

Litigation Prognostication: What Lit Daily Readers Expect Out of 2021

Expect an eventual return to the courtroom, an uptick in trials and settlement talks, and some new kinds of work for certain practices.

By Ross Todd
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Predicting anything packs certain risks. You're putting yourself out there a bit when you take a stab at what's coming around the bend. After all, it could be something that bowls you over.

Let's put it this way: Had I sat down to write this column in January 2020, I'm pretty sure no one would have mentioned business interference claims or the dawn of Zoom jury trials. Predicting what's going to happen in litigation first requires a good idea of what's going to happen in the greater world, since trends in public life and commerce are what drives the disputes that end up bringing clients to your door.

This much we know coming into 2021: Vaccines are starting to roll out. Courts have mounting trial backlogs. But there's plenty still left up in the air.

"Uncertainty leads to unprecedented litigation challenges," said **Michele Johnson**, global chair of the litigation & trial department at **Latham & Watkins**. "With the evolving pandemic, a new administration in the U.S., a new U.S. Supreme Court, and the wind down of Brexit logistics, we are sure to see an uptick in litigation activity in many specialties, particularly antitrust, class actions and product liability, M&A litigation, securities, IP, and complex commercial cases."



(Photo: Shutterstock.com)

Johnson says that now more than ever it's important for clients to see around corners, and "think and act offensively to prepare for enterprise-threatening litigation that may be coming."

Reid Schar, co-chair of the litigation department at Jenner & Block, says that the economic outlook for the near term still looks "extremely challenging" despite the approval of vaccines and potential progress in the fight against the pandemic. "As businesses continue to struggle, look for increased litigation around insurance issues, commercial real estate disputes, contract claims, consumer class actions, and, unfortunately, bankruptcy," he says.

Taj Clayton of Kirkland & Ellis says he anticipates an uptick in civil filing in 2021, adding to the accumulating pandemic-driven backlog. He says in this "milieu" the most effective litigators will

continue to use new the new tools and technology of virtual advocacy opportunities “to propel cases forward”; leverage alternative dispute resolution solutions whenever appropriate; make “intelligent use of big data” in their cases; and focus “acutely” on written advocacy skills to resolve cases on the papers when possible.

Michael Jacobs of Morrison & Foerster expects the pace of litigation to pick up in the second quarter. “Jury trials on hold for many months will be scheduled,” he predicted. “That, in turn, will accelerate settlement negotiations.”

“We’ll be busy!” he added.

Jonathan Youngwood, global co-chair of the litigation department at Simpson Thacher & Bartlett echoed Jacobs’ sentiment.

“It is likely that 2021 will start as 2020 ends, with remote depositions, hearings and trials. But, hopefully, as it becomes safe to conduct in person hearings and trials, in court activity will return,” he said. “There are many cases that are trial ready, and we expect many of those to head to the courtroom in 2021.”

Brad Brian, the chair of Munger, Tolles & Olson, agrees that ideally, with the rollout of the vaccine, courts will resume more normal operations throughout the year. But he, like Kirkland’s Clayton says that lawyers and judges will need to remain flexible to address backlogs. “We will likely see more virtual depositions and court hearings, as well as time limits on trials to expedite cases,” he said. “I also predict a continued uptick in bench trials over jury trials, as those will be much easier for the courts to handle as the world is still opening up.”

Brian said that he’s already seeing a rise in litigation brought under the False Claims Act and other

government fraud statutes. “The government’s stimulus bill and other relief efforts have created fertile grounds for financial fraud,” he said. “We have already seen litigation arising from people who allegedly have used false statements to obtain PPP loans, research grants, government contracts, and other sources of federal funding.”

Elizabeth Deeley, the global vice chair of the complex commercial litigation practice at Latham, says expect more business interruption claims and product liability class actions related to COVID vaccines that are currently approved and those still in the pipeline. “We also anticipate contract disputes resulting from disruption in supply chain to continue into 2021,” she said.

Kevin Prussia, an IP litigation partner at Wilmer Cutler Pickering Hale and Dorr, expects 2021 to be “a mirror image” of 2020, with the first three quarters seeing remote proceedings feature prominently and a limited, gradual return of the civil jury trial with courthouses only able to conduct one or two trials at a time. “Things might finally begin to feel more like ‘normal’ as we get closer to the last quarter of the year,” Prussia said.

“In terms of specific trends in the patent litigation space, given the substantial backlog in the most popular district courts across the country, I expect to see an uptick in Section 337 ITC investigations,” he said.

On the employment front, Lisa Lupion, a partner at Orrick, Herrington & Sutcliffe, says that employers are going into 2021 with “a keen focus on re-opening or keeping their offices and work-sites open safely in the face of the continuing COVID-19 crisis and grappling with how the vaccine will impact those plans.”

“Whether employers can or should be requiring vaccination and following the recently issued EEOC guidance on addressing the requests for disability-related and religious accommodations for those who won’t or can’t be vaccinated will be top of mind for employers,” she said. “COVID-related issues will also continue to make their way into the courthouses, with claims ranging from termination decisions, safety concerns, and failure to accommodate claims.”

In securities litigation, Sara Brody, a partner with Sidley Austin, notes that the practice “shifted with few glitches to remote work” with hearings, depositions and even mediations and trials going virtual. “On line, instead of in-person, will continue in 2021,” she predicts. “Even as restrictions on travel [lift] and in person appearances become possible, virtual hearings, depositions, mediations and trials will continue and thus add a new strategic consideration of what is most effective from an outcome and cost perspective.”

Jay Kasner, Scott Musoff and Susan Saltzstein, the head and co-deputy heads of the global securities litigation practice at Skadden, Arps, Slate, Meagher & Flom, say their expectations for 2021 are informed by what they saw in 2020: “Near historic filings despite all of the disruptions—personal, professional and otherwise—brought on by the pandemic.”

“And what we expect to see in 2021 is a continued focus on cryptocurrency; state court securities litigation; M&A related litigation, including suits relating to SPAC transactions; and litigation against foreign issuers more generally,” they said.

“We also anticipate that the trend of parallel state and federal Securities Act cases will continue.”

When it comes to privacy and data protection, Munger Tolles partner Jonathan Blavin said that while the pandemic has shown how important online platforms are to daily life, COVID-19 has also “resulted in a flurry of platform liability claims and privacy litigation that will only continue through 2021.”

“Platforms’ efforts to combat misinformation relating to the election and public health issues have resulted in an increase in content moderation litigation, as well as legislative discussions to eliminate or reform the immunity provided by the Communications Decency Act. At the same time, platforms also face growing legal scrutiny on digital privacy issues,” he said. “With a new political and regulatory environment, and an immense public health campaign underway concerning vaccination, these trends are likely to endure in 2021.”

Meanwhile, Mike Rhodes, global chair of the cyber/data/privacy practice group at Cooley, called data “the prevalent currency of the modern economic realm.”

“As such, we are going to see an acceleration in regulatory and litigation activity focusing on the confluence of competition and privacy,” he said.

I read that as “Look out Silicon Valley.”

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