



# COVID-19-Related Consumer Class Action Developments and Trends in California

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**Seyfarth Shaw LLP**

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- 01** Tuition and Fee Refund Actions against Universities and Other Educational Institutions
- 02** Refund Actions against Sports Teams, Conferences, Festivals, and Ticket Brokers
- 03** Membership and Subscription Refund Actions against Gyms, Theme Parks, Ski Mountains, and Semi-Private Clubs
- 04** Price Gouging Actions involving High Impact Products and Services
- 05** Privacy Actions in the Context of Data Collection Necessity or Mandated Because of COVID-19
- 06** Auto Renewal and Deceptive Pricing Actions

# Speakers

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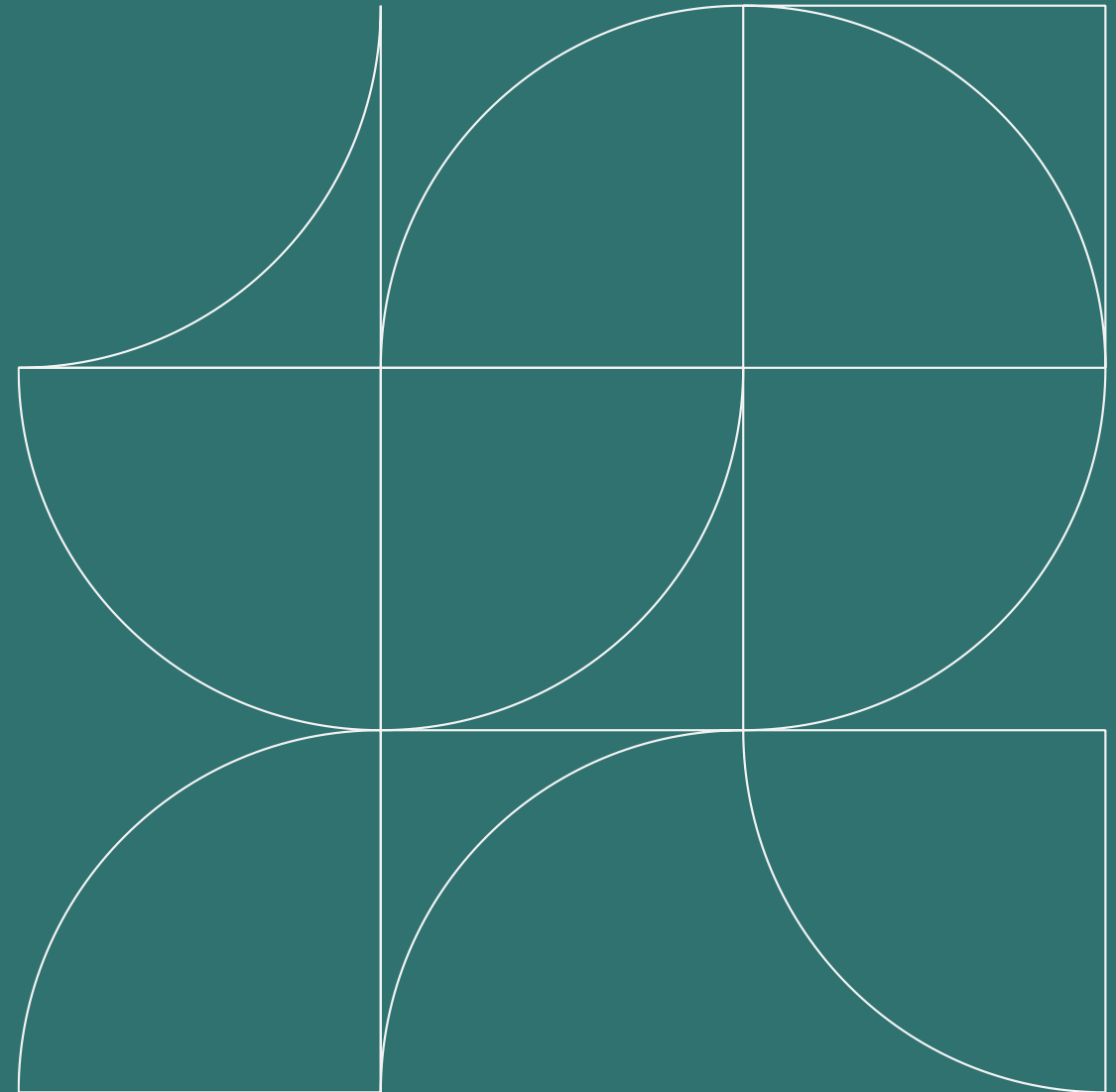
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# Tuition and Fee Refund Actions

against Universities and Other  
Educational Institutions



# Recent Developments



- Plaintiffs' lawyers are rushing to file lawsuits on behalf of students seeking reimbursement for tuition, fees, and room and board
- Over 10 suits filed against higher education institutions in California
- Over 100 suits nationwide
- Out of state counsel filing actions with use of local counsel
- Several copycat actions filed
- In most instances, the underlying agreement(s) with lead student is not attached
- -Students are filing lawsuits against their schools demanding partial refunds on tuition and campus fees, saying they're not getting the caliber of education they were promised
- Colleges reject the idea that refunds are in order because students are learning from the same professors who teach on campus and students are still earning credits toward their degrees.

# Explanation of Claims

- Breach of contract
- Unjust Enrichment
- Conversion
- Unfair Business Practice
- Tort claims?

# Plaintiffs' allegations and process

- “It is improper for them to attempt to retain what amounts to many millions of dollars in aggregate in campus fees they collected from their students, even though they terminated the services that these fees covered,” Adam Levitt, one of the lawyers filing the suits, said in a statement. “A college education is already a monumental expense for students and their families, and to essentially offer them no relief on these material expenditures, particularly during a time when millions of Americans are struggling financially, is not only tone-deaf but unfair and unlawful.”
- “The ongoing coronavirus pandemic has caused significant upheaval all across the globe, including for college students, many of whom are borrowing money for their education and now have had to quickly make arrangements to come back home and switch to online classes.
- Despite the fact that students will no longer be living on campus, utilizing campus amenities or service or eating in the school cafeteria, many colleges and universities are reportedly not offering refunds for tuition or room and board.
- If your private college or university closed because of the coronavirus, but you did not receive a refund for tuition, room, and board or other fees, you may be able to join this coronavirus school refund class action lawsuit investigation.”
- “The lawsuits claim that online classes don't have equal value to in-person classes and are not worth the tuition that students paid for on-campus classes.”
- “Plaintiff asserts on behalf of herself and a similarly situated class of individuals claims for breach of contract and unjust enrichment:
- Class action for breach of contract, unjust enrichment. Plaintiff brings this case as a result of defendant's decision to close campus, constructively evict students, and transition all classes to an online/remote format as a result of the COVID-19 pandemic. While closing campus and going online was the right thing to do, this decision deprived students from recognizing the benefits of in-person instruction, access to campus facilities, student activities, and other benefits and services in exchange for which they had already paid fees and tuition. Defendant has either refused to provide reimbursement for the tuition, fees and other costs that defendant is no longer providing, or has provided inadequate and/ or arbitrary reimbursement that does not fully compensate students for their loss.”
- The California Superior Court lawsuit lists how the university system's marketing materials emphasize the value of campus life. (“You'll find yourself among leaders of all kinds: Peace Corps volunteers, non-profit founders, student-government, presidents, scholarship winners, and club organizers,” UC Berkeley's [website says](#), according to the lawsuit.)



