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'Like We're Stuck in Park': With COVID Delaying Trials, High-Dollar Settlements Are Stalled in Philadelphia

Recent news that court leaders have set Jan. 21 as the day that civil jury trials are set to resume has been a hopeful sign for some attorneys. But others are wary that, in the face of skyrocketing COVID-19 numbers, a realistic date for when courts will open could still be far off.

By Max Mitchell | December 15, 2020



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With Philadelphia (<https://www.law.com/thelegalintelligencer/2020/11/18/philadelphia-court-system-again-suspends-criminal-trials-due-to-pandemic/>), one of the most active trial jurisdictions in the United States, well into its ninth month without seeing a civil jury (<https://www.law.com/thelegalintelligencer/2020/12/01/after-6-months-in-limbo-philadelphia-court-sets-january-date-for-restart-of-civil-jury-trials/>) seated, attorneys are saying that, with few exceptions, high-dollar personal injury cases are not settling.

That's according to several plaintiffs and defense attorneys who have talked with The Legal over the last six weeks. Without the looming threat of trial (<https://www.law.com/thelegalintelligencer/2020/11/19/as-jury-attendance-declines-lackawanna-judges-can-nix-peremptory-challenges-will-others-follow/>) motivating

both sides to come together with a settlement agreement, those lawyers said negotiations in the highest value cases on their dockets have largely ground to a halt.

"The really big cases I have are sitting in the inventory collecting dust. I can't get anybody to talk mediation," Philadelphia plaintiffs-side lawyer Slade McLaughlin of McLaughlin & Lauricella said, echoing sentiments from numerous other lawyers. "It's like we're stuck in park."

The recent announcement from court leaders in the First Judicial District setting Jan. 21 as the date for civil jury trials to resume was viewed as a hopeful sign. But others are wary that, in the face of skyrocketing COVID-19 numbers, a realistic date for when courts will open could still be far off.

Regardless of when trials can start, in the months since the pandemic shuttered the courthouse, attorneys say several patterns have emerged when it comes to settlement negotiations. Along with seeing little to no movement with larger cases, attorneys have also found the defense bar taking a tougher stance, with some plaintiffs attorneys reporting that their clients have been asked to take a "COVID discount."

Case 'Stratification'

When it comes to which cases have been moving, attorneys agree that only cases with lower dollar values have continued moving, with negotiations becoming increasingly deadlocked the higher the dollar value of the case.

Echoing figures mentioned by other lawyers, Ostroff Injury Law attorney Jon Ostroff puts the lines of demarcation at the six-figure and seven-figure marks, respectively, saying that cases valued below \$100,000 have seen little effect by the pandemic, while cases valued between that and \$1 million have slowed tremendously. Cases valued above \$1 million, he said, have all but ground to a halt.

"I've discussed those breakdowns with prominent mediators and that's what they're seeing too," Ostroff said.

Lawyers on both sides pointed to those cases typically being more contentious and requiring more layers of approval. Ostroff said the issue most often arises in high-value medical malpractice cases, which, under normal circumstances, required a trial date before the parties could come to a settlement accord.

"There's only one reason for a defendant to settle a catastrophic injury case and that's the prospect of a jury verdict," Kline & Specter attorney Shanin Specter said. "That's the difference from the smaller-damage tort actions, where the insurance company has an interest in turning the case over so it doesn't sit around accumulating monthly bills from counsel."

Gary Samms, chair of Obermayer Rebmann Maxwell & Hippel's catastrophic loss group, agreed that movement of cases have stratified across dollar values, noting that his firm has not resolved any of its highest value catastrophic loss cases since the start of the pandemic.

"The effect of going to trial is what people respond to and right now, without that threat, not a lot of people are settling," he said. He added that no longer having the pressure of a trial has helped the defense stick to its valuation of the case.

"If the case is not worth what they're asking for, there's no incentive to settle the case," he said, adding that carriers now have a little more leverage. "There's no downside. It has to be something fair and equitable."

