Roadblock

The Trucking Litigation Problem and How to Fix It

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Institute for Legal Reform

Contents

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01

Executive Summary

The trucking industry in the United States is the lifeblood of the nation's economy. Over three-quarters of American communities depend exclusively on trucks to meet their freight transportation demands, which is not surprising since trucks move roughly 72 percent of U.S. domestic tonnage shipped.[1]

Yet trucking in America is under siege by litigation. Verdicts in trucking accident cases accelerated in size starting in the 2000s but have skyrocketed over the last 10 years, despite a decreased rate of serious trucking crashes over that timeframe. Moreover, with the inflation of verdicts and settlements, the search for deep pockets is expanding and the circle of potential defendants is widening.

This paper documents the dramatic increase in trucking accident litigation awards across the board, including an analysis of recent verdicts and settlements to document the continuing trend. A review of 154 trucking litigation verdicts and settlements from June 2020 – April 2023 reveals a mean plaintiffs' award of $27,507,334 and a median award of $759,875.

For settlements, the mean award was $10,608,219, and the median award was $210,000. Although the means are driven up by a handful of extreme verdicts and settlements, trucking companies and insurers alike must account for these significant risks. The paper then discusses the impact of these inflated verdicts on the industry, consumers, and the economy.

The research also explores the various factors driving this litigation trend, most of which are tactical litigation tools that drive up verdicts. These tactics include:

- medical referral networks and inflated billing practices;
- "reptile" courtroom tactics by plaintiffs' lawyers;
- a widening circle of defendants to reach deeper pockets; and
- an ambiguous and exploitable standard of care for trucking operations.

The paper then notes the most problematic jurisdictions across the country for trucking litigation. Some jurisdictions are notoriously worse than others, making solutions ever more critical for the consumers in those jurisdictions.

After examining these trends and the factors behind them, the paper concludes with a number of solutions intended to prevent the unreasonable inflation of trucking industry verdicts and settlements, while preserving a civil justice system that

effectively provides for prompt, just, and reasonable compensation for those involved in trucking accidents.

These solutions would:

- Require transparency in claiming medical damages. Legislation should limit medical damages to reasonable and customary amounts actually paid instead of inflated amounts billed. State legislatures or courts should ensure evidence of referral relationships indicating bias or conflict of interest is disclosed and available to juries. Law enforcement and professional ethics regulatory bodies should take a more active role in prosecuting fraud or unethical behavior, respectively.

- Prohibit the presentation of inflammatory arguments if a defendant trucking firm stipulates responsibility for a driver's negligence. To ensure awards are tied to reasonable compensation, policymakers and judges should ensure that evidence and arguments intended to inflate the verdicts do not get presented to the jury. Courts and legislatures should generally prohibit presentation of evidence on derivative theories of negligence where a trucking company has stipulated responsibility for its driver's negligence, if any. Allowing such evidence inflames juries and promotes another, duplicative assessment of fault against a company.

- Create reasonable caps on non-economic damages. Non-economic damages, e.g., compensation for pain and suffering, are admittedly difficult to quantify but are an increasingly large portion of verdicts and settlements than more objective damages, like medical expenses for treatment.

- Prohibit the practice of "anchoring." Courts should ensure non-economic damages are supported by evidence and not arbitrarily chosen. Judges (and state legislatures if judges fail to) should prohibit unsubstantiated anchoring, where an award suggestion is argued without evidence simply to plant the number in the jury's minds.

- Permit evidence of non-use of seat belts by plaintiffs in damages calculations. The duty to mitigate damages has long been a component of the common law of torts. With seat belt use mandatory in 49 states, states that do not currently permit evidence of the non-use of seat belts in damages calculations should do so. The goals of a properly functioning civil justice system are not advanced by compensating for serious injuries that may have been avoided or mitigated by compliance with a seat belt law.

- Clarify the standard of care for motor carrier selection and failure-to-equip claims. Policymakers and judges should defer to federal agencies with a safety remit in deciding whether contracting with a motor carrier is reasonable or whether a

truck is properly equipped. The Federal Motor Carrier Safety Administration's (FMCSA) mission is to ensure the safety of trucking operations, and it is solely responsible for granting and withdrawing permission to operate as an interstate trucking company. Similarly, the National Highway Traffic Safety Administration (NHTSA) determines safety standards for newly manufactured trucks. Both are well funded and have personnel dedicated to their specific mission. Their expertise should establish the standard of care.

The trucking industry is an essential part of the fabric of our economy. Nevertheless, the plaintiffs' bar has targeted the trucking industry as a source of inflated verdicts and settlements. Policymakers, judges, and professional ethics regulators must take action to restore balance and fairness in truck accident litigation.

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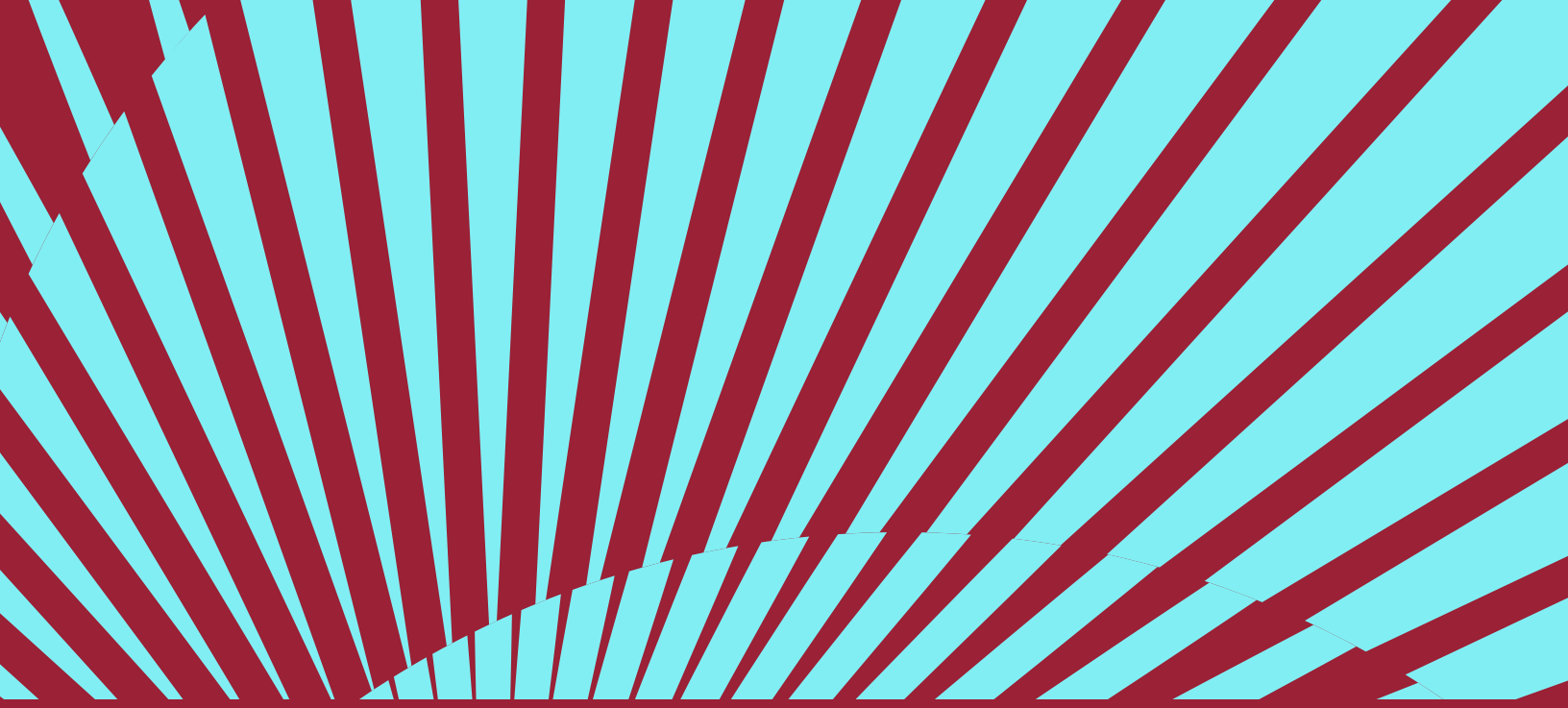


Chapter

02

Rise in Trucking Litigation

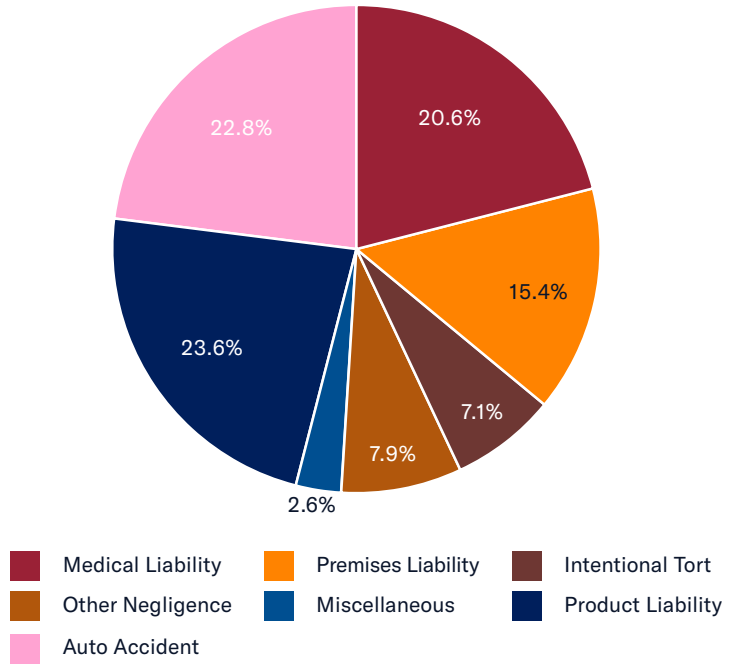
It has been well documented that the trucking industry is the target of voluminous litigation and increasing verdicts and settlements. This chapter provides key data points that illustrate the rising trend.

Million-Dollar Verdicts on the Rise

The explosion of disproportionate or nuclear verdicts in the past decade or so has drawn considerable attention. A fall 2022 U.S. Chamber of Commerce Institute for Legal Reform paper quantified the phenomenon in personal injury and wrongful death cases across a 10-year period.[2] Defining nuclear verdicts as those of $10 million or more, that study found auto accident cases comprised the second largest category of nuclear verdicts.[3] Within that category, about one in four cases involves a trucking company.[4]

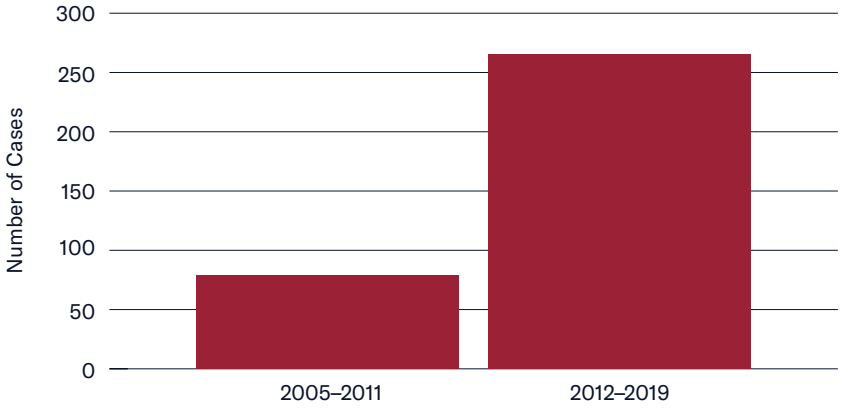
Additionally, an analysis of verdicts in the trucking industry from 2005 to 2019 found that the number of cases with verdicts over $1 million increased by 235 percent when comparing the latter half of that period (2012-2019) to the first half

Figure 1: Nuclear Verdicts by Case Type (2010–2019)



Source: U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes and Solutions*, pg. 6 (Sep. 2022).

