

Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?

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Introduction

Plaintiffs’ attorneys are aggressively asking jurors to award ever-higher sums for pain and suffering, and often getting it.¹ Summation anchoring—requesting an unjustifiably high noneconomic damage award in closing—is highly effective, particularly when sympathetic jurors lack objective means to determine compensation for pain and suffering. Research shows, “the more you ask for, the more you get.”²

The cycle of plaintiffs’ counsel asking for and receiving inflated noneconomic damage awards—that are frequently reduced post-trial and on appeal—is inefficient.³ Courts and legislatures should address

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¹ See David Tobenkin, *Panic! In the Courtroom*, LEADER’S EDGE (Mar. 1, 2020), <https://www.leadersedge.com/industry/panic-in-the-courtroom> (“[S]tatistics show a steady rise in the largest U.S. verdicts from 2014 to 2018.”).

² Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 519 (1996).

³ See Thomas W. Tardy II & Taylor H. Wilkins, Commentary, *Asbestos: An Immature Tort (The Contrarian View)*, 32 MEALEY’S LITIG. REP.: ASBESTOS 1, 2 (Sept. 13, 2017) (“Even when defendants lose at trial, the verdicts are often reduced and sometimes overturned. The average jury award for asbestos plaintiffs nationally during

anchoring tactics by plaintiffs' counsel that contribute to nuclear verdicts and social inflation.⁴

I. Anchoring Is a Highly Effective Tactic for Generating Excessive Verdicts

An “anchor” provided by a plaintiff’s counsel creates an arbitrary, but psychologically powerful, baseline for jurors who are struggling with assigning a monetary value to pain and suffering.⁵ As Dr. Sonia Chopra, a litigation consultant, explained in *Plaintiff* magazine, “once an anchor number has been provided, the number exerts undue influence on the final figure” and “can sway decisions even when the anchor provided is completely arbitrary.”⁶ Similarly, Patricia Kuehn in *Trial* magazine observed, “It is well recognized that a numerical anchor influences jurors’ judgment about damages even if they do not recognize that the anchor affected their decision.”⁷ Jurors who are bombarded with information during a trial suffer from “cognitive overload” and “unconsciously welcome the presence of an anchor that will reduce the cognitive effort needed.”⁸

Jurors may accept the suggested amount or “compromise” by negotiating it upward or downward.⁹ Although any category of damages

2008-2016 was approximately \$9.3 million. The average verdict nationally *after* reductions were taken into consideration was a considerably lower \$6.3 million.”).

⁴ See Telios Demos, *The Specter of Social Inflation Haunts Insurers*, WALL ST. J. (Dec. 27, 2019), <https://www.wsj.com/articles/the-specter-of-social-inflation-haunts-insurers-11577442780> (“One form of social inflation that executives point to are larger jury awards against big companies . . .”).

⁵ See Kathleen Flynn Peterson et al., *Dropping the Anchor*, TRIAL, Apr. 2017, at 34, 34 (“People often rely on the first number they are given as a baseline when making decisions.”).

⁶ Sonia Chopra, *The Psychology of Asking a Jury for a Damage Award*, PLAINTIFF, Mar. 2013, at 1, 1; see also Timothy D. Wilson et al., *A New Look at Anchoring Effects: Basic Anchoring and its Antecedents*, 125 J. EXPERIMENTAL PSYCHOL. 387, 399 (1996) (“[C]ompletely arbitrary numbers can anchor people’s judgments.”).

⁷ Patricia Kuehn, *Translating Pain and Suffering Damages*, TRIAL, Nov. 2020, at 26, 27.

⁸ David A. Wenner, *Anchoring: A Trial Lawyer’s Tool*, ANNUAL AAJ-PAPERS, at 20 (2013).

