



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

By Seth A. Horvath

Another Illinois state legislator has filed a lawsuit challenging the legality of Governor J.B. Pritzker's stay-at-home order. The new lawsuit—*Cabello v. Pritzker*, No. 2020-CH-210 (Seventeenth Judicial Circuit, Winnebago County, Illinois)—follows in the wake of litigation filed a week ago—*Bailey v. Pritzker*, No. 2020-CH-06 (Fourth Judicial Circuit, Clay County, Illinois)—in which the trial court entered a temporary restraining order (TRO) prohibiting the state from enforcing the stay-at-home order against the plaintiff. The relief requested in *Cabello* is much broader than the relief requested in *Bailey*: the plaintiff seeks an order prohibiting the state from enforcing the stay-at-home order against *any Illinois residents*. Here's what businesses need to know.

Developments leading to the *Cabello* lawsuit

The Illinois Emergency Management Agency Act (EMAA) gives the governor authority to declare that a “disaster” exists and confers certain “emergency powers” on the governor once a “disaster” has been declared.¹ The *Bailey* lawsuit challenges the governor's authority to exercise those “emergency powers” for more than 30 days.²

A TRO was entered in the *Bailey* case on April 27, 2020. Fast forward two days, and we have *Cabello*, a similar but much more comprehensive lawsuit challenging:

- the constitutionality of the governor's entire March 20, 2020, executive order under the separation-of-powers clause of the Illinois Constitution;
- the governor's authority to extend the March 20 order beyond 30 days under section 7 of the EMMA; and

¹ 20 ILCS 3305/2(a)(2); 20 ILCS 3305/7.

² *Illinois trial court restricts enforcement of coronavirus (COVID-19) stay-at-home order*, Commercial Litigation Alert, Nixon Peabody LLP, April 29, 2020.

- 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 allegations in *Cabello*

The *Cabello* lawsuit was brought on behalf of the plaintiff and all similarly situated Illinois citizens. The complaint does not specify the basis for the plaintiff's standing to pursue relief on behalf of other Illinoisans, which could become a point of contention as the litigation proceeds. But in theory, as long as the individual plaintiff has been adversely affected by the stay-at-home order, then he himself has standing to pursue declaratory and injunctive relief that could have statewide implications.³

The plaintiff alleges several different theories for invalidating, and enjoining the enforcement of, the March 20 order. First, he claims that the entire March 20 order violates the constitutional separation of powers between Illinois's executive and legislative branches and is therefore null and void. According to the plaintiff, as the leader of Illinois's executive branch, the governor can only exercise police powers granted by the Illinois Constitution or delegated by the legislature. Here, argues the plaintiff, the governor had no constitutional or statutory authority to enter a stay-at-home order: the constitutional authority to do so resides solely in the legislature; the legislative authority to do so was delegated to the Illinois Department of Public Health (IDPH) as a whole, not to the governor individually.

Second, as in *Bailey*, the plaintiff alleges that the governor had no authority to extend the March 20 order beyond the initial 30-day period following the governor's original disaster proclamation. This claim hinges on the plaintiff's interpretation of section 7 of the EMAA, which states, in part: "Upon such proclamation [of a disaster], the [g]overnor shall have and may exercise for a period not to exceed 30 days the following emergency powers . . ."⁴ According to the plaintiff, the EMAA allows the governor to proclaim one "disaster" and then exercise his emergency powers for 30 days after doing so; it does not permit the governor to re-proclaim the same "disaster" after 30 days to re-trigger his emergency powers for another 30 days, and so on. The "disaster," the plaintiff argues, can last more than 30 days, but the governor's "emergency powers," which are merely one aspect of a disaster declaration, expire on day 30.

Third, the plaintiff claims that the stay-at-home provisions in section 1 of the March 20 order violate principles of federal and state due process. The plaintiff asserts that the right to move unimpeded from place to place is part of the "liberty" of which citizens cannot be deprived without due process of law. The stay-at-home provisions of the March 20 order, the plaintiff contends, violate the liberty interests of each Illinois citizen because those provisions were unilaterally promulgated by the governor and are overly broad. By contrast, argues the plaintiff, the Illinois Department of Public Health Act, and the regulations enacted under it, contain procedural safeguards that allow the IDPH to impose legitimate quarantine measures without infringing on the constitutional rights of Illinois citizens.