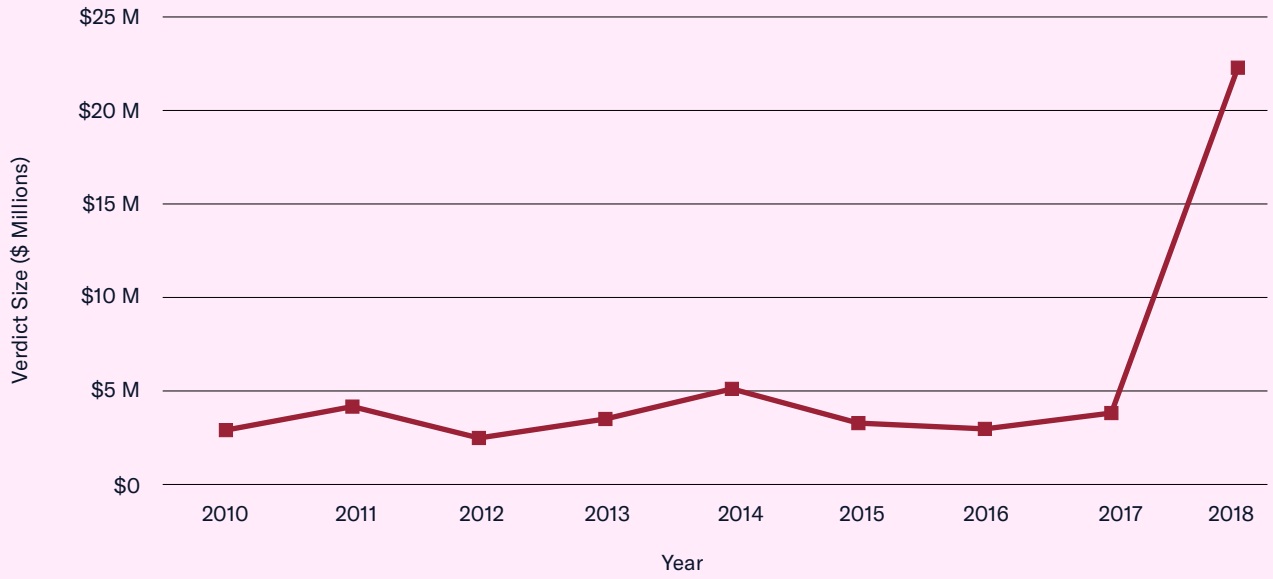
Figure 2: Cases With Verdicts Over $1 Million (2005–2019)



Source: American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, p. 17 (Jun. 2020).

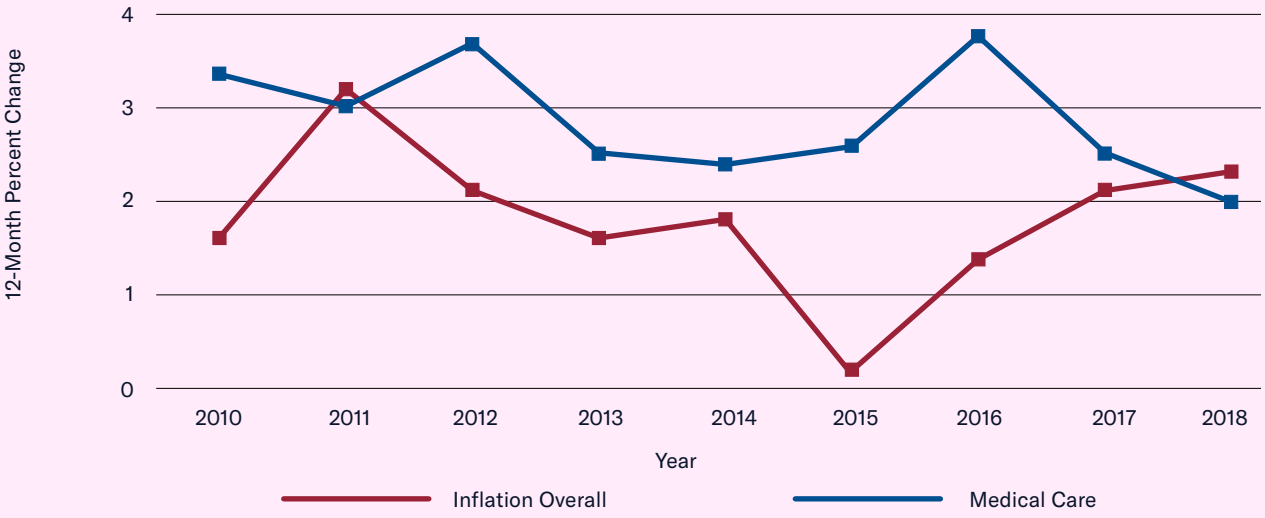
(2005-2011).[5] The same study of verdicts over $1 million calculated a 867 percent increase in the average size of verdicts between 2010-2018.[6] This sharp increase in size is not explained by overall inflation or even healthcare cost inflation, both of which increased at significantly lower rates of 16 percent and 26 percent, respectively, over the same time period.[7]

Figure 3: Average Size of Verdict (2010–2018)



Source: American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, p. 18 (Jun. 2020).

Figure 4: CPI (Inflation Overall and Medical Care) (2010–2018)



Source: U.S. Bureau of Labor Statistics.

Smaller Verdicts Add Up

While nuclear verdicts may threaten a company's existence, smaller verdicts and settlements can also be inflated and disproportionate and therefore severely impact a trucking company's operations. In a study of 641 cases with verdicts or settlements of under $1 million, the average payment was $427,336 and the median payment was $400,000.[8] That study did not capture the overwhelming majority of claims that are settled before any litigation is actually initiated.[9] As discussed further in Chapter 3, inflated verdicts influence larger settlements.

A different study examined large and small truck accident verdicts from 2009-2021 and, although the numbers from that dataset are slightly different, they are largely consistent. In that study, the median compensatory award (not including defense verdicts) was $260,000 and the average compensatory award (inclusive of defense verdicts) was $1,857,504.[10] It also found that 76 percent of compensatory awards were for under $1 million.[11] As awards continue an accelerating march upwards, there is reason to believe that number will decrease in the future.[12]

Perceived Safety Disconnect

A puzzling counterpoint to these rising verdict trends is a recent examination of trucking safety statistics, which showed that the trucking industry has made meaningful safety improvements from 2000–2020. Over that time, consumer demand for goods increased rapidly, resulting in a 47 percent uptick in large truck vehicle miles traveled (VMT).[13] While the number of fatal crashes involving large trucks has mostly remained steady, the rate of fatal crashes per 100 million VMT decreased from 2.23 to 1.47 during those two decades—a drop of 34 percent.[14] Furthermore, a study by the University of Michigan's Transportation Research Institute "found that actions of drivers of passenger vehicles alone contribute to 70 percent of the fatal crashes with trucks."[15]

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However, despite this evidence that trucking safety has improved significantly and that truckers are usually partially

or not at all at fault for fatal crashes, public perception of the trucking industry has struggled. In fact, a 2019 survey showed that a majority of respondents perceived truck drivers as unsafe.[16]

Perception Improves, But Verdict Trends Persist

The very next year, the COVID-19 pandemic introduced a seismic—but temporary—shift in public perception of a host of industries, including trucking. With large swaths of the population confined to their home yet still dependent on the continued availability of day-to-day necessities, truck drivers answered the call by continuing to deliver. The public took note, and trucking's image improved.[17]

The American Transportation Research Institute (ATRI) studies cited above relied on verdict and settlement data prior to the onset of the pandemic, which ushered in a unique period in modern American life. To determine whether the rise in verdict and settlement awards continued or was abated as a result of improved public perception, this paper examined 154 verdicts and settlements of all sizes involving truck accidents from June 2020 – April 2023. Of those, 97 were plaintiff's verdicts, 32 were defense verdicts, and 25 were settlements. Although it took some time for jury trials to ramp up again after the peak of the pandemic, somewhat limiting the available data, the review suggests trucking's improved public perception has not translated to a more reasonable litigation environment.

As mentioned in the Executive Summary, for plaintiffs' verdicts and settlements combined, the mean award for the dataset reviewed was $27,507,334 and the median award was $759,875. For plaintiffs' verdicts, the mean award was $31,862,776, and the median award was $314,217. For settlements, the mean award was $10,608,219, and the median award was $210,000. Although the numbers are skewed by a handful of high dollar verdicts, including trucking's first $1 billion verdict, and a high dollar settlement, the numbers offer little relief to trucking. Though it may be tempting to discard the mean numbers and focus more on the median, trucking companies and insurers alike must be aware that those extraordinary, high dollar verdicts and settlements persist despite improved public perception of the industry, and therefore must be part of any risk analysis.

Seeking Deep Pockets

Entities adjacent to trucking are also being targeted. Because 92 percent of motor carriers have 10 or fewer trucks[18] and are small businesses, plaintiffs' attorneys are turning to other sources for recovery; namely freight brokers that act as intermediaries to arrange transportation by motor carriers for shipper clients. Not only do freight brokers

represent an additional source for recovery, the freight brokers targeted also represent deeper pockets than the large majority of small trucking companies. Although plaintiffs may recover from the trucking company, plaintiffs' attorneys seeking deeper pockets bring claims of direct negligence against the freight broker that selected the trucking company. These types of claims may be made against any entity that hires trucking companies to transport their goods, including shippers. A review of verdicts against freight brokers from 2015-2021 calculated an average verdict of $12,528,663 with a median verdict of $4,126,000.[19]

Numerous studies, including this paper's review of more recent trucking verdicts and settlements, demonstrate that awards are increasing at a rate that has far outpaced inflation. This trend continues even though the number of fatal crashes involving trucks has been maintained at roughly the same level as 20 years ago despite a significant increase in VMT. Moreover, the lure of large awards is encouraging suits against entities perceived to have deep pockets, like freight brokers and even shippers.

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Chapter

03

Impact of Inflated Verdicts

The trucking industry is the critical link for most American communities to get their goods. To be sure, even the safest truck drivers and trucking companies will be involved in accidents, and in some cases, the truck driver is at fault. A properly functioning civil justice system would provide a swift, just award, whether through trial or settlement, to compensate for the wrong committed. However, the civil justice system is being leveraged to promote increasingly inflated and disproportionate verdicts and settlements against trucking companies, even fostering fraud to the point that accidents are being staged.

With the inevitable logic of a math equation, company insurance costs have increased as verdicts and settlements have increased. There is little sign that these costs are driven by insurance companies padding profits—indeed, over the last decade, companies offering trucking insurance have been unable to make a profit despite continuously increasing premiums. Consequently, some insurers have left the market, insurers that remain are offering less coverage or tighter bands of coverage, and trucking companies are having to take on more risk. The net result is that both small and large trucking companies find it increasingly challenging to obtain insurance for their operations.

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Because trucking is by far the most prevalent means by which communities throughout America get their goods, inflated and disproportionate verdicts against trucking companies affect everyone. As higher insurance costs erode or erase already-thin operating margins, some portion of the costs show up in higher prices. And in areas where the litigation climate for trucking is particularly unfavorable, service altogether can be constrained.

