

On The Defensive: How COVID-19 Will Impact Insurance Litigation?

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The only thing that remains constant is change. Earlier this year in January or February 2020, claims personnel might have been advising their clients of huge potential claim values in jurisdictions such as New York, Philadelphia, and Los Angeles. They might even have spoken about the danger of being “reptiled” at trial.

However, no one could have foreseen the entire world being placed on lockdown and commerce coming to a virtual halt. Some businesses had to ramp up their goods and services such as grocery stores, trucking companies and manufactures of essential products. Other industries came to a complete standstill such as movie theaters, restaurants, and bars. School buses stopped running, airlines were flying almost empty, and most hotels were vacant. Our world has changed dramatically in such a short period of time. In the short term, most people have been sheltering-in-place, some have been furloughed, some have been laid off and still others are working from home. This article addresses the impact of the pandemic to

claims professionals and defense counsel in both the short term and long term.

In the current environment, claim values are much lower and settlements dollars are now at a premium for a number of reasons.

- Many plaintiff firms have suddenly become cash poor and some firms have even laid off associates
- Many companies and defendants are also cash poor and having to triage which claims they are able to resolve and the priority of resolving these claims
- Many claimants are also finding themselves cash poor and needing to resolve their claims as soon as possible
- Court dates are becoming rare as many trials are being pushed out or struck altogether.

For this reason, the settlement dollar is worth more and buying a bigger claim than prior to the pandemic. The ultimate leverage that a plaintiff has over a defendant is the

threat of a potential jury verdict. This threat has diminished recently for the following reasons.

- Jurors will be less likely to want to spend days sitting next to strangers in the jury box or confined to a small jury room.
- Plaintiff may be less likely to want to undergo elective surgeries in order to enhance the claim value
- Cash poor plaintiff firms may be less likely to spend needed resources working up a claim with experts and questionable surgeries and may want to resolve the claim sooner at a lower value to maintain operating cash and build reserves.

Impact on Courts

As mentioned earlier, Covid 19 created a wave of court closings, requiring an unprecedented disruption in the prosecution and defense of civil cases and claims throughout the country. The virus literally “froze” the legal system bringing it to a virtual standstill. In New York, on March 20, 2020 New York State Governor Andrew Cuomo issued an executive order suspending all statutes of limitations and filing deadlines. The directive and subsequent orders from the state’s Chief Administrative Judge sought to limit court operations to only “essential matters” during the pendency of the Covid-19 health crisis, focusing court resources on matters such as criminal prosecutions, family court proceedings, mental hygiene adjudications, and any emergency applications the courts deemed essential.

The order initially directed that any specific time limitation for the commencement, filing, or service of any legal action, notice, motion or other process or proceeding, as prescribed

by the procedural laws of the state, be tolled. This directive took an industry driven by urgency and time requirements and grinded it to a screeching halt. Consequently, court conferences, depositions, and other proceedings were cancelled and/or postponed, and civil litigation in nearly all respects was stalled indefinitely, waiting for any indication that daily life would return to any semblance of normalcy.

Due to this immediate and shocking disruption in everyday business, essentially ending all court appearances and causing serious disruption to normal billing and fee collection practices, many firms were forced to resort to layoffs, furloughs, pay cuts and other means of fiscal self-preservation to sustain themselves through this unprecedented situation.

Following weeks of near silence in the industry, limited information and updates from the court system, New York State has recently opened its virtual courtroom “doors” and has attempted to bring some degree of normalcy back to the legal community. Relying upon the initial model establishing central locations within the numerous Judicial Districts through the state court system, local courts are now establishing rules and guidelines to begin the process of adjudicating “non-essential” matters virtually. , Several counties within New York’s Ninth Judicial District began what they called “Phase 1” of the virtual court plan, which provided and allowed for the following:

- Any traditional mail received by chambers previously or hereafter received may be reviewed by the designated chambers representative;
- Requests from counsel pertaining to existing files shall be considered for action at the discretion of the court.

No new non-essential actions would be commenced. Courts would continue operations via established central locations, handling only “essential” matters. All other locations shall remain closed and no work shall be conducted from these other locations. Priority shall be given to overdue undecided matters and pending motions;

- The E-File system would continue to be utilized only for those essential matters unless exceptions are granted by the Administrative Judge. The consideration of any matter authorized shall be at the sole discretion of the presiding judge. All conferences and appearances shall be handled remotely by Skype for business or by telephone. No physical appearances are permitted under any circumstances. The attorney requesting the conference shall make arrangements and provide call-in information for all parties.;
- Once all emergency and priority matters have been identified and completed, the courts may expand to address non-essential pending cases including the re-scheduling of court proceedings.

This process has continued to develop over recent weeks. Recently, the Chief Administrative Judge directed Courts to prioritize non-essential matters and work to resolve outstanding motions and applications. Numerous local courts and parts within those courts established individual guidelines for compliance and settlement conferences. This has proven to be an ongoing development, however, particularly in the larger counties such as the Bronx and Brooklyn (Kings), where Judges are currently

focused primarily on alternative dispute resolution and settlement conferences and have refrained from establishing procedures for virtual compliance conferences. How these specific courts, which were accustomed to seeing dozens upon dozens of attorneys within a single room prior to this pandemic due to their voluminous caseload and refrained from assigning cases to specific judges before trial will recalibrate their day-to-day operations. This is especially true for Brooklyn, which sadly experienced the devastating loss of a highly-respected judge weeks into the pandemic after his Honor had recently presided over a busy calendar.

