

Insurance Litigation in a Post-Pandemic World

Presented by:

Bill Casey | Swift, Currie, McGhee & Hiers

Jeff Shiver | Shiver Hamilton

Phil Anthony | DecisionQuest



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Considerations for Jury and Bench Trials and Arbitrations During the Pandemic

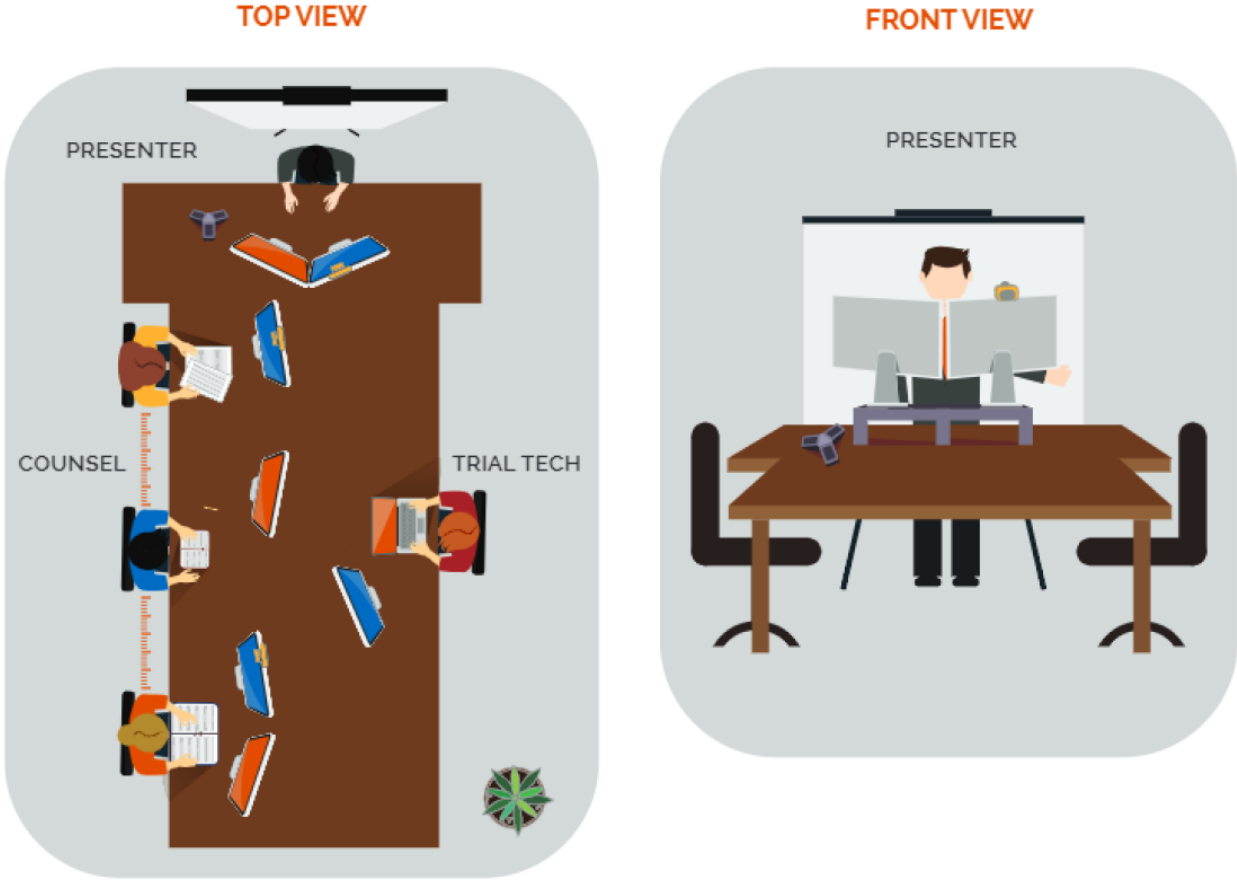
- Voir dire conducted via web platforms
- Jurors either allowed to view case via web platform or brought to courthouse and spread out with plexiglass protection
- Number of jurors reduced to minimum allowed per court rules
- Witnesses allowed to testify live via web platforms
- Demonstrative exhibits presented via web platform
- Trial technology specialists organizing and presenting all evidence for evaluation by court and trier of fact

Virtual Trial Assistance

During the pandemic, DecisionQuest® (a U.S. Legal Support Company), has assisted with several remote trials, providing complete consulting, support and management for virtual trial across the country. DecisionQuest can provide the following trial support services:

- Judge can view from courtroom
- Counsel each in their own location
- Witness testimony is presented over a proprietary and private web platform
- Technology consultation
- Platform setup and training
- Strategic remote courtroom design
 - Main courtroom
 - Multiple witness preparation rooms
 - Secure tech-free (offline) meeting room
- Equipment installation & testing
- Persuasive legal graphic design
- Trial “hot seat” technician

