GIBSON DUNN

May 19, 2020

CLOSED FOR COVID-19: CLASS ACTION REFUND LAWSUITS, PRACTICAL CONSIDERATIONS, & POTENTIAL DEFENSES

To Our Clients and Friends:

The COVID-19 global pandemic has changed the face of the world for businesses and customers as we know it. Public health mandates and local, state, and national shelter-in-place orders have required events to be canceled, plans to be postponed indefinitely, and facilities closed until further notice. In the wake of these closures and cancellations, consumer frustration has mounted, and scores of class action lawsuits have followed. This Article examines the industries facing these lawsuits, describes the theories that plaintiffs are asserting, and provides some practical considerations and potential defenses for these lawsuits.

Industries Facing COVID-19 Related Refund Class Actions

Plaintiffs' lawyers have seized on the COVID-19 pandemic to bring class action lawsuits involving the following businesses:

Student Tuition and Fees

As schools have been forced to close their campuses and shift to online learning, students and parents have filed class actions seeking reimbursement of tuition, room and board, and other expenses. The student-plaintiffs allege that the value of their degrees, the quality of their education, and their enjoyment of on-campus facilities have been diminished by switching to online classes. As such, the students allege that they are entitled to refunds on the theory that schools are not fulfilling their alleged contractual obligations to provide an on-campus education. Scores of these lawsuits have been filed against private and public universities.[1] Multiple class actions have been brought that seek not only reimbursement of room and board fees, but also tuition.

Concerts and Sporting Events

Shelter-in-place orders have left no choice but to cancel or postpone concerts and sporting events. In response, ticketholders to these events have filed refund class actions against event sponsors, as well as the websites that facilitate ticket sales, seeking refunds. For example, season ticket holders have sued Major League Baseball for "unfairly" financially burdening customers by withholding refunds after MLB postponed the season.[2] Other class action complaints brought against ticket sellers allege that companies changed their refund policies after consumers had already purchased their tickets.

Season Passes and Memberships

Companies that offer memberships and season passes for access to physical facilities, such as fitness centers, yoga studios, and ski resorts, also find themselves facing class actions seeking refunds following long-term and seasonal closures resulting from COVID-19. For example, one plaintiff claims her gym is not refunding her monthly membership fee while the gym is closed.[3]

Travel Deposits

Consumers have filed a number of class actions against travel companies seeking refunds for canceled flights or cruises. While many travel companies have offered no-fee cancellations and provided a credit for future travel, plaintiffs allege that they should be entitled to refunds of the funds paid, rather than a credit for future travel.[4]

Defenses and Practical Considerations

Businesses that are facing class action lawsuits based on mandatory closures have several defenses that warrant consideration as part of any legal strategy.

Arbitration Agreements and Class Action Waivers

Arbitration agreements are included in many contracts that accompany consumer transactions. Since the Supreme Court's landmark decision in *AT&T Mobility LLC v. Concepcion*,[5] these types of agreements are enforceable subject to any generally applicable contract defenses that do not interfere with the fundamental attributes of arbitration (e.g., fraud, duress, and unconscionability).

As a result, one of the first steps a company should take in defending a consumer class action is determining whether the parties have agreed to resolve the dispute outside of court and outside of a class action setting. This also includes looking at whether there are arbitration provisions in third-party contracts, such as contracts between plaintiffs and ticket resellers.

If the case is one in which California law applies, then recent caselaw confirms that a company must also evaluate whether any of plaintiffs' claims that are the subject of an arbitration agreement seek a public injunction.

Other Contract-Based Defenses

Once a company has determined whether the case should proceed in court or before an arbitrator, it should consider other contract-based defenses, especially those that may excuse a company's performance or otherwise limit a company's liability.

A frequently invoked contract defense in the wake of COVID-19 is *force majeure*. These clauses vary from contract to contract, but as a general matter, the purpose of these clauses is to set forth when a party may terminate or fail to perform without liability due to an unforeseen event. We anticipate that these

clauses will be a particular focus of COVID-19 related litigation, especially those based on forced closures and cancellations.

Another possible defense is that there has been no actual breach of contract. If a company is complying with its contractual obligations, there is arguably no liability. For example, a contract may contemplate that an event or season may be cut short due to unforeseen circumstances, and it may assign that risk to the purchaser. Similarly, a purchaser's entitlement to a refund may turn on his compliance with the contractual procedures for receiving a refund.

