May 1, 2020

Class Actions Target Ticket and Membership Refunds in the Wake of COVID-19

Key Takeaways

- New consumer class actions are targeting entities that have been forced to cancel or postpone scheduled events in response to COVID-19 and have deployed California's plaintiff-friendly consumer protection statutes in particular.
- Defendants named in such actions may be able to avail themselves of a number of defensive strategies, including by relying on the provisions of the relevant purchase or membership agreement.
- Nevertheless, reputational risks and potential loss of customer goodwill may militate in favor of a more conciliatory approach toward consumers.

As the COVID-19 pandemic has gripped the nation since early March, governments have implemented measures limiting the regular operation of large sectors of the economy, and many businesses now face an unprecedented risk of class action lawsuits. With businesses forced to cancel or postpone scheduled events and an uncertain patchwork of future federal, state, and local regulation responding to the swiftly evolving public health impact of COVID-19, class action litigators already have begun to target corporations struggling to navigate a path forward through the uncertainty.

We have observed an emerging trend of class action suits against businesses that have made tough decisions in response to the COVID-19 pandemic and resulting regulations. In particular, consumers are seeking refunds for tickets to events that have been canceled and recurring membership fees for services and facilities that cannot be accessed. In anticipating and responding to these claims, businesses should weigh carefully whether instituting policies or litigation positions that take full advantage of the terms in agreements with customers will result in reputational damage that persists even after the immediate crisis has abated.

Emerging Trends in Class Action Litigation

The COVID-19 pandemic has already sparked numerous class action lawsuits, and California's consumer-friendly consumer protection statutes, such as the Unfair Competition Law ("UCL") or Consumers Legal Remedies Act ("CLRA"), have emerged as popular causes of action among putative classes of consumers. Plaintiffs are likely eager to take advantage of the lower burden under the California statutes, such as the lack of scienter requirement.[1] We anticipate this trend will persist and accelerate as the nationwide shut-

down keeps businesses shuttered and forces the continued postponement and cancellation of events. Several recently filed class actions brought under these California consumer protection statutes and similar statutes in other states may be an early indicator of a wave of class actions to come.

- **American Airlines** – On April 22nd, an Arizona resident filed suit in the Northern District of Texas, seeking to represent a nationwide class of American Airlines ticket purchasers who allegedly did not receive refunds for canceled flights from March 1, 2020 to the present.[2] Plaintiff alleges that American Airlines made unannounced changes to its refund policy for canceled flights and, contrary to the preexisting policy, has instead offered only credits for future flights. Plaintiff asserts claims for breach of contract, fraudulent misrepresentation, conversion, unjust enrichment, and claims brought pursuant to dozens of state consumer protection statutes from around the country, including California.

- **Major League Baseball** – On April 20th, two New York baseball fans filed suit in the Central District of California, seeking to represent a nationwide class of season ticket and individual game ticket purchasers.[3] The plaintiffs demand a full refund for tickets to games that have not taken place, and allege that the League has conspired with individual teams and ticket brokers to avoid providing refunds by claiming that games have been merely postponed and not canceled. Plaintiffs have brought claims under California's CLRA and UCL.

- **Ticketmaster and Live Nation** – On April 17th, a California-based plaintiff filed suit in the Northern District of California, seeking to represent a nationwide class of event ticket purchasers who allegedly have been unable to obtain refunds for postponed events from Ticketmaster and its parent company, Live Nation.[4] Plaintiff alleges that Ticketmaster reneged on its representation to customers that refunds would be available for any event that was "postponed, rescheduled or canceled," by retroactively and unilaterally revising its policy to allow for refunds only for canceled events following the COVID-19 outbreak. Plaintiff has sued for breach of contract, conversion, unjust enrichment, false advertising, and fraud, as well as pursuant to California's CLRA. Shortly after the lawsuit was filed, however, Live Nation announced a new policy that would allow customers to obtain a full refund for cancelled shows and 30 days to claim a refund for postponed shows.[5] It remains to be seen whether the newly announced policy will moot plaintiff's claims in full.

- **Six Flags Magic Mountain** – On April 10th, a California resident filed suit in the Central District of California, seeking to represent a nationwide class of Magic Mountain Season Pass holders, who allegedly have continued to be charged membership fees despite the park's closure in early March.[6] Plaintiff asserts claims for breach of express warranty, negligent misrepresentation, unjust enrichment, conversion, and breach of contract, along with claims under California's CLRA, UCL, and False Advertising Law.

- **Adventures Northwest** – On April 2nd, a California resident filed suit in the Northern District of California, seeking to represent a nationwide class of subscribers to a members-only "singles" event

hosting service.[7] The plaintiff claims that members have continued to be charged for monthly memberships, despite the company's inability to host any parties or provide any services since early March. Plaintiff asserts claims for, among other things, negligent misrepresentation, fraud, and breach of contract, as well as claims under California's CLRA, UCL, and False Advertising Law.

Possible Defenses to Class Action Claims

In keeping with the rapidly evolving and unpredictable business and regulatory landscape wrought by the COVID-19 pandemic, optimal defensive strategies against such consumer class action claims will depend on the unique facts and circumstances of each individual case. However, companies should consider several defensive strategies in response to these complaints, including:

- **Enforcing Existing Contractual Rights and Obligations:** The transactions at issue in most cases of this type are governed by purchase or membership agreements that delineate the rights and obligations of both parties. Companies should review these agreements in depth to assert all contractual defenses applicable under the circumstances. Examples of provisions in purchase agreements that may provide helpful defenses include frustration of purpose or force majeure provisions that allow delayed or different performance without refunds, and class action waiver or mandatory arbitration provisions. Appeal to such contractual provisions is likely a company's strongest defense and may allow swift disposition of the case on a motion to dismiss.

