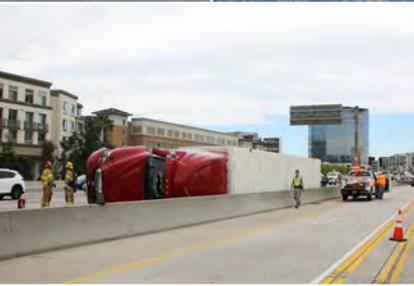


# Understanding the Impact of Nuclear Verdicts on the Trucking Industry

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June 2020



Prepared by the American Transportation Research Institute



# Understanding the Impact of Nuclear Verdicts on the Trucking Industry

June 2020

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## ACRONYMS

ATRI	American Transportation Research Institute
ABA	American Bar Association
ALD	ATRI Litigation Database
ALF	Alternative Litigation Financing
ALFA	American Litigation Financing Association
CEV	Critical Event Video
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
FMCSR	Federal Motor Carrier Safety Regulations
GAO	Government Accountability Office
HOS	Hours-of-Service
IRLS	Iteratively Reweighted Least Squares
OLS	Ordinary Least Squares
PwC	Price Waterhouse-Cooper
RAC	Research Advisory Committee
TPLF	Third-Party Litigation Financing
U.S.DOT	United States Department of Transportation

## DEFINITIONS

**Compensatory Damages:** An aspect of damages meant to reimburse the plaintiff

**Damages:** Monetary recompense for negligence or other legal injury, can be split into punitive and compensatory

**Defense:** An entity which defends itself from a Plaintiff charge

**Duty of Care:** An enforceable standard of businesses to act toward others and the public with the watchfulness, attention, caution and prudence that a reasonable person in the circumstances would use.

**Loss of Consortium:** Monetary awards given to the plaintiff to account for loss of time with a loved one

**Liability:** The state of legal responsibility

**Litigation Funding:** transactions in which a third party provides capital to one of the parties to a legal claim (a plaintiff, defendant or law firm, e.g.) on a non-recourse basis in exchange for a financial interest in the outcome of the claim or a lien on the law firm. Also known as champerty.

**High-Low Agreement:** A settlement where the defendant, if found liable, would pay between a range of a minimum and maximum amount of damages

**Negligence:** A failure to act in a way which a normal person would act in similar circumstances

**Nuclear Verdict:** While the threshold of “nuclear” verdicts are a point of contention, a nuclear verdict is a large verdict, oftentimes in excess of \$10 million

**Plaintiff:** An entity who brings a case to civil court

**Punitive Damages:** An aspect of damages meant to punish the defendant

**Spoilation:** the illegal destruction or ruining of evidence

**Tort:** An injury

**Tort Law:** Laws and precedent governing legal injuries

**Voir Dire:** a preliminary examination of a witness or jury by a judge or council

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## **INTRODUCTION**

Large legal verdicts, sometimes called “nuclear verdicts,” have been a part of the legal landscape of the trucking industry since 2006. These cases, oftentimes over \$10 million, typically stem from serious crashes involving injury and death. However, these large verdicts can exist on tenuous legal grounds and can have negative effects on multiple parties.

In 2019, the American Transportation Research Institute (ATRI) Research Advisory Committee (RAC)<sup>1</sup> ranked the “Impact of Large Verdicts on the Trucking Industry” as one of its top research priorities. At the time of this decision, several motor carriers had closed their doors due to rising insurance premiums. A number of articles have pointed to aspects such as rising medical costs leading to larger verdicts, while others have contended that the size of verdicts has increased independent of other factors. Recognizing the lack of unified research on this significant extant threat, the RAC prioritized research on the impact of large verdicts on the trucking industry.

To understand the impacts of large verdicts on the trucking industry, the RAC suggested both quantitative and qualitative approaches, developing a multifaceted understanding of large verdicts. The research has four main objectives:

- 1) analyze the legal landscape in the United States, and how large verdicts have impacted the trucking industry;
- 2) quantify the impacts of various crash factors on the size of respective verdicts;
- 3) survey industry stakeholders and subject matter experts on relevant courtroom tactics and the impacts of these verdicts on the industry; and
- 4) identify strategies utilized in other industries to protect firms against inordinately large verdicts, with the goal of applying them to the trucking industry.

This research provides an in-depth understanding of the history and circumstances that have allowed large verdicts in the trucking industry to proliferate, as well as the impact of these large verdicts and mitigation strategies from other industries.

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<sup>1</sup> ATRI's Research Advisory Committee is comprised of industry stakeholders representing motor carriers, trucking industry suppliers, labor and driver groups, law enforcement, federal government, and academics. The RAC is charged with annually recommending a research agenda for the Institute.

## **BACKGROUND**

The history of large verdicts in the trucking industry can be traced back to the first personal injury lawsuit, which took place in 1932. In the landmark case *Donoghue v. Stevenson*, a dead snail was found in May Donoghue's drink, making her ill.<sup>2</sup> As a result, she sued the company who bottled the drink for making her sick, thus allowing for product liability legal recourse in the United Kingdom. Before this point, the only legal recourse available to injured consumers was through a breach of contract.<sup>3</sup>

A particularly important result of this lawsuit was the establishment of "duty of care," an enforceable legal standard requiring companies to "act toward others and the public with the watchfulness, attention, caution and prudence that a reasonable person in the circumstances would use."<sup>4</sup> The standard that *Donoghue v. Stevenson* created was generally adopted by the U.S. legal system, and still serves as the basis for most personal injury lawsuits, including large verdicts in the trucking industry.

To create an environment where large verdicts could become commonplace, law firms had to make potential plaintiffs aware of their ability to sue. Advertising was legal for law firms from America's inception until 1908, when the American Bar Association (ABA) created the Canons of Professional Ethics.<sup>5</sup> In the early 1900s, the number of lawyers expanded greatly, and competition increased. Competition in the legal industry created incentive to advertise in a misleading way, prompting the creation of the Canons of Professional Ethics. A challenge to the advertising ban in the Canons of Professional Ethics arose through a Supreme Court case, *Bates v. State Bar of Arizona*, which was decided in 1977.<sup>6</sup> In the case, the law firm of Jacoby & Meyers argued that their First Amendment rights were being infringed upon, and they should be allowed to advertise. The Supreme Court found, in a 5-4 decision, that "commercial speech" such as advertising, merits First Amendment protection.<sup>7</sup> *Bates v. State Bar of Arizona* created an environment where the possibility and opportunity for litigation was known and advertised. Simultaneous with the increase in the scale of advertising, it became more lucrative to sue companies during this period.

Verdicts became even more lucrative from 1985 through 1994, whereby the legal environment incentivized lawsuits.<sup>8</sup> The median dollar value of every case won from 1985 through 1989 was just over \$100,000, whereas between 1990 and 1994, the median dollar value for every case won was approximately \$190,000 – a 90 percent increase. Furthermore, the median value of business-related verdicts increased from \$300,000 to \$500,000 during the same period.<sup>9</sup>

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<sup>2</sup>Coleman, Clive. "The legal cases of the snail found in ginger beer". BBC. November 11, 2009. Available online: <http://news.bbc.co.uk/2/hi/business/8367223.stm>

<sup>3</sup>"A History of Personal Injury Law". KBG Injury Law. May 18, 2016. Available online: <https://resultsyoudeserve.com/blog/a-history-of-personal-injury-law/>

<sup>4</sup>Hill, Gerald and Kathleen. "Duty of Care". Law.com. Available online: <https://dictionary.law.com/Default.aspx?selected=599>

<sup>5</sup>"Ending the Pursuit: Releasing Attorney Advertising Regulations at the Intersection of Technology and the First Amendment". American Bar Association. February 31, 2020. Available online: [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/2016/volume-24-number-2/ending\\_pursuit\\_releasing\\_attorney\\_advertising\\_regulations\\_the\\_intersection/](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/2016/volume-24-number-2/ending_pursuit_releasing_attorney_advertising_regulations_the_intersection/)

<sup>6</sup>Hudson, David L. Jr. "Bates v State Bar of Arizona (1977)." The First Amendment Encyclopedia. <https://www.mtsu.edu/first-amendment/article/72/bates-v-state-bar-of-arizona>

<sup>7</sup>"A History of Personal Injury Law". KBG Injury Law. May 18, 2016. Available online: <https://resultsyoudeserve.com/blog/a-history-of-personal-injury-law/>

<sup>8</sup>Moller, Eric. "Trends in Civil Jury Verdicts since 1985". RAND. 1996. Available online: [https://www.rand.org/pubs/research\\_briefs/RB9025.html](https://www.rand.org/pubs/research_briefs/RB9025.html)

<sup>9</sup>Ibid.

Laws governing civil litigation are known as “tort law.” The word “tort” comes from the Latin “*tortum*,” meaning wrong or injustice. There are multiple elements to tort law; duty, breach of duty, causation, and injury.<sup>10</sup> While the “Restatement of Torts: 2<sup>nd</sup> Edition” is widely regarded as the basis of tort law, the granularity of tort law is governed by rapidly changing state statutory law.<sup>11</sup>

The increase in verdict awards is inexorably related to the legal structure within each state. Differences in the liability and comparative fault (i.e. “negligence”) frameworks have created an environment that benefits large verdicts. From a fault perspective, there are typically three types of *negligence* relevant to large jury verdicts: contributory negligence; pure comparative negligence; and modified comparative negligence.<sup>12</sup>

The three types of negligence are defined below.

- **Contributory Negligence.** If the plaintiff caused any injury to themselves, they are not able to collect any damages.
- **Comparative Negligence.** If the plaintiff is partially responsible for the injuries to themselves, the damages awarded will be reduced proportionally.
- **Modified Comparative Negligence.** If the plaintiff is partially responsible for the injuries to themselves, the damages awarded will be reduced proportionally, but the plaintiff may be completely barred from collection if their negligence exceeds a threshold level, normally fifty percent.

These three types of negligence are coupled with diverse liability requirements, creating a legal landscape that has become conducive to large jury awards. Contributory negligence is becoming less popular, being replaced by the other two forms of negligence.<sup>13</sup> More specifically, the shift from contributory negligence to comparative negligence has benefitted individuals filing lawsuits, as their fault does not discredit their lawsuit. These types of negligence are coupled in a legal landscape with differing forms of liability to create a favorable environment for large jury verdicts.

Four types of *liability* applied in the United States are relevant to large jury verdicts: joint liability; several liability; joint and several liability; and modified liability. Twenty-nine states follow a rule of joint *and* several liability.<sup>14</sup> <sup>15</sup> The types of liability are listed below.

- **Joint Liability.** Any liable defendant can be required to pay the entire damages award.<sup>16</sup>
- **Several Liability.** A liable defendant can be required to pay damages only to the extent of their proportional fault.<sup>17</sup>

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<sup>10</sup> “A Brief Overview of Tort Law.” Law.com. December 22, 2019. Available online: <https://tort.laws.com/tort-law>

<sup>11</sup> “Tort.” Cornell Law School: Legal Information Institute. Available online: <https://www.law.cornell.edu/wex/tort>

<sup>12</sup> “Types of Negligence.” The Gallagher Law Firm. Houston, TX. Available online: <https://gallagher-law-firm.com/types-of-negligence/>

<sup>13</sup> Ibid.

<sup>14</sup> “Joint and Several Liability.” Justia. April 2018. Available online: <https://www.justia.com/injury/negligence-theory/joint-and-several-liability/>

<sup>15</sup> Matthiesen, Wickert, and Lehrer, S.C. “Joint and Several Liability and Contribution Laws in all 50 States.” February 2018. Available online: <https://www.mwl-law.com/wp-content/uploads/2018/02/JOIN-AND-SEVERAL-LIABILITY-AND-CONTRIBUTION-LAWS.pdf>

<sup>16</sup> “Joint and Several Liability.” Justia. April 2018. Available online: <https://www.justia.com/injury/negligence-theory/joint-and-several-liability/>

<sup>17</sup> Ibid.

- **Joint and Several Liability.** A variation of joint liability, where any defendant found liable can be held independently liable for the entire amount of a plaintiff's damages, irrespective of percentages of fault.<sup>18</sup> The defendant can then pursue the other defendants for their share of the damages.<sup>19</sup>
- **Modified Liability.** A liable defendant can be required to pay only its portion of their share of liability, set by statute.

*Liability* and *Negligence* are two aspects of the legal landscape that play a substantial role in the rise of large verdicts in the United States. States with joint liability may find that plaintiffs place the entire burden of the damages onto an involved party, despite the party being less negligent than other defendants. Joint liability may create an incentive for plaintiffs to sue parties such as corporations, for example, as they have substantial assets. The often-disparate relationship between *Liability* and *Negligence* has created an environment where large verdicts have become relatively commonplace.

In the waning years of the 20<sup>th</sup> Century, personal injury suits began to rise both in prevalence and monetary value, setting the stage for the large lawsuits seen in the trucking industry now. A watershed moment in the personal injury environment came in 1994, when a jury imposed \$2.7 million in punitive damages for selling scalding coffee.<sup>20</sup> While this amount was reduced after appeal and settled for an undisclosed amount, large verdicts captured America's attention, becoming fodder for late-night television and legal scholars alike. The watershed moment in trucking-related nuclear verdicts came in 2011, many years later.

In 2011, \$40 million was awarded to victims of a truck crash. In this instance, a truck driver ignored indicators of a stop sign, instead striking a passenger vehicle and killing two passengers and severely injuring another. One victim, a prominent member of the business community, was calculated to have a future lost income of \$15 million to \$42 million for a business venture that had not begun. The jury deliberated for five hours, and it resulted in a verdict of \$40 million, with \$28.7 million being attributed to the value of the life of the prominent business person for his future business venture.<sup>21</sup>

This same time period saw other large verdicts; a 2014 crash near Odessa, Texas led to one of the largest settlements in the history of the trucking industry. A truck driver employed by a for-hire motor carrier was driving under the posted speed limit in inclement conditions when a car traveling in the opposite direction lost control and veered into the truck's path. The resulting head-on collision killed one passenger, a 7-year-old, and injured three others, one with traumatic brain injuries. The surviving members of the family sued the motor carrier in Texas and were awarded \$90 million in 2018.<sup>22</sup> This verdict, while large, is not the largest verdict in the trucking industry.

In 2012, a drive shaft broke off a commercial truck and went through the windshield of a passenger car. As a result, the driver of the vehicle was killed. The court that heard this case

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<sup>18</sup> Ibid.

<sup>19</sup> Kenton, Will. "Joint Liability Defined." Investopedia. April 4, 2018. Available online:

[https://www.investopedia.com/terms/j/joint\\_liability.asp](https://www.investopedia.com/terms/j/joint_liability.asp)

<sup>20</sup> "A Brief History of Personal Injury Law." Crosley Law. July 7, 2015. Available online:

<https://crosleylaw.com/blog/brief-history-personal-injury-law/>

<sup>21</sup> Stone, Matt. "Will a \$40 Million Verdict in Cobb County, Georgia Affect other Cases against Trucking Companies?" Freeman, Mathis, and Gary. Available online: <https://www.fmglaw.com/article.php?id=193>

<sup>22</sup> "Werner will appeal \$90M verdict in crash lawsuit". Overdrive. May 23, 2018. Available online: <https://www.overdriveonline.com/werner-will-appeal-90m-verdict-in-crash-lawsuit/>

found that while the driver was not negligent, the company, Heckmann Water Resources, was negligent. The court initially handed down a record verdict of \$281.6 million, which was reduced on repeated appeals, to \$105.2 million, and eventually settled for an undisclosed amount.<sup>23</sup>

Ostensibly, the largest verdict for the trucking industry came from a truck-involved crash in Alabama in 2016. A truck driver for a scrap metal company was charged with five counts of criminally negligent homicide.<sup>24</sup> After falling asleep at the wheel, the truck driver crossed the centerline of a two-lane highway, causing a crash that killed five individuals, including two young children. While some aspects of the case were settled out of court, the deaths of a grandmother and two of her grandchildren were settled in a Georgia court, where the motor carrier was located. The driver, and by extension, the motor carrier, was found liable and ordered to pay \$280 million.

After these verdicts, there have been multiple other nuclear verdicts which have substantially impacted motor carrier operations, including bankruptcy filings and through untenably higher insurance premiums distributed among all motor carriers. One particular motor carrier publicly reported an increase in a single-year's insurance rates of more than 100 percent – from \$340,000 per year to \$700,000 per year. This cost increase ultimately forced the motor carrier out of business – putting more than 50 employees out of work. Multiple other fleets, many decades-old family businesses, experienced similar outcomes.<sup>25</sup>

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<sup>23</sup> "Archives: Legal Matters". Securities and Exchange Commission. Available online: <https://www.sec.gov/Archives/edgar/data/1403853/000119312514300749/R17.html>

<sup>24</sup> Tucker, Katheryn. "How a Columbus, GA Jury Returned a \$280 million Verdict in 45 Minutes." Law.com. August 24, 2019.

<sup>25</sup> Grisdela, Margret. "Trucking Nuclear Verdicts Drive Premiums Up." Insurance Defense Marketing. January 22, 2020. Available online: <https://www.insurancedefensemarketing.com/trucking-panel-counsel-nuclear-verdicts-012220/>

## **QUANTITATIVE ANALYSIS**

### **Methodology**

ATRI compiled litigation data for 600 cases to statistically analyze the key metrics of large verdicts in the trucking industry. This data was collected and amalgamated from multiple external sources in the industry, including a litigation database firm. Case information with jury awards over \$1 million was inputted into an ATRI-developed spreadsheet; incorporated data included verdict amounts, crash/filing/publication details, and jury/ litigation details.

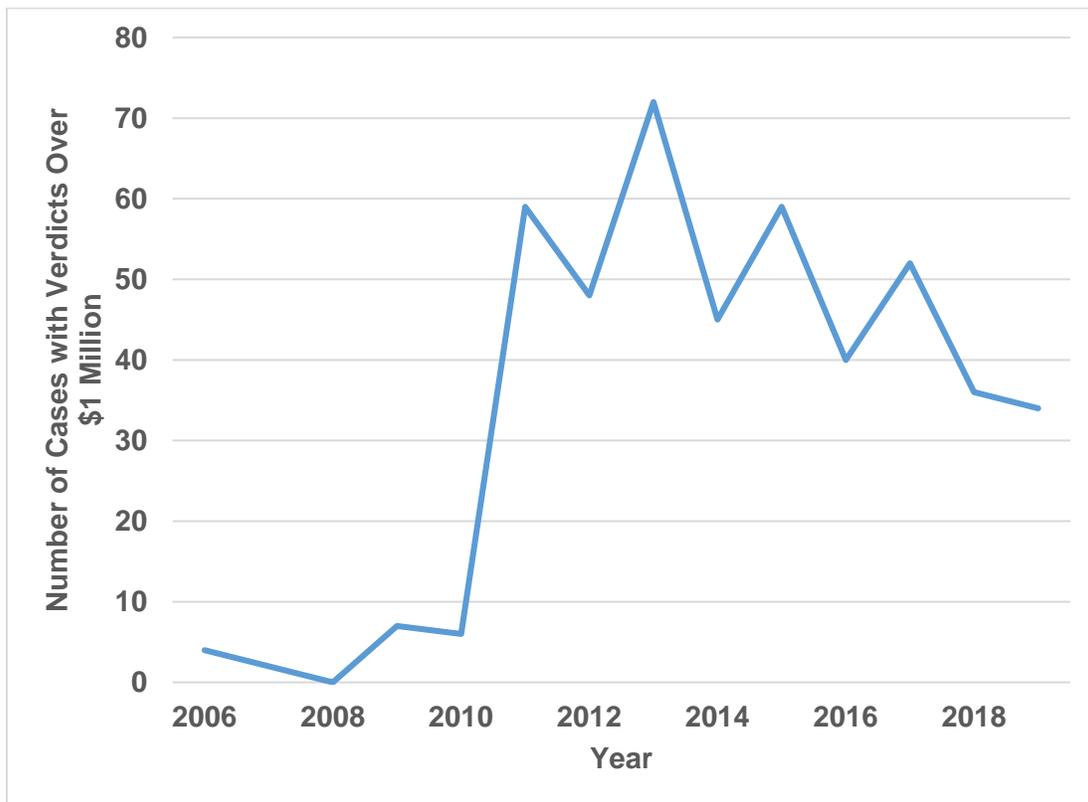
When case data critical to the analysis was missing, ATRI staff utilized external search engines to find and incorporate the missing data whenever possible. The data were cleaned, and 149 observations were excluded, due to missing information and lack of statistical merit. Due to the lack of uniformity in available dates for crashes, filings and award publication dates, the analysis utilized the jury award publication year. To validate publication date as a valid proxy for award date, ATRI staff developed and tested a mean calculation for the time lapse between known award dates and known publication dates. This time-lapse mean was calculated to be 159 days, or 5 months and 7 days, and was subtracted from the publication date.

There is a certain degree of latitude that was applied to interpreting and binning causal factors and case attributes, but all groupings were reviewed and corroborated by multiple staff in order to ensure the validity of the statistical outputs.

### **Descriptive Statistics**

Based on the data analysis, cases with awards over \$1 million have increased dramatically over the last 14 years. In 2006, only four cases with verdicts over \$1 million were identified and included in the ATRI Litigation Database (ALD). At their peak in 2013, over 70 cases with verdicts over \$1 million were awarded. Figure 1 illustrates the number of ALD cases over \$1 million since 2006.

**Figure 1. Number of Cases with Verdicts over \$1 Million**



Despite the decrease in cases from 2018 to 2019, the number of cases with verdicts over \$1 million increased by a factor of nine from 2010 to 2013. In conjunction with an increase in the number of cases, the dollar value of these cases also increased, as seen in Table 1.

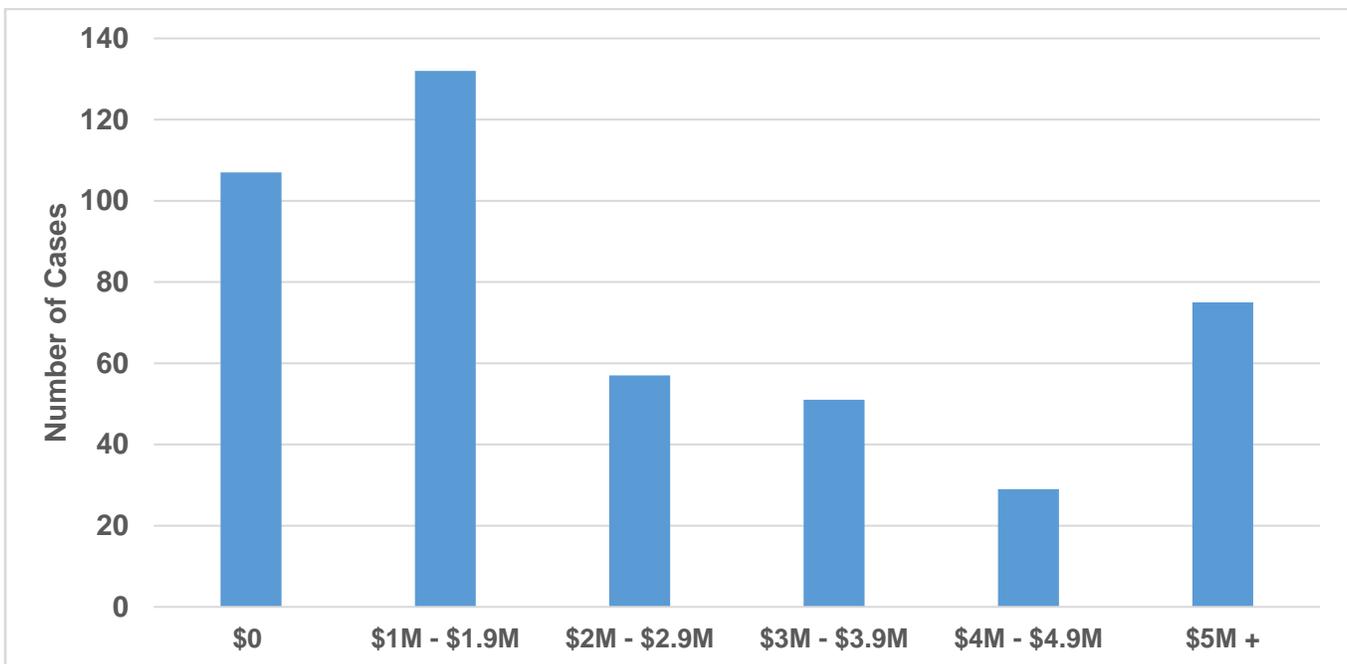
**Table 1. ATRI Litigation Database Descriptive Statistics**

	<b>Verdict Amount</b>
Mean	\$3,162,571
Median	\$1,750,000
Standard Deviation	\$7,199,699
Minimum	\$0
Maximum	\$91,000,000
Number of Observations	451

In the 451 observations analyzed, the mean dollar value for jury awards over this 14-year period was approximately \$3.1 million, with a median value of \$1.75 million. These two measures of central tendency are relatively disparate, indicating the presence of outliers. With a standard deviation of \$7,199,699, the spread of verdict size is large, considering the mean of \$3,162,571. The range of values is \$91 million, further indicating both a large spread and the presence of outliers. Outliers were not removed or mitigated in any manner, as to more accurately capture the variation in the observed sample.

