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CPLR 5501(c) Review in the Age of Summation 'Anchoring' Abuse

Abuse of the right to suggest a proposed figure pursuant to CPLR 4016(b) cannot be permitted without violating the explicit point and purpose of CPLR 5501(c) and should no longer be tolerated.

By **Timothy R. Capowski and John F. Watkins** | June 26, 2019

New York has experienced a trend of upwardly spiraling verdicts for pain and suffering directly precipitated by abuses of the now-ubiquitous tactic of "anchoring". For the uninitiated, anchoring abuse is the tactic of requesting an outlandishly high verdict in hopes of

inflating a "compromise" number—that is, asking for $50 million for pain and suffering in hopes that the jury will consider $25 million a modest compromise, even though, historically, the Appellate Division has never permitted an award for the injury in question higher than $10 million under CPLR 5501(c).

Anchoring exploits a tension within New York public policy as expressed in the CPLR. CPLR 4016(b) grants attorneys the express right to request "a specific dollar amount" for pain and suffering. But CPLR 5501(c) also requires damages awards to stay within the bounds of "reasonable compensation", and establishes a system whereby parties on the receiving end of an unreasonable verdict may seek review of the verdict through a comparable case analysis. Anchoring thus permits a plaintiff to abuse the CPLR 4016(b) privilege, secure an unreasonable and unsustainable verdict, and impose the cost of further litigation of the verdict on defendants, while burdening the courts. Anchoring accomplishes all of this with no downside to its proponent, as the probable outcome of even the most egregious anchoring requests is simply a remittitur to the high end of the sustainable range, which is itself a perverse reward for an improper comment. Over time, the consistent reduction of these verdicts to the high end of the range drives the range upward, benefitting the plaintiff bar and undercutting CPLR 5501(c)'s stated purposes to increase fairness to all litigants, normalize award ranges, prevent upward spiral, reduce uncertainty, and decrease litigation and court congestion.

The courts have yet to address this issue. We suggest, however, that anchoring's ills require a reconceptualization of CPLR 4016(b) that is consistent with CPLR 5501(c). The suggestion of an unreasonable verdict figure is improper and inflammatory, akin to any other unreasonable or improper statement by an attorney to the jury during trial, and must carry consequences to prevent its recurrence and a remedy to counter the unfair prejudice.

The More You Ask For, The More You Get

Anchoring works. Over the past 40 years, psychologists studying this topic (also referred to as "adjustment bias") have consistently concluded as much. Anchors serve to simplify judgments that involve uncertainty or have little to no objective basis.

People often rely on an anchor when making quantitative judgments. Alternative award proposals can somewhat "counterbalance" the anchor, but the anchor will still influence the ultimate award. Gary Giewat, et al., "Alternative Damage Awards: Worth the Risk?," 36 Westchester B.J. 21, 22 (2009); see *Consorti v. Armstrong World Industries*, 72 F.3d 1003 (2d Cir. 1995), vacated on other grounds 518 U.S. 1031 (1996); see also Gretchen Chapman and Brian Bornstein, "The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts," 10 Applied Cognitive Psychol. 519 (1996); Don Rushing, et al., "Anchors Away: Attacking Dollar Suggestions For Non-Economic Damages," 70 Def. Couns. J. 378 (2003); John Campbell, et al., "Countering the Plaintiff's Anchor: Jury Simulations To Evaluate Damages Arguments," 101 Iowa L. Rev. 543 (2016).

The Second Circuit expressed concerns regarding anchoring in *Consorti*, 72 F.3d 1003. Plaintiff asked for and received a grossly excessive $12 million pain and suffering verdict that was reduced on appeal to $3.5 million pursuant to CPLR 5501(c). The court observed its discomfort with the fact that "[s]uch suggestions anchor the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence." Id. at 1016. "A jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury unduly." Id.

Quite simply, the more you ask for, the more you get. The success of anchoring is no longer subject to debate—virtually every personal injury summation now includes such a request. For the same reason, the inadequacy of existing tools to combat anchoring—such as the standard jury charge that a request is not evidence—is likewise no longer up for debate.

CPLR 5501(c) Policy and History

CPLR 5501(c) was specifically enacted to stop the upward spiral of awards, and to tighten and normalize awards within a reasonable compensation range. The intention was that simplified valuation of injuries would lead to less uncertainty, greater evenhandedness and greater fairness to similarly-situated plaintiffs *and* defendants,

less litigation, more settlements, and reduced strain on scarce judicial resources. See *Consorti*, 72 F.3d at 1009-10, 1016; *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 423-25 (1996).

