

COVID-19 TASK FORCE

**Expect
Insights**

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COVID-19 and Unprecedented: Litigation Insights, Issue 29

This 29th edition of *Unprecedented*, our weekly update on COVID-19-related litigation, covers some of the hottest topics in these developing areas of law: governments' authority to implement mass gathering restrictions, face covering requirements, and curfews; personal injury and wrongful death claims against nursing homes and long-term care facilities; business-interruption disputes; and tuition refund claims.

We hope you enjoy reading.

[COVID-19 Task Force](#)



Judge Rules Against Brooklyn Diocese in COVID-19 Lawsuit

"Governor Andrew Cuomo ordered congregations in Covid-19 hotspots to reduce in-person capacity in early October, after cases began to bubble up in parts of the state."

Why this is important: The Roman Catholic Diocese of Brooklyn must continue operating under New York Governor Andrew Cuomo's COVID-19 restrictions for the time being. With a resurgence of COVID-19 in New York, the state has been divided into hotspot zones and assigned a color based on the severity of the outbreak in that zone. Executive Order 202.68 states that, in areas designated "red zones," churches are "subject to a capacity limit of 25% of maximum occupancy or 10 people, whichever is fewer." In areas designated "yellow zones," churches are limited to "a maximum capacity limit of the lesser of 33% of maximum occupancy or 25 people, whichever is fewer." The Brooklyn Diocese has 26 churches in either "red" or "yellow" zones. The Brooklyn Diocese sought a preliminary injunction to bar the enforcement of Executive Order 202.68 against it, claiming that it violates the Free Exercise Clause of the First Amendment when applied to the church. In a Free Exercise challenge, there are two standards of review that a court will engage. With a religion-neutral, generally applicable law, the court will do a "rational basis" review of the law. Under rational basis review, the law will be upheld if it is rationally related to a legitimate government interest. When a law targets a specific religion or religious group, the court will engage in "strict scrutiny" review. Under strict scrutiny review, a law will be deemed unconstitutional unless it is narrowly tailored to serve a compelling governmental interest. The court found that Executive Order was subject to rational basis review because it was not specifically targeting the Brooklyn Diocese and was rationally related to combatting the pandemic. Even though the Diocese lost on its preliminary injunction motion, they could still prevail at the trial. To do so, it must point to some evidence that shows it was targeted by the Executive Order so the court will apply strict scrutiny. However, protecting people against COVID-19 may be a compelling enough reason to survive strict

Brighton Rehab, Medical Director Facing Lawsuit Over Handling of COVID-19

"More than 70 residents have died, including 10 whose families are part of the lawsuit."

Why this is important: Nursing homes and assisted living facilities have been some of the hardest hit by COVID-19. For Brighton Rehabilitation and Wellness Center, in Beaver, Pennsylvania, more than 300 patients and staff have contracted the virus, resulting in over 70 deaths of residents. It came as no surprise when the families of 15 people who were exposed to COVID-19 at the facility filed a lawsuit alleging that the facility failed to adhere to "necessary and vital precautions." Specifically, the plaintiffs allege that the facility failed to ensure that staff followed social distancing and cleaning protocols, and failed to ensure that staff wore PPE. Additionally, the plaintiffs allege that residents were not quarantined from other residents who had tested positive for COVID-19. As COVID-19 cases continue to rise across the country, it seems likely that more and more assisted living facilities will face similar litigation. --- [Joseph A. \(Jay\) Ford](#)

Churches Win Federal Court Decision Against Two of State's COVID-19 Mandates

"In what was called a victory for religious freedom, a federal court judge's decision means congregants at Colorado churches will no longer be required to wear masks or limit their numbers as required by the governor of Colorado's COVID-19 mandates."