Based on these allegations, the plaintiff seeks a declaratory judgment that the March 20 order—or, at a minimum, section 1 of the order—is null and void. Alternatively, the plaintiff seeks a declaratory judgment that the governor's extensions of the March 20 order are null and void. The

³ See, e.g., *In re M.I.*, 2013 IL 113776, ¶ 32 ("In order to have standing to bring a constitutional challenge, a person must show himself to be within the class aggrieved by the alleged unconstitutionality.")

⁴ 20 ILCS 3305/7.

plaintiff also seeks an injunction prohibiting the state from enforcing the provisions of the March 20 order against anyone in the state.

The state has not yet responded to the plaintiff's allegations.

Next steps

The first hearing in the *Cabello* lawsuit is scheduled for May 5, 2020⁵—coincidentally, the last date for the appellate court to rule on the TRO in the *Bailey* lawsuit. How, if at all, the appellate court's ruling in *Bailey* may factor into the trial court's ruling in *Cabello* remains unclear.

Further complicating matters is that, the same day the *Cabello* lawsuit was filed, the Illinois Attorney General filed an emergency motion to directly appeal the TRO entered in the *Bailey* case to the Illinois Supreme Court.⁶ In addition to seeking an expedited appeal on the merits, the motion requests a supervisory order, a type of extraordinary relief in which the Illinois Supreme Court can bypass the normal appellate process in favor of immediate judicial action.⁷ The supervisory order requested in *Bailey*, if entered, would summarily reverse the trial court's TRO.

A trend?

Cabello, as mentioned, is now the second lawsuit in Illinois state court challenging the governor's stay-at-home order. And yesterday a lawsuit was filed in the United States District Court for the Northern District of Illinois by a religious organization seeking relief similar to that requested in *Cabello*. The federal lawsuit alleges that the March 20 order violates the United States and Illinois Constitutions' free-exercise, freedom-of-speech, freedom-of-assembly, and due-process provisions; the Illinois Religious Freedom Restoration Act; and section 7 of the EMAA.⁸

Similar litigation is pending in other states. For example, a lawsuit was filed in Michigan this week seeking to enjoin Governor Gretchen Whitmer's stay-at-home order.⁹ In Wisconsin, briefing has been completed in a case pending before the Wisconsin Supreme Court in which a group of lawmakers is challenging the stay-at-home order issued by the Wisconsin Department of Health Services.¹⁰ And in California, several small-business owners have filed a lawsuit challenging the constitutionality of Governor Gavin Newsom's stay-at-home order.¹¹

Do these lawsuits represent a new trend in the public's response to stay-at-home orders? Perhaps that's too strong a statement. But all signals continue to point to an increasingly complex legal landscape for companies seeking to understand coronavirus restrictions in the geographic areas where they do business. Nixon Peabody will continue to follow these developments.

⁵ Docket, Seventeenth Judicial Circuit, Winnebago County, Illinois, <http://fce.wincoil.us/fullcourtweb/civilHearingSummary.do?CourtCaseId=181717388>.

⁶ *Bailey v. Pritzker*, No. 129952 (Ill. S. Ct.), https://courts.illinois.gov/SupremeCourt/SpecialMatters/2020/125952_MOT.pdf.

⁷ See Ill. Const., Art. VI, § 16; *Gonzalez v. Union Health Servs., Inc.*, 2018 IL 123025, ¶¶ 16–17.

⁸ *Beloved Church v. Pritzker*, No. 3:20-cv-50153 (N.D. Ill.).

⁹ *Signature Sotheby's Int'l Realty, Inc. v. Whitmer*, No. 1:20-cv-00360 (W.D. Mich.).

¹⁰ *Wisconsin Legislature v. Palm*, No. 2020AP765-OA (Wis. S. Ct.).

¹¹ *Gondola Ventures, Inc. v. Newsom*, No. 2:20-cv-03789-CBM-MAA (C.D. Cal.).

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