CASENOTE

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"ANCHORING" MOTIONS

What is "anchoring" – *and why is such motion not applicable in California*?

There is research that demonstrates that an attorney's use of a specific dollar amount during closing argument for pain and suffering can cause a jury to experience a distinct cognitive phenomenon, labeled by researchers as "anchoring." Anchoring is defined as "the bias in which individuals' numerical judgments are inordinately influenced by an arbitrary and irrelevant number. In a very few jurisdictions – not in California – the court have held that it is prejudicial to allow the Plaintiffs' counsel to mention a specific monetary amount in opening statements to the jury as studies have shown that a jury may tend to "anchor" on that number and award a monetary amount close to that number in their verdict.

Not only has no appellate court in California approved such a motion in limine or accepted such an argument from the defense, but the California Supreme Court in ***Beagle v. Vasold*** has ***specifically rejected*** such a theory. The California Supreme Court in ***Beagle v. Vasold*** (1966) 65 C2d 166, held that the trial court erred in not allowing plaintiff's counsel to present a "lump sum" number or a "per diem" argument to the jury for the recovery of pain and suffering [I.e., a stated number of dollars for a stated period of time].

The Court held: *"It has long been the practice of attorneys in this state to tell the jury the total amount of damages the plaintiff seeks…"*. An attorney who suggests that his client's damages for pain and suffering may be calculated on a "per diem" basis is not presenting evidence to the jury but is merely drawing a permissible inference from the evidence. Further, a "per diem" argument as to the calculation of pain and suffering does not invade the duty and province of the jury. [**Note**: Many cases which have approved the "per diem" argument also approve that the jury be instructed that they are not governed by the amount of damages suggested by counsel, that this argument does not constitute evidence but is merely an approach to the damages issue which the jury may consider, but it does not have to. The jury's ultimate obligation is to arrive at a lump sum amount which, in its view, is supported by the evidence and is fair and just to both plaintiff and defendant. I.e., see: ***Weeks v. Holsclaw*** (1982) 295 S.E.2d 596].

As the Court held in ***Beagle***, despite some examples showing a jury returning a verdict for the exact number plaintiff's counsel asked for his/her client's damages, in the vast majority of cases the jury does not follow counsel's suggestions as to damages, regardless of the proposed mathematical basis.

Further, the Court in ***Beagle*** held that a plaintiff's counsel may not ask the jury to put themselves in plaintiff's position or in plaintiff's shoes or what would they take to

endure the pain plaintiff has undergone in making the determination as to an appropriate amount to award for pain and suffering [the so-called "Golden Rule" argument].

TO ALL PARTIES AND YOUR COUNSEL OF RECORD:

NOW COME Defendants COMMUNITY ARMS LP by their attorneys and move for an order barring plaintiff from making any suggestions to the jury regarding lump-sum amounts of non-economic damages. Defendants anticipate that plaintiff's counsel will attempt to use lump sum amounts during opening statements and closing arguments to establish the amount of non-economic damages the plaintiff is seeking from the jury. Defendants request that the Court enter an order prohibiting plaintiff's counsel from using a lump sum argument to request a dollar amount for non-economic damages. Defendants contend that mentioning such "specific" or "lump sum" is prejudicial for the reasons set forth hereinbelow and must be excluded and prohibited. Evidence Code §352.

1. <u>PURPOSE OF MOTIONS IN LIMINE</u>:

A pretrial motion in limine is a protective device for the opponent of the evidence, to prevent the proponent from even mentioning potentially prejudicial evidence to the jury. (*Abbett* ***Electric Corp. v. Sullwold*** (1987) 193 Cal.App.3d 708, 715); ***Rufo v. Simpson*** (2001) 86 Cal.App.4th 573, 608. In limine motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial. ' "The usual purpose of motions *in limine* is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order *in limine* excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. [Citation.] 'The advantage of such motions is to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the jury.' ***Blanks v. Shaw*** (2009) 171 Cal.App.4th 336, 375.

A. <u>THE "ANCHORING EFFECT</u>"

Research shows that a plaintiff's use of a dollar amount during closing argument can cause a jury to experience a distinct cognitive phenomenon, labeled by researchers as "anchoring." Anchoring is defined as "the bias in which individuals' numerical judgments are inordinately influenced by an arbitrary and irrelevant number" [Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519 (1996)].

Anchoring describes the correlation between the suggestion of specific numbers to a subject, and the effect of this suggestion on the subject [See: 70 Defense Counsel Journal 378, ANCHORS AWAY: ATTACKING DOLLAR SUGGESTIONS FOR NON-ECONOMIC DAMAGES IN CLOSINGS, July, 2003 [Don Rushing, Linda Lane, Erin Bosman].

Research reveals one truth about the anchoring effect—it results in reliable positive correlation between a number suggested to and chosen by a subject. The effect is not predicated on the plausibility or reasonableness of the numerical anchor, as has been revealed through a variety of studies.

In order to observe the effect of anchoring, researchers will ask people to make a numerical judgment after providing them with an initial estimate (Id.). Final judgments

tend to be positively correlated with the random starting point. Anchoring not only results in an increase in the average estimate of the anchored subjects, as compared to the control group, but the studies imply that the "magnitude of the effect grows with the discrepancy." [*See, e.g.*, S. Plous, *Thinking the Unthinkable: The Effects of Anchoring on Likelihood Estimages of Nuclear War*, 19 J. APPLIED SOC. PSYCHOL. 67, 68 (1989); Chapman & Bornstein, *supra* note 4, at 519-20].

