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COVID-19 Generates Class Litigation, Cobbled Legislation and Confusion for Corporate Refund and Return Policies

Not wasting time, consumer plaintiff lawyers are bringing numerous class actions to take advantage of the marketplace chaos caused by the COVID-19 pandemic. At the same time, state legislators, attorneys general and corporations seek to keep up with the ever-changing landscape.

Key takeaways:

- The uncertain times of the COVID-19 pandemic require extra vigilance and attention to new risks brought about by various states' quickly drafted legislation and shelter-in-place orders.
- Corporations should give serious consideration to long-term effects of changing or updating return and refund policies.
- Given the economic effect of the shelter-in-place orders, state attorneys general are even more aggressive in overseeing and protecting consumer interests.

COVID-19 has wrought unprecedented disruption and challenge to virtually every business, regardless of size or sector. In addition to the health and welfare of employees and customers, shelter-at-home and social distancing requirements, and the uncertainty of how long these measures will last, have had a severe impact on revenue, leaving businesses to seek creative and immediate cost-saving measures. As companies navigate these challenges, consumer

class action attorneys remain ever-creative and are responding quickly. In the past few weeks, we have seen trends emerging in class action complaints being filed across the country.

One of these trends is to target businesses that have modified return practices and policies. For example, many companies have extended their return policies to accommodate the reality that physical locations are closed and in-person returns are impossible. At the same time, stores that are currently open and selling essential items (such as household goods and cleaning supplies) may be limiting returns due to health concerns surrounding returned items. Indeed, New Jersey passed a bill ([A3865](#)) that prohibited retail food stores from accepting the return of groceries and other foodstuffs purchased during, and for 30 days following, the COVID-19 state of emergency. Returns due to manufacturer defect were allowed, provided the store does not put the item back on the shelf.

Companies are also modifying or suspending their refund practices, especially in light of mass cancellations of in-person events, including those involving travel and accommodations. These decisions raise potential consumer protection concerns, and class action attorneys have already exploited these decisions. In the first half of April alone, at least 15 putative national class action lawsuits have been filed against businesses for failing

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to honor refund policies or for enforcing policies that are alleged to be unfair or misleading. The lawsuits include a variety of causes of action including breach of contract, unjust enrichment, violations of state consumer fraud and false advertising laws, and common law fraud and conversion, among others. Nearly every area of the consumer marketplace has been targeted, with cases being filed across the country, including California, Wisconsin, New York, Pennsylvania and Florida, and across retail groups, such as ticket brokers, sports teams, amusement parks and banks. Some examples include:

- *Cuenco v. ClubCorp USA Inc.* (S.D. Cal, 4/23/20) (alleging operator of private clubs illegally continuing to charge membership dues)
- *McMillan v. StubHub, Inc.* (W.D. Wis. 4/2/20) (alleging change in refund policy for event tickets violates California law)
- *Radford v. Town Sports International Holdings, Inc.* (S.D. N.Y. 4/9/20) (alleging breach of contract under NY law related to gym memberships)
- *Ruiz v. Magic Mountain LLC* (C.D. Cal. 4/13/20) (alleging violation of California law for closing an amusement park but collecting membership fees)

While we are seeing the most activity coming from the plaintiffs' bar, state attorneys general and other governmental agencies appear to be supporting consumers' positions, and similar government challenges may not be far behind. For example, the Colorado Attorney General indicated that he expects businesses to bear the losses stemming from COVID-19-related cancellations. In Arizona and Wisconsin, the attorneys general have demanded gyms cease billing for memberships and revoke cancellation policies. On April 13, 25 bipartisan state attorneys general requested the United States Department of the Treasury "take immediate action to ensure" the monetary relief provided by the Coronavirus Aid, Relief, and Economic Security (CARES) Act is

not subject to garnishment. In addition, there have been additional concerns and issues raised from an antitrust perspective regarding favorable terms being offered to vendors who request relaxed or unique payment terms.

In most states, retailers are able to set their own refund and return policies. At least 14 states require the prominent display of a policy or any material terms if the retailer does not provide a full cash or credit refund for goods purchases made within some number of days. While each state's laws differ, the laws generally require that any return policy must (1) be conspicuously displayed; (2) be displayed in no less than 14-point font; (3) be posted and viewable prior to the transaction; and (4) state the conditions under which a refund will or will not be given, including exclusions. If a return policy is not compliant with those four requirements, then customers may be statutorily guaranteed the right to return an item within as short as seven days after purchase (Connecticut), all the way up to 60 days after purchase (Hawaii). Notably, some states provide exceptions for items that are food, plants, perishables, custom-made, items marked "as is" or "final sale," or items that cannot be resold under state or federal law.

From a federal perspective, the Mail, Internet, or Telephone Order Merchandise Rule prohibits sellers from soliciting orders unless, at the time of the solicitation, the seller has a reasonable basis to expect it will be able to ship 1) within the time it states, or 2) if no time is stated, within 30 days. Indeed, the Federal Trade Commission (FTC) recently settled allegations against Fashion Nova Inc. to the tune of \$9.3 million for failure to meet shipping representations, failure to provide consumers with notice of shipping delays and failure to provide an option to cancel. Given the unpredictable shipping delays facing the retail industry, companies are well advised to review their shipping and fulfillment protocols and promises.

Businesses should review their current membership, refund and return policies to ensure they are compatible with their current business needs and the law in the various states in which they operate, and consider best practices and risk mitigation if they are considering modifying consumer policies.

While every business and policy is different, some general best practices for companies implementing or considering an update to their refund or return policies include:

- Process and provide refunds in accordance with any promised time frame, and if none has been promised, within a reasonable time.
- Exercise caution if retroactively changing refund or return policies, even where the current policy provides for doing so.
- Make policy changes prospective, such as issuing refunds in the form of credits rather than cash for returns, to help mitigate class action risks.
- Notify consumers of changes to existing policies.
- Beware of relying on force majeure clauses in consumer contracts or terms of service, as consumer protection laws are likely to take precedence.
- Ensure any cancellation or return fees or penalties are reasonable and are clearly communicated to consumers.

- If issuing credit for returns, consult applicable federal and state gift card laws as well as escheat laws.
- Consider whether consumers may be owed prorated refunds, and issue any refunds promptly.
- If making reductions in staffing, ensure adequate staffing to field consumer inquiries and process refunds or returns.

We will continue to closely monitor the quickly changing situation and provide updates with additional suggested best practices to avoid the onslaught of class action challenges..

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