

Big Law Litigators See COVID-19 as a ‘Recipe for Litigation’

One big question will be whether companies' actions were reasonable. “But what does ‘reasonable’ look like today?” asked Gwyn Williams, a complex commercial litigation partner at Latham & Watkins.

By Jenna Greene
March 17, 2020

Litigation is coming—lots of litigation.

That’s the consensus from Big Law litigators I spoke with yesterday about the coronavirus pandemic.

“I see [COVID-19-related] litigation arising in just about every possible practice area you could think of,” said Gwyn Williams, a complex commercial litigation partner at Latham & Watkins.

“In some respects, this is a brave new world, so who the heck knows? But I think it will come in waves,” she said, starting with emergency actions to stop foreclosures, for example, but spreading steadily into disputes involving insurance coverage, contractual obligations, mass torts, consumer class actions, bankruptcy, M&A, securities fraud and more.

Ropes & Gray litigation head Gregg Weiner agreed. “Anytime there’s an unprecedented and unanticipated event, that’s sort of a recipe for litigation,” he said.

Pointing to 9/11 and the financial crisis of 2007-2008, he noted that there “are elements of both here, but it’s not like either one exactly.”

Some of the issues are similar—business interruptions and major market distress, for example—but the pandemic is “unique. It’s health-related, it’s more global.”



Nearly empty shelves in the cleaning products and disposable paperware aisles at a Giant supermarket in Baltimore, MD, due to the spread of the Coronavirus (Covid-19), on Thursday, March 12, 2020.

It also lacks obvious bad guys, like terrorists or greedy bankers. “This is kind of a villain-less scenario,” Weiner said.

He’s hopeful that perhaps a shared sense among the parties that “we’re both victims here” might make it easier to resolve some disputes more amicably.

Or not.

“We are going to be very busy,” said McKool Smith principal Gayle Klein, who notes that her

firm has a robust practice litigating against insurance companies and banks. “There will be a wealth of litigation between lenders and companies.”

She predicted some disputes will revolve around whether corporations are in line with their debt covenants, as well as conflicts over lease payments.

“The business cycle is a cycle, and we’ve been at the top for longer than normal. Now we’re seeing a major correction in the market,” Klein said, predicting “a lot of bankruptcies and a lot of deals that will have gone wrong.”

Weiner also flagged M&A-related litigation. “So many deals were being signed ... and then all the world changed,” he said.

One key question: Will an acquiring party be able to invoke a material adverse event to get out of a pending purchase?

The answer is still unclear and of course will depend on how exactly the clause is written. But generally, a material adverse event would typically need to last long enough to have a “significant impact,” he said, and at this moment, no one knows how long the COVID-19 outbreak will last. “What if in four weeks we’re getting back to work? Or will it be getting worse, with no end in sight?”

Still, Weiner said he thinks we’ll see “some buyers start to invoke these clauses, or to consider enforcement of the clauses.”

At Munger, Tolles & Olson, commercial litigation partner Robert Dell Angelo said he’s been fielding calls from clients seeking advice on whether or not to close, as well as contract-related questions.

“They need real-time advice. We don’t have the luxury of gathering all the facts,” he said. “We need

to provide usable, practical advice as opposed to perfect advice that comes too late.”

Further down the road, he predicted a spike in securities litigation related to stock drops. “But I think there’s a strong defense for companies” that they can’t have been expected to predict the future of the virus. “I’d rather be on the defense side,” he added.

Latham’s Williams agreed that clients are asking “What do I need to do right now?” she said. “There are a lot of questions about contracts—what if can’t perform? Can I cancel?”

She also anticipates a jump in consumer class actions. For example, what if consumers are being automatically billed each month for a gym that suddenly closed?

“Other tort liability may involve commercial landlords, hotels, airlines,” she said. All serve a large number of customers, and could be held liable if they failed to shut down when they should have.

The big question will be whether their actions were reasonable. “But what does ‘reasonable’ look like today?” she said.

Beyond strictly legal advice, Williams is offering her clients other wisdom as well. “One thing I’ve said is to think about being kind. [Clients] need to understand their legal obligations, but maybe in this moment in time, do you want to be more generous than you’re necessarily legally required to be?” she said. “Is this the right thing for you and your company to do?”

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