

National Trends In COVID-Related Business Interruption Claims

As a natural consequence of the COVID-19 shutdowns and stay-at-home orders, businesses nationwide experienced a loss of revenue. Many of these businesses sought insurance coverage for the loss of revenue under the “business interruption” coverage sections of their policies. Business interruption is intended to cover the loss of business income that an insured sustains due to “direct physical loss” or “direct physical damage” to the covered property. A vast majority of insurers denied coverage for these business interruption claims because COVID-19 and the subsequent shutdowns cannot and did not cause direct physical loss of or damage to covered property. What followed

was a flurry of declaratory judgment actions in which businesses sought court intervention for their COVID-related business interruption claims.

Insured businesses have been successful in several cases.

For example, a North Carolina state court ruled that the term “direct physical loss” includes the access to or loss of use of covered property even when the property has sustained no direct physical damage, and granted summary judgment in favor of the businesses. In another case, a New Jersey state court denied the insurer’s motion for summary judgment, finding that “direct physical loss” may include loss of use without physical alteration, warranting further discovery. A Missouri federal court ruled that alleging that the property was “unsafe and unusable” was sufficient to allege a “direct physical loss.” Also, several courts have found that a policy’s fungi, bacteria and virus exclusion(s) do not encompass COVID-19.

However, a larger number of courts have ruled in favor of the insurers, finding that loss of revenue due to COVID-19 does not constitute direct physical loss or damage. According to a litigation tracker maintained by the University of Pennsylvania’s Carey Law School, as of February 9, 2021, insurers have prevailed



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Supreme Court Rules on Retention of Repossessed Property

A secured creditor’s mere retention of property repossessed before the debtor’s bankruptcy petition is not an act to exercise control over property of the bankruptcy estate in violation of the Bankruptcy Code’s automatic stay provision, according to a recent opinion by the U.S. Supreme Court in *City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585 (2021).

The Court’s opinion resolves a circuit split as to whether a secured creditor’s failure to return property (i.e., vehicles repossessed prior to bankruptcy) is a violation of the automatic stay, which can result in sanctions and sometimes significant monetary damages.

The Court’s opinion is good news for lenders, especially auto lenders, with secured liens in personal property. The Court held that the automatic stay only “prohibits affirmative acts that would disturb the status quo of [bankruptcy] estate property as of the time when the [debtor’s] bankruptcy petition was filed” (emphasis added).

As a result of the decision, the focus is on maintaining the status quo as of the date of the bankruptcy petition. Therefore, secured creditors must proceed with caution and not take any other

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Gust Rosenfeld Expands Partnership

Jeffrey L. McLerran (Phoenix; Health Care Litigation) and **J.T. Shoaf** (Phoenix; Insurance Litigation) were elected as capital members of the firm. **Mina C. O'Boyle** (Phoenix; Real Estate Litigation), **Megan E. Ritenour** (Phoenix; Insurance Coverage and Litigation), and **Robert Williams** (Phoenix; Civil Litigation, Creditors' Rights, and Bankruptcy) were elected to the firm's partnership.



Jeffrey L. McLerran



J.T. Shoaf



Mina C. O'Boyle



Megan E. Ritenour



Robert Williams

Zoom Mediations—Welcome to the New Reality

COVID-19 has changed the legal landscape dramatically. While many court deadlines did not freeze due to the pandemic, many courts have suspended jury trials causing a significant backlog in criminal cases which must be tried due to speedy trial statutes and constitutional limitations.

Judges expect civil cases to continue to be delayed because of the backlog and strongly encourage private mediation or settlement conferences heard by Superior Court judges by Zoom or telephone. The Maricopa County Superior Court has an outstanding document on the civil department's website with "Best Practices for Virtual Court Hearings," which endorses the Go To Meeting platform for online hearings and settlement conferences.

While not ideal, they are the new normal. Be not afraid! Zoom settlement conferences are traditional settlement conferences. All parties are admitted to one "room" initially, and the settlement judge gives the rules. She/he then divides parties into separate confidential Zoom rooms. While there, each has confidential space to discuss positions and next steps.

The judge enters and exits each room as the negotiations progress and asks for negotiating positions. The judge does this with each party, seeking to reach a consensus.

