



Class Action Litigation Group Webinar: New Class Action Risks Relating to the Coronavirus

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Coronavirus Class Action Risks

- As the nation has grappled with the effects of the COVID-19 outbreak, Plaintiffs' class action lawyers have initiated suits stemming from it.
- Several class actions have already been filed in the U.S. that relate to the pandemic, with many more surely in the pipeline.
- Corporate decisions, practices and policies, and steps (or lack thereof) undertaken now—under the most difficult circumstances and time pressures—will likely be a focus of class actions for many months and years into the future.
- By previewing and tracking some of these early claims and legal theories, companies can mitigate potential risks and consider how corporate policies and practices will be scrutinized in litigation.



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Coronavirus Class Action Risks

Three Most Likely Plaintiff Classes

1. Shareholders and Investors
2. Customers and Consumers of Products and Services
3. Employees

The Current Count

- Shareholder Cases - 2
- Consumer Cases - 3
- Employment Cases - 3
- Foreign Sovereign Case - 1

Jurisdictions



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Shareholder Class Actions Arising From the COVID-19 Pandemic



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Douglas v. Norwegian Cruise Lines et al (S.D. Fla. 1:20-CV-21107)

- **The Basics**

- Securities action brought on a class of putative shareholders that traded securities of Norwegian between February 20, 2020 and March 12, 2020 based on a wide range of public statements made, including in public documents, press releases, SEC filings, etc.
- Allegations of false statements to not only the market but consumers which allegedly inflated sales and endangered the public.
- In the alleged Class Period (February 20-March 12), share price dropped 35.8% (Compl. ¶ 27).



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Douglas v. Norwegian Cruise Lines et al (S.D. Fla. 1:20-CV-21107)

- **Claims**

- Rule 10b-5 (15 U.S.C. § 78j(b)) and Section 20(a) of the Exchange Act Against Individual Defendants
 - Based in SEC Filings and Press Releases
 - “As a result of the foregoing, the market price of Norwegian securities was artificially inflated during the Class Period. In ignorance of the falsity of Defendants’ statements, Plaintiff and the other members of the Class relied on the statements described above and/or the integrity of the market price of Norwegian securities during the Class Period in purchasing Norwegian securities at prices that were artificially inflated as a result of Defendants’ false and misleading statements.” (Compl. ¶ 44)



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Douglas v. Norwegian Cruise Lines et al (S.D. Fla. 1:20-CV-21107)

- **Central Allegations**

- Company’s Code of Ethical Business Conduct
 - “NCLH and its team members are expected to conduct business in compliance with applicable environmental, health and safety (‘EHS’) laws and regulations. NCLH’s EHS programs are designed to ensure the preservation of the environment, and safety and security of NCLH’s guests, team members and vendors.” (Compl. ¶ 15.)
- Public statements and press reports
 - “The Company has proactively implemented several preventative measures to reduce potential exposure and transmission of COVID-19 and to protect the health, safety, security and well-being of its guests and crew. These measures include enhanced pre-boarding and onboard health protocols that go above and beyond standard operating procedures.” (Compl. ¶ 19.)
 - Press reports about managers asking staff to lie to customers about COVID-19 (Compl. ¶ 22.)



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Douglas v. Norwegian Cruise Lines et al (S.D. Fla. 1:20-CV-21107)

- **Central Allegations**

- Whistleblower leaked internal sales directives to the media. (Compl. ¶ 26.)
- Press obtained sales scripts reflecting communication customers that the virus caused an increase in demand: “[d]ue to the Coronavirus we have cancelled all of our Asia cruises on the Norwegian Spirit. This has caused a huge surge in demand for all of our other itineraries. I suggest we secure your reservation today to avoid you paying more tomorrow.”” (*Id.*)
- Told customers that “coronavirus ‘cannot live in the amazingly warm and tropical temperatures that your cruise will be sailing to.’” (*Id.*)



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Douglas v. Norwegian Cruise Lines et al (S.D. Fla. 1:20-CV-21107)

- **The Takeaways**

- **Claims are Based in a Wide Variety of Statements**
 - Ethics Manuals
 - Press Releases
 - SEC Filings
 - Internal Emails Seeking to Maintain Status Quo
 - Commissioned Sales Force with Economic Incentives
- **Claims Were Brought by Whistleblower**
 - Enhanced Power of Whistleblowers in Post-Impeachment Era
- **Shareholder Plaintiffs will be Scrutinizing Companies' Responses to the Outbreak**
 - Profits vs. Health and Safety
 - Policies vs. Practice
 - Public Statements vs. Private Decisions



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McDermid v. Inovio Pharmaceuticals, Inc. et al (E.D. Pa. 2:20-CV-01402)

• The Basics

- On February 13, 2020, CEO “appeared on Fox Business News with Neal Cavuto, where he claimed that Inovio had developed a COVID-19 vaccine and was ‘able to rapidly construct our vaccine in a matter of about three hours once we had the DNA sequence from the virus available cause of the power of our DNA medicine platform.’ He continued that ‘our goal is to start phase one human testing in the U.S. early this summer,’ claiming ‘we’ve done this many, many times before. We’re planning to beat our own record.’” (Compl. ¶ 17.)
- Similar statements made in connection with a televised meeting with President Trump at the Whitehouse on March 2, 2020. (Compl. ¶ 18.)
- Stock price jumped from \$4.39 a share on March 2, 2020 to \$7.45 per share on March 3, 2020 and increased to a high of \$14.09 on March 6, 2020. (Compl. ¶ 19.)



