Commercial Litigation Outlook

2021 Edition

Commercial Litigation Outlook

Introduction

—By Shawn Wood and Rebecca Woods

Welcome to Seyfarth Shaw's Commercial Litigation Outlook. The upcoming 12 months promises to be hectic and active on the litigation front. To help our clients anticipate and navigate what's to come, our subject-matter experts provide insights and analysis on what you can expect.

As the nation emerges from the pandemic, clients face the double-whammy of delayed resolution of existing disputes (thanks to court shutdowns) and increased litigation activity across the board. The third quarter of 2020 saw significantly increased lawsuit activity, particularly in the area of real estate litigation. The remainder of 2020 had slightly below average lawsuit filings, which we think was attributable more to delayed filing rather than avoided disputes. Indeed, prognostications from a variety of legal-watchers all agree that lawsuits will be on the rise.

The burning question for many is, "when will the courts unclog?" With criminal matters taking precedence, many jurisdictions will remain bogged down with civil suits taking a back seat through the rest of the year. But some jurisdictions are already rebooting jury trials, some remote and, with full vaccine distribution possible by summer, civil trials in unclogged jurisdictions are likely by the third quarter of 2021.

The deluge of real estate disputes, particularly those among landlords and tenants, is unlikely to abate until later in 2021. With the pandemic accelerating the disruption in retail and commercial space, we expect to see real estate litigation of all kinds to remain hot past 2021.

Among the new challenges clients will be facing are cyber-security breaches and claims, which raise tricky and company-survival issues including data exfiltration, data loss, and ransoms that are becoming increasingly bold. On the privacy front, we're seeing a more robust national movement toward California-style privacy protection laws, buoyed by the national conversation about the pervasiveness and power of technology in our everyday lives. Biometric litigation, limited for the moment to Illinois, is poised to explode as more states seek to pass similar laws to protect the data that digitally identify a person.

In the world of consumer financial services, we anticipate a high volume of claims as foreclosure and eviction moratoriums are lifted. Consumers are likely to initiate litigation challenging the interpretation and application of relief available under the CARES Act, including mortgage forbearance, debt collection and credit reporting issues. In addition, with consumers shifting to a variety of FinTech applications, we expect the evolving regulatory framework will trigger heightened compliance obligations for financial services companies.

We're seeing interesting, and much-needed, developments in eDiscovery. As many clients who have paid document production invoices can attest, the originally-promised efficiencies of eDiscovery were vastly outweighed by the sheer volume of responsive documents, thanks to email and other electronic media. Now clients can expect their outside counsel to deploy new technology to both reduce production costs and combine production with fact development.

Health care remains mired in fraud-based claims, with litigation increasing as a result of the arms-race between regulators who change rules to catch or limit fraud and fraudsters finding alternative means to circumvent them. The ACA will not only remain a litigation magnet, but is likely to expand as a result of COVID-19 Stimulus Plan signed by President Biden, which expands ACA benefits.

There's more, as you can read in these pages, including electric vehicles shaking up the automotive franchise world, a more robust antitrust enforcement under a Biden administration, and a tailing off of the crush of business interruption insurance claims as courts overwhelmingly reject most policyholder claims (but read the terms of your policies!).

We hope you find this publication informative. Please contact any of the authors for assistance with any of the issues outlined here.

What to Expect from the Unexpected: Trial Outlook

— By Christopher Robertson

Since the pandemic first closed many courts, one of the most significant adjustments made by federal courts has involved the use of electronic communications. Under provisions of the CARES Act, the COVID-19 relief law passed in March 2020, federal courts began conducting routine procedural hearings, such as first appearances for criminal defendants, by telephone and video hookups.

As the coronavirus dragged on, a small number of courts have adapted electronic proceedings to meet more challenging situations. Numerous courts by the close of 2020 conducted virtual bench trials, which did not require a jury. And just recently, the Western District of Washington began holding all-virtual jury trials in civil lawsuits. At least four other federal courts have scheduled virtual civil jury trials, with jurors serving from home. These include the Middle District of Florida, District of Minnesota, District of Kansas, and District of Rhode Island. Two of those case settled before trial and the other two proceeded. These courts determined that civil jury cases would stand up to any appeals, and they found that it was easier to assemble diverse juries. For some of these diverse jurors, not having to travel a hundred miles or more to a federal courthouse was a major advantage.

Seyfarth litigators were no strangers to remote proceedings in 2020, with our lawyers conducting several remote bench trials, in person bench trials, remote arbitrations, and mediations across the platform last year. Barring the occasional crying baby or barking dog, the feedback was positive, with a general consensus that documentary evidence came in smoothly and witness testimony was clear and captured into the record.

Coming into 2021, live trials are happening, mostly if not exclusively in many courts in criminal cases that have priority. Most civil jury trials will not be back online until at least summer. As a result, some courts are being more aggressive in pushing the parties toward mediation (and often judges are scheduling their own settlement conferences) to urge resolution as a practical approach to resolving current backlogs based on the number of civil cases awaiting trial.

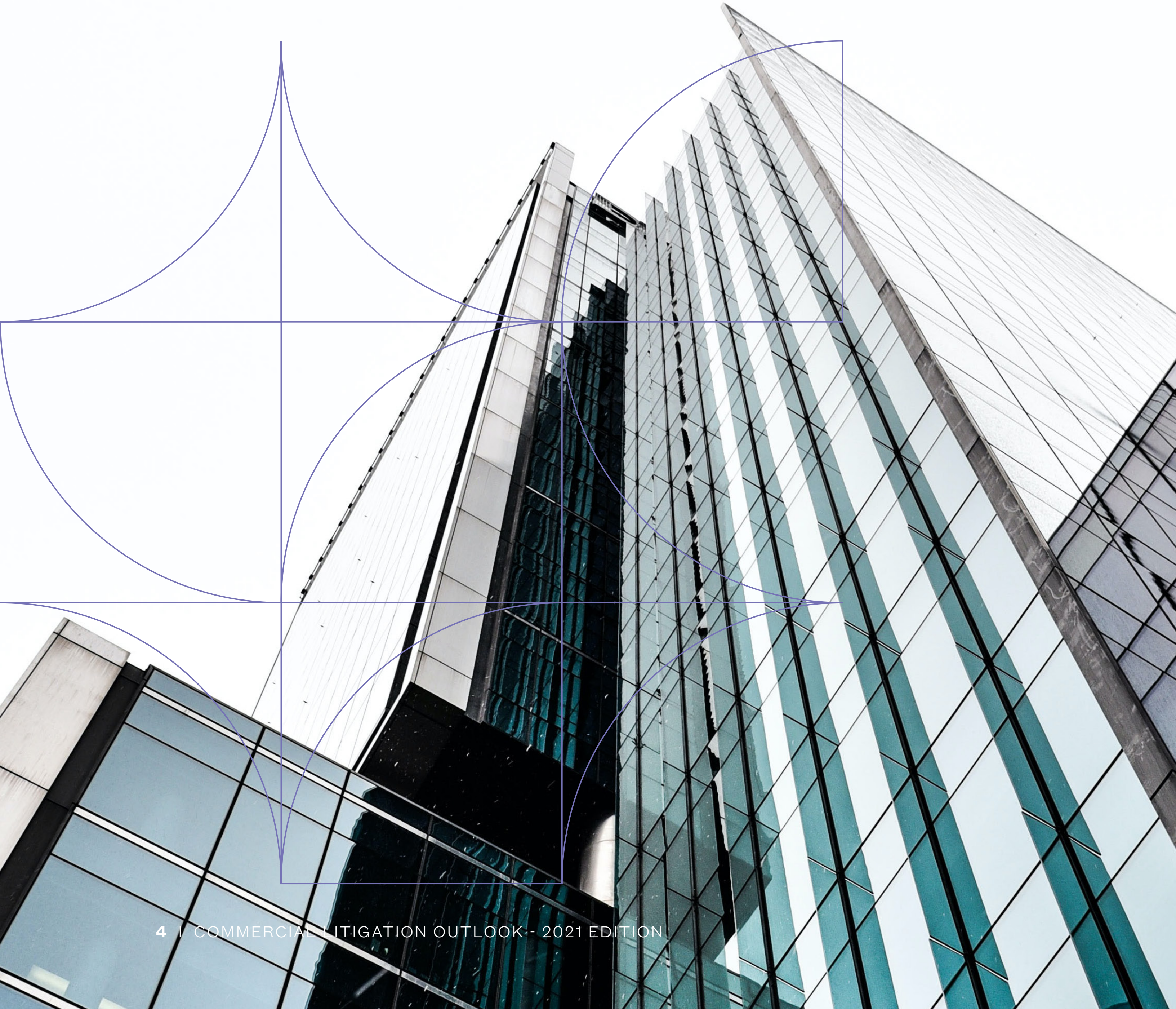
Currently, where there have been live trials, numbers are limited in the courtroom and only larger courtrooms are suitable. Some judges are exploring other possible venues for trials including military bases and community colleges. Under the recent Biden executive order covering federal buildings, everyone in a federal court must be masked, except the witness may remove his/her mask after entering the witness box (surrounded by Plexiglass). The witness typically cleans the witness stand before departing. Plexiglass separates the judge, counsel, witnesses and any jurors. Members of the trial team sit distanced so that if one becomes ill/quarantined, the other is not a close contact and trial can proceed. In many courts, sidebars, conferences between counsel, and attorney/client conferences take place over a single-channel microphone system. Remote hearings are working well for more routine conferences. They are especially effective for defendants in prison who are subject to an onerous quarantine after attending an in-person hearing. Remote hearings also save travel time and are efficient. Based on recent surveys, routine hearings conducted remotely appear to be here to stay, especially if counsel is not local.