# Key Response to Allegations

- Cal State spokesman Michael Uhlenkamp said that the 23-campus public university system will fight the lawsuit, which he said, “misstates the facts.” He said each of the campuses continued to provide instruction and services to students even after converting to online instruction. Counseling, advising, faculty office hours, disability student services and telehealth medical care are all being offered remotely, he said.
- Uhlenkamp also said that Cal State is refunding some fees, as outlined in an [interim policy](#) adopted March 19.
- “CSU will vigorously defend against this suit,” he said.

# Explanation of Expected Defenses & Strategies

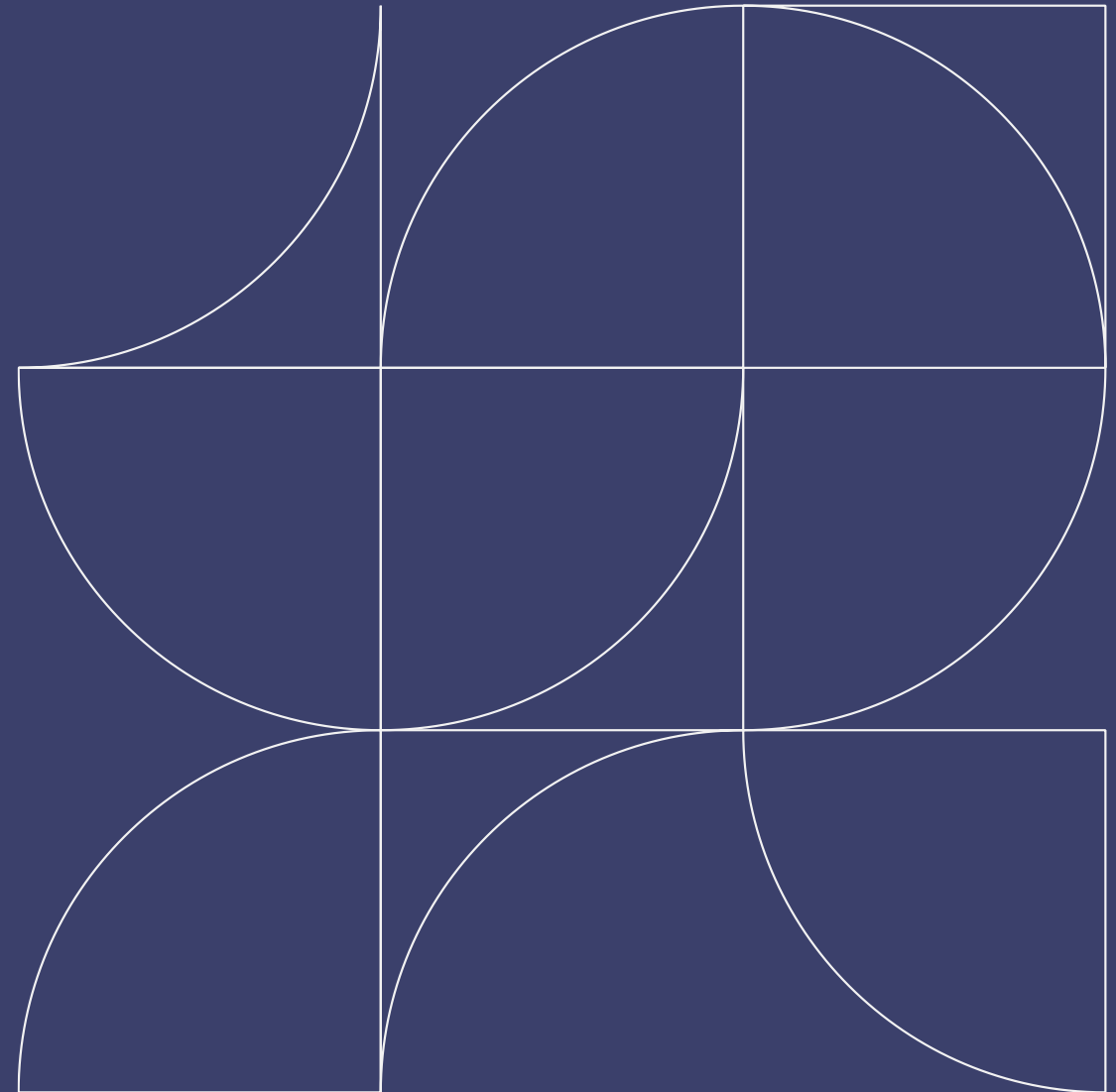
- No breach
  - no requirement to provide in-person classes
  - courts reluctant to make academic judgments
  - issues may exist concerning lack of access to labs, equipment and facilities
- Substantial Performance
- Force majeure and related contractual defenses
- Limited of Remedies
- Credit or Offset for proration
- Class challenge (e.g. individual issues predominate)
- Arbitration provision/Class Waiver provision
- Early class settlement? (e.g. credit for future fees)
- Sovereign Immunity?

# Managing the Risk



- Evaluation of strength of agreement (s)
- Evaluation of student and public relations
- Evaluation of financial circumstances
- Execution of customized approach based upon evaluation of contractual rights
- Consideration of adding language to contracts going forward

# **Refund Actions** against Sports Teams, Conferences, Festivals, and Ticket Brokers



# Recent Developments

- All sporting and other live events were either “postponed” or cancelled
- Some paused, some offered future events, and some went to the BK court
- Class Actions for refunds filed in all three instances
  - Litigation often filed even before the decision for future events is made
- Financial, Business, and Legal Considerations Changing for Post-Pandemic Refund Policies

# Pre-COVID-19 Policies and Considerations

- Unavailability of funds paid in advance
- Value of customer connectivity and brand loyalty
- Teams: Future events, refund last resort
- Festivals: Future event, or non-refundable
- Brokers: Hold funds for postponed events, refunds for cancellations
- Different contracts with Ticket Brokers, Different ticket selling platforms

# COVID-19 Refund Class Actions Filed:

*MLB, All MLB Teams, Major Ticket Brokers*

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- Suit filed on April 20 (well before alternative plans known)
- Suit filed in CA (despite named Plaintiffs from NY)
- Breach of contract, unjust enrichment, civil conspiracy, CA Consumer Protection, CA unfair Business Practices
- Argument: Each party knew or should have known that the games were cancelled immediately – therefore holding advanced payments as an interest free loan
- MLB Phased Response (class action still alive even after some full refunds)
- Who's Next: NBA, NFL, NCAA, and others face upcoming decisions

# COVID-19 Refund Litigation:

## Organizations Forced into Bankruptcy

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- Upstart football league forced to cancel season, then declare BK
- Refund policy changed two days before BK declaration
  - Future events changed to full refund – other business considerations?
- In BK court, judge has thus far denied request to pay refund in full
  - Debtor requested \$3.5 million of the \$5 million available to go to ticket holders wanting full refunds
- Highlights other business considerations even through BK



