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UP AND DOWN THE LADDER – THE INTERNATIONAL VIEWPOINT

How does the International Market view U.S. Risk?

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Structured Auto Buffers

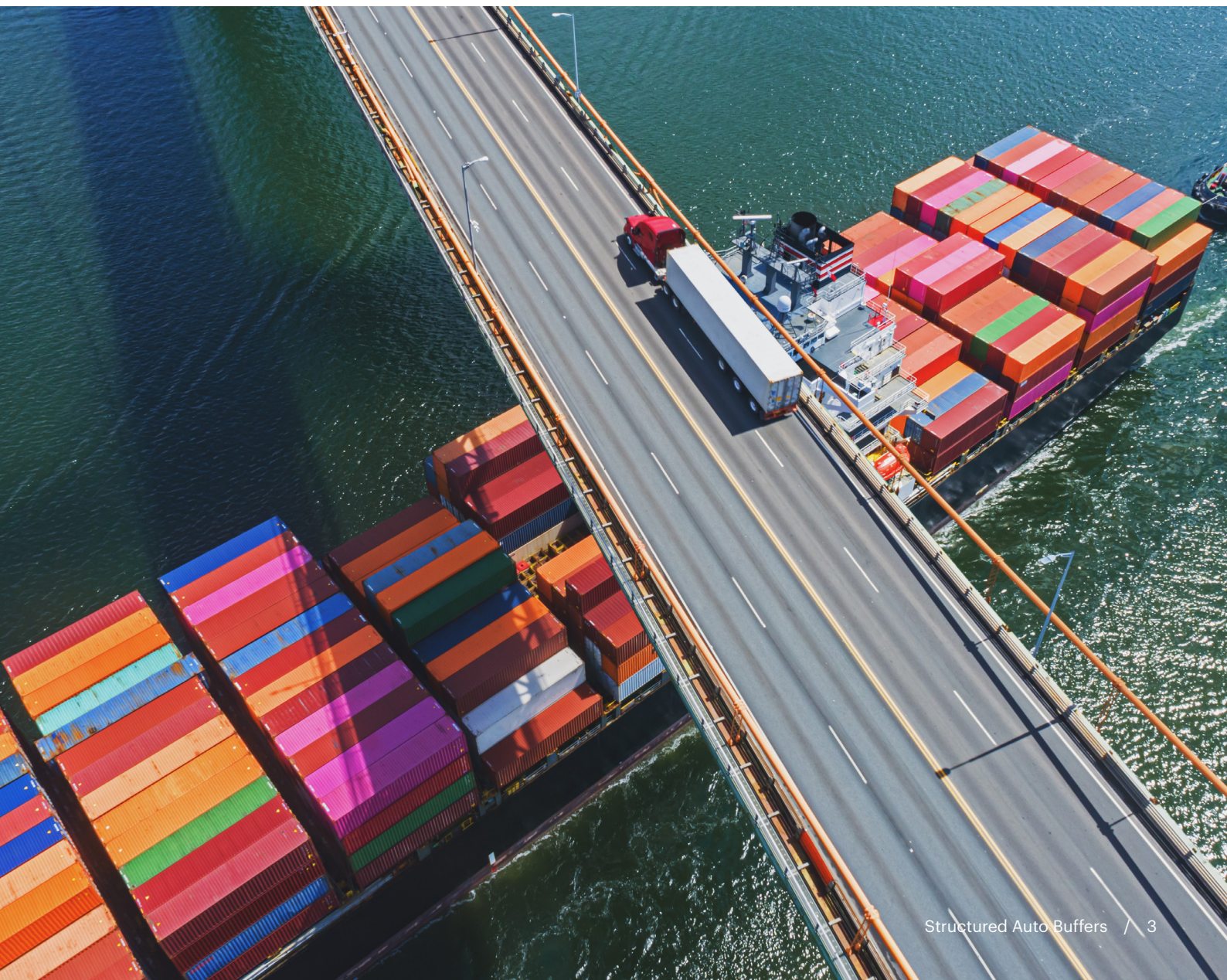
Managing Volatility

London Market Guide 2024



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Why is there a need?

A frequency of 'nuclear' verdicts in the U.S. Auto Liability space has restricted available capacity and forced many Insureds to bear out-sized premiums or to retain more risk.

Structured Auto Buffers, also referred to as Auto Liability "Swing Plans", provide an alternative risk financing solution and reward good risk management practices and loss performance.

01

Nuclear verdicts and large losses

02

U.S. Auto Liability market hardening

03

Pressure on client retentions and umbrella attachments

04

Development of Structured Auto Buffers

\$745m

Young woman killed on sidewalk by driver who huffed nitrous oxide canisters prior to accident.

2023

\$74m

Asphalt company deemed negligent in road repairs after flatbed truck struck a car, killing the mother and injuring the kids inside.

2021

\$730m

Woman ran off road and killed by truck carrying 200,000 pound "Super-Load".

2021

\$180m

Fatigued truck driver hit a passenger vehicle head-on that killed a family of five.

2019

\$411m

Motorcycle rider paralyzed in 45-vehicle pile-up that contained 18 crashes and 8 hospitalizations.

2020

\$1.0bn

Billion-dollar verdict reached in crash that involved two trucking companies that killed college student.

2021

Who can benefit?

Owners / lessors / brokers of **large** or **heavy** fleets across all industries

Insureds that have experienced a **shock loss**

Vehicles: **trucks, buses, concrete mixers, service fleets, etc.**

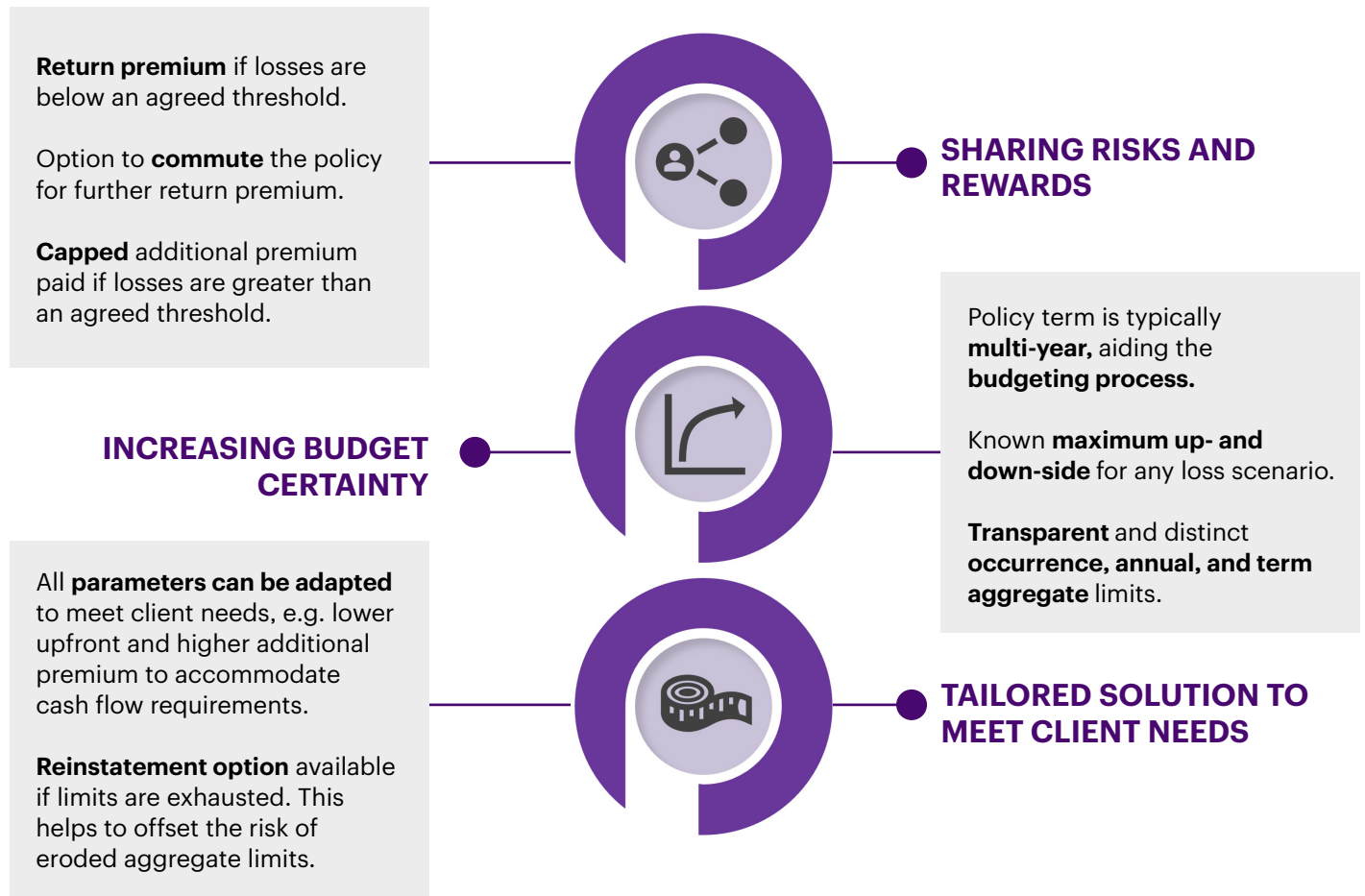
Services: **delivery, distribution, waste haulage, public transport, etc.**

Insureds with **exceptional claims** and **risk management practices**

Organisations with **confidence in their risk management**; those who wish to **share in the rewards of investment in telematics, driver education, etc.**



Key differentiators structured vs traditional



Structured Auto Buffers help clients manage loss volatility and insulate from market rate pressures

When meaningful losses occur, traditional insurance products are prone to sudden correction at annual renewal (higher retentions, significant premium increases, or insurer withdrawal of capacity).

With Structured Auto Buffers, clients have confidence in cover and certainty on pricing over an extended term.



Glossary

- **Additional premium (AP):** Portion of premium paid if layer losses > loss threshold; a pre-agreed % of layer losses.
- **Annual aggregate:** Limit for all losses for each 12-month period of cover.
- **Attachment point:** The point in the tower at which the Structured Auto Buffer layer attaches to the primary or SIR. \$2M+, typically around \$5M.
- **Commutation:** Can be selected by insured for a full release of liabilities and a potentially greater RP (see definition below).
- **Corridor retention:** Self-insured portion of losses within the layer and typically equal to the occurrence aggregate.
- **Loss threshold:** The amount of incurred loss into the insured layer, which triggers additional / return premium. This is set for the term.
- **Deposit premium:** Initiates a policy with adjusted premiums and forms the basis for adjustments. Paid in annual installments.
- **Additional premium cap:** The maximum additional premium payable for the term.
- **Occurrence aggregate:** Limit for a single occurrence.
- **Reinstatement:** Purchase of additional aggregate limit. Premium is pre-agreed at inception.
- **Return premium (RP):** Portion of term premium returned if layer losses < loss threshold.
- **Term premium:** The total premium paid over the term; the yearly installments combined. The total program cost is variable based on loss activity.
- **Term aggregate:** Limit for all losses over the term of cover.
- **Term length:** Can be annual or multi-year. Typically, 3 years.

Why come to the London market?



James Sallada
Head of Casualty
North America

“The current U.S. auto liability market continues to be difficult for many insureds to navigate, despite in many cases investment in good risk management practices. We are thrilled to have launched the first, dedicated structured auto liability solution in the marketplace. Our StABLE (Structured Auto Buffer London Excess) Facility is an innovative risk sharing solution, that addresses concerns around restricted and/or increasingly expensive capacity. The facility is yet another example of WTW’s client focused broking specialization, and it enables our team to quickly offer the broadest available terms, which can be tailored to meet specific balance sheet priorities.”

\$25m

of available capacity for
Structured Auto Buffers

- **Reduced deposit premium as non-ART**
London markets have more flexibility on terms.
- **Market expertise in structured risk;**
Structured Auto Buffers originated in the London Market.
- **Competitive terms (e.g. ‘pay on behalf’ rather than indemnity policies).**
- **Flexibility of coverage type: as well as Auto Liability, Structured Risk Solutions can be expanded to include other Casualty lines and even non-Casualty lines such as Property.**



London markets provide cover for punitive damages within Structured Auto Buffers

10+

**Carriers with appetite for
Structured Auto Buffers**

Where Lloyd’s Markets are selected:

Syndicated offering provides stability in the event of carrier withdrawal.

Streamlined claims handling process due to the Lloyd’s Claims Scheme Leader Arrangement.

Lloyd’s Central Fund for added security.

The placement process



Jon Drummond
Transportation and Logistics
Leader, and Head of Broking,
North America

“As the complexity of casualty risk continues to evolve, our approach to structuring capital needs to change. This unique solution extends leverage to clients and allows them to optimize their capital spend to better control total cost of risk in a highly inflationary environment as respect premium spend and loss costs.”

Stage 1: Building comfort and understanding

Moving from traditional risk transfer to an alternative structure can pose challenges and usually requires an adjustment period to build comfort and understanding.