According to a recent survey of federal judges, the long-term role of virtual evidentiary proceedings and non-routine matters remains unclear. While virtual trials in civil cases remain a rarity, a recent seminar on conducting virtual trials hosted by the Western District of Washington attracted more than 900 participants from more than 60 district courts. In addition, under the CARES Act, the Judiciary will end most electronic proceedings once the pandemic emergency is declared over. Until then, telephone and virtual hookups will play an important role in moving cases forward. For example, Chief Judge John R. Tunheim, of the District of Minnesota, said virtual civil trials are likely to be needed even after more people receive vaccinations. That is because anti-COVID-19 measures, such as plexiglass barriers and social distancing, will greatly reduce courtroom capacity, and criminal cases must be tried in person. He noted that they only have one courtroom in Minneapolis and one in St. Paul for trials, "so the ability to do civil trials virtually while we catch up on our criminal trial backlog will be very helpful."

And despite inevitable hiccups, judges agreed that virtual strategies have preserved the essentials of justice during the nation's worst health crisis in a century. Several judges noted that despite the issues that delayed many criminal jury trials because those could not be conducted, civil proceedings up to and including trials could progress in various ways resulting in a far lesser backlog than anticipated. Thus, even while we await a return to pre-pandemic operations in many courts, we should expect civil cases will continue to move forward expeditiously if the parties agree to conduct them remotely or try them to the bench.

COVID-19 Disruption and the Evolving Landscape of Real Estate Litigation

— By Mark Johnson and Elizabeth Schrero



We anticipate a busy year for real estate litigation as disruption resulting from the first year of the pandemic continues and recovery from the pandemic begins in earnest. COVID-19 has served to accelerate trends already in progress, such as the rise of e-commerce and the decline of brick and mortar retail stores. The pandemic also has served to push over the edge certain residential and commercial developments and properties who were struggling before the pandemic.

Still an Ever-Shifting Landscape

Legislatively-imposed moratoriums on foreclosures and evictions are set to expire. Forbearance agreements negotiated earlier in the pandemic and government sponsored financial assistance, such as the PPP program, likely served as temporary solutions that simply deferred parties' inability to meet their financial obligations. Once these temporary solutions no longer are available or no longer provide adequate protection, the disruptive effect of the pandemic will have increasingly significant impact on real estate, particularly in the retail and hospitality sectors, and will likely result in an uptick in the already-increased number of lawsuits. We anticipate commercial landlord-tenant litigation to remain robust in 2021.

Landlord-Tenant Litigation

Prior government shutdown orders and ongoing capacity restrictions continue to impact landlords and tenants of retail and office properties. This has spawned a cottage industry of litigation in both state and federal courts throughout the country.

In the retail industry, our experience has been that tenants, including traditional and big-box retailer tenants and quick serve restaurants, generally contend that because they were forced to close their doors to the public due to the spate of government shutdown orders that swept across the country they were unable to conduct ordinary operations. Accordingly, they have argued that they are relieved of their contractual obligations to pay the full amount of rent due during the impacted period by various contractual and equitable doctrines. Some tenants have even attempted to use such doctrines as a springboard to seek reformation or rescission of leases. We have seen that landlords typically respond that temporary periods of closure and negative economic impacts in the wake of COVID-19 are insufficient to relieve tenants' obligation to pay rent in general and under lease terms, particularly force majeure clauses, which typically contain carve-outs for monetary obligations.

These tensions have forced parties, and courts, to scour previously little-regarded lease provisions and revisit old common law excusability doctrines. Courts, and parties, typically first turn to the lease's force majeure clause, which is where contracting parties typically address rights and remedies for foreseeable events that could prevent, or render impossible, or delay a party's performance. Because force majeure clauses in commercial leases frequently contain carve-outs for monetary obligations, thereby still obligating tenants to pay rent, landlords rely on these clauses to defend against tenants' efforts to avoid rent obligations, particularly where government orders or restrictions are identified as events of force majeure.

This has forced tenants to try to distinguish their particular force majeure clause, or turn to other contractual defenses, such as co-tenancy (if they were shut down, other anchors may have been as well, thereby triggering a co-tenancy failure), casualty, and covenants of quiet enjoyment. In addition to contractual defenses, tenants have also resorted to a cadre of excusability defenses, including frustration of purpose, impracticability, and impossibility.

While the contours of excusability defenses and the impact of lease force majeure clauses are still developing in the real estate litigation context, preliminary results of court rulings have tended to skew in favor of landlords. There is also a vibrant argument that is emerging in developing case law regarding the availability of excusability defenses when the lease at issue contains a force majeure clause. Some courts decline to apply excusability defenses, noting that the parties contracted to incorporate those defenses as they saw fit in the force majeure clause, and other courts agree to proceed through the contractual and equitable defenses alike. In this regard, force majeure clauses are technically limited to the doctrine of impossibility, namely where a party is prevented or unable to perform, as opposed to the doctrine of frustration of purpose, where an intervening event has, either temporarily or entirely, frustrated the purpose of the lease, even though a party can still perform (i.e., the tenant is not prevented from paying rent). Some courts have adeptly noted that distinction, while others have blurred the doctrines together.

There have been, however, some notable pro-tenant rulings. For example, a recent Massachusetts trial court ruled that a commercial tenant was excused from paying rent while indoor operations were barred by government order during the Spring of 2020. Addressing the interplay between the common law doctrines of frustration of purpose and impossibility on a commercial tenant's obligation to pay rent during periods of shutdown where the lease's force majeure clause identified government restrictions and contained the typical carve out for monetary obligations, the court noted that the force majeure clause invoked the doctrine of impossibility. It distinguished that doctrine from "frustration of purpose [which] is a different issue, arises under different circumstances, and was not addressed by the force majeure provision." Similarly, in a New Jersey case, we represented the retail tenant who defeated to the landlord's motion for summary judgment on the ground that the tenant was permitted to present its defense of frustration of purpose as excusing its obligation to pay rent during the government shutdown.

In the office lease context, our experience has been that the excusability doctrines are finding much less success when courts look at the specific purpose of a space. For example, in a New York case, we represented the landlord of office space, who won summary judgment on its action to recover unpaid rent, against a tenant which asserted defenses of impossibility and frustration of purpose. As for the impossibility defense, the court explained that the tenant's business was not shut down by COVID-19-related government orders. The court's ruling is consistent with the prevailing view that mere economic hardship does not excuse a tenant's rent obligations. The court limited its holding to office leases, noting that this was not a case "where a tenant rented a unique space for a specific purpose that can no longer serve that function." In essence, courts are examining the use provisions of leases and the specific impact of government shutdowns and restrictions on particular uses, rather than issuing blanket relief for tenants.

Whether a cohesive body of case law develops regarding excusability defenses and the impact of lease force majeure clauses, or whether the results will continue to vary state by state and court by court is unclear, but it will dramatically impact the outcome of these disputes. Of course, this uncertainty could result in landlords and tenants being more willing to compromise, such as in the form of lease amendments or modification agreements, in order to control their own destiny and to implement business strategies, while avoiding unpredictable and unwanted results in court. This is a trend that we are already witnessing.

Insurance Coverage Litigation

Although we have not seen the anticipated tsunami of insurance coverage disputes relating to the pandemic, there is a growing body of decisions on whether COVID-19-related business income losses constitute compensable losses under business interruption or "casualty" coverage provisions. The results thus far skew strongly in favor of carriers where policies contain exclusions for losses arising from the presence of virus, bacterial or other microorganisms or which limit coverage to situations including "direct physical loss or damage to real property," with most courts requiring actual physical loss or damage rather than loss of access to or use of premises (due to government shutdowns or restrictions), to constitute a compensable loss.

Foreclosures and Bankruptcy Litigation

In addition to the well-publicized impact of COVID-19 shutdowns and the economic downturn on retail and office leasing, and on real estate financing for such properties, the hospitality industry has been particularly hard hit. There likely will be an increased number of mortgage foreclosures and UCC foreclosures on affected hotel properties, as well as guaranty litigation, hotel franchise disputes and possibly lender liability claims arising from actions taken by parties during the pandemic to defer or forbear from enforcement of remedies. In June 2020, a New York State court evaluated what constituted a commercially reasonable UCC foreclosure sale during the pandemic and enjoined a lender from proceeding with a UCC sale of the upscale, landmarked Mark Hotel where the sale was not "crafted in a way to accommodate New York City's stay at home orders and other local mandates in response to COVID 19." The court was persuaded by plaintiff's argument that "what is reasonable during normal business times, may not be reasonable during the pandemic." It is notable that the court did not rule that all foreclosure

"As temporary solutions in the form of moratoria on foreclosures and evictions, forbearance agreements, and financial assistance programs expire, the disruptive effect of the pandemic will have an increasingly significant impact on real estate litigation." – Elizabeth Schrero sales held during the pandemic are unreasonable, but rather, directed the lender to craft a commercially reasonable sale plan, considering COVID-19 conditions.

In addition, shopping mall failures likely will accelerate, with loan foreclosures on mall properties and lease disputes ranging from going-dark litigation, actions to recover rent on vacated spaces, and co-tenancy failures by mall owners, generating other shopping mall lease disputes. This would lead to more bankruptcy filings and work-out related disputes.

There have been several bankruptcy court rulings dealing with these precise issues and tackling the same contractual and equitable arguments pervading retail and office landlord-tenant litigation generally, again with varying outcomes. For example, an Illinois bankruptcy court excused the debtor-restaurant's obligation to pay full rent during the government shutdown where the lease's force majeure clause identified government orders as an event of force majeure but, unlike most commercial leases, did not contain a carve out for monetary obligations. Since the restaurant was able to use 25% of its premises for take-out orders, the court ultimately concluded that the "Debtor's obligation to pay rent is reduced in proportion to its reduced ability to generate revenue due to the [governor's] executive order," such that the debtor-restaurant was required to pay 25% of its monthly rental obligation. Relatedly, a Texas bankruptcy court rejected the debtor-restaurant's invocation of common law excusability defenses where several of its leases' force majeure clauses identified government orders as an event of force majeure and contained the usual carve-out for monetary obligations.

Property Management and Ownership Concerns

We anticipate litigation involving claims against commercial and residential property owners and managers arising from actions taken or not taken relating to COVID-19 such as potential claims relating to inadequate measures taken to protect against COVID-19 or improper restrictions or obligations imposed relating to COVID-19. Similar claims are anticipated in the context of cooperative and condominium governance disputes.

In addition, the disruption likely will lead to increased real estate partnership disputes, partition actions, as well as general commercial litigation involving real estate ownership entities and properties.

