



## **Ep. 36: Litigating During COVID: What You Need to Know**

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**Jose Garriga:**

Hello and welcome to *OnAir with Akin Gump*. I'm your host Jose Garriga.

Many of you may be wondering just how litigation may have changed during this pandemic. Today, we have, returning to the show, Gorav Jindal and Corey Roush, two of Akin Gump's antitrust and competition partners, based in Washington, D.C.

They're fresh off a two-week federal trial in St. Louis, Missouri, in which they defended Peabody Energy against the Federal Trade Commission's attempt to block its proposed joint venture with Arch Coal. They'll provide their perspectives on what's different, what worked well and what you should consider as you attempt litigation in a COVID-19 world.

Welcome to the podcast.

Gorav, Corey, thank you both for appearing on the show today. This litigation's a big deal for a number of reasons. To start, Gorav, could you tell us what the litigation was about?

**Gorav Jindal:**

Absolutely. And it's a pleasure to be here with you as well. As you mentioned, we represented Peabody in its proposed joint venture with Arch Resources. To give you a little bit of background, Peabody and Arch are the two largest coal producers in the United States. They have mines throughout the United States, but, in particular, the region that we were concentrated in is a region called the Powder River Basin, or PRB. Two of their flagship mines are located right next to one another; they're basically neighbors in the Powder River Basin. And as you may have read, the coal industry has declined in recent years, largely because of the influx of natural gas and renewables. The primary goal of this joint venture was to lower their cost by, among other things, combining those contiguous mines that I was just talking about.

As just a little bit of background that might be helpful, the industry itself has been the subject of FTC prior litigation. Not too long ago, in 2004, the FTC challenged a similar combination also involving contiguous mines and, in fact, involving Peabody's partner Arch. Ultimately, in 2004, and this is important for background purposes, the court

determined the market or the playing field in which you might try to compute market shares to try to predict adverse competitive consequences for the Powder River Basin coal or, really, even just a subsection of it, the southern Powder River Basin coal. And so what this transaction was largely about was whether or not the playing field is going to be defined correctly, the field in which you might try to compute market shares.

And then, according to the FTC, they were alleging that the market was limited to southern Powder River Basin coal, and we argued that it was broader than that and included fuels beyond southern Powder River Basin coal, things like natural gas. The determination about what is the right playing field would lead to dramatically different results about what that market share would be. And, so, in a nutshell, that's essentially what this litigation was about.

**Jose Garriga:** Thank you. Going back to something I mentioned in the introduction, and that's the pandemic. Many commentators have noted that COVID-19 pandemic is one of the most significant global health crises in a century. In response, a lot of businesses and governmental agencies have shut down. Why did this litigation go forward now?

**Gorav Jindal:** I think everybody has seen dramatic effects from COVID-19, and, certainly, health is the most important thing, and it certainly is paramount and everything, but like everything, things have to go on, and business must go on. This particular joint venture was signed before the pandemic started. It was signed in June of 2019, and mergers, in particular, have short lifespans. It's difficult for them to be held together indefinitely. And, so, both Peabody and Arch, as public companies, needed the cost savings to compete in a challenging economic environment before the pandemic. And, really, the pandemic just amplified the need for that kind of cost savings. As part of the law, the legal clearance process, Peabody can't close its joint venture without antitrust clearance. So, we needed a decision one way or the other. Letting it hang was just not an option. That's just the way transactions and mergers like this one had to work.

**Corey Roush:** Let me add, this is not unusual in the merger context, as Gorav said, they have a short life typically. And, so, merger agreements often have provisions that say, "If we haven't closed by a certain date, we're going to drop the deal because the value changes." While the trial was quite different than those that we've worked on before, the need for speed that we had here, the need to get it done by a date certain to get a judge's decision by a date certain, is actually the norm. It's just never been that you've had driving to that date in the midst of a pandemic before. We couldn't move, like so many of the cases that I have that are not merger cases, we couldn't move deadlines outside of a certain timeframe and just wait until a vaccine got us all comfortable with the notion of being in a courtroom again.

**Jose Garriga:** Speaking of this need for speed, the concept of the discovery period and an abbreviated discovery period in a case such as this, can you give us a sense of the timing involved in all this?

**Gorav Jindal:** It is interesting, particularly as Corey had mentioned, these things typically happen quickly. Merger litigation is often intense, but to give you a specific context of this particular transaction, we were trying to persuade commissioners who have to vote to decide whether to challenge a transaction at the end of February. And the filing of the complaint by the FTC just happened two days later. It was a pretty quick decision from pivoting to persuasion to preparing for trial. Immediately after the complaint was filed during that first week of March, we were negotiating discovery with an aim to start trial in St. Louis sometime in early June. Of course, you know, putting us back at that particular

period of time, none of us knew. We had no idea how much the pandemic was about to change the world in just a matter of a couple weeks.

