

COVID-19 Leads to New Class Actions

April 30, 2020

Like every aspect of our society, the coronavirus is affecting class action litigation. In the last month a rush of new "corona" class actions have been filed, and businesses are seeing novel class claims. The headlines have touted the Zoom confidentiality cases, the cruise ship refund cases, and the sensationalized cases against China. But with the dramatic changes in the way businesses operate during the pandemic, creative and diligent plaintiffs' lawyers are finding many opportunities to pursue class actions.

Some of the Recent Cases

Here are just a few of the areas that have been prevalent in the last few weeks:

- **Labeling:** A plethora of labeling cases alleging violations of consumer protection laws against cleaning and disinfectant products relating to the products' effectiveness against the virus. At the core of these cases is the issue in all labeling cases: does the product satisfy what is stated on the label? That question is now viewed through the lens of the coronavirus.
- **Insurance:** Most businesses are reviewing their insurance policies to see if there is coverage for losses incurred as a result of COVID-19 (see "Will Business Interruption Losses From COVID-19 Be Covered By My Insurance?"). There have been numerous class actions with policyholders suing different insurance carriers for business interruption and other insurance claims, often alleging nationwide classes.
- **Refunds:** There has been a wave of consumer class actions demanding refunds for everything from vacations to concert and entertainment tickets to airline tickets to monthly gym fees, along with many more.
- **"Price Gouging":** Grocery stores and others in their supply chain, along with other retailers and their suppliers, have been named in class actions alleging "price gouging" on a variety of products, including protective masks, toilet paper, sanitizers, and even flour and eggs.
- **Work Environment:** Employers are being sued in class actions for failing to take adequate protections and safety precautions for their workers.
- **Financial Institutions:** Financial institutions remain a target of class actions, and are being sued for administration of their policies for different pandemic relief loans. Most focus on processing of loans under the SBA's Paycheck Protection Program (PPP), and allege violations of the CARES Act. Other class actions focus on alleged improper foreclosures, seeking to prevent foreclosures due to the pandemic.

- **Education Entities:** With the closure of education facilities and the move to online learning, education entities have been named in class actions seeking refunds for tuition, housing and board.
- **Stock Price Declines:** With the steep decline in many companies' share prices, we have seen the expected stock price decline class actions for companies most severely affected by the virus. Likewise, ERISA retirement plan breach of fiduciary duty, employer sponsored stock plan and ESOP breach of fiduciary duty cases will follow.
- **Virus Exposure Cases:** Some businesses who had large groups of people together with alleged resulting infections among the customers are being sued in class actions for negligence in allowing large groups to congregate in confined areas, and not properly monitoring the environment in light of what was known about the virus at the time.

What Should Companies Do?

Even though EBOLA and SARS pandemics preceded the coronavirus, they did not spawn the kinds of class cases being filed today. Companies are operating in uncharted territory. Every business decision poses new risks. When do we reopen? How do we protect employees if we reopen? Can we open to the public? Do we need to change our labels? Do we offer refunds, and if so, how much? What do we announce publicly? Businesses need to be on the lookout and be prepared for class actions where they did not expect them before. Although business decisions are necessarily being made quickly, they warrant a risk review. A quick review of decisions in light of potential litigation could result in modifications to help avoid or minimize the risk of class actions.

What if you are sued in a class action?

Although class action *filings* have been prolific, the class actions are coming into a court system that too is limited in its ability to process and manage cases. As a result, most cases are unlikely to progress quickly and will likely move slower in the short term. When the cases start to move, they will be subject to the usual practice of responsive pleadings, discovery and significant motion practice before resolution or trial. There are a few practical things potential defendants need to be aware of in this unique environment:

- **Public Relations:** Many of the cases are accompanied by press releases or are picked up by the press due to their relationship with the virus when they otherwise would not have been noticed. Your company should be ready to respond appropriately, and due to business reasons in this climate, may consider responding publicly. Those responses may be different in the current pandemic than they would have been in a normal world.
- **Injunctions:** Many of the cases allege imminent and irreparable harm, and therefore seek immediate injunctive relief, with either a temporary restraining order or a preliminary injunction. This means you may need to have lawyers retained, facts gathered, and defenses prepared quickly. For example, if customers, suppliers or employees complain about safety issues, that may be a pre-suit warning. If this is a risk, it is wise to consult and retain counsel prior to moving forward.

- **Watch for Other Cases:** Where there is one class action, there are often nearly immediate copycat cases in the same or similar industries. Businesses and/or their counsel should monitor dockets so they are prepared appropriately.
- **Document Preservation:** Make sure your document preservation practices and policies are being implemented, particularly with the new work from home environment utilized by most businesses. With most employees working remotely, make sure your company is taking the necessary steps to preserve data and information. As text and instant messaging applications have proliferated and their content is the subject of discovery in pre-corona litigation, expect an even greater push for this information in an environment with a distributed and digital work force. Discovery of personal devices, and requests for new Electronically Stored Information, such as recorded Zoom meetings, should be expected.
- **Confidentiality:** In some cases, maintaining the confidentiality of business information is critical. That risk is higher now more than ever with the changed work environment. Make sure your employees are maintaining confidentiality in their new work environment so a potential waiver does not come back to hurt you in litigation.

As always, and in particular now during our current pandemic, be calm, be prepared and think through potential risks of business actions. If you desire legal assistance in evaluating your risk for potential class actions or in defending these cases, contact Brian Fries, Rick Bien, Litigation and Dispute Resolution Practice Group Chair Matthew Jacober or your regular Lathrop GPM contact.