COVID-19 class actions forecast

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As the COVID-19 pandemic continues to ripple across the globe, greatly affecting the global economy, proposed class actions relating to the pandemic have already commenced in the United States and Canada. BLG is committed to keeping our clients informed and updated on class action developments in these uncertain times. This update summarizes recent class actions relating to COVID-19 and forecasts future potential filings. It is important to note that none of the allegations in the claims set out below have been proven in court:

CONSUMER PROTECTION

Misrepresenting hand sanitizer

A consumer claim in California against Target Corporation alleges that Target misrepresented its store brand hand sanitizer "kills 99.99% of germs", which was not backed up by any reliable scientific studies. This class action echoes recent lawsuits filed against other hand sanitizer manufacturers, such as Germ-X and Purell, which arose pursuant to a letter sent by the U.S. Food & Drug Administration (FDA) to Purell regarding its marketing representations. The FDA notes in its letter that it was not aware of "any adequate and well-controlled studies demonstrating that killing or decreasing the number of bacteria or viruses on the skin by a certain magnitude produces a corresponding clinical reduction in infection or disease caused by such bacteria or virus". As a result, the lawsuit reads: "Target uses indirect statements to give an unfair, deceptive, untrue or misleading impression to the consumer that the Hand Sanitizer can prevent the flu and other viruses."

Flight cancellations

Several airlines currently face class actions in the Federal Court (in British Columbia) and in the Superior Court of Québec by consumers who entered a contract of carriage with these companies prior to the COVID-19 pandemic declaration and whose flights were cancelled as a result. The claimants claim a full monetary refund (as opposed to credits toward future flights) in connection with their cancelled flights.

Similarly, airline passengers in the United States claim their airline is refusing to honor ticket refund requests for cancelled flights. The plaintiffs allege that airline is only

offering a voucher that expires in a year or the opportunity to rebook on another flight. Plaintiffs seek full refunds and punitive damages.

School trip cancellation

EF Institute for Cultural Exchange, Inc. (EF) is being sued in California for refusing to provide a full monetary refund for cancelled trips because of COVID-19. EF's contract contained a clause, which allowed it to issue travel vouchers instead of cash refunds, excluding certain fees, when tours were cancelled "for public health issues or quarantine or threats of public health issues". The plaintiffs allege that EF instituted an unfair cancellation policy in their contract, imposing unreasonable limitation on cash refunds, which resulted in students losing some of their investment following the tour cancellations.

Event cancellation

Festival organizers (Rutledge v. Do LaB, Inc.) have been sued for refusing to issue refunds of festival tickets, after government orders prohibiting public gatherings resulted in event cancellations. As alleged, the terms and conditions of the tickets provide that "all sales are final" and that "no refunds will be granted for any reason". The terms go on to state that in the event of a cancellation, "the holder shall not be entitled to a refund except as otherwise required by law". The plaintiffs allege that the contract is unenforceable as illusory because the defendant retained "complete and unfettered control to modify or terminate the agreement without assuming any obligations towards Plaintiff and the Class".

Similarly, StubHub, an online event ticket exchange and resale platform, has been challenged in Wisconsin for failing to refund tickets for postponed events due to the COVID-19 pandemic. The plaintiffs are asking the court to prohibit StubHub from issuing coupons instead of offering full refunds.

Overpriced toilet paper and hand sanitizer

Online purchasers in Florida are claiming that the seller charged unconscionable prices for goods such as toilet paper and hand sanitizer following the state's COVID-19 pandemic state of emergency declaration.

University closing and refunds

The Arizona Board of Regents is challenged for profiting from the COVID-19 pandemic by refusing to refund costs and fees to students ordered out of Arizona universities and transitioned to online classes. The claimants are seeking refunds for unused portions of student room, board and service costs.

Gym monthly fees

Town Sports International's (TSI) gym users in New York are alleging that while all the gyms are currently closed and non-operational due to the COVID-19 pandemic, TSI is "outrageously continuing to charge members their monthly membership dues", which are paid to access gyms. The plaintiffs also allege that TSI engaged in fraudulent

consumer conduct by misrepresenting to customers that it would provide gym services in exchange for membership dues, but then retained membership dues while not providing gym access; and “by misrepresenting to customers that they could cancel their memberships at any time, but then refusing to honor customer cancellation requests.”

SECURITIES

Cruise line inflated securities prices

A cruise line was sued in Florida for making false and misleading statements under the US Securities Exchange Act. The class action was brought on behalf of individuals who purchased securities at allegedly artificially inflated prices between Feb 20, 2020, and March 12, 2020, and were thereby economically damaged. The cruise line had issued a press release, claiming inter alia that (i) it had a positive forecast for the company despite COVID-19, and (ii) it had procedures in place to protect guests and crew. Emails were leaked in news channels suggesting that the cruise line had made false and misleading statements, which resulted in drops in the share price.

