What Will "Phase II" of COVID-19 Class Actions Look Like?

Jaclyn M. Metzinger, James B. Saylor

July 27, 2020

As we previously reported, the spread of class actions relating to the COVID-19 pandemic has become a significant contagion of its own. More than 500 coronavirus class actions have been filed since March, including suits seeking refunds for cancelled courses and entertainment, charging employers and retailers with negligence in addressing the danger of infection, claiming price gouging over essential consumer products, seeking insurance coverage for virus-related losses, and challenging advertising claims touting various products' alleged ability to prevent or cure the virus.

As the economy gradually reopens in phases, "Phase I" of coronavirus class actions continues: plaintiffs continue to file COVID-related class actions every day, with insurance and education-related cases encompassing about 50% of the COVID-19 class actions filed to date.

"Phase II"—how companies will respond to these cases—is just beginning. Not surprisingly, defendants are fighting hard and early to defeat these claims, with many opting to file motions to dismiss rather than answering the complaint and entering into lengthy and expensive discovery. The success of these motions will depend largely on the causes of action being asserted and the level of detail in the pleading but, as is true in all class actions, a motion to dismiss in a COVID class action can be a valuable tool to educate the court and narrow the scope of discovery even if the motion is denied.

Early Action in Cases Against Public-Facing Businesses

Public-facing businesses—such those in the retail, travel and hospitality industries—have been the first to re-open and are currently navigating a patchwork of state-by-state guidelines on how to do so safely. Compounding this burden, these same companies are facing a wave of lawsuits by customers and employees alleging negligence, breach of contract, and unfair business practices during the pandemic.

Many of these companies are not new to class action litigation and have built arbitration clauses and class arbitration waivers into their consumer contracts. These clauses are largely enforceable due to a trio of recent Supreme Court decisions.[i] Companies fortunate enough to have arbitration clauses have, not surprisingly, moved to compel arbitration, and plaintiffs have responded with unique (but likely ineffective) allegations of unconscionability and fraud to try to stay in court. For instance, the Commissioner of Major League Baseball ("MLB"), Ticketmaster, and other ticket sellers recently moved the Central District of California to compel individual arbitration in class claims seeking $1 billion in refunds for tickets sold for the 2020 MLB season.[ii] Plaintiffs in the MLB class action alleged conspiracy and fraud in an attempt to avoid arbitration. In another case, Amazon moved to compel individual arbitration of claims alleging violations of California consumer protection and price gouging statutes.[iii] Despite agreeing to arbitrate all disputes with Amazon years ago, the plaintiffs

alleged that the agreement was unconscionable because they were under duress during the pandemic and were forced to purchase products from Amazon as opposed to a brick-and-mortar store. Amazon's motion to compel was based on the black-letter principle that unconscionability is measured at the time of contracting, and not at the time of the challenged conduct.

Other companies have focused on substance, arguing that they complied with their contractual obligations and that their customers have not suffered damages. For example, in the case of recurring monthly payments for fitness club memberships, defendants have argued that their membership agreements often do not mandate refunds for temporary closures unless the closure extends for more than 30 days, and therefore plaintiffs who filed suit within days or weeks of the initial closure did so too quickly.[iv]

Defendants have also attacked shotgun pleadings in cases where plaintiffs focused on broad issues arising out of the pandemic rather than the actions of individual companies. For example, consumers sued dozens of supermarkets and retailers, including Walmart, Kroger, Save Mart, Amazon, and others, alleging that the price of eggs soared during the pandemic. Yet, the egg-buying plaintiffs admitted in their pleading that "this lawsuit does not assert that each and every defendant engaged in price-gouging, [but] at a minimum, some of these defendants did so."[v] Similarly, ticketing companies facing refund claims and cruise lines facing negligence claims have moved against shotgun pleadings with vague allegations of wrongdoing against multiple defendants, and challenging plaintiffs' requests for damages arising from the risk of infection that did not result in an actual illness.[vi]

An Uncertain Road Ahead for Failure to Protect Claims

Unfortunately, and as is often the case with class action litigation, courts that have ruled on early motions to dismiss have come to different conclusions. For example, an Illinois state court denied a motion to dismiss by McDonald's in a negligence suit brought by employees who claimed that the company did not provide sufficient training and personal protective equipment to protect them from coronavirus, and entered a preliminary injunction requiring adequate social distancing training and mask-wearing policies.[vii] In contrast, a Missouri federal court dismissed similar claims by employees of a meat processing plant pursuant to the primary jurisdiction doctrine, deferring to the Occupational Safety and Health Administration ("OSHA").[viii] These inconsistent results will likely lead to even more filings, as many plaintiffs will use this uncertainty as leverage to try to obtain favorable settlements.

