Nuclear Verdicts

Trends, Causes, and Solutions

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Contents

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Executive Summary

Chapter

01

Nuclear verdicts—defined as jury verdicts of $10 million or more—are on the rise. This paper analyzes nuclear verdicts in personal injury and wrongful death cases over a ten-year period between 2010 and 2019, discussing national and state trends, causes of nuclear verdicts, real-world implications of these verdicts, and solutions to improve fairness in damage awards.

This analysis focuses on these extreme and fundamentally unpredictable verdicts because they play an outsized role in the civil justice system. These jury awards are "nuclear" in the sense that such a verdict can have devastating impacts on businesses, entire industries, and society at large, even when a verdict is later thrown out or substantially reduced by an appellate court. These verdicts can drive up the costs of goods and services, adversely affect the cost and availability of insurance, and undermine fundamental fairness and predictability in the rule of law.

To be sure, cases that result in nuclear verdicts can involve catastrophic, life-long injuries or tragic deaths. Two questions arise in these cases. The first is whether the defendant's conduct actually caused the plaintiff's injury or whether skilled attorneys manipulated jurors into reaching a plaintiff's verdict through improper tactics that inflame the jury. The second is how much is a reasonable amount of compensation for an injury. In many cases, there is no clear and objective way to place a monetary value on the injuries claimed by the plaintiff. Awards in the tens and hundreds of millions, and even billions of dollars, however, are often far afield from serving a truly compensatory purpose. Understanding how and why unsupportable nuclear verdicts can arise, including efforts by members of the plaintiffs' bar to further escalate these verdicts, is essential to recognizing what can and should be done to curb them.

Research Findings

This paper analyzes 1,376 nuclear verdicts between 2010 and 2019.[1] Approximately half of these verdicts were between $10 million and $20 million, and about one-third were between $20 million and $50 million. The remaining 16% of nuclear verdicts exceeded $50 million; a group that included 101 "mega" nuclear verdicts that exceeded $100 million.

A key takeaway of the study is that nuclear verdicts are increasing in both amount and frequency. The median nuclear verdict increased 27.5% over the ten-year study period, far outpacing inflation, and there was a

clear upward trend in the frequency of nuclear verdicts over time.

The study also revealed concentrations of nuclear verdicts with respect to types of cases and jurisdictions. Product liability, auto accident, and medical liability cases comprise roughly two-thirds of the reported nuclear verdicts. Juries in state courts, as compared to federal courts, also produced the vast majority of all nuclear verdicts. Half a dozen states, namely California, Florida, New York, Texas, Pennsylvania, and Illinois, hosted around 63% of the nuclear verdicts during the ten-year study period. By way of comparison, these states accounted for about 41% of the U.S. population during that period, showing a sharp divide in nuclear verdicts "per capita."[2]

Many reported nuclear verdicts did not include a complete breakdown of each damages component, but where that information was available it showed that nuclear verdicts consist primarily of awards of noneconomic damages, such as pain and suffering, or punitive damages. In comparison, economic compensatory damages such as lost wages or medical expenses accounted for only around 14% of total damage awards. This means that the lion's share of nuclear verdicts during the ten-year study period are attributable to subjective damage assessments by jurors that have inflated over time.

Drivers of Nuclear Verdicts

Nuclear verdicts are fueled by a variety of direct and indirect factors. In the courtroom, plaintiffs' lawyers often use tactics that manipulate juror behavior and arbitrarily inflate damages. They may, for example, resort to so-called "reptile theory" tactics that aim to instill a sense of fear or danger in jurors' minds so they lash out at their perceived attackers with inflated damage awards. Plaintiffs' lawyers may also suggest that the jury award a specific, exorbitant amount of damages or apply a method for calculating damages that will produce a nuclear verdict, knowing that jurors will often rely on such "anchors" in assessing damages even though they are totally arbitrary.

Outside the courtroom, plaintiffs' law firms and "lead generating" companies may flood the airwaves with lawsuit advertising that touts extraordinary verdicts and shapes potential jurors' views of appropriate compensation. Plaintiffs' lawyers are also increasingly bringing litigation funded by third parties seeking a return on their investment, which contributes to nuclear verdicts by driving up award demands and widening the gap for parties to negotiate a reasonable settlement.

Real World Implications

Increases in the frequency and amount of nuclear verdicts do more than lay bare problems in the civil justice system.

They adversely affect everyone in society in very real ways. In addition to increasing the costs of everyday items and services—including food, housing, and medical care—and potentially creating insurability problems, escalating lawsuit costs can stymie economic opportunity. They can threaten the viability of any business, and with it the jobs of its employees and others in a community whose livelihoods are connected to the business. Rising lawsuit costs can also inhibit job growth and new investments for businesses or industries, needlessly exhaust judicial resources, and erode basic confidence in the rule of law, all of which can have far-reaching adverse impacts.

Recommendations

Because there is no single cause of all nuclear verdicts, there is no single solution. Legislators can and should adopt a variety of reforms, many of which are set forth in the Institute for Legal Reform's *101 Ways to Improve State Legal Systems*,[3] that target the core causes of nuclear verdicts. Legislatures can adopt sound civil justice reforms that reduce the likelihood of inflated damage awards before they occur and respond to unjust awards that do occur. They can strengthen standards to screen unreliable scientific evidence used to generate some of these verdicts. They can require transparency regarding third party litigation funding and stop misleading practices in lawsuit ads. And they can prohibit baseless and manipulative trial lawyer tactics, such as arbitrary anchoring arguments. Together, these reforms can restore confidence, fairness, and predictability in jury awards.

Nuclear Verdict Trends

Chapter

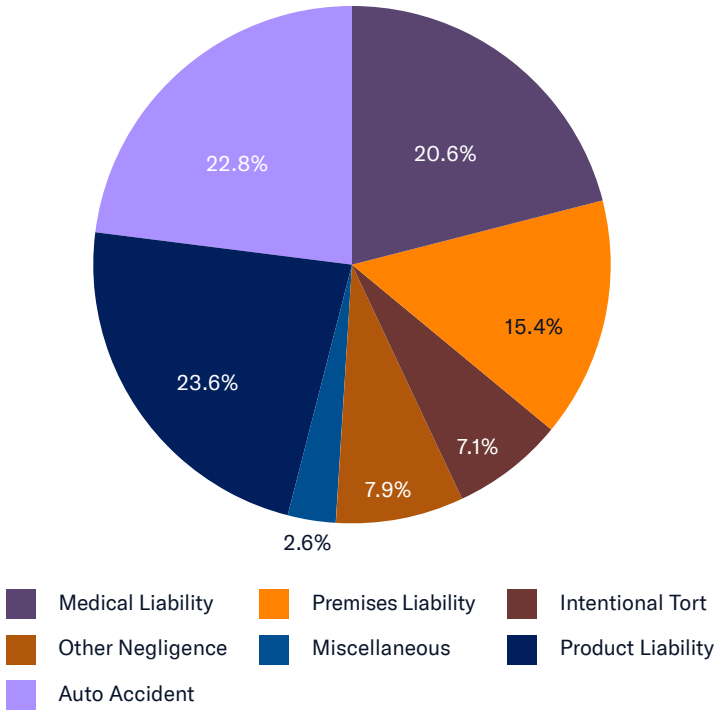
02

This paper analyzes 1,376 reported nuclear verdicts (jury verdicts of $10 million or more) in personal injury and wrongful death cases over a ten-year period between 2010 and 2019.

Case Breakdown

Nationwide, nuclear verdicts in personal injury and wrongful death cases were most frequent in product liability (23.6%), auto accident (22.8%), and medical liability (20.6%) cases. These three areas made up two-thirds of nuclear verdicts in personal injury and wrongful death cases during the ten-year study period.

Figure 1: Nuclear Verdicts by Case Type, 2010 – 2019



Product liability trials resulting in multiple nuclear verdicts included cases targeting prescription drugs, medical devices, automobiles, herbicides, and talcum powder products. Tobacco and asbestos claims also led to several nuclear verdicts.

Nuclear verdicts stemming from auto accidents arose in a wide range of cases involving severe injuries or deaths. While any auto accident case can involve catastrophic injuries and deaths, cases involving trucks, primarily tractor-trailers, are particularly susceptible to nuclear verdicts. About one in four auto accident trials that resulted in a verdict of $10 million or more involved a trucking company.[4]

The most common types of medical liability cases resulting in nuclear verdicts include lawsuits alleging that an elderly resident's death resulted from substandard care at a nursing home or that a child was born with permanent injuries due to complications during delivery that a healthcare provider might have avoided.

"About one in four auto accident trials that resulted in a verdict of $10 million or more involved a trucking company."

Premises liability (15.4%), other negligence (7.9%), intentional tort (7.1%), and miscellaneous claims (2.6%) make up the remaining shares of nuclear verdict awards. Premises liability claims encompass a broad range of actions from workplace injuries falling outside of the workers' compensation system to an injury resulting from the collapse of a city bus shelter. "Other negligence" claims include, for example, lawsuits alleging that a business negligently hired or supervised an employee who engaged in criminal conduct or lacked sufficient security to prevent a crime committed by a third party on its property. Intentional tort claims that result in nuclear verdicts are often civil actions against the perpetrator of a serious crime; however, these cases also sometimes include business defendants. Given the egregious nature of many intentional torts, it is revealing that such serious misconduct comprises a relatively small overall percentage of nuclear verdicts. Awards stemming from negligence or other unintentional conduct and primarily targeting businesses, on the other hand, account for the vast majority of nuclear verdicts.

The case-type percentages vary from year to year but did not change significantly over the ten-year period. As discussed below, however, the case mix varies significantly from state to state.

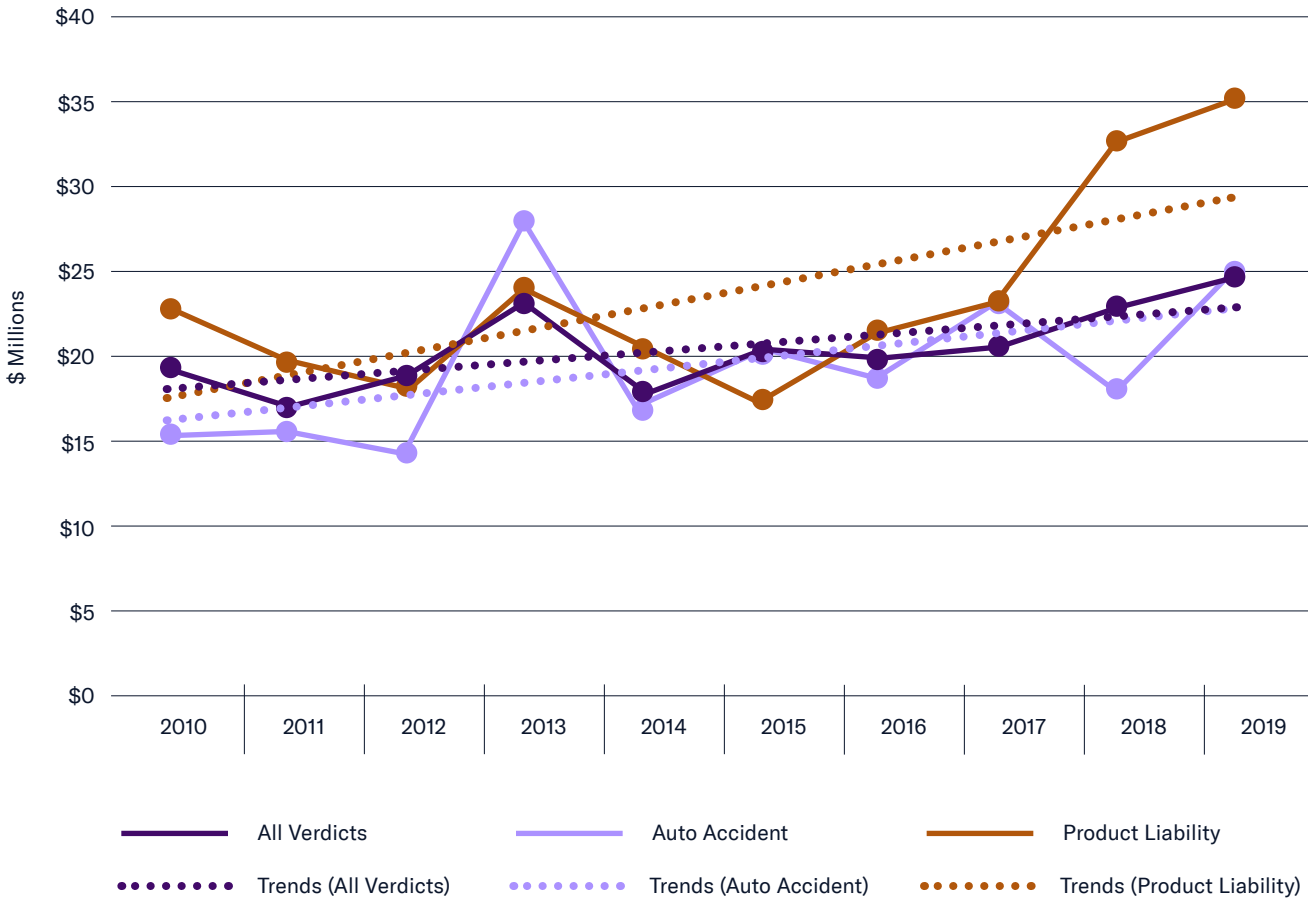
The Size of Nuclear Verdicts Is Rising

The median reported nuclear verdict between 2010 and 2019 was $20 million. Intentional tort cases had the highest median nuclear verdict ($29 million), followed by product liability ($23 million), and medical liability ($20 million) cases. Other negligence ($19 million), auto accident, premises liability, and miscellaneous cases (all $18 million) followed.

Overall, nearly half of nuclear verdicts (49%) were between $10 million and $20 million. Around one-third of nuclear verdicts (35%) were between $20 million and $50 million. Awards of $50 million or more constituted 16% of reported nuclear verdicts over the ten-year period.

