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ARIZONA

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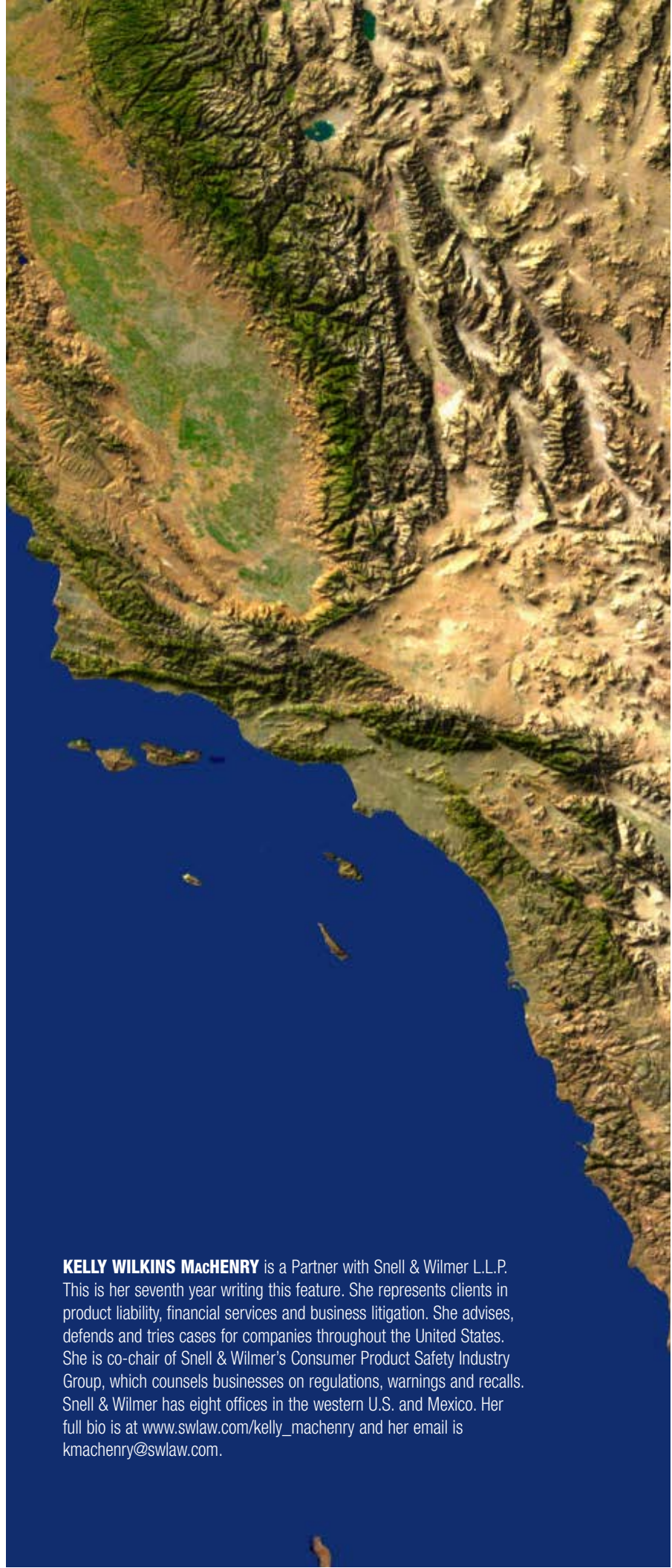
## TOP 10 CIVIL VERDICTS



Verdicts are a reflection of their times. That's why trial lawyers pay attention to news and trends around the time of their trials, and it how it might be shaping their jurors' thoughts and life experiences. Verdicts today surely seem different (larger in size yet perhaps fewer in number) than they were when I started law practice 20 years ago.<sup>1</sup> The economic recession has changed the entire country over the past three years. In 2010 in Arizona, major declines in real estate and jobs continued, and the state had a \$763 million budget shortfall. It had the nation's second-highest home foreclosure rate. Arizona also was at the forefront of the immigration debate.

Certain of the top Arizona verdicts in 2010 reflected current conditions. Two of the largest related to real estate development deals that fell through, including the top verdict for \$110 million.<sup>2</sup> A local bank won a large verdict against a mortgage broker and escrow officers for alleged widespread mortgage fraud. A boat owner fought back against his insurance company when it abandoned him, and another insurance company won several million dollars back when it showed that a greenhouse's owner had not properly protected it from floods. Two premises liability cases for serious injuries from falls on ice and on carpet were included in the Top 10, as were two bicycle accident cases. There were 22 verdicts of more than \$1 million.

This year's nationally highest verdict was for \$1.3 billion for copyright infringement by Oracle USA against SAP AG. Oracle alleged that SAP stole thousands of copies of Oracle software and then resold the software and related services to Oracle's own customers. Before trial, SAP admitted to contributory infringement. The California jury awarded what was believed to be the largest amount ever for software piracy.<sup>3</sup> Intellectual property verdicts have scored the very largest national verdicts in recent years. The national top 10 in 2010 also



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# Arizona Civil Verdicts 2010



included cases relating to product liability, breach of contract, employment, and a class action about the quality of care that a company provided in its nursing homes.

The largest award to an individual plaintiff in a personal injury case was \$505.1 million. That case was brought by a patient at a Las Vegas clinic who received an injection of the anesthesia propofol from a vial that had been reused from another patient, and he later contracted hepatitis due to the contamination of the vial.<sup>4</sup> Large individual recoveries between \$208 million and \$80 million also were handed down in Texas, Mississippi, Florida, Massachusetts and Pennsylvania.<sup>5</sup> Nearly all of the top 10 individual recoveries were in product liability cases, including three involving tobacco, as well as asbestos and vehicle rollover cases. My main area of practice is product liability, and my practice group regularly defends cases against the plaintiffs' lawyers who won three of the Top 10 injury verdicts in product liability cases (fortunately for our side, none of those were ours).

