

NOW +

NEXT

COMMERCIAL LITIGATION ALERT | NIXON PEABODY LLP

MAY 6, 2020



Illinois's coronavirus (COVID-19) stay-at-home order upheld by federal judge as other lawsuits proceed in state court

By Seth A. Horvath

The plot surrounding Illinois's stay-at-home order continues to thicken. Earlier this week, a federal judge upheld the order against challenges under the free-exercise clause of the United States Constitution and three state statutes. Meanwhile, a temporary restraining order (TRO) enjoining the stay-at-home order's enforcement has been vacated by agreement of the plaintiff; another state trial court is preparing to hear a separate, broader application for a TRO; and Governor J.B. Pritzker continues to ask the Illinois Supreme Court to weigh in on the stay-at-home order's legality. Here's a full update.¹

The federal litigation

In *Cassell v. Snyders*, No. 20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020), a church and its pastor filed a complaint alleging that Illinois's stay-at-home order violates the United States and Illinois Constitutions' free-exercise, freedom-of-speech, freedom-of-assembly, and due-process provisions, as well as three Illinois statutes: the Religious Freedom Restoration Act (RFRA), the Emergency Management Agency Act (EMAA), and the Department of Public Health Act (DPHA). The plaintiffs sought a TRO and a preliminary injunction prohibiting the state from preventing members of the church from gathering in person for religious services.

After the lawsuit was filed, the governor issued Executive Order 2020-32. The new order recognizes the exercise of religion as an "essential activity," stating that worshipers may "engage in the free exercise of religion" as long as they "comply with [s]ocial [d]istancing requirements" and "refrain

¹ See also "[Illinois trial court restricts enforcement of coronavirus \(COVID-19\) stay-at-home order](#)," Commercial Litigation Alert, Nixon Peabody LLP, April 29, 2020; "[The legality of Illinois's stay-at-home order: A second, broader lawsuit challenges the governor's authority to impose coronavirus \(COVID-19\) restrictions on Illinois residents](#)," Commercial Litigation Alert, Nixon Peabody LLP, May 1, 2020.

from gatherings of more than ten people.” The order also “encourage[s]” religious organizations “to use online or drive-in services . . . to protect the health and safety of their congregants.”²

The order in the federal litigation

The *Cassell* court denied the plaintiffs’ request for injunctive relief. After rejecting the defendants’ arguments that the plaintiffs’ lawsuit is moot, unsupported by standing, and unripe,³ the court ruled in the defendants’ favor, refusing an injunction on several independent grounds.

First, the court held that the plaintiffs are unlikely to succeed on the merits of their claim that the stay-at-home order violates their free-exercise rights under the U.S. Constitution.⁴ Relying on U.S. Supreme Court case law, the court noted that “during an epidemic . . . the traditional tiers of constitutional scrutiny do not apply.” Under this modified framework, which recognizes expanded government authority during a public-health crisis, the court concluded that the plaintiffs “have a less than negligible chance of prevailing on their constitutional claim.” Alternatively, the court concluded that, even under a “traditional” First Amendment analysis, the stay-at-home order “would likely withstand scrutiny.” The court reasoned that the order, which prohibits both secular and religious conduct, still allows various types of religious expression to occur. It also emphasized that there is no evidence the order resulted from “a history of animus towards religion or religious people.”

Second, the court held that the plaintiffs are unlikely to succeed on the merits of their claims that the stay-at-home order violates the RFRA, the EMAA, and the DPHA.⁵ The court initially concluded that the plaintiffs’ statutory claims are barred by the Eleventh Amendment, which grants sovereign immunity to state officials sued in their official capacities for alleged violations of state law. Turning to the merits, the court rejected the plaintiffs’ RFRA claim on the grounds that the state’s interest in fighting COVID-19 is a “compelling” one, and the stay-at-home order’s ten-person limit on in-person religious gatherings is “the least restrictive means” of pursuing that goal. The court then rejected the plaintiffs’ EMAA claim on the basis that, as long as a “threat of widespread or severe damage, injury, or loss of life” continues to exist from the COVID-19 pandemic, the governor has authority to exercise his emergency powers under the EMAA. Finally, the court concluded that the DPHA does not bar the stay-at-home order because, although the Illinois Department of Public Health has the authority to impose a “quarantine” under the DPHA, the governor’s order does not impose restrictions that fall within the meaning of “quarantine” under the statute.

Third, the court held that the “balance of hardships” favors the defendants.⁶ The court reasoned that, since preventing enforcement of the stay-at-home order “would pose serious risks to public health” and the lives of the plaintiffs’ congregants, and since the order does not ban the congregants from practicing their religion altogether, “equitable considerations . . . weigh heavily against” granting injunctive relief.