Development and Construction Project

There likely will also be increased litigation in the context of ongoing development projects. We have already seen litigation involving real estate purchase and sale agreements. As a basis for an attempt to nullify an agreement, some parties are pointing to the economic and business impacts resulting from COVID-19 as changing the fundamental purpose of an underlying agreement.

Construction-related litigation involving claims arising from project delays and project overruns will continue, and there likely will be an increase in mechanic's lien litigation. Resolution of these disputes will involve application of the same common law excusability doctrines and contractual force majeure clauses that impact landlord-tenant litigation as well as delay damages provisions unique to construction contracts.

New Areas of Potential Liability

Public real estate companies could face claims arising from inaccurate or incomplete disclosures regarding the impact of COVID-19 on their operations and values. In addition, in a trend that we have begun to see, some states are enacting legislation mandating gender diversity on corporate boards, obligating them to comply with board gender diversity disclosure requirements established by the legislation. Failure to do so could expose them to liability, including for disclosures that contain material misstatements or omissions. In addition, a company could face shareholder derivative suits alleging breach of fiduciary duties as a result of decisions made concerning board diversity or the lack thereof, or potential harm to their brand.

Conclusion—Optimism and Opportunity

Seyfarth's 2021 Real Estate Market Sentiment Survey indicates an overwhelming 85% of respondents' believe that 2021 will be a year of opportunity for their real estate companies, as they navigate the fallout from the 2020 recession and adapt to new market demands. If history is our guide, disruption in the real estate market coupled with companies' optimism about new opportunities will result in increased real estate litigation.

"The uncertainty resulting from inconsistent court results in COVID-19 commercial landlord-tenant litigation may lead to more parties negotiating compromises in the form of lease amendments so as to control their own destinies and achieve overall business strategies." – Mark Johnson

Key Trends in Commercial Litigation

Antitrust

— *By William Berkowitz, Brandon Bigelow, and Alison Eggers*

The US Department of Justice (DOJ) and state antitrust enforcers continued to investigate alleged collusion between employers in labor markets in 2020, with the DOJ announcing in early January 2021 that it was pursuing criminal charges against a health care company for entering into a "no-poach agreement" with competitors not to solicit senior-level employees.

The DOJ had warned in 2016 in its *Antitrust Guidance for Human Resource Professionals* that the antitrust laws apply to competition among firms to hire employees and that the DOJ would bring criminal charges "against naked wage-fixing or no-poaching agreements." Companies cannot afford to take the DOJ's warning lightly.

"No poach" agreements will continue to be an antitrust enforcement priority for regulators, with the DOJ filing its first criminal charges against an employer in January 2021.

One important step companies can take to significantly reduce antitrust risk is by maintaining a robust antitrust compliance policy, supported by regular programs and trainings. On July 11, 2019, the DOJ announced a new policy that directs prosecutors to consider the adequacy and effectiveness of a corporation's compliance program at the charging stage, meaning that businesses that take antitrust compliance seriously may be able to avoid the worst consequences even if rogue employees violate the antitrust laws.

All companies can mitigate antitrust risk by maintaining a robust antitrust compliance policy, supported by regular programs and trainings.

Regulatory scrutiny of potentially anticompetitive effects resulting from the conduct of large technology companies expanded in 2020. Early in 2020, the Federal Trade Commission (FTC) announced that it had issued Special Orders to five large technology companies requiring them to provide information about prior acquisitions not reported to the antitrust agencies under the Hart-Scott-Rodino (HSR) Act to determine whether greater scrutiny is necessary to detect potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR reporting thresholds. Although the FTC's inquiry has so far been limited to technology companies, two FTC commissioners urged a broader examination of "stealth consolidation" across a variety of industries, including healthcare, pharmaceuticals, and hospital markets.

Companies in all sectors should expect that the FTC and DOJ may give more scrutiny to transactions that in the past might have easily cleared HSR review.

Finally, the parties in a number of major antitrust class action litigation matters reached settlements in 2020, including matters involving alleged price fixing in the packaged seafood market and collusion among various Blue Cross/Blue Shield insurance providers to suppress competition between those plans. Businesses are often members of these certified classes, and given the volume of their purchases in these markets, often can recover substantial sums from these settlement funds. Businesses should be on the lookout for court-ordered notices concerning these settlements to make sure they do not waive any rights. Businesses also should be skeptical of companies that offer to "assist" with the submission of claims; these companies often demand a substantial percentage of any recovery for their work, even though settlements are typically designed to make claims submission easy.

Key Trends in Commercial Litigation

Automotive Franchise

— By John Skelton and Alison Eggers

As in so many sectors of the economy, automotive franchising was initially hit hard by the COVID-19 pandemic.

Though demand bounced back swiftly in the second half of the year — surprising industry participants and observers alike — the pandemic has brought significant change to the industry by accelerating consumer demands for new ways of engaging in the automotive sales process. The pandemic forced companies and consumers to embrace online retailing which was once viewed as maybe "someday" and made that a reality today. While many manufacturers had already been in planning, pilot, or limited roll-out stages of online platforms and tools, consumer expectations and demand are forcing manufacturers and their dealer networks to transform their customer experience and distribution and selling strategies at an accelerated pace. This transformation will require careful attention to, among other things, the control, ownership and use of consumer data.

The pandemic has brought significant change to the industry by accelerating consumer demands for new ways of engaging in the automotive sales process.

Of course, the pandemic is not the sole driver of this transformation. EV-only manufacturers, such as Tesla, and used vehicle e-commerce sites, such as Vroom and Carvana, present unique competitive challenges to manufacturers with traditional dealership models. State dealer statues and new motor vehicle boards have resisted many of the statutory changes "traditional" manufacturers and dealer networks will need in the very near future to compete with the coming wave of EV-only market entrants largely unencumbered by state laws mandating distribution of new motor vehicles through established dealer networks. One emerging area of tension concerns "over the air" (OTA) updates. These updates by definition require no dealer interposition between the manufacturer and the consumer, but dealers have already proposed legislation in some states requiring dealers to be compensated for these "OTA" updates.

The EV revolution will also create ripple effects far beyond the issues of direct sales, dealership models, and evolving consumer behavior. EVs will require a significant infrastructure investment across the country. The Biden administration's commitment to tackling climate change may be the impetus for an increase in EV charging infrastructure, clean energy to fuel those charges, and a standard protocol for EV charging interfaces.

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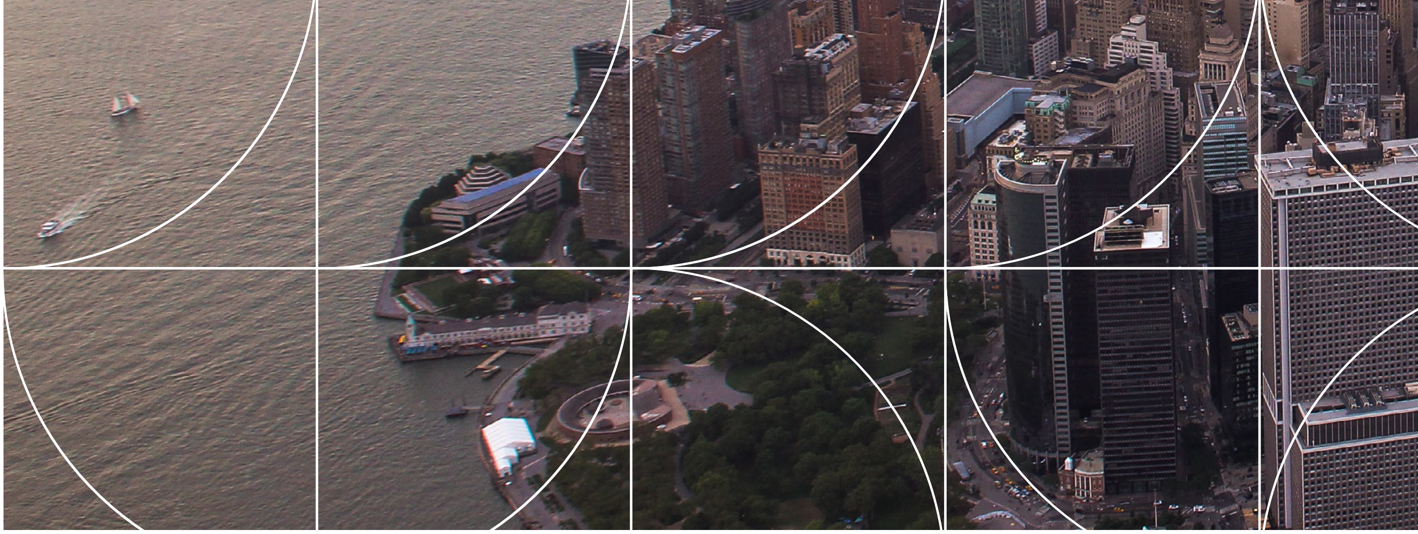


Key Trends in Commercial Litigation

Consumer Financial Services Litigation

— By David Bizar and Tonya Esposito

In the world of consumer financial services, there are myriad legislative, regulatory and enforcement, and executive actions likely to be prioritized by the Biden-Harris administration in 2021.