Main Courtroom Setup for Trial Team



Court, Counsel and Witness View



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Remote Mock Trials and Mock Arbitrations

Jury Trial



Arbitration



March 2020 Survey

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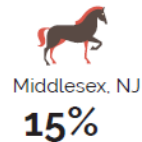
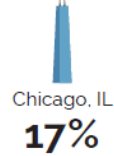
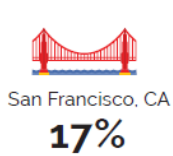
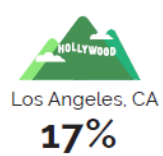
March 2020 Survey

Data from this survey was collected between March 27-31, 2020, using CaseXplorer™, a web-based survey research tool created in 2013 by DecisionQuest to provide trial teams with cost-efficient juror attitude surveys

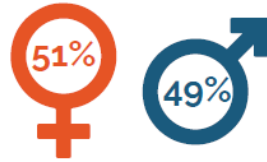
- **Objective:** Understand the impact of the pandemic on juror decision making
- **Sample:** Approximately 900 respondents from six metropolitan areas: Los Angeles, New York, San Francisco, Chicago, Miami and Middlesex County, NJ
- **Methodology:** Participants responded to a 90-item questionnaire and asked to render decisions on liability and damages for three brief case scenarios: asbestos, sexual harassment and talc

March 2020 Survey

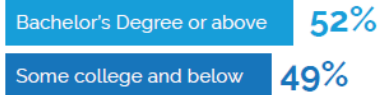
Approximately 900 respondents



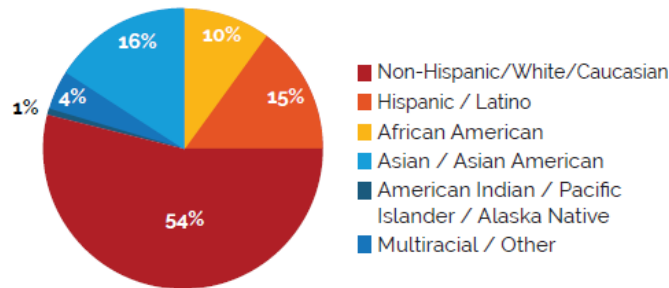
Gender Breakdown:



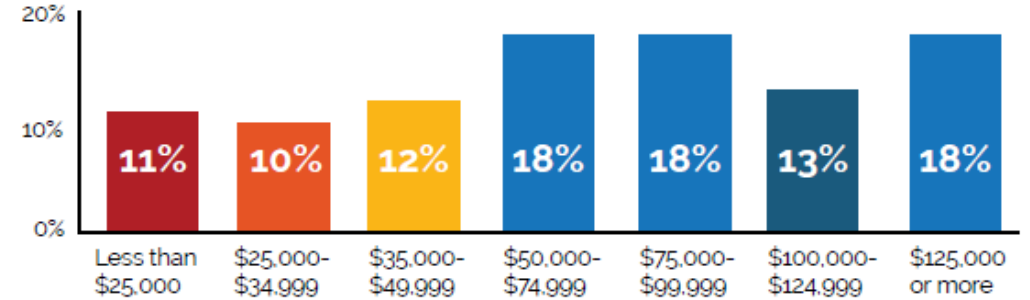
Education Breakdown:



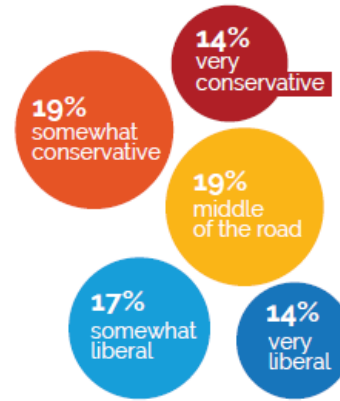
Ethnicity Self-Identification:



Annual Income:



Political Leanings:



March 2020 Survey - COVID-19 Impact



ONLY 16%

of respondents had tested positive themselves, or had someone close to them test positive for COVID-19



32%

of respondents had a spouse/significant other lose their job due to COVID-19

March 2020 Survey Findings

An analysis of the data revealed that concern about the infection and disruption from the virus was statistically related to their verdict decision and damages in the three case scenarios

Concern of Infection:

Respondents who expressed **significant concern** that they or a loved one would contract COVID-19 responded more **pro-plaintiff**, said they would award **higher damages** and the stronger the **punitive sentiments** they expressed towards the defendant.