These levels are rising. While the median fluctuates from year to year, the data shows an upward trend line. The median reported nuclear verdict increased from $19.3 million in 2010 to $24.6 million in 2019. This represents a 27.5% cumulative increase in the median nuclear verdict over a ten-year period in which inflation rose by about 17.2%. The rise in the median reported nuclear verdict was particularly steep in auto accident cases (up 63.2% from $15.2 million in 2010 to $24.8 million in 2019) and product liability cases (up 53.2% from $23 million in 2010 to $35.1 million in 2019), as shown below.

Figure 2: Median Nuclear Verdict & Trend Line, 2010 – 2019



The solid lines in the graph show the median reported nuclear verdict each year for all verdicts, and auto accident and product liability cases in particular. The dotted lines show the trend for each within the ten-year study period.

Means and Extremes

When deciding whether to go to trial or settle a case and, if so, how much is a reasonable settlement amount, businesses must consider the worst-case scenario. While the median nuclear verdict is about $20 million, the mean is substantially higher—$76 million. The higher average verdict results from the occasional award in the hundreds of millions or billions of dollars.

There were 101 reports of personal injury or wrongful

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death verdicts totaling more than $100 million during the ten-year study period. This included 86 reported verdicts between $100 million and $500 million, six verdicts between $500 million and $1 billion, and nine verdicts of $1 billion or more. The risk of a "mega nuclear verdict" ($100 million or more) is greatest in product liability actions.

Awards at these levels are often significantly reduced by a trial court or reversed on appeal.[5] These "send-a-message" verdicts are also, in some cases, symbolic and uncollectable, particularly when imposed on an individual or small business. Nevertheless, a business facing litigation must consider the cost of a lengthy appeal that will follow, and the damage to its brand and harm to shareholders from adverse publicity, even if the judgment is ultimately overturned or the award is reduced to a fraction of its original size.[6] When a "mega" nuclear verdict is reduced or uncollectable, plaintiffs' lawyers often still tout the award in advertising to solicit clients to bring new cases (discussed in Chapter 4).

Table 1: Mean Nuclear Verdict by Litigation Type, 2010 – 2019

Litigation Type	Mean Nuclear Verdict
Product Liability	$191.6 Million
Intentional Tort	$90.6 Million
Other Negligence	$40.8 Million
Medical Liability	$36.8 Million
Auto Accident	$33.8 Million
Premises Liability	$31.7 Million
Miscellaneous	$28.4 Million
All Personal Injury / Wrongful Death	**$76 Million**

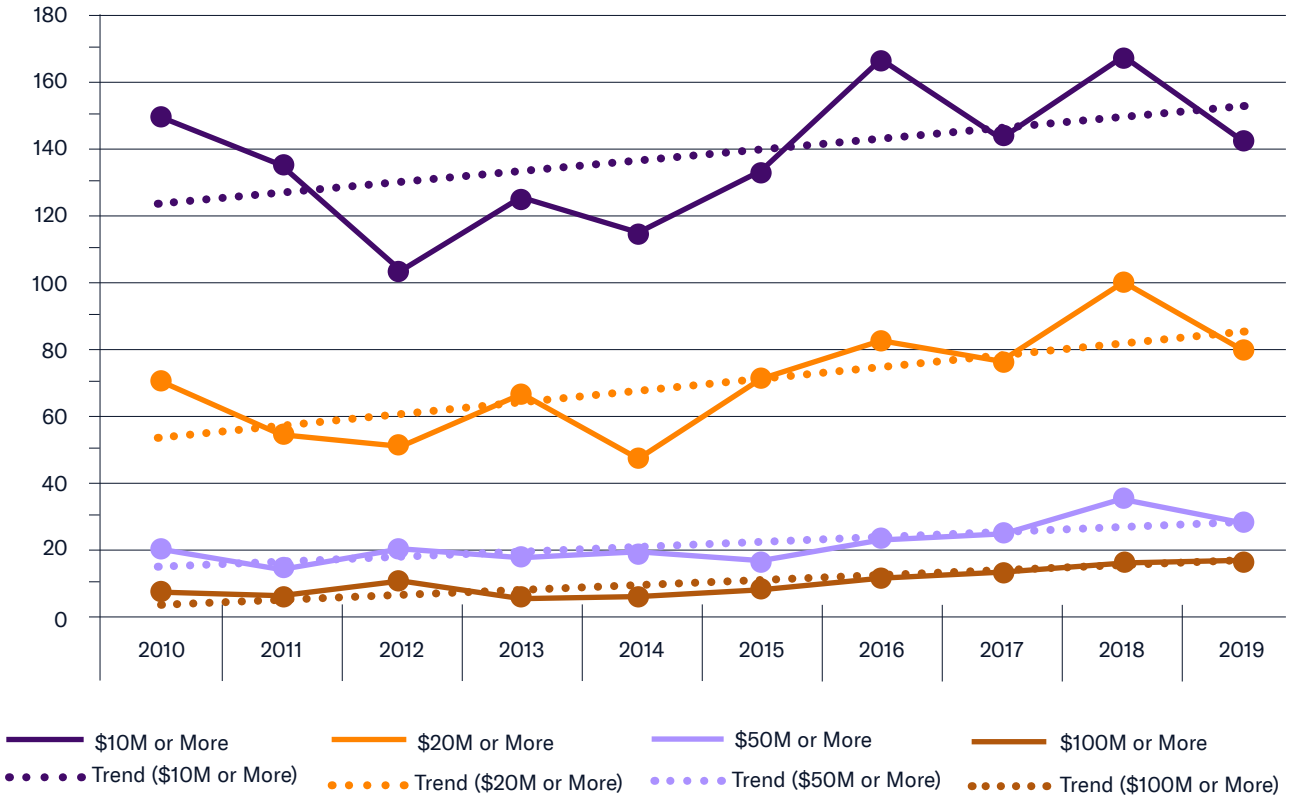
Nuclear Verdicts Are More Frequent

The number of reported nuclear verdicts fluctuates significantly each year, as can be expected given their unpredictability and outlier nature. While there is year-to-year variation, the data shows an upward trend in the frequency of reported nuclear verdicts in personal injury and wrongful death cases over the ten-year study period. The upward trend in the frequency of nuclear verdicts is present across all case types with the exception of intentional tort claims.

Nuclear Verdicts Often Do Not Result From Punitive Damage Awards

"Mega" nuclear verdicts typically (but not always) include a substantial punitive damage award.

Figure 3: Number of Reported Nuclear Verdicts, 2010 – 2019

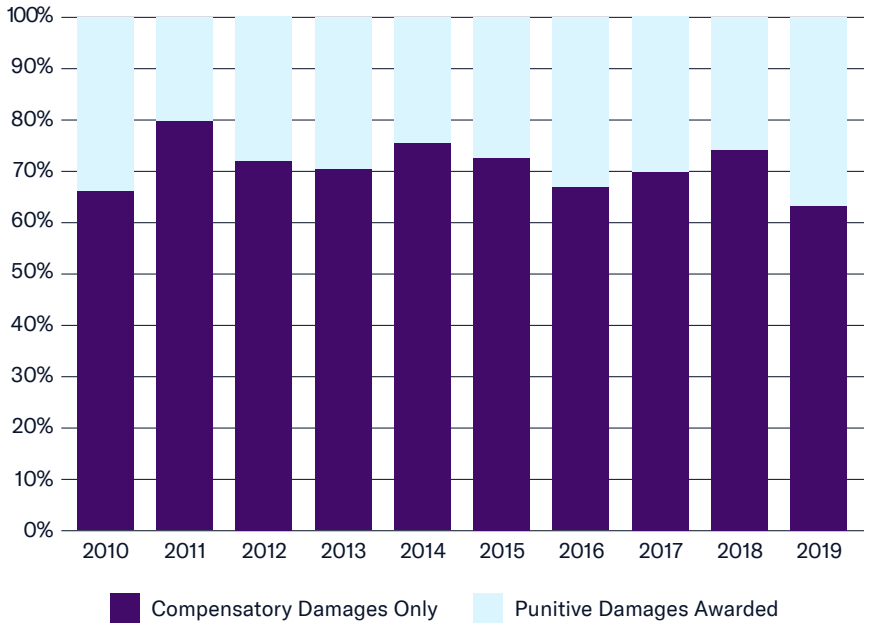


For example, all but one of the nine nuclear verdicts exceeding $1 billion in the sample were primarily punitive damage awards. Most "ordinary" nuclear verdicts, however, are entirely compensatory damages.

The U.S. Supreme Court's adoption of due process safeguards that protect against excessive punitive damage awards, combined with state legislative reforms, have left personal injury lawyers to seek alternative ways to obtain jackpot judgments. As discussed later in this paper, the result is that some plaintiffs' lawyers purposefully inflame juries and improperly urge them to "send a message" through pain and suffering and other forms of noneconomic damage awards. The data supports this observation. While intentional tort and product liability cases are more likely to include a punitive damages element than other types of litigation, overall, three-quarters of

"While there is year-to-year variation, the data shows an upward trend in the frequency of reported nuclear verdicts in personal injury and wrongful death cases over the ten-year study period."

Figure 4: Percentage of Nuclear Verdicts Including a Punitive Damages Award, 2010 – 2019



"As litigators have observed, pain and suffering awards are 'the biggest component of most nuclear verdicts' because '[t]he plaintiffs' bar knows how to successfully argue for large non-economic damages.'"

reported nuclear verdicts during the ten-year study period did not include a punitive damage award. As litigators have observed, pain and suffering awards are "the biggest component of most nuclear verdicts" because "[t]he plaintiffs' bar knows how to successfully argue for large non-economic damages."[7]

Jury verdict reports do not consistently or uniformly break down compensatory damages between economic and noneconomic damages, and some cases involve multiple plaintiffs, making it difficult to track the size of noneconomic damage awards or compare the proportion of economic damages and noneconomic damages over time. About half of the reported nuclear verdicts in the data set (762 verdicts) include a full breakdown of damage types. This subset of data indicates that economic damages, such as amounts to cover medical expenses or lost wages, accounted for just 14% of the total amount awarded in nuclear verdicts during the ten-year study period. Noneconomic damages and punitive damages accounted for roughly equal shares of the total verdicts (42% and 44%, respectively). These figures are skewed, however, due to the inclusion of billion-dollar punitive damage awards. Even including these outliers, in six out of ten years of the subset data, the total amount of noneconomic damages awarded in nuclear verdicts exceeded the total amount of economic damages and punitive damages combined.

State Courts Host Far More Nuclear Verdicts Than Federal Courts

Personal injury lawyers have long preferred to try cases in state courts—which they often perceive as having more plaintiff-friendly judges, jurors, and court rules—than more neutral, federal courts with lifetime-appointed judges.[8] The data supports that perception.

Nuclear verdicts were far more frequent in state courts than in federal courts. State courts hosted nine out of ten reported nuclear verdicts in personal injury and wrongful death cases during the ten-year study period. Federal courts hosted just 151 of 1,376 reported nuclear verdicts (about 11%) and 12 of 101 reported mega nuclear verdicts (12%). While this may, in part, reflect that most tort claims are decided in state courts, federal courts have hosted an increasing number of product liability and other personal injury cases in recent years.[9]

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Top States for Nuclear Verdicts

Chapter

03

Most nuclear verdicts—nearly three-quarters—are concentrated in ten states. Most of these states produce the highest levels of nuclear verdicts even when accounting for population differences.

California and Florida competed for the top spot, followed by New York and Texas. These four states consistently produced the most nuclear verdicts during the ten-year study period. Other states with courts that are prone to nuclear verdicts include Pennsylvania, Illinois, and, especially in more recent years, Georgia. Rounding out the Top 10 jurisdictions for most nuclear verdicts over the full ten-year study period are New Jersey, Washington, and Missouri.

Other states climbed into the Top 10 in a specific area. For example, Louisiana ranked seventh among the states for the number of nuclear verdicts in auto accident cases over the ten-year study period.

Looking at nuclear verdicts on a "per capita" basis shows that having more verdicts is not simply a function of having a larger state population. Seven of the

Figure 5: Top 10 States by Cumulative Nuclear Verdicts, 2010 – 2019

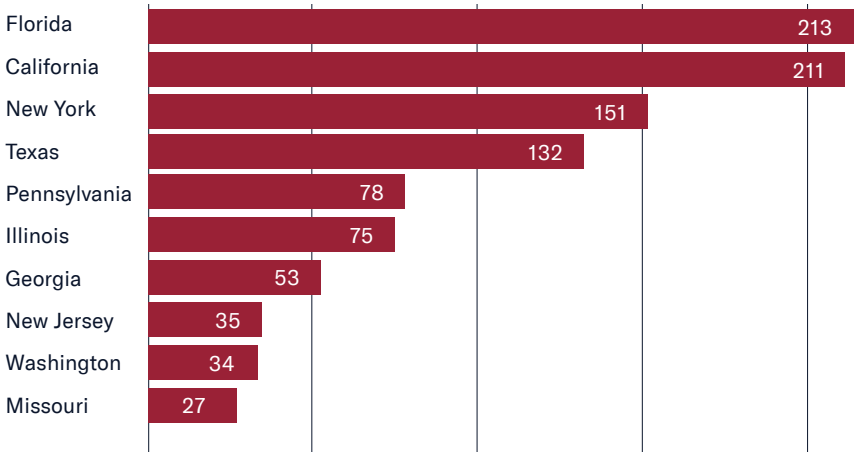

Table 2: Top 10 States by Per Capita Nuclear Verdicts, 2010 – 2019

State	Per Capita Rank	Cumulative Rank (From Figure 5)	Average State Population	Nuclear Verdicts per 100K People
Florida	1	1	20,109,631	1.059
New York	2	3	19,560,913	0.772
Pennsylvania	3	5	12,774,637	0.611
Illinois	4	6	12,822,325	0.585
California	5	2	38,618,190	0.546
Alabama	6	—	4,845,320	0.537
New Mexico	7	—	2,087,643	0.527
Georgia	8	7	10,147,472	0.522
Wyoming	9	—	577,786	0.519
Texas	10	4	27,172,097	0.486

Seven of the Top 10 states with the most cumulative nuclear verdicts also ranked in the Top 10 in terms of nuclear verdicts per capita.

