

TAMING THE COMPLEXITIES OF COMPLEX LITIGATION

THE PRACTICE MAKES PERFECT

SERIES - 4 / ARTICLE - 4

OCTOBER 19, 2022

By **Jeffrey Brochin, Esq.**

GreenPoint>
Law & Compliance

william.anderson@greenpointglobal.com | pranav.menon@greenpointglobal.com

International Corporate Center, 555 Theodore Fremd Avenue, Suite A102 Rye, NY 10580

www.greenpointlegal.com

Any lawsuit may be lengthy, costly, require outside experts, involve multiple parties, and have significant sums of money at stake. But when you seriously up the ante for each of those factors, drawing the litigation out over several years—if not decades—and employing not a few but full-fledged teams of attorneys while battling over hundreds of millions or even billions of dollars, you have the hallmarks of a complex litigation case. Not for the uninspired nor the garden-variety litigator, complex litigation practice requires an investment of time, energy, focus, financial resources, and commitment to the cause, possibly in multiple jurisdictions, for the—very—long run. Let's take a look at how top-gun complex litigation experts tame this organizational nightmare.

Record-breaking Litigation

Complex litigation cases can arise from virtually any dispute, whether over taconite tailings dumped into Lake Superior (eight years), overcharging by a healthcare provider (seven years), securities fraud by high-tech and pharmaceutical companies (fifteen-sixteen years), or, the granddaddy of them all: the Myra Clark Gaines litigation (Louisiana) running fifty years from 1834 until 1889 when the U.S. Supreme Court finally ruled in her favor—unfortunately, four years after poor Myra's passing.

Along the way, of course, neither nature nor the law stands still while waiting for the verdict, and as a result, lawyers can leave the team and move on to another firm, judges can retire, and intervening precedential rulings—especially from the U.S. Supreme Court—can, as Robert Burns poetically noted above, seriously upset the trajectory of one side's careful litigation planning.

What's Taking So Long?

Sooner or later, your sophisticated business clients will likely find themselves engaged in complex litigation, usually structured as a putative class action, whether as a result of alleged securities fraud claims by shareholders arising

out of 'misstatements', or mass tort MDL litigation due to medical device or pharmaceutical product negligence, or other similar disputes. In those cases, the first step involved is certifying the class—which can take months—followed by the battle over who wins the Holy Grail of being appointed Lead Plaintiff and Lead Counsel.

With those 'preliminaries' out of the way, the case then inevitably turns to one of pre-trial motion practice with the FRCP Rule 12 arguments taking off: Rule 12(b)(1)—lack of subject matter jurisdiction, Rule 12(b)(2)—lack of personal jurisdiction, Rule 12(b)(3)—improper venue, and Rule 12(b)(6)—failure to state a claim. In most cases, discovery is stayed pending the outcome of such motions to dismiss, thus further delaying the progress of the case. And, once discovery does get underway, the next points of contention are the qualifications of expert witnesses and the various Daubert challenges to them, along with motions to exclude reports, tables, charts, statistics, and other bits of expert testimony proffered by each side. Unhappy with a ruling along the way? No problem. An interlocutory appeal will render the 'final' say—for now.

“THE BEST-LAID SCHEMES OF MICE AND MEN, GO OFT AWRY”

— *‘To A Mouse’,*
by Robert Burns
(November, 1785)

In the Words of An Expert

A California complex litigator with over 20-years of first-chair experience has offered some tips on how to manage the unmanageable over the long run. His first tip is to stay focused throughout the litigation until the matter's conclusion. Both the legal team and the client need to be realistic about the prospect of impending fatigue and prepare for it by maintaining the focus of the case. Part of that preparation includes:

- **Building the Team:** Building a solid bench of lawyers who are experienced in general litigation and sophisticated motion practice and have legal expertise in the industrial or commercial topic of the case, even if not SMEs, is crucial to building an effective legal team. Aside from the First Chair, every complex litigation team needs a qualified Second Chair who has a global view of the litigation and who can oversee its management.
- **Sharing Knowledge:** Big picture planning should not be left to a few seasoned practitioners but rather should draw more universally from other team members, who should be given roles and responsibilities not just for the inherent value to the litigation scheme but also to keep their enthusiasm and focus sharp and provide them with a sense of shared ownership. The team must develop a team culture and community that readily shares litigation intel and other institutional knowledge with all team members. Once put in place, the team's members must feel empowered to go forward and contribute to the strategy.
- **Creating a Timeline:** Your litigation timeline will of course turn out to be a moving target as events invariably unfold that you cannot control. However, starting with a firm idea of where you want the litigation to go and by what general date points is an indispensable exercise, for it will first of all, communicate to all team members where you are going and what is expected of each one, and, in addition, will map out the progress—as well as the hiccups—of your litigation strategy. Furthermore, as you update your timeline—a must—it will provide an archival record of what has been achieved to date as well as what needs to be drafted and filed as the protracted litigation draws out. Lastly, it will serve as a record of informing your client as to what has been accomplished.
- **Client Contact:** While clients of course need to be regularly updated as to the progress of any legal services rendered by your practice, in cases of complex litigation, as noted above, the client is also inclined towards 'litigation fatigue', and might perhaps urge quick settlement just to get the matter behind them—even if it is not in the client's bests interest to do so. By updating the client as to 'how close', or, remote, the likelihood of prevailing is, both the ethics involved as well as attorney-client relationship

considerations are preserved. Over the long run, complex litigation cases have their rewards, if not by way of a prized multi-million-dollar judgment, or conversely, a dismissal, then at least by way of the substantial hourly billings accrued. The main thing, for either side, is to not lose focus!

Executive Summary

1. The Issue

How to manage long-term, complex litigation often times comprised of a class action or MDL proceeding.

2. The Gravamen

Proper planning and staying focused are essential elements of standing up to the rigors of complex litigation, typically lasting several years.

3. The Path Forward

By building and empowering a team of experienced lawyers with duly delegated responsibilities among your legal team's members, your firm will be well positioned to maintain focus and counter the scourge of 'litigation fatigue.'

Action Items:

1 Build:

Assemble a team of both seasoned litigation and motion-practice experts, as well as those having legal expertise in the topic of the case.

2 Empower:

Team members must be given roles and responsibilities, affording them the opportunity to see and participate in the 'big picture', and to contribute to the litigation culture and strategy decided upon.

3 Timeline:

Benchmark planning as to requisite filings, and a record of successes, defeats, and solutions going forward will give your litigation scheme structure and define the course of your strategy.

4 Communications:

Communication within your team and between you and your client will help all concerned to maintain critical focus and avoid the inherent complex litigation fatigue.

Further Readings

1. <https://corporate.findlaw.com/litigation-disputes/smart-ways-to-re-solve-complex-litigation.html>
2. <https://higgslaw.com/three-points-planning-managing-lengthy-com-plex-litigation/>
3. <https://www.majlaw.com/blog/2016/august/what-is-complex-litigation-/>
4. <https://www.crowell.com/Practices/National-Coordinating-Coun-sel-Complex-Litigation/Management-of-Complex-Litigation>
5. <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1319&con-text=lawineq>



Jeffrey Brochin, Esq.

GREENPOINT STAFF COUNSEL
AND CONTENT EDITOR

After receiving his Juris Doctor degree from The John Marshall Law School in Chicago, Mr. Brochin served as an Administrative Law Judge with the Illinois Department of Labor for six years where he presided over cases dealing with job separation issues and matters pertaining to contested Unemployment Insurance claims. He also co-wrote the agency's administrative rules, and periodically served as a 'ghost writer' for Board of Review decisions. Following that position, he was Director of Development for a Chicago-area non-profit college where he was responsible for High Net Worth donations to the institution. For the next eighteen years he practiced as a solo practitioner attorney with an emphasis in the fields of Real Estate law and Commercial Contracts transactions, and was an agent for several national title insurance agencies.

In 2003 he was recruited to head up a U.S. title insurance research office in Israel, a position he held for four years, and between 2007-2017 he participated in litigation support for several high-profile cases. He has taught Business Law as a faculty member of the Jerusalem College of Technology, and has authored a wide variety of legal White Papers and timely legal articles as a professional legal content writer for GPL clients. Separate from his legal writing, he has co-authored academic articles on Middle East security topics that have been published in peer-reviewed publications.



