



# Commercial Litigation Outlook: Post-Pandemic Trends and Emerging Challenges in 2021

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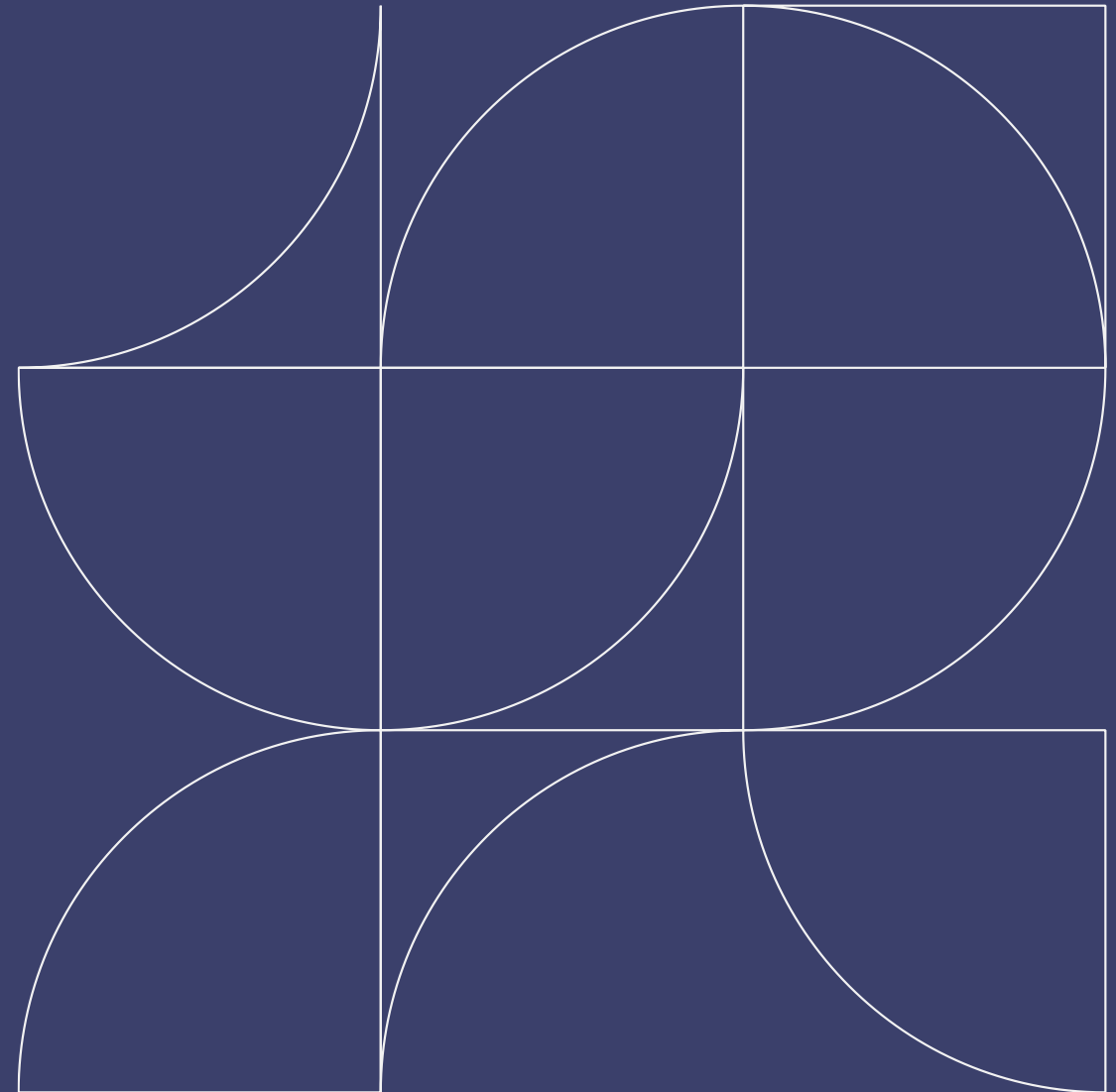
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# Agenda

