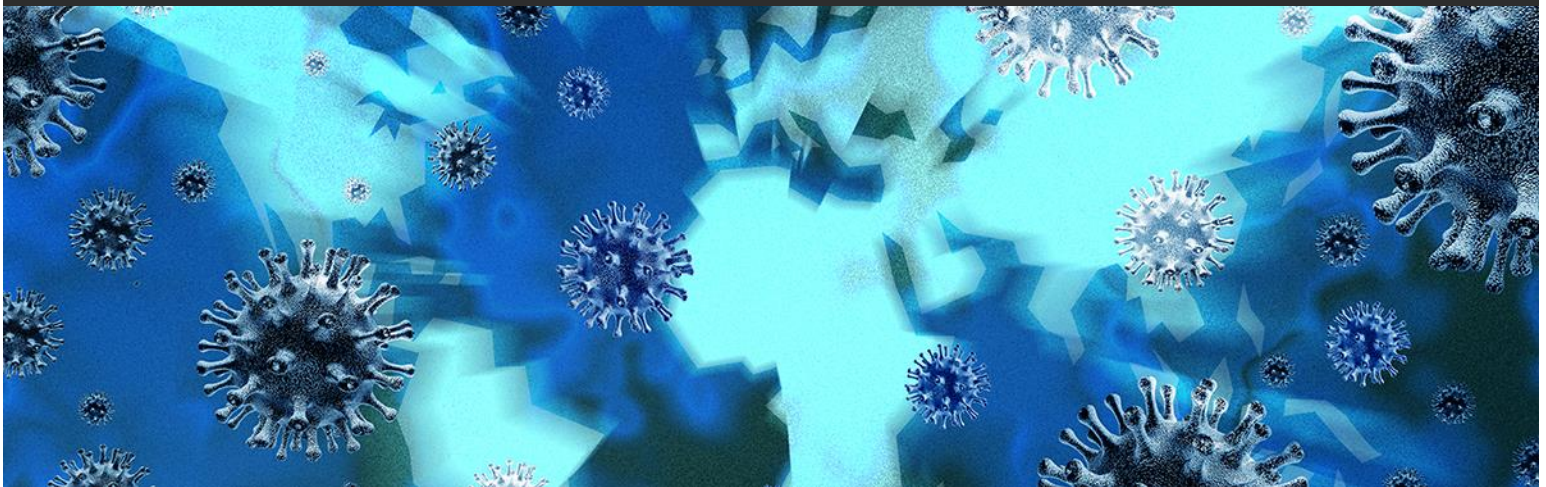


Coronavirus Disease 2019 Class Action Advisory | April 2020



Consumer Class Actions Relating to COVID-19

Companies impacted by the operational and legal challenges arising from Coronavirus Disease 2019 (COVID-19) may face another legal concern: the risk of class action lawsuits associated with the pandemic. Since early March, dozens of putative class actions relating to COVID-19 have been filed in state and federal courts throughout the country.

These cases range from a class action charging a major online retailer with price gouging on items like hand sanitizer and toilet paper, to multiple class actions against health club chains seeking refunds on dues, to a class action filed against a financial news website for failure to provide closed captioning on popular financial videos featured on its website, brought by a plaintiff who was deaf and alleged she was concerned about the economic impact of COVID-19. These suits are in addition to other types of class action litigation relating to COVID-19, such as employment class actions asserting that employees have not been provided with paid sick leave and feel compelled to continue working even if ill, and a securities class action asserting that public statements made by a company that it had developed a COVID-19 vaccine were false.

Class action law firms have been gearing up to bring these cases. As evidence of this:

- One website provides “[a] complete Guide to Coronavirus Lawsuits and Legal Issues,” seeking plaintiffs to join in class actions. The website states: “If you believe that your rights have been violated by a company as a result of the coronavirus pandemic, you may be entitled to compensation. Get help by checking out one of the Coronavirus lawsuit investigations below.”
- Another website describes how four plaintiffs’ law firms have formed a Coronavirus Litigation Task Force to use their combined strength to investigate “suspected wrongdoing” related to the COVID-19

pandemic, focusing on medical supply price gouging, business interruption insurance denials, at-risk medical workers, and nursing homes.

This GT Advisory summarizes recently filed consumer class actions. The authors take no position on the merits of the parties' claims. Rather, the abstracts below focus mainly on the substance of the case filings.

