

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2020

PHILADELPHIA, FRIDAY, JULY 10, 2020

VOL 262 • NO. 7

An **ALM** Publication

## LITIGATION

# When Will We See a Resumption of Jury Trials in Philadelphia County?

BY ANDREW F. SUSKO  
AND ROBERT G. DEVINE

*Special to the Legal*

When will the trial court in Philadelphia County be open for jury trials in civil actions? While a precise prediction is difficult given the existing state of our trial courts during the COVID-19 pandemic, what is known is that current medical risks of group gatherings make nearly impossible the in-person empaneling of juries of 12 anytime soon. The use of technology is likely permanently changing the landscape of civil litigation and even virtual civil jury trials are beginning to be conducted during the pandemic. This is occurring either by private agreement, or through the courts, as is occurring in Texas and most recently in Florida with its pilot virtual trial program in five of its trial courts. From the use of clear masks for the trial attorneys and witnesses to the use of hybrid, combined, virtual and live jury trials,



**SUSKO**

**ANDREW F. SUSKO** is a partner and trial attorney at White and Williams with over 35 years of jury trial experience, including having tried over 50 cases to verdict in Philadelphia County. He is also past president of the Pennsylvania Bar Association and the Pennsylvania Defense Institute. Contact him at [suskoa@whiteandwilliams.com](mailto:suskoa@whiteandwilliams.com) or 215-864-6228.



**DEVINE**

**ROBERT G. DEVINE** is also a senior trial attorney at the firm and has tried over 40 cases to verdict throughout the United States. He is the chair of the firm's litigation department. Contact him at [deviner@whiteandwilliams.com](mailto:deviner@whiteandwilliams.com) or 856-317-3647.

the complexities and exact manner of conducting a virtual trial by jury are real. The trial lawyer/director of the production must consider the medium's unique challenges and opportunities when presented virtually.

The pressure is mounting to develop some interim trial solution

for parties to pending civil litigation not only from the court system as backlog mounts, but also from litigants, both plaintiff and defendant, who seek prompt resolution. The size of the jury, the potential number of jurors empaneled during jury selection, as well as the conduct of the trial itself, raise significant challenges to the resumption of civil jury trials before an effective vaccine is found given the physical layout of many courtrooms. If justice delayed is justice denied, then overcoming the obstacles currently preventing the resumption of civil jury trials is a priority. The traditional system for the ultimate resolution of civil action disputes in Pennsylvania's state courts is the 12-member jury trial system and implicit, as a necessary component of the system, is that the courts are open. The "open courts" provision of the Pennsylvania Constitution, Article I, Section 11, is unfortunately a short-term casualty of the pandemic. Section 11 provides: "All courts shall be open; and every

man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay,” 40 P.S. 1303.101-1303.910, *Yanakos v. University of Pittsburgh Medical Center (UPMC)*, 218 A.3d 1214 (Pa. 2019, Opinion by Mundy, J.); *Yanakos v. UPMC*, 224 A.3d 1255 (Pa. 2020, Reconsideration Denied). While there is no doubt speedy trial considerations in the criminal context will require deployment of court resources at least in the short term, civil litigants are guaranteed a right to disposition of their cases consistent with due process.

As trial lawyers on the civil side know, settlement often occurs, in large measure, because of an impending or looming trial date. Yet, there has always existed a subset or class of cases on the civil side, either unresolvable because of significant liability issues or because of a fundamental disagreement on valuation, that require the parties have their proverbial day in court with a jury trial. The uncertain COVID-19 landscape has effectively put on hold the ultimate arbiter of disputes, the 12-person jury, has significantly reduced one of the biggest pressure points to getting civil actions resolved amicably, and has delayed any appellate review that is a litigant’s right. That does not mean that cases are not getting resolved during the pandemic, but it does mean for the class of cases

that cannot get settled promptly and which require a trial date, the timing of justice between the parties remains unclear.

In Philadelphia County, exactly when the civil trial courts will resume jury trials is not only uncertain, but on indefinite hold at least until after Labor Day. Most civil jury trials, where a jury of 12 is

---

*The uncertain COVID-19 landscape has effectively put on hold the ultimate arbiter of disputes, the 12-person jury, and has significantly reduced one of the biggest pressure points to getting civil actions resolved amicably.*

---

demanding, commence with a jury panel of anywhere from 35 to 45 prospective jurors convened in the same courtroom for jury selection. That number covers, in the routine civil case, the 12 jurors and two alternates impaneled as the jury, the three preemptory challenges per side, and then enough additional prospective jurors to cover challenges for cause and hardship. The longer the expected trial date, the greater the potential number of prospective jurors are needed to constitute a jury. One wonders when, if ever before an effective vaccine is

found, civil jury trials with jury selection along these traditional lines can resume, consistent with current social distancing requirements. While individual voir dire can offer an alternative to completely replace presenting to a panel generally, certain aspects lend themselves to a general presentation. While future timing of the resumption of civil jury trials in Philadelphia County is impossible to predict, we know there will be no civil jury trials before Sept. 8, as set forth by the order of President Judge Idee Fox suspending all civil jury trials through that time because of the pandemic and depending on the state of public health this date can be pushed back even further.