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McDermid v. Inovio Pharmaceuticals, Inc. et al (E.D. Pa. 2:20-CV-01402)

• Claims

- Rule 10b-5 (15 U.S.C. § 78j(b)) and Section 20(a) of the Exchange Act Against the Individual Defendant

• Central Allegations

- 8-K on March 9, 2020 announced plans to pursue an accelerated timeline of developing its DNA vaccine. (Compl. ¶ 22.)
- Falsely described the product as “a fully completed vaccine” and that it had been developed in a matter of hours with April 2020 as a target date for clinical trials. (Compl. ¶ 23.)
- March 9, 2020 tweet from Citron Research resulted in a 71% free fall--\$19.36 to \$5.70. (Compl. ¶ 25.)
- Safe Harbor Allegation: “To the extent there were any forward-looking statements, there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements.” (Compl. ¶ 35.)



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McDermid v. Inovio Pharmaceuticals, Inc. et al (E.D. Pa. 2:20-CV-01402)

- **The Takeaways**

- **Forward Looking Statements to the Market, Investors and Customers**

- **The Dynamics of this Pandemic**

- Naturally want to assure the market that things will be back to normal
 - Optimism vs. Realism

- **Best Practices to Come Within Forward Looking Statement Safe Harbor**

- Statutory Basis 15 U.S. Code § 78u-5.
 - Oral Forward Looking Statements Governed by Section 78u-5(c)(2)
 - Speakers should plan ahead and script comments that can refer listeners back to written and detailed cautionary statements
 - Reasonable basis for statements – avoid guessing and speculating
 - Forwarding looking statements can't shield companies that fail to disclose material adverse facts



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Consumer Class Actions Arising From the COVID-19 Pandemic



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Douglas v. EF Institute for Cultural Exchange (Cal. San Diego Sup. Ct. 37-2020-00013374)

- **The Central Allegations**

- Written contract for tours for high school students arranging for air travel, ground transport, hotels, food, sightseeing.
- Goods and services to “consumers” within the definition of Consumer Legal Remedies Act (Cal. Civ. Code § 1770(a))
- “If EF cancels the tour for any such reason, travelers will receive an EF future travel voucher for all monies paid, less the \$95 non-refundable deposit and any additional non-refundable fees. Cancellation by EF for causes described in this section shall not be a violation of its obligations to any traveler.” (Complaint labels this the “No Public Health Emergency Cash Refund Clause”).



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Douglas v. EF Institute for Cultural Exchange (Cal. San Diego Sup. Ct. 37-2020-00013374)

- **The Central Allegations**

- Broad release language and Forum Selection Clause (Massachusetts)

- **The Claim for Injunctive Relief**

- Contract of Adhesion
- Unconscionability
- Civ. Code §§ 1780(a)(2), 1780(a)(5) contain anti-waiver provisions

- **The Takeaways**

- Cancellation Fees (Cost Benefit Analysis)
- Credits vs. Refunds
- Delay in Performance vs. Inability to Perform



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David v. Vi-Jon, Inc. (S.D. Cal., Case No. 20-cv-424)

• The Central Allegations

- Plaintiff purchased Germ-X based on the belief that the product had medicinal and virus preventative benefits. (Compl. ¶¶ 61-66.)
- FDA issued a warning letter to another manufacturer, the maker of Purell, regarding its alcohol-based sanitizer, stating that it is not aware of “any adequate and well-controlled studies” supporting the representation. (Compl. ¶¶ 5, 45-46.)
- Internet and social media advertising expressly stating that the product is for “Coronavirus/Flu Prevention.” (Compl. ¶ 42.)
- Use of pictures of sneezing child designed to convey the impression that it is effective in preventing and treating certain communicable, viral diseases. (*Id.*)



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David v. Vi-Jon, Inc. (S.D. Cal., Case No. 20-cv-424)

• The Claims

- **Unfair Competition Law (UCL) Cal. Bus. & Prof. Code § 17200** (Proscribes conducts that is (a) unfair, (b) fraudulent or (c) unlawful.)
 - **Consumer Legal Remedies Act (CLRA) Cal. Civ. Code § 1750**
 - **False Advertising Law (FAL) Cal. Bus. & Prof. Code § 17500**
 - **Negligent and Intentional Misrepresentation**
- **Important:** The “injury” that is intended to satisfy the standing requirement is not illness but economic injury from buying the product.



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David v. Vi-Jon, Inc. (S.D. Cal., Case No. 20-cv-424)

- **The Takeaways**
 - Any marketing efforts aimed at obtaining a sales or market share benefit from the coronavirus will be closely scrutinized.
 - Social media is a major focus because of inherent challenges and lack of internal controls.
 - FDA and public enforcement activities will result in follow-on class action litigation.