We have identified **four key factors** to ensure timely understanding of how these layers work in practice: **timing, communication, education, and evaluation:**

Timing

Timely engagement with decision makers

Communication

Regular discussions around program nuances

Education

Debunking common misconceptions

Evaluation

Cash flow and terms and parameters considerations



Stage 2: Placement



Design

Attachment point, limits, deposit, and additional premium



Inception and Deposit

First annual installment which forms the basis of any adjustments



Adjustments

Return or additional premium calculated



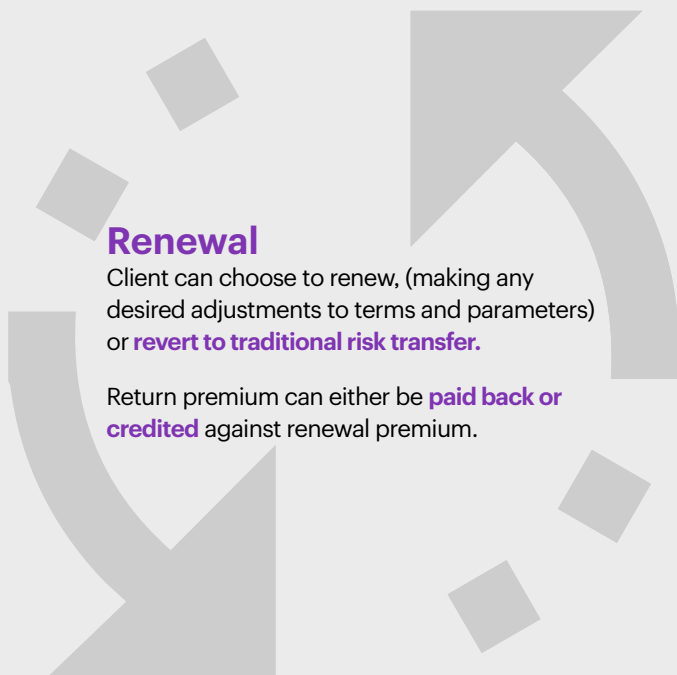
Expiration

Losses closed and final adjustments calculated

Renewal

Client can choose to renew, (making any desired adjustments to terms and parameters) or **revert to traditional risk transfer**.

Return premium can either be **paid back or credited** against renewal premium.



FAQs

Are Structured Auto Buffers more expensive?

They provide certainty of pricing and, depending on loss activity to the layer, can be more cost effective than traditional risk transfer. The maximum additional premium cap allows for budget certainty and smooths volatility in pricing compared to traditional risk transfer. That said, they are a risk sharing mechanism so present downside risk that must be considered.

How are defence costs handled?

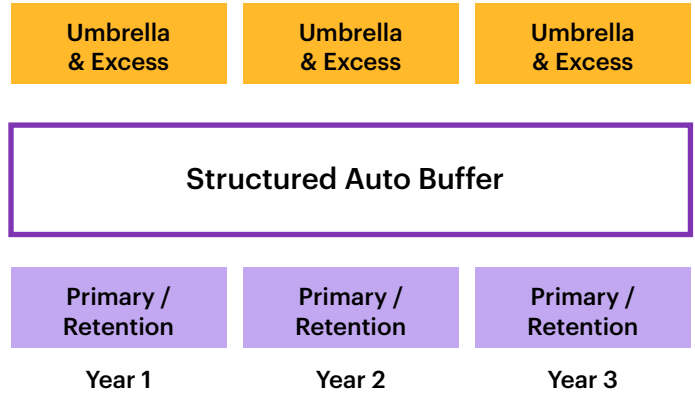
Defence costs are typically included in and erode the policy limits. Treatment of defence costs within the underlying layer/ retention may vary.

Is coverage for punitive damages included?

The London market can offer punitive damages cover included in the price of the structured auto buffer.

Where in the tower does the Structured Auto Buffer sit?

The layer bridges the gap between the primary and the excess layers. As well as Auto Liability, Structured Auto Buffers can also include coverage for General Liability, Employers Liability, and Employee Benefits Liability.



Next steps

WTW London loss scenario modelling tool

Alongside our team of actuaries, our London broking team has developed a tool which can model parameters and loss scenarios for Structured Auto Buffers.

We can feed in your own loss history as well as potential future scenarios to demonstrate the up- and down-sides of these structures. This can aid understanding prior to binding and be used to model losses throughout the program.



Further information

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At WTW (NASDAQ: WTW), we provide data-driven, insight-led solutions in the areas of people, risk and capital. Leveraging the global view and local expertise of our colleagues serving 140 countries and markets, we help you sharpen your strategy, enhance organisational resilience, motivate your workforce and maximise performance. Working shoulder to shoulder with you, we uncover opportunities for sustainable success — and provide perspective that moves you. Learn more at wtwco.com.



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The Honorable Kelli Warren
Chair Senate Judiciary Committee
February 10, 2025
Proponent Testimony SB 54
Phillip Davidson, Hinkle Law Firm

Chair and members of the committee, I am Phillip Davidson and I lead the litigation department at Hinkle Law Firm. I have been practicing law in Kansas since 1990. Throughout my career, I have represented clients in litigation, arbitration, and mediation in more than 30 states, and I have tried numerous civil jury trials, including complex, high-exposure personal injury and wrongful death cases.

The reason I am here today is because I am concerned our processes that have provided Kansans lawful relief are out of balance. I support SB 54 because it maintains the equitable efficiency we all need during the litigation process.

Last summer I participated in a meeting of corporate legal counsel hosted by the Kansas Business Roundtable. We had a dozen in-house general counsels, as well as, executive and legislative leaders who discussed why we need our judicial processes to work well. Kansans, both plaintiffs and defendants, need a fair process to seek legal redress. When the scales of justice become unbalanced, it can be difficult to make changes to return the system to equilibrium. Maintaining this sense of balance means one side of the litigation process cannot lean on the other to the point the process is fundamentally changed, because such a change will negatively affect all Kansans.

It was the view of many of the individuals who participated in the roundtable that we are nearing such an inflection moment with the introduction of third-party litigation funding. From a practical standpoint, third-party funding can have a significant impact on the strategy of both plaintiffs and defendants when it comes to settlement. These issues were discussed at length in an article published in the August 2017 issue of Advocate. The article was authored by Barbara A. Reeves, a mediator and arbitrator that was affiliated at that time, and is included with this testimony.

The article concludes by stating, “A skilled mediator can understand the impact of a third-party funder and can factor that impact into the settlement negotiations – if the mediator is fully informed.” That is what SB 54 seeks to accomplish. At present, a mediator (or opposing counsel) may never know of the presence of a third-party funder. When the issue does arise, it is often at mediation when the party receiving the funding rejects what otherwise appears to be a reasonable offer, or when the funding party actually participates in the mediation and starts exerting its influence in the process.

SB 54 corrects this issue by allowing the parties to learn, through discovery, of the presence of such funding early in the case and certainly well before any settlement conference. This is analogous to the defendants in civil cases being required to identify the insurers who are providing a defense, and disclosing any reservation of rights by the insurers that may affect the plaintiff's ability to collect a judgment. Certainly, plaintiffs' counsel and mediators would say that this information is necessary for them to understand the dynamics at play when trying to resolve a claim or case. The same can be said for disclosure of third-party funding agreements.

This does not mean that this information is admissible at trial – SB 54 specifically addresses this issue – but it allows the parties to be in a better position to resolve cases when they enter into a mediation or other settlement conference. This makes the time and expense related to mediation more effective and serves the purpose of judicial economy, particularly when considering that the vast majority of civil claims resolve prior to trial.

Thank you for the opportunity to support SB 54. Disclosing third party funding allows both parties the opportunity to retain the litigation efficiencies that best serve our processes.



How third-party funders change the chemistry of settlements

HOW THE ADDITION OF A THIRD-PARTY LITIGATION FUNDER AFFECTS BOTH PARTIES' DECISION-MAKING AT MEDIATION

A plaintiff, plaintiff's attorney, a defendant, defendant's attorney and a mediator walk into a mediation room. There is uncertainty, anxiety, stress and anticipation. Decisions must be made under conditions of uncertainty. What will happen at trial? Will we do better settling in mediation or at trial? What shapes our decision-making under conditions of uncertainty? And how are our decisions impacted by the elephant that is not in the room, the plaintiff's third-party funder?

Decision-making in mediation

Economists teach us to use rational-choice theory to maximize utility, based upon dollars and probabilities. The rational economic person will evaluate a case by calculating their likely damages weighted by likelihood of success. Psychologists remind us that people are not always rational economic beings, and our decisions are influenced by a range of psychological drivers that influence people's behavior.

Behavioral psychology uses a decision theory called "prospect theory" when explaining people's decision-making. Developed by cognitive psychologists Daniel Kahneman and Amos Tversky, prospect theory is an empirical theory that describes how people actually make decisions. Kahneman and Tversky formally introduced their theory in an article in 1979, and it has been the topic of scholarly comment since then. Prospect theory assumes that people try to maximize outcomes, but recognizes that people are influenced by psychological biases, optimism, fears and other emotions, and do not decide based strictly on economics and logic.

Prospect theory identifies the following types of behavior when people make risky or uncertain decisions:

- They evaluate decision options relative to some reference point, generally the status quo (if my net worth is \$20,000, I evaluate an option to gain \$10,000 differently than if my net worth is \$200,000.);
- When choosing between options that appear to be gains relative to that reference point, people tend to make risk-averse choices; when choosing between options that appear to be losses, people tend to

make risk-seeking choices (people will generally choose a definite \$1,000 prize over a 50 percent chance at receiving a \$2,000 prize but will opt for a 50 percent chance at having to pay a \$2,000 fine or nothing over having to pay a definite \$1,000 fine);

• Individuals' risk preferences tend to reverse when they are faced with low-probability gains and losses. For example, when choosing between a definite \$50 and a 5 percent chance at winning a \$1,000 prize, individuals tend to make the risk-seeking choice and opt for the gamble. And when choosing between paying a definite \$50 fine and facing a 5 percent chance at having to pay a \$1,000 fine, individuals tend to make the risk-averse choice and opt to make the sure payment.

• Individuals tend to value losses more heavily than gains of the same magnitude. The unhappiness one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount, and in fact, that losses generally loom at least twice as large as equivalent gains.

• Individuals tend to overvalue certainty. For example, most individuals prefer a definite award of \$1,000 over a 50 percent chance at winning \$3,000.

One can test these predictions on oneself by, for example, considering some examples. Which would you choose?

- Get \$900 for sure or a 90 percent chance to get \$1,000?
- Lose \$900 for sure or a 90 percent chance to lose \$1,000?
- Toss a coin, and if heads, you win \$100; if tails, you lose \$100; or a definite \$40?
- Toss a coin, and if heads, you win \$150; if tails, you lose \$100. Would you take this gamble?
- Would a person with a net worth of \$5 million evaluate these options any differently than a person with a net worth of \$20,000?

The crowded mediation room

At the most basic level, the mediation room contains two sides: a plaintiff and a defendant. Examined more closely, there are five players: a plaintiff, a plaintiff's attorney, a defendant, a defendant's attorney and a mediator. Each individual has

different risk tolerances, and starts from his or her own and different reference point.

In mediation, the attorneys and the mediator recognize that the clients generally make risk-averse choices when selecting between options framed as gains and risk-seeking choices when selecting between options framed as losses. If a party views a settlement as a gain, he is more likely to accept it; if he views it as a loss, he is more likely to opt for trial. Thus mediators (and the attorneys if they are interested in bringing about a settlement) emphasize the benefits of receiving a fixed amount of money now, without the risk, delay and stress of continuing to litigate through a long trial. For whatever reason, people are wired to be willing to take risks to avoid losses but are unwilling to take risks to accumulate gains. When faced with a definite loss versus a risk of an even greater loss, we prefer to roll the dice (in the hope of being lucky) and avoiding the loss.

The third-party funder

Add in a third-party funder, and the mediation room becomes much more crowded in terms of different economic and psychological interests, even though, and maybe even because, the third-party funder is not in the room. Lawyers are skilled at analyzing their clients' prospects and risk sensitivity and guiding them through mediation. The focus of this article is how a third-party funder's involvement in the case alters that assessment.

This article takes as a given that prospect theory, or something like it, influences decision-making by litigants and their counsel when deciding whether to accept a settlement or proceed to trial. The question is, does the addition of a third-party funder affect any party's decision-making, and how? Does a third-party funder's involvement alter a party's evaluation of an option that is seen as a gain or as a loss; might it lead to a party not accepting an offer that is a fair or rational settlement? The author has only recently begun to evaluate these theories against the empirical evidence of what happens during mediations she conducts, and is continuing to explore this issue. This article summarizes the author's

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early observations and solicits comments and input from the reader.

Third-party litigation funding: What is it?

First, a brief summary of third-party funding, also referred to as third-party finance or alternative litigation funding. Traditionally, litigation has been funded by a variety of sources: plaintiffs themselves, plaintiffs' attorneys, defendants, defendants' attorneys and insurance companies.

In the past decade, third-party litigation funding has gained public attention, most notably from the news articles surrounding the Hulk Hogan/Gawker litigation, financed by Silicon Valley venture capitalist Peter Thiel. Scholarly articles have been written about efforts to regulate third-party funding, ethical issues for lawyers handling cases funded by third parties and judicial responses to third-party litigation funding.

There are many variations in third-party litigation funding. The industry includes funders that fund individual plaintiffs in consumer litigation and those that fund plaintiffs in larger commercial litigation, as well as entities that provide funding to plaintiffs' law firms for an entire book of business. The contractual arrangements for litigation funding transactions also vary considerably. Some third-party funding companies provide funding of a client's litigation costs in exchange for an agreed share of any recovered proceeds. Some funding agreements may require the client to pay monthly fees to the funder. Some contracts may provide that the money may only be used for litigation expenses, others permit the money to also be used for personal matters such as to void foreclosure, eviction or bankruptcy, as well as for medical procedures.

The industry refers to the transactions as investments, advances, financing or funding, and not as loans, to avoid issues regulating loans, especially consumer loans. If the claim is successful, either in litigation or settlement, the funder receives a portion or percentage of the recovery. If the case proceeds to trial and the litigant loses, the third-party funding company receives nothing, the litigant does not have to repay the money, and the funder loses the money they have invested in the case.

