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THE EVOLVING LANDSCAPE OF COVID-19-RELATED CLASS ACTION LAWSUITS

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The coronavirus (COVID-19) pandemic has caused upheaval in the global economy. This massive disruption has led to a wave of class action lawsuits relating, directly or indirectly, to COVID-19. This White Paper reviews the various categories of such class actions, the most commonly asserted theories of liability, and possible defenses to such actions, both as to the merits and against class certification.

The categories of class actions addressed herein are:

- [PPP Loan Application Prioritization](#)
- [Price Gouging](#)
- [Cruise Line Mishandling of COVID-19](#)
- [Ticket Reimbursements and Membership Reimbursements](#)
- [Securities Fraud Actions](#)
- [Data Security Actions](#)
- [Higher Education Tuition Reimbursement](#)
- [Labor and Employment Class Actions](#)

The class actions discussed herein are in the early procedural phases, with no substantive decisions as of the time of this writing.

PPP LOAN APPLICATION PRIORITIZATION AND NONPAYMENT OF APPLICANTS' AGENTS

Several small businesses have filed putative class action lawsuits against banks that processed loan applications under the Paycheck Protection Program (PPP) of the CARES Act. The gravamen of these lawsuits is that defendant banks allegedly represented they would process loan applications on a "first come, first served" basis, in accordance with their purported duties under the PPP, without regard to any other factors. Plaintiffs generally allege that defendants instead prioritized larger, more lucrative loan applications to the detriment of smaller businesses. According to the plaintiffs, this prioritization exhausted the funds available through the PPP before their loan applications were processed.

Separately, several businesses that served as agents to small businesses that applied for loans under PPP, including accounting firms and attorneys, have filed putative class action lawsuits against banks that processed those loan applications. The gravamen of these lawsuits is that, under the CARES Act, for PPP loans under \$350,000, the federal government was obligated to pay 5% of the loan amount to the bank that processed the loan application as a processing fee, and, if the borrower engaged an agent to assist with the loan application, the bank was obligated to pay that agent 1% of the loan amount. The plaintiffs allege that the defendant banks failed to take reasonable steps to determine if borrowers engaged agents to assist with borrowers' loan applications and, in turn, failed to pay those agents amounts allegedly due under the CARES Act.

Possible Merits Defenses

- Defendants may argue that the plaintiffs' claims fail because the CARES Act does not provide for a private right of action.
- Defendants also may seek to develop the defense that there is no duty to process loan applications on a "first come, first served" basis under the CARES Act. If true, then any alleged duty to process applications

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in the order submitted would require the banks to have made specific representations to that effect to loan applicants.

- Depending on the allegations in a given complaint, defendants may be able to challenge the failure to plead with particularity an actionable misrepresentation.
- Failure to plead reliance and damages may also be viable defenses, particularly given that the loan applications of many small businesses were approved in the second round of PPP funding, potentially eliminating any bona fide claim of damages.

Possible Defenses to Class Certification

The defendant-banks may have compelling arguments in opposition to class certification in these lawsuits. If the putative classes are defined to include all small businesses whose loan applications under PPP were denied without regard to the timing of those applications, then lack of commonality should be a viable defense. Such a definition would include small businesses that waited until the end of the application period to submit an application, thereby undermining the plaintiffs' theory of liability premised upon the defendant banks' failure to process loan applications on a "first come, first served" basis.

PRICE GOUGING

Several consumers have filed against ecommerce platforms and grocery stores putative class action lawsuits alleging price gouging. In one group of lawsuits, plaintiff consumers allege that, since the start of the pandemic, these ecommerce platforms have permitted sellers to charge large markups for essential products like face masks, hand sanitizers, disinfectant, other personal care and protection products, pain and fever relievers/reducers, and flu and cold medicines. In another group of lawsuits, plaintiff consumers focus on an increased cost of certain grocery products after the start of the pandemic.

Possible Merits Defenses

- Any increased prices may have been the result not of price gouging but rather the seller's increased production and operational costs.
- Ecommerce platform defendants may also argue that they are not responsible for the prices advertised by sellers on their platforms. Relatedly, these defendants may further argue that the claims against them are barred by Section 230 of the Communications Decency Act, which provides that "[n]o provider or user of an [interactive computer service](#) shall be treated as the publisher or speaker of any information provided by another [information content provider](#)."