Top 10 states with the most cumulative nuclear verdicts also ranked in the Top 10 in terms of nuclear verdicts per capita. This per capita ranking considers the number of nuclear verdicts based on the average population of each state during the ten-year study period, according to U.S. Census Bureau data.[10]

Florida topped both Top 10 lists. The Sunshine State not only produced the most nuclear verdicts during the ten-year study period, it hosted far more with respect to its population than any other jurisdiction. In addition, California's high total of nuclear verdicts is not simply attributable to being the most populous state; California still ranked fifth when taking its large population into account.

The per capita rankings for New York, Pennsylvania, Illinois, and Georgia also closely tracked each state's ranking on the Top 10 list of most nuclear verdicts.

Texas ranked tenth on the per capita list while producing the fourth most nuclear verdicts cumulatively. Washington and Missouri fall just outside the Top 10 per capita list and are eclipsed by New Mexico and Wyoming, low population states in which a few nuclear verdicts produced a comparatively high per capita ratio.

Each state that is a hot spot for nuclear verdicts has its own unique mix of litigation and factors that contribute to the frequency of these extraordinary awards. The discussion below takes a closer look at the seven states that appear on both Top 10 lists.

Florida

213 Reported Nuclear Verdicts | $35B Awarded | Median $20M

Florida narrowly surpassed California for the most nuclear verdicts over the full ten-year period, though the number of nuclear verdicts in Florida decreased between 2015 and 2017 and remained flat between 2017 and 2019. That Florida rivals California for the most nuclear verdicts is surprising given that Florida's population is roughly half that of the Golden State. During the study period, Florida hosted, by far, the most nuclear verdicts per capita.

Nearly two-thirds of Florida's nuclear verdicts in personal injury and wrongful death cases were reached in product liability (38.5%) and auto accident litigation (24.4%). This is far higher than the proportion of nuclear verdicts coming from product liability cases nationally (23.6%) and slightly higher than auto accident cases (22.8%) overall. In the most recent three years of data, the share of reported nuclear verdicts resulting from auto accident lawsuits in Florida climbed to 32%. Florida is also more prone to punitive damage awards than other states. Forty percent of nuclear verdicts in Florida included a

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This mix of cases and award types reflects Florida's continuing, unique tobacco litigation[11] as well as the aggressiveness of the state's personal injury bar in auto accident cases. This trend continues, with record-breaking verdicts in Florida trials against trucking companies following the survey period, including $411.7 million in October 2020[12] and $1 billion in August 2021.[13]

While nuclear verdicts were reported across the state, Broward County and Miami-Dade County were the most frequent areas for such awards.

California

211 Reported Nuclear Verdicts | $9B Awarded | Median $21M

California hosted the most reported nuclear verdicts between 2014 and 2019, and, as noted, competed with Florida for the top spot across the ten-year study period. The number of nuclear verdicts in California may to some degree stem from the state's size but is also driven by its liability-friendly laws and courts. As indicated above, California ranks fifth for nuclear verdicts per capita.

Similar to Florida, two-thirds of California's nuclear verdicts came in product liability and auto accident litigation, but the percentages in California are reversed. In California, auto accident cases had the lead share of nuclear verdicts (32.7%), while product liability came next (25%). California's nuclear verdicts in product liability cases include a score of asbestos claims, a trend that restarted in California as courts reopened during the COVID-19 pandemic.[14] They also include several massive verdicts alleging that manufacturers failed to warn that use of talcum powder and weed-killer products containing glyphosate could cause cancer. Among these nuclear verdicts were a $417 million award in a talc case that was later overturned[15] and a $2 billion glyphosate verdict that was later reduced to $87 million.[16]

In one area, California is far less prone to nuclear verdicts than other states. Only 7.6% of California's nuclear verdicts during the ten-year study period were reached in medical liability claims (compared to 20.6% nationally). This significant difference may reflect that California's strong limit on noneconomic damages in healthcare liability actions

"Recent experience suggests 'nuclear punitives' are becoming more common in California, which, unlike many other states, has no limit on them."

provides stability in awards and facilitates settlements.

About 22% of California's nuclear verdicts across the ten-year period included punitive damages, a level consistent with the national experience. However, this level jumped to 32% in the final two years of the study period. Recent experience suggests "nuclear punitives" are becoming more common in California, which, unlike many other states, has no limit on them.[17]

While nuclear verdicts occurred across California, Los Angeles County was the most popular area, making up more than one-third of the verdicts over $10 million.

New York

151 Reported Nuclear Verdicts | $5B Awarded | Median $19M

Unlike other states, New York's nuclear verdicts are heavily concentrated in premises liability (29.8%) and medical liability (22.5%) trials, with auto accident cases coming in third (19.2%).

A significant contributor to New York's premises liability verdicts is the state's unique 19th century "Scaffold Law," which subjects employers to strict liability in the tort system for falls at construction sites, rather than compensating those who are injured through workers' compensation. For instance, a New York City jury returned a $102 million verdict, including $85.75 million for pain and suffering, to a construction worker injured after he fell from a booth that was hit by a forklift driven by another worker.[18] New York also has had nuclear verdicts stemming from claims alleging that businesses failed to provide adequate security on their premises.[19]

Medical liability cases resulted in several New York verdicts exceeding $100 million. Some of these verdicts are primarily noneconomic damages.[20]

While product liability cases make up a smaller share of nuclear verdicts in New York than nationwide (14.5% in New York compared to 23.6% nationally), those awards include more than a dozen verdicts stemming from New York's asbestos litigation docket, including amounts per plaintiff as high as $75 million and several for $60 million. New York's largest verdict during the ten-year study period was a $190 million award in a five-plaintiff asbestos trial.[21]

Nuclear verdicts in New York are less likely to include punitive damages than in other states. Just 6.6% of nuclear verdicts in New York over the ten-year study period included a punitive damages element. This may reflect that while New York does not have a statutory cap on punitive damages, its courts have traditionally allowed them only in cases involving malicious or the most irresponsible conduct.

Instead, New York personal injury lawyers urge jurors to return extraordinary noneconomic damage awards. These anchoring tactics contribute to excessive awards in the Empire State. A study of

"A significant contributor to New York's premises liability verdicts is the state's unique 19th century 'Scaffold Law,' which subjects employers to strict liability in the tort system for falls at construction sites, rather than compensating those who are injured through workers' compensation."

anchoring in New York documented 34 nuclear pain and suffering verdicts in which plaintiffs' lawyers asked juries to return amounts between $20 million and $140 million.[22] In some cases, juries returned the exact amount requested or "compromised" with a still-extraordinary verdict that was clearly influenced by the amount the lawyer urged them to award.

These awards are often significantly reduced on appeal,[23] however, New York's appellate division has repeatedly declined to consider whether plaintiffs' lawyers may ask for damages at levels state courts have never sustained as "reasonable compensation" in comparable cases.[24]

For many years, New York appellate courts had maintained a de facto $10 million limit on noneconomic damages for the most catastrophic of injuries. They have done so by applying a state law that allows judges to review whether an award is excessive because it "deviates materially from what would be reasonable compensation."[25] This law allows New York courts to objectively compare the amount of prior awards sustained on appeal involving individuals with similar injuries when reviewing the size of a verdict, rather than apply a vague, plaintiff-friendly "shocks the conscience" approach. Several recent verdicts, however, have breached this cap, leading plaintiffs' lawyers to argue in settlement negotiations that the $10 million limit "is kaput."[26] As a result, nuclear verdicts and settlements are even more likely in New York.

Nuclear verdicts in New York are most common in New York City, Kings County (Brooklyn), and Bronx County.

Texas

132 Reported Nuclear Verdicts | $7B Awarded | Median $21M

In Texas, nuclear verdicts largely stem from auto accident claims, which make up 32.6% of verdicts over $10 million over the ten-year period compared to 22.8% nationwide. Texas is particularly known for nuclear verdicts against the trucking industry.[27]

In some of these cases, liability appears to be more about who is perceived as able to pay an astounding figure for a tragic injury than about who was actually responsible for the accident. For example, a 2014 accident led to a nearly $90 million verdict against a trucking company in a case in which an out-of-control pickup truck

crossed a highway median and spun into the path of an oncoming truck that was driving below the speed limit during a winter storm. In the 2018 Houston trial, the plaintiffs' lawyer blamed the trucking company for not instructing its drivers to take an alternative route, drive slower, or pull off the road during bad weather conditions.[28] Another Texas trucking case resulted in a $260 million verdict that year, all of it noneconomic damages for the past and future mental anguish of the parents of a driver who died after he hit a tractor-trailer as it pulled out of a driveway into a highway.[29] These types of extraordinary verdicts have continued in Texas with a $730 million award (including $480 million in compensatory damages and $250 million in punitive damages) in 2021 to a great-grandmother who had a collision with an oversized-cargo truck hauling a propeller for a navy submarine.[30]

Product and premises liability claims each make up about 21% of the Lone Star State's nuclear verdict total, while medical liability claims come in a distant 6.8%, far below the national average. Like California, Texas' strong constraints on noneconomic damages and other safeguards in lawsuits against healthcare providers may help avoid nuclear verdicts in that area.[31]

On the other hand, despite a generally-applicable statutory limit on punitive damages, 38% of Texas' nuclear verdicts included punitive damages. Under Texas law, after the trial, the court will reduce an extraordinary punitive damage award to no more than the amount of economic damages plus two times the amount of noneconomic damages.[32] Such post-trial reductions are not reflected in the data.

Harris County (the Houston area) and Dallas County are the most prevalent jurisdictions for nuclear verdicts in Texas.

"Texas is particularly known for nuclear verdicts against the trucking industry. In some of these cases, liability appears to be more about who is perceived as able to pay an astounding figure for a tragic injury than about who was actually responsible for the accident."

Pennsylvania

78 Reported Nuclear Verdicts | $11B Awarded | Median $20M

Pennsylvania's nuclear verdicts largely resulted from product liability (30.8%) and medical liability (also 30.8%) actions, areas in which the state has long had a plaintiff-friendly reputation. Auto accident cases followed at a distant third (15.4%).

The Philadelphia Court of Common Pleas Complex Litigation Center (CLC) has served as a hub for mass tort claims against pharmaceutical and medical device manufacturers from across the state and the country. For example, the CLC hosted a series of seven nuclear verdicts against pelvic mesh manufacturers between 2015 and 2019, including awards as high as $120 million, $80 million, and $57.1 million. It also maintains a docket of thousands of cases alleging that a pharmaceutical manufacturer failed to warn that boys using the antipsychotic drug Risperdal could develop breasts. One of those cases resulted in an $8 billion punitive damage verdict in October 2019 (which was later slashed by the trial court judge to $6.8 million).[33] Another Philadelphia-tried Risperdal case resulted in a $70 million noneconomic damage verdict in 2016, which was upheld on appeal.[34]

More than half of Pennsylvania's nuclear verdicts are reached in the Philadelphia Court of Common Pleas. The remainder are dispersed throughout the state.

Illinois

75 Reported Nuclear Verdicts | $3B Awarded | Median $20M

In Illinois, nuclear verdicts in personal injury and wrongful death cases most frequently stemmed from medical liability trials (37.3%), which were nearly twice as common as the national experience during the ten-year study period. The next two most frequent areas for nuclear verdicts in Illinois combined did not reach this proportion—product liability (17.3%) and premises liability (16%). Auto accidents made up just 10.7% of nuclear verdicts in personal injury and wrongful death cases in Illinois compared to 22.8% nationwide.

Aside from their frequency in medical liability cases, nuclear verdicts in Illinois came in a wide range of cases. Two of Illinois' largest verdicts during the ten-year study period were the first bellwether trials in federal multidistrict litigation alleging that men experienced heart attacks from using the testosterone-boosting drug

"In Illinois, nuclear verdicts in personal injury and wrongful death cases most frequently stemmed from medical liability trials (37.3%), which were nearly twice as common as the national experience during the ten-year study period."

AndroGel. The trial court threw out the first verdict, $150 million, holding that it was inconsistent for the jury to find that the drug had not caused the plaintiff's heart attack and award no compensatory damages, but nevertheless to award punitive damages by finding the manufacturer had misleadingly marketed the drug.[35] The trial court tossed the second verdict, $140.1 million, for similar reasons.[36] The largest state court verdict, $148 million against the City of Chicago, came in a 2017 trial of a case in which a woman was injured when a bus shelter collapsed on her during a storm. During closing arguments, the plaintiff's attorney suggested that she be awarded nearly $175 million for pain, suffering, and medical costs.[37] The parties later reportedly settled for $115 million, rather than litigate over whether the full award was excessive.[38]

What many of the cases that result in nuclear verdicts in Illinois have in common is where they were tried. Two-thirds of nuclear verdicts in Illinois resulted from trials in the Cook County Circuit Court (Chicago). One-quarter of the state's nuclear verdicts were in federal court, primarily in the Northern District of Illinois, such as the AndroGel cases. The remainder came from cases in other state trial courts.

Georgia

53 Reported Nuclear Verdicts | $3B Awarded | Median $21M

Georgia has had a series of nuclear verdicts that are concentrated in premises liability (26%), medical liability (21%), and auto accident (21%) trials. Most of these verdicts occurred between 2015 and 2019. During the final two years of the ten-year period, these verdicts propelled Georgia into the top five states for nuclear verdicts.

Several of Georgia's premises liability verdicts stemmed from cases alleging that a business was responsible for a criminal attack on or near its property due to inadequate security. These cases followed a 2017 Georgia Supreme Court ruling that businesses can be held liable for attacks that are "foreseeable."[39] The 2013 trial in that case had resulted in a $35 million verdict against Six Flags for an attack by assailants at a bus stop outside of the amusement park. Later examples include a $69.6 million verdict against Kroger for a shooting in the supermarket's parking lot[40] and a $43 million verdict against CVS stemming from a robbery attempt in the drug store's lot.[41] Other Georgia premises liability verdicts included $25 million to a disabled woman who tripped when getting off a bus[42] and $125 million, including $50 million in punitive damages, against an apartment complex accused of causing a tenant's death due to substandard living conditions.[43]

Georgia has also experienced nuclear verdicts against the trucking

industry. For example, in August 2019, a Muscogee County jury returned a $280 million verdict against a trucking company in just 45 minutes.[44] The plaintiffs claimed the driver, who swerved across the center lane, fell asleep at the wheel, while his employer claimed the driver swerved to avoid a dog on the road. Whatever the cause, the amount of wrongful death damages awarded can only be viewed as extraordinary: $150 million for economic damages, $30 million for pain and suffering, and $100 million in punitive damages.

