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ARIZONA

# ATTORNEY

JUNE 2009



TOP TEN  
CIVIL  
VERDICTS



# 2008 ARIZONA CIVIL VERDICTS

Y ou could use some good news right about now, couldn't you? Many of us do not have good memories of 2008. The U.S. economy plunged into recession, the markets were hacked in half, and many of our own companies and clients continue to fight for their very survival. If you're like most people I know, you're getting up every day and working as hard as you can to help turn it around. Fear and pessimism have gripped the country for months.

We'll look later in this article at various perspectives on how that outlook and the economy might affect civil trial verdicts. But before we get to that, please permit us all to take a moment, breathe, and find reason for optimism.

The U.S. standard of living remains high, life expectancies are longer than ever, and cancer rates and deaths went down in 2008 for the first time. The national employment rate is still roughly 92 percent. Most of you reading this had the opportunity to go to college and earn advanced degrees. Many of us have had the privilege to serve as lawyers for years. Phoenix gets about 325 days of sunshine every year, and outdoor activities abound throughout this lovely state. This is just a start, but I hope it got you thinking positively.<sup>1</sup>

This article is about good things, too. It's about big wins on both sides of the "v," committed clients, enthusiastic and impressive lawyering by all those who tried these cases, and judges and juries who listened and gave their best. I hope it enlightens and inspires. And if you didn't happen to be on a winning side this year, take heart that next month or next year you might be. As the Eagles sang, "We may lose and we may win, though we will never be here again. So ... take it easy."<sup>2</sup>

**BY KELLY WILKINS MACHENRY  
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Back to those Arizona verdicts. The top 10 verdicts continued to remain in orbit in 2008 over the Grand Canyon State. For the second consecutive year, every one of the top 10 was more than \$5 million. In fact, 9 out of the top 10 were more than \$10 million. There were 24 verdicts over \$1 million. A homebuilding company claimed the top verdict of \$269 million.<sup>3</sup> Also among the highest Arizona verdicts were actions for breach of contract, condemnation, product liability and elder abuse.

This year's nationally highest verdict was for \$606.7 million in a California case for breach of contract, fraud and tortious interference. The case was won by ICO Global Communications against Boeing Company, and it was about 12 communications satellites.<sup>4</sup> That largest recovery was less than half of the previous year's largest verdict nationally. Fraud recoveries nationally were tripled over last year's, potentially a warning of the effects of the continuing recession. The largest award to a plaintiff in a personal injury case was \$85 million by a Pennsylvania jury to a medical student, who was badly injured after he fell 20 feet into an uncovered manhole.<sup>5</sup> Large individual recoveries between \$388 million and \$48 million were also handed down in Texas, California, New York, Nevada, Georgia, Oklahoma and Indiana.

Here's the yearly disclaimer. As it always has, this article focuses on what the Arizona *juries* did. It does not discuss in depth the postverdict activity or appeals, which occurred in many of the cases.<sup>6</sup> For example, in the instance of the second-largest verdict, a new trial has been ordered. The case numbers are included if you want to check out the appellate lawyering. This article does not analyze or include cases that settled before or during trial, mistrials, stipulated judgments, judgments as a matter of law, or criminal cases. The verdicts analyzed do not include costs, fees or reductions that may have been established later. The focus is on how our Arizona juries called these cases, and what they awarded.

Here they are, your Arizona top 10.

## TOP TEN LARGEST ARIZONA VERDICTS IN 2008

1 **\$269,900,000**

*Meritage Homes Corp. et al. v. Gregory Hancock*, United States District Court for the District of Arizona, CV 04-00384

During the recent Arizona homebuilding boom, a homebuilding company and one of its principals, Greg Hancock, sold their homebuilding business. He sold it for more than \$80 million, plus more than \$10 million in earnout payments, and licensed the “Hancock” name to Meritage Homes Corporation. Hancock became president of Meritage’s Phoenix homebuilding division and signed a three-year employment agreement with a non-compete provision.

He worked for Meritage for 20 months, and then resigned. Meritage alleged that he breached the duties he owed to it, engaged in self-dealing, and secretly acquired land for his own account. After Hancock resigned, he terminated his license to Meritage, sold land to a competitor, and opened a competing homebuilding business in the same development.

Hancock defended that Meritage breached the employment and license agreements, interfered with management operations and personally harassed him. Meritage’s claims included fraud, usurpation of corporate opportunity, breach of contract, breach of the covenants of good faith and fiduciary duty, and conversion, among others.

The jury levied \$215.9 million in compensatory damages and found for Meritage on all counts. The jury also awarded \$54 million in punitive damages, the top Arizona punitive award of the year.

2 **\$95,000,000**

*In Re Apollo Group Inc. Securities Litigation*, United States District Court for the District of Arizona, CV 04-02147, CV 04-2204, and CV 04-2334

This was a consolidated class action securities case brought on behalf of shareholders who bought Apollo Group stock from Feb. 27, 2004, through Sept. 14, 2004. The lead plaintiff was Policemen’s Annuity and Benefit Fund of Chicago. Plaintiffs alleged securities fraud against the parent of the University of Phoenix, its former CEO Todd Nelson and its former CFO Kenda Gonzales. The shareholders alleged that defendants made public statements that were misleading and concealed findings of an adverse Department of Education review report about recruitment practices. The shareholders alleged that their stock value declined as a result. Apollo Group and its executives contended that they acted in good faith and in conformity with all securities laws and that their public statements were not false or misleading. They also contended that their conduct did not cause any economic loss to the shareholders.

The jury awarded \$5.55 per share to eligible shareholders. The jury found Apollo Group 60 percent at fault, Nelson 30 percent at fault, and Gonzales 10 percent at fault.<sup>9</sup>

3 **\$81,903,496**

*City of Scottsdale v. Edmunds-Toll Constr. Co.*, Maricopa County Superior Court, CV 2004-001025

This was believed to be the largest-ever condemnation verdict by a jury in Arizona. It related to a parcel of land in eastern Scottsdale adjacent to the McDowell Sonoran Preserve. The preserve is a protected public desert habitat with wildlife, cactus, flowers, trails for hiking and biking, and mountains.

