Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Mitigating Class Action Exposure From COVID-19 Disruptions

By **Chantale Fiebig and Kelley Pettus** (May 13, 2020, 5:12 PM EDT)


Chantale Fiebig


Kelley Pettus

As businesses of all kinds have been affected by the COVID-19 pandemic, many that have canceled events or suspended services have been forced to make difficult decisions relating to refunds or other remedies for clients and customers. The decisions made by businesses today could have lasting significance in class action litigation, particularly as they relate to potential mitigation of damages.

However, the challenges presented by the COVID-19 pandemic are unprecedented, and many mitigation measures, such as offering online services, would not have been possible even 15 years ago. As a result, history cannot provide clear guidance about how companies can prevent or lessen liability given the unique challenges of the pandemic and the revolutionary technology that has become a part of our daily lives.

Nevertheless, prior cases do provide important insights into considerations companies should weigh as they navigate novel issues relating to liability and damages stemming from canceled events or suspended services as a result of COVID-19.

Precluding Liability and Limiting Damages

Companies in countless industries are considering a variety of efforts to minimize disruption to their clients or customers during the pandemic, including potentially issuing refunds, offering alternative (or online) experiences, or providing credits for future or extended services.

While these decisions are paramount to each company's relationships with its customers, they can also directly affect the outcome of class actions filed in the wake of the pandemic. Indeed, if past cases are any indication of how courts might treat liability and damages in COVID-19 suits, mitigation efforts taken now could have significant implications for a company's legal risk.

Breach of Contract Claims

Most of the COVID-19 class actions filed so far relating to canceled events or shuttered venues allege breaches of contract, including in suits filed against entertainment companies, sports franchises and amusement parks.[1] In those cases, strong arguments can likely be made that the claims should be governed by the terms of the company's contract with consumers (including the terms of any arbitration provisions contained in the contracts).

Although the volume of class action precedent in these circumstances is limited, prior cases indicate that courts are likely to be receptive to arguments that where defendants have complied with the terms of their contracts with clients or consumers, they are not liable for breach.

Courts have found that when the terms of the contract provide for a specific form of relief in the event of breach, such as a refund of a ticket price, those terms will govern and can prevent a finding of liability when that remedy has been provided to the consumer. For example, in Druyan v. Jagger, a plaintiff asserted breach of contract claims on behalf of a class after a Rolling Stones concert was postponed because Mick Jagger had a sore throat.[2] Ticket holders were notified that they could either obtain a refund of the ticket price or attend a rescheduled show, but plaintiffs instead filed suit.

The court found that the terms of the plaintiffs' tickets and the terms of use on the purchase website bound the plaintiffs to the contractual remedies. Those terms provided that all events were subject to the risk of rescheduling and that ticket holders would be entitled to a refund of the ticket price if an event was rescheduled. Because the plaintiffs had been offered a refund, there was no breach and the plaintiffs' contractual claims were dismissed.[3]

Courts have also enforced contractual limitations on liability for cancellations. In Ansari v. Kuwait Airways Corp., for instance, the court found that the airline had not breached its contract to the plaintiff by canceling his flight due to a volcanic eruption in Iceland that closed the airport.[4] The terms and conditions of the ticket provided that the airline could cancel a flight because of events beyond its control and that a refund was the only remedy in the event of such a cancellation.

Since the volcanic eruption was beyond the airline's control, the court held the airline's only obligation to the plaintiff was a refund of his ticket price.[5] The plaintiff was not permitted to recover any costs incurred in obtaining alternative transportation.[6]

However, the terms of a contract may not protect against consequential damages, particularly if a court finds them to be ambiguous. For example, in Ibe v. National Football League, the NFL was alleged to have failed to install sufficient seating for Super Bowl XLV and thus denied some ticket holders entry to the game.[7] The terms of the ticket provided for a refund in the event that ticket holders were denied entry.

However, the court found that the "subject to refund" language on the ticket did not explicitly limit liability, and that plaintiffs could seek recovery for consequential damages caused by the NFL's alleged breach, such as expenses for travel to the game, to the extent those costs were foreseeable and provable.[8]

Offsetting Damages After Liability Is Found

Even where a defendant has been found liable, mitigation measures can help offset damages. Generally, damages for breach of contract are intended to restore injured parties to the position they would have occupied had the contract been performed.[9]

While punitive damages are not usually permitted, injured parties may be able to recover for other losses caused by the breach, including consequential or incidental losses, when there is no contractual limitation on such damages.[10] However, a defendant that is found liable and assessed compensatory or consequential damages is permitted to present evidence of value received by consumers to offset any damages owed.[11]

Some courts have allowed even partial refunds to offset a defendant's damages. In Rainbow Travel Service Inc. v. Hilton Hotels Corp., for example, the court offset Hilton's damages with its partial refund of Rainbow's initial payment for hotel rooms.[12] A jury had found Hilton liable for breach of contract when the hotel failed to honor room reservations for a travel group upon arrival and instead reserved the group rooms at a nearby hotel. Though the jury awarded the travel group damages, the court offset those damages with the hotel's partial refund of the group's initial payment for room reservations.[13] The treatment of partial refunds relating to COVID-19 disruptions is yet to be seen in the courts.