Despite some of these cases including large punitive damage awards, overall, Georgia is below other states in that 19% of reported nuclear verdicts during this period included punitive damages compared to 26% nationally.

"During the final two years of the ten-year period, these verdicts propelled Georgia into the top five states for nuclear verdicts."

Georgia is one of a handful of states that has codified a rule allowing plaintiffs' lawyers to urge juries to return any amount of damages for pain and suffering, no matter how extraordinary.[45] Anchoring tactics (discussed in Chapter 4) have contributed to several of these Georgia awards. For example, in the Kroger case, the plaintiff's lawyer asked for $80 million in damages and the jury responded with an $81 million award (with just 14% of the fault allocated to the attackers).[46] Similarly, in the CVS case, the plaintiff's lawyer asked for $57 million in damages and the jury returned a $45 million award (with 5% of the fault allocated to the plaintiff).[47] Such verdicts strongly suggest that the jurors relied upon extraordinary anchors even though they were arbitrary.

Georgia's nuclear verdicts have continued beyond the study period. In August 2022, a Gwinnett County jury reached a $1.7 billion punitive damage award against an automaker in a pickup truck rollover case, after awarding $24 million in compensatory damages.[48]

Georgia's nuclear verdicts came from across the state, though Fulton and DeKalb counties saw the largest share.

Fueling Nuclear Verdicts

Chapter

04

Numerous factors contribute to a nuclear verdict. Plaintiffs' lawyers use tactics to manipulate juror behavior and arbitrarily inflate damages. Lawsuit advertising touts verdicts that may not stand, distorting potential jurors' views of appropriate compensation. And third party litigation funders can change litigation dynamics and drive up award demands.

Reptile Tactics

Plaintiffs' lawyers have increasingly embraced litigation tactics consistent with the "reptile theory" to manipulate jurors to reach decisions on liability and damages based on fear for themselves or others, rather than based on the evidence presented at trial.[49] The idea behind this strategy is to make jurors feel threatened, so they lash out at their perceived attackers. The tactic aims to instill a sense of danger in jurors' minds to suggest that unless they render a verdict that exceeds actual damages and effectively punishes the defendant, they are doing a disservice to the community and endangering the public and themselves.

This approach to get jurors to use their "reptile brains" gained prominence through a 2009 book coauthored by a trial lawyer and a jury consultant called, "Reptile: The 2009 Manual of the Plaintiff's Revolution."[50] Although the pseudoscience underlying the theory has largely been debunked, the tactic can be very persuasive in the courtroom because it diverts jurors' attention away from facts and evidence needed to evaluate whether a defendant is responsible for a plaintiff's injury and, if so, an amount that is reasonable compensation. Instead, plaintiffs' lawyers elicit jurors' anger and make them feel their purpose is to protect the public from a large, uncaring corporation.[51]

> "... [Reptile tactics] can be very persuasive in the courtroom because [they] divert[] jurors' attention away from facts and evidence needed to evaluate whether a defendant is responsible for a plaintiff's injury and, if so, an amount that is reasonable compensation."

This approach is essentially a substitute for so-called "golden rule" arguments that jurors put themselves in an injured plaintiff's shoes, which courts have widely held improper.[52] Nevertheless, many courts still allow plaintiffs' lawyers to argue perceived threats of danger that inflame jurors' sense of anger and outrage, which helps produce nuclear verdicts.

A related tactic is to focus the jury on some generalized standard for

imposing liability to direct it away from the legal elements of a claim, such as the need to find that a defendant breached a legal duty of care, that a product is defective, or that the defendant's conduct or the product caused the plaintiff's injury. Plaintiffs' lawyers may refer to nebulous "safety rules" and the overall importance of safety to a company to divert the jury's attention from the legal standard and stoke juror anger or resentment.[53] They may, for instance, trick a corporate representative during a deposition or trial testimony, asking, "Do you agree that safety is a top concern?" and use an affirmative answer to this seemingly innocuous question to remind the jury at every turn that the company fell short of the high standard it purportedly set. Such tactics can sidestep a claim's legal merits, debase defendants in jurors' minds, and trigger instinctual retributive behavior, all of which can contribute to nuclear verdicts.

"Plaintiffs' lawyers' ability to manipulate juror determinations of [noneconomic damages] has led to a transformative increase in these awards."

The Rise in Noneconomic Damages

Many nuclear verdicts are comprised primarily of an award of noneconomic damages such as pain and suffering. Plaintiffs' lawyers' ability to manipulate juror determinations of this inherently subjective damages component has led to a transformative increase in these awards. Historically, noneconomic damage awards were modest and rarely exceeded a claimant's economic damages. Courts typically reversed larger awards. An empirical study of tort cases between 1800 and 1900 found only two trials that resulted in affirmed verdicts of total damages exceeding $630,000 in current dollars.[54] No court permitted an award of noneconomic compensatory damages anywhere near this level. That began to change in the 1950s as plaintiffs' lawyers sought higher awards and, by the 1970s, pain and suffering awards had become the largest part of tort damages.[55] The push for higher pain and suffering awards appears to have experienced a resurgence over the past two decades, after the U.S. Supreme Court

"The push for higher pain and suffering awards appears to have experienced a resurgence over the past two decades, after the U.S. Supreme Court intervened to address a trend of punitive damages 'run wild.'"

intervened to address a trend of punitive damages "run wild."[56]

In a series of decisions, the Supreme Court adopted constitutional constraints on punitive damage awards.[57] Perhaps most significantly, the Court indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and that, in cases involving substantial amounts of compensatory damages, a lesser ratio "can reach the outermost limit of the due process guarantee."[58] Meanwhile, states adopted judicial and statutory safeguards, such as requiring clear and convincing evidence to support a punitive damage award, providing for bifurcation of liability and punitive damages phases of trials, and placing caps on damages. As a result of these court rulings and legislative reforms, excessive punitive damage awards became more prone to remittitur by trial courts and reversal on appeal.

For that reason, crafty personal injury lawyers looked to other avenues to boost damage awards and contingency fees. Pain and suffering awards and other forms of noneconomic damages provided an easy choice. Unlike punitive damages, pain and suffering awards are typically subject to imprecise and ineffective standards of review, such as whether the amount is so high that it "shocks the conscience" of the court or is clearly a result of passion and prejudice. And, while about half of states have statutory limits on noneconomic or total damages in medical liability actions, only nine states have laws that extend such limits to other personal injury cases.[59]

Seeing an opening, some plaintiffs' lawyers improperly urge juries to use pain and suffering awards, which are intended solely to compensate a plaintiff for an injury, to "send a message" and punish a defendant.[60]

"The 'anchor' proposed by the plaintiffs' lawyer creates a psychologically powerful baseline for jurors struggling with assigning a monetary value to difficult-to-define damages such as pain and suffering."

Anchoring Tactics

Personal injury lawyers are aggressively asking jurors to award ever-higher sums. In most states, they are permitted to suggest a damages amount or method of calculating damages as part of closing arguments to a jury. These suggested damages are arbitrary, and often extraordinary, yet can have a profound impact on jurors.[61] The "anchor" proposed by the plaintiffs' lawyer creates a psychologically powerful baseline for jurors struggling with assigning a monetary value to difficult-to-define damages such as

pain and suffering.[62] Once a plaintiffs' lawyer drops the anchor, jurors often either accept the suggested amount or "compromise" by negotiating it upward or downward.[63] While any category of damages may be influenced by anchoring, the practice has the greatest impact on noneconomic damages because these awards are highly subjective and not easily quantified by a dollar amount.[64]

Anchoring can take several forms. The first is to simply ask the jury for a specific amount (a "lump sum"). More often, "to make large amounts more palatable," plaintiffs' lawyers "argue that the jury should fix the plaintiff's compensation at a set amount per day, week, month, or year, and then multiply that amount by the length of time remaining in the plaintiff's life expectancy" (referred to as a "per diem" argument).[65] In some cases, the lawyer links the proposed amount or formula to some other aspect of the case, however irrelevant to the claimant's pain and suffering.[66] This may be the amount the defendant compensated its CEO[67] or its trial experts.[68] Whatever the approach, the goal is to prompt the jury to reach a multi-million dollar pain and suffering award.

Empirical evidence has repeatedly demonstrated that "the more you ask for, the more you get."[69] Whether it is an automobile negligence or medical liability trial, studies have found that jurors presented with an anchor return verdicts that are far larger than the amount they would have returned when left to decide a reasonable amount of damages on their own.[70] Plaintiffs' lawyers are well aware of the effectiveness of this tactic.[71]

Examples of anchoring that occurred during the ten-year study period include:

- In a California case alleging that the commonly used weed killer Roundup caused the plaintiff to develop non-Hodgkin's lymphoma, the plaintiff's lawyers asked the jury to award "a million dollars per year" for their client's past and future pain and suffering for the remainder of his expected life, a total of $37 million. The jury awarded precisely this sum, in addition to about $2 million in economic damages and $250 million in punitive damages.[72]

- In a New York case in which a construction worker fell while setting up a concert venue, the plaintiff's lawyer requested $35 million for his client's past pain and suffering and $50 million for future pain and suffering. The jury awarded $85.75 million in noneconomic damages.[73] Even after the trial court and an appellate court reduced the amount, the resulting $20 million pain and suffering award set a New York record.[74]

- In a Georgia case in which a trucking company conceded liability prior to trial for a tractor-trailer accident, the plaintiff's lawyer asked the jury to award $200 million for the value of the deceased plaintiff's life plus punitive damages and attorney's fees. The jury awarded $150 million for the value of the plaintiff's life, $30 million for her pain and suffering, and $100 million in punitive damages.[75]

Defense counsel are often reluctant to offer a counter-anchor because suggesting an amount of money that the jury should award could be viewed as a concession of liability and the effectiveness of suggesting a lower amount is uncertain.[76] Even if a defendant counters an absurdly high request, "the plaintiff's counsel hopes that jurors will split the difference between the two numbers, which still allows a nuclear verdict to occur."[77]

Only about one-third of states prohibit or limit anchoring practices by placing constraints on the use of "lump sum" arguments, "per diem" arguments, or both.

States have limited anchoring primarily through judicial decisions.[78] These courts provide several justifications for prohibiting anchoring. Amounts suggested by a plaintiff's counsel for a pain and suffering award are not based on evidence,[79] and, just as expert witnesses are not permitted to testify on the value of pain and suffering, lawyers cannot do so.[80] Courts have found that per diem calculations in particular create "an illusion of certainty"[81] or "can result in any amount that the imagination of counsel deems advantageous."[82]

And many courts that allow anchoring tactics have not revisited rulings on this issue in decades, even as plaintiffs' lawyers have sought ever-higher sums.

Inundating the Public and Jury Pool With Ads Touting Nuclear Verdicts

The public has become accustomed to viewing advertisements on television and social media suggesting that it is normal for plaintiffs to receive verdicts and settlements in the hundreds of millions or billions of dollars. The amounts advertised often are misleading because they flash nuclear verdicts that do not disclose that trial courts promptly slashed these amounts or that the awards are likely

"The amounts advertised often are misleading because they flash nuclear verdicts that do not disclose that trial courts promptly slashed these amounts or that the awards are likely to be further reduced or overturned on appeal."

Join the Many TV Spot, "Roundup." Source: iSpot.tv. Aired Apr. 11, 2022 to July 10, 2022.

Miller & Zois Attorneys at Law, "$110 Million Verdict in 3M Earplugs Bellwether Trial." Source: YouTube. Posted Jan. 28, 2022.

Arnold & Itkin LLP TV Spot, "Ovarian Cancer Linked to Talcum Powder." Source: iSpot.tv. Aired June 1, 2020 to Dec. 21, 2020.

Goldwater Law Firm TV Spot, "Xarelto and Pradaxa Internal Bleeding." Sources iSpot.tv and YouTube. Aired Oct. 5, 2015 to Mar. 4, 2016.

to be further reduced or overturned on appeal.

For example, consider lawsuit advertisements for litigation alleging that the commonly used weed killer Roundup causes non-Hodgkin's lymphoma. In the four months preceding a trial that led to a $2 billion verdict, defense lawyers expressed concern that plaintiffs' lawyers had "bombarded" the jury pool with television and radio ads in the local media. The most widely aired local TV ad, which ran an average of eight times per day in the weeks leading up to trial, touted a recent award of "nearly $300 million" in a prior Roundup case.[83] In the three months following the $2 billion verdict, plaintiffs' lawyers and lead generators aired about 160,000 television ads nationwide at an estimated cost of $50 million.[84] Courts lowered the $2 billion verdict to $87 million (*Pilliod*, May 2019), the $80 million verdict to $25 million (*Hardeman*, March 2019), and the $289 million verdict to $78 million (*Johnson*, August 2018)—a combined total reduction of 92% from the original, advertised levels.

A more recent example is a nuclear verdict in the

multidistrict litigation alleging that 3M's Combat Arms Earplugs did not sufficiently protect soldiers from hearing loss. In that case, the manufacturer's attorneys indicated that, just as the trial began, the local Florida community was "barraged" by internet ads touting recent verdict amounts, including a $110 million verdict ($55 million for each of two plaintiffs). The subsequent trial resulted in an unprecedented $50 million compensatory damage award in a case in which the defense argues that the plaintiff had only mild and treatable hearing loss. The defense lawyers, who are seeking a reduction in the verdict or retrial, say that the lawsuit ads, and the plaintiff's lawyer twice referencing the earlier case by name during the trial (inviting a juror to google it), "fanned the flames" that led to the nuclear verdict.[85] Several other trials in that ongoing MDL have resulted in either defense verdicts or relatively modest awards.[86]

Such litigation advertising campaigns involve investments of hundreds of millions of dollars in hundreds of thousands of targeted ads.[87] These ad campaigns are built

"These ad campaigns are built strategically around the lifecycle of a litigation, peaking at opportune times to maximize the investment."

strategically around the lifecycle of a litigation, peaking at opportune times to maximize the investment.[88]

Ads touting nuclear verdicts may also continue to run or be available online even after the court has significantly reduced the award or required a new trial. Lawsuit ads also emphasize mass tort settlements, which may be extraordinarily large in the aggregate, but may reflect relatively small amounts per individual plaintiff.