William H. Anderson, Esq.

MANAGING DIRECTOR AND HEAD OF
FINANCIAL PRODUCTS AND SERVICES

William Anderson is Managing Director and Head of Law & Compliance. He leads the GreenPoint practice in providing regulatory, legal, and technology solutions to law firms, legal publishers, and in-house law departments around the world, overseeing our team of experienced US attorneys and data and technology experts. Will has over 25 years' experience working with corporations to improve the management of their legal and corporate compliance functions. Will began his legal career as a litigator with a predecessor firm to Drinker, Biddle LLP. He then served as in-house counsel to Andersen Consulting LLP, managing risk and working with outside counsel on active litigation involving the firm.

Will has leveraged his legal experience interpreting regulations and appearing before federal (DOJ, SEC, FTC) and state agencies (NYAG) to oversee research and other areas at Bear Stearns. In this capacity, he counseled analysts on regulatory risk and evolving compliance requirements. Will also consulted on the development of a proprietary tool to ensure effective documentation of compliance clearance of research reports. Will then went on to work in product development and content creation for a global online compliance development firm pioneering the dynamic updating of regulated firms' policies and procedures from online updates and resources. Will holds a Juris Doctorate with High Honors from the Washington University School of Law in Saint Louis and is admitted to state and federal bars. He lives in Pawling, NY, with his wife and daughter.



Sanjay Sharma, PhD

FOUNDER AND CHAIRMAN



Pranav Menon, Esq.

LEGAL RECRUITMENT
MANAGER AND DATA
PRIVACY SPECIALIST – LAW
& COMPLIANCE | GPESR

GreenPoint>

Law & Compliance

About GreenPoint Law & Compliance

- ▶ GreenPoint Global was founded in 2001 and since that time has faithfully served an expanding roster of clients. GreenPoint leverages a unique combination of US-trained attorneys and proprietary technology to deliver a unique offering of skill and flexibility to meet client needs.
- ▶ Our core team of experienced US attorneys is based in Israel and works US hours. The breadth of experience of our attorneys ensures high-quality, cost-effective results across a wide range of legal, compliance, and regulatory matters.
- ▶ GreenPoint's methodology and proven track record of achieving client objectives has resulted in a broad base of clients in the United States, ranging from Fortune 500 insurance companies to solo practitioners, law firms, in-house law departments, and legal publishers. GreenPoint attorneys are selectively recruited and deployed based on possessing demonstrable subject matter expertise covering a broad spectrum of substantive US laws and regulations. The work product of our attorneys is thoroughly vetted internally before delivery to client. Adherence to quality, value and flexibility is at the core of our foundation.

GreenPoint>

Global

About GreenPoint Global

- ▶ GreenPoint Global provides litigation support, finance and technology solutions to insurers, law firms, banks, and in-house law departments through our subject matter experts and process specialists.
- ▶ Founded in 2001 and headquartered in Rye, New York, GreenPoint has grown to over 500 employees with a global footprint. We have a stable and growing client base that ranges from small and medium-sized organizations to Fortune 1000 companies worldwide. Our production and management teams are located in the US, India, and Israel with access to deep pools of subject matter experts. Our greatest strength is our employee-base of experienced lawyers, paralegals, process specialists, financial analysts, and software developers. We have leading edge software development capabilities with over 50 professionals on staff, working on internal and client projects.
- ▶ GreenPoint is certified by the TÜV SÜD (South Asia) for the highest standards of Quality Management (ISO 9001:2015) and Information Security Management (ISO 27001:2013). GreenPoint is certified as a Minority and Woman Owned Business Enterprise (MWBE) by New York City and a Minority Owned Business Enterprise (MBE) by the State of New York. GreenPoint complies with all federal and state contracting requirements. GreenPoint is owned by its founders and principals and is debt free. For comprehensive information on our services and products under Law & Compliance and Finance, please visit our subsidiary websites through the division's menu.