As we remind our readers every year, this article focuses on what the Arizona juries did in the following cases. It is not intended to sensationalize the plaintiffs' verdicts or the defense verdicts mentioned, but merely to report on them. It does not discuss in-depth the post-verdict activity or appeals, which occurred in many of the cases.<sup>6</sup> The focus is on how our Arizona juries called these cases, and what they awarded.

Sometimes the pursuit of justice is like fighting your way through a jungle. You're in a dark thicket with a machete, trying to make a trail. Whether I'm in the middle of a trial, a big piece of writing, or the mystery of a case, that's exactly the image that often comes to mind. And eventually you start to see daylight and a clear path. Even when things take a turn for the worse, we keep fighting for our clients and companies because that's what lawyers do. So did the people and lawyers in the cases you're about to read. Both sides in these cases believed they were right, or they wouldn't have invested the time, money and energy to take them through trial.

# 1

**\$110,658,800**

*Gray Development Group v. Klutznick Company, doing business as Northeast Phoenix Partners, L.L.C.,*<sup>7</sup> Maricopa County Superior Court, LC2007-000011

This was a battle over the north Phoenix real estate development called Desert Ridge, and the verdict was on a counterclaim. In 2004, during the real estate boom, Gray Development Group bought a 41-acre parcel of land there for \$32 million. Northeast Phoenix Partners was the master developer of the master-planned community. Gray alleged that Northeast Phoenix Partners interfered with the city planning and worked to block the zoning process to eliminate Gray's property as a competitor with the nearby CityNorth project that Northeast Phoenix Partners was developing. Evidence included documents showing that Northeast Phoenix Partners orchestrated a behind-the-scenes campaign to generate community opposition to Gray's apartment project. Northeast Phoenix Partners argued that the association was within its rights to reject Gray's development, and that Gray was attempting to build a commercial project within a residential neighborhood. Gray returned the property to the state in 2008, and it remains undeveloped.

The jury found for Gray on its claims of breach of contract, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, and bad faith. The jury awarded \$110,658,800 and found Northeast Phoenix Partners 95 percent at fault. This was the 16th-largest verdict in the country.

# 2

**\$71,598,527.84**

*Mesa Bank v. Thomas Alexander, Sandra Stevens, Bobbie Jo Johnson, American Mortgage Funding, Inc., Capital Title Agency, and American Mortgage*

*Specialists, Inc.,* Maricopa County Superior Court, CV2008-109063

This case alleging mortgage fraud highlighted the recent huge decline in Arizona real estate and its high foreclosure rate. Mesa Bank made residential interim construction loans between 2001 and 2007, and 45 of them went into default. The loans were originated by Thomas Alexander during the time that he worked either at American Mortgage Funding or American Mortgage Specialists. Mesa Bank alleged that Alexander misrepresented the qualifications of the borrowers, including their income, assets and credit. Mesa Bank alleged that Alexander acted as the seller and inflated the land value so that he could "flip" the properties quickly. Closings for most of the loans were through Capital Title Agency and its escrow officers Sandra Stevens and Bobbie Jo Johnson. Mesa Bank alleged that Stevens and Johnson prepared loan documents that showed the borrowers had made cash down payments, when in fact they had not.

The case was tried to a judge, who found for Mesa Bank on all counts including, among others, fraud, misrepresentation, breach of contract, and breach of fiduciary duty. The judge awarded \$36,844,771.57 against Alexander; \$10,613,412.27 against Capital Title; \$5 million each against Stevens and Johnson; and \$14,140,344.00 jointly against Capital Title, Stevens and Johnson. The total included \$40 million in punitive damages, which was the largest punitive award of the year in Arizona.

# 3

**\$47,031,574**

*RCS Capital Development, L.L.C. v. ABC Developmental Learning Centers USA, Inc. and ABC Learning Centres Limited,*<sup>8</sup> Maricopa County Superior Court, CV2008-026273

This was a second case about a development deal that fell through. In 2008,

Arizona child-care-center developer RCS Capital Development signed a contract to sell 31 child care centers to ABC. Australian-based ABC Learning Centres Ltd. and its U.S. subsidiary had been the world's largest provider of child-care centers. Later in 2008, they fell into financial trouble and went into receivership and liquidation. The banks and receivers told RCS that they were not going to comply with the contract, and RCS sued to recover its lost profits. ABC defended that RCS had breached the contract. The jury awarded \$47,031,574 to RCS.



**\$40,000,000**

*Jose Rincon Sr. and Adriana Rincon v. City of Tucson and Glenda Rumsey,*<sup>9</sup>  
Pima County Superior Court,  
C2008-1087

This largest individual judgment ever awarded against the city of Tucson arose from a road design case involving a drunk driver who struck and killed a teenager on his bike. On the evening of Jan 12, 2008, 14-year-old Jose Rincon and a friend were riding their bicycles in the bike lane of a Tucson road. Defendant Glenda Rumsey was intoxicated with a blood alcohol concentration of 0.28 (more than three times the legal limit). She drove into the bike lane when her lane ended and she tried to merge. Rumsey struck both boys, and Rincon died. Plaintiffs sued Rumsey as well as the city of Tucson. Plaintiffs alleged Tucson improperly constructed and maintained the road and abandoned its roadway improvement project that would have added another five feet of asphalt in the lanes. Tucson defended that the road was properly designed and constructed and safe, and that Rumsey's intoxication was the primary cause of the accident. Tucson also argued that non-party Chuy's Mesquite Broiler was negligent because it had continued to serve Rumsey after she was intoxicated. Rumsey was convicted in 2009 on various counts and is serving a 14-year sentence. Rumsey

admitted negligence and argued that she, Tucson and Chuy's were equally at fault, an allocation the jury effectively adopted. The jury awarded \$40 million to Rincon's parents, and found Tucson and Chuy's each 33 percent at fault and Rumsey 34 percent at fault.