Litigation and Cost of Insurance

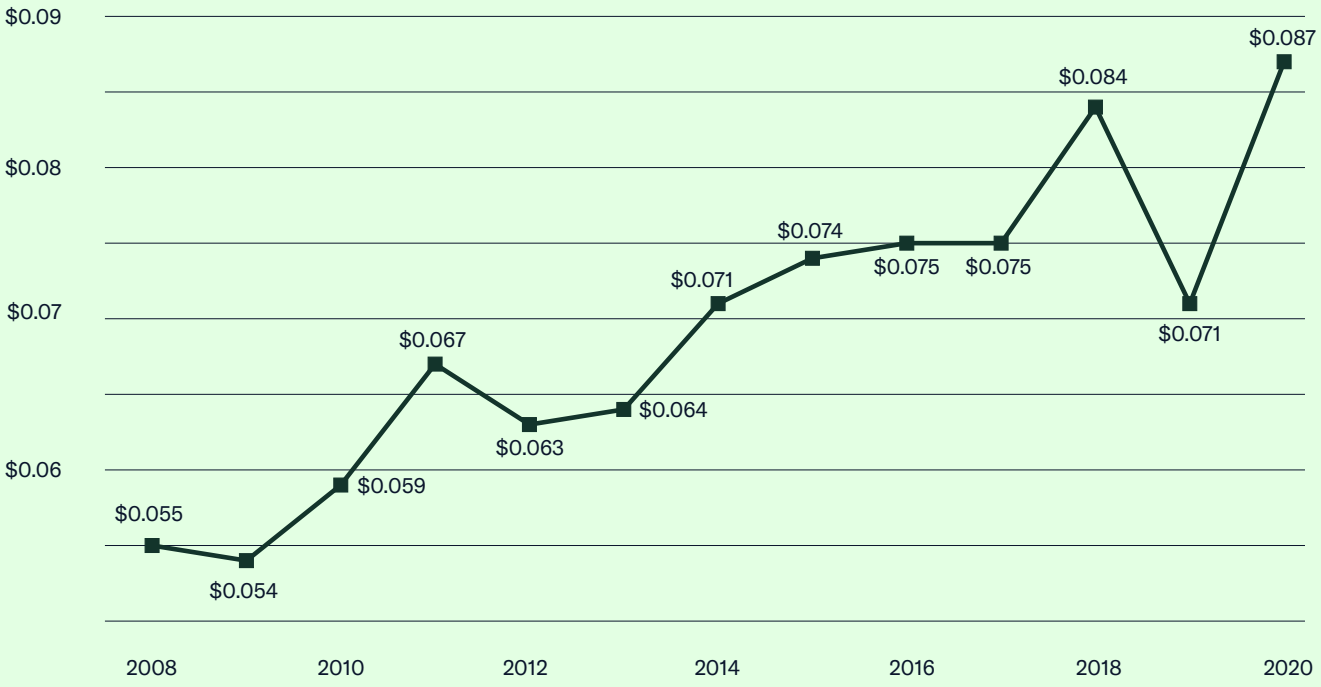
The cost of procuring insurance is one of the most noticeable areas where inflated verdicts have impacted trucking. Although federal law sets the minimum required insurance for most general freight carriers at $750,000, an overwhelming majority maintain coverage of

$1 million or more as a market standard. The cost of this insurance has risen in conjunction with the increase in trucking verdicts.

Over the period from 2010-2020, a trucking company's insurance premium costs per mile increased by 47 percent to $0.087 per mile.[20] ATRI attributed this rise, in part, to litigation, jury verdicts, and the pressure to settle cases. And ATRI is not alone. Fitch Ratings noted a decade of insurer underwriting losses despite renewal premium rates having risen for 43 consecutive quarters.[21] The decade of losses between 2011-2019 was attributed, in part, to "persistent rising claims severity tied to heightened litigation activity."[22]

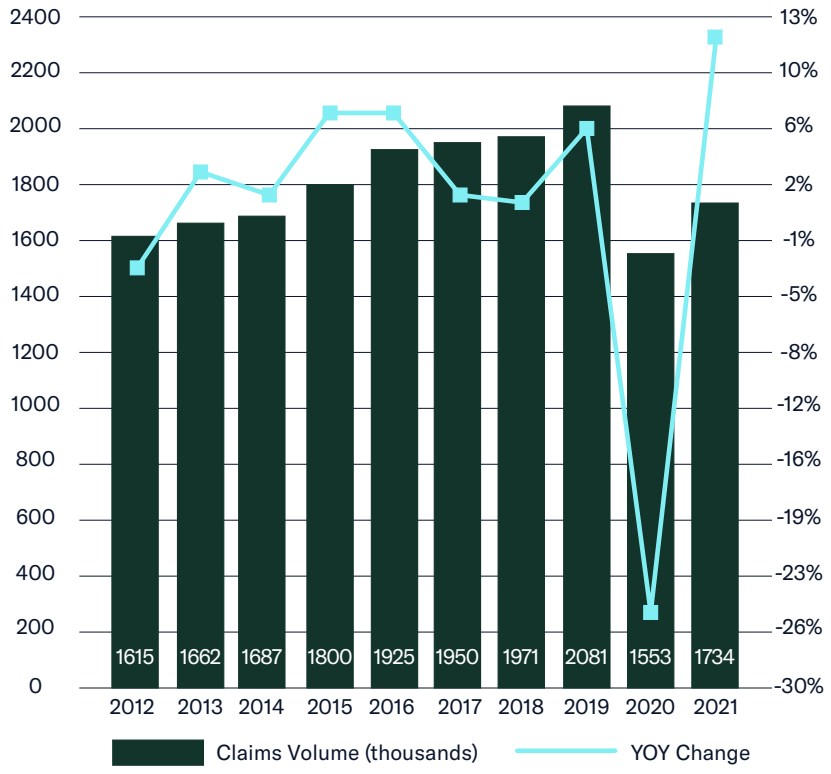
The increase in trucking company insurance premium costs cannot be solely attributed to increased frequency of claims. From 2012 to the peak in 2019, the number of reported commercial auto

Figure 5: Insurance Premium Costs per Mile (2008–2020)



Source: American Transportation Research Institute, *The Impact of Rising Insurance Costs on the Trucking Industry*, p. 8 (Feb. 2022).

Figure 6: Commercial Auto Liability Reported Claims by Accident Year (2012–2021)



Source: Fitch Ratings.

liability claims increased 29 percent.[23] But when comparing 2012 to 2021, there was only a seven percent increase in the number of claims,[24] yet truck insurance premium costs in 2021 were 37 percent higher than in 2012.[25]

Obtaining insurance in the excess market has likewise become more difficult over the same period of time that verdict sizes were skyrocketing. A 2019 report on the excess insurance market noted that insurers were reducing their offerings for excess coverage, establishing lower limits and thus requiring multiple layers of coverage.[26] It noted a quote to a national trucking company "for a $10 million layer in excess of $30 million went from [a cost of] $90,000 to nearly $1 million."[27] The result is that between 2018-2020, roughly 70 percent of very large fleets reduced their excess coverage by 25 percent or more.[28] A 2022 report on the excess insurance market noted that despite some improvement in the last two years, the authors anticipate the market will be challenging as "social inflation and third-party litigation funding have supported extended legal battles resulting in nuclear verdicts that further upend loss ratios."[29]

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Not only are trucking companies paying more in insurance premiums, they are also taking on more of the risk through higher deductibles or self-insured retentions. To that end, only 9.5 percent of carriers taking on increased risk from 2018-2019 or 2019-2020 were rewarded with lower premiums; the remainder simply mitigated premium increases.[30] With respect to commercial auto insurance, many companies are paying more for less coverage. This is a reality forged by inflated verdicts.

Even slight increases in premium costs can have an outsized impact on a trucking company's viability. Trucking companies typically have much higher operating ratios than competitors, like railroads. An operating ratio of 90 means a trucking company has 90 cents in expenses for every dollar in revenue; in other words, the company makes a margin of 10 cents for every dollar of revenue. While large public carriers often have operating ratios in the 90s, smaller carriers often have operating ratios close to 100 or, at times, over 100.[31] An increase of a cent or two in costs per mile attributable to insurance may seem negligible, but it can be a tipping point for many small carriers and force them to shut down.

Annual reports filed with the SEC for 2022 by some of the nation's largest trucking companies underscore the impact of litigation on operations in terms of increased insurance costs, decreased insurance availability, and structuring risk mitigation. They serve as further reminders that the pressures have not eased.

Higher Costs = Higher Prices

It should come as no surprise that trucking companies are constrained to pass on some of those increased costs to shippers. Transportation costs, like labor and capital costs, directly influence the price of goods and services of a seller. The influence of transportation costs on the product's final cost can certainly vary by industry sector. The Federal Highway Administration has estimated that "$1 of final demand for agricultural products requires 14.2 cents in transportation services, compared with 9.1 cents for manufactured goods and about 8 cents for mining products."[32] In short, the problem of inflated or disproportionate verdicts so prevalent in the trucking industry affects consumers of various goods throughout the nation.

Settlement Creep

As nuclear verdict awards continue a seemingly unbounded expansion,[33] the fear of outsized nuclear verdicts also results in settlement creep—the inflation of payouts necessary to settle a claim. In a tome for the plaintiffs' bar that gave birth to the "reptile theory," discussed *infra*, the authors describe a psychological edge, noting "[t]he fear button for the insurance company and the self-insured is their awareness of a strong chance of a large verdict."[34]

They note that large differences between a jury verdict and the defense's valuation of a case will "make heads roll." This explains the psychology behind why "trends in average jury awards do influence settlement values of ordinary claims over time"[35] and the notion that inflated verdicts beget inflated settlements.

This can also lead to settlements that are larger than verdicts for comparable claims. ATRI research indicates that, particularly for head, spine, and more severe injuries, settlements are often greater than average verdicts.[36] This is likely because trucking companies and their insurers have to take into account the potential for a nuclear verdict, and plaintiffs' attorneys are relentless in touting the high dollar verdicts.

The risk of inflated verdicts not only results in larger settlement payments, but they can also lead to settlement of suits where liability of the trucking company itself is contestable. On the heels of some increasingly outsized verdicts in its prior two years, a large truckload carrier settled a suit last year involving the death of two children for $150 million, even though the investigating officer placed no fault on the carrier or its driver. The passenger vehicle was stopped in the travel lane of an interstate highway and the two children were left in the car by three adults who left the car. One of the adults was criminally charged in connection with the deaths of the children.

By delivering goods, trucking touches all of our lives. Therefore, litigation trends in trucking also have a widespread impact that cannot simply be isolated or cordoned off. A low-margin business generally, inflated or disproportionate verdicts drive an increase in the prices of the myriad goods a majority of communities rely on trucking to deliver.

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Chapter

04

Factors Driving Accident Litigation Trends

Consider two real-world examples, explored further below, that paint a picture of the litigation challenges that the trucking industry faces:

A passenger vehicle intentionally runs into a tractor-trailer. The driver of the passenger vehicle trades places with another individual who is waiting nearby in a different vehicle and who claims to have been driving the passenger vehicle when it was struck. He, and three of the other passengers in the vehicle, are referred to an attorney, who paid the original driver to run into a tractor-trailer. The attorney directs all four passengers to his network of doctors and healthcare providers to undergo treatments and surgeries under the direction of the attorney. The trucking company and its insurance company pay out approximately $4.7 million in claims associated with the staged accident.

In another example, a passenger vehicle driver going in one direction on a divided interstate highway loses control of his pickup truck, crosses a roughly 40-foot grassy median, and collides with a tractor-trailer traveling in the opposite direction. Although the jury assigned the majority of the blame for the accident to the pickup truck driver, it awarded the plaintiffs roughly $92 million after being allowed to consider a claim against the trucking company that stems from the tractor-trailer driver's negligence,[37] even though the company stipulated it would be responsible if its driver were found negligent.

