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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 6

Welcome to the sixth issue of the 2021 edition of *Unprecedented*. The United States recently cleared the 3,000,000 daily vaccination threshold, a significant marker in efforts to have every eligible American vaccinated by year-end. But while these numbers are encouraging, progress continues to vary significantly state-by-state. The COVID-19 pandemic also will have lingering consequences even when eradicated. Beyond the litigation currently winding its way through the system, we expect to see more personal injury and wrongful death claims, more employment discrimination and safety claims, and more insurance coverage claims as injuries are fully realized and the courts complete their reopening. Stay with us, then, as we cover these developments and trends.

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

[COVID-19 Task Force](#)



COVID Deniers Drop Lawsuit

"One day before the deadline to answer Judge Carr's order, attorneys for Ohio Stands Up asked him to dismiss the case without prejudice, which would allow them to re-file if they choose."

Why this is important: A group of Ohio plaintiffs decided to dismiss their lawsuit against the Ohio Department of Health after they were ordered by a United States District Court to explain their argument. The plaintiffs had alleged the Health Department's orders to slow the spread of COVID-19

amounted to "absolute tyranny." They asked for all COVID-19 health orders to be overturned and for an award of \$75,000 per plaintiff. The court found the lawsuit's allegations were nearly "incomprehensible." These same plaintiffs also have filed COVID-19 lawsuits against federal health agencies for what they have termed "the greatest hoax in American history." It remains to be seen whether these other lawsuits will move forward. However, the chances are low given the plaintiffs' inability to explain their allegations in the dropped Ohio lawsuit. --- [Charity K. Lawrence](#)

Mediation is a Solution to COVID-19 Insurance Lawsuit Deluge

"The expense and corollary issues around business-interruption claim litigation should make mediation attractive to insurers and policyholders."

Why this is important: Businesses throughout the United States have been filing coverage lawsuits by the thousands in the hope that they will be able to recover some of the losses they have sustained during this pandemic. So far, there have been approximately 1,500 lawsuits filed in the past year. Many of the policies at issue have suit limitation provisions that will reduce the statute of limitations, some as short as one year. Others have longer periods of time to file suit or no limit. Therefore, the 1,500 lawsuits that have already been filed could be just the tip of the iceberg and many more suits could be filed as deadlines draw closer. If the policyholders and the insurance companies decide to mediate these lawsuits, it could result in cost savings to the parties and allow the insurance companies to resolve these matters without an admission that coverage is owed and avoid negative publicity. In addition, as it stands now, it is uncertain how the courts will rule on these issues. According to the article, there have been 80 rulings on motions to dismiss and 15 rulings on motions for summary judgment. However, a great deal of those decisions have been appealed.

In addition, according to the article, the most recent lawsuits are asserting different allegations, so there is no guarantee that the insurance companies will prevail. For policyholders, the risk inherent in litigation is time. Most businesses cannot endure prolonged litigation and are in need of money now. Given the benefits of mediation, it could be very advantageous for the parties to engage in settlement talks rather than litigation. This is important because it could provide an alternative and cheaper path for all of the litigants to resolve these cases. --- [Laura E. Hayes](#)

Second Lawsuit Filed Against Russell's for Alleged COVID-19

Violations

"They claim a former bartender, Lindsay McKay, allegedly saw 'violation after violation of COVID-19 rules and safety guidelines.'"

Why this is important: One of the lessons of the COVID-19 pandemic has been that the circumstances might be novel, but many of the legal risks are not. Firing employees for reporting violations of health and safety statutes, for instance, has long been illegal under state law or public policy. What has happened as a result of the pandemic, however, is that employees and employers have had to learn—and then re-learn—just what is permitted and prohibited from a health standpoint. It is unsurprising, then, that some employers have found themselves on the wrong end of employee complaints about working conditions. Some of these COVID-19 claims will lead to liability, whereas others will be dismissed. But, what is important for employers to consider are the measures that they can put in place now to ensure a robust compliance program through the end of the COVID-19 pandemic and beyond. --- [Joseph V. Schaeffer](#)

Lawsuit Claims Northam's COVID-19 Restrictions Discriminate Against Certain Businesses

"However, the governor failed to include wedding venues and other businesses in the recent change."