**\$8,500,000**

*David Ramsey v. International Water Safety Foundation,*<sup>10</sup>  
Maricopa County Superior Court,  
CV2009-009354

This was a case of bad faith and breach of contract by a boat owner against his insurance company. David Ramsey bought insurance for his boat from International Water Safety Foundation ("IWSF"). A few days later, Ramsey and three others were on the boat on the Colorado River. They had a serious accident that killed Ramsey's father and injured several others. Ramsey was sued in numerous suits arising out of the accident. He filed a claim with IWSF, but it refused to defend or represent him in the suits. IWSF denied coverage, maintaining Ramsey provided false information on his application. Ramsey denied doing so and argued that his insurance agent had actually completed and submitted the application. IWSF also refused to provide Ramsey a copy of his policy and did not seek any determination that it was not required to cover his claims. Ramsey alleged that IWSF, a Canadian company, sold insurance to Americans, then refused to defend them in lawsuits. He also contended that several U.S. states had banned IWSF from selling insurance. Ramsey claimed emotional trauma from the stress of being sued and facing the potential of financial loss. IWSF did not defend the civil case Ramsey brought against it, and the court granted a default judgment. After a hearing on damages, the court awarded \$2.5 million in compensatory damages and \$6 million in punitive damages.



**\$7,183,260**

*Bentley Gallery, Inc. v. Glen Lineberry and Rosethorn Art Group, LLC et al.,*<sup>11</sup>  
Maricopa County Superior Court,  
CV2007-001403

In 1996, Bentley Gallery hired Glen Lineberry as its director, and in 2002 they signed an employment agreement that included non-competition, confidentiality and non-solicitation clauses. Bentley Gallery alleged that a private art collector contacted Bentley Gallery about buying a number of valuable works of fine art, and that Lineberry negotiated and arranged the purchases. Bentley Gallery claimed that Lineberry and Rosethorn (a company managed by Lineberry) took 50 percent of a \$2,850,000 commission. Bentley Gallery maintained Lineberry breached the contract by selling such art in the same geographical area and using confidential information, and that he breached his duty of loyalty to the gallery. Bentley Gallery also claimed that Lineberry failed to pay the balance due on a \$110,658 loan that the gallery made to him. Lineberry denied the allegations and defended that the gallery had agreed that he was entitled to the 50 percent commission. The jury awarded \$5,016,880 against Lineberry and \$2,166,380 against Rosethorn Art Group.



**\$5,195,733.90**

*Travelers Indemnity Company v. Bernard Naus,*<sup>12</sup> Navajo County Superior Court,  
CV2004-0453

This was a subrogation action to recover for property damage and business income, and was the largest verdict that has come out of Navajo County in the seven years that we have been tracking verdicts. EuroFresh Farms produces greenhouse-

grown tomatoes and cucumbers in Snowflake, Arizona. In 2002 and 2003, two separate floods caused millions of dollars of damage to its property and equipment. EuroFresh was insured by Travelers Indemnity Company, which paid the damages and pursued a negligence action against the prior owner and developer of the greenhouse. Travelers alleged that the prior owner failed to discover the greenhouse was in a flood plain and also failed to take flood-control measures and get flood-zone building permits. Pre-trial rulings established that the prior owner was negligent and that its negligence caused the damages. The case was tried to determine the extent of damages and division of fault. Nauss maintained that he was not part of the joint venture that built the greenhouse and thus not liable. The jury awarded \$5,195,733.90 and found defendants 50 percent at fault, EuroFresh 25 percent at fault, and the town of Snowflake 25 percent at fault.



**\$3,800,000**

*Timothy LeClair v. Lumberman's Building Center*, Coconino County Superior Court, CV2009-0223

This premises liability case arose from a fall on ice that resulted in a severe injury. Timothy LeClair was a 47-year-old truck driver who slipped and fell on black ice at Lumberman's Building Center. He fractured his wrist and lower leg, both of which required surgery. Unsuccessful surgery led to above-the-knee amputation of his leg. He alleged that Lumberman's employees did not follow its own safety policy when they failed to lay cinders after snowplowing. Lumberman's defended that no black ice or dangerous condition existed and that LeClair caused his own injuries. The jury awarded \$3,800,000 and found Lumberman's 60 percent at fault and LeClair 40 percent at fault.



**\$3,000,000**

*Catherine Kerege and Estate of Harriet Volner et al. v. Viscount Suite Hotel*,<sup>13</sup> Pima County Superior Court, C20081176

This was another premises liability case involving an elderly woman's fall on carpeted stairs in a hotel atrium. Harriet Volner was a 78-year-old woman who went to the Viscount Suite Hotel in Tucson on September 13, 2007, to have breakfast with friends. The stairs had a railing when the hotel was built, but the railing was later removed by the owners, which plaintiffs alleged was a violation of city code. Plaintiffs also contended the paisley-patterned carpeting camouflaged the stairs and made the area appear flat as people approached it. Volner hit her head during the fall and died five days later from her head injuries. Plaintiffs alleged that other people had fallen on the stairs before Volner and the hotel had notice of the conditions. The Viscount Suite Hotel defended that the condition was open and obvious and Volner's fall was caused by her inattention. It also argued that the code requirement related to a fire exit and had nothing to do with Volner's fall. The jury awarded each of Volner's four adult children \$750,000, for a total verdict of \$3,000,000. The jury found the Viscount Suite Hotel 80 percent at fault and Volner 20 percent at fault.



**\$3,000,000**

*Henry Esparza Jr. v. BCI Coca-Cola Bottling Company of Los Angeles and Kenneth Davis*,<sup>14</sup> Maricopa County Superior Court, CV2007-091884

This was a second "Top 10" verdict in 2010 that arose from a bicycle accident. Henry Esparza, Jr., age 44, was riding a bicycle in the town of Gilbert on a bike path. Kenneth Davis, driving a Coca-Cola tractor-trailer,

had stopped at an intersection for a red light. Esparza was approaching the intersection on a bicycle to the right but Davis did not see him. After being stopped for some time at the red light, Davis began to turn right. Esparza rode into the intersection on his bike, the two collided, and a wheel ran over Esparza. He sustained a fractured pelvis, nerve damage to his legs, hand and shoulder, abrasions and lacerations, and had permanent neurological impairment. Coca-Cola and Davis claimed that Davis had looked both ways but did not see Esparza approaching and that Esparza was so close to the truck's front end when it began to turn that it wasn't possible to see him from the truck cab. The jury awarded Esparza \$3 million. The jury found Esparza 60 percent at fault and Coca-Cola and Davis together 40 percent at fault.