Obviously, every case is different and a large award may be warranted in some cases. But in others, it may equate to an inflated or disproportionate award. This chapter thus focuses on factors that cut across the landscape of cases and frequently contribute to the problem of inflated and disproportionate awards.

Lawyers, Medical Bills, and Funders

An intricate web of relationships between attorneys, healthcare providers, and third-party litigation financing firms is contributing to inflated medical bills resulting from exaggerated, over-treated, or even outright fraudulent injuries. Although it is not a brand new phenomenon, trucking companies are often targeted because, as compared to personal automobile drivers, trucking companies are generally required by law to maintain significantly higher insurance amounts and are thus seen as the deeper pocket.

One strand of the web involves personal injury attorneys, who advertise for vehicle accident victims or pay runners or other individuals to provide a pipeline of potential clients.

"Some attorneys even go so far as to pay individuals to orchestrate the staging of accidents and then refer the fraudulent claimants to the attorney."

For example, in Michigan, a federal indictment alleged that personal injury attorneys were involved in a scheme where Detroit Police Department crash reports were unlawfully obtained in order to solicit crash victims and direct them to the attorneys.[38] Some attorneys even go so far as to pay individuals to orchestrate the staging of accidents and then refer the fraudulent claimants to the attorney.[39]

As noted in the examples discussed *infra*, the web also involves referrals to healthcare providers and/or third-party medical financing companies. Healthcare providers with these types of referral relationships with personal injury attorneys often enter into a letter of protection whereby payment for the provider's fees comes from an injured person's future recovery or settlement. In essence, the healthcare provider has a lien in the amount of its bills on a plaintiff's recovery in a suit. Oftentimes, the letter of protection is accompanied by the injured person's required agreement to forego submitting their medical bills to either their automobile insurance or health insurance company. Alternatively, instead of the healthcare provider taking the risk, they may agree to receive some lesser payment from a medical financing company or other third-party litigation funder. In that scenario, the medical financing company is purchasing the receivables at a discounted rate with the expectation that it will get paid the higher receivables rate from the plaintiff's recovery or settlement.

A recent trucking case highlights the importance of shining a light on these financially interdependent relationships.[40] The defense was able, though discovery, to obtain a spreadsheet detailing the referral relationships between the plaintiff's counsel's law firm and the doctors treating and testifying on behalf of the plaintiff, as well as the involvement of a medical financing company.[41] Medical treatment in that case was provided under a letter of protection. Although the plaintiff subsequently withdrew the claim for special damages in the amount of his medical bills, he sought to exclude introduction of the referral relationships and the letter of protection to show bias. The court allowed its introduction to impeach the credibility of the doctor's testimony with respect to pain and suffering.[42] As a

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result, the jury awarded $5,000 rather than the plaintiff's request for $6.5 million.

Disclosure and admission into evidence of the relationships between these entities is currently more the exception than the rule. These types of arrangements foster perverse and harmful incentives to inflate medical bills—a key component of a plaintiff's damages calculation. Plaintiff's counsel, working on a contingency basis, has a financial interest in higher damages, resulting in a larger recovery. The healthcare providers at issue have an incentive to please their plaintiffs' attorney network, because they are referral sources for additional business. And when healthcare providers are working with a third-party litigation funder or under a letter of protection, the providers are incentivized to maximize medical billing. The jury should be privy to these motivations.

With all the connected players aligned behind a goal of larger medical bills, a frequent outcome is (1) billing at higher rates than would have been possible if the bills were submitted to insurance, and/or (2) providing or billing for treatment that is not necessary or medically reasonable and that would likely not have been possible if the claims were submitted to insurance. In the latter case, treatment may be directed by the plaintiff's attorney instead of a medical provider's professional judgment. For trucking companies, the end result is increased expense; for consumers, the result is higher prices for goods. These cozy referral networks and questionable billing practices lead to inflated damages or settlement payouts even when not outright fraud. But this is not to say that outright fraud does not occur as well.

"Operation Sideswipe"

The U.S. Department of Justice is currently investigating a staged accident ring in New Orleans, under the name "Operation Sideswipe," that offers an egregious example of how nefarious networks work together to the detriment of trucking and therefore consumers throughout the nation. The U.S. Attorney's investigation is ongoing, but so far there have been 47 individuals indicted in a criminal enterprise to stage accidents with tractor-trailers.[43] Of those 47, 45 have pleaded guilty, and one of the ringleaders was murdered four days after his indictment was made public.[44] The enterprise involved at least one named attorney paying individuals known as "slammers" to run their vehicles into tractor-trailers on I-10 and recruit people to get into those vehicles after-the-fact and claim injuries and pursue claims. As a Department

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of Justice press release announcing the sentencing of one criminal defendant involved in such a staged accident explained, the defendant was among four defendants who were "referred to an attorney" by a ringleader[45], all four of whom were "treated by doctors and healthcare providers at the direction of their attorneys" and two of whom underwent surgeries.[46] The trucking company and its insurance company paid roughly $4.7 million for the claims associated with this one staged accident.

From the indictments alone, there have been at least 150 staged accidents that have been admitted by the perpetrators.[47] Common elements connecting the various accidents are that occupants of the passenger vehicles are referred to an attorney (there have been several named and unnamed); the attorney would then refer them to healthcare providers and even pressure them "to undergo frequent doctor visits and invasive medical treatments in order to increase the value of their lawsuit;"[48] and the medical bills would often then be directed to a medical finance company run by a disbarred

Ripe for exaggeration, over-treatment, or outright fraud, the most frequently claimed injuries in truck accident verdicts are driving up trucking costs.

former attorney engaged to be married to one of the as yet unindicted participating personal injury attorneys.[49]

While instances of fraud like these are sensational and exceptional, they undoubtedly add upward pressure to the verdict trends facing trucking across the country.

Commonly Inflated Damages

There are a number of injuries or conditions that are difficult to objectively assess or that are difficult to separate from pre-existing injuries or conditions. These injuries or conditions, while undoubtedly real, painful, and meriting medical attention in many instances, are also susceptible to improper diagnosis if motivated by a desire to inflate damages. Therefore, it is hardly a coincidence that the most frequently claimed injuries in truck accident verdicts from 2009-2021 included: spinal nerve injuries, disc damage, brain damage, vertebra injuries, head injuries, back and neck strains, and shoulder injuries.[50] This paper's review of 154 truck accident settlements and verdicts from June 2020 – April 2023 showed that disc/spinal injuries were the most frequently claimed injuries in that dataset.[51]

Even a cursory internet search reveals chiropractors, MRI centers, and other providers frequently advertising the importance of visiting after a car accident to examine for common soft tissue injuries such as whiplash, bulging or herniated discs, or spinal nerve injuries.[52] Plaintiffs' firms similarly focus on soft tissue injuries.[53] This is likely because they are difficult to objectively measure or disprove and also because it can be difficult to distinguish pre-existing degenerative issues from acute injuries actually caused by the accident in question.[54] The ATRI Small Verdicts Study noted that herniated discs and cervical neck injuries were plaintiffs' most common pre-existing conditions but that those conditions were exacerbated.[55] Ripe for exaggeration, over-treatment, or outright fraud, the most frequently claimed injuries in truck accident verdicts are driving up trucking costs.

Although third on the list of injuries during the period 2009-2021, brain injuries were claimed in 19 percent of cases in this paper's review of truck accident settlements and verdicts from June 2020 – April 2023.[56] As the American Society for Neuroradiology has noted, "no single test is able to definitively confirm the diagnosis of [traumatic brain injury]."[57] Claims for traumatic brain injuries are likely to continue an upward trajectory in the future as they can generate substantial awards.[58] In fact, from 2009-2021, the median award for brain damage was $600,000 compared to $319,715 for spinal nerve injuries.[59] This paper's review of truck accident settlements and verdicts from June 2020 – April 2023 found the mean award where brain injuries were involved was

$18,588,107, with a median award of $675,000. As with some soft tissue injuries on the list, symptoms of brain injuries, like headaches, nausea, loss of memory, inability to concentrate, and behavioral issues (anxiety, nervousness, irritability) can be difficult to disprove.

Reptile Courtroom Tactics

A 2009 book written by David Ball and Don Keenan entitled *Reptile: The 2009 Manual of the Plaintiff's Revolution* has been credited as a driver of nuclear verdicts. Volumes have been written about how the theory is implemented to instill fear in jurors and make them think the only way they can keep their loved ones and the community safe is to award massive damages to the plaintiff. The pernicious effect of "reptile" tactics is to divert the juror's attention from the legal elements of a claim.

The great majority of trucking companies take immense pride in their continuous efforts to operate safely. But in order to instill fear in the jurors, plaintiffs' attorneys will point to company acts or omissions—oftentimes instances where a policy was not followed—as violating the carrier's professed commitment to safety. It often does not matter whether those particular acts or violations had a direct connection to the accident or who caused the accident. The point is to instill fear that the trucking company is jeopardizing the safety of the jurors and their community.

"It often does not matter whether those particular acts or violations had a direct connection to the accident or who caused the accident. The point is to instill fear that the trucking company is jeopardizing the safety of the jurors and their community."

These tactics can serve two goals. First, as noted, they can influence jurors to find liability even where all of the legal elements of the claim have not been proven. Second, they can influence jurors to artificially inflate the award as jurors believe a large award is what is necessary to deter the threats posed by the company.

Reptile tactics have been aided by a number of societal conditions. For one, as noted earlier, at least prior to the pandemic, the public perceived truck drivers as engaging in unsafe behaviors. Rising income inequality, which many blame on corporations, is another societal factor that plays into the reptile theory's hands.[60] This backdrop, along with often-devastating results of a high-speed passenger vehicle crash with a tractor-trailer regardless of fault, fosters sympathy for the plaintiff. That serves as a potent elixir for inflated or disproportionate verdicts

where jurors believe they are punishing the trucking company and not the truck driver.

Reptile Case Study

Reptile tactics can be used to present evidence alleging a trucking company's negligence despite the company admitting responsibility for the driver's negligence, if any. By doing so, the jury may "assess the [trucking company's] liability twice or award duplicative damages to the plaintiff."[61] A case involving a large truckload carrier, referenced in the introduction to this chapter, illustrates how allowing consideration of evidence about the carrier's general policies despite the company's admission of fault can inflame a jury.

In brief, the accident in question involved the driver of a pickup truck on a divided interstate highway losing control of the vehicle, crossing over the grassy median into traffic flowing in the opposite direction, where it collided with a tractor-trailer. A mother and two of her children survived (one severely injured), but a third child was killed. All were passengers in the pickup truck. The award to the plaintiffs was approximately $92 million.

At the time of the accident, there was a winter storm and variable icy conditions. The driver of the pickup truck was believed to be driving between 50-60 miles per hour while the driver of the tractor-trailer was believed to be driving at a lesser speed of roughly 50 miles per hour. The trucking company stipulated the tractor-trailer driver was its employee and was acting within the scope of his employment, thus making the trucking company vicariously liable if the driver was found to be negligent, regardless of the distribution of fault between the trucking company and its driver. Alleging derivative theories of negligence by the trucking company, the plaintiffs brought in significant evidence about the company's policies and practices, including policies related to on-time deliveries that plaintiffs argued overrode other safety policies.

When considering the responsibility of the two drivers, the jury assessed the pickup driver's responsibility at 55 percent and the trucking company driver's responsibility (and thus the trucking company's responsibility because of its admission of responsibility for its driver's negligence) at 45 percent. However, when considering the derivative theories of direct negligence by the trucking company, which the trial court allowed and on which the judgment was based, the allocation of responsibility to the pickup driver fell to 16 percent while 70 percent was attributed to the trucking company (and 14 percent to the company's driver, for a total of 84 percent effectively borne by the trucking company). Plaintiffs' reptile tactics and plaintiffs' arguments on the derivative theories "probably inflamed the jury" against the trucking company, as demonstrated by the dramatic reduction in the allocation of responsibility to the pickup driver.[62]

Reptile tactics are intended to generate large awards.