Third-party funding and mediation: ALF and ADR

So what does all this alternative litigation financing have to do with mediation and settlement? (Or what does ALF have to do with ADR?) Answer: the interests in the mediation room just became more complicated.

Objectively, the fact that a plaintiff has been financed by a third-party funder should not change his evaluation of his case, or his judgment as to whether to accept a settlement, assuming an economically rational plaintiff. In other words, if I have a 50 percent chance of prevailing on a claim, I can value my claim and why should it matter whether I am being financed by my credit card, my bank account, or a third-party funder? I want to maximize my recovery, my counsel wants the same, but also has an interest in receiving attorney fees for his work; the defendant wants to eliminate risk at minimum cost, defense counsel wants to protect her client while also keeping an eye on attorney fees; and the mediator wants a settlement.

The author's observations to date disclose that the involvement of a third-party funder has at least the following impacts upon the mediation room:

- The impact of the third-party funder's "endorsement" on the client's already overly optimistic evaluation of his case may cause the client to raise his or her settlement value;
- The "framing" impact of the funder's terms upon the client's reference point may cause an otherwise reasonable settlement to be viewed as a loss rather than as a gain when the funder's fees and compensation are considered;
- The fact that the third-party funder's reference point is different from the client's reference point may cause both the plaintiff and plaintiff's counsel to reconsider their own reference points;
- The presence of a third-party funder may level the playing field in terms of resources between a plaintiff and defendant, if disclosed, making it clear to the defendant that a war of attrition will not work because the plaintiff has more staying power, thus causing the defendant to raise its reference point for settlement.

The interaction of these influences leads to a shifting, or reframing, of the parties' reference points in a way that can

inhibit or encourage settlement. If the mediator is brought into the discussion and informed of the funding arrangement, and if the funder is allowed to "hear" the mediator, the empirical evidence seems to support the proposition that the mediator can work with all the parties to better reach a settlement.

Framing around different reference points

Framing refers to the process we go through to determine whether something appears to be a gain or a loss. If I expect a \$1,000 raise and I receive a \$2,000 raise, I perceive it as a gain. If I expect a \$3,000 raise and I receive a \$2,000 raise, I perceive it as a loss. How I view a settlement depends upon whether I am primed to view it as a gain or a loss.

When parties choose between a certain settlement outcome and an uncertain trial outcome, they likewise evaluate the options as a gain or a loss relative to a reference point. A plaintiff and a defendant come to mediation with their own reference points: the terms at which they each hope the case will settle, their aspirational settlement, and the terms they will accept if they have to, their bottom line settlement. Somewhere among those numbers the mediator tries to find a settlement.

By way of background, Kahneman and Tversky provide the following example. A village of 600 people is affected by a deadly disease. Physicians were asked to choose between two treatments: Vaccine A was 100 percent effective, but there were only 200 doses of the vaccine. Vaccine A would save 200 lives. There were 600 doses of the B vaccine, but it was only one-third effective. Framed that way, 72 percent of physicians preferred the vaccine A treatment. A second group of physicians were told that vaccine A was predicted to result in 400 deaths, whereas vaccine B had a 33 percent chance that no one would die but a 66 percent chance that everyone would die. Framed in this way (400 people will die), only 22 percent of physicians preferred the vaccine A treatment.

Why did the two groups of physicians react so differently to the same set of facts? The answer is in the framing. When faced with the prospect of a definite gain (save 200 lives) the physicians opted for that.

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When framed in terms of a loss (400 people die) the physicians preferred to roll the dice with the uncertain option.

In a mediation, a party's reference point for viewing a settlement as a gain or loss depends upon the party's current financial position, its past financial situation, its current view of the righteousness of its case, and its expectations about the case as it has developed. A third-party funder can influence a party's reference point in several ways, and these influences can cause a party to change his or her view of a settlement from a gain to a loss, or vice versa.

First, the third-party funder has probably impacted the party's case evaluation through an endorsement effect. The third-party funder endorsed my claim by investing in the case, so it must be valuable! My settlement reference point just increased.

Optimistic overconfidence is an impediment to mediation success. This is not difficult to understand. If the parties (and the parties' counsel) have similar evaluations about their likelihood of success, the maximum sum that the defendant is willing to pay in settlement and the minimum that the plaintiff is willing to accept to settle out of court will usually produce a bargaining range within which the case can be settled. This is true even when the parties are, as most humans are, overconfident in their prediction of future events.

However, if one or both parties substantially overestimate their likelihood of prevailing in the litigation, the bargaining range narrows or disappears as each party views litigation more desirable than settlement. A case will not settle if the plaintiff so greatly overestimates the expected value of trial, and/or the defendant so greatly underestimates the expected value of trial, that they eliminate any viable bargaining range.

Second, the third-party funder has its own sunk costs and expectations, and may convey those to the plaintiff or plaintiff's attorney. The third-party funder invested a certain amount with a specific expectation of receiving a good rate of return, and may try to persuade the plaintiff and plaintiff's attorney why the case is worth more than the amount they have as their original reference point. From the third-party funder's point of view, it has already sunk money into the case and a settlement offer that is less than it had anticipated recovering may cause it to prefer to gamble on the trial outcome.

Third, the third-party funder has a claim on the proceeds such that the plaintiff now evaluates a settlement offer as net of not only his attorney fees but also of the amount that the funder will take. If the plaintiff had potential damages of \$1 million, and a 50 percent chance of prevailing, he valued the case at \$500,000, then allowed for attorney fees and costs. Now the funder is entitled to a percentage of the recovery or a flat amount, whether the plaintiff goes to trial or settles. Is that amount in addition to any attorney fees? If the plaintiff has a number such as \$500,000 in mind, minus costs, the funder's payment must be subtracted out and that may bring the amount to the plaintiff below the number he would otherwise have been willing to accept. Suppose the plaintiff decides he will settle for nothing less than \$480,000 (\$500,000 - \$20,000 costs). However, the funder has made advances that now must be added in to the calculation, such that the amount that the plaintiff will accept now must equal his reference point (\$480,000) plus the amount due to the funder. Assume the amount due to the funder is its advances in the amount of \$100,000 plus a specified profit or percentage. (Is that amount more or less than a contingency fee would have been?) As such, the plaintiff views an offer of \$480,000, or even \$500,000 as a loss, given his original reference point and the impact of the amount owed to the third-party funder.

Fourth, the funder is generally an entity with a larger net worth than the plaintiff, and thus likely to view settlement offers from a different perspective. A plaintiff that has a net worth of \$100,000 views a \$500,000 settlement differently than a third-party funder with a net worth of tens of millions of dollars.

On the other hand, the presence of a third-party funder may level the playing field as regards the parties' relative resources, and cause the opposing party defendant to raise its reference point for a settlement. The question is whether any increase in the defendant's reference point will be sufficient to create a bargaining range in light of the plaintiff's increased reference point.

Two mediation examples

In conducting research for this article I asked colleagues to provide examples of

mediations they had conducted in which they knew or suspected that there was a third-party funder involved, without names or other identifying information so as to preserve confidentiality. I've selected two that illustrate several issues in which psychological biases that parties possess and that are obstacles to settlement appear to have been exacerbated in one case and lessened in another, by the actions of a third-party funder.

(1.) A wrongful death/product liability case

Plaintiffs were the wife and children of a 35-year-old construction worker who was killed when a wall fell on him on a construction site. He was employed by the construction company and his family initially was told they would receive only a Workers' Compensation recovery. For that reason, the widow initially had no luck in finding a lawyer to take the case. The widow thought there was something more there. She had heard her husband's co-worker complain that the wall supports were defective. Through a friend, the widow was connected to a plaintiff's firm that had a relationship with a litigation funding company. With the support of the third-party litigation funder, the widow and her attorney were able to afford to investigate and determine that there were viable claims against parties other than the contractor/employer, and brought suit against the manufacturer of the defective component and other sued defendants.

The defendants and their attorneys showed up for mediation, and their bench strength outnumbered plaintiff's. However, she authorized her attorney to disclose to the mediator that they had a third-party funder who had committed enough funding to take the case through all the discovery and motion practice that the defendants could throw at them.

The mediator used that information to move the defendants' settlement reference point to a considerably higher number than they had previously offered, and the matter resolved at a number that provided a fair economic compensation to the widow and her children, as much as economic compensation can be said to compensate for the loss of a husband and father.

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(2) An employment discrimination/whistleblower case

This was a case in which the plaintiff, an engineer, had been terminated from employment after complaining that the products the company was manufacturing did not meet mandated safety standards and posed a serious health hazard to consumers. The company sold products to the government through government contracts, in addition to selling to the general public. The plaintiff, a female, also alleged that after she learned that she had been paid fifteen percent less than her male counterparts, she complained and was retaliated against.

Plaintiff brought a *qui tam* action, and a claim for wrongful termination. The government declined to join the *qui tam* action.

Potential damages, measured by the amounts of the government contracts, exceeded \$100 million, and were subject to trebling. However, the plaintiff had only one other witness in addition to herself to support her *qui tam* case, her expert whose qualifications and credibility had been so badly shredded in deposition that there was a strong likelihood that the judge would exclude the expert. The defendant had a long list of witnesses, including government witnesses, testifying that the products were safe and in compliance with the mandated standards.

In sum, this was a case with high potential damages, but also a high risk of failure.

The defense recognized the financial risk it was facing, and made significant settlement offers, moving from \$5 million to \$15 million. (The defendant was also willing to allocate most of the settlement to the employment claims, as it was in both parties' interest to avoid making a significant payment to the government.) This settlement would have taken care of the plaintiff quite comfortably for the rest of her life, even after accounting for covering attorney fees and costs.

Plaintiff's initial demands were in the very high eight figures, starting at

\$90 million and gradually dropping to \$70 million. Upon receiving substantial offers from the defendant, plaintiff and plaintiff's counsel at first seemed receptive. Then plaintiff's counsel stated: "I have to check with my people." Following a lengthy break, plaintiff's counsel's next statement was that unless the defendant put at least \$30 million on the table as a beginning point, plaintiff would not negotiate further. What had happened? To whom did the plaintiff's counsel talk? At first the mediator assumed that there was another law firm partnering with plaintiff's counsel who had an interest in any settlement proceeds. The mediator explored this hypothesis with the parties in an effort to see what was feasible.

Plaintiff's counsel eventually disclosed to the mediator:

1) Plaintiff had signed a litigation funding agreement with a third-party funder.

2) The litigation funder was quite enthusiastic about the case, and had personally told plaintiff that a jury would love the case and they anticipated a nine-figure verdict if the case went to trial.

3) The litigation funding agreement was structured such that the funder would receive a larger percentage of any recovery (settlement or verdict) below \$30 million than of a settlement or verdict greater than or equal to \$30 million. (Counsel did not share the specific recovery percentages.) The higher percentage payout below a \$30 million recovery made the plaintiff feel as if she would "lose"—lose face, lose value—and thus rather than viewing a settlement of \$15, \$20 or \$25 million as a gain, she viewed \$30 million as a "must have" amount.

4) Plaintiff's reference point, and plaintiff's counsel's reference point, thus moved to \$30 million, and any offer less than that amount was viewed as a loss. Plaintiff's mindset became that the defendant had to offer at least \$30 million or else she was willing to roll the dice, rather than accept what she viewed as a "loss." Accordingly, the parties went to trial.

After a week of trial, the jury rendered a defense verdict.

Conclusion

Third-party funders bring additional economic and psychological interests and influences to the mediation room. Because they are not present, the mediator may be unaware of their existence and may not be assessing their impact upon what appears to be a rational bargaining range. The mediator is also not in a position to discuss settlement with an absent third-party funder, and thus while the parties in the mediation room may reevaluate their case during the mediation session, the third-party funder's evaluation may remain unchanged.

As the above examples illustrate, informing the mediator of the third-party funder early in the process, and, if possible involving the third-party funder in understanding the progression of the mediation, may be determinative of whether a reasonable settlement can be reached. Third-party funders play valuable roles in providing plaintiffs access to justice that they might otherwise not be able to afford, but they bring their own interests with them and their presence can alter the chemistry in the mediation room by impacting the parties' settlement reference points. A skilled mediator can understand the impact of a third-party funder and can factor that impact into the settlement negotiations—if the mediator is fully informed.

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Nuclear Verdicts, Tort Liability, and Legislative Responses

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IMPORTANCE The number and size of punitive damage awards has grown considerably since the 1980s. In 2021, there were 24 jury verdicts awarded in excess of \$100 million. These verdicts totaled \$309 billion. These verdicts can have several adverse effects. For example, they may reduce funds available to companies for safety and mitigation strategies, discourage innovation, lead to greater out-of-pocket insurance and claims costs, or lead to bankruptcy. Additionally, nuclear verdicts could reduce the capacity of the global insurance market.

OBJECTIVES This article brings together insurance and legal studies literature related to tort reform and nuclear verdicts to provide a comprehensive examination of nuclear verdicts. The primary focus is on a discussion of the effects of nuclear verdicts on the insurance industry and actions that are being taken to mitigate nuclear verdicts, including legal strategies and state legislative activity.

FINDINGS There are a number of reasons why nuclear verdicts are becoming more common. In some instances, the very nature of the facts involved in the case (age of the plaintiff, income of the plaintiff, and the extent of damages) can render a verdict more likely to be a nuclear verdict. Other reasons include the venue of where cases are being heard and the plaintiff attorney's utilization of "reptile theory" tactics at trial. Companies can be proactive in trying to mitigate losses and attorneys can use specific tactics during trials to reduce the likelihood of a nuclear verdict. For companies, this can include a focus on safety. For attorneys, this could include specific defense strategies and the use of appeals.

