



## COVID-19 AND COURT PROCEDURES

“ State courts are beginning to look ahead towards an eventual full reopening. As they do so, they must be aware of the potential consequences of the pandemic and be prepared to address them at each stage of litigation. ”

# COVID-19 and Court Procedures<sup>†</sup>

*COVID-19 has reshaped American life since its appearance in the U.S. in early 2020. The American legal system has been no exception: state courts across the country, where the vast majority of cases are set, largely have been unable to continue business as usual.*

With jury service suspended and courtrooms closed or operating under restrictions in many jurisdictions, an unprecedented backlog of cases continues to mount.

As more state courts plan for reopening, new measures are

being considered to help address this backlog. This ILR *Briefly* edition explores some of the options under consideration to address the issues presented by the pandemic at the commencement of new

litigation, during discovery, and in case resolution. It cautions state courts on the unintended consequences that may arise from drastic actions and proposes solutions to mitigate them.

## The State of the State Courts

### STATE COURT CIVIL TRIAL ACTIVITY

In March 2020, as COVID-19 began to spread throughout the U.S., states began to issue stay-at-home orders.<sup>1</sup> Most state courts closed for at least some period during this early stage of the pandemic. As the pandemic continued, courts implemented a wide variety of restrictions ranging from statewide total suspension of jury service to local determination of when and whether to conduct in-person proceedings.

The top ten states by incoming caseloads in 2019—Texas, New Jersey, California, Pennsylvania, Missouri, Florida, Michigan, Ohio, Georgia, and New York<sup>2</sup>—illustrate this mixed response. Georgia and New York continue, as of this writing, to impose statewide suspensions

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on civil jury trials, though Georgia permits its state courts to resume jury trials as of March 2021, local conditions permitting.<sup>3</sup> At the other end of the spectrum, Texas, Florida,

and Ohio have left decisions on whether to conduct in-person jury proceedings to the discretion of local judges.<sup>4</sup> This has led the Chief Justice of the Ohio Supreme Court to complain that some courts continue to engage in “‘cattle-call’ proceedings, allowing crowded courthouse hallways; requiring in-person appearances for routine, non-essential matters; [and] denying requests for reasonable, COVID-related continuances...”<sup>5</sup>

Other states fall somewhere in between these two extremes. Both New Jersey and Pennsylvania state courts resumed civil jury trials in person and in hybrid form (some witnesses, parties, or jurors appearing remotely and some in person) in the summer and fall of 2020 when COVID case counts ebbed, but reinstated suspensions in some or all counties in November 2020. Three counties in New Jersey resumed virtual civil trials on a consent basis in early February 2021,<sup>6</sup> while Philadelphia County—by far the largest trial jurisdiction in Pennsylvania—remains on suspension until sometime in 2021.<sup>7</sup> Though California, Missouri, and Michigan ostensibly are conducting civil jury trials in some counties, in practice very

few have occurred due to their phased approaches and prioritizing of criminal and emergency matters ahead of civil cases.<sup>8</sup>

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#### **A LOOMING BACKLOG COMPOUNDED BY NEW CLAIMS**

Most state courts saw a sharp reduction in the number of new cases filed. One analysis found that in nine state court systems with available data, overall case filings in April 2020 were 53 percent lower than in April 2019 and 49 percent lower in May 2020 versus May 2019.<sup>9</sup> Many of these case filings are merely delayed and can be expected to reach the state court dockets once restrictions ease. Indeed, in Sacramento County Superior Court, case filings in April 2020 were down 93 percent compared to April 2019.<sup>10</sup> When the court system reopened in May, filings swung 105 percent in the opposite direction, increasing 12 percent compared to the prior year.<sup>11</sup>

The mix of restrictions on state court proceedings has also drastically slowed the pace of civil trials. Without the pressure of trial on litigants, settlements in civil cases have also declined. Statewide in California, nearly 1.4 million fewer case dispositions, including any case cleared from the dockets, were reported between March and August of 2020, as compared to

the same period a year before.<sup>12</sup> This represents a 49 percent decline in state court case dispositions year over year.<sup>13</sup> Likewise, according to data from the New York State Office of Court Administration, the rate of resolution of civil lawsuits in New York fell by 39 percent from 2019 to 2020.<sup>14</sup> Because a majority of civil cases are resolved through settlement, this also indicates a decline in settled cases, although the confidential nature of settlements makes precise statistics difficult to calculate. Although they have been prioritized in most states, criminal cases are also backlogged in some jurisdictions. To comply with Due Process and Speedy Trial Clause requirements, those cases will have to proceed first in many instances, further delaying resolution of the civil case backlog.