"Allowing derivative negligence claims where a trucking company has stipulated the driver was in the course and scope of employment at the time of an accident combined with reptile tactics is a potent elixir for improperly influencing a jury."

And according to its founders, as of 2020, plaintiffs' attorneys using the reptile theory "have garnered over $7.7 billion in verdicts and settlements."[63] Allowing derivative negligence claims where a trucking company has stipulated the driver was in the course and scope of employment at the time of an accident combined with reptile tactics is a potent elixir for improperly influencing a jury.

Widening Circle of Defendants

As noted earlier, over 90 percent of motor carriers have 10 trucks or less. And those carriers are most likely to carry liability insurance in the market-dictated minimum amount of $1 million. Plaintiffs' attorneys are therefore expanding their range to target other more lucrative potential payment sources, notably freight brokers, in truck accident litigation. Freight brokers act as intermediaries that contract with shippers to arrange transportation for them and then contract with motor carriers to provide that transportation. Freight brokers do not actually own and operate the trucks providing the transportation.

Nevertheless, plaintiffs' attorneys are targeting freight brokers under various state law theories: negligent entrustment, vicarious liability, and negligent selection.[64] Negligent entrustment is usually difficult for plaintiffs to prove, because freight brokers customarily are not the ones making the truck involved in an accident available to the truck's driver. Vicarious liability generally looks at the amount of control a freight broker exercises over a motor carrier or its driver to assess whether the carrier or driver's liability should be imputed to the freight broker under a principal/agent relationship. And negligent selection is premised on a freight broker's duty to use reasonable care in selecting the motor carriers with which it contracts. This last category has fueled a rise in claims of direct negligence against freight brokers. And because this theory could equally apply to shippers who contract with motor carriers directly, shippers are also beginning to be named in truck accident litigation more frequently.

For some time, there has been a split within the lower courts over whether a federal deregulatory statute preempts state law negligent selection claims. That statute preempts state laws related to a price, route, or service of a freight broker but has an exception for the safety regulatory authority of a state with respect to motor vehicles.[65] Recently, two federal courts of appeals have taken divergent approaches to this

question, with the U.S. Court of Appeals for the Ninth Circuit holding that such claims are not preempted because they fall within the safety exception.[66] At least in the Ninth Circuit, these types of claims are likely to multiply. The circle of parties that need to be prepared to defend trucking accident claims is expanding beyond the truck driver and the trucking company and its insurer(s).

Ambiguous Standard of Care

Arguments over the appropriate standard of care are commonplace across the spectrum of tort litigation. However, the federal government's regulation of motor carriers poses a unique dilemma for freight brokers contracting with motor carriers. As one court has noted in a freight broker case, "it appears there is no single national standard of care." [67]

The FMCSA grants operating authority to for-hire motor carriers if it determines they are willing and able to comply with applicable safety requirements.[68] The FMCSA also has procedures to assess the safety fitness of motor carriers and assign them a safety rating after conducting a compliance review.[69] A motor carrier with a final "unsatisfactory" safety rating is prohibited from operating trucks and will have its operating authority revoked.[70]

In 2010, the FMCSA implemented the Compliance, Safety, and Accountability (CSA) program under which motor carriers are assigned scores in various categories based on roadside inspections and compliance reviews. CSA is intended to be a data-driven compliance and enforcement program to improve safety and prevent crashes and can lead to carriers being targeted for compliance reviews.[71] The CSA program and its scores, however, have been criticized as painting an unreliable picture of a carrier's safety performance and not being predictive of future crash risk.[72] That criticism came to a head when, in December 2015, Congress directed the FMCSA to cease making CSA scores publicly viewable and to conduct a comprehensive review of the program. Before Congress directed that the scores not be publicly viewable, the FMCSA included a disclaimer on its site, stating that "[r]eaders should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier in the [CSA] has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways."[73]

Plaintiffs' attorneys nevertheless often argue a motor carrier has a duty to constantly review CSA scores and take them into account even if the FMCSA has granted a carrier operating authority and not issued an unsatisfactory safety rating to remove the carrier's authority. As described, CSA scores serve an entirely different purpose

As one court has noted in a freight broker case, “it appears there is no single national standard of care.”

than the FMCSA's grant or revocation of operating authority/safety fitness standards. The FMCSA's determination to grant or revoke that authority should be viewed as a reasonable standard for selecting carriers to contract with. The plaintiffs' bar's alternative is to use a scoring system for a purpose for which it was not intended: to aid the plaintiffs' bar in defining its own standard of care.

The government's role in defining the standard of care arises in another area where plaintiffs' attorneys have more recently sought to expand the circle of potential defendants in truck accidents: defectively designed equipment claims or negligence based on the failure to equip a truck with a particular optional safety feature that is not required by law. Truck manufacturers and truck rental and leasing companies have primarily been the targets of these novel claims.[74] Here again, Congress and federal agencies weighed in on truck safety standards.

Congress authorized the National Highway Traffic Safety Administration (NHTSA) to "prescribe motor vehicle safety standards" and "carry out needed safety research and development."[75] NHTSA's mission is to "[s]ave lives, prevent injuries and reduce economic costs due to road traffic crashes through education, research, safety standards and enforcement activity."[76] This authority extends to commercial motor vehicles. Although there is case law addressing the preemptive effect of NHTSA action or inaction, there is still an open question in litigation whether a plaintiffs' attorney seeking another, perhaps deeper, pocket or a government agency tasked with prescribing truck safety standards should determine what safety technologies must be on a truck.

In sum, there are a wide variety of means and methods by which the plaintiffs' bar is executing a litigation onslaught against trucking companies and those contracting with trucking companies. They range from inflated or fraudulent medical damages made possible by attorney and healthcare provider networks that derive significant pecuniary benefit from each other to arguments for a standard of care that usurps the federal government's safety regulatory role. Together, these litigation trends are making it increasingly difficult to successfully operate a trucking company or contract for truck transportation—which should be a warning light for any observer concerned with the health of America's supply chain.

Chapter

05

Problematic Jurisdictions

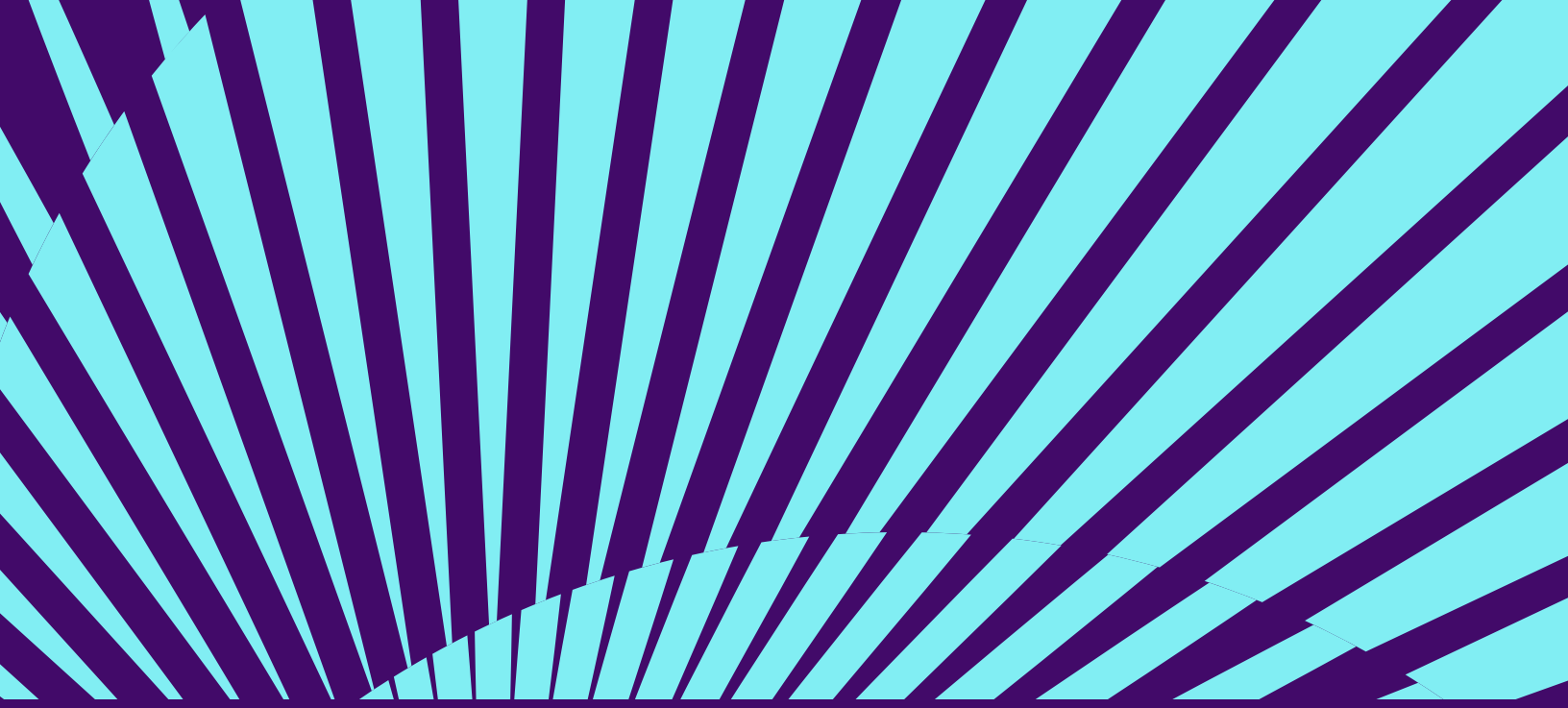
Some states and sometimes even specific jurisdictions within a state are more treacherous in terms of litigation outcomes than others. Trucking is largely an interstate business. As the risks of delivering to certain parts of the nation get higher, the costs for trucking companies increase as well. There comes a point where the risk is not worth the reward, competition in the market is reduced, and service is lessened.

Prior ILR research on nuclear verdicts identified Florida, New York, Pennsylvania, Illinois, and California as the top states in terms of number of nuclear verdicts per capita.[77]

It is not surprising that a litigation climate generally unfavorable for business will also be unfavorable for trucking. The ATRI study of verdicts and settlements under $1 million ranked states by average litigation-related payment size and California topped the list with New York, Illinois, Texas, Florida, and Louisiana making the top 10.[78]

In this paper's review of truck accident settlements and verdicts from June 2020 – April 2023, Florida led the way in terms of number of truck accident verdicts and settlements reported, followed by California, Pennsylvania, New Jersey, Texas, and Georgia. When looking at damages awards, the order changes, but the same states occupy the top spots. Texas led with a mean award of $114,617,913 (median award of $4,500,000), followed by Florida with a mean award of $96,572,173 (median award of $1,263,124), California with a mean award of $13,509,410 (median award of $7,938,343), New Jersey with a mean award of $11,348,897 (median award of $20,000), Georgia with a mean award of $2,700,942 (median award of $1,151,742), and rounded out by Pennsylvania with a mean award of $2,675,990 (median award of $910,000).

As argued in Chapter 3, the rising costs of insurance are attributable in large degree to litigation risk. Litigation risk varies by state and sometimes even within the state. This can be due to laws enacted by the state's legislature or case law formulated by judges. Experts have indicated that the states or regions in which a carrier operates is among the top three factors influencing the availability and pricing of insurance.[79] As a result, carriers that have historically operated and served customers nationwide are assessing the viability of continued service in problematic jurisdictions.