Impossibility and frustration of purpose also may excuse performance. "Impossibility" applies where performance is objectively impossible, and "frustration of purpose" is triggered if circumstances make the required performance worthless to the receiving party. Companies may be subject to government orders that make it impossible to host an event or open facilities, and courts have held that impossibility during disasters, based on intervening government restrictions, can excuse performance.[6]

Causation and Reliance-Based Defenses

Depending on a plaintiff's theory, intervening factors may preclude, or mitigate, a company's liability. These factors could include state and local orders limiting large gatherings or evidence of a plaintiff's unwillingness to attend an event even if it were to proceed as scheduled.

A purchaser's conduct may also defeat his claim. If a purchaser does not mitigate his or her damages, recovery may be limited. For example, a purchaser who fails to accept a voucher may be subject to an offset, and a purchaser who fails to accept a refund offer may not have standing to bring a claim, depending on the circumstances. A purchaser may also waive or negate any claim based on subsequent conduct, such as continuing a membership or using a voucher.

Defenses based on COVID-19 may also exist on bad faith and unjust enrichment claims. Evidence that a company is thoughtfully considering different options for responding to COVID-19 may negate a finding of bad faith. Similarly, companies are still incurring substantial costs due to government orders and closures, even with events canceled and facilities closed. Thus, a company may respond to an unjust enrichment claim by arguing that it is not unjustly retaining benefits due to the excessive costs it is incurring as a result of forced closures.

Class Certification Defenses

As this discussion suggests, putative class members are not going to be similarly situated and/or affected by the pandemic. For example, entitlement to a refund could turn on individualized issues, such as the specific representations to each consumer, and the steps taken to secure a refund. Individualized inquiries may also exist based on customer expectations. A frequent traveler may understand that flights are subject to unforeseen cancellation, but not a less-experienced traveler. In addition, damages may vary and be incapable of a method that allows them to be determined across the class. For example, a class member who uses a gym pass 50 times per year is differently situated than a consumer who historically uses it more infrequently. The presence of arbitration clauses and class action waivers in

contracts with at least some of the putative class members can also make a class action lawsuit an inappropriate forum.

Conclusion

Companies that have canceled or postponed events or closed their facilities face many difficult choices based on COVID-19, and the specter of class action lawsuits further complicates these decisions. Regardless of a company's approach, and even if a company is already subject to a class action lawsuit, there are important considerations that companies should weigh with counsel in order to determine the best path forward.

---

[1] *See, e.g.*, *Rickenbaker v. Drexel Univ.*, No. 2:20-cv-1358 (D.S.C. Apr. 8, 2020); *Dixon v. Univ. of Miami*, No. 2:20-cv-1348 (D.S.C. Apr. 8, 2020); *Rosenkrantz v. Ariz. Bd. of Regents*, No. 2:20-cv-00613 (D. Ariz. Mar. 27, 2020).

[2] *Ajzenman v. Office of the Comm'r of Baseball*, No. 2:20-cv-03643 (C.D. Cal. Apr. 20, 2020).

[3] *Labib v. 24 Hour Fitness USA Inc.*, No. 4:20-cv-02134 (N.D. Cal. Mar. 27, 2020); *see also Weiler v. Corepower Yoga LLC*, No. 2:20-cv-03496 (C.D. Cal. Apr. 15, 2020); *Kramer v. Alterra Mountain Co.*, No. 1:20-cv-01057 (D. Colo. Apr. 14, 2020).

[4] *See, e.g.*, *Manchur v. Spirit Airlines Inc.*, No. 1:20-cv-10771 (D. Mass. Apr. 21, 2020); *Alvarez v. Hawaiian Airlines Inc.*, No. 1:20-cv-00175 (D. Haw. Apr. 20, 2020); *Roman v. JetBlue Airways Corp.*, No. 1:20-cv-01829 (E.D.N.Y. Apr. 16, 2020); *Herr v. Allegiant Air LLC*, No. 2:20-cv-10938 (E.D. Mich. Apr. 15, 2020); *Bombin v. Sw. Airlines Co.*, No. 5:20-cv-01883 (E.D. Pa. Apr. 13, 2020).

[5] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

[6] *See, e.g.*, *Bush v. ProTravel Int'l*, 192 Misc. 2d 743, 752–53 (N.Y. Civ. Ct. 2002) (recognizing impossibility of performance due to state of emergency following September 11 terrorist attacks).

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For additional information, please contact any member of the firm's Coronavirus (COVID-19) Response Team or its Class Actions practice group, or the following authors:

AUTHORS: *Christopher Chorba, Timothy W. Loose, Daniel Weiss, Jeremy S. Smith, Emily Riff, and Andrew Kasabian.*