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# Antitrust

Brandon Bigelow





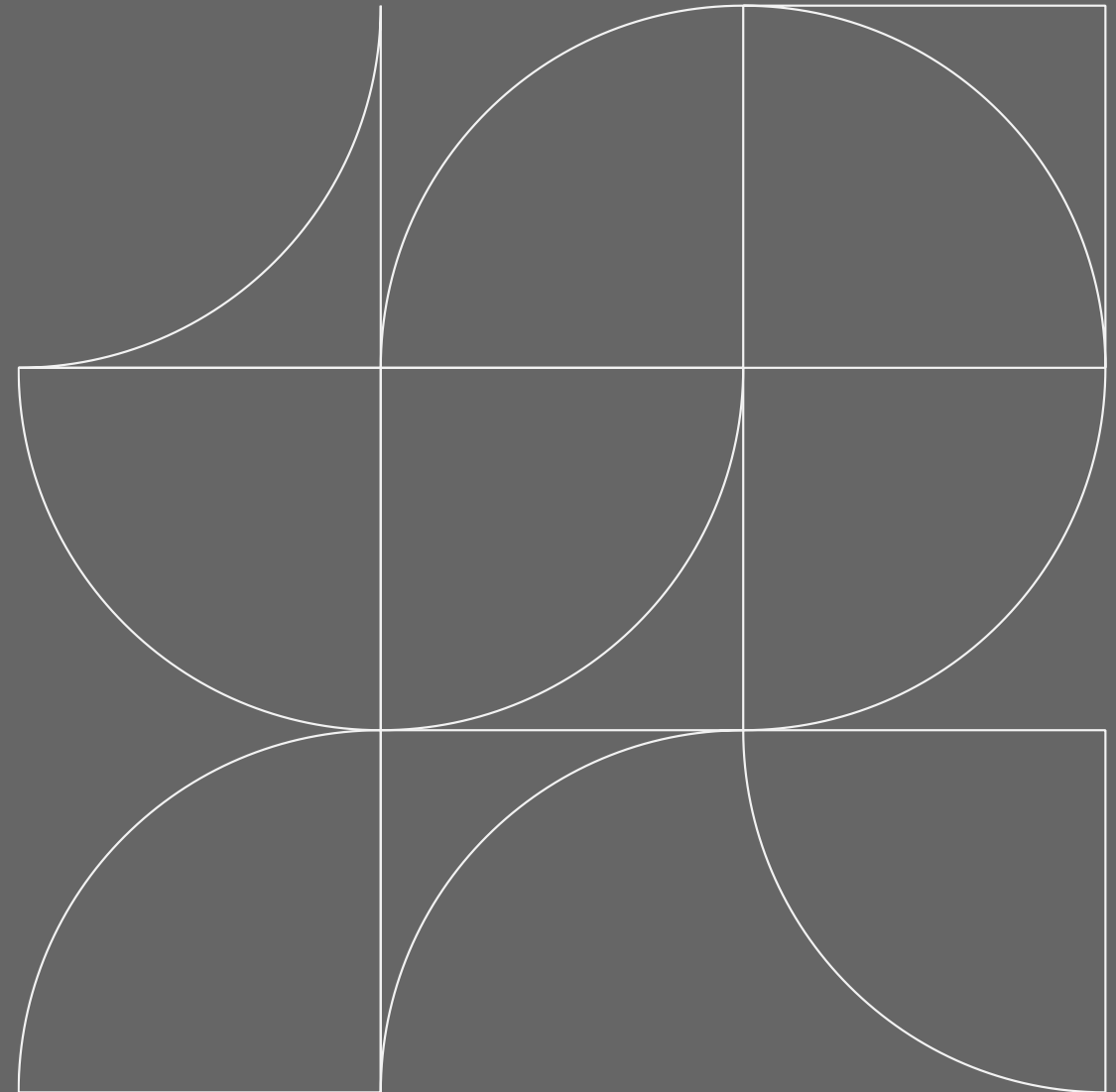


# Antitrust

- “**No poach**” agreements will continue to be an enforcement priority for regulators.
- **HSR**: Possible emerging skepticism by DOJ/FTC of transactions that traditionally were unremarkable.
  - FTC investigation into “**Big Tech**” continues.
  - Expect **more review of smaller transactions**, including those under minimum reporting thresholds.
- Major class action settlements in 2020 are **shifting into claims submission and settlement payout stages**.
  - Be skeptical of companies offering to help “assist” with the submission of claims.
- **Biden administration** appointees signal possible change to enforcement priorities.

# Automotive Franchise & Distribution

Brandon Bigelow





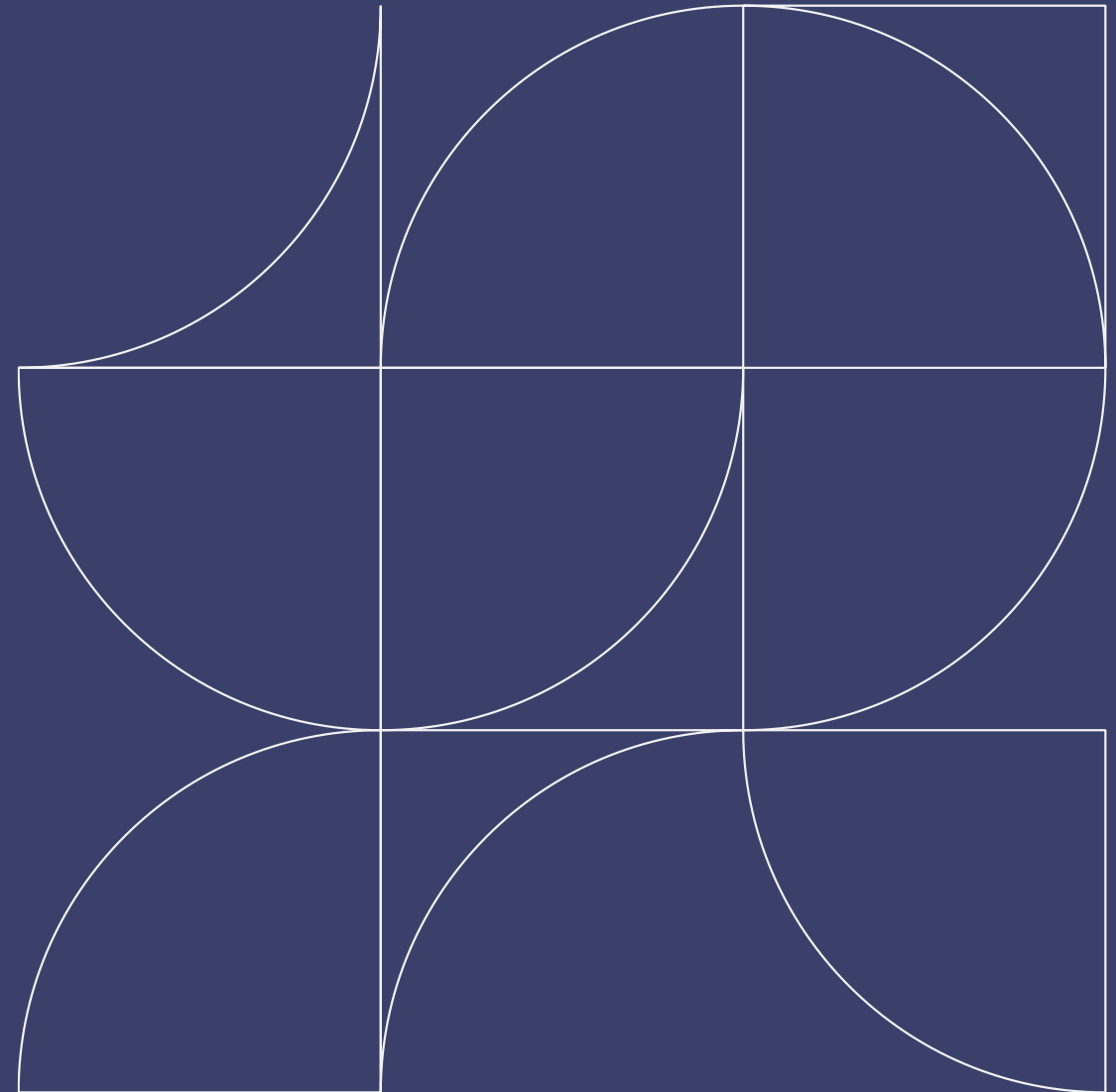
# Automotive Franchise & Distribution

- **Online retailing:** “Someday” becomes today.
  - Changes in consumer expectations and demands.
  - Online platform rollouts have accelerated.
- EV-only manufacturers present unique **competitive challenges** to “traditional” dealership models.
  - EV-only OEMs are unencumbered by many state dealer laws.
- **“Over the Air” Technology** – fundamentally changing how updates / enhancements are delivered.
- Larger franchise issues on the horizon for 2021.
  - **“Worker Protection”** – California’s AB5 and the proposed FAST Recovery Act fundamentally alter traditional franchise relationship.
  - **Changing Business Models** – and the impact on the rights and obligations under existing agreements.
  - **Franchisee Viability** – significant financial challenges as franchisees seek to rebound from pandemic.



# Biometric Privacy Laws

Paul Yovanic



# What is Biometric Information and How is it Used?

- Physical characteristics that can be used to digitally identify a person.
  - e.g. DNA, retinal scans, fingerprints, shape of hand or face, sound of voice
- Implemented for time clocks to prevent “buddy punching,” facilitate consumer transactions, and for restricting access to secure areas.





## Current Biometric Privacy Laws

- Standalone biometric privacy laws in Illinois, Washington and Texas.
- Illinois only state with private right of action for biometry privacy.



## Illinois BIPA

- Enacted in 2008.
- Over 1,000 class action lawsuits filed between 2015 and 2020.
- Regulates the collection, capture, and storage of “biometric identifiers,” such as fingerprints, voiceprints, retina/iris scans, and scans of hand or face geometry.
- Private right of action:
  - Attorneys’ fees
  - \$1,000 or actual damages for negligent violations
  - \$5,000 or actual damages for intentional/reckless violations.
- Requires publicly available written policy and user consent for all private entities.





## Key Issues On Appeal

- *Cothron v. White Castle System* (7th Cir.) - whether repeated collection of the same biometric information from an employee without prior consent constitutes separate violations of the Illinois BIPA.
- *Tims v. Black Horse Carriers* (1st Dist. Ill.) - whether a one-, two- or five-year statute of limitations applies to BIPA claims.
- *McDonald v. Symphony Bronzeville Park LLC* (Ill. Supreme Court) - whether the Illinois Workers' Compensation Act pre-empts BIPA claims in the employment context.