In 2002, Edmunds-Toll Construction Company (“Toll Brothers”) bought 783 acres of state trust land for a then-record price of \$66.3 million. Scottsdale wished to take approximately the eastern half of the land (383 acres) for a new trailhead and visitors center for the preserve. Scottsdale and Toll Brothers negotiated, but the two sides were unable to reach agreement on a price. Scottsdale argued the land was worth \$34 million, and Toll Brothers valued it at \$107 million.

The jury awarded \$81,903,496 as the fair market value of the property taken.<sup>10</sup>

4 **\$43,112,000**

*Benjamin Mutuvi-Kavu and Dora Mutuvi-Kavu, individually and as next friend of Jeffrey Mutuvi-Kavu and Benson Mutuvi-Kavu v. Electrolux Home Products, Inc.*, Pinal County Superior Court, CV2006-00528

On April 16, 2004, Jeffrey Mutuvi-Kavu, 12, and his brother, Benson Mutuvi-Kavu, 3, were severely burned when a flash fire erupted from a gas oven range manufactured by Electrolux in their parents’ mobile home in Stanfield, Ariz. Jeffrey sustained burns to more than 50 percent of his body and an inhalation injury to his trachea. Benson sustained burns to more than 15 percent of his body, primarily to his face and head. Together, their past and future medical expenses were nearly \$7.5 million.

The Mutuvi-Kavu family brought product liability claims against Electrolux, alleging that the fire was fueled by natural gas leaking from the range. The range’s stovetop was not sealed, and openings around each burner allowed spills and salt to collect on and corrode an aluminum gas supply tube. Gas then leaked from the corrosion hole in the supply tube. The family also claimed the oven’s pilot light extinguished when the oven door was snapped shut, allowing more gas to escape and pocket in the kitchen.

Electrolux denied that the range was defective and defended that the standing pilot light design was state-of-the art when the range was made in 1996, and that the hole in the supply tube occurred after the fire. Electrolux also maintained that there was insufficient gas leaking from the oven to cause a flash fire, and that Jeffrey Mutuvi instead caused the fire by pouring, splashing or spilling isopropyl alcohol around the kitchen, which then ignited the fire.

The jury awarded Jeffrey Mutuvi-Kavu \$21 million, Benson Mutuvi-Kavu \$16 million, their father Benjamin Kavu

## TOP TEN LARGEST ARIZONA VERDICTS IN 2008

\$3,056,000, and their mother Dora Mutuvi-Kavu \$3,056,000.<sup>11</sup> Electrolux was found 100 percent at fault.

### 5 \$36,000,000

*Anita Graham et al.<sup>12</sup> v. ValueOptions, Inc. and VO of Arizona, Inc.*, Maricopa County Superior Court, CV 2006-010027

On Aug. 23, 2005, 34-year-old Wal-Mart employee Patrick Graham was gathering shopping carts in his store's parking lot when Edward Liu drove into the parking lot and started shooting. Graham was killed in the shooting, along with another employee. Liu was followed by witnesses and arrested by police within hours. Liu was a paranoid schizophrenic and had been under psychiatric supervision for 20 years. Even with medication, he was found not competent to stand criminal trial for the murders. ValueOptions, Inc. contracted with the state to provide mental health care for indigents in Maricopa County. ValueOptions was to supervise Liu with monthly evaluations, home visits and medication. Liu's condition deteriorated over several months before the shootings, and he went without medication or appointments for eight months.

ValueOptions argued that Liu was entirely at fault. ValueOptions also defended that Liu was a voluntary patient who had not threatened violence recently. ValueOptions defended that it did nothing wrong, that it could not foresee Liu would kill anyone, and that Liu had the right to refuse treatment.

Graham's wife was awarded \$5 million in compensatory damages and \$5 million in punitive damages. His two sons were awarded \$10.5 million each (\$2.5 million compensatory and \$8 million punitive). His two parents were awarded \$2.5 million each (\$500,000 compensatory and \$2 million punitive). The jury found ValueOptions 45 percent at fault, VO of Arizona 45 percent at fault, and Liu 10 percent at fault.

### 6 \$33,300,000

*AAA Full Transportation Sys. dba AAA Cab Services Inc. v. John Hollis, Judy Hollis, Joseph Patterson, American Transport Ins. Corp., American Frontier General Agency, and Robert Osmundsen*, Maricopa County Superior Court, CV 2006-011153.<sup>13</sup>

Joining the list of national fraud recoveries, this was a breach of contract and fraud case. Although the punitive awards did not stand post-trial, the case would still make the "top 10" even without the punitive awards.

Plaintiff was a cab company that got its fleet insurance policy from defendant American Transport Insurance. Tri-Continental Exchange Limited was an offshore company that described itself as administrator for a "direct purchase" insurance pool, and it was named as a non-party. American Frontier General Agency

was owned by Robert Osmundsen, and John Hollis acted as attorney for the insurers and for AAA Cab. AAA Cab alleged that Hollis, Osmundsen and non-party Keith Morcroft were alter egos of American Transport. Non-party Sam Keyvan was retained by AAA Cab to provide insurance quotes; the premium checks went through him and Osmundsen and then to a bank account held in the name of Robert Brown dba Tri-Continental Insurance Company. Non-party Robert Brown was Director of Operations for Tri-Continental. American Transport was too new to be rated, so American Frontier General Agency and Osmundsen secured this insurance with a payment guarantee bond.

AAA Cab presented three claims for defense to American Transport. Hollis told AAA Cab to tender its \$100,000 self-insured retention payment, which AAA Cab paid. Judy Hollis endorsed and deposited the check. On Sept. 24, 2004, Tri-Continental's assets were seized by the U.S. government, and four months later Tri-Continental was raided and shut down by the government of St. Vincent and the Grenadines.

