

The Client Experience: How to Optimize Client Service and Deliver Value



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Chapter 11:

Litigation management in a still uncertain world

By Paul A. Williams, partner and general liability litigation practice co-chair, Shook, Hardy & Bacon LLP

In 2020, the world began battling the COVID-19 pandemic. We endured lockdowns with stay-at-home orders that eventually gave way to cautious forays back into the world, taking baby steps to resume activity outside our homes. Our daily lives were guided by local health mandates prescribed by multi-colored COVID-19 risk levels providing an array of limitations, restrictions, and hopeful opportunities for our economic, professional, and social return, all of which ebbed and flowed with the surging waves of positive cases, outbreaks, and hotspots. Vaccines arrived, and it seemed an end must be near. But even now, a full return to “normal” remains elusive as the world battles the COVID-19 variants. We are caught in limbo between work-from-home and return-to-work, masks or no masks, and more restrictions loom large as the pandemic rages on and our children return to school. But life, business, and the legal practice presses on. Trials are coming back on calendar, the backlog is being worked, and pandemic-invoked litigation is already here with more still on the way. For many companies, litigation is inevitable, and with the pandemic, litigation is likely even less avoidable. But even so, the traditional burdens associated with litigation can be strategically managed to mitigate their impact on the company, its people and operations. With the right law firm partner you can achieve some certainty in a still uncertain world.

Pandemic litigation trends so far

As anticipated, the pandemic has prompted a surge of litigation,¹ which is a predictable result of illnesses, deaths, furloughs and layoffs, business shutdowns, and a general economic downturn. Perhaps more remarkable are the types of litigation that shape the leading edge of the surge, and those that trail behind and are yet to be filed.²

Litigation stemming from individuals contracting COVID-19 and alleging that a business is responsible because it failed to implement

sufficient safeguards has largely focused on certain industries. Early in the pandemic, passengers filed over 100 individual and class action lawsuits against operators of cruise ships that experienced COVID-19 outbreaks. Nursing homes and others involved in senior care continue to face a steady stream of wrongful death claims, which make up more than half of all exposure claims. Some employers have faced take-home exposure claims that typically allege a person died of COVID-19 after contracting the illness from a spouse or family member who was exposed at work, though these remain rare. In some instances, employees or others have brought public nuisance claims, asserting that a business' operation poses an unreasonable risk of exposure.

Several factors have likely contributed to COVID-19 exposure claims not yet materializing at the level anticipated. First, state workers' compensation systems generally provide the exclusive remedy for workplace injuries aside from cases involving intentional misconduct. Second, plaintiffs face a challenge when attempting to prove causation. Third, whether voluntarily or as a result of government orders, limitations on large events reduced the potential for mass exposures. Finally, roughly two-thirds of states adopted some form of liability protection from COVID-19 exposure suits. These laws vary significantly from state to state, but generally provide a defense to businesses that follow public health guidance, raise the standard of liability beyond bare negligence, or combine these approaches.

While employees have brought relatively few personal injury claims against employers stemming from COVID-19, the same cannot be said of employment litigation, which makes up the largest share of all pandemic-related litigation. About one-third of COVID-19 employment litigation involves employees who claim employers improperly terminated them when they contracted COVID-19 or needed to quarantine, did not provide federally mandated paid sick leave, or failed to provide reasonable accommodations for employees with pre-existing medical conditions such as permitting them to work from home. The next most common employment suits allege that a business terminated an employee for expressing concerns about workplace safety or reporting an employee for not following public health guidance in violation of public policy. Changes in work schedules have led to a significant amount of wage and hour litigation. Some litigation contends that employers failed to pay employees for time spent taking COVID-19 tests or undergoing health screenings before work, for example. Given the number of layoffs, a significant portion of COVID-19 employment litigation involves employees who claim that their age, gender, race, or pregnancy was the true reason for their termination, some

of which point to their employer later filling their position with someone in a non-protected class. Finally, some employment cases allege that an employer did not provide federally mandated paid family leave to those who were unable to work due to the need to care for a child whose school or daycare provider closed or was unavailable because of the pandemic.

Contract claims comprise about one-quarter of all COVID-19-related litigation, excluding employment and insurance litigation. Aside from general disputes stemming from the inability to fulfill contractual obligations during the pandemic, the most common contract litigation, in order of frequency, are claims seeking refunds for events such as weddings, other events or travel; disputes over commercial leases; and disputes over COVID-19-related products, such as a failure to supply masks that met specifications or deliver promised personal protective equipment at all.

There is also substantial insurance litigation. Most of this litigation involves whether a policyholder's business interruption insurance policy covers losses stemming from shutting down or scaling back operations during the pandemic. The issue in many of these cases is whether these losses stem from a physical loss or damage to the property, as many policies require. This litigation has slowed, with most courts finding in favor of insurers. Some lawsuits also target auto insurers, alleging that they should have refunded a portion of policyholder premiums due to the reduction in vehicle traffic during the pandemic.