# COVID-19 Refunds – Concerts and Festivals

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- Non-refundable deposits, building materials, staff complicate use of funds even further
- Three Different Approaches
  - Coachella: full refund until June 1 offered
  - SXSW: no refund, admission to one of the next 3 annual festivals, plus other future discounts
  - Lightning in a Bottle: no refund, no promise for next year, possible BK

# COVID-19 Refund Class Actions Filed:

## *SXSW and Lightning in a Bottle*

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- Suit filed against Lightning in a Bottle on April 14 (in CA)
- Suit filed against SXSW on April 27 (in TX)
  - Venue and choice of law considerations important
- Breach of contract, unjust enrichment
- Plaintiff attorney claims regarding BK and potential future re-organization

# How to Defend Against These Class Actions: *Terms and Conditions*



- Class action waivers
- Arbitration agreements
  - Arguments over enforceability (unwaivable public right, or waivable private right)
  - Recent example in the news last week (inconspicuous arbitration agreement not enforced for Intuit)
- What to do:
  - Plaintiff point to a variety of platforms
  - Offer a variety of different ticketing options
  - Clear and conspicuous language in terms and conditions

# How to Defend Against These Class Actions:

## *Force Majeure*

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- Explicit *force majeure* language
- Common law principles of impossibility, impracticability, and frustration of purpose
- Size of market and television deals impact any force majeure equitable determinations
- Choice of law again important
  - For example, CA broader applicability than NY

# Looking Ahead

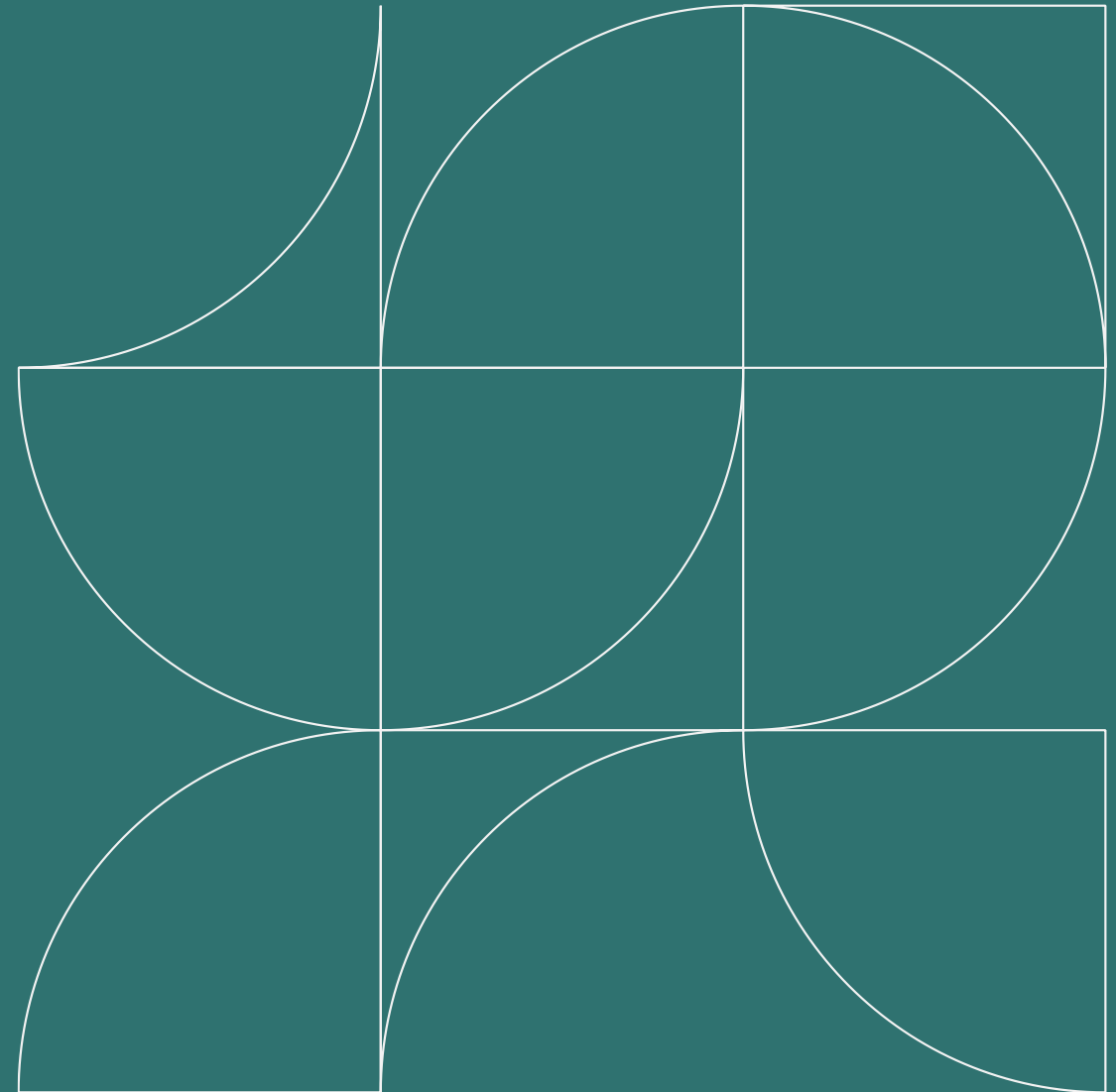
for Sports Teams, Conferences, Festivals, and Ticket Brokers

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- Revisit traditional uses of cash flow (self-insurance)
- Updating terms and conditions
  - *Force majeure* language to include viral pandemic and government shut downs
  - Clear and Conspicuous class action waivers
  - Clear and conspicuous arbitration agreements
  - Flexible refund policies
  - Limitation of remedies
- Offer multiple alternatives, track customer utilization
  - See Membership / Subscription discussion below)
- Focus on refund packages for season ticket holders who may not have the same access to tickets with social distancing restrictions

# Membership and Subscription Refund Actions

against Gyms, Theme  
Parks, Ski Mountains, and Semi-  
Private Clubs



# Recent Developments



- All non-essential activities and social gatherings shut down by the government – immediate questions arise as to:
  - Advanced payments for annual memberships or subscriptions
  - Recurring monthly payments that are automatically withdrawn
- What does this encompass:
  - Fitness Gyms and Specialized Fitness Workout Centers
  - Shared Work Spaces
  - Theme Parks
  - Ski Mountains
  - Golf clubs, Tennis clubs, Yacht clubs, Social clubs
- Response from Companies: Varied
  - Full refunds, partial refunds, freezing payment obligations, issuing future credits, issuing silence, declaring BK
- Response from Plaintiffs' Bar: Swift
  - Class Action law suits filed immediately, with more on the horizon

# COVID-19 Refund Class Actions Filed:

## *Gyms and Fitness Institutions*

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- Largest national chains initially continued to automatically withdraw monthly membership payments, with some also offering extended term for the time period of closure
- Recent policy amendments: suspended all billing until one or more gym is open in the market
- Still, law suits filed in CA and NY against the largest gyms in country
  - Breach of contract, unjust enrichment, CA Consumer and Unfair Business Practices
- Threat of additional litigation and liability after re-opening
  - Diminished value and individualized health risks