Even apart from the backlog of civil cases held in abeyance during the COVID-19 court closures, another tidal wave of litigation related to the pandemic itself is on the horizon. For example, over 2,000 labor and employment cases and over 1,500 insurance coverage cases have already been filed in state and federal courts related to the pandemic.<sup>15</sup> The number of business interruption lawsuits alone related to COVID-19 prompted the plaintiffs' bar to seek pretrial consolidation of these cases in a multidistrict litigation (MDL).<sup>16</sup> In October 2020, the Judicial Panel on Multidistrict Litigation certified an MDL against one insurer, Society Insurance Company,<sup>17</sup> while declining to certify an industry-wide business interruption insurance claims MDL.<sup>18</sup>

These insurance and employment cases are likely the tip of the litigation iceberg. As early as March 2020, mass tort plaintiffs' firms formed a "Coronavirus Litigation Task Force" to "root out" potential defendants alleged to have engaged in "wrongdoing related to the COVID-19 ... pandemic."<sup>19</sup> Between

March 1, 2020 and March 1, 2021, law firms and legal services providers aired over 186,000 ad spots at an estimated cost of over \$36 million, according to data compiled by Kantar CMAG.<sup>20</sup> Early cases included suits against cruise lines and other

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hospitality industry companies, and suits brought by restaurants, bars, and other businesses against their insurers following shutdowns.<sup>21</sup> Suits against health care providers and a wide variety of employers are trending upward.<sup>22</sup> A number of cases related to personal protective equipment (PPE)—including those alleging failure to provide PPE to employees, PPE price gouging, and design defects in PPE—have been filed. Yet paradoxically, many businesses have faced lawsuits for imposing mask-wearing mandates.

Recent data also indicate that product liability and non-COVID-related personal injury and wrongful death claims have begun to climb: the total product liability and personal injury or wrongful death claims filed in March 2021 was greater than all prior months of the pandemic combined.<sup>23</sup> While product liability case filings are still substantially lower than pre-pandemic levels, the relatively long statutes of limitations in many states coupled with the ease of obtaining tolling agreements in some mass torts may mean that these cases will hit dockets later than other types of claims. And if this trend continues, it could signify another

source of strain for state court systems.

As occurred after other crises, the *qui tam* bar likely will commence new litigation related to the alleged misuse of Coronavirus Aid, Relief, and Economic Security (CARES) Act, American Rescue Plan Act, and other relief funds. These suits will create additional potential liability sources for defendants whose litigation portfolios have ballooned as pandemic-related court closures reduced their ability to resolve cases through

the court system. Moreover, they will further strain courts already burdened by the existing backlog of cases. With three vaccines currently

approved for inoculation against COVID-19 in the United States, state courts are beginning to look ahead towards an eventual full

reopening. As they do so, they must be aware of the potential consequences of the pandemic and be prepared to address them at each stage of litigation.

## Issues at Commencement of Litigation

### STATUTES OF LIMITATIONS AND PREJUDGMENT INTEREST

In response to the pandemic, some courts have also opted to toll statutes of limitations and repose.<sup>24</sup> While a degree of leniency in this regard may be merited where the pandemic has actually limited a litigant's ability to file a claim, unlimited tolling of limitations periods can lead to a host of unintended consequences. For example, given enough time, defendants will be unable to keep up with the demands of record retention necessary to preserve internal documents relevant to claims against them.

Furthermore, courts create asymmetry between the rights of plaintiffs and defendants when they toll statutes of limitations without concurrent tolling of prejudgment interest. A case alleging substantial

damages in which the statute of limitations was tolled for two years could accrue significant prejudgment interest by the time the case is filed, makes its way through the backlog, and resolves. Some states are considering legislation that would exacerbate this problem. The Illinois Legislature recently

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passed House Bill 3360, which would impose nine percent prejudgment interest on personal injury and wrongful death claims from the date the tortfeasor had notice of the injury.<sup>25</sup> Rather than impose such measures at a time when many litigants already face financial hardship, states should

work to balance the equities resulting from delayed statutes of limitations. To do this, they should suspend prejudgment interest for as long as statutes of limitations are tolled.

### UNMERITORIOUS CLAIMS

As we have seen in other crises from 9/11 to the 2008 financial crisis, times of national distress can create windows for litigation (both for meritorious and unmeritorious claims). As the anticipated flood of litigation comes to fruition, courts may find their dockets

overwhelmed by frivolous cases solicited by attorneys during the long trial hiatus. Attorneys filing these claims often seek to freeride on legitimate claims, using consolidation, prior resolution values, and multi-case settlements to impute the value of those cases onto their own meritless ones.



