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LEGAL UPDATE

VOLUME 19, ISSUE 2
SEPTEMBER, 2020

"Waiv-ing" Goodbye to COVID-19 in Stadiums and Shopping Malls: Will Signed Waivers Protect Large Venues Against Liability When a Patron Catches Coronavirus? By Nicholas Christopolis, Esq.

Nicholas Christopolis

The moment cameras focused on Dallas Mavericks owner Mark Cuban staring in stunned disbelief at his cell phone was when the coronavirus pandemic became real for millions of Americans. Cuban had just learned in the middle of his team's game that the NBA had canceled the remainder of its season after Utah Jazz player Rudy Gobert tested positive for COVID-19. The stoppage of play was the first in a cascade of sports leagues, concerts, political rallies and other large venue events postponing operations. The economic impact has been significant. In a study conducted by ESPN, lost revenue for the sports industry alone is estimated to be at least 12 billion dollars, a figure that could double if the upcoming college and pro football seasons are canceled.[1] Similarly, the live music industry is projected to lose approximately 9 billion dollars if concert halls remain silent through the end of the year.[2] Large retail and restaurant chains are also suffering, with J.C. Penney declaring bankruptcy and set to close 242 locations by fall, Microsoft and Pier One Imports recently announcing they're closing all physical store locations, and even good old Chuck E. Cheese failing to collect enough tokens to avoid bankruptcy.[3]

However, even as the virus still rages in many parts of the country, live event operators and owners of large venues are attempting to restart operations. In addition to figuring out how to protect the public from the virus, they are also trying to protect themselves against liability from those who may claim they caught COVID-19 at the venue or gathering. Undoubtedly, precautions will be taken regarding the physical environment, and an implied assumption of the risk argument exists after endless warnings about the virus, but another tool being employed against potential lawsuits is the use of express waivers with exculpatory language disclaiming liability. Attendees at President Trump's political rally at Tulsa's BOK Center had to acknowledge that they "voluntarily assume all risks related to exposure to COVID-19" and that they would not hold the BOK Center or the Trump campaign "liable for any illness or injury."[4] Walt Disney World now requires guests to sign waivers with nearly identical language and sports teams have long used waiver language against liability on the back of their game tickets.[5] Read More . . . P. 2

Verdicts, Summary Judgments, Appellate Results
Final Summary Judgment

Orlando Managing Partner Anthony Merendino, Esq., and Appellate Partner Daniel Weinger, Esq., obtained a favorable result when the court granted Defendant Delaney Gas Station's Motion for Final Summary Judgment on July 9, 2020 in the matter styled *Vera Prochounina v. Delaney Gas Station d/b/a Mobil Gas* in the Circuit Court of Osceola County. Plaintiff filed suit alleging she slipped and fell in the restroom of the Defendant's gas station, and claimed that liquid on the floor (which was shown in a video taken by

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"Waiv-ing" Goodbye to COVID-19 in Stadiums and Shopping Malls: Will Signed Waivers Protect Large Venues Against Liability When a Patron Catches Coronavirus? Cont.

In the wake of COVID-19, the use of waivers for patrons entering retail spaces has been growing.[6] The question then becomes to what extent these waivers provide protection against liability from lawsuits? The short answer is that it depends on a particular state's contract laws. While the coronavirus is truly a novel situation, past decisions regarding use of these waivers in large group settings will likely predict how Florida courts may rule in regard to liability waivers in COVID-19 infection scenarios.

The Florida Supreme Court recently addressed the issue of a liability waiver for an amusement park in the case of *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256 (Fla. 2015). In *Sanislo*, parents of a seriously ill child brought a negligence action against a non-profit organization that provided resort vacations to gravely sick children and their families. During the trip, the child's mother sustained major physical injury when a wheelchair lift collapsed. *Id.* at 259. The Court acknowledged the competing public policy interests involved with liability waivers. On the one hand, they are generally disfavored because they relieve one party of liability to the detriment of another, usually from a corporation to an individual who now bears the responsibility to avoid injury and the financial risk of loss, and is probably the lesser equipped of either party to do so. *Id*. at 260. However, the Court acknowledged that exculpatory language in waivers should be enforced when certain criteria are met to fulfill the countervailing policy goal of allowing parties to freely contract. *Id.* at 261. The two criteria Florida courts consider when considering the enforceability of liability waivers are:

1) Whether the waiver contains clear and unequivocal language;

2) Each parties' relative bargaining power.