**2010 Arizona Verdict Averages vs. Medians**

	AVERAGE	MEDIAN
STATEWIDE	\$1,973,816	\$65,000
Maricopa	2,835,309	69,014
Navajo	2,601,256	2,601,256
Coconino	1,316,960	99,336
Pima	1,115,080	63,578
U.S. Dist. Ct.	569,856	150,000
Gila	350,936	350,936
Santa Cruz	350,400	350,400
Yuma	163,518	10,000
Yavapai	137,247	13,500
Cochise	65,000	N/A
Mohave	37,645	N/A
Pinal	2,097	N/A

**Averages and Medians By Venue**

Averages and medians for each venue are as follows. 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 we analyze the medians too. To calculate the median, we place the

verdicts in value order and find the middle number, where exactly half of the verdicts are 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 32.

The Arizona statewide average verdict<sup>15</sup> in 2010 was \$1,973,816. The statewide median in 2010 was \$65,000.

Maricopa County topped the averages in 2010. That was partially driven by six of the Top 10 verdicts coming out of that county. Maricopa County is the fourth-largest county by population size in the entire United States and is home to well over half of all Arizona residents. Maricopa County's average verdict in 2010 was \$2,835,309. Its median verdict was much less, at \$69,014.

Navajo County in 2010 rendered the biggest verdict in that county in the seven years we've been tracking these verdicts. (See Number 7, *Travelers Indemnity v. Nauss, supra.*) It reported only two civil verdicts in 2010, and the other was minimal, making its average and median \$2,601,256. Navajo County often produces only defense verdicts and no plaintiffs' verdicts, and its average only reached six figures in one other recent year. Coconino County's average was the next highest, at \$1,316,960, and its median was \$99,336.

Arizona's second-largest city is Tucson, and its venue of Pima County generally produces the second-highest volume of verdicts. Pima County's verdict averages have been in flux over the past few years. Its averages have ranged from low six figures to near \$1 million. The Number 4 verdict drove its average in 2010 to its highest level since we've been analyzing these verdicts, at \$1,115,080. Except for one brief dip in 2006, its verdict median has remained around \$50,000, and it was about the same this year, at \$63,578.

The United States District Court for the District of Arizona had an unusual year for verdicts. For the first time in the seven years that we've been tracking these verdicts, not one of the Top 10 came out of the federal court. In 2009, by contrast, this court produced five of the Top 10 verdicts. The federal court reported only 11 civil verdicts in 2010, one for as little as \$1. The federal court's average was \$569,856, and

its median was even lower, at \$150,000.

The outlying Arizona counties tend to produce few verdicts at all, and many of those are defense verdicts or smaller-scale plaintiffs' verdicts. Gila County's average and median was \$350,936, followed closely by Santa Cruz County's average and median of \$350,400. Yuma County had three verdicts with an average of \$163,518 but a median of only \$10,000. Yavapai County's average was \$137,247 with a median of \$13,500.

Cochise County reported three defense verdicts and one plaintiff's verdict of \$65,000. Mohave County had five defense verdicts and one plaintiff's verdict of \$37,645. Pinal County reported one plaintiff's verdict of \$2,097.

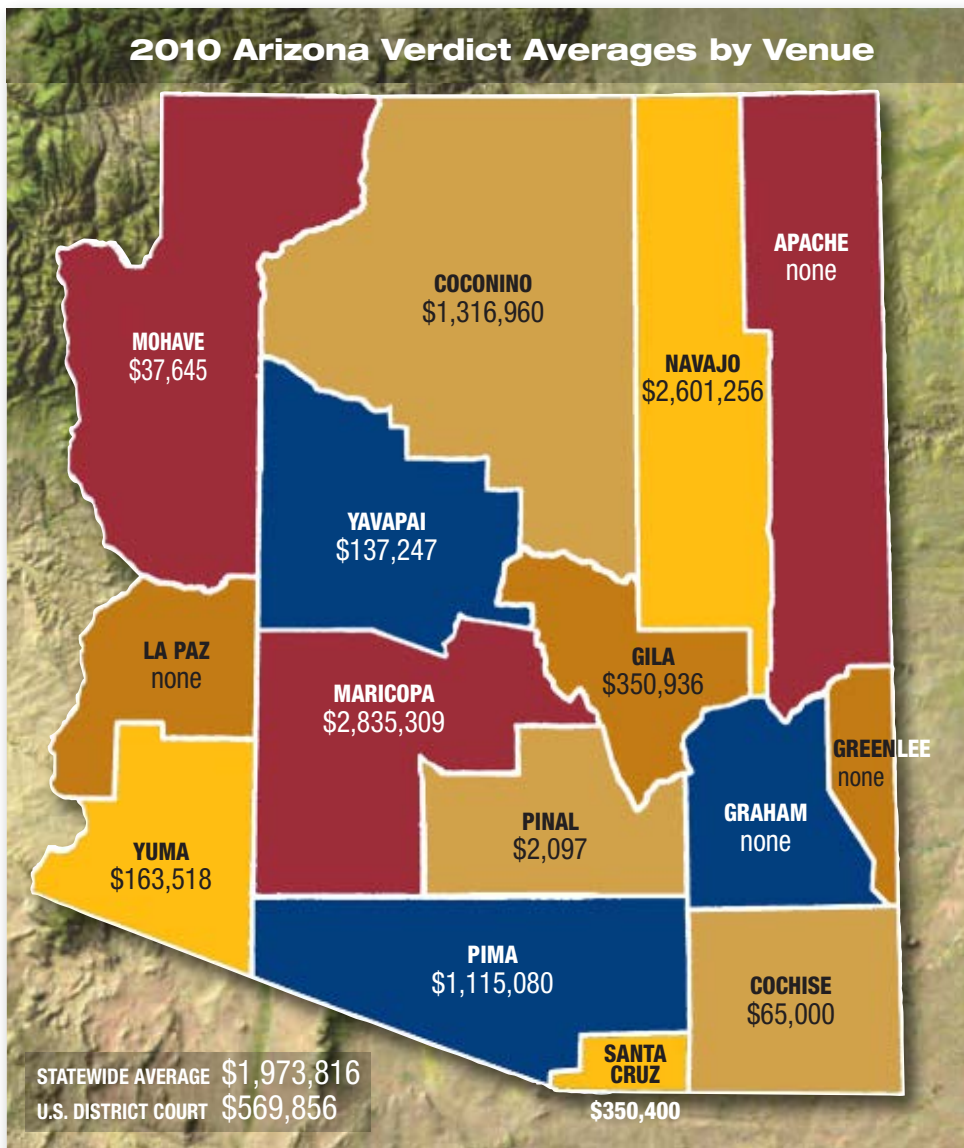
One defense verdict each was reported in Graham County and La Paz County. No civil verdicts were reported out of Apache

