

## COVID-19 AGGREGATE LITIGATION: THE SEARCH FOR THE UPSTREAM WRONGDOER

Robert H. Klonoff\*

*The COVID-19 pandemic has generated many suits—including thousands of class actions—in which plaintiffs claim that defendants caused economic or health-related harm. Although the COVID-19 context may have led many plaintiffs' lawyers to believe that the cases would be received with great sympathy, courts thus far have been very cautious, focusing closely—as they do in non-COVID cases—on whether the defendant has breached clear contractual commitments or has engaged in tortious or other wrongdoing. If anything, courts have been more skeptical and cautious in the COVID-19 context, recognizing that everyone has suffered due to the pandemic and that, in many instances, defendants themselves have attempted in good faith to navigate the challenges raised by the pandemic.*

*This Essay focuses primarily on three categories of cases that have already generated numerous rulings: (1) business interruption insurance claims, (2) tuition reimbursement actions, and (3) suits against prisons and immigration detention facilities. These three categories of cases line up on a continuum based on whether the proximate cause of the harm is COVID-19 itself or the conduct of the defendants. At one end are the business interruption insurance cases, which have received hostile treatment from almost all courts that have considered those claims. The underlying insurance policies almost universally require “physical loss or damage” to property, a requirement that is hard to square with losses caused by a pandemic. In the middle are the tuition refund cases, which have seen mixed success, with many (but not all) courts granting motions to dismiss after failing to find that there was a contractual commitment to in-person teaching. At the other end is the category of cases raising health and safety issues*

---

\* Jordan D. Schnitzer Professor of Law, Lewis & Clark Law School; Dean, Lewis & Clark Law School, 2007–2014. The author served as the academic member of the federal Advisory Committee on Civil Rules from 2011–2017. The author wishes to thank his research assistants, Cindy Lundt, David Ryan Mets, Emily Potucek, Arin Roberson, and River Sterne for their excellent research, and Professors Lynn Baker, Tom Baker, Samuel Issacharoff, Richard Marcus, Teddy Rave, and attorneys Elizabeth Cabraser and Gabriel Panek for their insightful comments on an earlier draft of this Essay. The views expressed in this piece, however, are solely those of the author. The case law has evolved rapidly; this Essay addresses cases rendered on or before August 31, 2022. This Essay was prepared for the Symposium entitled *Mass Torts Evolve: The Intersection of Aggregate Litigation and Bankruptcy*, hosted by the *Fordham Law Review* on February 25, 2022, at Fordham University School of Law.

*related to COVID-19 in prisons and at immigration detention facilities. On the merits, this is the strongest of the three categories, given the clear legal duty of government officials to protect the health of those in their custody. Yet, even in this context, many courts have declined to authorize injunctive relief, finding that the officials involved have attempted in good faith to protect their populations from COVID-19. At bottom, courts have commendably stayed focused on the merits and have not been swayed by the enormity of COVID-19 or the large numbers of claims. After discussing the three categories above, this Essay also briefly examines (1) consumer, labor, and securities fraud cases in the context of COVID-19; (2) COVID-19 cases involving arbitration clauses and class action waivers; and (3) the handful of class-wide settlements that have thus far been reached in COVID-related litigation.*

INTRODUCTION.....	387
I. COVID-19 LITIGATION IN THE THREE SELECTED CATEGORIES ..	391
A. <i>Business Interruption Insurance Cases</i> .....	391
1. Rulings on Motions to Dismiss.....	392
2. Rulings on Aggregation .....	395
a. <i>Judicial Panel on Multidistrict Litigation</i> .....	395
b. <i>Class Certification Rulings</i> .....	396
B. <i>Tuition Refund Cases</i> .....	397
1. Rulings on Motions to Dismiss.....	399
2. Class Certification Rulings .....	403
C. <i>Prison and Immigration Detention Cases</i> .....	405
1. Class Certification.....	406
2. Merits Rulings.....	410
II. OTHER EXAMPLES OF THE IMPORTANCE OF FOCUSING ON THE DEFENDANT’S CONDUCT .....	418
A. <i>Consumer Claims</i> .....	418
B. <i>Labor Cases</i> .....	420
C. <i>Securities Fraud Cases</i> .....	421
III. OTHER IMPORTANT TRENDS IN COVID-19 CASES.....	423
A. <i>Arbitration Clauses</i> .....	423
B. <i>Willingness of Some Defendants to Reach Prompt         Class-Wide Settlements</i> .....	424
CONCLUSION .....	427

## INTRODUCTION

No one could have predicted that, in early 2020, a pandemic would change the face of the planet. In addition to causing massive numbers of deaths and other serious injuries, the COVID-19 pandemic has had devastating economic consequences for millions of people in the United States and throughout the world. Just focusing on the United States, as of August 31, 2022, the number of deaths from COVID-19 totaled over 1,040,000<sup>1</sup>—far exceeding the total number of American deaths from the 1918 Spanish flu pandemic.<sup>2</sup> As compared to 1918, however, today’s Americans are far more litigious—whereas the Spanish flu pandemic led to very few suits,<sup>3</sup> COVID-19 has resulted in thousands of suits in the United States alone, including over a thousand class actions.<sup>4</sup> These include, among other categories:

- business interruption insurance claims;
- claims against colleges and universities seeking tuition refunds for switching from in-person to online classes;
- claims seeking refunds for canceled travel plans, canceled entertainment events, and gym closures;
- class actions against prisons and immigration detention facilities for COVID-19 health risks to confined populations;
- various labor and employment claims related to COVID-19;
- consumer-related claims, such as price gouging; and
- securities fraud suits alleging false claims of a vaccine or cure, or false statements regarding the financial impact of COVID-19.<sup>5</sup>

As suits started to mount, press accounts described the threat to defendants as historic, on par with some of the largest and most contentious civil litigation in history. One source, for example, stated that COVID-related business interruption insurance litigation alone has “dwarf[ed]” prior

---

1. See *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 31, 2022, 4:35 PM), <http://web.archive.org/web/20220831235848/https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

2. See Carla K. Johnson, *COVID Has Killed About as Many Americans as the 1918–19 Flu*, AP NEWS (Sept. 20, 2021), <https://apnews.com/article/science-health-pandemics-united-states-coronavirus-pandemic-c15d5c6dd7ece88d0832993f11279fbb> [<https://perma.cc/8W98-QQ8P>] (noting that approximately 675,000 Americans died as a result of the 1918 Spanish flu).

3. See Mark Jensen, *The 1918 Flu Pandemic and High Court Jurisprudence*, LAW360 (Mar. 27, 2020, 3:16 PM), <https://www.law360.com/articles/1257426/the-1918-flu-pandemic-and-high-court-jurisprudence> [<https://perma.cc/B7PK-C5FV>] (noting that only five suits were filed involving the 1918 pandemic).

4. See *COVID-19 Labor & Employment Litigation Tracker: March 2020–March 2022*, LITTLER MENDELSON, <https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker> [<https://perma.cc/Q3C9-DAS6>] (Apr. 1, 2022) (identifying 5,659 suits and 646 class actions filed against employers due to labor and employment violations related to coronavirus); *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases in 2020*, PIERCE ATWOOD (Mar. 9, 2021), <https://www.pierceatwood.com/alerts/class-action-litigation-related-covid-19-filed-and-anticipated-cases-2020> [<https://perma.cc/8BN9-36RB>] (summarizing more than 1,400 class actions filed in 2020).

5. See, e.g., PIERCE ATWOOD, *supra* note 4.

“battlefields” such as asbestos, environmental pollution, and the September 11, 2001, terrorist attacks.<sup>6</sup> According to that source, “there truly has never been a fight of this scale.”<sup>7</sup> Another source said that “the wave of [COVID-related] lawsuits is unprecedented”—a “tsunami”—and noted that COVID-19 “is expected to lead to more litigation than any other incident in U.S. history.”<sup>8</sup> Plaintiff-side class action firms—including some of the most well-recognized firms in the country—have filed a myriad of COVID-related class actions.<sup>9</sup> And top defense-side law firms have geared up to represent defendants in such cases, touting their expertise<sup>10</sup> and warning that “COVID-19 class actions [have] steadily proliferated across industries, jurisdictions, and areas of law,” and are “reverberat[ing] throughout all sectors and regions of the country.”<sup>11</sup> COVID-related litigation is so widespread that several websites have been established to track and count the ever-changing landscape of the litigation, often broken down into multiple categories of cases.<sup>12</sup>

---

6. Ashley Cullins, *A New Year's Nightmare: COVID-19 Litigation Piling Up*, HOLLYWOOD REP. (Jan. 11, 2021, 6:45 AM), <https://www.hollywoodreporter.com/business/business-news/a-new-years-nightmare-covid-19-litigation-piling-up-4112050/> [<https://perma.cc/J6HZ-2MSE>]; see also Leslie Scism, *Covid-19 Insurance Lawsuits Move Toward High-Stakes Phase*, WALL ST. J. (Nov. 16, 2021, 5:30 AM), <https://www.wsj.com/articles/covid-19-insurance-lawsuits-move-toward-high-stakes-phase-11637058600> [<https://perma.cc/4WSU-STKR>] (“Covid-19 business interruption lawsuits have shaped up to be one of the biggest fights the insurance industry has ever waged with policyholders.”).

7. Cullins, *supra* note 6.

8. Daniel S. Wittenberg, *Brace for the Storm: The Tsunami of Pandemic-Related Litigation*, AM. BAR ASS'N (June 2, 2021), <https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/brace-the-storm-tsunami-pandemic-related-litigation/> [<https://perma.cc/S8M2-SRM9>]; see Esquire Deposition Sols., LLC, *Scanning the COVID-19 Litigation Scene*, JD SUPRA (Aug. 18, 2020), <https://www.jdsupra.com/legalnews/scanning-the-covid-19-litigation-scene-68159/> [<https://perma.cc/8JYJ-VUSM>].

9. See, e.g., *COVID-19 Legal Resource Center*, COHEN MILSTEIN, <http://web.archive.org/web/20211102161132/https://www.cohenmilstein.com/covid-19-legal-resource-center/> (Sept. 24, 2022) (focusing on Cohen Milstein’s expertise in COVID-related cases in employment, business interruption, consumer, and other categories); BERGER MONTAGUE, <https://bergermontague.com/?s=covid> [<https://perma.cc/M5HG-FMW8>] (last visited Oct. 7, 2022) (listing various COVID-related class actions filed by Berger Montague).

10. See, e.g., Molly Moriarty Lane, Scott T. Schutte, Sujal J. Shah, Noah J. Kaufman, Gerald P. Konkell, W. Brad Nes, Robert M. Brochin & Peter C. Neger, *Colleges and Universities: Litigation Challenges and Risk Mitigation in the Face of COVID-19*, MORGAN LEWIS (May 21, 2020), <https://www.morganlewis.com/pubs/2020/05/colleges-and-universities-litigation-challenges-and-risk-mitigation-in-the-face-of-covid-19-cv19-1f> [<https://perma.cc/T94B-A2KY>] (Morgan Lewis touting its “multidisciplinary Coronavirus COVID-19 Task Force to help guide [clients] through the broad scope of legal issues brought on by this public health challenge”); *Coronavirus Resource Center*, DLA PIPER, <https://www.dlapiper.com/en/us/services/coronavirus-covid-19/> [<https://perma.cc/JJ7E-ES2S>] (last visited Oct. 7, 2022); *COVID-19/Vaccine Resource Center*, FISHER PHILLIPS, [https://www.fisherphillips.com/services/emerging-issues/covid\\_19-resource-center/index.html?tab=overview](https://www.fisherphillips.com/services/emerging-issues/covid_19-resource-center/index.html?tab=overview) [<https://perma.cc/JX3T-LU9N>] (last visited Oct. 7, 2022) (describing COVID-19 task force focused on addressing issues facing employers due to the pandemic).

11. PIERCE ATWOOD, *supra* note 4.

12. See, e.g., *id.*; LITTLER MENDELSON, *supra* note 4; Rachel Bailey, *An Updated Analysis of Litigation Caused by COVID-19*, LEX MACHINA (Oct. 6, 2020), <https://lexmachina.com/blog/an-updated-analysis-of-litigation-caused-by-covid-19/> [<https://perma.cc/ZB76-VCAW>].

COVID-19 cases, of course, are a recent phenomenon. The first reported instance of COVID-19 in the United States occurred in January 2020,<sup>13</sup> and the World Health Organization did not declare COVID-19 a global pandemic until March 2020.<sup>14</sup> Thus, many of the COVID-related suits have not advanced significantly, if at all. Nonetheless, there has been a surprising number of important rulings in various categories of cases. It is thus a good time to take stock of the current status of COVID-19 litigation.

At first blush, one might expect that the difficult circumstances suffered by plaintiffs in COVID-related cases—including serious health and economic consequences—would create a favorable and highly sympathetic climate for plaintiffs. Indeed, given the thousands of class actions that have been filed in the wake of COVID-19, many plaintiffs’ attorneys apparently believe that these cases are strong and eminently winnable, as well as suitable for aggregate treatment. However, as developed below, plaintiffs’ success thus far has been mixed at best. Courts addressing COVID-19 litigation have done what they always do in analyzing civil suits—focus rigorously and carefully on the “upstream” conduct of the defendant.<sup>15</sup> Do plaintiffs sufficiently allege that the defendant breached the precise terms of a contract or engaged in tortious or other wrongdoing? Or is the real culprit COVID-19 itself? If anything, plaintiffs’ unimpressive track record thus far, and the courts’ harsh criticism of plaintiffs’ theories and claims, suggest that courts are being even *more* demanding of plaintiffs in COVID-19 cases than in non-COVID civil suits. This approach reflects the reality that COVID-19 has impacted everyone, including the defendants. Indeed, the courts are especially sensitive to the challenges caused by COVID-19, given their own difficult issues in administering justice during a pandemic.<sup>16</sup>

It is beyond the scope of this Essay to address the case law relating to all of the myriad categories of COVID-19 cases. Rather, Part I of this Essay focuses on three major categories of COVID-related class actions: (1) business interruption insurance cases, (2) tuition reimbursement actions, and (3) suits against prisons and immigration detention centers alleging the failure of authorities to protect their populations from COVID-19. Part I focuses both on merits rulings and on procedural decisions granting or denying aggregate treatment. This Essay examines business insurance interruption cases and tuition reimbursement cases because of the sheer

---

13. See *First Travel-Related Case of 2019 Novel Coronavirus Detected in United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> [<https://perma.cc/HF9D-BN9E>].

14. See Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic*, ACTA BIOMEDICA, Mar. 2020, at 157, 157.

15. See Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 831–32 (1997) (using the “upstream” and “downstream” terminology); see also PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.01 cmt. c (AM. L. INST. 2010) (referring to “‘upstream’ matters focused on a generally applicable course of conduct on the part of those opposing the claimants in the litigation”).

16. See, e.g., Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 321, 421–22 (2021).

number of such cases<sup>17</sup> and because courts in those cases have already issued numerous rulings on motions to dismiss. It focuses on the prison and immigration detention cases because, (1) as with the insurance and tuition cases, courts have already issued numerous rulings and (2) those cases focus on structural relief and thus provide a useful contrast to the first two categories, which focus on economic damages.

These three categories of cases line up on a continuum based on the duties that the defendants allegedly owe the plaintiffs. At one end, the business interruption insurance cases have consistently received hostile treatment from most courts because the contractual language of the policies cannot fairly be read to insure against a pandemic.<sup>18</sup> Courts have repeatedly found that the defendant companies acted appropriately in denying coverage, given that the only duty owed by insurers is to pay under the precise terms of the policy.

In the middle, the tuition refund cases have seen, at best, mixed success, with several, but not all, courts dismissing the cases on the pleadings after failing to find any contractual commitment to in-person teaching in the event of a pandemic.<sup>19</sup> Schools have a duty to ensure the health of their students, but that often requires dismissing students because of health or safety risks, rather than maintaining in-person teaching in the face of clear dangers.

