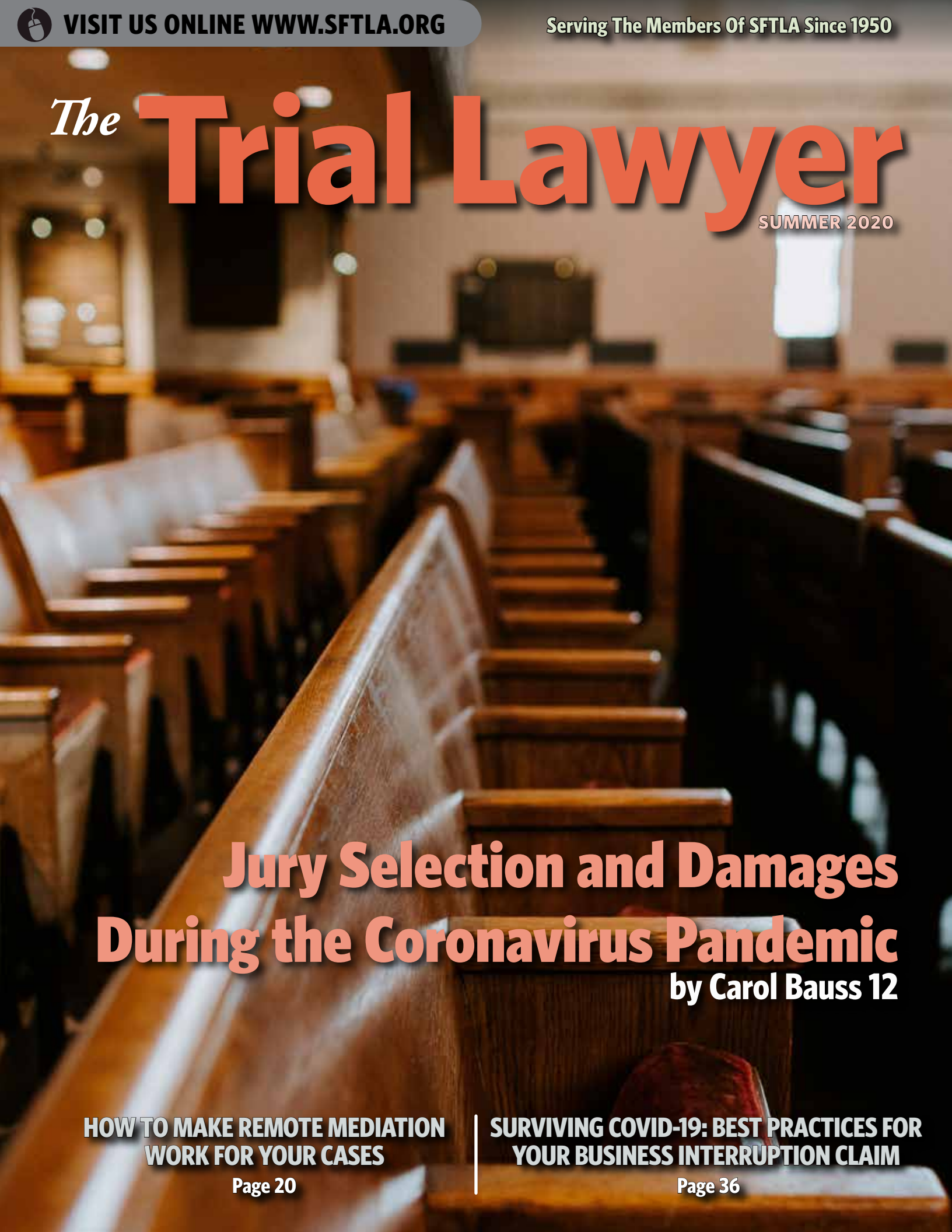
VISIT US ONLINE WWW.SFTLA.ORG

Serving The Members Of SFTLA Since 1950

The Trial Lawyer

SUMMER 2020



Jury Selection and Damages During the Coronavirus Pandemic

by Carol Bauss 12

2020 SFTLA RESULTS

"What can I say about Cindy Aragon. She told me she would save me money, and she did. Aragon-Haas Insurance Brokers saved me over 25% of the premium I had been paying. Don't wait. Don't miss out on savings. Call Aragon-Haas today!

- Markus Willoughby
Willoughby Brod, LLP

"For 30% less premium than I would have paid my former insurer, Aragon-Haas increased my policy limits and also increased my extra defense limit with their HCC (U.S. Specialty) insurance program. Do the math and compare coverage. You can save premium for the same limits you currently have, but you may find that you can also save premium even when you increase coverage."

- Lawrence Strick
Strick Schnasse Lawyers

"I gave Aragon-Haas literally 72 hours to provide our firm with a competitive quote, and they were very responsive. Not only did they save us money, they provided us with a better policy. Take the time to have Aragon-Haas review your insurance. It will not take long, and the resultscould be very beneficial to your law firm."

- John Feder
Rouda, Feder, Tietjen & McGuinn

"I gave Aragon-Haas my professional liability renewal quote and they gave me a savings of over $15,000, and it was through their HCC (U.S. Specialty) program too!! Wow. I gave them my workers compensation policy as well, and they saved me over 50%! Honestly, give Aragon-Haas a call. You may be as impressed as I was."

- Frank C, Liuzzi
Liuzzi, Murphy, Solomon, Churton & Hale LLP

"Bumping into Cindy Aragon literally saved me $10,000. Twenty-four hours after meeting at an SFTLA event, Aragon gave me a quote that was $10,000 less than my renewal quote. You may be paying too much too!"

- Robert E. Cartwright Jr.
The Cartwright Law Firm

"I've regularly seen Cindy Aragon as a sponsor of SFTLA MCLE Programs over the years, and when I started my own law office, I spoke to several close friends who encouraged me to contact her. By the next day, I received a quote that was better than what I had been able to locate on my own, but more importantly I received several optional limits, and having options is essential when selecting insurance coverage. If you want options, give Aragon-Haas a call. Don't wait to run into them."

- Scott H. Z. Sumner
Sumner Law

"Aragon-Haas saved me 25% of the premium I paid last year. **It was from their new, HCC (U.S. Specialty) admitted program**, which included a short application and a swift process. Aragon-Haas is not only devoted to economy, but also to service, and professionalism - a true ally of the trial attorney. Contact them, you won't be disappointed."

- Claude A. Wyle
Choulos, Choulos, & Wyle

"I received crucial information from Aragon-Haas regarding the shortcomings of my prior insurance policy, after which I received multiple options with very competitive premiums. But more importantly, and I can't stress this enough, I was able to choose better coverage for my firm. If you want insurance insights as well as options, contact Aragon-Haas."

- Skip Walker
Walker, Hamilton, & Koenig, LLP

"Aragon-Haas quoted me virtually the same limits and deductible as I had with my existing insurance company, but did it at a significant savings. They also gave me a great quote for an excess insurance policy."

- William L. Veen
Veen Firm, P.C.

"Aragon-Haas saved me 25% of my previous insurance premium, and it too is from their HCC (U.S. Specialty) admitted program. I couldn't believe it, but the program was designed for SFTLA and its members. SFTLA's dedication to continuing education and providing practice resources has culminated in real insurance discounts. Aragon-Haas capitalized on that dedication for the benefit of SFTLA's members, and I am the latest recipient! You can be too, just give them a call."

- Albert Stoll
Albert G. Stoll, Jr., ALC

ARAGON-HAAS

INSURANCE BROKER'S. INC

GLOBAL ACCESS TO PROFESSIONAL LIABILITY

T | 800.491.2422 F | 310.568.0211
www.aragon-haas.com | submissions@aragon-haas.com | License #0802650

The Trial Lawyer

SUMMER 2020

Contents

features

columns

departments

ADVERTISERS INDEX

What's Happening

Event: August 5	SIPs Virtual Hang Out
Event: August 12	War Room Wednesdays
Roundtable: August 18	Trial Playbook in Light of Recent Changes: Sanchez John Vannucci, Chair Tanis Kelly, sponsor
Event: August 19	SIPs Virtual Hang Out Coffee Break with Christine Spagnoli
Roundtable: August 25	Bad Faith Ryan Opgenorth, Chair
Event: August 26	SIPs Virtual Hang Out Lunch Break with Carol Bauss – COVID Jury Survey
Event: August 27	Trial Lawyer of the Year Awards
Event: September 10	SIPs Virtual Hang Out
ECLE: September 1	Out of the Pandemic Kyle Bates, Chair
Event: September 9	War Room Wednesdays
ECLE: September 15	Implicit Bias Training Lisa Holder & Chris Bridges
Event: September 23	SIPs Virtual Hang Out
MCLE: September 29	Liens Chairs: Jennifer Fiore & Andrew McDevitt Sponsors: Lesti; First Legal
Caucus: October 1	Women Referring Women
Event: October 7	War Room Wednesdays
NLD: October 15	Adventure CLE Conference - Virtual!