# COVID-19 Refund Class Actions Threatened:

## *Shared Work Spaces*

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- Many co-working companies have continued charging full membership fees despite offices being closed
  - Question as to whether these co-working companies are simultaneously receiving discounts on the rent they sometimes pay to the landlord
- Some Members have paid fees, some haven't, but no class actions have been filed yet. Why?
  - Presence of an arbitration agreement
  - Presence of class action waiver
- Recent high profile example – class counsel publicizing a letter requesting the company allow the customers to proceed as a class

# COVID-19 Refund Class Actions Filed: *Theme Parks*

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- Some major players (with considerable means) have offered a bevy of choices to customers, which include:
  - A choice for annual passholders to extend the membership or get a pro rated refund
  - Stopping and/or waiving all monthly payments for annual passholders on monthly plans
  - Retroactive refunds for payments made during days of park closure
- Other major players (with lesser means) continued to charge and automatically withdraw membership fees during closures – before subsequently pausing payments for monthly plans
  - Nevertheless, multiple class action suits in CA have been filed against this theme park owner, demanding full and partial refunds
- Both companies desired goodwill, but financial realities seem to dictate class action exposure

# COVID-19 Refund Class Actions Filed: *Ski Mountains*



- One major player has offered a discount on a sliding scale to be applied to the purchase of next year's passes
- Another major player has offered only an additional discount on early renewal fees for next year's passes
- For both, any refund option is contingent on entering into a new contract for the following year's passes
  - For both, class action litigation has already been brought

# COVID-19 Refund Class Actions Filed:

## Semi-Private Clubs

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- Golf Clubs, Tennis Clubs, Yacht Clubs, and Social Clubs
- Largest owner / operator of golf courses and social clubs in the country facing two class action suits after continuing to automatically deduct monthly payments despite all club closures
  - This includes partnerships amongst clubs and other venues (such as restaurants) that “guarantee” access to these other venues
- Private clubs with some other barrier to entry are safer (and thus can have less accommodating refund policies), but they are not immune from class action liability
  - Expect to see class actions in the coming months in this area

# How to Act and Defend Against These Class Actions

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- Best way to avoid class action litigation is to provide a full refund – but even that is no guarantee (time is of the essence)
- Those without the ability or willingness to provide a full refund must consider suspension of payments, rollover refund policies, and other future services or offers
  - Ideal World: continue to charge membership fees to members who agree so as to further the survival of the enterprise
  - Reality: People need their money back now – if they don't get it right away, Plaintiffs bar will get it for them
- Terms and Conditions will be key
  - If terms and conditions contemplate some form of suspension or rollover, the underlying breach of contract and unfair business practices claims will be harder to prove.
  - If terms and conditions are silent, courts may view it as a “changed term”
- See *Force Majeure* Discussion above

# Business and Legal Considerations for Other Offerings

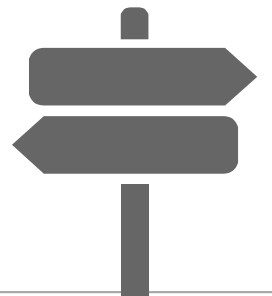
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- Resolving customer issues on a case-by-case basis to the best of a company's ability
- Offer multiple alternatives
  - Helps with customer satisfaction and connectivity
  - Helps with defeating class claims and class certification
- Track customer utilization with additional technologies
  - Customer usage data used to identify differences, for damages and for class certification

# Looking Ahead for Membership and Subscription Organizations

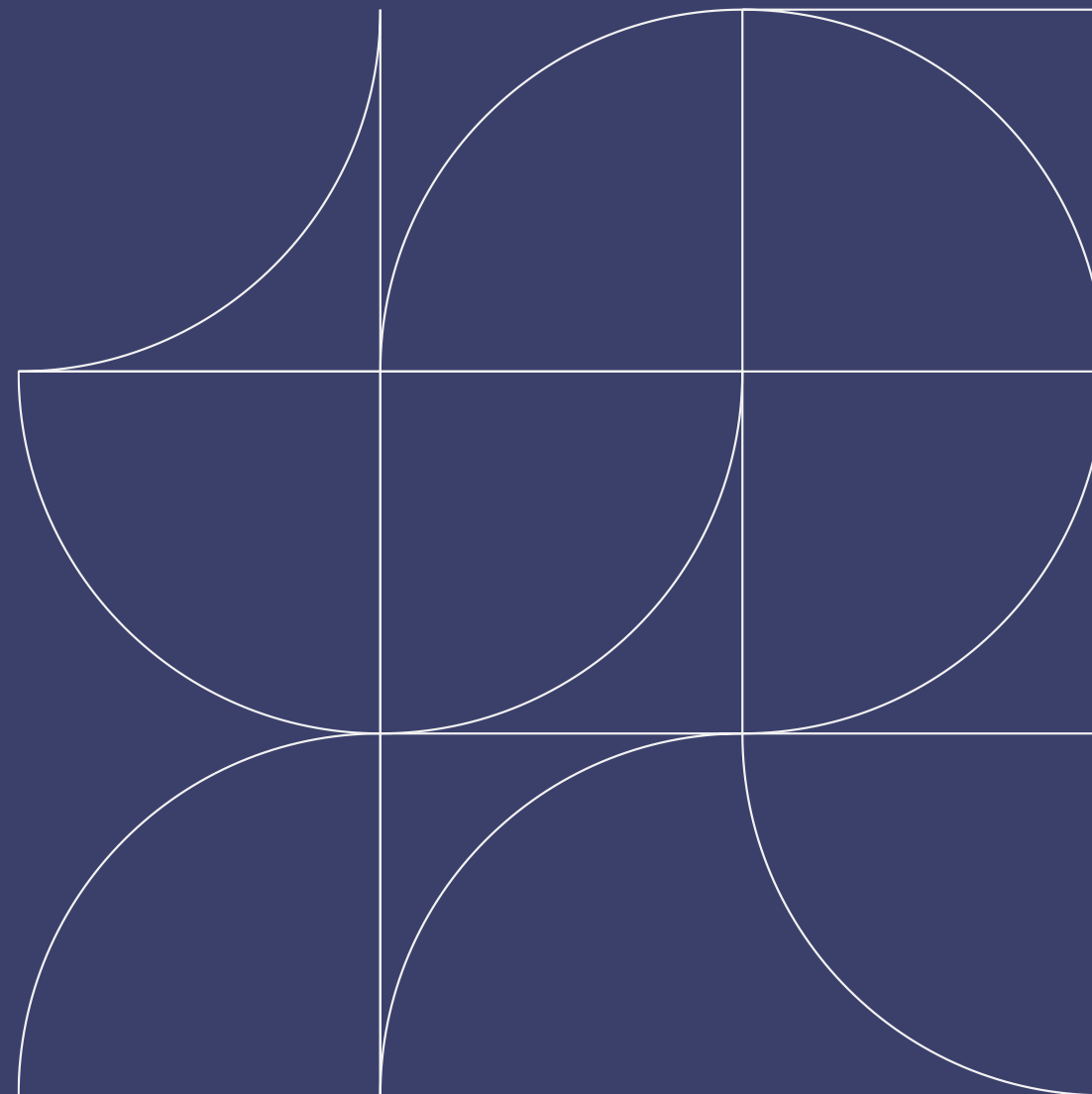
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- New (yet the same) issues upon re-“opening”
  - Social distancing measures, perceived diminished value to some
  - Perceived or actual inability to engage in the activity based on health concerns of individual consumers
- Companies must decide how to act, and how to act fast, in response to these consumer issues – or else face risk of class action litigation
- Future terms and conditions:
  - Accounting for the possibility of freezing or rollover of payments in certain situations
  - *Force majeure* language to include viral pandemic and government shut downs
  - Clear and conspicuous class action waivers
  - Clear and conspicuous arbitration agreements
  - Limitation of remedies



