

# Uncharted territory: Emerging litigation trends



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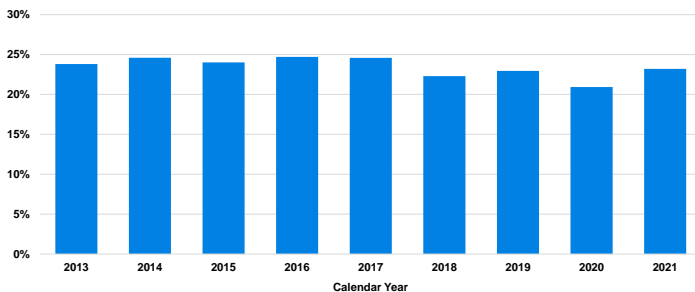
## When will litigation activity return to pre-Covid levels and what might that portend for claim settlements?

The past year and a half has been challenging to say the least. In addition to the very real human toll of the pandemic, businesses across the world have been impacted in various ways. From labor shortages to disruptions in the supply chain to transitioning to a remote work environment, seemingly every industry has needed to adapt in some way to this changed environment. The insurance industry is no exception.

By referencing a large dataset of litigated insurance claims, the remainder of this article will examine the abrupt slowdown in the litigation process and discuss the slow apparent return to normalcy that is occurring.

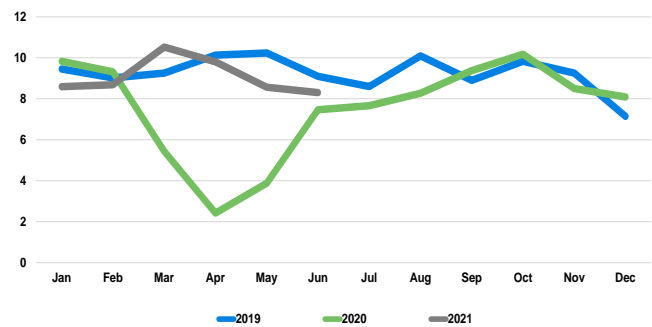
The adjudication process for litigated claims is complex and involves many parties. From the litigants themselves to the fact and expert witnesses as well as the attorneys representing all parties, litigation moves at its own, costly, pace. Within the litigation apparatus many different phases or events take place. Among those phases one of the most common and costly events relates to depositions. If one considers the cost of a deposition to include the preparation for, the travel to, the attendance at, and the summarization of, along with the accompanying expenses, then depositions are the single most costly part of litigation. Our research indicates that nearly one-quarter of all litigation costs relate in some way to depositions (see Chart 1).

**CHART 1: DEPOSITION COSTS AS A PERCENTAGE OF TOTAL LITIGATION COSTS**



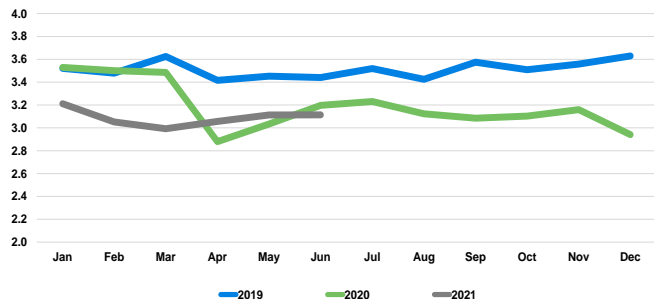
Perhaps this is not entirely surprising given the importance of this phase in the litigation process. Many cases really take shape as the information learned from depositions is assembled. Which is why when the number of depositions dropped dramatically with the onset of the pandemic, litigated claims within the insurance world slowed significantly. What was a relatively stable deposition rate of 8 to 10 depositions per 100 open claims per month during 2019 and through the first couple months of 2020 fell by 50% in March, April, and May of 2020 and remained at depressed levels throughout the summer of last year (see Chart 2). While the deposition rate seemed to recover as summer turned into autumn, a closer examination reveals that a disproportionate share of those autumn depositions were the less impactful ones, such as fact witnesses and the like, and few of them involved the litigants. Further, while the deposition rate is back to pre-pandemic levels, the lower amount of spring and summer deposition activity did not result in any "catch up" type period.

**CHART 2: NUMBER OF DEPOSITIONS PER 100 OPEN CLAIMS**

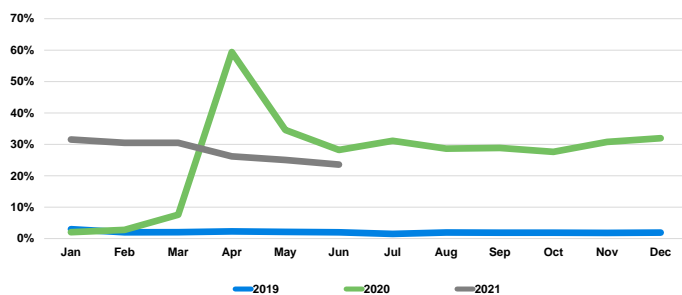


An interesting sidenote with respect to depositions is that it appears that they are being conducted somewhat more efficiently, post-pandemic. As seen in Chart 3, the average length of time of a deposition is approximately 15% shorter than it used to be. The prior average of 3.5 hours per deposition has been reduced to 3.0 hours on average. In making this comparison we have excluded virtual depositions from this analysis, which were nearly nonexistent prior to the pandemic and now account for approximately 30% of all depositions as everyone, attorneys included, seems to have embraced the various types of video call technologies (see Chart 4).

**CHART 3: AVERAGE HOURS FOR FACE-TO-FACE DEPOSITIONS**



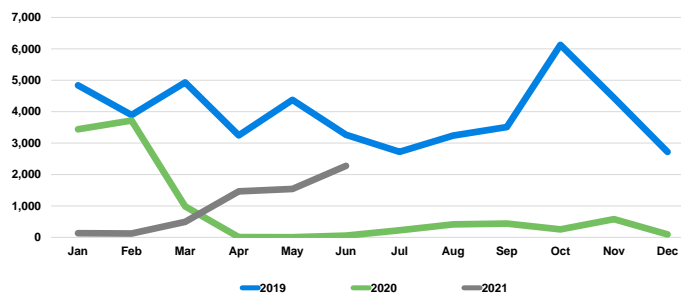
**CHART 4: REMOTE DEPOSITION PERCENTAGE**



While the deposition activity appears to be back to normal levels, claim closings don't yet seem to be. Looming trial dates are oftentimes a large motivator for both sides to try to come to an agreement and settle cases. And here it appears trials are not yet back to pre-pandemic levels. As with the deposition data, by comparing pre pandemic levels to current levels, one can see the

very dramatic reduction in trial-related activity beginning in March 2020 that is just now beginning to trend back toward historical levels (see Chart 5). With trials virtually nonexistent in 2020, many claims that would have otherwise settled remained open. As courthouses ramped up their activities again, criminal cases were generally given priority and thus civil litigation remained depressed. However, as the data is emerging it appears trials are reverting to pre-pandemic levels and thus we are expecting claim closings to likewise accelerate as well. It will be important to monitor this activity, particularly when it comes to average cost of claims as oftentimes it is the larger claims that require the looming trial date to motivate a settlement.

**CHART 5: TRIAL HOURS**



Source for graph information: Milliman Datalytics-Defense data that includes on average over 28,000 open claims throughout the reporting period.



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