

Quarterly Advisor

SPRING 2021

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Brach Eichler Litigation *In The News*

One Year Into the Pandemic: The Impact of Technology, Videoconferencing, and Remote Hearings on the Lawsuit Process

Over the past year, the COVID-19 pandemic has necessitated operational modifications in nearly every industry, and the legal sector has been no exception.

Effects of the Pandemic on Lawsuits

In May 2020, for the first time in its 230-year history, the United States Supreme Court broadcast live, allowing the general public to watch an oral argument before the highest court in the land. This unprecedented access was the beginning of a significant change in the way technology is used within the legal system.



Shortly following, Courts around the country used Zoom to pick juries, conduct hearings, and other court proceedings. How has the use of videoconferencing changed the landscape? How can the court ensure the integrity of proceedings or address the credibility of witnesses? Where are the advantages? The pitfalls?

Video Conferencing in Court – Does it Work?

A few months before the COVID-19 pandemic, New Jersey's Appellate Division issued *Pathri v. Kakarlamath*, 462 N.J. Super. 208 (App. Div. 2020) and provided several factors to

consider for when video testimony is acceptable during trials including, *inter alia*:

- A witness's importance to the proceeding;
- The severity of the factual dispute to which a witness will testify;
- The cost of requiring a witness's physical appearance in court versus the cost of transmitting the witness's testimony in some other form;
- Whether the witness's inability to be present in court at the time of trial was foreseeable or preventable; and
- A witness's difficulty with appearing in person.

Video is now recognized as a viable method of providing testimony, particularly if a witness has difficulty appearing

in-person. In some cases, a witness's appearance may be particularly suited for remote testimony if his or her statement is uncontroversial. However, when the witness's testimony is particularly important to the proceedings or if impeachment of the witness would be particularly probative in that case, video or remote testimony is less than ideal. Attorneys must assess the importance of the witness in the proceeding, whether the witness will need to be "confronted" in person via cross-examination and whether the person's credibility is a factor, necessitating live testimony.

What Can We Expect with Virtual Jury Trials?

On January 7, 2021, the New Jersey Supreme Court entered an Order to implement virtual jury trials, requiring the parties' consent. However, it also envisions that virtual jury trials will soon be mandatory as Courts attempt to manage

the backlog of trials that continue to accumulate during the COVID-19 pandemic.

Current and available technology has facilitated virtual jury trials, with little disruption or delay. For example, in *ResCap Liquidating Tr. Action v. Primary Residential Mortg., Inc.*, No. 0:13-cv-3451 (SRN/HB), 2020 WL 1280931, at *2 (D. Minn. Mar. 13, 2020), the court held that "given the speed and clarity of modern videoconferencing technology, where good cause and compelling circumstances are shown, such testimony satisfies the goals of live, in-person testimony

and avoids the short-comings of deposition testimony.” This finding assumes the participants are capable of participating remotely and know how to use the technology.

Another court rejected a challenge to video testimony in a civil bench trial but simultaneously granted a two-month continuance to allow the objecting party time to prepare while requiring the parties to move forward with the video conference trial. In *Argonaut Ins. Co. v. Manetta Enter., Inc.*, No. 19-CV-00482(PKC)(RLM), 2020 WL 3104033, at *3 (E.D.N.Y. June 11, 2020) the court recognized that the occasional technical glitch was an insufficient reason to not use video-conferencing.

Not all courts agree that virtual jury trials should become the norm. There are differing views among the courts and litigants on the use of video technology for court proceedings. Some courts believe it should be “the exception and not the rule” *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479 (D. Md. 2010), while others believe it is the only way to move bench trials along and avoid postponing trials indefinitely. *Argonaut Insurance Co.*, 2020 WL 3104033, at *3.

Attorneys and their clients should evaluate to determine whether a virtual trial is plausible, taking into consideration outside distractions to jurors and whether jurors will remain engaged. Equally important, protocols need to be set, by the stipulation of the parties or by order of the court, if the parties cannot agree. For additional information on virtual jury trials, please click [here](#).

Direct and Cross-Examination: How Will Examinations Be Affected By Remote Trials?

There are benefits to remote court proceedings. In addition to protecting participants from public health concerns, it can cut costs of securing witness attendance. Remote proceedings can also secure the attendance of witnesses who would otherwise be unavailable or outside the jurisdiction of the court, *Pathri v. Kakarlamath*, 462 N.J. Super. 208 (App. Div. Jan. 23, 2020).

Critics argue that remote testimony is not the same, as it does not allow an attorney or the court to effectively assess witness credibility, or how the witness is perceived. A witness who may appear sympathetic live might not be perceived that way remotely. Another criticism is remote proceedings adversely affect a lawyer’s ability to “confront” the witness during cross-examination. Non-verbal cues are more apparent

in a live proceeding and may be lost in a remote hearing. Some even argue that remote hearings are a violation of the due process right to cross-examine witnesses. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972).

