

DRUG, DEVICE AND BIOTECHNOLOGY

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This article explores the ways in which COVID-19 is uniquely affecting all phases of ongoing drug and device litigation, including discovery, motion practice, and trial.

Litigation in the Time of COVID-19: Understanding the Novel Impact on Drug and Device Cases

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The Drug, Device and Biotechnology Committee serves as an educational and networking resource for in-house counsel employed by pharmaceutical, medical device and biotech manufacturers and the outside counsel who serve those companies. The Committee is active in sponsoring major CLE programs at the Annual and Midyear Meetings as well as internal committee programs. The Committee also publishes a monthly newsletter that addresses recent developments and normally contributes two or more articles to the *Defense Counsel Journal* annually. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The COVID-19 pandemic has affected deadlines, in-person proceedings, and discovery in all pending litigation, but has had particular impact on drug and device cases. For example, the medical professionals who often serve as expert and fact witnesses during discovery are now on the front lines battling the pandemic. In addition, plaintiffs may seek to exclude evidence that manufacturers are researching and developing vaccines to treat the virus. And while many trials are suspended for the short term, the complexity of product liability litigation and related need for a jury trial make it especially difficult for a drug and device trial to proceed in the near future.

Discovery of Medical Professionals

While courts have rather uniformly issued orders addressing court closures and the suspension of jury trials in response to COVID-19, court orders addressing how to approach discovery have been far less uniform. Especially relevant to drug and device litigation is how some courts are singling out medical professionals and excusing them from discovery altogether, which may impact cases where medical professionals are either retained as experts or serve as key witnesses, such as the prescribing or implanting physician.

For example, the Supreme Court of New Jersey suspended “all depositions of and all required appearances for any doctors, nurses or other healthcare professionals who are involved in responding to the

COVID-19 public health emergency,” except where the deposition or appearance is requested by those individuals or the matters relate to COVID-19, recognizing the “critical need for the uninterrupted services of” doctors, nurses and other healthcare professionals during this time. See Order Suspending Depositions and Appearances of Medical Professionals Involved in Addressing COVID-19 (N.J. Mar. 24, 2020); see also Omnibus Order on COVID-19 Issues at 2 (N.J. May 28, 2020) (extending original order). A similar order out of Pennsylvania recently suspended such depositions and appearances without exception. See Emergency Order of Statewide Judicial Administration Applicable from May 1, 2020, Through June 1, 2020 at 6, *In re Gen. Statewide Judicial Emergency*, Nos. 531 & 532 (Pa. Apr. 28, 2020) (“Depositions of and required appearances for doctors, nurses, or other healthcare professionals who are substantially involved in responding to the COVID-19 public health emergency are suspended for the duration of this Order.”).

Other courts have addressed the issue in individual cases. For example, in *DeVine v. XPO Logistics Freight*, plaintiffs filed suit as a result of a motor vehicle collision, and the parties sought to depose various treaters regarding plaintiffs’ alleged injuries. In addressing the requests for depositions, the court acknowledged that “the medical community is very, very busy right now,” and it was “reasonable . . . to expect that . . . the situation at hospitals and medical offices will be all hands on deck.” *DeVine v. XPO Logistics Freight*, Case No. 18 C 1264, 2020

WL 1275087, at *2 (N.D. Ill. Mar. 17, 2020) (to be published in F. Supp. 3d.). In the interest of balancing the burden and expense of the proposed discovery with its potential benefit, Magistrate Judge Gabriel Fuentes imposed a multi-step protocol for the depositions of medical professionals and treatment providers. *Id.* at *3. As a preliminary matter, the court ordered the parties to meet and confer regarding whether each medical provider deposition was actually necessary. For any deposition still sought, the court ordered the party seeking the deposition to submit certain information about the provider, including (i) the provider’s “current and anticipated involvement in preparation or response to the COVID-19 public health emergency”; (ii) the nature and extent of the provider’s involvement in treating the plaintiff or another party; (iii) the provider’s relative importance to the case; and (iv) the extent to which the same or sufficient discovery could be obtained from alternative sources. *Id.*; see also *Lipsey v. Walmart, Inc.*, Case No. 19 C 7681, 2020 WL 1322850, at *4 (N.D. Ill. Mar. 20, 2020) (implementing the same protocol). The court explained that it would use the information to rule on the requests in light of the ongoing need for physician services and the fact that “[a]ll hands cannot be on deck if some of them are at a law office sitting for a deposition in a tort lawsuit.” See *DeVine*, 2020 WL 1275087, at *3.

These orders reflect an acknowledgment by some courts that medical professionals are in a unique situation where the essential services they are providing during this

pandemic necessarily outweigh litigation needs, and if other courts issue similar orders, the impact on deposition requests could be significant. Moreover, the orders may have wider implications for drug and device manufacturers involved in product liability litigation, where the types of company employees routinely asked to testify may be involved in the company’s coronavirus response efforts. Although, to date, these orders have been limited to medical professionals, they signal a willingness among courts to excuse certain individuals from the burdens of litigation where they are substantially engaged in responding to the COVID-19 crisis. In that regard, they suggest that courts may be receptive to similar arguments for other professionals on the front lines, such as a company scientist involved in safety testing for a coronavirus vaccine candidate or a company compliance officer tasked with ensuring that new life-saving drugs are properly labeled and approved for emergency use.