The Trial Lawyer

The Trial Lawyer is published by
The San Francisco Trial Lawyers Association

311 California Street # 620 San Francisco, CA 94104

Phone: (415) 956-6401 FAX: (415) 956-6680

email: admin@sftla.org www.sftla.org

LESTI
Structured
Settlements
Incorporated

We build secure Structured Settlements for Plaintiffs

Specializing in profoundly injured minors and deferred legal fees.

Qualifications include the following:

- **Over 20 years of experience**
- **A degree in Economics from the University of California, Berkeley**
- **An exclusive plaintiff-only practice**
- **Expert witness in Economics & Structured Settlements**
- **Author of *Structured Settlements*, 2nd Clark Boardman Callahan, 1993**
- **Certified Structured Settlement Consultant**

"My job is to decide what my client needs, not to wait and see what the defense offers. I want someone who shares my commitment in looking after the best interests of my client. That's why I work with Paul…"

— Gary Gwilliam, of Gwilliam, Ivary, Chiosso, Cavalli & Brewer
Valued customers since 1984

Paul's philosophy is simple: "By serving as *your* trusted structured settlement broker and advisor, I secure the highest value for your client and help you perform your due diligence."

Paul J. Lesti, CSSC

888.LESTISS
5 3 7 8 4 7 7

www.lesti.com • paul@lesti.com
745 Distel Dr., Ste. 114, Los Altos, CA 94022

Markus Willoughby is a partner at Willoughby Brod LLP who has been practicing for 25 years almost exclusively in the areas of medical negligence and personal injury litigation. Markus was honored with the SFTLA's Civil Justice Award in 2014, is a consistent Northern California SuperLawyer, National Trial Lawyers Top 100 Attorneys and received California Lawyer Attorney of the Year (CLAY Award) in 2016 for Medical Malpractice.

Be the Change

I can't breathe. These last 4 months have been the longest year of my life. Every year usually has a few defining moments. Last year Donald Trump was impeached, we learned that our attorney general was really a personal advocate for the President, there was the college admissions scandal and the Prime Minister of the UK stepped down over Brexit. But nobody is talking about these things now. Now we are living and experiencing the most truly defining year for anyone who is alive. Globally defining bi-pandemics: One is airborne, the other cultural. Both will kill you or leave you with lasting scars.

I can't breathe. Covid 19 is a super-spreading virus that we know how to control. Simple safeguards, though paradigm shifting, will slow the progression of the disease while our science community grapples with novel treatments and vaccines. Those safeguards require minimizing contact with others, wearing a mask in public, sheltering in place and washing your hands frequently. This has had dire consequences on business but when faced with the alternative, the health and safety of our lives and the lives of our families are more important. Recently, we have seen significant progress in our scientific community in creating promising treatments and vaccines. There is great hope on the horizon for the coming months. Unfortunately, our political dysfunction has defined our Covid 19 response. Even with the best medical institutions in the world, we still have the most cases and the most deaths. While our leadership has failed us, we must remain strong.

I can't breathe. The cultural pandemic of racial injustice and police brutality is not new. However, with the recent deaths of Breonna Taylor, Ahmaud Arbery and George Floyd (just to name a very few), there has been a sustained resurgence of attention on the Black Lives Matter movement throughout the world. The SFTLA published a statement denouncing police brutality and injustice of any kind and created a new Task Force to effect social change. And while issuing a public rebuke of hate-speech and hate-acts is important, history has shown our memories are short. We wanted to put a committee in place to integrate our words into actions to effect real change to the systemic biases in our community. The Task Force on the Elimination of Implicit Bias is being led by Sandra Ribera Speed, Che Hashim and Josephine Alioto. I invite all members of the SFTLA community to expect positive change.

I can't breathe. The cultural pandemic of racial injustice and police brutality is not new.

I can't breathe. With all this going on in the world, with all these difficult times, I leave you with the inspirationally wise words of Mahatma Gandhi: "Be the change that you wish to see in the world." TL

HENCE THE TERM GOTCHA COVERED

Health

Dental

Life

LTD (Long-term Disability)

LTC (Long-term Care)

Accident Insurance

Critical Illness

Allow us to introduce ourselves. We're Henderson SFIS and we're proud to be supporting the SFTLA community with a wide array of insurance solutions; comprehensive and cost-effective.

We're at your service. And that's a huge emphasis on the word *service*. After all, when it comes to the ins and outs of your insurance options, having a trusted advisor can make the literal difference between covered and exposed.

Henderson and SFTLA. We look forward to serving you. Give us a call or feel free to visit the site.

HENDERSON
Strategic Financial Insurance Services

Call us at 650.321.2251 · www.hendersonsfis.com/sftla

Our Work Ahead

P. Bobby Shukla represents plaintiffs in employment litigation at Shukla Law. She currently serves on the Board of SFTLA and the Board of the National Lawyers Guild Foundation. She has been named a Rising Star or a Super Lawyer every year since 2009 and named one of the Top Women Attorney in Northern California every year since 2012. She is also a recipient of the Wiley W. Manuel Award for Pro Bono Legal Services.

More than most professions, to do our jobs well, trial lawyers need to pay attention to the dimensions of our moment in time. We cannot effectively tell our clients' stories without an understanding of how they fit into the broader cultural experience. This assessment is as critical to developing case themes and narratives as it is to jury selection. Jurors will translate and interpret our clients' stories within the framework of the times. We need to understand how they perceive those times to select the best jurors for our cases. In this issue's feature article, jury consultant Carol Bauss provides a rich analysis on how to approach voir dire in our altered Covid 19 world. She draws upon research indicating anticipated changes to the jury pool, recent surveys regarding potential juror attitudes and lessons from other historical catastrophic events, among other informative data and insights. Carol's advice will undoubtedly increase your odds and your damages at trial. Given that the lasting effect of the pandemic has no end in sight, Carol's advice will also prove useful for many months to come. This issue also offers insightful and practical advice about increasing your odds for a successful remote mediation from mediator Rachel Erlich and invaluable tips on how best to position a claim for business interruption based on Covid 19 by Ryan Opgenorth.

During the time our magazine team worked on finalizing this issue, with content on how best to navigate the pandemic, a cultural tidal wave of a different kind consumed the world. The murders of African-Americans, mostly by the police, compelled our attention, yet again, with the killing of George Floyd. Floyd's murder seems to have caused a discernible shift. Our broken hearts and our outrage propelled a growing awareness about systemic racism and institutional white privilege. We are finally beginning to accept that the vestiges of slavery permeate every single aspect of modern day American life from education to employment to healthcare to access to justice. These realities have been raging all around us for 400 years, but right now, many more than before in the global community are no longer looking away. Those in the streets have sounded a collective call of action. We heed the call and to that end, our magazine team is committed to using this platform to further the discourse on dismantling the systems of oppression based on race that infect the legal realms, including our law firms, our legal organizations, and our courts. We ask that you join us in this critical effort by offering your suggestions for topics to cover and for voices to elevate to transform outrage into action and to prime broken hearts for healing.

TL

Our broken hearts and our outrage propelled a growing awareness about systemic racism and institutional white privilege.

"We handle the heavy lifting!"