At the other end, the prison and immigration detention cases are the strongest of the three categories, given the clear legal duty of public institutions to protect the health of those in their custody in circumstances in which release may not be a viable option.<sup>20</sup> Yet, even in this context, numerous courts have declined to authorize injunctive relief, finding that the institutions' officials have attempted in good faith to protect their populations from COVID-19. In short, courts are doing what they are supposed to do: evaluating the merits without being swayed by the sympathetic circumstances of COVID-19 losses or the sheer number of cases.<sup>21</sup>

Although the primary focus of this Essay is on the three categories discussed above, Part II looks briefly at other categories of COVID-19 cases—consumer, labor and employment, and securities fraud cases. There are fewer rulings thus far in these categories, but it is already clear that the success of those plaintiffs will likewise turn on whether, under the particular

---

17. See, e.g., Julianna Thomas McCabe, *COVID-19 Class Actions Update*, CARLTON FIELDS (Dec. 15, 2020), <https://www.carltonfields.com/insights/expect-focus/2020/covid19-class-actions-update> [<https://perma.cc/2EA3-53P7>] (noting that business interruption insurance and tuition reimbursement represent 25 percent and 22 percent of all COVID-related class actions, respectively); *Covid Coverage Litigation Tracker*, UNIV. PA. CAREY L. SCH., <https://cclt.law.upenn.edu> [<https://perma.cc/XKY6-8LPR>] (last visited Oct. 7, 2022) (noting that between March 2020 and July 2022, over 2,300 business interruption insurance cases were filed).

18. See *infra* Part I.A.

19. See *infra* Part I.B.

20. See *infra* Part I.C.

21. Cf. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 181 (2003) (“[T]he class action has no roving authority to alter unilaterally class members’ preexisting bundle of rights . . .”).

facts, they can show clear contractual breaches or wrongful conduct by the defendant. Part III examines cases involving arbitration clauses and class action waivers. It concludes that, as in non-COVID cases, courts have rigorously enforced such agreements. Part III also discusses the relatively few class-wide settlements that have been reached thus far in COVID-19 cases. The paucity of such settlements suggests that most defendants are mounting vigorous defenses and are not rushing to reach a compromise.

## I. COVID-19 LITIGATION IN THE THREE SELECTED CATEGORIES

### A. *Business Interruption Insurance Cases*

According to one source, business interruption insurance cases represent approximately 25 percent of all COVID-related class actions.<sup>22</sup> The underlying insurance policies are designed to provide covered business entities with a source of income when such parties are forced to temporarily close or significantly cut back operations after sustaining a covered loss.<sup>23</sup> Plaintiffs in these cases seek insurance coverage based on contract provisions that typically require a “direct physical loss or damage to *property*,” something that would not seem to contemplate losses caused by a pandemic.<sup>24</sup> Moreover, in some of the cases, policyholders have sued despite being insured under policies that expressly exclude losses “caused by or resulting from any virus.”<sup>25</sup> It is not surprising that the vast majority of courts that have ruled on motions to dismiss have held, without even reaching the issue of class certification, that the loss of use of property stemming from COVID-19 does not constitute a physical alteration to property.<sup>26</sup> Of the few courts that have taken up class certification, only one has certified a class outside of the settlement context, and that certification ruling was overruled on interlocutory appeal.<sup>27</sup> There have been several motions requesting the U.S. Judicial Panel on Multidistrict Litigation (JPML) to centralize business

---

22. See McCabe, *supra* note 17.

23. See, e.g., *Business Interruption Insurance*, THE HARTFORD, <https://www.thehartford.com/business-insurance/business-interruption-insurance> [<https://perma.cc/9JGQ-CLGE>] (last visited Oct. 7, 2022) (providing a description of business interruption insurance, noting that such insurance “can help replace income you lose if you can’t open temporarily after a covered loss, like property damage”); see also *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 329 (7th Cir. 2021) (noting that the policies at issue “provided coverage for income losses sustained as a result of an action of civil authority prohibiting access to covered property, when such action was taken in response to ‘direct physical loss’ suffered by other property”).

24. See, e.g., *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 888 (9th Cir. 2021) (emphasis added).

25. See, e.g., *Chung v. Am. Zurich Ins. Co.*, No. 20-CV-5555, 2021 WL 6136206, at \*6 (E.D.N.Y. Dec. 29, 2021) (dismissing business interruption claims and stating that “[e]ven if definitional ambiguity did exist, the Policy’s Virus Exclusion would apply so as to exclude coverage” from any COVID-related claims).

26. See *infra* Part I.A.1.

27. See *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 20-cv-265, 2021 WL 3686668, at \*11 (E.D. Va. Aug. 19, 2021), *rev’d and remanded*, No. 21-255, 2021 WL 4202678 (4th Cir. Sept. 2, 2021).

interruption insurance cases for efficiency purposes under 28 U.S.C. § 1407, but most such requests have been denied.<sup>28</sup>

This section first considers merits rulings in business interruption insurance cases. It then discusses aggregation rulings, i.e., centralization rulings by the JPML and the one ruling (reversed on appeal) granting class certification.

### 1. Rulings on Motions to Dismiss

Defendants have prevailed in the vast majority of business interruption insurance cases that have reached the motion to dismiss stage. Even more strikingly, every federal circuit to address the issue (the U.S. Courts of Appeals for the Second,<sup>29</sup> Fourth,<sup>30</sup> Fifth,<sup>31</sup> Sixth,<sup>32</sup> Seventh,<sup>33</sup> Eighth,<sup>34</sup> Ninth,<sup>35</sup> Tenth<sup>36</sup> and Eleventh<sup>37</sup> Circuits) has sided with the defendants. Notwithstanding the tragic economic losses suffered by many of the named plaintiffs and putative class members, and notwithstanding the principle that ambiguities in insurance contracts must be construed in favor of the insured,<sup>38</sup> these courts have consistently ruled in favor of the insurance companies.

For instance, in *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*,<sup>39</sup> the Ninth Circuit unanimously affirmed the district court's dismissal of business interruption insurance claims brought by plaintiff, the owner of a children's store, for itself and a putative class based on business interruption insurance coverage from Travelers.<sup>40</sup> The Ninth Circuit had no difficulty rejecting plaintiff's argument that the policy language covering "direct physical loss of or damage to' property" could not be stretched to

---

28. See *infra* Part I.A.2.a.

29. See *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 21 F.4th 216, 219–22 (2d Cir. 2021) (non-class case).

30. See *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 933–34 (4th Cir. 2022).

31. See *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 454–56 (5th Cir. 2022) (non-class case).

32. See *Estes v. Cincinnati Ins. Co.*, 23 F.4th 695, 699–702 (6th Cir. 2022) (non-class case); *In re Zurich Am. Ins. Co.*, No. 21-0302, 2021 WL 4473398, at \*1 (6th Cir. Sept. 29, 2021).

33. See *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 332–33 (7th Cir. 2021) (non-class case).

34. See *Robert Levy, D.M.D., LLC v. Hartford Cas. Ins. Co.*, No. 21-1446, 2022 WL 2520570, at \*1 (8th Cir. July 7, 2022).

35. See *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 15 F.4th 885, 890–93 (9th Cir. 2021); *Levy Ad Grp., Inc. v. Fed. Ins. Co.*, No. 21-15413, 2022 WL 816927, at \*1 (9th Cir. Mar. 17, 2022) (non-class case applying Nevada state law).

36. See *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 708–13 (10th Cir. 2021) (non-class case), *cert. denied*, 142 S. Ct. 2779 (2022) (mem.).

37. See *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697, at \*2 (11th Cir. Aug. 31, 2021).

38. See, e.g., *Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284, 288–89 (3d Cir. 2004).

39. 15 F.4th 885 (9th Cir. 2021).

40. *Id.* at 885.

cover losses stemming from COVID-19.<sup>41</sup> The court cited and quoted numerous decisions supporting its conclusion, including an Eighth Circuit decision in a non-class case.<sup>42</sup> In addition, the *Mudpie* court relied on language in the Travelers policies providing that the company would not “pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”<sup>43</sup> According to the court, “Mudpie does not plausibly allege that ‘the efficient cause,’ i.e., the one that set others in motion, was anything other than the spread of the [COVID-19] virus throughout California, or that the virus was merely a remote cause of its losses.”<sup>44</sup>

The Ninth Circuit also rejected business interruption insurance claims in two unpublished opinions handed down the same day as *Mudpie*.<sup>45</sup> In one of those cases, the court looked at the governing laws of the ten states at issue, finding nothing in any of those laws that would salvage the claims.<sup>46</sup>

Similarly, in *In re Zurich American Insurance Co.*,<sup>47</sup> the Sixth Circuit held, in the context of more than a dozen restaurant operators seeking coverage for lost income, that “‘a pandemic-triggered government order, barring in-person dining at a restaurant’ does not qualify as ‘direct physical loss of or damage to the property’ under Ohio law.”<sup>48</sup> The court reaffirmed its prior holding, rendered only a few days earlier, in a case involving a single restaurant.<sup>49</sup> In the earlier case, the court explained the fatal flaw with the plaintiff’s argument:

Whether one sticks with the terms themselves (a “direct physical loss of” property) or a thesaurus-rich paraphrase of them (an “immediate” “tangible” “deprivation” of property), the conclusion is the same. The policy does not cover this loss. The restaurant has not been tangibly destroyed, whether in part or in full. And the owner has not been tangibly or concretely deprived of any of it. It still owns the restaurant and everything inside the space. And it can still put every square foot of the premises to use, even if not for in-person dining use.<sup>50</sup>

---

41. *Id.* at 890.

42. *Id.* (discussing *Oral Surgeons, P.C. v. Cincinnati Insurance Co.*, 2 F.4th 1141 (8th Cir. 2021), and other cases).

43. *Id.* at 893.

44. *Id.* at 894 (quoting *Sabella v. Wisler*, 377 P.2d 889, 895 (Cal. 1963)).

45. *See Chattanooga Pro. Baseball LLC v. Nat’l Cas. Co.*, No. 20-17422, 2021 WL 4493920, at \*1 (9th Cir. Oct. 1, 2021); *Selane Prods., Inc. v. Cont’l Cas. Co.*, No. 21-55123, 2021 WL 4496471, at \*1 (9th Cir. Oct. 1, 2021).

46. *See Chattanooga Pro. Baseball LLC*, 2021 WL 4493920, at \*1–3.

47. No. 21-0302, 2021 WL 4473398 (6th Cir. Sept. 29, 2021).

48. *Id.* at \*1 (quoting *Santo’s Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 401 (6th Cir. 2021)).

49. *See Santo’s Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 400 (6th Cir. 2021).

50. *Id.* at 401; *accord Bridal Expressions LLC v. Owners Ins. Co.*, No. 21-3381, 2021 WL 5575753, at \*2 (6th Cir. Nov. 30, 2021) (rejecting business interruption insurance loss claim by a bridal shop on behalf of a putative class, stating that “[w]hat was true for the restaurant in *Santo’s Italian Café* is true for the bridal shop today”—the court rejected plaintiff’s effort to plead around the earlier precedent by alleging that COVID-19 was in fact present on the property).

Likewise, in *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Insurance Co.*,<sup>51</sup> the Eleventh Circuit rejected a putative class's claim that it was entitled to business interruption insurance coverage for loss of business to its dentistry operations stemming from COVID-19.<sup>52</sup> In finding that there was no "direct physical loss or damage" as required by the policy, the court noted derisively that plaintiff "has alleged nothing that could qualify, *to a layman or anyone else*, as physical loss or damage."<sup>53</sup>

Similarly, in *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Insurance Co.*,<sup>54</sup> the Tenth Circuit found that the contract "covered only losses stemming from physical alteration or tangible dispossession of property," and that "[n]either occurred here."<sup>55</sup> The court noted that "the decisions of every other circuit" to decide the issue were in accord.<sup>56</sup> It further found, as an independent matter, that the contract's virus exclusion barred the claim.<sup>57</sup>

Although courts in these cases understand the serious losses suffered by plaintiffs, they also understand their duty to adhere to the plain language of the insurance policies. As one district court explained in a suit brought as an individual action:

The Court understands and is sympathetic to Plaintiff's circumstances. Plaintiff, like countless others, has suffered enormous loss as a result of the COVID-19 pandemic, threatening not just Plaintiff's livelihood, but the continued vibrance and success of our local communities. Notwithstanding this reality, however, the Court is not free to rewrite the terms of the Policy and is obligated to enforce the terms thereof as written.<sup>58</sup>

To be sure, courts have occasionally allowed such claims to survive a motion to dismiss, reasoning that (1) the language requiring "direct physical loss" is ambiguous and could encompass the COVID-related claims, (2) the virus exclusion does not apply when the real cause of the harm is a government shutdown order, or (3) a showing of actual contamination of the premises could satisfy the "direct physical loss" requirement.<sup>59</sup> Ultimately,

---

51. No. 21-11046, 2021 WL 3870697 (11th Cir. Aug. 31, 2021).

52. *Id.* at \*2.

53. *Id.* (emphasis added).

54. 21 F.4th 704 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2779 (2022) (mem.).

55. *Id.* at 710.

56. *Id.*

57. *Id.* at 712–14; *accord, e.g.*, *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1358–59 (11th Cir. 2022) (affirming rejection in putative class action of business interruption insurance resulting from COVID-19); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 930–34 (4th Cir. 2022) (same); *Robert Levy, D.M.D., LLC v. Hartford Cas. Ins. Co.*, No. 21-1446, 2022 WL 2520570, at \*1 (8th Cir. July 7, 2022) (same).

58. *J.G. Optical, Inc. v. Travelers Cos.*, No. 20-5744, 2021 WL 4260843, at \*6 (D.N.J. Sept. 20, 2021).

59. *See, e.g.*, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 376, 378 (E.D. Va. 2020) (finding the phrase "direct physical loss" to be ambiguous and to potentially cover COVID-related claims, and further ruling that the virus exception did not apply because a government shutdown was the direct cause of the loss); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 874 (W.D. Mo. 2020) (finding that plaintiffs plausibly alleged that they were deprived of the use of their dental offices by the

however, those decisions are outliers, and are unlikely to have continuing vitality given the unanimous and well-reasoned federal appellate court decisions to the contrary.

## 2. Rulings on Aggregation

### *a. Judicial Panel on Multidistrict Litigation*

Although the JPML has not considered many COVID-19 cases overall, it has considered seven requests for centralization in business interruption insurance cases and has denied such requests in five (roughly 70 percent) of them.<sup>60</sup> This percentage contrasts significantly with the JPML's overall recent rate of granting a majority of motions for centralization.<sup>61</sup> Indeed, despite the obvious efficiency of affording multidistrict litigation (MDL) treatment when cases are spread throughout the country,<sup>62</sup> in the business interruption insurance cases, the JPML has rejected centralization except in situations in which the scope of the cases was geographically narrow.<sup>63</sup>

The first case that the JPML considered was *In re COVID-19 Business Interruption Protection Insurance Litigation*.<sup>64</sup> In that case, the JPML was asked to centralize fifteen cases pending in federal courts around the country and asserting declaratory judgment and breach of contract claims against providers of commercial property insurance.<sup>65</sup> The JPML also received notice of 263 related actions.<sup>66</sup> In total, the claims spanned forty-eight federal districts and involved collectively more than 100 insurers.<sup>67</sup> Plaintiffs and the putative classes all claimed that the policies at issue

---

COVID-19 virus “physically attach[ing] itself” to their clinics (citing *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 801–02 (W.D. Mo. 2020)); *see also* Shawn Rice, *The Biggest COVID-19 Business Interruption Rulings of 2021*, LAW360 (Dec. 17, 2021, 2:54 PM), <https://www.law360.com/articles/1436150/the-biggest-covid-19-business-interruption-rulings-of-2021> [<https://perma.cc/F7W8-ZNQ6>] (discussing state court rulings denying motions to dismiss).

60. *See infra* notes 63–75 and accompanying text.

61. *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS: JANUARY THROUGH DECEMBER 2020, at 5 (2020), [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics%202020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf) [<https://perma.cc/42WY-358K>] (JPML granted twenty-one requests and denied nineteen in 2019, and granted twenty-six requests and denied nineteen in 2020; in only four years between 2011 and 2020 did the JPML deny more requests than it granted).

62. *See, e.g., In re Volkswagen “Clean Diesel” Mktg., Sales Pracs. & Prods. Liab. Litig.*, 148 F. Supp. 3d 1367, 1367 (J.P.M.L. 2015) (consolidating sixty-three actions from district courts throughout the country in the Northern District of California, and noting that potentially related actions had been filed in more than sixty different districts).

63. *See, e.g., In re Soc’y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1359, 1363 (J.P.M.L. 2020) (centralizing thirty-four pending actions against a common insurer in the Northern District of Illinois because the forum “lies at the heart of [the insurer’s] regional business and represents an accessible forum with the capacity to efficiently manage these case”).

64. 482 F. Supp. 3d 1360 (J.P.M.L. 2020).