Cross-examination and impeachment of a key witness is an important part of a trial. The ability to confront, impeach and challenge the credibility of a witness are significant factors in deciding whether to consent to a remote trial. Despite these challenges, a virtual trial may be less risky



than a lawsuit sitting idly for too long. All of these issues must be carefully considered.

In conclusion, clearly some of the remote court policies and procedures adopted during the pandemic will remain in place long after the virus has subsided. Since many of these modifications were being considered before the pandemic hit, and the business world had accepted and adjusted to working remotely, the impetus toward remote proceedings seems certain to endure. As time goes on and the state of the pandemic evolves, we will see innovative strategies and solutions for managing remote and in-person litigation. Brach Eichler will stay up to date on these advancements and will continue to keep our readers informed.

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NEED TO KNOW

Key Highlights from Recent Cases that Could Impact Your Business

Federal Court Decisions: New laws passed by the U.S. Congress and cases moving through federal courts are vastly altering the legal landscape. New legislation, outlined below, will impose requirements on many businesses. It remains important for individuals and companies to stay abreast of recent legal developments, particularly as the COVID-19 pandemic has altered business as usual.

The Federal Corporate Transparency Act Imposes New Reporting Requirements on Many Businesses to Combat Money Laundering and Terrorism – Earlier this year, Congress passed the Corporate Transparency Act (the CTA), which will take effect after the U.S. Treasury Department issues regulations to be completed by the end of 2021. The CTA requires many businesses to file a report with the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Treasury Department, containing certain biographical information about its owners. The statute aims to assist national security and law enforcement to counter illicit activity, and business owners will need to comply with the new statute or face civil and criminal penalties. For additional information on the requirements under the CTA, please click [here](#).

Lien Claims in Construction Projects Amidst the COVID-19 Pandemic—Are They Valid When a Bankruptcy is Filed? – If the owner of a project or a general contractor files a bankruptcy petition, its property now becomes property of the bankruptcy estate. Creditors may not file a construction lien on a project due to bankruptcy. To protect the ability of a contractor or subcontractor to be paid for work performed on a project, it must file a construction lien on the project before an owner or general contractor files for bankruptcy. For additional information on filing a construction lien when there is bankruptcy, please click [here](#).

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New Jersey Court Decisions: The COVID-19 pandemic has caused interruptions to pre-existing obligations and business, as usual, necessitating new ways of conducting business. Cases addressing COVID-19 related disruptions are moving through the courts and impacting several areas of law, including pre-existing contract obligations, insurance coverage, and ongoing construction projects. Companies should closely monitor these ongoing developments to mitigate risk and protect their businesses.

COVID-19 and the Doctrines of Impossibility of Performance and Frustration of Purpose: The Impact of the Pandemic on Contractual Obligations – One year later, many businesses continue to face difficulties meeting

contractual obligations in contracts executed before the COVID-19 pandemic. A party may seek to apply the doctrines of frustration of purpose and impossibility of performance based on arguments that performance of the contract is either impossible or its purpose cannot be effectuated. This analysis is fact-sensitive and considers how the pandemic impacts the contract, industry, or a party's ability to perform. For additional information on the doctrines of frustration of purpose and impossibility of performance and COVID-19, please click [here](#).

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Recent Orders and Considerations:

Commercial Evictions – Among the executive orders issued in March 2020 in response to the COVID-19 pandemic was the suspension of residential evictions. On February 5, 2021, the Supreme Court of New Jersey entered an Order to permit a commercial landlord in "emergent circumstances" to apply for an Order to Show Cause (OSC), for eviction of tenants. The Order clarifies that "emergent circumstances" involve "something other than nonpayment of rent" or "nonpayment of rent that threatens the landlord's capacity to continue their business (in the case of a pending foreclosure or tax lien)." Thus, select commercial evictions may proceed depending on the facts to support the eviction.

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Employers and COVID-19 Vaccines – As vaccines become more available to the general population, employers consider whether to implement policies that require their employees to get COVID-19 vaccinations. Guidance from the United States Equal Employment Opportunity Commission suggests that employers may implement such a policy, as long as the policy does not violate another federal statute, such as the American with Disabilities Act or Title VII of the Civil Rights Act. In New Jersey, legal precedent protects an individual's right to privacy in the workplace. It remains unclear whether a mandatory COVID-19 vaccination policy could infringe those individual privacy interests. For additional information whether employers may implement a mandatory COVID-19 vaccination policy, please click [here](#).

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COVID-19 and Interruption to Your Business Operations:

What Business Losses are Covered? – A commercial property insurance policy may include business interruption coverage. This coverage may be triggered when there is "direct physical loss" to your business' property, which compels a closure. The coverage will likely not be triggered if the premises remain habitable. Any insurance policy must be closely examined

to determine the scope of coverage and any applicable conditions or exclusions. For additional information on COVID-19 and insurance coverage, please click [here](#).

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COVID-19 and Force Majeure Provisions: How Has the Pandemic Affected Contract Performance and Enforcement?

