The State Of Consumer Class Actions Amid COVID-19

By **Jessica Miller, Jordan Schwartz and Anthony Balzano** (December 2, 2020, 1:06 PM EST)

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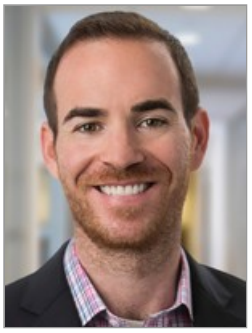

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COVID-19 is not just grinding civil trials to a halt and foreclosing live, in-person judicial proceedings, it is also slowing the filing of consumer class actions — down from approximately 290 putative class action complaints in October 2019 to 148 in October 2020.[1]

In an effort to better understand class action trends, we collected and categorized the complaints in cases filed in federal district courts during the month of October 2020.

While these complaints run the consumer class action gamut, the most common putative class actions were consumer fraud lawsuits alleging that a manufacturer's marketing is deceptive or misleading. In addition, as expected, some consumer class actions have focused on COVID-19 in particular, challenging universities' and other businesses' inability to deliver services as promised as a result of the ongoing pandemic.

Below, we detail our methodology for collecting and categorizing these complaints and offer some analysis regarding the current state of play for consumer class actions.

To collect and categorize consumer class action complaints in cases filed in federal district courts in October, we focused on those categories of lawsuits that can fairly be regarded as consumer lawsuits. We did not include antitrust, securities and civil rights actions in our review of October filings.

Once narrowed, we determined that approximately 148 consumer class action complaints were filed in federal court during October. And after categorization, four types of cases accounted for approximately two-thirds of the filings: 34 consumer fraud/false advertising cases; 31 Telephone Consumer Protection Act cases; 23 COVID-19-related cases; and 12 data breach cases.

The remaining cases were a hodgepodge of claims, including actions for breach of specific contracts; actions alleging that college athletes were inadequately warned about or protected from the risk of head injuries; actions under the Fair Debt Collection Practices Act; actions related to online illegal gambling; actions related to insurance claims; actions related to specific product defects; and actions for invasion of privacy.

As for jurisdiction, approximately half of all these complaints were filed in just seven jurisdictions:

- 19 in the U.S. District Court for the Southern District of New York;
- 13 in the U.S. District Court for the Central District of California;
- 13 in the U.S. District Court for the Northern District of California;
- Nine in the U.S. District Court for the Southern District of Florida;
- Eight in the U.S. District Court for the Eastern District of New York;
- Seven in the U.S. District Court for the Southern District of California; and

- Six in the U.S. District Court for the Northern District of Illinois.

The forums for these class actions are not surprising. With nationwide class actions essentially dead, plaintiffs lawyers typically seek to certify class actions in the states with the largest populations. In addition, the U.S. Courts of Appeals for the Second and Ninth Circuits have issued rulings in the last few years that appear to endorse a more permissive standard for some consumer protection cases, which has likely made those forums more attractive for plaintiffs lawyers.[2]

As noted above, the most popular category of consumer class actions filed in October are false advertising lawsuits, which typically involve allegations that product attributes are misleadingly touted on the front of food or beverage packaging, even if the ingredients and nutritional information on the back or side of the package are accurate.[3]

The theory for these cases can take on countless permutations — e.g., the products are not natural, contrary to representations on their label; the products are not as healthy as allegedly depicted; or the products do not contain as many servings as suggested on the label.

For example, in Prater v. Arizona Beverages USA LLC, the complaint, recently filed in the Southern District of New York, alleges that Arizona Iced Tea products are deceptively labeled as "lite" because the products contain high levels of calories and sugar.[4] According to the complaint, the "term 'Lite' is misleading because it gives the impression that consumption of the Product, when compared to other foods in its class, contributes substantially to the reduction of calories in the diet."[5]

Similarly, in Flaherty v. COOLA LLC, recently filed in the Northern District of Illinois, the complaint alleges that the label on the defendant's sunscreen contains several misleading representations that suggest it provides protection from the entire infrared spectrum when it does not.[6] And yet another complaint recently filed in the Central District of California, Tan v. The Folger Coffee Co., alleges that the label on a coffee cannister misrepresents the number of cups that can be brewed from the product.[7]

Although the overall number of consumer class actions has dropped significantly, activity on the false labeling front has remained relatively consistent, with 38 false labeling complaints filed in October 2019, as compared to 34 complaints filed in October 2020. There are several likely reasons why plaintiffs lawyers are attracted to filing such labeling suits.