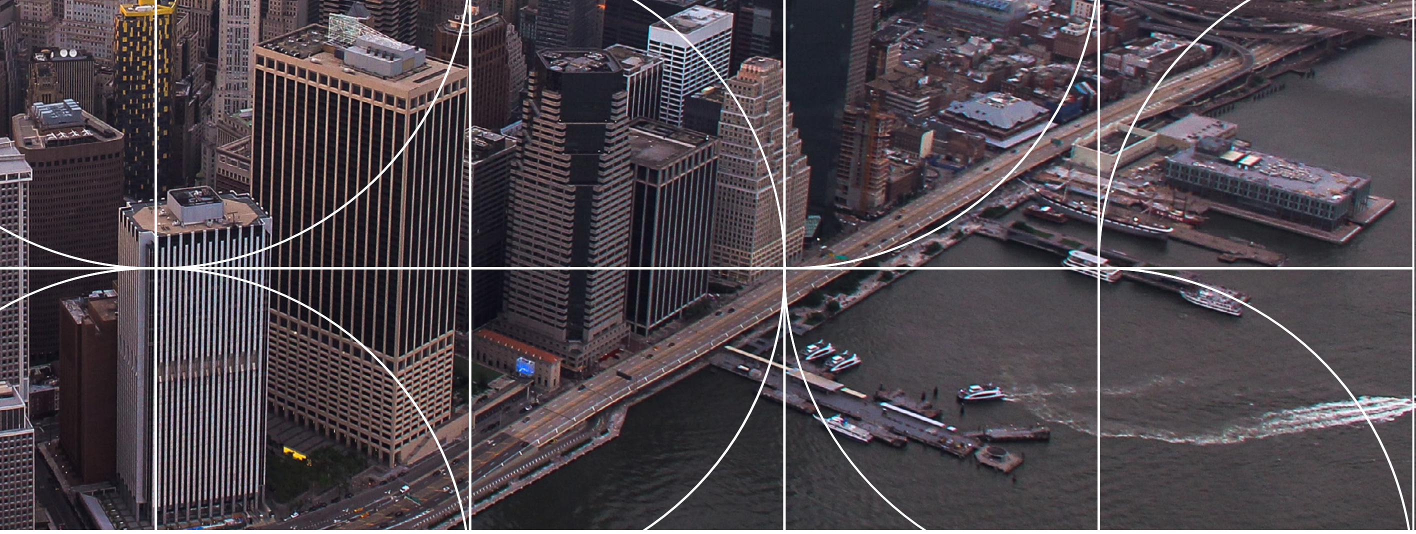
These include those that are directly related to the continuing impact of the pandemic and the relief afforded consumers under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) of 2020 and the American Rescue Plan of 2021. Specifically, this includes mortgage forbearance, foreclosure and eviction moratoria, credit reporting, debt collection, and bankruptcy issues. An uptick in regulatory and enforcement activity in the FinTech space is also likely given the number of consumers who pivoted to on-line and mobile banking during the pandemic.

With Democrats now in control of the House, Senate, and the White House, combined with COVID-19's effect of consumer lending, we expect there to be a heightened focus on consumer issues at every level. This includes CFPB regulatory and enforcement activity, as well as broad sweeping legislative reform/activity.

In a December 4, 2020 letter to then President-Elect Joe Biden, Chairwoman of the Committee on Financial Services Representative Maxine Waters set forth fourteen pages of actions the new Biden-Harris administration should take, including a full list of regulatory and administrative acts that should be prioritized. With that in mind, President Biden has appointed Rohit Chopra, a longtime consumer advocate, to head the Consumer Financial Protection Bureau (CFPB). Although Mr. Chopra, former assistant director of the CFPB during the Obama Administration and current FTC Commissioner, awaits Senate Confirmation, his track record and views on consumer issues are well known in Washington. Based on what we understand his priorities to be, we can expect Mr. Chopra to focus the Bureau's attention on aiding consumers who have been harmed financially during the COVID-19 pandemic, which means mortgage servicers, credit bureaus, debt collectors, and auto lenders are all likely targets of enforcement actions. Under Chopra's leadership, financial services companies should brace for increased CFPB enforcement and potentially greater penalties and fines.

We anticipate an uptick in CARES Act and American Rescue Plan-related consumer financial services litigation resulting from the interpretation and application of the consumer relief afforded by both statutes.

As vaccines become more readily available and the eviction and foreclosure moratoriums are lifted, we are likely to see a high volume of claims filed, both on behalf of consumers and lenders and/or servicers. Consumers are likely to initiate litigation challenging lenders' and servicers' interpretation and application of relief available under the CARES Act, including mortgage forbearance, debt collection, and credit reporting issues. Lenders and servicers are likely to once again initiate foreclosure and debt collection litigation across the country, which have been stayed across the country for over a year now.



Despite the passage of the American Rescue Plan of 2021 and accelerated vaccine rollout, many businesses will continue to struggle and will not be able to avoid bankruptcy in 2021.

As already mentioned, the Biden Administration is likely to move to strengthen consumer regulations generally. These efforts will likely include a focus on FinTech given its ability to partner with financial services companies to expand access to banking and investment products, both of which may ultimately shrink the racial wealth gap—a stated goal of the Biden Administration. FinTech applications are easily accessible and result in lower consumer fees. However, there's a current lack of clarity as to the applicable regulatory landscape and a real need for legislative action. We can expect the Biden Administration to work toward implementing a federal regulatory framework for the industry which would likely result in increased transparency for consumers and heightened compliance obligations for FinTech companies.

With consumers shifting to a variety of FinTech applications to pay for purchases, pay bills, loan money, or invest in the stock market during the pandemic, we anticipate there will be a heightened focus on the industry by regulators as well as a business need to better understand the evolving regulatory landscape and compliance obligation.

While certain industries have been able to creatively navigate the pandemic and avoid resorting to bankruptcy by obtaining stimulus funds and moving from brick and mortar to on-line or delivery/carry out platforms, many have not. Certain industries were hit much harder than others and will continue to bear the brunt in 2021. Retail, hospitality, entertainment, and energy sectors were hit the hardest in 2020, and have yet to recover in 2021. Employees in these industries contributed to the record unemployment numbers the nation experienced during the pandemic.

As CARES Act relief expires in 2021, and the moratoriums on foreclosures and evictions expire, we expect to see a dramatic increase in consumer filings, particularly in chapter 7 filings among the unemployed.

In 2020, the we saw a record number of retail establishments file for bankruptcy, besides thousands of store closings. Both the retail and energy sectors were struggling before Covid, and the pandemic accelerated their decline. While some of these bankruptcies were largely related to the industry's overall shift to e-commerce and a move away from brick and mortar establishments, and the complications resulting from the same, many were simply due to the lack of consumer spending. The ripple effects of closures are felt throughout the industry: lease defaults, layoffs, and lack of traffic and multi-use facilities.

While certain travel-related sectors like airlines managed to sustain because of the direct aid provided by the CARES Act, related sectors such as hotels and car rental companies have not. This trend will probably continue in 2021. We also expect to see continued distress in sectors mostly dependent on consumers' physical presence, including fitness centers, restaurants, and cinemas. Finally, and somewhat ironically, we expect to see continued distress in the health care industry. Due to continued rise in costs and a decrease in reimbursement rates, the health care industry was suffering before the pandemic. And the pandemic caused cancellation of elective procedures and displacement of "non-essential" health care workers.

Key Trends in Commercial Litigation

Cybersecurity

— *By Richard Lutkus and Scott Carlson*

Cybersecurity remains a rapidly growing problem and a significant organizational threat.

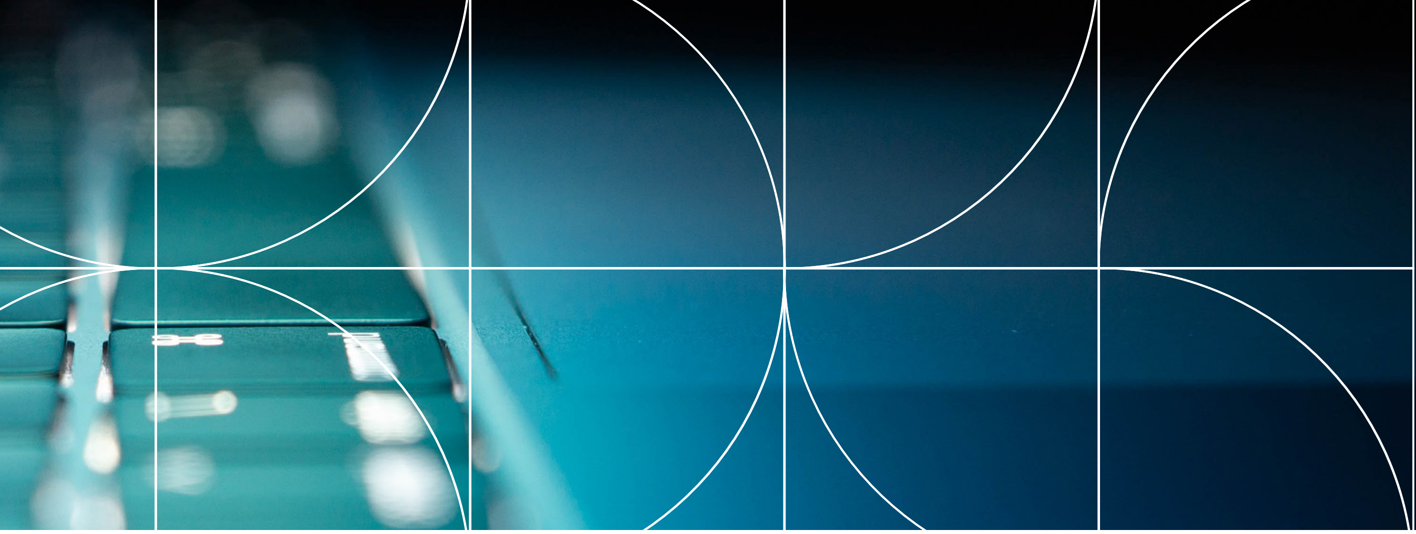
Over 68% of business leaders believe their cybersecurity risks are increasing, despite their own mitigation strategies. Organizations will continue to face a constantly evolving threat landscape and increasing threat actor sophistication. Catastrophic supply-chain breaches in 2020 have made organizations begin rethinking what devices, software, and hardware is trustworthy in their environments. While nation-state actors with significant resources appear to have carried out the recent major supply chain attack(s), even "script kiddie" threat actors are expanding their capabilities and improving their techniques. Several trends for 2021 are on the horizon.

Ransomware Is Evolving to Data Exfiltration and Extortion

Historically, ransomware focused on infiltrating organization endpoints and locking the organization out of their own data. While temporarily paralytic, organizations generally made it through those events by either paying the ransom, or recovering their data from disaster recovery or backup media. Tactics have changed for many ransomware threat actors, however, and now many seek to exfiltrate data in addition to deploying ransomware. They do this so that if an organization fails to pay the ransom amount, then they can fall back on the exfiltrated data to extort the organization. If the organization still fails to pay the new extortion ransom, the data is then leaked, usually on the Dark Web. In the first instance, effective incident management with experienced professionals is critical to managing your way through the incident. In the event of disclosure of data, there are also many issues that arise including potential disclosure of attorney-client communication, work product, trade secrets, and PHI/PII. Seyfarth's Carpe Datum Blog covers this specific situation in more detail.

