Analysis (/analysis/)

Defendants Beware: Juror Bias in COVID-19 Litigation

As trials resume, defendants need to be aware of the potential biases prospective jurors may have against those accused of coronavirus-related wrongdoing.

By **Josh Dubin** | November 05, 2020 at 11:45 AM

From February 24 to Sept. 13, 2020, more than 6,723 COVID-19-related complaints were filed in federal court. These cases allege claims directly related to the health crisis (i.e., class action lawsuits filed against sellers of event or airfare tickets for canceled events and flights, class action lawsuits by students against universities for breach of contractual obligation by failing to provide on-campus classes and the educational experience for which students had paid, and business interruption

insurance claims). As trials resume, defendants need to be aware of the potential biases prospective jurors may have against those accused of coronavirus-related wrongdoing. Dubin Research & Consulting (DRC) studied the attitudes of jury-eligible citizens towards COVID-19-related litigation by anonymously surveying 420 citizens residing in the counties that comprise the Southern and Eastern Districts of New York. The study sample matched the collective demographic characteristics of jury-eligible citizens of those districts. While DRC found that defendants are likely to be met with widespread juror bias, there are ways to anticipate the characteristics of jurors that have the potential to be especially harmful.

DRC found that even without being provided any specific evidence or details related to a case, most respondents assumed that defendants in COVID-19-related cases were responsible/liable for plaintiffs' injuries. DRC asked, "*Do you believe that, in most cases, if a corporation is a defendant in a coronavirus-related case, it is responsible/liable for the Plaintiff's injuries?*" to which 60% of respondents answered in the affirmative.

These results should be especially alarming for corporate defendants who already face a steep uphill battle due to anti-corporate sentiments. Since the start of the pandemic, several large corporations have been the subject of extremely negative media coverage. Some of the news stories concerned essential workers protesting unsafe labor conditions (e.g., McDonald's and Amazon) or corporations laying off a significant portion of their workforce due to COVID-19 slowdowns, while top tier executives continued to receive substantial bonuses (e.g., Disney, JC Penney, and Uber). Overall, DRC observed that approximately half of all respondents had negative views towards large corporations' response to the pandemic. More specifically, respondents were asked to indicate how strongly they agreed or disagreed with the statement, "*Since the start of the coronavirus outbreak, most large corporations are putting profits over the safety of their employees.*" Approximately 51% indicated that they agreed with the statement.

Respondents' awareness of negative COVID-19-related media coverage of large corporations negatively impacted jurors' views of the companies. Out of the respondents who had read or heard about companies that had laid off a substantial portion of their workforce while executives received substantial bonuses, 67%agreed that large corporations were putting profits over the safety of employees. Out of the respondents who had *not* heard of such coverage, 43% agreed with the statement. Although an increasing number of companies have put out commercials with "we care" or "we're in this together" themes, it will be important to consider how strongly prospective jurors will be influenced by a corporate defendants' reputation and response to the pandemic.

DRC also studied respondents' attitudes towards damages in COVID-19 litigation. DRC asked respondents whether they agreed with the statement, "*If I were a juror on a coronavirus-related case, I would vote to award the highest damage award possible.*" Approximately 40% of respondents indicated that if they were a juror on a coronavirus-related case, they would vote to award the *highest* damage award possible. This is troubling as it suggests that respondents were readily willing to award the high end of damages without hearing any evidence.

What Influences Decision-Making?

The coronavirus pandemic has not only disrupted most—if not all—facets of everyday life, but it has also left far-reaching mental health and trauma-related consequences. Data collection for this study took place during a time when New York City was an epicenter of the pandemic, and DRC observed that respondents were deeply affected by the virus. Concerning the employment status of the respondents and their loved ones, 11% indicated that they lost their job, and nearly half indicated that a family member or a close friend had lost their job(s) because of the virus. In addition, 83% of respondents were concerned that they or someone they knew would fall ill. Overall, the majority of respondents (78%) reported that their lives had been either "extremely" or "moderately" disrupted by the pandemic, and 83% indicated that they would be anxious and/or worried about the prospect of being in a large group.