⁹ See *Hodge v. State Farm Mut. Auto. Ins. Co.*, 884 N.W.2d 238, 255-56 (Mich. 2016) (Markman, J., concurring) (recognizing that “a jury’s final award may sometimes

may be influenced by anchoring, the practice has the greatest impact on noneconomic damages because these awards are highly subjective and not easily quantified by a dollar amount.¹⁰

In some cases, a plaintiff's lawyer will simply suggest that the jury return a specific amount for the client's pain and suffering. More often, "to make large amounts more palatable," plaintiffs' lawyers will "argue that the jury should fix the plaintiff's compensation at a set amount per day, week, month, or year, and then multiply that amount by the length of time remaining in the plaintiff's life expectancy" (referred to as a "per diem" argument).¹¹ Thus, "\$100 per day for pain and suffering becomes \$36,500 per year, or more than \$1 million over thirty years."¹² In some cases, the lawyer links the proposed amount or formula to some other aspect of the case, however irrelevant to the person's pain and suffering.¹³ This may be the amount the defendant compensated its CEO¹⁴ or its trial experts.¹⁵ Whatever the approach, the goal is to prompt the jury to reach a multi-million dollar pain and suffering award.

be unduly affected by a large initial presentation of damages," which sets the award's range and then may be "discounted" based on the plaintiff's credibility).

¹⁰ See Don Rushing et al., *Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings*, 70 DEF. COUNS. J. 378, 381 (July 2003); see also DAN B. DOBBS, LAW OF REMEDIES § 8.1(4), at 683 (3d ed. 2018) ("[T]here is no way to measure the amounts that should be given [for pain and suffering damages and the] . . . verdict[s] vary enormously . . .").

¹¹ Stacey L. Pietrowicz, *Closing Argument-Plaintiff's Perspective*, MASS. COURTROOM ADVOC. 10-1, § 10.10.1 (3d ed. 2019).

¹² *Id.*; see also Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 TENN. L. REV. 1, 11 (2003).

¹³ See Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUDIES 120, 144 (2011) ("[T]he research literature on anchoring includes many successful demonstrations of the anchoring process using arbitrary or nonsense anchors, such as numbers from a roulette wheel spin or the last four digits of a Social Security or telephone number . . . [but] there is a strong expectation that a meaningful anchor will be more persuasive than an arbitrary one . . .").

¹⁴ See *infra* note 40 and accompanying text.

¹⁵ See *infra* note 41 and accompanying text.

Empirical research proves the effectiveness of anchoring.¹⁶ For instance, a 2017 study confirmed that anchoring “dramatically increases” noneconomic damage awards.¹⁷ In that study, participants watched a mock medical malpractice trial where a doctor allegedly failed to diagnose a case of lumbar radiculopathy, which would have avoided the need for surgery and the plaintiff suffering a permanent disability.¹⁸ When mock jurors were left to decide the amount of pain and suffering the plaintiff would experience for life (an expected nine and a half years) without influence, mock jurors awarded a mean of \$473,489 and a median of \$225,000.¹⁹ But when plaintiff’s counsel requested \$5 million for nine and a half years of pain, the mock jurors awarded a mean of \$1.9 million and a median of \$1 million—quadruple the unanchored amount.²⁰

Although some anchoring tactics may be more effective than others, whether a plaintiffs’ counsel suggests that the jury use a time-based formula to calculate a pain and suffering award or simply urges them to award a specific amount can both lead to significantly higher verdicts than when jurors are left to decide a reasonable award without such influences. For example, one study divided 180 participants into groups in which they were read a five-page summary of an automobile negligence case in which the defendant driver hit the plaintiff, an eigh-

¹⁶ The effectiveness of anchoring has been proven in numerous non-legal contexts. See Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F. L. REV. 393, 396-97 (2018) (explaining the anchoring influence on consumer purchases where consumers are more likely to buy more if goods are marketed as six cans for three dollars or “limit of 4 cans”); *id.* at 397 (describing how estimating the fair market value of a house can have an anchoring effect on amateurs and experienced realtors influenced by the list price); *id.* at 396 (describing the anchoring effect on answering jeopardy-style questions where respondents answered a higher or lower percentage to the question of what are the “percentage of African counties in the United Nations” depending on the value of a random number returned from a wheel-of-fortune spin).

¹⁷ John Campbell et al., *Time Is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 WASH. U. L. REV. 1, 28 (2017).

¹⁸ *Id.* at 17.

¹⁹ *Id.* at 22.