The distribution of the number of cases dictates the mean and the median value of verdict size. Figure 2 illustrates the distribution of number of verdicts in the sample, with verdicts of \$0 indicating a verdict in favor of the defense.

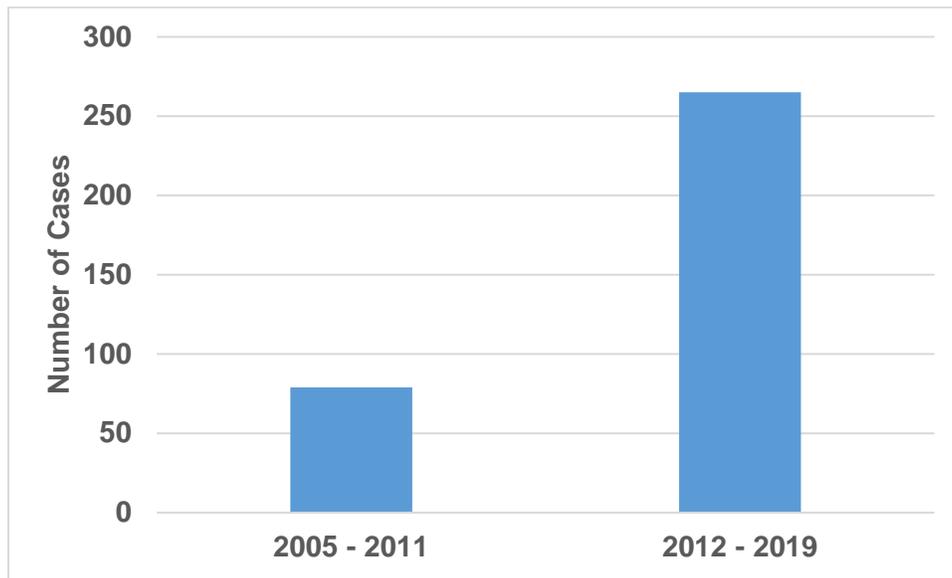
**Figure 2. Distribution of Number of Verdicts**



A plurality of cases in the ALD (n = 132) had verdict amounts of between \$1,000,000 and \$1,999,999. These cases comprised 29.2 percent of the sample. The second largest number of cases came from the bin relating to verdicts of \$0, or defense wins. For defense victories, the ALD had 107 observations, or 23.7 percent. Cases over \$5 million comprised 16.6 percent of the ALD.

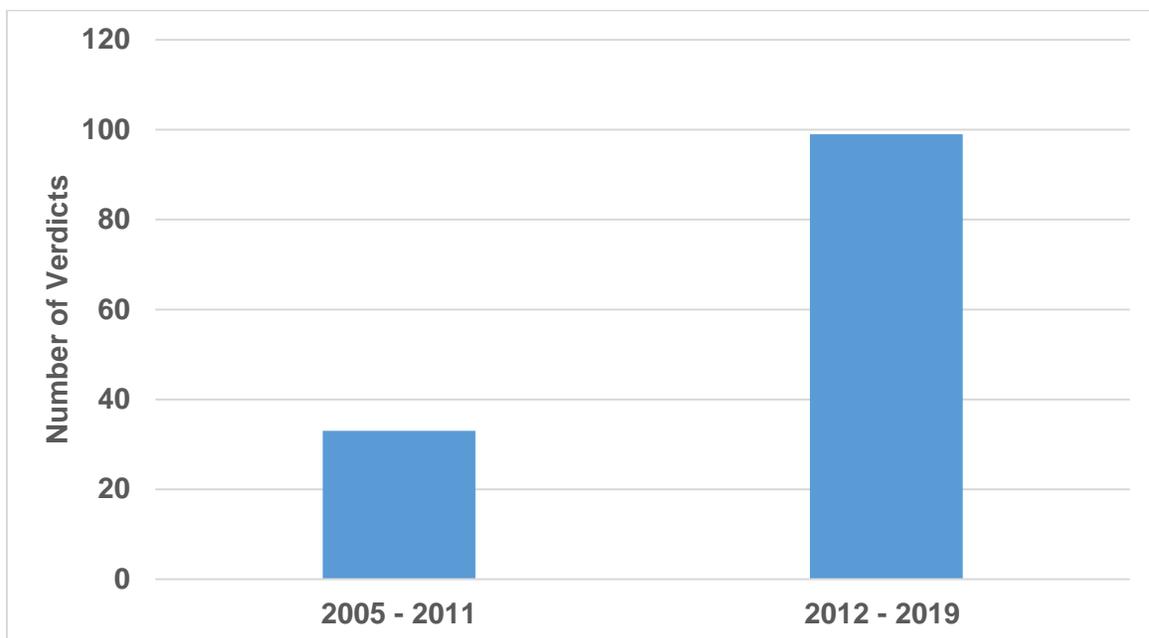
Cases over \$1 million have increased dramatically over the last six years as seen in Figure 3, which confirms that the number of cases between 2006 and 2011 involving trucks with verdicts over \$1 million has increased by over 250 percent, based on the ALD analysis.

**Figure 3. Number of Cases with Verdicts over \$1 Million**



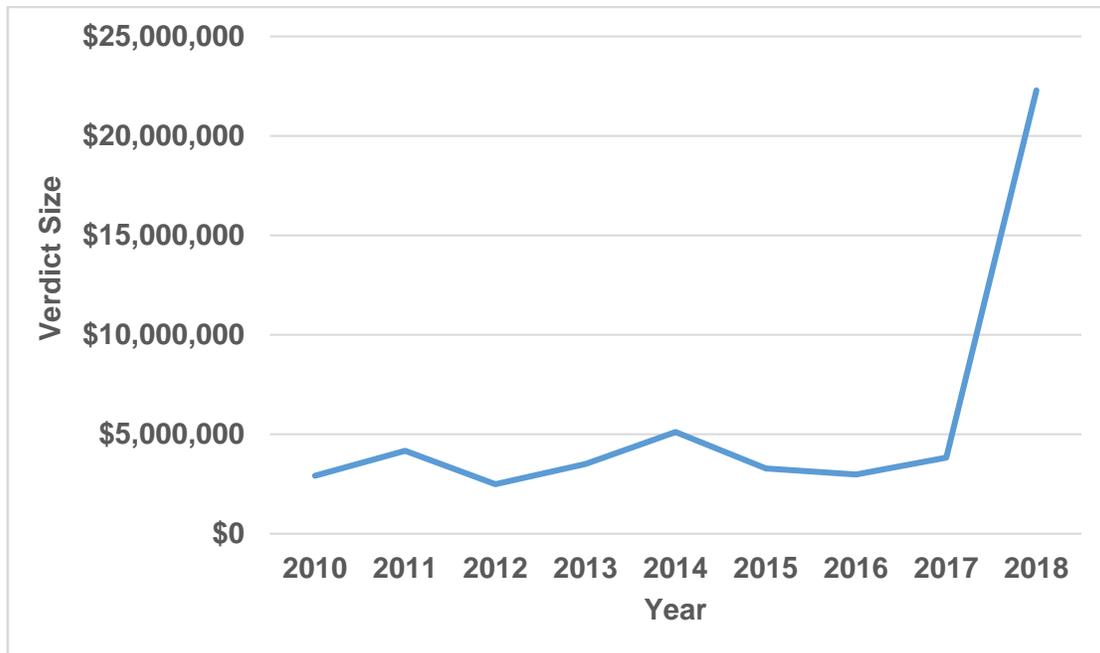
The two comparative verdict bins selected were from 2005 to 2011, and 2012 to 2019, as this splits the timeframe observed by the ALD in half. The first timeframe, 2005 to 2011, had 79 cases with verdict sizes over \$1 million. From 2012 to 2019, the number of cases with verdicts over \$1 million increased to 265 cases, an increase of 235 percent. Due to the small number of verdicts before 2010 in the ALD, the analysis of means over time used data from 2010 and beyond. The number of verdicts greater than \$1 million, but less than \$2 million increased by 300 percent in the same period, as shown in Figure 4.

**Figure 4. Number of Cases with Verdicts Less Than \$2 Million**



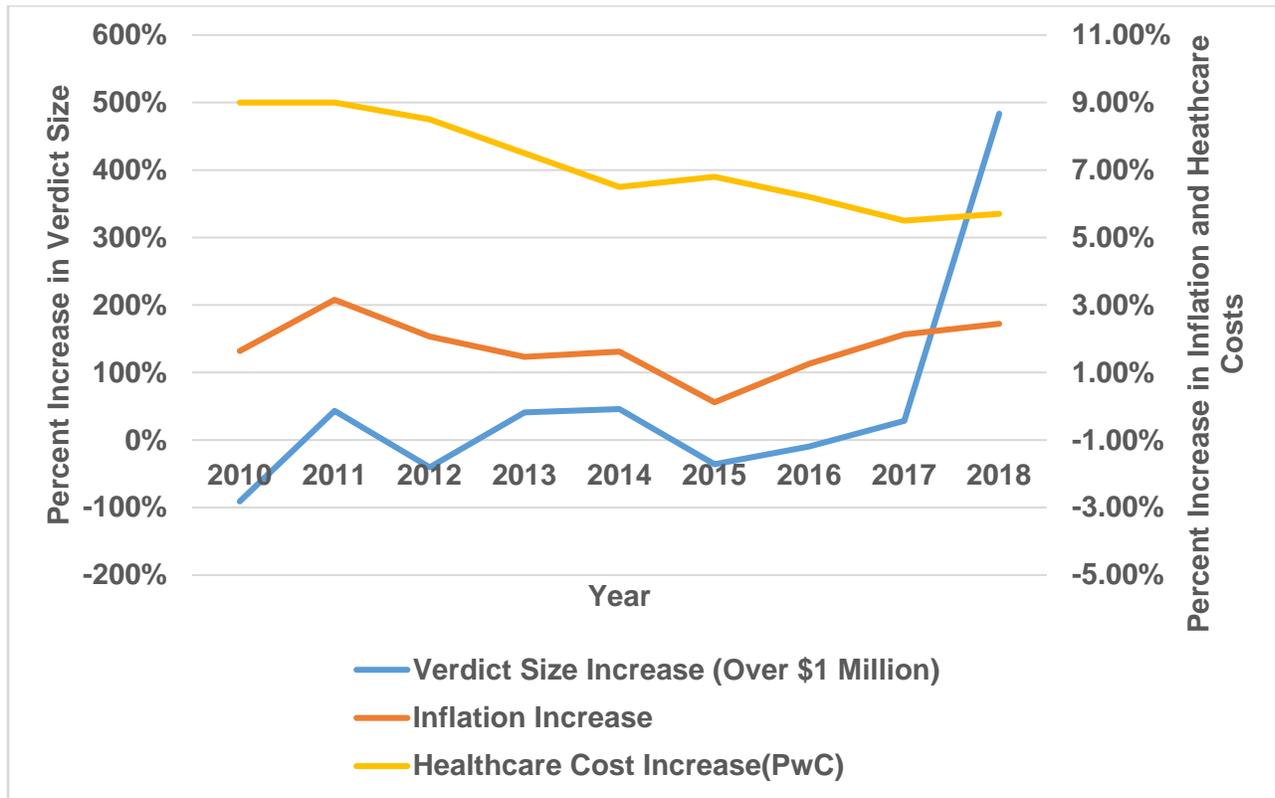
The average verdict among all 451 observations across the 15 years covered by the ALD was \$3,162,571. However, the average size of verdict from 2010 to 2018 increased from \$2,305,736 to \$22,288,000 – an increase of 967 percent. This large increase is indicative of a rise in the size of verdicts from 2005 to 2019. Means were utilized in this analysis as opposed to other measures of central tendency as it is extremely important to include verdicts that fall outside of “typical.” The mean verdict by year is included in Figure 5.

**Figure 5. Average Size of Verdict**



Small fluctuations existed within the general upward trend seen in Figure 5, in both 2012 and 2016. However, the greatest increase in the mean verdict was 2018, where the size of the average verdict increased by 483 percent from 2017. With a plurality of cases being filed from 2013 through 2016, and a majority of cases in the sample being between \$1 million and \$1.9 million, this would significantly depress the means for this time period. This would, in part, explain the deviation from the overall trend. When inflation and healthcare costs are accounted for, the average large verdict increased during this period between 36.5 and 37.6 percent faster than inflation or healthcare costs, as shown in Figure 6.

**Figure 6. Percent Change in Average Verdict Size, Annual Inflation, and Annual Healthcare Inflation by Year**



The measures of annual inflation and annual healthcare consumer price index were collected from the Bureau of Labor Statistics and Price Waterhouse Cooper (PwC). From Figure 6, for the 451 observations in the ALD, it is clear that verdicts increased at a far greater rate than either annual average medical costs or annual healthcare costs. It is a general presumption that faster-growing medical costs would play a leading role in the rising jury awards, but this corroborates that jury awards increased substantially faster than either inflation or healthcare costs.

The increasing average verdict award, as compared to average medical costs and inflation, indicates that the non-economic damages associated with a lawsuit are increasing. There are more verdicts being filed that are large, and the disparities between cases is increasing, with damage ceilings now reaching well above \$90 million

### Crash Characteristics and Litigation Factors

Certain factors are theorized to impact the size of a verdict associated with a crash. The two types of factors analyzed in the ALD are crash factors and litigation factors. Crash factors include important aspects of the crash, such as injuries sustained, number of cars involved in the crash, injury sustained, and the number of deaths involved. Litigation factors include the presence of expert witnesses, for example. Both crash and litigation factors were selected due to their impact on the size of verdicts, and statistical significance.

The presence of expert witnesses, both on the Plaintiff and Defense sides, may contribute to the size of verdicts in opposite directions. This is best illustrated in Figure 7, which shows the Mean Verdict by Expert Witness Presence.

**Figure 7. Mean Verdict by Expert Witness Presence**

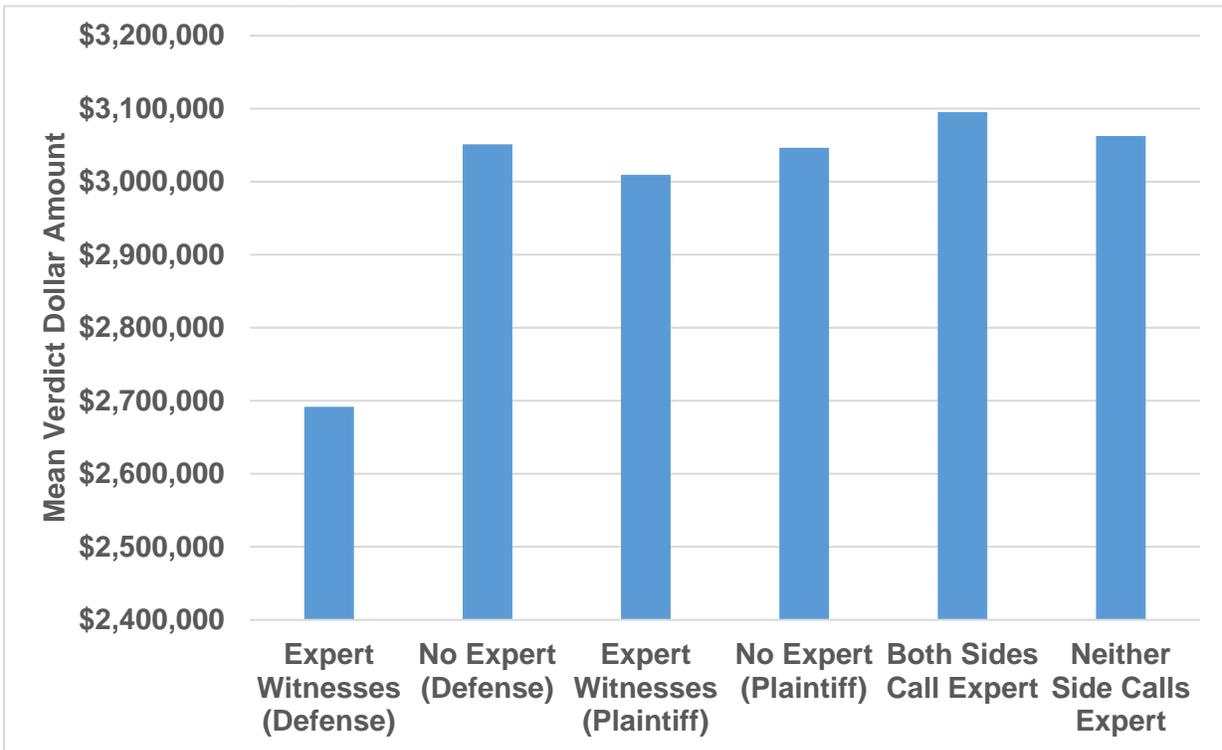
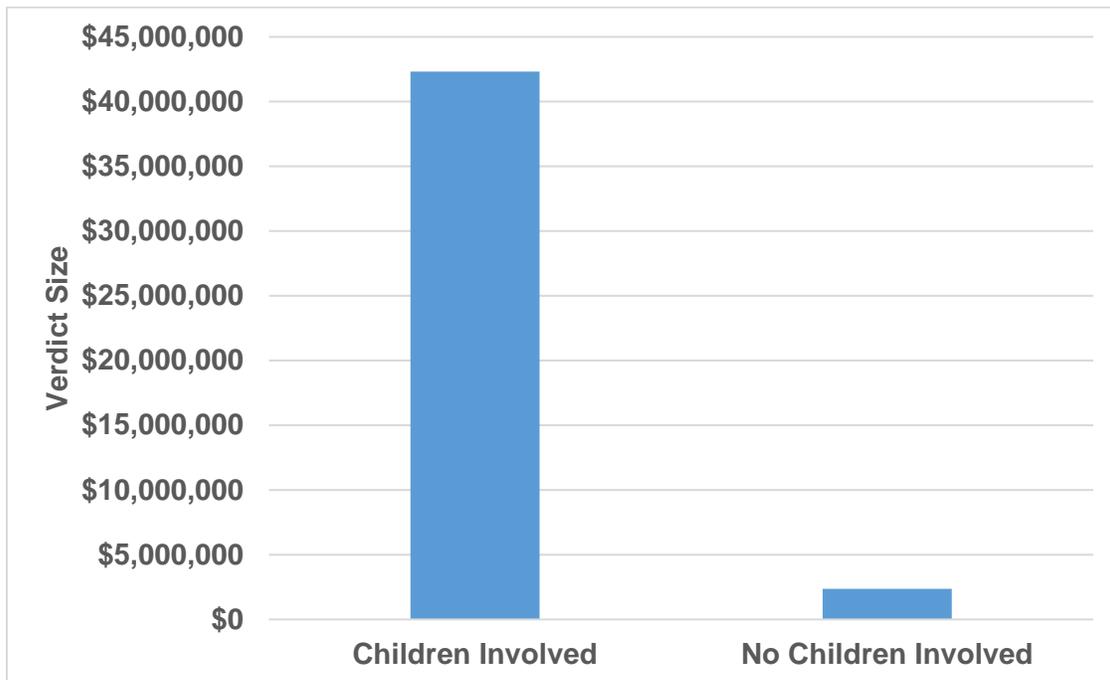


Figure 7 confirms that when an expert witness is called in favor of the defense and not for the plaintiff, there is a large decrease in the average size of the verdict, cutting the resulting mean verdict from \$3.1 million down to \$2.7 million. The decrease in verdict size could be applied as a strategy for mitigating verdicts.

Children also play a large role in the size of the verdict. If a child was involved in the crash and related litigation, the verdict statistically increased dramatically. This increase is best noted in Figure 8, which is the mean verdict of crashes with children involved.

**Figure 8. Mean Verdict Affected by the Presence of Children**



When children are involved in a crash, either being injured or killed, the size of the verdict increases 1,687 percent, from \$2.3 million to \$42.3 million. While it generally does not seem plausible that a minor could generate meaningful income for parents, the concept of “contributions during minority” does provide a placeholder for increasing awards during the award phase of a trial. In fact, legal scholars recognize that “contributions during minority” provides great latitude when the award is calculated.<sup>26</sup>

When dealing with specific injuries, there are particular injuries that are more impactful to the size of verdict award. One relevant injury to verdict awards is a spinal injury. Due to the life-changing nature of this injury, verdicts for crashes with spinal injuries have a 19.4 percent higher award than crash-related verdicts that do not have spinal injuries when other factors are controlled for, as shown in Figure 9.

<sup>26</sup> Decof, Leonard. “Damages in Actions for Wrongful Death of Children”. Notre Dame Law Review. Available online: <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=2921&context=ndlr>

**Figure 9. Average Verdict for Spinal Injuries**

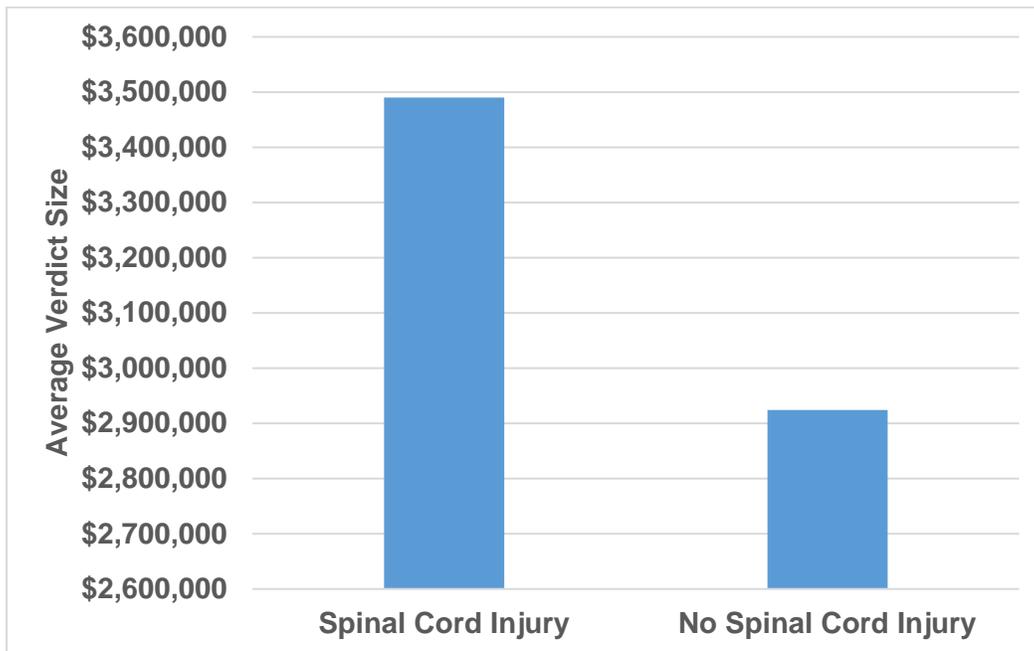


Figure 9 clearly shows that there is a verdict premium for crashes in which a spinal injury is sustained, when other factors are not controlled. In the 451 observations, awards in cases with a spinal cord injury were on average \$566,099 higher than those without a spinal cord injury.

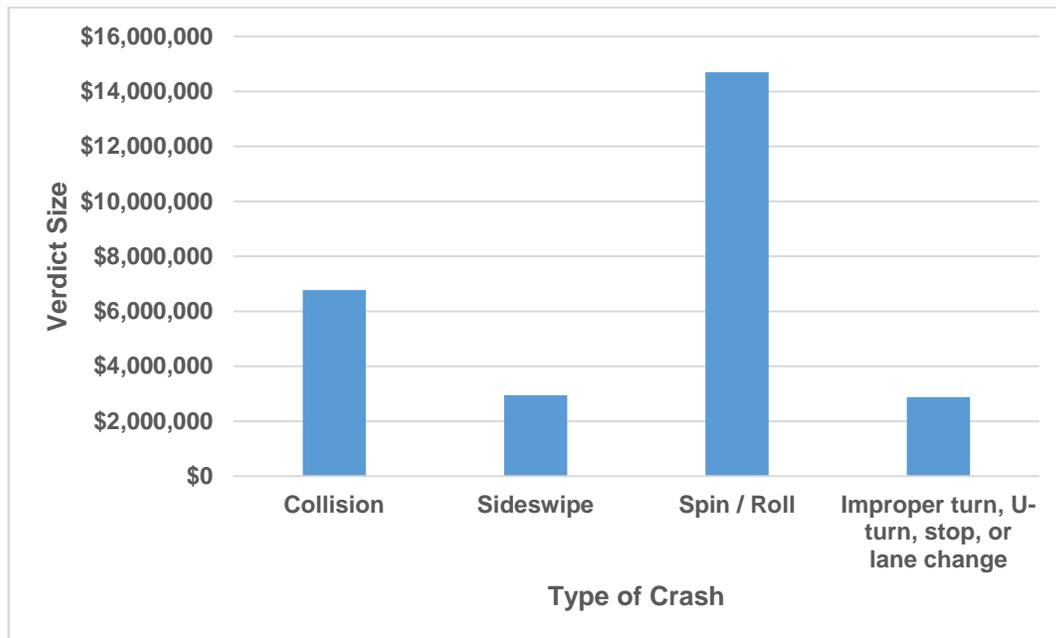
### Crash Types

Average damages vary depending on the type of crash in which the truck was involved. In the ALD data, there were four major types of crashes:

- collisions;
- sideswipe;
- spins and rolls; and
- improper turns, improper U-turns, improper stops, and improper lane changes.

