



Preparing for the Onslaught of COVID-19 Litigation

May 19, 2020

Presenters



Rachael Meny

Partner

rmeny@keker.com

(415) 676-2245



Sharif Jacob

Partner

sjacob@keker.com

(415) 676-2237

Agenda

1. COVID-19 Litigation Landscape

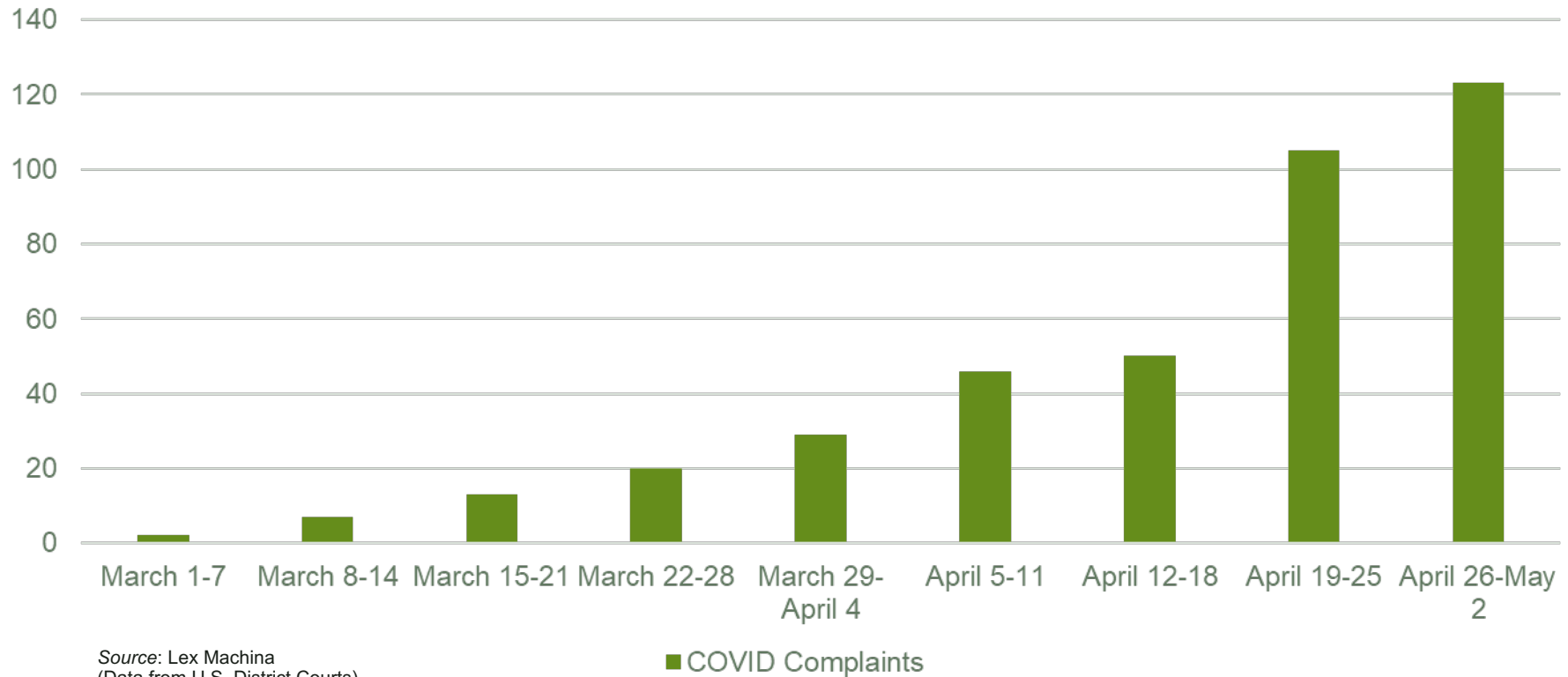
2. Effect on Pending Litigation

3. Assessment of Future Trends

4. How to Prepare Now

COVID-19 Litigation Landscape

Actions Arising from COVID-19



COVID-19 Litigation Landscape

Case Type	Prominent Defendants
Failure to Refund	United Airlines; StubHub; Major League Baseball
Price Gouging	Amazon; Cal-Maine Foods
Antitrust	GrubHub; DoorDash; Uber Eats
False Advertising	Purell; Germ-X; Target
Securities Fraud	Inovio Pharmaceuticals; Norwegian Cruise Lines
Improper Denial of Coverage	Hartford Fire Insurance; Society Insurance
Failure to Protect	Uber; Lyft; Royal Caribbean; Wal-Mart
Wrongful Termination	Trader Joe's; Hooters
Privacy	Zoom; TikTok

