . ." Although there is a similar lawsuit pending against Alterra Mountain Company, in which the court so far has refused to dismiss the customers' breach of contract claims, it seems that season pass holders who were not able to enjoy their passes due to COVID-19 likely will be left out in the cold. --- [Joseph A. \(Jay\) Ford](#)

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## **Amazon Sued by Warehouse Workers Over COVID-19 Screening Pay**

*"The complaint says that beginning in March 2020 Amazon required employees at Colorado warehouses to arrive early, wait in lines outside the facilities, and then answer questions and check their temperature once they were inside."*

**Why this is important:** A proposed class action recently was filed against Amazon in Colorado federal court related to Amazon's COVID-screening policies during the pandemic. According to the lawsuit, Amazon forced employees to spend 20-60 minutes each work day undergoing temperature checks and answering COVID-screening questions, and refused to compensate employees for this time. Amazon is facing at least one similar lawsuit in a different jurisdiction and previously has argued that the screening time was not compensable because it benefited Amazon's workers. While it is too early to say whether Amazon or its employees ultimately will prevail, if Amazon's arguments are rejected by the courts, it could end up facing substantial liability. --- [James E. Simon](#)

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