Chapter

06

Solutions

There are many factors that lead to inflated or disproportionate verdicts against trucking companies and entities that contract with them. There are also a variety of solutions to consider that will still allow for just and reasonable recompense for individuals who are harmed.

The trucking industry strives for safe performance, but accidents that are the fault of the trucking company, although infrequent, do happen. In those instances, the civil justice system should work to efficiently provide a reasonable compensatory award. At present, however, the civil justice system is being used too often to deliver windfalls to plaintiffs' attorneys, litigation funders, and certain healthcare providers.

In this chapter, the paper will discuss proposed solutions to address the specific litigation issues impacting the trucking industry addressed above.[80]

Medical Billing

The closely connected networks of plaintiffs' attorneys, healthcare providers, and litigation funders inflate verdicts and settlements of all sizes. A multi-pronged effort is necessary to address the negative impacts of their actions while still providing compensation for reasonably incurred and medically appropriate care.

Florida enacted civil justice reform legislation in March 2023 to tackle medical damages inflation in personal injury suits. The new statutory provision, Fl. Stat. § 768.0427, limits evidence to prove damages attributable to past medical treatment or services to:

1. the amount actually paid by the claimant's insurer plus any out-of-pocket deductible or coinsurance the claimant paid;

2. if the claimant has health insurance but elects not to submit to insurance or seeks treatment under a letter of protection, then the amount the health insurer would have paid plus any out-of-pocket deductible or coinsurance the claimant would have paid;

3. if the claimant does not have health insurance, then the amount that is 120 percent of the Medicare reimbursement rate for the service or, if there is no applicable Medicare rate, 170 percent of the applicable state Medicaid rate for the service;

"A multi-pronged effort is necessary to address the negative impacts of [this network's] actions while still providing compensation for reasonably incurred and medically appropriate care."

4. if the claimant obtained treatment under a letter of protection and the healthcare provider subsequently assigns the right to receive payment, the amount a third party funder paid the healthcare provider for the assignment of the right; or

5. evidence of reasonable amounts billed for medically necessary treatment or services.

There were similar limits placed on evidence to establish damages for future medical costs. The new legislation also requires disclosure of aspects of letters of protection if medical services or treatment are offered under such a letter. These include itemized billing per industry codes and disclosure if the claimant was referred for treatment and by whom (if by the claimant's attorney, that evidence is admissible).

Together, these provisions will help root out some of the more common and more pernicious tactics to inflate medical damages.

"In Florida, it may no longer be as lucrative to provide treatment under a letter of protection and direct clients not to submit bills to insurance. Inflated medical rates that no one pays—whether insured or not—will no longer be available to establish inflated damages. And the required disclosure about letters of protection and referrals, if enforced, will help juries better understand the conflicting interests and motivations of these interwoven networks."

In Florida, it may no longer be as lucrative to provide treatment under a letter of protection and direct clients not to submit bills to insurance. Inflated medical rates that no one pays—whether insured or not—will no longer be available to establish inflated damages. And the required disclosure about letters of protection and referrals, if enforced, will help juries better understand the conflicting interests and motivations of these interwoven networks. Florida's legislation is a useful model for states to adopt in order to better ensure that claimed damages reflect reasonable and necessary medical costs actually paid and not just billed. While other states, like Iowa, have recently tackled the issue of phantom medical damages[81], all states should adopt legislation to curb the abuses.

Legislative reform is not the only answer. More attention to investigating and prosecuting fraud rings, as in Operation Sideswipe (New Orleans), Detroit, and elsewhere, will have a salutary deterrent effect. This entails devoting scarce law enforcement resources to economic crimes, but as explained, those crimes have widespread impacts.

Similarly, as lawyers and doctors are often coordinating to inflate damages, more rigorous policing of professional ethics standards by their respective bodies would be

helpful. There should be little tolerance for unethical acts like paying people to orchestrate staged accidents and obtaining subsequent referrals (as at least one attorney in Louisiana has pled guilty to) or to perform medically unnecessary surgeries on patients.

Lastly, judges, as the gatekeepers of evidence, should ensure that information about referral networks and past billing malfeasance, which goes to the credibility of the damages calculation, is admitted into evidence.

Reptile Reforms

As discussed, by claiming derivative theories of direct negligence against the trucking company, plaintiffs' attorneys often seek to introduce negative evidence about a trucking company's practices and policies, however remotely related to the actual accident and its cause. The goal, which is to inflame the jury to gloss over the required legal elements of a claim and/or inflate the award the jury may contemplate, is often achieved through this tactic.

The McHaffie Rule

Adoption of the *McHaffie* Rule could serve as a useful countermeasure. More of the highest state courts to have considered the issue have adopted some form of the so-called *McHaffie* Rule[82] than have not. Whether through the judiciary or the state legislature, more states should adopt the principle behind the rule.

The *McHaffie* Rule essentially makes it improper for a claimant to pursue negligent hiring or other derivative theories against a motor carrier once it has admitted to being vicariously liable for any negligence of its driver. The *McHaffie* court and others that have adopted the rule reasoned that once an employer has admitted its employee's negligence should be imputed to the employer, there is no further need for derivative theories to prove the employer's negligence. This is because the employer becomes liable for all of the damages suffered by the plaintiff and legally caused by the employee's negligence, therefore obviating the need to separately establish the employer's negligence. Moreover, those courts recognized the risk that allowing pursuit of derivative theories in such instances would allow for a jury to hear potentially inflammatory and prejudicial evidence and also allow for a double assessment of liability against the employer. Neither of these are fair outcomes.

Some courts have recognized an exception under the *McHaffie* Rule where the plaintiff seeks exemplary damages for gross negligence. However, allowing a plaintiff to present evidence on derivative theories of negligence against a motor carrier simply because they claimed exemplary damages defeats the purpose of keeping out potentially inflammatory evidence that can cloud the driver negligence determination—a necessary prerequisite to any potential derivative theory of negligence against the motor carrier.

In 2021, Texas passed legislation to codify the *McHaffie* Rule and addressed the pleading issue by allowing for bifurcation of a trial and reserving evidence on the derivative theory of negligence until the second phase after the driver's negligence has been established.[83] This year, at least with respect to claims against motor carriers under the derivative theory of negligent hiring, Iowa went even further. It enacted legislation that would require dismissal of any negligent hiring claim if the motor carrier stipulates that the driver involved in an accident causing damages was the motor carrier's employee and was acting in the course and scope of the driver's employment.[84]

Damages Reforms

Damages Caps

Part of the "reptile" playbook is to incite juries to teach offending companies a lesson and make a statement through large damages awards. While *McHaffie* Rule-type reforms will be a helpful counter to these unmoored judgments, they can be bolstered by the legislature stepping in to set damages caps. In trucking cases, Iowa recently enacted legislation that caps non-economic damages (i.e., damages for pain and suffering, loss of consortium, emotional anguish) to $5 million dollars.[85] While Iowa's cap may still allow juries to issue inflated or disproportionate awards, at least there is an outer limit to the exercise with respect to one very subjective component of the largest awards. Changes like Iowa's will likely be impactful. The U.S. Chamber of Commerce Institute for Legal Reform's recent study of nuclear verdicts found that non-economic damages make up increasingly large portions of nuclear verdicts in particular, accounting for roughly 42 percent of the total value of verdicts for which a breakdown in damages types was available. [86]

While some states have caps on non-economic damages that are significantly lower,[87] the majority of states have not established any guardrails whatsoever.

Anchoring

Plaintiffs' attorneys utilize other methods to generate inflated awards. Anchoring is one such favored tactic. Anchoring is where an attorney introduces a number or formula for damages in argument that is not introduced and supported as evidence. Judges have authority as gatekeepers to bar arguments that are

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misleading, inflammatory, or unjust, but rarely use that authority to prohibit references to figures or ranges for damages, like non-economic damages, during opening or closing arguments.[88] That number sticks in the jury's minds as if validly backed by evidence. Therefore, plaintiffs' attorneys in trucking accident cases are, in some instances, not submitting evidence of damages at all but instead simply arguing a number or formula. Even if a judge subsequently instructs the jury to disregard the anchor number, it is exceedingly difficult for juries to put the genie back in the bottle.

A recent decision by the Texas Supreme Court illustrates a more reasonable approach. During closing arguments in a truck accident case that involved four decedents (but was brought by the family of just one of the deceased), plaintiffs' counsel engaged in unsubstantiated anchoring by analogizing to the $71 million cost of a fighter jet, the $186 million cost of a Rothko painting, and a formula for compensation at the rate of two cents for each decedent for every one of the 650 million miles that the trucking company's trucks traveled.[89] That last formula would have yielded $39 million in damages, and the jury awarded $38.8 million. Noting that non-economic damages are the exception in tort law and are intended to be compensatory and not punitive or exemplary, the court held that the amount of non-economic damages awards must be grounded in evidence.[90] Plaintiffs' counsel's unsubstantiated anchoring provided "no rational connection" to the amount awarded and was overturned.[91]

As defense lawyers grapple with how to respond, state legislatures are well positioned to clarify matters. In 2022, several states introduced bills to prohibit counsel from seeking or referring to a specific dollar amount, stating a range, or suggesting a mathematical formula for non-economic damages,[92] but none were enacted. In 2023, Nebraska introduced a bill to study the impact of jury anchoring.[93] State legislatures should be more proactive to short-circuit this prejudicial tactic.

Therefore, plaintiffs' attorneys in trucking accident cases are, in some instances, not submitting evidence of damages at all but instead simply arguing a number or formula.

Mitigation and the Use of Seat Belts

Under traditional common law, a plaintiff generally has a duty to act in a reasonable manner to ensure their wellbeing. With seat belt use laws mandatory in all but one state, it should be evident that failure to wear a seat belt is not reasonably looking after one's own wellbeing. However, a majority of states prohibit the admissibility of evidence of seat belt non-use for any purpose, including the duty to mitigate damages. These types of rules, at least with respect to admissibility for failure to mitigate damages, distort the incentives that the tort system and sound public policy should foster.

"With seat belt use laws mandatory in all but one state, it should be evident that failure to wear a seat belt is not reasonably looking after one's own wellbeing. However, a majority of states prohibit the admissibility of evidence of seat belt non-use for any purpose, including the duty to mitigate damages."