County or Greenlee County. The average by venue is highlighted in the chart below.

### Plaintiffs Won 60 Percent of the Trials

Statewide, plaintiffs prevailed in 60 percent of the trials, and defendants prevailed in 40 percent. Over the past few years, plaintiffs have had a slightly better than 50/50 chance of statistically prevailing in any given case. Plaintiffs' statistical percentage of prevailing has ranged from 56 percent to 66 percent in the past five years.

For many reasons, federal court is often viewed as a more defendant-friendly venue than state courts. In every one of the last seven years, federal court has been more statistically favorable to defendants than state court on verdicts. In the United States District Court for the District of Arizona in 2010, civil defendants prevailed in 52



percent of the reported verdicts. That was statistically 13 percentage points better for defendants than when we compare it to verdicts given only in state court.

### The Rise of Counterclaim Success

There has been an increase of major verdict wins on counterclaims. The Number 1 verdict from 2010 is the best example. There were five other plaintiffs' verdicts from 2010 in which plaintiffs lost on their main claims and were hit with counterclaim losses. In 2009, there was an \$11 million verdict on a counterclaim for abuse of process, after the plaintiffs' claims were dismissed. In 2007, there were counterclaim wins of \$16,194,178 and \$9,200,000 on claims such as breach of contract and conversion. We first commented on this trend in the article about 2007 verdicts, and it definitely seems on the rise.

### Business Verdicts and Personal Injury Verdicts

The average commercial verdict was \$4,024,589, with a median of \$99,336. Such cases included breach of contract, breach of fiduciary duty, employment, insurance bad faith, condemnation, malpractice, and property damage. Almost 10 percent of those verdicts included recoveries on fraud claims.

The average personal injury verdict was \$660,851 and its median was \$30,000. The cases in this category had one or more persons who were physically injured. They included motor vehicle accident injury, product liability, medical malpractice, excessive force, and wrongful death cases.

### Punitive Awards

Punitive damages were awarded in 15 cases in 2010. The largest was in the Number 2 verdict involving alleged mortgage fraud. (See *Mesa Bank v. Alexander et al.*, *supra*.) Two other large punitive awards were made against insurance companies in bad faith cases. (See *Number 4, Ramsey v. International Water Safety Foundation*, *supra*.) Two others were made in employment cases involving wrongful termination. Other punitive awards were given in fraud, defamation, fraud, malicious prosecution, and breach of contract cases.

## The number of Arizona cases that are tried all the way to verdict appears to be declining. Both business and injury trials seem equally reduced in quantity. Perhaps the still-recovering economy is driving fewer trials.

Punitive awards tend to be awarded in Arizona generally only when there are aggravating or extreme facts. Some examples from 2010 include cases alleging that a business seller falsified its financial records, that a contractor built a defective home, and that a detention officer inflicted physical violence on an inmate. The punitive awards ranged from a high of \$40 million to a low of \$8,000. Many of the punitive awards were appealed.

### Significant Defense Verdicts

The cases mentioned above with counterclaim wins also could be considered significant defense verdicts, and we highlight some more noteworthy defense verdicts below. These are from a variety of types of cases in which the claimed damages were high. Here are a few of the year's significant Arizona defense verdicts:

# A

*Sonia Figueroa v. State of Arizona Department of Transportation*, Pima County Superior Court, C2008-8043

On Jan. 18, 2008, shortly after 1:00 a.m., 17-year-old Daniel Figueroa was a passenger in a car driven by Daniel Martinez. The car collided with a truck driven by Dustin Bean at an intersection of an on-ramp to northbound Interstate 19 in Sahuarita, Arizona. Figueroa died in the collision. Figueroa's mother claimed the death was due to faulty traffic signals. Sonia Figueroa contended similar prior fatal accidents occurred at that intersection because of improperly timed traffic signals, and local and state officials knew about this but failed to repair the signals' timing and failed to test the signals. Figueroa also alleged that Arizona failed to properly respond to and investigate the crash. She asked the jury for

\$16 million. The state of Arizona defended that the traffic signal operated properly and that the fatal crash was the result of both drivers' errors, Bean for driving too fast and both drivers for failing to obey traffic signals.