²⁰ *Id.* The returned award was slightly higher—a mean of just over \$2 million and a median of \$1 million—when the plaintiff’s attorney requested a lump sum of \$5 million and also added that this amount would compensate for 9.5 years, or “4,979,520 minutes of pain that could have been avoided.” *Id.* at 17.

teen-year-old pedestrian, when he swerved to avoid a collision with the car in front of him.²¹ Mock jurors who were left to decide an award for the plaintiff's two years of pain and suffering on their own reached a mean award of \$61,257.²² When the trial summary included a closing argument that requested ten dollars for every hour of pain and suffering the plaintiff endured, mock jurors returned a median award of \$149,614.²³ A request for a lump sum of \$175,000 had a similar effect, resulting in a median award of \$151,000.²⁴ In each situation, the anchor proved highly influential, with mock jurors discounting slightly from the attorney's request.²⁵

In a third study, 763 mock jurors read a summary from one of two automobile accident cases.²⁶ Mock jurors were told the defendant was already found liable, all medical bills had been resolved, and it was now their duty to determine a value for the person's pain and suffering.²⁷ To assess the impact of anchoring, some jurors received a number that was meaningful to the case, a number that was meaningless to the case, or no number at all.²⁸ The mock jurors were most influenced by how much the injury interfered with the person's life, the anchor number, and the culpability of the parties.²⁹ The authors concluded that "mock jurors recognized they were influenced by the anchor to some extent, particu-

²¹ See Bradley D. McAuliff & Brian H. Bornstein, *All Anchors Are Not Created Equal: The Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards*, 34 L. & HUMAN BEHAV. 164, 167 (2010).

²² *Id.* at 170.

²³ *Id.*

²⁴ *Id.*

²⁵ See *id.* at 171. The study also presented groups of participants with per diem levels of \$240 per day and \$7,300 per month. The \$7,300 per month request resulted in only slightly higher awards than no anchor, likely because jurors viewed the amount, presented in that format, as excessive. As the authors observed, jurors may compare the anchor as "It's only \$10/hour," versus "Wow, that's \$7,300 per month!" *Id.*

²⁶ Krystia Reed et al., *Accounting for Awards: An Examination of Juror Reasoning Behind Pain and Suffering Damage Award Decisions*, 96 DENV. L. REV. 841, 848 (2019).

²⁷ *Id.* at 849.

²⁸ *Id.*

²⁹ *Id.* at 863.

larly when the anchor was relevant or meaningful to the case, but mock jurors seemed to underestimate the extent to which the anchor influenced them.”³⁰

Defense counsel have their hands tied in responding to anchoring tactics. They are often reluctant to offer a counter-anchor because the statement could be viewed as a concession of liability and the effectiveness of suggesting a lower amount is uncertain.³¹ Even if a defendant counters an absurdly high request, “the plaintiff’s counsel hopes that jurors will split the difference between the two numbers, which still allows a nuclear verdict to occur.”³² Defense attorneys also cannot educate the jury by presenting a reasonable range of awards for comparable injuries based on case law. This is not evidence before a jury, and is viewed as a legal, not factual, argument.

In states in which plaintiffs’ lawyers have become increasingly aggressive in proposing amounts or calculations for damages, the post-trial motion and appeal for remittitur have become standard practice. Although courts often reduce excessive awards, remitting awards to the top of the permissible range simply continues the inefficient cycle of trials, post-trial motions and appeals. Additionally, remittitur does nothing to counteract the marketing boost plaintiffs’ counsel obtains from publicizing the initial, inflated verdict.

II. Recent Examples of Anchoring

The trend of rising awards prompted by the “now-ubiquitous”³³ practice of summation anchoring is occurring across the spectrum of

³⁰ *Id.* at 864.

³¹ See John Campbell et al., *Countering the Plaintiff’s Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 IOWA L. REV. 543, 551 (2016) (“Many defense attorneys fear that juries will interpret . . . a response [of offering a counter-anchor] as conceding liability.”).

³² Bill Kanasky, Jr. & George Speckart, *The Nuclear Verdict*, FOR THE DEF., Apr. 2020, at 14, 18.