65. *See id.* at 1361.

66. *See id.*

67. *See id.*

provided coverage for business losses caused by the COVID-19 pandemic.<sup>68</sup> The JPML denied centralization, noting that “[t]here is no common defendant in the[] actions,” and that the individual cases involved either a single insurer or insurer-group, “i.e., related insurers operating under the same umbrella or sharing ownership interests.”<sup>69</sup> The JPML further noted that “[m]anaging such a litigation would be an ambitious undertaking for any jurist, and implementing a pretrial structure that yields efficiencies will take time.”<sup>70</sup> The time-consuming nature of an MDL was especially concerning to the JPML because “[m]any plaintiffs [were] on the brink of bankruptcy as a result of business loss due to the COVID-19 pandemic and the government closure orders.”<sup>71</sup> Thus, the JPML believed that individual litigation would be the most expeditious approach, a puzzling conclusion given that it was *the plaintiffs* who were requesting centralization.<sup>72</sup> The JPML further declined to create insurer-specific MDLs but held out such a possibility for future cases.<sup>73</sup>

Rejecting centralization in cases involving multiple insurance companies is understandable. Yet, following that initial ruling, the JPML has on four separate occasions denied centralization of cases involving a *single* insurer.<sup>74</sup> The JPML reasoned that separate handling of the cases by multiple judges would achieve more rapid resolution. To be sure, in one group of cases, the JPML did agree to centralize the business interruption insurance claims, but it involved a relatively small geographical scope.<sup>75</sup> Overall, the JPML has not been in favor of centralizing business interruption insurance cases.

#### *b. Class Certification Rulings*

Because of the overwhelming success defendants have had in getting the cases dismissed outright prior to rulings on class certification, there are virtually no class certification opinions in this area.<sup>76</sup> There is, however, an interesting ruling by the Fourth Circuit in *State Farm Mutual Auto Insurance*

---

68. *See id.*

69. *Id.* at 1362.

70. *Id.* at 1363.

71. *Id.*

72. *See id.* at 1361.

73. *See id.* at 1364.

74. *See In re Certain Underwriters at Lloyd’s, London, COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1355, 1358 (J.P.M.L. 2020); *In re Cincinnati Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1347, 1349–50 (J.P.M.L. 2020); *In re Hartford COVID-19 Bus. Interruption Prot. Ins. Litig.*, 493 F. Supp. 3d 1358, 1360–61 (J.P.M.L. 2020); *In re Travelers COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1341, 1343–44 (J.P.M.L. 2020).

75. *See In re Soc’y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 492 F. Supp. 3d 1359, 1361 (J.P.M.L. 2020) (involving only six midwestern states). *But see In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, 482 F. Supp. 3d 1360, 1361 (J.P.M.L. 2020) (denying centralization after reviewing eleven actions in two districts and fifteen related actions in twelve districts).

76. *See, e.g., Chung v. Am. Zurich Ins. Co.*, No. 20-CV-5555, 2021 WL 6136206, at \*6 (E.D.N.Y. Dec. 29, 2021) (holding that class claims had to be summarily dismissed after individual claims were dismissed).

*Co. v. Elegant Massage, LLC*.<sup>77</sup> In that case, the district court, after becoming one of the rare courts to deny a motion to dismiss a business interruption insurance case stemming from COVID-19, went on to certify a class action under Federal Rule of Civil Procedure 23 (“Rule 23”) sua sponte on the basis of commonality.<sup>78</sup> Even if the district court, contrary to the great weight of authority, thought that the business interruption insurance cases were plausible on the merits, its approach of certifying a class before even receiving plaintiffs’ motion for class certification merely underscored the outlier quality of the case. Not surprisingly, on State Farm’s application for interlocutory review under Rule 23(f), the Fourth Circuit summarily reversed the grant of class certification.<sup>79</sup> Although the Fourth Circuit “express[ed] no opinion as to whether a Rule 23(b)(3) class is appropriate in th[e] case,” it ruled that the district court may only exercise its discretion whether to grant class certification “once it is asked to do so, and its discretion is bounded by the requirements of Rule 23.”<sup>80</sup> Given the district court’s strong desire to certify a class, it is not surprising that, on remand—and after plaintiff formally moved for class certification—the district court again certified a Rule 23(b)(3) class.<sup>81</sup>

### B. Tuition Refund Cases

Somewhere in the middle of the spectrum are numerous class actions that have been filed by students against colleges and universities, seeking refunds of tuition payments and fees on the grounds that the schools conducted courses online, instead of in person, starting in the spring of 2020. But moving to remote teaching was not unique conduct by a few colleges and universities. More than 4,000 colleges and universities went to online teaching because of the virus, and more than twenty-five million students have been impacted.<sup>82</sup> There can be no serious dispute that schools were motivated by compelling health considerations, and in many instances by direct government shutdown orders. Indeed, in colleges across the country, the transition to online learning occurred in the middle of the spring semester of 2020, when the risks of COVID-19 became clear. Were it not for COVID-19, there can be little doubt that every school targeted in the tuition reimbursement suits would have provided the same in-person instruction it was providing prior to the pandemic.

---

77. No. 21-255, 2021 WL 4202678 (4th Cir. Sept. 2, 2021).

78. See *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 20-cv-265, 2021 WL 3686668, at \*11 (E.D. Va. Aug. 19, 2021), *rev’d and remanded*, No. 21-255, 2021 WL 4202678 (4th Cir. Sept. 2, 2021).

79. See *State Farm Mut. Auto. Ins. Co. v. Elegant Massage, LLC*, No. 21-255, 2021 WL 4202678, at \*1 (4th Cir. Sept. 2, 2021).

80. *Id.*

81. See *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 20-cv-265, 2022 WL 433006, at \*20 (E.D. Va. Feb. 11, 2022).

82. See Anjelica Cappellino, *More Than 70 Universities Sued for Refunds Following COVID-19 Campus Closures*, EXPERT INST. (Apr. 27, 2022), <https://www.expertinstitute.com/resources/insights/universities-sued-for-covid-19-refunds-following-campus-closures/> [<https://perma.cc/5SGM-YRXX>].

In reality, the colleges and universities were confronting a pandemic they did not cause and were trying to provide education to students in the face of serious health risks and government shutdowns. Indeed, these same educational institutions have a duty to protect the collective health of their students and may be held liable for any failure to do so.<sup>83</sup> Schools not infrequently dismiss students from class because of hurricanes, tornadoes, floods, snowstorms, and all manner of events in which the capacity to instruct safely is compromised. Online instruction was a solution necessitated by COVID-19, not by any greed on the part of the schools.<sup>84</sup> Indeed, most schools returned to live teaching in the fall of 2021, even though the virus continued to rage with the delta variant.<sup>85</sup> Schools looking for an excuse to continue online teaching for economic reasons could have cited continuing COVID-19 risks (including the delta variant) and the need to protect students, but they have not done so on a large scale.

Thus, these cases are not intuitively attractive. As one court noted, “suing a university for adjusting to the COVID-19 pandemic to safeguard the health of its students and faculty is not the most desirable case.”<sup>86</sup> Unlike the business interruption insurance cases, however, plaintiffs can allege a commitment to in-person teaching based not only on the language of a contract per se but also on a host of other marketing and course materials. If the schools provided an unwavering commitment—by contract or through course or marketing materials—to provide in-person teaching, regardless of the circumstances, then such cases might have at least arguable merit.<sup>87</sup> But, as discussed below, in many of the tuition refund cases, plaintiffs cannot point to any language whereby schools guaranteed in-person teaching.<sup>88</sup>

---

83. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 (AM. L. INST. 2012) (listing “a school with its students” as a “special relationship” requiring “a duty of reasonable care with regard to risks that arise within the scope of the relationship”).

84. *See, e.g., Dougherty v. Drew Univ.*, 534 F. Supp. 3d 363, 376 (D.N.J. 2021) (“Because the University’s decision [to go to online instruction in March 2020] was supported by public health concerns and compliance with the law, it was fair and not arbitrary. The experience of other institutions, commercial, educational, and judicial, suggests that Drew University was not some sort of unreasonable outlier here . . . . I note the lack of any allegation that the University possessed other, better options. For this reason, too, I lack a basis to fault the University’s decision to pursue virtual learning.” (citation omitted)).

85. *See Anne Dennon, Will Campuses Return to Normal in Fall 2021?*, BEST COLLS. (May 6, 2022), <https://web.archive.org/web/20210610060636/https://www.bestcolleges.com/blog/college-campuses-covid-19-guidelines-fall/> (noting that schools were “racing” to return to in-person teaching). A number of institutions, however, temporarily returned to online instruction in January 2022 because of the omicron variant. *See, e.g., Joe Hernandez, Some Colleges and Universities Will Start the New Year Online as Omicron Spreads*, NPR (Dec. 22, 2021, 11:18 AM), <https://www.npr.org/2021/12/22/1066788973/colleges-universities-remote-distance-learning-omicron> [<https://perma.cc/LJ5Y-9VHD>].

86. *Rosado v. Barry Univ. Inc.*, No. 20-21813-CIV, 2021 U.S. Dist. LEXIS 169196, at \*23 (S.D. Fla. Sep. 7, 2021).

87. Plaintiffs in business interruption insurance cases, by contrast, are almost invariably relegated to the plain language of the governing insurance policy because of integration clauses. *See supra* Part I.A.1.

88. Plaintiffs’ arguments are stronger with respect to services that were not provided, such as closing dorm rooms and cafeterias after students paid for those benefits for the entire

Plaintiffs' claims for tuition reimbursement are especially difficult to maintain if based on tuition for the fall of 2020 (as opposed to the spring of 2020) if plaintiffs paid their tuition knowing that classes would continue to be entirely online.<sup>89</sup> At bottom, while not quite as challenging as the business interruption insurance cases, the tuition reimbursement cases are nonetheless difficult for plaintiffs.

Thus far, there have been no rulings by the JPML regarding centralization of such claims. There have, however, been numerous decisions on motions to dismiss, as well as a handful of decisions on class certification.

### 1. Rulings on Motions to Dismiss

Numerous courts have granted motions to dismiss in tuition reimbursement cases. Not surprisingly, those courts have found no language in either specific contracts or in marketing or course material promising in-person instruction. Indeed, in some instances, the contracts explicitly reserved to the schools the authority to modify programs and curriculums and waived their liability for doing so.

For example, in *Zagoria v. New York University*,<sup>90</sup> a plaintiff sued New York University (NYU) on behalf of a putative class of students, raising claims of breach of contract, unjust enrichment, and money had and received.<sup>91</sup> Plaintiff sought a refund of all tuition and fees paid as a result of NYU's decision to go to remote teaching in the spring of 2020 for all courses.<sup>92</sup> In dismissing the breach of contract claim, the district court reasoned that there was no contractual provision guaranteeing in-person instruction, and it found nothing in NYU's marketing and recruitment materials supporting such a guarantee.<sup>93</sup> Moreover, the court found that plaintiff's argument was undermined by his "voluntary election to enroll in online courses during the 2020 Summer session with the knowledge that those courses would be conducted remotely."<sup>94</sup> The court also dismissed plaintiff's unjust enrichment claim, noting that unjust enrichment claims cannot be brought when there is a valid, enforceable contract.<sup>95</sup> That same reasoning also compelled dismissal of the claim for money had and received, which also does not apply when there is a contract covering the subject

---

semester, but the prospective recoveries are much less substantial than for tuition reimbursement. *See infra* Part I.B.1.

89. Of course, even in the cases in which courts have denied motions to dismiss, surviving summary judgment and trial is a whole different matter, given the implausibility that any school would guarantee in-person teaching regardless of specific urgent circumstances that might make it impracticable for a school to remain open.

90. No. 20-cv-3610, 2021 WL 1026511 (S.D.N.Y. Mar. 17, 2021).

91. *See id.* at \*1.

92. *See id.*

93. *See id.* at \*4–5.

94. *Id.* at \*5.

95. *Id.* ("Here, it is undisputed that the parties have a valid contract that governs the relationship between NYU and its students.").

matter.<sup>96</sup> As the court explained, “Plaintiff’s relationship with NYU is contractual in nature, and the terms of the contract are well-established.”<sup>97</sup>

Similarly, in *Michel v. Yale University*,<sup>98</sup> the court dismissed breach of contract, unjust enrichment, and Connecticut Unfair Trade Practices Act<sup>99</sup> claims brought by a Yale University student on behalf of a putative class seeking tuition refunds because the university shifted from in-person to online instruction in the spring of 2020.<sup>100</sup> The court noted that Yale was not alone in transitioning to online instruction: “[C]olleges and universities across the country closed their doors in the middle of the Spring 2020 semester and migrated course instruction from in-person classrooms to virtual ones,” and “[m]any of these institutions . . . chose not to refund any portion of students’ tuition or fees.”<sup>101</sup> In rejecting the breach of contract claim, the court pointed to “Yale’s right [under the school’s undergraduate regulations] to temporarily suspend—at its ‘discretion and judgment’—its operations in response to emergencies.”<sup>102</sup> As a result, “the exercise of that authority cannot constitute a breach” of contract.<sup>103</sup> Moreover, the regulation “expressly commits the decision of whether to issue a refund to the University’s discretion.”<sup>104</sup> And in refusing to find that Yale’s decision not to refund tuition was wrongful, the court said that it “cannot infer that Yale acted with ‘dishonest purpose or moral obliquity’ simply because it exercised its discretion in a manner that appears to be economically imbalanced to [the plaintiff].”<sup>105</sup> The court also rejected the plaintiff’s unjust enrichment and Connecticut Unfair Trade Practices claims—the former because it incorporated plaintiff’s flawed breach of contract claim, and the latter because the plaintiff failed to allege any deceptive practice.<sup>106</sup>

Several other courts have similarly dismissed suits seeking tuition refunds for remote teaching as a result of COVID-19.<sup>107</sup> In some cases, courts have relied on “reservation of rights” clauses that give colleges and universities sole discretion to make changes to academic programs.<sup>108</sup> Like in the above

---

96. *See id.* at \*6.

97. *Id.*

98. 547 F. Supp. 3d 179 (D. Conn. 2021).

99. CONN. GEN. STAT. §§ 42-110a to 42-110q (2022).

100. *See id.* at 182.

101. *Id.* at 185.

102. *Id.* at 190.

103. *Id.*

104. *Id.* at 190–91.

105. *Id.* at 191.

106. *See id.* at 192–94.

107. *See, e.g.,* *Barkhordar v. President & Fellows of Harvard Coll.*, 544 F. Supp. 3d 203, 212 (D. Mass. 2021) (“[E]ven assuming . . . that Harvard could reasonably expect that students would understand from general promotional material that they had contracted for in-person instruction and on-campus access during normal times, Spring 2020 was not a normal time.”); *Oyoque v. DePaul Univ.*, 520 F. Supp. 3d 1058, 1060–61 (N.D. Ill. 2021); *Burt v. Bd. of Trs. of Univ. of R.I.*, 523 F. Supp. 3d 214, 220–23 (D.R.I. 2021).

108. *See, e.g.,* *Dougherty v. Drew Univ.*, 534 F. Supp. 3d 363, 377 (D.N.J. 2021) (finding that “[t]he transition to virtual education and accompanying campus closure represent a change in the University’s academic program that falls within [the] reservation’s scope”).

cases, plaintiffs could not identify binding commitments guaranteeing in-person instruction either in individual contracts or in catalogs or other promotional materials.<sup>109</sup>

The decisions are not unanimous, however. The U.S. Court of Appeals for the District of Columbia Circuit—the first circuit to consider COVID-related tuition reimbursement cases—reversed in part a district court’s dismissal of such claims against the George Washington University and American University.<sup>110</sup> In addition to allowing certain claims for fees to go forward, the appellate court held that tuition claims for breach of implied contract and unjust enrichment claims—but not breach of express contract claims—could proceed.<sup>111</sup> The appellate court relied heavily on “the fact that the Universities *themselves* apparently charge different rates for online and in-person instruction,”<sup>112</sup> as well as on “numerous references to the benefits of their on-campus instruction.”<sup>113</sup> Importantly, the court—telegraphing its own distaste for the claims—warned the plaintiffs that “the Universities *will likely have compelling arguments* to offer that the pandemic and resulting government shutdown orders discharged their duties to perform these alleged promises.”<sup>114</sup> Plaintiffs can hardly take comfort in the appellate court’s blunt language.