Why this is important: On February 24, Governor Ralph S. Northam issued Executive Order 72, easing COVID-19 restrictions in the Commonwealth of Virginia by increasing the number of individuals who may attend private, outdoor, in-person events from 10 to 25, and increasing the number of individuals who may attend public, outdoor sporting, religious and entertainment events to the lesser of 1,000 persons or 30 percent of total venue capacity. Violation of these restrictions are punishable as a Class 1

misdeemeanor. On March 3, an outdoor wedding venue filed a complaint in the U.S. District Court for the Western District of Virginia against Governor Northam alleging that the restrictions are discriminatory and violate their Fourteenth Amendment rights to equal protection and to freedom of assembly, noting that a wedding conducted as a religious ceremony enjoys greatly expanded capacity compared to a non-religious wedding ceremony. A hearing on the wedding venue's motion for a preliminary injunction is scheduled for March 24. In its Response in Opposition to the motion, the Office of the Attorney General argued that federal jurisdiction is lacking as Governor Northam has sovereign immunity and that the venue lacks standing to assert the religious protections that may be accorded to its clients who elect between a religious and non-religious ceremony.

This lawsuit will be significant if the District Court allows the challenge to a Governor's executive order to proceed in federal court. Similar challenges have been attempted in the Eastern District of Virginia, as well as in Alabama, Louisiana, Ohio, and New York, and have been rejected. Recognizing that governors must make difficult decisions to protect the public in the midst of scientific uncertainties, federal courts have been reluctant to engage in judicial second-guessing. --- [Lori D. Thompson](#)

Award-Winning Raleigh Chef is the Latest to Sue Insurance Company for COVID Losses

"The two-time James Beard Award winner is suing Cincinnati Insurance for business interruption coverage, arguing that North Carolina-ordered restrictions on dining prevented her eight restaurants from running at full capacity and should be covered."

Why this is important: In the past year, many businesses have sought to recoup the losses they have sustained during the pandemic from their insurance policies. The main theory the insured businesses have advanced in these claims is that COVID-19 alters the physical property of the business resulting in property damage such that it would be covered under the business interruption coverage of the insurance policies. Now, award-winning chef, Ashley Christensen, has joined the list of approximately 1,500 businesses that have filed similar lawsuits against their insurance carriers. Chef Christensen's lawsuit is a class action lawsuit, so the result is likely to have far-reaching implications for other North Carolina businesses. To argue that coverage is due under the policy, Chef Christensen is relying upon the fact that the Cincinnati policy at issue does not have an exclusion for viruses.

While at the trial court level, last fall Cincinnati Insurance lost a similar lawsuit against Bakatsias and Kelly and their more than 20 Triangle Restaurants. Cincinnati has appealed that decision. Should the appellate court decide in Cincinnati's favor, that decision would go a long way toward shutting down these types of lawsuits. So far, of the thousands of similar lawsuits that have been filed against insurance companies, the majority have been dismissed. It remains to be seen whether this lawsuit will be dismissed, but it is highly likely. --- [Laura E. Hayes](#)

WV House Adopts Bill Establishing COVID-19 Lawsuit Shield

"Supporters of Senate Bill 277 say the bill is pro-business and pro-health care provider and will prevent a flood of COVID-19 lawsuits, particularly by people who have suffered health issues after contracting COVID-19 at a business or health care facility."