CONCLUSION AND RELEVANCE Businesses can try to prevent losses that could lead to nuclear verdicts. Additionally, attorneys can combat these verdicts through tactics at trial and the appeals process. However, given the scale of this issue, it is likely that state and federal government intervention will be needed. Some states have already taken action to limit damage awards, increase the standard of proof required to receive awards, and allow the use of bifurcated trials. At the federal level, a current bill would require trailers or semi-trailers of a certain size to install rear, side, and front guards in an attempt to reduce the number of underride accidents, one of the causes of nuclear verdicts within the trucking industry. However, since some of this legislation is new and other bills have not yet become law, it may be a few years before the effectiveness of these legislative tactics are evident.

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ABSTRACT

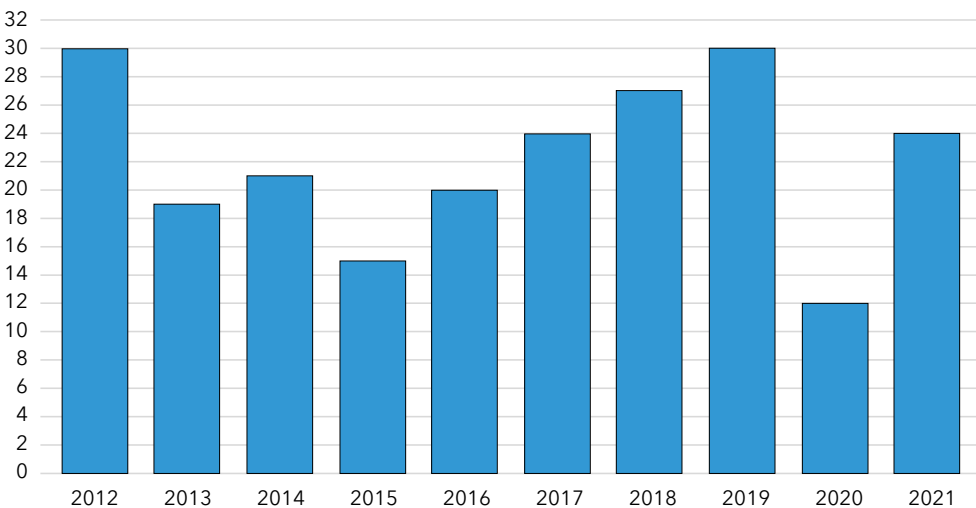
The size of punitive damage awards has grown considerably over the years, giving rise to what has been termed “nuclear verdicts.” Such large dollar verdicts can have several adverse effects on companies, such as limited innovation, high out-of-pocket claims-related expenses, increased insurance premiums, and bankruptcy in severe cases. This article reviews the growth of nuclear verdicts, examines the details of some key cases that have resulted in large damage awards, and identifies some reasons for these verdicts. The impact of nuclear verdicts and the actions that are being taken to mitigate such verdicts, with a focus on legal strategies and state legislative activity, are also discussed.

Introduction

In 2017, two women were killed in a car crash when a driver traveling at over 90 mph ran a red light. The family sued the bar that allegedly served the driver an excessive amount of alcohol. In 2021, a Texas jury awarded the family \$300 billion in punitive damages, one of the largest punitive damage awards in history. While this is an unusually sizeable award and a “largely symbolic settlement” since the bar had gone out of business two years prior to the verdict being rendered (*Texas Jury Awards \$301B Settlement in Suit Against Bar, 2021*), it is just one recent example of a phenomenon, termed “nuclear verdicts,” in which plaintiffs are receiving large awards, in some cases, with punitive damages 300 to 1,700 times compensatory damages (Viscusi, 2004).¹

The number and size of punitive damage awards have grown considerably since the 1980s. An article tracking what it calls “blockbuster” punitive damages awards, defined as punitive damages of at least \$100 million, identifies the first as being awarded in 1985. Between 1985 and 1989, a total of five cases with blockbuster punitive damage awards were identified. During the 1990s, the study identified more than seven times as many (Viscusi, 2004).² The number of large verdict cases, including those with sizeable punitive damage awards, has continued to grow since that time. Between 2012 and 2021, 222 verdicts of \$100 million or more have been awarded. As shown in Figure 1, the number of nuclear verdicts declined between 2012 and 2015, then increased steadily until 2019. While there were only 12 such awards in 2020, there were twice as many in 2021. Figure 2 shows that while the median award has remained somewhat steady during this time, the average award and the total of these awards have varied considerably. Most recently, the 24 jury verdicts awarded in excess of \$100 million totaled \$309 billion, as reported in Table 1. This includes the \$300 billion Texas verdict mentioned earlier.

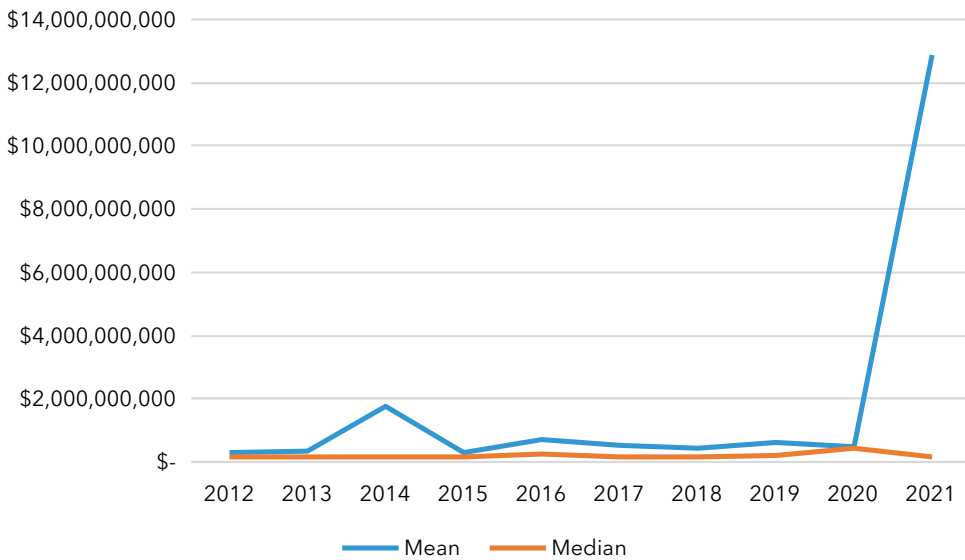
Figure 1: Number of Nuclear Verdicts by Year



Source: Information obtained from <https://topverdict.com/>. Includes all verdicts of \$100 million between 2012 and 2021.

1. A nuclear verdict is defined as a large or exorbitant award based on the specifics of a case, or an award larger than expected. The dollar amount of damages to qualify as a nuclear verdict is generally \$100 million or more.

2. It should be noted that a number of these cases were later settled, or the award amount was later reduced.

Figure 2: Size of Nuclear Verdicts by Year

Source: Information obtained from <https://topverdict.com/>. Includes all verdicts of \$100 million between 2012 and 2021.

Table 1: Nuclear Verdicts Statistics

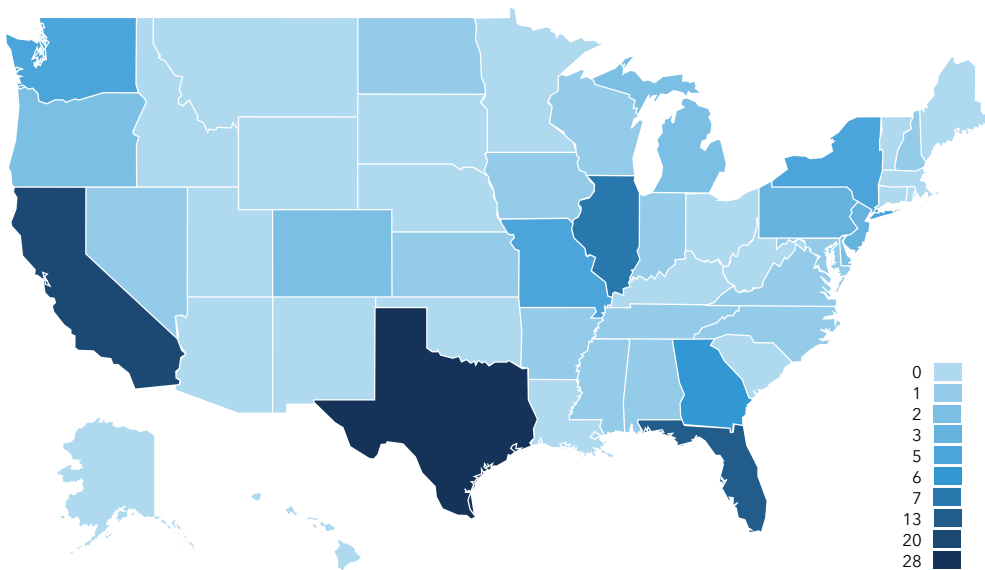
Year	Number	Mean	Median	Minimum	Maximum	Total
2012	30	\$319,000,000	\$159,000,000	\$103,000,000	\$1,170,000,000	\$9,570,000,000
2013	19	\$372,000,000	\$175,000,000	\$100,000,000	\$1,200,000,000	\$7,070,000,000
2014	21	\$1,780,000,000	\$172,000,000	\$100,000,000	\$23,600,000,000	\$37,300,000,000
2015	15	\$285,000,000	\$166,000,000	\$100,000,000	\$845,000,000	\$4,270,000,000
2016	20	\$717,000,000	\$251,000,000	\$109,000,000	\$3,010,000,000	\$14,300,000,000
2017	24	\$530,000,000	\$149,000,000	\$100,000,000	\$8,040,000,000	\$12,700,000,000
2018	27	\$438,000,000	\$176,000,000	\$101,000,000	\$4,690,000,000	\$11,800,000,000
2019	30	\$646,000,000	\$201,000,000	\$101,000,000	\$8,000,000,000	\$19,400,000,000
2020	12	\$466,000,000	\$439,000,000	\$103,000,000	\$1,110,000,000	\$5,590,000,000
2021	24	\$12,900,000,000	\$175,000,000	\$100,000,000	\$301,000,000,000	\$309,000,000,000
Total	222	\$1,940,000,000	\$175,000,000	\$100,000,000	\$301,000,000,000	\$431,000,000,000

While there are legal strategies attorneys can use to lessen nuclear verdicts, another mitigation strategy is to place limitations and/or restrictions on the maximum number of damages that can be awarded and the ability to offset damages awarded to a plaintiff by other sources of recovery, such as insurance. There is a wealth of insurance-related academic research that considers these mitigation strategies, specifically focusing on tort reform. Early research centered primarily on product liability (Warfel, 1991; Warfel, 1993) and medical malpractice insurance (Viscusi et al., 1993; Viscusi & Born, 2005). Though later studies considered automobile insurance (Born, 2017; Heaton, 2017) or took a broader perspective (Launie et al., 1997; Schmit et al., 1997; Lee et al., 1994), the research related to medical malpractice has been the most extensive, largely due

to the repeated crises that have occurred within this industry since the 1970s.³ These studies primarily consider the impact of reform on tort filings and insurer measures, such as incurred losses and premiums.

As noted by Deng and Zanjani (2018), while states began passing tort reform measures during the 1970s, most activity occurred in the 1980s. Academic studies have consistently considered the impact of caps on non-economic damages, caps on punitive damages, limits of defendants' financial responsibility to their share of losses (joint and several liability), and limits on evidence of other sources of recovery (collateral source rule) in examining the impact of tort reform; although, others have also included limits on attorney contingency fees and penalties for frivolous lawsuits and/or defenses. Despite the reform passed in some states, there has been continued growth in nuclear awards, particularly in states such as California, Florida, and Texas, as shown in Figure 3. The number of cases in these states account for more than half of the verdicts in excess of \$100 million occurring between 2017 and 2021 and 75% of total verdicts in 2021, suggesting that this issue may be of greater concern in these states.⁴

Figure 3: Distribution of Nuclear Verdicts



Source: Information obtained from <https://topverdict.com/>. Includes all verdicts of \$100 million between 2017 and 2021.

While nuclear verdicts can include large compensatory damage awards, they typically involve large punitive damage awards. Punitive damages are designed to hold the negligent party responsible and deter such behavior by others, but because these awards vary significantly from case to case and are considered by some to

3. The concern with large dollar awards in medical malpractice cases was the potential impact of the availability and affordability of insurance coverage on the accessibility of specific medical services, particularly specialty services and/or high-risk medical services.

4. These three states are also the only states with multiple verdicts of \$100 million or more in 2021.

be unpredictable, they may not have the intended effect of encouraging safety and mitigation strategies, and they could have an adverse impact. For example, in one of the industries most recently affected by nuclear verdicts, the trucking industry, “large verdicts typically reduce motor carriers’ access to capital otherwise used to invest in safety technologies” by increasing the cost of insurance, which limits “general driver training budgets” (American Transportation Research Institute, 2020). It has also been noted that some companies are reducing excess coverage to manage costs, as these coverages are experiencing rate increases of more than 75% (Brewer & Young, 2021). Other impacts of nuclear verdicts may include discouraging innovation by companies due to potential risks, larger settlement awards, increased insurance rates, changes to insurance programs, and insurance capacity issues (Viscusi, 2004; Willis Towers Watson, May 2020; Willis Towers Watson, November 2020; Willis Towers Watson, 2021).⁵ Additionally, cost and availability may result in a need to explore alternatives to commercial insurance products sold by insurers. Within the professional services industry, companies are turning to the use of captives and other alternative risk transfer techniques to provide excess coverage above what is available or affordable in the primary market (Wright, 2022).

