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civil verdicts



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If you're reading this, you lived through the Great Recession. In early 2009, the recession finally hit its low, financial and real estate markets started inching up again, and many of our own companies and clients started to see daylight in the fight for recovery. After months of cutbacks and layoffs, the turmoil in the business and legal worlds slowed. All of the verdicts you're about to read about¹ were born in the fires of the Great Recession.

In Arizona, bankruptcies were on the rise. Phoenix's first light rail transportation system got up and running. The state faced a budget shortfall that reached \$2 billion by late 2009. Real estate values continued their wild fluctuations. Those themes were all in play in Arizona's top verdicts in 2009. Punitive verdicts were awarded more often than ever in Arizona, particularly in the first half of the year.

The very top verdicts weren't quite as sky-high as the last couple of years, but they still included five verdicts of more than \$10 million. For the third consecutive year, every one of the Top 10 was at least \$4.5 million. There were 24 verdicts over \$1 million. A Phoenix flooring company that sued a Mexican tile manufacturer for unfair business practices claimed the top verdict of \$57 million.² There were two large condemnation verdicts against the City of Phoenix. Also among the highest Arizona verdicts were actions for breach of contract, insurance bad faith, copyright and trademark infringement, and road design. In addition to the jury verdicts mentioned below, nonprofit Science Foundation of Arizona obtained an \$18.5 million judgment against the State of Arizona in a lawsuit that alleged the state reneged on its contracts when it cut the foundation's funding in 2009 as it sought to close the state's large budget gap.³

This year's nationally highest verdict was for \$1.67 billion in a Texas case for patent infringement. The case was won by Centocor Ortho Biotech against Abbott Laboratories, and it related to an autoimmune drug.⁴ That was more than double 2008's highest recovery and very close to 2007's highest award, also from a patent infringement case. Nationally, product liability awards more than doubled, and medical malpractice awards were 37 percent higher.⁵

The largest award to a plaintiff in a personal injury case was \$330 million. It was awarded after a two-day trial to a Florida mother whose daughter died when a drunk driver crashed into the van in which she was riding, and \$275 million of it was in punitive damages.⁶ Florida also saw a record-setting tobacco verdict of \$300 million. Large individual recoveries between \$89 million and \$60 million also were handed down in Texas, New York and Pennsylvania.⁷

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 post-verdict activity or appeals, which occurred in many of the cases.⁸ 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. The focus is on how our Arizona juries called these cases, and what they awarded.

Here they are, the Arizona Top 10. ►

BY KELLY WILKINS MACHENRY

Arizona Civil Verdicts 2009



\$57,269,586.60

*Atlas Flooring, LLC v. Porcelanite S.A. de C.V., dba Grupo Porcelanite S.A.*⁹, United States District Court for the District of Arizona, 2007-CV-01741

Grupo Porcelanite was a Mexican manufacturer of several lines of high-gloss ceramic tiles. In a 2002 contract, it gave

Atlas Flooring the exclusive right to sell its tiles in Arizona to retailers, consumers and home builders. After Atlas Flooring landed Lowe's home improvement stores as a customer that would sell the tiles in Arizona, Porcelanite promised Atlas Flooring it would be the exclusive distributor to Lowe's throughout the United States. In 2007, Atlas Flooring learned that Porcelanite had been selling tile directly to Lowe's nationwide for months but never told Atlas Flooring. Porcelanite defended that its sales to Lowe's were outside the scope of the contract and that Atlas Flooring had breached the contract and failed to pay for accepted tile. Porcelanite counterclaimed for \$3.6 million for lost profits and breach of contract.

The jury awarded Atlas Flooring \$32,269,586.60 on the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and interference with business expectancies. The jury also awarded \$25 million in punitive damages. The jury allowed Porcelanite an offset of \$524,949 for tile it had delivered to Atlas Flooring but otherwise ruled in favor of Atlas Flooring on the counterclaim.



\$55,155,000

Kenneth and Tammy Nardelli v. MetLife Auto and Home Ins. Agency, Inc., Metropolitan Group Property and Casualty Ins. Co., and Metropolitan Prop. and Cas. Ins. Co., Maricopa County Superior Court, CV-2004-019991

On September 3, 2002, Kenneth and Tammy Nardelli's new Ford Explorer was stolen from an Arizona shopping mall

parking lot. They reported the theft to their insurance company, MetLife. The Explorer was recovered across the border in Mexico about two weeks later and towed back to them in Arizona. Its engine was destroyed, seats were slashed, wires cut, and its Vehicle Identification Numbers stripped. The Nardellis asked MetLife to total the vehicle because it would be difficult to resell, but MetLife maintained that under their coverage they were only owed the cost of the repairs and sent them a check for the repair costs of \$10,759. The Nardellis presented internal company documents that stated a MetLife profit goal of \$155 million for 2002, an increase of about \$100 million over the previous year. MetLife defended that it acted reasonably in its claim management and that the vehicle was repairable to pre-theft condition.