Id. *See also Give Kids the World Inc. v. Sanislo*, 98 So. 3d 759 (Fla. 5th DCA 2012).

As to the first criteria, an ordinary and knowledgeable party must know what rights it is contracting away. *Covert v. South Florida Stadium Corp.*, 762 So. 2d 938 (2000). In *Covert*, a Miami Dolphins season ticket holder was physically injured by other fans during a game and sued Pro Player Stadium. The court reversed judgment for the stadium owners based on two seemingly contradictory paragraphs in the waiver provision of the season ticket holder agreement. One paragraph seemed to relieve the stadium of liability, while another seemed to negate that statement. The court held that based on such ambiguity an ordinary person would not fully understand what had been contracted away and therefore the waiver provision was invalid. *Id.* at 939.

One particular area of concern regarding the question of clear and unequivocal language is whether the magic word "negligence" needs to be expressly included in an exculpatory clause to waive that cause of action. The Florida Supreme Court in *Sansilo* discussed competing jurisprudence on this issue. For example, an exculpatory clause in a condominium license agreement that stated "[m]anagement … will not be responsible for accidents or injury to guest," was too ambiguous to exculpate owners' association from a guest's negligence claims as the term "accident" did not equate to negligence. *Hackett v. Grand Seas Resort Owner's Ass'n Inc.*, 93 So. 3d 378 (Fla. 5th DCA 2012). However, *Sansilo* held that while it is better practice to include the word negligence in an exculpatory provision, the inclusion of such language is not an absolute prerequisite for a party waiving its own negligence. *Sanislo*, 157 So. 3d at 270. The waiver in *Sansilo* broadly stated "any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen to me/us…" and a second provision released the organization from "any liability whatsoever in connection with the preparation, execution, and fulfillment of said wish". *Id.* The Court held the scope of this language sufficiently put the plaintiff on notice that a negligence lawsuit was off the table. *Id*. at 271.

Another potential area of confusion is whether a waiver can absolve a party from gross negligence. It is true that some courts have held that an exculpatory clause does not excuse gross negligence; however, those courts made those holdings in fact specific circumstances - such as when the waiver simply didn't include gross negligence language or when an applicable statute prohibits the waiver of gross negligence. In the recent case of *MacGregor v. Daytona International Speedway, LLC*., 263 So. 3d 151 (Fla. 5th DCA 2018), a spectator at a large race in Daytona gained access to a restricted area by signing a "motorsport non-spectator liability release" that specifically extended to "all acts of negligence". However, the *MacGregor* court held that since the legislature in Florida Statute § 549.09(1)(e) did not include gross negligence in the definition of negligence for injuries occurr-

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Waiv-ing" Goodbye to COVID-19 in Stadiums and Shopping Malls: Will Signed Waivers Protect Large Venues Against Liability When a Patron Catches Coronavirus? Cont.

ing in the non-spectator areas of a racetrack, then the release cannot be found to bar gross negligence claims. The reality is that Florida courts regularly uphold agreements that seek to release a party's actions that constitute gross negligence. In another case involving a racetrack, a person was killed while participating in a "Dash for Cash" event at the Florida State Fairgrounds Speedway. *Theis, II v. J&J Racing Promotions*, 571 So. 2d 92 (Fla. 2d DCA 1990). The defendant racetrack operator was successful in its argument that the decedent had waived a claim for gross negligence because the waiver stated the racetrack owners would be absolved "from all liability...whether caused by the negligence of the releasees or otherwise." *Id*. at 94. The Court seized upon this "or otherwise" language in relation to negligence to reason that it "must be construed as intended to encompass all forms of negligence, simple or gross." *Id.*