The final set of crash types, improper turns, U-turns, stop, and lane changes, were placed together in the ALD, as they are all related to the fault of the driver and would have similar legal outcomes. The average damages based on the type of crash are shown in Figure 10.

**Figure 10. Average Damages based on Crash Type**



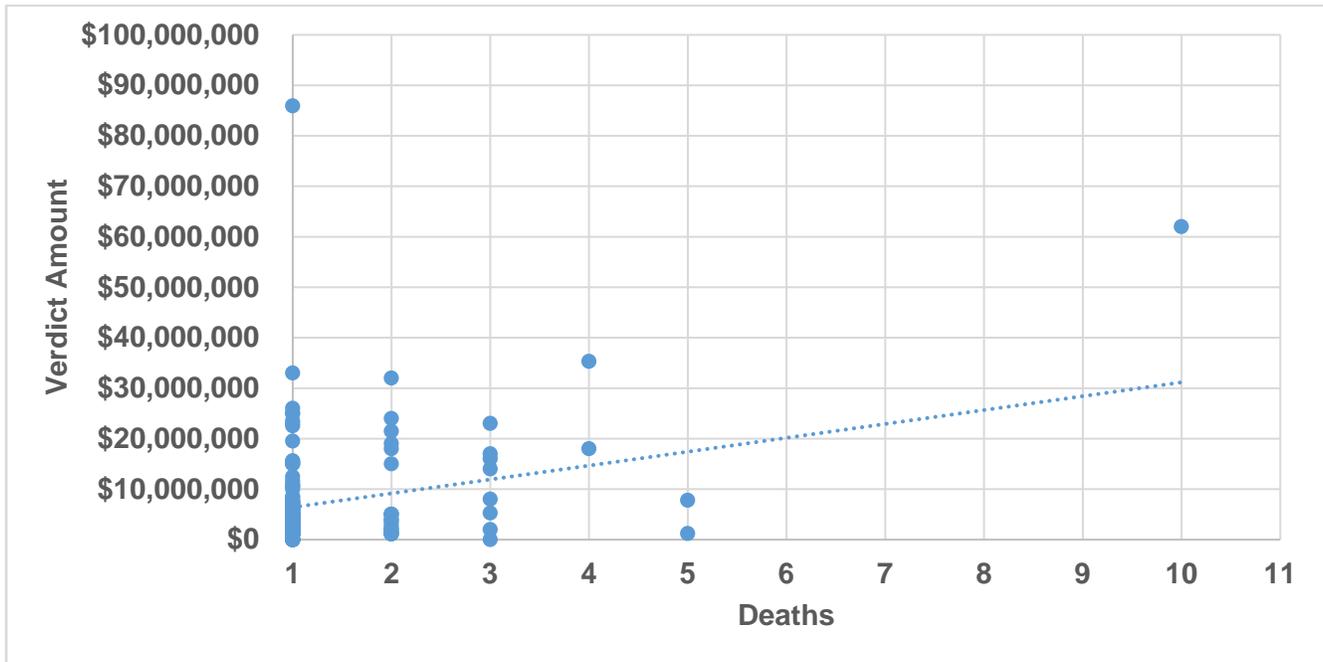
Spins and rolls are the most expensive crash type by far, with an average verdict of almost \$15 million – more than twice the average verdict of the next highest crash type, standard collisions. This increase is likely due to factors such as higher kinetic energy (required to generate spins and rolls), and the fact that rollovers are typically one of the most expensive crash types.<sup>27</sup> Across all vehicle types, 10,000 people die every year as a result of a rollover.<sup>28</sup> Thus, the type of crash plays a significant role in the amount of damages awarded.

It is intuitive that the number of deaths incurred as a result of a crash also plays a role in the size of the verdict. Figure 11 reflects the number of deaths relative to the size of the verdict and indicates a positive relationship.

<sup>27</sup> Murray, Dan and Caroline Boris. "Predicting Truck Crash Involvement: 2018 Update." American Transportation Research Institute. July 2018.

<sup>28</sup> "What are Common Injuries in Rollover Accidents?" The Bruning Law Firm. Available online: <https://www.bruninglegal.com/blog/rollover-accident-injuries/>

**Figure 11. Number of Deaths by Verdict Size**



As the number of people who died as a result of a crash increase, the size of the verdict increases as well. A number of factors also impact plaintiff and defense verdicts and were analyzed by utilizing a subset of the ALD.

Plaintiff and Defense Verdicts

A subset of the ALD containing 491 cases was analyzed to determine if specific crash factors and issues that plaintiffs raised against the defendant in court (including alleged claims) had a higher probability of generating a plaintiff verdict. Each case was assigned one or more codes to reflect the factors and issues the plaintiff raised in court, and singular cases may be represented in multiple categories.

As shown in Table 2, there were five particular factors brought against a defendant that yielded 100 percent verdicts in favor of the plaintiff. These issues included Hours-of-Service (HOS) or log book violations, lack of a clean driving history, driving under the influence of controlled substances, fleeing the scene of the crash, and health-related issues.

**Table 2. Percent of Cases that Yielded a Plaintiff Verdict by the Issues Brought Against the Defendant in Court**

<b>Issue Brought Against the Defendant in Court</b>	<b>Percent of Plaintiff Verdicts<sup>29</sup></b>	<b>Number of Cases</b>
HOS / Log Book	100.0%	26
Driver History	100.0%	14
Controlled Substance	100.0%	13
Left Scene of the Crash / Failed to Call 911	100.0%	8
Health Related Issue	100.0%	5
Sleep/Fatigue	91.7%	36
Driver on their Phone	91.7%	12
Rear End Collision	89.2%	66
Work Zone / Construction	88.9%	18
Unfavorable Hiring Practice	87.5%	24

In cases that involved phone use, only one yielded a defense verdict. In this instance, the plaintiff claimed the driver was distracted by a cell phone at the time of the crash, but could not prove in court that the phone was used at the time of the crash. However, evidence of cell phone use including while in compliance with Federal Motor Carrier Safety Regulations (FMCSRs) may garner a strong jury reaction.

Table 3 presents the three categories that yielded the highest percentage of cases with a positive defense verdict. Crashes categorized as a sideswipe were the only type of crash that yielded a higher than average percentage of defense wins. Nearly 56 percent of sideswipe cases generated a defense verdict.

<sup>29</sup> Some cases may appear in more than one category (e.g. a case that was coded as HOS/Log Book and Sleep/Fatigue will appear in both categories).

**Table 3. Percent of Cases that Yielded a Defense Verdict by the Issues Brought Against the Defendant in Court**

Issue Brought Against the Defendant in Court	Percent of Defense Verdicts <sup>30</sup>	Number of Cases
Sideswipe	55.6%	9
Blocking the Road or Lane of Traffic	50.0%	12
Changing Lanes / Passing / Merge	44.0%	75

Table 4 provides a simple assessment of these cases and their outcome.

**Table 4. Number of Cases Categorized as a Sideswipe**

Issue Brought Against the Defendant in Court	Number of Cases Ruled in Favor of the Defendant	Number of Cases Ruled in Favor of the Plaintiff	Plaintiff Verdict Amount
Sideswipe	2	1	\$2,500,000
Changing Lanes / Passing / Merge & Sideswipe	2	1	\$1,300,000
Sideswipe & Left Scene of the Crash	0	1	\$1,000,000
Sideswipe & Left / Right Turn Related	0	1	\$6,200,000
Rear End Collision & Sideswipe	1	0	\$0

In the ALD, 66 cases were categorized as a rear-end collision, with nearly 90 percent generating a plaintiff verdict (Table 5). In a majority of the cases (89%), the truck driver / motor carrier rear-ended the plaintiff. Approximately nine percent of the cases involved multiple semi-trucks, and one case involved the plaintiff rear-ending the defendant. This last case yielded a \$10 million jury award as a result of the truck driver quickly changing lanes in a construction zone and coming to an immediate stop.

<sup>30</sup> Some cases may appear in more than one category (e.g. a case that was coded as HOS/Log Book and Sleep/Fatigue will appear in both categories).

**Table 5. Mean Verdict Amount for Rear-End Crashes**

Verdict Type	Mean Verdict Amount	Sample Size	Percent
Plaintiff	\$6,103,978.97	59	89.4%
Defense	\$0	7	10.6%
Total	\$5,456,587.26	66	100.0%

Approximately half of rear-end crashes that ruled in favor of the plaintiff were categorized exclusively as a rear-end collision without other factors being raised against the defendant in court. As shown in Table 6, rear-end crashes that included the truck driver failing to slow down in or near a construction work zone generated a \$7.25 million mean verdict amount. Fatal crashes in work zones involving large trucks or busses increased 17.5 percent between 2016 and 2017.<sup>31</sup>

**Table 6. Rear-End Crashes and Mean Verdict Size (Excluding Defense Verdicts)**

Issues Brought Against the Defendant	Mean Verdict	Sample Size
Rear End	\$5,050,527.26	31
Rear End & Ran a Red Light / Stop Sign	\$2,580,833.33	6
Rear End & Construction / Work Zone	\$3,443,750.00	4
Rear End & Failed to Slow Down	\$6,700,000.00	3
Rear End & Equipment / Maintenance Issue	\$1,225,000.00	2
Rear End & Speeding	\$3,015,000.00	2
Rear End, Construction / Work Zone & Failed to Slow Down	\$7,250,000.00	2

To better understand the statistical relationship between verdict size and many of the factors described herein, regression techniques were applied, thus providing clarity on how each individual factor influences the size of verdicts.

<sup>31</sup> U.S. Department of Transportation Federal Highway Administration. (March 25, 2019). "FHWA Work Zone Facts and Statistics." [https://ops.fhwa.dot.gov/wz/resources/facts\\_stats.htm](https://ops.fhwa.dot.gov/wz/resources/facts_stats.htm)

## Regression

As previously noted, ATRI staff collected the 600 observations of jury verdicts from a variety of sources including court documents. In the estimated regression, there were 451 complete observations as there were missing data for some of the observations. The independent variables in the estimated regression were selected due to their theorized relationship with the dependent variable, *Verdict Awards*, as well as to mitigate missing observations and preserve statistical significance. For a more complete discussion on the applied statistical methods, see Appendix A: Quantitative Methods.

The functional form of the regression is:

$$\begin{aligned}
 \text{VerdictAwards} &= \beta_0 + \beta_{YOS} \text{Year of Settlement} + \beta_{NOD} \text{Number of Deaths} + \beta_{TBI} \text{TBI} \\
 &+ \beta_{Spine} \text{Spine Injury} + \beta_{Car} \text{Car Involved} + \beta_{Children} \text{Children} \\
 &+ \beta_{Defense} \text{Defense Expert} + \beta_{Plaintiff} \text{Plaintiff Expert} + \varepsilon
 \end{aligned}$$

The dependent variable, *Verdict Awards*, measures the dollar value of verdicts awarded from 2006 to 2019. The mean of *Verdict Awards* is \$3,162,571, and the median value of the dependent variable is \$1,750,000. Given the difference between the mean value and the median value, there are clearly outliers present in the data set. These outlier verdicts are important to the model as they often fall under the characterization of “nuclear verdicts.”

The first independent variable analyzed was *Year of Settlement*, an important variable in the analysis of nuclear verdicts. Figure 5 illustrated that the mean size of verdict increased from 2010 to 2018 by more than 950 percent. *Year of Settlement* is defined as the year in which a verdict or settlement was reached. This variable takes the values of 0 through 13, to represent the years 2005 through 2019. The greatest number of verdicts occurred in 2013 (year eight).

The independent variable *Number of Deaths* is defined as the number of deaths associated with the crash. *Number of Deaths* is important to the analysis of verdict size as deaths would increase the value of the verdict awarded. As expected, the relationship between *Number of Deaths* and *Verdict Awards* is positive.<sup>32</sup> The mean *Number of Deaths* in the sample is 0.442, meaning that on average, for the sample of verdicts, the average number of deaths per crash is approximately 0.442. In other words, most crashes did not include a death

*Number of Children Involved* captured the relationship between the number of children injured or killed by a crash and the size of the verdict awarded. The mean value of *Number of Children* in the dataset is 0.035, meaning that out of every 100 cases in the ALD, 3.5 cases involved a child. The median value of this independent variable is 0. There are multiple cases, however, which have one, two, or three children involved.

There are multiple binary variables to account for certain types of injuries, including traumatic brain injuries and spinal cord injuries. These two common injury variables are labeled *Spine* and *TBI*, and they are coded affirmatively, meaning that if there were a spine injury, *Spine* took the value of 1. Otherwise, *Spine* took the value of 0. The same pattern follows for traumatic

<sup>32</sup> Goguen, David. “How a Wrongful Death Lawsuit Works.” All Law. Available online: <https://www.alllaw.com/articles/nolo/personal-injury/how-wrongful-death-lawsuit-works.html>

brain injuries. The mean value for *Spine* is 0.423, indicating that in almost half of the recorded large-truck injuries, there was a spinal injury, while the mean value for *TBI* was 0.102, indicating one in ten truck-involved crashes involved a traumatic brain injury. For the ALD, spinal cord injuries were four times more common than TBIs.

*Cars Involved* is another binary variable that is meant to estimate the effects of other cars on the size of verdicts. *Cars Involved* is coded as a 1 if there were four-wheeled vehicles involved in a crash, and a 0 if otherwise. The mean value of the variable *Cars Involved* is 0.840, which indicates that 84 percent of large truck crashes in the sample involved one or more cars.

The final two independent variables that were tested were *Plaintiff Expert* and *Defense Expert*. For *Plaintiff Expert* the variable is coded as a 1 if a Plaintiff Expert testified in the trial and a 0 if there was no Plaintiff Expert present. If information was not present on the presence of expert witnesses, for cases over \$7 million, it was coded as a 1 for both *Plaintiff Expert* and *Defense Expert*, due to the ubiquitous nature of experts in trials with large amounts of money at stake. *Defense Expert* is coded similarly, with a 1 if a Defense Expert testified in the trial and a 0 if there was no Defense Expert present. The mean value for *Plaintiff Expert* was 0.368, which was higher than the 0.259 mean value for *Defense Expert*. This indicates that experts for the plaintiff were called 42.1 percent more frequently than experts for the defense.

A table of variables was generated to summarize the definitions of the variables and the expected relationship with the dollar value of the verdict, “Alternate Hypothesis” (Table 7).

**Table 7. Hypothesis Table**

	<b>Variable Type</b>	<b>Alternate Hypothesis</b>	<b>Definition</b>
Verdict Awards	Continuous	N/A	Dollar value of verdicts awarded from 2006 to 2019
Year of Settlement	Discrete	>0	Year in which a verdict or settlement was reached
Number of Deaths	Discrete	>0	Number of deaths which happened as a direct result of a crash
TBI	Binary	>0	Presence of a Traumatic Brain Injury as a result of a crash, 1 if present
Spine Injury	Binary	>0	Presence of an injury to the spinal cord as a result of a crash, 1 if present
Car Involved	Binary	>0	Presence of one or more 4-wheeled vehicles in a crash, 1 if one or more cars involved
Children	Discrete	>0	Number of children injured or killed by the crash
Defense Expert	Binary	<0	Presence of experts testifying for the defense
Plaintiff Expert	Binary	>0	Presence of experts testifying for the plaintiff

## Regression Results

The results of the estimated regression are shown in Table 8. The Value column is the average relationship between each of the variables and the dollar value of the verdict (Verdict Award). The Standard Error column is a measure of variability, which is important to measure the statistical merit of the estimated relationship. Finally, the T-value column is the measure of statistical validity of the Value column, which is based on the previous two columns. Table 8 presents and validates the results of the regression.

**Table 8. Regression Results**

Variable	Value	Std. Error	T-value
Year of Settlement	\$118,343	\$44,958	2.63
Number of Deaths	\$720,244	\$150,990	4.77
TBI	\$768,503	\$334,738	2.30
Spine Injury	\$19,232	\$235,809	0.08
Car Involved	-\$739,674	\$266,874	-2.77
Children	\$27,365,374	\$398,501	68.67
Defense Expert	-\$839,064	\$302,139	-2.78
Plaintiff Expert	\$513,872	\$272,132	1.89

The estimated coefficients in the context of the regression are:

$\widehat{VerdictAwards}$

$$= 1,411,573.67 + 118,343.10 * YearofSettlement + 720,243.51 * NumberOfDeaths + 768,502.85 * TBI + 19,231.74 * SpineInjury - 739,674.10 * CarInvolved + 27,365,373.60 * Children - 839,064.21 * DefenseExpert + 513,871.72 * PlaintiffExpert$$

The estimated growth in the size of verdicts by year, *Year of Settlement*, is \$118,343.10. Between 2005 and 2019, the average increase from year to year is approximately \$120,000 – all other things being held equal. In nominal terms, controlling for other factors, there was approximately a \$2.0 million increase from 2005 to 2019 in large verdicts. This value suggests a positive statistical relationship between the year in which a settlement was reached and the size of the verdict. In other words, the size of verdicts have increased over time, independent of other important factors. This increase in verdict size over time confirms and corroborates the increases that have been highlighted by industry experts in the other sections of this report.

The estimated relationship between the number of deaths incurred as a result of a crash and the size of the respective verdict, *Number of Deaths*, is \$720,243. For each one additional death in a large truck crash, the verdict associated with the crash increases by \$720,243, all other variables being held constant. The associated t-value indicates that there is a positive statistical relationship between these two variables.

The estimated relationship between the incidence of a traumatic brain injury due to a crash and the size of the respective verdict is \$768,502. If a traumatic brain injury were sustained as a result of a large truck crash, the verdict is expected to increase by \$768,502, all other variables being equal. The statistical analysis documents that there is a positive relationship between the instance of a traumatic brain injury and the size of the verdict awarded.

The estimated relationship between the incidence of a spinal cord injury associated with a large-truck crash and the size of the respective verdict is \$19,231. In the ALD, spinal cord injuries were four times more common than traumatic brain injuries, but spinal cord injuries fell short of statistical significance. This could be due to the relationship between spinal cord injuries and other life-altering injuries or death.

The estimated relationship between one or more cars being involved in a crash and the respective size of the verdict, *Cars Involved*, is -\$739,674. This variable contrasts the difference between commercial truck and car crashes against commercial truck and pedestrian crashes, as well as commercial truck and commercial truck crashes. If cars were involved in the commercial truck crash, the verdict size decreases by \$739,674 on average, all other things being held equal. Essentially, this reflects the fact that truck-involved crashes that involve pedestrians, bicyclists or other trucks are considerably more expensive than those involving cars. If a crash did not involve cars, the crash may have involved pedestrians or other commercial trucks, which may make the resulting verdict more expensive.

The estimated relationship between the number of children either injured or killed in a crash and the size of the verdict, *Children Involved*, is \$27,365,373. In the ALD, for every child that was either injured or killed as a result of a crash, the verdict size, on average, increases by more than \$27 million. The data indicates a strong, positive relationship exists between the number of children involved and the size of the verdict.

The estimated relationship between the presence of an expert witness for the defense and the size of the respective verdict, *Defense Expert*, is -\$839,064. If a defense expert is called, the size of the verdict, on average, decreases by \$839,064. The calling of a defense expert appears to lead to more rulings in favor of the defense. The calling of a defense expert witness could be viewed as a powerful mitigation strategy against large verdicts, as when both a plaintiff and defense expert are called, the size of the verdict decreases by over \$300,000 on average, all other things being held constant.

The estimated relationship between the presence of a plaintiff expert and the respective size of the verdict, *Plaintiff Expert*, is \$513,871. If a plaintiff expert is called, the size of the verdict increases, on average, by just over \$500,000. The evidence suggests there is positive relationship between the presence of plaintiff experts and the size of the jury award which follows the predicted relationship between these two factors. The value of the relationship for *Plaintiff Expert* is closer to zero than the value of the relationship for *Defense Expert*, indicating that if experts are called on both sides of a given trial, the defense expert still creates a mitigating factor on the size of the verdict awarded.

### Time Trend Regression

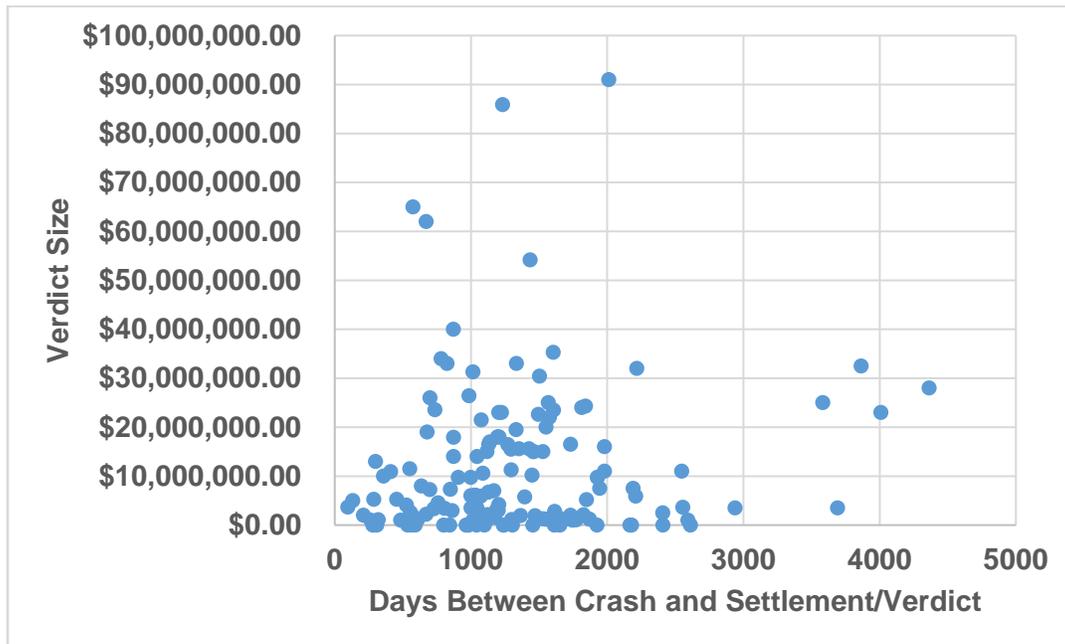
In addition to the first regression, a second regression was estimated, in an attempt to understand how the length of time between the crash and verdict date impacts the relative size of the verdict. To estimate this regression, 151 observations were taken from the initial ALD, as these observations had both crash date and verdict date. This data also only includes victories by the plaintiff, as defense verdicts would create artificial downward pressure on verdict size. Thus, the subset of data used is much smaller than the total ALD.

This statistical analysis focused on the relationship between three factors: the time between the crash and the verdict; the number of deaths; and the dollar value of the verdict. These two independent variables are meant to best estimate the size of the verdict as a result of the crash, *Verdict Size*.

$$Verdict\ Size = \beta_0 + \beta_{Log\ Verdict}\ Log\ Verdict + \beta_{Deaths}\ Deaths + \varepsilon$$

The first independent variable, *Log Distance*, is defined as the natural logarithm of the days between the crash and the verdict. The natural logarithm of this variable was used to better capture the expected non-linear relationship between the time between the crash and the verdict and the size of the respective verdict (Figure 12).

**Figure 12. Scatter Plot of Time between Crash and Verdict and Verdict Size**



As shown in Figure 12, there appears to be a nonlinear relationship between the size of the verdict and the time between the crash and respective verdict. Therefore, a nonlinear form of independent variable *Distance* is used in the estimated regression.

The number of deaths related to a crash, *Deaths*, is controlled in the regression to control for the relative complexity of a case. As the number of deaths increase due to a crash, the

complexity of the respective case is also expected to increase. Thus, *Deaths* is the other independent variable in the estimated regression.