On the claims for first-party bad faith and breach of the covenant of good faith and fair dealing, the jury awarded



\$18,500,883.59

*Brenda Moody Whinery, as Creditor Trustee of Fort Defiance Housing Corp., Inc. v. Lodgebuilder, Inc.*¹¹, United States Bankruptcy Court for the District of Arizona, 2006-AP-00911

Unusually, this was an award out of the bankruptcy court. Fort Defiance Housing Corporation is a nonprofit corporation that builds and manages low-

income housing on the Navajo reservation in northeastern Arizona. Fort Defiance contracted with Lodgebuilder to develop the housing projects. Lodgebuilder was owned and operated by William Aubrey and his business partner, Brenda Todd. Fort Defiance filed for chapter 11 bankruptcy in 2005, and Brenda Moody Whinery was named its creditor trustee and brought this action to recover funds and assets. The trustee alleged that Aubrey misappropriated millions in federal grants and private loans and gave kickbacks to various officials to cover up the fraud. The trustee traced the funds to Aubrey's personal bank accounts and to expenses for gambling, cars, furs, jewelry and race horses. The claims included breach of contract, conversion, misrepresentation, negligence, civil conspiracy, breach of fiduciary duty, fraudulent conveyance and unjust enrichment.

The case was tried to a judge, who awarded \$17,500,883.59 in compensatory damages against all three defendants, plus \$1 million in punitive damages.



(tie) \$11,000,000

Carmen Caccavale, Henry Schein, Inc. dba Caligor and v. McKesson Medical-Surgical, Inc., United States District Court for the District of Arizona, 2004-CV-01351

Two verdicts tied for the number 4 spot this year, and a counterclaim for abuse of process was one of them.

Carmen Caccavale was a medical products sales representative who worked for seven years at McKesson Corporation. He resigned in 2004 and took a job with Henry Schein, Inc., which was a McKesson competitor. McKesson sued Caccavale, his new company and other defendants on variety of claims mainly related to alleged misappropriation of trade secrets. Caccavale, who did not have a non-compete contract with McKesson, counterclaimed for abuse of the legal process, along with Henry Schein, alleging that McKesson's use of the legal process was primarily motivated by a desire to stifle competition.

On the counterclaim, the jury awarded \$5 million to Caccavale and \$6 million to Henry Schein, Inc.



(tie) \$11,000,000

Lydia Scherrer v. Liberty Manor Residency, Inc. dba Liberty Manor Residency II, Maricopa County Superior Court, CV-2007-007660

In 1996, at age 26, Earl Scherrer was in a car accident and sustained a traumatic brain injury. After a 16-month coma, he slowly began to recover. His wife Lydia Scherrer was very involved in his rehabilitation but had to work as well. Earl Scherrer was placed in Liberty Manor Residency, which said it provided 24-hour supervision. On May 7, 2006, he began vomiting, his wife brought him home, and within minutes he died. Autopsy results showed that he ingested a number of foreign objects which were contributing factors in his death. Scherrer presented evidence that Liberty Manor made numerous false entries in its charts and could not produce his caregiver. Liberty Manor argued his death was not related to ingestion of the objects but rather to ingesting water, or that the ingestion of objects could have occurred while he was at home. The jury awarded \$5 million to Lydia Scherrer, \$2 million to his estate and \$4 million in punitive damages.¹² It was believed to be the largest verdict ever awarded against an assisted living facility in the United States, and the second year in a row of a "Top 10" Arizona verdict concerning assisted living care.



\$9,063,446

City of Phoenix v. Cornerstone at Camelback, LLC, Maricopa County Superior Court, CV-2007-012556

Phoenix recently built its first light rail transportation line. This was a condemnation verdict relating to a parcel of land taken for the light rail (now known as Uptown Station) and other future high-rise development.

In July 2007, the City of Phoenix took one acre of a three-acre parcel in North Central Phoenix. Phoenix argued the land was worth \$3,344,335. Cornerstone at Camelback, which wanted it for 800 condo and hotel units to add to its already existing high-rise on the adjacent acres, valued it at \$9 million to 20 million.

The jury awarded \$9,063,446 as the fair market value of the property taken.

There have been five condemnation verdicts in the "Top 10" in Arizona in the past five years, perhaps due in part to the widely fluctuating property values.



\$6,600,004

*Skydive Arizona v. Cary Quattrocchi, Ben Butler, et al.*¹³, United States District Court for the District of Arizona, 2005-CV-02656

Skydive Arizona is one of the largest skydiving centers in the world. The individual and corporate defendants in this case did business as "1-800-Skyride" and were alleged to have configured their Web sites to divert customers away from Skydive Arizona. Defendants were alleged to have used Internet domain names confusingly similar to "Skydive Arizona," which held a trademark on that name. Defendants' Web sites and Internet advertising claimed to exist in virtually every city in the country. Customers who viewed their Web sites and purchased gift certificates generally paid higher prices and allowed defendants to profit. Defendants claimed that their trade name was generic and descriptive and that they were privileged to use the terms in their business. Skydive Arizona made claims for trademark infringement, cybersquatting and false advertising.

The jury awarded \$6,600,004 on all the claims together and assessed damages primarily against the two individual defendants.