Cases Involving Claims Concerning Product Labels and Other Statements About Products and Services

The Federal Trade Commission is reporting a surge of COVID-19-related consumer complaints in recent weeks, including reports of false labelling practices related to claims that products can protect against or cure disease. Similarly, since the beginning of 2020, the U.S. Food and Drug Administration (FDA) has issued dozens of warning letters to companies selling products claiming to prevent, treat, or mitigate the effects of viruses, including COVID-19. The warning letters generally note that products promoted as treatments for COVID-19 constitute misbranded and unapproved new drugs under the Federal Food, Drug, and Cosmetic Act (FD&C) and order the target companies to take "immediate action" to "ensure that [they] are not misleadingly representing [their] products as safe and effective for a COVID-19-related use." The Justice Department and states' attorneys general have also acted, blocking access to websites marketing COVID-19 cures and treatments and ordering online retailers to stop selling such products.

In the wake of these consumer complaints and enforcement actions, plaintiffs' attorneys have filed several class action lawsuits alleging false labelling or advertising related to COVID-19. Examples include:

- Multiple class actions across the country against the makers and retailers of hand sanitizers, alleging violations of state consumer protection laws based on marketing (including online and social media advertising) claiming the hand sanitizers effectively combat viral and bacterial diseases. The following examples are representative:
 - A lawsuit filed on March 13, 2020, in the Northern District of Ohio against a hand sanitizer manufacturer, alleging that the manufacturer's claim that its product "kills 99.9% of illness-causing germs" is misleading. The complaint expressly references a warning letter the FDA sent the manufacturer on Jan. 17, 2020, noting that its products constituted "unapproved new drugs" in violation of the FD&C based on, *inter alia*, marketing statements on the manufacturer's website and social media pages that its products "may be effective against viruses." The lawsuit seeks damages for all consumers who have purchased the products in reliance on such representations, noting that "[t]he recent outbreak of the coronavirus has greatly increased . . . demand."
 - An individual consumer filed a class action in the Southern District of New York against the manufacturer of a hand sanitizer concerning representations about the product's efficacy on the label. The lawsuit contends that the defendant violated New York's consumer-protection statute by making representations about the efficacy of the product.
 - Similar lawsuits have been filed against different manufacturers and retailers, each citing the FDA's Jan. 17, 2020, warning letter. These include a case filed on March 5, 2020, in the Southern District of California alleging that a hand sanitizer manufacturer's claim to provide "Coronavirus/Flu Prevention" was false and misleading, and a case filed on March 20, 2020, in the Central District of California alleging that a national retailer "misleads consumers into believing its [generic-brand] Hand Sanitizer is as effective as [nationally known brands] and can therefore prevent disease or infection from, for example, Coronavirus and flu."
- Allegations of COVID-19-related false claims also have spawned (i) lawsuits against media outlets under state consumer protection statutes for allegedly disseminating false information about COVID-

19; and (ii) a securities fraud class action against a biotechnology company alleging that it misled investors by claiming to have developed an effective COVID-19 vaccine.

As these cases illustrate, plaintiffs' attorneys are closely tracking agency warning letters and enforcement actions — including those related to COVID-19 — to generate new class action theories and bolster their complaints.

Cases Involving Canceled Trips, Entertainment and Sporting Events, and Other Recurring Fees That Have Not Been Refunded

- Several putative class actions have been filed against health club chains that shut down operations during the COVID-19 crisis yet continued to charge membership dues. For example, a putative class action was filed in the Southern District of New York on March 26, 2020, against a regional health club chain based on allegations that it is not honoring cancellation requests after the gym closed due to the pandemic; continues to charge membership fees automatically to its customers despite closing; and purportedly added members' electronic signatures to contracts containing terms to which they did not agree. Similar cases were filed in the Northern District of California and the Southern District of Florida against other nationwide health club chains.
- Similarly, mountain resorts that sold passes to customers have been hit with COVID-19 related class actions. For example, on April 10, 2020, a putative class action was filed in the Northern District of California against the owners of several ski resorts based on the allegation that the plaintiff could not fully use his season pass due to COVID-19 and had been denied a refund.
- Ticket aggregators and promoters of live events also have been targeted by COVID-19-related class actions. For example, on March 24, 2020, a putative class action was filed in Los Angeles Superior Court against the organizer of an electronic music festival in California. The defendant canceled the festival, which was scheduled for Memorial Day weekend, because of government mandates prohibiting large gatherings. Plaintiff alleges that the terms and conditions for the ticket purchases provided that “all sales are final” and that “no refunds will be granted for any reason,” but that ticket holders have the right to exchange their tickets for a rescheduled or different event. Plaintiff claims that these terms are unenforceable as illusory because the defendant supposedly retained “complete and unfettered control” to modify or terminate the agreement.
- On April 8, 2020, the organizer of a “festival-like” nursing conference and a cruise line owner were sued in the Southern District of Florida in a putative class action, alleging that defendants canceled a cruise featuring an event organized by a social media personality, who is a nurse and who leads “entertaining” conferences focusing on the nursing profession. Plaintiffs allege that defendants have refused to provide participants with cash refunds and have offered only credits for future events to be held between 2021 and 2023.
- Similarly, on April 2, 2020, a putative class action was filed in the District of Wisconsin against a ticket broker and a subsidiary, alleging that the defendants failed to honor the broker's purchase guarantee, which plaintiffs claim was supposed to provide cash refunds if requested for canceled sporting events. Plaintiff alleges that, in early March 2020, the broker offered customers the option of choosing to receive a voucher valued at 120% of their ticket purchase price that would be good for 12 months, but later changed its policy to offer only vouchers and no cash refunds.
- Other targets for COVID-19-related class actions include organizers of outings and social events. For example, a putative class action was filed on April 3, 2020, in the Northern District of California against the operators of a members-only singles event company that offers access to and hosts events