In addition, in *Gociman v. Loyola University of Chicago*,<sup>115</sup> the Seventh Circuit, in a sharply divided opinion, reversed the district court and held that a claim for tuition reimbursement could go forward based on a theory of an implied contract premised on a course catalog, online registration portal, and higher tuition for in-person than for online learning.<sup>116</sup> The court also held that an implied contract claim could proceed with respect to various fees paid by students for certain services.<sup>117</sup> Judge Amy J. St. Eve dissented, opining that “[n]one of the written materials the students cite contain a specific guarantee of in-person education or amenity access sufficient to maintain an implied contract under Illinois law.”<sup>118</sup>

More recently, in *King v. Baylor University*,<sup>119</sup> the Fifth Circuit reversed the district court’s dismissal of a tuition reimbursement claim under a theory of an express contract because the lower court failed to consider whether the term “educational services” under Baylor’s financial responsibility agreement (FRA) with students supported plaintiff, Baylor, or was ambiguous (and if it was ambiguous, how it should be construed).<sup>120</sup> The

---

109. *See id.* at 377–78.

110. *See Shaffer v. George Washington Univ.*, 27 F.4th 754, 760–61 (D.C. Cir. 2022).

111. *See id.*

112. *Id.* at 765.

113. *Id.* at 764.

114. *Id.* at 760 (emphasis added).

115. No. 21-1304, 2022 WL 2913751 (7th Cir. July 25, 2022).

116. *See id.* at \*5–8.

117. *See id.* at \*7–8.

118. *Id.* at \*12 (St. Eve, J., concurring in part and dissenting in part).

119. No. 21-50352, 2022 WL 3592114 (5th Cir. Aug. 23, 2022).

120. *See id.* at \*1, \*8–12.

court dismissed the implied contract and unjust enrichment claims because the FRA was a valid express contract covering the same subject matter.<sup>121</sup>

Several district courts have likewise refused to dismiss breach of contract and unjust enrichment claims, finding it premature to hold whether students' expectations of in-person instruction were unreasonable and unsupported.<sup>122</sup> They too have focused on (1) the fact that the school in question normally has both online and in-person instruction and charges less for the former, and (2) various statements in the school's marketing and course materials implying that instruction will be in person.

For instance, in *Metzner v. Quinnipiac University*,<sup>123</sup> the court denied a motion to dismiss, emphasizing that "Quinnipiac charges students significantly less for online degree programs"<sup>124</sup> and that, in its marketing and course materials, the school touted its "state-of-the-art facilities,' 'outdoor spaces,' 'classroom and immersive experiential learning,' and 'the beauty of New England.'"<sup>125</sup> The court cautioned, however, that "discovery may ultimately defeat Plaintiffs' ability to demonstrate the existence of an express or implied contract" based on marketing and course materials.<sup>126</sup>

Similarly, in *Ford v. Rensselaer Polytechnic Institute*,<sup>127</sup> the court denied a motion to dismiss in a COVID-related tuition refund suit, relying heavily on the fact that "defendant's publications describe a (mandatory) on-campus learning experience that is integral to attending its school."<sup>128</sup> The court also noted that the school "made some bold claims—or plausibly, promises—about its in-person programming and hammered repeatedly on the benefits of those programs in an assortment of circulars and even in its catalog."<sup>129</sup> Other cases with similar reasoning can be found.<sup>130</sup> In addition, some courts

---

121. *See id.* at \*12–15.

122. Plaintiffs, however, have been almost uniformly unsuccessful in alleging conversion. Even courts allowing contract or unjust enrichment claims to go forward reason that a conversion claim cannot succeed because it requires proof of dominion over personal property, which cannot be satisfied given that the failure to provide in-person education is not property and the tuition payments are not an isolated fund. *See, e.g., Amable v. New Sch.*, 551 F. Supp. 3d 299, 305 (S.D.N.Y. 2021); *Ford v. Rensselaer Polytechnic Inst.*, 507 F. Supp. 3d 406, 420–21 (N.D.N.Y. 2020). Similarly, claims based on "educational malpractice" have failed because of the great deference afforded to colleges and universities in determining the precise educational methods to utilize. *See, e.g., Metzner v. Quinnipiac Univ.*, 528 F. Supp. 3d 15, 26 (D. Conn. 2021).

123. 528 F. Supp. 3d 15 (D. Conn. 2021).

124. *Id.* at 33.

125. *Id.*

126. *Id.* at 34.

127. 507 F. Supp. 3d 406 (N.D.N.Y. 2020).

128. *Id.* at 414.

129. *Id.* at 416.

130. *See, e.g., In re Bos. Univ. COVID-19 Refund Litig.*, 511 F. Supp. 3d 20, 23–24 (D. Mass. 2021); *Omori v. Brandeis Univ.*, 533 F. Supp. 3d 49, 56 (D. Mass. 2021) (relying on the fact that the school charged less for online programs); *see also King v. Baylor Univ.*, No. 21-50352, 2022 WL 3592114, at \*16 (5th Cir. Aug. 23, 2022) (Duncan, J., concurring) (stating that the plaintiff "alleges a straightforward breach-of-contract claim . . . . Many courts around the country, faced with similar allegations, have refused to dismiss them").

have denied motions to dismiss with respect to fees, while dismissing the more potentially lucrative claims for tuition reimbursement.<sup>131</sup>

Taken as a whole, COVID-related tuition reimbursement cases pose an uphill battle for plaintiffs. Even courts that allow such cases to proceed beyond the motion to dismiss stage caution that plaintiffs have a long road to recovery (or, in the case of *Gociman*, face a strong dissent). And absent clear evidence that the colleges and universities are reneging on actual promises to provide in-person instruction, it is difficult to imagine many of these cases surviving summary judgment and trial.

## 2. Class Certification Rulings

There have been few class certification rulings thus far in the tuition reimbursement context, and they provide no basis, standing alone, for any generalizations. One court granted class certification<sup>132</sup> and another initially denied class certification at the class certification stage because of definitional issues but later certified a narrower class.<sup>133</sup> A third rejected a defendant's aggressive efforts to circumvent a full-blown class certification proceeding by moving to strike class allegations on the pleadings.<sup>134</sup>

In *Cross v. University of Toledo*,<sup>135</sup> an Ohio state court granted certification of three classes—a tuition class, a room-and-board class, and a fee class—all relating to the spring 2020 semester.<sup>136</sup> The court found that the requirements of Ohio's class action rule (which is similar to the federal rule<sup>137</sup>) were all met.<sup>138</sup> The court concluded that the question of whether reimbursement of costs and fees was appropriate was the same for the class as a whole, and that “[a] class action would achieve economies of time, expense and effort, as well as promote a uniformity of decisions relative to similarly situated persons.”<sup>139</sup>

In *Little v. Grand Canyon University*,<sup>140</sup> the court initially denied class certification, but did so solely because of concerns about the class definition, rather than concerns about whether common issues were present.<sup>141</sup> The class was defined to “include persons who could not have been harmed by

---

131. See, e.g., *Dougherty v. Drew Univ.*, 534 F. Supp. 3d 363, 383 (D.N.J. 2021) (noting that, unlike tuition claims, claims for fees do not “go to the core of the university’s pedagogical mission”).

132. See *Cross v. Univ. of Toledo*, No. 2020-00274JD, 2021 WL 1822676, at \*6 (Ohio Ct. Cl. Apr. 26, 2021).

133. See *Little v. Grand Canyon Univ.*, No. CV-20-00795, 2021 WL 4263715, at \*3 (D. Ariz. Sept. 20, 2021); *Little v. Grand Canyon Univ.*, No. CV-20-00795, 2022 WL 266726, at \*4 (D. Ariz. Jan. 28, 2022).

134. *Gibson v. Lynn Univ., Inc.*, No. 20-CIV-81173, 2021 WL 1109126, at \*7 (S.D. Fla. Mar. 23, 2021).

135. No. 2020-00274JD, 2021 WL 1822676 (Ohio Ct. Cl. Apr. 26, 2021).

136. See *id.* at \*6.

137. See *id.* at \*2.

138. See *id.* at \*6.

139. *Id.*

140. No. CV-20-00795, 2021 WL 4263715 (D. Ariz. Sept. 20, 2021).

141. See *id.* at \*3.

Defendant's allegedly unlawful conduct," such as "employees, parents, friends, relatives, or anyone else who potentially paid for tuition on behalf of a student," even though "[s]uch third parties, unlike students, have not entered into contracts with [Grand Canyon University]."<sup>142</sup> Such parties, the court held, would lack standing to sue because they were not parties to the contract.<sup>143</sup> As a result, the class was "overbroad in that the definition include[d] numerous individuals who lack[ed] standing to sue."<sup>144</sup> Four months later, the court certified a more narrowly defined class that included only students "enrolled in on-campus classes . . . for the Spring 2020 semester and who were charged *and paid* fees for services, facilities, resources, activities, and/or events that were not provided."<sup>145</sup>

In *Gibson v. Lynn University, Inc.*,<sup>146</sup> the court rejected defendant's motion to strike the class action allegations.<sup>147</sup> The court noted that it was rare to reject a class action without considering a motion brought by plaintiff, and it "disagree[d] [with defendant] that it would be impossible for Plaintiff's proposed class to satisfy the commonality and predominance requirements."<sup>148</sup> The court noted that "it appears that questions concerning what the operative contractual terms are between Lynn and its students may be capable of class-wide proof" and that it was not "convinced that Plaintiff's contractual claims would necessarily require delving into the individual state of mind of each student."<sup>149</sup> The court was "also unpersuaded that the potential for individualized damages issues makes class certification impossible in this case."<sup>150</sup> While plaintiff's burden was minimal because of the defendant's aggressive strategy of trying to circumvent a full-blown class certification proceeding, the court certainly suggests that there were nonfrivolous arguments supporting class certification.<sup>151</sup>

Courts that have dismissed tuition reimbursement claims under Federal Rule of Civil Procedure 12(b)(6) have had no occasion to address class certification. Moreover, although the class certification decisions to date yield few insights, courts that allow such cases to go forward beyond the motion to dismiss stage will likely opt to certify class actions as well. Class certification would seem to follow as a matter of course because presumably, the contracts, marketing, and course materials are the same (or very similar) for all or most class members. Indeed, the ruling in *Gibson* denying defendant's motion to strike class allegations followed the court's ruling from four months earlier, which denied defendant's motion to dismiss.<sup>152</sup>

---

142. *Id.* at \*2.

143. *See id.*

144. *Id.*

145. *Little v. Grand Canyon Univ.*, No. CV-20-00795, 2022 WL 266726, at \*4 (D. Ariz. Jan. 28, 2022).

146. No. 20-CIV-81173, 2021 WL 1109126 (S.D. Fla. Mar. 23, 2021).

147. *See id.* at \*7.

148. *Id.* at \*4.

149. *Id.* at \*5.

150. *Id.*

151. *See id.*

152. *See Gibson v. Lynn Univ., Inc.*, 504 F. Supp. 3d 1335, 1337 (S.D. Fla. 2020).

Although there might be some individualized issues if class members in a particular case are relying on specific promises or representations made only to them, the cases typically rely on widely disseminated marketing and course materials or on a two-tiered pricing system for online and in-person classes, and those facts are almost certainly the same for the class as a whole. Thus, courts that are persuaded to deny motions to dismiss in tuition refund cases are also highly likely to grant class certification.

### C. Prison and Immigration Detention Cases

It is the duty of the “government to provide conditions of reasonable health and safety to people in its custody.”<sup>153</sup> Based on that duty, convicted people, people detained pretrial, and detained immigrants have all filed putative class action suits alleging that officials have failed to protect them from COVID-19. For convicted people, the Eighth Amendment’s Cruel and Unusual Punishment Clause applies to health risk claims.<sup>154</sup> There are two elements to such a claim: an objective component and a subjective component.<sup>155</sup> Under the objective component, an incarcerated person must show “an objectively intolerable risk of harm.”<sup>156</sup> The subjective component requires a showing that the prison official acted with “deliberate indifference.”<sup>157</sup> For people detained prior to federal trial and raising health risk claims, the Fifth Amendment’s Due Process Clause applies,<sup>158</sup> and for people detained prior to state trial, the Fourteenth Amendment’s Due Process Clause applies,<sup>159</sup> but in all three scenarios, the same two-part objective/subjective test is controlling.<sup>160</sup> Moreover, health risk claims under the Fifth Amendment’s Due Process Clause, filed by those held in immigration detention, are also governed “under the same rubric as Eighth Amendment claims brought by prisoners.”<sup>161</sup> Thus, it is not surprising that the rulings in the prison context and those in the immigrant detention context employ virtually identical reasoning.

---

153. *Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) (citing *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989)); *accord, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding that exposure to secondhand smoke can form the basis of an imprisoned person’s Eighth Amendment claim against prison officials); *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (government is constitutionally required to “provide humane conditions of confinement” and “must ‘take reasonable measures to guarantee the safety of the inmates’” (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984))).

154. *See Farmer*, 511 U.S. at 828.

155. *See id.* at 834.

156. *Id.* at 846.

157. *Id.* at 834; *see also Helling*, 509 U.S. at 29–30.

158. *See Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000).

159. *See id.*

160. *See id.*; *see also Fernandez-Rodriguez v. Licon-Vitale*, 470 F. Supp. 3d 323, 348 (S.D.N.Y. 2020) (“The Eighth Amendment—for convicted prisoners—and the Fifth Amendment—for pretrial detainees—govern the inmates’ claims of unconstitutionality . . . . In either case, there is both an ‘objective’ and a ‘subjective’ prong to the analysis of whether an inmate’s conditions of confinement are unconstitutional.”).

161. *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013).

With respect to the objective prong, courts generally agree “that infectious diseases generally and COVID-19 specifically can pose a risk of serious and fatal harm” to detained populations.<sup>162</sup> Where courts are sharply divided is whether the respective plaintiffs have made a sufficient showing of the subjective element—deliberate indifference—to warrant preliminary or permanent injunctive relief.<sup>163</sup> To show deliberate indifference, plaintiffs must show that the official “knows of and disregards an excessive risk to inmate health or safety,”<sup>164</sup> and this showing requires proof of a “state of mind more blameworthy than negligence.”<sup>165</sup> In many of the COVID-19 prison and immigration detention cases, courts have either addressed class certification before deciding whether to issue an injunction,<sup>166</sup> or they have addressed class certification and preliminary injunctive relief in a single order.<sup>167</sup>

This section first considers class certification issues in prison and immigration detention cases. It then examines the judicial decisions regarding the appropriateness of injunctive relief.

### 1. Class Certification

The court’s task at class certification is informed by well-established authority. A case alleging mistreatment or unsafe conditions in a prison or immigration detention facility is a “textbook example of a claim that belongs in a class action.”<sup>168</sup> Because class members seek solely injunctive relief, an injunctive class under Rule 23(b)(2) is the appropriate type of class, as opposed to the more exacting Rule 23(b)(3) class that is appropriate in suits for damages.<sup>169</sup> Although federal courts have become increasingly hostile to class actions in the past two decades,<sup>170</sup> that hostility is not evident in the

---

162. *Smith v. DeWine*, 476 F. Supp. 3d 635, 662 (S.D. Ohio 2020) (quoting *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020)) (collecting cases).

163. *See infra* Part I.B.2.

164. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

165. *Id.* at 835.

166. *See, e.g.*, *Busby v. Bonner*, 466 F. Supp. 3d 821, 834 (W.D. Tenn. 2020) (prison case); *Malam v. Adducci*, 475 F. Supp. 3d 721, 744 (E.D. Mich. 2020) (immigration detention case).

167. *See, e.g.*, *Torres v. Milusnic*, 472 F. Supp. 3d 713, 746 (C.D. Cal. 2020) (granting class certification and preliminary injunction), *enforced*, No. CV 20-4450, 2021 WL 3829699 (C.D. Cal. Aug. 27, 2021); *Maney v. Brown*, 516 F. Supp. 3d 1161, 1185 (D. Or. 2021) (ordering a preliminary injunction to give vaccines while granting class certification); *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1111 (N.D. Ill. 2020) (concluding that putative class failed to show commonality and denying injunction for failure to show deliberate indifference).

168. *See* Ed Beeson, *Top 15 High Court Class Action Rulings of the Past 15 Years*, LAW360 (June 29, 2015, 4:14 PM), <https://www.law360.com/articles/671772> [<https://perma.cc/59AH-S8WF>] (interview with Professor Samuel Issacharoff, in which he also describes *Brown v. Plata*, 563 U.S. 493 (2011), a class action that successfully demonstrated prison overcrowding, as “[t]he most significant class action case from [the Supreme Court]”).

