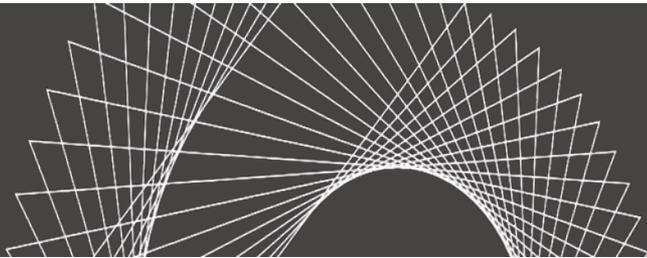


ACC NCR FALL CONFERENCE
In-House Primer

**Complex Commercial Litigation in
2022: Recent Developments and
Lessons Learned**

ACC NCR In-House Primer Conference

Complex Commercial Litigation in 2022: Recent Developments and Lessons Learned



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Agenda

- Recent trends and developments in complex commercial litigation:
 - Cases stemming from COVID-19 pandemic
 - Patterns in government enforcement actions and how they impact commercial litigation
 - Discovery developments
 - Ethics.

Pandemic Related Litigation: Challenges to Adverse Government Decisions

- Shuttered Venue Operators Grant program (DDC)
 - Program benefits performing arts venues and other businesses.
 - Cases are paradigms of Administrative Procedure Act litigation.
 - Challenge agency missteps, including dissimilar treatment of competitors.
 - High success rate.
- Force Majeure
 - Force Majeure defined (e.g., epidemic vs pandemic, act of god, act of government).
 - Risk unforeseeable?
 - Performance impossible?
 - *Cf. JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 29 F.4th 118 (2d Cir. 2022) (art auctioneer excused from holding live auction due to Covid-19 as force majeure) *with Rudolph v. United Airlines Holdings, Inc.* 519 F. Supp. 3d 438 (N.D. Ill. 2021) (no force majeure where airline not prohibited by Covid from flying but chose not to do so for economic reasons); *Oak Street LLC, v. RDR Enterprises, Inc.*, 275 A.3d 316 (ME 2022) (no force majeure where restaurant could operate at reduced capacity during Covid-19 restrictions).
 - Notice.
 - If no force majeure, common law claim of impossibility or frustration of purpose.

Government Investigations/Enforcement Actions

- Trends:
 - Increased attention in False Claims Act prosecutions (including COVID-related).
 - DOJ enhances corporate crime accountability initiatives. See Deputy Attorney General remarks
 - Increased requirements for corporate monitors in corporate compliance related prosecutions.
 - Enhanced requirements to share information to obtain cooperation credit.
 - Increased scrutiny by Administration of antitrust in government contractor space (See, e.g., Executive Order on Promoting Competition in the American Economy):
 - M&A
 - Scrutiny of teaming agreements; and
 - Reexamining relationships between primes and subs.
- Considerations:
 - Prioritize low-level engagement with law enforcement.
 - Prevent the pile-on effect between regulators and government.
 - Be cognizant of increased appetite for litigation among Plaintiff's bar during government investigations.
 - Coordinate between commercial litigation, government enforcement actions, and other legal matters.

Involving Appellate Attorneys Early

- Complex litigation matters
 - At motions to dismiss stage, frame issues for appellate court; and
 - Creative application of obscure doctrines.
- Expertise in areas that frequently go on appeal
 - Administrative law matters;
 - Federal Arbitration Act Cases; and
 - Removal to federal court.



Trends We are Seeing in Discovery

Social media searches that can make or break case

Initial investigation: identify the good and the bad, for both client and adversaries

- Craft discovery requests to identify relevant social media content
- Pay close attention to ethics rules
 - Don't conceal identity to "friend" or "connect"
 - Check client's social media account before court filings to ensure no inconsistencies
- Preserve social media, including "ephemeral messaging" applications, e.g., Telegram, Slack, Snapchat
 - Include social media in litigation hold
 - Save within application, e.g., as "Memory", using a social media collection application, e.g., Oxygen, or through vendor, especially for larger scale
 - *Doe v. Purdue U.*, 2021 WL 2767405 (N.D. Ind. July 2, 2021) (plaintiff sanctioned for failing to preserve relevant SnapChat data and deleting data from "Memories" folder)



Trends We are Seeing in Discovery

Considerations for companies in manage social media

- Bring Your Own Device policy
 - Can require employer to search employees' devices for texts, WhatsApp, personal email, other communications used for business
 - *United States v. Cameron-Ehlen Grp., Inc.*, No. 13-CV-3003, 2020 WL 9209366, at *12 (D. Minn. July 10, 2020) (employer found to “control” employees’ BYOD devices and sanctioned for failure to preserve work-related texts on devices)
- Social media’s evidentiary trail
 - *Gulliver Schools, Inc. v. Snay*, 137 So.3d 1045 (2014) (daughter’s posting on social media about father’s settlement of lawsuit breached settlement agreement confidentiality clause).

When social medial puts you on notice of potential liability

- Monitor feedback obtained through social media
- Evaluate statements for potential claims or regulatory action against the company

Virtual Depositions

- Logistics
 - Protocols for sharing exhibits.
- Managing remote communications
 - Ensure that communications are not picked up by software.
 - Do not engage in electronic communications during the deposition .
- Additional instructions for clients in the remote environment
 - Ensure quiet setting free of distractions.
 - Dress comfortably but professionally.
 - Witness close enough to the camera to detect facial expressions.
 - Know who is in the room.
 - Confirm no documents in front of the witness.



Increase in Section 1782 Matters

Recent SCOTUS decision curtailing the use of these subpoenas in foreign arbitration proceedings

- Litigants have started to use Section 1782 subpoenas as blank checks for discovery.
- International companies receiving these in higher numbers.

Guardrails

- Discovery must be “for use” in a foreign proceeding.
- Goal of Section 1782 is to obtain discovery not available in foreign jurisdiction—not to require parties in the foreign litigation to produce the documents in the United States.
- Discovery requests still bound by Rules 26 and 45 of the Federal Rules of Civil Procedure.

Ethical Issues

- Social media
 - Understand how social media may relate to case.
 - Preservation obligation.
 - Cannot mask your or subordinate's identity in gathering information.
 - Corporate social media policy is advisable to cover, e.g.:
 - Who has authority to post.
 - Protecting confidential information.
 - Litigation holds.
 - Be mindful of NLRA limitations on restricting employee activity concerning terms and conditions of employment, and avoid overly broad policies.



Emerging Issues on Privilege

- Litigation Funding / common interest agreements for litigation funding.
 - Partial discovery in regulatory action may constitute waiver.
 - Discovery requests from former business partner that is now an adversary in multi-party litigation.



Takeaways

- Pandemic-related issues continue to fuel litigation.
- Appellate attorneys can be overlooked assets, particularly in cases that you know will generate at law issues on appeal.
- Understand government enforcement lens and consider impacts of government actions on commercial litigation.
- Consider social media in discovery as a weapon and defensive tool, and evaluate ethical issues that may accompany the use of social media in an action.
- Evaluate additional precautions with remote depositions.
- 1782 actions will become tools for harassment and are good in foreign actions where access to typical US forms of discovery is lacking.
- Keep an eye on privilege in seemingly common-interest arrangements and other corporate engagements.
- There are lots of trends in commercial litigation so make sure your lawyers internal and external are keeping up.

Questions? / Contact Us



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