In the Crosshairs

Looming Tidal Wave of COVID-19 Lawsuits

By Sam Felker and Kyle Diamantas

The recent flurry of class actions filings may only be the tip of the iceberg for the battles that lie ahead.

As businesses struggle to reopen after COVID-19 pandemic-related closures, just over the horizon is a tidal wave of litigation. The plaintiffs' bar has seemingly overcome any perceived stigma associated with capitalizing on the pandemic. This article will summarize the developing litigation landscape and provide guidance for businesses that may find themselves in the crosshairs.

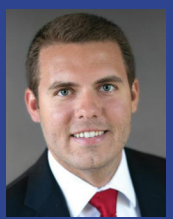
Consumer Class Actions for Cancelled Services or Memberships

In the past several weeks, a host of consumer class actions have been filed against businesses that continued billing customers for dues, membership fees, or other charges even though their business operations substantially shut down or curtailed services because of the pandemic. Across the country, numerous suits alleging breach of contract and consumer protection statutory violations have been filed, initially against gyms and sporting clubs in particular. *Namorato v. New York Sports Clubs*, No. 20-cv-02580 (S.D.N.Y.), is a good early example. The class action complaint leads off with what is now a familiar theme:

> At a time when New Yorkers are using all their efforts to help one another and make sacrifices necessary to meet the daily challenges associated with a the health and economic crisis created by the novel coronavirus are suffering, TSI–the publicly-traded [*sic*] company which owns and operates the ubiquitous gym brand New York Sports Clubs ("NYSC")—is defrauding and stealing from customers.

The complaint goes on to allege that all NYSC gyms were closed on March 16,

■ Sam Felker is a shareholder in Baker Donelson's Nashville and Fort Lauderdale offices and focuses his practice on the defense of class actions and complex litigation. Mr. Felker represents clients in significant litigation involving product liability, food safety, transportation, toxic torts, health care, and commercial matters. Mr. Felker is an experienced trial lawyer and has tried cases throughout the United States in state and federal court and in arbitration proceedings. Kyle Diamantas concentrates his practice on food and drug law, commercial litigation, mass tort, and general business matters. Mr. Diamantas counsels food and beverage, life sciences, and private equity clients on Food and Drug Administration (FDA), Federal Trade Commission (FTC), and state equivalent regulatory, compliance, and enforcement issues. He assists in the representation of food, cosmetic, dietary supplement, drug, device, and personal care manufacturers and suppliers on issues involving regulatory and quality compliance and in transactions and litigation involving products and companies subject to FDA and related regulations.



2020, in response to the public health crisis, but the defendant "outrageously" continued to charge members monthly membership dues, which are paid for one purpose and one purpose only—to access NYSC gyms—and refused to honor attempted membership cancelations. The complaint alleged three counts: violation of the New York General Business Law prohibiting false, misleading, and deceptive conduct; violation of a statute regulating health clubs; and breach of contract. The plaintiffs seek unspecified damages, injunctive relief, and attorneys' fees. *See also Delvercchio v. Boston Sports Clubs*, No. 20-cv-10666 (D. Mass.); *Jampol v. Blink Holdings*, No. 20-cv-02760 (S.D.N.Y.); *Jason Blank v. Youfit Health Clubs LLC*, No. CACE2006161 (Broward Cir. Fla.).

Although gyms and sports clubs were targeted early, the theories advanced by plaintiffs' lawyers in those suits have now been applied to other businesses that continued charging fees or membership dues without providing some or all of their normal services, and the ski industry is a notable example. *Hunt v. Vail Corp.*, 4:20-cv-02463 (N.D. Cal.), is a putative, nationwide class action against Vail Resorts that the plaintiffs have pursued allegedly because the defendant has refused to refund skiers' annual passholder fees, even though it closed its mountain resorts on March 25, 2020, for the remainder of the ski season due to the pandemic. The complaint alleges the defendant offers its "Epic Pass" for unlimited skiing at its thirty resorts, but the closure prevented customers from using the remaining days on their passes. Vail Resorts allegedly did not offer to refund any consumers for their lost days of skiing or permit transfer to another ski season. The complaint alleges that Vail Resorts "made the unconscionable decision to retain its millions of customers passholder fees while closing 100 percent of its mountain resorts," whereas the passes were supposed to be good for as long as there was snow suitable for skiing. The plaintiff class sued under the California consumer protection law, alleging unfair competition, false advertising, breach of contract, fraud, and unjust enrichment. Other ski resorts have been caught in the web. *See, e.g., Kramer v. Alterra Mountain Company*, No. 1:20cv1057 (D. Colo.) (filing a class action on behalf of hundreds of thousands of skiers who purchased Ikon ski passes for the 2019–2020 ski season but did not get the full benefits they paid for, i.e., unlimited access to listed ski resorts in Colorado, throughout the United States, and in Canada).