Email Compromise Events Will Rise Along with Wire Fraud

Incidents involving threat actors gaining access to organizational email accounts will continue to rise in 2021. This increase can be attributed to password re-use, credential harvesting attacks, data leaks following a breach or extortion event, malware, phishing, smishing, etc. Motivation for these attacks typically involve obtaining information that can be used to facilitate other types of attack. Threat actors steal signature lines, email recipient metadata, prior dealing information, and payment information. This allows a threat actor to set up convincing-looking emails/invoices to perpetrate bank fraud. This comes in the form of requesting a fake invoice be paid or bank information changed. Unfortunately, this person-in-the-middle type attack often goes undetected by the legitimate employees involved. In 2021, organizations should focus on employee training to increase awareness, sophistication, and "cyber-suspicion" of their employees. Organizations will benefit from taking a closer look at their email system logging to ensure that requisite logs are available to conduct investigations following a business email compromise.



Without logs, organizations may face greater costs by virtue of not knowing what data a threat actor took and may be misusing, leaking, or selling on the Dark Web.

Importance of Training Is Increasing

Technologic solutions alone cannot prevent cybersecurity threats and employees will routinely be fooled by clever attacks. However, employee training will remain critical. Many of the most successful hacks to date have started with social engineering. Whether phishing, smishing, link-clicking, or myriad other methods, employees who are well trained will help their organizations avoid costly cybersecurity events. While technology advancements in early detection and containment will continue in 2021, the human elements in an organization cannot be abandoned. Reputable cybersecurity training providers will likely see an uptick in business as organizations move to defend their perimeters.

Cybersecurity Insurance Coverage

Due to the rise in claims, cyber insurance coverage is undergoing a transformation in covered events, limits on liability for certain classifications of events, and rising prices to match the increasing threat level and amount of claims being paid out. It's critical in 2021 that businesses re-evaluate their coverage and make sure adequate protections are in place in the event of a cybersecurity event. Organizations will see more value in working with brokers who understand the threat landscape and organizational needs. This year may not be the year for alignment on cybersecurity policies within the insurance industry. Organizations will still have different coverage options, limits, included services, terms, self-insurance amounts, and rates depending on who their broker is and whether the underwriters of the policy truly understand the organization and its risk. We anticipate underwriters will ask harder questions of organizations in the renewal process. They may ask for proof of cybersecurity risk assessments, penetration tests, NIST (or other framework) compliance, etc. Organizations who rely solely on cyber insurance coverage as their threat mitigation strategy may see their coverages shrink and rates increase.

Business Annoyance/Nuisance Threats

Aside from direct threats, organizations will find themselves fending off more annoying and nuisance type threats. These can take the form of unemployment insurance scams, 401k fraud / withdrawal scams, mass fake LinkedIn profile scams, doppelganger website scams, etc. While many of these get detected, they still drain resources from an organization and will continue to do so in 2021. Seyfarth's Carpe Datum Blog dives deeper into the COVID-19 unemployment scams organizations currently face.

Key Trends in Commercial Litigation

Data Protection

— By John Tomaszewski

With the forced distribution of workers as a result of the COVID-19 pandemic, as well as the natural evolution of the "information age", data and data protection have acquired a significant amount of attention across all levels of society.

Businesses, regulators, consumers, employees, investors, and even lawyers are all looking at data protection as a critical path to success. To this end, there are a number of issues which will likely come to the forefront in 2021 and beyond

State Privacy Laws

While California was the first state to pass a (reasonably) comprehensive privacy law (as opposed to a cybersecurity law) it was not the only state to try. Since 2018, multiple states have tried and failed to pass California Consumer Privacy Act (CCPA)-style statutes. However, we are now seeing not just momentum, but actual progress in these state initiatives. Virginia passed its version of the CCPA (the Consumer Data Protection Act, or CDPA) on March 2, 2021. Washington State looks to be poised to pass their version of the CCPA. Additionally, Florida and New York have strong momentum in their legislatures to pass CCPA-style laws.

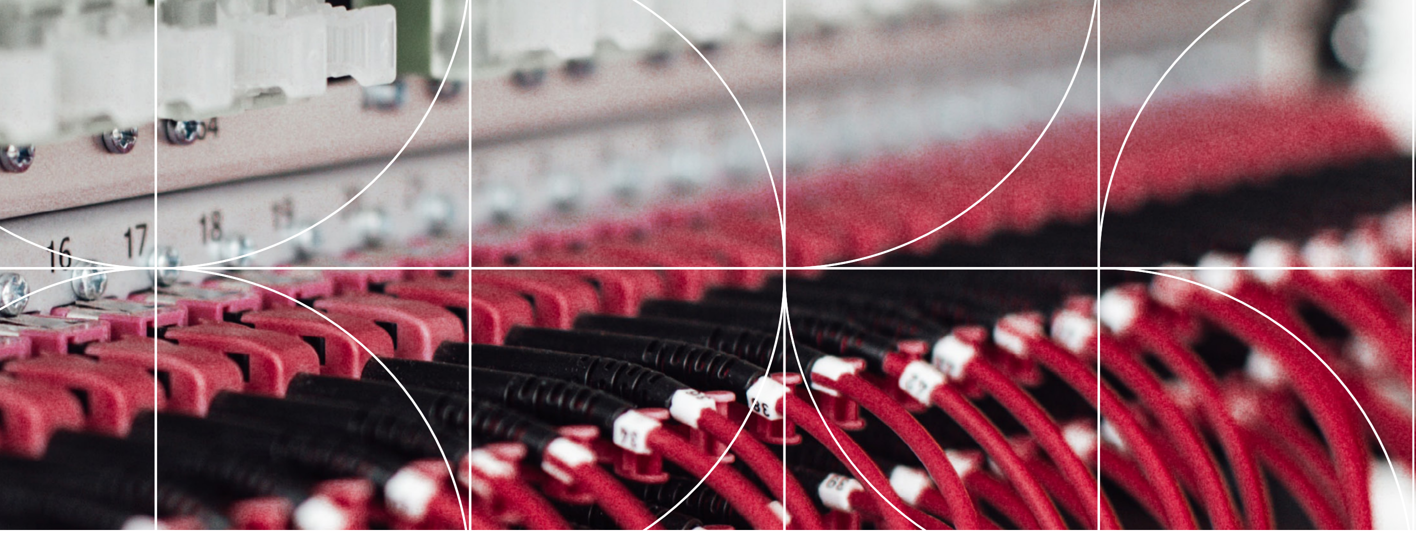
The big factors in these state initiatives are: 1) **who gets to enforce the law**, 2) **scope of application**, and 3) **preemption by other laws**. So far, we haven't seen a law permitting a private right of action pass out of a state house. However, proposals permitting such private rights of action have been included in the drafting process for all of the state bills. Should a private right of action appear, we can expect significant litigation under these statutes as the practices that these laws regulate are central to most of how commerce happens.

The scope of who the law applies to, and what constitutes personal data are also evolving. The CCPA originally applied to everyone, and any data about everyone. The trend we are seeing now is the narrowing of the scope of individuals the law applies to (generally just "consumers") but the expansion of the scope of data covered. Biometric data, event data recorder data (vehicle "black box" data), wellness data (non-health care data), "wearable" data, and even "Internet of Things" device data is now all subject to the requirements and restrictions of the expanding universe of state privacy laws.

One of the challenges with these new laws is that they are designed to limit the scope and uses of data. However, there are a number of existing state and federal laws which implicate the data handing practices addressed in the privacy laws. While each of the state privacy laws attempt to carve-out exemptions for existing regulations, these exemptions (e.g. HIPAA, Gramm-Leach-Bliley, Fair Credit Reporting Act (FCRA), etc.) are not always consistently drafted. The exemptions can even be drafted in different ways in the same act. For example, the CCPA exempts "any activity" governed by the FCRA, but only exempts "entities" governed by HIPAA. This type of drafting at a minimum creates confusion as to the scope of the exemptions. It is quite possible that such confusion will also create litigation when the enforcement actions start to pick up steam.

Privacy Is Everywhere

As the world becomes a smaller and smaller place, with the ever increasing expansion of interconnectivity across geopolitical boundaries, data protection becomes a much more significant issue. Whether it is workforce management, M&A activity, or entering into new markets,