for singles looking to meet other singles. Plaintiff alleges that the defendants continue to charge members monthly fees for access to these events, even though all in-person events have been canceled.

- A putative class action was filed on March 17, 2020, in the Southern District of California against an educational tour company that promoted and organized trips abroad for high school students. Plaintiffs allege that defendant refused to provide cash refunds for trips that were canceled due to COVID-19, and that defendant only offered vouchers for future travel, less various “non-refundable fees.” Plaintiffs argued that a clause in the parties’ agreement providing that no refunds would be given in the event of a public health emergency are unconscionable. Plaintiffs also allege that defendants knew or should have known that the nature of the COVID-19 crisis would make rescheduling their trips impossible.
- Colleges and universities are also being sued in putative class actions relating to the COVID-19 crisis. For instance, on March 27, 2020, a class action was filed in the U.S. District Court for the District of Arizona against a university and its governing body, alleging that defendants have not offered refunds to students for unused portions of fees for room and board after defendants shifted to online learning. Plaintiff alleges that defendants’ actions constitute a “constructive eviction,” and that, although the transitions to online learning “were responsible decisions to make,” “it is unfair and unlawful....to retain fees and costs and to pass the losses on to the students and their families.”
- The airline industry is also being hit with COVID-19-related class actions involving refunds. A putative class action was filed on April 6, 2020, against a national airline in the Northern District of Illinois, alleging that it improperly changed its refund policy to provide travel vouchers only good for one year.
- Theme parks are also being hit with COVID-19 related class actions. On April 10, 2020, the owner of two large theme parks was sued in a putative class action filed in the Central District of California. Plaintiffs allege that the theme park owner continued to charge prorated monthly fees to annual passholders despite the parks being closed. Plaintiffs allege that, when they signed up to become annual passholders, they expected access to the parks, which are normally open seven days a week.

Cases Alleging Price Gouging

- In Florida, a consumer filed a class action in state court against a major retail e-commerce company on March 10, 2020, alleging that the company had engaged in unlawful price increases on scarce personal hygiene products during the current pandemic. The plaintiff claimed she paid \$99 for a 36-roll package of toilet paper, which she alleged “customarily retails” for around \$1 per roll, and \$199 for a pack of two one-liter bottles of hand sanitizer, which she claimed “regularly retails” for around \$7-8 per liter. The claims rely on Florida’s statutory price-gouging provision, which makes it illegal to charge “unconscionable” prices for certain “essential commodities” following a declared state of emergency.
- The state price-gouging statutes may end up in play in a variety of different litigation contexts in addition to cases seeking to enforce the price-gouging provisions in and of themselves. For example, in one case filed in the Southern District of New York, a manufacturer of a leading brand of N95 respirators – masks that fit over faces to filter out air particles and protect the wearer against the coronavirus – filed suit against an alleged unauthorized distributor of its products. The complaint alleged that the defendant had submitted a quote to New York City, offering to sell millions of the plaintiff’s brand of respirator masks at a grossly inflated price, seeking to deceive the city procurement officials into believing the defendant was an authorized distributor. The suit claimed that the defendant was trying to use the plaintiff’s trademarks to “perpetrate a false and deceptive price-gouging scheme on unwitting consumers,” including government agencies, during the coronavirus

pandemic. Although the complaint asserted various different claims for trademark infringement, unfair competition, false association, and deceptive acts and practices, among other claims, the complaint specifically cited to the New York price-gouging provision.