³³ Timothy R. Capowski & Jonathan P. Shaub, *Improper Summation Anchoring Is Turning the New York Court System on Its Head and Contributing to the Demise of New York State*, N.Y.L.J. (Apr. 28, 2020, 11:00 AM), <https://www.law.com/newyorklawjournal/2020/04/28/improper-summation-anchoring-is-turning-the-new-york-court-system-on-its-head-and-contributing-to-the-demise-of-new-york-state>.

personal injury litigation, as illustrated by three recent “nuclear verdicts” in New York City involving a premises liability claim, a construction injury, and a medical malpractice case.³⁴ In *Perez v. Live Nation Worldwide, Inc.*,³⁵ plaintiff’s counsel asked the jury to award \$85 million in pain and suffering to a construction worker who experienced a brain injury from a fall; the jury responded with an award of \$85.75 million.³⁶

Plaintiffs’ lawyers have asked for tens of millions of dollars for pain and suffering in dozens of New York cases, including several requests in the \$80 million range and one as high as \$130 million.³⁷ In several cases, jurors returned the precise sum for pain and suffering damages requested during summation.³⁸ In other cases, juries returned an inflated amount that was influenced by the baseline provided by plaintiff’s counsel.

Examples from other jurisdictions include:

- A DeKalb County, Georgia case in which a customer was shot in an attempted robbery and carjacking in a supermarket parking lot. The plaintiff’s lawyer asked for \$80 million in damages. The jury responded with an \$81 million award, placing just 14% of the responsibility on the assailants and saddling Kroger, which operated in the high-

³⁴ See *Redish v. Adler*, No. 310294/11, 2019 WL 6269086, at *7-8, 119 N.Y.S.3d 705 (Table) (Sup. Ct. 2019), *aff’d as modified*, 2021 WL 2229663 (N.Y. App. Div. June 3, 2021) (involving a medical malpractice case in which plaintiff requested \$10 million for past pain and suffering and \$30 million for future pain and suffering, resulting in a \$110.6 million award, which included \$90 million for pain and suffering, reduced post-trial); *Perez v. Live Nation Worldwide, Inc.*, No. 158373/2013, 2020 WL 4258745, at *6-7 (N.Y. Sup. Ct. July 24, 2020), *aff’d*, 193 A.D.3d 517 (2021) (involving a construction injury case in which plaintiff’s counsel requested \$85 million in pain and suffering damages and jury awarded \$85.75 million, reduced post-trial); Brief for Business Council of New York State et al. as Amicus Curiae Supporting Respondents, *Hedges v. Planned Sec. Serv., Inc.*, No. 2019-03524, 2020 WL 7365726, at *4 (N.Y. App. Div. 2020) (entailing a security case where plaintiff’s counsel requested \$8 million for past pain and suffering and \$50 million for future pain and suffering, and the jury awarded 75% and 50% of these amounts, respectively).

³⁵ No. 158373/2013, 2020 WL 4258745, at *1 (N.Y. App. Div. 2020)

³⁶ *Perez*, 2020 WL 4258745, at *6-7.

³⁷ See *Top NYS Court Pain & Suffering Personal Injury Verdicts & Improper Anchoring (2010-Present)*, SHAUB AHMUTY CITRIN & SPRATT, https://www.saclaw.com/media/publication/6_Improper-Anchoring-42620.pdf (last updated May 22, 2020) (compiling thirty-one cases).

³⁸ *Id.*

crime area, with \$69.7 million in liability.³⁹ In a similar case against CVS in Fulton County, Georgia, the plaintiff's lawyer asked for \$57 million in damages and the jury returned a \$45 million award, allocating all but 5% of the damages to the pharmacy.⁴⁰

•A San Francisco case in which a groundskeeper claimed he developed non-Hodgkin's lymphoma from exposure to Roundup weedkiller. The plaintiffs' lawyer suggested that the jury award the plaintiff \$1 million in pain and suffering for each of thirty-three years of his expected remaining life. Jurors awarded the plaintiff \$33 million.⁴¹