Courts may also (but need not) offset damages with any alternative benefit received by the consumer in lieu of a refund.[14] For example, the defendant in Makaeff v. Trump University LLC was permitted to put forth evidence of the value of the materials provided to the plaintiffs to support a damages offset.[15]

However, other courts have rejected offsets with gratuitous benefits or other benefits that were not part of the original bargain with plaintiffs.

In Rodman v. Safeway Inc., for instance, the defendant sought to offset its damages with evidence of unquantifiable benefits of online grocery shopping offered to the plaintiffs through its delivery services.[16] The court flatly rejected introduction of this evidence because these benefits were not a part of the bargain entered into by class members. Similarly, the court in Cappalli v. BJ's Wholesale Club Inc. rejected evidence of additional membership benefits offered to offset an unjust enrichment claim.[17]

Thus, while mitigation measures are not guaranteed to offset damages, courts may and often do consider such evidence to reduce liability.

Time Limits for Implementing Mitigation Measures

Time matters when it comes to implementing mitigation measures. Courts often consider when a company offered a refund or substitute services to consumers, and a robust mitigation measure provided early enough could even prevent certain lawsuits. Moreover, refunds or other benefits offered before a plaintiff files suit can defeat standing or preclude certification of a class. However, measures offered after plaintiffs have filed suit do not always moot plaintiffs' claims.

Preventing Standing to Bring Suit

A full refund issued to consumers prior to suit can redress plaintiffs' injuries such that plaintiffs lack standing to bring suit. In some instances, courts have found that refunds preclude standing when issued directly to plaintiffs' credit cards.[18]

For example, in Luman v. Theismann, the plaintiff's claim was redressed such that he lacked standing where he had received a full refund to his credit card two months prior to filing suit.[19] Additionally, courts have found refund checks issued prior to suit defeat standing, even where a plaintiff has not cashed the check.[20]

However, merely communicating that purchases may be refunded has been found inadequate to defeat standing because a potential plaintiff could choose to reject this "offer." For example, the U.S. Court of Appeals for the Seventh Circuit recently reversed the district court's holding in Laurens v. Volvo Cars of

North America on the grounds that the defendant's communication of a refund offer through a generic letter did not redress the plaintiff's injury since she did not accept it.[21]

Critically, once a suit has been filed, refunds or other mitigation measures may not suffice to prevent a suit from proceeding. Indeed, in Campbell-Ewald Co. v. Gomez, the U.S. Supreme Court held that an unaccepted settlement offer, such as a refund, was not sufficient to moot a claim.[22] This may be true even when a company offers plaintiffs all of their alleged monetary damages or more than they could receive at trial.[23]

Precluding Class Certification

In some instances, a full refund implemented prior to suit may be an effective mechanism to preclude class certification. Some courts find that a class action is not a superior means of resolving a claim where a defendant has offered a refund prior to suit being filed.[24] Other courts have refused to allow a refund to defeat superiority because a refund is not a means of "adjudication," as required by Rule 23.[25]

Whether a court will ultimately find that a refund program is a superior method of resolving claims is a toss-up, and one of the many cutting-edge class action issues likely to be clarified through COVID-19 litigation.

Conclusion

There are no easy answers for companies navigating the COVID-19 pandemic. Companies in every industry are undertaking herculean efforts to minimize disruptions to their customers, while simultaneously striving to survive in an uncertain economic climate. Although these are unprecedented times, prior court decisions suggest those same efforts may help those companies limit their exposure to class action liability based on COVID-19 disruptions.

Even if courts are not ultimately persuaded to limit liability or directly offset any damages based on refunds or other accommodations, such efforts are likely to engender tremendous goodwill with customers, and could position the company well if a court or jury is ever looking back to assess its conduct during these critical times.

For these reasons, as companies grapple with the difficult business decisions relating to their response to the pandemic, they should consult closely with their counsel to factor in considerations of liability and damages that could be impacted later by decisions made today.

Chantale Fiebig is a partner and Kelley Pettus is an associate at Gibson Dunn & Crutcher LLP.

[1] See e.g., Complaint, Hansen v. Ticketmaster Ent'mt, Inc., No. 20-02685 (N.D. Cal. Apr. 17, 2020) (alleging breach of contract for failure to issue ticket refunds); Complaint, McMillan v. StubHub, Inc., No. 20-319 (W.D. Wis. Apr. 2, 2020) (alleging breach of contract for failure to issue ticket refunds); Complaint, Rezai-Hariri v. Magic Mountain LLC, No. 20-716 (C.D. Cal. Apr. 10, 2020) (alleging breach of

contract for continuing to charge monthly membership fees while Six Flags parks remain closed); Complaint, Labib v. 24 Hour Fitness USA, Inc., No. 20-2134 (N.D. Cal. Mar. 27, 2020) (alleging breach of contract for continuing to charge membership fees while gyms remain closed); Complaint, Namorato v. Town Sports Int'l, LLC, No. 20-2580 (S.D.N.Y. Mar. 26, 2020) (alleging breach of contract for continuing to charge membership fees while gyms remain closed); Complaint, Bromly v. SXSW, LLC, No. 20-439 (W.D. Tex. Apr. 24, 2020) (alleging breach of contract for failure to provide refunds for festival tickets and instead offering admission to future festivals).