Similar suits have been filed by customers, particularly cruise ship passengers, who allege that the cruise companies knew or should have known that coronavirus outbreaks were likely, and that they failed to take sufficient action even after infections were known to have taken place on various vessels. Companies have moved against these complaints, challenging whether they could be liable particularly where the plaintiffs did not contract the disease.[ix] On July 14, 2020, a federal court in California dismissed a series of what it calls "Fear Cases" against Princess Cruise Lines. Plaintiffs in the Princess "Fear Cases" were passengers on an early March 2020 trip on the company's *Grand Princess*. Plaintiffs did not actually contract coronavirus, but sought to recover damages for negligent infliction of emotional distress arising out of their alleged fear of contracting the illness while quarantined on the ship. The Princess court, applying the general maritime law of the United States, found that the plaintiffs failed to satisfy the necessary "Zone of Danger" test because they did not sufficiently allege that they were in immediate risk of physical harm. Relying on cases espousing public policy of weeding out "trivial suits" and the difficulty of separating valid from invalid emotional injury claims, the court found that while exposure that might carry some risk of

future disease and only results in emotional distress, it does not qualify as a "physical impact" and therefore plaintiffs could not claim they were in immediate risk of any physical harm. This decision, while interpreting maritime law, could provide support to public facing businesses that are reopening on land.

To help alleviate the uncertainty facing businesses as they reopen, state and local governments have begun to enact liability protections for businesses related to the coronavirus pandemic. But, these measures can vary both within and across states. For example, North Carolina recently passed temporary liability shields for all essential businesses and emergency response entities. Many other states, such as Massachusetts and Connecticut, have limited such liability shields to the healthcare industry. Some states, like Georgia, fall somewhere in between, protecting a limited set of businesses and individuals beyond the healthcare industry.

These variations have caused many companies to adopt strict and consistent policies across regions and states in an attempt to protect their employees and customers while also insulating themselves from liability. For example, following Walmart's July 15, 2020 decision to require masks in all of their stores (even where local ordinances did not require them), a slew of retailers and grocery stores including Target, Krogers, Walgreens, Bed Bath & Beyond, Best Buy, Kohl's, Home Depot, and Lowe's followed suit.

But even this seemingly-conservative approach carries some risk. In Pennsylvania, a number of individuals sued retailer Giant Eagle for complying with a Pennsylvania Secretary of Health Order requiring customers to wear face coverings in retail stores and denying entry to individuals with disabilities that allegedly prevent them from wearing masks.[x] The complaint and subsequent motion for a preliminary injunction argues that the policy is a violation of both the Americans with Disabilities Act and the Pennsylvania order itself, which exempts individuals who are unable to wear a mask due to a medical condition. Giant Eagle responded to the plaintiff's motion by outlining the numerous efforts the retailer took to accommodate those with disabilities (including enhanced curbside service, home delivery and on-the-spot personal shopping), emphasizing the public health justification for the policy, and by undercutting the plaintiff's unsupported claim of disability. In fact, Giant Eagle produced social media evidence suggesting that one lead plaintiff did not suffer from a disability at all, and that his aversion to wearing a mask was political rather than medical. As more businesses adopt a uniform mask requirement, and as the issue becomes more politicized, we expect these types of claim to proliferate.

Given the uncertainty that lies ahead, companies should adopt and enforce reasonable and appropriate policies, and carefully document any incidents that could lead to claims that they failed to protect (or failed to accommodate) their customers and employees. Companies who take these steps will be better-positioned to prevail on the merits (or to reach an early settlement if desired).

The Price of Education

With the fall semester looming, many educational institutions are still reeling from the wave of class actions challenging universities' decisions to close on-campus activities last spring. These cases largely share the same theme: students should be given at least a partial refund of tuition and fees because virtual learning does not carry the same value as an in-person education. These claims, couched in breach of contract, unjust enrichment, and violations of state consumer protection law face many difficulties.