# B

*Darian Aira v. Larry Dever and Wyatt Berry*,<sup>16</sup> Pima County Superior Court, C2007-6692

This was a case arising from a high-speed police pursuit. Cochise County Deputy Sheriff Wyatt Berry was driving his patrol car on State Route 90 in Sierra Vista, Arizona, on Aug. 5, 2006, at 2:30 a.m. Berry saw another driver, Anthony Young, approaching from the opposite direction and clocked his speed at about 95 miles per hour. Berry made a U-turn and began pursuit. Darian Aira, a 33-year-old physical therapist, turned out of a parking lot and her car was hit from behind by Young's car. Young died in the collision, and his blood alcohol was measured at 0.17 percent. Aira sustained a traumatic brain injury with paralysis of the right side of her body and permanent cognitive impairment. Aira alleged she had no warning of Young's approach because Berry failed to activate his emergency lights and siren. She also alleged that his supervisor Larry Dever and Cochise County failed to provide the deputy with appropriate training and failed to implement adequate policies and procedures on high-speed pursuits. Aira asked the jury for \$13.6 million. Berry and Dever asserted that the standard of care for police officers is to get within 200 feet of a speeding vehicle before activating lights and siren and Berry never got that close. They also argued that he was trained properly and that Aira was at fault in turning out into the highway.



C

*Mary Cameron v. John Christner Trucking, Kathryn Westbrook, Royal Express, Inc. and Paul Horta, Jr.*,<sup>17</sup>  
Maricopa County Superior Court,  
CV2006-011915

This case arose from a multi-vehicle crash in a dust storm. Kathryn Westbrook was driving a tractor-trailer for John Christner Trucking on interstate 10 on Aug. 11, 2004. A dust storm came through, and she stopped her truck in the road without its lights on. Martin Cameron was driving behind the truck with his wife Mary Cameron as a passenger. The Cameron car rear-ended the tractor-trailer. Mary Cameron was getting out of the car when it was side-swiped by another tractor-trailer and then rear-ended by Paul Horta, Jr., who was driving a tractor-trailer for Royal Express. The Cameron car then caught on fire. Martin Cameron was killed by the collision and fire, and Mary Cameron fractured her ankle and foot and had degloving injuries to her leg. The Camerons claimed that Westbrook and Horta were negligent for their part in the crash. They asked the jury for more than \$6 million. Westbrook, Horta and their companies argued that all of the drivers had reduced visibility due to the dust storm and that they acted reasonably. Arizonans must be sympathetic to dust storm havoc, because we also noted a significant defense verdict in 2006 that arose from similar facts.

D

*Albert Pellegrini v. L.A. Fitness Sports Club, L.L.C. and Brunswick Corporation*,<sup>18</sup>  
Maricopa County Superior Court,  
CV2008-002245

Albert Pellegrini, 59 years old, was working out at L.A. Fitness using a back extension machine when the weights disconnected from the roller pad and he fell off the rear of the machine. He sustained a spinal cord injury that resulted in weakness, partial paralysis and spasticity below chest level. Pellegrini claimed L.A. Fitness failed to properly inspect, maintain and repair the weight machine. He claimed that Brunswick Corporation defectively designed the machine because it did not have positive stops and locking mechanisms for the collar that held the weights.

Pellegrini asked the jury for more than \$1.3 million. L.A. Fitness and Brunswick alleged that Pellegrini did not use the available seatbelt or foot peg safety device. They defended that Pellegrini fell off the machine while still sitting on it and before operating it. Brunswick maintained the machine was not defective and its warnings and instructions were adequate.

E

*Diana Hix v. Red Mountain Anesthesiologists and Brian Delisio*,<sup>19</sup>  
Maricopa County Superior Court,  
CV2007-005171

This was a medical malpractice case. John Hix was a 46-year-old human resource director who went in for gastric bypass surgery. Alexander Villares was the surgeon and Brian Delisio was the anesthesiologist. Complications developed, and after two additional surgeries over the next four days, Hix died. The Hix family alleged that Delisio fell below the standard of care when he failed to order appropriate post-operative blood testing, failed to engage in direct physician-to-physician contact with the surgeon (Villares), and failed to ensure that the nursing staff and surgeon communicated adequately. The Hix family asked for more than \$4.5 million. Red Mountain Anesthesiologists and Delisio alleged that blood tests were not required, and the death was due to the malpractice of the surgeon and the nursing staff.

F

*Joan Kilbey v. Integrity First, L.L.C.*,  
Maricopa County Superior Court,  
CV2008-050519

This was a retrial of an employment case alleging wrongful termination and retaliation. Joan Kilbey was a real estate agent and designated broker who worked for Integrity First in 2007. She claimed that in her 19 days on the job, she saw and reported numerous violations of Arizona real estate law. She alleged that Integrity First terminated her for reporting the violations. Kilbey asked the jury to award her about \$800,000 in past and future lost earnings. Integrity First defended that Kilbey was responsible for handling agent compliance issues and discussion about those issues caused no concern. Instead,

she was terminated for poor interpersonal skills and lack of basic professionalism. The jury found there was no retaliation.