•A Polk County, Iowa case in which a mix-up of test samples led to an unnecessary surgery. The plaintiff's attorney asked for \$15 million for his client's pain and suffering. The clinic, which admitted liability, suggested \$750,000 as an appropriate amount. The jury awarded \$12.25 million. The award might have been significantly higher had the judge had not blocked the lawyer's attempt to raise his request to \$46.6 million.⁴²

•A Philadelphia case in which the plaintiff alleged that he developed mesothelioma from occupational exposure to asbestos while working at a steel plant. The verdict sheet listed twelve elements of noneconomic damages. During closing argument, the plaintiff's lawyer displayed the verdict sheet and suggested the jury award at least \$1 million for each element. The jury listened, awarding \$12 million.⁴³

³⁹ Greg Land, *DeKalb Jury Awards Nearly \$70M in Kroger Parking Lot Robbery-Shooting Case*, DAILY REP. (Apr. 19, 2019, 5:06 PM), <https://www.law.com/dailyreportonline/2019/04/19/dekalb-jury-awards-nearly-70m-in-kroger-parking-lot-robbery-shooting-case/?sreturn=20210023180331>.

⁴⁰ Greg Land, *Fulton Jury Awards \$43M to Man Shot, Robbed in CVS Parking Lot*, DAILY REP. (Mar. 25, 2019, 2:41 PM), <https://www.law.com/dailyreportonline/2019/03/25/fulton-jury-awards-43m-to-man-shot-robbed-in-cvs-parking-lot/?sreturn=20210023180353>.

⁴¹ See *Johnson v. Monsanto Co.*, 52 Cal. App. 5th 434, 436-48 (Cal. Ct. App. 2020) (reducing verdict post-trial by the appellate court).

⁴² Tony Leys, *Wrong-Patient Prostate Cancer Surgery Costs Iowa Clinic \$12.25 Million in Malpractice Case*, DES MOINES REGISTER (Apr. 5, 2019, 4:20 PM), <https://www.desmoinesregister.com/story/news/health/2019/04/05/wrong-patient-prostate-cancer-surgery-medical-malpractice-trial-verdic-iowa-clinic-health-care-court/3377004002>.

⁴³ See *Nelson v. Airco Welders Supply*, 107 A.3d 146, 162-64 (Pa. Super. Ct. 2014)

•A Decatur County, Georgia case involving a Jeep rollover accident resulting in the death of a child. The plaintiff’s lawyer asked the jury to award \$120 million as the value of the child’s life, linking the amount to the compensation of the automaker’s CEO. That is exactly how much the jury awarded, in addition to \$30 million in damages for pain and suffering.⁴⁴

•A five-plaintiff bellwether trial in which a jury awarded \$141.5 million in noneconomic damages against a hip implant manufacturer. The plaintiffs’ attorney told the jury to award damages “by the day, by the hour, by the minute” and then argued that if the defendants “will pay their experts a thousand dollars an hour to come in here, when you do your math back there don’t tell these plaintiffs that a day in their life is worth less than an hour’s time of this fellow, or people they put on the stand.”⁴⁵ In ordering a new trial, the Fifth Circuit criticized these tactics as “mean[ing] simultaneously to activate the jury’s passions and to anchor their minds to a salient, inflated, and irrelevant dollar figure.”⁴⁶

III. What Makes Anchoring Improper?

The cases above each involve tragic accidents, life-altering injuries or conditions, or loss of life. Jurors understandably feel great empathy for the plaintiffs. They want to do what is right and struggle with the civil justice system’s demand that they place a monetary value on a person’s pain and suffering and other harm that is incapable of objective measurement. Jurors, however, should not be unduly influenced by closing statements that inflame passions, suggest extraordinary sums that are beyond amounts sustained in comparable cases, or manipulate jurors with formulas and calculations intended to produce such results.

(vacating the judgment as resulting from plaintiff’s counsel’s “inappropriate” use of an algebraic formula, as well as inflammatory language).

⁴⁴ *Chrysler Group, LLC v. Walden*, 812 S.E.2d 244, 248 (Ga. 2018) (affirming the trial courts remittal of the damages to \$30 million and \$10 million respectively).

⁴⁵ *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 787 n.71 (5th Cir. 2018).