First, they are easy to research, file and litigate without leaving one's home. Lawyers can also copy and paste prior complaints, which reduces the transaction costs for filing these cases since the allegations are the same from case to case.

Indeed, many of the lawsuits are filed by the same plaintiffs lawyers, who can easily repurpose previously filed class action complaints without undertaking significant presuit investigatory efforts. For example, Sheehan & Associates PC filed 15 labeling suits in the Southern District of New York in October, advancing similar theories of deception against different defendants with respect to different products.[8]

Several of those complaints — e.g., Collishaw v. Cooperative Regions of Organic Producer Pools and Bradshaw v. Blue Diamond Growers — contain virtually identical allegations regarding the vanilla-based labeling of different products. Notably, a judge in the nearby Eastern District of New York recently denied a motion to dismiss in a similar case involving allegations that vanilla-related representations on the front of soda packaging were misleading.[9]

Second, it is increasingly difficult for defendants to win motions to dismiss in these kinds of cases, and many defendants settle after that point. Thus, these cases are seen by plaintiffs lawyers as a chance for quick payoffs, and even if they proceed past motions to dismiss, they can be litigated relatively easily without in-person proceedings.

As expected, plaintiffs lawyers have also filed putative class actions related to COVID-19 itself.[10] For the most part, these complaints related to COVID-19 allege that, due to COVID-19 lockdown orders and restrictions, the defendant cannot deliver the services promised to the putative classes, in part or at all, and that the putative class members should receive a refund or reimbursement for the

undelivered services.

For example, in Adavenaixx v. Howard University, the complaint, recently filed in the U.S. District Court for the District of Columbia, alleges that Howard University imposed certain restrictions due to the COVID-19 pandemic that resulted in services not being delivered to the putative class of students who paid tuition and fees, and that the students are entitled to a refund for the undelivered services.[11]

More specifically, the complaint alleges that the university breached its contract with the putative class of students by only offering online classes and not providing in-person services or physical access to the campus's facilities for the use of the students.

Similarly, in Hoak v. United Specialty Insurance Co., the complaint, recently filed in the Northern District of California, alleges that the putative class is entitled to a refund or reimbursement from the insurance purchased for unused ski passes since the ski trails were closed due to COVID-19.[12] And in another complaint recently filed in the Northern District of California, Reynolds v. StubHub Inc., the plaintiffs allege that the popular ticket selling website unlawfully withheld refunds to customers who purchased tickets for shows that were subsequently canceled because of the COVID-19 pandemic.[13]

As with the consumer labeling cases, these COVID-19 suits do not require particularly intense legal or factual investigation to file, with most being based on a fairly straightforward theory — i.e., the amount paid should be fully or partially refunded because the agreed service or access to physical space was not or cannot be delivered. Plaintiffs lawyers are also likely attracted to these suits because they present simpler issues at class certification in that consumers are more or less in the same boat when they pay for something that is canceled.

But simpler is not tantamount to certifiable, and plaintiffs counsel might be overlooking the highly individualized facts that underlie these putative class actions, including, for example, any oral representations that were made in connection with the underlying contracts or variations among the contract terms themselves.

Beyond the labeling and COVID-19-related class actions, the October docket for federal courts also saw a steady flow of TCPA-based complaints. These TCPA complaints all follow the same formula: a single plaintiff or a handful of plaintiffs sue a company alleging that it violated the TCPA by sending unsolicited — usually computer-generated — phone calls or text messages to the class.

For example, in Robinson v. WeCompete Inc., the complaint, recently filed in the Southern District of New York, alleges that the defendant violated the TCPA by sending unsolicited text messages advertising its business to the putative class.[14] As with COVID-19-related class actions, lawsuits alleging violations of the TCPA have been — and are likely to continue to be — a major focus of plaintiffs lawyers during the pandemic in light of the relatively straightforward nature of the underlying facts and requested remedy — typically, statutory damages that do not require individualized proof of causation or reliance.