\$5,096,997

Merchant Transaction Sys., Inc., Post Integrations, Inc. and Lexcel, Inc. v. Nelcela, Inc., Len Campagna and Alec Dollarhide, United States District Court for the District of Arizona, 2002-CV-01954

This copyright infringement case was over merchant and authorization computer software systems used for processing credit card transactions. In 2007, the first phase of the case was tried and established Lexcel, Inc.'s ownership of the copyright to the software.¹⁴ This was the second phase of the case, to determine whether there was any infringement and, if so, the damages. Merchant Transaction Systems, Inc. licensed the software at issue from Lexcel. Alec Dollarhide worked as an employee of Merchant Transaction Systems to modify and maintain the software licensed from Lexcel. Dollarhide, with Leonard Campagna, later formed another company called Nelcela, Inc., and Nelcela began selling and licensing the same software. Post Integrations, Inc. bought software from Nelcela. Post Integrations asserted that the defendants did not own the software it sold and that the software did not work as promised. Defendants claimed that parts of the software were not protected by copyright laws, and that Dollarhide was authorized under a license to use the software because he wrote and developed it.

The jury awarded Post Integrations \$3,145,797 on claims for breach of contract, fraud, unjust enrichment and breach of warranty. The jury awarded Merchant Transaction Systems \$1,951,200 on claims for breach of contract, breach of duty of

Top 10 Arizona Verdicts in 2009

loyalty, unjust enrichment, conversion and misappropriation of trade secrets. The jury found Nelcela to be jointly and severally liable.¹⁵ On counterclaims by Nelcela against Post Integrations for failure to pay for work performed, the jury awarded \$147,569.



(tie) \$5,000,000

Herman Martinez and Romelia Martinez v. Desert Sky Esplanade, L.L.C. and Michael Manzutto, Maricopa County Superior Court, CV-2006-014888

Two verdicts also tied for number 9 this year.

On January 7, 2005, 16-year-old Sarah Martinez was a passenger in a vehicle driven by third-party defendant Michael Manzutto.

The vehicle was traveling on a road open to the public but privately owned by Desert Sky Esplanade shopping center. Manzutto, 24, hit a speed hump on a curve and lost control of his vehicle. The vehicle struck a tree, and Martinez sustained injuries that resulted in her death. Martinez's parents claimed that Desert Sky Esplanade did not place any warning signs for the curve and speed hump and that the speed hump did not meet city and federal specifications. Martinez was not wearing a seatbelt but the jury was instructed not to attribute fault on the seatbelt issue. Desert Sky Esplanade defended that it was not governed by regulations because the road was private, and that the speed hump conformed with industry standards. Desert Sky Esplanade also claimed that Manzutto was speeding.

The jury awarded Martinez's parents a total of \$5 million. The jury found Desert Sky Esplanade 50 percent at fault and Manzutto 50 percent at fault.¹⁶



(tie) \$5,000,000

Randolph Groom v. Roger Clyne and Susan Clyne, Santa Cruz County Superior Court, CV-2006-0051

Randolph Groom was riding his motorcycle on State Route 82 after dark at about 6:00 p.m. on December 8, 2005. A cattle trailer driven by Roger Clyne turned left ahead of him and Groom hit the trailer's left side. The trailer's lights were not working, and eyewitness testified that the motorcycle headlight was not on. Methamphetamine and marijuana metabolites were found in Groom's blood, and Groom argued he was not impaired; the Clynes argued he was impaired. Groom was not wearing a helmet, and the two sides disagreed about whether it would have prevented his injuries. The Clynes argued that Groom was completely at fault for impairment and not wearing a helmet, plus that he was speeding and had enough time to react and avoid the collision. Groom sustained severe traumatic brain damage plus multiple orthopedic injuries. Susan Clyne argued that her son was operating his own independent contracting business at the time and that he was not her employee, and the jury agreed with her.

The jury awarded \$5 million against Roger Clyne. The jury found Groom 75 percent at fault and Roger Clyne 25 percent at fault. This was the third "Top 10" verdict in six years resulting from a motorcycle accident. So let's be careful out there.

2009 Reported Arizona Verdict Averages vs. Medians

	AVERAGE	MEDIAN
STATEWIDE	\$1,384,215	\$78,125
U.S. Dist. Ct.	7,304,775	2,005,110
Santa Cruz	2,500,668	2,500,668
Maricopa	1,164,790	77,519
Cochise	863,400	863,400
Navajo	511,000	511,000
Pinal	360,128	302,000
Coconino	325,000	325,000
Pima	243,209	40,000
Gila	136,895	136,895
Mohave	116,134	116,134
Yuma	91,798	91,798
Yavapai	56,500	56,500
Graham	10,000	10,000

Averages and Medians By Venue

Averages and medians by 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 taking a look at the medians as well can help. 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 to the left.

The statewide average verdict¹⁷ in 2009 was \$1,384,215. That was about half of 2008's statewide average. However, the statewide median in 2009 was \$78,125, the highest the median has been in recent years. That tells us that while the very top verdicts were not as high in 2009, the majority that round out the greater part of the verdicts increased. The statewide median was 25 percent higher than what it has been the past three years.

The United States District Court for the District of Arizona had the highest average. It produced 5 of the Top 10 verdicts of the year, and its average was \$7,304,775. Arizona's federal court reported 31 civil verdicts in 2009, a few more than usual. Sixteen of those were defense verdicts. Even the federal court's

Top 10 Arizona Verdicts in 2009

median was well into seven figures at \$2,005,110, which was significantly higher than last year or in other recent years.

Santa Cruz County's average was unusually elevated this year. It reported only two verdicts the entire year, one of which tied for the number 9 verdict of \$5 million (*see Groom v. Clyne*, above). Its average/median verdict was \$2,500,668. In recent years, Santa Cruz County's average has been about 10 percent of that, in the \$200,000 to \$300,000 range.