Why this is important: Churches and other religious institutions have had better success in their challenges against COVID-19-related restrictions from even the earliest days of the pandemic. But recent weeks indicate that their cases have gotten even stronger over time. The key reason is that, starting at least with the Pennsylvania federal court in *County of Butler*, the courts are viewing the states' arguments for perpetual emergency powers with increasing skepticism. Thus, the federal court in this case rejected Colorado's argument for broad powers under *Jacobson* -- a 1905 case upholding local measures to control smallpox -- arguing that it was akin to an argument for the suspension of constitutional rights. The court held that the modern triad of constitutional review applied and Colorado had unconstitutionally discriminated against the plaintiff churches by enforcing occupancy limits and face covering requirements that were not equally enforced against secular entities. As the court took pains to stress, however, the plaintiff churches' victory was a narrow one that merely put them on equal footing with secular Colorado businesses and organizations. And the court rejected the church plaintiffs' argument that the sheer number of emergency orders, as well as their many cross-references, made them void for vagueness, before continuing to also reject state law claims under 11th Amendment immunity, as well as novel constitutional claims based on federal aid. Even so, the court's decision marks yet another victory for churches and religious institutions in the ongoing litigation over COVID-19 restrictions. --- [Joseph V. Schaeffer](#)

Lawsuit Filed Over COVID-19 Deaths at Whitefish Care and Rehabilitation Center

"The families allege in the court action that Whitefish Care and Rehabilitation Center 'failed to provide a safe environment during the COVID-19 outbreak and failed to establish and maintain a basic and reasonable infection prevention and control program designed to provide and maintain a safe and sanitary environment for this at-risk population of residents.'"

Why this is important: The flurry of COVID-19 related lawsuits continues as families of residents in a nursing home in Whitefish, Montana have filed a lawsuit alleging that residents "unnecessarily contracted or died of COVID-19; experienced unnecessary complications related to COVID-19; or were neglected, abused, malnourished or otherwise mistreated under the guise of 'Covid-19 precautions' as a result of the

negligent management and business practices." The families further allege that the nursing home "failed to provide a safe environment during the COVID-19 outbreak and failed to establish and maintain a basic and reasonable infection prevention and control program designed to provide and maintain a safe and sanitary environment for this at-risk population of residents." In response to the pandemic and the wave of lawsuits, some states have enacted laws or issued executive orders that either explicitly grant nursing homes immunity during the pandemic or appear to implicitly do so. For example, in Virginia legislation exists that extends civil immunity to nursing homes, assisted living facilities, hospices, and adult day cares during the COVID-19 pandemic. Nursing homes and other facilities that care for older adults should continue to monitor these lawsuit trends. --- [Kayla I. Russell](#)

Evers Faces Third Lawsuit Over Authority to Make Coronavirus Restrictions

"The lawsuit, like others against Evers, argues the governor may not issue new emergency orders after his first one expired because the emergency - in this case the pandemic - is the same threat."

Why this is important: It is perhaps no surprise that the battleground states in the presidential election have also been battleground states in the debate over COVID-19-related restrictions. In [last week's Unprecedented](#), we discussed how a Wisconsin state trial court judge denied temporary relief against Governor Evers' face covering requirements -- a decision that is now already up on appeal. But, as this article reports, another judge has put a hold on Governor Evers' mass gathering limitations. And now another lawsuit argues that Governor Evers' authority to renew the emergency declarations underlying his restrictions is barred by a state law requiring the Legislature to approve any such extension. The result is a patchwork framework that makes it difficult for even the most attuned observer to know which COVID-19-related restrictions are in place at any given time. --- [Joseph V. Schaeffer](#)

Court: Broker Not Liable for COVID-19 Business Interruption Claim Denial

"In one of the first cases to consider producer liability in COVID-19 cases, Judge Eduardo Robreno of the Eastern District of Pennsylvania dismissed the lawsuit against the producer and the carrier."

Why this is important: This case is one of the first cases to consider producer liability for business interruption COVID-19 losses. The facts of the case are pretty simple. When a New York law firm, The Law Office of Rhonda Hall Wilson, P.C., made a claim for the losses it sustained due to COVID-19, the claim was denied. The Wilson law firm then sued Hartford and the broker, USI Insurance Services claiming that coverage was owed under the policy. The Hartford policy provided coverage for lost business income and extra expense caused by direct physical loss of, or damage to property. Similarly, the policy covered lost business income if a nearby property experienced a direct physical loss that caused a civil authority to issue an order that prohibited access to the law firm's property. The policy also included a virus exclusion "for loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of . . . virus." The court after reviewing the insurance policy, chose not to decide the issue of whether the virus caused a physical alteration of property, but instead ruled that the virus exclusion precluded coverage even if property damage occurred.