Similarly, Six Flags Magic Mountain was hit with a consumer class action filed by season pass holders for continuing to charge monthly membership fees, despite the park's closure. On March 13, 2020, Magic Mountain and Discovery Kingdom closed temporarily, due to the COVID-19 pandemic. According to the suit, annual memberships range from about $240 to $505 per year, depending on various promotions. When they sign up, members hand over the information for their credit or debit cards, which are automatically charged as the payments become due on a monthly basis, the suit alleges. "However, unlike its competitors in the industry, defendants continued charging its thousands of customers monthly fees—at full price," the plaintiffs contend. This access to the pass holders' personal credit and debit card information enables Six Flags to charge their customers "unilaterally" and without their consent. "Thus, defendants have made the deliberate decision to bilk its customers out of untold sums per month while its customers do not have access to defendants' parks," the suit says. The plaintiffs seek unspecified compensatory and punitive damages, asserting claims for breach of the California Consumers Legal Remedies Act, the California Unfair Competition Law, the California False Advertising Law, breach of express warranty, negligent misrepresentation, unjust enrichment, conversion, and breach of contract. *Ruiz v. Magic Mountain LLC*, No. 2:20cv3436 (C.D. Cal.).

Products that Allegedly Don't Perform as Represented

Another common theme in consumer class actions is that goods or products fail to protect against COVID-19 as represented. For example, two leading makers of hand sanitizers, Purell and Germ-X, were recently hit with class actions, alleging that they falsely advertised their products as being effective at preventing the flu and other viral diseases. According to the complaints, there are no reliable studies to support these representations, which the plaintiffs claim allow the defendants to increase their sales unlawfully during the pandemic. *Gonzalez v. Gojo Industries,* No. 1:20-cv-00888 (S.D.N.Y.); *David v. Vi-Jon, Inc.*, No. 3:20-cv-00424 (S.D. Cal.).

Cancelled or Rescheduled Events

Countless cancelled or rescheduled events have led to a host of consumer suits and class actions over refunds and fees charged by organizers. Ticketmaster and Live Nation were recently hit with a class action over events postponed due to COVID-19, alleging that they are making customers bear the costs of thousands of disrupted events by retroactively changing their refund policy. *Hansen v. Ticketmaster Entertainment, Inc., et al.,* No. 3:20-cv-02685 (N.D. Cal.)

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COVID-19 Exposure: Failure to Warn or Protect

This liability is an extremely hot topic for defendant businesses. Several recent suits pursue a common theme: that the defendant businesses allegedly failed to protect employees or patrons from the COVID-19 virus. The allegations include the failure of businesses to clean and sanitize the premises adequately, to provide

adequate protective equipment, to warn of other employees who tested positive for COVID-19, to screen workers for the virus, and generally to warn of the risks of infection based on the particular circumstances known only to the business owner.

Evans v. Walmart, Inc., No. 2020L003938 (Cook Cty. Ill. Cir. Ct.), is a first of its kind wrongful death case brought by the family of a deceased Walmart employee alleging that the store failed to take appropriate steps to protect its workers. According to the complaint, Wando Evans, a 15-year-old employee at the Walmart supercenter in Evergreen Park, Illinois, purportedly contracted COVID-19 at work and later died of COVID-19 complications. The suit alleges that another employee died from COVID-19 complications a few days later and that Walmart knew, or should have known, that "several employees and individuals at the store were exhibiting signs and symptoms of the virus." The suit, filed in Cook County Circuit Court, alleges that Walmart was negligent, and willful and wanton, for failing to do the following:

- cleanse and sterilize the store to prevent COVID-19 infection;
- implement, promote, and enforce social-distancing guidelines;
- provide personal protective equipment such as masks and latex gloves to employees to prevent COVID-19 infection;
- warn the decedent and other employees that various individuals were experiencing symptoms at the store and may have been infected by COVID-19, which was present and active at the store;
- adequately address employees at the store who communicated to management that they were experiencing signs and symptoms of COVID-19;
- follow the recommendations of mandatory safety and health standards promulgated by the U.S. Department of Labor and Occupational Safety and Health Administration (OSHA);
- follow the guidelines promulgated by the Centers for Disease Control and Prevention (CDC) to keep workplaces safe and healthy;
- develop an infectious Disease Preparedness and Response Plan, as recommended by the CDC;
- prepare or implement basic infection-prevention measures, as recommended by the CDC;
- conduct periodic inspections of the condition and cleanliness of the store to prevent and/or minimize the risk of employees and others contracting COVID-19;
- provide employees with antibacterial soaps, antibacterial wipes, and other cleaning agents, as recommended by the CDC;
- develop policies and procedures for prompt identification and isolation of sick people, as recommended by CDC;
- develop, implement, and communicate to its employees about workplace flexibilities and protections, as recommended by the CDC;
- implement engineering controls designed to prevent COVID-19 infection, including installing high-efficiency air filters, increasing ventilation rates in the work environment, and installing physical barriers, such as clear plastic sneeze guards, as recommended by the CDC;
- cease operations of the store and to close the store when it knew, or should have known, that various employees and others present at the store were experiencing COVID-19 symptoms;
- properly train its personnel to implement and follow procedures designed to minimize the risk of contracting COVID-19; and
- periodically interview and evaluate its employees for signs and symptoms of COVID-19.