# Price Gouging

## Actions Involving High Impact Products and Services





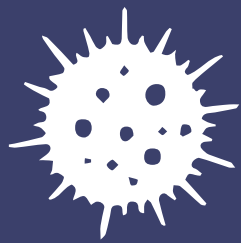
# “Price Gouging”



## What is it?

- Price gouging occurs when, during abnormal market conditions, a seller increases the prices of goods, services, or commodities to a level much higher than is considered reasonable or fair.
- *Unconscionable* or *exorbitant* pricing can occur after a demand spike or supply disruption during a public emergency. The most common examples involve *excessive* price increases for basic necessities after natural disasters.
- In many jurisdictions (like California), price gouging during a declared state of public emergency is a crime. Whether criminal or not, price gouging is generally discouraged and may be considered *exploitative* and *unethical*.
- Price gouging is usually short-term, localized, and restricted to essentials such as food, clothing, shelter, medicine and equipment needed to preserve life and property.

# COVID-19: Unprecedented Event and Price Gouging



- COVID-19 pandemic presents uniquely different issues than natural disasters:
  - Expansive geographic scope – literally a world wide phenomenon.
  - Long period of emergency with uncertain ultimate end date.
  - Run on both expected and unexpected, traditional and non-traditional necessities, e.g., personal protective equipment, disinfectants, hand sanitizers, surgical masks, and medical supplies, but also toilet paper, eggs, hair dye, etc.
  - Items that did not exist or had limited pricing data prior to the declaration of emergency (e.g. COVID-19 testing kits).
- COVID-19 presents tremendous and unprecedented far reaching, long lasting, high dollar profit and windfall opportunities. Follow the money \$\$\$.

# COVID-19 Price Gouging – Sources of Regulation

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- No federal law against price gouging, but multiple bills are pending.
- President Trump’s March 23, 2020 “Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19”:
  - “The Secretary is delegated . . . the authority of the President conferred by section 102 of the [Defense Production] Act to **prevent hoarding** of health and medical resources necessary to respond to the spread of COVID-19 within the United States, including the authority to prescribe conditions with respect to the accumulation of such resources, and to **designate any material as a scarce material, or as a material the supply of which would be threatened by persons accumulating the material either in excess of reasonable demands of business, personal, or home consumption, or for the purpose of resale at prices in excess of prevailing market prices**”
- More than 35 states, including California, have price gouging statutes (<https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>)
- State and local Executive Orders

# Types of Restrictions



- Threshold pricing restriction (varies by jurisdiction):
  - Unspecified limit on unconscionable, excessive, exorbitant, or unreasonable prices
  - Cap on percentage increase (10% in California)
  - Outright ban on price increases
- Who can be sued (varies by jurisdiction)
  - Often broadly includes every person or entity in the consumer distribution chain (retailers, wholesalers, distributors, and manufacturers). So, likely, your business!
- Material elements of a price gouging claim:
  - Has a state of emergency been declared where the alleged violation occurred?
  - Is the product identified explicitly or implicitly in an executive order or statute as an essential product during the state of emergency?
  - Is the price excessive, given the legal threshold in place in that particular jurisdiction?

# Enforcement



- Sources of potential legal claims:
  - *Customer and consumer lawsuits and class actions (alleging violation of laws relating to price gouging or unfair and deceptive trade practices).*
  - *Employee whistleblower and retaliation suits.*
  - State Attorneys General and District Attorneys (inquiries, investigations, subpoenas, lawsuits)
  - Federal Trade Commission (potential to use power under Section 5(a) of the FTC Act relating to unfair and deceptive practices)
- Civil damages, fines, penalties, injunctive relief and restitution.
- Criminal fines and imprisonment (violation of California price gouging laws can result in a fine of up to \$10,000 and imprisonment for up to one year).

# Price Gouging – Cal. Declaration and Executive Order

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- On March 4, 2020, California Governor Gavin Newsom declared a state of emergency in response to the COVID-19 public health emergency. Price gouging is illegal in all California communities during the declared state of emergency.
- Executive Order N-44-20 makes it unlawful to increase the price of food items, consumer goods, or medical and emergency supplies by more than 10 percent of what a seller charged for that item on February 4, 2020.
- Exceptions exist if the seller has experienced increased costs in labor, goods, or materials, or if the seller sold the item at a discount on February 4, 2020, in which case they may sell the item for no more than 10 percent greater than the price at which they ordinarily sold the item.
- If the seller did not offer the item for sale on February 4, 2020, the seller may not sell the item at a price that is 50 percent greater than what they paid for it, or, if the seller produced the item, they may not sell it for a price that is 50 percent greater than the cost to produce and sell the item.

# Cal. Penal Code Section 396

- Cal Penal Code Section 396(a): “The Legislature hereby finds that **during a state of emergency or local emergency, including**, but not limited to, an earthquake, flood, fire, riot, storm, drought, plant or animal infestation or **disease**, or other natural or manmade disaster, **some merchants have taken unfair advantage of consumers by greatly increasing prices for essential consumer goods and services. While the pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, when a declared state of emergency or local emergency results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of essential consumer goods and services be prohibited.** It is the intent of the Legislature in enacting this act to protect citizens from excessive and unjustified increases in the prices charged during or shortly after a declared state of emergency or local emergency **for goods and services that are vital and necessary for the health, safety, and welfare of consumers.** Further, it is the intent of the Legislature that this section be liberally construed so that its beneficial purposes may be served.” (bold italics added).
- California Penal Code section 396(b) prohibits charging prices that exceeds, by more than 10 percent, the price of an item before a state or local declaration of emergency.
  - Applies to those who sell food, emergency supplies, medical supplies, building materials, and gasoline.
  - Applies to repair or reconstruction services, emergency cleanup services, transportation, freight and storage services, hotel accommodations, and rental housing.
  - Applies to transactions between manufacturers, wholesalers, distributors, and retailers as it does between retailers and consumers.
  - Exceptions exist if, for example, the price of labor, goods, or materials has increased for the business.

# Cal. Penal Code Section 396

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- The statute's effective period lasts for 30 days after a declaration of emergency, and it can be extended by state or local officials.
- The state, and most local agencies, have extended this period for the COVID-19 public health emergency. California's Executive Order N-44-20 is effective through September 4, 2020.
- Local governments can also pass their own laws that prohibit price gouging, and a number of California cities and counties have done so.
- Violators of the price gouging statute are subject to criminal prosecution that can result in a one-year imprisonment in county jail and/or a fine of up to \$10,000.
- Violators are also subject to civil enforcement actions including civil penalties of up to \$2,500 per violation, injunctive relief, and mandatory restitution.
- The Attorney General and local district attorneys can enforce the statute.
- Persons or entities that have been the victim of price gouging, or have information regarding potential price gouging, in California can file a complaint at [oag.ca.gov/report](https://oag.ca.gov/report).