Jurors are not immune from the "anchoring" effect. One study found that nearly half of mock jurors selected a damage award that exactly matched the amount requested. [Raitz, A., Greene, E., Goodman, J. and Loftus, E.F., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW AND HUMAN BEHAVIOR 385-395 (1990).

Another study required subjects to read a short description of a personal injury suit brought by a woman against a health maintenance organization. [Chapman & Bornstein, *supra* note 4, at 523]. The plaintiff claimed that her HMO-prescribed birth control pills resulted in ovarian cancer, which precluded her from having children and would ultimately result in her death. The subjects were separated into four distinct groups, with each receiving a different numerical anchor prior to determining damages for pain and suffering. The four anchors were $100, $20,000, $5 million, and $1 billion. The study revealed a linear relationship between the anchors and the subsequent awards. A larger request in the ad damnum clause yielded a greater award.

Another study analyzed the effect on mock jurors of requests for different awards. [Malouff & Schutte, *supra* note 1, at 491, 493].

One scenario that was analyzed involved a plaintiff with permanent temporomandibular joint and shoulder injuries, as well as permanent wage loss. The "jurors" were told that the defendant had admitted liability and that the sole remaining issue was the amount of damages to be awarded. They were given differing summations in which the plaintiff's attorney asked for specific monetary amounts of $200,000, $400,000, $600,000 or $800,000. In each instance, defense counsel suggested $150,000. The results were enlightening. A request of $200,000 brought a mean of $197,875; a request $400,000 brought a mean of $289,375; a request of $600,000 brought a mean of $434,400, and a request of $800,000 brought a mean of $479,447. As part of this same study, a separate group of jurors was given the same factual scenario, but the plaintiff's attorney did not request a specific amount.

The jurors awarded a mean of $276,687. The primary finding of this study was that "when more money was requested for damages by the plaintiff's attorney, the jurors awarded more." This study powerfully illustrates how a numerical anchor used during closing argument can increase the amount of damages that may be awarded by a jury.

Another researcher concluded that his examination of anchoring on mock jurors indicated the "powerful impact of the introduction of anchors on mock jurors' damage awards." [Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991, 1000, 1009 (1995)].This study utilized three different settings: no anchor, a $2 million anchor and a $20 million anchor. The subjects were shown a videotape of a personal injury trial involving the death of two children in a car accident.

The anchors were provided to certain subjects in the context of a closing argument and to others as upward limitations on damages as concluded by the judge. In each setting, the damage awards moved toward the anchor that was given to the mock jurors.

This research shows that jurors will become anchored to the monetary sums suggested by plaintiffs' counsel in arguing for an award of non-economic damages, no matter how irrelevant or outrageous the suggested sum may seem.

While the numerical anchoring effect applies broadly to any category of damages, the impact is greatest on that category of damages least susceptible to quantification—pain and suffering; emotional distress; fear; loss of care, comfort and society; or loss of consortium.

B. DETERMINATION OF PAIN AND SUFFERING IS THE EXCLUSIVE FUNCTION OF THE JURY. SPECIFIC PROPOSALS HAVE THE REAL POTENTIAL TO SWAY THE JURY UNDULY:

Pain and suffering are not subject to precise measurement by any scale, and their translation into terms of money damages is peculiarly the function of the trier of the facts. ***Sexton v. Key System Transit Lines*** (1956) 144 Cal.App.2d 719, 722.

Plaintiff's counsel may not request a specific dollar amount for pain and suffering in his closing remarks. In the final analysis, a jury trial should be an appeal to the rational instincts of a jury rather than a masked attempt to "import into the trial elements of sheer speculation on a matter which by universal understanding is not susceptible to evaluation on any such basis. We hold that the references by plaintiff's counsel in his closing remarks to a minimum dollar amount that plaintiff should be awarded for his pain and suffering could have irrationally inflated the damages award and, under the facts of this case, constituted reversible error. ***Waldorf v. Shuta*** (C.A.3 (N.J.),1990) 896 F.2d 723, 744 [requesting a specific dollar amount for pain and suffering in closing argument is improper in a federal district court as a matter of federal law].

Specifying target amounts for the jury to award is disfavored. Such suggestions anchor the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence. *See* ***Mileski v. Long Island R.R. Co.,*** 499 F.2d 1169, 1172 (2d Cir.1974) ("A jury with little or no experience in such matters, rather than rely upon its own estimates and reasoning, may give undue weight to the figures advanced by plaintiff's counsel....").

A jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury unduly. ***Consorti v. Armstrong World Industries, Inc.*** 72 F.3d 1003, 1016 [C.A.2 (N.Y.),1995] *vacated on other grounds*, 518 U.S. 1031 (1996). Lawyers cannot state in summation the number they think jurors should award for pain and suffering. ***Bielunas v. F/V Misty Dawn, Inc***. (C.A.1 (Mass.),2010) 621 F.3d 72, 79.[1]

CONCLUSION:

In light of the irrefutable research as to the dangers of allowing Plaintiff's counsel to mention to the jury a specific amount for pain and suffering – and its "anchoring effect" -- and in light of the fact that it would be prejudicial to the defense and any limiting

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[1] See also: ANCHORS AWAY: ATTACKING DOLLAR SUGGESTIONS FOR NON-ECONOMIC DAMAGES IN CLOSINGS [July, 2003] Defense Counsel Journal, attached hereto.

instruction or objection could not “unring the bell”, it is respectfully requested that this Court grant this motion in limine and prelude the mentioning of a specific dollar amount to the jury for pain and suffering. The jury must be allowed to make this determination without the “suggestion” of counsel as to what their determination should be. The prejudicial effect of such “suggestions” is not eliminated solely by a limiting instruction stating that such “suggestions” are merely argument of counsel.