The lawsuit also alleges that the supercenter hired employees via telephone and other remote means in an expedited process without personally interviewing or evaluating whether prospective employees had been exhibiting signs and symptoms of COVID-19 before they began their employment.

In a statement, Walmart defended its response to the pandemic, declaring that it had instituted additional cleaning measures, installed sneeze guards at registers, placed social-distancing decals on the floors, limited the number of customers in a store at a given time, provided masks and gloves to employees, and screened associates for the virus.

An immediate battleground will be whether claims such as those in *Evans* are covered by workers' compensation such that an employer is shielded from tort liability by the exclusivity provision in most states' workers' compensation laws. It is likely that the plaintiff in *Evans* alleged willful and wanton misconduct by Walmart in an attempt to avoid the exclusivity bar under 820 Ill. Comp. Stat. 305/11 (2012) (exclusive remedy). Similar to most states, the Illinois workers' compensation law bars an employee from bringing a common law cause of action against his or her employer unless "the injury was not an accident," meaning the injuries were "intentionally inflict[ed] upon an employee or which were commanded or expressly authorized by the employer." *Meerby v. Marshall Field and Co.,* 564 N.E.2d 1222, 1226 (Ill. 1990). It seems a stretch, to say the least, for the plaintiffs in *Evans* to prove that Walmart intentionally exposed its employees to COVID-19.

In another first of its kind lawsuit, Smithfield Foods, Inc., is being sued for allegedly failing to protect workers from

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COVID-19 at its meat-processing plant in Milan, Missouri, after at least eight workers had to stay home after showing symptoms of the virus. In *Rural Community Worker's Alliance et al. v. Smithfield Foods, Inc. et al.,* No. 5:20-cv-06063-DGK (W.D. Mo.), the plaintiffs seek an injunction to force Smithfield to comply with CDC guidance, the orders of state public health officials, and additional protective measures that public and occupational health experts deem necessary. Smithfield allegedly refused to provide workers sufficient opportunities or time to wash their hands, discouraged workers from taking sick leave when they were ill, and established bonus payments that encouraged workers to come to work sick. The company also failed to implement a plan for testing and contact-tracing workers who may have been exposed to the virus that causes COVID-19, the complaint said. The workers want Smithfield to provide proper personal protective equipment, COVID-19-related sick leave, additional break time, implement proper social distancing, alter the configuration or speed of the line, stagger shifts, and develop and implement a testing and contact-tracing protocol. This may be the first COVID-19-related case that seeks injunctive relief to address safety issues at a workplace and comes after hundreds of employees at Smithfield's plant in South Dakota contracted COVID-19.

It is also noteworthy that several prominent members in the United States Congress, led by Senate Majority Leader Mitch McConnell, have demanded that Congress use the next COVID-19 stimulus bill to shield corporations from legal responsibility for workers who contract the novel coronavirus on the job, a proposal also being pushed by the U.S. Chamber of Commerce. In a statement issued Monday, April 27, 2020, Sen. McConnell noted that companies could be hit with "years of endless lawsuits" if Congress doesn't provide employers with liability protections as states begin reopening their economies. It remains unclear if such legislation will be palatable to both sides of the political aisle.

Cruise Industry Swamped with Class Actions by Passengers and Employees

The cruise line industry has been hit with a flurry of class actions, alleging disregard for the safety of employees and passengers aboard cruise ships immediately before and during the pandemic. It is estimated over twenty such suits have been filed against Carnival, the industry's leading operator. The plaintiffs' playbook is the same. In *Archer v. Carnival Corporation, et al.*, No. 20-cv-02381 (N.D. Cal.), passengers of the Grand Princess who had to be quarantined at Travis Air Force Base just north of San Francisco filed a class action against the cruise line's operators demanding $5 million in damages. They claim that when the Grand Princess left for Hawaii on February 21, 2020, with 2,000 passengers on board, Carnival Corp. and Princess Cruise Lines Ltd. were already aware of the escalating public health crises on sister ships abroad. A fellow Carnival cruise liner, the Diamond Princess, was docked in Japan by early February, and two of her passengers had died as a result of COVID-19 before the Grand Princess pushed off, according to the complaint. The companies also allegedly knew about COVID-19 cases on board its Australia–New Zealand cruise liner, the Ruby Princess, by mid-February, but Carnival chose instead to operate the second voyage that left port with a new set of passengers weeks later, the plaintiffs say. Aboard the Grand Princess officials allegedly delayed cabin-based quarantining and cancelling large events and waited too long to start increased sanitation procedures. The plaintiffs say that this allowed the disease and panic to spread, causing their physical and emotional injuries.

