

National Trends In COVID-Related Business Interruption Claims

In our Spring 2021 Newsletter, Gust Rosenfeld discussed the national trends related to the loss of revenue that businesses experienced as a natural consequence of the COVID-19 shutdowns and stay-at-home orders. To offset their loss of revenue, many of these businesses sought insurance coverage of such loss under the “business interruption” coverage



sections of their property policies. In Spring 2021, there was no rule of law enforced solely in favor of insurers or insureds, and many of the decisions made at the trial court level were pending appeal. However, the trends over the last year at the appellate level more often exhibit decisions rendered in favor of insurers, finding no coverage for COVID-19 related business interruption. To date, at least six federal Circuit Courts of Appeals – the 6th, 7th, 8th, 9th, 10th and 11th – have ruled in favor of insurers and found no coverage for COVID-19 business interruption.

In *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, the daycare plaintiffs sought coverage for losses sustained due to government-mandated closures. The 6th Circuit Court of Appeals, applying Ohio law, ruled that the policy provisions under which the daycare plaintiffs sought coverage – building and personal property, business interruption, and civil authority coverage provisions – each required direct physical loss of or damage to property for there to be coverage. The 6th Circuit further ruled that no coverage was available because

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Arizona Legislature Makes Major Revisions to Homestead Laws



Arizona’s homestead laws allow a homeowner to protect from most creditors a sufficient amount of money from the sale of the family residence so a subsequent home can be purchased. To clarify the extent to which such a homeowner is protected against a recorded money judgment, the legislature amended Arizona’s homestead laws effective January 1, 2022. The amendments were in part a response to an Arizona Court of Appeals case, *Pacific Western Bank v. Castleton*, 246 Ariz. 108 (App 2018), which Gust Rosenfeld lawyers successfully handled.

The good news for homeowners is that the legislature increased the homestead protection from \$150,000 to \$250,000. This increase ensures that homeowners can protect up to \$250,000 of

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“the mere economic injury and loss of use that results from a shutdown order” does not constitute direct physical loss of or damage to property.

On January 12, 2022, the 6th Circuit Court of Appeals reinforced its rulings in *Ryan P. Estes v. Cincinnati Ins. Co.*, a case in which the plaintiff sought to recover lost revenue in his dental business due to a mandated ban on non-emergency care. The 6th Circuit, applying Kentucky law, analyzed whether the COVID-19 pandemic or the ensuing government shutdown orders caused a “direct physical loss” to the dental offices such that coverage would be triggered. The 6th Circuit held that the plaintiff did not suffer a “physical loss” to his business because he was not tangibly deprived of his property, and said property was not tangibly destroyed.

Likewise, the 7th and 10th Circuit Courts of Appeals have rendered similar rulings. In *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.* (December 9, 2021), the 7th Circuit found no “direct physical loss” and stated that the virus, while devastating, had only “inconsequential” impact on physical property since it can be wiped off surfaces and disintegrates on its own in a matter of days. In *Goodwill Industries of Central Okla. v. Philadelphia Indem. Ins. Co.* (December 21, 2021), the 10th Circuit ruled in the insurer’s favor and held that Goodwill did not sustain “direct physical loss” to tangible property and, further, that the policy’s Virus Exclusion applied to preclude coverage.

Finally, at the end of 2021, the country saw its first jury verdict on the issue of COVID-19 business interruption, with a Missouri federal jury, in *K.C. Hopps Ltd. v. Cincinnati Ins. Co.*, finding that the insurer did not breach its policy with the insured due to a lack of direct physical loss of or damage to property.

While we still have not seen a decision from the U.S. Supreme Court or a state supreme court on this issue, based on the varied appellate court decisions we have seen to date, an insured seeking recovery of its COVID-19 business interruption losses faces a punishing uphill battle.

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Megan focuses her litigation practice on complex insurance coverage analysis and litigation and insurance defense.

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home equity against claims by creditors holding recorded money judgments.

The most significant aspect of the new legislation is that a recorded money judgment attaches as a lien against the homestead regardless of the amount of equity held by the homeowner. A lien is a powerful tool for a creditor because the title to the property remains encumbered by such a lien until it expires or is released, even when the title is conveyed to a subsequent buyer.