This can be cumbersome and difficult. Some are better at using the technology than others. It is more likely in Zoom that the judge will ask the parties to "get real" earlier on in the mediation. This early pressure is not unusual, but it is more pronounced in Zoom conferences.

Zoom settlement conferences/mediations require more preparation and strategic discussions before the settlement conference/mediation by the lawyers and their clients. Suitable materials are critical. Judges use visually attractive exhibits to

good effect. Submit exhibits and your recommendation to the judge well in advance of the mediation. A separate confidential letter suggesting strategy is always helpful. This gives the judge tools and a preferred approach to the opposing party. Parties need to be realistic, prepared, and then opportunistic in Zoom.

This fundamental approach has not changed, but it is more pronounced in virtual mediations for both attorneys and parties.

Finally, pre-COVID, parties used to "nickel and dime" to reduce payouts and "send messages." In Zoom, both tactics are counterproductive. Parties and their lawyers are encouraged to strategize earlier, more effectively and proactively to get to their desired result in less time, with fewer exchanges between the judge/mediator and the parties.

*Peter Collins, Jr. | 520.628.7073 | pcollins@gustlaw.com
Peter concentrates his practice in general litigation with an emphasis on insurance defense and coverage, construction, personal injury, aviation, medical malpractice and products liability claims, including wrongful death.*



NEW FACES



Joseph D. Estes (Phoenix Office)

Joe's government and municipal law practice includes administrative law, election law, code enforcement and compliance, public records, procurement law, open meeting law, real estate, land use and zoning, development, conflict of interest, 1983 actions and civil litigation.

His experience includes serving as Assistant City Attorney for the City of Yuma from 2017 to 2020 and the City Attorney for the City of Page from 2014 to 2016. Joe has also served as a Judge Pro Tem for the Justice Court for Pinal County and the Superior Court for Maricopa County and as an Assistant Attorney General for the Arizona Attorney General's Office.

Joe earned his J.D. from the UNLV William S. Boyd School of Law. He served in the United States Air Force from 1992-1997 as an Arabic Linguist and Air Transportation Specialist and held a top-secret security clearance.

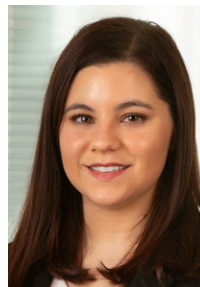


Joshua C. Offenhartz (Phoenix Office)

Josh's practice includes a broad range of insurance defense, civil litigation, and complex commercial litigation matters. He has experience litigating construction defects, transportation, employment, corporate, real property and various insurance matters. Josh also works with non-profit organizations and candidate

committees to ensure strict compliance with relevant campaign finance requirements.

Josh received his J.D. from the Sandra Day O'Connor College of Law at Arizona State University. He also earned a Master of Public Administration degree from Arizona State University. Josh has a B.S. degree in Public Management & Policy and a B.A. in Judaic Studies from the University of Arizona.



Shannon M. Scola (Phoenix Office)

Shannon has experience with commercial litigation and civil litigation matters. She focuses her practice on complex insurance coverage analysis and insurance defense.

Shannon received a B.A. degree from Gonzaga University in 2014. In 2018, Shannon earned her J.D. from the University of Arizona, James E. Rogers College of Law, where she served as a Note and Comment

Editor and a writer for the Arizona Journal of International and Comparative Law. While in law school, Shannon was a summer extern at the General Counsel's Office for the Governor in Phoenix.



Rachel L. Werner (Phoenix Office)

Rachel's practice focuses on the defense of nurses, physicians and other health care professionals, and civil litigation, including personal injury, medical malpractice, business and real estate litigation.

Before joining Gust Rosenfeld, Rachel maintained a diverse litigation practice, with areas of expertise in representing businesses

and individuals in various tort claims ranging from medical malpractice to defamation. She also was involved in matters relating to contract claims, representing major manufacturers in matters involving product liability, toxic and environmental litigation (asbestos, CERCLA), and general commercial litigation in both Arizona state and federal courts.

Rachel graduated magna cum laude with a B.S. in Public Health from California State University Northridge, where she was a four-year member of the Dean's List. At Cal State, Rachel was a member of Eta Sigma Gamma, the professional Health Sciences Honor Society, and the National Society of Collegiate Scholars. She obtained her J.D. from DePaul University College of Law in Chicago, Illinois, with a Certificate in Health Law.