[2] Druyan v. Jagger, 508 F. Supp. 2d 228, 232 (S.D.N.Y. 2007).

[3] Id. at 237-38.

[4] Ansari v. Kuwait Airways Corp., No. 10-2426, 2011 WL 2457396, at *1 (E.D.N.Y. June 16, 2011).

[5] Id. at *3.

[6] Id.; see also Druyan, 508 F. Supp. 2d at 238 (terms of contract precluded recovery of consequential damages if an event was rescheduled or canceled).

[7] Ibe v. National Football League, No. 11-248, 2014 WL 4906886, at *1 (N.D. Tex. Sept. 30, 2014).

[8] Id. at *4-5.

[9] Restatement (Second) of Contracts § 347 cmt. a (1981).

[10] Restatement (Second) of Contracts §§ 355, 347(b) (1981).

[11] A defensive offset is a permissive counterclaim that does not need independent jurisdictional grounds in federal court. See, e.g., U.S. for Use and Benefit of D'Agostino Excavators, Inc. v. Heyward-Robinson Co., Inc., 430 F.2d 1077, 1080-81 (2d Cir. 1970). Traditional tort rules that preclude a defendant from offsetting damages with benefits or payments received by the plaintiff from third parties (the "collateral source rule") do not apply to contract damages because "only such damages will be allowed as fairly compensate the injured party for his loss." See United States v. City of Twin Falls, Idaho, 806 F.2d 862, 873-74 (9th Cir. 1986); see also International Longshore and Warehouse Union v. ICTSI Oregon, Inc., No. 12-1058, 2019 WL 267714 (D. Or. Jan. 17, 2019).

[12] Rainbow Travel Service, Inc. v. Hilton Hotels Corp., 896 F.2d 1233, 1243 (10th Cir. 1990).

[13] Id.

[14] FTC v. Kuykendall, 371 F.3d 745, 766 (10th Cir. 2004).

[15] Makaeff v. Trump University, LLC, 309 F.R.D. 631, 642 (S.D. Cal. 2015).

[16] Rodman v. Safeway Inc., 125 F. Supp. 3d 922, 932 (N.D. Cal. 2015).

[17] Cappalli v. BJ's WholeSale Club, Inc., 904 F. Supp. 2d 184, 198 (D.R.I. 2012); see also Hahn v. Massage Envy Franchising, LLC, No. 12-153, 2014 WL 5100220, at *17 (S.D. Cal. 2014) (finding that plaintiff's recovery should not be offset with any additional benefits of their membership).

[18] Luman v. Theismann, 647 Fed. App'x 804, 806-807 (9th Cir. 2016).

[19] Id.; see also Becker v. Skype Inc., No. 12-06477, 2014 WL 556697, at *2 (N.D. Cal. Feb. 10, 2014) (full refund of subscription fee nine days prior to suit redressed plaintiff's injury and thus he lacked standing).

[20] Epstein v. JPMorgan Chase & Co., No. 13-4744, 2014 WL 1133567, at *7 (S.D.N.Y. Mar. 21, 2014) (uncashed check reimbursing plaintiff for all economic damage he incurred as a result of the alleged breach redressed injury-in-fact and thus plaintiff lacked standing); see also Lepkowski v. CamelBak Prods., LLC, No. 19-04598, 2019 WL 6771785, at *2-3 (N.D. Cal. Dec. 12, 2019) (full refund redressed plaintiff's injury and prevented standing even though plaintiff maintained the refund in escrow).

[21] Laurens v. Volvo Cars of North America, LLC, 868 F.3d 622, 627-28 (7th Cir. 2017).

[22] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 670-71 (2016) ("When a plaintiff rejects such an offer — however good the terms — her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer — like any unaccepted contract offer — is a legal nullity, with no operative effect.")

[23] See Mey v. North American Bancard, LLC, 655 Fed. App'x 332 (6th Cir. 2016) (offer sent after suit was filed did not moot claims because, despite offering full monetary value of claims, it did not remediate the injunctive relief sought by plaintiff); Conrad v. Boiron, Inc., 869 F.3d 536 (7th Cir. 2017) (generous settlement offer did not moot claims).

[24] See Waller v. Hewlett-Packard Co., 295 F.R.D. 472, 488 (S.D. Cal. 2013); Pagan v. Abbott Laboratories, Inc., 287 F.R.D. 139, 151 (E.D.N.Y. 2012).

[25] See In re: Scotts EZ Seed Litigation, 304 F.R.D. 397, 415-16 (S.D.N.Y. 2015); Forcellati v. Hyland's, Inc., No. 12-1983, 2014 WL 1410264, at *12 (C.D. Cal. Apr. 9, 2014).