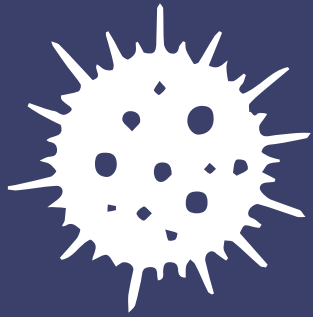
# Pending Legislation



- New York Biometric Privacy Act AB 27 (January 6, 2021)
  - Identical to Illinois BIPA
- Maryland “Commercial Law – Consumer Protection – Biometric Identifiers and Biometric Information Privacy” House Bill 218 (January 13, 2021)
  - Broader definition of “biometric identifiers” and “biometric information”
  - No requirement for publicly available biometric policy in employment context

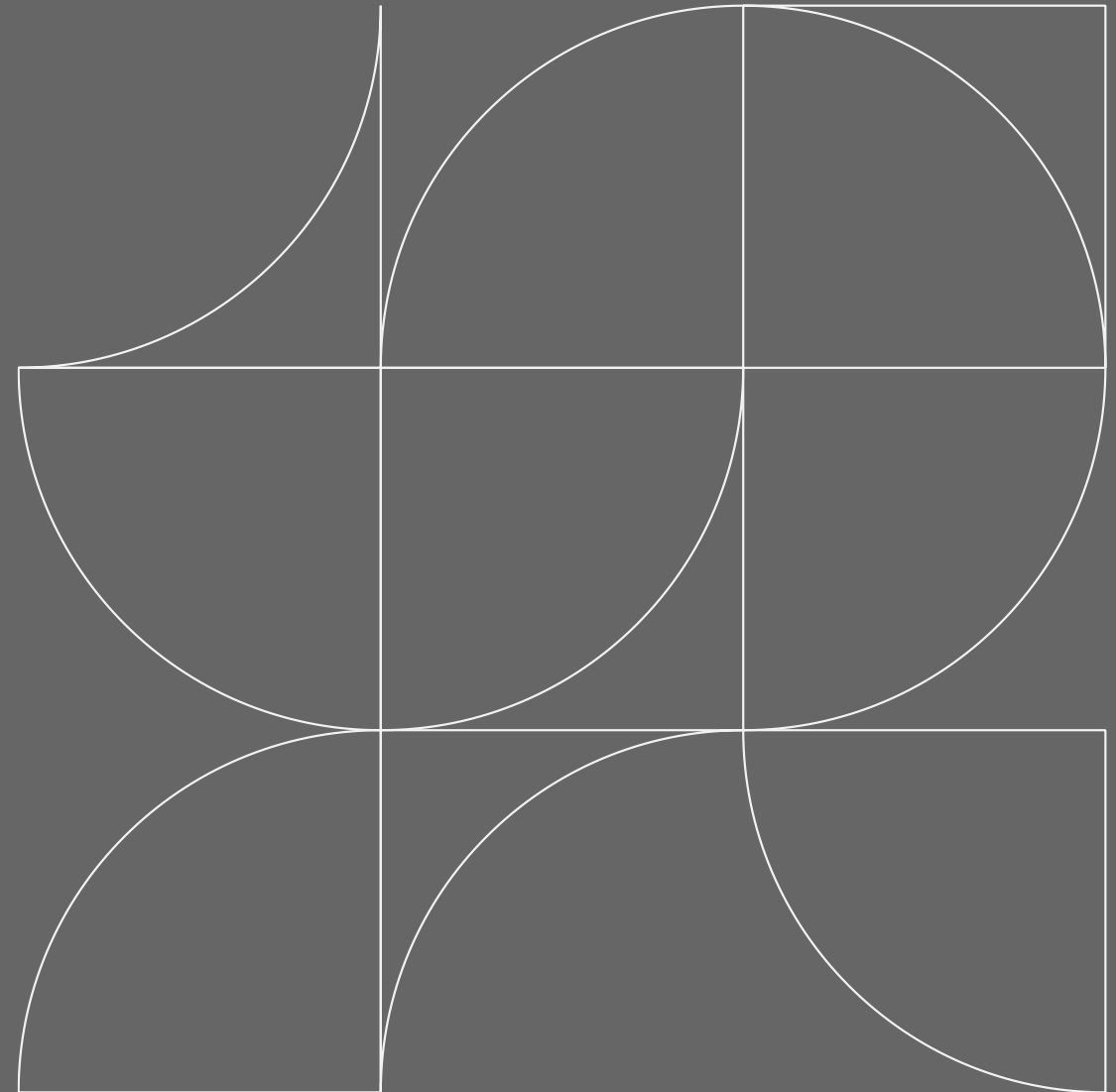
# COVID & Biometrics

- Contactless infrared temperature scanners



# Consumer Financial Services Litigation

Tonya Esposito







# Consumer Financial Services Litigation

- Continuing Impact of the Pandemic
  - Coronavirus Aid, Relief and Economic Security Act (CARES Act) of 2020
  - American Rescue Plan of 2021
  - Litigation and Enforcement Activity Expected:
    - Mortgage Forbearance
    - Foreclosure and Eviction Moratoria
    - Credit Reporting
    - Debt Collection
    - Bankruptcy



# Consumer Financial Services Litigation

- Regulatory and Enforcement Outlook
  - Democrats now in control of the House, Senate, and the White House
  - Biden-Harris Administration focused on consumer issues
    - Rohit Chopra appointment as Bureau Head pending
      - Current FTC Commissioner and track record as consumer advocate
      - Expected to take aggressive enforcement action
    - Recent CFPB Pandemic-Related Activity
      - Mortgage Servicing Changes (April 5, 2021 Rule Proposal)
      - Fair Debt Collection Practices Act (FDCPA) May 3, 2021 Interim Final Rule (amendment to Reg. F).