**Corey Roush:** Remarkably, we set that schedule early really before we all knew that we were going to be working from home for the next several months, but we ended up only pushing the trial date twice. And, so, we ended up starting a little over a month after we had originally planned in the negotiated schedule. In any merger litigation, I like to say, we do in four to six months, what usually takes two to 10 years, depending on the litigation.

To put that in perspective, over the course of the less than five months that we have filing of the complaint and the starting of the trial, we and our co-counsel took or defended 40 depositions, including five expert depositions, produced over 80,000 documents, had over 1,000 pages of expert reports produced, drafted almost a dozen motions or responses to motions and, all told, from that filing of the complaint in February, there is now over a 450-entry docket. Needless to say, our home offices were very busy because all of this, other than the trial, what was from our homes.

**Gorav Jindal:** Just to piggyback on that, because that's the litigation piece. But again, to give you a sense for how much was being done and to give a little bit more perspective on the complexity that we were rolling into for purposes of litigation during a pandemic, the record was already very rich. The investigation that the FTC conducted into the transaction lasted about seven months. As part of that investigation period, we produced over six million pages of documents, we defended over a dozen deposition-like kind of testimony. We made nearly 20 person presentations and submissions. Really, the punchline that I'm trying to drive at is that the investigation period was intense. Litigation is always challenging, but the pandemic just amplified those challenges. It created new ones on top of it.

**Jose Garriga:** That's remarkable. Now, I know from our previous episode and I'll direct listeners to our previous chat back in January of 2019, but I know both of you have defended parties against the FTC and also the Department of Justice in antitrust merger litigation. Corey, if you would, can you tell us whether litigating this matter was different at all? You've alluded to some of this, but how is it different at all from your other merger litigation experiences?

**Corey Roush:** The issues, the application of the facts to the law were essentially the same. Different facts, but the law is the same. And, really, the strategies that I think both the FTC and we employed in terms of getting out the best evidence on behalf of our cases were all the same. But the logistics, as you can imagine, were vastly different, particularly for discovery and trial. I'll focus on the document production side and then let Gorav focus on the deposition side.

On documents, it wasn't just us working from home, or the FTC working from home, sending out subpoenas and then everybody across the country having the ability to go into the office. Almost everyone, other than the sort of people necessary to keep coal plants running, were working remotely. IT departments were largely at home; they had to deal with a very distributed workforce. The normal practice is you issue the subpoenas to third parties who are customers, and you get documents and data from them that allow you to build your case. I don't think anybody who's done this would say that those document subpoenas and discovery is extremely narrow. In fact, you usually get the overbroad objection. And there's a reason that we issue broad subpoenas because we don't want to leave any stones unturned.

And, so, we issued subpoenas that were narrower than normal, but we then had to make decisions that cut those even more. It caused both sides to be extremely focused, to prioritize what they would and, frankly, could get from third parties, knowing that often the third-party documents are the ones that will most clearly reflect what the market definition is and what affects their purchasing decisions. We had things that I personally have never seen before: third parties where we really wanted their material, but we knew it was going to be too dense even if we got it within a few weeks or a month that we had at that point, that we just didn't get it. Or there were parties who were on the FTC's witness list where we would have really wanted to get a lot more information, and we'd compromise for getting emails from just the deponent, two people who worked for the deponent. We had to work with IT departments and in-house counsel and outside counsel for customers in states across the Midwest, the South and the West.

As a sort of personal note, it was pretty stunning how much everyone did come together and work together despite this being a litigation where we and the FTC clearly had differing views, and third parties had differing views. None of the disputes that we had really related to, or none of the disputes we took to the court related to the production of materials based on COVID. Everybody really worked together to make this work in a really unique time.

**Gorav Jindal:**

Let me just comment really quickly on depositions, because, as Corey mentioned, logistics are very different and for those of you who have a background with the deposition process, in the COVID world, depositions occur very differently. All of our 40 depositions were done remotely. And, so, we're sharing the Internet with everyone else in the world, and, so, you've got to accept that there will be logistical hiccups, and you try to solve some of those things by agreement with opposing counsel by saying things like, "If we experience technological issues, or you do, we'll agree not to count that time in which technological issues are occurring against either one of us because it's not any of our fault." But you have to accept that it's going to throw you off.