As a result, the creation of specialty courts such as MDL panels or subject-matter dockets, where cases with similar allegations are filed and administered, can exacerbate this problem.

To avoid further overtaxing their dockets, courts should take steps to weed out frivolous and abusive litigation.

In recognition of the documented pattern of disaster-related meritless filings, states should implement heightened pleading standards for COVID-19-related claims. These heightened standards could mirror those of the federal courts, where unsubstantiated “notice” pleadings are prohibited, and plaintiffs are required to support each claim with particular facts. Similarly, courts can use preliminary disclosures—including plaintiff fact sheets, proof of diagnosis or other threshold facts, and case summaries—to require plaintiffs’ attorneys to produce evidence that there is a basis for their claims. Additionally, courts can require litigants to state whether their case is financed by third party litigation funding

(TPLF) and, if so, by whom. Because TPLF can be a major driver of mass litigations, courts can use these disclosures to better understand what is

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driving their backlogs and to determine if actual or apparent conflicts of interest exist because of such funding, including for the court.

When attorneys file frivolous cases, courts should impose stricter sanctions upon them. The Lawsuit Abuse Reduction Act<sup>26</sup> provides a blueprint for the types of sanctions courts could consider. First, courts could award attorney’s fees sufficient to compensate the defendant for the time spent litigating the frivolous claims. Courts could also revoke plaintiffs’ automatic leave to withdraw claims within 21 days of service of a complaint, disincentivizing a “kitchen sink” approach to pleading. Finally, for severe or

serial violations, courts could strike the pleadings, dismiss the suit, impose non-monetary sanctions such as revocation of *pro hac vice* admission, or impose other deterrent punishments.

Courts can further reduce the burden imposed by meritless claims by altering their approach to motions to dismiss. State courts historically have been reluctant to grant motions to dismiss

except in the clearest of cases. Some COVID-19 defendants, however, may assert new grounds for dismissal, such as protections under the Public Readiness and Emergency Preparedness (PREP) Act, which provides limitations on liability (except for willful misconduct) for claims related to the use of countermeasures for COVID-19.<sup>27</sup> Where applicable, the PREP Act can provide a useful tool for courts to remove COVID-19 litigation from their dockets, in keeping with the law’s intended purpose of avoiding penalizing those who assist with mitigating national emergencies.

# Discovery Issues

## REMOTE DISCOVERY

The pandemic has compelled millions of Americans to work from home for over a year. As cases begin to proceed, remote working will present new difficulties during discovery. For example, document discovery is complicated by limited access to hard copy documents. Employees working at home also may have difficulty maintaining company document storage protocols, recording data on company systems, and locating documents in company electronic storage systems.

Depositions are also affected by remote working. Despite litigants' best efforts, deposition video lags can garble transcripts, household distractions can disrupt questioning, and poor lighting and sound quality can make it difficult to assess a witness's demeanor. Yet litigants may have no other choice than to rely on videotaped deposition testimony, particularly when cases take years from discovery to trial and witnesses become unavailable in the interim.

To reduce these burdens, courts should consider loosening requirements regarding the manner of document production. For instance, where appropriate, courts could waive onerous requirements to produce documents categorized by request, or to produce

curtail the breadth of discovery to begin with. Courts can accomplish this with a carrot and stick approach. First, they can incentivize playing fairly: parties that keep discovery limited can be given preferential trial settings, for example. Litigants that serve burdensome discovery

demands and occupy the court's time to resolve disputes related to these demands, by contrast, can be penalized by having their trial dates withdrawn, having further discovery curtailed, or other appropriate sanctions.

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documents in particular formats. Courts can also decrease discovery burdens on litigants by liberally granting discovery extensions and avoiding imposing deadlines on defendants, for whom discovery is not necessary to prove the merits of a claim unless necessitated by trial deadlines.

## LIMITING BURDENSOME DISCOVERY

The most effective means to limit the imposition posed on litigants by discovery during a pandemic, however, is to

## SPOILIATION

As pandemic-related closures stretch into their second year, defendants may justifiably dispose of documents previously held pursuant to expired litigation holds in cases that resolved prior to or during the pandemic. In those instances, defendants may find themselves subject to spoliation arguments in similar cases filed belatedly due to the tolling of the statute of limitations, or pandemic-related reticence to file.