As of May 4, 2020, the New York State E-File system was re-opened to allow for the filings of “[n]ew motions, responsive papers to previously filed motions, and other applications (including post-judgment applications)” This has allowed for the resumption of some normal business and regular case filings that have previously been on hold. We have also seen a recent increase in the courts rendering written decisions on pending applications, as they comply with the Chief Judge’s request to prioritize and decide pending matters.

The Impact of the Pandemic on Jury Verdicts

There are two schools of thought on how the pandemic will impact jury decision making when jury trials resume. Terror Management Theory (TMT) suggests that individuals will be more likely to punish companies that provide them with reminders of their own vulnerability and mortality. According to the theory, individuals are able to achieve protection from death-related concerns by finding meaning within their culture worldviews. When death-related concerns

are made salient, people are motivated to punish those who violate their cultural worldviews. In a classic study conducted by Rosenblatt et al. (1989), judges who were asked to think about their own mortality set the bail of a prostitute nine times higher compared to judges who were not given this instruction. The pandemic has certainly reminded individuals of their vulnerability to sickness and death. Based on this theory, the implications for trial jurors are that they may be more likely to punish defendants based on their need to preserve psychological equanimity in response to reminders of death.

The second school of thought is that the pandemic will make jurors less likely to punish corporate defendants. Although people have a primal, animal response to perceived threats, in times of peace these threats are directed to abstract threats that pose no immediate danger to individuals such as plaintiff reptile arguments. However, real physical threats are likely to bring individuals together and remind people that we are more alike than different. Barack Obama once famously said that “you never want a serious crisis to go to waste.” Crises create a common enemy and threaten everyone. For example, following 9/11, individuals were united together against the coordinated terrorist attacks against this country. Following the great recession, however, many jurors believed that corporations were bailed out while the government let the average person financially suffer. This belief led to political movements against status quo and fueled the sense that corporations were solely driven by profits at the expense and well being of the average individual. Plaintiff attorneys fueled juror animosity of corporate entities using reptile tactics to show that corporations pose

a personal threat to jurors and their communities.

We believe that the effectiveness of plaintiff reptile tactics and animosity against corporate defendants are likely to be diminished in the foreseeable future as jurors view the employees and management of trucking and bus companies, grocery chains, airlines, and healthcare workers as heroes who risked their well being to serve their communities during the pandemic. During this unprecedented time, the community is in crisis and the perceived enemy at trial not the bus driver or grocery cashier and stocker who are keeping the buses operating and grocery stores open at great risk to themselves and their families, nor their employers who keep their jobs going and keep our transportation and food available. Essential workers such as first responders, doctors, delivery drivers were at work when most of the country was sheltered-in-place. Jurors are less likely to punish such defendants and want to teach them a lesson when these individuals were saving lives by providing critical goods and services at personal risk to themselves and their families.

Rather, the community enemy is the plaintiff who may be perceived as the selfish individual who clamors for the community’s empathy and recompense for his own personal grievances and injuries caused by matters entirely unrelated to the community’s actual threat. Plaintiffs who squander jurors’ energy and focus on individual peevishness and hurts which now may be viewed as unrelated to the physical threat to the community may be perceived by jurors as not just selfish but traitorous. Consequently, plaintiff reptile arguments are much more likely to fall flat when their

corporate story is that the defendant provided essential services to the community during these unprecedented times.

Sympathy for plaintiffs also will likely decrease once jury trials resume. There will likely be more psychological distance between plaintiffs and jurors as society will become more germ-conscious and people will consciously or unconsciously want to maintain more personal space between themselves and others. This instinct may put more psychological and emotional distance between jurors and plaintiffs. During this time, many people are enduring financial setbacks and potential or actual exposure to a deadly virus. Going forward, jurors are less likely to be sympathetic to plaintiffs and award significant damages when they have had to endure significant hardships themselves.

Conclusion

It is difficult to assume when any level of normal court business or regular deposition practice will resume, particularly as the country grapples with reports that cases and fatalities may continue to increase despite social distancing protocols. What is clear is that it is hard to imagine courts, especially in downstate New York, returning to the standard practice that was in place prior to this pandemic. We have already seen and have partaken in video depositions ourselves, although the willingness and comfort with such a process is slow-developing.

There is the real possibility that the legal industry itself, especially with regard to civil

litigation, may be entering a new era in how cases are administered and adjudicated. With the possibility that social distancing may extend for many more months and into and even through 2021, virtual court conferences and depositions and the lack of regular appearances before a presiding judge may very well become the “new normal.” Such a change would have a dramatic impact upon the insurance defense litigation industry as well as impact how aggressively parties can pursue and defend claims without the specter of a court or a specific judge to exert pressure on parties or force compliance with discovery procedures.

As the industry experienced after the September 11, 2001 terrorist attacks as well as Hurricane Sandy, bringing everyone involved back into a “business as usual” posture proves challenging even in the short-term. If social distancing and avoiding densely populated areas becomes the standard social practice for up to a year or more, the entire legal system will be forced to recalibrate how cases are handled. We need look no further than the medical industry, where it has been plainly stated that “telemedicine” is the wave of the future. It is only logical that this way of doing business could expand to other industries, including the legal profession. The only conclusion that seems clear is that, while the extent is currently unknown, this pandemic will permanently change how we practice law and defend claims.



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