Very Concerned **51%**



Somewhat Concerned **33%**



A Little Concerned **11%**

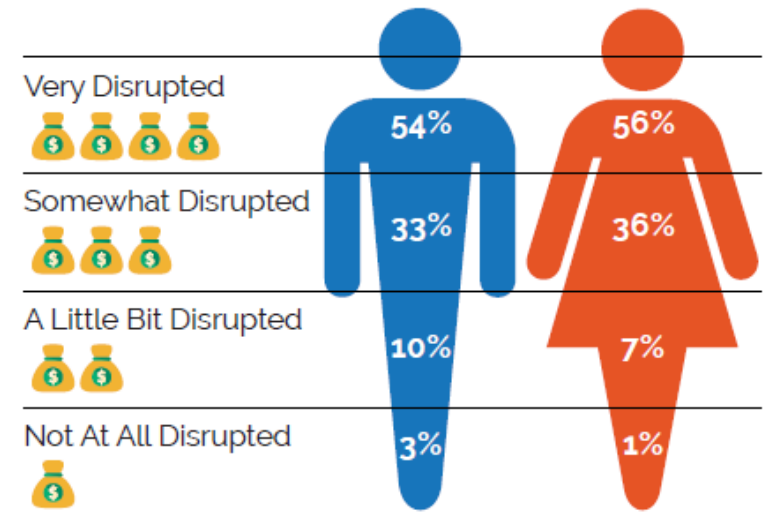


Not At All Concerned **5%**



Life Disruption & Damages:

Life disruption is also related to damages: the more people reported their lives have been disrupted, the higher the damages they would award.



March 2020 Survey - Juror Profile

Pro-Plaintiff Characteristics

- Are more (“very” or “somewhat”) concerned that they or someone they know will contract COVID-19
- Have experienced more (“very” or “somewhat”) disruption to their life due to COVID-19
- Said “yes” they would get a test for the virus if it were easily available and free
- Describe themselves as politically liberal

Pro-Defense Characteristics

- Men who express “little” or “no concern” that they or someone they know will contract COVID-19
- Have experienced less (“little” or “no”) disruption to their life due to COVID-19
- Said “no” to getting a test for the virus even if it were easily available and free
- Describe themselves as politically conservative

May 2020 Survey

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May 2020 Survey

Data from this second survey was collected between May 5-19, 2020, using CaseXplorer™

- **Objective:** Understand the ongoing impact of the pandemic on juror decision making
- **Sample:** Approximately 900 respondents from six areas: Los Angeles, New York, Miami, Houston, Minneapolis and Middlesex County, NJ. Plus, an additional 200 respondents from Illinois, including Cook County.
- **Methodology:** Participants responded to an approximately 115-item questionnaire and asked to render verdict-like decisions on case scenarios
- The sample of 900 were presented with three brief case scenarios: *contract, whistleblower and talc*
- The sample of 200 were presented with one brief case scenario on *business interruption insurance*

Business Interruption Insurance Scenario

This is a lawsuit about insurance coverage for small businesses in Illinois that have suffered severe financial losses during the last several months. There are three plaintiffs in this lawsuit, they are Bull & Bear, a company with two local, fine-dining restaurants; Go-To-Gym, a boutique fitness studio; and Sanderson Salon, a three-location hair salon. The defendant is Great Midwestern Insurance Company, based in Wisconsin.

The three plaintiffs are seeking a lawsuit judgment against Great Midwestern to cover losses they have suffered during the government-mandated closure of their businesses.

Great Midwestern sold the plaintiffs “all-risk” insurance policies for their business properties. These Great Midwestern Insurance policies agree to *“pay for the loss of business income sustained due to the necessary suspension of operations. The suspension must be caused by direct physical loss or damage to covered property.”*

The COVID-19 pandemic is a public health crisis that has profoundly affected American society, including the public’s ability to congregate in businesses such as restaurants, gyms, and hair salons. In March, Illinois Governor Pritzker issued Executive Orders for certain businesses to suspend all of their onsite services and for Illinois residents to stay at home except when performing essential services.

Business Interruption Insurance Scenario

The plaintiffs argue they are entitled to business interruption insurance coverage for the losses they have suffered while their businesses have been shut down. The plaintiffs claim they have suffered physical loss of their properties. Because of COVID-19 virus contamination and Governor Pritzker's Executive Orders, the plaintiffs have not been able to use their business properties. This means the COVID-19 virus and Governor Pritzker's executive orders have caused the plaintiffs to suffer the physical loss of their business properties. The plaintiffs also claim they have suffered physical damage to their properties. A property can sustain physical damage without experiencing significant structural damage. Damage unnoticeable to the naked eye such as asbestos in the air or viruses on surfaces can be physical damage if the damage is severe enough to make the building unusable.