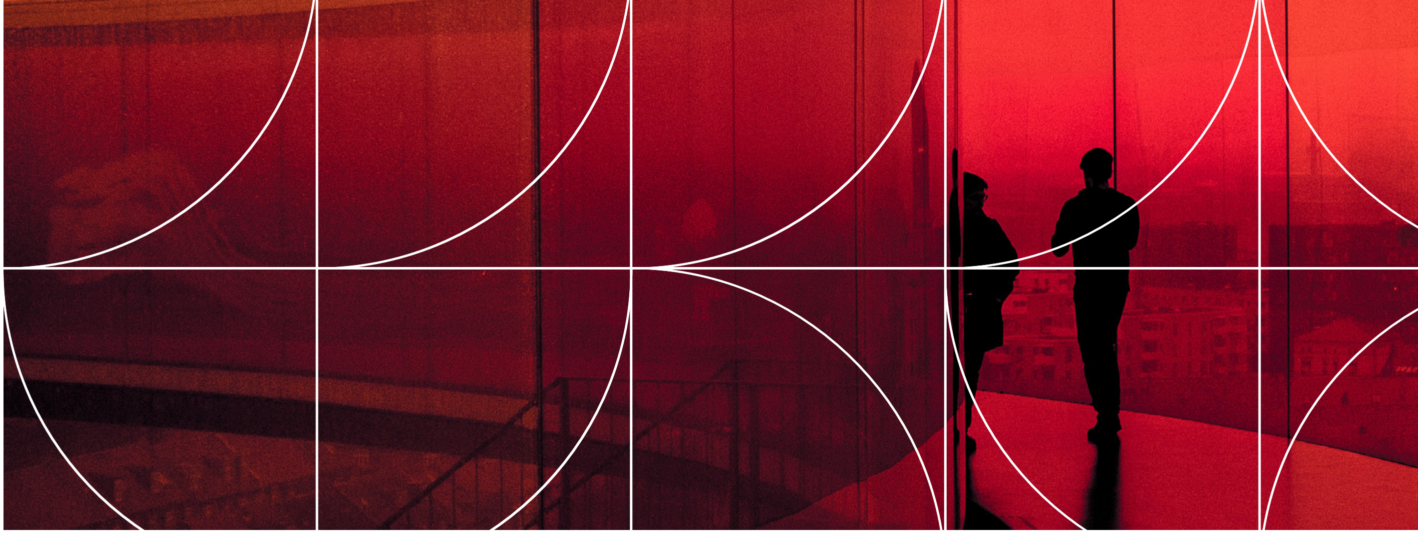


all “first” and “second world” countries have data protection laws. Many of these are modeled off of the EU’s General Data Protection Regulation. As such, while the US is currently struggling to birth its own approach to data protection, almost all of our international trading partners have strong data protection laws. This is not limited just to the European continent. It includes places like Mexico, Argentina, Colombia, Israel, Japan, and Egypt. As a result, businesses which deal in data (and that is all of them – see third point below) are now having to take data protection regulation into consideration across all of their operations. Otherwise, they run the risk of significant fines and costly litigation. Even in those jurisdictions where litigation isn’t as common as in the US, the functional regulators are seeing data protection fines as a means to self-fund their offices. There is a very real financial incentive for enforcement actions under the various data protection laws.

Data Is a Capital Asset

With the increasing number of privacy laws which are being proposed and passed at the state level, as well as the implication of international data protection laws in many modern businesses, there is a tension between the ability of a business to leverage and monetize data as an asset. This is becoming more important as well, as most businesses recognize that the traditional way of operating is limited in terms of growth. All businesses are becoming “data businesses”. Retail is looking at how on-line marketing, retargeting, and related data-heavy practices can improve their profitability. In fact, with the pandemic, retailers are facing a reality where on-line property is more valuable than brick-and-mortar properties. Retail isn’t the only market to start to understand how “virtualization” is the wave of the future. Health care (telehealth), auto dealerships (Vroom and Carvana), banking, manufacturing, and utilities are all industries which are looking to improve their profitability via the use of data. As is the case with any valuable capital asset, disputes arise, regulation is developed, and “reasonable protections” are necessary to ensure that the appropriate parties have their rights protected.

Unlike traditional capital assets, data as a capital asset will always have at least one additional stakeholder in the equation–the individual data subject. As a consequence, businesses need to develop not just an understanding of how to monetize data, but also how to benefit the data subjects who make up a critical part of the ecosystem. This includes implementing “reasonable” information security–an obligation which is being included in all the various privacy laws at the state and federal level. Additionally, we expect to see management and owners of businesses start to view information security the same way they do financial reporting and other asset management and control systems. This will likely lead to increased scrutiny by lawyers for the various stakeholders to ensure that the asset isn’t being abused. As part of this scrutiny, we predict that new and novel legal theories will start to show up in litigation, contract negotiation, and even insurance policies which address the needs for businesses (and their vendors) to consider information security and privacy in the same manner that quality is addressed. Theories like breach of fiduciary duties, waste, negligence, fraud, unfair or deceptive trade practices, may be used to impose liability on data supply-chain participants who don’t take proper precautions in ensuring a proper legal basis for processing, or in securing data. All of the existing legal risks associated with asset management will start to get applied to data protection. It won’t be just about “privacy” any more. It will be about “responsible information management” or “data governance”.



Key Trends in Commercial Litigation

eDiscovery

— *By Jay Carle*

The practice of eDiscovery is changing dramatically and is on the precipice of rediscovering what discovery is all about.

That is, modern eDiscovery is focused on finding and establishing the facts that support legal arguments and tactical strategy, and *not* solely producing documents as *efficiently as possible*. Guided by skilled eDiscovery lawyers utilizing advanced technology and processes, the task of transforming thousands if not millions of pieces of information from multiple sources into a story that counsel can tell at all stages of a matter is becoming possible without exceeding the proportional spending limits of the case. Embracing the integration of skilled eDiscovery attorneys into case teams, embracing innovations in artificial intelligence ("AI"), and weaving eDiscovery into the strategy is the next frontier in eDiscovery and delivers tremendous value to clients.

Moving Beyond Just Producing Documents "Efficiently"

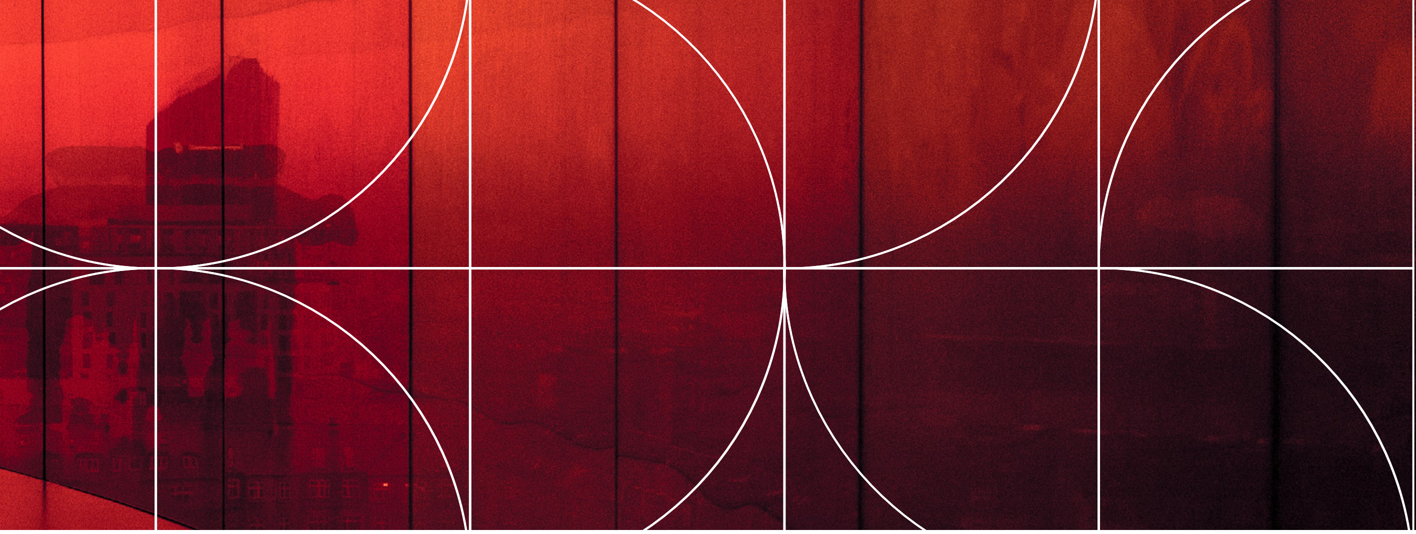
For the past 5 years, the focus of eDiscovery has been on the process of efficient and cost-effective discovery, i.e., the identification, preservation, collection, review and production of electronically stored information (ESI) in response to a request for production in a lawsuit or investigation. For years, corporations and eDiscovery vendors and consultants alike have focused on this process, and for good reason, too. eDiscovery can be costly, and it carries considerable risks, both in terms of costs to execute and concerns that a single misstep along the way could derail the strength of a case on the merits. The side effect of this focus on process and eDiscovery risks is that identification and production of documents was frequently divorced from the fact-finding process and solely about responding to discovery requests as efficiently as possible without stepping on landmines.

The Volume and Variety of ESI Is Growing Exponentially

eDiscovery risks are increasing and becoming more complex. The volume and variety of ESI in use by corporations and individuals is expanding exponentially. Cloud-based collaboration platforms with integrated chat, file sharing, and virtual work rooms are increasingly used more than email. Text messaging in all its various forms is discoverable, and given the immediacy and flexibility of the platform, it is becoming more widespread as a preferred form of communication within businesses. Further, the "connectedness" of things, or the internet of things ("IoT"), which leave traces of discoverable information such as time stamps, location data, or even video or audio recordings, completely surround us.

Advanced Technology Changes the Discovery Dynamic

In response to this trend, some organizations have developed sophisticated in-house capabilities to address preservation and collection of ESI, and have partnerships with vendors that offer the latest in eDiscovery fact-finding technology. But it is ultimately the responsibility of outside counsel to make effective use of process and technology to distill and develop a factual narrative from potentially millions of ESI records, and to do so defensibly and early in the matter. Harnessing the facts from the ESI is ultimately the purpose of the discovery process.