In addition, plaintiffs' lawyers issue press releases touting nuclear verdicts, which are often picked up by the media. The public is less likely to learn the ultimate outcome of these cases after post-trial motions and appeals, or find out that a confidential settlement followed for a substantially lower amount. In sum, the publicity and advertising of nuclear verdicts is desensitizing the public to astronomical amounts. This may lead jurors to believe that awards at these levels are normal and legally sound, when they are not. This continues a cycle of unreasonable damage demands, unsustainable nuclear verdicts, post-trial motions and reductions, and appeals.

The Rise of Third Party Litigation Funding

One reason some plaintiffs' lawyers aggressively pursue ever-higher damage awards is that they are increasingly splitting recoveries with third parties. Hedge funds, private equity firms, and other companies dedicated to litigation finance underwrite individual cases and portfolios of cases, including big-ticket mass tort litigation, with an expectation that they will obtain a substantial return on that investment.[89]

While lawsuit investors "have long operated under a veil of secrecy," their business model has become harder to hide because third party litigation funding (TPLF) has transformed into a multi-billion dollar industry.[90] The industry has become so lucrative, and demand so high, that one chief investment officer for a funding company likened business to "drinking from a fire hose."[91]

According to a Swiss Re Institute study, an estimated $17 billion was invested in litigation funding globally in 2021, with more than half that amount directed at litigation in the United States.[92] TPLF investments also increased 16% between 2020 and 2021 alone and are projected to balloon to $31 billion annually by 2028.

In addition, the study found that "TPLF contributes to higher awards, longer cases and greater legal expenses."[93] The practice can distort litigation dynamics by changing what a plaintiff is willing to accept to settle his or her case, knowing the recovery must be shared with the

“Funders recognize that bankrolling numerous longshot lawsuits seeking enormous sums may prove a successful strategy even if only a single case results in a nuclear verdict.”

funder. Plaintiffs may be less willing to accept a fair settlement and instead opt to proceed with a jury trial in the hopes of obtaining a far greater sum. Funders, who as a practical matter may direct the litigation behind the scenes, may also push to hold out for a larger settlement to maximize their own return.

Further, because litigation funders’ objective is to maximize profit, they may not act in the interest of justice generally or even in the best interests of the individual whose claim is being funded. When a case can reasonably be settled, they nevertheless may pressure plaintiffs to go “all in” on a jury trial to achieve the greatest possible return, even if it increases the likelihood that the plaintiff will recover nothing for what might be a serious injury.

TPLF may also result in the filing of more risky and speculative lawsuits that chase substantial damage awards. Funders recognize that bankrolling numerous longshot lawsuits seeking enormous sums may prove a successful strategy even if only a single case results in a nuclear verdict.

Real World Implications

Chapter

05

Increases in the frequency and amount of nuclear verdicts adversely affect society in many ways. They can drive up the costs of goods and services, create insurability problems, inhibit job growth and new investments for businesses or industries, deplete judicial resources, and—perhaps most significantly—undermine confidence in the rule of law.

A jury verdict in a personal injury or wrongful death action that awards tens or hundreds of millions of dollars against a business or other civil defendant often has far-reaching implications. For relatively small businesses, the verdict may threaten the viability of the business, and with it the jobs of its employees and potentially others in a community whose livelihoods are connected to the business. A massive verdict can also loom large over a business' operations during the months or years before it is reduced on appeal or settled for a substantially lower amount, delaying the hiring of new workers and other investments that build the business.

For larger businesses, a nuclear verdict can disrupt an entire industry or sector of the economy in addition to the adverse impacts on the business itself. For example, the multiple nuclear verdicts involving the weed killer Roundup (discussed in Chapter 4), which included a $2 billion verdict, affected the continued production and use of the "No. 1 agricultural chemical" in America.[94] The product plays an invaluable role in agriculture worldwide, especially as a growing population increases the demand for food.[95]

Nuclear verdicts can also cause a host of other problems that reverberate throughout society.

Higher Costs and Insurability Problems

Higher costs of lawsuits brought about by inflated damage awards make it more costly to make a product or service available to consumers. The outlier nature of a nuclear verdict can impose substantial added costs in an unpredictable manner that is unrelated to market forces such as the cost of a product's raw materials or labor for a service. As a result, consumers may ultimately bear higher costs and increased volatility as opposed to what they reasonably expect to pay for everyday items and services.

This unpredictability also creates insurability problems. Insurers underwrite policies based on expected costs given particular risks. Nuclear verdicts introduce unexpected costs that may dramatically exceed and distort ranges of reasonable compensation for an injury. This may

significantly increase the cost of insurance, pricing some individuals or entities out of the insurance market altogether, or make certain types of insurance so risky and unpredictable that insurers back away from underwriting policies.

The trucking industry, which is essential to the availability of countless goods, provides an example of how nuclear verdicts can overwhelm an industry and cause insurability problems. A 2020 study by the American Transportation Research Institute of hundreds of trucking accident cases reported significant increases in the frequency and amount of multi-million dollar verdicts from 2005 to 2019.[96] It explained that nuclear verdicts have contributed to dramatic increases in insurance costs for all motor carriers, which have caused a number of motor carriers to go out of business.[97] The remaining motor carriers must incorporate higher insurance costs into the transportation rates they charge entities throughout the supply chain, which are costs ultimately reflected in higher consumer prices for transported goods.[98]

"The reality is that [nuclear verdicts] permeate innumerable aspects of every American's daily life. They increase the costs of food, housing, health care, and other valued goods and services, as well as insurance for things such as a car, home, or other property."

Rising nuclear verdicts also adversely affect the costs and insurability of other essential services such as the provision of health care. The Medical Professional Liability Association, for instance, found that the number of multi-million dollar awards in medical malpractice cases has been increasing and that the average verdict increased by 50% between 2016 and 2019 alone.[99] These higher lawsuit costs, when upheld, are incorporated into higher insurance premiums for doctors and other medical professionals, who in turn face financial pressure to charge higher amounts for their services. The combination of ever-increasing medical costs due to other factors[100] can push the health care industry to a breaking point. It can exacerbate physician shortages, leaving patients in some areas (particularly rural areas) without adequate health care options or access to certain medical specialists.[101]

Greater frequency and amounts of nuclear verdicts can also more acutely affect costs and insurance in specific states based on specific state laws. For example, New York has experienced spiraling costs of construction projects and a resulting construction insurance market "crisis" due to nuclear verdicts awarded under the state's Scaffold Law (discussed in Chapter 3).[102] New York is home to some of the nation's highest insurance costs, and this law singlehandedly increases the costs of every construction

project in the state. Several estimates conclude the law approximately doubles insurance costs without providing any clear safety benefit for workers.[103] Most insurers will not underwrite policies for New York construction projects at all, and those that do often restrict or exclude coverage for Scaffold Law claims.[104] These added costs and insurability problems contribute to New York's extreme housing expenses and escalating housing shortages in areas such as New York City.

These are only a few of the ways nuclear verdicts burden society through inflated costs. The reality is that these awards permeate innumerable aspects of every American's daily life. They increase the costs of food, housing, health care, and other valued goods and services, as well as insurance for things such as a car, home, or other property. While some jurors and members of the public might think of a nuclear verdict as "sticking it" to a business, the reality is that they are sticking added layers of costs to themselves and their communities.

Prolonged Litigation

Nuclear verdicts often waste the time and resources of the judiciary as well as those of plaintiffs and defendants. The chance of obtaining a jackpot nuclear verdict may lead a plaintiff, encouraged by his or her lawyer, to reject reasonable settlement offers and instead go to trial—requiring the time of a judge, jurors, attorneys, and witnesses. If a jury returns an extraordinary amount, rather than end the litigation, the nuclear verdict is just the beginning. Following the verdict, the case moves on to motions for remittitur (to reduce the verdict) or for a new trial. A moderate reduction in the award by the trial court resulting in a smaller, but still nuclear, verdict will typically be appealed by a defendant. On the other hand, a substantial reduction of the award to a reasonable level is likely to lead a plaintiff's lawyer to appeal. Even if the case ultimately reaches a reasonable amount through post-trial litigation or a settlement, the parties will have spent significant and unnecessary sums to arrive at this result and the plaintiff may wait years before receiving his or her recovery. Achieving this result may also needlessly exhaust significant judicial resources (both trial and appellate)—with a concomitant effect on other litigants in other matters—perhaps only to arrive at a "reasonable" verdict that could or should have occurred in the first place. The result is inefficiency across the board for parties and the judiciary.

"The trial court reduced the punitive award to $6.8 million—a more than 99.9% reduction—in 2020, prompting further appeal until the case was settled out of court eight years after it was filed."

For example, in one of the largest nuclear verdicts in the ten-year study period (discussed in Chapter 3), a Philadelphia jury awarded $8 billion to a plaintiff who took the antipsychotic drug Risperdal, which allegedly caused him to develop breasts and gain weight. The plaintiff commenced the action in 2013 and obtained a $1.75 million compensatory damages award in 2015, which was reduced to $680,000 in 2016. He then obtained an $8 billion punitive damages award in 2019.[105] The trial court reduced the punitive award to $6.8 million—a more than 99.9% reduction—in 2020, prompting further appeal until the case was settled out of court eight years after it was filed.[106] Had the case not settled, it would likely have gone on for more than a decade with multiple additional stages of appeals.

Another example of a top nuclear verdict during the study period did involve multiple appeals, including to the U.S. Supreme Court. In 2015, a group of plaintiffs commenced an action in St. Louis alleging personal injuries from talcum powder products, which resulted in a $4.14 billion verdict in 2018.[107] The defendants appealed and, in 2020, a mid-level appellate court reduced the award to around $2.1 billion.[108] An appeal to the Missouri Supreme Court followed, and after the court denied review, the defendants sought the U.S. Supreme Court's review. The Court denied review in 2021, allowing the modified award to stand. Thus, three years passed between the jury's nuclear verdict and the resulting award (which was nearly $2 billion less) even though the Missouri Supreme Court and U.S. Supreme Court never reviewed the merits of the case.

"When evaluating [lawsuit] demands, defendants must factor in the rising risk of a nuclear verdict, even if it has strong defenses to the suit. As a result, nuclear verdicts can lead to a spiral of inflated 'nuclear settlements,' which are typically confidential and unreported."

Unreasonable Demands

The prospect of a nuclear verdict may incentivize plaintiffs' lawyers to make unreasonable settlement demands. After all, if plaintiffs' lawyers feel emboldened enough to ask a jury to return a verdict of hundreds of millions of dollars in a case,[109] it is not a stretch to demand similarly exorbitant amounts from a defendant outside of public view.

When valuing a case, lawyers on both sides will consider verdicts in cases involving similar injuries and comparable plaintiffs. A personal injury lawyer is likely to use nuclear verdicts to seek amounts that are beyond levels that reasonably and fairly compensate a client for his or her injury. When evaluating such demands, defendants must factor in the rising risk of a nuclear verdict, even if it has strong

defenses to the suit. As a result, nuclear verdicts can lead to a spiral of inflated "nuclear settlements," which are typically confidential and unreported. These inflated settlements, like nuclear verdicts, can increase the costs of goods, services, and insurance.

In addition, situations arise in which the parties cannot resolve their claims outside of a courtroom because of the wide gap in expectations. Greater frequency and amounts of nuclear verdicts can widen this expectations gap by expanding the range between what actually compensates a party for an injury and what amount of recovery a plaintiffs' lawyer may nonetheless believe is attainable with an impressionable jury. Parties, therefore, may be more likely to litigate claims that in the past would have settled for a reasonable amount. This can strain judicial resources, which are already stretched thin in many jurisdictions, and perpetuate a cycle in which plaintiffs' lawyers keep increasing demands.

Loss of Confidence in the Rule of Law

When nuclear verdicts are permitted to stand, such as when appellate courts decline discretionary review, it can understandably shake confidence in the rule of law. A defining characteristic of a stable and just society is that the law is applied even-handedly. This includes subjecting defendants to liability, and awarding damages, in a fair, consistent, and predictable manner.

When a defendant is made to pay radically different sums to compensate individuals for the same or a substantially similar injury, it undermines the rule of law. There is no rational explanation for why a claimant should be permitted to recover $100 million in compensatory damages in one jurisdiction for an injury while a claimant with the same injury is fairly compensated by a $1 million jury award in another jurisdiction. The American legal system is not a lottery to dole out jackpot awards, yet nuclear verdicts push it in that direction.

"When damage awards increasingly display signs of lawlessness, the incentives shift to do business elsewhere."

Loss of confidence in fairness and predictability in the rule of law may sound abstract, but it has very real societal implications. People start businesses, invest in new technologies, and endeavor to enter markets in the United States based on a fundamental belief in an uncorrupted legal system. For example, 89% of respondents of the latest Institute for Legal Reform survey of state legal climates expressed agreement that a state's litigation environment is likely to impact important business decisions, including where to locate or to do business.[110] When damage awards increasingly display signs of lawlessness, the incentives shift to do business elsewhere.

Solutions

Chapter

06

The factors that fuel rising nuclear verdicts provide a blueprint for reforms. Legislators can take a variety of actions to prevent inflated awards before they occur and to respond to nuclear verdicts that occur in spite of safeguards. No single reform will stop all nuclear verdicts, but a comprehensive approach that addresses core causes of nuclear verdicts can mitigate the trends seen during the ten-year study period.

Adopt Pre- and Post-Nuclear Verdict Civil Justice Reforms

There are many ways to curb nuclear verdicts, both before and after unsound damages are awarded, through the adoption of traditional civil justice reforms.[111] Below are examples of safeguards that can help.