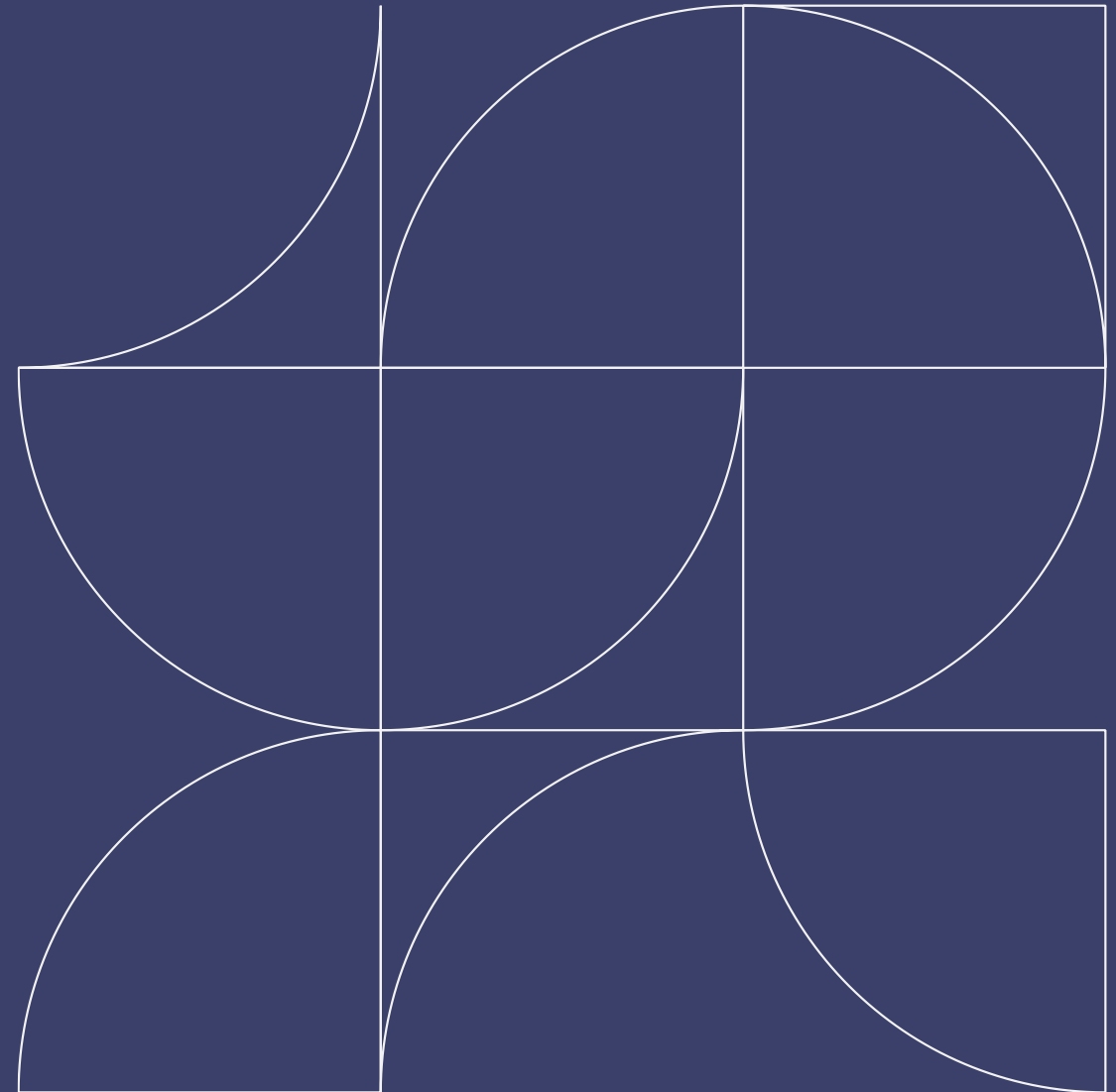


# Consumer Financial Services Litigation

- FinTech
  - Regulatory landscape will continue to evolve under Biden-Harris Administration
  - Expanded access to banking and investment products
    - this includes communities of color that have historically been underserved/underbanked
    - one way of addressing the racial wealth gap
  - Consumer shift during COVID led to increased usage
    - higher usage likely to result in more litigation and enforcement
    - compliance measures for FinTech companies is key

# Cybersecurity

Scott Carlson





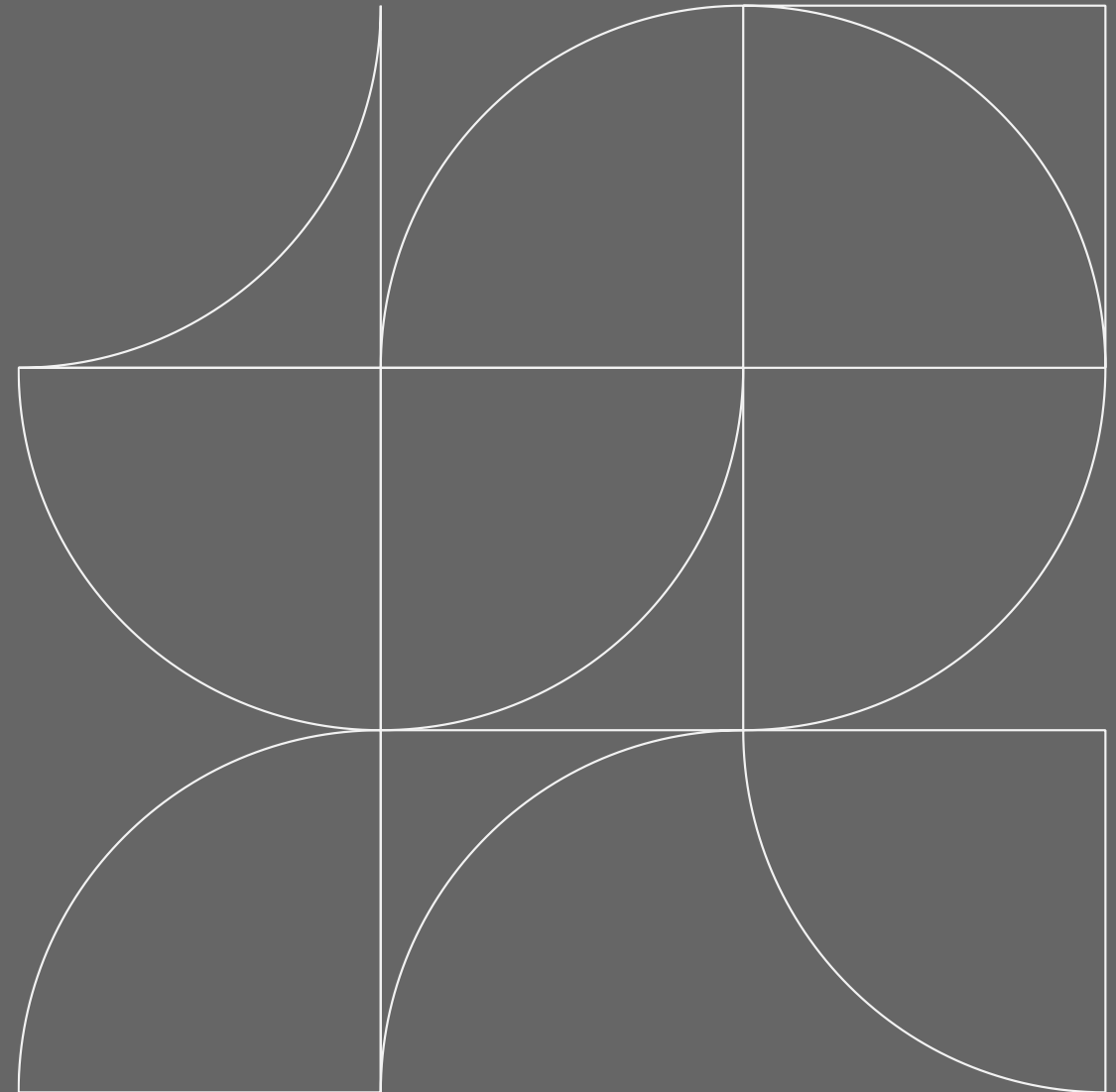


# Cybersecurity

- Ransomware on the rise and expanding more deliberately into data exfiltration
- Email compromise leading to wire fraud
- Employee training remains important
- Cyber insurance coverage is becoming increasingly expensive with stronger underwriting rules
- The usual threats continue
  - Unemployment insurance fraud
  - Other attacks