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Armas v. Amazon.com (Cir. Court Fla. 11th Cir. (Miami-Dade County))

- ***Armas v. Amazon.com***
(Cir. Court Fla. 11th Cir. (Miami-Dade County))
 - **The Central Allegations**
 - “[R]etailers . . . are preying upon the public’s fear of a surging epidemic and using COVID-19 as an opportunity to pad profits by way of unlawful price increases.”
 - Plaintiff’s purchase: 36 rolls of toilet paper and a pack of 2, 1-liter bottles of Purell, paying \$99.00 for the TP and \$199.00 for the hand sanitizer.
 - Class is comprised of “[a]ll consumer in the State of Florida who purchase hygienic products from the Defendant following the state of emergency, on March 9, 2020.” (17)
 - Florida Statute § 501.211



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Price Gouging

- **From Findlaw's Online 50-State Survey***
<https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>
 - **California:** “Selling commodities, household essentials, fuel, etc. after a declared state of emergency for more than 10% over the cost of these items immediately preceding the declaration.”* (Cal. Pen. Code § 396)
 - A violation of state law may be the predicate for an “unlawful” business practice under California’s UCL.
 - **Variations on State Law**
 - Some limited to fuel and others are limited to necessities.
 - Some set a percentage (e.g., above 25% of pre-emergency price) and others apply an unconscionable or similar standard.
 - Some are triggered by a declaration of emergency and others refer to abnormal market disruption.
 - The Amazon case presents unique questions of e-commerce intermediaries.



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Employment Class Actions Arising From the COVID-19 Pandemic



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Employment-Related Class Actions Already Filed

- ***Verhines v. Uber Technologies***
(San Francisco County Case No. CGC-20-583684)
 - The Central Allegations
 - Alleges driver was misclassified as an independent contractor (Cal. Labor Code § 2750.3) and does not pay for sick leave as required by California law.
 - “Faced with the choice of staying home without pay and risking losing their access to their livelihood, including housing, food, and other necessities of living, Uber drivers across California will continue working and risk exposing hundred of riders who enter their car on a weekly basis to this deadly disease.” (Compl. ¶ 5)
 - The Claim
 - Cal. Labor Code § 246 which requires employers to allow employees to accrue sick days.
- ***Rogers v. Lyft, Inc.***
(San Francisco County Case No. CGC-20-583685)
(same allegations against Lyft)



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Potential Employment Class Actions in the Pipeline

- **Top Six Employee Class Actions in the Pipeline**
 1. **Massive Layoffs will Result in WARN Act Claims**
 - Federal and State Laws
 - Application of the Emergency Exemptions
 2. **Wage & Hour Issues Are Triggered by Remote Working,**
 - Meal and Rest Breaks
 - Overtime Pay
 - Reimbursement Claims for Office Equipment and Other Expenses
 3. **Employee Safety and Claims Will Follow**
 - Those Who Contracted Coronavirus in the Workplace
 - Mental Health and Stress-Related Injuries
 - Ergonomic Disability



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Potential Employment Class Actions in the Pipeline (cont.)

4. ERISA Claims Rise as the Bottom Falls Out of 401ks and Pension Plans

- Similar to Shareholder Claims—*Who Knew What and When Did They Know it?*
- Declining Balances Prompts Greater Scrutiny Even After *Retirement Plans Committee of IBM v. Jander*, (No. 18-1165)

5. Employee Medical Privacy Claims Regarding Disclosure of Medical Diagnosis

- Employee health conditions reported to government and third parties
- Employee records stored outside of secured servers

6. Disparate Impact Layoffs

- For more information on L&E issues, refer to Dorsey's Coronavirus and Employment Law Webinar (March 4, 2020) by Michael Droke and Aaron Goldstein. Playback available at Dorsey's Coronavirus Resource Page



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Class Actions Against Foreign Sovereigns



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The Most Ambitious Claim of All

- ***Alters v. People's Republic of China***
(S. Dist. Fla. 1:20-cv-21108)

- **Class Allegations**

- “All persons and legal entities in the United States who have suffered injury, damage, and loss related to the outbreak of the COVID-19 virus.”
- “All persons and legal entities in the United States whose businesses have suffered injury, damage, and loss related to the outbreak of the COVID-19 virus.”

- **Claims**

- Negligence and Negligent Infliction of Emotional Distress
- Strict Liability for Conducting Ultra Hazardous Activity
- Nuisance



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Closing Thoughts on Class Actions Arising from the COVID-10 Pandemic



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Closing Thoughts

- **What is your company's risk profile in the coming uptick in consumer class actions?**
- **What is it about the health crisis that elevates the class action risks?**
- **What are the procedural arguments companies should be thinking about from the outset of the filing of the case?**
- **How will these cases be perceived?**
 - Judges and Juries are people
 - Bring to the case their own life experiences—extends to other litigation
 - Which party is seeking to obtain a windfall from the crisis, the Plaintiffs' counsel or the Defendant Corporation?
- **Impact of the crisis itself on timeline, trajectory of cases**



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