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NATIONAL DIRECTORS INSTITUTE

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- Questions can be entered via the Q&A widget open on the left-hand side of your screen. We will address questions at the end of the program, time permitting.
- The recorded version of this presentation will be available on [Foley.com](https://www.foley.com) in the next few days and you can get a copy of the slides in the Resource List widget on the right-hand side of your screen.

BREAKOUT SESSION

Ready, Set, Zoom: How COVID-19 Is Impacting Business Litigation



PANELISTS



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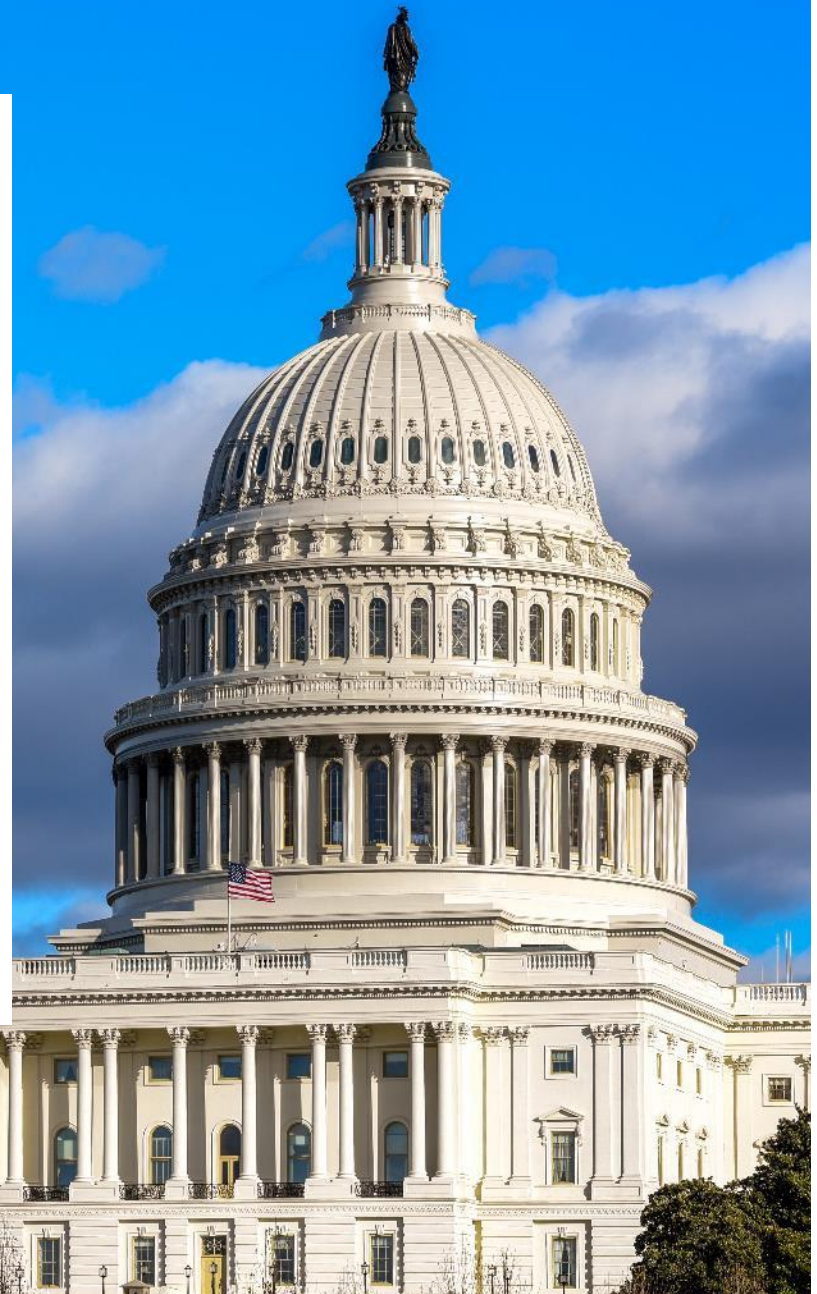


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1

More delays



More Delays

- **Outset:**
 - Judges and their staff are also “safer at home” - most courts ground to a halt
 - Assuming (or hoping) conditions were temporary, courts aggressively adjourned hearings, trials, and even routine court actions
 - Parties followed suit, deferring depositions, key motions, and discovery conferences
- **Mid to late summer**
 - Judicial activity began to slowly resume, criminal cases given priority due to statutory and Constitutional requirements

More Delays

- Recently

- Some courts have begun to pull back due to the recent surge of cases

- Result? Massive backlog

- Even courts that are functioning (and aggressively using technology to conduct operations) face a massive backlog of civil cases, many of which do not have any defined schedule
- “The Court will reschedule the dates of its Trial Scheduling Order . . . at such time as circumstances warrant, but certainly not before the development of a safe and effective vaccine.”
Danaher Corp. v. Gardner Denver, Inc., Case No. 19-CV-1794-JPS (Sept. 28, 2020)

A server room with rows of server racks illuminated by blue light. The racks are filled with various components, and the overall atmosphere is dark and technical.