The legislation creates three scenarios for a homeowner to obtain a release of such a judgment lien so that the residence may be sold free and clear of such lien. First, if the homeowner will receive sale proceeds of less than \$200,000 (80% of the \$250,000 homestead protection), then the title company handling the sale may unilaterally record a release of the judgment lien to allow the homeowner the benefit of the homestead protection. Second, if the homeowner will receive \$200,000 or more from the sale, then the title company may unilaterally record a release of the judgment lien only if the judgment lienholder fails to object to the sale after receiving a 20-day notice of the amount of sale proceeds to be received by the homeowner. Third, if the judgment lienholder submits an objection to the proposed sale in which the homeowner will receive \$200,000 or more in sale proceeds, the homeowner must go to court to establish that the sale will not benefit the homeowner by more than the \$250,000 homestead protection.

The new legislation creates two scenarios for refinances depending on whether the homeowner is doing a “cash-out” refinance or not. If the homeowner receives no new money from the refinancing loan, for example, when a homeowner refinances to take advantage of a lower interest rate and pulls out no equity, then the title company may unilaterally subordinate the judgment lien to the new lender’s deed of trust. But if the homeowner wants to refinance and pull out equity from the home value, then the title company is not authorized to subordinate the judgment lien to the new lender’s lien interest. In other words, if a homeowner subject to a judgment lien wants to tap into any home equity, then the homeowner must obtain a release or a subordination of the judgment lien from the judgment lien holder.

We hope you are not the subject of a recorded money judgment. If you are, then the legislature gave you a slight benefit by increasing the homestead protection amount in exchange for your creditor receiving a powerful tool in the form of a judgment lien to force you to pay your debt.

Scott Malm | 602.257.7481 | samalm@gustlaw.com

Scott focuses his practice on real estate disputes. He was the lead lawyer in the Castleton case and assisted the legislature in drafting the recent amendments to the homestead laws.

NEW FACES



Christopher P. Thomas (Phoenix Office)

Chris concentrates his practice on education law. He represents schools, school districts and other educational organizations in all types of legal matters, including policy creation, compliance reviews, personnel matters, intergovernmental agreements, public records requests, and open meeting law compliance.

He is adept on statewide K-12 legal aspects of board governance, including open meeting law, conflicts of interest, public contracting, public records law and Title 15.

Before joining Gust Rosenfeld, he was the General Counsel and Associate Executive Director for the Arizona School Boards Association (ASBA) from 2000 to 2021. He oversaw the team that created model policies for ASBA's subscriber districts. He also advocated for the ASBA's interests as part of their Governmental Relations Team.

Chris earned his J.D. from the University of Nebraska. He earned a B.A. in Political Science and History from the University of Arizona. In 2020, he was given the Chuck Essigs Lifetime Achievement Award from the Arizona Association of School Business Officials, Lifetime Achievement recognition by the Friends of Association of School Personnel Administrators Association, and Executive Citation Recognition from the Association for Career and Technical Education of Arizona.



Victoria L Buchinger (Tucson Office)

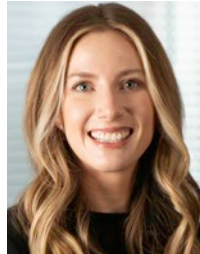
Victoria is a client-focused, goal-oriented attorney with more than 35 years of legal experience, including seven years in house as Claims Manager and General Counsel of Attorneys Liability Protection Society. Her civil and commercial litigation practice emphasizes professional liability defense, insurance coverage

counsel and litigation, protection of creditors' rights, and defense of class and individual consumer claims made under federal and state law.

Most recently, Victoria was a member of the Business & Transactions Unit of the Civil Division of the Pima County Attorney's

Office. She has appeared in federal and state trial and appellate courts, including the 9th Circuit Court of Appeals.

Victoria earned her J.D. from Arizona State University and her B.A. from Saginaw Valley State University. She is a former Judge Pro Tempore for Pima and Maricopa County Superior Courts. She has served on several State Bar of Arizona committees.



Courtney Kramer (Phoenix Office)

Courtney Kramer focuses her practice on medical negligence and health law defense. She previously served as an Assistant Attorney General for the Arizona Attorney General's Office, working as a health care fraud and abuse prosecutor while gaining significant courtroom and trial experience.

Her time with the U.S. Department of Health and Human Services and Centers for Disease Control provided the opportunity to work on matters pertaining to the Physician Self-Referral (Stark) Law, anti-kickback statutes, and Health Insurance Portability and Accountability Act of 1996 (HIPAA). She was also previously a Deputy County Attorney for both the Maricopa County Attorney's Office and Pima County Attorney's Office.



Philip Moncla (Phoenix Office)

Philip Moncla's practice is concentrated on insurance defense, with a focus on personal injury, construction defect, and coverage. He is skilled in representing clients at all stages of litigation.