Failure to Refund

- **Allegations:** Defendants failed to issue refund for a service not rendered. Often involving subscriptions (e.g., gyms), prepaid services (e.g., season passes; university tuition and housing; airline flights).
- **Prominent Defendants:** Major airlines (e.g., United, Delta); universities (e.g., Arizona State, Columbia); StubHub; Major League Baseball; fitness clubs (e.g., New York Sports Club, L.A. Fitness)
- **Example Legal Claims:**
 - California Unfair Competition Law
 - California False Advertising Law
 - California Consumers Legal Remedies Act
 - Conversion
 - Unjust enrichment
 - Negligent misrepresentation



Price Gouging

- **Allegations:** Defendants wrongfully increased prices of goods in midst of COVID-19 pandemic.
- **Prominent Defendants:** Amazon; Cal-Maine Foods
- **Example Legal Claims:**
 - California Unfair Competition Law
 - Unjust enrichment
 - Negligence



Antitrust

- **Allegations:** Food delivery app companies used their market power to impose unlawful price restraints in their merchant contracts.
- **Prominent Defendants:** GrubHub, DoorDash, PostMates, Uber Eats
- **Example Legal Claims:**
 - Sherman Act §§ 1, 2



False Advertising

- **Allegations:** Defendant manufacturers/retailers misrepresented the efficacy of sanitizing products.
- **Prominent Defendants:** Gojo Industries d/b/a Purell; Germ-X; Target
- **Example Legal Claims:**
 - California Unfair Competition Law
 - California False Advertising Law
 - California Consumer Legal Remedies Act
 - Magnuson Moss Warranty Act
 - Negligent & intentional misrepresentation



Securities Fraud

- **Allegations:** Defendants inflated stock price through materially misleading statements regarding COVID-19 vaccine or impact of pandemic on business outlook.
- **Prominent Defendants:**
 - Inovio Pharmaceuticals
 - Norwegian Cruise Lines
- **Example Legal Claims:**
 - Securities Exchange Act §§ 10(b), 20(a)



Improper Denial of Insurance Coverage

- **Allegations:** Challenges to insurance companies' positions that business closures in reaction to COVID-19 are not covered losses under business insurance policies.
- **Prominent Cases:**
 - French Laundry Partners v. Hartford Fire Insurance Co.
 - Big Onion Tavern Group v. Society Insurance
- **Example Legal Claims:**
 - Declaratory judgment
 - Breach of contract



Failure to Protect

- **Allegations:** Defendant employers failed to protect workers from the harmful effects of COVID-19 in the workplace.
- **Prominent Defendants:** Uber, Lyft, Royal Caribbean; Wal-Mart
- **Example Legal Claims:**
 - California Labor Code § 246 (Misclassification of employees as independent contractors, denying benefits to drivers during pandemic)
 - Wrongful death (state statutes)
 - Negligence, NIED, IIED



Wrongful Termination

- **Allegations:** Defendants illegally terminated or laid off employees during COVID-19 pandemic.
- **Prominent Defendants:** Trader Joe's; Hooters
- **Example Legal Claims:**
 - Wrongful discharge
 - Worker Adjustment and Retraining Notification (WARN) Act



Privacy

- **Allegations:** Defendants violated user privacy, for technology platforms widely used during COVID-19 pandemic.
- **Prominent Defendants:** Zoom, TikTok
- **Example Legal Claims:**
 - State privacy laws
 - Failure to protect user communications
 - Wrongful use of biometric information, such as faces