2

Less ability to get important things done (or get them done quickly)

Less ability to get important things done (or get them done quickly)

- For the foreseeable future, cases will take longer to prepare and get to the finish line
 - The length of delay is highly dependent on the complexity of the issues, jurisdiction
- Health and safety considerations
 - Corporate policies and individual comfort levels are significantly restricting witness availability for depositions, etc.
- Personnel are still working home
 - Management, finance, and accounting often working from home with limited in office personnel

Less ability to get important things done (or get them done quickly)

- Government agency staff (including court personnel) working from home
 - Agencies are cutting staff and services
 - Challenges in regulatory practices, like health care, white collar, and antitrust
- Many (most) courts are not still not conducting in person hearings in civil cases
 - Slow going if case strategy needs a face-to-face interaction
- Significant impact on strategy and expense
 - TRO or preliminary injunction



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More reliance on technology

More Reliance on Technology

- Technology is helping, but has its limitations
 - Remote document collection, technology-assisted analysis and remote review platforms - transition has been largely seamless
 - Court hearings
 - Works well for argument
 - Challenges with evidentiary hearings
 - Virtual depositions
 - Quickly becoming the norm
 - Not all lawyers have embraced
 - “Ground rules” are inconsistent and evolving
-

More Reliance on Technology

- Virtual witness preparation
 - Technologically feasible (and better than no preparation)
 - Not as effective for important witnesses
- Pandemic conditions may persist through 2021
 - Tech will improve, we will get better at using it
- Some use of tech likely here to stay
 - Bench trials, oral arguments, depositions
- Significant advantages: facilitating scheduling, increasing efficiency and reducing travel expense
- Must be used thoughtfully and strategically

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Less jury trials



Less Jury Trials

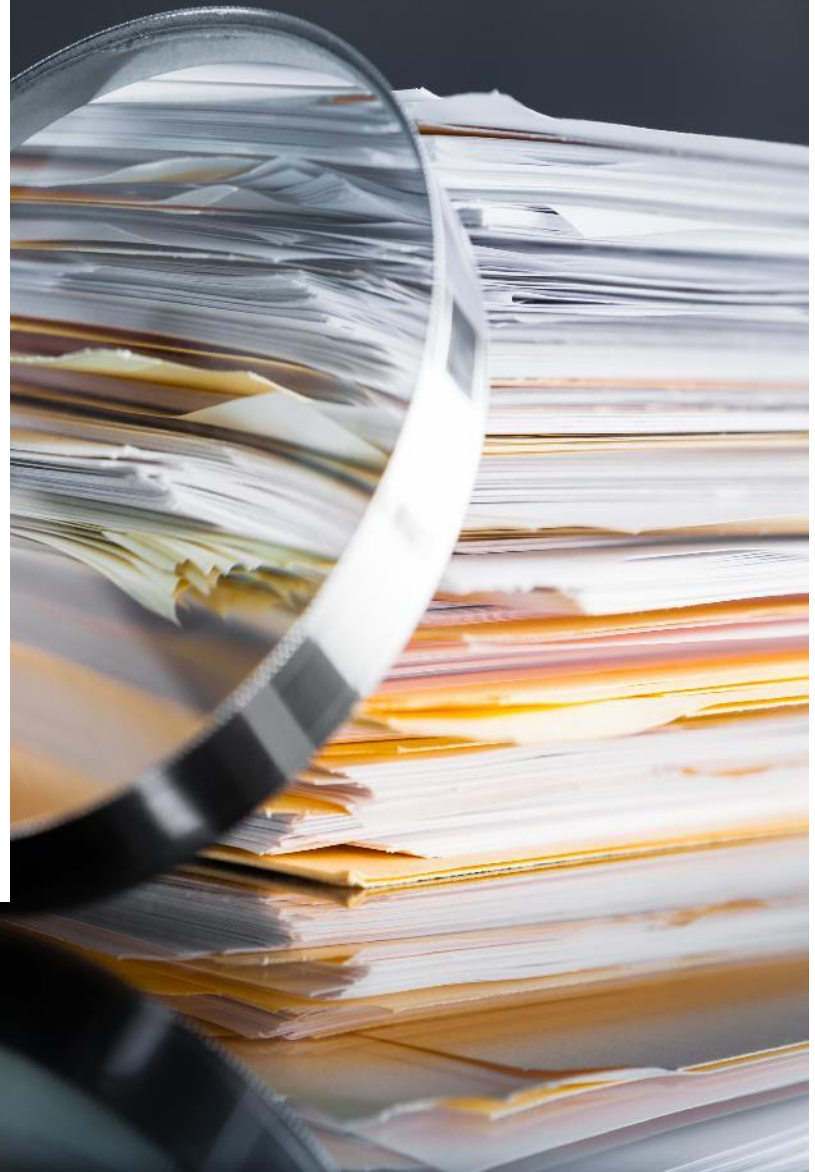
- Jury trials: the last frontier of litigation technology
- On May 22, 2020, test jury-trial-by-video was held in Dallas and meant to reveal a possible path forward for civil jury trials in the age of COVID-19
- Florida held what is believed to be the nation's first remote jury trial with a binding verdict
 - Damages only, was fairly simplistic
 - Defendant did not participate
 - Awarded \$354,000 in damages stemming from a physical altercation