- **Using Time to Your Advantage:** Given the rapidly developing business and regulatory landscape affecting corporate decisions to host events or issue refunds to customers and the typically slow pace of litigation, time may play a decisive role in many consumer class actions. Plaintiffs' claims may become moot as businesses adopt new refund policies or announce plans to cancel events that are presently only postponed. Additionally, the controversy over ticket and membership refunds has drawn attention from legislators, who may step in and resolve the controversies at the heart of these cases through legislation.[8]

- **Opposing Class Certification:** Although California's consumer protection statutes may broadly empower California residents, courts have been hesitant to allow certification of nationwide classes asserting claims under California-specific consumer protection statutes. For example, in *Mazza* v. *American Honda Motor Co., Inc.*, the Ninth Circuit found that California's UCL and CLRA differed so significantly from other state consumer protection laws that this variation overwhelmed common issues and precluded certification of a nationwide class. The court held instead that each class member's claim was governed by consumer protection laws of the jurisdiction in which each transaction took place.[9] And although this might be a battle for the class certification stage, class certification issues have been framed by some federal courts as Article III standing issues that may be resolved on a motion to dismiss.[10] Similar analyses may be applicable to claims brought pursuant to other consumer protection statutes in other jurisdictions.

Considerations Moving Forward

Companies currently facing similar decisions about event postponements or cancellations should evaluate their risk of exposure to similar class action lawsuits. Review of the above-cited complaints might enable companies to identify strategies for avoiding similar adverse claims in future litigation. In addition, businesses should consider certain key legal issues while plotting their strategies moving forward to minimize legal risk, without sacrificing customer trust and relationships in the long term.

As a preliminary matter, companies should determine what contracts would govern claims arising from ticket purchases or membership agreements. Companies should work with counsel to review relevant contracts to understand and define the scope of their risk arising from canceled events and the cessation of membership services.

Relatedly, companies should determine what law would apply to actions brought by their customers. While a choice of law provision in a contract provides a useful starting point, the law that applies to a given action may depend on, among other things, what type of goods or services are at issue, where the company and customer are located, and where the transaction actually takes place. Such issues are inherently complicated and nuanced, so companies are encouraged to seek assistance from counsel in conducting this analysis. As noted above, California's consumer protection statutes, which many plaintiffs may seek to exploit, vary significantly from other states' laws. Understanding which state consumer protection laws would ultimately apply to claims against a company is essential to defining the scope of risk posed by various corporate policy decisions.

Companies should carefully evaluate their existing refund and cancellation policies and consider whether updates or revisions might be appropriate. To date, organizations have implemented a range of refund- and membership-related policies in response to COVID-19—including refunding tickets and membership fees entirely; waiving cancellation and/or change fees for air travel; and offering customers "bonus" credit against future purchases (e.g., 120% of the original purchase price) in lieu of refunds of prior purchases. As the above complaints indicate, however, consumers affected by COVID-19 may have a strong preference for full and prompt cash refunds and an abatement of recurring membership fees. Moreover, scrutiny from the media, state attorneys general, and lawmakers and regulators may lead companies to conclude that offering anything less than full refunds to customers would risk lasting reputational damage that outweighs the immediate financial loss of issuing the refunds.

When evaluating existing corporate refund and cancellation policies or developing new ones, companies should also take care to formulate a communication strategy explaining the policies to customers. In several of the complaints noted above, plaintiffs' negligent misrepresentation and fraud claims target ambiguous or inconsistent corporate messaging. These miscommunications can be avoided by drafting clear language and ensuring that it is communicated consistently. Furthermore, announcing or reiterating refund or

cancellation policies may help to discourage class action litigation or improve the company's position with regard to certain claims after a complaint is filed.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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1 *See Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012) (noting that California's CLRA, UCL, and False Advertising Law "have no scienter requirement, whereas many other states' consumer protection statutes do require scienter").

2 *Ward* v. *American Airlines*, 4:20-cv-00371-Y (N.D. Tex.) (complaint filed on Apr. 22, 2020).

3 *Ajzenman et al* v. *Office of the Commissioner of Baseball et al*, 2:20-cv-03643 (C.D. Cal.) (complaint filed Apr. 20, 2020).

4 *Hansen* v. *Ticketmaster Entertainment, Inc. and Live Nation Entertainment Co.*, 3:20-cv-02685 (N.D. Cal.) (complaint filed Apr. 17, 2020).

5 Ben Sisario, *Under Fire, Live Nation Outlines New Ticket Refund Plan*, NEW YORK TIMES, (last visited April 27, 2020), https://www.nytimes.com/2020/04/17/arts/music/live-nation-refunds-virus.html.

6 *Rezai-Hariri* v. *Six Flags Discovery Kingdom*, 8:20-cv-00716 (C.D. Cal.) (complaint filed Apr. 10, 2020).

7 *Carisi* v. *Adventures Northwest*, 3:20-cv-02260-SK (N.D. Cal.) (complaint filed April 2, 2020).

8 *Pascrell, Porter Blast Ticketmaster Refusal to Refund Fans for Pandemic Postponed Shows*, BILL PASCRELL 9TH DISTRICT OF NEW JERSEY, (last visited April 24, 2020), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=4260.

9 666 F.3d 581 (9th Cir. 2012) (reversing class certification in case asserting nationwide class under CLRA, UCL, and FAL).

10 *See, e.g.*, *Azimpour* v. *Sears, Roebuck & Co.*, 2017 WL 1496255, at *10-11 (S.D. Cal. Apr. 26, 2017) (granting motion to dismiss plaintiff's nationwide class action claim for lack of Article III standing).