The estimated regression had 151 observations and the estimated results are

$$\textit{Verdict Size} = -13,952,452 + 3,223,453 * \ln\textit{Distance} + 3,984,311 * \textit{Death}$$

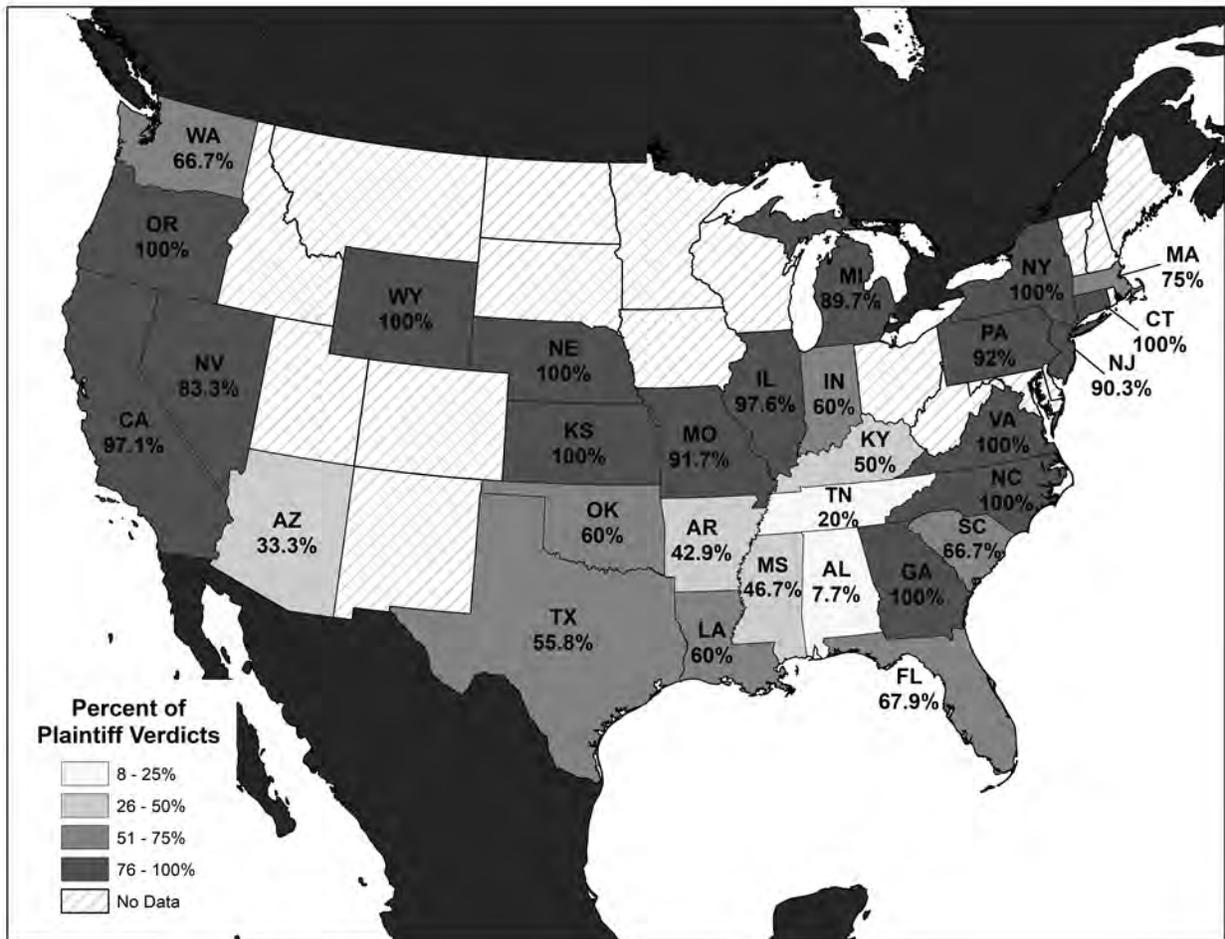
The variable of interest, *Distance*, is 3,223,453. In context, this coefficient means that as the distance between the crash date and the verdict date increases by one percent, the size of the verdict increases by \$3,223,453, with all other things being held equal. This coefficient is significantly different than 0 at 90 percent confidence level, which indicates a meaningful, positive relationship. With a level of statistical certainty, the estimated coefficient indicates that an increase in the amount of time between crash date and verdict date increases, the size of the verdict also increases.

### Geographic Analysis

While the ALD includes the state where litigation took place, it is important to note that not all states were represented in the ALD. Leveraging the location data, the percentage of plaintiff verdicts by state was calculated (Figure 13).

The percentage of verdicts for plaintiffs varied widely. For instance, in Alabama 92.3 percent of the 20 cases tried resulted in a defense verdict. This is in stark contrast to California where 97.1 percent of 34 cases resulted in a plaintiff verdict. Texas had the greatest number of cases in the ALD (86), with 55.8 percent in favor of the plaintiff. These results indicate that some areas may be more favorable for litigating large truck crashes than others, which was further corroborated by participants in the subject matter expert interviews and surveys described below.

**Figure 13. Percent of Plaintiff Verdicts by State**



Quantitative Analysis Key Findings

Aspects of crashes have an impact on the size of their respective verdict awards. From the type of crash to the number of deaths, there are multiple factors that impact jury awards. Among the key findings are the following:

- The size of the verdicts have increased over time by a relatively large amount, regardless of the factors of the crash.
- Traumatic Brain Injuries increase the size of the verdict when controlling for other factors.
- Time between the crash date and the verdict date increases the size of verdict.
- The number of children either injured or killed in a crash is the single largest factor in verdict size, with a \$27 million increase on average.
- The presence of a defense expert witness decreases the size of verdicts considerably.

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## **SUBJECT MATTER EXPERT INTERVIEWS AND SURVEYS**

In addition to the quantitative analysis, ATRI interviewed a number of subject matter experts to further elucidate the causal factors of large verdicts. Interviews were also intended to expand on the issues identified in the quantitative analysis.

### **Methodology**

Open-ended interview questions were collated into an interview guide before being beta-tested with select subject matter experts knowledgeable on large verdicts. The first few interviews included a post-interview discussion of how to improve the interview questions, as well as solicit feedback on additional questions that should be asked. These discussions generated a robust and consistent interview process for the remaining participants. The full interview guide can be found in Appendix B.

Among the subject matter experts interviewed by ATRI were defense attorneys, plaintiff attorneys, insurance agency brokers, insurance executives, and underwriters. Names and any identifiable factors and attributions were kept confidential. The opinions conveyed by the convenience sample of interviewees may not be statistically representative, but still indicated a general consensus across many themes and questions.

Key interview features included:

- All interviews were conducted over the phone.
- Interviews ranged from 20 minutes to more than two hours; however, the majority of interviews were approximately one hour.
- Most interviews were conducted between June and December 2019.
- While the majority of interview questions were identical for each interviewee, several questions were modified and updated to be more applicable to the interviewees' job and background.
- The majority of people were identified and interviewed based on peer recommendations.

Since interviews and surveys are qualitative in nature, and ATRI researchers did not attempt to apply rigorous statistical tests to the answers, this section presents interviewee responses in the aggregate.

### **Defining Nuclear Verdict**

After beta-testing the interview questions, the research team recognized the ambiguity and lack of consistency around the term "nuclear verdict." Of the respondents that were queried for a definition of "nuclear verdicts," more than a third provided a definition based on a specific dollar threshold. The majority of these responses defined nuclear verdict as any verdict over \$10 million.

Nearly two-thirds (61.5%) indicated that the context of the case and verdict is necessary to define "nuclear." For example, several respondents recommended definitions whereby punitive and compensatory damages exceeded the direct costs by two to three times. Several others had more ambiguous definitions, such as verdicts "that should never have gone to court," or any award beyond "rational application of the given law to the admitted evidence," particularly in

relation to other historical cases and context.

### Factors Influencing Large Verdicts

Across the subject matter expert interviews, approximately three dozen causal or contributing factors were mentioned as foundational to large verdicts. These factors have been categorized into one of six categories:

- Prevention;
- Crash-related details;
- Post-crash / pre-litigation stage;
- Litigation strategies;
- Unfavorable practices; and
- Additional factors.

#### *Prevention*

Multiple interviewees prefaced remarks with variations of “the only way to prevent nuclear verdicts is to prevent the crash from happening in the first place.” Since this was a common theme, ATRI researchers documented various interviewee recommendations for reducing crashes and crash likelihood. Interviewees generally concurred that the more safety activities motor carriers engaged in to prevent crashes the lower the likelihood that a nuclear verdict would result. It was also commonly noted that motor carriers typically do not allocate enough resources toward safety and crash prevention.

Another common theme was that motor carriers failed to run proper background checks and/or conduct or review drug tests. In situations where there was any history of alcohol or drug use by the truck driver, it became much easier to convince a jury that the truck driver was at fault for the crash – even when the crash causal factors were unclear or tenuous.

*“...The defense intends to focus on the 30 seconds before the crash. And when I handle a case, I look long before that. I look at how he was hired, how he was trained, and how he was supervised...”*

***A Plaintiff Attorney***

The plaintiff’s burden to show negligence becomes much easier, from a jury perspective, when there is any possibility that drugs or alcohol were a contributing factor; hence, truck driver background checks become critical from a litigation prevention standpoint.

Juries are less forgiving of trucking companies when plaintiffs can document that additional reasonable steps to prevent a crash could have been taken, regardless of compliance with FMCSRs. Most plaintiff attorneys frame FMCSRs as minimum standards. The ability of defense attorneys to document safety activities that exceed FMCSRs carries great weight with juries.

### *Crash-Related Details*

The quantitative analysis utilized powerful statistical tools to document significant litigation factors, and many of those findings are independently corroborated in this qualitative interview section. For instance, interviewees highlighted the following factors as playing significant roles in nuclear verdicts:

- number of passengers in the plaintiff's vehicle;
- number of fatalities resulting from the crash;
- number of injuries resulting from the crash;
- cost of medical treatment;
- economic inflation;
- plaintiff demographics, especially age and income; and
- the amount of insurance the motor carrier has at time of crash.

Due to myriad factors, including medical technology improvements, level of care, malpractice insurance, and federal insurance regulations, medical costs have increased substantially over the last decade (Figure 6). In relation to litigation, there is no uniform method or formula for accurately calculating medical costs, which can lead to disagreement among parties and volatility among jury awards. Until an accurate medical cost calculator is developed, defense attorneys should be comprehensive in their medical cost assessments. It was noted that when a defense attorney spends too much time arguing over the validity of the medical costs, the jury can perceive them as unsympathetic. Plaintiffs indicated that reasonable settlements that covered all medical costs reduced the likelihood of litigation and potential nuclear verdicts.

It was advocated by both plaintiff and defense attorneys that defense attorneys must undertake more technical evaluations of crashes, and develop high-level probability assessments to determine whether to litigate or settle, and/or to develop "reasonable" settlement offers. The significant factors and analyses identified in this and other research must be mapped and weighted for each case.

### *Post-crash / Pre-litigation*

Three activities were identified that occur post-crash but pre-trial. The successful implementation of these tasks can also play a critical role in successful litigation:

- case evaluation;
- settling the case in a mediation; and
- pre-trial preparation.

**Case Evaluation.** The attorneys and insurance professionals interviewed emphasized the importance of accurate, thorough and objective risk assessments of the crash to avoid a nuclear verdict. A risk assessment or risk analysis is an objective evaluation of the case to identify crash causes, negligence and the requisite financial liability.

The risk evaluation must be based on verifiable facts, driver and carrier histories, depositions and internal point-counterpoint debates. During this phase, attorneys need to candidly assess their vulnerabilities, and treat each strategy with a "devil's advocacy" approach.

A thorough risk assessment will include a search for any potential structural issues that may have contributed to the crash. Not having implemented an adequate driver training curriculum or committing too few resources to safety programs were cited examples of structural issues that good attorneys include in their risk assessment.

A subjective analysis inhibits the integrity of an accurate and thorough case evaluation. The ultimate question being asked and investigated mostly by the plaintiff, but also by successful defense attorneys is, “what are the operational, safety or training factors that could have prevented the crash from happening in the first place?”

**Settling in Mediation.** Before a case is considered for litigation, due diligence includes assessing the feasibility of settling through a mediation process. Nearly 50 percent of interviewees talked about how settling in mediation is critical to avoiding a nuclear verdict. That said, settlement amounts that avoid litigation may still exceed insurance and/or carrier expectations for being “reasonable.”

Settling early and the size of the settlement offer are the two main components that interviewees emphasized in order to have a successful mediation.

**Settling in Mediation: Settle Early.** The greater the time span between the date of the crash and when the case commences, the more expensive it becomes. This is corroborated in the quantitative analysis, where a statistically significant relationship between the length of time between the crash and the verdict, and the size of the respective verdict was found. Similarly, settling becomes more expensive as the case comes closer to trial. Attorney fees, mock juries, witness coaches, and court fees are examples of preparatory costs that raise overall litigation costs in advance of a late-date settlement offer.

*“Understand the value of these cases and settle them early, not three years later. Settle them within three months.”*

***A Defense Attorney***

**Settling in Mediation: Settlement Size.** Multiple plaintiff and defense attorneys mentioned the importance of bringing reasonable offers to the table. Several examples were provided whereby “insulting” low-ball offers angered plaintiff attorneys, who went straight to litigation – and in several of those instances, jury awards far exceeded the original settlement offer. The ideal mediation scenario is when both parties bring detailed risk analyses to the table, and negotiate a fair and reasonable compensation. This is particularly important for the defense, as it informs the plaintiffs of the likelihood (or unlikelihood) of success in court.

**Pre-Trial Preparation.** A number of interviewees discussed how witness coaches, mock juries, focus groups, expert witnesses, jury consultants, and thorough risk assessments can dramatically impact the outcome of a trial, depending on how they are used.

Both plaintiff and defense attorneys described the importance of adequately investing in resources that help prepare for trial. Table 9 provides a general overview of the types of services attorneys can invest in to help their case.

**Table 9: Estimated Costs of Various Trial Preparation Tactics**

Pre-trial Preparation Method	Description	Estimated Cost
Jury Consultant	A human behavior expert that helps attorneys research and select jurors. <sup>33</sup>	\$5,000 - \$20,000 <sup>34</sup>
Mock Trial	A sophisticated jury simulation involving adversarial arguments and witness evaluations. <sup>35</sup>	\$3,000 - \$10,000 <sup>36</sup>
Focus Group	A group of people assembled to hear issues and arguments relating to a lawsuit with the objective of providing qualitative data to better understand how a jury might react in the trial. <sup>37</sup>	\$1,000 - \$1,500 (4 hours with 8 jurors) + travel costs
Expert Witnesses	A person who testifies at a trial due to their advanced or proficient knowledge of a particular topic.	\$200 - \$600 per hour per witness <sup>38</sup>

**Pre-Trial Preparation: Attorney Qualifications.** A subject that emerged from the first several interviews was how defense and plaintiff fields of practice have improved over the last two decades. In response to this common talking point, an additional question was added to the interview guide for subsequent interviewees.

Approximately 60 percent of interviewees were asked if they thought plaintiff attorneys or defense attorneys do a better job at arguing truck crash cases. Of these respondents, 73.3 percent said that plaintiff attorneys were doing better, 20.0 percent said both, 6.7 percent said neither, with no one saying defense attorneys did better.

Years of experience, particularly as a successful trucking defense attorney, is an important consideration in evaluating the quality of an attorney. Table 10 contains a series of comments from both plaintiff and defense interviewees that convey perceived differences between defense and plaintiff attorneys.

<sup>33</sup> Kane, Sally. "What does a Jury Consultant Do?". August 10, 2019. Retrieved from <https://www.thebalancecareers.com/jury-consultant-2164304>

<sup>34</sup> "What Do Jury Consulting Services Cost When on a Budget?" February, 22, 2018. Retrieved from <https://www.litigationinsights.com/services-cost-on-budget/>

<sup>35</sup> "What is the Difference in a Focus Group and a Mock Trial?" Retrieved from <https://magnusweb.com/faq/what-is-the-difference-in-a-focus-group-and-a-mock-trial/>

<sup>36</sup> "What is a Mock Jury and Can it Be Improved?" November 30, 2017. Precise Law. Retrieved from: <https://trial.precise-law.com/mock-jury/>

<sup>37</sup> Warshauer, Michael and Thorton, Steven. "Effective use of 'Do It Yourself' Focus Groups." Retrieved from <https://warlawgroup.com/wp-content/uploads/2017/09/16.DIYFocusGroups-1.pdf>

<sup>38</sup> "How Much Does a Civil Suit Lawyer Cost?" October 18, 2017. Retrieved from <https://www.thumbtack.com/p/civil-suit-lawyer-cost>

**Table 10. Interviewee Perceptions on Differences between Defense and Plaintiff Attorneys**

As plaintiff attorneys have become more successful over time, it acts like a magnet in drawing in other high-quality plaintiff attorneys from other sectors.
Plaintiff attorneys are becoming better storytellers.
Plaintiff attorneys are generous in their willingness to share tools and strategies with other (non-competing) plaintiff attorneys; believing that a rising tide lifts all boats, they will even extend gratis support services. Defense attorneys appear to operate in a more competitive firm environment, and expressed great difficulty in obtaining, from insurers, carriers and/or truck drivers, all the information and data needed to successfully litigate the case. Several attorneys described situations where important information was not provided to the defense team, as it was considered “more confidential than critical” by an insurance client.
It is important for attorneys to be immersed into the industry. <ul style="list-style-type: none"> <li>• Being a dabbler or a generalist won’t yield much success.</li> <li>• All, or almost all, attorneys who are certified truck accident attorneys are plaintiffs, even though it is meant for all attorneys.</li> </ul>
Plaintiff attorneys work harder because they have the burden of proof, defense attorneys simply have to poke holes in the opposing counsel’s argument.
Some defense attorneys are using the playbook from 20 years ago and they simply bully the plaintiff, which does not work anymore.
Defense lawyers come off as more arrogant than plaintiff attorneys.
Defense lawyers are not utilizing technology in the courtroom.
The plaintiff’s bar is more strategic and considers the big picture, defense attorneys are more tactical.
The defense side has not changed enough.
In terms of caseload, defense attorneys are spread too thin by insurance companies.

**Pre-Trial Preparation: Attorney Compensation.** One of the issues cited by interviewees is that the defense is often “under-resourced” and works under a “cost-minimization” business model. Since defense attorneys are often paid by insurance companies, it was argued that defense teams spend more time rationalizing the need for important litigation strategies. Plaintiff attorneys, on the other hand, are typically paid a percentage of the settlement or jury award, which incentivizes them to apply any strategy that increases the award. One plaintiff attorney pointed out that defense attorneys are paid by the hour, and so they may not be as invested in the case outcome as are plaintiff attorneys.

**Pre-Trial Preparation: Balancing Logos and Pathos.** Another issue cited by interviewees is the strategies employed by both sides in preparing for a trial, and at its simplest, it is striking a balance between facts and emotion. In Greek rhetoric, three well-known strategies of persuasion are ethos, logos and pathos. Ethos is loosely defined as credibility, honesty and character. It goes without saying that both plaintiff and defense teams must possess ethos in the courtroom – as it is foundational to building any position with a judge, jury and the general public. Without ethos, logos and pathos cannot realistically succeed.

Logos creates persuasion through the building of a logical, empirical construct. Used appropriately, logos is ostensibly technically or scientifically irrefutable.

Finally, pathos is an appeal to emotions. It is generally accepted that pathos is the most powerful or effective form of rhetoric, based on psychology and human nature.

During the interviews, several attorneys juxtaposed, somewhat stereotypically, the strategies used by plaintiff versus defense attorneys. The simplest example is that the defense would call expert witnesses to testify about “brake stopping distances” and company policies whereas the plaintiffs might describe, in detail, the tragedy of losing a spouse or child. In fact, the legal descriptor of “pain and suffering” is well capitalized on in a pathos-flavored strategy. In theory, the defense under-utilizes pathos, believing that a reasonable jury would find a “rational” conclusion within a logos approach. Based on the comparative analysis highlighted in the qualitative analysis, it appears that a recalibration or balancing of logos versus pathos by the defense could modify the existing balance of defense wins versus losses.

In summation, interviewees identified and defended a series of successful factors and approaches for pre-trial preparation:

- Defense attorneys and insurance companies need to clearly articulate to each other why it is or is not worth investing in the pre-trial preparation strategies described above.
- Do not underestimate the validity of the opposing counsel's case.
- While trial preparation tactics are expensive, it is worth spending more money to prepare for trial in order to avoid a significantly larger verdict award.

### *Litigation Strategies*

If mediation was not chosen or successfully negotiated, the following describes the interviewees' perceptions of various litigation strategies

**Litigation Strategy: Information Sharing Among Litigants.** Plaintiff attorneys maintain strong communication networks, and actively share strategies and insights among their peers. Beyond direct and informal conversations between plaintiff attorneys, the plaintiff bar holds numerous educational conferences where litigation case studies are dissected, and where successful plaintiff attorneys share their tactics and approaches. Alternatively, multiple attorney interviewees from both bars described defense attorneys as having a more “competitive” attitude, which limits information sharing by design. To some degree, the lack of information sharing by the defense bar relates to a dearth of empirical data, but generally the interviewees describe the defense bar model as being more “secretive.”

**Litigation Strategy: Tactical versus Strategic.** One interviewee proposed that defense attorneys are more tactical in their litigation approach; whereas, plaintiff attorneys are more strategic. A tactical approach focuses on documenting whether or not a driver was speeding, or calculating braking distances. A strategic approach focuses on why the driver felt compelled to speed, or the motivation behind a hard braking situation.

Interviewees referenced other approaches that can be more tactical or strategic, including the application of the reptile theory, sentiment, and humanizing the defense (motor carrier). The reptile theory asserts that an attorney influences a jury by appealing to the reptilian complex, a portion of the brain that controls breathing, heart rate and other functions associated with survival. When the reptile theory is applied in a legal setting, questions are framed in a way that compels the jurors to make decisions based on fear or survival instinct, rather than logic and

reasoning. For example, an attorney may present a safety scenario as being potentially catastrophic to anyone on the road, and convince jurors that they can make everyone safer by punishing the defendant with a large verdict.

The defense bar was primarily concerned with the use of the reptile theory because it ostensibly redirects the jury to emotional pleas when decisions should be “based on the factual merits of the case.” This becomes particularly problematic when defense counsels build out rational arguments utilizing highly technical expert witnesses.<sup>39</sup>

The use of sentiment refers particularly to plaintiff attorneys that create and direct emotions toward the plaintiff. For example, if a child were injured during the crash, they may put that child on the stand and engage them in a way that creates pathos among the jury. Several interviewees believe that in successful defense cases, the defense counsel makes the trucking company seem more human, compassionate or relatable. Some factors that may be highlighted in trial are the trucking company’s long history as a family-owned business, its record of employing veterans, its strong community support and the compassion and dedication of its truck drivers.

**Litigation Strategy: Expert Witnesses.** Multiple interviewees commented on the criticality of properly utilizing expert witnesses. First, multiple redundant expert witnesses can generate boredom and lack of attention among jurors. One highly credible expert witness is often adequate to command authority and credibility in their respective field.

Second, the expert witness should be relatable. Someone who speaks at a highly technical level may not be able to communicate effectively with the jury. An example provided by an interviewee was that a local mechanic may do a better job of explaining an engine failure issue to the jury than a person with a PhD in mechanical engineering. Jurors of diverse education backgrounds and socio-economic status must be able to easily understand the point that the expert witness is trying to communicate.

Lastly, attorneys should be mindful of the reason they are using an expert witness. If both counsels proffer a series of competing expert witnesses, the case will get more expensive and may lose focus. In the Quantitative Analysis section, it was found that the inclusion of defense expert witnesses correlates with smaller verdict amounts. Attorneys should take into consideration how critical the content or objective is prior to utilizing an expert witness – who may quickly be debunked through cross-examination or countered by opposing experts.

**Litigation Strategy: State vs. Federal Court.** One insight provided by interviewees was the value of taking a case to federal court rather than trying it in state court. Three primary considerations were proffered by interviewees in deciding federal versus state court.

1. Not all cases can be tried in federal court. For a case to be tried in federal court it must involve a federal criminal, antitrust, bankruptcy, patent, copyright, or a maritime issue; involve the United States as a legal party; violate the U.S. constitution; or the involved parties are of different domiciles and the amount in question is greater than \$75,000. The rule that most commonly applies to truck crash cases is “diversity jurisdiction” which

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<sup>39</sup> For more information about the reptile theory see Wilinski, John and Christina Marinaks. (March 3, 2016). “The Reptile Brain Strategy: Why Lawyers Use It and How to Counter It.” Litigation Insights. <https://www.litigationinsights.com/reptile-brain-strategy-lawyers-how-to-counter/>

allows a case to be tried in federal court if parties have different domiciles and the amount in question is greater than \$75,000.<sup>40</sup> While some attorneys might recommend trying a case in federal court whenever possible, jurisdictional restrictions may prohibit some cases from being heard at the federal level.