The second criteria courts examine for the enforceability of a waiver, the relative bargaining power of the parties, is not as broad as one may envision. In the context of large athletic and recreational events, Florida courts have consistently refused to find inequality of bargaining power. In *Banfield v. Louis*, 589 So.2d 441 (Fla. 4th DCA 1991), a triathlete was struck by a motorist while she competed in the bicycle leg of the Bud Light United States Triathlon Series in Ft. Lauderdale. She had earlier signed a release waiving any negligence claim against the race sponsors, organizers, and promoters. *Banfield*, 589 So.2d at 443. The court upheld enforcement of the release holding that bargaining power disparity was "not applicable to entry of athletic contests of this nature, where a party is not required to enter it and not entitled to participate unless they want to." *Id.* at 443. Florida courts have held that the bargaining power of the parties will not be considered unequal in contexts outside of public utilities or public functions. *Give Kids the World Inc.*, 98 So. 3d at 762. Interestingly, the plaintiff in *Banfield* attempted to raise a public function argument stating that enforcing the waiver would serve a greater public interest by ensuring race promoters, who may conduct endurance races on public roads, would not be tempted to cut corners on safety precautions. The Court disagreed, holding that attendance at an athletic event was not a necessary service and is completely voluntary. *Banfield*, 589 So.2d at 446.

Waivers executed by parents on behalf of their minor children, for potential injuries the child could sustain, are also generally disfavored in Florida. The Florida Supreme Court in *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008), unequivocally stated that an exculpatory release signed by a parent on behalf of a minor child is unenforceable when it relates to a child's potential injuries arising from participation in a commercial activity. Another court focused on two public policy concerns when holding an exculpatory clause related to ear piercing at a jewelry store was unenforceable. *Claire's Boutiques v. Locastro*, 85 So. 3d 1192 (Fla. 4th DCA 2012). First, *Claire's Boutiques* held that such agreements could undermine the integrity of the parent-child relationship. Second, the court put forth an argument rooted in law and economics by stating that such an agreement would unduly shift the risk and cost of damages onto the family unit. *Id*. at 1199.

In conclusion, through June 30, 2020, over 3,100 lawsuits were filed in the United States related to COVID-19 infection.[7] A number that unfortunately, like the virus itself, may grow exponentially. Owners and operators of large venues face an imminent imperative for a strategic, holistic approach to defense of potential claims. Based on the precedence above, the main consideration for exculpatory waivers for any such large gathering place is to have clear and unambiguous language - preferably language specifically releasing the owner or operator from its own negligence. Relative bargaining power of the parties should not act as a bar in these types of venues because a would-be attendee or consumer can simply leave without being forced into a proposition that hinders their fundamental needs or welfare such as with a public utility. However, even the most expertly tailored waiver needs to be part of a multi-leveled approach. In addition to a signed waiver, measures should include adequate warnings to the public before arriving at the venue, ample signage at the location, enforcement of protective coverings such as masks, and physical barriers and partitions in order to minimize potential liability in our brave new (and viral infected) world.

For assistance with COVID related exposures, please view the firm's **COVID-19 Practice Area.** The COVID -19 team defends businesses and insurers facing lawsuits from COVID related exposures. The claims may include failures to safeguard premises and work zones, professional negligence, errors and omissions, agents, business interruption, business operations, injuries, coverage and workers' compensation claims arising from COVID-19.

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Waiv-ing" Goodbye to COVID-19 in Stadiums and Shopping Malls: Will Signed Waivers Protect Large Venues Against Liability When a Patron Catches Coronavirus? Cont.

Our team is able to assist and provide claims handling guidance and services in each specialty area:

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- COVID related Construction Delay and Force Majeure Defenses
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- Daubert COVID Strategies for Causation and Forensics

For further information about the article or assistance with your matters, please also contact Nicholas Christopolis, Esq., in the Jacksonville office at T: 904.365.5679 or email NChristopolis@insurancedefense.net.

End Notes

[1] https://www.espn.com/espn/otl/story/_/id/29110487/sudden-vanishing-sports-due-coronavirus-cost-least-12-billion-analysis-says

[2] https://www.latimes.com/entertainment-arts/music/story/2020-04-06/concert-industry-lose-9-billion-corona//virus

[3] https://www.thesunchronicle.com/news/local_news/chuck-e-cheese-heading-to-bankruptcy-jc-penney-at-emerald-square-in-north-attleboro-hanging/article_34f74fdb-8b38-5ae2-9152-78740c8c31da.html

[4] https://www.politico.com/news/2020/06/11/trump-rally-sue-campaign-coronavirus-exposure-314353