AAA Cab alleged that the insurance procured by Keyvan and the bond was a fraudulent insurance scheme, that signatures were forged on some documents, and that the defendants acted in concert with each other.

The jury awarded \$1.3 million on each count of negligent misrepresentation, fraudulent nondisclosure, constructive fraud, conspiracy, and fraudulent misrepresentation, plus \$1.8 million on a RICO claim. The \$25 million punitive damages award included \$10 million against John Hollis, \$10 million against Judy Hollis, and \$5 million against Osmundsen. The jury allocated fault as follows: American Transport 10 percent; John Hollis 20 percent; Judy Hollis 20 percent; Osmundsen 10 percent; non-party Morcroft 10 percent; non-party Keyvan 10 percent; and non-party Brown 20 percent.

### 7 \$19,484,965

*State of Arizona v. LeSueur Investments V, L.L.C.*, Maricopa County Superior Court, CV 2003-013072.

In this condemnation action, the State of Arizona sought to acquire title to approximately 108 acres in Gilbert owned by landowners LeSueur Investments V. The taking was for construction of a portion of the SanTan Freeway. Arizona argued that, without the freeway, the property would have been developed, almost entirely, with single-family houses. Arizona's appraiser valued the property at \$10,770,000. LeSueur Investments argued that the property's highest and best use was for mixed-use development, including a regional shopping center. It claimed just compensation of \$21,174,600.

The jury awarded \$19,484,965, which was 92 percent of the fair market value claimed by LeSueur Investments. This was the second "top 10" verdict in three years related to condemnation of parcels for the SanTan Freeway.

## TOP TEN LARGEST ARIZONA VERDICTS IN 2008

**8** **\$17,000,000**

*Gravel Resources of Arizona v. Salt River Sand & Rock*, Maricopa County Superior Court, CV 2004-004737

Gravel Resources of Arizona leased three sand and gravel quarries to Salt River Sand & Rock, a Salt River Pima-Maricopa Indian Community company. Salt River Sand & Rock mined those quarries in Sun City, Glendale and Queen Creek and paid Gravel Resources royalties. Gravel Resources claimed Salt River Sand & Rock failed to report all materials it removed and that it underpaid the royalties. Gravel Resources also alleged that the mines were left in an environmentally unsafe condition. Salt River Sand & Rock denied liability, and said Gravel Resources had orally agreed to modify how the royalty rate was recalculated each year.

The jury awarded \$17,000,000.<sup>14</sup> This was the second “top 10” verdict in two years related to sand and gravel mining disputes.

**9** **\$10,594,400**

*Media Services Ltd. v. Pure Verge, L.L.C. dba ePoint Processing, Ltd., June An, and Cory Harris*, Maricopa County Superior Court, CV 2004-005095

This was another fraud case, which also had claims for breach of contract, misrepresentation, negligence and conversion. A merchant account allows a company to offer payment processing to clients through credit and debit cards. Many of those transactions today are done over the Internet. Pure Verge, doing business as ePoint Processing, was a company that provided credit and debit payment processing to merchants over the Internet. June An and Cory Harris were the officers, directors and ultimate owners of ePoint and ran its day-to-day payment processing operations.

For three months, ePoint processed credit card transactions for Media Services Limited under their merchant service agreement. The defendants refused to pay the proceeds of the payment transactions due to Media Services. Media Services alleged that ePoint was the alter ego of An and Harris, and that they kept large amounts of the money for their personal use including luxury vehicles and homes. Defendants said they never received the money from the associated merchant bank, and that the bank had closed the account and seized millions of dollars.

The jury awarded \$6.8 million, including \$2.6 million in punitive damages. The jury allocated fault 50/50 to June An and Cory Harris. The court ruled on the equitable claims and, finding sufficient evidence to support them, awarded damages of \$1,900,750 against June An and \$1,893,650 against Cory Harris.<sup>15</sup>

**10** **\$6,000,000**

*Mary Culpepper et al.<sup>16</sup> v. TMC Healthcare, Tucson Long Term Care Medical Group, Inc., Scott Bolhack, Jean Marsalla, and Omnicare Pharmacy Services, Inc.*, Pima County Superior Court, C-20053827

This was an elder abuse case brought by the family of an 81-

year-old woman who died from a morphine overdose while in a nursing home. On Dec. 2, 2003, Sylvia Culpepper was admitted to Tucson Medical Center for sciatic pain after a fall. She was prescribed 15 mg of morphine sulfate tablets (MS Contin) twice a day. A Tucson Medical Center physician later increased to the dosage to 30 mg, but the hospital’s case manager didn’t delete the previous order. Dr. Scott Bolhack was a physician with Tucson Long Term Care, and his nurse practitioners included Jean Marsalla. When Culpepper was transferred to non-party Manor Care, a skilled nursing facility, both of the prescriptions went with her. Manor Care reviewed the medication orders with Marsalla. Manor Care staff began giving Culpepper both the original and increased dosages (which totaled 90 mg per day), and ignored symptoms of morphine intoxication such as hallucinations and lethargy. OmniCare Pharmacy dispensed the morphine as prescribed. Culpepper died of acute morphine intoxication on December 8.

Culpepper’s three children were awarded a total of \$6 million. Several defendants (Tucson Long Term Care, Bolhack, Marsalla and Omnicare Pharmacy) were found zero percent at fault; non-party Manor Care was found 90 percent at fault; and Tucson Medical Center was found 10 percent at fault.<sup>17</sup>

### AVERAGES AND MEDIANS BY VENUE

To calculate an average for a particular county, we add up all the verdict totals, then divide by how many verdicts there are. In some counties, typically a few extra-large verdicts skew the averages higher, so taking a look at the medians as well can help. To calculate the median, we place the verdict totals in value order and find the middle number, where exactly half of the verdicts are

### 2008 REPORTED ARIZONA VERDICT AVERAGES VS. MEDIANS

	AVERAGE	MEDIAN
STATEWIDE	\$3,523,239	\$52,000
U.S. Dist. Ct.	33,769,589	733,500
Pinal	22,289,228	22,289,228
Maricopa	1,931,865	41,799
Mohave	1,535,000	1,350,000
Gila	411,500	411,500
Pima	367,875	55,000
Cochise	277,046	277,046
Coconino	65,051	65,051
Yuma	49,750	49,750
Yavapai	39,021	38,252

## TOP TEN LARGEST ARIZONA VERDICTS IN 2008

higher and half are lower. Both the average and the median verdicts are analyzed for each venue below, rounded to the nearest dollar, and summarized in the chart on page 22.