Pharma company allegedly makes false claims

Similarly, Inovio Pharmaceuticals, Inc. (Inovio) faces a class action in Pennsylvania for allegedly making false and misleading statements under the US Securities Exchange Act. The Claimants allege that Inovio and its CEO capitalized on widespread COVID-19 fears when the CEO falsely claimed Inovio had developed a vaccine for COVID-19. This statement caused Inovio’s stock price to jump over 10 per cent in the ensuing trading days. Citron research exposed the fact that Inovio had not developed a vaccine by calling for a Securities Exchange Commission investigation. Stock then experienced a 71 per cent decline, resulting in losses to shareholders.

ALLEGED NEGLIGENT RESPONSE

COVID-19 on cruise ship

Passengers on a cruise line allege that the cruise line negligently failed to have proper screening protocols for COVID-19 prior to boarding them on its cruise ship and failed to warn them that passengers from a prior voyage had symptoms of COVID-19.

Chinese government alleged cover-up of COVID-19

People's Government of the City of Wuhan, China, is being blamed by a number of small businesses in Nevada for damages caused by the COVID-19 pandemic. The claimants allege that the Chinese government acted improperly by initially covering up the COVID-19 pandemic and that the government’s lack of transparency affected the global response to the pandemic.

Under the same umbrella, a group of Florida residents filed a federal class action against the Chinese government and other Chinese governmental entities for damages suffered as a result of the COVID-19 pandemic. According to the claimants, "[t]he PRC

and the other Defendants knew that COVID-19 was dangerous and capable of causing a pandemic, yet slowly acted, proverbially put their head in the sand, and/or covered it up for their own economic self-interest".

Forced closing of business

Pennsylvania business owners are claiming against the Governor of Pennsylvania that "non-life sustaining" businesses and their employees have been unlawfully forced to bear the cost of the state's response to COVID-19. The claimants allege that executive orders by the Governor amount to unlawful seizure of property without due compensation, a practice prohibited by the Fifth Amendment. It also claims that businesses were provided with no notice before being forced to close their doors for an indefinite period of time.

Temporarily stopping foreclosure sales

Plaintiffs in a claim against a U.S.-based bank are seeking to stop foreclosures in West Virginia during the national emergency caused by the spread of the COVID-19 virus. The plaintiffs claim that they were victimized by a predatory lending scheme perpetrated in concert by a manufactured housing retail dealer and Countrywide Home Loans, Inc., whereby the dealer and lender arranged for fraudulent home loans far exceeding the actual value of the properties. The plaintiffs allege that Countrywide's successor, the U.S.-based bank, increased the indebtedness to more than double the value of the property and seeks to enforce a fraudulently originated lien. The bank also allegedly rejected and refused the plaintiffs' payments and seeks to foreclose on the homes in violation of the contract and law.

Illegal short-term rentals

Fairbnb Canada has published an unissued claim alleging that condominium corporations exposed residents to COVID-19 by allowing illegal short-term rentals in their buildings. However, in response, the condominiums released a notice to owners prohibiting such short-term rentals until the end of the pandemic state of emergency period. Thus, this class action will not proceed.

PRIVACY & DATA SHARING

Privacy concerns around Zoom data sharing

Zoom Video Communications, Inc. (Zoom) users in California are claiming Zoom shares their data with Facebook and other third parties without adequate notice. Its use by consumers and businesses has exploded in the face of the current COVID-19 virus pandemic. The plaintiffs allege that upon installing the Zoom App, Zoom collects the personal information of its users and discloses, without adequate notice or authorization, this personal information to third parties, including Facebook, allegedly invading the privacy of millions of users. The plaintiffs seek damages and equitable relief to remedy the violations.

INSURANCE AND COVERAGE

Denied insurance claims

Insurance companies are being sued in Québec and Saskatchewan by insureds, who were parties to a contract of insurance that included “business interruption” or “operating loss” coverage. The plaintiffs claim that the insurers engaged in breached of contract and in anti-competitive behaviour by denying claims occasioned by COVID-19. The plaintiffs allege that insurance companies cannot claim that these events were unforeseen under the force majeure clause, in light of the prior the SARS pandemic. They seek compensatory damages for being denied coverage after being forced to close their businesses.

Similarly, Ocean Grill and the Choctaw Nation of Oklahoma and Chickasaw Nation Department of Commerce have commenced actions in the United States against their insurance provider claiming that their “all risk” commercial general liability policies should cover losses incurred because of business closures resulting from the COVID-19 pandemic.

LABOUR & EMPLOYMENT

Rideshare drivers as independent contractors

Rideshare drivers in California allege that the company misclassified them as independent contractors and thus owed the workers paid sick leave, which is particularly harmful given the COVID-19 pandemic. The plaintiffs allege that the company’s failure to comply with California’s labour law puts the lives of the drivers and the general public in danger, because drivers feel forced to keep working to maintain their income.