THE VEEN FIRM, PC

Largest Personal Injury Verdict in Marin
Largest Personal Injury Verdict in Fresno
Trial Lawyer of the Year Finalist Last 4 Years
CAOC Trial Lawyer of the Year

20 Haight Street, San Francisco, CA 94102
415.673.4800 | **veenfirm.com**

Appellate Victories *for* Deserving Plaintiffs

by Jennifer L. Fiore

Sharufa v. Festival Fun Parks, LLC

On May 27, 2020, the Sixth District Court of Appeal issued a published decision in *Sharufa v. Festival Fun Parks, LLC* (2020 WL 2739859). In a case of first impression, the Court held that, in California, the doctrine of primary assumption of risk is inapplicable to waterpark slides and, in fact, waterslide parks owe their riders the heightened duty of care of common carriers. The Court further held that, in the record before it, it was undetermined whether the subject waterpark was a product or a service so reversed summary adjudication as to Plaintiff's products liability causes of action.

John Fitzpatrick Vannucci's client, Sean Sharufa, suffered an awful hip separation coming off a waterpark slide at Defendant's Raging Waters in San Jose in the summer of 2012. John sued defendant Festival Fun Parks, LLC, which owns waterslide parks up and down the state and elsewhere, alleging various causes of action in negligence and products liability. The parties engaged in discovery and retained experts. Defendant moved for summary judgment arguing: 1) the doctrine of primary assumption of risk barred the negligence causes of action and; 2) a waterslide park provides a service and not a product so the products causes of action fail.

Vannucci argued to the trial court that there was no precedent in California applying the doctrine of primary assumption of risk to the rider of a waterpark slide. The defense represented to the Court that various courts up and down the state had applied the doctrine of primary assumption of risk to waterpark slide riders and granted summary judgment on behalf of his client (which, if true, was irrelevant.) Judge William Elving in Santa Clara County Superior Court applied the doctrine of primary assumption of risk to the negligence causes of action, not reaching the merits of the evidence, and granted summary adjudication. The trial court further held that defendant was providing a service rather than a good so granted summary adjudication as to the products causes of action as well.

Vannucci appealed and argued the trial court erred in applying the doctrine of primary assumption of risk to the negligence causes of action and that, in fact, rather than being held to the much lower standard the Court applied, the defendant should be held to the higher standard of a common carrier. Plaintiff argued that waterpark slides are more akin to a rollercoaster (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125—holding rollercoaster operators are common carriers) than to bumper cars (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148), whitewater rafting (*Ferrari v. Grand Canyon Dories*, (1995) 32 Cal. App. 4th 248), or water tubing behind a boat (*Record v. Reason*, (1999) 73 Cal.App.4th 472)—which cases all applied the doctrine of primary assumption of risk. Vannucci further argued that the defendant primarily provided access to waterslides, a product, rather than some service such as lifeguarding or food service—so the products causes of action should have also survived.

The Court of Appeal first engaged in an analysis of various precedents applying standards of care ranging from the very low (primary assumption of risk—duty not to increase the harm inherent in the activity) to the high standard of a common carrier and concluded "It follows that a waterslide operator owes riders the heightened duty of a common carrier." The Court then went past the trial court's analysis and found that, although the defendant should be held to the duty of care of a common carrier, the record did not establish adequate evidence of negligence so affirmed summary adjudication as to the negligence causes of action.

The Court then addressed the products liability causes of action to "determine whether the primary objective of the transaction between Sharufa and Festival Fun Parks was to deliver the use of a product or a service. The Court noted "It would be reasonable to infer that the purpose of a guest's transaction with Festival Fun Parks is to use the Raging Waters waterslides, not to receive a service." The Court also rejected defendant's argument that it was not a product supplier at all but an end user of its waterslides noting "The rider of a theme park waterslide—not the park itself—is the end user of the product and most likely to suffer physical injury in the event of a defect."

Jennifer L. Fiore is a trial attorney with Fiore Achermann where she focuses on catastrophic personal injury, wrongful death, public entity liability, sexual abuse, maritime and other torts.

The Court held there was insufficient information in the record to make a determination of this issue so reversed the trial court's order of summary adjudication as to Plaintiff's causes of action for products liability based on strict liability and products liability based on negligence.

Going forward, consumers injured on waterpark slides will now be protected from being thrown out of court by arguments of primary assumption of risk and will be able to hold defendant waterparks to the higher standard of care of the common carriers they are. Further, the language of *Sharufa's* products liability analysis may be relied upon by injured consumers in various circumstances where express assumption of risk (signed waivers) or primary assumption of risk may be at issue to support the position that defendants were providing products rather than services.

Anthony v. Li (2020) 47 Cal.App.5th 816

On April 13, 2020, the First District, Division 3, issued a published decision in *Anthony v. Li* (2020) 47 Cal.App.5th 816. Anna Dubrovsky prevailed at the trial level with a jury verdict that was nearly four times the defendant's 998 offer and $150,000 more than Anna's offer, but the trial judge nonetheless shaved the prevailing party costs and disallowed all C.C.P. section 998 expert costs.

The lawsuit arose from an automobile accident on Battery Street in San Francisco when a visiting tourist from Singapore ran a red light and t-boned Chad Anthony's car, injuring both Anthony and his canine companion.

Dubrovsky initially named both the foreign driver and the rental car company PV Holding (doing business as Avis Rent-a-Car), alleging liability against the rental car company on a negligent entrustment theory. However, because of the liability limitations under the Federal Graves Amendment (49 U.S.C.A. § 30106) and following defense counsel request, Dubrovsky dismissed PV Holding as a defendant well before trial and before issuing a statutory settlement offer to resolve the case.

PV Holding was still involved in the litigation, however, because in addition to being a rental car company, PV Holding was also an insurer for the foreign motorist, having sold the motorist a $1 million liability policy, which PV Holding administered as a self-funded insurer. When the foreign motorist could not be located after the collision, Dubrovsky served the complaint on PV Holding pursuant to what is now Civil Code section 1939.33.

That code provision allows a plaintiff to serve a missing foreign motorist defendant by delivering the summons and complaint to the rental car company, which then triggers any rental insurance coverage. A plaintiff who elects this remedy, however, is limited in his recovery solely to the available insurance, and the foreign driver is part of the litigation in name only.

The plaintiff's statutory 998 settlement offer was directed to both the foreign motorist (the named defendant) and PV Holding (the true defendant with sole liability and complete control of the litigation, including settlement decisions).

The first part of the Court of Appeal's decision addressed the statutory 998 offer in this somewhat unique situation where there was no actual motorist defendant participating in the case, and where the sole possible liability was against

Continues on page 34

JURY SELECTION AND DAMAGES DURING THE CORONAVIRUS PANDEMIC

BY CAROL BAUSS

When trial lawyers head back into the courtroom, they will likely be speaking to a jury that may look different demographically, at least temporarily, and may view the world through an altered lens. It is not hyperbole to say the world is forever changed. The pandemic of 2020 is more far-reaching than in past crises. Almost everyone across the globe has been affected by Covid-19, forced to stay home while economies ground to a halt. The coronavirus pandemic is also unique in that it represents a double whammy – a threat to health and safety and financial security.

While it is too soon to know how these changes will affect juror decision-making and verdicts, we know that plaintiffs' attorneys can strengthen their cases by recognizing these changes and embracing society's shared experiences in this time of crisis. This pandemic provides opportunities to explore critical topics in voir dire to assist in evaluating jurors for peremptory and cause challenges.

Changes to the Jury Pool

Living through the pandemic is a scary and traumatic time as the economy is in freefall, and the health risks of the coronavirus remain. More people than usual may ignore their jury summons, and hardship requests will increase dramatically, including for,

- The unemployed, underemployed, and those worried about job security;
- The medically vulnerable – the elderly, those with compromised immune systems, and pregnant women; and
- Women, who as a group, have been harder hit economically, are more likely to be responsible for childcare, and are more concerned about getting the virus.

NJP Litigation Consulting/West conducted a survey June 12-18, 2020, of more than 400 juror eligible respondents from Los Angeles and six Bay Area Counties (Alameda, Marin, Santa Clara, San Francisco, San Mateo, and Contra Costa). Fifty-eight percent said it would be too difficult to serve on a jury and give a trial their full attention because of Covid-19 concerns. Seventy percent were afraid to be in a large group and risk exposure to Covid-19, and 22% had a Covid-19 related financial hardship.