There have been few COVID-19-related product liability claims, which could target the safety of vaccines or COVID-19 treatments, or the design or labeling of respirators, for example. The PREP Act, a federal law in place prior to the pandemic and implemented during COVID-19 through the US Department of Health and Human Services, provides robust liability protection to those who make, sell, distribute, or administer covered countermeasures.³ In addition, several states have adopted product liability protections that extend to products, parties, or circumstances that may not be covered by the federal law. These laws discourage product liability lawsuits, though there have been government enforcement actions targeting price gouging and fraud, and consumer class actions targeting whether disinfecting or other products provide protection from COVID-19.

While the surge of COVID-19 hospitalizations, staffing and bed shortages, and the need to postpone non-emergency elective surgery and treatment led to the potential for medical malpractice claims, outside the nursing home context, plaintiffs' lawyers have filed relatively few lawsuits against healthcare providers. They may be discouraged from doing so in all but the most egregious cases by Executive Orders issued by governors and

legislation that, in most states, provides for liability only in cases of gross negligence or reckless misconduct.

Other areas of focus are likely to trend in the coming months, and still others are anticipated, which have yet to be filed.

What still lies ahead?

As the economy continues to reopen and as businesses resume more fulsome operations, many companies and consumers are financially unable to complete contracted-for purchases. Many businesses are dealing with deconstructed supply chains, piecing together the means to resume production and deliver products to the marketplace. Plants and offices are trying to do business while managing ongoing COVID-19 health and safety protocols, also challenged by shortage of personnel and the increasing risks presented by unvaccinated personnel. Business deals that stalled may still be unable to close and will ultimately collapse. Companies still may be forced to restructure, or seek the safe harbor of protected bankruptcy proceedings. And for those hundreds of companies that answered the call for repurposing their operations to supply critical medical and health care equipment and supplies to help save lives? They are front and center for claims related to the virus. As we know, millions of people have gotten sick, and hundreds of thousands have lost their lives in the United States. And now, even at the risk of more employees leaving companies, or even exiting the work force, vaccine passports and vaccine mandates are squarely in view as the nation grasps inch by inch to close the gap to resume a pre-pandemic way of life.

As if this social and economic tragedy wasn't enough, in the midst of these turbulent circumstances prompted by the pandemic, we know opportunists are already engaged, filing lawsuits seeking to capitalize on the already-vulnerable business community.⁴ Data hackers and cybersecurity threats are also rampant. As companies reopen their workplaces, the new health and safety measures create a risk of a new wave of privacy litigation, no matter how essential such measures are to enable the reopening of the economy and a hopeful return to normal. The list goes on (and on). Without question, more litigation is on the way.

The litigation burden

Even in the best of times, litigation can impose a substantial burden on companies, consuming time and resources that preferably would be spent pursuing new business opportunities and growth. The impact of these traditionally encountered burdens is exacerbated in times of crisis when

companies need “all hands on deck” to focus on recovering, resuming operations and, in some cases, just financially surviving the crisis.

Now is not the time for serial training of multiple law firms hired to help with one-off cases. Now is not the time for many different points of contact reaching into the business looking for help answering questions and making requests for information. And now is not the time for companies to exhaust already stretched-thin resources trying to corral law firms and coordinate a consistent strategy and litigation effort. Moreover, never is it a time to overspend on litigation when a more coordinated, less burdensome and holistic option is available that provides companies with better litigation outcomes and a better overall litigation experience.

For law department teams and business executives, you will be pleased to know there is a way to protect your company, while rebuilding and growing your business, and you can do so in a way that provides a better overall litigation experience in an environment compatible with your company’s culture and business objectives. With a client-focused law firm partner, companies can take a holistic – and strategic – approach to manage and control their litigation and mitigate the impact of litigation on the company, its people, and its operations.

This is an extract from the chapter ‘Litigation management in a still uncertain world’ by Paul A. Williams from the title *The Client Experience: How to Optimize Client Service and Deliver Value*, published by Globe Law and Business.

We all know that law is a people business. Clients buy from lawyers whom they like, respect, and trust, and they judge those lawyers and their firms on the quality of service that the firm provides, the results achieved, and whether they receive value for money. This applies to corporate, institutional, and private clients alike. For their business plans to be connected to reality, partners and law firm leaders must learn how they are perceived by their clients and adapt accordingly. They do this by listening to their clients. Historically this was through informal, fireside chats. In recent years, many firms have devised formal client listening programs and there has been an explosion of review sites and social media channels enabling clients to leave their unfiltered and public feedback, whether solicited or not. Forward-looking firms are adopting multi-channel approaches to taking feedback to maximize the intelligence they gather and to adapt to clients' own preferences. As ever, the most nimble and adaptable will reap the rewards.

The Client Experience: How to Optimize Client Service and Deliver Value looks at the client experience from end-to-end, from client listening programs to journey mapping, from customer audits to how LegalTech can help improve the way a client interacts with a law firm throughout its relationship. A client-centric business model is essential for future law firm success and the authors of this far-reaching title utilize their own experience and real-life case studies to drill down into the importance of maintaining the one thing no business can do without: its client.



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