Philip was previously a legal extern at the Arizona Supreme Court. He graduated *cum laude* and received his J.D. from Arizona State University with High Pro Bono Distinction for the pro bono work he performed at the Probate Lawyers Assistance Project. He also was a Pedrick Scholar and was awarded the CALI Excellence for the Future Award in Advanced Estate Planning. Philip graduated *cum laude* with a B.S. in Political Science from Ohio University, where he served as a Student Senator.

Can You Match the GR Attorney to Their Pet?

Want to learn which attorneys are matched with which pets? Turn to the last page for answers.



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Teddy**



Sméagol



Paisley



"Dog gang"



**Christina
Noyes**



Mina O'Boyle



Heidi Purtzer



**Megan
Ritenour**

Gust Rosenfeld Elects New Capital Members and Partners

Kyle Bate (Estate Planning and Business Law) and **Carrie O'Brien** (Education and Employment) are new capital members of the firm. Elected to the firm's partnership are **Dan Coumides** (Insurance and Litigation) and **Melissa San Angelo** (Litigation).



Kyle Bate



Carrie O'Brien



Dan Coumides



Melissa San Angelo

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Interesting Times

The Russian invasion of Ukraine has put the world in turmoil again, resulting in sanctions by the U.S., U.K. and E.U. The word “sanction” comes from the Latin for a formal decree, particularly an ecclesiastical order. By the 17th century, it came to refer to a means to enforce a law. Today we recognize a sanction as a penalty for violation of international law, treaty or norm. The phrase “May you live in interesting times,” spoken with irony, is believed to have originated from an old Chinese curse. We have been cursed once again.

Richard B. Hood | 602.257.7470 | rbhood@gustlaw.com. Rick, our etymologist, practices in the areas of commercial law and litigation.

Tempers in Trying Times: Calls to the Public that Go Haywire

America has a long history of open debate on public issues. As *Smithsonian* magazine notes, since 1663, town halls have been used to air differences, settle issues, and make “such orders as may tend to the [general] good as aforesayd.” However, meetings of governing bodies in Arizona and elsewhere are not intended to be town halls, and the “call to the public” is often misunderstood.

Arizona’s open meeting law allows, but does not require, a public body to place a call to the public on its meeting agendas. At the call to the public, persons may speak on any topic, but the law limits how the governing body members respond. The optional call to the public is often misunderstood. It is not intended to serve as a vehicle for back-and-forth debate with the public body on a topic not specifically listed on the agenda. Members of the governing body are prohibited from discussing or taking action on matters not specifically identified on the agenda. In that case, they can only respond to criticism made by those who have addressed the public body, ask staff to review a matter or request that a matter be put on a future agenda.

Constituents who want answers from members of a public body on an issue are often irritated, unsatisfied, and angry when the members cannot respond substantively to them at the meeting. That situation is equally unsettling to the governing body members. The frustration level intensifies when sensitive, emotionally charged, or controversial topics are raised. Sometimes tempers flare, and the meeting devolves into disorder and chaos. Police have been called, meetings have been abruptly adjourned, and recall petitions and demands for resignations have been circulated. The end result is a lose-lose for everyone.

Public bodies should educate members of the public on what their members can and cannot do during a call to the public. While the debate over an issue may be productive, a call to the public is not the forum to do so unless the matter is specifically on the meeting agenda. Notices on agendas and websites highlighting the law’s limits on a call to the public should help avoid confrontation and accusations that the governing body is trying to limit debate in these trying times.

Susan Plimpton Segal | 602.257.7425 | spsegal@gustlaw.com Susan focuses her practice on public law and employment law.



Barbara Rodriguez-Pashkowski was named the Maricopa County Bar Association Robert R. Mills Member of the Year. Also, Barbara presented on an environmental topic at the Paralegal Annual Conference.

AzBusiness Leaders named **Barbara Rodriguez-Pashkowski** and **Gerard O'Meara** as business leaders for 2022.

Barry Markson was inducted into the National Academy of Distinguished Neutrals. Also, Barry served as the emcee of the Geshler Disability Resources' Annual Gala and the Martin Pear J.C.C. Gala.

AZ Business Magazine named **Mark L. Collins**, **Christina M. Noyes**, and **Barbara Rodriguez-Pashkowski** as 2022 Top 100 Lawyers in Arizona.

Peter Collins was voted into the American Board of Trial Advocates.

The Arizona Society of Healthcare Risk Management elected **Heather Bohnke** as President-Elect.

