



Professional Perspective

Covid-19 and Class Actions

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Faced with the social and economic effects of the Covid-19 pandemic, businesses in all industries have had no choice but to react. Enterprising plaintiffs' attorneys have been poised to file Covid-19 lawsuits alleging a variety of theories based on novel fact patterns that will unfortunately try to capitalize on the current pandemic and industry reactions.

Pending Litigation

There have already been numerous Covid-19-related class actions involving a variety of consumer-related issues, such as pricing, refunds, provision of services, and marketing. In one Florida state court class action, a plaintiff pursuing a Florida Deceptive and Unfair Trade Practices Act claim against an online retailer alleges "unconscionable prices" for toilet paper and hand sanitizer. Another class action against an event producer asserts a variety of state law claims based on the alleged refusal to refund pass and ticket holders of a canceled event.

And in a pending federal class action, a group of plaintiffs is challenging representations allegedly made by a hand sanitizer manufacturer. According to the allegations, "advertisements...show pictures of a sneezing child and another child with a thermometer in her mouth"—"designed to convey the impression to consumers" that the products are "effective in preventing and treating certain communicable, viral diseases."

The plaintiffs' bar is also exploring novel litigation theories amidst the pandemic. A pending suit against a communications technology provider alleges the pandemic resulted in increased use of the provider's technology that allegedly collects and shares information, which the plaintiff claims triggers the California Consumer Privacy Act (a law that went into effect earlier this year), the California Constitution, and other theories.

What's Ahead and Potential Strategies

The Covid-19 pandemic has had immediate and widespread effects. It has forced industries to change how they do business and has resulted in substantial job loss. Covid-19-related consumer class actions will likely increase through the remainder of the year as new fact patterns emerge that the plaintiffs' bar will seek to capitalize on.

Industries Seeing Consumer Class Actions

Covid-19 headlines and already pending litigation provide a glimpse into upcoming consumer class actions. Industries that are likely to continue to see consumer class action litigation include the travel and event industries as well as the personal care products industry. Other industries and businesses, while less obvious, are also likely to see Covid-19-related class action litigation. These include distribution, education, technology, dining (including takeout), banking and financial services, businesses providing continuing membership programs/services, and debt collectors as well as businesses that conduct in-house recovery efforts.

Likely Claim Types

Businesses should expect to see the plaintiffs' bar roll out the full gamut of consumer class action theories. These will include already popular statutes and claims such as the Telephone Consumer Protection Act, state unfair competition and false advertising laws, the [Fair Debt Collection Practices Act](#) and its state analogues, and contract claims. As has already been borne out by pending cases, the plaintiffs' bar will also use new fact patterns to test the limits of new or typically overlooked legal claims, such as those premised on the California Consumer Privacy Act and state constitutions.

Defensibility

Though every case is different, companies facing Covid-19-related class action litigation can look to tested and novel defense theories when responding to these claims. Defendants facing pricing-related class actions, for example, may point to changes in pricing as a deterrent to product hoarding. If not a direct seller, a defendant may be able to avoid liability by arguing a lack of vicarious liability. Cases involving refunds may be susceptible to contract-related arguments, arbitration clauses, and class action waivers.

Various defenses are likewise available for class actions implicating alleged privacy concerns. For example, a defendant may challenge a claim premised on the California Consumer Privacy Act by arguing the private right of action in fact does not apply and may stave off state constitutional issues by arguing the alleged conduct does not trigger constitutional concerns. See, e.g., *Moreno v. S.F. Bay Area Rapid Transit Dist.*, No. 17-cv-02911 (N.D. Cal. Dec. 14, 2017).

Telephone Consumer Protection Act claims, depending on the jurisdiction and claim, may be susceptible to recent defendant-friendly developments in the Seventh and Eleventh Circuits that, like the Third Circuit, now mandate telephone number generation for technology to qualify as an “automatic telephone dialing system.” Additional positive Covid-19 developments in the TCPA space may also be forthcoming as a petition is currently pending before the FCC asking for confirmation that calls and texts from financial services institutions associated with the pandemic fall under the emergency purposes exception.

Covid-19-related class actions are still in their inception and it is, at best, unclear whether any pending theories will gain traction. While Covid-19 presents new and highly publicized fact patterns, defendants facing related litigation can rest assured knowing that protections provided by federal and state courts remain in place as do defenses that may otherwise apply to non-Covid-19 class actions.