When trials resume, juries are likely to be less diverse. The black and Latinx communities have been harder hit by the virus, economically and with higher rates of illness and death. In the NJP study, 64% of Latinx said it would be too difficult to serve on a jury now compared to 46% of Blacks, 58% of Whites and 58% of Asians. Blacks may be more willing to perform their civic duty given the recent protests in support of the Black Lives Matter movement and against police killings of Black people. Another recent survey found that younger, white, non-college-educated, conservative males were more likely to report for jury duty in this pandemic.

More jurors will have difficulty concentrating and will be frustrated at another disruption in their lives. In a post-Covid-19 era, jurors will be critical of repetitive witnesses or unnecessary experts. The NJP survey found that 58% would not be willing to participate in jury deliberations that lasted more than one day.

Changes in Juror Attitudes and Damages

Past crises provide guidance on how juror attitudes and verdicts are affected in times of societal upheaval. Understanding how jurors assess damages and what factors drive damages up or down can help attorneys think strategically about conveying a client's harms and losses. Damage awards have a great deal of variability because each verdict is dependent on the facts, venue, attorney skill, judicial rulings, and makeup of the jury. It is difficult to predict whether jury awards will generally go up or down in volatile times. Instead, focus on how individual jurors process their experiences in the crisis, and the attitudes formed as a result.

The pandemic provides opportunities for increased damage awards, but it can also lead to decreased damages and increased skepticism of plaintiffs.

NJP Survey Findings on Damages

Our survey found a split of opinions on damages. Respondents were almost evenly divided over whether the current economic problems from the pandemic would influence the amount of money awarded to an injured person: 49% said it would influence the amount, and 51% said it would not. Of those who said the current economic problems would influence damage awards, slightly more than two-thirds would increase damages. Those who lived in a household where someone lost a job or experienced a decline in income during the pandemic were more likely to increase damages. At the same time, 43% of respondents agreed with the statement, With everything that is going on in the country now, a company that made a defective product which badly hurt someone should only have to pay for medical costs and lost wages, and very little if anything for emotional distress.

Financial Insecurity Can Drive Damages Down

Poll after poll shows a great deal of uncertainty about the economic future of the U.S. Many think the economic recovery will take many months or even years. People are being forced to tighten their belts to ride out the recession. Uncertainty and pessimism about the direction of the economy can lead to lower awards.

Everyone is struggling financially. When assessing damages, jurors may think about how they have had to make do with less after losing a job or having their income reduced. Compensating someone in the millions of dollars while unemployment is rampant, food banks cannot meet the demand, and retirees have seen the value of their 401k's plummet may be perceived as overreaching. Damages for pain and suffering may go down. With so much suffering in their communities, some jurors may be unwilling to compensate the plaintiff for

Carol Bauss, J.D. has been a Senior Litigation Consultant with NJP Litigation Consulting/West for over 25 years. Drawing on her background in law and communications, she advises attorneys on trial presentation and jury selection strategy and works with witnesses to improve their communication skills.

what everyone is experiencing – "*Why should the plaintiff get money when we are all hurting?*"

Sympathy for Defendant Companies

Sympathy for companies shuttered during the quarantine or experiencing a steep decline in business can lead to lower damage awards. Jurors may think hitting defendant companies too hard will put them out of business or lead to more employee reductions.

Skepticism of Plaintiffs

Skepticism of plaintiffs is always a problem. Jurors will be critical of a plaintiff's claims if they think she is wasting everyone's time or does not have a sufficiently meritorious injury; what seemed important before the pandemic may not seem so important today. Some jurors may measure the plaintiffs' harms against the suffering in their own lives and the country and find the plaintiff's suffering comes up short.

Anger and Empathy

Some jurors will come out of this pandemic bitter and unsympathetic to plaintiffs. Attorneys can identify those jurors in jury selection the way they always have; by using voir dire to identify bias against plaintiffs, lawsuits, and damages.

Emotions are high in our country now, and plaintiffs' attorneys can tap into those emotions to argue the value of their clients' losses. Anger and empathy are two emotions that impact damage awards.

Learning From Other Historical Events

In looking back, three recent historical events had the potential to shift juror attitudes and impact damages: the terrorist attacks of September 11, 2001, the Enron Scandal, and the sub-prime mortgage crisis and resulting Great Recession of 2008. Each event has conflicting claims and data about whether plaintiffs' verdicts across the board went up, went down, or stayed the same.

Who Do Jurors Blame?

It is instructive is to understand who jurors blamed for those events to know how they affected jury attitudes and verdicts. After 9/11, there was a documented rise in anti-Muslim bias. Muslim American plaintiffs were at risk of having their cases devalued because of the fear and misinformation surrounding Islam and its role in the 9/11 terrorist attacks. Similarly, in the current Covid-19 crisis, Asian-Americans are reporting an increase in bias related to misrepresentations about the origin of the virus. We can expect to see this bias in the jury box in upcoming trials, and it may affect the value of claims.

The Enron scandal and the 2008 Recession resulted from corporate misconduct and lax government regulations. After both, we saw an erosion of trust in corporations, corporate executives, and government institutions responsible for corporate oversight. People were angry at the culture of corporate greed and the price paid by the working class. Some jurors may have used that anger to send a message to corporate America with the only platform available to them – the jury verdict. This anger was likely strengthened in jurors already predisposed to find against a company.

Tapping into Anti-Corporate Attitudes During the Pandemic

People are closely watching corporations' responses to the current crisis on two levels – how corporations are protecting the health and safety and financial security of both their employees and the public. In future cases, how corporations responded in this pandemic will influence jurors' views of corporate conduct. We have seen anger at the lack of corporate responsibility for the common good. The backlash against publicly traded companies like Shake Shack and Ruth's Chris Steak House forced them to give back millions received from the SBA's Paycheck Protection Program intended to help small businesses. Meat producers and factories have ignored the scientific and medical evidence about best practices to prevent the spread of Covid-19, sickening workers on the job, and threatening public health. These failings have set the bar high for good corporate citizenship. Plaintiffs' attorneys can frame the wrongdoing of their case to align with this public anger about corporate greed during the pandemic. Did defendant companies listen to the science about whether its product could be harmful? Did the defendant company choose to take reasonable efforts to prevent harm to the public? Did the defendant company act out of self-interest and put its profit motives ahead of public health and safety?

Damages Decision-Making Model

What does not change, even after a pandemic, is the process by which jurors determine damages, and most importantly, pain and suffering damages. A model of juror decision-making helps explain how jurors come up with an amount for pain and suffering. This "Gist" model of damages shows that after determining the defendant is at fault, jurors make a subjective judgment as to whether damages should be high or low based on their view of the severity of the injury, or if they aren't sure, somewhere in the middle. They then translate that gist-based judgment of high or low onto a number they consider high, low, or in the middle. To help determine high and low numbers, jurors look to numbers in the case, like economic damages, and their own life experience. For many, a low number is $1, and a high number is $1,000,000. Each juror has a different sense of what is high or low based on their own life experiences. Focus group research often shows jurors may agree a plaintiff's injuries are permanent and debilitating, yet some think pain and suffering should be $250,000, and others think it should be $5 million. Studies of this model found that meaningful anchors, such as one year's income, were more successful at driving damages up than meaningless anchors like the cost of courtroom construction, the example used in the study.

High Anchors in the News

This pandemic is likely to recalibrate how we think about the severity of injuries and high and low numbers. The fiscal response to this crisis has introduced some huge universal anchors. Congress passed a $2 trillion economic relief plan. To help small businesses, Congress authorized $659 billion for its Paycheck Protection Program. The number of unemployed could rise to 30 million. On the flip side, the govern-

Voir Dire Questions During the Coronavirus Pandemic From Practitioners:

Personal Injury (Jennifer Fiore, Lori Andrus and Kevin Osborne)

1. Have you suffered financial hardship during the pandemic?
2. Did you or someone close to you lose a job, work less hours or make substantially less money because of COVID-19?
3. Do you know any front-line workers/healthcare professionals?
4. Can anyone think of a situation where a company put profits before the health and safety of its workers?
5. Do you have any issue or concern with the current social distancing rules?