Maricopa County reported the third-highest average verdict of \$1,164,790, much lower than the past two years' averages. This county, home to Phoenix, is where the majority of Arizona verdicts are rendered. Maricopa County produced 5 of the Top 10 verdicts this year. There were also many smaller verdicts, making Maricopa County's median verdict \$77,519.

The next two highest counties had only two reported plaintiffs' verdicts each, which makes it difficult to call these true "averages" due to the limited amount of data. Both Cochise and Navajo

County had verdicts higher than in recent years. Cochise County had an average and median of \$863,400; its average is typically about half that. Navajo County's average and median was \$511,000. Navajo County often produces only defense verdicts and no plaintiff's verdicts, and its average only reached six figures in one other recent year.

Pinal County's average was \$360,128, and its median was \$302,000. Following that was Coconino County, with an average and median of \$325,000.

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 all over the map the past few years. Its averages have ranged from low six figures to near \$1 million. In 2009, Pima County's average was \$243,209. Except for one brief dip in 2006, its verdict median has remained around \$50,000, and it was so again in 2009, at \$40,000.

The outlying Arizona counties tend to produce few verdicts at

all and those that they do produce are rarely into six figures. Gila County's average and median was \$136,895. Mohave County's single plaintiff's verdict resulted in an average and median of \$116,134. Rounding out the lower part of the ranges, Yuma County's single plaintiff's verdict resulted in an average and median of \$91,798. Yavapai County had an average and median of \$56,500.

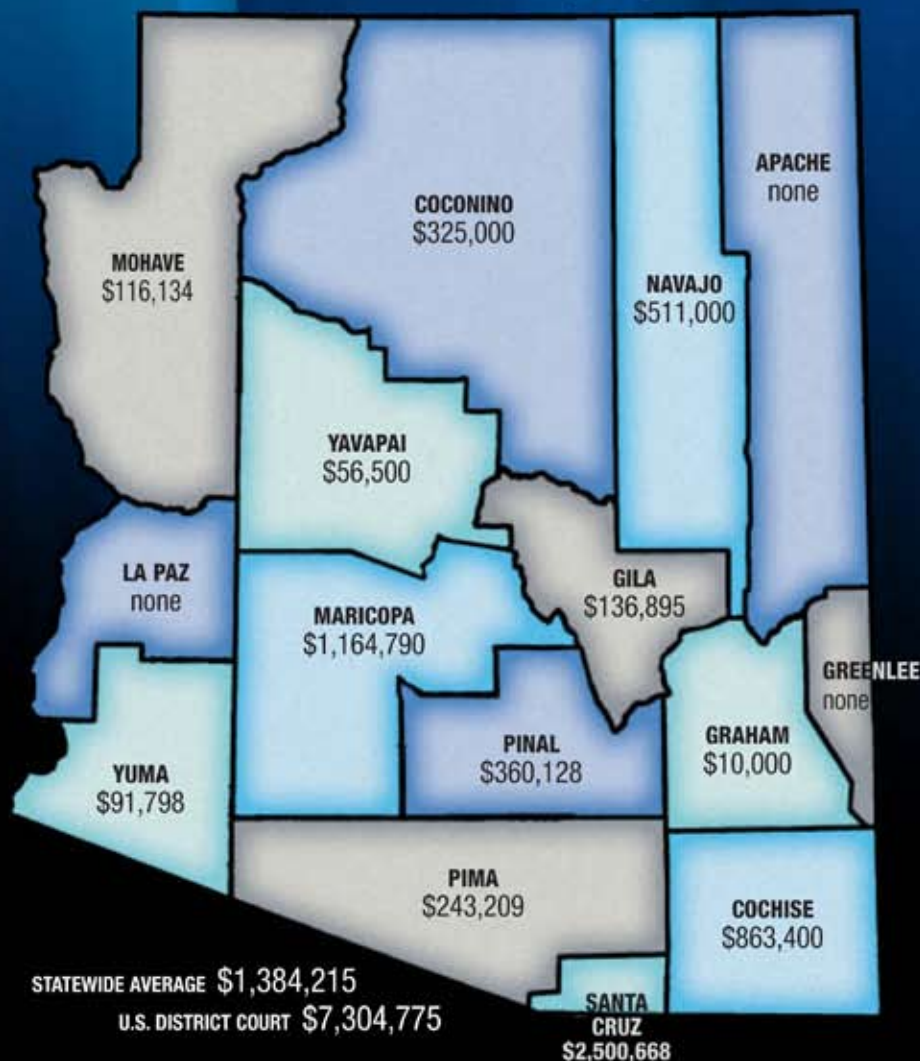
Graham County, in the eastern mountains, has produced only three reported civil verdicts in the past six years, always under \$80,000. With a third verdict this past year, its average and median in 2009 was \$10,000.

No civil verdicts were reported out of Apache County, La Paz County or Greenlee County. The average by venue is highlighted in the chart on this page.

Plaintiffs Won 56 Percent of the Trials

Statewide, plaintiffs prevailed in 56 percent of the trials, and defendants prevailed in 44 percent. After a more favorable year for plaintiffs in 2008, that marked a return to the largely 50-50 split that has been the general trend in Arizona in recent years.

