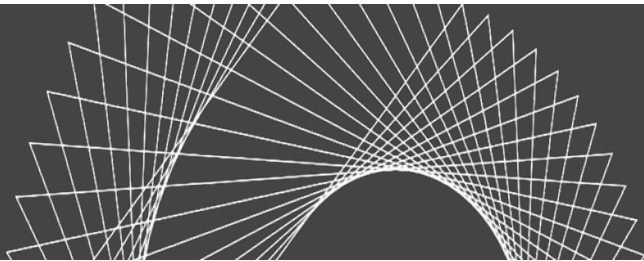


**ACC NCR FALL CONFERENCE**  
**In-House Primer**

**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

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- 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

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- 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.4<sup>th</sup> 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

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- 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

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- 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.



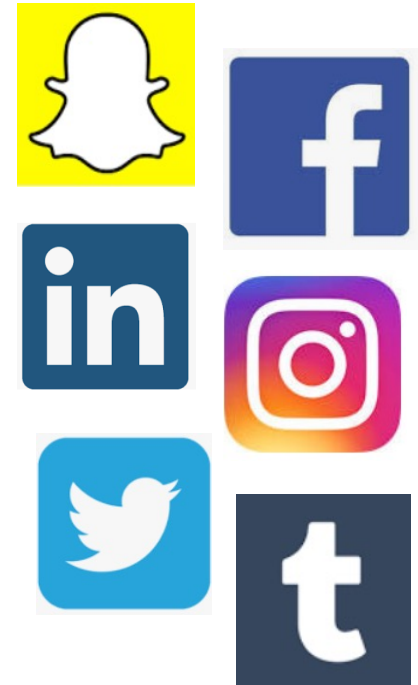
# Trends We are Seeing in Discovery

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## 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

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## 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

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- 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

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## 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

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- 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

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- 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

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- 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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