Of course, a fundamental element of liability under the TCPA is that the defendant sent the communication without the plaintiff's consent, which some courts have made clear cannot be adjudicated on a classwide basis.[15] Thus, while it is a fair bet that at least some of these putative TCPA-based class actions will survive threshold motions to dismiss, they might ultimately be doomed by the thorny issue of consent.

Finally, October also saw a significant number of putative class actions filed related to data breaches. Unlike the other lawsuits described in this article, data breach suits can threaten any company, regardless of industry, because virtually every business stores some amount of personal information gathered from the public.

For example, in Saunders v. Collabera Inc., the complaint, recently filed in the U.S. District Court for the District of New Jersey, alleges that the defendant, a corporate staffing company, failed to adequately protect personal information collected from employees stored on its database when a third party gained access to, and allegedly stole, that personal information.[16]

In Trandem v. Blackbaud Inc., the complaint, recently filed in the U.S. District Court for the District of South Carolina, lodges similar data breach allegations, but the defendant is a cloud-based data storage company that provides millions of users — typically nonprofit organizations such as hospitals and universities — with data storage software and services.[17]

We expect that a hotly litigated threshold question in these and other data breach class actions will be Article III standing — i.e., whether the named plaintiffs have plausibly alleged a concrete injury as a result of the data breach. While some courts — e.g., the U.S. Court of Appeals for the Ninth Circuit — have held that data theft alone can constitute a cognizable injury, other courts — e.g., the U.S. Court of Appeals for the Second Circuit — have required actual misuse of the stolen information for purposes of standing.[18]

But regardless of how the cases play out, one thing seems clear: Data breach class actions are not going away anytime soon. In an increasingly digital world and with online shopping likely hitting an all-time high this holiday season because of the pandemic, the opportunity for data breaches is likely to increase dramatically too.

And, as reflected by the diversity of companies hit with these lawsuits, which span a variety of industries, any company can experience a data breach and an accompanying lawsuit.

As the examples discussed above illustrate, while COVID-19 has shut down most trials and in-person judicial hearings, it has not put an end to consumer class action filings. Moreover, although the overall activity on the consumer class action front has slowed, labeling class actions continue to be filed at a fast clip.

These particular kinds of suits likely remain popular among the plaintiffs bar because they are easy to file and frequently survive motions to dismiss. Other suits are, of course, a function of COVID-19 itself, and lack any prepandemic analog with which to compare.

In sum, although consumer class actions have not been immune to the effects of the ongoing pandemic, they remain a significant part of the current litigation landscape.

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[1] The results for both October 2019 and October 2020 were generated by searching the Bloomberg Law database for class actions docketed in federal district courts with the following associated filing codes: Banks and Banking [*430]; Cable/Satellite TV [*490]; Constitutionality of State Statutes [*950]; Contract - Enforcement of Judgment [*150]; Contract - Franchise [*196]; Contract - Insurance [*110]; Contract - Marine [*120]; Contract - Medicare Act [*151]; Contract - Miller Act [*130]; Contract - Negotiable Instrument [*140]; Contract - Other [*190]; Contract - Product Liability [*195]; Environmental Matters [*893]; Forfeiture/Penalty - Occupational Safety/Health [*660]; Forfeiture/Penalty - Other Food and Drug [*620]; Forfeiture/Penalty - Other [*690]; Miscellaneous [1999]; Other Statutory Actions [*890]; Personal Injury - Airplane Product Liability [*315]; Personal Injury - Airplane [*310]; Personal Injury - Asbestos Liability [*368]; Personal Injury - Assault [*320]; Personal Injury - Federal Employers Liability [*330]; Personal Injury - Health Care/Pharmaceutical Personal Injury/Product Liability [*367]; Personal Injury - Marine Product Liability [*345]; Personal Injury - Marine [*340]; Personal Injury - Medical Malpractice [*362]; Personal Injury - Motor Vehicle Product Liab. [*355]; Personal Injury - Motor Vehicle [*350]; Personal Injury - Other [*360]; Personal Injury - Product Liability [*365]; Personal Property - Other Fraud [*370]; Personal Property - Other Property Damage [*380]; Personal Property - Product Liability [*385]; Personal Property - Truth in Lending [*371]; Statutes: Customer Challenge 12 USC 3410 [*875]; and other [3990]. The nature of the search feature in the Bloomberg Law database returns cases docketed in federal district courts as of a certain date, and includes cases originally filed in the relevant federal court, cases removed from state court to the federal court in which they

are now pending and cases transferred from one federal court to another. Accordingly, the term "filed" as used herein includes cases removed from state to federal court and cases transferred from one federal district court to another.