[5] https://www.natlawreview.com/article/covid-19-three-legal-issues-leagues-teams-and-stadium-operators-live-sports-return

[6] https://www.detroitnews.com/story/business/2020/06/16/coronavirus-outbreak-company-waivers/111969982/

[7] https://www.huntonak.com/en/covid-19-tracker.html

About Nicholas Christopolis

Nicholas Christopolis, Esq., is a Junior Partner in the Jacksonville office. He has extensive experience in all phases of general civil litigation in Florida state and federal courts. His practice areas include automobile liability, premises liability, product liability, construction defect, personal injury protection (PIP) claims, and first-party homeowners' insurance claims for property and windstorm damage.

Nicholas was previously a professor of law and served as Director of Florida Coastal School of Law's Trial Advocacy Program. He obtained a Bachelor of Arts from the University of Georgia. Nicholas also obtained an MBA from the University of North Florida. He earned his Juris Doctor from Florida State University College of Law. Nicholas is admitted in Florida (2001). He is also admitted to the United States District Court, Middle District of Florida (2003).

Verdicts and Summary Judgments, cont.

Final Summary Judgment
Anthony Merendino, Esq.
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Plaintiff's ex-husband at the scene) is what caused her to fall. Plaintiff allegedly lost consciousness after the fall, was transported from the scene to the hospital by ambulance, and ultimately claimed injuries to her neck and lower back as a result of the slip-and-fall. Plaintiff's claimed past medical expenses totaled approximately $130,000. At the hearing, Mr. Merendino persuaded the court that Plaintiff failed to meet her burden of proof that the Defendant had either actual or constructive notice of any hazardous condition in the restroom pursuant to Florida Statute §768.0755. In addition, the court was persuaded by the Defendant's argument that at the time of the alleged incident, the Plaintiff was not an invitee, but an uninvited licensee, limiting any alleged duty owed to the Plaintiff by the Defendant.

Dismissal with Prejudice
Marc Greenberg, Esq.
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Appellate Partner Daniel Weinger, Esq., and Senior Partner Marc Greenberg, Esq., prevailed on appeal when the Lower Court Ruling dismissing the case with prejudice was affirmed by the 4th District Court of Appeal in matter styled *Jane Doe v. National Retail Chain*. Judge Cymonie Rowe's dismissal on the first day of Trial was based on Plaintiff's failure to appear at trial. Defense counsel persuaded the lower court that a dismissal with prejudice was warranted based on the decision in *Scott v. Seabreeze Pools, Inc., 300 So.2d 279 (Fla. 4thDCA 1974).*

Summary Judgment
Vicki Lambert, Esq.
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Orlando Managing Partner Vicki Lambert, Esq, obtained a good result when the court granted Defendant's Motion for Summary Judgment in matter styled *Meinert v Mulligan Constructors, et al.* on May 22, 2020. The matter involved a slip and fall at a WAWA gas station wherein we represented the general contractor, Mulligan Constructors. Their role was to pour the concrete for specific portions of the property. The plaintiff fell in one of those specific areas, alleging that the concrete did not have the proper finish (i.e., wet burlap vs broom finish). Since our client finished his work on the project and it was accepted by the owner two years prior to the accident, and any alleged defect was patent, we filed a MSJ based on the Slavin doctrine which generally precludes liability against the contractor when the work has been accepted by the owner and the alleged defect is patent.

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Verdicts and Summary Judgments, cont.

Dismissal
Anthony Merendino, Esq.
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Orlando Managing Partner Anthony Merendino, Esq., obtained a dismissal in the matter styled *Craig Brown, Pro Se Plaintiff, Plaintiff, v. Fidelity National Title Group et al.* Plaintiff sued the Defendant, Town of Rockport, Maine, in the Middle District of Florida, alleging four (4) causes of action against the Defendant: (1) Violation of Constitutional Rights by Rockport per 42 U.S.C. §§ 1983, 1985; (2) Retaliation against a Crime Victim by Rockport under 18 U.S.C. § 1513 (18 U.S.C. § 1961); (3) Obstruction of Justice by Rockport under 18 U.S.C. § 1503 (18 U.S.C. § 1961); and (4) Extortion, Violation of the Hobbs Act under 18 U.S.C. § 1951. Plaintiff's claims arose out of an eighteen (18) year old property boundary line dispute between Plaintiff and his neighbor on Plaintiff's real property located in Camden, Maine (the "Property"). Specifically, Plaintiff alleged that his neighbor improperly erected a fence on Plaintiff's adjacent Property, relying on a fraudulent survey in support. Plaintiff further alleged he engaged in self-help to remove the fence and was "falsely" convicted of criminal mischief as a result. Plaintiff alleged a criminal/civil conspiracy involving the erection of the fence and the lot lines for his Property by all of the Defendants in this litigation. In the instant case, the District Court Judge granted the Defendant Town Of Rockport, Maine's Motion to Dismiss on the grounds that there was a lack of personal jurisdiction and that the court did not have subject matter jurisdiction under the *Rooker-Feldman* doctrine.