Possible Defenses to Class Certification

Defendants may argue that class treatment is inappropriate because individualized questions of fact and law would predominate, including with respect to the timing and circumstances of each putative class member's individual purchases. Moreover, defendants may argue that, even proof of an increased price would require an analysis of specific factors that likely varied over time, including (i) state and local governments' COVID-19-related limitations on commercial activity, (ii) the sellers' production and operational costs, (iii) the trailing average price of the products at issue, and (iv) other considerations affecting and justifying a price increase.

CRUISE LINE MISHANDLING OF COVID-19

Cruise lines face class action lawsuits for allegedly endangering passengers and/or crewmembers by embarking on, and proceeding with, cruises despite the risk of a COVID-19 outbreak. Plaintiffs in certain cases contend that ships continued to operate even though passengers on prior voyages tested positive or displayed symptoms, and in certain other cases contend that operators failed to take appropriate actions even after current passengers became sick. Some plaintiffs have also alleged that cruise lines

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made misrepresentations concerning ship safety, or failed to protect passengers adequately from COVID-19, such as by properly sanitizing the ship, implementing medical screenings, or adopting quarantine protocols. The plaintiffs generally bring claims under maritime law for intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence.

Possible Merits Defenses

- These cases may be challenged for lack of causation and injury. Although the plaintiffs allege they were exposed to a heightened risk of contracting COVID-19 during cruises, they generally have not alleged that they contracted the virus, much less as a result of the cruise lines' actions.
- Relatedly, and depending on governing laws, claims for infliction of emotional distress could be subject to dismissal for failing to allege manifestation of physical harm and/or the requisite "extreme and outrageous conduct."
- Depending on the facts of each case, some defendants may raise comparative negligence and assumption of risk defenses because passengers arguably were, or should have been, aware of the pandemic and risks of exposure.
- Certain passengers also may have signed waivers, and potentially agreed to arbitration provisions with class action waivers.

Possible Defenses to Class Certification

Defendants are likely to have strong arguments that individualized issues will predominate. For example, any misrepresentation-based theory may require individual inquiries into what each passenger read or heard, when, and how they reacted. Plaintiffs also may face difficulty in proposing a damages theory applicable to the class because of varying individualized circumstances.

TICKET REIMBURSEMENTS AND MEMBERSHIP REIMBURSEMENTS

Ticket purchasers have filed class actions against airlines, ticketing agencies, ticket exchange companies, sports teams, and entertainment venues for failing to offer full or adequate refunds for COVID-19-related cancellations. Similarly, companies that charge membership fees, such as gyms and amusement parks, have been subject to class actions for recovery of fees paid during the period such business were shut down and inaccessible. Plaintiffs in these cases generally assert claims for breach of contract, unjust enrichment, conversion, and violations of state consumer protection laws.

Possible Merits Defenses

- Defendants may seek to compel individual arbitration based on mandatory arbitration provisions contained in membership agreements or tickets for cancelled events or flights.
- Plaintiffs' breach of contract claims may face factual challenges depending on the terms in the relevant agreements regarding cancellations or refunds. Defendants also may seek to enforce force majeure clauses in those agreements.
- In some jurisdictions, the unjust enrichment claims may not be tenable if plaintiffs have also asserted claims for breach of express terms of a contract.
- Some defendants, such as gyms, can raise a factual challenge to breach of contract claims if they complied with contractual requirements by extending the membership period by the number of days that the facility was closed.
- Common law contractual defenses may be available (e.g., impossibility of performance, frustration of purpose, and unforeseeable circumstances).

Possible Defenses to Class Certification

Variations in the steps customers took to obtain refunds, variations in the dollar value of refunds or credit provided, and variations in how each plaintiff values a voucher for future use may present individualized

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issues. In addition, choice of law issues and variations in state laws may create further manageability problems for any proposed multistate class.

SECURITIES FRAUD ACTIONS

Public companies that have faced significant business disruption during the pandemic have become the subject of a growing number of securities class actions concerning their public statements about COVID-19. Plaintiffs' theories range from allegations that companies made false and misleading statements regarding the magnitude of the pandemic's impact on the defendant's business to claims that companies have exaggerated or misrepresented their progress toward the development of vaccines, testing kits, and other medical products to detect or treat COVID-19.