Evidence Management

A key to promoting fairness and predictability before a nuclear verdict is to ensure jurors hear evidence at an appropriate time, not when it is likely to lead to an unjust result. In this regard, legislators can adopt laws to facilitate jurors considering potentially inflammatory evidence only in the right context.

Several states have adopted laws to require a trial court, upon request, to bifurcate a jury's consideration of compensatory and punitive damage claims. These laws help ensure that evidence supporting a punitive award does not improperly lead the jury to find a defendant liable when it did not cause a plaintiff's injury or to inflate a compensatory award to punish a defendant.[112] For example, in 2021, Texas adopted a law in commercial motor vehicle accident cases allowing for bifurcated trials so that liability and compensatory damages are assessed in a separate phase before any potential jury consideration of evidence supporting exemplary damages.[113]

Additionally, legislators can codify the separation of noneconomic damages and punitive damages to require trial judges to better police the presentation of evidence to a jury. For example, the Ohio legislature, cognizant of misuse of noneconomic damage awards, enacted legislation that prohibits a jury from considering evidence of wrongdoing, misconduct, guilt, or other evidence offered for the purpose of punishing a defendant when determining noneconomic damages.[114]

"... [L]egislators can adopt laws to facilitate jurors considering potentially inflammatory evidence only in the right context."

Venue Reform

Another approach to curb nuclear verdicts before they occur is to ensure cases are heard in an appropriate venue, not simply steered by plaintiffs' lawyers to a forum more prone to nuclear verdicts. Venue reform appears increasingly important in light of rising nuclear verdicts because juries having little or no connection to a case may believe they can award any amount of damages without adversely affecting their community.

"... [L]egislators can adopt other reforms that help curb unsound nuclear verdicts, such as by prohibiting the multiple imposition of punitive damages for the same conduct."

Damages Guardrails

Legislators can also enact laws that respond to nuclear verdicts. For example, states have adopted limits on pain and suffering awards to provide that some amount of subjective noneconomic damages is "enough" to reflect the reality of a serious injury.[115] Similarly, some states place statutory limits on punitive damages, either as a total amount or a multiple of compensatory damages, as a legislative judgment that some amount of punishment of a defendant adequately deters future misconduct.[116] Because subjective noneconomic damages and punitive damages comprise the bulk of damages in most nuclear verdicts, these civil justice reforms provide a legislative backstop that promotes greater predictability in what damages are ultimately awarded.

In addition, legislators can adopt other reforms that help curb unsound nuclear verdicts, such as by prohibiting the multiple imposition of punitive damages for the same conduct.[117] Such laws can prevent duplicative nuclear verdicts comprised mainly of punitive damages in product liability or other cases.[118] Legislators might also consider instituting a statute of repose or some other time horizon on the imposition of punitive damages to ensure that such awards still make sense in a case. There comes a point in time when punitive damages no longer advance the objectives of punishment and deterrence because the nature of the defendant's business, leadership, or form no longer resembles the entity that engaged in misconduct many years or decades ago. Legislators should make clear that punitive damages represent an exceptional remedy, which if included as part of a large verdict, must serve its intended purpose.

Address Misleading Lawsuit Advertising

Some personal injury firms and "lead generating" companies inundate the public with advertising that touts nuclear verdicts, even where those verdicts are substantially reduced, overturned by an appellate court, or later settled for a substantially lower amount. In doing so, these ads portray to potential jurors a highly

distorted picture of the civil justice system and what constitutes fair compensation for an injury. Ads celebrating nuclear verdicts can also endanger the public by incorrectly suggesting that the use of a product, such as an FDA-approved prescription drug or medical device, is so dangerous that people are being compensated for physical injuries to the tune of many millions of dollars. Such advertising has been shown to prompt individuals to stop taking needed medications or using medical devices without consulting their doctor, leading to incidents of injury and even death.[119]

Legislators can address both the adverse public health effects of misleading lawsuit advertising and the misleading portrayal of damage awards that seed the ground for unsound nuclear verdicts by regulating trial lawyer advertising. In recent years, legislation to combat misleading ads has been enacted in a number of states, including Kansas, Indiana, Tennessee, Texas, and West Virginia.[120] Legislation can focus on deceptive advertising of nuclear verdicts by requiring clear disclaimers about product safety, past case results, depictions of events, or any statements that promise or imply a lawyer's ability to obtain results in a matter.[121] By ensuring that only truthful and complete information about product safety risks and recovered damages are included in lawsuit advertising, states can help protect the public and recalibrate incorrect public perceptions that contribute to inflated damage awards.

"Legislation can focus on deceptive advertising of nuclear verdicts by requiring clear disclaimers about product safety, past case results, depictions of events, or any statements that promise or imply a lawyer's ability to obtain results in a matter."

Promote Sound Science in the Courtroom

The most common types of personal injury and wrongful death cases that resulted in nuclear verdicts during the ten-year study period, namely product liability, auto accident, and medical liability cases (discussed in Chapter 2), often involve the admission of expert scientific evidence. Many cases turn on whether a jury believes an expert with respect to key issues such as whether a product caused an alleged injury or whether a driver or doctor acted negligently. Consequently, when expert evidence is not based on sound science or is otherwise unreliable, it can mislead jurors into awarding a nuclear verdict.

Legislators, and where appropriate courts, can strengthen expert evidence standards so that jurors only hear expert testimony based on reliable scientific principles and methods that the expert reliably applies to the facts of the case. In federal courts, where nuclear verdicts are far less common, Federal Rule of Evidence 702 instructs judges to

"States should likewise strengthen their expert evidence rules, such as by following the amended federal rule slated to take effect at the end of 2023, and curb nuclear verdicts based on misleading and unreliable scientific evidence."

act as "gatekeepers" to screen unreliable expert evidence.[122] In 2022, the federal Committee on Rules of Practice and Procedure approved amendments to strengthen Rule 702 by addressing ways in which the rule has been misapplied by courts.[123] The amended rule clarifies that: (1) the proponent of expert testimony must establish its admissibility to the court by a preponderance of the evidence before it can be presented to a jury; and (2) an expert must not assert a degree of confidence in an opinion that is not derived from sufficient facts and reliable methods.[124] States should likewise strengthen their expert evidence rules, such as by following the amended federal rule slated to take effect at the end of 2023, and curb nuclear verdicts based on misleading and unreliable scientific evidence.

Adopt Third Party Litigation Funding Disclosure

The proliferation of TPLF arrangements that can fuel nuclear verdicts by adding costs that drive up plaintiffs' litigation demands provides another area in which legislators can take action. A basic problem with TPLF agreements is that plaintiffs enter these agreements with funders in secret. Defendants, other parties, and the court typically do not know who may be exerting influence behind the scenes.[125] As discussed, these arrangements can impact crucial issues regarding the resolution of a case, such as whether a plaintiff accepts or rejects a reasonable settlement offer and faces pressure to chase a nuclear verdict.

Legislators and judges can adopt TPLF disclosure requirements to provide transparency for litigants, judges, and the public. Several states require, either through enacted legislation or court rules, parties to disclose any TPLF agreement.[126] By adopting disclosure rules, legislators and jurists can also learn more about these agreements and how they may distort litigation dynamics and contribute to nuclear verdicts.

"Legislators and judges can adopt TPLF disclosure requirements to provide transparency for litigants, judges, and the public."

Prohibit Manipulation of Juries Through Anchoring Tactics

A clear way to prevent a jury from latching onto an arbitrary amount of

damages suggested by a plaintiffs' lawyer for pain and suffering or another form of noneconomic loss is to prohibit such highly influential, manipulative arguments. Judges generally have discretion to bar or limit courtroom arguments that are inflammatory, misleading, or unsupported by evidence, but instructing a jury after-the-fact that it should not consider a suggested damages sum or calculation method because the suggestion is only an argument and not evidence does not adequately solve the problem. As a practical matter, it is virtually impossible for a jury to move on from a proposed damage award after the plaintiffs' lawyer has dropped a damages anchor.

The better approach is for state legislators to take these baseless and manipulative arguments off the table for use in jury trials. This can be accomplished by something as straightforward as a one-sentence reform stating that no party or counsel may refer to a specific dollar amount, state a range, or offer a formula to suggest to the jury an amount to award for noneconomic damages.[127]

In 2022, state legislatures showed interest in addressing the use of anchoring tactics that contribute to nuclear verdicts. Legislators introduced bills to prohibit anchoring tactics in at least three states: Oklahoma (where current law is uncertain), Missouri (which currently prohibits mathematical formulas, but allows plaintiffs' lawyers to request a specific damages amount), and West Virginia (which currently prohibits forms of anchoring, though courts sometimes find that violating this rule does not require retrial).[128] Such legislation enables jurors to decide on their own the amount of noneconomic damages, if any, a plaintiff should receive free from undue influence that can drive a nuclear verdict.

"The better approach is for state legislators to take these baseless and manipulative arguments off the table for use in jury trials."

Conclusion

Chapter

07

This analysis of nuclear verdicts in personal injury and wrongful death cases over a ten-year period between 2010 and 2019 confirms what many civil defendants and others have long suspected: nuclear verdicts are increasing in frequency and amount. The study also reveals concentrations of nuclear verdicts and sheds light on the types of cases and jurisdictions where nuclear verdicts are most prevalent. The question moving forward is what can and should be done to address unsound nuclear verdicts and promote greater fairness and predictability in damage awards.

Legislators can adopt a variety of measures that target the core causes of nuclear verdicts. Adopting sound civil justice reforms, regulating misleading lawsuit advertising, strengthening expert evidence standards, requiring disclosure of TPLF agreements, and prohibiting arbitrary jury anchoring arguments each respond to different factors that often combine to produce extraordinary and unsustainable awards. Understanding the types of cases and jurisdictions in which concerns regarding nuclear verdicts appear most acute also helps inform the development of specific reforms. Considering the Top 10 jurisdictions producing nuclear verdicts over the ten-year study period accounted for nearly three-fourths of the reported nuclear verdicts, and that many of these jurisdictions also had the highest concentrations of nuclear verdicts on a per capita basis, those jurisdictions are prime candidates for additional reforms.

The consequences of allowing nuclear verdicts to continue to proliferate will be increasingly felt throughout society. Businesses will need to incorporate rising lawsuit costs into their products and services while simultaneously facing increasingly unpredictable liability. These higher costs and greater unpredictability will trigger higher insurance costs, potentially creating insurability problems. Everyone will end up paying more for goods and services. More litigation will ensue and take longer to resolve, exacerbated by factors such as ever-expanding third party litigation funding and lawsuit ads that reinforce distorted views of product safety and what is a reasonable amount of damages. All the while, individuals and businesses will increasingly lose confidence in a fair and predictable civil justice system. These adverse consequences are reversible and now is the time for action.

Methodology

The findings presented in this paper are based on an Institute for Legal Reform-developed database (ILR database) of 1,376 reported verdicts of $10 million or more in personal injury and wrongful death cases during a ten-year period between January 1, 2010, and December 31, 2019. The ILR database does not include more recent data due to the COVID-19 pandemic, which may be unrepresentative due to court shutdowns and trial delays.

The information in the ILR database originates from the LexisNexis jury verdicts and settlements database (Lexis JV database). The Lexis JV database includes verdict reports collected from federal and state courts in every state. The Lexis JV database draws from 717 individual proprietary and licensed sources, such as ALM, Dolan Media, Mealey Publications, Matthew Bender & Company, and American Association for Justice (AAJ) publications, as well as LexisNexis' content and media reports. Lexis JV database reports include a case summary; identify the parties, injuries, and dates involved; and indicate the case resolution and damages awarded (often, but not always, broken down by types of damages). While the sources used to develop the ILR database likely capture verdicts over $10 million at a high rate, no jury verdict database captures all verdicts in every court.

The ILR database does not include nuclear verdicts in areas outside of personal injury and wrongful death litigation, such as employment, environmental, or intellectual property litigation. The ILR database is also limited to nuclear verdicts—it does not include individual settlements, many of which are confidential and unreported, nor does it include class action or mass tort settlements.

Damage awards included in the ILR database reflect the amounts awarded by the jury. These amounts do not reflect adjustments by the trial court or on appeal, such as a reduction of the verdict as excessive or the addition of pre-judgment interest.

Cases that involved multiple claims were categorized based on the primary theory of liability. For example, cases involving auto accidents that alleged the injury resulted from a defect in the vehicle were categorized as product liability claims, even if they also included a negligence claim against a driver.

Endnotes

[1] A full discussion of the data collection and methodology used to develop this report is provided in the Methodology appendix at the end of this report.

[2] Calculations involving state populations are based on U.S. Census Bureau data and annual estimates between 2010 and 2019. *See State Population Totals and Components of Change: 2010-2019*, U.S. Census Bureau.

[3] *101 Ways to Improve State Legal Systems,* U.S. Chamber Inst. for Legal Reform (6th ed. Sept. 2019). A new, seventh edition of the 101 Ways report is forthcoming.

[4] Other studies and media reports also confirm this trend. *See Understanding the Impact of Nuclear Verdicts on the Trucking Industry,* American Transportation Research Inst. (June 2020); *see also* Contessa Brewer & Katie Young, *Rise in 'Nuclear Verdicts' in Lawsuits Threatens Trucking Industry*, CNBC, Mar. 24, 2021; Y. Peter Kang, *Plaintiffs Bar is Steering Truck Crash Cases to Mega Verdicts,* Law360, Aug. 6, 2019.

[5] For example, in *Robinson v. R.J. Reynolds Tobacco Co.*, No. 2008-CA-000098 (Fla. Escambia County Cir. Ct., July 16, 2014), the jury awarded a smoker $16.9 million in compensatory damages and $23.6 billion in punitive damages, and the trial court reduced the punitive damages award to $16.9 million. *See* Frances Robles, *Jury Awards $23.6 Billion in Florida Smoking Case*, N.Y. Times, July 19, 2014. The court of appeals reversed, finding plaintiff's closing arguments crossed proper boundaries "repeatedly, flagrantly, and often in defiance of the trial court's admonishments." *R.J. Reynolds Tobacco Co. v. Robinson*, 216 So.3d 674 (Fla. 1st DCA, 2017). The retrial resulted in a defense verdict in 2019. *See* Andrew Caplan, *Jury Sides with Tobacco Company in $23.6 Billion Case*, Gainesville Sun, June 25, 2019.

