

COVID's Impact On Litigation To Persist In 2022

By **Jack Karp**

Law360 (January 4, 2022, 12:02 PM EST) -- The coronavirus pandemic will continue to impact both the types of cases that are litigated and the mechanics of how those cases play out through 2022, litigation attorneys predict.

Remote court proceedings and depositions are here to stay, as is the ongoing backlog in trials, litigators say. Meanwhile, disputes arising from employees' return to the office, business interruption issues and bankruptcies will keep litigators busy.

Intellectual property and regulatory enforcement are also likely to be active areas of litigation in the coming 12 months, regardless of what happens with COVID-19.

More than anything, litigators will have to be flexible in 2022, attorneys say.

"Preparation has always been key to a litigator's success," said Michele D. Johnson, global chair of the litigation and trial department at Latham & Watkins LLP, "but litigating in 2022 will require us to be particularly nimble and adaptable."

Virtual Litigation Is Here to Stay

Disruption to the mechanics of litigation will likely be the biggest challenge litigators will face, as COVID-19 continues to affect courts, attorneys told Law360 Pulse.

"The more interesting and biggest shift we're going to see is not the 'what changes' but the 'how practice changes,'" said Rebecca Woods, a partner in Seyfarth Shaw LLP's commercial and construction litigation practice.

Court proceedings like status conferences, discovery hearings, hearings on motions to dismiss and even oral arguments will remain largely remote through 2022, and possibly for good.

"I think there will be a significant piece of the traditional litigation appearances that will be remote forever," said Jack J. Laffey, a partner at Laffey Leitner & Goode LLC.

The same is likely true of depositions, mediations and arbitrations.

"I think the days of lawyers flying all over the country for every meeting and every deposition and every

hearing are probably over," said Mark A. Klapow, a partner in Crowell & Moring LLP's litigation group.

The one exception may be trials. Fully virtual trials aren't likely to become routine, though hybrid trials in which at least some witnesses testify remotely will continue, according to Lisa Wood, co-chair of Foley Hoag LLP's litigation department.

To adapt, litigators will have to become far more flexible and tech-savvy, attorneys say.

"There's going to be a huge premium on outside counsel who are a little bit more adroit at the use of technology and aware of the pitfalls," said Seyfarth's Woods.

For depositions and hearings on Zoom, litigators will need to consider their video settings and backgrounds, and they may want to use more demonstratives. Lighting, sound quality and camera angles will be important, as will making sure to have a reliable video feed.

And in person, they will have to hone their skills in dealing with masked judges and juries, Johnson said.

Foley Hoag's Wood has heard judges complain about lawyers who haven't invested in their equipment, she says, with one judge telling her, "I would hope that people would spend as much money on the technology as they spend on some of the suits they wear."

These pandemic-fueled changes are largely positive, says Wood. The new technology has made litigation more efficient and less expensive, and has removed some barriers to participation.

But not all lawyers are excited about the adjustment.

"It is at least my hope that we will gradually return to in-person litigation," Laffey said.

COVID-19 Keeps Fueling Litigation

With new waves of COVID-19 continuing to surge around the world, pandemic-related litigation will likely continue "at a strong clip" through much of the year, according to Johnson. Litigators can expect to see business interruption-related and breach of contract suits across industries, with many of those disputes tied to the cascading impact of supply chain disruptions.

While the number of new filings in insurance coverage disputes has waned slightly from its peak in the middle of 2020, those numbers could rise again depending on how courts decide key legal issues involving force majeure and insurance claims for physical damages, Johnson added.

The new year could also see plenty of employment disputes involving the terms of employees' return to the office and accommodations for remote work, according to Klapow.

And bankruptcy and real estate litigation is likely to become increasingly robust as federal stimulus money runs out and tenant protections sunset, cautioned Seyfarth's Woods.

But no matter the practice area or industry, litigators should expect to be very busy in 2022, according to Wood at Foley Hoag, with a lot of cases "coming back to life" after being stalled by COVID-19.

"I think '22 will be a busy year just catching up," she said.

IP and Regulatory Disputes on the Rise

Rest assured, attorneys also expect plenty of litigation that doesn't involve COVID-19, particularly in the areas of intellectual property and white collar and regulatory cases.

For many companies, their intellectual property is their most valuable asset. The past decade has seen a dramatic transformation in IP litigation, driven by changes to patent law and venue rules as well as the practical difficulties of enforcing patent protections across international boundaries, according to Klapow.

So IP litigation, which used to consist largely of patent infringement cases heard in district courts, has evolved into multifaceted disputes that also involve copyrights and trade secrets, Klapow said.

The inter partes review process at the Patent Trial and Appeal Board will continue to play a significant role in these disputes in 2022. So will the International Trade Commission, a patent dispute venue that "is hot and will continue to be," Klapow added.

Battles over software copyrights and biotechnology patents are especially likely, said Johnson. The pandemic could play a role here, with litigation over COVID-19 treatments and vaccines.

Meanwhile, white collar and other regulatory enforcement litigation is also likely to see an uptick.

The Trump administration presided over "historic lows" in federal law enforcement action, according to Wood at Foley Hoag.

But the Biden administration has a very different approach.

The U.S. Securities and Exchange Commission has already previewed increased regulation of cryptocurrency trading, according to Johnson.

The administration is also likely to be more aggressive in the realms of antitrust, environmental and white collar regulation, said Klapow.

"The regulatory litigation, or litigation that is sort of adjacent to regulation, can be up or down depending on the administration," said Klapow. "I think obviously right now we're clearly up."

Continued Backlogs

Courts still face a substantial backlog as a result of the pandemic, and it could take them 18 more months to work through the glut of trials, Klapow said.

Virtual alternatives are helping courts catch up, and calendars are starting to resemble pre-pandemic schedules. Litigators will see "an unprecedented number of trials" teed up in the next 12 months, Johnson predicted.

It's not just attorneys who will have to deal with backlogs. Judges are also feeling stressed by the number of cases on their dockets and will be ordering attorneys to move quickly, whether they want to or not, said Wood.

So in 2022, litigators should be prepared, write short briefs and refrain from filing unnecessary motions.

"There'll be just a lot of pressure to get things done," Wood said.

--Editing by Bruce Goldman.

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