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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 11

Welcome to the eleventh, post-Memorial Day issue of the 2021 edition of *Unprecedented*. As India and Peru experience record COVID-19 cases, many parts of the United States have reached a return to normality that was unthinkable even a few months ago. People are eating and drinking at restaurants and bars, attending live sporting events, and gathering with friends and families. Vaccines are due most of the credit for these developments. But, many states are finding themselves experimenting with lotteries to overcome vaccine hesitancy. Ohio, for instance, announced a $1 million lottery—won last week by a 22-year-old who thought it was a prank. California also has offered cash prizes of up to $1.5 million. And West Virginia Governor Jim Justice has enlisted his English bulldog, "Babydog," in his state's vaccination efforts—encouraging people to get vaccinated for Babydog if they won't do it for their families. All of this must seem surreal to parts of the globe where vaccines still remain in short supply, but public officials are betting on these efforts to prevent the virus's return. Whether their bet will pay off, however, remains to be seen.

Joseph V. Schaeffer, Editor of *Unprecedented*

COVID-19 Task Force

spilman
thomas & battle

Lawsuit Accuses COVID-19 Testing Company of Breaking Rules, Putting Patients at Risk

"Wicker allegedly expressed concern about testing protocols to company officials, including owner and then-CEO Ravi Reddy."

Why this is important: A former employee, Michael Wicker, filed a wrongful discharge lawsuit against a Monroeville COVID-19 testing company, MHS Labs. Wicker alleges that he raised concerns with officials at the testing company concerning testing procedures and was fired shortly after. Specifically, Wicker alleges that MHS Labs did not properly train its employees, accepted specimens that did not meet the standard qualifications of specimen identification, and submitted numerous false claims to the government. This is important because whistleblower claims, encouraged by the potential for qui tam awards, can present a significant source of risk for companies that submitted claims for payment to government agencies. --- Victoria L. Creta

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Small Businesses Say Erie Insurance Wrongfully Denied Their COVID-19 Loss Claims

"The plaintiffs claim two of Justice's executive orders closed or otherwise limited occupancy of businesses like theirs and they should have had covered claims through Erie for their business losses."

Why this is important: For over a year, businesses have been trying recoup their losses from the pandemic from their own insurance policies. Most have been seeking business interruption coverage, which is a type of expense allowed under the property damage coverage of insurance policies. In order to trigger business interruption coverage, the insured must have sustained a direct tangible physical loss to their property. Moreover, a great deal of the policies issued to insureds contain specific exclusions for viruses. Accordingly, most courts throughout the country have rejected the arguments of insured businesses in this regard and found no coverage.

In this lawsuit, the plaintiffs, Cirque De Cheveaux, a hair salon, and Tri-State Tint & Vinyl, an auto window tinting service, both located in Wheeling, West Virginia, appear to not be claiming the pandemic caused them physical direct property damage. Instead, they are claiming that two of Governor Justice's executive orders closed or otherwise limited the occupancy of their businesses, and that they sustained significant losses from this government shutdown. Therefore, they are trying to recoup their losses from their insurance policy with Erie Insurance Company. They contend that Erie Insurance Company wrongfully denied their claims when it cited a virus exclusion that does not exist in their policy. Finally, the plaintiffs are alleging that Erie Insurance Company violated the West Virginia Unfair Trade Practices Act in the handling of their claims. It remains to be seen how the court in this lawsuit will rule, but if the court follows the numerous other judges throughout the United States that have dealt with this issue, it will deny the plaintiffs' claims for coverage. --- Laura E. Hayes

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Four Seasons in Miami Leaves Staff on "Perpetual Furlough" to Avoid Severance Pay

"Six workers filed the suit seeking class action, citing a WARN Act violation."

Why this is important: The Four Seasons Hotel in Miami is facing a class action lawsuit alleging that it put employees on a "perpetual furlough" in order to avoid giving them severance pay. In March 2020, the hotel furloughed more than 300 employees due to the COVID-19 outbreak. At that time, it provided the required notices for under the Worker Adjustment and Retraining Notification ("WARN") Act. However, in the past 14 months, the hotel has provided some of those furloughed employees with no updates about the furlough, their employment status, and if/when they can return to work. Under WARN, a furlough that lasts six months equals employment loss, which triggers another round of notices and obligations. The lawsuit alleges the hotel purposefully abandoned its employees without direction on a "perpetual furlough" to avoid providing those notices and obligations, one of which was to pay employees pursuant to the hotel's severance pay policy. The employees are seeking a variety of damages beyond just severance pay, however, including usual wages, salary, and bonuses; pension and 401(k) contributions; health and medical insurance; and reimbursement for medical expenses incurred during the furloughed period that health insurance would have covered. The class action would encompass over 50 workers at the Miami hotel and potentially thousands at other Four Season hotels nationwide. This case is significant for several reasons. The high-class nature of the hotel at issue makes it high profile. It is one of the first big cases involving WARN Act violations for layoffs lasting over six months. And, it could potentially capture thousands of class members nationwide. Thus, if the hotel employees are successful, it is likely for similar WARN class actions regarding long layoffs to follow suit. --- Chelsea E. Thompson