169. *See* ROBERT H. KLONOFF, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL* 118 (6th ed. 2021) (“[U]nlike Rule 23(b)(3) . . . , neither the text of Rule 23(b)(2) nor the Advisory Committee Notes provide that common legal or factual questions among the claimants must predominate over individual questions.”).

170. *See generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

COVID-19 prison and immigration cases. Those cases involve situations in which the alleged wrongdoing of the defendants is front and center, given that their job is to protect a vulnerable population.

Courts that have addressed the issue have overwhelmingly granted class certification in COVID-related prison cases. As the court noted in *Ahlman v. Barnes*,<sup>171</sup> “[f]ederal judges *around the country* have provisionally certified similar classes of detainees bringing claims arising from the COVID-19 pandemic.”<sup>172</sup> In some cases, the defendants offered only weak, pro forma objections.<sup>173</sup>

The four Rule 23(a) requirements are normally easy to satisfy. First, numerosity under Rule 23(a)(1) is a given in these cases, which typically involve hundreds or thousands of class members.<sup>174</sup>

Second, commonality under Rule 23(a)(2) is easily established, even after the U.S. Supreme Court’s opinion in *Wal-Mart Stores, Inc. v. Dukes*,<sup>175</sup> which raised the bar for showing commonality.<sup>176</sup> For instance, in *Valentine v. Collier*,<sup>177</sup> the court noted that “all class members are subject to the policies . . . that leave them at high risk of contracting COVID-19,”<sup>178</sup> and that “[s]ome form of coordinated emergency relief was necessary in order to keep Plaintiffs and other [inmates] safe.”<sup>179</sup> In *Criswell v. Boudreaux*,<sup>180</sup> the court found that the commonality requirement was satisfied because “all members of the Proposed Class ‘are subject to the same practices and lack of policies’ related to social distancing, testing, and legal visits,” and because an overarching issue existed regarding “whether . . . defendant’s failure to reduce overcrowding and to provide testing exposes class members to a heightened risk of serious illness and death in violation of the Eighth and Fourteenth Amendments.”<sup>181</sup>

---

171. 445 F. Supp. 3d 671 (C.D. Cal. 2020).

172. *Id.* at 684 (emphasis added) (collecting cases); *accord, e.g.*, *Criswell v. Boudreaux*, No. 20-cv-01048, 2020 WL 5235675, at \*12 (E.D. Cal. Sept. 2, 2020) (“[S]everal district courts have provisionally certified classes of detained and incarcerated individuals seeking preliminary injunctive relief related to their conditions of confinement and detention during the COVID-19 pandemic.”).

173. *See, e.g.*, *Malam v. Adducci*, 475 F. Supp. 3d 721, 744 (E.D. Mich. 2020) (granting class certification where defendant conceded a number of the requirements); *Criswell*, 2020 WL 5235675, at \*15 (noting that “Defendant [did] not meaningfully oppose plaintiffs’ argument” for certifying a Rule 23(b)(2) class).

174. *See, e.g.*, *Maney v. Brown*, 516 F. Supp. 3d 1161, 1173 (D. Or. 2021) (finding numerosity based on a class of 10,400 members). Moreover, “where the relief sought is ‘only injunctive or declaratory,’ the numerosity requirement is somewhat relaxed, and ‘even speculative or conclusory allegations regarding numerosity’ are sufficient to permit certification.” *Fraihat v. U.S. Immigr. & Customs Enf’t*, 445 F. Supp. 3d 709, 736–37 (C.D. Cal. 2020) (quoting *Sueoka v. United States*, 101 F. App’x 649, 653 (9th Cir. 2004)), *rev’d on other grounds*, 16 F.4th 613 (9th Cir. 2021).

175. 564 U.S. 338 (2011).

176. *See* Klonoff, *supra* note 170, at 774–76.

177. No. 20-CV-1115, 2020 WL 3491999 (S.D. Tex. June 27, 2020).

178. *Id.* at \*9.

179. *Id.* at \*6.

180. No. 20-cv-01048, 2020 WL 5235675 (E.D. Cal. Sept. 2, 2020).

181. *Id.* at \*13.

Third, typicality under Rule 23(a)(3) is readily satisfied because the class representatives are carefully selected by class counsel from the larger prison population, and they normally do not raise any unique or atypical issues or claims.<sup>182</sup>

Fourth, adequacy of representation under Rule 23(a)(4) is readily satisfied. The class representatives in the prison cases have presented no concerns in terms of their willingness and ability to advocate for the class, and they have not had disabling conflicts of interest.<sup>183</sup> Similarly, class counsel have easily passed the adequacy threshold, with courts highlighting the class action experience of class counsel.<sup>184</sup>

The requirements for establishing an injunctive class under Rule 23(b)(2) have also been easily satisfied in prison cases. Courts have recognized that the prison cases seek broad injunctive and declaratory relief—precisely what Rule 23(b)(2) is designed to accomplish.<sup>185</sup> As one court succinctly noted, “[d]efendants’ actions and inaction apply to the class generally.”<sup>186</sup>

Courts in immigration detention cases have similarly had no difficulty finding that the requirements of Rule 23(a) and Rule 23(b)(2) have been met.<sup>187</sup> They have found numerosity, typicality, and adequacy of representation to be satisfied with little analysis.<sup>188</sup> Likewise, courts have had no difficulty identifying important common questions. For instance, in *Fraihat v. U.S. Immigration & Customs Enforcement*,<sup>189</sup> the court explained that “the common question driving this case is whether Defendants’ system-wide response—or the lack of one—to COVID-19 violates Plaintiffs’ rights.”<sup>190</sup> It noted that “[o]ne shared factual question is . . . what, if any, nationwide measures ICE has taken in response to COVID-19 to protect the health of vulnerable immigration detainees and whether those measures are

---

182. *See, e.g., id.* at \*14; *Maney v. Brown*, 516 F. Supp. 3d 1161, 1176 (D. Or. 2021) (“Both representatives are currently [adults in custody], are subject to substantial risk of exposure to COVID-19, and challenge the same exposure regarding Defendants’ failure to prioritize vaccine doses to [adults in custody].”); *Busby v. Bonner*, 466 F. Supp. 3d 821, 833 (W.D. Tenn. 2020) (also finding typicality satisfied).

183. *See, e.g., Maney*, 516 F. Supp. 3d at 1176; *Busby*, 466 F. Supp. 3d at 833; *Torres v. Milusnic*, 472 F. Supp. 3d 713, 745 (C.D. Cal. 2020), *enforced*, No. CV 20-4450, 2021 WL 3829699 (C.D. Cal. Aug. 27, 2021).

184. *See Maney*, 516 F. Supp. 3d at 1176; *Busby*, 466 F. Supp. 3d at 833; *Torres*, 472 F. Supp. 3d at 745.

185. *See Busby*, 466 F. Supp. 3d at 833 (“Numerous courts have held that Rule 23(b)(2) is an appropriate vehicle in actions challenging prison conditions.” (quoting *Williams v. City of Phila.*, 270 F.R.D. 208, 222 (E.D. Pa. 2010))).

186. *Maney*, 516 F. Supp. 3d at 1177.

187. *See, e.g., Malam v. Adducci*, 475 F. Supp. 3d 721, 744 (E.D. Mich. 2020) (granting class certification to noncitizens in ICE custody); *Savino v. Souza*, 453 F. Supp. 3d 441, 449–53 (D. Mass. 2020) (same); *Coreas v. Bounds*, No. 20-0780, 2020 WL 5593338, at \*14 (D. Md. Sept. 18, 2020) (same).

188. *See, e.g., Fraihat v. U.S. Immigr. & Customs Enf’t*, 445 F. Supp. 3d 709, 736–40 (C.D. Cal. 2020), *rev’d on other grounds*, 16 F.4th 613 (9th Cir. 2021); *Gayle v. Meade*, No. 20-21553-Civ, 2020 WL 3041326, at \*12–15 (S.D. Fla. June 6, 2020).

189. 445 F. Supp. 3d 709 (C.D. Cal. 2020), *rev’d on other grounds*, 16 F.4th 613 (9th Cir. 2021).

190. *Id.* at 737.

legally sufficient. The existence, scope, and adequacy of those measures are central to all of Plaintiffs' claims."<sup>191</sup>

In the rare cases in which Rule 23 issues have squarely reached the appellate courts, those courts have upheld class certification, sometimes in very conclusory rulings.<sup>192</sup> For instance, in *Roman v. Wolf*,<sup>193</sup> the Ninth Circuit concluded in a single paragraph that the district court did not err in certifying a class of those detained in the Adelanto Immigration and Customs Enforcement Processing Center ("Adelanto").<sup>194</sup> According to the Ninth Circuit, "[t]he alleged due process violations exposed *all* Adelanto detainees to an unnecessary risk of harm, not only those who are uniquely vulnerable to COVID-19 or who are not subject to mandatory detention."<sup>195</sup> Citing *Brown v. Plata*,<sup>196</sup> as well as Ninth Circuit authority, the court referenced strong precedent upholding the suitability of class certification under Rule 23(b)(2) for constitutional attacks relating to health and safety issues in prisons, such as "prison overcrowding."<sup>197</sup>

To be sure, there are isolated cases denying class certification in prison and immigration detention COVID-19 cases. For instance, in *Money v. Pritzker*,<sup>198</sup> the court found that commonality was lacking because any decision on whether the vulnerable should be transferred or released "would require 'individualized safety assessments' and 'approve[d] home sites.'"<sup>199</sup> In *C.G.B. v. Wolf*,<sup>200</sup> the court denied class certification in a suit by a putative class of transgender people seeking immediate release from immigration detention facilities because of the risk of COVID-19, reasoning that class members differed in age and medical conditions and were dispersed at numerous detention facilities.<sup>201</sup> And, in *Thakker v. Doll*,<sup>202</sup> the court declined to certify a class of those held in immigration detention centers across central Pennsylvania because the class representatives and class members "[we]re housed at different facilities," were "subject to different infection control procedures," and "allege[d] a wide variety of medical conditions that give rise to vastly differing COVID-19 risk profiles."<sup>203</sup>

---

191. *Id.*

192. The only exceptions are cases in which the appellate court has overturned an injunction. In that situation, the court has sometimes vacated the corresponding class certification order. *See, e.g.,* *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 618, 635 (9th Cir. 2021) (vacating class certification order not because of failure to satisfy Rule 23, but because class certification was premised on the granting of a class-wide preliminary injunction).

193. 977 F.3d 935 (9th Cir. 2020).

194. *See id.* at 944–45.

195. *Id.* at 944.

196. 563 U.S. 493 (2011).

197. *Roman*, 977 F.3d at 942.

198. 453 F. Supp. 3d 1103 (N.D. Ill. 2020).

199. *Id.* at 1127 (alteration in original) (quoting briefs).

200. 464 F. Supp. 3d 174 (D.D.C. 2020).

201. *See id.* at 203–06.

202. 336 F.R.D. 408 (M.D. Pa. 2020).

203. *Id.* at 416; *see also, e.g.,* *Wragg v. Ortiz*, 462 F. Supp. 3d 476, 515 (D.N.J. 2020) (denying class certification because "the Court would be required to engage in an intensive,

## 2. Merits Rulings

As explained above, prisons and immigration detention facilities are responsible for protecting the health and safety of their populations.<sup>204</sup> Based on the evidence, prison and immigration officials can clearly be upstream wrongdoers, with COVID-19 merely providing context for the wrongdoing. Not surprisingly, therefore, plaintiffs have been successful in securing injunctive relief<sup>205</sup> if they can show that the government officials were deliberately indifferent to maintaining a safe environment.<sup>206</sup> Yet, as discussed below, even in prison and immigration detention cases, plaintiffs have frequently failed to secure injunctive relief because some courts—including a number of appellate courts—have determined that the officials acted in good faith by taking specific steps to address the dangers imposed by COVID-19. Courts have thus focused carefully on the law, without being swayed by the enormity of COVID-19 or the aggregate nature of the claims.

As noted above, in both prison and immigration detention cases, the courts have almost all found the objective component of relief to be satisfied because “an inmate can face a substantial risk of serious harm in prison from COVID-19 if a [facility] does not take adequate measures to counter the spread of the virus.”<sup>207</sup> Moreover, numerous courts have found the subjective “deliberate indifference” test to be satisfied as well and have accordingly ordered robust relief. For example, in *Torres v. Milusnic*,<sup>208</sup> the court—after certifying a class of people imprisoned at Lompoc federal prison who were age fifty or over or suffering from specified underlying conditions—determined that preliminary injunctive relief was warranted.<sup>209</sup> The court found that officials at the Federal Correctional Institution, Lompoc, “fail[ed] to take reasonable measures to promptly review and grant requests

---

multi-step, individualized inquiry as to whether each prisoner met criteria for conditional release”).

204. See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

205. In this context, unlike in the business interruption insurance and tuition refund cases, the prison and immigration detention cases usually proceed directly to preliminary injunctive relief, without prior motions to dismiss. It would be virtually impossible for a prison or immigration detention facility to successfully argue that a COVID-related complaint should be dismissed on the pleadings, given the extensive allegations that normally accompany such complaints and the clear legal duty of the institutions to protect their populations.

206. See, e.g., *Maney v. Brown*, 516 F. Supp. 3d 1161, 1182 (D. Or. 2021) (granting injunctive relief because the plaintiffs “[were] likely to establish that [the prison officials were] acting with deliberate indifference by failing to offer the COVID-19 vaccine to AICs [(adults in custody)] at the same time they offer[ed]” it to prison employees).

207. *Chunn v. Edge*, 465 F. Supp. 3d 168, 200 (E.D.N.Y. 2020); accord, e.g., *Fernandez-Rodriguez v. Licon-Vitale*, 470 F. Supp. 3d 323, 351 (S.D.N.Y. 2020) (“Many courts have found that prisons exposed to the novel coronavirus present conditions that meet the objective prong of the constitutional analysis.” (collecting cases)); *Smith v. DeWine*, 476 F. Supp. 3d 635, 662 (S.D. Ohio 2020) (“This Court agrees with the other district courts across the country who have found COVID-19 to be an objectively intolerable risk of harm to prisoners when it enters a prison.” (collecting cases)).

208. 472 F. Supp. 3d 713 (C.D. Cal. 2020), *enforced*, No. CV 20-4450, 2021 WL 3829699 (C.D. Cal. Aug. 27, 2021).

209. See *id.* at 746–47.

for compassionate release or move for compassionate release on behalf of Lompoc inmates to reduce the inmate population,” and that this failure to act “demonstrate[d the prison’s] deliberate indifference to inmates’ risk of severe illness or death from COVID-19.”<sup>210</sup> The court ordered broad preliminary injunctive relief, including requiring the facility to determine eligibility for home confinement and adopting criteria for compassionate release.<sup>211</sup> Similarly, in *Martinez-Brooks v. Easter*,<sup>212</sup> the court held that officials at the Federal Correctional Institution, Danbury, “acted with deliberate indifference to the risk posed by COVID-19” by “fail[ing] to transfer medically vulnerable prisoners from . . . Danbury to home confinement ‘in any meaningful numbers.’”<sup>213</sup>

Numerous district courts have granted wide-ranging injunctive relief in immigration detention cases, as they did with the prison cases. For instance, in *Gayle v. Meade*,<sup>214</sup> the district court’s preliminary injunction included numerous requirements, such as:

- “providing [the class representatives] and the class members with unrestricted access to hand soap, hand sanitizer, and disposable hand towels”;
- “[p]rovid[ing] cleaning supplies for each housing area,” including “CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning”;
- “provid[ing] new gloves and masks for each inmate” when “they are cleaning or performing janitorial services”;
- “[p]rovid[ing] all inmates and staff members with masks” and education on their proper use;
- increasing the frequency of “cleaning and disinfecting of all common areas and surfaces”;
- “[l]imit[ing] transportation of detainees to only instances regarding immediately necessary medical appointments and release from custody”;
- and providing education and posting signage regarding ways to protect against COVID-19.<sup>215</sup>

---

210. *Id.* at 740.

211. *See id.* at 746–47.

212. 459 F. Supp. 3d 411 (D. Conn. 2020).