Possible Merits Defenses

- Defendants may be able to argue that the statements in question did not directly impact the price of their shares.
- Given the conflicting guidance provided by public health professionals, scientists, healthcare workers, and municipalities and politicians in all levels of government during the COVID-19 crisis, the courts may closely evaluate whether companies had a "reasonable basis" under the Securities Act for their statements about the effect of COVID-19. This may complicate adjudication of whether companies should be held liable for projections and statements informed by public officials' directives.
- Defendant companies may be able to challenge plaintiffs' failure to plead scienter, and, more particularly, failure to allege with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind in making allegedly false or misleading statements regarding their profitability, state of operations, and the effectiveness of medical products and devices manufactured by health companies.
- Defendants may also be able to avail themselves of the "safe harbor" of the Private Securities Litigation Act afforded to forward-looking statements accompanied by the appropriate meaningful cautionary language and caveats that particular issues may cause the companies' performance to differ materially from their disclosures.

Possible Defenses to Class Certification

Defendants may contest certification of classes composed of investors with differing sophistication and investment practices, which would prevent resolution of issues by common proof and would undermine the predominance of common issues. The inclusion of investors with different investment approaches, like short sellers, for instance, will complicate establishment of materiality, reliance, or injury in fact with common proof. Defendants may present arguments regarding the lack of causation at the class certification stage under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) and *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), which enables a defendant to defeat class certification with evidence that alleged misrepresentations did not actually affect the market price of the stock.

DATA SECURITY ACTIONS

With the mass transition to remote work over the past six months, there has been increased scrutiny and concern about data security issues. For example, companies offering videoconferencing platforms have come under scrutiny for their privacy practices, particularly under the California Consumer Privacy Act (CCPA) which took effect earlier this year. The CCPA provides a first-in-the-nation private cause of action with significant statutory penalties for data security incidents resulting from a lack of reasonable information security. Plaintiffs' principal theory of liability has been that such services failed to properly safeguard, or improperly shared, users' personal information (e.g., their device model, software, storage information, time zone, IP address, and other unique identifiers) for the purpose of targeted advertising.

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The actions also charge that inadequate security measures have left the platforms susceptible to hackers obtaining users' credentials and infiltrating virtual meetings.

Possible Merits Defenses

- Limitations in the CCPA may provide defenses. For instance, the CCPA grants a private right of action only to consumers whose personal information has been subject to "unauthorized access and exfiltration, theft, or disclosure" resulting from a defendant's "violation of the duty to implement and maintain reasonable security procedures and practices." Cal. Civ. Proc. § 1798.150(a)(1).
- Plaintiffs in these suits improperly seek to apply the definition of "personal information" under the CCPA's core provisions, instead of the more limited carve-out of personal information applicable to private CCPA claims (limited to only information covered by data breach notification statutes, such as social security numbers, financial or credit card numbers and passcodes, and medical or health information).
- Plaintiffs have initiated these cases improperly without the prior written notice. Prior to bringing a private suit, the CCPA requires that a consumer notice a would-be defendant of the alleged violations and allow 30 days for the business to "cure" these violations. Cal. Civ. Proc. § 1798.150(b). If the business "actually cures the noticed violation," no action for "class-wide statutory damages may be initiated against the business."

Possible Defenses to Class Certification

Plaintiffs may encounter difficulties in establishing standing for aggrieved Zoom users who did not pay for the service. In addition to standing requirements under Article III, certain consumer protection statutes require plaintiffs to prove they suffered injury in fact and lost money or property as a result of a defendant's alleged wrongful conduct. In the case of free applications in particular, many putative class members may not have actionable damages. Additionally, Defendants might attempt to defeat class certification by arguing that plaintiffs' class definitions, which include "all persons and businesses in the United States," are too broad.

LABOR AND EMPLOYMENT CLASS ACTIONS

Plaintiffs have filed a range of putative class actions against employers, including actions alleging negligence and breach of standards of care in failing to provide workers adequate protective equipment; failing to sanitize shared employment spaces and install barriers and shields to maintain a safe working environment; pressuring workers with COVID-19 symptoms to report to work; denying paid sick leave; and instituting policies that result in the loss of regular and incentive pay for COVID-19-positive employees who miss work. These actions most commonly assert that employers have violated federal and state mandates, guidelines, and regulations regarding employee safety. Employees have also filed lawsuits alleging that employers have violated the federal WARN Act, which in certain circumstances requires that employers with 100 or more employees provide at least 60 days' notice before conducting a mass layoff or closing a plant. Other suits have alleged violations of similar "mini-WARN" acts enacted by various states.

In addition to requesting compensatory damages, plaintiffs in some of these actions are also seeking injunctive relief requiring employers to provide personal protective equipment, promulgate updated illness and injury prevention programs to address COVID-19, and implement other measures that would prevent employees from contracting COVID-19.