# Challenges and Risks



- Beyond California, numerous other states and jurisdictions have their own similar but distinct and somewhat varying price gouging laws. In California and elsewhere, price gouging can have a profound impact across commercial business and supply chains.
- Affected and potentially affected industries include, but are not limited to, consumer goods, healthcare, insurance, employee benefits, labor and employment, retail, hospitality, real estate, construction, manufacturing and distribution, transportation and logistics, and government contracts.
- Actual or perceived price gouging presents tremendous challenges, class action litigation risks, and potential exposures for commercial businesses and employers.
- As businesses reopen, employees return to work, and courts resume operations, there is likely to be a spike in price gouging claims, disputes, and lawsuits –including class actions -- filed by consumers or businesses under state and federal consumer protection and unfair competition laws.
- Alleged actual or perceived anti-competitive practices, collusion or price fixing among market competitors, participants, or employers could lead to an uptick in state and federal antitrust claims and litigation.
- There may be an increase in state and federal *qui tam* false claim actions initiated against employers by employee whistleblowers, accompanied by claims personal to the employee against his or her employer for retaliation and wrongful termination.
- Businesses and employers are not immune from impacts and collateral consequences of criminal prosecutions and convictions.

# COVID-19 Price Gouging Class Actions (Exemplars)

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- *Consumer class action example no. 1:*
  - Consumer class action complaint alleging cost increases and price gouging by re-sellers on major online retail website on products including, e.g., face masks, pain reliever, cold remedies, toilet paper, disinfectants, and various foods (beans, milk, cereal, etc.).
  - Seeks to certify a class of consumers in California who bought any “protected product” on the site on or after February 4, 2020 at a price 10 percent greater than the site that charged for the same protected product (a) on February 2, 2020 or (b) immediately prior to any declaration of a state of emergency relating to the COVID-19 crisis.
  - Complaint alleges three claims: (1) violation of unfair competition law; (2) negligence *per se*; and (3) unjust enrichment. Complaint prays for damages, restitution, injunctive relief, fees, costs, and punitive damages.



# COVID-19 Price Gouging Class Actions (Exemplars)

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- *Consumer class action example no. 2:*
  - Consumer class action complaint against online retailer on behalf of a consumer who said that she purchased a face mask at a 300 percent markup. Plaintiff allegedly bought a two-pack of N95 masks from the retailer for \$23.98, with the same product selling at other national retailers for no more than \$8.99.
  - Complaint alleges that retailer’s business model incentivizes it to turn a blind eye to price gouging because retailer charges a fee based on the ultimate product sale price.
  - Seeks to certify national and California class who purchased products for which the sale price 10% or more
  - Suit alleges claims for (1) violations of California’s Consumer Legal Remedies Act, (2) violations of California’s Unfair Competition Law, and (3) quasi-contract, restitution, and unjust enrichment. Prays for injunctive relief, restitution, fees and costs.



# COVID-19 Price Gouging Class Actions (Exemplars)

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- *Consumer class action example no. 3:*
  - Consumer class action complaint alleging that more than two dozen grocery stores, wholesalers and producers have been nearly tripling the price of eggs during the COVID-19 pandemic. Defendants include many large supermarket chains, online retailers, as well as smaller stores and farms.
  - The proposed class includes people who have bought eggs in California that were sold, distributed, produced or handled by the defendants since the state of emergency was declared March 4.
  - Complaint alleges violations of Cal. Unfair Competition Law and Cal. Penal Code section 396. Complaint prays for declaratory relief, a permanent injunction barring the defendants from selling eggs at illegal prices, and restitution.