And so just to give you a picture of what that kind of situation was like is, we were using a Zoom-like platform where you could see the people who were involved, imagine the witness, their counsel, opposing counsel, much like you might see the introduction to *The Brady Bunch*, where you have a bunch of different squares up on your screen with faces, except one of those squares would be the documents you might show the witness. And, while the technology is clunky, you're trying to make sure that everybody can see what you're trying to show them, including the documents. So, if it's a particularly dense document, you have to be able to zoom into a particular portion. If you want to switch over to a particular page, you've got to flip through those pages.

Those things take time, and things that we might take for granted in ordinary law exposition, like comparing and contrasting paper exhibits, are much harder to do in a remote world because you have to factor in time it takes to pull down a document remotely and bring up another one, get to the right page, make sure that they have the right context. Some of these things we tried to solve by trying to provide paper documents ahead of time. Unfortunately, that comes with the downside of compressing your preparation because if you want to submit documents to the other side, and you can be creative and try to figure out ways that prevent them from being able to see some of those documents, of course, by agreement. But you have to be ready earlier than you might otherwise be. You can't be working right up until the morning before your deposition. You've got to be able to have all of those exhibits ready to go or, at least, identify the universe of ones that you will have ready to go. And you need to back out the time that it will take to get them into production, make binders. And then, in today's

COVID world, you can't expect that getting them to your overnight delivery service by 8:00 or 9:00 PM will get them to you, wherever they might be, in the morning. You've got to make lots of copies, not just for the individual witness who's in one place, but their counsel in a different place, opposing counsel, et cetera.

It takes a lot of time that you have to factor in. But I think, overall, the key thing I would say is you cannot expect to get the normal efficiency you would get from a typical seven-hour deposition. You've got to adjust that down substantially and focus on the questions much like Corey was saying that you have to for the document discovery. You really cannot expect that you're going to get seven hours' worth of questions in like you would in a typical live deposition. I think you have to adjust that downward substantial. I think that you might get about five hours, really at maximum, given the challenges and the idiosyncrasies of a technological platform.

**Corey Roush:** Let me add that what Gorav was talking about was even more complicated for the dozens of third-party witnesses, the non-experts, because the agreement that we had with the FTC was that if both sides noticed a witness, we would each get to split the seven hours. We weren't going to try to inconvenience folks and make them go through two days of deposition. The need to prioritize and to focus was even greater for those third-party witnesses where you ultimately had three-and-a-half hours of testimony. You can imagine that, by the end, even though we were getting a little bit more facile with how to do this, depositions were not nearly as document intensive as they might have been in an in-person situation.

**Gorav Jindal:** Yeah. And just one point on that, because that's exactly right. One point of best practice that at least I found to be helpful, that might be helpful for others who are considering taking depositions too, is we would often tag team the approach. If I was examining a witness, I might have one of my colleagues working the exhibits so that if we needed to pull up a particular exhibit, I wasn't also simultaneously diverting some of my brain to handling some of the logistics. Different people had different approaches in that respect. Some people are more technologically facile than others, but I found, and it may be helpful to consider, having someone else helping you if you're the examining attorney so that you can focus your attention on questioning.

**Jose Garriga:** That's a good point. Thank you. A reminder, listeners, we're here today with Akin Gump antitrust and competition partners Gorav Jindal and Corey Roush, discussing what litigation's like during this pandemic.

We've covered the pretrial bit, the document production, depositions, but now trial itself. What was trial like in the middle of a pandemic? Corey, can you give us a picture of that?

**Corey Roush:** Sure. The normal federal courthouse is the judge is sitting up in front of the litigants and in front of, in this case, her are the court reporter, clerk of the court and to the left is the witness stand. And this was a bench trial, so there was no jury. And so what they had done in the courtroom is to spread things out a bit more and to put in a good bit of plexiglass, frankly. The judge had plexiglass in front, to the side of her and then sitting in front of her is a court reporter and the clerk. They had plexiglass in front of them to separate them from the counsel. The witness stand had plexiglass in front of it, and then the counsel tables were divided into, depending on the size of the table, quadrants that had plexiglass divided up into four spots where it was a smaller table for two.

And then for the courtroom seating, even though the public wasn't allowed, other counsel for upcoming witnesses, et cetera, and the clients were there. They had marked off the seating, six feet apart, front to back and side to side to try to keep the social distancing throughout.

The first day we walked in, it was stunningly different, but, by the end, it just seemed like the new normal. I found, actually, the courthouse made me feel very safe, certainly safer than the hotel we were staying at. In addition, the courthouse wanted us to, at all times in the courtroom, either be wearing a mask or to have a plexiglass shield. And, so, you had the judge wearing a mask, you had the people asking questions wearing masks, and you had the witnesses in the courtroom wearing masks.

