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Litigation risk in COVID-19 environment: Big changes

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Litigation risks are materially different today, under COVID-19, than at the start of 2020 when the threat of a world-changing global pandemic was barely an idea. The economic and strategic considerations affecting organizations' litigation decisions are shifting. This article examines that shift and explores the consequences for litigants going forward as they seek to resolve disputes in the pandemic environment—both existing legal disputes and new litigation arising from COVID-19.

The effect of COVID-19 on existing litigious disputes

COVID-19 is influencing litigation leverage and litigation risk in existing disputes. The cost/benefit analysis of litigating, and the strategies and tactics needed to arrive at an optimal outcome, must be assessed anew by all litigants. Although the effect is not universal, there are many existing disputes in which the opportunities for compromise and early settlement have been enhanced. In others, the outlook is more likely to be one of delays.

Three major changes need to be considered.

First, there has been a material change in the value-for-money analysis associated with pursuing a litigated outcome. In the current liquidity and risk environment, the perceived benefits of expending substantial funds on a multi-year litigation process with an uncertain outcome are changing for some litigants. Many parties need to free up cash, reduce costs or eliminate contingent liabilities now. In some cases, the financial pressures created by the pandemic will drive a party to settle on terms that would have been unacceptable a few months ago. In other cases, the effect of the pandemic will be to cause a reduction in immediate legal spend and the deferral of litigation activity to a later date.

A second major shift in the litigation environment relates to the potential insolvency of one's litigation adversary. With even some of the healthiest corporate players now financially threatened, litigants need to consider carefully whether to settle their disputes sooner or later, taking into account the potential that the financial viability of their litigation adversary may worsen. For plaintiffs, an early settlement now on less-than-optimal terms may be preferable to waiting for better terms, given the enhanced risk that the defendant may not survive the wait. For defendants, a plaintiff's liquidity and solvency concerns may enable early settlement on terms more favourable to the defendant, or could incentivize the defendant to extend the proceedings in the hope that this will result in the plaintiff ceasing to remain financially viable.

A third factor is that government-imposed physical distancing requirements have resulted in reduced access to courthouses and tribunals, suspended filing deadlines, and (in many but not all matters) postponed trials, hearings, applications and motions. Out-of-court discovery procedures are likewise often being deferred, particularly where defendants can identify a compelling reason for delay, such as inability to meet with clients or access their documents, or a bona fide basis to insist on in-person examination. While courts are still hearing urgent matters and certain classes of disputes (such as class actions) in some major centres—where hearings are proceeding on an *ad hoc* basis by way of video conference, teleconference or in writing—the bulk of the court-driven and tribunal-driven

litigation process is on hold. This creates, at least for now, a defendant-friendly environment because plaintiffs cannot as effectively push matters forward in many cases, and therefore cannot leverage the pressure created by an impending hearing or deadline.

New dynamics in disputes resulting from COVID-19

The pandemic is generating a host of new legal disputes, including class actions. Human crisis creates a fertile environment for plaintiff class action lawyers, who do not need to look very far for claims they are willing to underwrite. COVID-19 is one of the greatest crises in modern history, and could well be the greatest single generator of class actions to date in history, given the widespread unremedied harm and loss suffered by individuals across all segments of society.

Class action activity in the first few months of the pandemic already includes:

- privacy claims (e.g., alleging failure of a video-conferencing platform to protect personal information
- personal injury claims (e.g., alleging failure to protect against COVID-19);
- employment claims (e.g., for mass layoffs, unsafe working conditions);
- securities disclosure claims (e.g., alleging failure to disclose the effect of the pandemic on the organization in a timely fashion);
- consumer protection claims (e.g., for not refunding payments relating to purchases that could not be fulfilled); and
- insurance claims (e.g., for not providing coverage for certain types of losses).

The range of class actions that COVID-19 is generating will continue to grow. Successfully defending some of these class actions will be vital for the organization being targeted—that is, the significance of the claim may be such that the survival of the organization depends on either successfully defending against it, or negotiating a compromise resolution that allows the organization to continue. The leverage for class counsel, and the determination of defendants, are heightened.

The pandemic is also producing a range of new inter-party commercial disputes, such as novel force majeure claims affecting supply chain and construction contracts, claims through which buyers seek to terminate corporate acquisition agreements based on material adverse effect clauses, interim operating covenants, bring down requirements or other alleged breaches, whistleblower suits relating to improper receipt of government funds, and cybersecurity claims, among a variety of others.

Many of these claims will likewise be of heightened importance for defendants, for at least two reasons. First, less material disputes are now more likely to be resolved at the business level, given cash scarcity, a less efficient justice system and the need to prioritize business continuity. Second, the pandemic is generating “bet the farm” litigation at a higher rate. The breaches of material contracts are more frequent; the dollar values of the losses are higher.

A related trend in the non-class action litigation space may be increased use of private arbitration and other alternative dispute resolution mechanisms outside the traditional court process. In the short term, this consequence is arising from the shutting down of the court system. In the longer term, it is expected that some commercial parties will prefer private dispute resolution, with the goal (if not always the effect) of expediting the process, controlling the costs, and achieving greater certainty of outcome.

It is not yet known how courts and arbitrators will react to the unprecedented cluster of problems and losses created by COVID-19. The effects of the pandemic are far broader than any single private law dispute. It is likely that adjudicators, in assessing the merits of any particular claim arising from COVID-19 (whether a class action or an ordinary inter-party claim), will weigh the law and the equities carefully before laying the concentrated financial risk of the pandemic on the shoulders of any single defendant.

Due diligence takes a different form in a crisis, and adjudicators can be expected to be attentive to whether a defendant took steps that were reasonable based on the limited time and information available. The assessment of what constitutes reasonable contractual risk allocation will likewise be performed differently when dealing with a risk

no one considered or could readily have fully accounted for. Ultimately, there are some losses for which our system of private law will not be prepared to compensate.

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