# eDiscovery

Scott Carlson



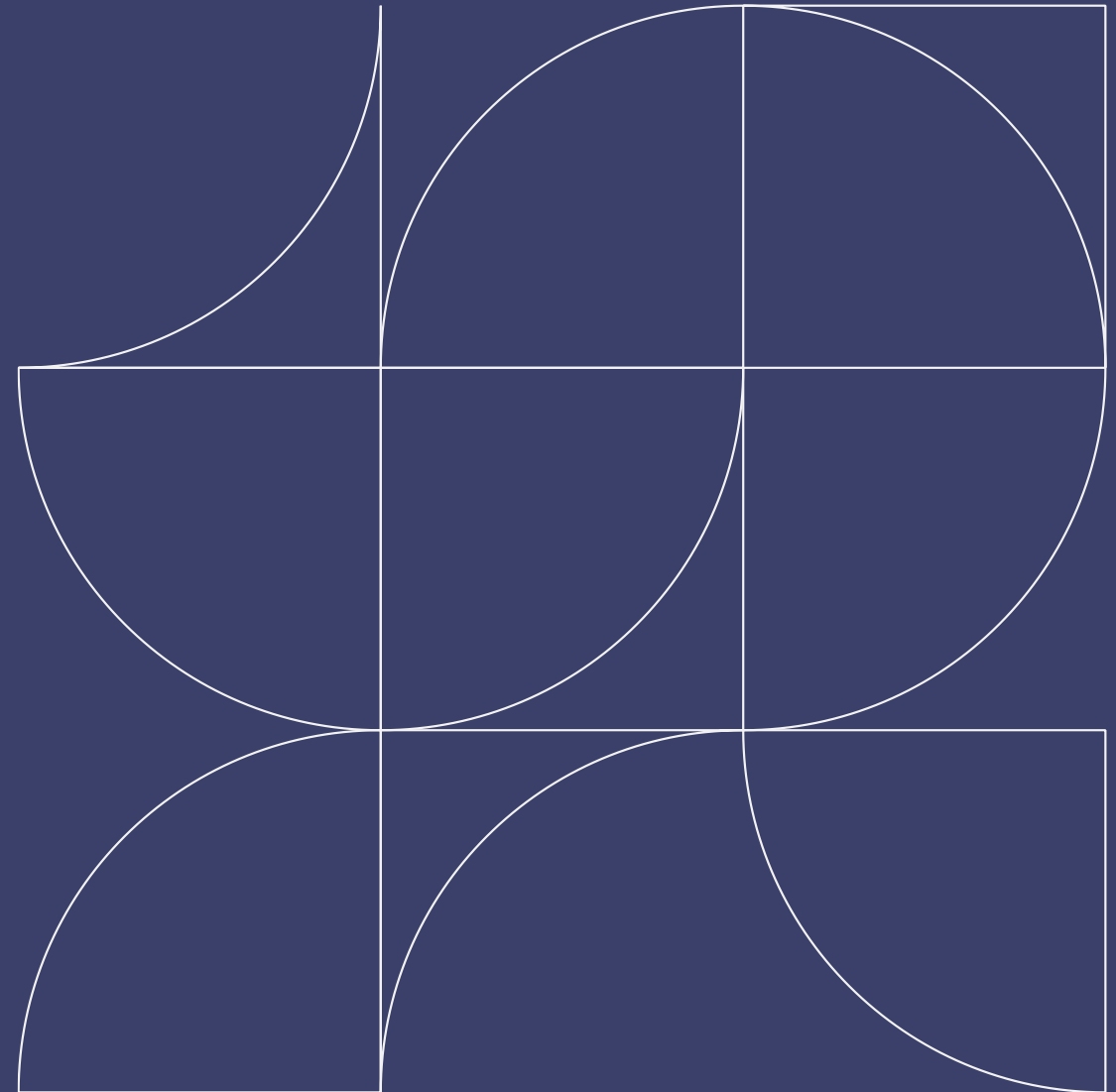


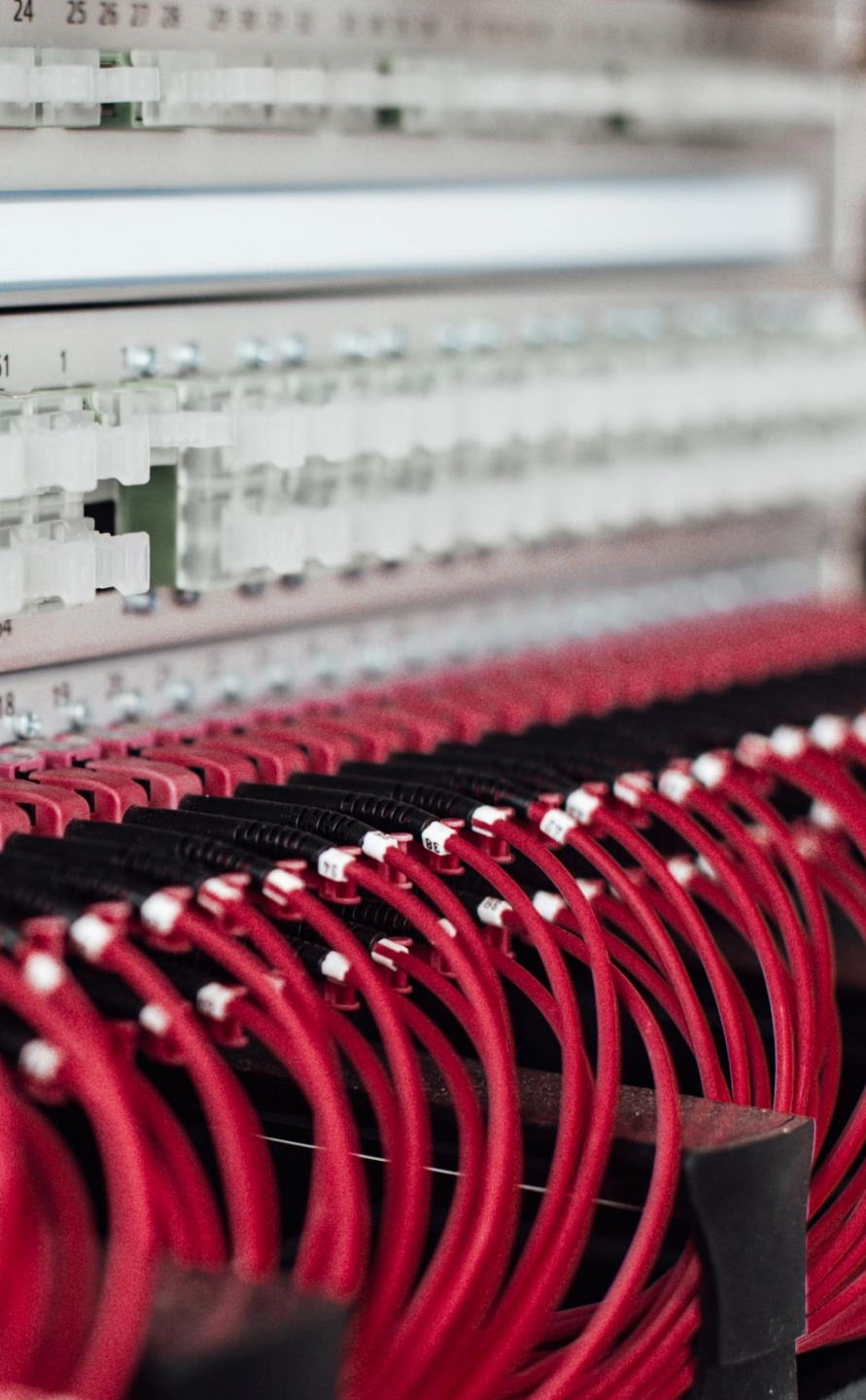
## eDiscovery

- Moving beyond “efficiency” and making the most out of your discovery
- Volume and variety of ESI is growing dramatically
- Advanced technology changing ediscovery dynamic
- The role of the ediscovery attorney is becoming more important

