

# THE APPROACHING CLASS ACTION WAVE

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**E**pidemiologists, government officials, and many Americans are understandably concerned about a second wave of Covid-19 infections rolling across our country later this year. But there is another kind of wave that may be of concern to companies big and small across the land: Covid-19 related class actions.

Ripples of cases that foreshadow an approaching wave of class actions have appeared. In recent months, we have seen class action filings related to airline ticket, concert ticket and college tuition refunds; the collection of monthly membership fees; denials of insurance coverage for business losses; foreclosures and debt collection; challenges to governmental orders; and representations made by manufacturers and sellers of medical, sanitation, and hygiene products.

As the class action wave swells, we will no doubt see future class actions involving consumer claims, breaches of contract and, perhaps the biggest subject matter of all, employment matters. We expect class actions will be filed alleging that employees were denied wages, paid leave or accommodations, discriminated against during layoffs or furloughs or that employers created unsafe work conditions. Indeed, because 51 million Americans have lost jobs since the start of the pandemic, this class action wave will likely gain strength and intensify as workers are recalled to work.

Fortunately, filing a class action and winning a class action do not necessarily go hand in hand. To begin with, courts are required to treat class actions as an “exception” to the usual rule that litigation should be prosecuted only by individually named parties, as opposed to hundreds or thousands of unnamed parties. But, courts are also

required to conduct a “rigorous analysis” to ensure that Plaintiffs have satisfied important court rules — namely Civil Rule 23 — to justify certification as a class action.

Specifically, in order for the court to grant class treatment, a plaintiff must prove these seven requirements:

1. An identifiable class that can be defined without ambiguity.
2. The named plaintiff representative must be a member of the proposed class.
3. It must be impracticable to join all members as named plaintiffs because they are so numerous.
4. There must be questions of law or fact that are common to the class.
5. The claims of the named plaintiff and the defenses to those claims must be typical of the claims of the proposed class.
6. The named plaintiff must fairly and adequately protect the interests of the class.
7. One of three Civil Rule 23(b) requirements must be met:
  - a. Prosecuting separate actions by or against individuals will result in inconsistent, varying or unfair adjudications.
  - b. Injunctive relief or declaratory relief is appropriate for the entire class.
  - c. Questions of law or fact that are common to the class predominate over any question that affects individual members.

While each class action presents its own unique challenges from a defense perspective, each one also presents unique opportunities for a defense. Challenging a plaintiff’s efforts to secure class certification is a major component of any well thought out defense strategy. In some jurisdictions, the court’s decision to grant or deny class certification may be immediately appealable.

But other important defenses may be available as well. For example, the Class Action Fairness Act of 2005 confers federal subject matter jurisdiction over many large class actions (where there is minimal diversity of citizenship and the aggregate amount in controversy exceeds \$5 million). This is often an effective defense weapon in removing cases from state court to federal court, where the venue may be more friendly to defendants and better suited for navigating potential class actions. Of course, other potential defenses may be available based upon statutes, common law and precedent within the particular jurisdiction. And still other defenses may apply based upon contracts, waiver, estoppel, voluntary payment, lack of causation, pleading deficiencies, collective action standards, binding arbitration provisions and failure to mitigate damages.

Last but not least, taking an effective deposition of the named plaintiff can yield critical admissions and support many defenses, and thus go a long way toward undermining plaintiff’s attempt to obtain class action certification and weakening his or her entire case.

So while a wave of class actions will be hitting land soon as a result of the pandemic and its aftermath, strategically navigating litigation with thoughtful, creative and aggressive defense counsel can ensure your course is set for success.



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