There have been a few exceptions to this trend.

Nancy Winkler of Eisenberg, Rothweiler, Winkler, Eisenberg & Jeck said her firm has been able to settle a number of cases, including some in the multimillion-dollar range.

In September, she and Todd Schoenhaus settled a motor vehicle case for \$12.75 million. The plaintiff in the case was a woman in her 70s, who suffered injuries, including quadriplegia, as a result of an auto accident. The settlement included confidentiality as to the name of the parties and the location of the crash. Although the case did not include any projected earnings or loss of consortium, the plaintiff was able to establish a punitive damages claim.

Winkler pointed to the discovery the firm was able to uncover showing that the truck driver involved in the collision was using her phone at the time of the accident and that the trucking company had placed the phone's holder too low. The firm, she said, was also able to obtain on-board video footage, which, she said, was a significant motivating factor for the settlement as well.

"Any time you're able to get any type of video—either photographs or video—that really helps in putting pressure on the defense in a case," Winkler said.

Schoenhaus also cited the company's reaction to the crash and its available coverage.

"They terminated the driver right after this happened. They knew there were problems," he said. "And there happened to be insurance policies that covered punitive damages for vicarious liability, so there was coverage for it. We were marshalling the evidence to establish recklessness."

The pandemic, they said, did affect the case, since doctors couldn't examine the plaintiff in person. But, according to Winkler, from the very beginning, defense counsel treated the case very seriously.

"There was no gamesmanship. They handled themselves very professionally," she said. "They were very able adversaries, but they also recognized there were significant problems for them in the case."

The 'COVID Discount'

Although characterized differently depending on whether you ask a plaintiff or defense attorney, both sides agree that the defense's position has been leveraged during the pandemic.

Several plaintiffs attorneys reported that their counterparts have told them their case needs to take a "COVID discount," which typically means a 10% to 20% drop in valuation from the plaintiff's demand.

"I've had defense lawyers say, you want to settle this case, it's a fire sale," McLaughlin said, adding that some have also referred to it as "taking a haircut."

McLaughlin and others said those tactics seem to be aimed at taking advantage of firms at a time when their typical revenue stream has been cut off. Plaintiffs attorneys also said those "low ball" offers can create complications with the clients as well, who may be increasingly willing to take the offer, since many are also out of work as a result of the pandemic.

But, lawyers said, frequent and honest communication can help.

"The best thing you can do representing an injured victim is to prepare them for these tactics, implore them to be patient and not be taken advantage of, and to stay by what they're entitled to," Ostroff said.

Specter said the irony is that, in the smaller cases, where people's livelihoods aren't impacted, their cases are still settling, while the more catastrophic cases, where a breadwinner might be taken out of the workforce, those cases are the ones having to wait.

"We tell our clients what the realities are and they're trying to cope, but in some cases, the burdens are inherently catastrophic," he said. "The burden of delay is inherently catastrophic."

Defense attorneys tend to see the situation differently than those in the plaintiffs bar. According to defense lawyers, the trial delays have put the ball in the defense's court.

"You try to settle the case at the most opportune time for your and your client. Sometimes that's at trial, sometimes that's early on in a case, but at a period like now, there's nothing incentivizing people to settle other than if there's a break in the numbers," Samms said.

Elliott Greenleaf lawyer Brian Grady, however, said it seems that the pandemic has taken some of the adversarial nature of the process. Instead of focusing on the threat of trial, or the potential courtroom prowess of the litigators, attorneys and their clients, he said, have been forced to focus more on the fundamentals of the case.

"It has really caused both sides to focus more on the legal, evidentiary and factual aspects of their cases," Grady said, adding that it has cut both ways. "I think plaintiffs are able to express to their clients in a better way, the value of a matter and I think the defense bar has been able to express to their clients that, also, we have to look to the legitimacy of some of these claims. You can't count on your defense counsel's ability to sway a jury here or there."

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