Although the statewide average has continued to climb in recent years, the statewide median has stayed within a remarkably consistent range. The statewide average verdict<sup>18</sup> in 2008 was \$3,523,239. The statewide median in 2008 was \$52,000. The median has not deviated in the last five years by more than \$20,000. In exactly 50 percent of the cases statewide where plaintiffs won, they won \$50,000 or less. The number-one verdict had a huge effect on the average. Without that single outlier verdict, the statewide average would have dropped by more than a million dollars, to \$2.1 million.

The United States District Court for the District of Arizona had the highest average. It claimed the two highest verdicts of the year, which drove its average to much higher than is typical. As a result, its average was \$33,769,589. Arizona's federal court reported 21 civil verdicts in 2008, 11 of which were defense verdicts. Relatively few civil cases go to verdict in this court each year, but when plaintiffs prevail here they tend to get large awards. A full 45 percent of the plaintiffs' verdicts in Arizona's federal court in 2008 were in seven figures or more. The federal court's median was \$733,500, also higher than in recent years.

Pinal County's average was unusually elevated this year. It reported only two verdicts the entire year, one of which was the number-four verdict of \$43.112 million (*see Kavvu v. Electrolux*, above). Its average/median verdict was \$22,289,228. Still, this was Pinal County's second time in the past five years in which it has produced verdicts at the very top of the statewide averages. It did so in 2004, as well.

Maricopa County reported the third-highest average verdict, of \$1,931,865. This is where the majority of Arizona verdicts are rendered, and in 2008 Maricopa County had nearly two-thirds of them. Maricopa County produced 6 of the top 10 verdicts this year. There were also many smaller verdicts, making Maricopa County's median verdict \$41,799.

The next two highest counties had only a few reported plaintiffs' verdicts each, which makes it difficult to call these really "averages" due to the limited amount of data. Both Mohave County and Gila County had verdicts higher than in recent years. Mohave County had an average of \$1,535,000 and a median of \$1,350,000. Its average is typically in less than six figures. Gila County's average and median were both \$411,500. Its average is usually less than half that.

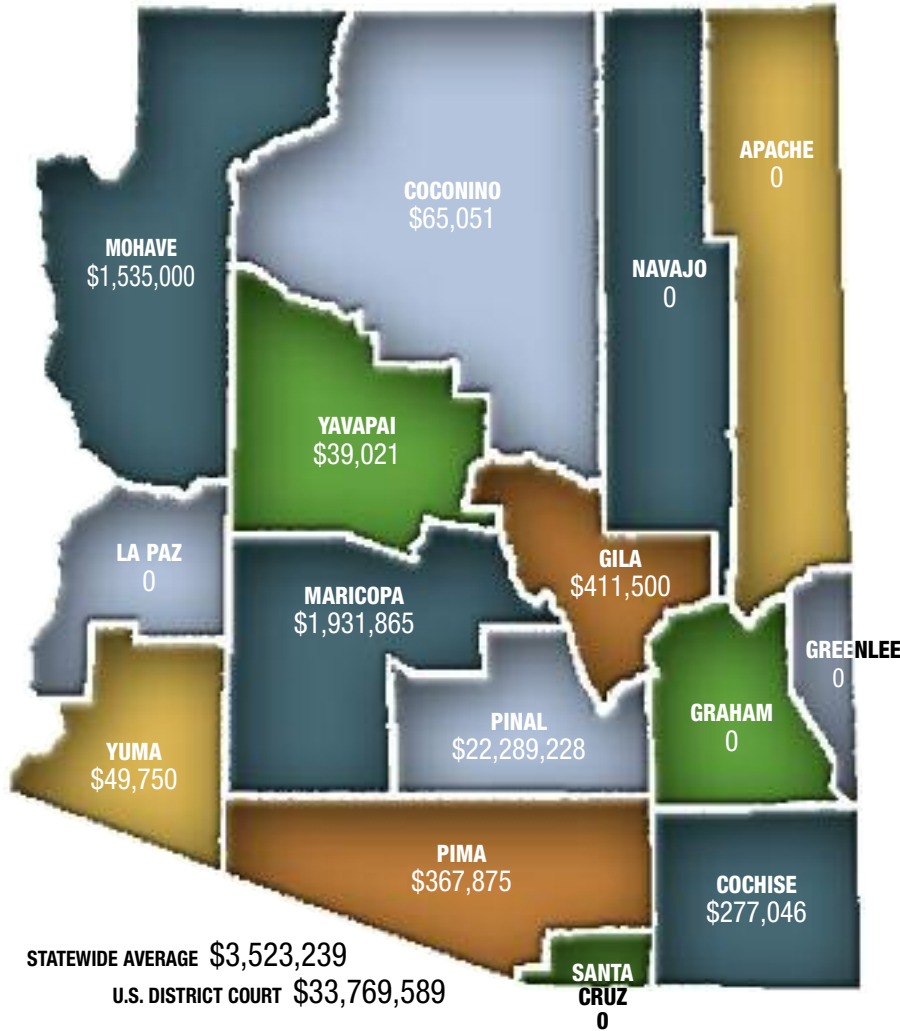
Pima County's verdict averages have been all over the map the past few years. Its averages have ranged from low six figures to near \$1 million. In 2008, Pima County's average was \$367,875. Except for one brief dip in 2006, its verdict median has been around \$50,000, and

it was so again in 2008, at \$55,000.