Employment (Leslie Levy and Sharon Vinick)

1. If someone kept their job, but experienced emotional distress due to harassment, would you be willing to award emotional distress damages?
2. If someone kept their job, but their promotional/economic opportunities were limited, would you be willing to award damages to compensate them for that?
3. Do you believe you would award less money because of the impact of SIP on our economy?
4. How did you adjust to SIP?
5. Do you think any good came from the pandemic? If so, what?

Medical Malpractice (Mark Zanobini and Doris Cheng)

1. What was your first thought when you heard this was a case against a doctor?
2. In light of the fact that we have just come out of the Covid mess, and considering we are suing a doctor, do you think that it might make it challenging to be neutral in a lawsuit against a physician?
3. Would it be a struggle for anyone to be here in light of what we have come out of?
4. Anyone here believe that doctors/hospitals cannot afford to compensate patient-victims?
5. Anyone here worried that the doctor's personal assets are at issue?

Insurance Bad Faith (Demian Oksenendler, Dan Veroff and Mike Duffy)

1. Some people say that, in comparison to all that people lost during COVID-19, we shouldn't be spending time and resources on an insurance claim that went wrong 2, 3, or even 5 years ago. Do you agree?
2. Some people say that in order to justify going ahead with a trial these days, the behavior of the defendant has to be worse than it would have been before COVID-19. Does anyone else feel that way?
3. Some say that people who file lawsuits against insurance companies are trying to blame them for the bad things that inevitably happen in life. How do you feel about that?
4. Did you or anyone you know have an insurance claim during Covid-19? Was it handled fairly? Did the insurance company delay because of Covid-19 and if so, did you find that acceptable?
5. Did you or someone you know have a business close or lose income because of Covid-19? Did they make a claim and if so, did the insurance company pay? Do you think that was fair?

ment sent stimulus checks for $1200 to qualifying adults. The public criticized this amount for not being enough to pay the rent and put food on the table for most Americans. All of a sudden, to some, 1 million sounds like a low number.

Everyone Has Experienced a Loss

As a society, we are experiencing a collective trauma. For many, life was humming along before Covid-19 slammed on the brakes. A Gallup poll conducted April 13-19, 2020, found one in three Americans experienced a change in job circumstances: lost a job, was furloughed, took a pay cut, or had a reduction in hours. Similarly, a Kaiser Family Foundation poll administered April 15-20, 2020, found that 56% of people reported that their life had been disrupted "a lot" by the coronavirus.

The losses are incalculable, lost lives, lost jobs, lost

income, lost retirement savings, canceled graduations, weddings, and birthday celebrations. Family members of frontline medical workers worried their loved ones would die going to work. Medical professionals reported having PTSD. People staying home are socially isolated, leading to depression, anxiety, and substance abuse disorders. Sound familiar as a plaintiffs' attorney? Suddenly, jurors in your jury box have a greater appreciation of what your clients experience: being knocked down by something beyond their control.

This crisis has forced everyone to slow down and appreciate what is essential in our lives: family, health, security. A crisis of this magnitude can result in some jurors having more empathy and a deeper understanding of how devasting an injury can be and the amount of money needed to compensate for that injury fully.

Better Appreciation of What it Takes to Compensate Plaintiffs

Attorneys can make parallels to these shared experiences when conveying the severity of the harm and how much money it will take to fully and fairly compensate the plaintiff.

- An injured plaintiff who isolates himself – remind jurors of the anxiety, pain, and fear they or a loved one felt when they had to self-isolate for weeks during the quarantine. For many sheltering at home alone or away from family was a dark period.
- Those emotions are similar to what the plaintiff lives with every day. Except the plaintiff will live with those feelings for the rest of her life. Is that worth $20,000 per week? Now multiply that by the suffering endured by the plaintiff.
- Loss of enjoyment of life: Important celebrations and milestones canceled to stop the spread of the virus – ask the jurors to remember what they gave up during the pandemic – vacations, weddings, graduations, work opportunities, just like the plaintiff has had to give up due to her injuries. Is $1 million enough to make up for those losses? Would they have paid $1 million to forgo their child's high school graduation? Would the plaintiff have paid $1 million to give up all the things she enjoys doing in her life?
- This pandemic has robbed us all of security. No one knows what the future holds. Everyone has taken a financial hit. Plans for buying homes, sending kids to college, and retiring are now at risk. Security is also one thing a plaintiff loses when injured. Their injuries make the future uncertain and rob them of the security of knowing that their life was on track. Their plans and dreams are gone. What is that security worth? Is it worth $500,000 or $10,000,000?
- Future damages: Many injured plaintiffs now have medical conditions that make them a high risk in the event of another pandemic, and jurors may want to make sure they have enough money to weather the next pandemic.

Whether attorneys make these arguments explicitly or not, jurors can draw on their own experiences living through the Covid-19 crisis to advocate for more money in the jury room.

Voir Dire

In voir dire, first assess how this pandemic has affected jurors financially, physically, and mentally. Because these are personal and painful issues, a jury questionnaire will help to ensure honest and thorough answers. Jurors could complete a jury questionnaire online or by mail before the start of jury selection to save them from making a trip to the courthouse. Attorneys could stipulate to excuse those jurors who are clear cause challenges to winnow the panel further. The use of a questionnaire will also speed up voir dire.

For starters, you want to know the extent to which Covid-19 disrupted a jurors' life,

- Experiences losing a job, being laid off, taking a pay cut, working reduced hours;
- Knowing anyone who was critically ill or died from Covid-19;
- Knowing medical personnel who treated Covid-19 patients; and
- Experiences as an essential worker during the shelter at home orders.

Identify the Rule Followers

Protesters around the country demanded that cities re-open and people go back to work. At issue is a debate over core values of protecting life vs. protecting the economy. Should people continue to follow the rules by public health officials? Whether the defendant followed the rules is at the heart of every case. In voir dire, explore jurors' opinions about the importance of following the rules during the Covid-19 crisis. People who followed the rules to stay home and wear masks did so out of fear for their health, or to keep others safe. Identify those jurors who put their self-interest first and saw the rules as an intrusion on their rights. Ask,

- Who knows someone who did not follow the rules during the pandemic? What was their reasoning? What was your reaction to that?
- Who here thinks the health risks of Covid-19 were exaggerated?
- Who thinks state or local government went too far in closing down the economy?
- How do you think those views will affect you in this case where we say the defendant did not follow the rules about safe driving?

Science will Save the Day

Polarization of opinion is growing in this country around the importance of science and medicine, two areas often at issue in plaintiffs' cases. Find out how much stock the jurors put in the scientific evidence around protecting the spread of Covid-19 and treating the virus. What information sources did they rely on when assessing the risk to themselves and their families? Now, even more than before, knowing jurors' news sources may be one of the most important factors to consider.

The Silent Jurors

Lastly, I always counsel my clients to have one or two stock questions for the silent jurors who did not volunteer any information in voir dire. Here are two that may be enlightening,

- What is the most significant change in your life since the Covid-19 crisis started?
- What did you learn about yourself while sheltering in place?

Our world has forever changed, and the only way we will know for sure how jurors' attitudes have shifted and how those shifts affect damage awards is to collect data from mock juror surveys, focus groups, and post-trial interviews. Some jurors will be harder on plaintiffs. As always, use jury selection to try and get rid of those jurors. Some jurors will be more emotional and empathetic and have a deeper understanding of your client's suffering. Attorneys should be aware of who will likely be in the jury box and look for opportunities to tap into anger and empathy and find ways to connect with experiences that unite us during this pandemic. TL

End Notes

1. In a national public opinion poll June 8-11, 2020, conducted by National Center for State Courts (NCSC), 55% cited caregiving for an elderly family member, concern about someone in the household with an underlying health condition, and lack of childcare as an obstacle to serving on a jury now. Sixty-five percent of women over 50 said they had an obstacle to serving as a juror.
2. NCSC public opinion poll results reported in June 18, 2020, webinar.
3. Hans, V. P., Helm, R., & Reyna, V. F. (2018). From Meaning to Money: Translating Injury into Dollars. Law and Human Behavior 42:2, 95-109.

How To Make Remote Mediation Work For Your Cases

by Rachel Erlich

Mediation is a powerful tool that moves cases along the resolution spectrum. Over the past 30 years, in the mediation of tort, employment, and other cases that SFTLA members typically handle, we've been acculturated to expect that parties, lawyers, and insurers (if any) will get together with the mediator on a particular day and resolve the case.