And in this world of, or new world of, trying cases for those who do that, you usually have, especially an out-of-town trial, a war room where you're set up, and you debrief every day, and you prep for the next day. Instead of a normal small conference room in a hotel, we essentially had the room that people get married in. And our stations were 12 feet apart, and if you moved around the room, you wore a mask. But if you were in your own station, you didn't have to. And it was just very different than what you normally have, but it ended up working.

And then you had to prep witnesses, both experts, party witnesses and third parties. And that was done almost all remotely, which makes it very hard to create the rapport that you want with your witnesses. And Gorav had a witness who was in Australia, I don't know that he ever got to meet him during this process. In fact, I'm pretty sure he didn't and had to field not just the remote logistics, but figuring out times to actually talk to him and prep him.

**Gorav Jindal:**

Corey, it might be helpful if, do you want to explain really quickly what it was like when witnesses showed up or some of the lawyers participated remotely, what that looked like?

**Corey Roush:**

Sure. That's a great point, Gorav. I describe this as if it's obvious, but almost all the witnesses were remote. We had two third-party witnesses that came live, who happened to be there in St. Louis. We had a few party witnesses who came live, they were also from St. Louis, and then the experts testified live. Other than those individuals, the other roughly 30 witnesses were all remote. And while most of the lawyers taking witnesses were in the room for the defendants, for the FTC, that wasn't the case. And defendants also had at least one witness where the lawyer was taking the testimony remotely. You had situations where you'd have a lawyer in the room with a video of the person's remote testimony. You had situations where the lawyer was in D.C. in a conference room at the FTC ask questions of someone who was live in the courtroom. And you had instances where neither the questioner nor the witness was in the courtroom, the rest of us were there, and the judge was then assessing the veracity of everything, being the only relevant person at that moment in the courtroom.

It created a very interesting dynamic. It led to timing issues. It led to making decisions that you obviously, you never have to make about, do I have the witness wear a face mask? Or is a plexiglass shield better able to convey the emotions and veracity of what's being said? And, candidly, it almost sometimes was better to have a witness remotely because their face wasn't covered, and the judge really could more, I think, clearly assess did the witness then when they were wearing a mask.

**Jose Garriga:** Well, that goes to the point regarding the judge. How do you think then, any of these issues or the aggregated issues affected how well the judge was able to consider the evidence that was being presented?

**Gorav Jindal:** It's, obviously, hard to say definitively because the trial just ended, and, obviously, there is no written opinion just yet that might provide particularly great insight about whether certain points landed or missed, but I will say both sides, as you would typically expect, both sides worked hard to adapt to the situation. I will point out one thing that I thought was really important about participating groups that might not otherwise participate as much because they're just not interested. From our perspective, and again, you have to think about this in the context of a merger litigation, where the government has prosecutorial discretion. They obviously have a reason in their view to bring a claim, and oftentimes if I go back to that playing field analogy, they think that the playing field is small, and the two particular players at issue here are large.

Having customers appearing remotely was a huge benefit to us. Just having that option was an enormous benefit for us because, in litigation like ours, it's hard to get customers to participate. The customers that do want to participate tend to be ones that are motivated to participate for the government. And even under the best of circumstances, few will be motivated to spend the time, energy and money to travel to testify for defendants when one perspective is that we're large players on a very small playing field. When you add in the global health emergency, no one wants to travel unless they absolutely have to. And even then they're going to resist for appropriate health reasons. Being able to get them to participate remotely from the comfort of their home and without having to travel or take any time really away, no material time away from work, improved substantially our batting percentage for having witnesses participate that might not otherwise happen.

In our particular instance, we had seven customers testify live at trial, which, in our experiences, is fairly remarkable. It does not happen that often that you will have customers willing to spend time and energy to testify at trial for the defendants, and that was a huge benefit. And, relatively speaking, given the ability to participate remotely, overall we had a much richer body of evidence. Both sides did. There were 24 live witnesses, counting party witnesses, third-party witnesses and expert witnesses. I think that's one important element of it is as you think about this: Lesser-motivated categories of entities might be more willing to participate if they are allowed to participate, or they have the option of participating, remotely without the expense and time associated with having to be there in person.