2. The structure of the federal court system may favor truck litigation based on the fact that when a federal judge is assigned to a case, they typically manage the case through its completion, making them more “invested.” In contrast, a case tried in the state system may have had six or seven judges touch the case between the first motion and trial. Additionally, since the federal court system pulls from broader sections of the state, it can take away local advantages and/or biases. Interviewees noted that there can be relationships between local attorneys, law enforcement, and judges that could create a biased trial setting. Trying a case in federal court ostensibly removes these biases.
3. Federal court could give one counsel an advantage over the other counsel. That is, if the defense counsel has more experience trying cases in federal court than the plaintiff counsel, the defense counsel may have procedural advantages.

### *Unfavorable Practices*

Multiple interviewees raised concerns about ethical or inappropriate litigation practices. While it is important to reference the various “unfavorable practices” raised by interviewees, this research did not attempt to quantify the scope and frequency of these activities.

**Unfavorable Practice: Ambulance Chasers and Excessive Advertising.** An “ambulance chaser” is stereotypically defined as an attorney who aggressively seeks out crashes to increase their client base, caseloads and financial gain. Interviewees asserted that ambulance chasers are plaintiff attorneys who are not typically associated with cases that lead to nuclear verdicts. Rather they focus on “quantity over quality” by representing a large number of cases that are typically smaller in monetary value. The frequency and scope of these smaller cases was identified by ATRI’s RAC as a top research need when it prioritized the study on understanding the impact of small verdicts on the trucking industry at its March 2020 annual meeting.

Several defense attorneys commented on the amount of litigation advertising that now takes place in certain states. Interviewees remarked that many of the southern states in particular have a plethora of billboards sponsored by plaintiff attorneys. These advertisements encourage people to file potentially lucrative lawsuits if they were in a truck-involved crash. Concerns with ambulance chasing and excessive billboard advertising highlighted problematic messaging, mainly that simply being in a truck-involved crash entitles someone to a large sum of money independent of fault or negligence.

**Unfavorable Practice: Litigation Investors / Financers.** Litigation financing is a relatively new business model for upfront financing of certain legal cases with the goal of recovering a profitable percentage of a future verdict award or settlement. A litigation financing investor will cover some or all of litigation research expenses, lawyers’ fees, medical bills, among other

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<sup>40</sup> “Federal vs, State Courts – Key Difference.” June 20, 2016. Available online: <https://litigation.findlaw.com/legal-system/federal-vs-state-courts-key-differences.html>

expenses. Litigation finance is discussed later in this report but was raised as a problematic issue by multiple interviewees.

**Unfavorable Practice: Chameleon Carrier.** A chameleon carrier is a trucking company that typically has a marginal safety record and a tenuous financial situation. They often do not comply with government regulations and may have little regard for safe processes. If they are cited or closed down by FMCSA, they quickly change the name and address of the company and restart operations.

Government regulatory agencies do not have the resources to identify and pursue the myriad of chameleon carriers, so it is not surprising that the Government Accountability Office found in 2012 that “18 percent of the applicants with chameleon attributes were involved in severe crashes compared with 6 percent of new applicants without chameleon attributes.”<sup>41</sup>

Chameleon carriers pose a real threat to the trucking industry’s litigation landscape in two ways:

- First, marginal trucking companies harm the trucking industry’s image both on the road, and in the courtroom. Whether people are looking at unsightly trucks on the road or reading about catastrophic crashes caused by careless truckers, reputable trucking companies will have their image tarnished as well.
- When marginal trucking companies are involved in a crash of any type or severity, they are priming the litigation well by providing legal precedents and plaintiff training – not to mention insurance payouts that hit every fleet’s premium.

**Unfavorable Practice: Fraudulent Activity.** Multiple defense attorneys identified insurance fraud as a serious and pervasive threat to the trucking industry. There are numerous variations of fraud, primarily defined by the parties engaged in the activity. A major challenge in addressing fraud is it often utilizes sophisticated plans and well-rehearsed teams. In December of 2019, the U.S. Attorney’s office of the Eastern District of Louisiana indicted eight people for intentionally staging a fake crash involving a semi-truck.<sup>42</sup> Five of these people plead guilty to the charges, and one has since died.<sup>43</sup> The eight individuals staged “crashes” with tractor-trailers for the purpose of collecting insurance payouts. The Louisiana perpetrators varied the number of passengers, changed the crash locations, and avoided traffic cameras.<sup>44</sup> While this group may have illegally staged at least 40 crashes, the individuals are being tried for two staged crashes that occurred in 2017.<sup>45</sup>

Several interviewees referenced medical fraud as being equally problematic. In truck crash litigation, medical fraud can take the form of excessive or exaggerated medical treatments,

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<sup>41</sup> U.S. Government Accountability Office. “New Applicant Reviews Should Expand to Identify Freight Carriers Evading Detection.” March 2012. Available online: <https://www.gao.gov/assets/590/589530.pdf>

<sup>42</sup> “A Total of Eight Now Indicted in Insurance Fraud Scheme Involving Staged Accidents.” United States Department of Justice The United States Attorney’s Office Eastern District of Louisiana. Dec. 2019. Available online: <https://www.justice.gov/usao-edla/pr/total-eight-now-indicted-insurance-fraud-scheme-involving-staged-accidents>

<sup>43</sup> Miller, Eric. “Five Plead Guilty to Staging Truck Crashes in New Orleans Area.” Feb. 2020. Available online: <https://www.tnews.com/articles/five-plead-guilty-staging-truck-crashes-new-orleans-area>.

<sup>44</sup> “A Total of Eight Now Indicted in Insurance Fraud Scheme Involving Staged Accidents.” United States Department of Justice The United States Attorney’s Office Eastern District of Louisiana. Dec. 2019. Available online: <https://www.justice.gov/usao-edla/pr/total-eight-now-indicted-insurance-fraud-scheme-involving-staged-accidents>.

<sup>45</sup> Miller, Eric. “Five Plead Guilty to Staging Truck Crashes in New Orleans Area.” Feb. 2020. Available online: <https://www.tnews.com/articles/five-plead-guilty-staging-truck-crashes-new-orleans-area>.

and/or deliberate misdiagnosis of injuries and harm.<sup>46</sup> An investigation into one truck crash fraud case in Atlanta involving a medical finance investing company revealed that a doctor was billing patients from truck crashes 2.5 to 3.5 times more than the average market rates for the same medical procedures.<sup>47</sup> For example, an injured plaintiff may have suffered a minor concussion but the doctor treated it as a severe traumatic brain injury.

**Unfavorable Practice: Spoliation.** Spoliation refers to the act of tampering with or destroying evidence. The most common example in trucking litigation is when the motor carrier deletes video camera data, electronic log data, or other electronic evidence of the crash, despite regulations that specify how long data must be retained. Of all the “corrupt” practices referenced by interviewees, spoliation is one of the few that is discretely illegal.

Spoliation is defined and treated differently in each state. For instance, “bad faith” is not essential to imposing spoliation sanctions in the state of New Hampshire; however, other states such as Washington require proof that there was an element of “bad faith” in the process of destroying the evidence.<sup>48</sup> It is unknown how often motions pertaining to spoliation are filed. The Judicial Conference Advisory Committee on Civil Rules conducted a study in 2010 that found 209 cases of motions for sanctions based on spoliation between 2007 and 2008 across 19 districts.<sup>49</sup>

Similar to chameleon carriers, spoliation contributes to nuclear verdicts in several primary ways. First, when a jury discovers that the defense has deleted or tampered with evidence, it immediately raises questions about the veracity of any defense arguments that are raised. In addition, it tarnishes the overall image of the trucking industry, which in turn raises the bar for defendants in attempting to offset negative perceptions as the trial unfolds. Finally, the process that ensues after the plaintiff counsel accuses the defense of spoliation can be long and tedious, ultimately lengthening the trial and making the case more expensive.

**Unfavorable Practice: Preferential Treatment.** Preferential treatment refers to the personal, biased, or subjective relationships that sometimes exist between local attorneys, judges, doctors, law enforcement, and any other stakeholders that may have some loose association to the crash or trial. If the crash is tried in the state or county where the plaintiff lives or works, interviewees proposed that there is an increased likelihood that the plaintiff attorney has a pre-existing or historical relationship with judges and potential jurors. The personal dynamics that sometimes exist between the court stakeholders can give rise to ethical concerns and/or bias. Hence, the same interviewees proposed moving cases to federal court if possible.

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<sup>46</sup> Legal Information Institute. “Healthcare Fraud.” Cornell Law School LII.  
[https://www.law.cornell.edu/wex/healthcare\\_fraud](https://www.law.cornell.edu/wex/healthcare_fraud)

<sup>47</sup> Ibid.

<sup>48</sup> “Spoliation Evidence in All 50 States.” Matthiesen, Wickert, and Lehrer, S.C. Dec. 2019. Available online:  
<https://www.mwl-law.com/wp-content/uploads/2018/02/SPOLIATION-OF-EVIDENCE-CHART.pdf>

<sup>49</sup> Lee, E. A III. “Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases.” 2011.  
[https://www.uscourts.gov/sites/default/files/federal\\_judicial\\_center.pdf](https://www.uscourts.gov/sites/default/files/federal_judicial_center.pdf)

### *Additional Factors*

Interviewees mentioned a number of other factors that can influence a large verdict including juror desensitization to large verdict amounts, technology improvements changing the nature of crashes, and the trucking industry's image.

**Additional Factor: Jurors Being Desensitized to Large Dollar Amounts.** Interviewees believe that jurors have become desensitized to large verdict awards. This may be occurring as a result of jurors reading about and watching news highlights of large jury verdicts (in trucking and other industries), which in turn creates a new baseline from which they believe awards can be made to the plaintiff.

The concurrent trends toward jury desensitization of large awards and plaintiffs seeking large awards puts more pressure on carriers and insurers to be more aggressive when trying to settle. If a case does go to trial, defense attorneys need to educate the jury on realistic and objective injury and litigation costs without being perceived as greedy and un-empathetic. Arguing down the value of the case too aggressively could have an adverse effect on the jury.

**Additional Factor: Technology Improvements.** Improvements in automotive safety technologies have altered the severity and type of injuries that people experience when in a crash. Through increased deployment of safety technologies like automatic braking, lane departure warning, and adaptive cruise control, crashes have become less lethal, and instead may lead to long-term injuries rather than fatalities.

Although fewer people may be dying in vehicular crashes, many interviewees suggested that injuries are more severe than they previously were leading to higher medical costs. Someone who suffers quadriplegia from a crash will expend approximately \$1,065,000 in medical expenses in the first year and approximately \$185,000 for each of their subsequent years.<sup>50</sup> In short, as safety technologies continually improve and increase in number, more victims will survive crashes – but potentially with more severe injuries resulting in higher medical costs.

**Additional Factor: Industry Image.** Industry image refers to the manner in which the trucking industry is perceived by the public. Interviewees confirmed that if the jury perceives the motor carrier as a “greedy trucking company,” then they are less likely to be sympathetic to the defendant, and will be less likely to base their decision on the merits of the case. Several defense attorneys discussed how they emphasize to juries the symbiotic relationship between trucking companies and the public. Specifically, highlighting the critical role truck drivers play by delivering lifesaving medical supplies, groceries, fuel, and clothing. The defense attorneys also emphasized how truck drivers complete extensive safety training and the carrier invests in safety technologies. If the defense attorney does not address the industry's image or counter any negative industry perceptions by the jurors, then it is more likely that the jury will sympathize with the plaintiff.

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<sup>50</sup> Gale, Jacky. “The Lifetime Cost of Quadrapalegia.” Law Street Capital. November 2017. Available online: <https://lawstreetcapital.com/2017/11/the-lifetime-cost-of-quadriplegia/>

## Litigation Impact Survey

In an effort to understand the impact that nuclear verdicts have on fleet safety, financials and operations, a *litigation impact* survey was developed and distributed to both fleets and commercial insurance carriers. The surveys were designed to generate responses relevant to each respondent's title and background (Appendix C).

### *Impact on Safety*

While the safety survey responses were limited, the findings are both comparable and insightful.

When asked if nuclear verdicts have an impact on roadway safety, respondents indicated that large verdicts have a negligible positive impact on promoting safety, and typically reduce motor carriers' access to capital otherwise used to invest in safety technologies. Several examples were provided for the transfer of financial resources away from safety budgets. For instance, nuclear verdicts led to higher insurance and risk management costs. According to *An Analysis of the Operational Costs of Trucking: 2019 Update*, insurance costs increased 12 percent between 2017 and 2018, and 18.3 percent over the last 5 years.<sup>51</sup> These impacts appear to extend beyond classic safety investments; one respondent indicated that, beyond safety, rising insurance costs reduced their general driver training budgets.

Insurance industry respondents were generally aware of the negative impact of both nuclear verdicts and rising insurance costs on carrier safety, but had little flexibility to modify carrier costs. Aside from payouts, insurance and reinsurance firms have had to increase recoverables and reserves, as well as increasing labor costs associated with research, underwriting and risk management. The increased financial pressures associated with insurance cost increases as well as other related cost centers have forced multiple carriers out of business. Unfortunately, there is inadequate empirical data to assess the direct on-the-road safety and crash consequences associated nuclear verdicts.

Survey respondents suggested that plaintiff attorneys are attacking company policies – even if the driver and motor carrier were in compliance with FMCSRs, and expressed frustration that it is a litigation shortfall when they are “doing what we’re supposed to be doing.” While many respondents indicated that they typically exceed FMCSA standards and regulations, it is difficult to document and corroborate how and where a carrier's safety programs, investments and training exceed FMCSR regulations. It was proposed that the industry develop an internal calculator for baseline standards, but it was noted that each new level of “Exceeding Standards” could create a new baseline in the eyes of plaintiffs and juries.

As awareness of nuclear verdicts increases both in the media and within the trucking industry, carrier scrutiny of existing safety policies and programs has increased. Whether additional resources available to carriers has commensurately increased is less clear.

*“...the plaintiff attorneys attempt to have the jury set the standard and unfortunately, whatever you do is not enough... There is no safe harbor for exceeding FMCSRs.”*

***Motor Carrier Senior Vice  
President of Safety***

<sup>51</sup> Murray, Daniel and Seth Glidewell. “An Analysis of the Operational Costs of Trucking: 2019 Update.” Arlington, VA. American Transportation Research Institute. November 2019.

When queried, respondents noted two primary ways in which nuclear verdicts can impact carrier safety policies and programs.

1. For carriers that experience large verdicts or settlements, the litigation costs are typically built into future safety assessments; either directly into an ROI calculation (e.g. total safety technology costs over crash plus legal expenses), or indirectly as a future litigation impact that will be avoided. These approaches and considerations are made even when the carrier does not deem itself to be negligent. Several insurance firms also build future verdict/settlement risk into their actuarial models – independent of carrier negligence.
2. Respondents described settlement agreements that require the motor carrier to modify their internal safety programs, policies and/or safety technology investments. Due to the confidential nature of most settlement agreements, it is unclear how frequently, or to what extent plaintiffs demand changes to policies. That said, one plaintiff attorney differentiated good plaintiff attorneys from bad by noting that any plaintiff attorney that does not attempt to improve the defendant's safety culture is simply in it for the money. He referenced his own settlement clause in a truck-involved crash that involved multiple fatalities and multiple injured people. The trucking company was required to implement automatic braking technology on all of their units as part of the settlement agreement.

*“There is greater carrier attention to how policies, training, company publications and websites are worded in an effort to thwart the litigation style of ‘reptile attorneys.’ Unfortunately, we are not able to be as clear in communication about expectations and must leave room for exceptions.”*

***Motor Carrier Senior Vice President of Safety***

According to respondents, larger motor carriers may be updating their training programs and safety procedures as a proactive mechanism for dealing with the threat of a large verdict. A leading example of this is the dramatic increase in use of critical event video (CEV) cameras, which can quickly clarify which party is negligent, thus reducing long litigation processes. CEV cameras and other safety technologies may not directly “improve” on-road safety as much as they generate much needed crash data for more accurate assessment of negligence and liability.

### *Impact on Stakeholder Costs*

ATRI's Litigation Impact Survey included 22 questions relating to business and cost impacts that were typically completed by fleet business managers and insurance analysts. These questions were categorized into one of three general bins:

- 1) How have insurance companies been impacted by large verdicts?
- 2) How have motor carriers been impacted by large verdicts?
- 3) Have large verdicts contributed to trucking companies bankruptcy filings?

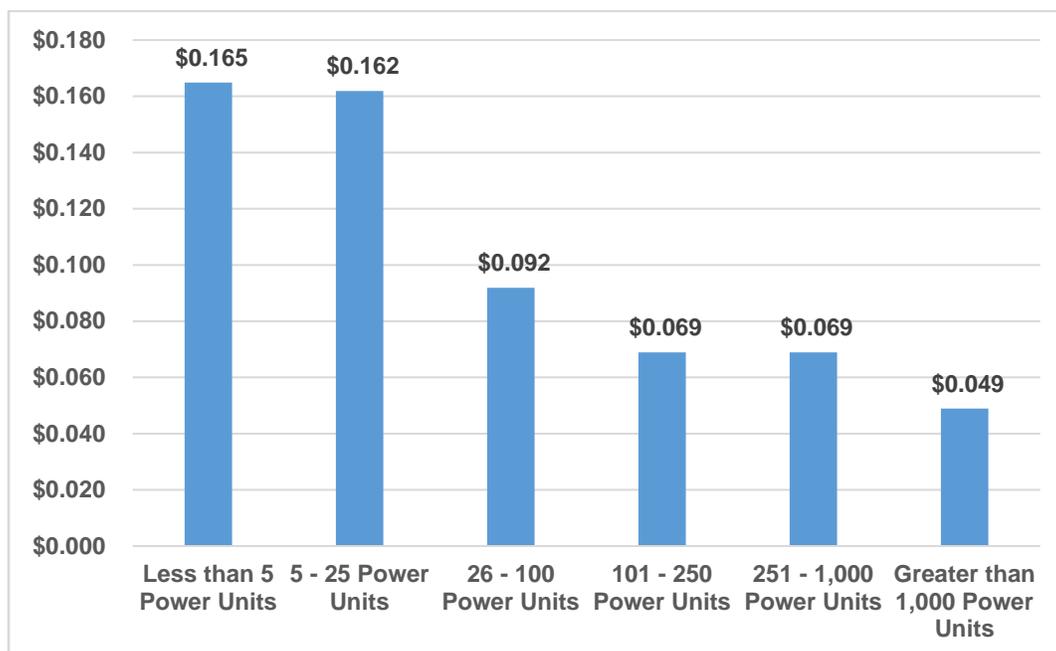
All survey respondents reported that insurers have had to increase premiums as a result of large verdicts. As margins for insurance companies have decreased, they have responded quickly in several ways including:

- raising annual premiums across all fleets, independent of safety ratings;

- being more selective in who they insure; and
- in rare instances, retreating from the industry all together.

While all fleets now pay more, premiums definitively scale based on safety records. One respondent specified that “low risk” motor carriers are experiencing eight to ten percent increases in insurance costs, while new ventures and average-to-marginal carriers are experiencing a 35 percent to 40 percent annual increase – a trend that has occurred for three consecutive years. In terms of fleet size, it appears that size matters. Based on ATRI’s operational cost data, small fleets and owner-operators pay out-of-pocket considerably more on a per-unit basis than larger fleets (Figure 14).<sup>52</sup>

**Figure 14. Cost per Mile of Insurance Premiums by Fleet Size**



As noted, insurance companies are more selective in who they insure. As a result, motor carriers have fewer options for purchasing full coverage to protect their balance sheets. Consequently fleets continue to accrue increased risk (e.g. higher deductibles, less coverage) to mitigate costs. To offset this increased risk and fearing nuclear verdicts, motor carriers have generally increased their focus on safety and hiring practices.

<sup>52</sup> Murray, Daniel and Seth Glidewell. “An Analysis of the Operational Costs of Trucking: 2019 Update.” Arlington, VA. American Transportation Research Institute. November 2019.

Survey respondents generally agreed that nuclear verdicts are not common, and do not directly cause motor carriers to go out of business. However, many respondents reported that increased insurance costs, an indirect consequence of large verdicts, is a primary reason for closing. Inability to compete in a competitive freight market, poor operation and business practices, and inability to adequately adjust their prices quickly are several other reasons reported as to why motor carriers may have to file for bankruptcy.

*“Motor carriers that do not take steps to manage their CSA, retain safe drivers, control claims, and equip their units with the latest safety technology will have a difficult time obtaining insurance.”*

***Insurance Executive***

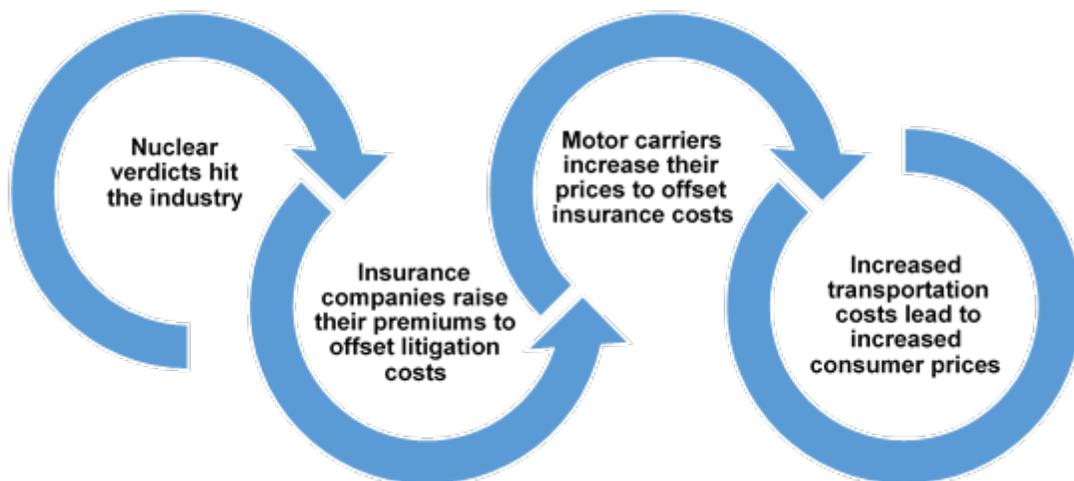
### *Impact on Economic Costs*

To provide economic context to the Litigation Impact Survey data, ATRI interviewed a transportation economist to better understand direct and secondary consequences of nuclear verdicts. While trucking and insurance companies are directly affected by large verdicts, unintended consequences flow up and down the supply chain.

The impact was described as a trickle-down effect on the cost of living for all consumers. Presuming that the fleets and insurers continue to operate, they do so by either passing along costs, or squeezing their operating margins. It was noted that this latter strategy can generate unintended consequences in that a lack of capital and liquidity can negatively impact driver retention and safety – two of the most critical areas of fleet operations.

With increased costs being passed on as a price increase for the same service provision, nuclear verdicts ultimately are inflationary to the shippers and consumers (Figure 15).

**Figure 15. Relationship between Nuclear Verdicts and Higher Consumer Costs**



## **LITIGATION FINANCE**

One of the unfavorable practices indicated by a number of subject matter expert interviewees was litigation finance, which is a rapidly growing discipline used by plaintiffs, and to a lesser extent, defendants to pay legal fees in cases. This niche investment class is still under most people's awareness radar, but its use is expanding rapidly amongst both investors and litigation participants. Since the late 1990s, the market for litigation finance has grown from a handful of firms to a dozen major players and dozens of alternative investment funds that use litigation as part of a broader set of investment strategies around the globe.

### *Litigation Finance Basics*

Litigation finance, sometimes called legal funding, third party litigation finance (TPLF), or alternative litigation financing (ALF), refers to transactions in which a third party provides capital to one of the parties to a legal claim (e.g. a plaintiff, defendant or law firm). This is done on a non-recourse basis in exchange for a financial interest in the outcome of the claim or a lien on the law firm. Repayment of the financing is generally contingent upon a successful outcome of the underlying claim, whether by way of a judgment or (as is more frequently the case) an out-of-court settlement between the parties. If the litigation is unsuccessful, the lender is owed nothing.