While student plaintiffs have an understandable and salient point that online-only classes do not

compare to the experience of being on campus, universities have moved to dismiss these claims, as there is often no express written contract that guarantees students that stereotypical "college experience."[xi] Force majeure clauses and contractual defenses of impossibility or impracticability often provide additional support for defendants' arguments that they are substantially performing their obligations by providing virtual learning during the pandemic. Public universities have also relied on sovereign immunity and other procedural hurdles that plaintiffs must follow when suing state agencies.[xii]

At the same time, schools are struggling to define what classes will look like in the Fall, balancing the risk of potential spread of infection with the potential for new litigation challenging either partial or complete remote learning. Schools are also facing new potential theories of liability—how to treat students (or teachers) who do not wish to return to campus.

Education-related class actions that survive the pleading stage face an interesting road to class certification. Students take different courses, obtain different degrees, involve themselves in different organizations, utilize the resources available to them on campus to different degrees, and so on. Students may place a different value on "in-person classes," and some students may even prefer an online learning experience and benefit from the extra time they can spend at home or at work. Thus, satisfying the predominance requirement of Rule 23 will be particularly challenging. And, constructing a class-wide damages model that fits plaintiffs' theory of liability will be nearly impossible because it raises an ambiguous, and perhaps philosophical, question: what is the true "value" of education?

All of these COVID-related class actions raise fascinating and novel legal questions that courts will have to deal with in the not-so-distant future. We will be following these cases closely and continue to report on significant developments.

---

[i] *Stolt-Neilsen S.A. v. Animalfeeds Int'l Cop.*, 559 U.S. 662 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Lamps Plus, Inc. v. Varela*, 2019 WL 1780275 (2019).

[ii] *Ajzenman v. Office of Comm'r of Baseball*, C.D. Cal., No. 20-cv-03643 (C.D. Cal., filed April 20, 2020) .

[iii] *Dean Nicosia v. Amazon.com, Inc.*, No. 19-1833-cv (2d Cir. 2020) (holding plaintiff's continued use of the site after learning about its arbitration clause amounts to assent to the agreement); *McQueen v. Amazon.com, Inc.,* No. 4:20-cv-02782 (N.D. Cal. Apr. 21, 2020). In response to Amazon's motion to compel arbitration, plaintiffs' counsel filed an amended complaint in which is substituted new plaintiffs for the originals. As of the date of publication, Amazon has not yet filed a renewed motion to compel.

[iv] *Brenda Labib v. 24 Hour Fitness USA. Inc*. No. 3:20-cv-02134 (N.D. Cal. Mar. 27, 2020); *Mary Namorato v. Town Sports Int., LLC, et. al*. No. 20-cv-025803 (S.D.N.Y. Mar. 26, 2020).

[v] *Fraser et al. v. Cal-Maine Foods, Inc. et al.*, No. 3:20-cv-02733-EMC (C.D. Cal., filed April 20, 2020).

[vi] *Turner v. Costa Crociere S.P.A., et al.*, No. 1:2020-cv-21481 (S.D. Fla., filed April 7, 2020); *Ajzenman v. Office of Comm'r of Baseball*, C.D. Cal., No. 20-cv-03643 (C.D. Cal., filed April 20, 2020).

[vii] *Massey Taynarvis v. McDonald's Corp.*, No. 2020-CH-04247 (Cook Cty. Cir. Ct. May 19, 2020)

[viii] *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 5:20-CV-06063 (W.D. Mo. May 5, 2020).

[ix] *See, e.g., Chao v. Princess Cruise Lines, Ltd.*, No. 2:20-CV-03314 (C.D. Cal. June 2, 2020).

[x] *See, e.g. Pletcher v. Giant Eagle Inc.*, No. 2:20-cv-00754 (W.D. Pa., filed May 26, 2020).

[xi] *Dimitryuk v. University of Miami*, No. 0:20-cv-60851 (S.D. Fla. Apr. 26, 2020); *Eglestron v.*

University of Florida Board of Trustees, No. 1-20-CV-106 (N.D. Fla. May 11, 2020).

[xii] *Andrew Rosenkrantz, et. al. v. Arizona Board of Regents*; No. 2:20-cv-00613 (D. Ariz. Apr. 15, 2020).