

COVID-19: DEFENDING CLASS ACTION LITIGATION IN PENNSYLVANIA

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INTRODUCTION

As Pennsylvania heads into its seventh week of quarantine due to the disease caused by the novel coronavirus (“COVID-19”),¹ businesses from all sectors continue to be severely impacted by the commercial shut down. The effects of COVID-19 have devastated local economies throughout the state. And while Governor Wolf recently announced his plan for reopening,² the road to recovery will be anything but short.

Actions taken (or not taken) in response to COVID-19 not only affect every aspect of a business — from its workforce and operations to its supply chains and finances — they also carry risks. One example of such a risk is the class action lawsuit. Because of the widespread and far-reaching nature of COVID-19, class action lawsuits provide the perfect vehicle for large masses to band together against corporate defendants over a multitude of issues ranging from workplace safety to unfair consumer practices and shareholder fraud.³

Already, there have been a number of COVID-19-related class actions filed in Pennsylvania. For example, on March 12, 2020, a shareholder of Inovio Pharmaceuticals filed a class action suit alleging false and misleading statements on the part of the biotechnology company with respect to what it had touted as a COVID-19 vaccine.⁴ Then, on March 26, 2020, a manufacturer of orchestral-quality instruments filed a class action suit challenging the Governor’s 19 March 2020 Order shutting down all “non-essential” businesses as an unconstitutional taking.⁵ And on April 17, 2020, a group of Pittsburgh-area restaurants filed a class action suit against Erie Insurance Exchange, alleging that the insurance giant had wrongfully failed to provide coverage for COVID-19-induced harms suffered by restaurants, bars, and the like.⁶

Class actions like these are just the beginning, and sadly, no business is immune. In-house lawyers and other business leaders who take the initiative now to review and brush up on key defense strategies will find themselves in a much better position if and when their company is named as a defendant in a class action lawsuit.

FORUM

At the outset, one of the most important things corporate defendants can do is to find a way to defeat class certification. Forum selection is a key consideration for achieving this goal because federal and state courts treat class action suits differently. By way of example, Pennsylvania state courts generally favor maintaining class actions,⁷ while federal courts do not. In federal courts, a plaintiff must demonstrate that a class action would be

the *superior* method for a fair and efficient adjudication,⁸ and because this is no easy hurdle for a plaintiff,⁹ state court is often the preferred forum.

STANDING

A plaintiff seeking to sue must have standing. In federal court, Article III of the United States Constitution provides that standing exists if a plaintiff has suffered an injury in fact which (1) is causally connected to the defendant's conduct and (2) can be redressed by a favorable court decision.¹⁰ In state court, Pennsylvania common law similarly provides that standing exists if a plaintiff has been aggrieved or adversely affected.¹¹ As explained by the Supreme Court of Pennsylvania, a plaintiff must establish a "substantial, direct[,] and immediate interest" in the outcome of the litigation — the causal connection between the grievance and the defendant's conduct must not be remote or speculative.¹²

REQUIREMENTS FOR CLASS CERTIFICATION

Rule 23 of the Federal Rules of Civil Procedure and Rule 1702 of the Pennsylvania Rules of Civil Procedure set forth the requirements for class certification in federal and state court, respectively.¹³ The rules are similar in that both permit one or more persons to bring suit on behalf of a larger group if (1) the class is so numerous that joinder is impracticable, (2) there are questions of law or fact that are common to the class, (3) the claims or defenses of the representing parties are typical of those of the class, and (4) the representing parties will fairly and adequately protect the interests of the class.¹⁴ Pennsylvania Rule of Civil Procedure 1702 contains one additional requirement: the plaintiff must show that a class action would provide a fair and efficient method of adjudication.¹⁵ To make this determination, courts consider various factors, including (1) the size of the class, (2) difficulties likely to be encountered in managing the class, and (3) whether separate actions might create the risk of inconsistent rulings with respect to individual class members.¹⁶

BURDEN OF PROOF

The burden of proof for each of the requirements of class certification falls on the plaintiff initially. And because federal courts impose a much higher standard than state courts, plaintiffs may see state court as more desirable.

To compare, a plaintiff seeking class certification in federal court must affirmatively demonstrate compliance with each of the requirements of Rule 23 by a preponderance of the evidence.¹⁷ This means that the facts necessary to make Rule 23 findings *more likely than not* must be true. A plaintiff seeking class certification in state court, on the other hand, only has to demonstrate compliance with each of the requirements of Rule 1702 by a *prima facie* showing.¹⁸ This means that the facts necessary to make Rule 1702 findings, standing alone and without more, are sufficient to establish the fact unless disproved or rebutted.¹⁹ The *prima facie* standard of proof, which is a significantly lighter burden to carry, comports with Pennsylvania's policy in favor of maintaining class actions.

OTHER DEFENSES

The elements of causation and injury, which tend to be fact driven, can give corporate defendants occasion to build solid defenses. Notably, claims which include reliance as an element (e.g., claims under Pennsylvania's Unfair Trade Practices and Consumer Protection Law²⁰) have been deemed by Pennsylvania state courts to be inappropriate for class certification because the inquiry into each individual class member's reliance would not make for a fair or efficient method of adjudication under Rule 1702(5).²¹

CONCLUSION

Amidst the uncertainties of COVID-19, one thing that is becoming clear is that many companies will find themselves in a position of having to defend against a class action. Suits involving large numbers of plaintiffs can raise the stakes for a company — even resulting in bet-the-company litigation. In-house lawyers and other business leaders armed with information about how to defend against such actions can give their companies an advantage in the litigation and help mitigate damages.