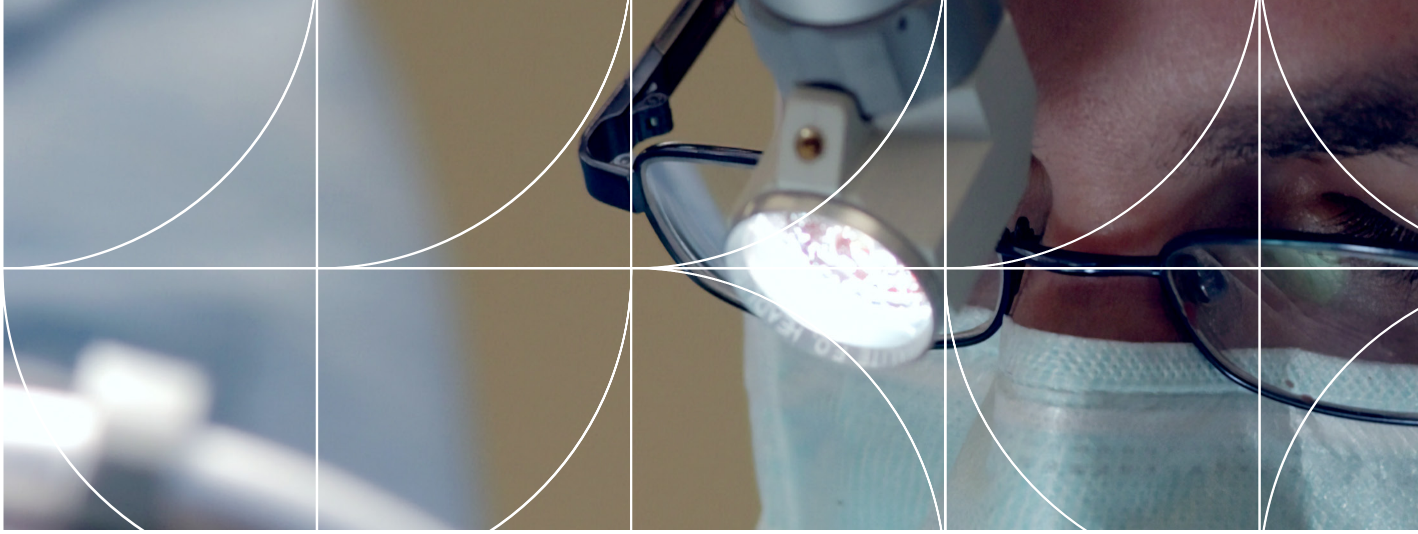
The combination of advancements in eDiscovery technology and process are once again making this possible. For example, one of the most powerful, Continuous Active Learning (CAL), which is a relatively new technology in itself, is evolving to offer Portable Predictive Models. At its core, CAL is a form of predictive coding that learns from attorney document coding decisions and re-ranks and reorders the documents in a document review at regular intervals to push relevant information toward the top of the queue. The effect is that relevant information within large document populations is pushed to the top and identified faster. CAL technology can be employed to not only prioritize the review of documents, but also to cut a document review short of reviewing all documents where the vast majority of the relevant documents have been identified by the CAL engine. The ability to forgo reviewing certain documents using CAL is supported by quality control testing and proportionality principles.

The concept of Portable Predictive Models takes this concept a step further by allowing the predictive model built in one matter to be applied to another matter from the start. In essence, the attorney coding decisions within a document review can be preserved and applied to new matters with similar legal issues and data sets to immediately jumpstart the identification of key information. The predictive models themselves can be continuously refined and honed over time and developed to identify key relevant information for a multitude of different types of legal matters, or even for identifying privileged or confidential information, for example.

The potential value in harnessing these technologies to make true fact-finding within the eDiscovery process is tremendous. Portable Predictive Models powered by the combined work product of attorneys over multiple matters offer clients a tremendous advantage in speed to evidence. However, the legal landscape surrounding the use of these technologies is very much in flux, particularly as it relates to the information, parameters, and disclosures required to support stopping a review short of reviewing all documents. Further, the ability to manage eDiscovery risk through effective preservation of ESI but within a reasonable and proportional scope considering the growing volume and varieties for ESI remains a critical component in the ability to realize this value.

The Role of the eDiscovery Attorney Is Becoming More Important

As a result, the role of the eDiscovery attorney, a rare breed of attorney who is not only a skilled technologist and project manager but who is also a skilled litigator, is evolving and becoming increasingly important. Attorneys with this skillset will become even more essential to address ESI preservation and collection scoping decisions, develop legal proportionality strategy and the supporting facts, and to effectively leverage the latest in technology-assisted review and AI technology to its fullest potential. Law firms and organizations that embrace these skills and technology innovations will unlock and harness the creativity, insight, and experience of litigators to shape fact development from the very beginning of a legal matter.



Key Trends in Commercial Litigation

Health Care Litigation

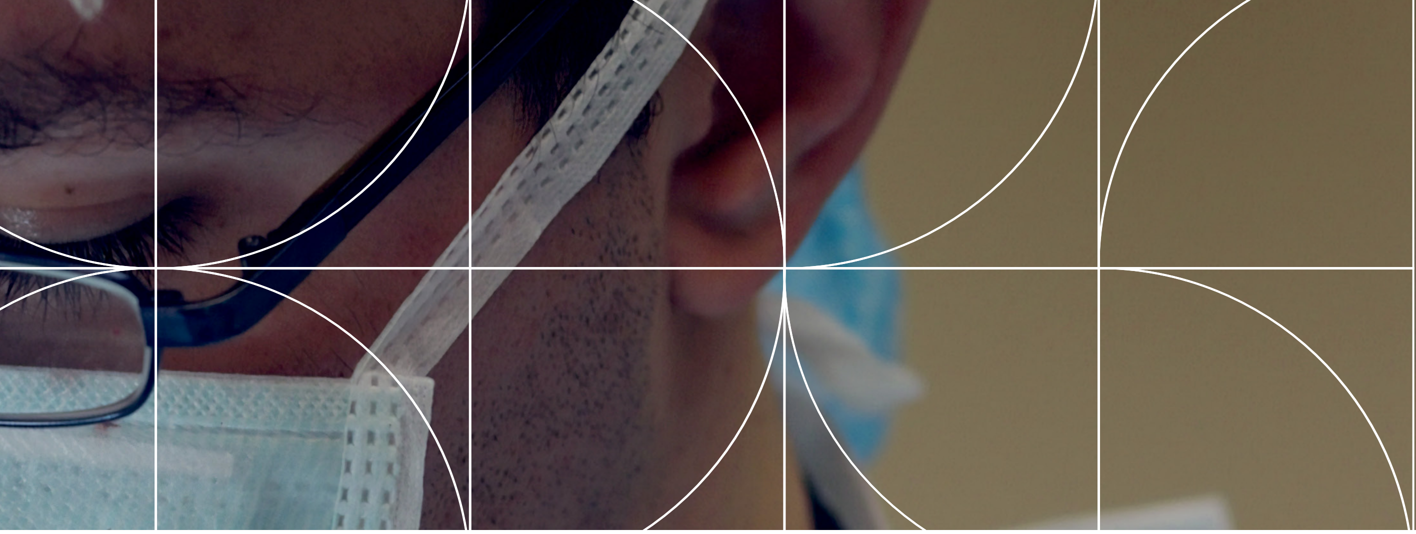
— *By Jesse Coleman*

With the trillions of dollars pumped in to prop up the economy in 2020, and with a substantial portion of that money focused on health care, we can expect a surge of health care litigation in 2021 addressing false claims and other fraud.

The US Department of Justice reported recovering only $2.2 billion from both settlements and judgments in False Claims Act (FCA) investigations and litigation in 2020. This was the lowest level since 2008 and almost $1 billion less than what was recovered in 2019. Of that, the vast majority of recoveries came from the health care and life sciences industries, meaning that health care remains the prime target for FCA investigations and litigation. Indeed, the government and individual qui tam plaintiffs collectively filed more FCA cases in 2020 than in any past year. At least with regards to qui tam plaintiffs, the vast majority of filings were related to health care. Given the 2020 filings, the ongoing pandemic, and the government's plan to pump even more funds into the economy, we can anticipate that 2021 will likely include an even greater number of FCA filings by the government and qui tam relators. For companies in the health care industry who obtain reimbursement from the government in any form or fashion, these numbers are an indication that they can expect more government scrutiny and possible whistleblower claims.

In addition to deliberately fraudulent actors, some of the FCA lawsuits and investigations in 2021 may stem from uncertainty on how to interpret changes in the rules. The US Department of Health and Human Services (HHS), through the Centers for Medicare and Medicaid Services and its Office of Inspector General, released new rules in 2020 governing how to interpret the Stark and Anti Kickback statutes governing health care provider compensation arrangements. While these rule changes are designed to provide greater clarity around fair market value, expand the number of legitimate compensation arrangements, and allow for more safe harbors, ambiguities and uncertainty in their interpretation are likely to lead to more litigation until the courts have weighed in on their meaning.

Meanwhile, as the COVID-19 vaccine and other countermeasures (such as COVID tests and personal protective equipment) continue to spread and become a part of our everyday lives, tort, breach of contract, and other personal injury lawsuits will invariably arise from their distribution and administration, particularly when those countermeasures are employed by private companies seeking to push forward with business as usual. Over a dozen states (e.g., Connecticut, Kentucky, North Carolina, Washington, and Wisconsin) have enacted corporate immunity regimes to protect private business in the administration and use of covered countermeasures. In addition, the federal government has enacted the Public Readiness and Preparedness (PREP) Act, which provide broad immunity and preemption powers to covered persons who administer and distribute covered countermeasures pursuant to state or federal guidance. Private parties and HHS are debating the contours of this federal immunity in



lawsuits across the country. 2021 will likely see decisions on whether the Act applies to cases of failure to properly administer countermeasures, whether state-law claims are preempted, and whether a PREP Act defense gives rise to federal jurisdiction.

The COVID-19 vaccine and other countermeasures spread across the country, lawsuits will invariably arise from their distribution and administration, particularly when those countermeasures are employed by private companies seeking to push forward with business as usual.

Another hot area for false claims litigation and investigations has been pharmaceutical companies. The DOJ recovered hundreds of millions in 2020 against companies for paying physician speakers to induce prescribers to write prescriptions and for illegally paying patient copays for their own drugs through purportedly independent foundations that the companies treated as conduits for these payments. The DOJ announced just after the close of fiscal year 2020 that it had reached a $2.8 billion settlement with a pharmaceutical company for alleged FCA violations arising from its purported unlawful promotion of its opioid drugs related kickback schemes to induce prescriptions of its opioids. We can expect these types of recoveries to continue, as the DOJ recently emphasized that the ongoing opioid crisis is one of the department's key priorities.

Perhaps the highest profile matter in health care law to be decided in 2021 will be the Supreme Court's decision that either once again saves or finally strikes down the Affordable Care Act (ACA), a statutory regime that impacts nearly every facet of American life. A federal district judge in Texas found the ACA unconstitutional after Congress repealed the individual mandate which required all Americans to carry insurance. The justices heard oral arguments in November, and evinced very little enthusiasm for these latest efforts to strike down the law. Still, the possibility of the justices finding the law unconstitutional has left uncertainty in the industry, which will be magnified greatly if the law is declared unconstitutional and likely setting off a wave of related litigation. 2021 is shaping up to be a busy year for health care litigation.