Courts should avoid penalizing defendants for good faith



beliefs that litigation holds were no longer necessary. When a litigant alleges spoliation, courts should take into account whether the COVID-19 backlog caused the non-moving party to terminate its hold or otherwise dispose of documents based on a good faith belief that the litigation had been resolved.

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## Resolution

### DELAYED RESOLUTION

Litigants whose meritorious claims languish in the backlog may justifiably conclude that justice delayed is justice denied. Small businesses engaged in contract disputes may be unable to wait for years before having their day in court. Likewise, irreparable harm may befall a business that is unable to access a court’s help in protecting its intellectual property.

These harms demand immediate attention, and courts should be vigorous in hearing and, where appropriate, granting preliminary injunctions of durations sufficient enough to protect litigants as they await more

permanent resolution. As court systems open, state legislatures also can help courts avoid unnecessary delays by providing additional funding to

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court systems. The Federal Judiciary has already asked Congress for increased funds to deal with backlogs in the federal courts.<sup>28</sup> State legislatures can use a variety of federal

pass-through funds to similarly support their state courts as they work to provide justice for litigants with good faith claims.<sup>29</sup> To ensure efficiency, state legislatures can condition these funds on the court systems taking appropriate measures to remove meritless claims from their dockets.

### CONSOLIDATION

It may be tempting for courts to try to deal with their overloaded dockets by consolidating cases. Indeed, as discussed above, plaintiffs have

had mixed results attempting to consolidate some business interruption lawsuits against insurers.<sup>30</sup> Proponents of consolidation often argue that it has “the potential to reduce the



cost of litigation, make more economical use of the trial court's time and speed the disposition of cases."<sup>31</sup> In reality, available evidence suggests that multi-plaintiff trials can take more time than those with single plaintiffs.<sup>32</sup> Even more importantly, consolidation raises concerns regarding procedural fairness, as consolidated cases tend to result in more and larger plaintiffs' verdicts.<sup>33</sup> When consolidating cases with different factual allegations, damages, and defenses, juror confusion is a risk as well.<sup>34</sup>

Courts should avoid the pressure to resolve cases quickly at the expense of fairness. Rather than consolidating cases and thereby

prejudicing defendants, courts should permit only valid cases to go to trial in the first place. In the context of cases involving scientific evidence, one way to accomplish this goal is by exercising their role as gatekeepers.<sup>35</sup> By scrutinizing expert witness opinions, courts can reduce time spent in trial on tangential issues, eliminate scientifically specious claims, and even in some instances eliminate from their dockets cases that are not supported by science.

## JURY SELECTION

Even in single-plaintiff cases, jury selection during the pandemic continues to be fraught with issues. In the rare instances where civil litigants have been able to summon a jury, response rates are down drastically from prior years.<sup>36</sup> In fact, "[o]ut of 1,500 individuals surveyed, 46% said they would actively attempt to avoid jury duty entirely, and ... 30% stated they would ask courts to

*“ Defendants have complained that socially distanced testimony interfered with the jury's ability to assess the witness's credibility, and attorneys have remarked on the difficulty of advocating for a client to a remote jury. ”*

excuse them due to their discomfort serving in closed spaces.”<sup>37</sup> Screening procedures aimed at preventing jurors at risk from COVID-19 from being summoned further reduce the available panel, and they present concerns about the representativeness of any panel drawn, as older people and people of color are at disproportionate risk of serious adverse effects of the virus.<sup>38</sup> Moreover, when jurors appear for remote selection, they are frequently distracted by their home environments. At an early

attempt at remote jury selection, jurors in Alameda were reportedly “curled up [in bed] and possibly asleep, ... working out on an elliptical machine[,] ... leav[ing] the room with a child[,]” and engaging in other distracting behaviors.<sup>39</sup>

Increased enforcement of jury summonses, however, also presents issues. Many jurors who respond to jury summons report being nervous or fearful about participation in jury service

due to concerns about the virus.<sup>40</sup>

One study found that jurors who are nervous about serving value cases approximately 16 percent more than jurors who are not nervous.<sup>41</sup>

Accordingly, if courts decide to enforce their summons more aggressively and

force apprehensive jurors to appear despite their misgivings, the result could be a jury disproportionately inclined to place a high value on cases based on their personal fears rather than the facts of the case.