Given the continued growth in the number and size of nuclear verdicts, the shift in the industries affected by nuclear verdicts, and the broadscale impact of nuclear verdicts on businesses and the insurance industry, a study of nuclear verdicts is warranted. This article adds to existing research in this area by bringing together insurance and legal literature related to tort reform and large-dollar awards to provide a comprehensive examination of nuclear verdicts. This includes a review of the growth of nuclear verdicts, a discussion of the details of some key cases that have resulted in large damage awards, and the identification of some reasons for these verdicts. Next, the effects of nuclear verdicts are explored. Finally, actions that are being taken to mitigate nuclear verdicts, including legal strategies and legislative activity, are discussed. This is an important issue, as these verdicts continue to increase in frequency and size and could have lasting impacts on the availability and affordability of insurance and, therefore, the profitability and viability of affected businesses and industries. Ultimately, this could lead to larger economic issues related to the accessibility and cost of goods and services for consumers and the growth of investments in affected businesses. As such, this should be of concern to insurers and consumers, as well as both legislators and state insurance regulators.

Background of Nuclear Verdicts

The contemporary phenomenon of nuclear verdicts has a predecessor in the U.S. Supreme Court case of *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003). The underlying facts of the *State Farm Mut. Auto. Ins. Co.* case arose out of a 1981 automobile liability accident in Utah, in which an insurer allegedly failed to settle a third-party liability claim within the insured’s policy limits of \$50,000. Ultimately, the claimants received a favorable verdict of \$185,849 at trial, well above the \$50,000 policy limits.

5. It should be noted that some of the other key factors affecting insurance rates and capacity include COVID-19 and social inflation.

The insureds later filed a lawsuit against the insurer, alleging claims of bad faith, fraud, and intentional infliction of emotional distress. This lawsuit was bifurcated by the trial court, resulting in one trial on liability and one trial on damages. The first jury found that the insurer's failure to settle the liability claim was unreasonable. A second jury, examining the issue of damages, rendered a verdict award of \$2.6 million in compensatory damages and \$145 million in punitive damages to the insured. Following the second jury verdict, the trial court then reduced the jury's award to \$1 million in compensatory damages and \$25 million in punitive damages. Both parties in the case appealed, and the appeal reached the U.S. Supreme Court. In assessing whether a punitive damages award comports with the due process guarantees of the U.S. Constitution, the U.S. Supreme Court in *State Farm Mut. Auto. Ins. Co.* noted that awards of single-digit multipliers of punitive damages compared to compensatory damages were more likely to meet due process than cases outside of the single-digit multipliers.

Kanasky and Speckart (2020) have contended that the modern phenomenon of the nuclear verdict has an origin in the "runaway jury" trend of the 1990s. They remark that there was a need to quantify the basis of dollar awards for wrongful death cases. Thus, estimates would range widely depending upon the testimony of experts in cases. In some cases, juries would award the higher end of damages in wrongful death cases. However, it should be noted that punitive damage awards are not limited to jury trials. Eisenberg et al. (2002) examined punitive damages cases to determine whether there was a significant difference between the awards granted in jury-tried cases as opposed to judge-tried cases. The authors, analyzing one year of trials, found that judges and juries award punitive damages at approximately the same rate.

In recent years, nuclear verdicts have become more common in premises liability (Rabb, 2021), personal injury (Hyden, 2022), and commercial trucking cases (Moorcraft, 2022). In June 2020, the American Transportation Research Institute (ATRI) released a report, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, which analyzed approximately 600 trucking litigation cases from 2006 to 2021 (American Transportation Research Institute, 2020). According to this report, the size of a verdict award in a trucking case rose by 51.7% each year. Furthermore, the report noted that 26 cases involved verdicts of \$1 million or more in the first five years of the data; however, in the last five years of the data, there were nearly 300 cases that involved verdicts of \$1 million or more.

Recent Nuclear Verdicts

There have been nuclear verdicts awarded in several cases spanning a variety of industries. The awards ultimately received by plaintiffs have varied based on the type of parties involved and applicable comparative negligence laws. This section discusses some recent cases and the final awards received by plaintiffs.

Recent Personal Injury and Premises Liability Nuclear Verdicts

As previously noted, personal injury and premises liability claims have not been immune from the nuclear verdict phenomenon. Two recent examples of nuclear verdicts both occurred in Florida. In *Rodgers v. City of Gainesville D/B/A Gainesville Regional Utilities*

(2021), a 20-year-old passenger in a truck was struck by a Gainesville Regional Utilities vehicle in Alachua County, Florida. The driver of the Gainesville Regional Utilities vehicle failed to observe a stop sign. As a result of the accident, the Plaintiff was left with paraplegia. The Plaintiff was allegedly not wearing a seat belt at the time of the accident, and the truck in which the passenger was seated was allegedly speeding (Crisco, 2021; Erickson, 2021; Swirko, 2021). The jury in the *Rodgers* case awarded \$120 million, including \$114 million in damages for pain and suffering. However, since the verdict was against a municipal subdivision, a sovereign immunity cap of \$200,000 in damages applies, pursuant to the provisions of Fla. Rev. Stat. § 768.28 (Crisco, 2021).

In *Garvin v. Dominion Energy South Carolina Inc.* (2021), the Plaintiff was a municipal lineman who was trained by South Carolina Electric & Gas, a company purchased by Dominion Energy in 2019.⁶ On June 27, 2016, the Plaintiff was electrocuted by a 14,000-volt powerline. The electrocution resulted in the amputation of both of the Plaintiff's arms (Brown, 2021). The Plaintiff's attorney in the case argued that the company did not properly train the Plaintiff regarding the utilization of gloves, as well as protective sleeves covering the arms and shoulders. A South Carolina jury awarded the Plaintiff \$63 million in damages, a figure reduced from \$90 million since the jury found the Plaintiff also 30% at fault and South Carolina recognizes comparative fault principles (Brown, 2021).

Recent Nuclear Verdicts in Trucking Litigation

As noted earlier, the 2020 ATRI report indicated a substantial increase in the number of trucking litigation verdicts over \$1 million in recent years (American Transportation Research Institute, 2020). One example is *Hein v. Utility Trailer Manufacturing Co.* (2019). On Nov. 24, 2015, a 16-year-old driver lost his life in an accident along I-40 in New Mexico. A semi-trailer that moved into the decedent's lane trapped the decedent's vehicle between the trailer and a concrete barrier. The decedent's car was caught underneath the semi-trailer for nearly half a mile and caught on fire (Oswald, 2019).

The estate of the decedent settled with the company employing the driver of the semi-trailer and filed suit against the manufacturer of the semi-trailer. The estate argued that the semi-trailer manufacturer was also at fault for selling a "defective" product since the semi-trailer did not have side underguards (Oswald, 2019). A New Mexico jury awarded \$42 million in damages, and they allocated 45% fault to the semi-trailer manufacturer and 55% liability to the company employing the semi-trailer driver. Thus, the manufacturer was liable for \$18.9 million (Oswald, 2019).

In *Ramsey v. Landstar Ranger Inc. et al.* (2021) a 73-year-old woman was killed in an accident with a truck hauling a propeller for a U.S. Navy submarine that was escorted by a front vehicle and rear vehicle. The truck company settled for \$50 million, and the employer of the front escort driver settled for \$1 million (Gray et al., 2021). During the trial that proceeded against the employer of the rear escort driver, the driver of the front escort vehicle admitted that she drove "recklessly." A Texas jury awarded \$480 million in compensatory damages and \$250 million in punitive damages to the family of the decedent (Gray et al., 2021).

6. This claim was not a workers' compensation claim, as the Plaintiff worked for a municipality, and the tort claim was against the entity that trained him—South Carolina Electric & Gas, now Dominion Energy.

One of the largest nuclear verdicts, more than \$1 billion, was awarded in *Dzion v. AJD Business Services & Kahkashan Carrier* (2021). The case arose out of a Sept. 4, 2017, incident near Yulee, FL, that resulted in the loss of the life of an 18-year-old college student. A truck driver who did not have a commercial driver's license flipped his truck on I-95 while driving distractedly on his cell phone. This incident caused traffic to stall. The decedent's vehicle was struck by another truck that was traveling on cruise control on the highway (Lewin, 2021). In August 2021, a Nassau County, FL, jury awarded \$86 million in compensatory damages against the company of the vehicle that struck the decedent's car. The jury also awarded \$16 million in emotional distress damages and \$900 million in punitive damages against the company employing the driver that caused the stalled traffic (Lewin, 2021).

Reasons for Nuclear Verdicts

A multitude of reasons have converged as to why nuclear verdicts are becoming more common and prominent. In some instances, the very nature of the facts involved in the case—i.e., age of the plaintiff, income of the plaintiff, and the extent of damages—can render a verdict more likely to be nuclear. Other reasons include the venue of where cases are being heard and the plaintiff's attorney's utilization of "reptile theory" tactics at trial.⁷

The Nature of the Facts of the Case

In a personal injury case, a plaintiff may recover compensatory damages. Economic compensatory damages, those damages that can be quantified, include property damage; current lost wages; future lost wages; and past, present, and future medical expenses. Non-economic compensatory damages, those that are nonmonetary, include physical or emotional pain and suffering, loss of consortium, and loss of companionship (Cross & Miller, 2021; American College of Surgeons, 2022). In addition, in some cases, a plaintiff may recover punitive damages. Punitive damages are generally recoverable in cases where a defendant engaged in willful and wanton misconduct (Carbone III, 2014).

Consider this hypothetical scenario that could result in a nuclear verdict. Assume that a 25-year-old woman is seriously injured in a terrible accident involving a commercial truck. Assume further that the commercial trucking company is at fault in the incident, and the woman was working as a nurse making approximately \$100,000 per year. For compensatory damages, assume that the injured party's car was completely totaled in the incident, worth approximately \$40,000. In addition to the property damage, assume that the woman incurred serious injuries, with medical bills of approximately \$500,000, which include bills for the ambulance, hospital stay, necessary surgeries as a direct and proximate result of the incident, and therapy costs.

Also assume *arguendo* that the woman is unable to return to work as a nurse because of the incident. With the nurse's annual salary of approximately \$100,000 per year, and 40 years remaining until the nurse reaches the age of 65, there is approximately \$4 million in damages on a future wage loss claim. Now, a defendant

7. "Reptile theory" is the idea that the plaintiff's attorneys will focus on the actions of the defendant and seek to appeal to the jury's sense of safety. An in-depth discussion of this theory is provided later in the paper.

may proffer evidence to mitigate the wage loss claim with testimony of a vocational rehabilitation expert, who may be able to counteract a plaintiff's evidence of wage loss with testimony establishing that the plaintiff may be employable in other occupations with their education, skills, and experience (Occupational Assessment Services Inc., 2020).

With just the property damage, medical bills, and wage loss claims in this hypothetical case alone, the damages would be more than \$4.5 million. This does not include any claims for pain and suffering, which a jury may or may not grant. If the pain and suffering award doubles the compensatory damages award, at \$9 million, the hypothetical verdict would be more than \$13 million. Note that this scenario does not include any mention of punitive damages.

As demonstrated in this scenario, one of the reasons for large verdicts may relate to the particular facts of the case. In cases involving a plaintiff that is younger, has a higher income, and/or sustains significant medical bills, the likelihood of a nuclear verdict would be higher given the nature of potential damages recoverable.

Another possible reason for the presence of nuclear verdicts is the occurrence of multiple similar losses. For example, in trucking litigation, it is the continued occurrence of "underride" accidents. "Underride" accidents occur when a vehicle collides with a tractor-trailer and becomes embedded under the tractor-trailer. Approximately 500 to 600 individuals in the U.S. die each year in these accidents (Charles, 2022). While the National Highway Traffic Safety Administration (NHTSA) requires tractor-trailers to have rear guards on trailers—Mansfield bars—side underride guards are not mandated (McHugh, 2017).

It is noteworthy that in the *Hein* case, a case in which a nuclear verdict was awarded, the Plaintiff alleged that the trailer manufacturer was liable for selling a "defective" trailer since it did not include side underride guards (Oswald, 2019). The *Hein* case illustrates that plaintiffs may very well utilize a trailer's lack of side underride guards as an argument to hold a trailer manufacturer liable for an incident.

Jurisdiction of State versus Federal Court

Another factor that can affect the size of the verdict and the possibility of a nuclear verdict is whether a case will proceed to trial in state court or federal court. With insurance disputes, it is generally understood that federal court is a more favorable jurisdiction to an insurer than state court (Toutant, 2021). This is not surprising, as juries are selected from a much broader range of individuals in federal court as opposed to state court (Kennerly, 2010; French, 2020). State court judges, as opposed to federal court judges, can sometimes be elected from the same cities and towns in which the plaintiffs reside (French, 2020). In addition, cases in federal court may be more likely to be dismissed at the motion to dismiss stage than in state court (Kennerly, 2010; French, 2020). Research has indicated that insurance coverage cases are much more likely to be resolved prior to trial in federal court as opposed to state court (Watkins, 2015).

So, what determines if a case is heard in state court or federal court? In general, a personal injury lawsuit is often filed within the state where the injury occurs (Wilson, 2017). However, under 28 U.S.C. § 1332 and diversity jurisdiction, a federal court can hear a case originally filed in state court if there is at least \$75,000 in controversy in

the case and there are diverse parties; i.e., plaintiffs and defendants from different states. If a case is originally filed in state court and the elements of diversity jurisdiction are present, pursuant to 28 U.S.C. § 1441, a defendant can move the case from state court to federal court. It should be noted that several of the cases with nuclear verdicts mentioned earlier—the *Rodgers*, *Garvin*, *Ramsey*, and *Dzion* cases—all were cases where the jury delivered a verdict in state court.

