

Survey Results Confirm Foley & Lardner LLP's Prediction Regarding Uptick in Class Action Lawsuits

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The results of the ninth annual [Carlton Fields Class Action Survey](#) confirms Foley & Lardner LLP's [recent forecast](#) that businesses should be prepared for a sharp uptick in class action lawsuits. Even pre-pandemic, there was an upward trend in class action litigation. The survey published by Carlton Fields earlier this month confirms that there have been an astounding number of COVID-19-related class action lawsuits in the past few months, with over 500 new putative class actions filed since early spring. Based on current trends, we expect that filings will continue to mount.

The bulk of the recent class action filings involve disputes over insurance claims (e.g., business interruption coverage disputes) and lawsuits brought by students seeking reimbursement of tuition and fees. Several notable recent cases are described below.

Two limited liability companies responsible for managing a pair of San Francisco restaurants recently filed a putative class action suit against their insurers, seeking declaratory relief in the form of an order requiring said insurers to provide coverage for business interruption expenses attributable to the COVID-19 pandemic. See *Boxed Foods Company, LLC, et al. v. California Capital Insurance Co., et al.*, Case No. 3:20-cv-04571 (N.D. Cal. July 9, 2020). Similarly, two companies responsible for operating a local barbershop and barber academy in Virginia Beach filed a putative class action lawsuit against their insurer, asserting a more complex set of claims for breach of contract and declaratory relief corresponding to four particular coverages. *Legacy Sports Barbershop LLC, et al. v. Continental Casualty Co.*, Case No. 1:20-cv-04149 (N.D. Ill. July 14, 2020). The defendant insurance companies in both lawsuits have yet to file their responses to these complaints, but there already are hundreds of business-interruption-related class actions that have been filed in recent months, with many more filings likely to follow.

As to the latter category, two private South Florida universities were recently sued by students alleging, on behalf of themselves and others similarly situated, entitlement to partial refunds of tuition and fees due to the suspension of on-campus instruction and activities. *Ferretti v. Nova Southeastern University Inc.*, Case No. 0:20-cv-61431 (S.D. Fla. July 15, 2020), and *Gibson v. Lynn*

University Inc., Case No. 9:20-cv-81173 (S.D. Fla. July 17, 2020). On July 24, 2020, Lynn University filed a motion to dismiss based primarily on written policies that disclaim student entitlement to refunds of tuition and fees in the event operation of the university is suspended for reasons outside its control. In its motion, the university also leaned heavily on the concept that performance of any contractual obligations was rendered impossible by public safety orders prohibiting on-campus instruction and activities. The motion will likely be decided in August.

Earlier this year, Columbia University, Cornell, and the University of Southern California, among several others, were hit with similar lawsuits brought by students demanding the reimbursement of tuition and fees due to the campus closures necessitated by the COVID-19 pandemic. See *Student A v. The Board of Trustees of Columbia University in the City of New York*, Case No. 1:20-cv-03208 (S.D.N.Y. April 23, 2020); *Olivia Haynie v. Cornell University*, Case No. 3:20-cv-00467 (N.D.N.Y. April 23, 2020); *Watson v. The University of Southern California*, Case No. 2:20-cv-04107 (S.D. Cal. May 5, 2020).

The lawsuit against Columbia University has been among the more active examples. On June 22, 2020, Columbia University moved to dismiss the plaintiffs' First Amended Complaint, asserting both that the plaintiffs failed to plead a specific and enforceable contractual promise, and that the university was excused from performance after March 22, 2020, when Governor Cuomo's executive order prohibited the conduct of in-person classes at universities across the state. The district court granted the plaintiffs an opportunity to amend, and they filed their Second Amended Complaint on July 22, 2020. Columbia University has yet to file its response.

As colleges and universities across the country gear up for a virtual fall semester, they are faced with uncertainty and a constantly changing set of challenges. The same is true of consumer-facing businesses, many of which have been left in the lurch by unpredictable changes in circumstance, including stay-at-home orders prompted by the recent uptick of COVID-19 cases in many major metropolitan areas.

As these class action claims play out in courts across the country, companies and educational institutions will be able to distill and implement important "lessons learned," including how to avoid or minimize the risk of class action liability. Regardless of the industry, companies can implement proactive measures to fortify their operations and protect against future exposure stemming from the pandemic. For more information, please contact your Foley relationship partner or the authors listed below.

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