



CLASS ACTIONS IN A COVID-19 WORLD

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As the COVID-19 coronavirus continues to spread throughout the United States – and the fallout from the virus is beginning to be felt across industries, by consumers and businesses alike – the first putative class actions relating to COVID-19 have been filed. Businesses in many industries could face the prospect of COVID-19-related class litigation in the near future. This article will provide a brief summary of the currently filed putative class actions, other potential areas and industries that could face putative class actions regarding COVID-19, and what businesses can do now to try to prevent potential COVID-19-related class actions.

Recently Filed COVID-19 Putative Class Actions

Thus far, only a few putative class actions have been filed relating to COVID-19, including the following:

- On March 5, 2020, a deceptive advertising putative class action was filed in the United States District Court for the Southern District of California against Vi-Jon, Inc. – the makers of hand sanitizer Germ-X – alleging that Vi-Jon made false and misleading promotional and advertising statements that Germ-X could prevent or reduce infection from the flu and several viruses, including COVID-19. *David, et al. v. Vi-Jon, Inc. d/b/d Germ-X*, Case No. 3:20-cv-00424-CAB-AGS (S.D. Cal.).
- On March 12, 2020, in the United States District Court for the Southern District of Florida, a nationwide putative class action on behalf of individuals and businesses was filed against China, alleging claims for negligence, emotional distress, public nuisance, and strict liability for "conducting ultrahazardous activity" relating to China's alleged failure to report or contain COVID-19. *Alters, et al. v. People's Republic of China, et al.*, Case No. 1:20-cv-21108-UU (S.D. Fla.).
- On March 12, 2020, a stock drop securities class action was filed against Norwegian Cruise Lines – also in the United States

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District Court for the Southern District of Florida – by one of Norwegian's shareholders, alleging that Norwegian made false or misleading statements in filings with the SEC that downplayed the current and potential impact of COVID-19 on Norwegian's operations and concealed information regarding Norwegian's response to the virus. *Douglas v. Norwegian Cruise Lines, et al.*, Case No. 1:20-cv-21107-RNS (S.D. Fla.).

- On March 12, 2020, another stock drop securities class action was filed in the United States District Court for the Eastern District of Pennsylvania, against Inovio Pharmaceuticals, in which an Inovio shareholder alleges Inovio made several false and misleading public statements about its development of a COVID-19 vaccine, causing share prices to increase significantly, before declining by over 70% after more information became public showing that Inovio had not developed a vaccine. *McDermid v. Inovio Pharmaceuticals, Inc., et al.*, Case No. 2:20-cv-01402-GJP (E.D. Pa.).

Other Potential COVID-19-Related Class Litigation

Presumably, these putative class actions are just the tip of the iceberg for class litigation relating to COVID-19. Setting aside the merits of claims or whether any potential class is certifiable, below are some industries and types of business and entities that may end up as defendants in COVID-19-related putative class actions, and the types of potential class claims they might face.

Health Care

- Hospitals and health care providers may face putative class actions alleging failure to contain the virus, failure to properly diagnose virus, or failure or refusal to treat persons with the virus. Any measure (or lack thereof) that leads to more people becoming infected with COVID-19 increases the chances of a putative class action.
- Also, given the susceptibility of the elderly to COVID-19 and recent instances at nursing homes where multiple people have died from or become infected with the virus, there is the potential for nursing homes to face wrongful death or other medical-related class actions relating to COVID-19.

Travel, Hospitality, and Food Service

The travel, hospitality, and food service industries will be among the hardest hit economically by COVID-19, and businesses within these industries are ripe for potential for class actions.

- There are already at least four individual lawsuits against Princess Cruise Lines by passengers who were stranded on the Grand Princess cruise ship that was stuck off the coast of San Francisco for a week because of an outbreak of COVID-19 on the ship. While the cases are not styled as putative class actions at this time, it is reasonable to assume that class litigation is on the horizon for any cruise line that had a COVID-19 outbreak on one of its ships or that could not return to port as a result of COVID-19.
- Many airlines have waived cancellation and/or flight change fees in light of COVID-19, but those that have not done so or those that place restrictions on travel credits may face putative class actions from frustrated consumers.
- Hotels and vacation rental companies may face putative class actions for charging non-refundable deposits or refusing to fully refund customers who had to cancel travel plans (especially if shelter-in-place orders are instituted).



- Restaurants and bars – even those open only for carry-out or delivery during local or state-wide restaurant and bar closure orders – could face putative class actions if customers were infected with the virus at the restaurant or bar or after eating food prepared by the restaurant, or if employees have the virus and then spread it to customers.

