The unprecedented health emergency and closely related economic crisis created by COVID-19 have triggered a wave of putative class action and individual lawsuits targeting a wide range of businesses. This article identifies and describes seven business practices connected to COVID-19 that have already drawn a substantial number of civil lawsuits and are likely to draw more as the adverse health and economic impacts are felt more fully across the nation. By understanding these trends, business owners can plan for the types of litigation that their businesses may face, and strive to avoid them.

Failing to Provide a Safe Environment for Employees and Customers
The failure to ensure a safe environment for employees and customers is one of the most obvious breeding grounds for litigation. Indeed, lawsuits alleging that businesses
failed to provide an environment free from coronavirus are already popping up around the country. Several of these lawsuits have alleged employers failed or are failing to protect their employees. For example, a nationwide retail and grocery store is facing a wrongful death lawsuit alleging the company failed to provide a safe workplace for an employee who died from COVID-19. The complaint alleges the company’s management knew that several employees and individuals at the store were exhibiting signs and symptoms of COVID-19 and failed to warn employees or cease operations. Additionally, a complaint filed on behalf of thousands of nurses contends that a medical center in New York failed to, among other things, provide personal protective equipment (PPE), enforce the visitor policy, and comply with staffing ratios. Similarly, a state was sued by its employees for failing to take adequate measures to protect employees at work, including not following guidelines established by the Centers for Disease Control and Prevention (CDC).

Customers are suing businesses for similar reasons. To date, several putative class actions and an individual lawsuit have been initiated against cruise ship companies, alleging negligence and gross negligence for failing to warn customers of the risk of exposure to COVID-19 aboard the ships.

We anticipate an enormous uptick in the number of lawsuits asserting claims for negligence and related torts due to the large number of illnesses and deaths related to COVID-19, and the fact that COVID-19 is expected to remain a hazard for the foreseeable future. Traditional negligence concepts are likely to be hotly contested, as litigants argue over (for example) the foreseeability of the virus being transmitted in the early stages of its arrival in the United States and whether a business’s alleged failure to adequately sanitize a workplace caused an employee or customer’s illness as opposed to myriad other causes (transmission from family members, commuting, etc.). Additionally, the executive orders dictating that certain businesses shut down and that all businesses follow mitigation measures, and the mitigation measures issued by the CDC, are likely to play significant roles in litigation in which plaintiffs contend defendants deviated from applicable standards of care.

Improper Product Advertising and Pricing
COVID-19 has created an extraordinarily high demand for products and tests used to protect against the disease or combat its spread. In turn, there has been intense scrutiny of the availability, source, efficacy and pricing of products related to COVID-19, and several types of litigation have emerged from this scrutiny. For example, there are a substantial number of consumer lawsuits against manufacturers and distributors asserting claims
for false advertising. Consumers have filed at least three putative class actions against manufacturers and distributors of hand sanitizer, alleging the defendants’ advertising misrepresented the efficacy of their products in combating COVID-19.

There also have been a number of lawsuits between manufacturers and sellers of PPE and COVID-19 testing kits. For example, a well-known manufacturer of N95 respirator masks recently filed several trademark infringement, unfair competition and false advertising lawsuits against suppliers of PPE. The lawsuits allege the defendants are using the manufacturer’s trademark to exploit the increased demand for N95 respirator masks through price gouging, selling counterfeit products and accepting money for the masks despite not being authorized distributors. Similarly, a manufacturer of COVID-19 tests filed suit against a company for falsely and deceptively advertising and offering the manufacturer’s tests, which the manufacturer claims it never sold to the defendant.

Meanwhile, the shutdown of businesses has disrupted supply lines and created a scarcity in certain everyday products, which has in turn triggered lawsuits related to the pricing of these products. For example, one of the world’s largest e-commerce platforms was sued in two putative class actions that claim it violated state consumer protection and unfair competition laws by charging unconscionable prices for products such as toilet paper, hand sanitizer, black beans and disinfectants.

These cases demonstrate that businesses are policing representations made about their products in the marketplace, and sellers and distributors must be sure to confirm the accuracy of advertising and claims about the source and availability of products related to COVID-19. With respect to product pricing, businesses must assess the risks related to price increases at a time when consumers, as well as state and federal prosecutors (link available at https://www.pepperlaw.com/publications/covid-19-price-gouging-prevention-act-may-give-ftc-and-state-ags-needed-enforcement-powers-2020-04-10/), are paying particular attention to price increases.

