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Can the Government Do That? – New Class Action Challenges Pennsylvania's COVID-19 Order as Unconstitutional

Authors: Stephen K. Pudner, Ivy N. Cadle

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Why can't I open my business? Where is my due process? The public health risks of COVID-19 are very real. But, the question remains whether some of the COVID-19 shutdown orders have taken private property for "public use, without just compensation" in violation of the Fifth Amendment? The forthcoming wave of litigation challenging these orders as unconstitutional is likely to test the extent of the government's police powers to protect the health, safety, and welfare of its citizens during a health pandemic.

One set of orders that are under attack are the COVID-19 Executive Orders issued by Pennsylvania Governor Tom Wolf which closed any business that was not "life-sustaining." A recently filed class action challenges these orders as an unconstitutional taking and seeks a ruling ordering Pennsylvania to pay just compensation to the plaintiffs.

The lead plaintiff is Schulmerich Bells, a manufacturer of orchestral quality musical handbells and handchimes, and the orders shuttered the business at what Schulmerich Bells says is one of its busiest times of the year. It also left Schulmerich's employees unemployed, and they have joined the lawsuit as additional plaintiffs. Together, the plaintiffs challenge the orders as violating the U.S. Constitution's Fifth and Fourteenth Amendments.

The complaint opens with a seminal quote from the 1960 U.S. Supreme Court case of *Armstrong v. United States*. There, the Court proclaimed that the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was specifically "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The Plaintiffs note that the "Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use, without just compensation." The Plaintiffs then claim that compensation is appropriate here because of the Supreme Court's recognition that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such 'regulatory takings' may be compensable under the Fifth Amendment." Because the Plaintiffs "have suffered a complete loss of 'all economically beneficial uses' of their Property," they claim the orders inflicted a "complete loss" that "constitutes a categorical taking." Thus, they are entitled to, but have not received, just compensation.

To defeat the argument that the orders are within the police powers of the Commonwealth of Pennsylvania, the Plaintiffs argue that the orders interfere with their "protected liberty interest in their right to live without arbitrary governmental interference," and "protected fundamental property right to use and enjoy land in which they hold a recognized interest." As such, they claim that the orders "constitute arbitrary, capricious, irrational, and abusive conduct which unlawfully interferes with" these rights.

Furthermore, the Plaintiffs argue the "forced shutdown of all 'non-life sustaining' businesses" "shocks the conscious" and violates their substantive due process rights by "arbitrarily forcing [the Plaintiffs] to shoulder the burden for Executive Orders aimed at benefiting the public across the entire Commonwealth." Finally, they argue that the orders do not properly weigh "the private interest affected by the governmental action and the value of additional procedural safeguards against the fiscal and administrative burdens that additional procedures would impose on the government."

Whether or not the Pennsylvania lawsuit is successful remains to be seen, but it and its progeny will send a cautionary tale to states and localities to narrowly tailor their orders so that they balance the very legitimate policy goal of limiting the spread of COVID-19 versus the important private property rights of business owners.

The lawsuit reveals potential flaws in hastily drafted and issued orders; it will be interesting to see how the courts balance the police powers of the governmental entities with the rights of their citizens to just compensation and due process. As each state and locality try to cope with the unknown, but potentially devastating impacts of the COVID-19 epidemic, similar "shelter-in-place" and "stay-at-home" orders are being issued daily. Similar lawsuits will likely be filed in the weeks to come as more and more small businesses are unable to cope with little to no cash flow.

Visit our [State-Specific Resources and Restrictions page](#) to learn more about the orders issued by each state. Contact us if you believe your business has been unfairly shutdown without just compensation by a state or local "stay-at-home" or similar order, or that you have been otherwise targeted by a governmental entity relating to COVID-19 issues. Our attorneys are experienced in eminent domain, constitutional, real estate, and other relevant areas and can help protect your business interests while we all try to protect each other from the spread of COVID-19.

For more information specific to this topic, please contact [Stephen Pudner](#) or [Ivy Cadle](#) and visit our website's [Eminent Domain page](#) and [Coronavirus \(COVID-19\): What you Need to Know information page](#).