Possible Merits Defenses

- Defendants may argue that plaintiffs' negligence claims fail because they took reasonable measures, based on employers' then-existing state of knowledge, to provide sufficient protective equipment and take measures to prevent the spread of the coronavirus. Employers may cite to factual defenses of adherence to applicable guidance from the Occupational Safety and Health Administration (OSHA), the

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Centers for Disease Control and Prevention (CDC), and state and local officials, to argue that they satisfied any alleged duty of care.

- Defendants will also likely argue the lack of causal connection between the conditions resulting in their alleged exposure and plaintiffs' illness, and highlight plaintiffs' failure to establish whether a defendant's failure to act actually caused outbreaks of COVID-19 in the workplace.

Possible Defenses to Class Certification

Defendants likely will resist class certification by arguing that the court's consideration of these issues will be overtaken by individualized inquiries of how particular managers in differing company locations and franchises handled the health and safety of its individual employees, in accordance with varying ordinances, mandates, and guidelines regarding shelter-in-place requirements and public health protocols. Supervisorial staff may have taken different precautionary measures to provide sufficient protection to employees, variations of which should prevent resolution of claims on a class-wide basis.

HIGHER EDUCATION TUITION REIMBURSEMENT

Students and parents across the country have filed class actions against colleges and universities arising from the shutdown of campuses and the move to online learning due to COVID-19. The students allege that they have been deprived of the in-person education and college experience for which they paid and that the solution offered by the institutions, namely online classes and a partial refund of certain fees, is inadequate. The complaints generally include claims for breach of contract, unjust enrichment, and, in some cases, conversion, and seek damages in the form of refunds for some combination of tuition, room and board, meals, and fees for campus services. Several schools and universities have moved to dismiss. The United States District Court for the District of Arizona recently granted such a motion, dismissing claims among other reasons because plaintiffs failed to comply with pre-suit notice requirements. See *Rosenkrantz v. Arizona Bd. of Regents*, No. CV-20-00613-PHX-JJT, 2020 WL 4346754, at *4 (D. Ariz. July 29, 2020) (granting motion to dismiss).

Possible Merits Defenses

- Many states bar "educational malpractice" claims for public policy reasons. To the extent plaintiffs challenge the quality of their education – as opposed to claiming a breach of a specific promise such as a minimum number of hours of instruction or ratio of students to professors – the defendants may argue that such claims are susceptible to an early motion to dismiss.
- Plaintiffs generally have not attached to their complaints, or sufficiently described the terms of, the contract or agreement they contend the institutions breached, rendering their breach of contract claims subject to a motion to dismiss. In some jurisdictions, courts will look more rigorously at whether a plaintiff has sufficiently alleged the terms of a purportedly breached contract with a college or university.
- Plaintiffs' claims for refunds of fees against some colleges may be barred by express refund policies that make clear that students will be refunded only those fees that correspond to services that are no longer offered, but not for services that remain available to students.
- Depending on the state law and whether governmental funds are placed at issue, claims against public colleges and universities for money damages may be barred if conditions precedent to suit, like a pre-suit notice of claim, are not satisfied. See *Rosenkrantz*, 2020 WL 4346754, at *4 (granting motion to dismiss).
- Many additional defenses may be available, such as sovereign immunity for public institutions, common law contractual defenses (e.g., impossibility of performance, frustration of purpose, and unforeseeable circumstances), and invocation of force majeure clauses.

Possible Defenses to Class Certification

There should be opportunities to argue that individual issues predominate over common questions in several respects. For example, the question of whether or not online instruction is less valuable than in-person instruction likely depends heavily on the student and the particular course of study. Likewise, the

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services that remain available to a particular student, whether the student incurred any harm from the absence of particular services, the identity of the actual payor of the challenged fees, and the amount of any damages likely vary from student to student. These factors may open the door to typicality and adequacy arguments as well.

Coronavirus COVID-19 Task Force

For our clients, we have formed a multidisciplinary Coronavirus COVID-19 Task Force to help guide you through the broad scope of legal issues brought on by this public health challenge. Find resources on how to cope with the post-pandemic reality on our [NOW. NORMAL. NEXT. page](#) and our [COVID-19 page](#) to help keep you on top of developments as they unfold. If you would like to receive a digest of all new updates to the page, please [subscribe](#) now to receive our COVID-19 alerts, and download our [COVID-19 Legal Issue Compendium](#).

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