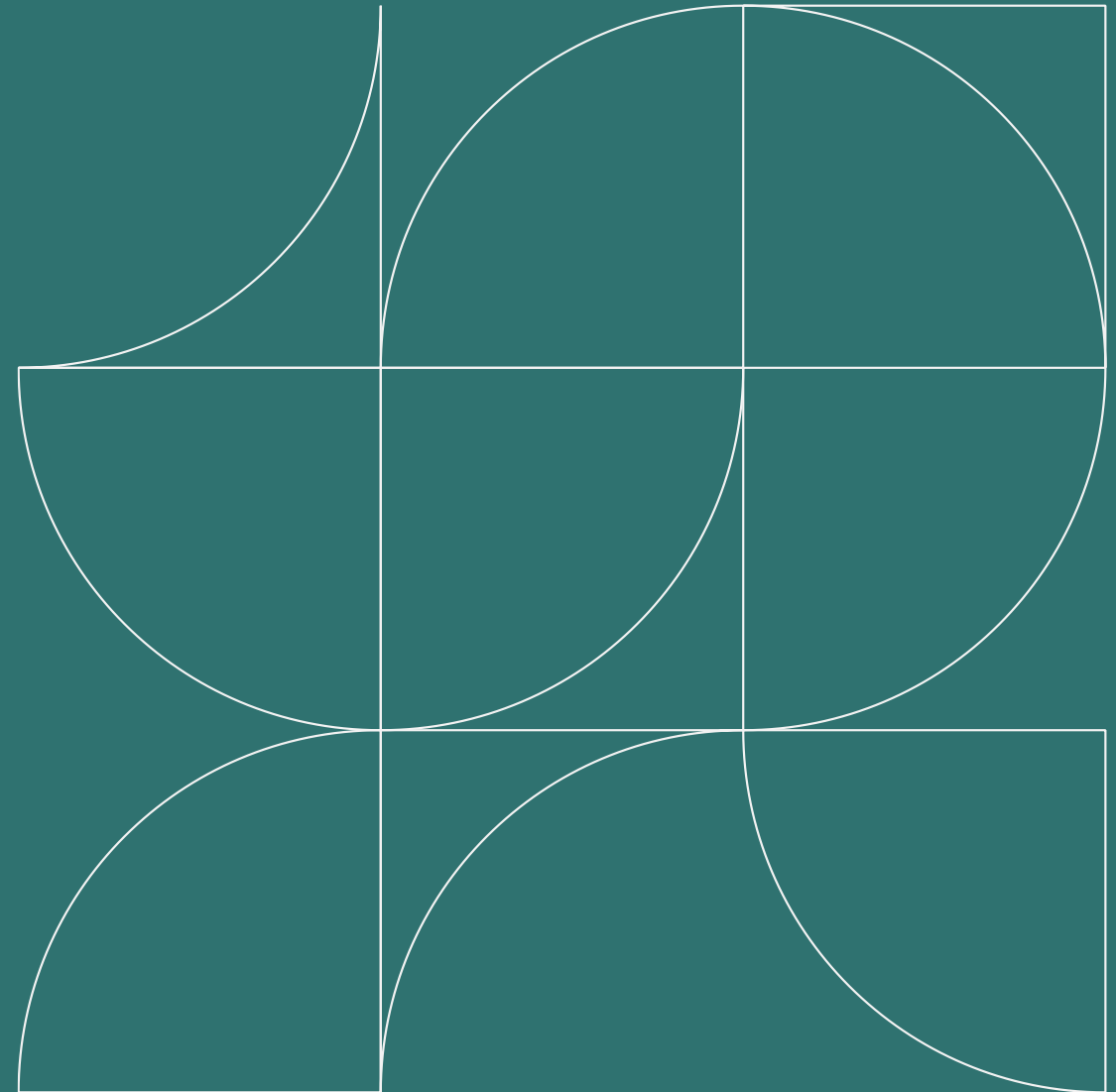


# Defending the Consumer Class Action

- Challenge whether the pricing gouging statute or order applies:
  - Did the sale occur within the geographic area covered by the statute or order?
  - Was the price excessive under the applicable legal standard?
  - Was the product sold subject to the restrictions of the statute or order?
  - Did the sale occur within the time period prescribed in the statute or order?
- Assert exceptions:
  - Increase costs. If the increase in price the consumer is the result of an increase in the seller's costs to obtain or deliver the good or service, there is no price gouging.
  - Sale pricing. If the item was previously on sale, the it is not price gouging to raise price back to pre-sale regular price.
  - Sale of emergency supplies to the State on terms acceptable to the state.
- Challenge the appropriateness of class treatment and certification.
- Challenge the alleged claims and causes of action (e.g., UCL, CLRA).

# Privacy Actions

in the Context of Data Collection  
Necessity or Mandated because  
of COVID-19



# Eavesdropper/Call Recording Claims under CIPA:

## Anatomy of CIPA

- California's Invasion of Privacy Act, Cal. Penal. Code § 630, *et seq.* ("CIPA") was enacted in 1967 to curb aggressive wiretapping and related privacy invasions
- As technology has evolved over the years, CIPA has been supplemented with additional sections
- CIPA's key sections cover landline call monitoring or recording (§ 632) and cellular phone call recording or interception (§ 632.7)



# Eavesdropping/Call Recording Claims under CIPA: What's the Difference?

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Cal. Penal Code § 632(c)

vs.

Cal. Penal Code § 632.7(a)

- nonconsensual
- landline communications
- eavesdropping/monitoring or recording
- confidential communications

- nonconsensual
- communications involving a cellular or cordless phone
- intentional recording
- any communication



# Eavesdropper/ Call Recording Claims under CIPA:

## Best Practices

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- Ensure consent before recording
  - Make warnings non-bypassable
  - Change automated warning to say, “Calls may be monitored *or recorded* for quality assurance purposes”
  - Remember it applies to inbound calls as well
- Be mindful of the differences between § 632(c) and § 632.7(a)
  - Are the communications confidential?
  - Is the recording intentional?
  - What type of communications?



# Privacy/Data Breach Claims: California Laws - CCPA

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- California Consumer Privacy Act (CCPA)
  - Signed into law June 28, 2018
  - Purpose is to provide CA residents with the right to:
    - Know what personal data is being collected about them
    - Know whether their personal data is being disclosed and to whom
    - Say no to the sale of their personal data
    - Access their personal data
    - Have equal service and prices, even if they exercise their privacy rights



# Privacy/Data Breach Claims: California Laws - CCPA

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- What is personal data?
  - “Information that **identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household** such as a real name, alias, postal address, unique personal identifier, online identifier Internet Protocol address, email address, account name, social security number, driver’s license number, passport number, or other similar identifiers.”
  - Information that “**identifies, relates to, describes, or is capable of being associated with, a particular individual**, including, but not limited to, his or her name, signature, Social Security number, physical characteristics or description, address, telephone number, passport number, driver’s license or state identification card number, insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information.”
  - **Does NOT include publicly available information**



# Privacy/Data Breach Claims: California Laws - CCPA

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- Applies to any business that does business in CA (regardless of physical presence) and meets at least one of the following:
  - Has annual gross revenues in excess of \$25M
  - Possesses the personal information of 50,000+ consumers, households, or devices
  - Earns more than half its annual revenue from selling consumers' personal information
- Business obligations:
  - Duty to comply
    - Post notice of consumer rights
    - Respond to consumers who exercise their rights
  - Duty to protect the security of personal information
  - Duty to train employees and contract as required



# Private Individual (and Class) Actions – Key Points

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- The only private right of action is for security breach
  - CA Unfair Competition Law: Can Plaintiff's bootstrap 17200 for class action filings?
    - Section 1798.150(c) does not provide for any right of action under any other law (thus apparently excluding 17200 claims, supported by Senate Judiciary Committee)
    - But, Plaintiff's bar has already challenged this: See **Clearview AI, Inc.**
    - To be safe: avoid privacy policy in terms of service, no independent cause of action
  - AG is only one allowed to enforce everything under the CCPA
- Central Issues:
  - whether there was a security breach, AND
  - Whether there was “reasonable security” in place prior to the breach
- Immediate effect despite AG enforcement uncertainty
  - While AG enforcement will not take place until July 1, 2020 (or possibly later), Plaintiffs have already begun filing class actions for security breaches and dissemination that took place since Jan. 1, 2020
  - See **Clearview AI**; See **Salesforce / Hannah Andersson**; See **Ring**; See **Zoom**