Reinforcing expectations that mediation will be in person are State, Federal, and Local Rules such as California Rule of Court 3.894 that provides:

Attendance

1. All parties and attorneys of record must attend all mediation sessions in person unless excused or permitted to attend by telephone as provided in (3). If a party is not a natural person, a representative of that party with authority to resolve the dispute or, in the case of a governmental entity that requires an agreement to be approved by an elected official or a legislative body, a representative with authority to recommend such agreement, must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).
2. If any party is insured under a policy of insurance that provides or may provide coverage for a claim that is a subject of the action, a representative of the insurer with authority to settle or recommend settlement of the claim must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).
3. The mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session under (1) or (2) or permit attendance by telephone. The party, attorney, or representative who is excused or permitted to attend by telephone must promptly send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission.
4. Each party may have counsel present at all mediation sessions that concern the party.

The Federal District Court for the Northern District ADR Rule 6-10 provides as summarized by the Court itself:

Attendance:
The following individuals are required to attend the mediation session in person:

- clients with settlement authority and knowledge of the facts
- the lead trial attorney for each party
- insurers of parties, if their agreement would be necessary to achieve a settlement

Requests to permit attendance by phone rather than in person, which will be granted only under extraordinary circumstances, may be made to the ADR Magistrate Judge. Clients are strongly encouraged to participate actively in the mediation. (See ADR Rule 6-10 for full rule).

In the final weeks before "shelter in place" orders went into effect people attended mediation in person with trepidation. Every cough resulted in wary looks from people nearby and assurances from the cougher, "I don't have COVID-19," or, "It's just allergies." Before quarantine, mediation participants were asking for help brokering having parties who were at risk attend remotely and some people who were sick asked to attend remotely.

People were asking, "Rachel, can you do remote mediation?" On March 16, 2020, I did my first Pandemic-related, entirely remote attendance mediation session, in which most people were on video and just a couple of defendants were by phone – all mostly from home. During that day, shelter-in-place ("quarantine") orders began issuing for Bay Area counties, we were experiencing the new normal for mediation as we were doing it.

Since that day, it is apparent that not everyone is comfortable with the idea of remote mediation. So, here are some things to make you more comfortable with it so that during the pandemic you are not deprived of the powerful resolution tool in your cases. First, know that feedback has been very positive for all of the remote mediations that I and others have conducted (the mediators who have received complaints will either adjust or will be available for in person again in the

Rachel Erlich A mediator of civil disputes in California and across the country, Rachel is based in the Bay Area and affiliated with Judicate West. She mediates insurance coverage and bad faith, personal injury, and real estate (including financing, purchases/disclosures, construction and landlord-tenant). Rachel mediates in Superior Court and Federal Court programs.

future). Second, remote mediation does not necessarily mean that mediation will be conducted by video on just one day, and that the case will settle on the day of mediation. Third, remote mediation requires a bit of adjusting to a new normal on timing, pacing, and modes of communication.

Remote Mediation – What is it?

Most people hear "remote mediation" and think, "video." Remote mediation may include video but it leverages all communication modes available – video, phone, e-mail, text, and electronic transmission of documents, videos, and photos via secure portals.

Video mediation can use a number of different video-conferencing platforms. Many mediators are using Zoom, even those who previously used others such as Court Call or Skype. While Zoom has gotten some bad press recently and made people wary of it, the company itself is tightening security. There are measures that most mediators implemented immediately upon switching to video-mediation (waiting room, breakout rooms, recording and chat are disabled, and each mediation has a unique meeting ID with password). Using these safeguards, March 16 we went all day just as we might have done had we all been together in one office suite. At one point we needed to have all three defense rooms together, this was accomplished in far less time than we would have in person. I had another all video mediation that went more than twelve hours and concluded with a fully executed long form agreement that needed to be signed by six parties and their lawyers. In this regard, the plaintiffs' bar is ahead because many of you have implemented DocuSign.

Practical things to expect in video. Expect that you will use text during mediation to communicate with the mediator, and possibly your client. At some point someone will have to leave the conference and return, this means that if your mediator is using a waiting room and breakout rooms the person who left will need to be readmitted from the waiting room and will have to be reassigned to their breakout room. If your mediator is using multiple video conferences then the waiting room may not be an issue but there will be other limitations. Audio quality seems to be best when using computer/device for audio. Have a work around planned if audio or internet connection speeds are poor – most mediators can help you with this and will pivot quickly. Mediators have different styles in how they let you know that they are coming into your private breakout room.

Expectations for the Process. You can reasonably expect everything that you would expect from the process in person. Party emotional needs can be met by a mediator who is skilled in video-conferencing, the opportunity to meet the other side can be done by a mediator who is adroit in using the technology and setting the table for such a meeting. If participants agree to have the mediation session happen over the course of days or weeks instead of all at once then the process may include a variety of technology including video, telephone, e-mail, and text. Regardless of whether you are using video or phone please do include the mediator in communications with your client throughout the process. Also let your client know that there will be times when the mediator communicates with you separately – certainly by text or e-mail and possibly in another

video breakout room.

Practical things to expect in a non-video process. If all have agreed to proceed telephonically, consider whether you want to have those communications occur entirely on one day or whether it might be more practical to work toward your mediation day with a goal of getting the case settled before "The Day."

Preparatory Communications with Mediator and Clients. As with in person mediation, preparing for mediation is important. Including your mediator in those conversations early will give you a chance to learn and assess how adroit your mediator is in handling remote mediations. Getting people to commit to the process, to think about the logistics of mediation in the context of their household. Not everyone has space dedicated to a home office so people have done mediation from bedrooms and even closets. How the mediator works with you and your client on this non-technical but key rapport-building issue may set the stage for whether video or audio only communication is better.

Practice with the Technology. Download the application for your device more than a day before your first mediation using that technology. Guide your client through downloading the application too. Practice with your client so that you know that your client understands how it will be used on the game day.

The good news is that the days of defendants saying they and their insurance people must be, "on standby," are over. Years of experience in mediation have taught us that having the decision-maker's direct participation (whether in person or remotely) makes a deal more likely. Insurance carriers are noticing the benefit of having the insurance claims professional be part of the mediation session throughout, even when not physically with the defense attorneys. This is due to hearing the progress of negotiations as they occur which benefits the defense just as it benefits the decision-makers on the plaintiff's side. A big driver for carriers to not send people to mediation is the productivity cost of having a claims professional away from the desk for a full day or days. Obviously, remote participation reduces this lowered productivity (right now, while people are dealing with lack of childcare and the chaos of multiple people being at home there are other reasons that claims professionals are not participating throughout the day). The cost-savings to insurers of not putting a person on a plane have also always been part of the carrier's decision-making. These factors can be addressed through remote mediation while getting the benefit of the decision-maker's participation. This makes it likely that we will see carriers participate remotely even after quarantine ends.

The pandemic has brought participants to Mediation 2.0 a bit sooner than some might have liked. We do not have to use the wholly remote approach forever. Once we are no longer forced to be remote, we can design our processes in a way that works for everyone. The past two months have proven that full participation by everyone is possible just by leveraging technology that allows remote access using a device that fits in the palm of your hand. TL

2020 SFTLA Sponsors

Champion of Justice - Lesti Structured Settlements

Defender of Justice

Thomson Reuters
360 Financial, LLC
Physician Lifecare Planning
Morgan Stanley
Sarni Settlement Service
Sage Settlement Consulting
Judicate West
Steno
JAMs
Melissa Baldwin Settlements

Friend of Justice

The Lien Project
The Veen Firm
Aragon-Haas Insurance Brokers, Inc.
US Legal
Lawyer's Mutual
Creative Legal Funding
Cogent Legal
Robson Forensics
FileVine
Independent Life
KLE Nurse Consultants, LLC
Lexis-Nexis
Facts Please!
Pacific Liability Research
GoCloud Office, Inc.
First Legal
Trellis Legal Intelligence
Mechanic's Bank

Guardian of Justice Sponsors

The Arns Law Firm
The Cartwright Law Firm
The Scarlett Law Group
Schneider Wallace Cottrell Konecky
The Veen Firm
Walkup, Melodia, Kelly & Schoenberger

Advocate of Justice Sponsor

Callaway & Wolf
Pillsbury & Coleman

Partner of Justice Sponsors

Brady Law Group
Bohbot & Riles
Law Office Of Mark J. Zanobini

Ally of Justice Sponsors

Dunn & Panagotacos
Law Offices of John Hill
Mannion, Lowe & Oksenendler
Paoli & Geerhart
Ribera Law Firm
Shukla Law Firm
Stebner & Associates
Willoughby Brod

Keeping the Wheels of Civil Justice Turning

As I write this, we are a couple days removed from a very big victory that will help any California attorney struggling to practice in the civil courts during the COVID-19 pandemic.