If litigants are somehow able to muster enough jurors to proceed, technological and safety measures may interfere with their ability to put on their case. Defendants have complained that socially distanced testimony interfered with the jury's ability to assess the witness's credibility,<sup>42</sup> and



attorneys have remarked on the difficulty of advocating for a client to a remote jury. The need to prevent “Zoom fatigue” and technological hiccups can derail proceedings and detract from key arguments. As the Chief Justice of the Missouri Supreme

Court stated in describing remote arguments, “the most common phrase uttered [during remote proceedings] still may be ‘You’re on mute.’”<sup>43</sup> Litigants should not be forced to proceed to trial with a jury that, because of COVID-19 screening and

response rates, does not provide a fair cross-section of their community. To ensure a representative venire, courts should permit extended voir dire and allow for increased attorney participation in jury selection.

## Conclusion

State court systems throughout the United States have faced unprecedented challenges over the past year as the pandemic has upended every aspect of litigation. With 90 percent of the U.S. population expected to be vaccinated by some time in summer 2021,<sup>44</sup> state court systems must contend with the litigation issues created by the pandemic, including the massive case backlogs. At each stage of litigation, courts must be attuned to how their actions in resolving these issues affect litigants. At the commencement of litigation, courts must weed out frivolous claims and ensure that meritorious litigants are not penalized for delays beyond their control. Throughout discovery, courts must understand the challenges socially-distanced life places on parties. And in resolving claims, courts

must keep in mind the ways in which the pandemic has created challenges to protecting fundamental constitutional rights like a quick trial, a representative jury, and due process.

As state legislatures, judiciary committees, and individual courts grapple with the issues presented by reopening, they should ensure that they listen to a diverse set of viewpoints on the ways to recommence proceedings. The interests of current litigants stuck in the backlog and future plaintiffs and defendants entering the line behind them must have a voice in these discussions. With such a thoughtful approach, state court systems can ensure that their mandate of fair and efficient administration of justice is fulfilled, even in the face of COVID-19.

## Operating Status of State Courts Across the U.S.

Closed/No Jury Trials*	Remote Jury Trials Only/ Juries Allowed in Some Jurisdictions	In-Person Jury Trials With Limitations	Jury Service Resumed
<b>Alaska</b> (9/7)	<b>California</b>	<b>Colorado</b> (only if authorized by chief judge of judicial district)	<b>Alabama</b> (at judge's discretion)
<b>Arkansas</b> (5/1)	<b>Illinois</b> (varies by district, most civil jury trials suspended)	<b>Florida</b> (some courts have suspended, others have limited number of jury trials or remote)	<b>Arizona</b>
<b>Connecticut</b> (4/30)	<b>Michigan</b>	<b>Indiana</b> (varies by district, most allow in-person jury trials)	<b>Georgia</b> (at court's discretion)
<b>Delaware</b>	<b>Nebraska</b> (varies by district)	<b>Kansas</b> (in-person jury trials only permitted under certain conditions)	<b>Hawaii</b>
<b>Idaho</b>	<b>North Dakota</b> (some remote, varies by district)	<b>Massachusetts</b> (50% court staff capacity)	<b>Iowa</b> (courts can consider parties' requests for remote proceedings)
<b>Kentucky</b> (5/1)	<b>Ohio</b> (varies by county)	<b>Mississippi</b> (county must have two or fewer deaths)	<b>Louisiana</b> (individual courts to determine if in-person trials can be held safely)
<b>Maine</b> (criminal trials only, due to restricted number of jurors)	<b>Pennsylvania</b> (varies by county, some remote proceedings)	<b>New York</b> (limited number of in-person trials)	<b>Missouri</b> (courts must meet criteria for in-person activities)
<b>Maryland</b> (4/26)	<b>Utah</b> (varies by county)	<b>North Carolina</b> (in-person jury trials in counties with approved jury trial resumption plans)	<b>Montana</b>
<b>Minnesota</b> (6/14)	<b>West Virginia</b> (varies by court)	<b>Oregon</b> (in-person jury trials permitted in certain areas)	<b>Nevada</b> (at presiding judge's discretion)
<b>New Hampshire</b>	<b>Wisconsin</b> (varies by circuit court, must have approved plan)	<b>Rhode Island</b> (in-person jury trials with reduced hours)	<b>New Mexico</b>
<b>New Jersey</b>	<b>Wyoming</b> (each county must have approved plan)	<b>Virginia</b> (varies by county, most counties have approved reopening plan)	<b>Oklahoma</b>
<b>South Carolina</b>			<b>South Dakota</b> (at judge's discretion)
			<b>Tennessee</b>
			<b>Texas</b>
			<b>Vermont</b>
			<b>Washington</b>

\*Dates included in parentheses are the courts' reopening dates. States without a date noted do not have a specified reopening date.



# Endnotes

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