Despite this record flood of litigation against the cruise industry, legal experts expect this to be an uphill battle for passengers, largely because the tickets that cruise passengers buy generally contain language barring customers from filing class action suits. That waiver language is just one of several built-in legal protections in cruise tickets, coupled with industry-friendly maritime laws. Nevertheless, this same theme—inadequate response to the COVID-19 pandemic—could play out in a host of scenarios as injured individuals and their families cast blame for contracting the virus.

In a slightly different twist, crew members recently filed a putative class action against Celebrity Cruises, Inc. for "careless and continuous failure to protect its crewmembers… from COVID-19—despite Celebrity having prior notice pertaining to the dangerous conditions and/or explosive contagiousness associated with COVID-19 aboard its vessels from previous passengers, crewmembers and/or other invitees… allowed aboard the vessels." The suit involves crew members from fourteen vessels in the Celebrity fleet. *Nedeltcheva v. Celebrity Cruises, Inc.* No. 1:20-cv-21569 (S.D. Fla.).

Securities Class Actions for Alleged False Statements

Given the pandemic's immediate effect on the stock market, it is no surprise that several securities class actions have already been filed. Norwegian Cruise Line Holdings Ltd. was likely the first hit in a lawsuit claiming that the company made public statements promoting the company's financial performance at the outset of the COVID-19 crisis that artificially inflated the company's stock price. The plaintiffs claim that the cruise line made false statements in its February 2020 U.S. Security and Exchange Commission filings, which touted the company's strong financial performance, despite the coronavirus outbreak, and the company's confidence in its preventive measures to reduce exposure and transmission of the virus. The plaintiffs claim that these statements about the cruise line's business and operations were false because, when the company made them, it was using sales tactics that provided customers with unproven and false statements about COVID-19 to entice them to purchase cruises. The plaintiffs argue that the deceptive acts inflated Norwegian's stock price. Had investors known about the inflation, "they would not have purchased Norwegian securities at the artificially inflated prices that they did, or at all." *See Douglas v. Norwegian Cruise Lines*, No. 1:20-cv-21107 (S.D. Fla.). In another securities class action, *McDermid v. Inovio Pharmaceuticals*, No. 2:20-cv-01402 (E.D. Pa.), the plaintiffs allege that a pharmaceutical company induced investors to acquire stock at artificially inflated prices with misleading statements, made by the company's CEO, that the company had developed a vaccine for COVID-19. Similar suits may arise as companies make difficult decisions about how to address the effect of the cri-

sis in public filings and through accounting decisions.

Financial Services Litigation Is Likely

The pandemic's economic disruptions are also likely to spawn lawsuits based on financial service providers' handling of loans. In *Shuff v. Bank of America*, No. 5:20-cv-00184 (S.D. W. Va.), for example, homeowners facing foreclosure sought injunctive relief on behalf of a class, arguing that the public auctions allegedly required by the parties' contracts and West Virginia law could not be conducted because of the coronavirus outbreak. Several lawsuits have also been filed, alleging that banks were discriminatorily prioritizing current accountholders for extensions of loans under the Paycheck Protection Program.

Loan servicing is also likely to be an area for potential class claims. The Coronavirus Aid, Relief, and Economic Security (CARES) Act provides an automatic suspension of principal and interest payments on federally held student loans through September 30, 2020, and it gives homeowners who are experiencing a financial hardship due to the COVID-19 emergency a right to forbearance for federally backed mortgages. Class suits may arise based on claims that servicers failed to apply these requirements appropriately. The crisis is also likely to exacerbate ongoing trends of suits that are brought under statutes such as the Fair Credit Reporting Act and the Fair Debt Collection Practices Act.

Recommended Best Practices

With the federal government, states, municipalities, and regulatory bodies issuing new directives and guidance on a daily basis, business must stay focused and be ready to adapt quickly to this changing environment. It is imperative that businesses follow best practices and directives from the CDC and local government authorities for managing the pandemic and dealing with employee and customer safety. Tracking and addressing consumer complaints may also help quell costly litigation by identifying problems before they turn into bigger issues. Finally, any business that has recurring charges for its clients and customers must assess whether full value is still being provided in light of limited business operations.