Plaintiff Utilization of “Reptile Theory” or “Reptile Tactics”

Several legal commentators have also cited plaintiffs’ counsel utilization of the “reptile theory” or “reptile tactics” as a rationale for the rise in nuclear verdicts (Herbers & Fears, 2021; Katz et al., 2021; Marinakis, 2022). The “reptile theory” has its foundation with neuroscience research in the 1960s, particularly that of Paul MacLean, which focused on the “reptilian” part of the human brain (Sirico Jr., 2017). This theory posits that part of the human brain has its evolutionary origins with reptiles, and this part of the brain focuses on the protection of the individual, family, and community (Sirico Jr., 2017). David Ball and Don Keenan co-authored a book, entitled “Reptile: the 2009 Manual of the Plaintiff’s Revolution,” that extended this theory to the courtroom. Under the reptile theory, a plaintiff’s attorneys will focus on the actions of the defendant and seek to appeal to the jury’s sense of safety (The Reptile Theory, 2020). The attorney will start with an emphasis on safety rules and the violation of safety rules, and then argue that the violation of those rules placed the plaintiff in great danger (The Reptile Theory, 2020).

The “reptile theory” and “reptile tactics” can have the effect of confusing the jury to the benefit of the plaintiff’s attorneys (McCubbin, 2020). With the focus on safety under this theory, jurors can become confused with the proper legal standard to apply; i.e., instead of applying a correct legal standard based on statutory or common law duties during jury deliberation, an improper “safest possible” standard could potentially be applied (McCubbin, 2020; Voss, 2022).

Other Reasons: Stealth Jurors, Tactics at Trial, and Egregious Conduct on the Part of Defendants

Kanasky and Speckart (2020) have cited several other reasons that might account for an increase in nuclear verdicts. One is the phenomenon of the “stealth juror,” where a juror may be skilled in concealing biases against certain defendants and is then motivated by sympathy at trial to award a high amount of damages in a case.

In some cases, a nuclear verdict may be due to the tactics utilized by counsel at trial. Part of a defense attorney’s strategy at trial is often preserving a record on appeal, as objections not made during a trial phase can be waived on appeal (Davis, 2007). Kanasky and Speckart (2020) argue that the emphasis on preserving the appellate record could come with a tradeoff in altering tactics during the trial, with the defense expending less energy trying to “win” the jury. Thus, a nuclear verdict may be more likely to occur.

Finally, Kanasky and Speckart (2020) also note that in some cases, defendants may engage in egregious conduct that causes the jury to award more in damages. Indeed, in several states, defendants may be liable for punitive damages awards in cases of

willful and wanton misconduct (Carbone III, 2014). Kanasky and Speckart (2020) cite cases in which the conduct of a defendant may be “inflammatory.” Thus, juries may wish to “send a message” to that defendant.

The Impact of Nuclear Verdicts

As noted earlier, nuclear verdicts can have several adverse effects. First, these verdicts can directly affect the cost and availability of insurance. Specific to the commercial trucking industry, one of the industries more recently affected by nuclear verdicts, annual insurance payments increased by 22.5% between 2019 and 2020 (American Transportation Research Institute, 2021). Survey results of insurance industry professionals administered by the ATRI indicate that rate increases are across the board, regardless of the safety ratings of the fleets. The fact that insurers and reinsurers “have had to increase recoverables and reserves, as well as ... (are experiencing greater) labor costs associated with research, underwriting and risk management” because of nuclear verdicts, these awards are also affecting rates (American Transportation Research Institute, 2020). Additionally, a Swiss Re Institute report noted a significant increase in the cost of liability insurance in 2020, with some lines, such as directors and officers as well as umbrella coverages, experiencing double-digit increases (Swiss Re Institute, 2021). A later report by Willis Towers Watson (2021) identified several factors that were continuing to drive increases in insurance rates, which included nuclear verdicts. It also indicated that the potential for nuclear verdicts was being factored into pricing.

While evidence related to the impact of the effect of tort reform on premiums is mixed, some studies have found that specific reform measures are negatively associated with insurance premiums. The results of Grace and Leverty (2013) may offer some insight into these mixed results. This study categorizes reform as either temporary (reform later determined to be unconstitutional) or permanent (reform that was either unchallenged or upheld). The results indicate that permanent limitations on non-economic damages are associated with lower insurance premiums. Additionally, a recent study of medical malpractice insurance in North Carolina finds that following the enactment of tort reform related to non-economic damage caps, the premiums for all three types of services examined decreased (Yu & Baker, 2022). There is also evidence that states that have taken action to manage nuclear verdicts by placing caps on non-economic damages have fewer insurers exiting the state (Lei & Browne, 2008). Greater competition within the state can lead to greater availability of coverage and more affordable pricing.

Through its impact on insurance, nuclear verdicts can also affect how companies operate. For example, the creation of new products can lead to growth and expansion for businesses. This could not only benefit companies but also generate job opportunities and provide goods and services wanted or needed by consumers. However, in the presence of high nuclear verdicts, companies may forgo product innovation due to the potential risks. These verdicts could also affect the cost of goods and services. Additionally, a recent report by Willis Towers Watson (2021) noted that nuclear verdicts can lead to excess out-of-pocket expenses for companies that can reduce funds available for other purposes, such as safety and/or other risk mitigation techniques,

or, in more severe cases, lead to bankruptcy. Nuclear verdicts have been specifically cited as the cause of bankruptcy for several small trucking companies (American Transportation Research Institute, 2020; Hawes, 2022).

Nuclear verdicts have also been cited as reasons for larger settlement awards. It is estimated that a large percentage of cases are settled before trial, and other cases are settled after the verdict is rendered but before damages are awarded. Called the “shadow effect,” it is possible that nuclear verdicts are used by plaintiffs in the negotiation of settlements; specifically, the fear of a nuclear verdict may lead potential defendants to agree to larger settlements. In a recent interview, an attorney indicated that if a claim involved a loss that had a high probability of resulting in a large verdict, “settlement (or another form of alternative dispute resolution) needs to be strongly considered” (Smith, 2021). While there is not much academic research in this area, Koenig (1998) reviews research on punitive damage awards that focus on four states considered judicial “hot spots”: Florida, California, Alabama, and Texas. The author finds that some of the studies in Alabama, California, and Texas did find evidence that large punitive damage awards affect settlements.

Finally, nuclear verdicts have led to reductions in insurance capacity and changes to insurance programs. For example, global casualty insurance capacity was \$2.2 billion in 2018. By 2020, this had dropped to \$1.4 billion. This decrease was related to the reductions in the availability of certain types of coverages within the U.S. “because of the volatile nature of the U.S. litigation environment” (Willis Towers Watson, November 2020). Insurers are also making changes to insurance programs, taking such actions as reducing the limits of liability for some coverages and increasing attachment points for excess insurance and/or reinsurance (Willis Towers Watson, November 2020; Wright, 2022).

Mitigation of Nuclear Verdicts

There are a variety of actions that can be taken by companies prior to a loss and attorneys during trials to reduce the likelihood of a nuclear verdict. For companies, this can include a focus on safety. For attorneys, this could include specific defense strategies and the use of appeals. Finally, state and federal actions can also be effective in mitigating nuclear verdicts. In the past two years, state legislators in Texas and Iowa have introduced proposals intended to reduce the nuclear verdict phenomena, and the continued occurrence of override accidents in commercial trucking accidents has garnered congressional attention at the federal level. This section provides a discussion of some of these mitigation strategies.

The Use of Defense Strategies and the Appeal Process

One possible defense that companies may have in a liability case is that of comparative fault. With the comparative fault defense, the fault of the plaintiff is also assessed by the jury (Sobelsohn, 1985). Several jurisdictions utilize the “modified comparative fault” rule, in which a plaintiff is completely barred from recovery if they are 50% or more negligent (Sobelsohn, 1985). The plaintiff is able to recover if their negligence is below 50%, but their recovery would be reduced by the percentage of their own

fault (Sobelsohn, 1985). An example of this in a nuclear verdict situation would be found in the Garvin case, in which the jury reduced the Plaintiff's recovery by 30%.

Defense counsels have suggested several tactics that could reduce the effect of the "reptile theory," including filing a motion in limine to limit the utilization of questions premised on the reptile theory that may inflame a jury (Katz et al., 2021). In addition, an attorney focusing on the complexity and nuance of a particular case may counteract the theory along with a focus on testimony that safety rules are not absolute and are based upon multiple factors (Marinakakis, 2022). As it relates to the "stealth juror," Kanasky and Speckart (2020) suggest that defense attorneys utilize a supplemental jury questionnaire during jury selection to seek to identify jurors who may be of the "stealth" variety.

In addition, as discussed in McAlister (2006), offers to confess judgment may help a defendant avoid a nuclear verdict by promoting the settlement of a case instead of proceeding to trial. In many states, a defendant can send an offer to confess to the plaintiff during the litigation. If the plaintiff fails to recover an amount at trial that exceeds the offer to confess, the plaintiff is then required to pay the defendant's costs from the date of the offer until trial. Some states even allow for the recovery of attorney's fees as well.

An appeal may also be an option for a defendant if a jury returns a nuclear verdict. However, the chance of successfully reversing a verdict in a civil case is less than 15% (United States Courts, 2016). In recent years, appeals have yielded mixed results for defendants. In *Denton v. Universal Am-Can Ltd.* (2019), the Illinois Court of Appeals upheld a verdict of compensatory damages of \$19,155,900 and punitive damages of \$35 million against a trucking company after a trucking accident. The driver of the trucking company involved in the case was convicted of nine traffic-related offenses within a period of seven years prior to applying for a job with the trucking company. Despite the driver being ineligible to work for the company under its safety standards, it was noted that the company hired the driver anyway. The Illinois Court of Appeals upheld the verdict and did not find the punitive damages award to be excessive.

However, an opposite result in an appeal occurred in *Zander et al. v. Morsette* (2021). The underlying facts of the *Zander et al.* case involved a motor vehicle accident in which the Plaintiffs were injured by a motorist driving on the wrong side of the highway in North Dakota. Two of the three motorists in the other vehicle were killed, and the other was seriously injured. The motorist at fault had a blood alcohol concentration of 0.295 at the time of the collision. The jury at trial awarded the plaintiffs \$242 million in compensatory damages and \$885 million in punitive damages, for a total verdict of more than \$1 billion. On appeal, the North Dakota Supreme Court reversed the jury verdict in the *Zander et al.* case, as the defendant had admitted liability in the case; thus, intoxication was not relevant to the Plaintiff's damages. In addition, the North Dakota Supreme Court in the *Zander et al.* case noted that the Plaintiffs did not produce evidence supporting a finding of actual malice on the part of the at-fault driver, which is necessary for a punitive damages claim in North Dakota. Thus, the North Dakota Supreme Court remanded the case for a new trial on compensatory damages.

State and Federal Legislative Activity

Deng and Zanjani (2018) find evidence of a connection between state tort reform and litigation activity in the state; i.e., states with greater liability losses, more lawyers, and more lawsuits initiated the adoption of tort reform faster than other states. There is also empirical evidence that some tort reform, particularly reform that limits damages, can lead to lower liability losses for insurers and lower costs of services for consumers (Viscusi & Born, 2005; Born et al., 2009; Born & Neale, 2014; Yu & Baker, 2022). Other studies find that tort reform reduces claims filed, reserve volatility, and the likelihood of a crisis in the state (Schmit et al., 1997; Born et al., 2019; Born et al., 2020). As a result, it is not surprising that, over the years, legislatures in all states have passed some bills related to tort reform that would limit award amounts, increase the standard of proof required to receive awards, and allow the use of bifurcated trials (Greene et al., 2001).

Since the primary focus of this article is nuclear verdicts, we will focus our discussion primarily on laws that limit damages. A summary of the general provisions of the laws of these states is provided in the Appendix. In 17 states, punitive damages are limited to some dollar amount or a ratio of compensatory damages, whichever is greater.⁸ The most common dollar limit is \$500,000; although, these limits are as low as \$50,000 (in Indiana). The most common ratio used is 3:1; however, two states, Missouri and New Jersey, use a ratio of 5:1, with dollar limits of \$500,000 and \$350,000, respectively. Three states limit punitive awards based on the income or net worth of the defendant. For example, in Kansas, a plaintiff can recover the lesser of \$5 million or the highest gross income earned by the defendant in the past five years. In Mississippi, the cap is scaled based on the defendant's net worth. For example, if the defendant's net worth is \$50 million or less, the plaintiff can recover 2% of the defendant's net worth. Finally, in Montana, punitive damages are limited to the lesser of \$10 million or 3% of the defendant's net worth.

A handful of states have narrow or very specific provisions. For instance, in Connecticut, punitive damages can only be awarded in cases involving product liability. In Oregon, plaintiffs cannot recover punitive damages from health care providers unless the provider acted with malice. In Rhode Island, punitive damages cannot be recovered in cases that involve wrongful death actions. Other states have exceptions to caps, or situations in which either a higher cap or no cap applies. Examples of such situations include cases involving wrongful death, product liability, bad faith, defamation, felonies, and class actions. Punitive damage caps also do not apply in some states when the defendant exhibits behavior or actions such as:

- Conduct motivated by financial gain/unreasonable financial gain.
- Intent to cause harm/engage in willful and wanton behavior/act intentionally and with malice.
- Actions/inactions related to alcohol or drugs.