# Data Privacy

Jason Priebe



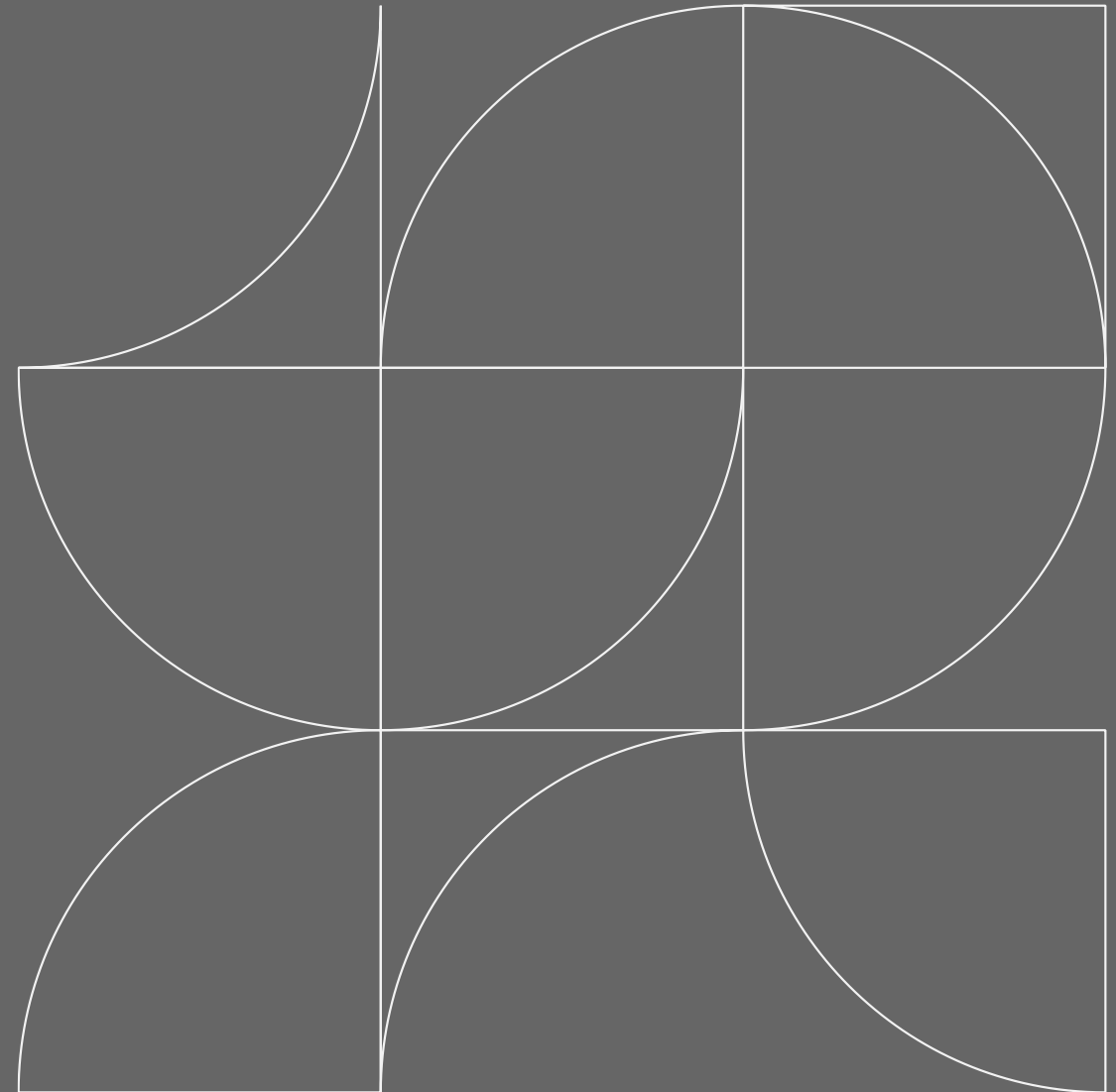


# Data Privacy Litigation

- **Information as a Capital Asset – Now more than ever**
  - Targeted online advertisement and Ad networks
  - Loyalty and reward programs
  - “data monetization”
- **State Privacy Laws for Consumer / Internet Information**
  - CCPA and CPRA
  - Virginia – PIPA
  - About 19 other states pending or in committee
- **Scope of Privacy Law Application Increasing**
  - Technical Rights Violations
  - Data Breach Class and Individual Claims
  - FTC Enforcement
- **International Regulation Continues Beyond Europe**
  - Mexico, Brazil, Argentina
  - China, Russia
  - APEC

# Health Care Litigation

Jesse Coleman







## False Claims Act (“FCA”) Basics

- Liability for anyone who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” to the US Government (3 elements). 31 U.S. Code § § 3729-3733
- Knowing failure to disclose material noncompliance can also lead to liability
- Claims subject to heightened pleading standards of Fed. R. Civ. P. 9(b)
- Qui tam relators v. government investigation and intervention
- DOJ may move to dismiss these claims to preserve government prerogatives





## Key DOJ Stats

- FY 2020 had lowest recovery of FCA claims (decrease of over 27% from approx. \$3.08 billion recovered in FY 2019)
- FCA **filings** were up in 2020 to their highest level ever (922 new FCA matters filed; up from 786 new matters filed in 2019).
  - Vast majority of new matters – 672 – were qui tam
  - 250 new government-initiated matters commenced in FY 2020; highest total since 1994
- End result: banner year in 2021 for FCA health care litigation



## Recent FCA Recoveries

- One company paid over \$591 million to resolve claims that it paid kickbacks to doctors to induce them to prescribe its drugs, selected ***high-volume prescribers to serve as paid “speakers” to induce the prescribers to write prescriptions.***
- Two companies paid a combined total of over \$148 million to resolve claims that they ***illegally paid patient copays for their own drugs through purportedly independent foundations*** that the companies in fact treated as mere conduits for these payments.
- Post FY 2020 – October/November 2020
  - \$2.8 billion global resolution for opioid kickbacks (included \$225 million individual resolution)
  - \$300 million payment promoting prescriptions of unsafe, ineffective opioids

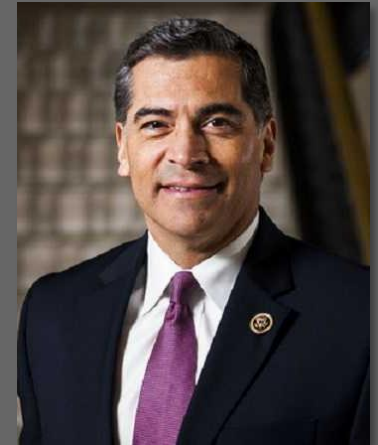
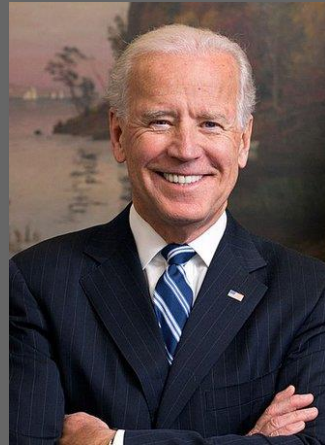
## Anticipated Cases in 2021