Cochise County's average and median, based on two verdicts, was \$277,046. Following that was Coconino County, which had its lowest average and median in five years, at \$65,051. Rounding out the lower part of the ranges, Yuma County had an average and median of \$49,750. Yavapai County had an average of \$39,021 and a median of \$38,252.

Navajo County had three defense verdicts and no plaintiffs' verdicts. There were one defense verdict each and no plaintiffs' verdicts in Apache County, Santa Cruz County, and La Paz County. No civil verdicts were reported in Graham County. As in

### 2008 REPORTED ARIZONA VERDICT AVERAGES BY VENUE



# TOP TEN LARGEST ARIZONA VERDICTS IN 2008

all the rest of the last five years, no civil verdicts at all were reported from Greenlee County. The average by venue is highlighted in the map on page 24.

## PLAINTIFFS WON 67 PERCENT OF THE TRIALS

Statewide, plaintiffs prevailed in 67 percent of the trials, and defendants prevailed in 33 percent. That was a sharp increase in the percentage of trials won by plaintiffs this year. It was also the greatest percentage of overall wins for plaintiffs in the last five years. Over the past few years, it's been closer to 50/50.

In every one of the last five years, federal court has been distinctly more statistically favorable to defendants than state courts on verdicts. It was so again this year. In the United States District Court for the District of Arizona in 2008, civil defendants prevailed in 52 percent of the reported verdicts.

## BUSINESS VERDICTS HIGHER THAN TORT VERDICTS

In 2008, Arizona verdicts in business-to-business and commercial cases were again higher than personal injury verdicts in their averages and medians. The average commercial verdict was \$7,163,988, with a median of \$76,166. Such cases included breach of contract, breach of fiduciary duty, employment, insurance bad faith, takings and property damage. Thirteen of those cases also recovered on fraud claims.

A tort is a civil wrong that injures someone. The average tort verdict was \$1,000,380, and its median was \$30,000. The cases in this category had one or more plaintiffs who were physically injured. They included product liability, medical malpractice, motor vehicle accident, injury and wrongful death matters.

## PUNITIVE AWARDS

Punitive damages remain uncommon in Arizona, awarded in only 11 cases in 2008. That's in about 6 percent of the cases that plaintiffs won. When awarded, however, they tend to live up to their name. There were five cases in which the punitive damages were over a million dollars, and all of those were in our "top 10." The other kinds of cases in which punitive damages were given included wrongful termination, excessive force, insurance bad faith, battery and fraud actions.

The punitive awards ranged from a \$54 million high to a low of \$10,000. In one instance, the punitive award was all but \$2 of the verdict. Many of the punitive awards were appealed. Punitive awards have remained relatively constant in recent years in terms of how often juries give them.

## DECLINE IN NUMBER OF CASES THAT WENT TO VERDICT

From 2004 through 2007, the number of Arizona civil cases that went all the way to verdict stayed within a rather close range (305 to 368). In 2008, however, that figure took a noticeable drop. Only 281 cases were tried to verdict this past year, which is about 10 percent to 20 percent fewer than in recent years.

I'm not entirely sure what explains this, but I can tell you

what's not driving it. It wasn't a decline in trials in the second half of the year as the economy fell, because there were a consistent number of verdicts throughout the full year. It wasn't a drop-off in business-to-business cases either, because almost as many of those went to verdict in 2008 as the previous year. I don't automatically conclude this is the "vanishing trial" effect either. A recent federal report that studied verdict statistics nationally concluded that there was a 27 percent decrease in trials from 1992 to 2005, but then the numbers leveled off between 2001 and 2005.<sup>19</sup>

Maybe trials were postponed into 2009 as people waited out the economy. Maybe it's a one-year blip. Stay tuned.

## THE ECONOMY: THE JURY'S STILL OUT

The economy is affecting just about everything these days, so we were naturally interested in how it's affecting verdicts. For the past year, fear has had the upper hand, and we've lost our taste for risk.<sup>20</sup> *Arizona Attorney* recently reported on its survey of Arizona lawyer outlooks. Compared to the previous year, 46.6 percent of respondents said their economic circumstances related to legal work were worse in 2008.<sup>21</sup> Looking toward 2009 with respect to their law office, 43.4 percent said they were uncertain, and 16.8 percent were pessimistic.<sup>22</sup> I have to believe that pervasive mentality will affect the willingness of all parties in litigation to go to verdict, as well as jurors' attitudes.

On the starting end, certain kinds of cases are seeing more filings. Employment litigation spiked in 2008 due to massive job layoffs and plant closings.<sup>23</sup> Recent high-profile coverage of lending practices and investment scams suggest it's reasonable to anticipate a major increase in litigation between and against financial institutions. Collection matters, liens and foreclosures are clearly on the rise.

Some believe that jurors will be less willing to hand out high damages in times of economic hardship than in prosperity. Plaintiffs seeking millions of dollars in damages could find themselves facing an unsympathetic panel of their peers, whose concerns about the economy may well translate into conservative awards.<sup>24</sup> On the other hand, a struggling economy increases people's feelings of alienation and disenfranchisement, which could lead some to have a higher desire to punish.<sup>25</sup> A stronger punitive temperament could increase damages awards. Juror attitudes may be driven by the particular personalities or industries involved. News about the auto industry's woes may play on the sympathies of jurors, for example, while troubles in the world of high finance or the oil industry could bring out resentment in jurors. As one commentator said, "For those who are against damages and litigation in general, the country's economic woes give them another weapon in their fight, and for those who are prone to sympathizing with the little guy, the economy is just another excuse to spread the wealth."<sup>26</sup>

## SIGNIFICANT DEFENSE VERDICTS

Defendants won some big cases in 2008, too. The defense verdicts highlighted below are those in which the claimed damages were high, and this analysis focuses on different types of cases that

## TOP TEN LARGEST ARIZONA VERDICTS IN 2008

had the largest claimed damages. Here are a few of the year's significant Arizona defense verdicts:



*Mark Goldberg et al.*<sup>27</sup> v. *Pacific Indemnity Co.*, United States District Court for the District of Arizona, CV 05-02670

This was an insurance bad faith case over a homeowner's claim for remediation of an odor in a Paradise Valley home. The Goldbergs bought a 14,000-square-foot home for \$5 million in June 2001 and bought homeowner's coverage through Pacific Indemnity Co. The Goldbergs hired a contractor for renovation and remodeling. During construction, a cup that contained urine was spilled in the attic and cleaned up. About six months after the Goldbergs moved in, a half-gallon water bottle that contained some percentage of urine was found in the attic. A year later, the Goldbergs claimed that urine odor permeated the home and that Pacific Indemnity needed to raze and build the entire home or buy it at its fair market value.