Effect on Pending Litigation

Effect on Courts

- **Some courts are all but closed**
 - San Diego Superior Court, through at least May 22 (hearing only emergency matters)
- **Many are accepting limited filings**, with courtrooms closed and level of activity varying by judge
 - E.g., California Superior Courts of Alameda, Los Angeles, San Francisco, San Jose
- **Most federal courts continue to conduct court business**
 - E.g., N.D. Cal., C.D. Cal., and S.D. Cal.
 - Courtrooms closed but filings accepted, some holding telephonic hearings
 - But trials generally continued to later dates
- **Some courts are even Zooming**, like the rest of us!



Effect on Cases in Progress

- **Numerous stays and delays of litigation**
 - See, e.g., *Optrics Inc. v. Barracuda Networks, Inc.*, 2020 WL 1815689, at *1 (N.D. Cal. Apr. 1, 2020)
- **But not all courts are granting stay motions, even where stipulated**
 - See *FTC v. Hornbeam Special Situations, LLC*, 17-cv-3094-WMR (N.D. Ga. Mar. 20, 2020)
- **Courts are more frequently resolving motions on the papers**
 - E.g., *Fluidigm Corp. v. IONpath, Inc.*, 2020 WL 1433178, at *1 (N.D. Cal. Mar. 24, 2020)
- **Some depositions moving to video**

Assessment of Future Trends

Immunity from Suit

- Various legislation proposed or passed to limit businesses' liability to employees (and, less frequently, to consumers) resulting from COVID-19 exposure
- Businesses would still have to comply with safe harbors, such as compliance with gov't health guidance
- **Federal:** Senate leadership wants nationwide immunity, but House opposes and is not included in recently passed House bill
- **States:** Several have passed limited immunity, such as for nursing homes & other medical providers (e.g., New York). Other states in process of granting broader immunity (e.g., Senate bill passage in Oklahoma).
- **California:** No legislation passed. For worker's comp. claims, Governor's recent EO creates, in some instances, a presumption that employees with COVID got it on the job.



Criminal Enforcement

- Insider Trading
- Fraud
 - Securities Fraud
 - False Claims
 - Bankruptcy Fraud
- Antitrust



Litigation Invoking Force Majeure Clauses

- Contract provisions that excuse nonperformance due to “acts of God” or extraordinary events
- **Breach of contract** or **declaratory judgment** actions
- When evaluating clause applicability, courts consider:
 1. Whether event qualifies as force majeure under the contract;
 2. Whether risk of nonperformance was foreseeable and capable of mitigation; and
 3. Whether performance is truly impossible.



CARES Act Compliance

Paycheck Protection Program (PPP) Loans

- Loan applicants must certify that “current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
- All PPP loans >\$2M will be audited by the Small Business Administration, and companies “could be subject to investigation.” Safe harbor for PPP loans <\$2M.
- “It is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith.”



How to Prepare Now

Review Existing Contracts



Be Mindful of Communications with Competitors



The screenshot shows the Federal Trade Commission (FTC) website. At the top is the FTC logo and the text "FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS". Below this is a navigation bar with links: "ABOUT THE FTC", "NEWS & EVENTS", "ENFORCEMENT", "POLICY", and "TIPS & ADVICE". The main content area displays a breadcrumb trail: "Home » News & Events » Press Releases » Federal Trade Commission and Justice Department Issue Joint Statement Announc Labor Markets". The headline reads: "Federal Trade Commission and Justice Department Issue Joint Statement Announcing They are on Alert for Collusion in U.S. Labor Markets". To the right of the headline are social media sharing icons for Facebook, Twitter, and LinkedIn, with the text "SHARE THIS PAGE" above them. In the bottom left corner, there is a blue box with the text "FOR RELEASE" and the date "April 13, 2020".

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Federal Trade Commission and Justice Department Issue Joint Statement Announcing They are on Alert for Collusion in U.S. Labor Markets

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Identify Salient Risks



Assess Risks in an Attorney-Client Setting



Document Final Policy



Consider Possible Defenses



Consider Offensive Claims and Remedies



Questions?