Final Summary Judgment
Cristina Sevilla, Esq.
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Miami Senior Associate Cristina Sevilla successfully secured a final summary judgment in a first-party property matter styled *Maria Calvo and Rem Manuel Calvo v. Citizens Property Insurance Corporation*. Plaintiffs made a claim with Citizens, their homeowner's insurance carrier, for damage to their property as a result of a failed cast iron plumbing system. Prior to Citizens inspection of the residence, the failed plumbing system was replaced and the damaged property was removed and discarded. Citizens requested a recorded statement and supporting documents in order to evaluate the claim, but its requests were ignored. As a result, Citizens was prejudiced in its ability to investigate the claim and arrive at a coverage decision. Subsequently, Plaintiffs filed suit alleging Citizens breached the insurance policy by not providing coverage for the loss.

Ms. Sevilla moved for final summary judgment with regard to Plaintiffs non-compliance with the policy's post-loss obligations. Ultimately, the trial court granted summary judgment in favor of Citizens on the grounds that Plaintiffs failed to comply with the pre-suit requirements of the policy that they, among other things, show the damaged property, provide requested documentation, and submit to a recorded statement. Ms. Sevilla is now pursuing a claim for attorney's fees and costs pursuant to a proposal for settlement.

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Verdicts and Summary Judgments cont.

Motion to Dismiss for Fraud on the Court

Laurette Balinsky, Esq.
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Laurette Balinsky, Esq., recently prevailed in a case where the court granted Defendant's Motion to Dismiss for Fraud on the Court. In the matter styled *John J. Colon and Janet Torres v. JLM Hotels, LLC,* Plaintiffs both claimed serious injuries and damages purportedly resulting from a trip and fall incident. Both Plaintiffs alleged severe injuries resulting from an allegedly hazardous condition in a parking lot. Through discovery, the defense was able to uncover inconsistencies and false statements made by both Plaintiffs under oath. The defense obtained records from a number of facilities and agencies which completely contradicted much of Plaintiffs' testimony regarding their alleged damages. Defendant's Motion to Dismiss was predicated on the clear and unequivocal false statements made by Plaintiffs under oath, and after hearing argument from counsel for Plaintiffs and the Defendant, the Court granted Defendant's Motion and entered a Final Judgment in Favor of Defendant.

Summary Judgment

Jonah Kaplan, Esq.
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Partner Jonah Kaplan, Esq., recently obtained full Summary Judgment in a First-Party Property matter styled *Timothy and Dorothy Maxwelll v. Centauri.* The matter stemmed from a homeowner's claim for water damage from a plumbing loss. Plaintiffs were seeking in excess of $200,000.

Prior to this lawsuit, Centauri issued payment in full in the amount of $10,000 to the Plaintiffs for the alleged loss based on a Limited Water Damage Coverage Endorsement. The Court found that as a matter of law, there is no ambiguity in the Policy and Plaintiffs are only owed $10,000. The Policy contained a Water Damage Exclusion Endorsement**,** which the Court found to exclude all of the direct and indirect damages related to the plumbing loss. The Limited Water Damage Coverage Endorsement (CSH FL LWD 08 14) only provides for $10,000 in direct damages, but does *not* in any manner, affect the exclusion of the *indirect* damages referenced in the Water Damage Exclusion Endorsement. The Court further found there is no coverage under the Policy for damages for tear out and replacement for any part of Plaintiffs' home to repair the failed plumbing system by virtue of the Water Damage Exclusion Endorsement (CSH FL WDE 03 10 16). Thus, the Policy capped all of the Plaintiffs' direct and indirect damages (including but not limited to tear out and replacement and loss of use) for their alleged claim to $10,000. The Court found that the Plaintiffs were only entitled to recover $10,000 for direct physical damages as a result of the alleged loss pursuant to the Limited Water Damage Coverage Endorsement.