**Using COVID-19 as a Basis Not to Perform**

Certain defenses to contractual obligations to perform, such as force majeure (link available at https://www.pepperlaw.com/publications/your-contracts-in-a-coronavirus-world-2020-03-16/), impossibility, impracticability and frustration of purpose, have drawn an enormous amount of attention since the outbreak of COVID-19. The attention is undoubtedly well-deserved, since COVID-19 and closely related events, including the state shutdown orders issued by various governors, have almost certainly prevented some
parties from performing their contractual obligations. Nonetheless, there exists a significant risk that parties are not fully knowledgeable about the scope and limitations of these defenses, and this may prevent the successful assertion of these defenses as the basis for suspending or terminating performance. Indeed, recently filed litigation demonstrates that the assertion of these defenses may be heavily resisted by counterparties, who contend these defenses do not apply and performance is not excused by the occurrence of COVID-19.

In a lawsuit recently filed in Texas federal court, for example, a target company in an acquisition filed suit seeking injunctive relief that would require the buyer to close the transaction. The suit alleges that the buyer decided not to complete the acquisition because it was not obligated to do so “in light of COVID-19 related fallout.” More specifically, the buyer claims that it was unable to perform certain conditions to closing and was excused from doing so pursuant to certain defenses to performance (i.e., impossibility, impracticability, illegality, frustration of purpose and commercial frustration). Notably, the parties’ contract contained a material adverse effects (MAE) clause that specifically excluded “epidemics, pandemics, and outbreaks” as events that excused closing of the transaction. The target company argues that the inclusion of “epidemics, pandemics, and outbreaks” in the MAE clause prohibits the buyer from relying on any such occurrence to excuse the failure of a closing condition.

In contrast, a purchaser under a land purchase agreement sued the seller in California state court for breaching the agreement by rejecting the purchaser’s “rightful invocation of the force majeure clause” to extend the closing date and then attempting to terminate the transaction. The parties’ force majeure clause provides for extending the deadline of any obligation due to certain events, including acts of God, material or labor restrictions by any governmental authority, and any other cause not reasonably within the control of the party. The purchaser contends that the California stay-at-home orders constitute force majeure events, which made closing the deal on the deadline set forth in the contract and using the property for redevelopment impracticable and illegal.

The fact that the assertion of these defenses has led to litigation does not suggest that these businesses’ reliance on the defenses was necessarily improper. Businesses should, however, carefully consider the applicability and limitations of these defenses before relying on them, and consider alternatives to terminating or suspending performance, such as negotiated resolutions.
Statements to Investors Regarding COVID-19’s Impacts and Risks

Public companies are potential targets for securities class actions related to statements or omissions regarding COVID-19’s business and financial impacts. A number of these lawsuits have already been filed. For instance, two putative securities class actions pending against a cruise line allege it deceived investors by making false statements regarding the impact of COVID-19 on the business, which caused its stock price to be artificially inflated.

Public companies involved in the production or development of products currently in high demand or used to combat COVID-19 are especially at risk for being sued based on disclosures regarding their products. One pharmaceutical company is currently facing two putative securities class actions related to the company’s statement that it had developed a COVID-19 vaccine, which led to a quadrupling of the company’s stock price. After a third party exposed that the company had not developed a vaccine but had merely designed a precursor for a vaccine, the stock price plummeted. Likewise, shareholders filed a putative class action against the provider of a videoconferencing platform that has become increasingly popular for facilitating remote working. The suit alleges that the company’s SEC disclosures falsely portrayed the strength of the company’s data privacy capabilities and that the increased use of the platform led to a series of news reports and corrective admissions indicating the company had overstated its privacy capabilities, which resulted in many companies prohibiting use of the platform, followed by a drop in the stock price.

Given all the uncertainties caused by COVID-19, public company activity and disclosures will likely continue to be subject to heightened scrutiny for the foreseeable future by investors and regulatory authorities alike. Companies must proceed with caution and carefully consider disclosure obligations, and they should follow the COVID-19 disclosure guidance for public companies (link available at https://www.troutman.com/insights/sec-releases-covid-19-disclosure-guidance-for-public-companies.html) recently issued by the SEC.