Key Trends in Commercial Litigation

Insurance

— *By Thomas Locke*

In 2021, extensive litigation will continue across the country regarding whether insurance coverage exists for losses that businesses have experienced as a result of pandemic-related closures.

Approximately 1,500 coverage lawsuits are pending, with more being filed each day. Thus far, the vast majority of courts—particularly federal trial courts—have dismissed pandemic-related business interruption coverage lawsuits. The results are more mixed in state courts, where a number of judges have denied insurers' motions to dismiss. However, the battle is far from over. In federal courts, over 50 appeals of dismissals are being pursued. And, in those state courts that have denied insurers' motions to dismiss, policyholders still have a long way to go before establishing coverage for their losses caused by pandemic-related closures.

The coverage disputes typically arise in the context of whether: (1) the pandemic caused "physical loss" or "physical damage" to the policyholder's property; (2) under the civil authority coverage part, access to the policyholder's property was prohibited due to a physical loss or damage at adjacent properties; (3) the virus prevents ingress or egress to property even absent a government closure order; and (4) a virus exclusion that may be included in a policy applies. Insurers have asserted that pandemic-related closures do not involve physical loss or damage to property. They argue that the policies were intended to cover business interruption losses when, for example, a business temporarily closes as a result of a fire or tornado. Some policyholders have countered that the virus caused damage to the surfaces on which it landed and the surrounding air, which constitutes direct physical loss or damage. Those policyholders further argue that, as the words "physical loss" and "physical damage" often are not defined in the policies, terms may be ambiguous and courts should error on the side of the policyholders, finding coverage. Policies that are subject to virus exclusions pose particularly challenging issues for policyholders because those exclusions often preclude coverage for loss or damage caused, directly or indirectly, by any virus that may cause bodily injury.

Policyholders should read carefully their policy terms and consider the applicable state laws. Many of the property policies that include business interruption coverage parts require that coverage litigation be pursued within a relatively short period after a loss has been incurred. In some instances, that period may be as short as one year. And, in some states, that period starts when the loss begins. Accordingly. That one-year period for pursing coverage litigation may soon be coming to a close. However, in many states, the period for pursuing pandemic-related coverage losses has been extended. In sum, it is important to analyze the policy terms and applicable state law to avoid an unintentional loss of coverage.

Navigating Biometric Privacy Laws and Special Concerns in the Wake of COVID-19

— By Paul Yovanic

Biometric privacy continues to be a hot-button topic in the United States, with more states contemplating the adoption of biometric data protection laws. In an effort to avoid costly litigation as the country continues to reopen following the COVID-19 pandemic, businesses should be mindful of the potential risks when implementing biometric policies and procedures.

What Is Biometric Data and How Is It Used?

Generally, biometric data consists of physical characteristics that can be used to digitally identify a person. Physiological biometrics pertain to the body and include DNA, retinal scans, fingerprints or other characteristics such as the shape of a person's hand or face or the sound of their voice. Due in large part to its increased practicality and affordability, businesses have gradually begun to utilize biometric technology for various beneficial purposes, such as implementing biometric time clocks to prevent "buddy punching," facilitate consumer transactions, and for restricting access to secure areas.

Current Biometric Privacy Laws

Standalone biometric privacy laws have currently been adopted in three states: Illinois, Texas and Washington. Among those three states, only Illinois' Biometric and Information Privacy Act (BIPA, 740 ILCS 14/) provides for a private right of action, which has made it very attractive to the plaintiffs' bar. Despite its enactment in 2008, the Illinois BIPA only came to the forefront in 2015, and has turned into a plaintiffs' buffet in recent years. In fact, between 2015 and 2020 alone, there were over 1,000 class action complaints filed across the United States alleging violation of the Illinois statute. As discussed below, other states are now introducing legislation nearly identical to the Illinois BIPA, so it is important to understand and address key aspects of the Act to ensure compliance.

The Illinois BIPA was enacted as a reaction to the increased use of biometric technology due to the sensitive nature of biometric identifiers and associated data. The Act regulates the collection, capture, and storage of "biometric identifiers," such as fingerprints, voiceprints, retina/iris scans, and scans of hand or face geometry. The Illinois BIPA provides a private right of action and allows plaintiffs to recover liquidated damages and attorneys' fees. Specifically, the Act provides that "[a]ny person aggrieved by a violation" can recover "liquidated damages of $1,000 or actual damages, whichever is greater" for negligent violations, and "liquidated damages of $5,000 or actual damages, whichever is greater" for intentional or reckless violations.

Courts interpreting the statute have concluded that claimants need not sustain actual damages in order to qualify as a "person aggrieved" under the Act. In Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, the Illinois Supreme Court held that a person does not need to allege any actual injury or adverse effect, beyond technical violations of the statute in order to state a claim. Further pursuit of these lawsuits became more attractive following the Rosenbach decision, partly due to its holding that a "violation [of the BIPA], in itself, is sufficient to support the individual's or customer's statutory cause of action." Id. at ¶ 33.

Despite this expansive interpretation of biometric privacy laws, the Illinois statute provides guidance on how businesses can mitigate their exposure by adopting policies which: (1) first and foremost, informs individuals in writing that his or her biometric data is being captured; (2) outlines the purpose and period of time for which the data will be utilized; and (3) receives a written release from individuals consenting to the collection. The Illinois statute also includes regulations requiring a compliant, publically-available written policy, prohibits disclosure of biometric data to third-parties absent consent, and mandates a "standard of care" that businesses must adhere to in protecting biometric data.

Special Concerns During COVID-19

As businesses adjust to the new "norms" following COVID-19, they will likely explore policies and procedures that aim to minimize consumer interaction and protect its invitees and customers from potential exposure to the virus. One solution is the implementation of contactless infrared facial scanning to verify an employee or invitee's temperature. The use of contactless infrared facial scanning raises potential issues under biometric privacy laws if it collects and captures a person's facial geometry without consent. Thus, even as businesses adopt technologies with the best of intentions to protect the health and safety of those who work within or visit their facilities, it will be important to understand the scope of biometric privacy laws in the states where these policies are implemented and ensure that proper steps are taken in terms of continuing compliance.

What's Next?

On January 6, 2021, the New York state legislature introduced a standalone biometric information privacy bill, AB 27, which is a carbon copy of the Illinois BIPA. If passed, it would become only the second biometric privacy act in the United States to provide a private right of action and plaintiffs' attorneys' fees for successful litigants.

Hot on New York's heels, and just a week after the introduction of AB 27, Maryland introduced its own standalone biometric privacy bill on January 13, 2021 (House Bill 218) called the "Commercial Law – Consumer Protection – Biometric Identifiers and Biometric Information Privacy." While substantially similar to both Illinois' BIPA and New York's proposed legislation, Maryland's bill in its current form differs in a couple of respects. For example, the definition of "biometric identifiers" is arguably even broader, extending to "data of an individual generated by automatic measurements of that individual's biological characteristics such as fingerprint, voiceprint, genetic print, retina or iris image, or any other unique biological characteristic that can be used to uniquely authenticate the individual's identity." Moreover, the proposed legislation also clarifies that the broader definition of "biometric information," which includes "any information regardless of how it is captured, converted, stored, or shared based on an individual's biometric identifier used to identify an individual," does not include "information derived from an item or a procedure excluded under the definition of a biometric identifier," such as photographs or information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under HIPAA. The proposed Maryland legislation also clarifies that a policy regarding retention/destruction of biometrics need not be made "publicly available" if the policy "applies only to the employees of the private entity," and "is used solely for internal company operations."

Best Practices for Compliance

In short, as businesses contemplate the use of biometric technology to navigate their way through COVID, and beyond, it is important that they understand and comply with biometric privacy laws in each state where they are operating. This should extend to the adoption of practices and policies relating to the collection, storage, and retention of biometric information, as well as avoiding or disabling technologies that unnecessarily collect such data to ensure continuing compliance with governing state statutes.

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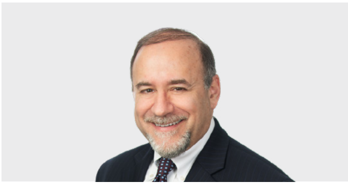

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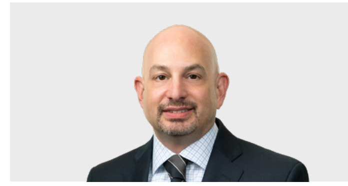

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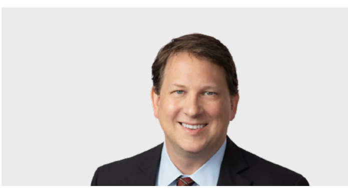

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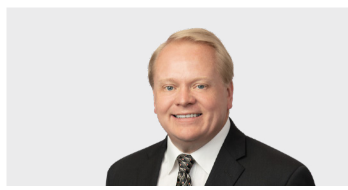

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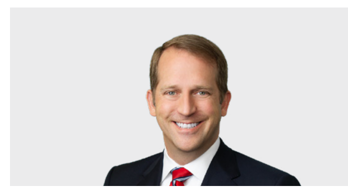

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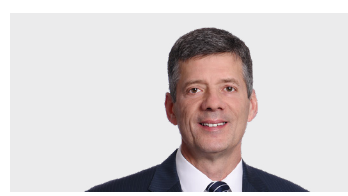

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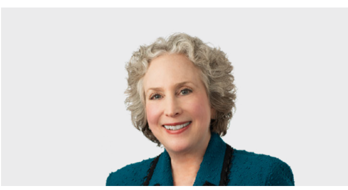

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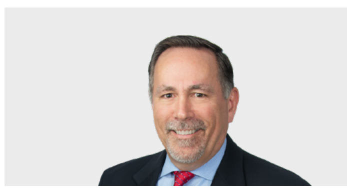

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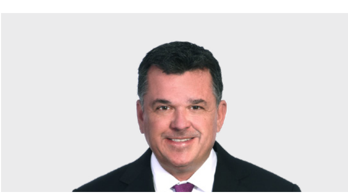

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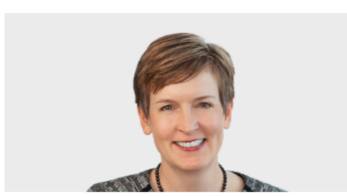

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