With regard to USI Insurance Services, the Wilson law firm argued that USI was an agent of Hartford, and therefore was liable for the denial of coverage. The court held that to make such an assumption would "stand agency theory on its head". Ultimately, the court ruled that even if USI could be held liable as an agent of Hartford, the coverage decision was correct, so USI was not liable for the denial of coverage. The court also noted that USI Insurance Services was not a party to the policy, so no claim could be made against it.

This case is illustrative of how the growing trend around the United States finding no coverage under insurance policies for business interruption coverage is being extended to the producers and brokers that placed those policies years ago. --- [Laura E. Hayes](#)

[Chiropractor Challenges Michigan's New Mask Mandate in Lawsuit](#)

"Gordon put the orders in place earlier this month after Gov. Gretchen Whitmer's executive orders were invalidated by a Michigan Supreme Court decision."

Why this is important: Like Wisconsin and Pennsylvania, the battleground state of Michigan has been a hot bed of litigation over COVID-19 restrictions. Now a new front has opened up over the legality of face covering requirements issued by Michigan's Department of Health and Human Services ("DHHS"). A Michigan chiropractor argues that the requirements exceed DHHS's authority, which it argues is limited to imposing mass gathering restrictions. And in a sign of the political dimensions that these debates have taken on, it argues that its case stands for broader principles of constitutional governance against one-person rule. But that the requirements are coming from DHHS at all seems attributable to a recent Supreme Court of Michigan decision limiting Governor Whitmer's authority - a sign that, as governments adapt to past rulings, so too will plaintiffs adapt their challenges. --- [Joseph V. Schaeffer](#)

[Student Lawsuits Asking for COVID-19 Refunds Pile Up Against Universities](#)

"A federal lawsuit against the University of San Diego is the latest asking for prorated tuition and fees to reflect the switch to online learning"

Why this is important: When the COVID-19 pandemic first struck in the spring, much of our daily lives became virtual, including secondary education at colleges and universities. Months later, as the pandemic continues to present a threat, most colleges and universities are keeping classes virtual or offering a hybrid version of virtual/in-person education designed to mitigate the chances of disease spreading. However, many students believe that virtual learning does not provide the same benefits as the face-to-face college education that they paid the universities to provide, and they have begun filing class action lawsuits to recoup some of their tuition money. The equities are strong on the students' side: many colleges enrolled students based on campus attractions and benefits that cannot be adequately used virtually. And though some student disciplines can be learned online, others (particularly those in the sciences and mechanics) cannot be so easily taught across a computer screen, nor can expensive campus laboratories be recreated in a living room. For these reasons, the student-plaintiffs argue that their tuition should be cut to reflect the now-lesser valued college experience, or at least reduced to match tuition rates for distance learning programs. However, the schools have equitable considerations on their side as well; while many have received federal grants to help them weather the pandemic, the lack of on-campus students is still drastically affecting cash flow and causing millions of dollars in budget shortfalls. Others would argue that the schools are doing the best they can to navigate an impossible situation, given that COVID-19 has thrown every industry into havoc, not just the educational fields. Balancing these equities and contractual arguments will be a difficult task, as these problems will present issues of first impression for most courts. While at least one judge has dismissed one of these lawsuits, others have allowed the cases to proceed on their merits, and those judges will now have to decide who should shoulder this financial burden of COVID-19: schools or their students. --- [James E. Simon](#)

[Miami-Dade's Nightly Curfew Returns After County Wins Emergency Appeal](#)

"The ruling was due to a lawsuit brought against the county by Miami-Gardens strip club Tootsie's, who in its lawsuit said the curfew goes against Florida Governor Ron DeSantis' order barring all local COVID-19 restrictions within the state."

Why this is important: In response to a daily record of 52,000 cases, last week France announced a 9:00 p.m. to 6:00 a.m. curfew covering about two-thirds of its population. In the United States, however, curfews have been a much smaller part of the response to COVID-19 and, perhaps for that reason, have generally not been challenged in litigation. One exception is a lawsuit by a Miami-Dade County

gentlemen's club that alleged a county-wide curfew was precluded by Governor DeSantis's order barring local COVID-19 restrictions. A Florida trial court enjoined the curfew earlier this fall. And then, as a sign of how quickly these cases are moving through the courts, a Florida appeals court stayed the injunction pending an appeal on the merits -- meaning that, for now at least, Miami-Dade county can continue enforcing its curfew. --- [Joseph V. Schaeffer](#)

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