- Stark/AKS/CARES Act
- People creating fictitious companies in order to gain federal funds
- Selling fake vaccines and treatments
- Falsifying test results in government funded research for COVID-19 treatments
- Providing substandard or defective equipment, including PPE



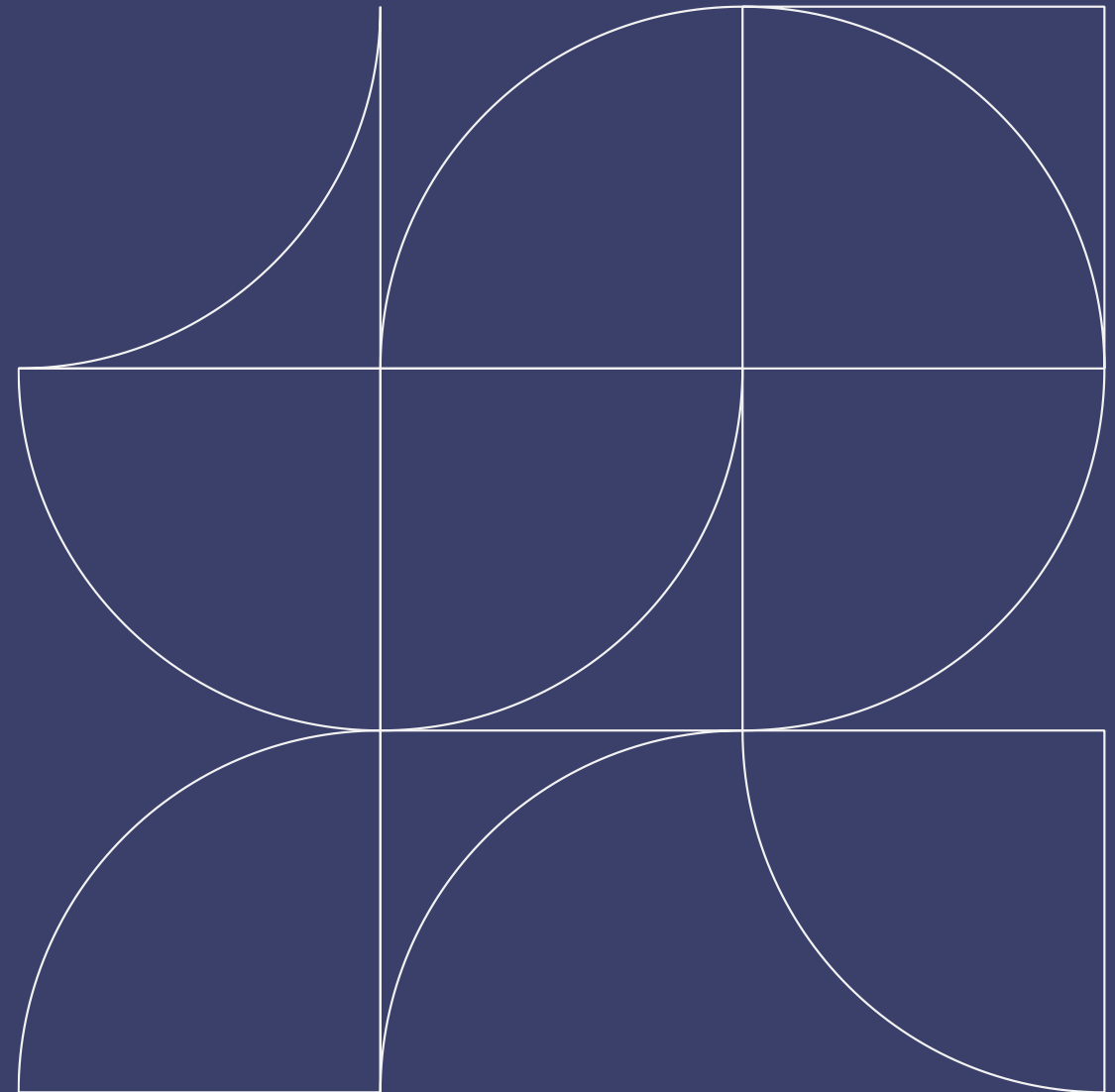
# Why Now?

- Pent up 2020
- President Joe Biden
- Vice President Kamala Harris
- HHS Secretary Becerra
- Single political party in effective control of the White House
- Rule changes for Stark and AKS laws with new administrative interpretations



# Real Estate Litigation

Mark Johnson and Elizabeth Schrero





# An Ever-Shifting Landscape

- Acceleration of Pre-COVID Trends
  - Rise of e-commerce and decline of brick and mortar retail
  - Struggles of developers, owners, retail tenants and homeowners
- Disruptive effects of the Pandemic will have increasing impact on real estate as the legislatively imposed eviction and foreclosure moratoriums and forbearance agreements expire and government-sponsored financial assistance ends
- Real estate market optimism and opportunity as well as necessity will spur real estate litigation



# Hot Areas and Trends for 2021 Real Estate Litigation

- **Commercial Landlord-Tenant Disputes**
  - *Force Majeure*
  - Casualty
  - Frustration of Purpose
  - Impossibility & Impracticality
  - Temporary Frustration of Purpose
  - Co-tenancy Failures
- **Insurance Coverage Litigation Regarding Claims for COVID-Related Business Loss**





## ...Continued

- **Foreclosure and Bankruptcy Proceedings**

- Anticipated increase in mortgage foreclosures once moratoria are lifted, particularly in retail and hospitality sectors. This will also likely cause an increase in bankruptcy filings.
- Novel issues relating to COVID-19 are being raised (i.e., what is a reasonable UCC sale plan during a pandemic?)
- Anticipated Shopping Mall disputes (unpaid rent, co-tenancy failures, going dark) will lead to mall loan failures and loan foreclosures.
- Bankruptcy filings are on the rise compared with 2020
  - Ch. 5 Relief is available for smaller reorganizations.
  - Bankruptcy Court Decisions on the contractual and equitable arguments dominating retail and office lease disputes have resulted in varying outcomes.