Why this is important: COVID-19 liability protection bills have been a hot topic in state legislatures over the past year. The West Virginia Legislature recently passed Senate Bill 277, known as the COVID-19 Job Protection Act, designed to prevent a flood of COVID-19 lawsuits by limiting individuals' rights to file claims against businesses or health care entities for injuries or death caused by COVID-19. Under SB 277, there would be no liability for claims for injury or death when a person sought medical care for issues unrelated to COVID-19 and contracted COVID-19, unless there is evidence that the health care provider or entity acted with actual malice. Similarly, SB 277 would immunize businesses and personal protective equipment manufacturers and sellers from customer claims for injuries or death caused by contracting COVID-19, unless there is evidence of intentional conduct and malice. SB 277 would allow employees at health care facilities and essential workers to file workers' compensation claims if they contract COVID-19 and suffer damages at work. The bill now goes to Governor Justice for his signature. If signed into law, SB 277 would be one of the broader COVID-19 liability protection bills enacted to date. --- [Joseph A. \(Jay\) Ford](#)

In a Victory for Walz, Judge Rules in Favor of Statewide Mask Mandate

"Ramsey County District Court Judge John H. Guthmann ruled against a group of plaintiffs that included a church, chiropractic practice and other individuals who sued the governor claiming the mask mandate violated their rights."

Why this is important: Face coverings have become as much a political symbol as a public health measure, with the decision to wear one carrying broader implications for beliefs on how to address the COVID-19 pandemic. It is interesting, then, to see a Republican-appointed Minnesota judge uphold that state's face covering requirement against a wide array of challenges, including a claim alleging that face covering requirements violate the wearer's First Amendment rights by "virtue signaling" a belief that face coverings are "right and good." Though this decision is consistent with the general trend toward upholding pandemic-related measures, it is unlikely to stop the political and policy debate. Given the progress with vaccinations, however, it seems feasible that many of these disputes over face covering measures will become moot before they can make their way all the way through the court system to become broadly applicable precedent. --- [Joseph V. Schaeffer](#)

Disney Cruise Passengers File Lawsuit Claiming They Caught COVID-19 on Ship

"The lawsuits allege that Disney did not let passengers reschedule even if they had compromised health conditions."

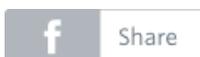
Why this is important: Claiming that they contracted COVID-19 while aboard Disney cruises, multiple plaintiffs have filed suit against Disney Cruise Line asserting that Disney is responsible for their injuries. At first glance, the allegations seem plausible -- the plaintiffs argue that Disney continued to allow buffet dining and group activities at the onset of the pandemic, like many other businesses did. However, one of the plaintiffs' claims may possibly doom their cases; specifically, the claim that Disney did not let them reschedule "even if they had compromised health conditions." The logical inference of this statement is that the plaintiffs were aware of COVID-19 risks but chose to attend the cruises despite this because they could not get refunded. In other words, they intentionally put their money ahead of their health. While the plaintiffs' position is certainly sympathetic -- who among us would want to walk away from a pre-paid vacation? -- Disney's lawyers will now be able to argue that the plaintiffs knowingly assumed the risks inherent to the cruise when they made their decision to board. Time will tell as to whether the plaintiffs' claims can overcome these defenses. --- [James E. Simon](#)

Minn. Judge Tosses Flower Shop's Pandemic Insurance Suit

"A Minnesota flower shop owner can't force Florists' Mutual Insurance Co. to cover pandemic-related losses, a federal judge ruled, saying the shop didn't show that the virus was present at its property."

Why this is important: Bachman's Inc. is one of the latest businesses to file a coverage business interruption lawsuit against its insurance company, Florists' Mutual Insurance Company, to cover pandemic-related losses. As with so many other similar lawsuits, Bachman argued that the order from the government forcing it to close its doors was a covered loss. U.S. District Judge Michael J. Davis disagreed and ruled that Florists' Mutual owed no coverage to Bachman's for its losses. Judge Davis reasoned that the virus easily could be eliminated with routine cleaning, and therefore did not constitute a physical loss such that business interruption coverage was triggered.

Judge Davis' decision is in keeping with the majority of other courts that have faced similar issues. This is important because it could discourage other policyholders from filing similar lawsuits. In addition, it could provide precedent for other insurance companies currently defending business interruption coverage lawsuits. --- [Laura E. Hayes](#)



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