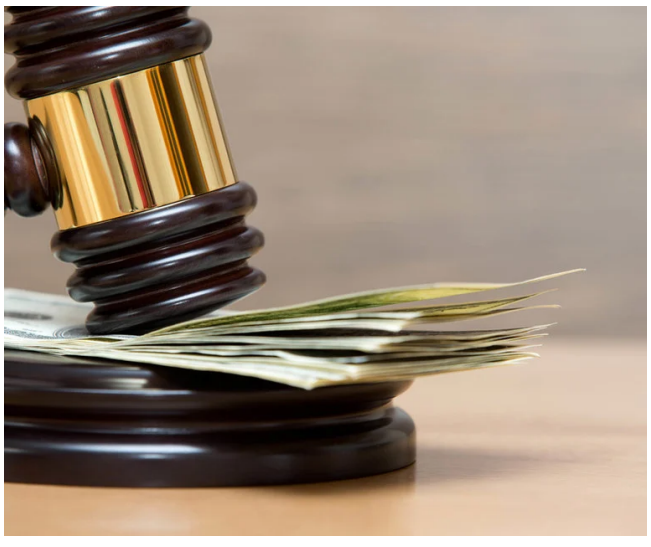

ANALYSIS

Anchoring Away

Improper anchoring remains a massive, but solvable, problem that imposes unnecessary burdens on an already overtaxed court system and state.

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Two years ago we began a project to track and catalogue the pernicious impact of anchoring on jury awards in New York state.[1] The data we collected over the previous year confirms the trends we first identified in our prior article: Improper anchoring remains a massive, but solvable, problem that imposes unnecessary burdens on an already overtaxed court system and state.[2]

First, improper anchoring handsomely rewards its practitioners. Along these lines, the collective value of the pain and suffering verdicts procured through improper anchoring in our study was approximately $1.5 billion. Second, the awards obtained through improper anchoring are illusory, as the $1.5 billion in verdicts was ultimately reduced by $930 million. Third, several readily identifiable solutions to the anchoring problem are available.

Anchoring

Anchoring is a summation tactic that asks juries to return unreasonably excessive verdicts for pain and suffering. The practice is rooted in the text of CPLR 4016(b), which expressly allows plaintiffs to request “a specific dollar amount” for pain and suffering.[3] While plaintiffs are afforded this right, CPLR 5501(c) also limits a plaintiff’s recovery to “reasonable compensation” as determined by a comparable case analysis. Accordingly, a plaintiff can request a dollar figure, but that demand must bear some rational relationship to prior appellate reviewed awards for similar injuries.

The data we collected confirms that plaintiffs have continued to erode CPLR 5501(c)’s protections through the use of anchoring and that these efforts have contributed to the rise of nuclear verdicts. Indeed, anchoring is particularly effective when combined with improper trial tactics designed to inflame the jury so they render a verdict aimed at punishing the defendant rather than compensating the plaintiff.[4]

Methodology

As in our prior article, we treated the Appellate Division’s CPLR 5501(c) jurisprudence as imposing a $10 million soft cap on pain and suffering damages[5] and therefore treated any demand of $20 million or more as an improper anchor.[6] We then employed the same three-pronged approach in analyzing the publicly available anchoring data.[7] First, we collected runaway pain and suffering compensatory verdicts from 2010-2021 where either the summation transcript or information regarding the improper anchor was available.[8] Second, we compared these verdicts with the summation anchor utilized by the plaintiff. Third, where available, we provided the final disposition of the pain and suffering component (i.e., remittitur or settlement).

The Anchor Remains Extremely Effective

It is no surprise that plaintiffs rely on anchoring to maximize awards—the data shows it works. In almost half of the cases we reviewed the jury either met or exceeded the anchor. Drilling down further, in 91% of the instances where the plaintiffs engaged in improper anchoring, they obtained a

pain and suffering verdict that was at least double the $10 million cap, and a third of the verdicts surveyed, produced a verdict exceeding $50 million. All told, the median pain and suffering verdict achieved through an improper anchor was $34 million, approximately three and a half times New York's $10 million de facto cap while the average was $41.5 million.

Almost $1 Billion in Reductions

Although anchors are effective at manufacturing inflated jury awards, the plaintiff often recovers just a fraction of the verdict. Collectively, the plaintiffs in our study demanded $1.7 billion, were awarded approximately $1.5 billion, and saw these awards reduced to $322 million. The nuclear verdicts in our survey were reduced by a staggering $930 million with the median amount of the reduction equaling 77%.

The size of these reductions underscores the inefficiencies created through improper anchoring. These savings are often only realized after the courts and parties spend tremendous time and incur substantial expenses filing post-trial motions, obtaining bonds, drafting judgments, and perfecting appeals. An already overburdened system can ill-afford these costs.

Partial Story

Our analysis, however, only scratches the surface of the anchoring problem. The data we collected is limited to nuclear verdicts. It does not account for the litany of cases where a plaintiff engages in improper anchoring that fails to generate a nuclear verdict, but nevertheless results in a wholly unsustainable award. For example, the case where a plaintiff who suffered a broken leg requests the jury award $10 million in pain and suffering. This ask is disproportionate and outside the sustainable range for this type of claim—an improper anchor. Accordingly, even if the jury awards half of the demand (i.e., $5 million), the plaintiff's anchoring has improperly manufactured an

unsustainable verdict. When the anchors and reductions in these types of cases are added to the anchors and reductions in the nuclear verdict context, the scope of the problem expands exponentially.

Solutions

While the potential solutions to the improper anchoring problem merit their own article, we briefly outline several options.