2009 Reported Arizona Verdict Averages By Venue



Federal court continues its reign as a more defendant-friendly venue than state court. In every one of the last six years, federal court has been distinctly more statistically favorable to defendants than state court on verdicts. No surprise, it happened again this year. In the United States District Court for the District of Arizona in 2009, civil defendants prevailed in 53 percent of the reported verdicts.

Business Verdicts Higher Than Personal Injury Verdicts

In 2009, 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 \$2,594,942, with a median of \$189,941. Such cases included breach of contract, breach of fiduciary duty, employment, insurance bad faith, condemnation, malpractice and property damage. After a spike in the average commercial recoveries the past two years, that average was about equivalent to that in 2006.

The average personal injury verdict was \$453,867, and its median was \$32,022. The cases in this category had one or more people who were physically injured. They included motor vehicle accident injury, product liability, medical malpractice, assault, excessive force and wrongful death matters. Nationally, motor vehicle verdicts were up 37 percent,¹⁸ and Arizona saw nearly the same, with an increase of 31 percent in its motor vehicle case recoveries.

Punitive Awards

Punitive damages were awarded more often in 2009 than in any of the last six years. They were awarded in 16 cases in 2009, in nearly 10 percent of the cases that plaintiffs won. That was a major spike in Arizona. Interestingly, about two-thirds of the punitive awards occurred in the first five months of 2009.

There were four cases in which the punitive damages were more than a million dollars, including three from the "Top 10." Punitive damages were given in wrongful termination, dram shop, insurance bad faith, battery and fraud cases, as well as in a case arising from a hit-and-run car crash. The punitive awards ranged from a high of \$55 million to a low of \$1,388. Many of the punitive awards were appealed.

Number of Cases That Went to Verdict

Last year in this article, we observed a noticeable drop of 10 percent to 20 percent in the number of cases that went to verdict in 2008 as compared to recent years. In 2009, the number of cases tried to verdict in Arizona rebounded. There were 299 cases tried in verdict in 2009. That was nearly back to the same volume of cases tried each year between 2004 and 2007.

Significant Defense Verdicts

In the first five or so months of 2009, defense verdicts were actually outpacing plaintiffs' verdicts in Arizona. That had never happened before in our six years of tracking verdicts. It leveled out the remainder of the year and returned to the more general 50-50 balance. The defense verdicts highlighted below are those

in which the claimed damages were high, and this analysis focuses on different types of cases that had the largest claimed damages. Here are a few of the year's significant Arizona defense verdicts:

A. *Ervin Hale and Maria Hale v. Dewane Brueske*, Yuma County Superior Court, CV-2005-00439

This was a medical malpractice case for neurological impairments sustained by the Hales' 3-year-old son. Joyoko Wigfall Hale was seen and treated by emergency medicine doctor Dewane Brueske. The Hales alleged that Brueske failed to diagnose and treat their son's herpes encephalitis infection. They alleged that if the antiviral drug acyclovir had been administered shortly after Hale was admitted, he would have remained neurologically normal. The Hales asked for \$27.2 million in damages.

The doctor denied any breach in the standard of care and defended that early administration of acyclovir would not have made a difference or reversed the damage caused by the infection.¹⁹

B. *Penny Plass v. Steven L. Evans, P.L.C.*,²⁰ Maricopa County Superior Court, CV-2006-019533

This case for legal malpractice was brought by the children of decedent Dorothy Glass. They alleged they retained Steven L. Evans to bring claims against John C. Lincoln Hospital for claims of elder abuse and neglect after their mother sustained a leg injury and died at the hospital. The children of Glass asked the jury to award \$11 million on wrongful death and abuse/neglect claims.

Evans defended that he declined to pursue the claims and had informed Glass' children of that decision. As to the underlying claim, Evans also argued that plaintiffs would not have successfully prosecuted a medical malpractice claim and presented evidence regarding the medical standard of care and causation.

C. *Raul Zendejas v. Shell Oil Co.*,²¹ Maricopa County Superior Court, CV-2007-005399

Raul Zendejas was a gasoline delivery driver for nonparty McNeece Brothers Oil Co., Inc. Shell Oil Co. provided the gasoline, solvents and chemicals. Zendejas alleged he was exposed to harmful levels of benzene and developed leukemia as a result. Zendejas had two bone marrow transplants and had been unable to work since April 2006. He alleged Shell Oil should have required his employer to install vapor recovery equipment and required the use of personal protective equipment, and failed to warn of the hazards of benzene. Zendejas asked for \$10 million.

Shell Oil defended that there was no medical evidence linking gasoline with leukemia, and that benzene in gas is not a cancer-causing agent and did not cause his leukemia. Shell Oil contended that its gas was reasonably safe and complied with all federal regulations, and its warnings were appropriate.

D. *Dustin Anderson v. Ford Motor Co.*, Maricopa County Superior Court, CV-06-053189

In this product liability case, Dustin Anderson was driving a 2001 Pathfinder toward Flagstaff on Interstate 17. As he drove on an icy portion of road, he lost control of the vehicle. The Pathfinder went into a spin, entered the median and rolled over several times. Anderson sustained a traumatic brain injury, which he claimed occurred when his head was partially ejected through his window frame and contacted the ground. He alleged that the Pathfinder should have had electronic stability control and that it should have had a safety canopy system that activates side-curtain airbags in a rollover. He asked the jury to award \$9.6 million.