213. *Id.* at 441; *accord, e.g., Torres*, 472 F. Supp. 3d at 740; *Cameron v. Bouchard*, 462 F. Supp. 3d 746, 778–79 (E.D. Mich.) (given the “medically-vulnerable population’s unique, specific, and life-threatening susceptibility to COVID-19—paired with the communal nature of jail facilities, the Court finds that home confinement or early release is the only reasonable response”), *vacated*, 815 F. App’x 978 (6th Cir. 2020).

214. No. 20-21553-Civ, 2020 WL 3041326 (S.D. Fla. June 6, 2020).

215. *Id.* at \*23; *accord, e.g., Ahlman v. Barnes*, 445 F. Supp. 3d 671, 694 (C.D. Cal. 2020) (granting injunction requiring compliance with CDC guidelines for social distancing and sanitary practices while denying request for release); *Maney v. Brown*, 516 F. Supp. 3d 1161, 1185 (D. Or. 2021) (ordering “that Defendants shall offer all AICs [(adults in custody)] . . . a COVID-19 vaccine”); *Chatman v. Otani*, No. CV 21-00268, 2021 WL 2941990, at \*24 (D. Haw. July 13, 2021) (requiring greater intake screening, social distancing measures, and sanitary living conditions).

In some instances, federal appellate courts have upheld preliminary injunction orders issued by district courts. For example, in *Roman v. Wolf*,<sup>216</sup> a putative class action was brought on behalf of 1,370 people detained at Adelanto, alleging that they were placed at grave risk of contracting COVID-19.<sup>217</sup> After certifying a class, the district court issued a preliminary injunction requiring numerous safety measures to address COVID-related risks, including sanitation measures and social distancing.<sup>218</sup> The Ninth Circuit held that the district court did not abuse its discretion in ordering preliminary injunctive relief, given the district court's detailed factual findings—which identified a lack of quarantining, unsanitary conditions, and a lack of social distancing—that the government did not challenge as clearly erroneous.<sup>219</sup> The appellate court found that Adelanto's "inadequate response reflected a reckless disregard for detainee safety."<sup>220</sup>

Similarly, in *Zepeda Rivas v. Jennings*,<sup>221</sup> those detained at Mesa Verde Detention Facility and Yuba County Jail filed a class action challenging the conditions in both facilities.<sup>222</sup> The district court granted preliminary injunctive relief, concluding that plaintiffs showed a likelihood of success as of the time the court's temporary restraining order was entered.<sup>223</sup> On appeal, the Ninth Circuit affirmed.<sup>224</sup> It cited the district court's finding that "COVID-19 posed grave health risks," making the facilities "a 'tinderbox' for COVID-19 transmission," and it highlighted the district court's conclusion that the facility had taken only "modest measures in response to the pandemic," even though "COVID-19 posed a serious health-risk to all detainees—not only those in high-risk categories."<sup>225</sup>

On the other hand, a number of district courts have found—based on the efforts of prison and immigration detention officials to address COVID-19—that plaintiffs likely could not establish deliberate indifference. The following quotes exemplify the approaches of those courts:

The evidence shows that [prison] officials have been acting urgently to prevent COVID-19 from spreading and from causing harm. They have imposed dozens of measures . . . . [And they] are "trying, very hard, to

---

216. 977 F.3d 935 (9th Cir. 2020) (per curiam).

217. *See id.* at 939.

218. *See id.*

219. *See id.* at 942.

220. *Id.* at 943. The Ninth Circuit did, however, vacate parts of the district court's order requiring specific measures tailored to conditions at Adelanto in April 2020. *See id.* at 945. The court indicated that the government was taking specific steps to address COVID-19 risks, including testing all people detained at Adelanto for COVID-19, and that the injunction thus "no longer reflect[ed] the current realities at Adelanto." *Id.*

221. 845 F. App'x 530 (9th Cir. 2021) (per curiam).

222. *See id.* at 532.

223. *See id.* at 533.

224. *See id.* at 534.

225. *Id.*

protect inmates against the virus and to treat those who have contracted it” . . . .<sup>226</sup>

There is no dispute . . . that Defendants have enacted various policies in response to the risks posed by COVID-19 . . . . The very fact that Defendants have enacted such policies supports that they have not been subjectively indifferent to the risks posed by COVID-19 to Plaintiffs . . . .<sup>227</sup>

[T]he warden has implemented a number of policy changes . . . . [These changes] show that the prison’s good faith efforts to improve its response—even if it was initially deficient . . . —is enough to demonstrate that a petitioner is unlikely to succeed in showing deliberate indifference.<sup>228</sup>

Even when a district court makes extensive findings *supporting* deliberate indifference, such findings do not ensure success on appeal. Several federal appellate courts faced with such findings have reversed district court injunctions in both prison and immigration detention cases.<sup>229</sup> In each case, the rationale for reversal has been the same: contrary to the district court’s findings, the evidence showed that the prisons were indeed making substantial efforts to protect the safety of the incarcerated, which belied a claim that they were deliberately indifferent to health and safety concerns.<sup>230</sup> In some instances, the appellate decisions have provoked vigorous dissents that attempt to refute the notion that the officials were genuinely taking adequate and effective measures to combat COVID-19 in their institutions.<sup>231</sup> These appellate decisions are thorough and are worth examining in some detail.

In *Wilson v. Williams*,<sup>232</sup> incarcerated people at the Federal Correctional Institution, Elkton, sought a preliminary injunction to reduce the population and allow for proper social distancing.<sup>233</sup> The district court agreed, noting that “Elkton has altogether failed to separate its inmates at least six feet apart, despite clear [Centers for Disease Control and Prevention] guidance.”<sup>234</sup> The Sixth Circuit reversed, noting that “while the harm imposed by COVID-19 on inmates at Elkton ‘ultimately [is] not averted,’ the [Bureau of Prisons] has ‘responded reasonably to the risk’ and therefore has not been deliberately

226. *Chunn v. Edge*, 465 F. Supp. 3d 168, 202–03 (E.D.N.Y. 2020) (quoting *Money v. Pritzker*, 453 F. Supp. 3d 1103, 1132 (N.D. Ill. 2020)).

227. *Lucero-Gonzalez v. Kline*, 464 F. Supp. 3d 1078, 1090 (D. Ariz. 2020).

228. *Fernandez-Rodriguez v. Licon-Vitale*, 470 F. Supp. 3d 323, 353–54 (S.D.N.Y. 2020); *accord, e.g., Plata v. Newsom*, 445 F. Supp. 3d 557, 564 (N.D. Cal. 2020) (noting numerous measures to protect the health of the imprisoned); *Alcantara v. Archambeault*, 462 F. Supp. 3d 1073, 1076–77 (S.D. Cal. 2020) (noting steps to protect health of those detained in immigration centers).

229. *See infra* notes 232–83 and accompanying text.

230. *See infra* notes 232–83 and accompanying text.

231. *See infra* notes 232–83 and accompanying text.

232. 455 F. Supp. 3d 467 (N.D. Ohio), *vacated*, 961 F.3d 829 (6th Cir. 2020).

233. *See id.* at 470.

234. *Id.* at 479. The Elkton facility expected to receive only twenty-five tests a week, despite imprisoning 2,400 people. *Id.* at 471.

indifferent to the inmates' Eighth Amendment rights."<sup>235</sup> Chief Judge R. Guy Cole, Jr., dissented, reasoning that

the BOP's failure to make use of its home confinement authority at Elkton, even as it stared down the escalating spread of the virus and a shortage of testing capacity, constitutes sufficient evidence for the district court to have found that petitioners were likely to succeed on their Eighth Amendment claim.<sup>236</sup>

Soon thereafter, the Sixth Circuit reversed another preliminary injunction order. In *Cameron v. Bouchard*,<sup>237</sup> five people incarcerated at Michigan's Oakland County Jail brought a putative class action claiming that the jail was deliberately indifferent to the risks posed by COVID-19.<sup>238</sup> The district court agreed that plaintiffs were likely to succeed in showing deliberate indifference and ordered the facility to adopt a myriad of protective measures.<sup>239</sup> On appeal, the Sixth Circuit reversed.<sup>240</sup> It held that plaintiffs could not satisfy the deliberate indifference standard because "the steps that jail officials took to prevent the spread of COVID-19 were reasonable."<sup>241</sup> The court described those steps in great detail: the jail officials circulated a mailing to staff about proper cleaning procedures, halted all visitation, quarantined new arrestees for fourteen days, quarantined anyone with COVID-19 symptoms, offered masks and medical treatment, canceled group activities, provided a disinfectant that works against COVID-19, provided COVID-19 testing access, and took on several other measures.<sup>242</sup> The court again found that such steps showed that plaintiffs were unlikely to succeed on the merits.<sup>243</sup> Chief Judge Cole again dissented, reasoning that the majority had improperly reviewed factual findings by the district court, which included specific incidents in which imprisoned people were exposed to serious safety risks.<sup>244</sup> As one example, Chief Judge Cole noted evidence that officials altered their practices solely for an inspection of the jail, only to return to unsafe practices when the inspection concluded.<sup>245</sup> He also noted that the jail "deployed transfers to COVID-infected areas punitively, . . . repeatedly provided inadequate medical care, failed to consistently

---

235. *Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir. 2020) (first alteration in original) (quoting *Farmer v. Brennan*, 511 U.S. 825, 844 (1994)).

236. *Id.* at 847 (Cole, C.J., concurring in part and dissenting in part).

237. 462 F. Supp. 3d 746 (E.D. Mich.), *vacated*, 815 F. App'x 978 (6th Cir. 2020).

238. *See id.* at 753.

239. *See id.*

240. *See Cameron v. Bouchard*, 815 F. App'x 978, 983 (6th Cir. 2020).

241. *Id.* at 985.

242. *See id.*

243. *See id.* at 988. The court noted that the facts were similar to those in *Wilson*, in which the Sixth Circuit vacated a preliminary injunction that had required various steps to protect imprisoned people from COVID-19, finding that the steps taken by the prison showed that plaintiffs were not likely to succeed on the merits. *See id.* at 985–86 (discussing *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020)). It rejected plaintiffs' arguments in *Cameron* attempting to distinguish *Wilson*. *See id.* at 986–88.

244. *Id.* at 990 (Cole, C.J., dissenting).

245. *Id.* at 991.

quarantine symptomatic inmates, and did not take advantage of opportunities for increased social distancing.”<sup>246</sup>

In *Valentine v. Collier*,<sup>247</sup> a putative class action was brought by incarcerated people against the Wallace Pack Unit, a state geriatric prison run by the Texas Department of Criminal Justice and comprised of people over age sixty-five and others with significant health issues.<sup>248</sup> The complaint alleged, inter alia, that the prison—in violation of the Eighth Amendment—failed to provide hand sanitizer and disposable paper towels, did not enforce social distancing, and failed to provide incarcerated people working as janitors with clean masks and gloves.<sup>249</sup> The district court granted a preliminary injunction.<sup>250</sup> Two days later, the Fifth Circuit unanimously stayed the preliminary injunction pending appeal.<sup>251</sup> The Fifth Circuit concluded that “the evidence shows that [the Texas Department of Criminal Justice] has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus.”<sup>252</sup> Plaintiffs thereafter applied to the Supreme Court to vacate the Fifth Circuit’s stay, but the Court denied the application without comment.<sup>253</sup> Justice Sonia M. Sotomayor, writing for herself and Justice Ruth Bader Ginsburg, filed a “statement” (not a dissent) “to highlight the disturbing allegations presented below”—including the dramatic increase in the number of imprisoned people testing positive for COVID-19—and to note their expectation that “courts will be vigilant in protecting the constitutional rights of those like applicants.”<sup>254</sup>

The district court subsequently granted class certification<sup>255</sup> and thereafter conducted an eighteen-day bench trial on plaintiffs’ request for a permanent class-wide injunction.<sup>256</sup> After the trial, the district court issued lengthy findings detailing the continued safety issues at the prison and held that a permanent injunction was warranted.<sup>257</sup> Again, the Fifth Circuit rejected the district court’s analysis, this time overturning the permanent injunction.<sup>258</sup> It determined that the prison had in fact taken numerous important steps to protect the incarcerated, and it noted that “this litigation generally and the district court’s careful management and expedited handling of the case

---

246. *Id.* at 994.

247. 455 F. Supp. 3d 308 (S.D. Tex. 2020).

248. *Id.* at 311.

249. *See id.* at 314–19.

250. *See id.* at 330.

251. *See Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020).

252. *Id.* at 802.

253. *See Valentine v. Collier*, 140 S. Ct. 1598 (2020).

254. *Id.* at 1598, 1601 (statement of Justice Sotomayor, joined by Justice Ginsburg).

255. *Valentine v. Collier*, No. 20-CV-1115, 2020 WL 3491999, at \*1 (S.D. Tex. June 27, 2020).

256. *See Valentine v. Collier*, 490 F. Supp. 3d 1121, 1128 (S.D. Tex. 2020), *rev’d*, 993 F.3d 270 (5th Cir. 2021).

257. *See id.* at 1174–75.

258. *Valentine v. Collier*, 993 F.3d 270, 277 (5th Cir. 2021).

played a role in motivating the prison officials into action and saved countless lives.”<sup>259</sup>

In *Swain v. Junior*,<sup>260</sup> a class of medically vulnerable people incarcerated at Miami’s Metro West Detention Center challenged the conditions there and alleged that prison officials displayed deliberate indifference by not practicing social distancing when feasible and by failing to provide adequate cleaning or personal sanitation supplies.<sup>261</sup> The district court granted a preliminary injunction, finding that the rate of COVID-19 infections in the prison had increased significantly, and that social distancing was not occurring.<sup>262</sup> It ordered numerous measures, including (among others) social distancing to the extent feasible and ensuring that “all inmates have access to testing, protective masks, cleaning and hygiene supplies, and adequate medical care.”<sup>263</sup> In a split decision, the Eleventh Circuit reversed.<sup>264</sup> Quoting testimony by an expert commissioned by the district court, the majority noted that prison officials “should be commended for their commitment to protect the staff and the inmates.”<sup>265</sup> At bottom, the court “simply [could not] conclude that, when faced with a perfect storm of a contagious virus and the space constraints inherent in a correctional facility, the defendants here acted unreasonably by ‘doing their best.’”<sup>266</sup> Judge Beverly B. Martin dissented, arguing that the “repeated failures to enact adequate social distancing measures documented in these declarations [submitted by plaintiffs] are sufficient to demonstrate a systemic, institutional pattern of deliberate indifference.”<sup>267</sup>

In *Mays v. Dart*,<sup>268</sup> a class of people detained at Cook County Jail—presently or in the future—sued the Cook County sheriff, claiming that the facility failed to provide them with “reasonably safe living conditions as the pandemic raged[d].”<sup>269</sup> In granting a preliminary injunction, the district court mandated procedures to ensure social distancing throughout the prison.<sup>270</sup> The prison had opposed the motion, arguing that it had “taken substantial steps to implement social distancing, and that further steps were impossible.”<sup>271</sup> The district court focused solely on social distancing and did not address the prison’s other responses to COVID-19.<sup>272</sup> The Seventh Circuit unanimously reversed.<sup>273</sup> It found that the district court “erred by

---

259. *Id.* at 289.

260. 961 F.3d 1276 (11th Cir. 2020).

261. *Id.* at 1280–81.

262. *See id.* at 1283.

263. *Id.* at 1284.

264. *Id.* at 1280.

265. *Id.* at 1288 (quoting expert report).

266. *Id.* at 1289.

267. *Id.* at 1301 (Martin, J., dissenting).

268. 974 F.3d 810 (7th Cir. 2020), *cert. denied*, 142 S. Ct. 69 (2021) (mem.).

269. *Id.* at 813.

270. *See id.*

271. *Id.* at 817.