⁴⁶ *Id.*

For these reasons, about one-third of states prohibit or limit anchoring practices by placing constraints on the use of “lump sum” arguments,⁴⁷ “per diem” arguments,⁴⁸ or both.⁴⁹ States have also limited anchoring through judicial decisions and court rules.⁵⁰

For example, Pennsylvania courts do not permit lump sum demands “in cases where the damages are unliquidated and incapable of measurement by a mathematical standard . . . because they tend to instill impressions in the minds of the jury that are not founded upon the evidence.”⁵¹ Similarly, Delaware courts have long prohibited attorneys from requesting a specific sum, reasoning that no court would allow an expert to testify on the value of an individual’s pain and suffering and that

⁴⁷ See, e.g., N.J. CT. R. 1:7-1(b) (“In civil cases any party may suggest to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum.”). Relatedly, some states prohibit a claimant from demanding a specific amount of noneconomic damages in a complaint or other pleading. See, e.g., ME. REV. STAT. ANN. tit. 14, § 52 (2001); MO. REV. STAT. § 509.050(2) (West 2020); 9 R.I. GEN. LAWS § 9-1-30(a) (West 1956).

⁴⁸ See, e.g., Caley v. Manicke, 182 N.E.2d 206, 208-09 (Ill. 1963); Hartt v. Wiggin, 379 A.2d 155, 158 (Me. 1977); Graeff v. Baptist Temple of Springfield, 576 S.W.2d 291, 302-03 (Mo. 1978); Duguay v. Gelinias, 182 A.2d 451, 453-55 (N.H. 1962); King v. Ry. Exp. Agency, Inc., 107 N.W.2d 509, 517 (N.D. 1961); Felder v. Johnson, 257 S.E.2d 714, 716 (S.C. 1979); Wakole v. Barber, 722 S.E.2d 238, 241 (Va. 2012); Affett v. Milwaukee & Suburban Transp. Corp., 106 N.W.2d 274, 277-79 (Wis. 1960); 4 MAINE PRAC., TRIAL HANDBOOK § 37:10 (2020 ed.) (citing *Hartt* for the proposition that per diem arguments and formulas are prohibited).

⁴⁹ See, e.g., Henne v. Balick, 146 A.2d 394, 398 (Del. 1958); Stassun v. Chapin, 188 A. 111, 111 (Pa. 1936); Crum v. Ward, 122 S.E.2d 18, 27 (W. Va. 1961); Page v. Columbia Nat. Res., Inc., 480 S.E.2d 817, 834 (W. Va. 1996); Henman v. Klinger, 409 P.2d 631, 634-35 (Wyo. 1966); see also Mohnkern v. Gould, No. 1767 WDA 2018, 2019 WL 6770679, at *2 (Pa. Super. Ct. Dec. 12, 2019) (“Counsel in civil cases are prohibited from making statements to the jury, during closing arguments, concerning the amount of non-economic damages expected.”).

⁵⁰ See Campbell et al., *supra* note 17, at 34-48 (providing state law survey); James O. Pearson, Jr., *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering*, 3 A.L.R.4th 940 (1981); Thomas J. Vesper & Richard Orr, *Make Time Palpable by Using Per Diem Arguments*, TRIAL, Oct. 2002, at 1 (“Only 37 states and the District of Columbia allow plaintiff lawyers to either present a bottom-line amount for noneconomic damages or suggest that a specific time unit be used to calculate them.”).

⁵¹ *Stassun*, 188 A. at 111. Per diem arguments are also impermissible in Pennsylvania. See *Ruby v. Casello*, 201 A.2d 219, 220 (Pa. 1964) (reasoning that the plaintiff’s attorney was improper when he suggested to the jury that they should value the plaintiff’s pain and suffering at a dollar per minute).

anchoring practices can be used “solely to introduce and keep before the jury figures out of all proportion to those which the jury would otherwise have had in mind, with the view of securing from the jury a verdict much larger than that warranted by the evidence.”⁵²