## Where Are They Now?

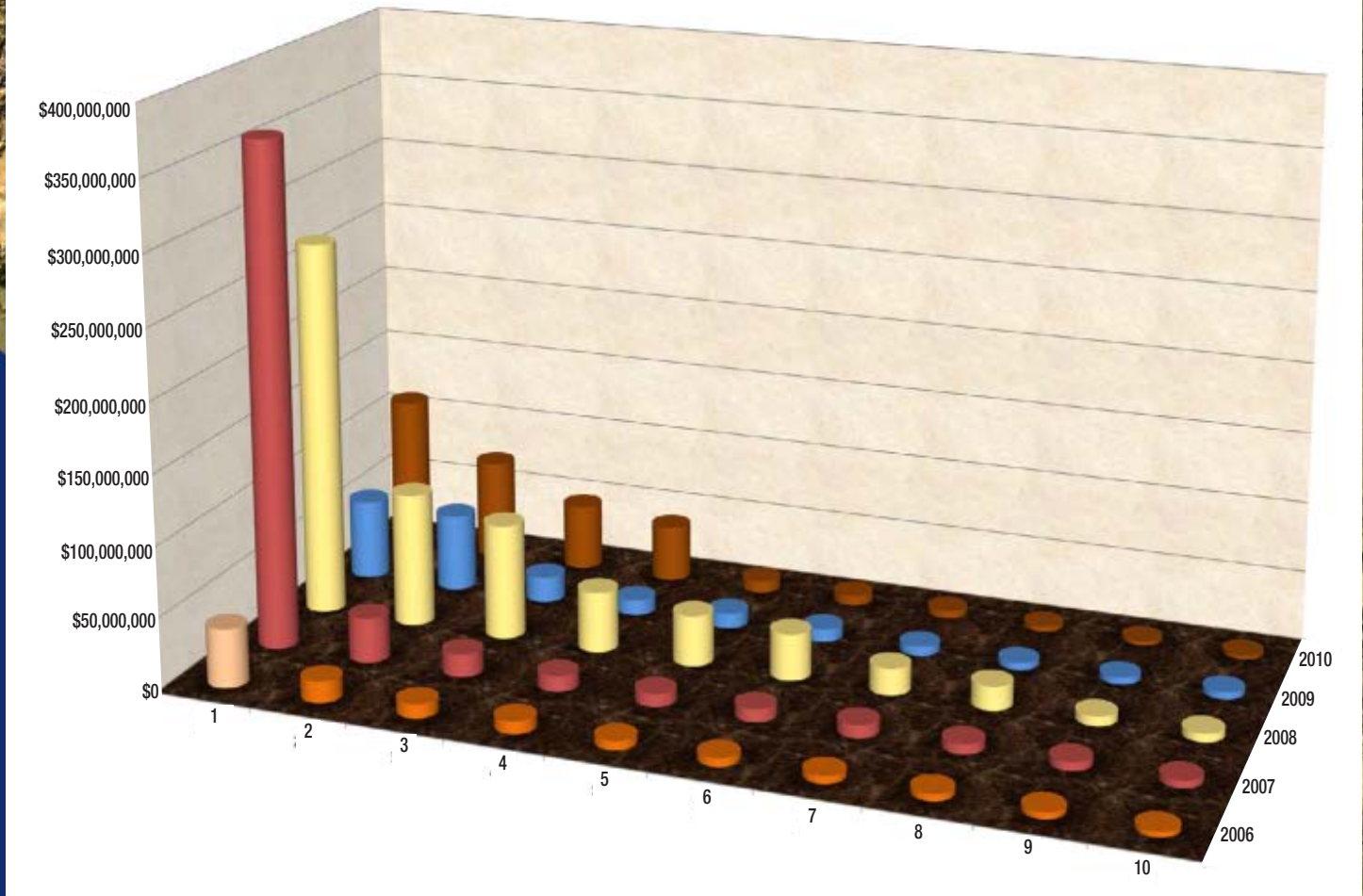
So what about the rest of the story? After a major verdict such as those described in our article each year, what happens to these cases? Many of them are appealed, some are paid in full, and, like the rest of the universe of civil cases, many are settled. This is not a comprehensive history of all the recent verdicts, but here are a few of our past years' notable verdicts that had major developments in 2010:

*Bard Peripheral Vascular, Inc. and David Goldfarb v. W.L. Gore & Associates, Inc.*, United States District Court for the District of Arizona, CV03-0597. This is one of the longest patent cases to continue to be litigated and it relates to a prosthetic vascular surgical graft first developed in 1974. It was the Number 2 jury verdict in 2007 at \$185 million. Double damages, interest and attorneys' fees were later awarded, and a royalty rate was set. Final judgment was entered in August 2010 for approximately \$660 million. Gore has again appealed.

*Anita Graham et al. v. ValueOptions, Inc. and VO of Arizona, Inc.*,<sup>20</sup> Court of Appeals of Arizona Division One, 1 CA-CV 09-0431. This was the Number 5 verdict in 2008 for \$36 million. In this case, Patrick Graham was killed in a shooting by a paranoid schizophrenic who had been under psychiatric care with ValueOptions. The jury awarded \$11 million in compensatory damages and \$25 million in punitive damages. In 2010, the Arizona Court of Appeals affirmed the verdict in part and reversed in part. The court held that the jury properly found that ValueOptions' duty extended to Graham and to the public and upheld the compensatory damages. The court held there was no clear and convincing evidence that ValueOptions acted with an "evil mind," the standard in Arizona for punitive damages, and reversed that part of the judgment.

*Jeanne Steven et al. v. Swift Transportation Co., Inc.*,<sup>21</sup> Court of Appeals of Arizona Division One, 1 CA-CV 08-0505. This

TOP 10 JURY VERDICTS BY YEAR 2006-2010



was the Number 3 verdict in 2007 for \$31.6 million. In this case, Thomas Steven was killed when a Swift tractor-trailer driver ran a stop sign and crashed into him. The jury awarded \$23.7 million in compensatory damages and \$13.875 million in punitive damages. In 2010, the Arizona Court of Appeals affirmed the verdict in part, reversed in part, and remanded it for a new trial. The court affirmed the personal injury verdicts in favor of the other two passengers in the car as well as the jury's determination that the tractor-trailer driver was solely responsible for the crash. The court reversed the punitive and compensatory awards for wrongful death of Thomas Steven based on the discussion of certain missing documents and because Kansas law should have been applied to the punitive award.

*Centocor Ortho Biotech, Inc. v. Abbott Laboratories*, No. 2010-1144, Fed. Cir. Feb. 23, 2011. This was the Number 1 verdict nationally in 2009 for \$1.67 billion in a Texas case for patent infringement. The Federal Circuit set aside the verdict, finding that Centocor's written description in its patent application was not adequate and conveyed merely a wish or plan to invent an antibody. The court also held that Centocor's disclosure of asserted claims of the patent did not provide an adequate written description.

**Trends**

Here are some observations on Arizona verdict trends, as we continue our multi-year analysis. This is the seventh year for this article, and we've reviewed about 2,100 verdicts. The graph above shows the chart of the top verdicts over the most

recent five years.