Less Jury Trials

- Thorny technological and inter-personal issues
 - Lack of solemnity and dignity
 - Lack of equal juror access to/facility with technology
 - Challenges in monitoring and controlling a jury
 - Ability of the parties, witnesses and counsel to “connect” with jurors and engage in non-verbal communication
 - Confidentiality and security
 - Loss of feeling that party has had its “day in court.”
- Likely low adoption rate
- Want a jury trial – you’ll wait, other options?

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More contract and force majeure litigation



More contract and force majeure litigation

- Pandemic disrupted “business as usual” - interrupted key supply chain and other commercial relationships
- Most commercial agreements contain boilerplate “force majeure” provision, not specifically negotiated, not tailored to what COVID-19 presented
- Clients saw both ends of the issue – seeking to enforce, while excusing own lack of performance
- Many companies focused on immediate commercial solutions – deferred thorny legal issues for “later”
- Later is now!

More contract and force majeure litigation

- We can expect to see significant commercial litigation about:
 - The scope of force majeure clauses
 - Extent to which they excuse performance
 - Whether triggered by a financial inability to perform
 - Whether invoking party gave sufficient and appropriate notice
 - Length of the event (legally and practically)
 - Overreach by demanding price increases or other contractual changes
 - Mitigation of damages
 - New supplier?
 - When “suspension” of performance becomes a material breach
 - Responsibility for work-in-process, tooling, transportation, storage, and other costs already incurred (or unavoidable) when event occurred

The background of the slide is a dark blue grid with various financial charts. A prominent candlestick chart is visible, showing price movements with red and white bars. Several colored lines (green, red, blue, purple) represent different moving averages or technical indicators. The overall aesthetic is that of a professional financial or economic presentation.

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**More (or less?)
bankruptcy cases . . .
impact still unclear**

More (or less?) bankruptcy filings

- Generally, pandemic and shutdowns have not (yet) resulted in a spike of corporate bankruptcy filings
- Increase in bankruptcy filings in hard hit industries: retail, fast casual dining and hospitality
- Government relief programs (CARES, PPP, Main Street Lending)
 - Have provided liquidity
 - Likely forestalled an increase in commercial filings
 - Limited: cash will be used up at some point.

More (or less?) bankruptcy filings

- Banks
 - Have been cooperative in providing extension and forbearance
 - The honeymoon will not last forever
- Private equity and portfolio companies
 - Those seeking bolt-on acquisitions - aggressive in evaluating and acquiring distressed companies.
 - Some have used the bankruptcy process (Section 363 sales) as the acquisition vehicle, other deals being done outside bankruptcy
- Without a sustained economic recovery, increased bankruptcy activity seems inevitable

A close-up photograph of a person's hand typing on a laptop keyboard. The scene is brightly lit, likely by natural light from a window, creating a warm, golden glow. The background is softly blurred, showing what appears to be an indoor setting with a window and some greenery outside. The overall mood is professional and focused.