[2] Mantikas v. Kellogg Co., 910 F.3d 633, 637 (2d Cir. 2018) ("[A] reasonable consumer should not be expected to consult the Nutrition Facts panel on the side of the box to correct misleading information set forth in large bold type on the front of the box."); Williams v. Gerber Prods. Co., 552 F.3d 934, 939 (9th Cir. 2008) ("We disagree with the district court that reasonable consumers should be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.").

[3] See, e.g., Jackson v. SFC Glob. Supply Chain, Inc., No. 3:20-cv-01072 (S.D. Ill. filed Oct. 12, 2020); Wong v. Old Lyme Gourmet Co., No. 3:20-cv-07095 (N.D. Cal. filed Oct. 12, 2020); Flaherty v. COOLA LLC, No. 1:20-cv-05964 (N.D. Ill. filed Oct. 7, 2020); Robie v. Trader Joe's Co., No. 3:20-cv-07355 (N.D. Cal. filed Oct. 20, 2020).

[4] No. 1:20-cv-09108 (S.D.N.Y. filed Oct. 29, 2020).

[5] Compl. ¶ 8, Prater v. Ariz. Beverages USA LLC, No. 1:20-cv-09108 (S.D.N.Y. filed Oct. 29, 2020).

[6] No. 1:20-cv-05964 (N.D. Ill. filed Oct. 7, 2020).

[7] No. 2:20-cv-09370 (C.D. Cal. filed Oct. 13, 2020).

[8] See, e.g., Prater v. Ariz. Beverages USA LLC, No. 1:20-cv-09108 (S.D.N.Y. filed Oct. 29, 2020).

[9] Sharpe v. A&W Concentrate Co., No. 19-cv-768 (BMC), 2020 WL 4931045 (E.D.N.Y. Aug. 23, 2020).

[10] See, e.g., T & J's 5th Down, Inc. v. Soc'y Ins., No. 1:20-cv-06153 (N.D. Ill. filed Oct. 16, 2020); RSV Enters., Inc. v. Soc'y Ins., No. 1:20-cv-06154 (N.D. Ill. filed Oct. 16, 2020).

[11] No. 1:20-cv-02872 (D.D.C. filed Oct. 7, 2020).

[12] No. 4:20-cv-07069 (N.D. Cal. filed Oct. 9, 2020).

[13] No. 4:20-cv-07040 (N.D. Cal. filed Oct. 8, 2020).

[14] No. 1:20-cv-08691 (S.D.N.Y. filed Oct. 19, 2020).

[15] See Gorss Motels, Inc. v. Safemark Sys., L.P., No. 6:16-cv-01638-Orl-31DCI, 2018 U.S. Dist. LEXIS 58111, at *11-12 (M.D. Fla. Apr. 5, 2018) ("Whether the issue of prior express consent can be resolved with generalized proof depends on the circumstances of each case. Several courts have declined to certify TCPA class actions after finding that individual issues regarding consent predominated over common questions of fact, while other courts have found that issues of consent did not predominate over common issues of fact.") (footnote omitted).

[16] No. 3:20-cv-15207 (D.N.J. filed Oct. 29, 2020).

[17] No. 2:20-cv-03487 (D.S.C. filed Oct. 1, 2020).

[18] Compare Krottner v. Starbucks Corp., 628 F.3d 1139, 1143 (9th Cir. 2010) ("[T]he plaintiff has met the injury-in-fact requirement for standing under Article III. Here, [p]laintiffs-[a]ppellants have alleged a credible threat of real and immediate harm stemming from the theft of a laptop containing their unencrypted personal data."), with Whalen v. Michaels Stores, Inc., 689 F. App'x 89, 90 (2d Cir. 2017) (unpublished) (holding that the allegedly hacked information was limited in scope and rejecting plaintiff's argument that she had standing as a result of the increased "risk of future identity fraud" stemming from a breach that exposed her credit card number and expiration date).