Plaintiffs' attorneys frequently cite to any violation of any Federal Motor Carrier Safety Regulation as evidence of a trucking company's negligence, even if wholly unrelated to the cause of an accident. In many, if not most, cases, a plaintiff's violation of the requirement to wear a seat belt or other failure to wear a seat belt can be relevant to whether any claimed injuries may have been avoided or lessened. The defendant has to prove that causal connection between the failure to wear a seat belt and injuries that could have been avoided or lessened. But states prohibiting such evidence, even for mitigation of damages purposes, are eliminating an incentive for passenger vehicle occupants to wear a seat belt. Allowing full recovery and side-stepping the duty to mitigate damages contradicts the legislature's judgment, in passing a mandatory seat belt use law, that seat belt use is beneficial to the user's safety and is a beneficial policy for taxpayers overall. State legislatures that have yet to do so should allow admission of seat belt non-use for purposes of establishing a plaintiff's failure to mitigate damages.[94]

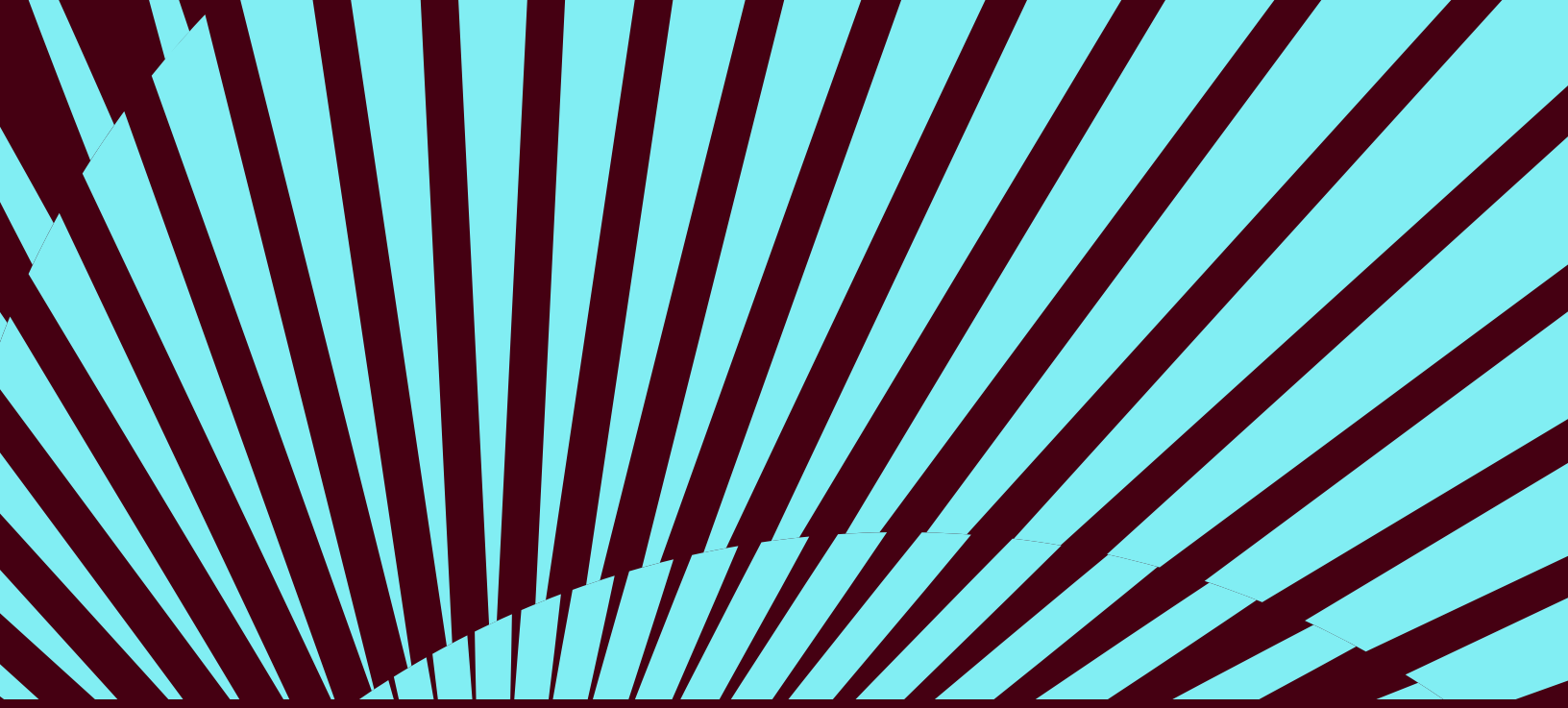
Clarifying the Standard of Care

As plaintiffs' attorneys seek to widen the circle of responsibility for truck accidents beyond the trucking companies themselves, the judgment of federal government agencies should establish a clear standard of care in complex areas. As discussed, freight brokers are increasingly brought into suits under the theory that the freight broker was unreasonable in selecting a motor carrier to transport goods. However, it is the federal government (specifically, the FMCSA) that sets the standards and grants the authority to permit a motor carrier to lawfully transport goods for-hire in

interstate commerce. Other ongoing measures utilized by the FMCSA to prioritize enforcement efforts have proven unreliable indicators of crash risk upon further scrutiny and thus have been removed from public view. Proposed federal legislation, like H.R. 915 in the 118th Congress, sets a clear standard of care that requires a freight broker to ensure that a trucking company it contracts with is properly authorized to operate by the FMCSA, has in place federally required minimum liability insurance, and has not received an unfit safety rating. Today, plaintiffs' attorneys are essentially requiring freight brokers to second-guess, with far fewer resources, the judgments of the federal agency responsible for, and devoted to, motor carrier safety (FMCSA).

In the same vein, the notion that truck rental and leasing companies should be deemed negligent for not equipping a truck with a device or technology that is not required by law and not requested by the customer requires the second-guessing of NHTSA and FMCSA expertise. The world of safety technology is ever evolving and, as with all optional items, some are more beneficial for certain companies' operations than others. NHTSA is a federal government agency whose mission is to research and establish truck safety standards. The FMCSA shares some regulatory authority with NHTSA with respect to commercial motor vehicle equipment. Rather than leaving it to a jury to establish a shifting standard of care on a per-accident basis, the complex area of what equipment or technology should be reasonably required on a truck should be left to experts singularly focused on that subject. Legislation, like a bill recently passed in Texas that establishes compliance with applicable federal motor vehicle safety standards as the standard of care, should leave important vehicle safety standard decisions in the hands of experts.[95]

> "As discussed, freight brokers are increasingly brought into suits under the theory that the freight broker was unreasonable in selecting a motor carrier to transport goods. However, it is the federal government . . . that sets the standards and grants the authority to permit a motor carrier to lawfully transport goods for-hire in interstate commerce."



Chapter

07

Conclusion

The trucking industry is the critical linchpin for the American consumer. Overwhelmingly, truck drivers are the hard-working individuals who go about safely ensuring the store shelves are stocked with groceries, medicines, electronics, or anything else the consumer desires.

Trucking companies similarly work, often with thin margins, to coordinate this transportation and meet their customers' needs. The plaintiffs' bar, lured by ever-increasing inflated verdicts, has fixed a bullseye on the trucking industry and is threatening its continued health.

That verdict awards are increasing is well documented. So too are the increasing costs for trucking liability insurance and decreasing availability of insurance options. The threat of a crippling nuclear verdict or a steady drip of inflated verdicts and settlements is something trucking companies and their insurers have to plan for. The impact flows down to all consumers of goods.

The current trajectory is unsustainable. As discussed in this paper, many of the drivers of inflated verdicts are known. Likewise, a number of potential solutions have been identified. Policymakers, judges, law enforcement, and ethics bodies must now answer the call and restore reasonableness and fairness to the resolution of truck accident litigation claims.

Appendix—
Methodology

This paper's analysis is based in part on the development of a database of 154 verdicts and settlements (excluding arbitrations) during the period between June 2020 and April 2023 involving large commercial truck accidents. The information in the database primarily originates from Westlaw's Jury Verdicts and Settlements (JVS) database. The database contains jury verdicts, settlements, judgments, and arbitrations of all sizes from U.S. state and federal court cases. Westlaw's JVS database compiles information including, but not limited to, case type, jurisdiction where case was tried, factual information about the case (including type of injury), and amount of award. The database developed for this paper was supplemented with verdicts and settlements reported in media sources and for which total award information was available. While the database likely captures a large percentage of the commercial truck accident verdicts and settlements during the referenced time period, the nature of jury verdict reporting and the often confidential nature of settlements makes it highly unlikely that any database will capture all commercial truck accident verdicts and settlements.

When reporting on the size of awards, whether mean or median, defense verdicts were excluded. The damage awards utilized for calculation purposes were the damages awarded by the jury. Those damage awards do not reflect subsequent reductions by the trial court or on appeal.

Endnotes

[1] U.S. Census Bureau, *U.S. Census Bureau Commodity Flow Survey*, 2017.

[2] U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes and Solutions* (Sep. 2022) (ILR Nuclear Verdicts Study).

[3] *Id.* at p. 6.

[4] *Id.*

[5] American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, p. 17 (Jun. 2020) (ATRI Nuclear Verdicts Study).

[6] *Id.* at p. 18 (indicating an increase in the average size from $2.3 million to $22.3 million).

[7] ATRI calculated that, from 2010-2018, the mean verdict award increased 51.7 percent per year, inflation increased 1.7 percent per year, and healthcare costs increased 2.9 percent per year. ATRI Nuclear Verdicts Study, at p. 60.

[8] American Transportation Research Institute, *The Impact of Small Verdicts and Settlements on the Trucking Industry*, at p. 11 (Nov. 2021) (ATRI Small Verdicts Study).

[9] *Id.* at p. 10 (noting that "less than 2 percent of reported claims generate any litigation action.").

[10] Jury Verdict Research Series, *Personal Injury Valuation Handbook*, "Plaintiff Recovery Probabilities for Truck Accidents Involving Backing Collisions, Broadside Collisions, Collisions with Disabled Vehicles, Head-on Collisions, Intersection Collisions, Multiple Vehicle Collisions, No-Contact Accidents," 2011 WL 5528563. The calculations did not include awards for punitive damages, special damages, additurs, remittiturs, and interest. In response to customer queries, Jury Verdict Research included an analysis of the compensatory award mean for both plaintiff and defense verdicts. However, Jury Verdict Research cautioned readers concerning the interpretation of the mean, commonly referred to as the average. Per Jury Verdict Research, use of the mean may give a distorted view of the data. Due to the nature of jury verdict data, the mean award can often be skewed by a small number of very high awards. In addition, Jury Verdict Research has not provided the compensatory award median for plaintiff and defense verdicts, claiming that defense verdicts are more prevalent in certain liability situations and that this prevalence would artificially skew the data.

[11] *Id.*

[12] *See* ATRI Small Verdicts Study, at pp. 11-12 (discussing the possibility that more cases in 2017-2019 may have crossed over the $1 million threshold).

[13] Federal Motor Carrier Safety Administration, *2022 Pocket Guide to Large Truck and Bus Statistics*, at p. 35 (Dec. 2022) (FMCSA 2022 Pocket Guide). Vehicle miles traveled (VMT) increased (as measured by million VMT) from 205,520 in 2000 to 302,141 in 2020.

[14] *Id.*

[15] University of Michigan News, *Most Fatal Crashes Involving Heavy Trucks Are Not the Fault of Truckers, U-M Study Says* (Apr. 24, 2007) (available at https://news.umich.edu/most-fatal-crashes-involving-heavy-trucks-are-not -the-fault-of-truckers-u-m-study-says/). The study's author notes that addressing truck safety must focus on more than truck and truck drivers, stating, "The actions of other vehicles on the road contribute substantially to the toll. Even if all trucks were operated perfectly, only a minority of the fatal crashes would be eliminated."

[16] Danielle Sperry, et al., *Trucking in the Era of COVID-19*, American Behav. Sci. (Feb. 25, 2022) (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8883137/).

[17] Jason Cannon, *Survey Shows National Respect for Trucking Is High,* CCJ (Nov. 3, 2022) (available at https://www.ccjdigital.com/workforce/article/15302582/national-respect-for-trucking-is-high-survey-shows). Polling in September 2022 indicated that 87 percent of voters had a favorable impression of the trucking industry, up 20 percentage points from pre-pandemic 2019.

[18] FMCSA 2022 Pocket Guide, at p. 13.

[19] The review was a dataset of 14 verdicts. As explained further in Chapter 4, there are reasons to believe claims against brokers will continue to increase.

[20] American Transportation Research Institute, *The Impact of Rising Insurance Costs on the Trucking Industry*, p. 8 (Feb. 2022) (ATRI Insurance Study).

[21] Fitch Ratings, *US Commercial Auto Insurance Recovery May Prove Unsustainable* (Jun. 30, 2022) (available at https://www.fitchratings.com/research/insurance/us-commercial-auto-insurance-recovery-may-prove-unsustainable-30-06-2022).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] American Transportation Research Institute, *An Analysis of the Operational Costs of Trucking: 2022 Update*, p. 17 (Aug. 2022).