# Class Action Suits Filed in First Three Months of 2020

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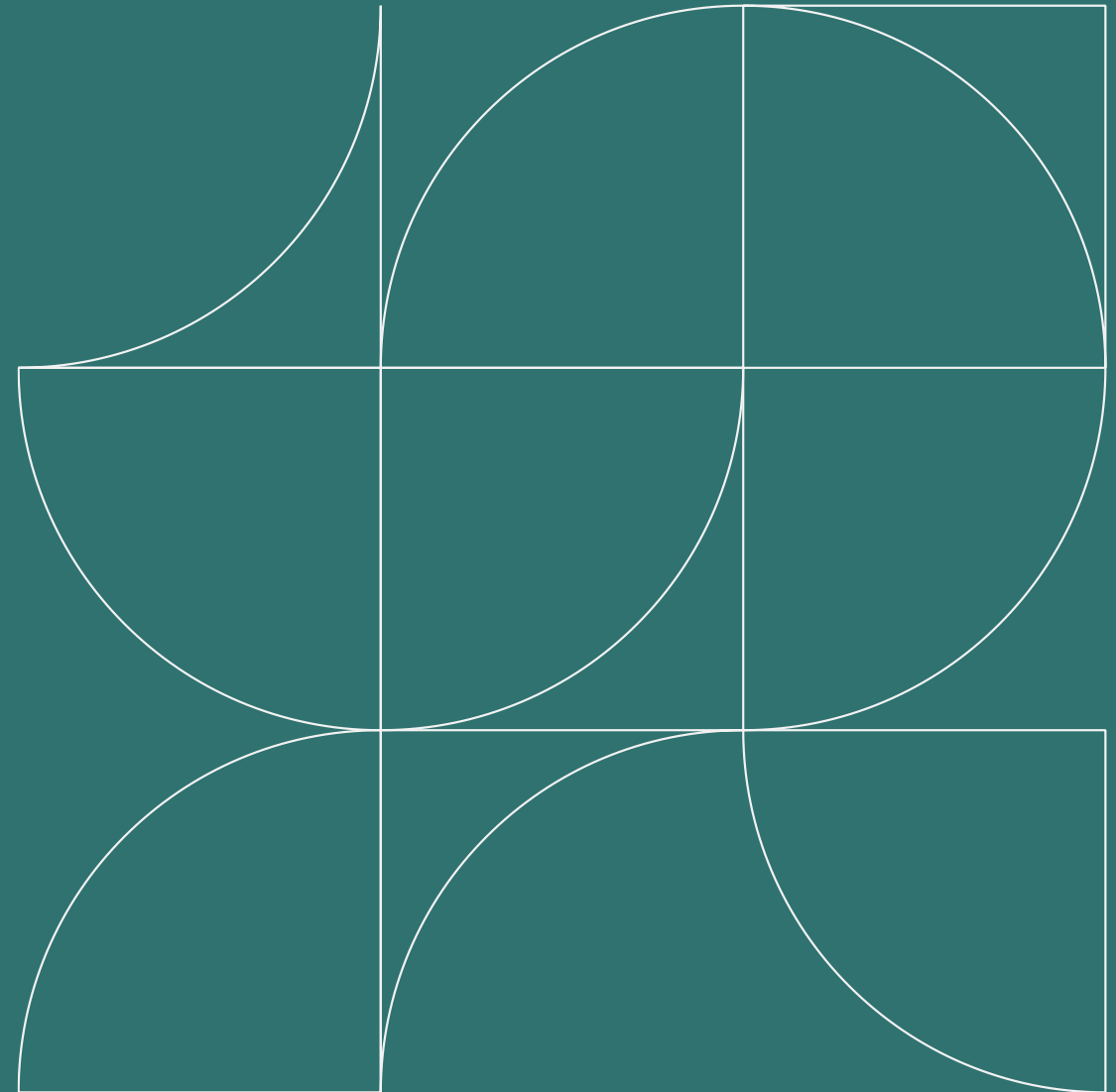
- Feb. 3 Initial Suit against e-commerce platform and **Salesforce** (operator of platform)
  - Security breaches occurred prior to Jan. 1, but Plaintiff alleges that the hackers did not disseminate to this parties until after Jan. 1...outcome TBD
- Feb. 18 Second Notable Suit against **Ring** (home security company):
  - Allegations: sharing of personal information with unauthorized third parties without consent; inadequate security measures; and failure to provide notice of the right to opt-out of the sale of the personal information
- First suit filed against **Zoom** (video-conferencing platform)
  - Complaint filed only 11 days after a March 20 Vice article exposing sharing of information, and despite Zoom responding within 7 days with a new product
  - Involved dissemination of info to Facebook (the anti-Facebook law)
  - Allegations: (1) failure to provide adequate notice and reasonable security measures; and (2) failure to block prior versions of the app and failure to assure users that the previously-collected info has been deleted.
  - CCPA action pled violations of CA's Unfair Competition Law, CA's Consumer Legal Remedies Act, Privacy Rights under CA Constitution, negligence and unjust enrichment

# Coronavirus-Related Issues

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- Recently, 60 trade associations, companies and organizations asked the AG for a compliance extension due to the coronavirus outbreak
  - No response yet provided, but AG has indicated a commitment to the July 1 date, and has “encouraged business to be particularly mindful of data security in this time of emergency”
- Increase in the need to screen and collect Physiological Data
  - Examples: body temperature, prior testing results, personal movement based on cell phone location monitoring, etc.
  - Information may not be PHI, but it still may be personal biometric information
- CCPA does not limit companies to online notification (unlike similar previous laws)
  - Creates difficulties about who to provide notice to consumers that are not interacting with the company online
- Example: Wholesale Supermarkets or Large Shopping Malls requires the taking of a customer’s temperature before entering the premises
  - Need (a) Process for notice; (b) deal with and provide verifiable customer requests; © response protocol, who it is sent to and for what purpose
- Major Takeaway: Any collection of information to mitigate the impact of the coronavirus on a business will necessarily relate to personal information – because the risk associated with the coronavirus is a personal risk (someone is sick)

# Auto Renewal and Deceptive Pricing Actions





# California's Automatic-Renewal Statute

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- Cal. Bus. & Prof. Code § 17600 et seq.
  - Applies to any arrangement, whether made online, on paper, or on the phone, where a paid subscription or purchasing agreement is automatically renewed until the consumer cancels (with some exceptions)
    - The purpose of the statute is to require businesses to disclose their subscription terms in a clear and conspicuous manner and obtain affirmative consent before charging consumers' debit or credit cards on a recurring basis
      - California's Automatic Renewal law is considered one of the most stringent in the U.S., which makes it a "hot spot" for filing automatic renewal disclosure class action cases
- The revised statute went into effect July 1, 2018
  - E-commerce sellers doing business in CA must allow online cancellation of auto-renewing memberships/purchases that were initiated online
  - Sellers who provide automatic offers that include a free gift, trial, or promotion must notify consumers about how to cancel the auto-renewal before they are charged

# California's Automatic-Renewal Statute:

## Compliance

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- The business must also provide to the consumer an acknowledgement capable of being retained which states the following:
  - the automatic renewal of continuous service offer terms;
  - the cancellation policy; and
  - a cost-effective, timely, and easy-to-use mechanism for cancellation (e.g. toll-free phone number, email address) and information regarding how to cancel
- If the auto-renewal offer contains a free trial, the business must disclose to the consumer how to cancel before he or she pays for the goods or services
  - the business must provide the consumer with clear and conspicuous notice of any material change

# California's Automatic-Renewal Statute:

## Remedies and Defenses

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- Section 17600 provides for the availability of all civil remedies applicable to the violation of a statute, making it attractive to the plaintiffs' bar
  - Further, any goods/services sold without the requisite disclosures are considered unconditional gifts, which may entitle consumers to refunds (including shipping and handling) without having to return their purchases
- **Defenses and Defensive Strategies:**
  - Express exception for businesses that comply in “good faith” (§ 17604)
  - Enforceable mandatory arbitration provisions and class action waivers
    - some notable auto-renewal cases have been compelled to arbitration
    - plaintiffs' attorneys discouraged from bringing putative class actions when applicable and enforceable arbitration provisions exist
  - At least two federal district courts have dismissed at the pleading stage auto-renewal claims brought by non-California residents
  - Plaintiffs must allege an injury that is *both* concrete and particularized (*Spokeo v. Robins*, No. 13-1339)

# Pricing Claims: FAL § 17500

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- California False Advertising Law
  - Cal. Bus. & Prof. Code §§ 17500 *et seq.*
    - it is unlawful to engage in advertising “which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading... or... so to make or disseminate or cause to be made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised”





## **Additional Resources :**

**Stay current on consumer class defense:**

[www.consumerclassdefense.com](http://www.consumerclassdefense.com)

**COVID-19 Resource Center**

[www.seyfarth.com/returntobusiness](http://www.seyfarth.com/returntobusiness)

An abstract geometric design consisting of white lines on a dark blue background. The design features a vertical line on the left, a horizontal line in the middle, and a vertical line on the right. Two large, overlapping circular arcs are positioned on the left side, one above and one below the horizontal line. Two smaller, overlapping circular arcs are positioned on the right side, also one above and one below the horizontal line. The overall composition is balanced and minimalist.

**Thank You**