As we all know too well, the COVID-19 pandemic caused California legal authorities to shut down courthouses up and down the state and put the justice system in a tailspin. It took a lot of 24/7 advocacy by our team at Consumer Attorneys of California, but first the governor and then the Judicial Council answered our call for help and took the first steps toward ensuring access to justice and maintaining legal rights during this crisis.

… on our to-do list is minor's compromise, the creation of a uniform statewide standard for rescheduling of trials that were suspended because of the health crisis and other adjustments needed to keep the wheels of civil justice turning.

On April 6, the Judicial Council acted to extend the statute of limitations until the crisis is declared over, throttle back restrictions on remote depositions and add an extra six months to the five-year rule for bringing cases to trial. Then on April 17, the Council approved an emergency rule that allows for an expansion of electronic service to guard legal rights while protecting public health during the COVID-19 pandemic.

Those actions followed a March 27 emergency order enacted by Gov. Gavin Newsom that gave Chief Justice Tani Cantil-Sakauye and the California Judicial Council authority to take necessary steps to ensure legal rights are not undercut. The governor also used his powers to directly suspend the statute that had been a barrier to attorneys trying to use remote video depositions and electronic service of process as a workaround during the health crisis.

Try as we might, the governor and Judicial Council stopped short of providing all the remediation we felt necessary. Still on our to-do list is minor's compromise, the creation of a uniform statewide standard for rescheduling of trials that were suspended because of the health crisis and other adjustments needed to keep the wheels of civil justice turning.

COVID-19 Emergency Toolkit

As a service to attorneys around the state as well as the general public dealing with civil litigation, CAOC launched a special online COVID-19 "Coping With Crisis" emergency toolkit.

Actually it is a lot of web pages. You'll find links to key resources for helping you get through these tough times, including business help, information on small business loans, and the latest news on how courts are handling the crisis as well as links to legal, government and health sites that have even more information. All of these web pages are being updated on a real-time basis.

Two of my favorite parts of this valuable web resource are the court status page, which provides updates on the latest rule changes and other actions from the Superior Courts in all 58 California counties, and the "additional resources" web page, which is awash with links to key documents – like the aforementioned actions by the governor and Judicial Council – as well as the latest CAOC communications and resources to help you with your practice in these uncertain times.

We also have a special page for all COVID-19 related webinars we are producing to help your practice. Many of them are free, and more will be added to the list in the weeks ahead. TL

SFTLA MEMBERS MARCH FOR BLACK LIVES MATTER


BLACK
LIVES
MATTER


UNTIL ALL
DENIAL IS THE
HEART BEAT
OF RACISM
BLACK LIVES
black
lives


CAN YOU HEAR US GEORGE?
WOME IN THE SEQUEL WORK!
45


O'Reilly
AUTO PARTS
BLACK
LIVES
MATTER!


WHITE
SILENCE
=
VIOLENCE

Don't miss what matters.

You should [redacted] never go to trial with a [redacted] deposition missing just because [redacted] you couldn't afford it. [redacted] [redacted] That's why we offer [redacted] exceptional [redacted] court reporting and videography [redacted] with DisbursePay, our signature deferred payment approach. [redacted] Get all the court reporting you need, [redacted] but pay nothing until your case concludes. [redacted] Totally non-recourse. [redacted] Totally no risk. [redacted] Designed to solve the problems plaintiff's attorneys face, [redacted] so you can focus on the case, [redacted] not the cost. [redacted] Make your depositions an asset, not an obstacle, [redacted] with Steno.

STENO

Schedule a deposition with with DisbursePay today:
concierge@steno.com or 310-573-8380

STENO.COM

DISABILITY

Long-Term Care
Life Insurance
Bad Faith – ERISA

PILLSBURY & COLEMAN LLP

Protecting the rights of all policyholders to be treated fairly and in good faith.

Our firm's sole focus is insurance coverage, bad faith and ERISA on behalf of individuals and businesses in insurance disputes. We thank our colleagues in the Bay Area legal community who have referred clients, friends and family to our lawyers at Pillsbury & Coleman for over thirty years. We have recovered substantial policy benefits for our clients throughout California in all types of insurance matters. Please call us when your client needs specialized expertise.

415.433.8000 | 100 Green Street, San Francisco, CA 94111 | pillsburycoleman.com

» Closing Argument continues from page 36

This is not an easy burden for the insurer to satisfy. Each virus exclusion must be carefully scrutinized to determine whether it will apply. Is the exclusion limited to precluding coverage for microorganisms? If so, it would arguably not apply to non-living viruses. Does the exclusion preclude coverage for specific viruses like SARS or MERS thereby opening the door to coverage for other viruses including the novel coronavirus? Does the exclusion apply to business interruption coverage or is its application limited to the liability or other property coverages? Application of this exclusion will turn on its particular language and how it fits within the policy as a whole.

Even if you have the broad form ISO "Exclusion of Loss Due to Virus or Bacteria" (CP 01 40 07 06), you are not without hope. When that endorsement was shopped by ISO for approval by State Departments of Insurance, ISO falsely claimed that the exclusion was nothing new since "*property policies have not been a source of recovery for losses involving contamination by disease-causing agents …*" ISO couldn't have been more wrong. Nonetheless, states, including California, approved the use of this form under the false pretense that it was merely a clarification of coverage, when, in fact, it wiped-out coverage for these losses. Insurers should not be able to dupe states into approving this form, then turn around and rely on it to preclude coverage for losses that would otherwise be covered.

What Can I Do To Best Position My Claim?

How you navigate the claims process, both before and after the denial of your claim, is important. It will affect how the insurance company responds to your claim and will certainly affect any subsequent lawsuit. Here is what we suggest:

1. **Start by Understanding your Coverage.** Coverage counsel can review your policy to determine the coverages that are most likely to apply. Is this a pure business interruption claim or are there other additional coverages for Civil Authority or Dependent Business Premises that will also apply? Do you have a virus exclusion? Do any other exclusions potentially apply? Understanding your coverage will help you submit the best possible claim to your insurance carrier.
2. **Be Reasonable.** Once your claim is submitted, it is important that all of your interactions with your insurance carrier are reasonable, no matter how frustrated you may get (and you will get frustrated). Every communication is being documented by your insurance company. Every communication is a piece of evidence that may be used at trial. The best plaintiffs are those that have been reasonable with their insurance company, even when their company is acting unreasonable toward them.
3. **Pushback on the Denial of Coverage.** If the goal is to get your claim paid without litigation, then it will be important to appeal the insurance company's denial of coverage. This will often be most effective with the assistance of coverage counsel who is familiar with the insurer and the coverage arguments. Be sure to emphasize the importance of immediately receiving benefits, and the devastating impact that it will have on your business if you don't receive them.

Don't be deterred by your insurance company's denial of coverage. Persist with the knowledge that many of these denials are improper. Together we can ensure that insurance companies keep their promises to those that are counting on their business interruption coverage for the survival of their business. We will survive this pandemic. And when we do, those insurance companies that should have helped, but refused, will be held accountable. In the meantime, stay safe and healthy. TL

» Appellate Victories continues from page 9

the insurer and not the absent foreign motorist. The Court of Appeal held that even though PV Holding was solely in charge of the litigation and all settlement decisions, its inclusion as an offeree on the 998 offer rendered the offer invalid. The Court of Appeal's decision suggests that if the offer had explicitly stated that PV Holding was included as an offeree solely as an insurer, and if the offer had stated that PV Holding could unilaterally accept the offer despite not being the named defendant, then it would likely have been valid.