**Jose Garriga:** That's interesting. Corey, how about you? What stood out about this whole trial experience for you?

**Corey Roush:** Well, certainly as Gorav mentioned, the number of backed and third-party witnesses that came in was, it just really stood out to me. 24 live witnesses plus four more came in by video deposition, almost all of those were customers. But that's a lot of witnesses. And I mentioned earlier that this was a time trial. We and the FTC each had 25 hours to try our respective cases, including cross-examinations and rebuttal case. And that requires, in any situation, a remarkable amount of discipline. We actually ended up finishing with, I think, about 10 minutes left. Gorav had the last witness, but to give you a sense of the type of discipline, we set, with the co-counsel, at the very outset, how long we thought each witness would take, and we knew our minimum and maximum ranges to get to the 25 hours and knew that any witness going over would have to buy time somewhere else.

And we imagine the FTC did a very similar thing. And we had some witnesses go over, and it really caused us tighten some of our directs because we had to make up that time. For the most part, we were fortunate because we were in the courtroom and could be timing each other and could slip a note to say, "Look, you're above your max now." and try to get the person who had the witness to step down or finish up.

There was one particular instance where the FTC had a person who was taking the testimony from D.C. remotely. And there was just no way to slip him a note. and it seemed like the testimony went long. and we noted after that that their crosses and their directs became much crisper. And it's interesting being forced to be that crisp actually can make your case much more effective. And there's a lesson there that I think we as litigators when held to it, realize that you can, there's sometimes a lot of fluff that you put in testimony and if you're precise, you might do an even better job in your directs and crosses.

**Jose Garriga:** That's interesting here in sense of pointing out a possible advantage to what might otherwise be considered a disadvantageous situation or a very challenging set of factors to have to accommodate. And you've also, both of you, have made reference to some other things that might be considered unexpected benefits or advantages that emerged from this. Just as an open question to both of you, do you think any of these COVID-related adjustments are going to survive once the pandemic is in the rear-view mirror?

**Corey Roush:** One thing that I was thinking about is, I doubt that the plexiglass is going to come down anytime in the near future, regardless of vaccines. There are various things that we all carry that might cause that plexiglass to stay up and especially with judges who do sit through trials where there is plexiglass in the courtroom, it doesn't take long to get used to it. I think that's one thing. But from a strategic perspective, I think the use of technology to take remote depositions, as I mentioned, these depositions of folks—Gorav and I are both in D.C. as were most of the trial teams of both sides—these were of people in Oklahoma, Nebraska, Missouri. They were all over the country, and if this had not been a COVID situation, we would have been flying to each of those witnesses to take the deposition. And while there were disadvantages to doing it remotely, I certainly think that this is something that could continue in the future.

I also think that the remote nature of the trial testimony is something that, for judges like ours who have now experienced what it's like to have that testimony, and I think that she did not think she was disadvantaged by having them remotely, they might be willing to allow that in the future, which as Gorav mentioned, at least for the defense, we thought was a big advantage. Although a judge who hasn't experienced this might not be as willing to accept that that is a way that they can still test the testimony.

**Gorav Jindal:** I was going to jump in to say, I completely agree. I'll say it now: I completely agree. I think having this as an option, it can really change the way that people think about litigation risk, particularly for those participants who may not be motivated to participate because they don't have an ax to grind. They don't have as much at stake, but they still have helpful information and evidence that they can provide. Allowing them or improving their ability to participate, the so-called lesser interested parties, but those with very much relevant evidence, may ultimately lead to richer bodies of evidence, richer records, and improve the risk calculation, or at least change the risk calculation versus the typical litigation strategy where you have to factor in that certain groups of potential testifying witnesses may be less inclined to participate, so you have to litigate those kinds of cases without the benefit of that information.



I think now if this survives, you will have to factor that in, and it may help you in certain instances, and it may hurt you in others. And I think that's something that, as a consequence of what Corey was just saying, may be one that we learn to think about as a residual effect or a longer-lasting effect of COVID.

But I would say one other thing, and I hope this has been clear: I think the whole team on the defense side and also on the other side for the Federal Trade Commission, everybody worked very admirably under trying circumstances. Typical merger litigation is a pressure cooker. This is no different. It was just amplified by COVID. And I thought everyone worked to adapt and worked quite admirably and quite well under the circumstances. But, hopefully, some of these things that we've just talked about, we learned and experienced and got to judge for ourselves in real time will help those that are considering or faced with the risk of litigation in complex litigation during the pandemic.

**Jose Garriga:**

Thank you. Listeners, you've been listening to Akin Gump antitrust and competition partner, Gorav Jindal and Corey Roush. Thank you both. This is fascinating: real-world details of litigation during this pandemic.

And thank you, listeners, as always, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, Google Play and Spotify.

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Until next time.

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