For additional information, see K&L Gates' [*Defense of Class Action Litigation in Federal Court*](#).

FOOTNOTES

¹ OFFICE OF THE GOVERNOR, COMMONWEALTH OF PENNSYLVANIA, [ORDER OF THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA REGARDING THE CLOSURE OF ALL BUSINESSES THAT ARE NOT LIFE SUSTAINING](#), (March 19, 2020).

² THE COMMONWEALTH OF PENNSYLVANIA, [PROCESS TO REOPEN PENNSYLVANIA](#), (Apr. 25, 2020).

³ See, e.g., *Capriole v. Uber Technologies Inc., et al.*, Case No. 1:19-cv-11941 (Mass. Dist. Ct.) (filed Sep. 12, 2019) (alleging wrongful denial of employment status, forcing drivers to work while potentially sick with COVID-19); *David et al. v. Vi-Jon Inc.*, Case No. 20-cv-424, 2020 WL 1082551 (S.D. Cal.) (filed Mar. 5, 2020) (alleging false advertising, among other things, with respect to a hand sanitizer's touted effectiveness against influenza and COVID-19); *Armas v. Amazon.com Inc.*, Case No. 104631782 (Fla. Cir. Ct., 11th Cir., Miami-Dade County) (filed Mar. 10, 2020) (alleging price gouging of various retailers with respect to toilet paper and hand sanitizer); *Douglas v. Norwegian Cruise Lines*, Case No. 20-cv-21107, 2020 WL 1226410 (S.D. Fla.) (filed Mar. 12, 2020) (alleging false claims of assurance and safety to customers amidst COVID-19).

⁴ See *Patrick McDermid, et al. v. Inovio Pharmaceuticals, Inc., et al.*, No. 2:20-cv-01402-GJP, 2020 WL 1227260 (E.D. Pa.) (filed Mar. 12, 2020).

⁵ See *Schulmerich Bells, LLC et al. v. Wolf et al.*, No. 2:20-cv-01637 (E.D. Pa.) (filed Mar. 26, 2020).

⁶ See *HTR Restaurants, Inc. et al. v. Erie Insurance Exchange*, No. GD-20-5138 (Ct. Com. Pleas Allegheny Cty.) (filed Apr. 20, 2020).

⁷ See *Piper v. Elkhart Brass Mfg. Co.*, No. 1018 EDA 2015, 2016 WL 1615703, at *2 (Pa. Super. Ct. Apr. 22, 2016) (“[T]he policy of this Commonwealth toward certification of class is both liberal and inclined toward maintaining class actions[.]”) (internal citation omitted); *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 892 (Pa. Super. Ct. 2011), *aff’d*, 106 A.3d 656 (Pa. 2014) (same).

⁸ See *Vrakas v. United States Steel Corp.*, No. CV 17-579, 2019 WL 7372041, at *3 (W.D. Pa. Dec. 31, 2019) (citing *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. 455, 460 (2013)) (stating that a plaintiff must establish that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”).

⁹ See, e.g., *Ferreras v. Am. Airlines, Inc.*, 2019 WL 7161214, at *3 (3d Cir. Dec. 24, 2019) (stating that a plaintiff must prove that “the class action device is superior to other methods for resolving the claims, which is often referred to as the ‘superiority’ requirement”).

¹⁰ See *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1543 (2016), as revised (May 24, 2016).

¹¹ See *Johnson v. Am. Standard*, 8 A.3d 318, 329 (Pa. 2010) (internal citations omitted).

¹² See *id.*

¹³ See Fed. R. Civ. P. 23; Pa. R. Civ. P. 1702.

¹⁴ See Fed. R. Civ. P. 23(a).

¹⁵ See Pa. R. Civ. P. 1702(5).

¹⁶ See *generally*, Pa. R. Civ. P. 1708(a)(1)–(5). See also *id.* § 1708(a)(6)–(7) (listing additional factors for consideration where the relief being sought is only monetary); *id.* § 1708(b)(2) (listing one additional factor where the relief being sought is only equitable/declaratory).

¹⁷ See *Stevens v. SEI Investments Co.*, No. CV 18-4205, 2020 WL 996418, at *7 (E.D. Pa. Feb. 28, 2020) (“Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence”) (internal citation omitted); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (“A party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”) (emphasis in original).

¹⁸ See *Piper*, 2016 WL 1615703, at *2.

¹⁹ See *id.*; see also Prima Facie Definition, *Black’s Law Dictionary* (11th ed. 2019).

²⁰ See 73 P.S. §§ 201-1, *et seq.*

²¹ See *Kern v. Lehigh Valley Hospital, Inc.*, 108 A.3d 1281, 1285–86 (Pa. Super. Ct. 2015) (involving alleged violations under Pennsylvania’s Unfair Trade Practices and Consumer Protection Law); *Kotsur v. Goodman Glob., Inc.*, No. CIV.A. 14-1147, 2014 WL 6388432, at *4 (E.D. Pa. Nov. 17, 2014) (same); *Williams v. Empire Funding Corp.*, 227 F.R.D. 362, 366 (E.D. Pa. 2005) (same).

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