While the focus of the above discussion relates to punitive damages, a handful of states also cap compensatory damages.⁹ This information is summarized in the last column of

8. Oklahoma uses a dollar limit and a ratio of 1:1; however, damages are limited to the lesser of these two.

9. General information regarding limitations is discussed here. See table for details and/or conditions related to the limitations.

the table in the Appendix. As outlined in the table, Arkansas, Colorado, Hawaii, Idaho, Maine, Mississippi, Ohio, and Tennessee all limit non-economic damages. California, Florida, Indiana, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin all limit non-economic damages in medical malpractice cases. Finally, Maryland limits non-economic damages only in wrongful death cases.

It is interesting to note that of the three states accounting for most of the nuclear verdicts, California has no cap on punitive damages, while Florida has one of the larger caps. Texas has one of the lower caps, at \$200,000 or greater than twice the economic damages. All states limit non-economic damages, but only for medical malpractice/health care liability claims. Table 2 summarizes the top 10 types of losses resulting in nuclear verdicts. Medical malpractice is ranked seventh on the list with a total of six verdicts. The top three causes are intellectual property infringement, breach of contract, and personal injury.¹⁰ This suggests that the type of action may be such that the awards are not subject to the limitations imposed by the state statutes.

Table 2: Top 10 Types of Losses for Nuclear Verdicts

Type of Loss	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
Intellectual Property Infringement				3	2	1	4	5	6	6	27
Breach of Contract	2	1	4	2	3	4	3	2		3	24
Personal Injury			3	6	5	2		2			18
Intellectual Property	8	3	6								17
Car Accident						2	4	4		3	13
Failure to Warn						2	1	2		2	7
Medical Malpractice	5	1									6
Breach of Fiduciary Duty	2		1	1						1	5
Business Liability						1				4	5
Wrongful Death			3		2						5

Source: Information obtained from <https://topverdict.com/>. Includes all verdicts of \$100 million between 2012 and 2021. It should be noted in later years, multiple types are often listed for each case. Type used in summary information presented here is based on first type listed.

Examining these states in particular, Texas is the state that has the plurality of nuclear verdicts between 2017 and 2021, as shown in Figure 3. However, in a paradox, Texas also has a lower cap on punitive damages. For decades, until 1995, punitive damages were recoverable without any caps in Texas, and such damages were recoverable in cases as varied as those involving fraud, breach of fiduciary duty, and breach of contract cases involving a willful tort. In addition, punitive damages could be imposed in cases where a jury found gross negligence (Demarest, 1987).

10. It should be noted that in later years, multiple causes were listed for each case. A search of terms finds 27 instances of "truck accident." These cases also commonly list other causes, including car accident, motor vehicle accident, and personal injury. Additionally, truck accident is never the first cause listed. Regardless, this provides some additional evidence that the trucking industry is being adversely affected by nuclear verdicts.

In 1995, Texas enacted tort reforms, which changed the landscape on the recovery of punitive damages in the state. First, the reforms implemented a cap on punitive damages; i.e., twice the amount of economic damages. In addition, the reforms eliminated gross negligence as a basis for recovery of punitive damages, instead allowing punitive damages in cases of fraud, malice, or a wrongful death resulting from a “willful act or omission” or “gross neglect” (Barrick, 1995). These reforms were further extended in 2003, and punitive damages awards in Texas now require unanimous juries (Miller, 2003).

In the past decade, there has been an increasing prevalence of larger verdicts against trucking companies in Texas (Zalud, 2021). Within the past two years, the Texas Legislature enacted H.B. 19, which allows bifurcated trials in cases involving commercial motor vehicles. In the first trial, liability and compensatory damages are decided; in the second trial, punitive damages are decided. The law became effective on Sept. 1, 2021, so it may be some time before we know its impact, but proponents expect that it will diminish the impact of the “reptile theory” tactics.

Limitations on damages is an area in which reform is ongoing. It is likely that states that do not currently have any restrictions may propose bills similar to the existing laws in the states discussed in this section if nuclear verdicts increase in their state. The report completed by the ATRI (2020), finds that in California, Georgia, Illinois, Kansas, Missouri, Nebraska, New York, North Carolina, Oregon, Pennsylvania, Virginia, and Wyoming, more than 90% of the verdicts were in favor of the plaintiffs. This may be evidence that some jurisdictions are more favorable to plaintiffs than others, and limitations on damage awards in these states would have a more significant impact on the number of nuclear verdicts than similar legislation in other states (Hess et al., 2012; Evans & Leslie, 2021). Though not on the list of top states affected by nuclear verdicts, limitations on damages awards in trucking cases may soon be implemented in Iowa. There is a bill before the Iowa Legislature, S.F. 228, which would place a cap of \$2 million on the recovery of pain and suffering (non-economic) damages in commercial vehicle accident cases. In addition, trucking companies could not be sued for the negligent hiring, training, or supervision of a driver involved in an accident. It has passed through the Iowa Senate (Gruber-Miller, 2023). Interestingly, not discussed in any recent legislation throughout the country is the imposition of a unanimous jury requirement for the imposition of large damage awards over a certain number, similar to what Texas requires for punitive damages awards.

There is a variety of research related to the impact of limitations on damages. Studies have generally found that limitations on damages are associated with fewer claims filings and lower insurer-incurred losses (Viscusi & Born, 2005; Schmit et al., 1997; Born et al., 2009). Focusing specifically on medical malpractice insurers, Born and Neale (2014) explore the size of the cap by placing states into categories based on the limit: 1) \$250,000 cap on non-economic damages; 2) \$251,000 to \$500,000 cap on non-economic or total damages; 3) \$501,000 to \$1,000,000 cap on non-economic or total damages; 4) other damage cap reform; and 5) no cap on non-economic damages. The study finds that only the lowest cap level affects insurer-incurred losses and loss ratios. Collectively, the results of these studies suggest that caps on punitive damages could reduce compensatory damages and, therefore, the total damages

awarded. However, the effectiveness of this tort reform measure may depend on the specific cap selected. It should be noted that studies have also shown that in the absence of the ability to provide punitive damage awards, juries increase the amount of compensatory damages (Robbennolt & Studebaker, 1999; Anderson & MacCoun, 1999; Greene et al., 2001). If this is the case, then limiting punitive damages may just lead to juries shifting dollars that would have been awarded in punitive damages to the category of compensatory damages.¹¹

While placing limitations on punitive damage awards may have some impact on the number of nuclear verdicts, this alone may not be an effective tool. Another option adopted by several states is to increase the standard of proof required to receive punitive damages. In almost all these states, while a "preponderance of evidence" is required to receive compensatory damages, which is an easier standard to meet, to receive punitive damages, plaintiffs must meet a higher burden of "clear and convincing evidence" (Hurd & Zollers, 1994). However, there can be concern as to whether jurors understand the differences in the standards. Additionally, a study finds that the standard of proof "had relatively little impact" on the decision of the mock jurors to award punitive damages (Woody & Greene, 2012).

As described in the discussion of *State Farm Mut. Auto. Ins. Co.*, bifurcated trials are trials that separate the liability decision and the decision on the amount of damages to award; i.e., the compensatory and punitive damages decisions. While there can be several reasons for doing so, as it relates to punitive damages, the purpose would be to prevent prejudicing the jury or having them influenced by the wealth of the plaintiff. This distinction is important because while compensatory damages should factor in the wealth of the plaintiff as it considers factors such as lost wages and loss of earning potential, punitive damages are intended to serve the purpose of holding the negligent party responsible and deterring others from engaging in similar behavior. As such, the punitive award is related more to the actions of the defendant than the financial position of the plaintiff.

Empirical evidence suggests that there are benefits to bifurcation. Greene et al. (2000) find that while evidence related to punitive damages did not affect the mock jurors' decisions related to compensatory damages, there did appear to be some correlation between the defendants' wealth and jurors' decisions related to punitive damages. There are few states that allow or require bifurcated trials, and the bifurcation is related to specific instances. For example, for medical malpractice cases, Missouri requires the use of bifurcated trials when punitive damages are involved, and Arkansas, New Jersey, and Ohio allow bifurcated trials if requested. Finally, in states such as Connecticut, Florida, and New York, the court or judge can order bifurcation. Also, as discussed earlier, Texas now allows for bifurcated trials in cases involving commercial motor vehicles.

Finally, studies have also explored the impact of a variety of other reform measures, including joint and several liability reforms, collateral source rule reforms, attorney contingency fees, and penalties for frivolous lawsuits and/or defenses. Viscusi et al. (1993) find that joint and several liability is associated with lower premiums; although,

11. Some studies also control for the "egregiousness" of the defendant's actions and find that the actions do not affect the level of compensatory damages when punitive damages can be awarded.

Schmit et al. (1997) and Born et al. (2009) find that this reform measure is positively associated with claims filings and reported losses. Lee et al. (1994) find that the impact of this reform on claims filings varied depending on the extent of the reform, with this reform having no impact in states that completely abolished joint and several liability in comparison to those that modified it. Older studies considering the collateral source rule generally found that reform in this area has little to no impact on insurers. More recent studies, including Grace and Leverty (2013), Born and Neale (2014), and Heaton (2017) generally find some evidence that collateral source rule reform is associated with lower losses and premiums. Additionally, Schmit et al. (1997) find that reform related to frivolous lawsuits and/or defenses is negatively associated with tort filings, while Born (2017) finds that the impact of this type of reform differs when considering automobile coverage type. The lack of consistent findings on the effectiveness of these provisions may be due to variations in the specific types of businesses examined, the time period, and how the reform is measured. As such, additional empirical research related to these provisions may be warranted.

At the federal level, the recent focus has been on specific areas of growing concern, such as the trucking industry.¹² For example, the continued incidence of underride accidents has garnered congressional attention. U.S. Sen. Marco Rubio (R-FL), U.S. Sen. Kirsten Gillibrand (D-NY), and U.S. Sen. Richard Burr (R-NC) re-introduced the Stop Underrides Act (S. 1605) in the U.S. Senate during the 117th Congress (Rubio, 2021). The Stop Underrides Act would require trailers or semi-trailers to install rear, side, and front underride guards if the trailer or semi-trailer's gross vehicle weight rating is 10,000 pounds or more (Rubio, 2021). Companion legislation was introduced in the U.S. House of Representatives (H.R. 1622) by U.S. Rep. Steve Cohen (D-TN) and U.S. Rep. Mark DeSaulnier (D-CA) (Cohen, 2021). While this does not limit damages, to the extent that this increased safety requirement reduces the number of underride accidents, it may also reduce the number of nuclear verdicts in trucking-related cases.

Conclusion

Since the 1980s, the number and size of nuclear verdicts have continued to rise. Prior to this time, awards in excess of \$1 million were rare. Today, multi-million-dollar awards are more common, with some awards reaching the billions. While there can be rational reasons for nuclear verdicts, such as the willful and wanton misconduct of a defendant and/or the severity of the injuries sustained by a plaintiff, some of these verdicts may be due to factors such as the trial venue and the tactics used by plaintiff attorneys.

Attorneys can combat these verdicts through tactics used at trial and the use of the appeals process. However, given the scope of this issue, state and federal government intervention may be needed. Some states have already taken actions, which have included limiting damage awards, increasing the standard of proof required to receive

12. It should be noted that some existing federal laws already place some restrictions on punitive damage awards in particular cases. For example, Title VII of the Civil Rights Act requires specific conditions to be met for a plaintiff to receive a punitive damage award, and the dollar amount is limited depending on the size of the employer. Another example of a federal statute that bars recovery of punitive damages entirely is the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302. The DOHSA is a federal statute that allows for civil actions in cases involving the death of an individual due to the wrongful act, neglect, or default of a vessel while on the high seas.

awards, and allowing the use of bifurcated trials. At the federal level, a current bill would require trailers or semi-trailers of a certain size to install rear, side, and front guards to reduce the number of underride accidents, which is one of the causes of nuclear verdicts within the trucking industry. Some of this legislation is new, and other bills have not yet become law, so it may be a few years before the effectiveness of these legislative tactics is evident.

Nuclear verdicts can have several adverse effects on businesses, both directly and indirectly. In a recent report, the NAIC/Center for Insurance Policy and Research (CIPR) Research Library (Center for Insurance Policy and Research, 2023) cites nuclear verdicts as one of the drivers of social inflation, noting that nuclear verdicts have grown from being primarily related to medical malpractice claims to other liability insurance, including commercial auto, private passenger auto (PPA), directors and officers, and errors and omission. The report further states that social inflation, or larger claims costs and loss ratios, can ultimately lead to “insurers raising the costs of premiums to the point where insurance may become unaffordable for businesses or consumers” (Center for Insurance Policy and Research, 2023). Additionally, companies in a variety of industries may be forced to forgo growth opportunities or safety mitigation efforts due to potential risks and greater out-of-pocket insurance and claims expenses; or in extreme cases, nuclear verdicts may lead to bankruptcy. Finally, these verdicts have affected the cost and availability of insurance on a global basis. Given the widescale potential impact on businesses and consumers, understanding the cause of nuclear verdicts, monitoring the trends in nuclear verdicts in terms of affected lines of insurance, and regularly examining the effectiveness of existing legislation will be key in developing strategies to mitigate the growth in nuclear verdicts.