The awards at the very highest end went up dramatically in 2007 and 2008 and leveled off somewhat in the years that have followed. Punitive damages are still comparatively uncommon and tend to be awarded only when there are extreme facts. The statistical chance of prevailing as a plaintiff in any given case has ranged from 53 percent to 66 percent, and the seven-year average chance of winning as a plaintiff was 58 percent. The average verdict in commercial cases spiked in 2007 and 2008 up in the \$7 million to \$9 million range, but the medians have stayed in a much closer range of \$75,000 to \$250,000. The median personal injury verdict has been hovering around the \$30,000 mark since 2006.

The number of Arizona cases that are tried all the way to verdict appears to be

declining. From 2004 through 2007, the reported number of Arizona civil taken to verdict<sup>22</sup> stayed within a rather close range (305 to 368). In 2008, however, that figure took a noticeable drop of 10 percent to 20 percent fewer. In 2009 it was a bit higher, but in 2010 it was back down again, to 288. Both business and injury trials seem equally reduced in quantity. Perhaps the still-recovering economy is driving fewer trials.

Some more intriguing trivia about Arizona verdicts between 2004 and 2010:

- ▶ The largest verdict was in 2007, for \$360 million.
- ▶ There were 26 verdicts of more than \$10 million.
- ▶ The largest punitive award was \$155 million, handed down in 2009. That was also the year for the highest

quantity of punitive awards.


- ▶ The highest percentage of defense verdicts (47 percent) was in 2005.
- ▶ I don't believe the "holiday effect" of juries awarding plaintiffs' verdicts just before the December holidays applies in Arizona. I've read just as many defense verdicts that happen in that time frame.

## Conclusion

I've been thinking a lot lately about the importance of persistence. Persistence applies to the art of trial too. Of all the great trial lawyers I know, not one has a perfect record. Many times over the past several years, I've read the names of lawyers on the losing side of a verdict, and then a few months later they're on the

winning side in another one. The risk of trials, like anything in life, is that you may give your all and still end up disappointed. It doesn't always go the way you think it's going to go. But keep fighting the good fight. "Giving up may be a mistake. Giving up too early is always a mistake."<sup>23</sup>

This is the seventh year for this analysis of verdicts from the past year. Your suggestions over the years have helped to make it better. What else would you like to see in it?

Please feel free to contact me any time for more details about the verdicts or to report significant ones that happen in the future. You're also invited to browse my firm's website ([www.swlaw.com/kelly\\_machenry](http://www.swlaw.com/kelly_machenry)), where you can find more of my publications and other good things. See you next year. 

## endnotes

### 1. Acknowledgements and thanks to:

- My partners and colleagues at Snell & Wilmer L.L.P., who are among the smartest nice people I have ever known.
  - The readers of this article for your positive comments and the encouragement to keep writing it.
  - Pam Ritchey, Karen Kowing and Koren Lyons for their helpful background research.
  - My husband and family, who keep me laughing and who remind me every day what's important. This article's dedicated to Milo.
2. This article analyzes 288 civil verdicts reported from the Superior Courts of Arizona and the United States District Court for the District of Arizona for the 2010 calendar year. Although the great majority were jury verdicts, some were bench trials tried to a judge. The parties named are the ones who were active in the case when it went to verdict.
  3. Karen Gullo, *Oracle Wins \$1.3 Billion Verdict for Closed SAP Unit's Illegal Downloading*, BLOOMBERG NEWS, Nov. 24, 2010, at <http://www.bloomberg.com/news/2010-11-23/sap-must-pay-oracle-1-3-billion-over-unit-s-downloads.html>.
  4. Sylvia Hsieh, *Small Firm Wins \$505M Verdict*, LAWYERSUSA, May 13, 2010, at 2.
  5. Susan Bocamazo, *Top 10 Jury Verdicts of 2010*, LAWYERSUSA, Jan. 18, 2011, at 1-2.
  6. The case numbers are included if you want to check out the post-trial 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. 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 found in these endnotes. Not all of the post-verdict activity is reported here, which would be an article unto itself.
  7. Defendants filed a motion for a new trial, which is pending.
  8. Defendants filed a motion for a new trial, which is pending.
  9. Post-trial, the court reduced the total award to \$14 million on the city's request for reduction of judgment, calling the original judgment

10. IWSF went into receivership in Canada in 2010.
11. Another defendant was Heather Lineberry, the wife of Glen Lineberry. Rosethorn Art Group filed for bankruptcy in 2009. The Lineberrys have filed an appeal. They also filed for bankruptcy in 2010, so the appeal has been stayed. Post-verdict, the final judgment was adjusted and limited to \$2,850,000.
12. Defendant has filed an appeal that is pending.
13. Other plaintiffs were Paul Volner, Rick Volner, and J.D. Volner. The Viscount Suite Hotel filed an appeal that is pending.
14. BCI Coca-Cola Bottling Company of Los Angeles was doing business as Coca-Cola Bottling Company of Phoenix.
15. 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.
16. Other plaintiffs were her parents and guardians John and Elizabeth Aira.
17. Plaintiffs filed a motion for a new trial, which was denied, and have filed an appeal that is pending.
18. Another plaintiff was his wife Janis Pellegrini and another defendant was L.A. Fitness International LLC. Plaintiffs filed a motion for a new trial, which was denied. Plaintiffs have filed an appeal and L.A. Fitness has filed a cross-appeal, all of which are pending.
19. Other plaintiffs were Kayla, James, Scott, Delaney, and Nicole Hix.
20. Other plaintiffs were Patrick Graham'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.
21. Other plaintiffs included Thomas Swift's passenger/son Jacob Steven and well as his other 7 children, and passenger/nephew Glen Steven.
22. This data is from the reported verdicts as noted in endnote 1, from the Superior Courts and federal court. It does not factor in small claims or Justice Court trials, which are not reported in the same way.
23. MARK MARAIA, RELATIONSHIPS ARE EVERYTHING! 15 (2009).