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Verdicts and Summary Judgments cont.

Dismissal
Jairo Lanao, Esq.
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PIP Partner Jairo Lanao, Esq., obtained dismissal in the matter styled *Jorge Perez v. United Automobile Insurance Co.* The lawsuit was filed in 2012 on behalf of United Auto's named insured, Jorge Perez, for an auto accident on February 24, 2011, in which he was driving his wife's vehicle. After receiving treatment for his injuries at a chiropractor and medical doctor, United Auto denied payment of his medical expenses on the grounds that his wife's vehicle was not insured by United Auto, but by Travelers Insurance. Thus, it fell under an exclusion clause of the policy which precluded coverage of a claim occurring in a vehicle owned by any of the named insured spouses but not listed on the policy. The Plaintiff filed a claim for a declaratory judgment, seeking to have the court declare that at a minimum, the two insurers, United Auto and Travelers, should pay "pro rata" or, alternatively, United Auto should be liable as the husband was its named insured and, as such, United could not deny coverage as to his own spouse's vehicle.

The United Auto policy, just like the Travelers policy, contained a general definition of a "named insured and the spouse if a resident of the named insured". United Auto's motion for summary judgment called attention to the fact that both the United Auto and Travelers policies contained the same definition of a named insured and their spouses, as well as the exclusion clause pertaining to a vehicle owned by a spouse but not listed on the policy. Mr. Lanao, on behalf of United, served a motion for sanctions supported by case law from several courts of appeal tracking similar policy language and holdings of no right of recovery. Persuaded by Mr. Lanao's arguments, Plaintiff's counsel was forced to dismiss the case within the 21-day safe harbor period and prior to the hearing on the still pending motion for summary judgment.

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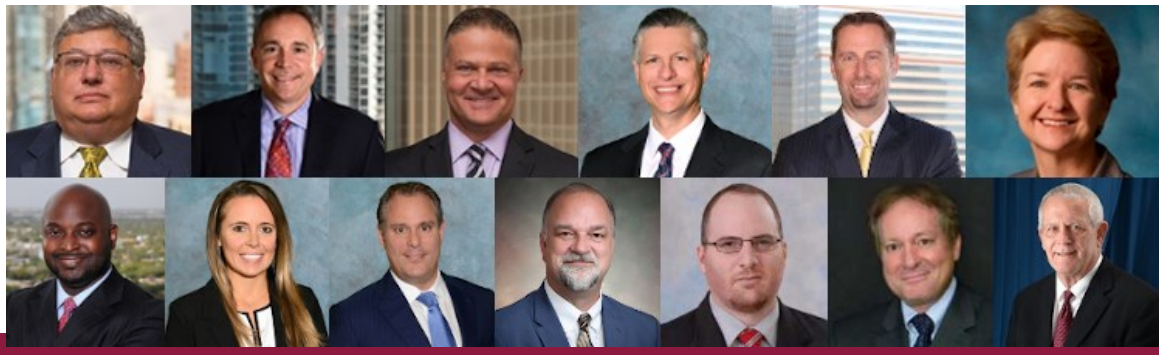
We are introducing a nationwide reach for virtual training covering multi-state jurisdictions through **The Gavel Nationwide Claims Defense Network**. Let us help you stay current and meet the statutorily prescribed hours of continuing education. Luks, Santaniello will draw upon nationwide Gavel Member defense attorneys to serve as co-panelists in training addressing case law in multi-state jurisdictions. In the near future, The Gavel Network will be introducing a course catalog with over 100+ descriptions of virtual and onsite offerings submitted by vetted member law firms. The complimentary offerings will be available to claims and risk professionals.

Currently, if you require training on a topic, we can team up with Gavel Member Law Firms to provide a virtual webinar. To discuss your training requirements, please email **Maria Donnelly**, Client Relations or **Emily Jones** and we will contact you to discuss the logistics.



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