- Although there is no price-gouging law at the federal level, many states have some form of price-gouging prohibition. For example, in California, Massachusetts, and New Jersey, statutes limit how much the price of certain goods may increase following a declared public emergency. In those states, the statutes provide for a private right of action, including the ability to bring a class action. High-profile plaintiffs' class action attorneys have been quoted in the media as saying they are looking for situations involving serious price gouging.
- These provisions vary from state to state. For example, California's price-gouging law prohibits "excessive and unjustified increases in the prices" of any "essential consumer goods and services" during a proclaimed or declared state of emergency at the national or local level. The statute also makes it unlawful for anyone to sell or offer to sell consumer food items, emergency supplies, and medical supplies for a price more than 10% percent greater than the price charged by that person for those goods or services immediately before the emergency declaration. But an increase is not unlawful if it is directly attributable to additional costs imposed on the seller by the supplier or to additional costs of labor or materials used to provide the services, and the price is "no more than 10 percent greater than the total of the cost to the seller" plus the customary markup by the seller for that good or service in the usual course of business immediately before the state of emergency.
- Massachusetts's price-gouging law, which was expanded to cover the COVID-19 pandemic, includes "any goods or services necessary for the health, safety or welfare of the public" and prohibits increases to "an unconscionably high price." The Massachusetts regulation does not define "an unconscionably high price" as a specific percentage, but under prior case law, a court may find an "unconscionably high price" where there is "gross disparity" between the increase in prices to consumers compared to the increase in gross margins, calculated based on costs to sellers.
- New Jersey's price-gouging law, which is part of the state's Consumer Fraud Act, makes it "an unlawful practice" to sell during a state of emergency "any merchandise which is consumed or used as a direct result of an emergency or which is consumed or used to preserve, protect, or sustain the life, health, safety or comfort of persons or their property" at a price that constitutes "an excessive price increase." Although New Jersey defines "excessive price increase" to mean an increase of "more than 10 percent" over the price at which the good was sold in the usual course of business immediately before the state of emergency, it carves out an exception if the increase is attributed to the additional costs of providing the good during the state of emergency or is imposed by the seller's supplier, provided the price does not represent an increase in the markup from cost of more than 10 percent of the markup customarily applied by the seller immediately prior to the state of emergency.

Cases Involving Claims Concerning Customer Data Privacy

- A class action was filed in the Northern District of California against a videoconferencing platform for allegedly sharing users' personal information with a third-party social media company without user permission. The named plaintiff alleges he used the platform to communicate during the stay-at-home directives due to COVID-19. According to the complaint, the company's privacy policy did not inform users that the software would collect certain data points and share that data with certain third parties. The putative nationwide class action asserts claims for violations of state unfair competition, consumer protection, and data privacy statutes, in addition to common law claims. Similar class actions have also been filed alleging, in addition, that the platform's security features are overstated.

- Two shareholder suits have been filed against a communications technology company. These suits claim that the company made false and misleading statements and failed to disclose inadequate data privacy and security measures. The shareholder suits claim that these issues came to light due to the increasing reliance on video communication software during the COVID-19 pandemic.
- A similar class action has been filed in the Central District of California against two social media companies and a videoconferencing platform. The plaintiff alleges the social media companies “eavesdropped” on his and other users’ meetings by reading and learning the contents of his devices’ communications with the videoconferencing company’s servers. The putative class action asserts nationwide claims for unjust enrichment and trespass to chattels, as well as intrusion upon seclusion claims on behalf of a multi-state subclass, and invasion of privacy under the California privacy laws on behalf of a California subclass.
- As consumer and individual public health data is increasingly being used to track the spread of COVID-19, the Senate Commerce Committee held a paper hearing beginning on April 9, 2020, titled “Enlisting Big Data in the Fight Against Coronavirus.” Among the issues discussed were the use of anonymized, de-identified, aggregate smartphone location data in the fight against the spread of the COVID-19; the use of videoconferencing software and the implications to individuals’ privacy rights; the implications for students’ privacy under the Family Educational Rights and Privacy Act and the Children’s Online Privacy Protection Act for schools engaging in distance-learning; and the interplay between HIPPA and the use of public health data to stop the spread of the coronavirus. Even though these statutes do not necessarily provide for private causes of action, plaintiffs’ counsel often look to government proceedings for ideas for new potential lawsuits.

Cases Alleging Product Liability and Negligence-Based Claims

On April 7, 2020, a cruise-ship passenger filed a class action lawsuit in the Southern District of Florida against a large cruise line company alleging that the company acted negligently in setting sail despite knowing that the vessel had taken previous voyages with passengers who had confirmed cases of COVID-19, and despite knowing that there were infected passengers on board for the voyage. Plaintiff claimed that the company negligently exposed him and thousands of other passengers to COVID-19. The claims rely on allegations of improper sanitation aboard the ship once an infected passenger had been onboard, untrue assurances of passenger safety, failures to screen passengers, and the failure to warn passengers about increasing risks of contracting COVID-19 as the voyage continued.

For more information and updates on the developing COVID-19 situation, visit [GT’s Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

This Greenberg Traurig Advisory was prepared by the firm’s [Class Action Litigation Group](#).

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