Collecting Fees Despite Not Providing Services

Businesses that typically charge monthly fees for services or sell seasonal passes for access may be exposed to liability for continuing to collect fees despite not providing access or services due to COVID-19.
Several putative class actions recently have been filed against companies that continue to collect recurring fees while closed or unable to provide services. Gyms have been the primary target of these suits, with several across the country being hit with putative class and individual lawsuits for collecting dues despite gyms being closed due to COVID-19. These lawsuits assert a wide range of claims against the gyms, including conversion, breach of contract, misrepresentation, false advertising, unjust enrichment, and unfair and deceptive businesses practices. Similar putative class actions have been filed against a ski resort, a dating events company, and an amusement park for failing to refund season pass holders.

Businesses that continue to charge fees despite being unable to provide the anticipated level of services should consider ways to address adverse customer reactions. For instance, businesses may consider offering alternative services, lowering or delaying fees, and/or preemptively addressing customer concerns.

**Failing to Provide Refunds for Cancelled Events or Services**

Companies across many industries are unwilling or unable to provide refunds for cancelled travel, events and services. This practice has spurred a wave of putative class action and individual litigation by consumers attacking refund policies and practices and demanding monetary refunds instead of credits or vouchers. A number of these lawsuits contend that companies are either misapplying the refund policies and/or that such policies are unconscionable. Other lawsuits assert basic claims for breach of contract, conversion and unjust enrichment, alleging defendants failed to provide the product, experience or services promised.

For instance, customers have initiated a number of putative class action and individual lawsuits against event organizers and ticket resellers for failing to provide refunds for events cancelled or postponed indefinitely due to COVID-19. The airline industry has also been repeatedly hit with putative class action lawsuits based on the industry’s policy of providing vouchers instead of full refunds for cancelled flights. Moreover, a number of colleges and universities across the country are also facing putative class actions due to their refusal to refund room and board payments despite closing campuses and sending students home for the year.

It is likely that consumers will continue to challenge refund policies and practices as more concerts, events and sports seasons scheduled in the upcoming months are cancelled or postponed. Companies faced with deciding how to handle refunds should weigh reliance
on contractual policies to deny refunds against the costs of possible litigation and reputa-
tional damage.

**Inequitable Conduct Under Government Relief Programs**

The conduct of banks under government relief programs has also drawn litigation from
businesses that contend they were treated unfairly. The Paycheck Protection Program
(PPP) (link available at https://www.pepperlaw.com/publications/overview-of-corono-
virus-aid-relief-and-economic-security-act-cares-act-paycheck-protection-pro-
gram-2020-03-27/), which is part of the Coronavirus Aid, Relief, and Economic Security
Act (CARES Act), is a billion-dollar loan program that empowers lenders to make govern-
ment-guaranteed loans to eligible small businesses to cover certain expenses.

With this type of unprecedented emergency legislation, litigation is inevitable. In fact,
lenders participating in the PPP are already facing lawsuits from applicants denied
funding under the program. Several banks have been named as defendants in putative
class actions filed on behalf of small businesses that applied for PPP loans. The lawsuits
allege that the banks violated the CARES Act through policies that favored and prioritized
certain applicants, which effectively denied funding to any applicants that did not already
have a lending relationship with the banks.

But at least one federal court opinion indicates these claims may not get much traction. In
District Court for the District of Maryland denied the plaintiffs’ request for injunctive relief
against Bank of America, concluding the CARES Act does not create an express or im-
plied private right of action and, further, that nothing in the CARES Act prohibits lenders
from considering other information when deciding from whom to accept applications or
in what order to process applications accepted. The plaintiffs have appealed to the U.S.
Court of Appeals for the Fourth Circuit.

As the program develops, we anticipate that different types of lawsuits will arise and the
focus may shift to targeting recipients of the PPP loans. For example, we may see liti-
gation related to businesses that received funding based on misinformation contained in
applications or whether businesses are using the loans for permitted purposes.

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The impacts of COVID-19 on consumers and businesses are far from over, and we anticipate that the number and types of litigation related to COVID-19 are likely to significantly expand. It should be noted that decisions made today in the middle of the pandemic may be judged in a different light, fairly or not, when some of the anxiety and fear begin to dissipate. Businesses should continue to monitor the types of practices that are drawing litigation and implement strategies to reduce that risk.