Jennifer Kalvestran accepted the nomination to be the Regional Chair of Claims and Litigation Management Alliance Region 10.

Rob Williams and **Chris McNichol** presented at the State Bar of Arizona's "Essentials of Foreclosure Law."

Tim Stratton spoke on financing sports and athletic stadiums and facilities with public-private partnerships at the Convention Sports and Finance Conference.

Brandon Caywood spoke at a Bond Compliance Seminar hosted by Stifel.

Scott Malm spoke at the Arizona State Bar's Real Property Section meeting.

Carrie O'Brien participated on a panel via Zoom titled "The Patchwork of U.S. Data Privacy Laws" for Mackrell International.

At the United Trustees Association's Annual Education Conference, **Chris McNichol** led a panel on case law updates covering impacts of foreclosure in the western states. Also, Chris presented on homestead judgment issues at the Industry Partners Conference.

Jay Graif presented "WRAP Policies: The Ethical Issue of Whether to Tender" at the Perrin National Construction Defect Conference.

Jennifer MacLennan spoke at the Arizona School Personnel Administrators Association (ASPA) Fall Conference. At the Virtual Lunch & Learn in December, Jennifer presented on COVID-19 Vaccination and Testing (OSHA) for the ASPAA.

Jim Kaucher was one of three presenters discussing photography in wound documentation during a webinar sponsored by Molnlycke.

Jennifer Kalvestran presented "The Future is Now- Robotics, Holograms and Drones- Hot Trends in Construction" at the Claims and Litigation Management 2022 Annual Conference.

Banking on the Future of Your Cannabis Business?

On February 4, 2022, the U.S. House of Representatives advanced the America COMPETES Act, which focuses on making the U.S. more competitive in the global marketplace. This act, which is now pending in the Senate, contains the Secure and Fair Enforcement (SAFE) Banking Act, which would allow cannabis-related businesses (CRBs) to utilize banks and other financial institutions, giving them access to much-needed capital.

Although 47 states have legalized some form of medical or recreational cannabis, most banks and financial institutions refuse to serve CRBs. The illegality of cannabis under federal law, and a labyrinth of anti-money laundering laws, create such a high degree of risk for financial institutions that most decide not to serve CRBs.

As a result, CRBs throughout the country are severely limited in their ability to raise capital, retain favorable loan arrangements, protect their earnings, and generally grow their businesses. The limitation leaves many CRBs operating on a cash-only basis or paying fees that put them at a disadvantage to companies in other industries. However, CRBs may soon find some relief.

If passed, the SAFE Banking Act will alleviate many financial institutions' concerns regarding transacting with CRBs by barring federal banking regulators from punishing financial institutions for providing services to legitimate CRBs.

Gust Rosenfeld is prepared to help navigate these changes. If you have questions about connecting CRBs with banks and other financial institutions, please reach out to us at 602.257.7422.

Michael C.S.J. Goodman | 602.257.7672 | mgoodman@gustlaw.com Michael's practice focuses on government, municipal and public law.

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Gust Rosenfeld Earns Top Honors in 15 Categories by Ranking Arizona: The Best of Arizona Business

Gust Rosenfeld was ranked in 15 categories in the 25th Anniversary Edition of Ranking Arizona: The Best of Arizona Business. Published annually by AZ Big Media, the 2022 rankings are a result of the largest opinion poll in Arizona that reviewed more than 2,000 Arizona businesses.

The firm was one of seven companies included in the ranking of "Best Places to Work (101-549 employees)" and was the only law firm in this category. In addition, a number of other Gust Rosenfeld law firm practice groups were ranked throughout the publication within its respective categories, including:

- Best Places to Work (101-549 Employees)
- Law Firms (41 Attorneys or More)
- Law Firms: Alternative Dispute Resolution
- Law Firms: Business/Corporate
- Law Firms: Commercial Litigation
- Law Firms: Construction Litigation
- Law Firms: Creditor's Rights, Bankruptcy/Reorganization
- Law Firms: Creditor's Rights, Collections
- Law Firms: Employment Labor
- Law Firms: Environmental
- Law Firms: Estate/Trust
- Law Firms: Mergers/Acquisitions
- Law Firms: Real Estate
- Law Firms: Securities/Corporate Finance
- Law Firms: Tax

Attorney Pet Match... Heidi Purtzer: Paisley; Megan Ritenour: Sméagol; Mina O'Boyle: Emmy and Teddy; Christina Noyes: "Dog gang" (from left: Jack, Chubbs (St. Bernard), Stلالuna, Sugar Magnolia--a/k/a Maggie).

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