[6] For example, in *Allen v. Takeda Pharmaceutical Co.,* No. 6:12-cv-00064 (E.D. La. Apr. 7, 2014), the jury awarded $9 billion in punitive damages and about $1.5 million in compensatory damages for alleged injury from the prescription drug Actos. The trial court found the $9 billion punitive damage award unconstitutionally disproportionate and reduced the award to $37 million. *See* Sindhu Sundar, *$9B Takeda, Eli Lilly Actos Damages Slashed to $37M*, Law360, Oct. 27, 2014. The parties withdrew their appeals as multidistrict litigation moved toward a global settlement.

[7] Michael Bradford, *Shifting Defence Tactics for US Nuclear Verdicts*, Global Risk Manager, Dec. 23, 2021 (quoting Robert Tyson, a partner at Tyson & Mendes).

[8] *See, e.g., Aguayo v. AMCO Ins. Co.,* 59 F. Supp. 3d 1225, 1272 n.18 (D. N.M. 2014) ("Plaintiffs prefer to argue in front of state judges, who are often elected, rather than appointed, and who often do not have law clerks. They also prefer state juries, who are often selected from driver-license registries, to federal juries, who are often selected from voter-registration rolls.").

[9] U.S. Courts, Federal Judicial Caseload Statistics 2021 (indicating that diversity of citizenship cases rose 188.1% since 2012 and 249.5% since 2017, which has largely been driven by mass tort cases in multi-district litigation).

[10] *State Population Totals and Components of Change: 2010-2019,* U.S. Census Bureau.

[11] Florida's unique tobacco litigation, often referred to as "*Engle* progeny" litigation, stems from a 2006 Florida Supreme Court decision, in *Engle v. Liggett Group, Inc.,* 945 So. 2d 1246 (Fla. 2006), decertifying a proposed class of several hundred thousand claimants. As a result, thousands of individual cases have proceeded in Florida trial courts, some of which have resulted in nuclear verdicts. *See* Carolina Bolado, *Engle Cases Likely to Drag On Despite Higher Damages Risk*, Law360, Mar. 17, 2006.

[12] Cara Salvatore, *Fla. Jury Awards $412M in Zoom Trial Over Highway Crash*, Law360, Oct. 8, 2020 (reporting on *Duane Washington v. Top Auto Express, Inc.*, No. 18000861 CAA (Fla. Cir. Ct., Gadsden County Oct. 2, 2020). The entire verdict was for noneconomic damages, with the largest amount, $371,205,000, for future pain and suffering. *See id.*

[13] Hailey Konnath, *Fla. Jury Awards $1B to Family of Big Rig Crash Victim*, Law360, Aug. 24, 2021 (reporting on *Melissa Dzion v. AJD Business Services Inc.,* No. 2018-CA-000148 (Fla. Cir. Ct., Nassau County Aug. 20, 2021). The verdict included $900 million in punitive damages and $102 million in damages for pain and suffering).

[14] *See, e.g.,* Amanda Bronstad, *Los Angeles County Jury Awards $43M in Asbestos Trial*, Law.com, May 23, 2022 (reporting that the Los Angeles verdict is one of the largest in an asbestos case nationwide since courts reopened amid the COVID-19 pandemic).

[15] Tina Bellon & Nate Raymond, *California Judge Tosses $417 Million Talc Cancer Verdict Against Johnson & Johnson*, Reuters, Oct. 20, 2017 (reporting on *Echeverria* case). The award had included $70 million in compensatory damages and $347 million in punitive damages. After the trial, the court granted a request for a new trial, finding the excessive verdict stemmed from errors and insufficient evidence. *See id*.

[16] Dorothy Atkins, *Monsanto Hit With $2B Verdict in 3rd Roundup Trial*, Law360, May 13, 2019. In addition to the $2 billion award in *Pilliod v. Monsanto*, a state jury in San Francisco awarded former school groundskeeper DeWayne "Lee" Johnson $289 million (reduced by the trial court judge to $78 million) in 2018, and a California federal jury handed down an $80 million verdict, including $75 million in punitive damages, against Monsanto in favor of Ed Hardeman in 2019.

[17] Jonathan LaCour, *'Nuclear Punitives' Could Be the New Normal for Damages*, Bloomberg Law, Jan. 31, 2022.

[18] *Perez v. Live Nation Worldwide, Inc.,* No. 158373/2013, 2020 WL 4258745, at *6-7 (N.Y. Sup. Ct. July 24, 2020), *aff'd,* 193 A.D.3d 517 (2021).

[19] *See, e.g., Hedges v. Planned Sec. Serv. Inc.*, No. 101854/12, 2021, 2021 WL 96276 (N.Y. App. Div. Jan. 12, 2021).

[20] *See, e.g., Redish v. Adler*, No. 310294/11, 2019 WL 6269086, at *7-8, 119 N.Y.S.3d 705 (Table) (Sup. Ct. 2019), *aff'd as modified*, 195 A.D.3d 452 (N.Y. App. Div. 2021) (returning a verdict of $60 million for past pain and suffering, $30 million for future pain

and suffering, plus special damages; reduced post trial); *see also* Cathy Burke, *Bronx Woman Awarded More than $110 Million in Malpractice Lawsuit Against St. Barnabas Hospital, Doctors,* Daily News, Apr. 13, 2019.

[21] Jeff Sistrunk, *NY Jury Awards $190M Over Asbestos Injuries, Deaths*, Law360, July 24, 2013.

[22] Timothy R. Capowski & Jonathan P. Shaub, *Improper Summation Anchoring Is Turning the New York Court System on Its Head and Contributing to the Demise of New York State*, N.Y.L.J., Apr. 28, 2020; *see also* Shaub Ahmuty Citrin & Spratt, *Top NYS Court Pain & Suffering Personal Injury Verdicts & Improper Anchoring (2010-Year-End)*.

[23] Christopher Simone, Jonathan Shaub & Molly Cohen, *Anchoring Away*, N.Y.L.J., Feb. 4, 2022.

[24] *See, e.g., Perez v. Live Nation Worldwide, Inc.,* 193 A.D.3d 517, 518 (N.Y. App. Div. 2021) ("We decline the invitation of defendant and amici to announce a new rule prohibiting the practice of anchoring"); *Hedges v. Planned Sec. Serv., Inc.,* 190 A.D.3d 485, at 489 (N.Y. App. Div. 2021) (same); *see also Redish v. Adler,* 195 A.D.3d 452, 453 (N.Y. App. Div. 2021) (finding $30 million award for past and future pain and suffering deviates materially from reasonable compensation, but finding other arguments raised "unavailing").

[25] N.Y. C.P.L.R. 5501(c).

[26] Tom Stebbins, *Ambulance Chasers Fiddle While New York Burns*, Empire Rep., Feb. 1, 2021.

[27] Keep Texas Trucking Coalition, Lawsuit Abuse and Its Impact on the Transportation Industry, 2021.

[28] David Earl, *Texas Jury Hits Werner Enterprises With Nearly $90 Million Verdict*, KETV 7, May 17, 2018. The judgment is on appeal. *Werner Enterprises, Inc. v. Blake*, No. 14-18-00967-CV (Tex. 14th Ct. App. en banc consideration granted July 27, 2021 and submitted for ruling on Oct. 28, 2021).

[29] *McPherson v. Jefferson Trucking, LLC*, No. 16-00247, 2018 WL 7017862 (Tex. Dist. Ct. Nov. 16, 2018); *see also* Carola Salvatore, *Jury Awards $260M After Man's Death in a Crash*, Law360, Nov. 13, 2018). That case appears to have settled while on appeal. *See Jefferson Trucking, LLC v. McPherson*, No. 06-19-00023-CV, 2019 WL 2273872 (Tex. Ct. App. May 29, 2019).

[30] *Titus County Jury Delivers $730 Million Judgment in Truck-Accident Case*, Texarkana Gazette, Nov. 28, 2021.

[31] Tex. Civ. Prac. & Rem. Code 74.301 (limiting noneconomic damages in healthcare liability actions to $250,000 per claimant and, in cases with multiple defendant institutions, $500,000 per claimant); *see also* Tex. Civ. Prac. & Rem. Code 74.303 (limiting the liability of healthcare providers in wrongful death actions to $500,000 per claimant, including exemplary damages, but excluding any necessary medical care). These amounts are adjusted for inflation.

[32] Tex. Civ. Prac. & Rem. Code 41.008. The limit does not apply to cases involving certain felony criminal conduct.

[33] Jonathan Stempel, *Judge Slashes $8 Billion Risperdal Award Against Johnson & Johnson to $6.8 Million*, Reuters, Jan. 17, 2020.

[34] Matt Fair, *J&J Loses Pa. High Court Appeal Bid In $70M Risperdal Case*, Law360, Sept. 1, 2020.

[35] Lauraann Wood, *Judge Throws Out $150M AbbVie AndroGel Verdict*, Law360, Dec. 22, 2017 (discussing ruling in *Mitchell v. AbbVie*, No. 14-cv-01748 (N.D. Ill. Dec. 22, 2017).

[36] Nate Raymond, *AbbVie Wins Reversal of $140 Million Verdict in Case Over Androgel Risks*, Reuters, July 5, 2018.

[37] Leah Hope & John Garcia, *Jury Awards Paralyzed Dancer $148M After O'Hare Bus Shelter Collapse*, ABC 7, Aug. 23, 2017.

[38] *City Agrees To Pay $115 Million To Woman Paralyzed By Fallen O'Hare Shelter*, CBS Chicago, Jan. 16, 2018.

[39] *Martin v. Six Flags Over Georgia II*, L.P., 801 S.E.2d 24 (Ga. 2017).

[40] Greg Land, *DeKalb Jury Awards Nearly $70M in Kroger Parking Lot Robbery Shooting Case*, Daily Rep., Apr. 19, 2019.

[41] Greg Land, *Fulton Jury Awards $43M to Man Shot, Robbed in CVS Parking Lot,* Daily Rep., Mar. 25, 2019.

[42] Daniel Siegal, *Atlanta Transit Rider Awarded $18.8M For Brain-Damaging Fall,* Law360, Nov. 9, 2018 (reduced to $18.75 million to reflect the plaintiff's comparative negligence).

[43] Y. Peter Kang, *Apt. Building Owner Hit With $125M Verdict In Ga. Death Suit*, Law360, July 2, 2019.

[44] Katheryn Hayes Tucker, *How a Columbus, Ga., Jury Returned a $280M Verdict in 45 Minutes*, Law.com, Aug. 24, 2019; *see also* Meredith Hobbs, *Are Megamillion Georgia Verdicts 'Nuclear' or Sign of the Times?*, Law.com, Oct. 8, 2019.

[45] Ga. Code Ann. § 9-10-184 ("[C]ounsel shall be allowed to argue the worth or monetary value of pain and suffering to the jury ....").

[46] Greg Land, *DeKalb Jury Awards Nearly $70M in Kroger Parking Lot Robbery Shooting Case*, Daily Rep., Apr. 19, 2019.

[47] Greg Land, *Fulton Jury Awards $43M to Man Shot, Robbed in CVS Parking Lot,* Daily Rep., Mar. 25, 2019.

[48] Rosie Manins, *Ga. Jury Hits Ford With $1.7B Verdict In Rollover Trial*, Law360, Aug. 19. 2022.

[49] Sonya Naar, et al., *Personalizing the Corporate Client: Reversing the Reptilian Theory in High-stakes Litigation*, Ass'n of Corporate Counsel, Oct. 16, 2016.

[50] Don Keenan & David Ball, Reptile: The 2009 Manual of the Plaintiff's Revolution (Balloon Press 2009).

[51] Max Mitchell, *With New Tactics Fueling 'Nuclear' Verdicts, Can Defense Catch Up?*, Legal Intelligencer, Oct. 23, 2019.

[52] Stephen A. Saltzburg, *Improper Golden Rule Argument*, Am. Bar Ass'n Crim. Justice Magazine, Vol. 35, Issue 1 (Apr. 20, 2020).

[53] Tim Capowski et al., *The Snake Attack Phenomenon: The Courts Must Stop Overlooking and Facilitating the Continued Poisoning of Our Jury System*, N.Y.L.J., Mar. 4, 2022.

[54] Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Noneconomic Compensatory Damages in the 19th Century*, 4 J. Empirical Legal Stud. 365, 397-98 (2007).

[55] Victor E. Schwartz & Cary Silverman, *The Case in Favor of Civil Justice Reform*, 65 Emory L.J. Online 2065, 2066-67 (2016).

[56] *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

[57] *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2002); *Cooper Industries, Inc. v. Leatherman Tool Grp. Inc.,* 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562-63 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415,420 (1994).

[58] *Campbell*, 538 U.S. at 425.

[59] *See, e.g.*, Alaska Stat. Ann. § 09.17.010; Colo. Rev. Stat. Ann. § 13-21-102.5; Haw. Rev. Stat. Ann. § 663-8.7; Idaho Code Ann. § 6-1603; Md. Code Ann., Cts. & Jud. Proc. § 11-108; Miss. Code Ann. § 11-1-60(2)(B); Ohio Rev. Code Ann. § 2315.18; Tenn. Code Ann. § 29-39-102. Michigan limits noneconomic damages in product liability actions. Mich. Comp. Laws 600.1483. Some of these laws include significant exemptions, such as lifting the statutory limit on noneconomic damages in cases of catastrophic injury.

[60] *See generally* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S. C. L. Rev. 47 (2002).

[61] *See generally* Mark A. Behrens, Cary Silverman & Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, 44 Am. J. Trial Adv. 321 (2021).

[62] Kathleen Flynn Peterson, et al., *Dropping the Anchor*, Trial (Apr. 2017) ("People often rely on the first number they are given as a baseline when making decisions.").

[63] *Hodge v. State Farm Mut. Auto Ins. Co.*, 884 N.W.2d 238, 255-56 (Mich. 2016) (Markman, J., concurring) (recognizing that "a jury's final award may sometimes be unduly affected by a large initial presentation of damages," which sets the award's range and then may be "discounted" based on the plaintiff's credibility).