The caution for practitioners is that despite the public policy encouraging settlements, the courts are still finding ambiguity in statutory settlement offers, and any offer that facially appears to be a joint offer will be strictly scrutinized.

The second part of the decision is more universally applicable. The Court of Appeal held that any contractual agreement to share costs with the other side waives the right to claim those costs in a post-judgment cost bill, unless the agreement expressly mentions the issue and states that despite the agreement to share costs, the parties do not waive their right to claim them if they ultimately prevail.

This was particularly galling with respect to the several thousand dollars in JAMS fees that were incurred under JAMS standard two-party contract, but it was also galling with the parties' oral/e-mail agreement to split court reporter fees now that courts do not supply a reporter.

Until another court addresses the issue, the onus will thus be on the litigants to put all courtesy agreements to share expenses in writing and to expressly reserve the right to claim those expenses as prevailing party costs. The Dubrovsky firm has notified JAMS of the Court of Appeal's decision and urged JAMS to update its standard agreement to include a non-waiver provision. Interested practitioners may wish to forward their thoughts to JAMS and other mediation providers as well.

Whether with mediation agreements or any other agreement with defense counsel to share litigation costs, plaintiff's counsel should insist on written language that the agreement to share costs does not constitute a waiver of the right to claim prevailing party costs under Code of Civil Procedure section 1033.5. (Contributing author Douglas A. Applegate) TL

JUDICATE WEST IS PROUD TO OFFER THE SERVICES OF THESE RESPECTED NORCAL NEUTRALS


Melissa Blair Aliotti, Esq.


Alan R. Berkowitz, Esq.


Sarah F. Burke, Esq.


Douglas deVries, Esq.


Rachel K. Ehrlich, Esq.


Susan G. Feder, Esq.


Jeffrey A. Harper, Esq.


Hon. Hurl William Johnson, Ret.


David J. Meadows, Esq.


Herman D. Papa, Esq.


David L. Perrault, Esq.


Mark D. Petersen, Esq.


Robert Slattery, Esq.


Hon. Donald J. Sullivan, Ret.


Bradley Thomas, Esq.


Peter Thompson, Esq.


Hon. Michael G. Virga, Ret.


Buzz Wiesenfeld, Esq.

- A respected roster of statewide neutrals, including former state and federal judges plus skilled attorney mediators and arbitrators.
- Well appointed conference rooms designed to maximize comfort and productivity.
- Case consultants, each with over 15 years experience in helping you select the "right" neutral for your challenging matters.
- Dedicated staff of ADR professionals exceeding your every service expectation.
- A wide-variety of innovative solutions including: Jury Mediation℠, Discovery Mediation, Private Jury Trials, and expeditious Rules for Commercial Arbitration that are accompanied by new Appellate Rules.

(415) 266-1242
100 Pine Street, Suite 1950
San Francisco, CA 94111

WWW.JUDICATEWEST.COM

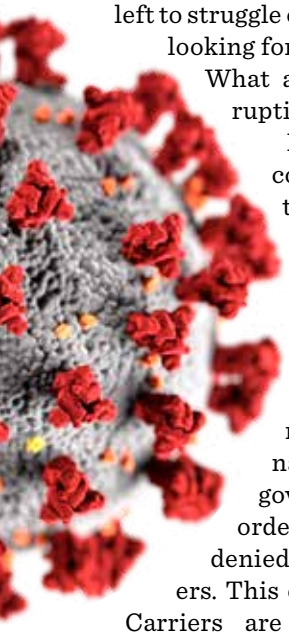
JUDICATE WEST
Alternative Dispute Resolution
PROUDLY SERVING 25 YEARS
Results Beyond Dispute℠

DOWNTOWN LOS ANGELES | SACRAMENTO | SAN DIEGO | SAN FRANCISCO | SANTA ANA | WEST LOS ANGELES

Surviving Covid-19: Best Practices For Your Business Interruption Claim

By Ryan H. Opgenorth

Cash reserves are low. Your business credit line is nearly depleted. And you still have to meet next month's payroll obligations, fund your employees' health insurance, and somehow pay your rent or mortgage assuming it has not already been deferred. Businesses are suffering. They need relief. But with big business gobbling up all the Paycheck Protection Program loans, many small businesses (and small law firms) have been left to struggle on their own. They are looking for other forms of relief. What about business interruption coverage?



Business interruption coverage is supposed to protect you whenever your business in interrupted, right? Wrong, according to the insurance industry. Business interruption claims resulting from coronavirus, COVID-19 or government shutdown orders are being routinely denied by insurance carriers. This comes as no surprise. Carriers are facing catastrophic exposure from these claims in the hundreds of billions of dollars. And while carriers' grounds for denying these claims can be legitimate, that isn't always the case.

Is My Claim Potentially Covered?

Generally speaking, an insurance carrier's first line of defense against your business interruption claim is its insuring agreement. The ISO Form for Business Income (and Extra Expense) Coverage provides:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by *direct physical loss of or damage to property* at the premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations.
> (Emphasis added)

Insurance carriers have seized on the above language to claim that coverage only applies where there is a "distinct, demonstrable, physical alteration of the property." (*MRI Healthcare Ctr. Of Glendale, Inc. v. State Farm Gen. Ins. Co.* (2005) 187 Cal.App.4th 766, 779.) The coronavirus, according to insurers, fails to satisfy this requirement. It can be easily wiped clean from surfaces resulting in no physical damage whatsoever to the property. This, however, is a very narrow reading of this policy language. It arguably ignores over 50-years of well established law requiring insuring agreements to be interpreted broadly in order to protect the objectively reasonable expectations of the insured. (*State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 101.)

A broader, alternative reading of this same policy language doesn't limit coverage to only "[direct physical] *damage* to property", but extends it to "direct physical loss of [property]" as well. "Loss of property" must mean something different than "damage to property." The two phrases should not be conflated. (Cal. Civ. Code §1641; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.* (1993) 5 Cal.4th 854, 867.) Accordingly, "loss of property", interpreted in its plain and ordinary sense, may reasonably extend to lost property, including loss of use or loss of access to property, *without any physical damage to the property itself*. This would arguably include losses resulting from the coronavirus or government shutdown orders.

Even so, insurance carriers will endeavor to deny coverage for these claims by relying on policy exclusions, in particular, the virus exclusion. We have encountered some version of the virus exclusion in roughly 70% of the policies associated with these claims. And despite their seemingly broad application, they must be "strictly construed against the insurer and liberally interpreted in favor of the insured." (*Delgado v. Heritage life Ins. Co.* (1984) 157 Cal.App.4d 262, 271.) "The burden rests on the insurer to phrase the exceptions in clear and unmistakable language ... The exclusionary clause must be conspicuous, plain and clear." (*State Farm Mut. Auto. Ins. Co. v. Jacober* (1973) 10 Cal.3d 193, 201-202.)

Continues on page 34

Ryan H. Opgenorth, Mr. Opgenorth is partner at Pillsbury & Coleman LLP. He exclusively represents policyholders in bad faith litigation against their insurance carriers in order to hold companies accountable for their misconduct. He has been a Northern California Super Lawyers Rising Star each year since 2013.

That Hard Fought Settlement

How long will it last? Will it affect her existing benefits?
Can he pay his medical bills?
Don't Let Your Win Turn Into a Loss

For more than 30 years, Dennis Sarni has helped California trial attorneys and their clients preserve their settlement proceeds by structuring more than
$1 Billion in settlement proceeds

SARNI SETTLEMENT SERVICES

License 0D00968

We sit down with you and your client, methodically exploring your client's financial needs and goals; constructing strategies that preserve Medi-Cal and pre-existing benefits

Proud Sponsor of CAOC, SFTLA, ACCTLA, and MTLA

Dennis Sarni, J.D. 800 380 2655

- **Structured Settlements for Injury, Wrongful Death, Wage and Hour and Employment Litigation**
- **Life Care Plan Analysis**
- **Structuring MSA's and Special Needs Trusts**
- **Attorney Fee Structures that defer income yet provide *Market Rate Returns***
- **CLE Approved In-house Lunch & Learn Training for you and your staff**

The **Trial Lawyer**

Is a Publication of the
San Francisco Trial Lawyers Association
311 California Street # 620
San Francisco, CA 94104

Postmaster: Time Value