Gust Rosenfeld Turns 100

2021 marks Gust Rosenfeld's 100th Anniversary. We are excited to celebrate this significant milestone by honoring our tradition of serving the communities in which we live and work. This year, in addition to our customary efforts, we will be providing extra support to recognize some of our communities' additional needs during this pandemic. The firm's contributions will be made throughout 2021 and have a theme that ties to our 100 years. We will highlight our efforts in the fall issue of this newsletter.

We also have adopted a unique logo to commemorate this Anniversary, which you will see in communications from the firm throughout 2021. Here is a preview of that logo.

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100 YEARS • 1921-2021

Homesteading Your Castle in Arizona

Homestead: conjuring up images of a distant past, this seemingly archaic terminology remains relevant to homeowners.

Under Arizona law, any married or single adult may hold a homestead on any one home in Arizona where they live, including condominiums and mobile homes.

Homestead protection is automatic; the homeowner does not need to file or record anything to declare a homestead. However, if more than one home could qualify, the homeowner may be asked to designate the one applicable property.

The basic idea behind a homestead is to protect against nonconsensual or involuntary liens and judgments. The homestead does not protect against collection under consensual liens such as mortgages and deeds of trust. Nor does it apply to mechanic's liens or liens for child support or spousal maintenance.

The homestead functions as an exemption; in practical effect, the first \$150,000 in equity is rendered protected from attachment, execution or forced sale. It applies even in the context of bankruptcy. A recent Arizona case confirmed that a recorded judgment does not create a lien against the homestead property.

While there are other nuances to a homestead beyond this article's scope—including some proposed changes now before the Arizona legislature dealing with the amount of the homestead and the lien status of recorded judgments—it remains a potent protection for Arizona homeowners.

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Chris focuses his practice on general commercial transactions and litigation, with an emphasis on real property matters.

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affirmative act to exercise or enforce their lien rights in bankruptcy-estate property—for those affirmative actions, seeking and obtaining relief from the automatic stay is still required.

Secured creditors should further exercise caution because the Court only resolved the limited application of 11 U.S.C. § 362(a)(3) regarding the “exercise [of] control over property of the estate.” The Court did not address any other subsections of the automatic stay, such as § 362(a)(4) “any act to . . . enforce any lien against property of the estate” and § 362(a)(6) “any act to collect, assess, or recover a claim . . . that arose before the commencement of the case.” However, the decision provides secured lenders with significant leverage at the outset of a debtor's bankruptcy filing.

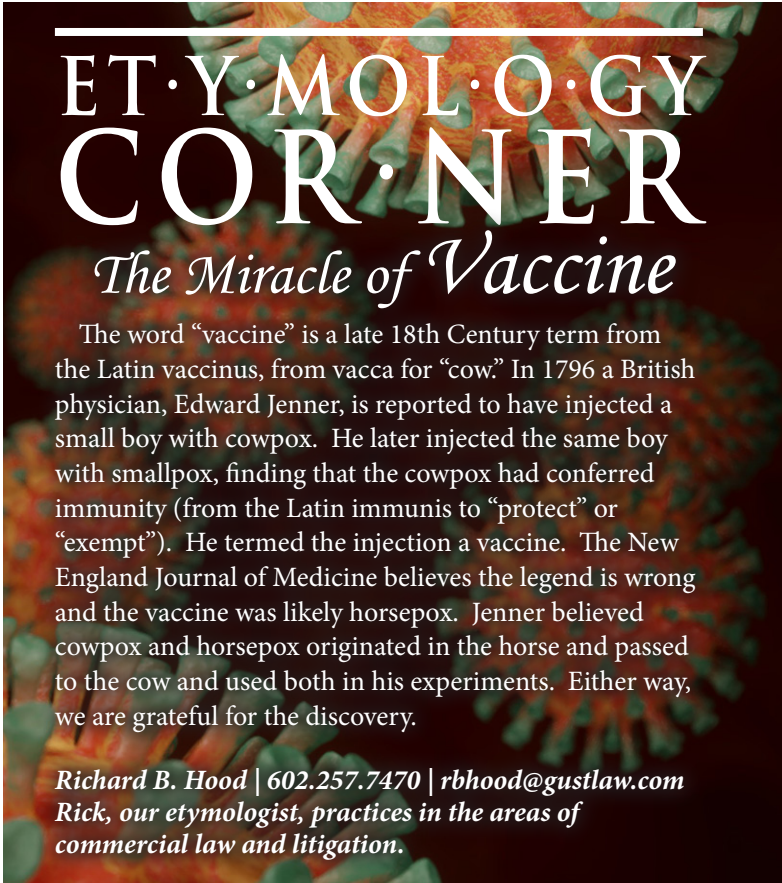
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Rob focuses his practice on civil litigation, creditors' rights, commercial bankruptcy, restructurings, related litigation, appeals, and mediation.