Motions to Exclude Evidence of Defendants’ Good Conduct

Another way in which drug and medical device cases are specifically impacted by COVID-19 is through the role that manufacturers are playing in the response to the virus. Many clients currently engaged in litigation are working to develop vaccines and other drug therapies to treat the virus, or have ramped up manufacturing efforts to meet the high demand for certain life-saving medical equipment.

As a result, many plaintiffs are proactively seeking to keep any evidence of manufacturers' response efforts out of upcoming trials in order to support their narrative of manufacturer defendants as bad actors. *See, e.g.,* Plaintiff's Memorandum of Law in Support of Her Motion *In Limine* to Preclude Any Reference to Johnson & Johnson or Its Subsidiaries' Efforts to Create A Vaccine for or Otherwise Combat COVID-19 at 1, *In re Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, Case No. 2:14-cv-01379 (S.D. W. Va. filed Apr. 13, 2020), ECF No. 227-1 (motion to preclude defendants from "introducing into evidence or making any direct or indirect mention or reference whatsoever—by counsel, or through witnesses, exhibits, or expert testimony—to [their] efforts to develop a vaccination for, or otherwise combat, Covid-19"). To that end, plaintiffs are claiming that a company's efforts to create a vaccine or otherwise combat COVID-19 are evidence of its good character and should not be admitted to more broadly bolster its reputation. Moreover, plaintiffs contend that where a litigation does not relate to COVID-19, such evidence is irrelevant, having no tendency to make any fact in the case more or less probable than it would be without the evidence. Plaintiffs have also argued that such evidence is unfairly prejudicial because its sole purpose is to evoke an emotional response from jurors and convey that the companies are doing good in the community.

But a sweeping prohibition of the kind sought by plaintiffs would be unfair to

defendants. Jurors are likely to have been affected by COVID-19 in one way or another, and although defendants may not be seeking to affirmatively introduce evidence of vaccine development, the notion that all references to COVID-19 must be excluded seems both overbroad and unnecessary. Moreover, there are many circumstances where a pharmaceutical drug or medical device company would have legitimate reason to mention its efforts to develop a vaccine or otherwise combat the virus, such as introducing the company to jurors by way of explaining the types of products it makes, introducing a company witness involved in the company's response efforts, or even describing how a drug gets to market in emergency situations.

Suspension of Jury Trials

Lastly, the complexity of drugs and medical devices makes trials especially difficult in the current environment. As a general matter, many courts have put in-person jury trials on hold due to issues with both jury selection and service. *See, e.g.,* General Order No. 72-2 at 1, *In re Coronavirus Disease Pub. Health Emergency* (N.D. Cal. Apr. 30, 2020) (suspending civil jury trials through June 1, 2020); Further Continuance of Jury Trials and Exclusion of Time Under the Speedy Trial Act at 2, *In re Coronavirus/COVID-19 Pandemic* (E.D.N.Y. Apr. 21, 2020) (Administrative Order No. 2020-15) (suspending civil jury trials through June 15, 2020); Amended General Order No. 2020-05-2 at 2, *In re Coronavirus (COVID-19) Pub. Emergency*

(N.D. Ohio Apr. 20, 2020) (suspending civil jury trials through June 12, 2020).

For instance, jury selection becomes especially difficult while social distancing because potential jurors may need to take public transportation to get to the courthouse, and they may be closely inspected by security personnel while entering the building. *Commonwealth v. Vila*, No. FE-2019-0000939, 2020 WL 1643379, at *5 (Va. Cir. Ct. Mar. 30, 2020, trial order). In addition, while actually serving on a jury, the jurors would be seated in a juror box where it would be a “practical impossibility” to keep everyone six feet apart. *Id.* However, spreading out the jury would make it difficult to police inappropriate interactions between jurors and attendees in the gallery. *Id.* Courts have also raised concerns with compiling a representative sample of the population while excluding those at high risk for COVID-19, ensuring that the jury is focused on the task at hand despite COVID-19 struggles at home, and acknowledging the potential for a mistrial if a juror becomes ill during the trial and others need to quarantine.

With those considerations in mind, some courts are choosing virtual alternatives to trial, but that option is less likely to be successful in drug and device litigation. Generally speaking, a virtual trial is most straightforward in a bench trial, which is rarely the format for drug and device litigation. Furthermore, a virtual trial is least controversial if the verdict is non-binding, but summary jury trials are similarly rare in

drug and device litigation. Moreover, product liability litigation against drug and device companies tends to involve document-intensive examinations of several witnesses, some of whom live in other time zones, raising both scheduling and logistical concerns. Finally, as discussed above, to the extent discovery of medical professionals is halted for the foreseeable future, any trial testimony of medical professionals may be similarly suspended.

Conclusion

COVID-19 has been and will continue to be a universal disruptor. While it may not be possible to predict what the world will look like six months from now, taking stock of the ways in which COVID-19 has already manifested itself in ongoing litigation is instructive. As it relates specifically to drug and device litigation, the impact thus far suggests restrictions on requesting the deposition of a medical professional, challenges to the admissibility of evidence concerning defendants' COVID-19 response efforts, and a longer hiatus from trials.

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