The litigation finance market is made up of three major segments: commercial litigation finance; personal litigation finance; and mass tort litigation finance. The commercial market generally refers to any litigation involving disputes between corporate entities, and can include breach of contract, intellectual property infringement, business torts, trade secrets, domestic and international arbitration, antitrust, securities, fraud, employment, bankruptcy and creditor's rights, partnership disputes, and tax, among others. The consumer market covers personal injury, estate law, family law, and automotive crashes. The mass tort space generally funds law firms directly as they litigate cases involving mass tort matters such as product injury cases and environmental damages cases. Despite the investor backing of a case, language is typically included in the investment agreements that govern litigation finance deals that explicitly prohibits the provider of funds from exerting any control over the management of the case, including any negotiations around settlements.

Advocates of litigation finance typically focus on the "equal access to justice" angle when describing its chief merits, as it permits plaintiffs to pursue litigation and retain legal representation they otherwise could not afford. Thus, proponents argue, cases are more likely to be decided on their merits instead of based on which party has deeper pockets. Litigation finance does have its share of detractors however. Arguments against it include that it puts investor interests ahead of those of plaintiffs and that it increases the amount of litigation that occurs, especially frivolous litigation.

### *Litigation Finance Users*

**Plaintiffs.** Plaintiffs often turn to litigation financing as a means of funding legal representation they otherwise could not afford, or to monetize an expected settlement. Corporate plaintiffs can use capital they would otherwise have to allocate to costly litigation to continue to invest in their businesses instead, or to maintain a liquidity cushion that could improve their credit ratings. Importantly, litigation finance transactions are typically structured off-balance-sheet, so they will not negatively impact a firm's financials and/or earnings per share.

**Law firms.** Law firms (except those in the District of Columbia and Washington State) are prohibited from accepting non-lawyers as investors, which poses significant obstacles to raising outside capital. Yet they can use litigation finance as an alternative mechanism to provide liquidity for their operations, most typically by monetizing portfolios of contingency cases – essentially a form of factoring of their dockets.

**Defendants.** To a lesser extent than on the plaintiff side, and almost exclusively in the commercial TPLF space, some companies have looked to litigation funding to defray the costs of mounting a legal defense. In this scenario, a defendant seeking funding submits its claim to a litigation financing firm, which evaluates and assigns expected damages to the case. Once the case is resolved, if it results in damages below that expected value, the litigation funder retains a portion of the difference based on a previously agreed-upon formula.

### *Litigation Finance Market Overview*

The global market for litigation is estimated at more than \$400 billion USD. Litigation financing has its roots in the UK and Australia, dating back to the mid-1990s, and is deeper and more developed in those regions than in the United States, although the market has ample room to grow globally. The U.S. is the largest market, with litigation financing accounting for a two percent market share of U.S. legal spending, followed by the UK, where it has just under two percent market share of UK legal spend. In Australia, a much more mature market, litigation financing is believed to have a 15 percent market share.

The litigation financing market is also characterized by fragmentation and opacity. While a handful of firms are well known in the marketplace, many providers maintain low profiles. There is no publication of pricing and no centralized exchange. Terms can vary meaningfully from provider to provider, as most potential recipients do not negotiate simultaneously with multiple providers. As yet, there is also a notable absence of a litigation finance investment offerings from the larger and more established asset managers. This could be explained by the fact that the industry is still in its early stage.

Growth in the space continues to be robust on both the supply and demand side. Some quick findings from a 2019 Litigation Finance Survey underscore this growth:<sup>53</sup>

- The use of litigation finance by U.S. law firms has grown 745 percent between 2015 and 2019.

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<sup>53</sup> 2019 Litigation Finance Annual Market Survey. Morning Investments. [www.MorningInvestments.com](http://www.MorningInvestments.com)

- 83 percent of lawyers in the U.S. and 89 percent of lawyers in the UK say they are aware of litigation finance.
- 77 percent of U.S. law firm respondents cited liquidity in contingency heavy case dockets as a business challenge.

### *Jurisdictional Considerations in Litigation Finance*

Though litigation finance is growing rapidly across the U.S., that growth is uneven in many regions of the country. The reality is that in some states, litigation financing is next to impossible to obtain, while in others, it can be less costly than might be expected.

The discrepancy in attractiveness of litigation finance between states generally stems from judicial decisions that have been handed down in that state, as well as state-level legislative differences.

Many people new to the industry do not realize that there are important differences in litigation finance across states. In particular, there are important underwriting differences on a state-by-state basis. In other words, a deal that works in one state might be illegal in another. For example, a commercial claim in Indiana proved virtually unfundable due to adverse issues with the treatment of litigation funding in the state. Specialized software can provide details on the requirements for litigation funding in different states.

In addition to legislative restrictions around litigation and litigation finance, there are varying state-by-state regulations for litigation funders. Against this backdrop, litigants looking for third party funding typically have to agree to both choice-of-law and choice-of-forum clauses that would put the agreement under the jurisdiction of a state that is friendly to litigation financing.

In addition, litigation financing is often dramatically different for individuals versus enterprises. In many states, the limitations on lending to individuals, such as usury laws, do not apply to commercial enterprises.

Another important consideration for litigants looking for financing is the timing of the agreement. There are states in which courts have held that the common-law principle of champerty only applies to the “stirring up” of litigation. In such jurisdictions, it makes a difference if the litigation financing is sought before or after the litigant has hired an attorney and made a firm commitment to litigating a case. In these situations, it is probably not necessary to file a complaint before seeking financing, but it is necessary to establish that the litigant’s decision to pursue a claim was independent of the availability of financing.

In some states, courts also examine the extent to which the litigation financiers have the capacity to control fundamental decisions about litigation strategy and settlement. If the litigation financing agreement is clear about preserving the litigant’s own autonomy in these situations, it will go a long way to minimizing the risk that a court will find the agreement invalid.

### *Litigation Finance Jurisdictions*

Different litigation financiers often prefer cases in states based on their own personal geography, the industry niche they are in, or their experience. With that said, some commonalities do hold. From the perspective of many litigation financiers, the most attractive states for investing in litigation are:

- Florida
- Texas
- New York
- California

Each of these states is regarded as attractive for specific reasons related to past court decisions and legislative action. Two of the top issues in litigation finance are the enforceability and regulation of litigation finance.

Paralleling the most attractive states for litigation finance, there are also a number of states that are unattractive according to industry. States cited as the least favorable states for litigation finance include:

- Georgia
- Alabama
- Colorado
- Kentucky
- Pennsylvania

A detailed description of relevant case law from each of these states and the basis for identifying each as either favorable or unfavorable for litigation finance can be found in Appendix D.

The litigation finance arena is growing rapidly and with it, regulatory considerations are also growing. While some have advocated for federal legislation around litigation finance, thus far there has been no meaningful movement toward a national law.<sup>54</sup> There was proposed federal legislation in 2019 that would mandate disclosure of litigation financing in class actions and multidistrict litigation, but even in the unlikely event that it passed this session, it would do little to restrict the growth in litigation financing.<sup>55</sup> Indeed, the national patchwork of laws as it exists around litigation financing shows little sign of becoming more uniform. The biggest movement both federally and at the state level (as well as in court decisions) seems aimed at improving disclosure. For instance, West Virginia passed a disclosure law in 2019. Similar legislation was also introduced in Utah, Florida, and Texas. The outlook for litigation finance growth continues to look strong, while the most likely regulatory response in 2020 is limited state law action, particularly around disclosure.

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<sup>54</sup> See a more complete discussion here: <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2019/03/31095133/Federal-Regulation-of-Third-Party-Litigation-Finance.pdf>

<sup>55</sup> See <https://www.congress.gov/bill/116th-congress/senate-bill/471/text>

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## **COMPARATIVE INDUSTRY ANALYSIS**

Other industries similar to the trucking industry in their vulnerability to large lawsuits have created legal protections against their impacts. The aviation industry, medical industry, and nuclear power industry have generated means of insulating themselves from excessively large verdicts, and their tactics can be applied to the trucking industry.

### *Medical Malpractice*

Medical malpractice litigation has been an inexorable aspect of the medical profession, with the first litigation taking place in 1794.<sup>56</sup> Defined as “improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist, or other healthcare professional,” medical malpractice has shaped the fiscal landscape of the medical care industry.<sup>57</sup> Doctors have argued that medical malpractice suits are a leading cause of rising medical costs.<sup>58</sup>

However, reforms did not arise until late in the 20<sup>th</sup> Century, first in New York, and later, the U.S.<sup>59</sup> In New York, an 18-year-old was admitted to a hospital where she succumbed to her illness due to negligence. The parents of the deceased sued in 1984, and the case spurred change in the medical field, including work-hour limits for medical residents, both in New York and later, the U.S. The Federal Government has ceded most of the responsibility for regulating medical malpractice suits to individual state governments.

Some states have regulated specific aspects of medical malpractice suits.<sup>60</sup> These efforts include:

- Shortening the statute of limitations – limiting the amount of time after an injury in which a plaintiff can file a lawsuit.
- Ending joint, and joint and several liability – joint liability can place an unfair amount of burden on the company, as a plaintiff has incentive to sue the most wealthy defendant.
- Putting a limit on damages that can be awarded – damage ceilings can limit lawsuits to certain financial levels.
- Requiring an affidavit joint and several liability – joint liability can place an unfair amount of burden on the company, as a plaintiff has incentive to sue the most wealthy defendant.

**Medical Malpractice: Statue of Limitations.** One approach for limiting the *number of medical malpractice lawsuits* is by decreasing the statute of limitations for malpractice cases; most states have a statute of limitations of two to six years.<sup>61</sup> There are very few mechanisms for

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<sup>56</sup> Anderson, Naomi. “A Brief History of Medical Malpractice”. Physicians News Digest. May, 2017. Available online: <https://physiciansnews.com/2017/05/10/brief-history-medical-malpractice/>

<sup>57</sup> “Malpractice and Its Effects on the Healthcare Industry”. Texas A&M University, Corpus Christi. Sept., 2016. Available online: <https://online.tamucc.edu/articles/malpractice-and-its-effects-on-the-healthcare-industry.aspx>

<sup>58</sup> Ibid.

<sup>59</sup> Anderson, Naomi. “A Brief History of Medical Malpractice”. Physicians News Digest. May, 2017. Available online: <https://physiciansnews.com/2017/05/10/brief-history-medical-malpractice/>

<sup>60</sup> “Medical Malpractice Law: Ancient History and Recent Controversies”. Reiter and Walsh, P.C. Available online: <https://www.abclawcenters.com/resources/medical-malpractice-overview/>

<sup>61</sup> “The Time Limit to File a Medical Malpractice Lawsuit.” All Law. Available online: <https://www.alllaw.com/articles/nolo/medical-malpractice/time-limit-file-lawsuit.html>

circumventing these more restrictive statute of limitations – unless the harm to the plaintiff is not discovered until later.<sup>62</sup> While it is not well understood what role statute of limitations plays in trucking litigation, statute of limitation reform should certainly be viewed as an important component in a suite of reform strategies.

**Medical Malpractice: Damage Limits.** In total, these regulations attempt to create a more equitable legal environment for medical malpractice suits. One particular solution that many states have pursued is the addition of Damage Limits. These regulations cap the *scale of damages* by limiting the maximum amount of “non-economic” losses, i.e. pain and suffering, stress, and anxiety. Some states go further by also limiting total damages for which a single plaintiff can sue. Appendix E provides a comprehensive list of the “non-economic” and total limits on lawsuits for medical malpractice by state.

**Medical Malpractice: Expert Affidavits.** Expert affidavits are another element of the medical malpractice legal environment, and could be implemented by the trucking industry for assessment of damages. Sometimes called a “certificate of merit,” this affidavit is normally written by a medical expert, testifying to the degree of the injury suffered.<sup>63</sup> An approach that requires an expert to testify on the nature of the crash and injury would insulate trucking firms from frivolous lawsuits.

Medical malpractice suits can also target faulty products, such as pacemakers and catheters. However, the Supreme Court made the standard for which medical device manufacturers can be sued very high. In *Riegel v. Medtronic Inc.*, a catheter balloon manufactured by Medtronic exploded in a patient’s artery, causing serious complications.<sup>64</sup> The patient then sued Medtronic. The Supreme Court heard the case in 2007 and ruled in favor of the defendant in an 8 to 1 decision. The Court decided that Medtronic had no liability as it was certified adequate by the highest testing standard of the Department of Health. In the trucking industry, this would likely require clarifications of FMCSA and NHTSA regulations relating to driver and vehicle standards. Once the industry meets or exceeds regulatory requirements, case law may favor defense arguments that highlight the role of government standards, vis a vis *Riegel v. Medtronic Inc.*

These legal avenues – damage limits, legal standard protections, certificates of merit, and testing standards – could be valuable in insulating the trucking industry from large verdicts. Damage limits could protect the industry from exorbitant non-economic damages, which have bankrupted smaller trucking companies.<sup>65</sup> *Riegel v Medtronic Inc.* established medical industry standards that protect and exempt companies that abide by the highest standard of care in the manufacturing and management of their products; a similar process could be implemented in the trucking industry for motor carrier policies, driver training, and vehicles and components. New regulations and/or executive orders would likely be needed to establish formal technical and high “standard of care” protocols – all of which would replace any “minimum standards” presently used in trucking.

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<sup>62</sup> Ibid.

<sup>63</sup> O’Brien, Tatum. “The Expert Affidavit Requirement in Medical Malpractice Cases.” *The Legal Examiner*. Jan, 2020. Available online: <https://fargo.legalexaminer.com/legal/the-expert-affidavit-requirement-in-medical-malpractice-cases/>

<sup>64</sup> “*Reigel v Medtronic, Inc.*” Oyez. December 2008. Available online: <https://www.oyez.org/cases/2007/06-179>

<sup>65</sup> “Kentucky Trucking Company Files For Bankruptcy as Lawsuits Pile Up from Fatal Crash.” *Yahoo Finance*. October 2019. Available online: <https://finance.yahoo.com/news/kentucky-trucking-company-files-bankruptcy-142722135.html>

## *Aviation Industry*

The aviation industry has a long history of safety events and risks similar to the trucking industry. Every state has a different system of liability and differing insurance requirements. The aviation industry has added complexity, as the U.S. is a party to a number of international agreements, which dictate the litigation framework for the industry.

An accident in the aviation industry is broadly defined through a number of court cases. In *Saks v. Air France*, an accident is defined as “an unexpected and unusual incident or occurrence external to the passenger, which cannot arise from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft.”<sup>66</sup> Over time, this definition has expanded to other aspects of the airplane “experience” including:

- Boarding ramp falls;
- Terrorist attacks;
- Turbulence;
- Scalding Water;
- Wet stairs and floors in airports; and
- Failure to apply medical attention.<sup>67</sup>

The two foundational international treaties in the aviation legal landscape are the Warsaw Convention, which was entered into by the U.S. in 1934, and the Montreal Convention, which was entered into by the U.S. in 1999.<sup>68</sup> These two conventions govern the liability structure for passengers with international connections, either on an international flight or with an international itinerary. The Montreal Convention used language stemming from the Warsaw Convention, and has provided the basis for international air carrier liability in the U.S.

The Warsaw Convention and the Montreal Convention contain articles related to negligence, which the U.S. has adopted.<sup>69</sup> Article 20 of the Warsaw Convention contains an “all necessary measures” defense, which the U.S. has interpreted as meaning “all reasonable measures.” “All reasonable measures” is a legal standard by which companies must attempt to avoid all injuries by reasonable measures. Article 17 of the Montreal Convention creates a standard of strict liability, meaning airlines have “legal responsibility for damages or injuries even if the person who was found strictly liable did not act with fault or negligence.”<sup>70</sup>

In conjunction with Article 17, Article 21 of the Montreal Convention, which adds a “no negligence” defense, requires airlines to prove they had no duty of care to the plaintiff.<sup>71</sup> These two clauses, working in conjunction, create a powerful legal landscape that the trucking industry could implement to better protect companies from large lawsuits.

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<sup>66</sup> “Airplane Crash Lawyer – Montreal Convention”. The Law Office of Bohrer and Lukeman. New York, NY. Available online: <http://www.flightinjury.com/practice-areas/montreal-convention>

<sup>67</sup> Ibid.

<sup>68</sup> Harakas, Andrew J, and Ellis, Jeffrey. “Aviation Liability in the USA”. Clyde and Co LLP. Available online: <https://www.lexology.com/library/detail.aspx?q=33df2dc6-5859-435b-acab-c115c62bd01d>

<sup>69</sup> Danko, Mike. “Warsaw and Montreal Conventions.” Aviation Law Monitor. Redwood Shores, CA. Available online: <https://www.aviationlawmonitor.com/2009/03/claims-and-defenses/warsaw-and-montreal-conventions/>

<sup>70</sup> “Strict Liability.” Justia. April 2018. Available online: <https://www.justia.com/injury/negligence-theory/strict-liability/>

<sup>71</sup> Danko, Mike. “Warsaw and Montreal Conventions.” Aviation Law Monitor. Redwood Shores, CA. Available online: <https://www.aviationlawmonitor.com/2009/03/claims-and-defenses/warsaw-and-montreal-conventions/>

A vital aspect of the Warsaw Convention is its establishment of liability ceilings, which has served as a point of contention for legal scholars. The legal challenges faced by the airline industry could pave the way for the trucking industry to implement certain liability ceilings. The ceiling came under legal consideration in *Ekufu v. Iberia Airlines*, where a passenger's luggage was stolen by airport security.<sup>72</sup> The passenger sued Iberia Airlines, which argued that it was bound by the Warsaw Convention and therefore, the liability ceiling was applicable. However, since the security staff were not acting in an official capacity, the ceilings on litigation were not applicable. This court case provides a precedent relevant to the trucking industry, as liability ceilings only impact people operating in the capacity of their company.

Airlines have a unique system of jurisdiction determination that would benefit the trucking industry as both industries potentially suffer from application of multiple jurisdictions. As stated in the Montreal Convention, there are a number of potential jurisdictions outlined depending on the nature of the damages.

If the damages did not result in death or injury, the jurisdiction is up to the plaintiff and is as follows:

- In the territory of one of the parties;
- In the court of the domicile of the carrier;
- In the territory of the destination;
- The carrier's personal place of business; or
- Where the carrier has a place of business where a contract has been created.<sup>73</sup>

The Montreal Convention built upon the Warsaw Convention by adding jurisdiction in the plaintiff's home. However, when the damages result in death or serious injury results, the jurisdictional requirements become broader to include the domicile of the plaintiff or any place which business transactions of the defendant takes place.<sup>74</sup> Limiting the jurisdiction options based on the type of injury the plaintiff suffered could create a more equitable legal environment in the trucking industry.

### *Nuclear Energy*

As is the case in the trucking industry, large verdicts have played a role in the nuclear energy industry. Given the catastrophic nature of nuclear disasters, the U.S. created the Price-Anderson Act in 1957 as a means to support the expansion of nuclear energy.<sup>75</sup> Among other important aspects, this act established the liability framework for nuclear power-related lawsuits.

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<sup>72</sup> Cotter, Christopher E. "Recent Developments in Montreal Convention Litigation". *Journal of Air Law and Commerce*. Volume 79, 2014. Available online:

<https://www.ralaw.com/storage/Recent%20Developments%20in%20Montreal%20Convention%20Litigation.pdf>

<sup>73</sup> "Convention for the Unification of Certain Rules for International Carriage by Air: Chapter 3 – Liability of the Carrier and Extent of Compensation for Damage." Montreal, Canada. May 1998. Available online:

<https://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/33.html>

<sup>74</sup> Ibid.

<sup>75</sup> "Price-Anderson Act." Center for Nuclear Science and Technology Information. November 2005. La Grange Park, IL. Available online: <http://cdn.ans.org/pi/ps/docs/ps54-bi.pdf>

The Price-Anderson Act requires that nuclear reactor owners must obtain insurance liability coverage of at least \$300 million, which is the maximum level of primary insurance available.<sup>76</sup> There is also a requirement to contribute a maximum of \$95 million per unit to a secondary insurance pool.<sup>77</sup> Beyond this initial liability, the federal government assumes the remaining liability up to \$560 million.<sup>78</sup> From an aggregate perspective, the total insurance pool for nuclear energy insurance is \$13 billion.<sup>79</sup>

Insurance pooling is a popular method of risk amortization and is used internationally in conjunction with the Price-Anderson Act. The U.S. is party to an agreement, the Convention on Supplementary Compensation for Nuclear Damage, which establishes liability coverage for nuclear incidents.<sup>80</sup> Currently, the U.S. has auxiliary coverage of \$57 million to cover damage in excess of first-tier damages.<sup>81 82</sup>

This liability framework was utilized during the Three Mile Island Disaster, when nearly 150,000 individuals were evacuated from Pennsylvania when a nuclear reactor suffered a partial meltdown.<sup>83</sup> Insurance adjustors advanced money to families evacuated during the meltdown, for both travel costs and loss of wages.<sup>84</sup> Altogether, insurance pools paid approximately \$71 million for the accident. While politically problematic, this concept of government-involved insurance pooling is intriguing in that it would create de facto litigation limits and allow firms to amortize risk.

Three different industry legal landscapes bear similarities to the trucking industry in terms of litigation, those being the medical field, the aviation industry, and the nuclear energy industry. The medical field has adapted to large malpractice suits by setting a limit on the amount of non-economic damages that can be obtained by plaintiffs. The aviation industry has innovative means to both restrict the jurisdiction of plaintiffs, as well as to limit the amount of damages that a plaintiff can sue for under certain circumstances. The nuclear energy industry collaborates with government to pool resources, creating de facto limits and allowing companies to better absorb large verdicts. These methods of mitigating large settlements conceptually could be pursued by the trucking industry to better protect firms against large verdicts.

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<sup>76</sup> Boyd, Michele. "Price-Anderson Act: The Billion Dollar Bailout for Nuclear Power Mishaps." Public Citizen. September 2004. Available online: [https://www.citizen.org/wp-content/uploads/price\\_anderson\\_factsheet.pdf](https://www.citizen.org/wp-content/uploads/price_anderson_factsheet.pdf)

<sup>77</sup> "The Price-Anderson Act: Background Information." Center for Nuclear Science and Technology Information. La Grange Park, IL. Available online: <http://cdn.ans.org/pi/ps/docs/ps54-bi.pdf>

<sup>78</sup> Dircks, William J. "Analysis of the Price-Anderson Act." Comptroller General of the United States. Washington DC. Available online: <https://www.gao.gov/assets/140/130208.pdf>

<sup>79</sup> "Backgrounder on Nuclear Insurance and Disaster Relief." May 2019. United States Nuclear Regulatory Commission. Available online: <https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.html>

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> The tier system of damages was developed by the International Atomic Energy Association and the Nuclear Energy Agency of the OECD. A tier one disaster is described as an anomaly, "[A] Breach of operating limits at a nuclear facility." It may include overexposure of a citizen to non-dangerous amounts of radiation, or minor issues with safety components.

<sup>83</sup> "Legal History of Three Mile Island." Three Mile Island Alert. 2003. Available online: <http://www.tmia.com/old-website/history/tmilegalhistory.html>

<sup>84</sup> "Backgrounder on Nuclear Insurance and Disaster Relief. United States Nuclear Regulatory Commission. May 2019. Available online: <https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/nuclear-insurance.html>

## CONCLUSIONS

Over several decades, the trucking industry has become a leading target for litigation. From the 1932 case that first defined “duty of care” to the present day, lawsuits have expanded at a nearly exponential pace. Some believe the root of the increase stems from the 1977 U.S. Supreme Court case that re-allowed litigation advertising, and there is much merit to that assumption. The median dollar value of trucking litigation awards from 1985 to 1989 was slightly more than \$100,000. And in the next five years, the average award increased by 90 percent to \$190,000.

There is also a theory that the initial “scalding coffee” award of \$2.7 million further raised the litigation bar in the minds of attorneys and juries, as both the number and size of verdict awards grew annually at double-digit rates.

To better assess the landscape of truck-involved litigation and verdicts, ATRI compiled a large database (n=600) of trucking-related jury awards. In reviewing that litigation database, there were only four award cases over \$1 million in 2006, and a total of 26 cases over \$1 million from 2006 to 2010. From 2010 to 2013, the number of awards over \$1 million increased by more than 900 percent. From 2010 to 2018, there were 299 cases over \$1 million.

Aside from the increased volume of cases and awards, the size of verdict awards continued to increase. In 2011, one of the largest truck-involved verdicts, based on two motorist fatalities, was \$40 million for a truck driver that failed to yield for a stop sign. In 2012, a truck-involved case involving a single fatality generated the largest ever truck-involved award of \$281 million, although it was later reduced to \$105 million.

Not surprisingly, insurance rates have increased at similar rates as litigation awards. Over the last 2 to 5 years, commercial truck insurance premiums have increased annually between 35 percent and 40 percent for low- to average-risk carriers according to the expert surveys.

As noted in this report, the **quantitative** research – based on ATRI’s litigation database (ALD) – identified a number of statistically significant findings.