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More (but different) employment litigation

More (but different) employment litigation

- State and Local Requirements / Areas of risk
 - Work from home mandatory where possible?
 - Return to in-person work considerations
 - Physical distancing, testing, cleaning, and mask requirements
 - OSHA requirements and considerations
 - Workers compensation implications (state specific)
 - FFCRA and other leave issues (FMLA? ADA?)
 - Vaccine considerations

More (but different) employment litigation

- Reductions in force:
 - Older Workers Benefit Protection Act (OWBPA) requirements in severance agreements
 - Group termination: 45-day consideration period and 7-day revocation for 40 and older
 - Age disclosure
 - Disparate Impact Analysis
 - WARN Act
 - Advanced planning is key to avoid liability
 - Seek legal counsel early and often



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More commercial insurance claims

More commercial insurance claims

- Litigation over business interruption coverage has exploded
 - Over 1,250 cases filed in state and federal courts, more are coming
 - The Joint Panel on Multidistrict Litigation declined to consolidate many cases into an MDL (but did consolidate around 30 cases into a business interruption MDL)
 - About one-third of cases are class actions
- Policyholders have argued that their “all risk” insurance policies cover losses from government-mandated shutdowns and closures
 - Restaurants and bars or other consumer-focused businesses
- Insurers have argued (among other things) - the lack of “direct physical loss or damage” to insured property takes such losses outside policies

More commercial insurance claims

- Early returns? where rulings, about 75% have resulted in dismissal of policyholder claims
- Two recent decisions, however, concluded that the applicable policy or law did not require physical loss or damage for coverage. Appeals are nearly certain.
 - *Optical Services USA/JCI v. Franklin Mutual Ins. Co.*, No. BER-L-3681-20 (Superior Court of New Jersey, Bergen County)
 - *North State Deli LLC et al v. The Cincinnati Insurance Co., et al.*, 20-CVS-02569 (North Carolina Superior Court, Durham County)
- Outcomes turn heavily on policy language

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Less settlements, despite more mediations



Less settlements - more mediation

- Why more mediation?
 - Backlog and delay (uncertainty and expense)
 - Novel legal issues presenting uncertain outcomes
 - Economic pressure (cash needs and preservation)
 - Preservation of important business relationships
 - Management resources focused on business priorities
 - Remote platform (ease of scheduling and reduced expense)
- Likely to be on a remote platform
 - Major providers (JAMs and AAA) are aggressively marketing their virtual mediation products

Less settlements - more mediation

- Benefits
 - Easier to coordinate schedules
 - High-level decision makers, others, greater availability to participate
 - Targeted use of joint sessions easier, removes animus
- Less settlements?
 - Less personal time invested, no travel, walk away is easy
 - Distraction and multi-tasking reduce engagement and focus
 - Lack of inter-personal connection with mediator
 - Technological issues can easily prevent or ruin momentum
 - Exacerbates weaknesses of “shuttle diplomacy” mediators
- Here to stay, cost efficient tool, but may be less effective



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Less “Perry Mason” moments

Less “Perry Mason” Moments

- Strategic implications of remote hearings and trials can be significant
- Physical presence and inter-personal connection critical to success in important depositions, hearings and jury trials
- What differentiates a litigator from a trial lawyer is the ability to build rapport with a witness, judge, or juror, read verbal and non-verbal cues, and adjust quickly and effectively

Less “Perry Mason” Moments

- Few cases go to trial and, when they do, they typically turn on the credibility and likeability of a handful of key witnesses and trial counsel;
- Cross-examination and courtroom presence are essential and challenging in a remote environment
- While trial lawyers will continue to adapt as technology evolves, the most important and hotly-contested cases will be litigated face-to-face

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**More need for
regular and effective
communication
between outside and
corporate counsel**



Communication between outside and corporate counsel

- Close communication and partnership between outside and corporate counsel are more important than ever
- Setting realistic time frames and allocating resources for document collection and factual investigation
- Understanding health and safety protocols that impact witness availability and effectiveness
- Ensuring thoughtful and accurate budgeting (including quarterly expense projections) as case schedules elongate

Communication between outside and corporate counsel

- Evaluating the strategic risks and benefits of virtual platforms for depositions, hearings, mediation and trial
- Understanding unique economic constraints or goals as a result of the pandemic
- Appreciating the importance of key commercial relationships and business pressure precipitated by an unexpected dispute with an uncertain outcome
- Sharing reasonable expectations for budgets, scheduling, goals, and outcomes

Coronavirus Resource Center

Offers insights from across
Foley's many practice disciplines to
provide timely perspective on what
companies can do now and how they
can prepare for the future.

FOR MORE INFORMATION, PLEASE VISIT:

[Foley.com/Coronavirus](https://www.foley.com/coronavirus)

Thank You



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