² *Cassell v. Snyders*, No. 20-cv-50153, 2020 WL 2112374 (N.D. Ill. May 3, 2020), at *2 (internal quotation marks omitted).

³ *Id.* at *4-6.

⁴ *Id.* at *7-11.

⁵ *Id.* at *11-14.

⁶ *Id.* at *15.

The court did not address any of the Illinois state constitutional claims alleged in the plaintiffs' complaint. Nor did the court address the plaintiffs' federal freedom-of-speech, freedom-of-assembly, or due-process claims, expressly finding that, for purposes of the request for a preliminary injunction, the plaintiffs had waived the speech and assembly claims by failing to raise them in their opening brief.⁷

The state litigation

The court's decision in *Cassell* is the latest development in several pending lawsuits challenging Illinois's stay-at-home order. In *Bailey v. Pritzker*, No. 2020-CH-06 (Fourth Judicial Circuit, Clay County, Illinois), a state trial court entered a TRO prohibiting the state from enforcing the stay-at-home order against the plaintiff. Among other things, the trial court concluded that the plaintiff was likely to succeed on the merits of his claim that the governor exceeded his statutory authority to exercise his emergency powers under section 7 of the EMAA by exercising those powers for more than 30 days.

The state appealed the TRO to the Illinois Appellate Court. It also asked the Illinois Supreme Court to conduct an expedited appeal, or enter a supervisory order, regarding the TRO. In an interesting procedural twist, the plaintiff submitted a pleading to the appellate court agreeing to the entry of an order vacating the TRO so the plaintiff can amend his complaint on remand and submit additional evidence to the trial court about the stay-at-home order's alleged illegality. The state, for its part, continues to press the supreme court to review the case using its supervisory authority, arguing that the court should address whether the governor acted consistently with the EMAA when he issued successive disaster proclamations, and executive orders, in response to COVID-19. The state has submitted the district court's opinion in *Cassell* as supplemental authority in support of its position.

Meanwhile, in *Cabello v. Pritzker*, No. 2020-CH-210 (Seventeenth Judicial Circuit, Winnebago County, Illinois), filed by the same attorneys as *Bailey*, but on behalf of a different plaintiff, the plaintiff challenges (i) the constitutionality of the governor's entire March 20, 2020, executive order under the separation-of-power clause of the Illinois Constitution, (ii) the governor's authority to extend the March 20 order beyond 30 days under section 7 of the EMAA, and (iii) the constitutionality of the stay-at-home provisions of the March 20 order under the due-process clauses of the United States and Illinois Constitutions. The TRO hearing in *Bailey*, originally set for May 5, has been reset for May 14.

Where does this leave us?

The opinion in *Cassell* resolves the statutory question at issue in *Bailey* and *Cabello* in favor of the state. But the federal court's interpretation of section 7 of the EMAA is not binding on the Illinois courts deciding those cases.⁸ The federal court also did not rule on the separation-of-powers or due-process questions raised in *Cabello*.

Additionally, the plaintiffs in *Cassell* are appealing the district court's order. Because the order involves the denial of a preliminary injunction, the plaintiffs have the right to proceed with an

⁷ See *id.* at *6 n.3.

⁸ See, e.g., *People ex rel. Ryan v. World Church of the Creator*, 198 Ill. 2d 115, 127 (2001) (Illinois Supreme Court "has the final word on interpretation of Illinois statutes"); *Prior Plumbing & Heating Co. v. Hagins*, 258 Ill. App. 3d 683, 688 (1st Dist. 1994) (noting that Illinois state courts are "not bound to follow decisions by [f]ederal courts other than the United States Supreme Court").

interlocutory appeal. They have already filed their notice of appeal. They also filed an emergency motion for an injunction pending the appeal, which the district court denied.

With three lawsuits in full swing, the ultimate fate of the stay-at-home order is unclear. State and federal courts have reached conflicting decisions on whether the order violates section 7 of the EMAA. Unresolved state constitutional issues remain to be litigated. The original TRO invalidating the order has been vacated by agreement of the plaintiff. The state continues to ask the Illinois Supreme Court to take a position on the stay-at-home order's legality. And the plaintiffs in *Cassell* are appealing their case to the United States Court of Appeals for the Seventh Circuit. Many outcomes remain possible. Nixon Peabody will continue monitoring the litigation.

For more information on the content of this alert, please contact our [Coronavirus Response Team](#), your Nixon Peabody attorney, or:

— Seth A. Horvath, 312-977-4443, sahorvath@nixonpeabody.com
