

ARTICLE

THE IMPACT OF COVID-19 ON U.S. LITIGATION

| 27/04/20 | Olivier Attias Flore Mahieu



The Covid-19 pandemic has severely impacted courtroom procedures and the conduct of litigation around the world. Due to the decentralized organization of the United States' judiciary, each state and federal court in the U.S. has adjusted in various ways, including by closing courthouses or restricting their access to essential personnel, rescheduling hearings, allowing remote appearances before the judge, etc.

The U.S. Supreme Court

On 16 March 2020, the U.S. Supreme Court reported that all oral arguments scheduled during the month of March would be postponed until further notice[1]. Such postponement is not unprecedented; similar measures were indeed taken by the U.S. Supreme Court during the Spanish flu epidemic in 1918.

However, for the first time ever, the U.S. Supreme Court will be hearing oral arguments by telephone conference in May 2020[2]. This is a major change considering the revulsion of the highest jurisdiction at cameras in its courtroom.

The federal courts

James C. Duff, chief of the Administrative Office of the U.S. federal courts, highly recommended that all federal courts take the following measures:

- Permit as many employees as is practicable to telework;
- Postpone all courthouse proceedings with more than 10 people, such as naturalization ceremonies;
- Conduct in-person court proceedings only when absolutely necessary. Utilize videoconferencing or audioconferencing capabilities where practicable;
- Conduct jury proceedings only in exceptional circumstances;
- Limit the number of family members who attend proceedings;
- Stagger scheduling of critical court proceedings to reduce the number of people in seating galleries, wells of courtrooms, conference rooms, and public waiting areas; and
- Limit staff in critical courtroom proceedings to fewer than 10 people, and ensure that they are at least six feet apart[3].

However, federal courts are adapting these recommendations to their needs.

Most of them have decided to postpone all civil and criminal jury trials until further notice, as it would be challenging to implement social distancing during physical hearings. Most courts are still expecting electronic filings by the parties when possible.

In the Central District of California, a "Continuity Of Operations Plan" has been put into place. Although jurors will not be called for service in civil or criminal jury trials until after 1 June 2020, all filing deadlines have been maintained, hearings in civil cases and in certain criminal matters take place via video or telephone conference and criminal duty matters before Magistrate Judges (such as initial appearances, arraignments, detention hearings, etc.) are heard by video or telephone conference where possible[4].

In the Northern District of Illinois on the other hand, all filing deadlines have been extended by 21 days. All civil case hearings and trials scheduled on or before 1 May 2020 are stricken from the court calendar and will be re-set by the presiding judge after 4 May 2020. However, in order to preserve the criminal defendants' right to a speedy and public trial (as guaranteed by the 6th Amendment of the U.S. Constitution), most criminal proceedings are maintained, whether by physical or remote access[5].

Although physical access to the courthouse is restricted, most federal Court of Appeals are still hearing cases remotely.

The state courts

The New York state courts have decided to hear civil and criminal jury trials that have already commenced but will not hear any new jury trials. Since the beginning of the month of April, all oral arguments are heard through the Skype application. Motions are ruled by the judge without hearing oral arguments, unless otherwise directed[6].

On 20 March 2020, the Governor of New York, Andrew Cuomo, issued an executive order thereby tolling all time limits 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" from 20 March to 19 April 2020[7]. This suspension has been extended until 7 May 2020[8].

Discovery proceedings

Although most party discovery proceedings could be conducted despite the measures taken by the jurisdictional





authorities, the government directives to limit travel may slow down such process.

Indeed, data collection requiring on-site presence will be challenging, as well as physical depositions of experts. In health-related disputes, the unavailability of medical experts should also be taken into account.

Therefore, video and telephone conferences, as well as written depositions, should be the privileged medium of obtaining evidence. This is especially the case as not all jurisdictions are willing to allow a tolling of procedural time limits.

Overall considerations

No common jurisdictional regime dealing with the impact of Covid-19 on litigation has been implemented in U.S. courts: every jurisdiction applies its own rules. It is therefore essential for litigants – especially when not in the US – to regularly liaise with their counsel to discuss applicable procedural rules in their specific cases.

Because most courts have decided to postpone hearings and to rule on pending motions only, it is anticipated that once courthouses decide to reopen their doors to litigants, criminal cases will be prioritized over civil cases. Litigants may therefore experience delays in the resolution of their civil disputes which do not present an urgent aspect.

The crisis may also create some opportunities.

Due to the current uncertainty regarding dates of hearing and final resolution of disputes, settlements between the parties should be anticipated so as to ensure a quicker resolution. Moreover, certain parties may be financially impacted by the Covid-19 crisis and may therefore be willing to accept settlement offers, rather than wait for their cases to be rescheduled.

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[1] https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20

[2] https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20

[3] <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19>

[4] <https://www.cacd.uscourts.gov/news/further-measures-taken-response-covid-19-pandemic>

[5] <https://www.ilnd.uscourts.gov/>

[6] <https://www.nycourts.gov/whatsnew/pdf/MEMO-3.13.20.pdf>

[7] <https://www.nycourts.gov/whatsnew/pdf/EO-202.8-ocr.pdf>

[8] https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.14_final.pdf