Pa. Judge Grants Virus Coverage to Pittsburgh Tavern

"Allegheny County Court of Common Pleas Judge Christine Ward ruled that Erie Insurance Exchange must cover Grant Street Tavern's loss of use of its property during the COVID-19 pandemic, finding that the bar didn't need to have sustained physical damage to have suffered a direct physical loss or damage to property as covered by its insurance contract."

Why this is important: In a break with most of the courts in this country, Judge Christine Ward of the Allegheny County Court of Common Pleas ruled that Erie Insurance Exchange must cover Grant Street Tavern's loss of use of its property during the COVID-19 pandemic. Judge Ward ruled that the pandemic did result in a "direct" and "physical" loss of use of an insured property such that business interruption coverage was triggered. Furthermore, she ruled that the Grant Street Tavern did not have to prove that the virus physically altered property. She found that the Erie's interpretation of the policy "improperly conflates" the phrases "direct physical loss of" with "direct physical… damage to". She determined that the limitation of the number of people allowed into the pub's building resulted in a direct physical loss of use of the property. Therefore, Grant Street Tavern's losses were covered.

This case is important because it is one of the very few cases that supports an insured's arguments for coverage. Other insured businesses will most likely use this case as precedent in their own cases to argue for coverage. It remains to be seen whether this decision will be overturned by the appellate court. Erie most certainly will appeal this decision given that this case likely will lead to a flood of similar claims. --- Laura E. Hayes

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Pasadena Church Gets $1.35M from CA to Settle COVID-19 Lawsuit

"As part of the settlement, the state can no longer impose any similar restrictions on churches."

Why this is important: As the COVID-19 pandemic created an incredible amount of challenges for the world to overcome, it also caused a number of relatively obscure Constitutional issues to develop, often surrounding claims of equal protection and due process violations. One particular hotspot arose as local and state governments were forced to develop protocols for which types of businesses and organizations would be subject to which regulations and limitations. After several high profile cases regarding improper limitations on religious worship-related gatherings were resolved by the United States Supreme Court, states appear to be taking active steps to ensure that their COVID-19 regulations do not infringe on religious freedoms. Most recently, the State of California agreed to lift certain COVID-related restrictions that had been placed on California churches, and also agreed to reimburse $1.35 million in attorneys' fees and costs that the churches incurred in obtaining this settlement. Although these types of cases will no doubt fade away as the pandemic continues to wane, the work of Constitutional legal scholars will no doubt be affected for years to come by some of the judicial opinions that arose out of this pandemic. --- James E. Simon

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Investors Bet Big on Washington Firm's Potential COVID-19 Treatment as CEO Cashed Out

"In lawsuits filed in federal court at Seattle, some shareholders now claim they were misled about leronlimab's prospects as a COVID-19 treatment and that CytoDyn leaders including CEO Nader Pourhassan sold millions of shares during the stock price spike."

Why this is important: Investors purchasing shares in CytoDyn, a Washington-based biotech company, between March 27, 2020 and March 9, 2021 are suing in federal court under §10(b) and Rule 10-b-5 of the Securities Exchange Act of 1934 ("Exchange Act"). The potential class alleges that CytoDyn and their executives artificially inflated the share price of CytoDyn and then cashed out. The company announced that its drug "leronlimab" would undergo trials for use as a COVID-19 treatment, and rumors indicated that it might be included in the FDA's "Operation Warp Speed." According to the class members, CytoDyn exaggerated leronlimab's effectiveness as a treatment for COVID-19. It was later revealed that CytoDyn had never "formally sought FDA authorization for leronlimab's use in treating COVID-19." Further, study results showed that leronlimab was not effective in combatting COVID-19. The stock price rose from less than $1 dollar per share to over $10 per share during this period, and the leaders of CytoDyn, including CEO Nader Pourhassan, allegedly dumped the bulk of their shares while the stock was artificially inflated. Under Rule 10-b-5, it is unlawful to "make any untrue statement of a

material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." However, the statement must be made with knowledge, purpose, or recklessness. It will be important going forward to see if the class can prove that CytoDyn knew that leronlimab was not effective in treating COVID-19 or if the statements were mere puffing or "corporate optimism" that leads to a dismissal of the class action. --- Kellen M. Shearin

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Lawsuit Over Insurance Company Labeling COVID-19 a Pollutant

"The complaint maintains that the company did not investigate the filing as requested and eventually declined to pay up, in part because of its definition of COVID-19 as a pollutant, which Classy Glass's policy listed as an exclusion."

