

*Daily Labor Report*<sup>®</sup>

# INSIGHT: Doctrine of Primary Jurisdiction— An Ace for Dismissing COVID-19 Suits?

June 11, 2020, 4:00 AM

By Aliza Karetnick, Brian D. Pedrow, and Elizabeth Schilken

The recent dismissal of the Missouri Smithfield meatpacking worker safety lawsuit, applying the primary jurisdiction doctrine, may prove useful to employer-defendants in future suits involving worker safety, Ballard Spahr attorneys write. However, employers should keep in mind a number of caveats, especially in areas with many confirmed COVID-19 infections.

As businesses begin the process of reopening during the COVID-19 pandemic, some observers, including the U.S. Chamber of Commerce, have predicted a flood of litigation alleging unsafe workplace conditions that put employees and customers at increased risk of infection.

As such, the business community was closely monitoring a recent case brought on behalf of meatpacking workers in Milan, Mo., in an attempt to force Smithfield Foods to increase safety measures at its pork processing facility. The plant has remained open throughout the pandemic, and plaintiffs, the Rural Community Workers Alliance and an unidentified plant worker named Jane Doe, alleged Smithfield was putting profits ahead of lives by not enforcing social distancing and implementing other precautions (*Rural Community Worker's Alliance v. Smithfield Foods Inc.*, No. 20-06063 (W.D. Mo.)).

U.S. District Judge David Gregory Kays quickly tossed the suit, ruling the dispute was appropriately referred to OSHA and the USDA under the doctrine of primary jurisdiction, and that plaintiffs were not entitled to injunctive relief because no workers had gotten sick with COVID-19.

But the ink was barely dry on Kays' decision when reports emerged of confirmed cases at the plant. Since the court's May 5 ruling, at least two dozen workers have been diagnosed, raising the possibility that the Milan plant could join other Smithfield facilities in South Dakota and Wisconsin that have been temporarily shuttered due to outbreaks.

If Kays' decision stands, its application of the primary jurisdiction doctrine could become an important precedent for employers facing suits over workplace safety. The doctrine allows a court to stay or dismiss an action to refer the dispute to a regulatory agency with relevant expertise and is often invoked by defendants in other types of litigation, such as deceptive food labeling cases and environmental cleanup suits.

Courts have entertained requests to refer such claims to the FDA and EPA, respectively. But the doctrine has rarely been applied to refer claims of unsafe working conditions to OSHA.

## With the Doctrine Come Caveats

The emergence of COVID-19 infections at the Milan plant undermines the district court's ruling on injunctive relief, to say the least, and Smithfield may yet be forced to implement further safety measures to curtail the outbreak. However, the court's decision applying the primary jurisdiction doctrine may prove useful to employer-defendants in future suits involving worker safety, provided they keep in mind a few caveats.

Courts have cautioned that the primary jurisdiction doctrine is to be applied "sparingly," as it can result in added expense and delay. *Alpharma Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005). While the court in this case ruled that such concerns were outweighed by the need for uniformity in regulation, other courts may give these concerns more weight, especially where numerous COVID-19 infections have been confirmed in the community.

Further, OSHA has indicated it is unlikely to cite employers outside the health care and emergency response sectors when addressing COVID-19-related complaints. Thus, the lack of pending or likely enforcement proceedings by OSHA may weigh against the application of primary jurisdiction.

Where an agency has indicated its reluctance to actively involve itself in the type of dispute before the court, a court may view reference to that agency more as deferring to an administration's public policy goals rather than deferring to an agency's technical expertise.

Indeed, after the district court ruled in this case, President Trump issued an executive order on May 19 stating that "non-adherence to guidelines [by government agencies regarding prevention of transmission of COVID-19] shall not by itself be a basis for enforcement action." Other courts may question whether their role in adjudicating disputes under long-established common law doctrines such as public nuisance should be supplanted by policy determinations of the executive branch.

Finally, the ability to document compliance with OSHA and CDC guidance will play a critical role in determining whether a primary jurisdiction defense is successful. It is much more likely that a court will keep a case when an employer cannot show substantial good-faith efforts to implement OSHA/CDC guidance, as the defendants were able to do here.

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

### Author Information

*Aliza Karetnick is a litigation partner in Ballard Spahr LLP's Philadelphia office. She has a broad advisory, complex commercial, and intellectual property litigation practice in which she works closely with clients in the food, flavor and beverage industry.*

*Brian D. Pedrow is the practice leader of Ballard Spahr's Labor and Employment Group. Also based in Philadelphia, he represents employers and management in the full scope of matters related to employment, labor, and employee benefit disputes.*

*Elizabeth Schilken is a litigator in the firm's Los Angeles office and a member of the firm's Media and Entertainment Law group.*