Nissan demonstrated that electronic stability control and side airbags would not have prevented this rollover or plaintiffs' injuries, and that neither of those systems were feasible in a 2001 Pathfinder. This was the second year in a row in which automotive manufacturers prevailed in a major verdict where similar theories were raised.

E. *Pat Linneen et al. v. City of Chandler et al.*,²² Maricopa County Superior Court, CV-2005-011881

Five high school students left campus in a car on a lunch break. Shayna Linneen was driving a VW Beetle, and her passengers included Krystal Ebel and Tyler Spurbeck. A second vehicle driven by Alfred Galaviz merged into Linneen's lane and she swerved to avoid it. The Linneen vehicle went into a raised median island, hit a palm tree stump, pivoted and hit a second palm tree. The VW was propelled into the oncoming lane, where it was hit by a truck. Linneen and Ebel died as a result of the crash and Spurbeck was injured. Plaintiffs alleged that the tree stump caused the loss of control, that Chandler failed to remove the tree stump from the median and that the road design was not safe. Plaintiffs alleged that Galaviz made an unsafe lane change. Plaintiffs asked the jury collectively for approximately \$6.6 million.

Chandler contended the road design was reasonably safe and complied with the standard of care, and that the collision with the truck would likely have caused fatal and serious injuries even if the stump had not been in the median. Galaviz argued that Linneen failed to reasonably observe his lane change and overreacted. The jury found in favor of both defendants.

F. *Duane Wozniak v. Employers Mutual Casualty Co.*, Maricopa County Superior Court, CV-2006-015647

On February 5, 2004, Duane Wozniak's vehicle was hit head-on by another driver. The second driver paid his auto policy limits of \$15,000 to Wozniak. Wozniak alleged he developed arthritis as a result of his injuries and he made an under-insured motorist claim to his insurance company, Employers Mutual Casualty Co. Wozniak alleged that Employers Mutual failed to properly handle his claim and breached its duty of good faith. Wozniak made a pretrial demand of his \$1 million policy limit and at trial demanded an additional \$3 million to \$5 million in punitive damages.

Employers Mutual argued it had offered money to settle and was willing to continue negotiating but was cut short when Wozniak filed suit.

G. *Edwin Vigil et al. v. Starwood Hotels & Resort Worldwide, Inc. et al.*,²³ Maricopa County Superior Court, CV-2006-008663

Edwin and Denise Vigil stayed at the Westin Kierland Resort & Spa in Scottsdale for three days in July 2004. They claimed that they were bitten by mosquitoes while they slept and contracted West Nile virus as a result. The Vigils claimed that the hotel failed to follow county advisories for treatment of mosquitoes, failed to provide screens on patio doors, and failed to warn about the mosquitoes. Edwin Vigil alleged that he had arm weakness, dizziness, muscle twitching and fatigue and was essentially unemployable. The Vigils asked for \$1.5 million.

Starwood Hotels and its related defendants contended that they followed county recommendations and hired a contractor to deal with insects. Starwood also contended that the Vigils were at fault for leaving the patio door open in spite of the warnings on the doors to keep them closed, and that the mosquitoes came from the surrounding community rather than a breeding site on its property.

H. *Joochul Kim v. Arizona State University*, United States District Court for the District of Arizona, 2004-CV-1931

Joochul Kim was an Associate Professor at Arizona State University. He was denied promotion to full professor. He alleged that the denial was wrongfully based on his race and Korean national origin. He asked for lost wages for the difference in salary, and alleged that \$1 million would not be sufficient to compensate him.

Arizona State University defended that his research activity record was insufficient to merit promotion.²⁴