272. *See id.*

273. *See id.* at 814.

narrowly focusing . . . almost exclusively on social distancing instead of considering the totality of facts and circumstances, including all of the Sheriff's conduct in responding to and managing COVID-19.”<sup>274</sup> It noted that such “substantial efforts” included “opening shuttered divisions of the Jail, creating new single-cell housing, and decreasing the capacity of dormitories,” as well as “extensive other measures to prevent and manage the spread of COVID-19 at the Jail.”<sup>275</sup>

Finally, in *Fraihat v. U.S. Immigration & Customs Enforcement*,<sup>276</sup> plaintiffs filed a putative class action challenging deliberate indifference to medical needs at the approximately 250 U.S. Immigration and Customs Enforcement (ICE) facilities nationwide.<sup>277</sup> After certifying two nationwide subclasses involving detained individuals with heightened risk factors, the district court issued a preliminary injunction mandating numerous COVID-related measures, including tracking those with risk factors, making prompt custody determinations for those with risk factors, and implementing a comprehensive performance standard covering COVID-related issues.<sup>278</sup> In a lengthy split decision, the Ninth Circuit reversed.<sup>279</sup> The court noted that “ICE in the spring of 2020 (and earlier) took steps to address COVID-19.”<sup>280</sup> In particular, ICE “provided a detailed set of directives on a host of topics relevant to mitigating the risks of COVID-19.”<sup>281</sup> Moreover, while the district court cited specific problems in individual detention centers, “the circumstances at individual detention facilities could not justify the broad, nationwide relief that plaintiffs pursued.”<sup>282</sup> Judge Marsha S. Berzon dissented, arguing that “ICE did little to carry out the broad, deferential directives issued in April [2020], and the coronavirus spread exponentially among the medically vulnerable members of the Plaintiff subclasses.”<sup>283</sup>

Taken as a whole, these district court and appellate court decisions in both the prison and immigration detention settings reveal judges struggling with whether officials had taken sufficient steps to reduce the risks of COVID-19 at their facilities. District judges, hearing the evidence firsthand, have in many cases agreed with the need for injunctive relief, although plaintiffs have not been universally successful. At the appellate level, however, the courts give far more deference to prison and immigration detention officials, finding that their efforts are made in good faith in the face of an ever-changing and

---

274. *Id.* at 819.

275. *Id.* at 820. The court did, however, affirm portions of the district court's order embodied in an earlier temporary restraining order issued by the district court relating to “sanitation, testing, and providing facemasks,” noting that those requirements did not raise the same safety issues as mandating social distancing. *Id.* at 824.

276. 16 F.4th 613 (9th Cir. 2021).

277. *See id.* at 618.

278. *See id.*

279. *See id.* at 619.

280. *Id.* at 637.

281. *Id.*

282. *Id.* at 645.

283. *Id.* at 656 (Berzon, J., dissenting).

challenging pandemic. One can credibly argue that the appellate courts fail to give sufficient deference to the findings of the district courts, but one thing is certain: the focus of both the district courts and the appellate courts is on whether the defendants were deliberately indifferent to the health risks in their institutions, or instead were doing their best to address the serious health concerns. Moreover, the appellate decisions, like those in the district courts, are exhaustive, with extensive citation to, and analysis of, the trial records. In the end, the point on which all of the judges in these cases agree is that the focus must be on whether the facilities—through their own action and inaction—have been deliberately indifferent to the health risks of COVID-19.

## II. OTHER EXAMPLES OF THE IMPORTANCE OF FOCUSING ON THE DEFENDANT'S CONDUCT

In many of the categories of COVID-related cases, there have been few decisions either on the merits or at the class certification stage. Nonetheless, based on the few rulings that have been rendered, and a review of various complaints that have been filed, it is possible to reflect on the likelihood that various other types of cases will be successful. I focus here on consumer, labor, and securities fraud cases.

### A. Consumer Claims

Numerous cases have been filed by consumers alleging that defendants have unfairly sought to profit from COVID-19. For example, in *Garner v. Global Plasma Solutions Inc.*,<sup>284</sup> a plaintiff filed a putative class action alleging that the defendant falsely touted its air ionizer product as “a proven tool in the fight against COVID-19”<sup>285</sup> and falsely claimed that “the ionizers could filter COVID out of the air and disinfect surfaces.”<sup>286</sup> The court denied the defendant Global Plasma’s motion to dismiss, finding that the plaintiff had properly alleged material misrepresentations.<sup>287</sup> For instance, Global Plasma described certain favorable tests as “independent” when the tests were actually funded by the company.<sup>288</sup> In addition, two studies contradicted the company’s claim that the ionizers were in fact effective in filtering COVID-19 out of the air and in disinfecting surfaces.<sup>289</sup> The court noted that, during a crisis, “some people scramble to make a quick buck,” and that “[t]he COVID-19 pandemic is no different.”<sup>290</sup>

By contrast, courts have refused to allow consumers to bring claims of deceptive advertising tied to COVID-19 when the product label contained

---

284. No. 21-cv-00665, 2022 WL 742488 (D. Del. Mar. 10, 2022).

285. *Id.* at \*5 (quoting complaint).

286. *Id.*

287. *See id.* at \*6.

288. *Id.* at \*4.

289. *See id.* at \*5.

290. *Id.* at \*1.

clear warnings about the product's limitations. In *Gudgel v. Clorox Co.*,<sup>291</sup> the court dismissed putative class claims alleging that Clorox's packaging and marketing were misleading consumers to believe that one of its bleach products was "suitable for disinfecting" during the pandemic when, in fact, it was not.<sup>292</sup> The court relied on the fact that the label in question explicitly warned that the product was "not for sanitization or disinfection" and contained no misleading words or images that would lead a "reasonable consumer" to believe otherwise.<sup>293</sup>

In *Ranalli v. Etsy.com, LLC*,<sup>294</sup> consumers brought claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law,<sup>295</sup> as well as common-law claims of unjust enrichment, fraud, and conversion against online distributors of face masks.<sup>296</sup> Before the pandemic, the sale of nonmedical face masks at issue were subject to sales tax because the masks were classified as "ornamental wear . . . and the use for which consumers purchased nonmedical masks . . . was not for an exempt purpose."<sup>297</sup> In response to the pandemic, the governor of Pennsylvania declared a state of emergency, which allowed for an exemption to paying sales tax on purchases of "medical supplies and/or clothing and accessories."<sup>298</sup> According to plaintiffs, defendants failed to comply with the governor's mandate and charged plaintiffs sales tax on their purchases of face masks.<sup>299</sup> The court granted the distributors' motion to dismiss all claims with prejudice, based on its finding that "[i]t is clear that collection of the sales taxes was *not* for profit or revenue."<sup>300</sup> The court emphasized that the tax could not have been appropriated for defendants' use because, "once [plaintiff] paid the sales tax, regardless of whether the tax was imposed correctly, it became the property of the Commonwealth."<sup>301</sup>

The need to focus on the defendant's precise conduct is also illustrated by the competing arguments in *Greenberg v. Amazon.com, Inc.*,<sup>302</sup> in which a motion to dismiss by Amazon is pending as of the time of writing.<sup>303</sup> In *Greenberg*, customers of the online marketplace brought a putative class action alleging negligence, unjust enrichment, and price gouging in violation

---

291. 514 F. Supp. 3d 1177 (N.D. Cal. 2021).

292. *Id.* at 1182.

293. *Id.* at 1186.

294. 570 F. Supp. 3d 301 (W.D. Pa. 2021).

295. 73 PA. STAT. AND CONS. STAT. ANN. §§ 201-1 to 201-10 (West 2022).

296. *See Ranalli*, 570 F. Supp. 3d at 303–04.

297. *Id.* at 304 (quoting guidance from the Pennsylvania Department of Revenue).

298. *Id.* (quoting complaint).

299. *See id.*

300. *Id.* at 309 (emphasis added).

301. *Id.* at 308.

302. No. 21-cv-00898 (W.D. Wash. filed July 2, 2021).

303. *See* Motion of Defendant Amazon.com, Inc. to Dismiss Plaintiffs' First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *Greenberg v. Amazon.com, Inc.*, No. 21-cv-00898 (W.D. Wash. Dec. 3, 2021), ECF No. 22.

of the Washington's Consumer Protection Act.<sup>304</sup> Specifically, plaintiffs identified price increases ranging from 233 percent to 1,800 percent on specific products supplied by both Amazon and third-party vendors that were in high demand due to the pandemic.<sup>305</sup> Amazon allegedly “jacked prices on its own inventory of products to profiteer off consumers in desperate need.”<sup>306</sup> Amazon filed a motion to dismiss arguing, among other things, that judicial interference with free-market functions, especially in times of emergency, fail to consider the difficulty that retailers and suppliers faced in “obtaining raw materials or labor to create the products in highest demand.”<sup>307</sup> The success of this litigation will depend on the court's assessment of whether Amazon used COVID-19 to reap unconscionable profits or was simply responding in good faith to overwhelming consumer demand and passing along price increases that Amazon itself incurred.

### B. Labor Cases

One COVID-19 litigation tracker indicates that, as of April 2022, there were “5,659 lawsuits (including 646 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus.”<sup>308</sup> Statistics alone, however, are of limited value; overall numbers belie the wide range of COVID-related labor cases, with some alleging serious wrongdoing by employers, but with others involving employers acting reasonably to protect the health of staff and customers.

Plaintiffs raising allegations of direct wrongdoing by defendants include those alleging race discrimination, such as claims that hospitals gave African Americans dangerous assignments—e.g., cleaning COVID-19 patients' rooms—while white employees received less dangerous assignments.<sup>309</sup> If

---

304. WASH. REV. CODE ANN. §§ 19.86.010–19.86.920 (West 2022); see First Amended Class Action Complaint at 1, 61–66, *Greenberg v. Amazon.com, Inc.*, No. 21-cv-00898 (W.D. Wash. Oct. 22, 2021), ECF No. 19.

305. First Amended Class Action Complaint, *supra* note 304, at 2. The complaint alleged the following price increases:

- Face Masks: Increases up to 1,800 percent, from \$4.21 to \$79.99;
- Cold Remedies: Increases up to 1,523 percent, from \$4.65 to \$79.00;
- Toilet Paper: Increases up to 1,044 percent, from \$17.48 to \$200;
- Pain Reliever: Increases up to 233 percent, from \$18.75 to \$62.40;
- Black Beans: Increases up to 521 percent, from \$3.54 to \$21.99;
- Baking Soda: Increases of more than 1,500 percent, from \$3.08 to \$50.00;
- Flour: Increases up to 400 percent, from \$22.00 to \$110.00;
- Yeast: Increases up to 625 percent, from \$7.02 to \$50.95; and
- Disinfectant Wipes: Increases of more than 745 percent, from \$20.71 to \$174.96.

*Id.* (emphasis omitted).

306. *Id.* at 3.

307. Motion of Defendant Amazon.com, Inc. to Dismiss Plaintiffs' First Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), *supra* note 303, at 8.

308. LITTLER MENDELSON, *supra* note 4.

309. See *Hayward v. Cath. Health Sys.*, No. 21-cv-01033 (W.D.N.Y. filed Sept. 17, 2021); Patrick Lakamp, *Workers Allege Racial Discrimination in Lawsuit Against Mercy Hospital*, BUFFALO NEWS (Aug. 24, 2021), [https://buffalonews.com/news/local/workers-allege-racial-discrimination-in-lawsuit-against-mercy-hospital/article\\_40d57136-0504-11ec-9bea-d335200f90b2.html](https://buffalonews.com/news/local/workers-allege-racial-discrimination-in-lawsuit-against-mercy-hospital/article_40d57136-0504-11ec-9bea-d335200f90b2.html) [<https://perma.cc/VN4U-Q6TS>].

these kinds of allegations can be supported with precise factual allegations (for motions to dismiss) and evidence (for summary judgment), they represent serious misconduct on the part of the defendant, with COVID-19 serving as the particular context of such wrongdoing.

On the other hand, cases can be identified in which the alleged labor violations are simply reasonable attempts to maintain health and safety. For example, in *Bridges v. Houston Methodist Hospital*,<sup>310</sup> plaintiffs—116 hospital employees—complained that, with certain exceptions, they would be terminated if they did not receive a COVID-19 vaccination.<sup>311</sup> In granting defendant’s motion to dismiss, the court noted that defendant was not a wrongdoer but was instead trying to protect the safety of patients and staff: “Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer.”<sup>312</sup> The court emphasized that “Bridges [the lead plaintiff] can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.”<sup>313</sup>

### C. Securities Fraud Cases

In securities fraud suits, courts are likely to hold that statements early in the pandemic about expected positive earnings or the likely limited financial impact of the pandemic *cannot* be deemed fraudulent because the company could not have anticipated the scope or magnitude of the pandemic.<sup>314</sup> On the other hand, cases alleging false statements about a company’s progress in developing a vaccine or about the ability of a company’s drugs to cure COVID-19, as opposed to mere optimistic predictions about the possibility of such breakthroughs, are likely to survive motions to dismiss.<sup>315</sup>

For example, in *In re Carnival Corp. Securities Litigation*,<sup>316</sup> a class of investors alleged that a cruise line downplayed the risks of COVID-19 and falsely advertised “full compliance with . . . all U.S. and international safety regulations,” and that this materially misled investors regarding the potential impact that COVID-19 would have on the company’s financial health.<sup>317</sup> Despite Carnival’s claim of having “protocols, standards and practices for every possible issue you might imagine, including coronavirus,”<sup>318</sup> plaintiffs

---

310. 543 F. Supp. 3d 525 (S.D. Tex. 2021), *aff’d sub nom.* *Bridges v. Methodist Hosp.*, No. 21-20311, 2022 WL 2116213 (5th Cir. June 13, 2022).

311. *See id.* at 526.

312. *Id.* at 528.

313. *Id.*

314. *See, e.g.*, *Berg v. Velocity Fin., Inc.*, No. 20-cv-06780, 2021 WL 268250, at \*10 (C.D. Cal. Jan. 25, 2021) (stating company could not have anticipated in January 2020 “the extent of the coronavirus pandemic, or even the presence of the disease in America, at the time of [the company’s initial public offering]”).

315. *See, e.g.*, *McDermid v. Inovio Pharms., Inc.*, 520 F. Supp. 3d 652, 662–65 (E.D. Pa. 2021) (finding sufficient allegations that company misled investors about the progress of a vaccine).

316. No. 20-cv-22202, 2021 WL 2583113 (S.D. Fla. May 28, 2021).

317. *Id.* at \*6.

318. *Id.* at \*8.

alleged that the COVID-19 outbreaks on the defendant's ships revealed that Carnival actually "lacked proper policies, procedures, controls, or processes" to effectively keep its passengers safe.<sup>319</sup> Among other things, the cruise line allegedly failed to conduct pre-boarding screening or only required passengers to sign a form stating that they were not sick before boarding.<sup>320</sup> The court found that none of Carnival's statements rose to the level of materially false or misleading because the statements could not be "objectively measured in the face of a rapidly evolving global pandemic."<sup>321</sup> According to the court, many of the statements challenged were goals that were not actually false, and in a number of instances the health protocols requested by the plaintiffs *exceeded* what the CDC recommended at the time.<sup>322</sup> The court also noted that "hindsight knowledge [about passengers becoming sick on Carnival cruises] cannot be used to assert securities fraud."<sup>323</sup> Subsequently, a second amended complaint was filed and dismissed with prejudice.<sup>324</sup>

By contrast, in *McDermid v. Inovio Pharmaceuticals, Inc.*,<sup>325</sup> the court denied a motion to dismiss the plaintiffs' claims that the company's CEO and CFO misled investors about the company's progress toward developing a COVID-19 vaccine, thereby inflating the company's stock price.<sup>326</sup> The primary statements leading to the suit were made during two nationally televised interviews with the CEO, who claimed that "within three hours of accessing [COVID-19's genetic sequence] . . . we were able to construct our vaccine,"<sup>327</sup> and that the company had "fully construct[ed] [its COVID-19] vaccine within three hours."<sup>328</sup> After each of the two interviews, the second being with then President Donald Trump, the company's stock price increased 7.5 percent and 69.7 percent, respectively.<sup>329</sup> While the price was inflated, both the CEO and the CFO sold portions of their company stock for the first time in nearly two years.<sup>330</sup> The court held that the issue of whether these statements were misleading to investors—given that the company had only designed a vaccine without actually constructing it—was an issue "of fact inappropriate for resolution at the motion to dismiss stage of the litigation."<sup>331</sup>

---

319. *Id.* at \*2.

320. *See id.* at \*3–4.

321. *Id.* at \*12.

322. *See id.* at \*15 (emphasis added).

323. *Id.* at \*13.

324. *See In re Carnival Corp. Sec. Litig.*, No. 20-cv-22202, 2022 U.S. Dist. LEXIS 58526, at \*80 (S.D. Fla. Mar. 30, 2022).

325. 520 F. Supp. 3d 652 (E.D. Pa. 2021).

326. *See id.* at 657–58.

327. *Id.* at 658 (alterations in original) (quoting amended complaint).

328. *Id.* (alterations in original) (quoting amended complaint).

329. *See id.*

330. *See id.* at 660.

331. *Id.* at 662.