A contract may contain a *force majeure* provision intended to protect a party from its inability to meet obligations under the contract. *Force majeure* provisions should be carefully reviewed to assess if a particular event falls within the clause and if the inability to meet an obligation was beyond a party's control. This analysis is fact-sensitive and considers how the pandemic impacts the contract, industry, or a party's ability to perform. For additional information on *force majeure* clauses and COVID-19, please click [here](#).

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WINS AND SIGNIFICANT BRACH EICHLER LITIGATION DEVELOPMENTS

Charles X. Gormally and **Thomas Kamvosoulis** successfully obtained summary judgment in favor of a medical practice. The plaintiff filed claims alleging violations of the Consumer Fraud Act and Truth in Consumer Contract, Warranty and Notice Act, based on allegations that the defendant charged for copies of medical images. The defendant's summary judgment papers argued that, *inter alia*, the plaintiff lacked standing to bring the claims, the plaintiff was not charged

for copies of the images, and it never charged patients for these images. The case was dismissed in its entirety, securing a complete victory for the client.

Eric Magnelli and **Lucas Markowitz** successfully defended an employer against a CEPA claim. The plaintiff claimed that he was transferred to a less desirable position and forced to take on more work because he reported that an administrative official was unlawfully withdrawing funds from a city account. After a seven-day trial and 3 ½ hours of deliberations, a jury of seven returned a unanimous verdict in favor of the employer, finding that it did not retaliate against the plaintiff and violate the CEPA statute. The plaintiff's appeals of the jury verdict and the imposition of monetary sanctions were denied, and the trial court's decisions affirmed.

Keith Roberts and **Paul DeMartino, Jr.** successfully obtained a preliminary injunction for a healthcare service company resulting in broad restraints on an LLC member arising from fiduciary breaches while managing the company. Further, they also successfully removed a member from management after being found to have surreptitiously acquired a division of the business by a transaction with insufficient consideration. The court entered an Order, *inter alia*, removing the partner from all business accounts and restraining the partner from communicating with employees, and barring the partner from using the business's confidential information.

Rose Suriano, Litigation Practice Co-Chair, successfully compelled a national general contractor's insurance carrier, in a construction defect claim, to pay \$500,000 in damages for what was argued to be a "Covered" claim, which also included the payment of over \$50,000 in legal fees and costs incurred by the general contractor.

ATTORNEY SPOTLIGHT

Welcome to this new feature in the *Quarterly Advisor* designed to help you get to know the faces and stories of the people behind the articles in each issue. This month, we invite you to meet Co-Chairs **Rose Suriano** and **Keith J. Roberts**.



Rose Suriano

Rose Suriano is an experienced business litigation attorney representing large and mid-sized, national and international companies in many types of complex business disputes. Rose also handles many types of construction claims for state and

national companies. Rose brings to her clients nearly 30 years of trial and appellate court experience in both state and federal courts across the nation. To her business colleagues, she has succeeded in a field where few women dominate.

In her spare time, Rose enjoys spending time with her three daughters as well as biking and exploring the outdoors. She is also an avid skier.



Keith J. Roberts

Keith J. Roberts is an accomplished civil trial attorney certified by the New Jersey Supreme Court. He has tried over 50 cases to a jury verdict in addition to bench trials, as well as complex administrative actions and arbitrations. Keith is a recognized expert in healthcare

litigation matters comprising of insurance coverage and reimbursement disputes, insurance fraud defense, disciplinary proceedings before state licensing boards, and complex business disputes. As a member of the Healthcare Law Practice at Brach Eichler, Keith is often called upon to represent hospital systems, surgical centers, medical practices, and a wide array of healthcare professionals.

Outside of the office, Keith enjoys photography, the pursuit of culinary skills, and is an enthusiast of Napa Valley Cabernet.

Brach Eichler Litigation *In The News*

The following Litigation attorneys were named [2021 New Jersey Super Lawyers!](#) Congratulations to **Edward P. Capozzi**, **Matthew M. Collins**, **Thomas Kamvosoulis**, **Anthony M. Rainone**, **Eric Magnelli**, **Keith J. Roberts**, **Carl J. Soranno**, **Frances B. Stella**, and **Rose Suriano**. In addition, the following Brach Eichler Litigation attorneys were named to the [2021 New Jersey Rising Stars](#) list: **Alex S. Capozzi**, **Shannon Carroll**, **Corey A. Dietz**, **Lucas A. Markowitz**, **Autumn M. McCourt**, **Kristofer C. Petrie**, **Kelley M. Rutkowski**, and **Salim F. Sabbagh**.

Litigation Co-Chair **Keith Roberts** discusses concerns about mandatory virtual trials in [Law360](#).

Litigation Co-Chair **Rose Suriano** co-authored with **Michael Ansell** an article in the *New Jersey Law Journal* on April 7, 2021 "[The CFA: Have Courts Expanded Its Reach Even When Other Statutes Control?](#)"



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