A property can also be considered to have suffered physical damage if it becomes physically incapable of performing its essential functions, such as providing services to the public. For example, a cellphone can be considered physically damaged because, due to a dead battery, the phone is physically incapable of performing its essential function of making telephone calls. The plaintiffs' business properties were damaged because, due to the COVID-19 pandemic and Governor Pritzker's Executive Orders, the properties became physically incapable of performing their essential functions of serving the public.

The plaintiffs ask for a verdict finding they have sustained "*direct physical loss or damage*" at their properties because of the COVID-19 pandemic and Governor Pritzker's Executive Orders, and that the business income they have lost is covered under the policies.

Business Interruption Insurance Scenario

In response, Great Midwestern says that these insurance policies do not cover business interruptions caused by the COVID-19 pandemic. These policies cover only losses that result from direct physical loss or damage to property. These insurance policies are meant to be coverage for physical property damage caused by things like hurricanes, fires or theft.

All three policies say in writing that they only cover “*direct physical loss or damage to covered property.*” It does not matter whether the plaintiffs claim their businesses were shut down because of the COVID-19 pandemic or shut down because of government orders. Either way, there is no insurance coverage because the businesses have not suffered “*direct physical loss or damage*” to their properties.

Physical loss or damage requires visible or structural damage to the insured property. Lack of use is not physical loss or damage. Is a cash register that is not being used damaged? No, lack of use is not “*direct physical loss or damage.*”

A need for cleaning is not physical loss or damage. When a restaurant table is cleaned to make it safe and useable, is it being repaired because it is damaged? No, if it is something that can be readily cleaned, then there is no “*direct physical loss or damage.*”

Business Interruption Insurance Scenario

The absence of customers is not physical loss or damage. If customers stay home to help stop the spread of a virus, has the property been physically damaged? No, there has been no “*direct physical loss or damage*” to the property.

Further, there is no evidence that any significant amount of the COVID-19 virus was present in the properties when they were closed or that any presence of the virus inside the business properties made them unusable. The business properties have not suffered any contamination damage.

Great Midwestern argues that the plaintiffs are not entitled to business interruption insurance coverage because there has been no direct physical loss or damage to their business properties.

Liability Decisions

Question	Yes	No
Did the three plaintiff companies sustain “direct physical loss or damage” at their properties because of the COVID-19 pandemic?	61%	39%
Is the business income lost by the Bull & Bear <u>Restaurant</u> Company a covered loss under its policy with Great Midwestern Insurance?	54%	46%
Is the business income lost by the Go-To- <u>Gym</u> a covered loss under its policy with Great Midwestern Insurance?	54%	46%
Is the business income lost by the Sanderson <u>Salon</u> a covered loss under its policy with Great Midwestern Insurance?	54%	46%

Business Interruption Insurance: Juror Profile

Pro-Plaintiff Characteristics	Pro-Defense Characteristics
<ul style="list-style-type: none">• Under 24 years of age*• Living normally, coming and going as usual*• Very liberal*• They, or someone close, has gotten the virus*• “Very” confident about federal government’s ability to control the pandemic• Are comfortable coming to a courthouse to serve as a juror “one” to “two” months from now• If called to serve as a juror in a civil lawsuit between now and October, they are “a little bit angry” at the plaintiff for filing the lawsuit• Believe the “spirit of a contract” is more important*• Agree that most large companies would not hesitate to break an agreement if it benefited them somehow	<ul style="list-style-type: none">• Over 45 years of age*• Not leaving home at all*• NA• NA• Only “a little confident” about federal government’s ability to control the pandemic• Are comfortable coming to a courthouse to serve as a juror “four” months from now• If called to serve as a juror in a civil lawsuit between now and October, they are “not at all angry” at the plaintiff for filing the lawsuit• Believe the “letter of the contract” is more important*• Disagree that most large companies would not hesitate to break an agreement if it benefited them somehow

Business Interruption Insurance: Juror Profile

Pro-Plaintiff Characteristics	Pro-Defense Characteristics
<ul style="list-style-type: none">• Have experienced property or physical damage from a natural disaster• Believe it is “very common” for insurance companies to try to avoid paying valid claims without justification• Believe that when juries award large dollar amounts in lawsuits, those awards are based on “the evidence and the law”*• NA	<ul style="list-style-type: none">• Have not experienced property or physical damage from a natural disaster• Believe it is “somewhat common” for insurance companies to try to avoid paying valid claims without justification• Believe that when juries award large dollar amounts in lawsuits, those awards are based on “jurors’ emotional reactions to the case”*• Believe damages awarded in lawsuits are “too high”

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Thank you!

Bill Casey | Swift, Currie, McGhee & Hiers

bill.casey@swiftcurrie.com

404.888.6144

Jeff Shiver | Shiver Hamilton

jeff@shiverhamilton.com

404.620.2117

Dr. Philip Anthony | DecisionQuest

panthony@decisionquest.com

310.618.9600



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