### III. OTHER IMPORTANT TRENDS IN COVID-19 CASES

Part III of this Essay focuses on two other important trends in COVID-related cases: (1) courts' rigorous enforcement of arbitration clauses and class action waivers and (2) the paucity of COVID-related class-wide settlements, given the thousands of class actions filed in the wake of COVID-19.

#### A. Arbitration Clauses

The Supreme Court, in several cases, has made it very difficult for plaintiffs to circumvent arbitration clauses or class action waivers.<sup>332</sup> Outside of the COVID-19 context, courts have not considered defendants' alleged wrongdoing when determining whether the case should be submitted to arbitration.<sup>333</sup> The sole issue is whether the parties in fact contracted for arbitration or a waiver of class actions in the event of a dispute.

Not surprisingly, courts have uniformly followed this approach in the COVID-19 context. Courts have enforced class action waivers and arbitration clauses in numerous COVID-related cases involving cruise line and airline contracts,<sup>334</sup> tickets to canceled entertainment events,<sup>335</sup> hosts complaining that Airbnb canceled bookings,<sup>336</sup> gyms that were forced to close,<sup>337</sup> and even disputes regarding benefits under the Coronavirus Aid, Relief, and Economic Security Act<sup>338</sup> (CARES Act).<sup>339</sup> Although some courts have denied motions to compel arbitration in COVID-related cases,

---

332. *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (enforcing arbitration clause that barred class-wide litigation and class-wide arbitration); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (enforcing agreement requiring individual arbitration despite argument that such a result would prevent aggrieved parties from vindicating rights under federal antitrust laws). *See also* Klonoff, *supra* note 170, at 815–23 (discussing case law on arbitration clauses and class action waivers).

333. *See, e.g.*, Selden v. Airbnb, Inc., 4 F.4th 148, 152 (D.C. Cir. 2021) (affirming lower court's submitting to arbitration allegations that company allowed property owners to discriminate on the basis of race in violation of the Civil Rights Act); Gilbert v. Indeed, Inc., 513 F. Supp. 3d 374, 382–83 (S.D.N.Y. 2021) (granting employer's motion to compel arbitration after finding valid arbitration provisions in employment and incentives contracts despite allegations that employee was sexually harassed, assaulted, raped, and then fired for medical conditions resulting from the trauma).

334. *See, e.g.*, Lindsay v. Carnival Corp., No. C20-982, 2021 WL 2682566, at \*4 (W.D. Wash. June 30, 2021); Saperstein v. Thomas P. Gohagan & Co., 476 F. Supp. 3d 965, 967 (N.D. Cal. 2020).

335. *See, e.g.*, Snow v. Eventbrite, Inc., No. 20-cv-03698, 2021 WL 3931995, at \*1 (N.D. Cal. Sept. 2, 2021); Ajzenman v. Off. of Comm'r of Baseball, 492 F. Supp. 3d 1067, 1071 (C.D. Cal. 2020).

336. *See, e.g.*, Farmer v. Airbnb, Inc., No. 20-cv-07842, 2021 WL 4942675, at \*1 (N.D. Cal. June 1, 2021).

337. *See, e.g.*, Williams v. Planet Fitness, Inc., No. 20-CV-3335, 2021 WL 1165101, at \*1 (N.D. Ill. Mar. 26, 2021).

338. Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended in scattered sections of the U.S.C.).

339. *See, e.g.*, Marselian v. Wells Fargo & Co., 514 F. Supp. 3d 1166, 1170 (N.D. Cal. 2021).

those cases apply settled law without noting any considerations unique to the pandemic.<sup>340</sup>

For example, in *Saperstein v. Thomas P. Gohagan & Co.*,<sup>341</sup> following cancellations in response to the pandemic, a cruise line offered its customers two refund options: (1) transfer the reservation and money paid to a similar travel program in 2021 or 2022 or (2) receive travel vouchers for other Gohagan travel programs operating through 2022.<sup>342</sup> Consumers, who were seeking a full refund of monies paid, brought a putative class action alleging intentional misrepresentation, unjust enrichment, and violation of California's Unfair Competition Law.<sup>343</sup> Plaintiffs challenged, on unconscionability grounds, the validity of the arbitration provision included in the cruise reservation, claiming that there was no opportunity for meaningful negotiation of the terms and that the contract therefore lacked mutuality.<sup>344</sup> The court held that the parties entered into a valid agreement to arbitrate "issues of arbitrability, which encompass[e] the dispute of whether the broader arbitration provision is unconscionable."<sup>345</sup>

Similarly, in *Marselian v. Wells Fargo & Co.*,<sup>346</sup> a putative class action was brought against Wells Fargo for its processing of Paycheck Protection Program loans for businesses under the CARES Act.<sup>347</sup> The bank allegedly prioritized processing loans for larger businesses that required higher loan amounts as a way of maximizing commissions.<sup>348</sup> Plaintiffs alleged that "[a]s a result of Wells Fargo's unfair business practices . . . thousands of small businesses . . . did not receive the critical loan proceeds they needed while most at risk."<sup>349</sup> The court found that plaintiff had assented to the terms of an application form that contained an arbitration agreement, and thus granted defendant's motion to compel arbitration.<sup>350</sup>

These cases, and others like them, reveal that many putative class actions relating to COVID-19 may be nonstarters because of enforceable arbitration agreements and class action waiver clauses.

### *B. Willingness of Some Defendants to Reach Prompt Class-Wide Settlements*

With thousands of COVID-related class actions pending throughout the country, one might have expected to see a significant number of class-wide settlements by defendants fearful of exposing themselves to massive

---

340. See, e.g., *In re StubHub Refund Litig.*, No. 20-md-02951, 2021 WL 5447006, at \*7–8 (N.D. Cal. Nov. 22, 2021).

341. 476 F. Supp. 3d 965 (N.D. Cal. 2020).

342. See *id.* at 969.

343. CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2022); see *Saperstein*, 476 F. Supp. 3d at 967.

344. See *id.* at 970–71.

345. *Id.* at 976–77.

346. 514 F. Supp. 3d 1166 (N.D. Cal. 2021).

347. See *id.* at 1170.

348. See *id.*

349. *Id.* (first and second alterations in original) (quoting complaint).

350. See *id.* at 1173, 1177.

class-wide judgments—or simply wanting to foster goodwill among repeat customers. Thus far, class settlements have been rare, and they have virtually always followed defendants’ defeat either on the merits (denial of motions to dismiss) or through the grant of a preliminary injunction.

As an example of the handful of class-wide settlements, Barry University reached a class-wide settlement in a tuition reimbursement case.<sup>351</sup> After losing on its motion to dismiss,<sup>352</sup> Barry University agreed to create a \$2.4 million common fund for the benefit of students, covering various fees including tuition fees, room and board fees, health fees, and lab and material fees.<sup>353</sup> Under the settlement, class members will receive “approximately 60% of their anticipated recoverable damages.”<sup>354</sup> In addition to the problems of surviving summary judgment and winning at trial, plaintiffs faced the fact that the Florida legislature had specifically adopted legislation denouncing the tuition reimbursement cases as “without legal precedent.”<sup>355</sup> As the court noted, this legislation “may have precluded relief altogether.”<sup>356</sup>

Columbia University similarly reached a settlement of a putative class action seeking reimbursement for tuition and fees.<sup>357</sup> The district court had previously granted in part and denied in part Columbia’s motion to dismiss, allowing claims for fees to go forward but not those for tuition reimbursement.<sup>358</sup> Under a proposed settlement, Columbia would establish a fund with \$12,500,000 that, after payment of attorneys’ fees, would be used to reimburse students the amount of student fees that had been paid for the portion of the spring semester that was conducted remotely.<sup>359</sup> Because the settlement is limited to the recovery of student fees, it is a far cry from the expansive class action suit that was originally brought, which sought not only fees but also the reimbursement of the much higher tuition costs.<sup>360</sup>

In the context of claims seeking reimbursement for canceled flights, Deutsche Lufthansa AG and a class of passengers settled a case in which the class sought refunds for flights canceled as a result of COVID-19.<sup>361</sup> The

---

351. See *Rosado v. Barry Univ. Inc.*, No. 20-21813-CIV, 2021 U.S. Dist. LEXIS 169196, at \*1–3 (S.D. Fla. Sep. 7, 2021).

352. See *Rosado v. Barry Univ. Inc.*, 499 F. Supp. 3d 1152, 1154 (S.D. Fla. 2021).

353. See *Rosado*, 2021 U.S. Dist. LEXIS 169196, at \*6–7.

354. *Id.* at \*6.

355. *Id.* at \*15 (quoting FLA. STAT. § 768.39(1) (2021)).

356. *Id.* at \*17. *But see* *Ferretti v. Nova Se. Univ., Inc.*, No. 20-CIV-61431, 2022 WL 471213, at \*8 (S.D. Fla. Feb. 16, 2022) (holding that “retroactive application of the [Florida] [s]tatute would violate due process by impairing Plaintiff’s vested rights in his causes of action”).

357. See *Stipulation of Settlement, In re Columbia University Tuition Refund Action*, No. 20-cv-03208 (S.D.N.Y. Nov. 23, 2021), ECF No. 86-1.

358. See *In re Columbia Tuition Refund Action*, 523 F. Supp. 3d 414, 419–20 (S.D.N.Y. 2021).

359. See *Stipulation of Settlement, supra* note 357, at 12–13, 24.

360. See *In re Columbia Tuition Refund Action*, 523 F. Supp. 3d at 420.

361. See Plaintiffs’ Notice of Motion and Motion for Preliminary Approval of Class Action Settlement, Provisional Certification of Nationwide Settlement Classes, and Approval of Procedure for and Form of Notice at 1, *Maree v. Deutsche Lufthansa AG*, No. 20-cv-00885 (C.D. Cal. Aug. 16, 2021), ECF No. 95.

case had previously survived a motion to dismiss (on plaintiffs' second attempt).<sup>362</sup> In their motion for preliminary approval of the proposed settlement class, plaintiffs noted that numerous airline refund cases had failed to survive a motion to dismiss, and that others that had survived dismissal had nonetheless been voluntarily dismissed.<sup>363</sup> The motion further noted that, while there were some other airline refund cases that had survived a motion to dismiss, the Lufthansa case was the only one known to class counsel to have resulted in a settlement.<sup>364</sup>

A rare example of a class-wide settlement of a COVID-related labor dispute is *Benson v. Enterprise Leasing Co. of Orlando*.<sup>365</sup> The settlement resolved a class action challenging Enterprise's decision to lay off 964 employees with less than sixty days' notice, allegedly in violation of the Worker Adjustment and Retraining Notification Act<sup>366</sup> (WARN Act).<sup>367</sup> Enterprise had lost in the district court despite asserting that the requirements of the WARN Act did not apply because COVID-19 qualified as a "natural disaster."<sup>368</sup> The settlement is a meager one—it creates a \$175,000 fund that, after subtracting administrative fees and litigation costs (estimated to be around \$23,000–\$24,000), will be divided among all of the 964 class members who submit claims.<sup>369</sup>

In the prison and immigration detention context, there have been some settlements as well. For instance, in *Chatman v. Otani*,<sup>370</sup> a federal judge in Hawaii entered an order granting final approval to a class settlement in a suit by people incarcerated in Hawaii alleging that the state's prisons had failed to protect them from COVID-19.<sup>371</sup> Four months earlier, the court had issued a lengthy opinion certifying a class action and entering a preliminary injunction, after finding that state officials showed deliberate indifference to the health of the prison population.<sup>372</sup> The settlement provides for "[i]mplementation of the Response Plan, with adaptations based on CDC guidelines, best practices and recommendations from the State of Hawai'i Department of Health,"<sup>373</sup> as well as a five-person monitoring panel

---

362. *See* *Maree v. Deutsche Lufthansa AG*, No. SACV 20-885, 2021 WL 267853, at \*1 (C.D. Cal. Jan. 26, 2021).

363. *See* Plaintiffs' Notice of Motion and Motion for Preliminary Approval of Class Action Settlement, Provisional Certification of Nationwide Settlement Classes, and Approval of Procedure for and Form of Notice, *supra* note 361, at 2–3.

364. *See id.* at 3–4.

365. No. 20-cv-891 (M.D. Fla. filed May 25, 2020).

366. 29 U.S.C. §§ 2101–2109.

367. *See* Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement at 4, 14–15, *Benson v. Enter. Leasing Co. of Orlando*, No. 20-cv-891 (M.D. Fla. Nov. 29, 2021), ECF No. 130.

368. *Benson v. Enter. Leasing Co. of Orlando*, No. 20-cv-891, 2021 WL 1078410, at \*5 (M.D. Fla. Feb. 4, 2021).

369. *See* Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, *supra* note 367, at 5–7.

370. No. 21-00268, 2021 WL 5238762 (D. Haw. Nov. 10, 2021).

371. *See id.* at \*1.

372. *See* *Chatman v. Otani*, No. 21-00268, 2021 WL 2941990 (D. Haw. July 13, 2021).

373. *Chatman*, 2021 WL 5238762, at \*1.

responsible for “provid[ing] non-binding, informed guidance and recommendations to aid [the Department of Public Safety (DPS)] with the implementation of the Response Plan and any necessary changes to DPS’s COVID-19 response.”<sup>374</sup>

Likewise, in *Gayle v. Meade*,<sup>375</sup> immigrants in three south Florida ICE detention centers reached an agreement with the United States to address COVID-related concerns.<sup>376</sup> The settlement requires ICE to comply with various population requirements, CDC guidelines, and ICE’s pandemic response requirements, and provides for judicial oversight to ensure such compliance.<sup>377</sup> Again, the settlement mirrored prior rulings that granted class certification and ordered preliminary injunctive relief.<sup>378</sup>

The paucity of class settlements to date may be due in part to the slowdown of COVID-19 litigation and the absence of pressure from an upcoming trial date. Nonetheless, it also appears that defendants are not in any hurry to settle the cases and are content, at least for now, to defend them vigorously. That strategy is understandable, given the cautious approach that courts have taken in COVID-related cases, and the myriad of victories that defendants have achieved thus far.

#### CONCLUSION

Instead of providing a sympathetic backdrop for plaintiffs, COVID-19 has served as a source of caution for courts adjudicating COVID-related cases. The myriad of adverse rulings in COVID-19 cases are striking. Courts understand that defendants did not cause the pandemic and should be liable only when their own contractual breach or misconduct is clear. Even in some cases alleging serious misconduct, arbitration clauses and class action waivers will frequently serve as a roadblock to aggregating cases that are not worth pursuing individually. And few defendants have felt compelled to enter into early class-wide settlements. In short, while the flurry of COVID-related class actions initially raised the prospect of a litigation crisis akin to the explosion of asbestos cases, the courts have not been swayed by

---

374. *Id.* at \*2.

375. No. 20-21553-civ, 2021 WL 6101368 (S.D. Fla. Dec. 3, 2021), *report and recommendation adopted*, No. 20-21553-civ, 2021 WL 6072820 (S.D. Fla. Dec. 23, 2021).

376. *See id.* at \*1.

377. *See id.* at \*5–7.

378. *See Gayle v. Meade*, No. 20-21553-civ, 2020 WL 3041326, at \*23–24 (S.D. Fla. June 6, 2020). For other examples of settlements in COVID-19 prison and immigration detention cases, see Joseph P. Smith, *Cumberland, Jail Inmates Reach Settlement in Federal Court Case over COVID-19*, DAILY J. (May 6, 2021, 5:34 PM), <https://www.thedailyjournal.com/story/news/2021/05/06/nj-federal-lawsuit-inmates-cumberland-county-jail-brown-warren-judge-hillman/4972080001/> [<https://perma.cc/CG4T-MRUN>]; *WIRAC Class Action Reaches Settlement in Landmark COVID-19 Case for Immigrants*, YALE L. SCH. (Apr. 6, 2021), <https://law.yale.edu/yls-today/news/wirac-class-action-reaches-settlement-landmark-covid-19-case-immigrants> [<https://perma.cc/5ZEV-34AR>]; Noelle E.C. Evans, *NYCLU Reaches Settlement with ICE over COVID-19 Protections at Batavia Detention Center*, WXXI NEWS (Aug. 4, 2020, 4:10 PM), <https://www.wxxinews.org/coronavirus/2020-08-04/nyclu-reaches-settlement-with-ice-over-covid-19-protections-at-batavia-detention-center> [<https://perma.cc/V3VA-Z9XV>].

the enormity of COVID-19 or the large number of claims. Instead, they have commendably focused on the merits of the cases and have not hesitated to deny relief when such relief is not clearly justified.