Why this is important: For almost a year, insureds and insurance companies have been litigating whether the insurance policies at issue provide coverage for losses incurred during the pandemic. We have seen some very creative arguments on both sides. Cincinnati Insurance Company is the latest insurance company to advance a creative argument to combat the flood of claims on this issue. Cincinnati is espousing the theory that COVID-19 is a pollutant. Therefore, coverage is excluded under the pollution exclusion that most insurance policies contain. In the Cincinnati policy, ""[p]ollutants" include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment regardless of whether injury or damage is caused directly or indirectly by the 'pollutants.'" The plaintiffs, three glass businesses, claim that Cincinnati is including this exclusion simply to "weasel out" of providing coverage because the insurance policy at issue does not contain a virus exclusion.

If a court should find that COVID-19 is a pollutant, it would be a significant win for the insurance industry. It would give other insurers another tool in the toolbox to combat the flood of claims they are receiving for business interruption coverage. As most insurance policies contain pollution exclusions, many insurance companies are watching this case very closely. --- Laura E. Hayes

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Boca Raton Nursing Home Negligence Led to COVID Death: Lawsuit

"While the lawsuit just filed focuses on Myers, the State of Florida reports that Encore At Boca Raton Rehabilitation And Nursing Center has recorded 48 resident deaths related to COVID-19 as of May 23rd, 2021."

Why this is important: The family of a former resident at a Florida nursing home recently filed a lawsuit alleging that the nursing home incompetently handled the COVID-19 pandemic, leading to the resident's death. The family alleges that the nursing home was negligent and violated the resident's rights under Chapter 400 of the Florida Statutes. Earlier this year, however, Florida enacted a COVID-19 business liability shield, providing liability protections against COVID-19-related lawsuits. Under the liability shield, a plaintiff is required to show that the defendant acted with gross negligence and that the defendant did not make a "good faith effort" to comply with public health standards. Additionally, the liability shield requires that a plaintiff provide a physician's affidavit of merit, which requires that the physician connect the plaintiff's injury to the defendant's acts or omissions. It remains to be seen whether the family of the former nursing home resident has sufficiently alleged a claim against the nursing home or whether the liability shield will immunize the nursing home from liability. --- Joseph A. (Jay) Ford

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State Says They are Dropping Lawsuits Placed Against Restaurants which Defied COVID Restrictions

"Petition to drop the suits mentioned a 'decline in new cases and hospitalizations from COVID-19 as well as continued increase in vaccinations' as their reasoning for dropping the suit."

Why this is important: Many would agree that Pennsylvania was one of the most stringent enforcers of COVID-19 regulations at the start of the pandemic, sometimes famously (or infamously) ticketing individuals for non-essential travel. As part of this enforcement strategy, the Pennsylvania Department of Health brought multiple lawsuits against restaurants for violating the state's COVID-19 regulations. While the state initially sought to recover punitive damages for "willful and wanton" violations, Pennsylvania

now has chosen to dismiss these suits in part based on the reduced effects of the pandemic--essentially conceding that the purpose of the lawsuits has disappeared as the effects of the pandemic have also dissipated. While some may naysay this decision, the state's action seems to be a wise step that will help re-establish good will and trust between the administration and its constituent industry. --- James E. Simon

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Insurer Says Policy Doesn't Cover Carilion's $150M in COVID-19 Losses; Asks Court to Toss Suit

"Roanoke, Va.-based Carilion Clinic sued the insurance provider in March after it declined to provide coverage and properly investigate Carilion Clinic's losses that were tied to the pandemic."

Why this is important: This is yet another case of an insured business seeking coverage under its insurance policy for losses it allegedly sustained during the pandemic. In this case, Carillion Clinic sued its own insurance company, American Guarantee and Liability Insurance Company, when it denied its claim for pandemic coverage. As with most other insurance companies that have litigated this issue, American Guarantee has filed a motion to dismiss arguing that COVID-19 does not cause direct physical loss to property, so business interruption coverage is not triggered. American Guarantee asserts that the virus can be merely wiped away with disinfectant, so there is no physical damage. If the Virginia court presiding over this case follows the lead of numerous other courts throughout the country, it will grant American Guarantee's motion to dismiss. This will be important because it will be another case that will help stem the tide of claims that insurance companies are receiving from businesses. If the court breaks with the majority of courts on this issue and finds coverage, then it will be important because it will provide precedent to the thousands of insured businesses trying to recoup their pandemic losses under their own insurance policies. --- Laura E. Hayes

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