The Goldbergs asked for \$12.8 million in damages. Pacific Indemnity maintained that it covered repairs to the home even there was no proof of damage, and that there was no evidence of any current contamination.



*Andrew Triemert Jr. v. Nationwide Vision Center, Sheldon Morgenstern, and Alan Paris*, Maricopa County Superior Court, CV 2005-017806

This was a medical malpractice case for loss of vision in one eye. Andrew Triemert, age 56, was seen and treated by optometrists Sheldon Morgenstern and Alan Paris. Triemert alleged that the doctors failed to diagnose, treat and provide adequate warning concerning a postvitreous detachment with a retinal tear that ultimately resulted in a "macula off" retinal detachment (detachment of the center part of the retina). He also alleged they failed to perform accepted testing, and that he sustained a slowly progressing retinal detachment, which led to permanent total vision loss in one eye. The "macula off" retinal detachment was diagnosed more than six months after Triemert's first visit to Nationwide Vision, and more than five months after a return visit. The eye clinic and doctors presented scientific literature that demonstrated that "macula off" retinal detachments develop quickly, and not months later, as Triemert said his did.<sup>28</sup>



*Beth Myers et al.*<sup>29</sup> v. *Ford Motor Co.*, United States District Court for the District of Arizona, CV 06-2332

In this product liability case, Beth Myers was driving her 2003 Mercury Mountaineer on Interstate 40 near Winslow. For unknown reasons, the Mountaineer's left side tires went off the edge of the road, Myers steered to get back on the road, and then she steered again the opposite way. The maneuvers caused the SUV to roll over as many as five times. Myers was ejected and suffered an instantly fatal head injury. Another passenger was ejected and suffered spinal and leg fractures, and two other passengers sustained minor injuries. Plaintiffs alleged that the

Mountaineer's center of gravity was too high and it should have had electronic stability control; that its seatbelts were defective; that its roof was defective; and that it should have had a safety canopy system that activates seatbelt pretensioners and side curtain airbags in a rollover. They asked the jury to award \$9.2 million in compensatory damages.

Ford demonstrated that the Mountaineer exceeded all governmental requirements, that Myers had her seatbelt improperly buckled under her arm, and that none of the alternative designs would have prevented this rollover or plaintiffs' injuries.



*UC Restaurant, L.L.C., dba Uncle Charlie's American Grill v. Maricopa County Environmental Services*, United States District Court for the District of Arizona, CV 05-01602

Maricopa County inspected Uncle Charlie's American Grill restaurant in Glendale on Feb. 23, 2005, and cited it for seven health code violations. The restaurant was featured on a "Dirty Dining" television news segment. Uncle Charlie's claimed the violations were without basis, false and inaccurately represented. Uncle Charlie's claimed a violation of due process and civil rights because it did not get an immediate appeal or hearing. Uncle Charlie's demanded \$7.5 million in damages. Maricopa County defended that the prevention of food-borne illness and the safety of citizens was its primary concern, and that all the violations were factual, dangerous and properly documented. Maricopa County also established that there is no appeal process as suggested by Uncle Charlie's anywhere in the United States before violations are made public, and that Uncle Charlie's' business struggles resulted from poor management and not from being featured on a short news segment.



*Gennifer Rives v. Joe's Real BBQ*, Maricopa County Superior Court, CV 2003-009042

Gennifer Rives ate a pork dinner at Joe's Real BBQ restaurant in Gilbert. About 12 hours later, she became violently ill and developed ongoing irritable bowel syndrome. She alleged she is totally disabled and asked the jury for \$3.8 million. Joe's Real BBQ defended that her conditions were not caused by its food and could not be linked to the meat from the restaurant. Joe's Real BBQ maintained that the conditions could have been caused by many other factors and that it had served 804 pork meals that same day with no other complaints.

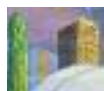


*Stephen Jones and Melisa Jones v. Gregory Groothuis*, Maricopa County Superior Court, CV 2006-051611

Stephen Jones was asked to leave Billet Bar in Scottsdale after a verbal argument with another customer. He alleged that the bouncer who tried to remove him from the bar threw him headfirst into a concrete wall. Jones claimed he received a forehead laceration that required stitches; a fractured jaw and nose; temporomandibular joint injury, which required three surgeries; strains and sprains; a closed-head injury with brain damage; impaired vision; loss of sexual function; and loss

of fine motor skills. He asked the jury for \$2.4 million.

Defendant argued Jones caused his own injuries by fighting and resisting removal and that Jones had refused to leave after being asked to do so several times. The bouncer said he used reasonable and appropriate force and that he and Jones both fell because Jones was struggling. Defendant also argued Jones did not have residual brain damage.



*Daniel Rodriguez v. Michael Chertoff, Secretary of United States Department of Homeland Security, United States District Court for the District of Arizona, CV 05-00546*

Daniel Rodriguez was a border patrol trainee for a probationary period and was terminated after 10 months. He alleged he was wrongfully terminated based on his Puerto Rican national origin. Rodriguez also alleged he was subjected to a hostile work environment, was repeatedly humiliated and abused by his supervisors, and that his performance was misrepresented on evaluations. He asked for past and future lost wages, compensatory and punitive damages.