Trends

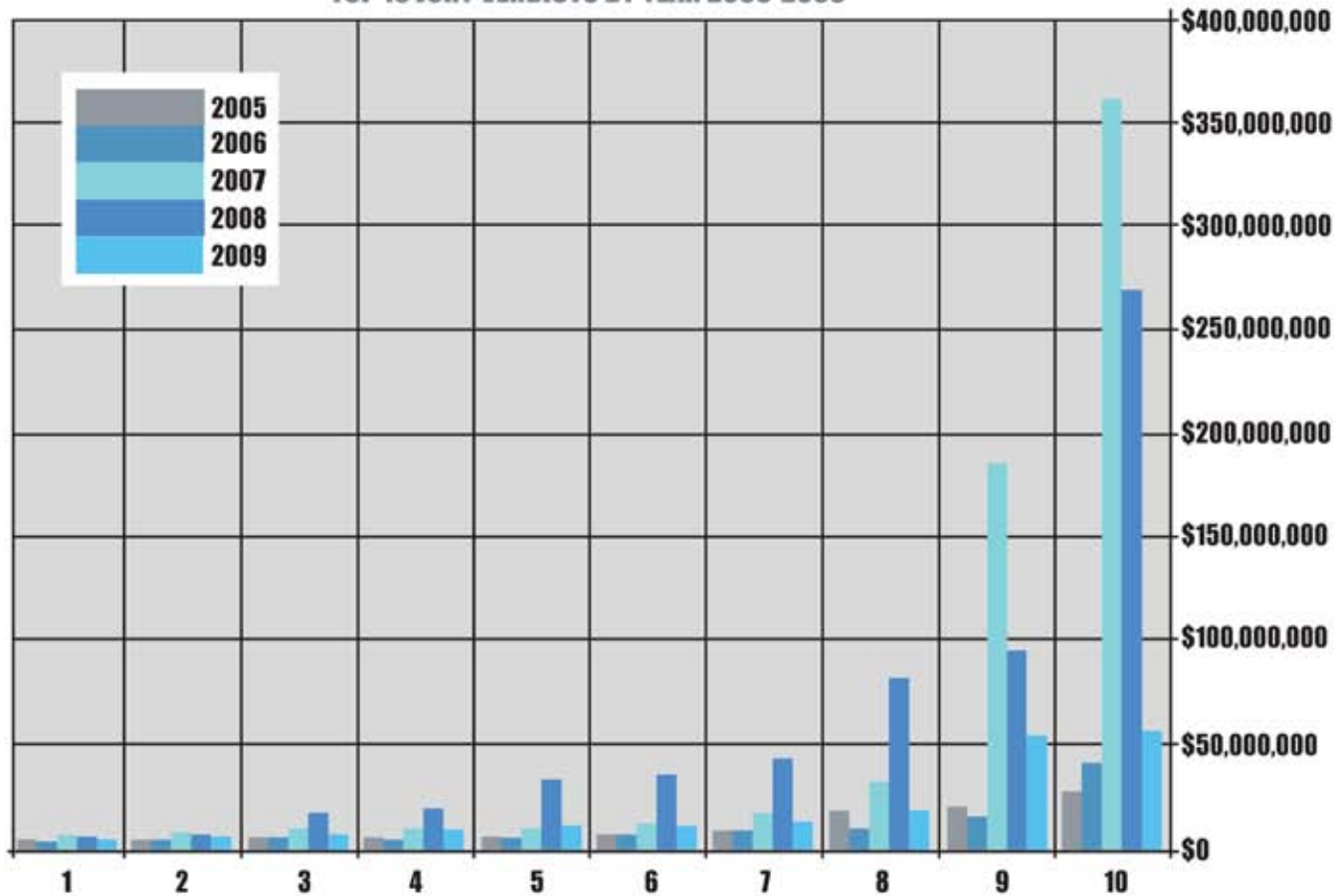
Here are some observations on Arizona verdict trends, as we continue our multi-year analysis. This is the sixth year for this article and we've reviewed about 1,800 verdicts. The graph on page 38 shows the chart of the top verdicts over the most recent five years.

The awards at the very highest end went up dramatically in 2007 and 2008 and leveled off somewhat in 2009. Punitive damages are still comparatively uncommon, but they were given more often than ever in 2009. 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 percent to 67 percent, and the five-year average chance of winning as a plaintiff was 59 percent. The outlying Arizona counties tended to generate defense verdicts and relatively low plaintiffs' verdicts, although the plaintiffs' verdicts in those counties have been on the rise.

Where Are They Now?

What happens to the big verdicts that make our "Top 10" list each year? Many of them are appealed, some are paid, and, like the rest of the universe of civil cases, many are settled. Although this is not a com-

TOP 10 JURY VERDICTS BY YEAR 2005-2009



prehensive look at all the recent verdicts, here are a few of our past years' top verdicts that had notable further developments in 2009:

- *Marlyn Nutraceuticals, Inc. v. World Nutrition, Inc., Patrick Buehl and William Wong*, United States District Court for the District of Arizona, 2002-CV-01876

This was a retrial of the number 5 verdict in 2006 in which the jury awarded \$6.325 million. Plaintiff Marlyn Nutraceuticals, dba Naturally Vitamins, is an Arizona distributor of an enzyme product called Wobenzym. World Nutrition introduced a competing enzyme product called Vitalzym. Defendants incorrectly claimed that Wobenzym was quarantined due to mad cow disease, and claimed that their own product was faster and required smaller doses. Marlyn Nutraceuticals claimed that its former employee took its customer list and used it for direct mailing. World Nutrition contended its claims were mere puffing and that the customer list was not confidential.

In 2009 at the retrial on very similar claims and before the same judge, the jury awarded \$2,005,110, less than a third of the previous award.

- *Jeff Brethauer v. General Motors Corp.*, Court of Appeals of Arizona Division One, 1 CA-CV 07-0530

Brethauer was listed as a significant defense verdict in 2007. In this product liability case, Brethauer was driving a 1998 Chevrolet pickup truck on I-17 in a heavy rainstorm. The truck hydroplaned, ran off the highway and hit a steep embankment. Brethauer was ejected and sustained paralyzing injuries. GM demonstrated that he was not wearing the seatbelt, and that the alternative laminated glass design was not safer and would not have prevented his ejection.

In 2009, the Arizona Court of Appeals rejected most of plaintiffs' challenges and upheld the verdict. The court also found that a jury instruction on the consumer expectation test was appropriate for the driver's seatbelt at issue. Plaintiffs appealed to the Arizona Supreme Court, but the appeal was stayed when GM went into bankruptcy.

- *Thomas Hudgins and Leroy Devore v. Southwest Airlines, Inc.*, Court of Appeals of Arizona, No. 1 CA-CV 07-0366

This was the number 4 verdict in 2006. Exactly two years before 9/11, plaintiff "bail bond agents," on their way to arrest a fugitive, flew from Baltimore to Phoenix on Southwest Airlines. They had arranged to "fly armed," meaning that they lawfully took their guns on the plane with them. The pilot radioed that they did not have authorization and after landing they were incarcerated for three days. Federal

criminal charges and civil sanctions by the FAA were filed against them, but all later dropped. In their 2006 trial, the jury awarded \$9 million, including \$4 million in punitive damages.