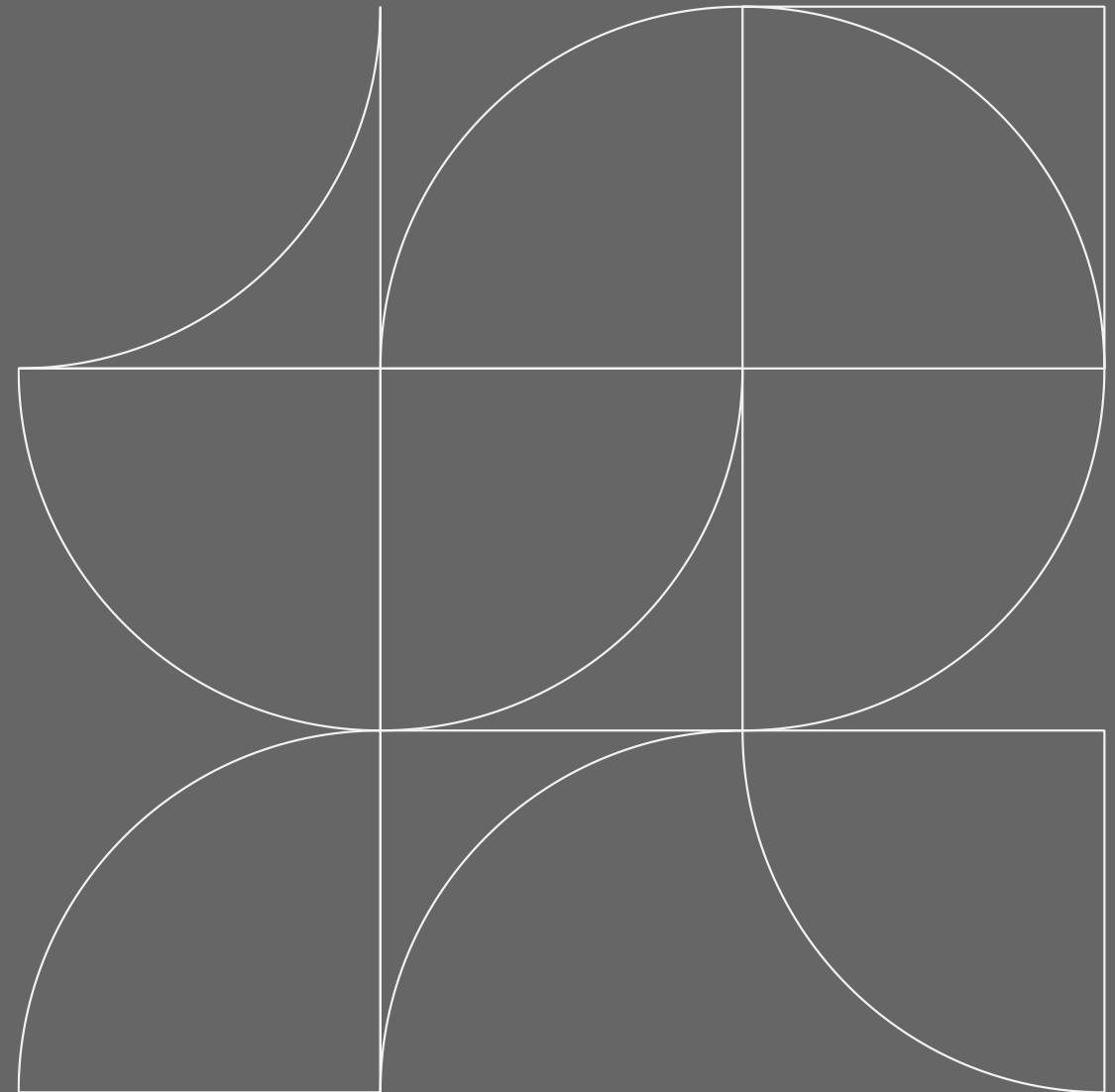


# New Areas of Potential Real Estate Litigation

- Claims against Owners and Property Managers arising from actions taken or not taken during the Pandemic (i.e., alleged improper restrictions or obligations imposed or alleged inadequate protective measures taken). There also may be insurance coverage litigation arising from such claims.
- Cybersecurity claims
- Claims relating to inaccurate or incomplete disclosure regarding impact of COVID-19
- Claims relating to compliance with legislative mandates for Board gender diversity disclosure and lack of diversity

# Trial Outlook

Chris Robertson

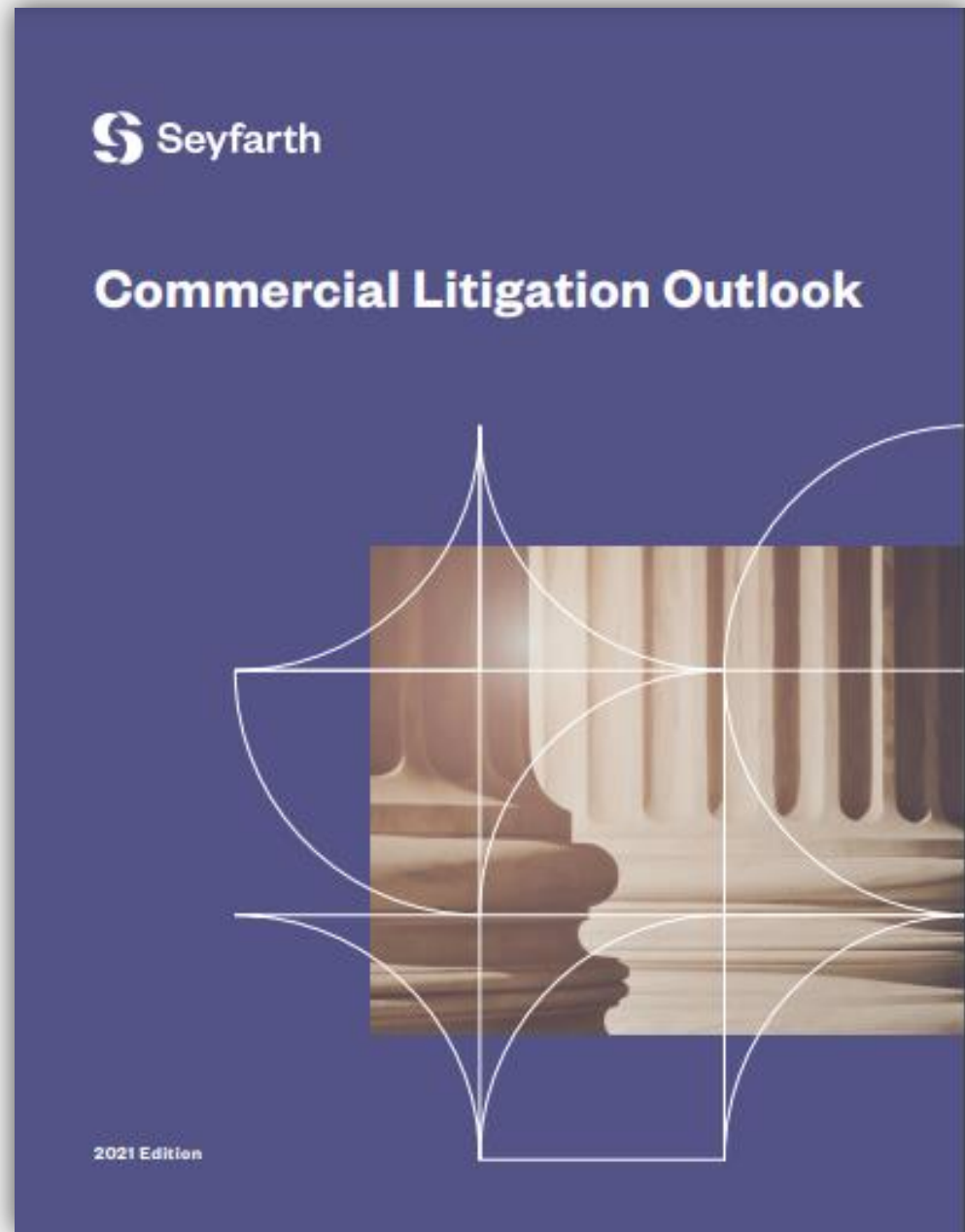




## Trial Outlook

- Remote Hearings
  - Legislation and Court Rules
- Remote Trials
  - Logistics and Timing
  - Evidence and Witness Testimony
- Criminal vs. Civil Trials
  - Priority of Trials
  - Live vs. Remote
  - Appellate Issues
- Remote Arbitrations
  - Rules and Procedures
- Remote Mediations

**Available  
Now**



# Please contact us with any questions.



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