In applying CPLR 5501(c) over the 33 years since its enactment, the appellate courts have only twice permitted pain and suffering awards in excess of $10 million: a $16 million award in the First Department (involving catastrophic burn injuries), and a $12 million award in the Fourth Department (involving a young quadriplegic). Setting aside those two outliers, $10 million has essentially served as a CPLR 5501(c) hard cap for pain and suffering for the most catastrophic of injuries over the last three decades. Even that figure has only been approved (after remittitur) five times (three times by the First Department and once each by the Second and Fourth).

Anchors Away

Despite the foregoing, counsel in recent years have nevertheless repeatedly requested that juries return verdicts in the tens of millions for various injuries. Indeed, it is now becoming commonplace to see counsel request pain and suffering verdicts of $10 million to $20 million for injuries that have been consistently valued by the relevant appellate venue in the six-figure to $2 million range.

Such requests are unreasonable per se, but made with impunity because courts reflexively construe CPLR 4016(b) to permit them. Treating CPLR 4016(b) this way guts CPLR 5501(c)'s fundamental purpose and leads to an absurdity. Because absurdities are to be rejected, CPLR 4016(b) should be construed to incorporate a CPLR 5501(c) reasonability limit to harmonize the two. See McKinney's Statutes §145, Absurdity ("A construction which would make a statute absurd will be rejected."); Statutes §144, Ineffectiveness; Statutes §143, Unreasonableness.

Litigation Burden and the Resulting Unfair Prejudice

Defendants have no choice but to use CPLR 5501(c) to contest excessive pain and suffering verdicts generated by improper anchoring. This inevitably clogs our already overburdened New York state court system with damages controversies. Even

successful CPLR 5501(c) contests, however, do not make a defendant whole. This is both because of the cost of litigation and the traditional application of *remittitur*.

In typical remittitur situations, the reviewing court reduces the excessive awards to the upper end of the sustainable range. Siegel's New York Practice §407, "Additur and Remittitur" (Third Ed.), p. 658 ("The figure set by the court, and the one to which the party is required to stipulate or face a new trial, represents the minimum (in the case of additur) or the maximum (in the case of remittitur) found by the court to be permissible on the facts."). The forgiving remittitur rule derives from the "light most favorable" standard of review, which assumes the jury wholeheartedly accepted the prevailing party's evidence but simply awarded more than could be sustained as reasonable compensation (remittitur). Thus, a plaintiff in possession of an excessive verdict has no downside: defeat in a CPLR 5501(c) proceeding leaves plaintiff with a *maximum* verdict. It should come as no surprise, therefore, that abusive anchoring tactics have become the new norm.

A New Approach to Anchoring Abuse

Remittitur, thus applied, cannot stop an upward spiral; it merely slows its advance. As such, better tools are required to shield the CPLR 5501(c) policy goal from abusive anchoring.

One option is to expand the awarding of mistrials or new trials on damages in response to improper anchoring. Sufficiently egregious anchoring should warrant a new trial on liability as well. Courts have recognized that a damages verdict occasioned by inflammatory or improper summation or trial conduct guts the rationale behind the "light most favorable" review standard and warrants a new trial on all counts, to ensure an untainted result. See, e.g., *Smith v. Rudolph*, 151 A.D.3d 58, 63 (1st Dep't 2017). The same logic applies where the excessive pain and suffering verdict is occasioned by a jury inflamed or misled by suggestion of an artificially high damages figure. See *Rangolan v. County of Nassau*, 370 F.3d 239, 244-45 (2d Cir. 2004) (remittitur to highest sustainable only appropriate where "the excess [verdict] is not attributable to a discernable error").

A second remedy is required, however, to protect the courts from the glut of litigation caused by endless contests of these inflated verdicts. We propose two: (1) remittitur to the middle or lower end of the sustainable range in cases involving improper anchoring, and (2) the award of attorney fees where an anchoring request departs from good faith. Either would force plaintiffs to think carefully before anchoring, and incentivize them to properly suggest a figure tethered to the sustainable "reasonable compensation" spectrum established by the Appellate Division through the application of CPLR 5501(c).

Conclusion

In sum, abuse of the right to suggest a proposed figure pursuant to CPLR 4016(b) cannot be permitted without violating the explicit point and purpose of CPLR 5501(c) and should no longer be tolerated. Anchoring abuse will either be checked by the Courts or, failing this, will ultimately lead to the legislative implementation of caps on damages that CPLR 5501(c) might otherwise have obviated.

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