[64] Don Rushing, et al., *Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings,* 70 Def. Counsel J. 378, 381 (July 2003); *see also* Dan B. Dobbs, Law of Remedies 8.1(4), at 383 (2d ed. 1993) (observing that there is no standard measurement of pain and suffering or "even a conception of those damages or what they represent").

[65] Stacey L. Pietrowicz, *Closing Argument-Plaintiff's Perspective*, Mass. Courtroom Adoc. 10-1, § 10.10.1 (3d ed. 2019).

[66] Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. Empirical Legal Studies 120, 144 (2011) (observing that "[t]he research literature on anchoring includes many successful demonstrations of the anchoring process using arbitrary or nonsense anchors, such as numbers from a roulette wheel spin or the last four digits of a Social Security or telephone number" but "there is a strong expectation that a meaningful anchor will be more persuasive than an arbitrary one").

[67] *Chrysler Group, LLC v. Walden,* 812 S.E.2d 244, 248 (Ga. 2018) (involving a Jeep rollover accident in which the plaintiffs' lawyer asked the jury to award $120 million as the value of the child's life, linking the amount to the compensation of the automaker's CEO, and the jury awarded that amount in addition to $30 million in damages for pain and suffering).

[68] *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.,* 888 F.3d 753, 787 n.71 (5th Cir. 2018) (ordering a new trial in a product liability case against a hip implant manufacturer after the plaintiffs' attorney told the jury to award damages "by the day, by the hour, by the minute" and argued that if the defendants "will pay their experts a thousand dollars an hour to come in here, when you do your math back there don't tell these plaintiffs that a day in their life is worth less than an hour's time of this fellow, or people they put on the stand," leading to a $141.5 million noneconomic damages award).

[69] 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, 526 (1996); *see also* Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F. L. Rev. 393, 395-99 (2018).

[70] John Campbell, et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash. U. L. Rev. 1, 28 (2017) (finding that participants who watched a mock medical malpractice case presented with a $5 million anchor returned a median pain and suffering verdict four times the amount of participants who were left to decide a reasonable amount of damages on their own—$1 million compared to $225,000); Bradley D. McAuliff & Brian H. Bornstein, *All Anchors are Not Created Equal: The Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards,* 34 L. & Human Behavior 164, 167 (2010) (finding that mock jurors who received a five-page summary of an auto accident case involving an 18-year-old pedestrian with a lump sum or per diem anchor returned a median pain and suffering award just under the lawyer's request, while those whose summary did not include an anchor returned an amount that was less than half that amount).

[71] *See, e.g.,* Patricia Kuehn, *Translating Pain and Suffering Damages,* Trial (Nov. 2020) ("It is well recognized that a numerical anchor influences jurors' judgment about damages even if they do not recognize that the anchor affected their decision."); Sonia Chopra, *The Psychology of Asking a Jury for a Damage Award*, Plaintiff (Mar. 2013), at 1 ("Once an anchor number has been provided, the number exerts undue influence on the final figure" and "can sway decisions even when the anchor provided is completely arbitrary"); David A. Wenner, *Anchoring: A Trial Lawyer's Tool,* 2013 Annual AAJ-Papers 20 (Am. Ass'n for Justice 2013) (recognizing jurors who are bombarded with information during a trial suffer from "cognitive overload" and "unconsciously welcome the presence of an anchor that will reduce the cognitive effort needed").

[72] *Johnson v. Monsanto Co.*, 52 Cal. App. 5th 434, 446 (Cal. Ct. App. 2020) (reduced post-trial and by appellate court).

[73] *Perez v. Live Nation Worldwide, Inc.,* No. 158373/2013, 2020 WL 4258745, at *6-7 (N.Y. Sup. Ct. July 24, 2020), *aff'd*, 193 A.D.3d 517 (2021) (reducing the amount the jury allocated for future noneconomic damages from $75.23 million to $30.1 million). Plaintiffs' lawyers have asked for amounts in the tens of millions of dollars for pain and suffering in dozens of New York cases, including several requests in the $80 million range and one as high as $140 million. *See* Shaub Ahmuty Citrin & Spratt, *Top NYS Court Pain & Suffering Personal Injury Verdicts & Improper Anchoring (2010-Year-End)* (compiling 31 cases).

[74] Peter Hayes, *Live Nation Faces N.Y. Record $20 Million for Pain, Suffering*, Bloomberg Law, Apr. 14, 2021.

[75] The Top 100 Verdicts of 2019, Nat'l L.J. (report on *Madere v. Greenwich Ins. Co.,* No. SC 17-CV-000106 (Ga. State Ct., Muscogee County, Aug. 23, 2019)); *see also How a Columbus, Ga., Jury Returned a $280M Verdict in 45 Minutes*, Fla. Bus. Rev., Aug., 24, 2019; Hobbs, *Are Megamillion Georgia Verdicts 'Nuclear' or Sign of the Times?, supra.*

[76] John Campbell, et al., *Countering the Plaintiff's Anchor, Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543, 551 (2016).

[77] Bill Kanasky, Jr. & George Speckart, *The Nuclear Verdict*, For the Defense, Vol. 62, No. 4, 14, 18 (DRI, Apr. 2020).

[78] Campbell, *supra* note 76, 95 Wash. U. L. Rev. at 34-48 (providing 50-state survey).

[79] *See, e.g., Stassun v. Chapin*, 188 A. 111, 111 (Pa. 1936).

[80] *See, e.g., Henne v. Balick,* 146 A.2d 394, 398 (Del. 1958).

[81] *Caley v. Manicke,* 182 N.E.2d 206, 208 (Ill. 1963).

[82] *Duguay v. Gelinas,* 182 A.2d 451, 452 (N.H. 1962); *see also Affett v. Milwaukee & Suburban Transp. Corp.*, 106 N.W.2d 274, 279-80 (Wis. 1960) (observing the "absurdity of a mathematical formula" to measure pain and suffering, since a plaintiff's counsel can manipulate it by day, hour, minute, second, or "perhaps even a heart beat" to make the award that is sought seem reasonable); *Certified T.V. & Appliance Co. v. Harrington*, 109 S.E.2d 126, 130 (Va. 1959) (recognizing that mathematical formulas "plunge the already subjective determination [of valuing pain and suffering] into absurdity" and "instill[] in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence").

[83] Defendant Monsanto Company's Opposition to Plaintiffs' Motion for Temporary Injunction Precluding Advertisements by Monsanto Relating to Safety, Testing, and Studies on its Products Until After Entry of Judgment in This Action, at 2, *Pilliod v. Monsanto Co.*, No. RG17862702 (Cal. Super. Ct., Alameda County, filed Apr. 3, 2019).

[84] *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle*, U.S. Chamber Inst. for Legal Reform (Apr. 2020), at 47.

[85] Mike Curley, *3M Wants Judge To Undo 'Excessive' $50M Ear Plug Verdict*, Law360, June 1, 2022.

[86] Lauren Berg, *3M Hit With $110M Verdict In Fla. Military Earplug Bellwether*, Law360, Jan. 27, 2022 (reporting, at that time, three defense verdicts, and six other plaintiffs' verdicts of $1.7 million, $7.1 million, $8.2 million, $13 million, and $22.5 million).

[87] *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle*, U.S. Chamber Inst. for Legal Reform (Apr. 2020), at 1-4.

[88] *See id*.

[89] *Selling More Lawsuits, Buying More Trouble*, U.S. Chamber Inst. for Legal Reform (Jan. 2020), at 6-11.

[90] Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J., Mar. 21, 2018.

[91] Caroline Simson, *Third-Party Funders' Business Is Booming During Pandemic*, Law360, Apr. 8, 2020 (quoting Allison Chock, U.S. chief investment officer for funder Omni Bridgeway).

[92] *U.S. Litigation Funding and Social Inflation*, Swiss Re Institute (Dec. 2021), at 8.

[93] *Id.* at 2; *see also* Autumn Demberger, *Swiss Re Charts $17 Billion in Litigation Funding in 2021; Is It Any Wonder We're Experiencing Social Inflation?*, Risk & Insurance, Jan. 11, 2022.

[94] Patricia Cohen, *Roundup Weedkiller Is Blamed for Cancers, But Farmers Say It's Not Going Away*, N.Y. Times, Sept. 20, 2019.

[95] *See id.*

[96] *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, American Transportation Research Inst. (June 2020).

[97] *See id.* at 9, 13.

[98] *See id.* at 50.

[99] Amy Buttell, *Nuclear Verdicts Escalate*, Inside Medical Liability (First Quarter 2021).

[100] *See, e.g., ILR Briefly: Fixing the FCA Health Care Problem*, U.S. Chamber Inst. for Legal Reform (Aug. 2022), at 1 (discussing how the mandatory per-claim civil penalty provision of the federal False Claims Act (FCA) disproportionately impacts the health care industry, driving up costs for hospitals and other health care providers).

[101] Ass'n of Am. Med. Colleges, *AAMC Report Reinforces Mounting Physician Shortage*, June 11, 2021.

[102] Jason Schiciano, *Scaffold Law Drives Up Cost of Construction in New York, Insurance Broker Says*, The Journal News, Jan. 9, 2019.

[103] Conner Harris, *Deconstructing New York's Building Costs*, City Journal, Spring 2022.

[104] *See* Schiciano *supra* note 102.

[105] Motion of Defendants for Post-Trial Relief, *Murray v. Janssen Pharmaceuticals, Inc.,* No. 130401990, 2019 WL 7630393 (Pa. Ct. Comm. Pleas Oct. 17, 2019).

[106] Katie Thomas, *$8 Billion Verdict in Drug Lawsuit Is Reduced to $6.8 Million*, N.Y. Times, Jan. 17, 2020.

[107] Brief of Appellants, *Ingham v. Johnson & Johnson,* No. ED 107476, 2019 WL 4696636, at *18-19 (Mo. Ct. App. Sept. 6, 2019).

[108] Bill Wichert, *High Court Won't Hear J&J Challenge to $2.1B Talc Verdict*, Law360, June 1, 2021.

[109] Hobbs, *Are Megamillion Georgia Verdicts 'Nuclear' or Sign of the Times?*, *supra* (quoting Bobby Shannon, a defense attorney who tries catastrophic injury and death cases around the country, following a $280 million verdict in a trucking case as asking, "How have we gotten to the point ... where a plaintiffs' lawyer feels comfortable asking for almost $400 million?").

[110] *2019 Lawsuit Climate Survey: Ranking the States*, U.S. Chamber Inst. for Legal Reform (Sept. 2019), at 1.

[111] *See generally* Victor E. Schwartz & Christopher E. Appel, *Perspectives on the Future of Tort Damages: The Law Should Reflect Reality*, __ S.C. L. Rev. __ (forthcoming 2022).

[112] *See, e.g.,* Mo. Rev. Stat. § 510.263; N.C. Gen. Stat. § 1D-30; Ohio Rev. Code § 2315.21(B); Tex. Civ. Prac. & Rem. Code § 41.009(a).

[113] H.B. 19 (Tex. 2021); *see also* Jim Sitinson, *Texas Trucking Officials Score Tort Reform Win*, Transport Dive, June 18, 2021.

[114] Ohio Rev. Code § 2315.18(C)(3).

[115] Tort Reform, WestLaw 50 State Statutory Surveys, 0100 SURVEYS 45 (2021); *see also* Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 486 (2d ed.) ("Well over half the states have enacted some kind of cap on damages recoverable.").

[116] Punitive Damages, WestLaw 50 State Statutory Surveys, 0020 SURVEYS 25 (2021).

[117] Victor E. Schwartz & Leah Lorber, *Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages*, 7:12 Briefly (Nat'l Legal Ctr. for the Pub. Int. Dec. 2003).

[118] *See, e.g.,* Fla. Stat. Ann. § 768.73(2).

[119] *Bad for Your Health: Lawsuit Advertising Implications and Solutions*, U.S. Chamber Inst. for Legal Reform (Oct. 2017), at 19-31; *see also* Press Release, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits*, Fed. Trade Comm'n, Sept. 24, 2019 (stating that FTC sent warning letters to law firms and lead generators regarding advertising to solicit personal injury clients that may mislead recipients and endanger public health).

[120] Victor Schwartz & Cary Silverman, *State Crackdown on Deceptive Ads for Drug Suits Is Welcome*, Law360, June 10, 2022.

[121] *See, e.g.,* La. S.B. 383 (2022) (amending La. Rev. Stat. § 37:223 to prohibit deceptive legal services advertisements generally and require disclaimers for certain forms of advertising).

[122] Fed. R. Evid. 702 Comm. Notes on Rules—2000 Amend. (discussing purpose of amended rule to "affirm[] the trial court's role as gatekeeper").

[123] Agenda Book, Committee on Rules of Prac. & Proc., June 7, 2022.

[124] LCJ Applauds Unanimous Approval of Amendment to Rule 702 by the Committee on Rules of Practice and Procedure, Lawyers for Civil Justice, June 7, 2022.

[125] *See generally* David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency,* DRI Ctr. for L. & Pub. Pol'y, Third Party Litigation Funding Working Group (2018).

[126] *See* Wis. Code § 804.01(2)(bg); W. Va. Code Ann. § 46A-6N-6 (consumer lending lawsuits); *see also* Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); Disclosure of Third-Party Litigation Funding, D. N.J. Civ. R. 7.1.1 (June 21, 2021).

[127] *See generally* Mark A. Behrens, Cary Silverman & Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, 44 Am. J. Trial Adv. 321 (2021).

[128] S.B. 1751 (Okla. 2022) (prohibiting any party or counsel from referring to a specific dollar amount, stating a range, or suggesting a mathematical formula for the jury to consider with respect to an award for noneconomic damages); H.B. 2017 (Mo. 2022) (prohibiting any party or attorney from referencing a specific dollar amount or stating a range for the jury to consider for a noneconomic damage award); H.B. 4550 (W. Va. 2022) (providing that in the trial of any civil tort action, no party or counsel for a party shall seek or refer to a specific dollar amount or state a range for the jury to consider with respect to awards of noneconomic damages.).

Notes

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