### General Findings

Relative to a decade ago, jury awards are large and cases are increasing.

- The average dollar amount of awards in the ALD was \$3.16 million, with a large standard deviation of \$7.19 million.
- The average size of verdicts increased 483 percent from 2017 to 2018.
- From 2010 on, the size of verdicts has far exceeded both standard inflation as well as healthcare cost increases. From 2010 to 2018, mean verdict awards increased 51.7 percent per year, in contrast to inflation and healthcare costs, which on average grew 1.7 and 2.9 percent per year, respectively.
- Corroborated with the time-trend regression, as time length between crash date and verdict date increased by one percent, the size of the verdict increased by approximately \$3 million. With a mean value of 1,319 days between crash and verdict, an increase in

13 days in length of time resulted in an award increase of \$3 million, controlling for other factors.

### Crash Data Plays a Significant Role

The data analysis confirms that the type of injury, number and type of parties involved, and even vehicle types have a statistically significant impact on verdicts.

- When children were involved in the crash, verdict sizes increased more than 1,600 percent, regardless of fault.
- While they fall short of statistical significance, the existence of spinal cord injuries more than doubled average jury awards, raising them to slightly less than \$3.5 million.
- In terms of traumatic brain injuries, the presence of TBI raised jury awards by more than \$800,000 per case.
- Crashes involving “spins and rolls” were by far the most expensive crash type, with average awards of nearly \$15 million.
- When rear-end crashes occur (primarily the truck driver rear-ending the plaintiff), the plaintiffs win 89 percent of cases. Rear-end crashes that occur in work zones generate the highest award among rear-end crashes, with an average award of \$7.25 million.
- As would be expected, there is a positive relationship between the number of parties involved in the crash and the size of the verdict.

### Expert Witnesses and Plaintiff Claims Matter

The presence of expert witnesses makes an important difference in cases for both the plaintiff and the defense.

- When the defense uses expert witnesses and the plaintiff does not, awards decrease by 13 percent.
- There were five “issues & claims” bins in the ALD where the defense lost every case, including HOS and log book violations. The highest percentage of wins by the defense related primarily to specific crash types. For example, sideswipe crashes generated the highest number of wins for the defense.

ATRI’s research included a **qualitative** section, primarily based on expert input from both defense and plaintiff attorneys, insurance industry experts, motor carrier safety personnel and industry economists. While the qualitative section is more anecdotal in nature, the research is based on multiple expert participants who often provided overlapping to identical input, experiences and/or guidance, thus providing corroboration of the findings.

### Pre-Crash Actions by Motor Carriers are Critical

- Both attorney bars emphasized that crash avoidance is everything and that strictly adhering to safety and operational policies is essential to staying out of court and/or reducing award sizes.
- Almost any failure to adhere to FMCSRs or company safety policies will be the focus of plaintiff arguments. The most common examples included failure to run proper background checks, failure to conduct or review drug testing, and tolerance of driver violations such as HOS and log book citations.
- Solely from a litigation standpoint, motor carriers should consider FMCSRs as minimum standards that can and should be exceeded, rather than assuming FMCSR compliance is adequate. The ability of defense attorneys to document carrier or driver safety activities that exceed FMCSRs carries great weight with juries. The longer-term solution is the creation of national testing and compliance standards for trucking, as was noted in the U.S. Supreme court case *Riegel v. Medtronic Inc.*

### Litigation Preparation is – and should be – Both Complex and Costly

- The three preparation tasks were generally described as Case Evaluation, Settlement/Mediation Planning and Pre-Trial Preparation. All three are closely related and contingent on each other.
- Risk Assessments must be thorough and objective. Case vulnerabilities and potential liabilities must be acknowledged, and vetted against realistic financial damage projections. A useful tool in developing realistic Risk Assessments is internal point-counterpoint / devil's advocacy debates.
- The ultimate strategy-driving question internally posed by most plaintiff attorneys and successful defense attorneys is: "what operational, safety or training factors could have prevented the crash in the first place?"
- Experience matters. Both defense and plaintiff attorney bars noted that attorneys inexperienced in trucking litigation are harmful to all parties. The longer learning curve, lack of industry familiarity, and lack of knowledge on FMCSRs and legal precedents can generate unnecessary litigation, higher legal costs, image issues and ultimately will impact other cost centers such as insurance.

### When Mediation and Settling Makes Sense

- There was general agreement that mediation and settlements are missed opportunities, particularly by the defense when they do not believe that negligence by the carrier and/or driver exists. Exclusively from a litigation risk and financial liability standpoint, mediation should be candidly weighed against the alternative.
- If mediation and settlements are pursued, initial offers should be realistic and equitable. Multiple plaintiff attorneys describe the frustration and consequence of initial "low-ball" offers.

- Settling early reduces costs. As noted in the quantitative analysis, costs and awards go up as the length of time increases. This same effect was proposed in the Expert Interviews, whereby several attorneys noted that the decision to settle was sometimes made close to the court date, and after expenditures on mock trials, expert witnesses and additional attorney time.

#### Litigation Strategies and Models: Success versus Failure

- One of the most fundamental and tenuous disconnects between the defense and plaintiff bars is the underlying business models. The defense bar is a party in an economic model focused on “cost minimization,” as dictated by the client (e.g. motor carrier, insurance firm). The deliberate efforts made to reduce costs will often cut corners on detailed risk analyses, litigation preparation expenses and expanded legal representation. One defense attorney pointed out the irony of spending client money to request more resource spending by the client. Overall, this model generates financial risk as mediation appears less palatable to the client, and yet courtroom preparation is less robust. Alternatively, the plaintiff bar recognizes that litigation failure will generate little to no revenue, but with “high risk, can come high reward.” So the plaintiff bar is “all in” in resource investment and creative litigation approaches. At least one plaintiff attorney believes that the plaintiff model reduces frivolous lawsuits because plaintiffs must have a relatively high chance of winning before risking the upfront preparation costs.
- Knowledge and training differentiate good vs bad litigation outcomes. Yet the information-sharing models between defense and plaintiff attorneys are stark and disparate. While the descriptions may be stereotypical, the respondents generally described defense attorneys as being more secretive and competitive in their approaches and strategies – ostensibly a function of using a corporate business-oriented model. The outcome is minimal sharing of tactical and strategic information among defense attorneys and firms. Alternatively, every year the plaintiff bar holds dozens of open-door and closed-door conferences on successful litigation approaches and tactics. They described a willingness for gratis sharing of materials, witnesses, etc.
- Several defense attorneys also described their own inability to obtain detailed and critical information from their own clients. One described the information flow from client to attorney as a minimal “needs to know” relationship.
- While there was much discussion and debate on the existence and role of the “reptile theory,” there was general consensus that emotion, egos, and sentiment play a crucial role in “winning over the jury.” On a related note, another observable difference in defense vs plaintiff approaches can be defined using classical rhetoric terms; logos vs pathos. The defense often relies on logic, technical witnesses, compliance with FMCSRs and other rational arguments. Plaintiff attorneys often times rely on emotional pleas and “heart string” stories to win over the jury with sympathy and empathy. The example provided was juxtaposing a mechanical engineer describing brake stopping distances vs a child testifying about the loss of a sibling. Empirical research does corroborate the power of pathos over logos.
- Multiple attorneys proffered a solution or response to this by noting that defense arguments should highlight the critical role of the trucking industry in the nation’s

economy, a fleet's role in the community as both an essential employer and corporate citizen, and stories about truck drivers being devoted family members who would never intentionally harm someone.

- In terms of expert witnesses, it was recommended to avoid “technical overkill.” Since likeability plays a key role in believability, rely on a down-to-earth mechanic to discuss certain issues versus an automotive engineering professor.
- While anecdotal, several plaintiff attorneys believe that use of technology and media (videos and presentations) are highly effective with juries, and more likely to be used by the plaintiff bar.

### Unfavorable Practices will Destroy Case Potential

Many of the experts raised variations on different ethical or unfavorable issues and tactics among both attorneys and motor carriers that would have an overt impact on existing and/or future verdicts and awards.

- Any type or degree of spoliation, aka destroying evidence, when proven in court almost always ensures immediate jury sympathy for the plaintiff. If the credibility of the defendant is destroyed through documented proof that evidence was tampered with, “all hope is lost.”
- Image issues of attorneys as unsavory or ambulance-chasing can negatively influence a jury and verdict, even though it was pointed out that these types of attorneys rarely are associated with nuclear verdict cases. Also referenced were image issues associated with billboards and advertising. One participant noted that most trucking-related plaintiff advertising emphasizes you can be compensated for simply being involved in the crash.
- If a carrier or truck driver defendant is shown to be a chameleon carrier – a typically marginal carrier that may operate below the radar screen of FMCSR compliance – it nearly eliminates the possibility of a favorable defense verdict. This in turn harms the overall image of the trucking industry – creating long-term negative implications among future jurists.

### Fraudulent Activity is Becoming More Apparent

- Whether it is medical fraud, insurance fraud or crash fraud, it was described as previously uncommon and unsophisticated. Now entire “teams” involving medical and legal stakeholders as well as fake victims and spotters often work together. It is hoped that continuing dissection of the Louisiana cases of staged crashes provides an in-depth look at how these efforts are developed and carried out.
- Medical fraud was described as much more subtle and difficult to prove, as it often includes speculative diagnoses of crash-related injuries, and minor to moderate increases in medical treatment costs over standard medical costs.

### Outside Investors See a Lucrative Market.

- Litigation financing has become one of the fastest growing trends in trucking litigation. State regulations view it somewhere akin to both marketplace investing and gambling. ATRI's research on litigation financing documents an investment model that is highly speculative and relatively unregulated.
- Worldwide, litigation financing is estimated to be a \$400 billion industry, although it is just in its infancy in the U.S. That said, litigation financing in the U.S. has grown more than 745 percent between 2015 and 2019
- Based on regulations and litigation opportunities, the most attractive states for litigation financing are Florida, Texas, New York and California. The least attractive states are Georgia, Alabama, Colorado, Kentucky and Pennsylvania.

The existence and impact of nuclear verdicts on the trucking industry is clear and expansive. All entities in the supply chain – far beyond those involved in a crash, are experiencing the negative financial consequences from verdicts and awards that dramatically exceed compensatory costs. Any successful attempts to reign in extreme jury awards will require a comprehensive and multi-faceted program that addresses:

- Both state and federal litigation landscapes, including tort reform;
- Modified approaches to trial preparation and approaches;
- New safety compliance standards;
- Broader fraud investigations; and
- Expanded strategy and information-sharing among the defense bar.

## APPENDIX A: QUANTITATIVE METHODS

In order to understand the impacts of large verdicts on the trucking industry, a regression was used. This regression utilized data from a variety of sources, and covered approximately 600 cases between 2005 and 2019. The regression utilized a variety of methods, including Ordinary Least Squares (OLS) and Iteratively Reweighted Least Squares (IRLS). The reasons for utilizing a model such as this are many, including the properties of the estimators and resistance to outliers. The functional form of the model estimated is:

$$\begin{aligned}
 \text{VerdictAwards} &= \beta_0 + \beta_{YOS} \text{YearofSettlement} + \beta_{NOD} \text{NumberofDeaths} + \beta_{TBI} \text{TBI} \\
 &+ \beta_{Spine} \text{SpineInjury} + \beta_{Car} \text{CarInvolved} + \beta_{Children} \text{Children} \\
 &+ \beta_{Defense} \text{DefenseExpert} + \beta_{Plaintiff} \text{PlaintiffExpert} + \varepsilon
 \end{aligned}$$

### Specification Tests

Serial correlation was tested using the Durbin-Watson test. The null hypothesis for this test is that there is no serial correlation present in the model, and the alternate hypothesis is that there is serial correlation present in the model. More formally, the Durbin-Watson test hypotheses are:

$$H_0: \rho = 0 \quad H_A: \rho \neq 0.$$

The variable  $\rho$  is the lagged correlation coefficient between the error terms. The Durbin-Watson statistic was calculated, and the value for this regression is 1.93. The p-value associated with this particular statistic is .322, which indicates a failure to reject the p-value at all conventional levels. Thus, in the sample regressed, there is no evidence of serial correlation.

Heteroscedasticity, the non-uniform distribution of error terms, can cause the OLS model estimations to lose their status as the best, linear, unbiased estimate. Furthermore, the presence of heteroscedasticity, in extreme cases, can make significance estimations impossible. To test for heteroscedasticity in the estimated regression, the first test used is Breusch-Pagan. This particular test's null hypothesis is that there is no heteroscedasticity present in the linear model, and the alternate hypothesis is linear heteroscedasticity exists in the model. This particular test was used, as opposed to the White Test for heteroscedasticity, to start with a base of understanding, that being linear heteroscedasticity.

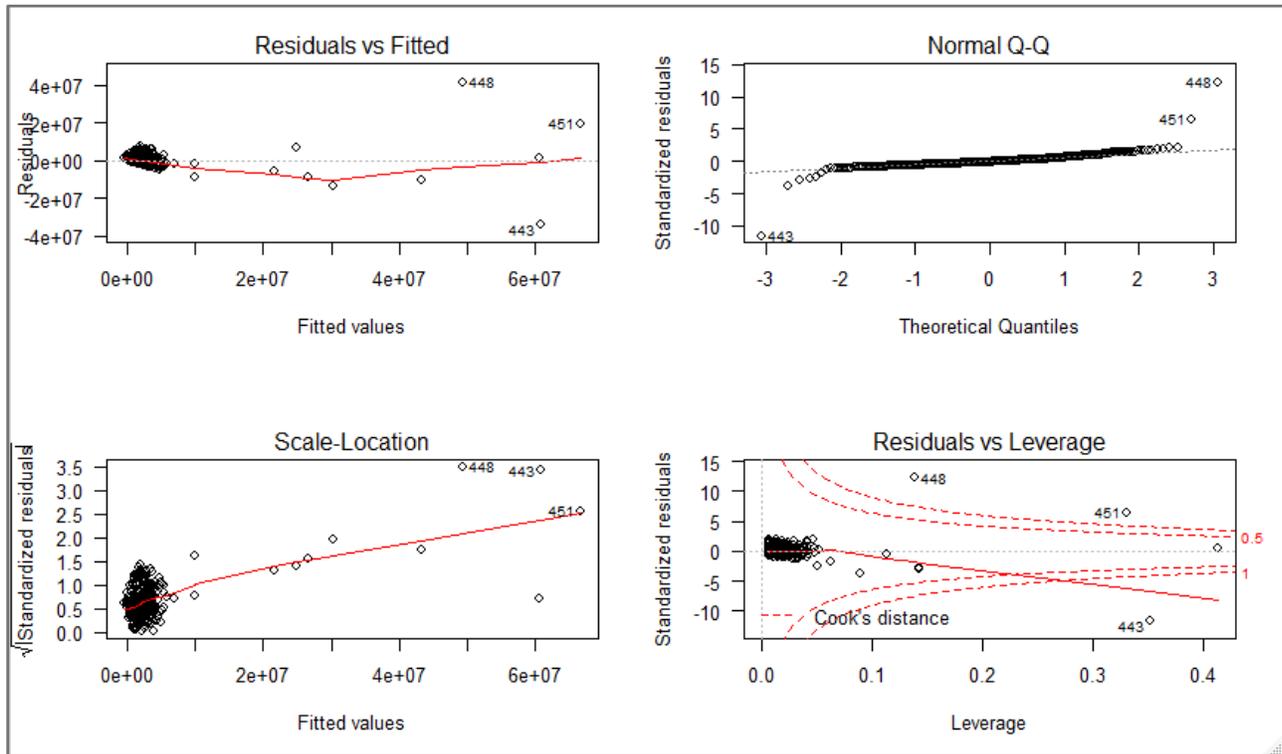
Formally, the hypotheses tested by the Breusch-Pagan are:

$$H_0: E(u^2 | x_1, x_2, \dots, x_n) = E(u^2) = \sigma^2, \quad H_A: E(u^2 | x_1, x_2, \dots, x_n) \neq E(u^2) \neq \sigma^2.$$

The test was performed, and the calculated statistic for the Breusch-Pagan test is 217.49, with an associated p-value of  $2.2e^{-16}$ . A p-value of this size means a rejection of the null hypothesis at all conventional levels; the presence of a non-constant variance in the error term is highly likely. Thus, corrective action is necessary.

In considering corrective action, a number of graphs were generated (Figure 16).

**Figure 16. Heteroskedastic Specification Error Diagnostics**



“Residuals vs Fitted,” the plot on the top left of the diagram, indicates that there are issues with the data which must be corrected. Under normal circumstances this graph should show a scatter of data points around 0, with no correlation. However, the red line indicates that there is a non-zero relationship between the residual values and the fitted values of the linear regression. This non-zero relationship further indicates that corrective action needs to be taken.

The “Normal Q-Q” graph measures the theoretical quantiles against the standard residuals. With data originating from the same distribution, most of the data should exist on a linear plane. In this graph, there are a number of points that exist outside the plotted line. This further confirms that the data does not have similar distributions.

The “Residuals vs Leverage” plot is meant to capture the effect of outliers on the estimation, as Cook’s Distance measures the effect of influential outliers. From the graph it is clear that there are a few outliers which have large effects on the data. These outliers will not be removed, but they must be accounted for in some capacity.

### *Robust Regression*

To account for non-constant variance, a robust regression was used. The package “MASS” was utilized in R, using the command “rls.” More detail about the minutia of the R code can be found directly proceeding the analysis of the robust regression. This command utilizes a technique known as Iteratively Reweighted Least Squares (IRLS). The coefficients are estimated in a fundamentally different way than OLS, that being,

$$\beta_j = [X'W_{j-1}X]^{-1}X'W_{j-1}Y.{}^{85}$$

The overall goal for this particular regression is identical to OLS, that being the minimization of the squared residual. However, when done iteratively, the regression calculates the residuals and their weights in a lagged sense repeatedly.<sup>86</sup> This process is repeated until the estimated coefficients converge.

In the estimation of this regression, the Tukey Bisquare estimator method was chosen. The impetus for the utilization of the bisquare estimator is the upper bound present in the estimator.<sup>87</sup> The structure of the objective function for the bisquare estimate is:

$$\rho_B(e) = \begin{cases} \frac{k^2}{6} \left\{ 1 - \left[ 1 - \left( \frac{e}{k} \right)^2 \right]^3 \right\} & \text{for } |e| \leq k \\ \frac{k^2}{6} & \text{for } |e| > k \end{cases} .$$

The variable  $k$  is the tuning constant and smaller values produce greater resilience to outliers. As the tuning constant decreases, more residuals are forced into the bottom calculation, which is independent of the residual term  $e$ . In a standard bisquare estimate, the tuning constant is  $4.865 * \sigma$ , where  $\sigma$  is the standard deviation of the sample. Thus, there is more resistance to outliers the lower the tuning constant becomes, which is necessary for this regression. The weight function for the Tukey Bisquare method is:

$$\omega_B(e) = \begin{cases} \left[ 1 - \left( \frac{e}{k} \right)^2 \right]^2 & \text{for } |e| \leq k \\ 0 & \text{for } |e| > k \end{cases} .$$

For observations less than the tuning constant  $k$ , the weight of the observation is 0. Thus, the weighting issue of serious outliers are avoided. As opposed to Hubert weights or standard weights, this estimation process does not increase without bound, which given the nature of the data, is a powerful tool.<sup>88</sup> The robust regression with bisquare weights was estimated and the results are encapsulated in Table 11.

<sup>85</sup> “Robust Regression: R Data Analysis Examples.” UCLA: Institute for Digital Research and Education, Statistical Consulting. Available online: <https://stats.idre.ucla.edu/r/dae/robust-regression/>

<sup>86</sup> Fox, John and Weisberg, Sanford. “Robust Regression: An Appendix to *R Companion to Applied Regression*, 3<sup>rd</sup> Edition”. Last Revision: 09/27/2018. Available online: <https://socialsciences.mcmaster.ca/jfox/Books/Companion/appendices/Appendix-Robust-Regression.pdf>

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

**Table 11. Robust Regression Results**

Variable	Value	Std. Error	T-value
(Intercept)	\$1,411,574	\$466,368	3.03
Coded Year of Settlement	\$118,343	\$44,958	2.63
Number of Deaths	\$720,244	\$150,990	4.77
TBI	\$768,503	\$334,738	2.30
Spine Injury	\$19,232	\$235,809	0.08
Car Involved	-\$739,674	\$266,874	-2.77
Children	\$27,365,374	\$398,501	68.67
Defense Expert	-\$839,064	\$302,139	-2.78
Plaintiff Expert	\$513,872	\$272,132	1.89

In the context of the functional form of the regression, the estimates are:

$\widehat{VerdictAwards}$

$$\begin{aligned}
 &= 1,411,573.67 + 118,343.10 * YearofSettlement + 720,243.51 \\
 &* NumberOfDeaths + 768,502.85 * TBI + 19,231.74 * SpineInjury - 739,674.10 \\
 &* CarInvolved + 27,365,373.60 * Children - 839,064.21 * DefenseExpert \\
 &+ 513,871.72 * PlaintiffExpert
 \end{aligned}$$

*Degrees of Freedom: 442*

## **APPENDIX B: SUBJECT MATTER EXPERT INTERVIEW GUIDE**

ATRI conducted phone interviews with industry professionals, focused on the contributing factors of large verdicts. Every phone interview followed a strict interview guide and began with an introductory statement that described ATRI's mission and the scope of the research project. The interview guide contained the following questions.

### **Questions**

- 1) After learning about this ATRI research, what are your initial thoughts on the topic?
- 2) What are the most important questions about the impacts of large verdicts on the industry that ATRI's research should attempt to answer? When the research is completed, how would you or others ideally benefit from it?
- 3) While this research is primarily focused on trucking-related litigation data trends over time, do you have any suggestions on additional tasks that should be included?
- 4) How do you define Nuclear Verdicts?
- 5) What public or private resources do you recommend we investigate further as part of this research? Do you have direct access to relevant data or information that ATRI might benefit from? (If necessary, ATRI can sign a Confidentiality Agreement).
- 6) Can you identify 2-3 critical trucking industry lawsuits that you believe have changed the legal or operating environment for motor carriers? Why and how have the verdicts changed the industry?
- 7) Do you believe that trucking industry litigation and/or jury awards are increasing? Why?
- 8) If you believe that verdicts are increasing, are plaintiffs doing a better job, or are defense attorneys doing a worse job? Please elaborate.
- 9) What role should state and or federal government play in trucking industry litigation?
- 10) What are your thoughts on tort reform?
- 11) What are 2-3 strategies that are needed to control or limit nuclear verdicts?
- 12) In your opinion, what are the 5 states that generate the highest legal verdicts?
- 13) Can you propose other experts that we should speak with?
- 14) Do you have any final thoughts you would like to share, or questions you think we should add to this survey?

Thank you very much for your time! This has been very helpful to our research analysis. If we have any related questions, would it be OK to follow up with you? We will make sure that you get an advance copy of our report when we are ready to publish.

## **APPENDIX C: LITIGATION IMPACTS SURVEY**

### **I. Scope of Project**

ATRI has developed a detailed analysis of large verdicts in the trucking industry through the development of a large litigation database. To provide more qualitative granularity to the data analysis, ATRI is conducting targeted interviews and surveys.

The objective of this interview is to understand how large or “nuclear” verdicts impact specific industry stakeholder groups.

### **II. Questions - Carrier Costs**

- 1) How specifically do large verdicts impact insurance premiums for the litigated carrier?
- 2) How specifically do large verdicts impact insurance premiums for non-litigated “safe” carriers?
- 3) What impacts do large verdicts have on reinsurance companies and rates?
- 4) What broad impacts do large verdicts have on the insurance industry?
- 5) Do you think other types of insurance industries (i.e. not trucking insurance companies) are learning or reacting from what is happening in the trucking insurance sector?
- 6) As a result of large verdicts, have insurance companies changed their business models? If yes, please elaborate.
- 7) To what degree or percentage are motor carriers experiencing higher insurance costs?
- 8) Have the changes in insurance costs due to large verdicts affected different types of motor carriers differently? (small fleets vs. large fleets, sectors, etc...)
- 9) How have motor carriers reacted to rising insurance premiums?
- 10) Do your insurance rates automatically increase every year?
- 11) What does your company do in response to a large verdict in the trucking industry “outside of your customer base”?
- 12) What does your company do in response to a large verdict that your company is directly involved in?
- 13) What due diligence steps do you take to make sure your clients are operating safely? How do you promote carrier safety policies?
- 14) As a result of large verdicts, have motor carriers changed their business or cost models? If yes, please elaborate.
- 15) What would you say are the top 2 reasons that cause a motor carrier to file for bankruptcy?
- 16) Do motor carriers file for bankruptcy more often as a result of one major reason, or many smaller reasons?
- 17) How often is a large verdict the exclusive reason as to why a motor carrier is going to file for bankruptcy?
- 18) When a motor carrier files for bankruptcy, how does that affect the large verdict they owe to the plaintiff?
- 19) Do you think people who have considered or are considering starting a new trucking company are taking into account the risk of experiencing a large verdict? How big a deterrent is that?
- 20) Please share any final questions or thoughts related to this topic.