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in 141 out of 172 cases. In Georgia, a federal court granted an insurer's motion to dismiss, finding that the unambiguous policy language requires physical alteration to the property, particularly where COVID-19 had never been identified on the premises. Likewise, a Mississippi federal court ruled that a music production company's income and revenue losses due to various states' stay-at-home orders do not qualify as direct physical loss or damage in the absence of actual physical damage to the property. The Mississippi federal court further found that the policy's virus exclusion applied. Federal district courts in Alabama, Arizona, California, Florida, Illinois, New York, and Pennsylvania, among others, have granted dismissal in the insurers' favor on the same basis – that “direct physical loss of or damage to property” requires some physical alteration of that property. There remain hundreds of pending cases in the lower courts.

While the balance of court decisions to date favors the position that COVID-19 has not caused a physical loss of or damage to the premises, most, if not all, of these lower court decisions are undergoing appeal. The appellate rulings will establish whether a business can recover COVID-related business interruption or whether an insurer can deny for lack of “direct physical loss.” Like many areas of coverage law, it may all come down to jurisdiction.

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



ET·Y·MOL·O·GY COR·NER *The Miracle of Vaccine*

The word “vaccine” is a late 18th Century term from the Latin *vaccinus*, from *vacca* for “cow.” In 1796 a British physician, Edward Jenner, is reported to have injected a small boy with cowpox. He later injected the same boy with smallpox, finding that the cowpox had conferred immunity (from the Latin *immunis* to “protect” or “exempt”). He termed the injection a vaccine. The New England Journal of Medicine believes the legend is wrong and the vaccine was likely horsepox. Jenner believed cowpox and horsepox originated in the horse and passed to the cow and used both in his experiments. Either way, we are grateful for the discovery.

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

PERSONAL NOTES



Barbara Rodriguez-Pashkowski was named as a 2021 AZ Business Leader by AZ Big Media.

Rob Haws, Gerry O'Meara and Susan Segal were included among *AZ Business Magazine's* Top 100 Lawyers in Arizona.

Dan Coumides and Samantha Winter McAlpin were included among *Phoenix Business Journal's* Rising Stars in Law.

Craig Keller received the Compadres Award from the Desert Caballeros Western Museum for his service as a Trustee on its Board of Trustees. Craig served as a "Judge" for a Mock Coroner's Inquest put on by the museum.

Christina Noyes and Mina O'Boyle co-wrote the Arizona section of *Franchise U.S.A. 2020* for Lexology's Getting the Deal Through resource guide.

Chas Wirken co-authored the chapter on Oral Argument in the new edition of the Arizona Appellate Handbook, the comprehensive two-volume guide for lawyers and judges published by the State Bar of Arizona.

Fred Cummings authored "Risk Management in the Time of Coronavirus" for *Risk Adviser*, published by MICA.

Christina Noyes was nominated to serve on the Executive Council of the Business Law Section of the Arizona State Bar.

Tim Stratton was appointed to serve on the Arizona State Board for Charter Schools.

Scott Malm presented "Defending Against Escrow Fraud – Think Like A Football Coach" during the American Escrow Association's webinar. Also, Scott spoke about title insurance claims at the 2020 Land Title Association of Arizona's annual conference.

Jennifer MacLennan, Rob Haws, Susan Segal and Carrie O'Brien spoke at the Arizona School Boards Association's Virtual Law Conference.

Jennifer MacLennan spoke on accommodating employees at the Arizona School Administrators Principal and the Law Conference held virtually. She also presented on general human resource issues currently facing school districts to the Arizona School Personnel Administrators Association (ASPAA). She also presented at a joint ASA/ASPAA conference regarding COVID and employment law topics.