[26] CRC Group, *State of the Market: Excess Trucking,* 2019 (available at https://www.crcgroup.com/Tools-Intel/post/state-of-the-market-excess-trucking).

[27] *Id.*

[28] ATRI Insurance Study, at p. 20.

[29] CRC Group, *State of the Market: Excess Trucking in 2022* (2022) (available at https://www.crcgroup.com/Tools-Intel/post/state-of-the-market-excess-trucking-in-2022).

[30] ATRI Insurance Study, at p. 23.

[31] Joanna Marsh, *"What Is Operating Ratio?"* Freightwaves (Apr. 18, 2021) (available at https://www.freightwaves.com/news/what-is-operating-ratio).

[32] Federal Highway Administration, *The Economic Costs of Freight Transportation* (last modified May 4, 2022) (available at https://ops.fhwa.dot.gov/freight/freight_analysis/freight_story/costs.htm).

[33] 2021 saw trucking's first reported $1 billion verdict.

[34] D. Ball and D. Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, 173 (2009).

[35] D. Hensler and M. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, Brooklyn L. Rev., 59 BKNLR 961, 968 (1993).

[36] ATRI Small Verdicts Study, at pp. 23-25. In its study, ATRI found that settlements were approximately $135,805 larger than verdicts on average and that just over half (50.3 percent) of all settlements in its database had payments over $500,000 whereas just under a third (31.5 percent) of verdicts had payments over $500,000.

[37] These are often referred to as derivative claims and encompass claims against trucking companies, such as negligent hiring, training, or supervision. They are derivative because they still depend on the negligence of the truck driver having caused the accident.

[38] Indictment (Doc. 1) filed in *U.S. v. Angelo*, Case 4:20-cr-20599 (E.D. Mich. Dec. 16, 2020).

[39] *See, e.g.*, U.S. Department of Justice Press Release, *New Orleans Personal Injury Attorney Pleads Guilty in Connection with Staged Accident Probe* (Jun. 17, 2021). The attorney paid an individual staging accidents $1,000 per passenger for referrals in accidents involving tractor-trailers and $500 per passenger for referrals in accidents involving passenger vehicles.

[40] *See Lowe v. Difei Transport, LLC*, No. 1:20-cv-05224 (N.D. Ga. Feb. 13, 2023).

[41] Alex Anteau, *Evidence of 'Lien Doctor' Referral Relationship Seen by Defense as Key in Ga. Verdict*, Law.com (Apr. 3, 2023) (available at https://www.law.com/dailyreportonline/2023/04/03/evidence-of-lien-doctor-referral-relationship-seen-by-defense-as-key-in-ga-verdict/); *see also* Aaron Huff, *Court Cases Reveal Secret Litigation Networks for Trucking Accidents*, CCJ (updated Jul. 21, 2020) (available at https://www.ccjdigital.com/business/article/14938542/court-cases-reveal-secret-litigation-networks-for-truck-crashes).

[42] *Lowe v. Difei Transport, LLC*, 2022 WL 17920295 (N.D. Ga. Nov. 10, 2022).

[43] Status Report to Court (Doc. 23) filed in *Charles v. Wiley Sanders Truck Lines, Inc.*, No. 18-CV-08907, at p. 4 (E.D. La. May 15, 2023) (Status Report).

[44] *Id.*

[45] The ringleader referred to also plead guilty after being indicted and indicated he would refer passengers in the staged accident vehicles to the named attorney and other unnamed personal injury attorneys in New Orleans for $1,000 per-passenger for crashes involving tractor-trailers. Land Line, *Attorney Pleads Guilty to Role in 'Operation Sideswipe' Scheme,* (Jun. 22, 2021) (available at https://landline.media/attorney-pleads-guilty-to-role-in-operation-sideswipe-scheme/).

[46] U.S. Department of Justice Press Release, *New Orleans Woman Sentenced for Conspiring to Stage Automobile Accident in Order to Defraud Insurance and Trucking Company Out of $4.7 Million* (Apr. 20, 2022).

[47] Status Report, at p. 14.

[48] U.S. Department of Justice Press Release, *Defendant Pleads Guilty in Staged Automobile Collision Scheme* (Apr. 1, 2022); Factual Basis (Doc. 84) filed in *U.S. v. McGowan*, Case 2:21-cr-00110 (E.D. La. Mar. 31, 2022).

[49] *See Jones v. Quality Distribution, Inc.*, 2022 WL 4241866, at *4-5 (La. App. 2022); *Collins v. Benton*, 2019 WL 6769636 (E.D. La. Dec. 12, 2019) (allowing discovery of contract agreements between medical financing company and a plaintiff's medical provider where trucking company plead fraud) (agreeing that "the financial arrangement between the plaintiffs' healthcare providers and the third-party funding companies could create an incentive for the plaintiffs' treating physicians to want the plaintiffs to win their case, because a victory could result in more referrals.").

[50] Personal Injury Verdict Reviews, *Top Injuries Claimed for Truck Accidents Analyzed*, Vol. 30, Issue 3 (Feb. 2022) (Median Injury Awards).

[51] Disc/spinal injuries were reported in 33 percent of the verdicts and settlements. Injuries were categorized as: death, disc/spinal injury, brain injury, or other. Multiple types of injuries may have been reported for an individual verdict or settlement.

[52] *E.g.*, https://firstcoastmedicalcenter.com/soft-tissue-injury; https://suffolkptchiro.com/soft-tissue-injuries/.

[53] *E.g.*, https://www.ritchielawfirm.com/spine-and-soft-tissue-injuries/.

[54] *See* J. Kulin and M. Reaston, *Musculoskeletal Disorders Early Diagnosis: A Retrospective Study in the Occupational Medicine Setting*, J. Occup. Med. Toxicol. (Jan. 5, 2011) (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3022622/).

[55] ATRI Small Verdicts Study, at p. 16 (noting that by claiming exacerbation, plaintiffs could claim more in damages).

[56] *See* endnote 51. Brain injuries were more prevalent than deaths and only trailed disc/spinal injuries and the combined category of other injuries.

[57] American Society of Neuroradiology, *Traumatic Brain Injury (TBI) and Concussion* (available at https://www.asnr.org/patientinfo/conditions/tbi.shtml). The article goes on to note that "every blow to the head will not necessarily result in TBI in every individual" and that "the severity of the trauma to the head does not necessarily determine the severity of the TBI, when it occurs."

[58] *See* ATRI Nuclear Verdicts Study, at p. 34.

[59] *See* Median Injury Awards.

[60] Looking at total family wealth, in 2010, the bottom 50 percent held $1.4 trillion while the top 10 percent held $56.7 trillion in wealth. By 2019, the amount held by the bottom 50 percent had increased $0.9 trillion to $2.3 trillion, whereas the among held by the top 10 percent had increased by $25.7 trillion to $82.4 trillion. Congressional Budget Office, *Trends in the Distribution of Family Wealth, 1989 to 2019* (Sep. 2022).

[61] *Werner Enterprises, Inc. v. Blake*, 2023 WL 3513843, at *55 (Tex. Ct. App. May 18, 2023) (Wilson, J., dissenting).

[62] *Id.* at *65.

[63] LexisNexis Legal Insights, *The Reptile Theory: A Game-Changing Strategy in Personal Injury Lawsuits* (Feb. 21, 2020) (available at https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/the-reptile-theory-a-game-changing-strategy-in-personal-injury-lawsuits). One of the co-founders, Don Keenan, claims that attorneys using his Edge trial methods, which includes reptile tactics, have garnered $10 billion in verdicts and settlements. *See* https://edgeverdicts.com/.

[64] Depending on the state, this may also be styled as negligent retention or negligent hiring.

[65] 49 U.S.C. § 14501(c).

[66] *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016 (9th Cir. 2020), *cert. denied*, 142 S.Ct. 2866 (2022). The United States Court of Appeals for the 11th Circuit held negligent selection claims are preempted. *Aspen Amer. Ins. Co. v. Landstar Ranger, Inc.*, 65 F.4th 1261 (11th Cir. 2023).

[67] *Ortiz v. Ben Strong Trucking, Inc.*, 2022 WL 3717217, at *13 (D. Md. Aug. 29, 2022).

[68] 49 U.S.C. § 13902(a)(1).

[69] 49 C.F.R. § 385.1.

[70] 49 C.F.R. § 385.13.

[71] *See* https://csa.fmcsa.dot.gov/About.

[72] *See, e.g.*, Government Accountability Office, *Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers*, GAO-14-114 (Feb. 2014); American Transportation Research Institute, *Compliance, Safety, Accountability: Analyzing the Relationship of Scores to Crash Risk* (Oct. 2012).

[73] *See* FMCSA Press Release 03-11, *FMCSA Reaches Settlement Agreement in National Association of Small Trucking Companies Litigation on the Compliance Safety Accountability Program* (Mar. 9, 2011) (available at https://csa.fmcsa.dot.gov/WhatsNew/Article?articleId=30184).

[74] To be clear, these are not claims where a purchaser or lessee of a truck requested a specific safety feature and the manufacturer or lessor led it to believe the truck provided had the safety feature. Nor are these claims where the safety feature malfunctioned. Rather the claim is that providing a truck without a particular safety feature is negligent in and of itself.

[75] 49 U.S.C. § 30101.

[76] NHTSA, *Commitment to Serving the Public* (available at https://www.nhtsa.gov/about-nhtsa/nhtsas-core-values#commitment-to-serving-the-public).

[77] ILR Nuclear Verdicts Study, at p. 14.

[78] ATRI Small Verdicts Study, at p. 13.

[79] ATRI Insurance Study, at p. 37.

[80] The U.S. Chamber of Commerce Institute for Legal Reform's *101 Ways to Improve State Legal Systems* offers a number of solutions to improve the civil justice system that would help address items that contribute to inflated and disproportionate verdicts and settlements in general. These include but are not limited to measures to: require disclosure of third party litigation funding; prevent misleading lawyer advertising; and prevent excessive punitive damages awards. U.S. Chamber of Commerce Institute for Legal Reform, *101 Ways to Improve State Legal Systems*, 7th ed. (Oct. 31, 2022) (ILR 101 Ways).

[81] Other efforts to curb consideration of phantom damages are cataloged in ILR 101 Ways, pp. 110-13.

[82] The rule derives from the Missouri Supreme Court's decision in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995).

[83] Texas H.B. No. 19 (enacted Jun. 16, 2021).

[84] Iowa Sen. File 228 (enacted May 12, 2023).

[85] *Id.*

[86] ILR Nuclear Verdicts Study, p. 11.

[87] *See, e.g.*, Idaho Code § 6-1603.

[88] *See, e.g., Quintero v. National Railroad Passenger Corp.*, 2022 WL 4093120, at *13 (W.D. Wash. Sep. 7, 2022) (noting the absence of case law in the Ninth Circuit or Washington prohibiting anchoring arguments).

[89] *Gregory v. Chohan*, 2023 WL 4035886, at *7-8 (Tex. 2023).

[90] *Id.* at *1.

[91] *Id.* at 12.

[92] *See, e.g.*, SB 1751 (Oklahoma) (2022); HB 4550 (West Virginia) (2022).

[93] See LR 231 (Nebraska) (2023).

[94] States that have yet to allow admission of use of seat belts as evidence include: Alabama, Arkansas (statute permitting use deemed unconstitutional), Connecticut, Delaware, District of Columbia, Georgia, Idaho (not available in pleading but may be available in pre-trial motion with respect to mitigation of damages), Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Wisconsin limits the reductions of an award to no more than 15 percent. Michigan, Nebraska, and Oregon limit reductions of an award to no more than five percent. Missouri limits reductions of an award to no more than one percent.

[95] *See* HB 4218 (Texas) (2023) (passed by the legislature and awaiting signature by the governor at the time of this writing).

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