In many states and in contrast to Pennsylvania, juries of six can pass constitutional muster in civil cases. In, New Jersey, for example, Article 1, Paragraph 9 of the New Jersey Constitution explicitly provides that a civil matter in excess of \$50 must be tried by a jury of no fewer than six members. The New York Constitution, Article 6 Section 18 provides that “the legislature may provide that in any court of original jurisdiction a jury shall be composed of six or of twelve persons.” The practice is reflected in New York Civil Practice Rule Section 4104 and followed by the New York Court of Appeals. See *Sharrow v. Dick*, 86 N.Y.2d 54 (1995). In Massachusetts, while the approach is more varied, juries with fewer than 12 jurors are allowed

in certain civil trial courts within the state. See Mass. R. Civ. P. 48 (allowing fewer than 12 jurors in civil district court action); *In re Sheridan*, 422 Mass. 776 (1996); see also *Jamgochian v. Dierker*, 425 Mass. 565 (1997). In Delaware, Article 4, Section 20 of the Delaware Constitution has been interpreted to provide a right to a jury trial in civil matters, see *McCool v. Gehret*, 657 A.2d 269 (Del. 1995), and, unless a jury of 12 is specifically demanded, Delaware considers the parties in a civil action to have consented to a jury of six. And finally, in Rhode Island, Article 1, Section 15 of the Rhode Island Constitution recognizes a right of a civil jury trial stating in pertinent part: “In civil cases the general assembly may fix the size of the petit jury at less than 12 but not less than six.” This rule was adopted through R.I. Super. Ct. R. Civ. P. 48, which states, “Unless the parties otherwise stipulate and the court approves, the court shall seat a jury of six and the verdict shall be unanimous.”

However, the Pennsylvania Supreme Court 27 years ago in *Blum v. Merrell Dow Pharmaceuticals*, 534 Pa. 97, 626 A.2d 537 (1993) (Nix, C.J.), determined that there must be 12 jurors, given a proper demand, to satisfy the guaranteed right of jury trial under Article 1, Section

6 of the Pennsylvania Constitution. In *Blum*, then Chief Justice Robert Nix reviewed the U.S. Supreme Court’s departure from a long history of 12-person juries when it ruled that the jury trial requirement under the Sixth Amendment of the U.S. Constitution permitted a jury of eight in criminal cases. See *Williams v. Florida*, 399 US 78, 92 n.30 (1970). In civil cases, juries of six have been held to satisfy the U.S. Constitution, Seventh Amendment, protection of trial by jury. See *Colgrove v Battin*, 413 US 149,159-60 (1973). Nonetheless, in *Blum*, the Pennsylvania Supreme Court concluded that Pennsylvania’s Constitution required a jury of 12 when either party demanded a jury of 12. See *Blum v. Merrell Dow Pharmaceutical*, 534 Pa. 97, 112-13, 626 A.2d 537, 544-45 (1993).

Recently, the Pennsylvania Supreme Court lifted the declaration of the “judicial emergency” in the state of Pennsylvania, it was effective June 1, leaving to the president judges of the county to determine when the trial level courts, the Courts of Common Pleas, could resume with civil jury trials. With social distancing guidelines recommended during the pandemic requiring distancing of six feet, it is difficult to see panels of 35 to 40 potential jurors maintaining that

distance, much less juries of 12, with two alternates in the box. And, while issues abound regarding the conduct of the trial itself including masking and distancing, ultimately the jury’s deliberations, which often occur in a small room, would need to conform to recommended safe practices regarding group gatherings. There is no doubt that as far as deliberations go Aristotle was right: the whole is greater than the sum of the parts. Preserving in-person juror interaction during deliberations is more likely accommodated given current limitations with a jury of fewer than 12.

Although not in the contemplation of the Pennsylvania Supreme Court at the time of the *Blum* decision, the present circumstances could allow for a reexamination of the jury of 12 requirement in Pennsylvania during the COVID-19 pandemic. Exactly when jury trials can safely resume, and what final shape they will take ultimately under the supervision of our Pennsylvania Supreme Court and the Court of Common Pleas, the requirements of the CDC, and existing case law, is unclear. And while the solution is not immediately and readily available or even apparent, all parties have an interest in having the jury system available and functioning as soon as is reasonably practical. •