Homeland Security defended that he was terminated for poor performance and was not subjected to a hostile work environment.<sup>30</sup>

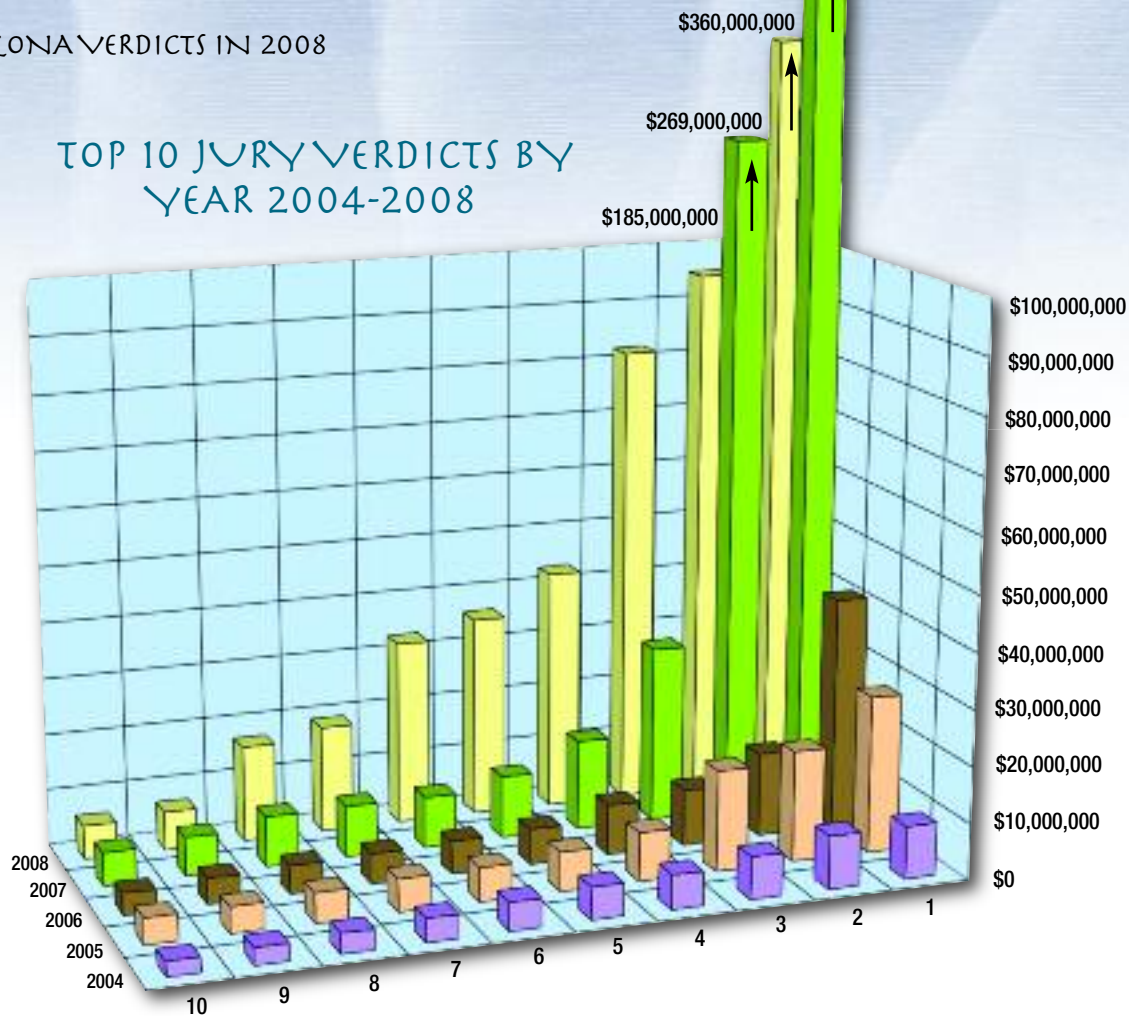
### FIVE-YEAR TREND

This is the fifth year for this article, and we've reviewed nearly 1,500 verdicts. So what have we learned on trends?

The awards at the very highest end have been going up. The five-year graph shows this dramatic rise (see graph above).

In spite of the top tier of verdicts escalating, much of the other results have been consistent over the past five years. Median verdicts have stayed largely steady. Punitive damages have only been awarded in a handful of cases each year. Federal court has continued to be statistically more favorable to defendants than state court on percentage of verdicts. The statistical chance of prevailing as a plaintiff in any given case has ranged from 53 to 67 percent, and the five-year average chance of winning as a plaintiff was 60 percent. The outlying Arizona counties, with only a scattered

### TOP 10 JURY VERDICTS BY YEAR 2004-2008



few exceptions, tended to generate defense verdicts and plaintiffs' verdicts lower than \$500,000.

Other notable points:

- Five years ago, the largest Arizona verdict was for \$9.389 million. Four years ago, the largest was \$28 million. Three years ago, it was \$41.5 million. In 2007, it was \$360 million. The largest for 2008 wasn't too far behind, at \$269 million.
- The number 1 verdict in 2004 would have placed number 7 in this year's top 10.
- The year that had the greatest number of verdicts that were higher than \$1 million was 2006, with 30.
- The number 10 verdicts in 2007 and 2008 were exactly the same amount: \$6 million. That's about double what it took to break into the top 10 when we started this yearly analysis in 2004.
- The first year in which nine verdicts exceeded more than \$10 million was 2008.

### CONCLUSION

So, do you feel any better? And if you don't, have you at least enjoyed a few minutes of distraction?