Insurance

- Insurance companies may face putative class actions relating to COVID-19, filed by both individuals and businesses, for denial of claims related to the virus, including business interruption claims, travel insurance claims, and medical claims.

Governmental Agencies and Officials

- Federal, state, and local governmental agencies and officials could be at risk of putative class actions for failing to act quickly enough to stop the spread of the virus or, on the other end of the spectrum, imposing restrictions on businesses and individuals that are deemed too harsh or unreasonable.
- In addition, jails and prisons could face putative class actions for failing to take measures to prevent the spread of COVID-19 or for failing to provide adequate treatment to inmates infected with the virus.

Employers and Businesses in General

In addition to the more industry-specific types of claims identified above, employers and businesses in general could face putative class actions relating to COVID-19 for a variety of reasons, including the following:

- Any business where the virus was spread or was not contained could face potential class litigation, either by employees or customers
- Delays in performance or delivery of goods or services
- Cancellation of paid events without full refunds or postponement of paid events without giving attendees the option of full refunds
- Businesses that charge membership fees, but are closed or have limited hours due to COVID-19, and refuse to refund membership fees in part or in whole
- Price gouging for goods or services as a result of COVID-19
- Deceptive or misleading advertising or marketing relating to goods or services that are supposed to treat or combat COVID-19
- Treatment of employees or customers differently based on actual or perceived illness, disability, race, or national origin
- Failure to comply with COVID-19-related laws, regulations, mandates, or guidelines, including requiring employees to go to work, refusing to allow employees to work from home, or failing to take any required or suggested precautions
- For publicly held companies, securities fraud and potential derivative liability against corporate directors and officers relating to companies' responses to, and statements regarding, COVID-19



Steps to Take to Avoid Class Litigation

Of course, the merits of any of these types of claims will vary, and there will likely be significant hurdles to class certification in many of these types of potential class actions, but given the unprecedented nature of COVID-19 and its ever-growing impact on everyday life, it is a fair assumption that more and more COVID-19-related class actions will be filed. Here are a few basic and easily implementable steps businesses and employers can take immediately to help avoid potential class actions related to COVID-19:

- **Don't lie!** While this is good advice whether or not there is a global pandemic, it is particularly critical and sensitive advice when health is at stake. Businesses should take extra care to ensure that any advertising, marketing, promotional materials, social media posts, press releases, press conferences, public claims or communications to shareholders, or communications to employees relating to COVID-19 are truthful and do not conceal anything that may be considered potentially harmful. As the few putative class actions relating to COVID-19 that have already been filed demonstrate, false or misleading statements or concealing facts can lead to class litigation.
- **Implement clear and concise written policies and procedures – and follow those policies and procedures.** Regardless of the type or size, every business should implement clear written policies and procedures regarding COVID-19 – and, more importantly, follow those policies and procedures consistently – such as allowing employees to work from home (if possible), encouraging employees who feel sick to stay home, separating sick employees and sending them home, educating employees on COVID-19, instituting additional cleaning and disinfecting of offices and businesses, and requiring employees who have recently traveled to high-risk countries or areas to self-quarantine for a certain period of time before returning to work. Read more about Employers' Frequently Asked Questions here: [COVID-19 Employer Frequently Asked Questions.] This will not only help to avoid a potential class action by a company's own employees, but can also help to avoid potential liability in class actions brought by customers. For instance, if a customer were to bring a putative class action as a result of contracting COVID-19 at a business (be it a restaurant, airline, hotel, or anywhere else), having clear policies and procedures (and following them) may help avoid liability on both an individual and class-wide basis.
- **Follow federal- and state-issued mandates and guidelines regarding COVID-19.** As with having written policies and procedures, companies that follow government-issued mandates and guidelines regarding COVID-19 will better be able to defend against putative class actions.
- **Treat current customers and consumers as though you would like them to continue to be customers and consumers after the COVID-19 virus has been contained.** Don't take advantage of your customers because there is a pandemic. If the delivery of goods will be delayed, provide honest updates and explanations. Offer refunds or credits for canceled or postponed events or for out-of-stock or delayed goods that have been paid for. Reduce business hours or implement maximum capacity rules for your business, for the safety of your employees or customers. It may sting the profit-and-loss statement to do some of these things, but a company that is perceived as greedy, uncaring, or unscrupulous is far more likely to draw the ire of its customers (and class action plaintiffs' attorneys) than a company perceived as reasonable and understanding – and customers of the latter type of company are far more likely to be repeat customers once things go back to normal.
- **Class action waivers and arbitration clauses.** Companies that do not already have class action waivers and/or arbitration clauses in their customer agreements should incorporate those clauses



into agreements, particularly in industries that may be more susceptible to COVID-19-related litigation.