Drivers of another rideshare company are also claiming sick leave. Furthermore, a federal judge ruled that the company can’t force its drivers in Massachusetts to arbitrate claims as they are being misclassified as independent contractors rather than employees, and workers are exempt from the *Federal Arbitration Act*.

Unions allege failure to protect workers

The Alaska State Employees Association has filed a class action against the State of Alaska seeking injunctive relief based on the state’s failure to protect union members from the health and safety risks posed by COVID-19. The lawsuit alleges that nonessential workers were denied the right to telework and that their work environment was not well adapted for social distancing. The plaintiffs have asked the court to require the state to enforce safety policies and health mandates and provide a safe work environment.

Similarly, federal employees, assisted by the American Federation of Government Employees labour union claim against the United States of America that federal workers have risked exposure to COVID-19 without receiving proper hazard pay.

PROTECTING THE VULNERABLE AGAINST COVID-19

Protecting prison population

The Governor of Illinois and the director of the Illinois Department of Corrections might face an order directing state officials "to drastically reduce Illinois's prison population" as inmates are vulnerable to catching COVID-19. The lawsuit seeks to represent older prisoners and those with health problems because the poor protective measures in prisons make the COVID-19 effects deadly for them.

Similarly, the prison wardens and the Federal Bureau of Prisons are being sued in Colorado and Louisiana for allegedly failing to protect prisoners and corrections staff from COVID-19. The plaintiffs allege that the prisons "are knowingly risking the lives of every prisoner".

POTENTIAL FUTURE CLASS ACTIONS

As the impact of COVID-19 spreads, class action lawsuits are likely to rise. Given the similarities between the legal systems in Canada and the U.S., class actions commenced in one country are often filed across the border. Following recent trends, below is a list of potential future class actions that might be expected:

Consumer protection claims are very popular with consumers seeking compensation for their financial or personal loss. Claims are likely to arise mainly in three categories: refund policies, misleading advertising or price gouging.

Securities claims might be raised against public companies for failing to abide by securities disclosure obligations. Public companies should consider whether there are company-specific implications of the crisis that constitute material non-public information, whether that information requires immediate disclosure, and whether the company should restrict trading by insiders.

Tort claims are expected for allegedly negligent responses to COVID-19. These claims may allege a failure to protect from or a failure to warn of the potential exposure to COVID-19. These types of claims have already been commenced against cruise lines and governments. A claim in negligence could be brought in respect of companies in the hospitality industry and elsewhere: e.g. sporting event spectators in large arenas, attendees of conferences, patrons of hotels, religious congregations, and government bodies, all of whom may have been exposed to the virus.

Breach of contract claims may be filed for breach of warranty, issues with the supply chain or delays. As companies scramble to keep supplying products, in some cases, those companies are using alternative suppliers or back-up manufacturing lines to maintain operations. Companies are already challenging the right to exercise force majeure clauses. There are also disputes surrounding termination in cases where buyers exercise a contractual right to terminate a contract if the force majeure event extends for too long a period. Once manufacturing ramps up again, there could also be disputes regarding which party is responsible for expedited freight related to shipping delays caused by COVID-19.

Privacy and data security claims for failure to adequately protect confidential information or dissemination of confidential information are likely to rise. There are

increased opportunities for malicious actors to gain access to an organization's electronic information systems, whether through phishing or other social engineering, or through a hack at a time when the organization is digitally overstretched. These risks are likely to be exacerbated by the increased number of employees working from home and outside of normal supervisory regimes.

Insurance claims are on the rise against insurance companies for declining coverage under their policies for company losses occurred in relation to COVID-19. Insurance companies assert the benefit of the force majeure clause to deny coverage, stating that the closure events were unforeseen. Insureds are challenging this interpretation in the courts.

Employment claims are increasing against employers for failing to take steps to safeguard the health and safety of employees or to follow employment standards legislation. Concerns have already arisen from unionized meat inspectors at a meat processing plant in Alberta, where one individual had tested positive for COVID-19.

Corporate governance claims might arise as many companies face financial challenges and even bankruptcy. Companies and their directors and officers may face class actions for breach of fiduciary and other duties to creditors and other stakeholders upon filing for insolvency.

Government entities also face increasing challenges for allegedly "causing harm" or "increasing the risk of harm" from COVID-19. Other claims might arise for failure to safeguard the health and safety of citizens. There have also been actions by companies forced to close for inadequate responses or notices from the government leading them to hardship.

COVID-19 exposes companies to class actions. The above examples show that it is crucial for companies to carefully inform their investors, customers and the public about the impacts of COVID-19 on their business.

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