### **III. Questions – Safety Impacts**

- 21) What impacts have large or “nuclear” verdicts had on the trucking industry?
- 22) Do you feel large verdicts have had an impact on roadway safety? If yes, please elaborate.
- 23) Do you feel large verdicts have an impact on safety regulations? If yes, please elaborate?
- 24) Do you feel large verdicts affect commercial drivers and motor carriers differently? Please elaborate.
- 25) At a company level, in what ways do large verdicts impact safety related policies?
- 26) To what extent do you think motor carriers are taking additional steps towards safety as a means to prevent a large verdict?
- 27) At a government level (federal or state), in what ways do you think large verdicts are having an impact on safety regulations.
- 28) Should motor carriers be expected to exceed FMCSA standards when implementing and executing safety policies in order to avoid a large verdict? Please elaborate.
- 29) What are the financial considerations that are associated with the implementation of safety regulations that impose a financial burden to motor carriers or drivers?
- 30) What are non-financial barriers motor carriers have when it comes to strengthening or enforcing safety regulations on their drivers or at a company level?
- 31) Do large verdicts have a substantive role in or “promote” the “safety agenda”?
- 32) Please share any final questions or thoughts related to this topic.

### **IV. Questions – Consumer/Macro-Economic Impacts**

- 33) What impacts have large or “nuclear” verdicts had on the trucking industry?
- 34) Do large verdicts have an impact on the US economy as a whole? Please elaborate (if yes - in what ways, over what period of time, etc...)
- 35) If large verdicts were to put a large stress on the supply chain, how would you describe that process from a technical perspective?
- 36) Which, if any, segments of the supply chain have been impacted more than others?
- 37) Consider a motor carrier that has A) been hit with a large verdict and B) is strongly considering filing for bankruptcy as a result of A. Describe the changes a company might go through in between stages A and B, things they will take under consideration, and strategies they may implement to keep their doors open. Feel free to elaborate on any other bankruptcy related information from a motor carrier perspective.
- 38) Please share any final questions or thoughts related to this topic.

Thank you very much for your time! This has been very helpful to our efforts. All responses to this survey will be anonymized without attribution.

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## **APPENDIX D: FAVORABLE AND UNFAVORABLE LITIGATION FINANCE JURISDICTIONS**

### *Litigation Finance-Favorable Jurisdictions – Florida*

Florida does not directly regulate litigation finance by statute, and litigation financing agreements are not contrary to Florida law. It is unlikely this will change in the foreseeable future based on proposed and prospective legislation. There is case law that addresses both champerty and usury in the context of litigation financing and that holds that there is nothing unlawful about an agreement to fund litigation as long as the party providing the funding does not instigate the litigation and has only a contingent right to repayment.

Florida does not apply the common law doctrines of champerty, barratry, and maintenance in a way that would prohibit a third party from providing funding to a litigant. In *Kraft v. Mason*, 668 So. 2d 679 (Fla. 4th DCA 1996), the Florida District Court of Appeals considered the validity of a contract under which a non-party to a lawsuit provided funding to a litigant in return for a share of any eventual recovery. The Court concluded that such a contract was not unlawful.

In *Kraft*, the defendant was involved in antitrust litigation and lacked the funds to pay for litigation expenses, as required by the contingent fee arrangement with his lawyer. He contacted his sister for financial support. He proposed that she take out a bank loan for \$100,000 and direct the loan funds to him for use in the litigation. He then promised to cover interest payments during the pendency of the antitrust case and to pay his sister a portion of any recovery, including the first \$100,000 of the recovery (which would be used to pay off the bank loan), and a percentage of total award in the case. The contract governing this arrangement was drafted by the defendant. The sister signed the contract and provided the funds. The defendant partially performed his repayment obligations, but then stopped making interest payments to the bank, apparently due to an unrelated family dispute with the sister. Eventually, the defendant obtained a substantial recovery in the antitrust action, but still did not pay the sister in accordance with the contract.

The sister sued to enforce the contract, and the Court of Appeals held that it was enforceable. In reaching this ruling, the Court affirmed the lower court's ruling that the contract was not champertous as the sister did not instigate the litigation or solicit the loan. Thus, she was not "intermeddling" in the antitrust action. As long as the party providing litigation financing does not prompt a lawsuit or convince a party to start litigation, that party will not be deemed to have engaged in champerty.

As in other jurisdictions, litigation financing will not violate Florida's usury law as long as the repayment obligation is contingent upon a recovery in the case. For contracts with a principal amount exceeding \$500,000, the maximum allowable interest rate is 25 percent. To determine whether the usury statutes apply to any particular transaction, courts look at the substance of the transaction.<sup>89</sup> That is, a finding of usury depends on the intent and understanding of the parties, not on any formalities or labels that may be attached to the transaction.<sup>90</sup>

The usury statutes do not apply when the substance of a transaction gives the "lender" only a contingent right to repayment. Consequently, the limitation on interest rates does not apply to

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<sup>89</sup> *Kay v. Amendola*, 129 So. 2d 170 (Fla. 2d DCA 1961)

<sup>90</sup> *Indian Lake Estates, Inc. v. Special Investments, Inc.*, 154 So. 2d 883 (Fla. 2d DCA 1963).

transactions in which a portion of the investment is at speculative risk.<sup>91</sup> This principle applies regardless of whether the transaction involves more or less than \$500,000.<sup>92</sup>

#### *Litigation Finance-Favorable Jurisdictions – Texas*

Texas imposes no direct regulation of litigation finance, and its case law has specifically held that litigation finance agreements are enforceable and that usury laws do not apply to them. There is a very low risk that a litigation funding transaction would be invalidated or subject to usury rules under Texas law. This does not appear poised to change in the near future.

In *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 103-04 (Tex. App. 2006), the Texas Court of Appeals held that litigation finance agreements cannot be voided on the basis of the public policy against champerty. The court noted that Texas has long permitted the free assignment of claims and the proceeds of claims, and that litigation finance agreements are lawful under the same principle that permits such assignments.

The *Haskell* court also held that a litigation finance agreement is not regulated by Texas' usury laws as long as the litigant has not obtained incontrovertible proof of its claim at the time of the execution of the agreement. *Id.* at 96-100. Thus, in Texas, as in other states such as Michigan, usury laws only apply if the litigant was assured of a recovery when the agreement was finalized.

#### *Litigation Finance-Favorable Jurisdictions – New York*

New York courts have specifically held that litigation finance agreements are enforceable.<sup>93</sup> In addition, a consent decree between the New York Attorney General and the American Litigation Funding Association (ALFA) permits litigation finance agreements that include certain minimum disclosures and provide for a five-day "cooling off" period after execution that would permit consumers to rescind the agreement. There is a very low risk that a litigation financing transaction would be invalidated under New York law as long as it conforms to ALFA guidelines. In addition, there is a very low risk that such an agreement would be subject to the state's usury law.

Litigation funding in New York is regulated by a kind of consent decree between the American Litigation Funding Association (ALFA) and the New York Attorney General. In 2005, ALFA entered an agreement with the Attorney General entitled "Assurance of Discontinuance Pursuant to Executive Law §63(15)." Under the Assurance, the nine original ALFA members promised to draft litigation financing agreements that disclose annual interest rates, itemize and describe any one-time fees, and include 36-month "repayment schedules" broken down into six-month intervals. The LFCs also pledged to allow consumers a five-day cooling off period to terminate the agreement, as well as to conspicuously advise consumers to consult legal representation prior to signing.

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<sup>91</sup> Hurley v. Slingerland, 461 So. 2d 282, 283 (Fla. 4th DCA 1985); Diversified Enters, Inc. v. West, 141 So. 2d 27 (Fla. 2d DCA 1962)

<sup>92</sup> Bailey v. Harrington, 462 So. 2d 861 (Fla. 3d DCA 1985).

<sup>93</sup> Echeverria v. Estate of Lindner, 7 Misc. 3d 1019(A), 801 N.Y.S.2d 233 (Sup. Ct. 2005).

Apart from the regulatory effect of the Assurance, New York law does not recognize champerty and specifically permits the assignment of the proceeds of a litigation claim. Moreover, New York courts have specifically held that litigation financing agreements are enforceable.<sup>94</sup> As the *Echeverria* Court pointed out, the common law of champerty has been codified in New York under Judiciary Law, mainly sections 488 and 489. Champerty prohibits any attorney, person, co-partnership or corporation from directly or indirectly taking assignment of a chose in action "with the intent and for the purpose of bringing an action or proceeding thereon."<sup>95</sup> In order to constitute champerty in New York law, the primary purpose of the purchase must be to bring suit or proceed with action upon the claim they received.<sup>96</sup> The case law interpreting these statutes recognizes a distinction between the assignment of the claim and the assignment of the proceeds of a claim. A litigation financing agreement does not give the funder the right to litigate the claim, therefore, such an agreement cannot be voided as champertous under New York law.

It should be noted, however that, in *Echeverria, supra*, the court did find that a litigation funding agreement involved a usurious loan, and it limited the amount of interest that could be charged. But the *Echeverria* Court did not address the definition of a "loan" as the court in *Kelly, Grossman* did. Consequently, there is a strong argument that the conclusions of the *Echeverria* court are suspect.

#### *Litigation Finance-Favorable Jurisdictions – California*

There is a very low risk that California law would invalidate a litigation financing agreement now or in the near future based on existing and proposed legislation. California law never adopted the common law doctrines of champerty, barratry, and maintenance. It does have an anti-barratry statute, but it only prohibits the promotion of groundless cases, and it only applies to attorneys who have engaged in three separate instances of barratry. As for usury, California follows the prevailing rule that a contract creating a contingent right to repayment cannot be usurious. California also does not directly regulate litigation finance by statute.

California law does not include the common law doctrines of champerty and maintenance, which have been the ordinary source of rules prohibiting the financing of litigation by third-party funders. The California Supreme Court has stated that California "has never adopted the common law doctrines of champerty and maintenance."<sup>97</sup>

In *Abbott Ford, supra*, the California Supreme Court considered the validity of an agreement between a plaintiff and a settling defendant for a non-interest loan that was secured by the recovery against non-settling defendants. In that case, the Supreme Court reviewed a lower-court decision that had invalidated a settlement agreement in a personal injury case. In the underlying personal injury case, the plaintiff had been injured in an automobile crash and had asserted claims against the manufacturer of the vehicle, an automobile dealer who had performed some modifications to the vehicle that were implicated in the crash, and other defendants. In connection with a mandatory settlement conference, the plaintiff estimated that

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<sup>94</sup> *Ibid.*

<sup>95</sup> NY Jud. Law §§ 488, 489

<sup>96</sup> *Knobel v. Estate of Eugene A. Hoffman*, 105 Misc.2d 333, 432 N.Y.S.2d 66, 68 (NY Sup. Ct., 1980); see also *Moses v. McDivitt*, 88 N.Y. 62, 65 (1881); *Wightman v. Catlin*, 113 A.D. 24, 98 N.Y.S. 1071, 37 Civ. Proc. R. 105 (NY App. Div., 1906).

<sup>97</sup> *Abbott Ford, Inc. v. Superior Court*, 714 P.2d 124, 141, n. 26; 43 Cal. 3d 858 (1987) (citing cases).

her likely recovery at trial against all defendants would be no less than \$3,000,000. Shortly after submitting this estimate to the court, she entered into a settlement agreement with the dealer under which the dealer would guarantee that she would recover at least \$3,000,000 in the case. If she recovered more than \$3,000,000 from the other defendants, the dealer would pay nothing. If she recovered less than \$3,000,000, the dealer would pay the difference. In addition to providing the guarantee, the dealer also agreed to give the plaintiff periodic no-interest loans during the pendency of the litigation. These loans would be capped at \$3,000,000. If the plaintiff recovered from the other defendants, the award would be used to repay the loan from the dealer. Under this agreement, the dealer was, in essence, financing the litigation against the non-settling defendants. Eventually, the trial court invalidated the agreement for violating principles of good faith. The dealer filed a separate action against the trial court, challenging the decision to invalidate the settlement, and, on appeal in that action, the California Supreme Court held that the agreement was valid in principle because, among other things, California had never adopted the common law doctrines of champerty and maintenance.<sup>98</sup>

Although *Abbott Ford* dealt with the rather unique situation of a loan from a settling defendant to the plaintiff, the Supreme Court's explanation of its decision indicates that California law can accommodate the third-party financing of litigation. The Supreme Court noted that there was nothing improper about a settlement agreement that took "the form of a non-interest loan from the settling defendant to the plaintiff, repayable out of the proceeds of any recovery."<sup>99</sup> By this reasoning, *Abbott Ford* indicates that there is nothing illegal or inequitable about a loan agreement with a litigant that is secured by any award that the litigant might receive from the case. Of course, the loan in *Abbott Ford* did not involve any interest charges. Consequently, the case does not provide much guidance about how California courts would view a litigation finance loan that involved a high effective interest rate. It is possible that a court could take exception to the assessment of interest charges. But *Abbott Ford* shows that, if there is a problem with the provision of litigation finance loans, that problem would not be located in the fact that a party provided funding to a litigant that enabled the litigant to go forward with a case.

California does include some rules that prohibit certain specific activities that are associated with champerty and maintenance, but these do not apply to litigation funding by a third-party. One statute prohibits attorneys from purchasing a cause of action for the purpose of bringing suit on it.

Like other states, California courts have held that its usury laws do not apply to transactions in which a party provides funds to another and is not guaranteed any interest payments in return. California law includes a common law doctrine known as the "interest contingency rule," which provides that interest is usurious only when it is "absolutely repayable by the borrower."

This rule has been specifically applied to preclude the application of usury laws to financial arrangements in which one party provides financing to another for an economic venture with the option of taking a share of proceeds of the venture in lieu of interest. In *Schiff v. Pruitt*, 301 P.2d 446; 144 Cal. App. 2d 493 (1956), a lender loaned \$20,000 to fund the construction of a residential development. Under the loan agreement, the developer was required to repay the principal with only nominal interest; but it also gave the lender the option to share the proceeds from the sale of the homes. The court in *Schiff* concluded that the loan agreement was not

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<sup>98</sup> *Abbott Ford*, 714 P.2d at 141 n. 26.

<sup>99</sup> *Id.* at 141

usurious, reasoning that the lender's profit from the loan was contingent and “wholly at hazard.”<sup>100</sup>

### *Unfavorable Litigation Finance Jurisdictions – Georgia*

There is a high risk that Georgia law could be used to invalidate a litigation financing agreement, and there is a moderate risk that such an agreement could be subject to usury law. Georgia does not appear poised to directly regulate litigation finance in the near future, but existing decisions could be used to challenge financing agreements.

Georgia law includes a variety of rules that would appear to prohibit litigation finance contracts. First and foremost, Georgia has a statute that defines “contracts of maintenance or champerty” as against public policy and void.<sup>101</sup> The research team could not find any Georgia cases that provided a specific definition of “champerty” that was different from the standard common-law formulation; therefore it seems likely that Georgia would treat a contract as champertous when it involved “speculation” in a lawsuit.

There is some case law that would militate against this apparently conclusive proscription of champerty. Georgia law specifically permits the assignment of causes of action arising from contract or from property rights. Nevertheless, Georgia does not permit the assignment of any personal injury claims or any other tort claims that involve something more than a purely pecuniary injury.<sup>102</sup> In discussing the statutory rule that permitted the assignment of rights of action in contract, the *Sullivan* Court also noted that the assignment of actions in tort is impermissible and indicated that the assignment of anything other than a contract action would “savor[ ] of” champerty and maintenance. *Id.*

Georgia has a somewhat more inclusive definition of usury than most jurisdictions. Case law provides that a transaction may be usurious when, among other things, the parties agree to a rate of interest that is above the legal limit. *Bank of Lumpkin v. Farmers' State Bank*, 161 Ga. 801, 810-11, 132 S.E. 221, 225 (1926) (holding that the elements of usury are: “(1) A loan or forbearance of money, either express or implied. (2) Upon an understanding that the principal shall or may be returned. (3) And that for such loan or forbearance a greater profit than is authorized by law **shall be paid or is agreed to be paid.** (4) That the contract was made with an intent to violate the law”) (emphasis added). In other words, a transaction can be usurious simply because the parties agree to an excessive rate of interest, even if the obligation to pay is not absolute.<sup>103</sup>

### *Unfavorable Litigation Finance Jurisdictions – Pennsylvania*

There is a high risk that a litigation financing agreement would be invalidated under Pennsylvania law, and a low risk that such an agreement, if not invalid, would be subject to usury law. In general, Pennsylvania is an area where litigation finance companies should add a

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<sup>100</sup> Schiff, 144 Cal. App. 2d at 498–499.

<sup>101</sup> Ga. Code Ann. § 13-8-2(a)(5).

<sup>102</sup> Ga. Code. Ann. §§ 44-12-22 & 44-12-24; Villanueva v. First Am. Title Ins. Co., 292 Ga. 630, 634-35; 740 S.E.2d 108 (2013); see also *Sullivan v. Curling*, 149 Ga. 96, 99; 99 S.E. 533 (1919).

<sup>103</sup> See also *Knigh v. First Fed. Sav. & Loan Asso.*, 151 Ga. App. 447, 260 S.E.2d 511 (1979) (following *Bank of Lumpkin*).

premium to their pricing to account for the risks around invalidation of a financing agreement, or else take special care to create a unique structure for such an investment. While Pennsylvania does not directly regulate litigation finance by statute, Pennsylvania does recognize the doctrine of champerty, and it may be asserted as a defense against the enforcement of a contract when three elements are established: “1) the party involved must be one who has no legitimate interest in the suit; 2) the party must expend its own money in prosecuting the suit; and 3) the party must be entitled by the bargain to share in the proceeds of the suit.”<sup>104</sup> The doctrine has recently been applied to invalidate litigation financing agreements.<sup>105</sup>

Pennsylvania law provides that a transaction creating a contingent duty of repayment is not subject to the usury laws, but there must be a significant chance that the contingency will not occur.

The risk must be substantial, however, for a mere colorable hazard will not prevent the charge from being usurious. Courts have held that a loan is contingently repayable only if the lender has subjected himself to some greater hazard than the risk that the debtor might fail to repay the loan or that security might depreciate in value.<sup>106</sup>

#### *Other Unfavorable Litigation Finance Jurisdictions*

Alabama courts have held that litigation financing agreements are a form of “gambling” or speculating in litigation and are therefore void as against public policy.<sup>107</sup>

Colorado courts have held that litigation financing is a loan, notwithstanding the contingency of the duty of repayment. Thus, litigation financing agreements are subject to the state’s usury laws.<sup>108</sup> In addition, because the decision in Oasis Legal effectively disregarded express contract provisions, there is reason to think that Colorado courts will interpret litigation finance contracts very loosely and will not respect the strict terms of the agreement.

Kentucky has a statute that, by its express terms, would make litigation financing contracts void.<sup>109</sup> A recent federal case has held that this statute and case law applying common-law principles would invalidate litigation finance contracts.<sup>110</sup> In addition, the Boling court held, in dicta, that a litigation finance agreement would violate Kentucky’s usury laws as well.

There are a number of states that directly regulate litigation financing agreements, and some of them impose strict limits on the fees that funders can charge. Tennessee and Indiana are two examples of this. While these states make litigation funding more difficult, they pose fewer problems than the states that have explicitly held that litigation finance contracts are unlawful or that have case law demonstrating aggressive hostility to litigation financing.

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<sup>104</sup> Fleetwood Area Sch. Dist. v. Berks Cnty. Bd. of Assessment, 821 A.2d 1268, 1273 (Pa. Commw. Ct. 2003)

<sup>105</sup> WFIC, LLC v. LaBarre, 2016 PA Super 209, 148 A.3d 812.

<sup>106</sup> Olwine v. Torrens, 236 Pa. Super. 51, 55; 344 A.2d 665, 667 (1975).

<sup>107</sup> See Wilson v. Harris, 688 So. 2d 265 (Ala. Civ. App. 1996).

<sup>108</sup> See Oasis Legal Fin. Grp., LLC v. Coffman, 2015 CO 63, 361 P.3d 400 (2015).

<sup>109</sup> Ky. Rev. Stat. Ann. § 372.060

<sup>110</sup> Boling v. Prospect Funding Holdings, LLC, No. 1:14-CV-00081-GNS-HBB, 2017 U.S. Dist. LEXIS 48098, at \*5-6 (W.D. Ky. Mar. 30, 2017).

**APPENDIX E. MEDICAL MALPRACTICE DAMAGE LIMITS BY STATE<sup>111</sup>**

<b>State</b>	<b>Damage Caps</b>
AL	None
AK	Non-economic: \$250,000. Wrongful death or a disability considered more than 70% disabling: \$400,000
AZ	Constitutionally prohibited
AR	None
CA	Non-economic \$250,000
CO	Non-economic: \$300,000. Total damages: \$1 million
CT	None
DE	None
DC	None
FL	Non-Economic Damages: \$500,000 for practitioners; \$750,000 for non-practitioners; \$1-million for permanent vegetative state or death
GA	Punitive: \$250,000. Non-economic: \$350,000 against providers. Additional \$350,000 against each health care facility. Total maximum for non-economic: \$1,050,000
HI	Non-economic: \$375,000 with exceptions for specific situations
ID	Non-economic \$250,000, adjusted annually for inflation. Does not apply to willful/reckless negligence or felonies.
IL	Struck down in 2010 - Non-economic: \$500,000 against providers. \$1,000,000 against hospitals
IN	\$1,250,000 total if it occurred after 1999. Providers liable for a maximum of \$250,000 with the rest to be paid through state's Patient Compensation Fund.
IA	None
KS	Non-economic: \$250,000
KY	None
LA	\$500,000 total. Health care providers liable for only \$100,000 with the rest paid by compensation fund
ME	Non-economic: \$500,000 on wrongful death
MD	Non-economic: \$740,000 as of 2015 to increase \$15,000 annually. Applies to all claims and to all defendants from the same injury, or to wrongful death cases with only one plaintiff. If two wrongful death plaintiffs- \$125% of current non-economic cap.
MA	Non-economic damages: \$500,000 except in catastrophic injuries
MI	Non-economic: As of 2015 \$444,900 or \$794,500 for catastrophic/disabling injuries. Adjusts annually for inflation
MN	None
MS	Non-economic: \$500,000/plaintiff
MO	Non-economic: \$350,000; but cap ruled unconstitutional by Missouri Supreme Court in 2012
MT	Non-economic: \$250,000
NE	\$2,250,000 total except maximum of \$500,000 for those qualifying entities under the Hospital-Medical Liability Act
NV	Non-economic: \$350,000 except with limited exceptions
NH	None
NJ	Punitive: The greater of \$350,000 or 5x compensatory damages.

<sup>111</sup> Retrieved from: <https://www.alllaw.com/articles/nolo/medical-malpractice/award-settlement-limits.html>

State	Damage Caps
NM	Total: \$600,000 except for past/future medical bills and punitive damages. Maximum provider liability is \$200,000 with the rest paid by compensation fund.
NY	None
NC	Non-economic: \$500,000
ND	Non-economic: \$500,000 however any award above \$250,000 may be reviewed by judge
OH	Non-economic damages: \$250,000 or 3x economic damages up to \$350,000/plaintiff, whichever is greater. \$500,000 total for multiple plaintiffs. In catastrophic cases, \$500,000 or \$1,000,000
OR	Non-economic \$350,000 for OB/ER cases or if there's an offer of judgment
OR	Non-economic: \$500,000 for wrongful death. Other non-economic caps not constitutional
PA	Punitive: Twice actual damages. Constitutional prohibition on caps of economic damages
RI	None
SC	Punitive damages: \$350,000 or 3x compensatory damages. Non-economic: \$350,000 or facility against each provider adjusted annually for inflation. Total claim with multiple providers capped at \$1,050,000
SD	Non-economic \$500,000
TN	None
TX	Non-economic damages: \$250,000 against physicians or providers. Additional \$250,000 against each health care institution
UT	Non-economic \$450,000
VT	None
VA	Total damages \$2,000,000 for acts occurring after July 2008.
WA	None
WV	Non-economic \$250,000, adjusted for inflation annually with an absolute maximum of \$375,000. In catastrophic cases, \$500,000 adjusted annually up to a max of \$750,000
WI	Non-economic \$750,000 for medical negligence. Wrongful death actions: \$500,000 for minors and \$350,000 for adults
WY	Constitutionally prohibited



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