Chris McNichol and Kent Cammack presented at the United Trustees Association Virtual Conference.

Rob Haws presented "Leave ... and Please Come Back - Dealing with the FFCRA's Thorniest Issues" at the ASPAA Virtual Conference.

Carrie O'Brien presented "Data Privacy in the Age of Distance Learning and Remote Working" at the Arizona Association of School Business Officials' (AASBO) Virtual Conference.

Barbara Rodriguez-Pashkowski moderated the virtual event "Follow the Yellow Brick Road – To the Bench!" hosted by the Maricopa County Bar's Diversity & Inclusion Committee.

Jim Kaucher was a panelist for the State Bar Convention's seminar on "Litigating Medical Malpractice Cases under the Recent Civil Rules Amendments," part of the Bar's larger Current Issues in Civil Litigation Seminar.

Megan Ritenour was a panelist on a webinar discussing "What Does Jury Selection Look Like During a Pandemic?"

Jennifer Kalvestran spoke during the WRAP Insurance webinar hosted by the Seminar Group.

Jim Giel presented on school bond and override elections at Stifel Nicolaus' Virtual School Finance Conference and Piper Sandler's Virtual Election Seminar.

Carrie O'Brien co-presented "Student and Staff Confidentiality" during the AASBO Winter Virtual Conference.

Heather Bohnke and Melissa San Angelo Selected to Ladder Down Phoenix Class of 2021

Ladder Down is a year-long training and career development program for women lawyers. The program focuses on leadership, business development and mentoring. The goal is to "pay it forward" by providing tools for women to advance in the legal profession.

Programs like Ladder Down have become more important due to the increased rates of women leaving the workforce in 2020. Ladder Down connects women lawyers and provides coaching to navigate changes in the law. Whether examining the impacts of work-from-home arrangements, remote hearings or how to stay connected in a physically distanced environment, Ladder Down's strong network of professional women is available to assist.

Gust Rosenfeld is a proud sponsor of Ladder Down, with several graduates among its ranks, including Samantha Winter McAlpin, Mina O'Boyle, Shannon Scola and Rachel Werner. Ladder Down is going on its ninth year in Phoenix, with programs expanding to other cities.

Gust Rosenfeld congratulates Heather Bohnke and Melissa San Angelo for their selection to Ladder Down and their commitment to the advancement of women in the legal profession.

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Gust Rosenfeld Attorneys Recognized by Super Lawyers® 2021

Nine Gust Rosenfeld attorneys were selected to the 2021 Southwest Super Lawyers list, including four as Rising Stars. Super Lawyers is a national rating agency that evaluates lawyers from more than 70 practice areas.

- **Kent E. Cammack** (Business Litigation)
- **Peter Collins, Jr.** (Insurance Coverage)
- **Christina M. Noyes** (Franchise/Dealership)
- **Mina C. O'Boyle** (Real Estate; Rising Stars)
- **Sean P. O'Brien** (Bankruptcy; Business)
- **Rachel L. Werner** (Personal Injury – Medical Malpractice; Defense; Rising Stars)
- **Robert Williams** (Bankruptcy; Rising Stars)
- **Samantha Winter McAlpin** (Estate Planning & Probate; Rising Stars)
- **Charles W. Wirken** (Appellate)



Gust Rosenfeld Ranked in the Top 10 in 13 Categories by Ranking Arizona

Gust Rosenfeld was ranked in the Top 10 in 13 law firm categories and was among seven companies included in the Best Places to Work (101-499 employees) in the 2021 Ranking Arizona lists.

The categories Gust were ranked in are:

- Best Places to Work (101-499 Employees)
- Law Firms: Employment/Labor
- Law Firms (48 Attorneys or More)
- Law Firm: Environmental
- Law Firms: ADR/Mediation or Arbitration
- Law Firms: Estate/Trust
- Law Firms: Banking
- Law Firms: Mergers/Acquisitions
- Law Firms: Business/Corporate
- Law Firms: Real Estate
- Law Firms: Commercial
- Law Firms: Securities/Corporate Finance
- Law Firms: Creditor's Rights, Bankruptcy/Reorganization
- Law Firms: Tax

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