In 2009, the Arizona Court of Appeals rejected most of Southwest's challenges but reversed the award of unconstitutionally excessive punitive damages. The judgment was reduced to a total of \$1 million in punitive damages.

Conclusion

I spent the first six weeks of 2010 in trial. I learned great things every day from my trial partner, the utterly unflappable Warren Platt. It gave me a renewed sense of how much background work

and dedication the art of trial really takes. It also brought back to me that moment of inspiration that I'll always remember from law school Trial Practice, when I had that "aha" moment about how fun and exciting it could be.

If you're still reading this, you're about halfway through the year after the end of the Great Recession. So give yourself a pat on the back. One way or another, you made it through. And now you've made it through this story.

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

endnotes

1. Thanks to the readers of this annual article for your positive comments and the encouragement to keep writing it. I'm grateful to my husband and family who helped me to weather the storms of trial and all else. Thanks to Snell & Wilmer L.L.P., whose name I've always been proud to have linked with mine.
2. This year's article is dedicated to two friends lost to the legal world recently. Jonas Saunders was a calm and steady presence who helped us avoid bad verdicts and find the middle ground. His last verdict was a huge win, and he was respected nationwide on both sides. Dan McAuliffe was a true intellectual of great spirit. He was a frequent author on these and many other pages, and I'll always remember how he especially encouraged me on a challenging case.
3. This article analyzes 299 civil verdicts reported from the Superior Courts of Arizona and the United States District Court and Bankruptcy Court for the District of Arizona in 2009. 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. *Science Foundation of Arizona, Inc. v. State of Arizona*, Maricopa County Superior Court, CV-2009-014795.
5. Sheri Qualters, *Top Verdicts of 2009*, NATIONAL LAW JOURNAL, Mar. 15, 2010, at 18.
6. *Id.*
7. Nora Lockwood Tooher, *Florida Jury Awards \$330M in DUI Fatality*, LAWYERSUSA, Jan. 15, 2010, at 4.
8. Susan Bocamazo, *Top 10 Jury Verdicts 2009*, LAWYERSUSA, Jan. 15, 2010, at 2-14.
9. 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.
10. Defendants filed a motion for a new trial, which was denied, and have filed an appeal, which is pending.
11. Post-trial, the court reduced the punitive portion of the award to \$620,000. Applying *State Farm* and its related Arizona cases, the court found the ratio between the compensatory and punitive damages to be "unconstitutionally excessive" and reduced it to a 4:1 ratio. Order dated Aug. 5, 2009.
12. Other defendants were William Aubrey and Brenda Todd. Defendants appealed the judgment to a district court judge, who affirmed it. They also filed notices of appeal, which are pending.
13. Prior to verdict, the parties had entered into a \$2 million/\$500,000 high/low agreement.
14. Other defendants were USSO, LLC; CASC, Inc.; Atlanta SC, Inc.; and IGOVincent, Inc. Defendants filed motions for a new trial and for judgment as a matter of law, which were denied. The court doubled the jury's awards on the claim for trademark infringement to \$5 million and on the claim for false advertising to \$2 million, rendering the total award \$10.1 million.
15. Before the second phase, Nelcela entered into a settlement agreement with Lexcel that resolved Lexcel's copyright infringement claims. The trial in the second phase of the case was of claims asserted by Post Integrations, Inc. and Merchant Transaction Systems against Nelcela and claims of Nelcela against Post Integrations.
16. Defendants filed a motion to amend the judgment or in the alternative for a new trial, and that motion is pending.
17. Desert Sky Esplanade filed a motion for a new trial, which was denied, and has filed an appeal, which is pending.
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. Qualters, *supra* note 4, at 18.
20. Plaintiffs filed a motion for a new trial, which was denied.
21. Other plaintiffs were Timothy Glass, Ruth Michael, Elizabeth Miller and Estate of Dorothy Glass. Other defendants were Steven L. Evans and Marta Evans. The defense verdict was on the wrongful death claim; the jury deadlocked on the abuse/neglect claim, and the last vote was 5-2 in favor of defendants.
22. Another plaintiff was Araceli Zendejas. Other defendants were Shell Chemical LP and Shell Chemical Corp.
23. Other plaintiffs were Rebecca Linneen, Dennis Ebel, Donna Oltmann-Ebel and Tyler Spurbek. A second defendant was Alfred Galaviz, Jr. After this accident, several Arizona school districts adopted closed-campus policies, and stricter driving laws for teens were proposed.
24. Other plaintiffs were Denise Vigil and Alexis Vigil. Other defendants were Starwood Hotels & Resorts, Kierland Resort Co. LLC, Westin Kierland LLC, The Westin Kierland Resort & Spa, Woodbine Development Corp., Troon Golf LLC, Troon Golf Administration LLC, and Troon Golf Management Inc. Plaintiffs filed a motion for a new trial, which was denied.
25. Other defendants were the Arizona Board of Regents and Alvin Mushkatel. Plaintiff filed a motion for a new trial, which was denied.