With every detour comes opportunity. I hope that 2009 gives you a chance to stretch your wings, embrace new challenges, do some pro bono, and reconnect with families and communities. I

# TOP TEN LARGEST ARIZONA VERDICTS IN 2008

read a splendid call to action a few weeks ago that spoke to me:

It's times like these that raise the important questions. Do you cower, or do you live free. Do you succumb to fear and doubt, or do you seize the throttle and give it a fearless twist forward. We see American companies and good old American ingenuity wrenching the life back into this economy of ours. Maybe you're ready to feel the same way.<sup>31</sup>

Yes, we are.

Please feel free to contact me any time for more details about the verdicts. You're also invited to browse my firm's website ([www.swlaw.com/kellymachenry](http://www.swlaw.com/kellymachenry)), which has more of my publications and other good things. See you next year. 

## endnotes

1. My own gratitude list includes:  
Snell & Wilmer L.L.P. for its ongoing encouragement and its steadiness and calm in these choppy waters.  
You, the readers, for your positive comments and the encouragement to keep writing this article every year; and editor Tim Eigo, for his creativity and infusion of ideas to keep it fresh. Together, we've added something new every year, and those suggestions have helped to make this article better.  
My husband and family, who are the best and funniest people I know.
2. EAGLES, *Take It Easy*, on EAGLES (Elektra Entertainment, 1972).
3. This article analyzes 281 civil verdicts reported from the Superior Courts of Arizona and the United States District Court for the District of Arizona in 2008. Although the great majority were jury verdicts, some were bench trials. The parties named are the ones who were active in the case when it went to verdict.
4. Emily Heller, *Satellite Litigation Was Rather Like Rocket Science*, NAT'L L. J., Mar. 2, 2009.
5. Susan Bocamanzo, *Top Ten Jury Verdict Awards for 2008*, LAWYERS USA, Jan. 15, 2009.
6. This article makes no comment on the merits of the claims or defenses, or the parties or specific lawyers involved, in these cases. If there have been significant post-verdict developments as of the date this article went to press, those are footnoted. Not all of the post-verdict activity is reported here, which would be an article unto itself.
7. Other plaintiffs were Meritage Homes Construction, Inc. and Meritage Homes of Arizona, Inc.
8. The jury did not award a specific collective dollar amount. Rather, the jury awarded a dollar amount per share of stock. The actual final award was never determined by the court, because it later vacated the judgment. In responding to a post-trial motion, plaintiffs estimated the value of the judgment to be \$300 million. Apollo Group estimated its total potential liability to be \$190.2 million. The court, for purposes of an order setting bond, estimated the value of the judgment at \$190.2 million. The court determined that \$95 million adequately protected plaintiffs' interest, because not all potential claimants were expected to file claims. We have chosen to report \$95 million as this verdict's total because it was the amount that the court determined, and thus we believe it is the most objective determination of its value.
9. In August 2008, the court ruled that the evidence at trial was insufficient to support the verdict and that plaintiffs had failed to prove loss causation. The judgment was vacated.
10. Scottsdale filed a motion for new trial but then paid the judgment amount and withdrew the motion. Five months after the verdict, construction began on the preserve access area and is expected to be complete in spring 2009.
11. After Electrolux's motions for new trial and remittitur were denied, it filed an appeal, which is pending.
12. Other plaintiffs were the decedent's sons Marcus and Jordan Graham, and his parents Henry and Oneida Graham. Defendant VO Options of Arizona, Inc., was a company related to Value Options.
13. Post-trial, the court struck down the \$5 million punitive award against Osmundsen. In addition, applying *State Farm*, the court found as against the Hollises "an award of \$10 million punitive damages with compensatory damages award of \$1.3 million is neither reasonable nor proportionate to the amount of harm to the Plaintiff and the general damages recovered." Order dated Nov. 20, 2008. The court stated it would grant the Hollises a new trial unless plaintiff accepted a reduced amount of \$3 million against the Hollises. An appeal has been filed.
14. Salt River Sand & Rock has filed a motion for a new trial.
15. Defendants' motion for a new trial was denied.
16. Other plaintiffs were John Culpepper and Robert Culpepper.
17. Tucson Medical Center filed a motion for new trial, which was denied.
18. Average verdicts and median verdicts are computed from all plaintiffs' verdicts in the particular venue. Defense verdicts and reductions for comparative negligence or non-party fault are deliberately not factored into the analyses of averages and medians.
19. LYNN LANGTON & THOMAS COHEN, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, NCJ 223851 at 1 (Oct. 2008), available at [www.ojp.usdoj.gov/bjs/abstract/cbjtsc05.htm](http://www.ojp.usdoj.gov/bjs/abstract/cbjtsc05.htm).
20. Daniel Gross, *Stop Saving Now!*, NEWSWEEK, Mar. 23, 2009, at 27, available at [www.newsweek.com/id/189232](http://www.newsweek.com/id/189232).
21. Tim Eigo, *Bad Faith: Our Economic Survey of Arizona Lawyers*, ARIZ. ATT'Y, Feb. 2009, at 13, available at [www.azattorney.com/digital.com/azattorney/200902](http://www.azattorney.com/digital.com/azattorney/200902).
22. *Id.* at 16.
23. Peter Page, *Litigation Makes Like the Economy*, NAT'L L.J., Mar. 2, 2009, at 13.
24. Christine Caulfield, *Economic Woes Could Make for Stingy Juries*, LAW 360 (Dec. 19, 2008).
25. *Id.*
26. *Id.*
27. Other plaintiffs were Sherry Goldberg and the MH and SR Goldberg Family Trust. Plaintiffs have filed a motion for a new trial, which is pending.
28. Plaintiff filed a motion for a new trial, which was denied, and has filed a motion for reconsideration.
29. Other plaintiffs were Michelle Bersbach, Paige Noss, Gillian Noss, William Myers, Janelle Myers-Hamilton, Paul Bersbach and Michael Noss.
30. Plaintiff has filed a motion for a new trial.
31. Harley-Davidson Motor Company, Advertisement, NEW YORK TIMES, Mar. 29, 2009, at 10-11; see the full flag artwork, available at [www.h-d.com/letsride](http://www.h-d.com/letsride).