Research conducted by Harvard social psychologist Jennifer Lerner in March 2003 has shown that emotions, like anger, can play a role in decision-making such that it makes us more eager to act. Dr. Lerner's findings can be extrapolated to juror decision-making in COVID-19-related litigation. For example, within the group of respondents that "strongly" or "somewhat" agreed with the question, "*If I were a juror on a coronavirus-related case, I would vote to award the highest damage award possible*," 81% of them reported that coronavirus had either "extremely" or "moderately" impacted their lives. In addition, DRC observed a difference between respondents who had had COVID-19 and those who had not. Amongst those that had COVID-19, 56% agreed that they would vote to award the highest damage award possible. Within the group of respondents that had *not* had COVID-19, 38% said they would vote to award the highest damage award possible. Put simply, the more a prospective juror has been directly impacted by the coronavirus, the more likely their anger, anxiety, and fear will translate into a high damages award.

DRC also observed that respondents' feelings and concerns about COVID-19 influenced how they perceived large corporations. The more respondents were concerned about the risk of infection or were anxious about being in large groups of people, the more likely they were to agree with the statement, "*Since the start of the coronavirus outbreak, most large corporations are putting profits over the safety of their employees*." For example, out of those who agreed with that statement, approximately 85% of respondents reported being "extremely concerned" or "moderately concerned" that they or someone they knew would contract the virus. In addition, 85% of respondents who indicated that they would be "anxious" or "very anxious" about being in large groups agreed with the statement.

DRC found that the more COVID-19 had disrupted the respondent's life, the more likely they were to believe that in most cases, a defendant in a COVID-19-related case is responsible for Plainti 's injuries. More speci cally, out of those who answered in the a rmative to the question, "Do you believe that in most cases, if a corporation is a defendant in a coronavirus-related case, it is responsible/liable for the Plainti 's injuries," 82% expressed that their lives had been "extremely" or "moderately disrupted" by the pandemic.

One of the most effective ways to anticipate how a prospective juror's experience with COVID-19 may shape their decision-making or what assumptions they have about your client and their handling of the pandemic is to test the case before a mock jury. Understanding prospective jurors' biases and how they will affect trial outcome *before* picking the jury will allow litigators to craft a winning trial strategy.

In addition to testing the case, litigators should propose voir dire questions about a juror's experience and attitudes relating to the pandemic. Below is a sampling of potential voir dire questions for COVID-19-related litigation that will expose prospective jurors that we know, based on the research DRC has conducted and as set out above, will be problematic jurors for the defense:

- Have you, a family member, or a close friend lost their job since the onset of the pandemic?
- Can you please describe how COVID-19 disrupted your life (e., have you, a family member, or friend contracted the virus, or you were terminated or furloughed from your job)?
- How concerned are you that you or someone you know will contract the virus?How many of you are extremely uncomfortable being in a large group of people at the courthouse today?
- Have you read or heard anything about the defendant's COVID-19 policies?If so, what have you read or heard? Did this change how you view the defendant? If so, can you please elaborate?
- How many of you feel that you want to quickly reach a verdict to avoid prolonging how long you have to be in court?

Considering the limited voir dire in federal court, litigators should request a written questionnaire in addition to voir dire questions addressing COVID-19 issues. On June 4, 2020, the Federal Judiciary COVID-19 Task Force published the report "Conducting Jury Trials and Convening Grand Juries During the Pandemic," noting that courts should consider requiring jurors to complete a COVID-19 questionnaire that inquires about "health concerns, health fears, vulnerability to coronavirus, and issues concerning family exposure, vulnerability, or risk." Whether you are able to obtain information about a prospective juror's experience with the pandemic through voir dire or a juror questionnaire, any and all information will help you anticipate if the prospective juror is unfavorable for a COVID-19-related case.

Josh Dubin *is president of NYC-based consulting firm, Dubin Research & Consulting (DRC) specializing in jury selection, focus groups, demonstrative aids, and trial strategy for complex civil and criminal matters. He is co-author along with U.S. federal judge Nancy Gertner of the book "The Law of Juries", and Ambassador Advisor to the Innocence Project.*