First, scrupulous enforcement of CPLR 5501(c) at the trial stage. Under this approach, the trial judge would expressly tie the plaintiff's right to demand a specific dollar figure to CPLR 5501(c)'s "reasonable compensation" construct. Practically speaking then the plaintiff could not ask for a pain and suffering award that is orders of magnitude beyond previously sustained highs. As we have previously explained, this model can only succeed if the defense bar actively pushes the issue with: (1) pre-summation motions in limine objecting to improper anchoring; (2) contemporaneous objections to the improper anchoring; and (3) a motion for a mistrial.

Second, the Legislature should act and amend CPLR 4016(b) to foreclose plaintiffs from requesting a specific dollar figure for non-economic damages (i.e., pain and suffering). Federal courts in New York typically prohibit plaintiffs from assigning a specific dollar figure to their non-economic damages and unsurprisingly the awards tend to skew lower.[9]

Third, the defense bar as a whole must commit to confronting a perception problem that has only multiplied with the proliferation of attorney advertising. All too often, the public only hears about the large verdicts, but never about the subsequent substantial reductions. As a consequence, nuclear verdicts warp the perceptions of plaintiffs and prospective jurors as to the value of an injury. A more complete accounting, including the amount the plaintiff actually receives, would exert a downward pressure on jury awards by offering a valuable window into how plaintiffs are actually compensated in our justice system. This approach will necessarily require a reevaluation of the prophylactic use of confidentiality provisions. While these clauses certainly serve a purpose, they do so at the cost of stymieing the defense bars ability to push back on the flow of incomplete information that is fueling the rise of nuclear verdicts.

In summary, improper anchoring remains wildly effective; however, it can be successfully combatted with proper trial tactics and at the appellate level.

For accompanying chart of data, please see Top NYS Court Pain & Suffering Personal Injury Verdicts & Improper Anchoring (2010-2021).

Endnotes:

[1] See "Improper Summation Anchoring Is Turning the New York Court System on Its Head and Contributing to the Demise of New York State," NYLJ (April 28, 2020).

[2] //www.sacslaw.com/media/publication/37_Improper_Anchoring_Chart_through_2021.pdf

[3] See "CPLR 5501(c) Review in the Age of Summation 'Anchoring' Abuse," NYLJ (June 26, 2019).

[4] See Three-part "Ahead to the Past" series published in the New York Law Journal: Part I, Part II and Part III.

[5] Consistent with our prior article, we posit that the Appellate Division's CPLR 5501(c) jurisprudence imposes a $10 million soft cap on pain and suffering awards. Over the course of CPLR 5501(c)'s 36-year history, the Appellate Division has held that an award above $10 million constitutes "reasonable compensation" on just five occasions with three of those instances occurring in the last year. See *Barnhard v. Cybex Intl.*, 89 A.D.3d 1554 (4th Dep't 2011) ($12 million highest amount sustainable as reasonable compensation for young quadriplegia victim suffering from unremitting

pain); *Peat v. Fordham Hill Owners*, 110 A.D.3d 643 (1st Dep't 2013) ($16 million for plaintiff with horrific third-degree burns over 50% of body); *Hedges v. Planned Sec. Serv.*,190 A.D.3d 485 (1st Dep't 2021) ($13 million for plaintiff with organic brain damage); *Perez v. Live Nation Worldwide*, 193 A.D.3d 517 (1st Dep't 2021) ($20 million for TBI that court found resulted in encephalomalacia, cerebral atrophy, traumatic epilepsy, chronic pain and headaches, significant cognitive deficits, depression and increased risk of neurological disease); *Yanes v. City of New York*, — A.D.3d — (1st Dep't Nov. 18, 2021) ($29 million for teenager who suffered third degree over 31% of body, including his face, ears, neck, arms, and hands, after he was set on fire for approximately 45 seconds).

These decisions, however, do not call for a retreat from the $10 million soft cap. First, for reasons that could fill an entire brief, these five decisions are best treated as idiosyncratic outliers due to the severity of the injuries and proof introduced at trial. Second, four of these five decisions emanated from the First Department, so at a minimum, the other three departments in the state still adhere to the $10 million soft cap. The concentration of these decisions in the First Department also raises the specter that the court has implicitly diluted CPLR 5501(c)'s comparable case analysis with a standard that is more deferential to the jury's award. Finally, last year's opinions offer further proof that improper anchoring is steadily chipping away at CPLR 5501(c)'s protections. As the First Department is presented with a steady stream of higher and higher jury verdicts, it seems to have fallen prey to the trap set by anchoring (i.e., rewarding an unreasonable demand with a substantially reduced, but still wholly unreasonable award).

[6] We treat $20 million as an improper anchor as it is twice the $10 million soft cap. Two additional points are an order. First, an anchor well-below $20 million may very well be improper depending on the severity of the injury. Second, even taking into account the First Department's decision in *Yanes*, there is just one appellate sustained award above $20 million. This award should be treated as an aberrational outlier, rather than as free pass for plaintiffs to increase the size of their anchors.

[7] Perfect empirical precision is not attainable due to the unavailability of every transcript or settlement, undifferentiated settlements that do not distinguish between economic and noneconomic damages, and still-pending matters.

[8] For the sake of simplicity and consistency, this article, like our prior article, defines a nuclear verdict as one where the jury awarded $15 million or more in pain and suffering.

[9] *Nunez v. Diedrick*, No. 14 Civ. 4182 (RJS), 2017 WL 4350572, at *2 (S.D.N.Y. June 12, 2017) ("Absent a specific reason to contravene the Circuit's well-established policy disfavoring suggestions of specific damages figures, courts within this Circuit have routinely granted motions to preclude plaintiffs from requesting a specific dollar amount from the jury").

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