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Appendix

Table: Damage Caps by State

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
Alabama	Ala. Code § 6-11-21	Greater of 3:1 or \$500,000	Does not apply to wrongful death actions	None
Alaska	Alaska Stat. Ann. § 9.17.010 and Alaska Stat. Ann. § 9.17.020	Greater of 3:1 or \$500,000	If defendant's conduct was motivated by financial gain, then the punitive damages cap does not exceed the greatest of: 1) four times the amount of compensatory damages; 2) four times the amount of aggregate amount of financial gain the defendant received as a result of the defendant's misconduct; or 3) \$7,000,000	\$400,000 or the person's life expectancy in years multiplied by \$8,000, whichever is greater. In cases involving severe permanent physical impairment or severe disfigurement, the cap is \$1,000,000 or the person's life expectancy in years multiplied by \$25,000, whichever is greater.
Arizona	None	None	There are no punitive damages caps in Arizona; however, per Arizona Rev. Stat. § 12-820.04 neither public employees acting within the scope of employment nor public entities can be liable for punitive damages.	None
Arkansas	Caps were found in Ark. Code Ann. § 16-55-208(a)(1)-(2) - found unconstitutional	The punitive damages cap in Arkansas was held unconstitutional in <i>Bayer CropScience LP v. Schafer</i> , 385 S.W. 3d 822 (Ark. 2011)	N/A	None
California	None	None	N/A	None; however, per Cal. Civ. Code § 3333.2 non-economic damages in medical malpractice cases are capped at \$250,000.

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
Colorado	Colo. Rev. Stat. Ann. § 13-21-102	1:1	Can be increased to up to three times actual damages in cases involving willful and wanton behavior.	The cap on non-economic damages was originally set at \$250,000 and \$500,000 in cases involving clear and convincing justification for the higher cap. The caps have been adjusted every two years for inflation.
Connecticut	Conn. Gen. Stat. Ann. § 52-240b (product liability only)	2:1	Connecticut allows recovery of punitive damages in product liability cases.	None
Delaware	None	None	N/A	None
District of Columbia	None	None	N/A	None
Florida	Fla. Stat. Ann. § 768.73	3:1 or \$500,000, whichever is greater.	If the wrongful conduct was motivated by unreasonable financial gain, the cap is the greater of four times the amount of compensatory damages or \$2 million. If the defendant had the specific intent to harm the claimant, then no punitive damages cap applies.	Per Florida Stat. Ann. § 766.118, Florida has a cap of \$500,000 for non-economic damages for medical practitioners in medical malpractice actions. If negligence results in a permanent vegetative state of the claimant or death, the cap is \$1 million.
Georgia	Ga. Code Ann. § 51-12-5.1(g)	\$250,000	There are no caps in cases involving product liability, cases where there is specific intent to cause harm, or in cases involving actions or inactions due to the influence of alcohol or drugs.	In the case of Atlanta Oculoplastic Surgery P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010), the Georgia Supreme Court ruled that caps on non-economic damages in medical malpractice actions are unconstitutional.
Hawaii	None	None	N/A	Per Haw. Rev. Stat. § 663-8.7, damages recoverable for pain and suffering are limited to \$375,000.

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
Idaho	Idaho Code Ann. § 6-1604	Greater of 3:1 or \$250,000	N/A	Per Idaho Code Ann. § 6-1603, non-economic damages were capped at \$250,000 in 2004; since that year, the cap increases or decreases pursuant to the amount of increase or decrease by which the Idaho Industrial Commission adjusts the annual average wage.
Illinois	Ill. Comp. Stat. Ann. § 5/2-2107	Illinois does not have a cap on punitive damages.	N/A	In <i>Lebron v. Gottlieb Memorial Hospital</i> , 930 N.E.2d 895 (Ill. 2010), the Supreme Court of Illinois ruled that non-economic damages caps in medical malpractice actions are unconstitutional.
Indiana	Ind. Code Ann. § 34-51-3-4	Greater of 3:1 or \$50,000	Per <i>Durham v. U-Haul International</i> , 745 N.E.2d 755 (Ind. 2001), punitive damages are not recoverable in wrongful death actions.	In medical malpractice actions, per Ind. Code Ann. § 34-14-18-3, the total amount recoverable for a claimant in a medical malpractice action is \$1,800,000 for an act of malpractice that occurs after July 1, 2019.
Iowa	Iowa Code Ann. § 668A.1	None	N/A	None
Kansas	Kan. Stat. Ann § 60-3701(e)	Lesser of \$5 million or defendant's highest gross income over the last five years	If a defendant is expected to make a profit above the cap, then 1.5 times defendant's expected profit	In 2019, the Supreme Court of Kansas in <i>Hilburn v. Enerpipe Ltd.</i> , 442 P.3d 509 (Kan. 2019) held that non-economic damages caps in personal injury actions are unconstitutional.
Kentucky	Ky. Rev. Stat. Ann. § 411.186	None	N/A	None

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
Louisiana	La. Civ. Code Ann. Art. 2315	Punitive damages are generally not recoverable in Louisiana.	There are a few statutory exceptions to the recovery of punitive damages, including cases involving intoxicated defendants and hazing, for example.	Per La. Rev. Stat. § 40:1231.2(B)(1), there is a \$500,000 cap of damages in medical malpractice actions.
Maine	18-C Me. Rev. Stat. Ann. § 2-807(2)	\$250,000	N/A	\$750,000
Maryland	None	None	N/A	Per Md. Code § 3-2A-09(b), the cap of non-economic damages on wrongful death claims is \$905,000. For wrongful death claims involving two or more wrongful death beneficiaries, it is \$1,380,000.
Massachusetts	Mass. Gen. Laws Ann. 229 § 2 (wrongful death cases)	In wrongful death cases, an award of punitive damages of not less than \$5,000 can be imposed if the decedent's death was caused by the malicious, willful, wanton, or reckless conduct of the defendant.	N/A	Per Mass. Gen. Laws Ann. 231 § 60H, there is a non-economic damages cap of \$500,000 in medical malpractice cases. However, the cap does not apply in cases involving a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other cases in which a cap would deprive a plaintiff of just compensation for injuries.
Michigan	None	Punitive damages are generally not recoverable in Michigan.	N/A	Per Mich. Comp. Laws Ann. § 600.1483, the non-economic damages cap for medical malpractice actions is \$497,000, and in cases where the plaintiff is hemiplegic, paraplegic or quadriplegic, the cap is \$887,500.
Minnesota	None	None	N/A	None.

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
Mississippi	Miss. Code Ann. § 11-1-65(3)(a)	The cap on punitive damages depends upon the defendant's net worth and follows a scale. For any defendant worth \$50 million or less, then the cap is 2% of the defendant's net worth.	N/A	Per Miss. Code Ann. § 11-1-60(2) (a) and (b), there is a general cap of \$1,000,000 for non-economic damages. In medical malpractice actions, there is a cap of \$500,000.
Missouri	Mo. Rev. Stat. § 510.265	Greater of 5:1 or \$500,000.	N/A	Per Mo. Rev. Stat. § 538.210(2), there is a cap of \$400,000 in medical malpractice cases and \$700,000 in medical malpractice cases involving a catastrophic personal injury.
Montana	Mont. Code Ann. § 27-1-220(3)	Cap is the lesser of \$10 million or 3% of a defendant's net worth.	There is no cap of punitive damages in class action cases.	Per Mont. Code Ann. § 25-9-411(1) (a), there is a \$250,000 cap of non-economic damages in medical malpractice actions.
Nebraska	None	None	N/A	Per Neb. Rev. Stat. Ann. § 44-2825(1), there is a \$2,250,000 non-economic damages cap in medical malpractice actions.
Nevada	Nev. Rev. Stat. Ann. §42.005(1)	3:1 if damages are in excess of \$100,000; \$300,000 if the amount of compensatory damages is less than \$100,000.	There are exceptions for several actions, including that of bad faith; defamation; and the manufacturer, distributor, or seller of a defective product, for example.	Per Nev. Rev. Stat. Ann. § 41A.035, there is a cap of \$350,000 of non-economic damages in medical malpractice actions.
New Hampshire	N.H. Rev. Stat. Ann. § 507:16	Punitive damages are not available in New Hampshire.	N/A	None
New Jersey	N.J. Stat. Ann. § 2A:15-5.14	Greater of 5:1 or \$350,000.	N/A	Per N.J. Stat. Ann. § 2A: 53A-8, there is a cap of \$250,000 in medical malpractice actions against non-profit hospitals.

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
New Mexico	N.M. Stat. Ann. § 41-5-6(A), (B)	Punitive damages are not capped in New Mexico.	N/A	There is a non-economic damages cap of \$600,000 for medical malpractice claims if the injury or death occurs before Jan. 1, 2022; after this date, the cap is \$750,000; and after Jan. 1, 2023, the cap is adjusted annually by the Consumer Price Index.
New York	None	None	N/A	None
North Carolina	N.C. Gen. Stat. Ann. § 1D-25(b)	Greater of 3:1 or \$250,000	N/A	Per N.C. Gen. Stat. Ann. § 90-21.19(a), prior to 2014, the non-economic damages cap in medical malpractice actions was \$500,000. Every third year, starting in 2014, the cap is adjusted according to the Consumer Price Index.
North Dakota	N.D. Cent. Code Ann. § 32-03.2-11(4)	Greater of 2:1 or \$250,000	N/A	Per N.D. Cent. Code Ann. § 32-42-02, there is a cap of \$500,000 for non-economic damages in medical malpractice cases.
Ohio	Oh. Rev. Code § 2315.21(D)(2)(a) and (b)	2:1	If the defendant is a small employer or individual, punitive damages are capped at the lesser of two times the compensatory damages or 10% of the small employer's or individual's net worth, up to a cap of \$350,000.	Per Oh. Rev. Code § 2315.18(B)(2), non-economic damages are capped at the lesser of \$250,000 or three times the amount of economic loss, and in cases of two or more plaintiffs, an individual plaintiff cannot recover more than \$350,000 with a per occurrence cap of \$500,000.

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
Oklahoma	23 Okla. Stat. Ann. § 9.1(B)	Lesser of \$100,000 or the amount of actual damages awarded.	If a court finds that the defendant has acted intentionally and with malice toward others, then the cap is the lesser of \$500,000 or twice the actual damages awarded.	In the case of <i>Beason v. I.E. Miller Services Inc.</i> , 441 P.3d 1107 (Okla. 2019), the Supreme Court of Oklahoma held the state's cap on non-economic damages to be unconstitutional.
Oregon	Or. Rev. Stat. § 31.735(1)	None	Per Or. Rev. Stat. § 31.740, punitive damages are not recoverable against a health care provider acting without malice.	None
Pennsylvania	None	There is no general cap on punitive damages in Pennsylvania.	There are some specific caps on punitive damages in specific causes of action.	None
Rhode Island	None	There is no general cap on punitive damages in Rhode Island.	Per the Supreme Court of Rhode Island in <i>Simeone v. Charron</i> , 762 A.2d 442 (2000), punitive damages are not recoverable in a wrongful death action in Rhode Island.	None
South Carolina	S.C. Code Ann. § 15-32-530(A)	Greater of 3:1 or \$500,000	The punitive damages cap does not apply if the defendant had an intent to harm the plaintiff and indeed harms the plaintiff, the defendant has pled guilty to or has been convicted of a felony relating to the conduct at issue in the case, or the defendant acted under the influence of alcohol or drugs.	Per S.C. Code Ann. § 15-32-220(B), there is a \$350,000 non-economic damages cap for actions against health care providers in medical malpractice cases.
South Dakota	None	None	N/A	Per S.D. Codified Laws § 21-3-11, there is a \$500,000 non-economic damages cap in medical malpractice cases.

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
Tennessee	Tenn. Code Ann. § 29-39-104	Greater of 2:1 or \$500,000	The punitive damages cap does not apply if the defendant had a specific intent to inflict serious physical injury and indeed seriously injured the plaintiff; the defendant has committed a felony relating to the conduct at issue in the case; or the defendant acted under the influence of alcohol, drugs, or any other intoxicant or stimulant.	Per Tenn. Code Ann. § 29-39-102(b) and (c), Tennessee has a non-economic damages cap of \$750,000 with a cap of \$1,000,000 in cases involving a catastrophic injury.
Texas	Tex. Civ. Prac. & Rem. Code Ann. § 41.008	Greater of \$200,000 or 2:1	The punitive damages cap does not apply to conduct that constitutes certain felony crimes.	Per Tex. Civ. Prac. & Rem. Code Ann. § 74.301(a), there is a non-economic damages cap of \$250,000 per claimant for health care liability claims.
Utah	Utah Code Ann. § 78B-8-201	There is no cap on punitive damages in Utah.	The first \$50,000 of any punitive damages award is awarded to the plaintiff, and any excess award beyond \$50,000 is shared equally between the state and the plaintiff.	Per Utah Code Ann. § 78B-3-410(1)(d), there is a non-economic damages cap of \$450,000 for malpractice claims against health care providers.
Vermont	N/A	None	N/A	None
Virginia	Va. Code Ann. § 8.01-38.1	\$350,000	N/A	Per Va. Code Ann. § 8.01-581.15, there is a \$2.55 million non-economic damages cap with medical malpractice claims.
Washington	None	None; punitive damages are prohibited unless authorized by statute.	N/A	Caps on non-economic damages are unconstitutional in Washington, per the Supreme Court of Washington decision in <i>Sofie v. Fibreboard Corp.</i> , 771 P.2d 711 (Wash. 1989).

State	Statute	Punitive Damage Cap	Exceptions	Non-Economic Damage Cap
West Virginia	None	None	N/A	In 2003, per W. Va. Code Ann. § 55-7B-8, a non-economic damages cap of \$250,000 in medical malpractice actions was enacted, with adjustments for inflation.
Wisconsin	Wis. Stat. Ann. § 895.043(6)	Greater of 2:1 or \$200,000.	The punitive damages cap does not apply in cases involving the defendant's operation of a vehicle while intoxicated.	Per Wis. Stat. Ann. § 893.55(d)(1), there is a non-economic damages cap of \$750,000 in medical malpractice actions.
Wyoming	None	None	N/A	None

Source: Hurd and Zollers (1994); U.S. Law Network (2019); and a review of current state laws.