Courts in other states, such as Illinois and New Hampshire, permit lump sum requests, but find that offering per diem calculations for pain and suffering awards go too far because they create “an illusion of certainty”⁵³ or “can result in any amount that the imagination of counsel deems advantageous.”⁵⁴ The Wisconsin Supreme Court has observed the “absurdity of a mathematical formula” to measure pain and suffering, since a plaintiff’s counsel can manipulate it by day, hour, minute, second, or “perhaps even a heart beat” to make the award that is sought seem reasonable.⁵⁵ Similarly, the Virginia Supreme Court has recognized that formulas “plunge the already subjective determination [of valuing pain and suffering] into absurdity” and “instill[] in the minds of the jurors impressions, figures and amounts not founded or appearing in the evidence.”⁵⁶ The Missouri Supreme Court recognized over sixty years ago the “ungilded reality” that per diem arguments are designed to “implant in the jurors’ minds definite figures and amounts not theretofore in the record (and which otherwise could not get into the record)” and influence them to award damages accordingly.⁵⁷

Federal courts also differ in their approach to anchoring tactics. The Second Circuit has observed that “[a] jury is likely to infer that counsel’s choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury

⁵² *Henne*, 146 A.2d at 398.

⁵³ *Caley*, 182 N.E.2d at 208.

⁵⁴ *Duguay v. Gelinas*, 182 A.2d 451, 452 (N.H. 1962).

⁵⁵ *Affett v. Milwaukee & Suburban Transp. Corp.*, 106 N.W.2d 274, 279-80 (Wis. 1960).

⁵⁶ *Certified T.V. & Appliance Co. v. Harrington*, 109 S.E.2d 126, 130 (Va. 1959). *Cf. Wakole v. Barber*, 722 S.E.2d 238, 240 (Va. 2012) (distinguishing *Certified T.V.* to allow plaintiff’s counsel to request a fixed amount for noneconomic damages so long as the amount is supported by the evidence in the record and is not based on a per diem or other fixed basis).

⁵⁷ *Faught v. Washam*, 329 S.W.2d 588, 603 (Mo. 1959), *overruled on other grounds*, *Tune & Synergy Gas Corp.*, 883 S.W.2d 10 (Mo. 1994) (en banc).

unduly.”⁵⁸ For that reason, the Second Circuit disfavors anchoring and has urged trial court judges to bar this “[un]desirable practice.”⁵⁹ The Third Circuit has prohibited the “troublesome practice” of attorneys requesting a specific amount of damages for pain and suffering.⁶⁰ The court reached this decision in an auto accident case⁶¹ in which plaintiff’s counsel dropped a \$3,799,000 anchor—the amount the plaintiff would have earned in a lifetime if he were an attorney—and then called that amount “peanuts,” suggesting that the jury return a multiplier of that figure.⁶² The Fifth Circuit recently reaffirmed that unit-of-time arguments are “impermissible because they can lead the jury to ‘believe that the determination of a proper award for pain and suffering is a matter of precise and accurate determination and not, as it really is, a matter to be left to the jury’s determination, uninfluenced by arguments and charts.’”⁶³

Should plaintiffs’ attorneys be faulted for using anchoring techniques that “exploit the irrational tendencies of jurors,” manipulating them to reach larger awards than jurors would otherwise do based on their own values, judgment, and experience?⁶⁴ Professors Linder and Levit of the University of Missouri-Kansas City School of Law consider this

⁵⁸ *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1016-17 (2d Cir. 1995) (reducing the award to \$3.5 million after plaintiff’s counsel’s request and the jury returned a \$12 million pain and suffering award).

⁵⁹ *Id.* at 1016.

⁶⁰ *Waldorf v. Shuta*, 896 F.2d 723, 743-44 (3d Cir. 1990) (holding plaintiff’s counsel may not make a request for a specific lump sum of damages for pain and suffering).

⁶¹ The accident, which stemmed from a malfunctioning traffic light, and the resulting \$8.4 million verdict left a small New Jersey borough scrambling and considering a tax increase on residents because it only held \$1.5 million in insurance coverage. Carlotta Gulvas Swarden, *Award in Accident Leaves Residents Facing Higher Taxes*, N.Y. TIMES (Aug. 27, 1989), <https://www.nytimes.com/1989/08/27/nyregion/kenilworth-journal-award-in-accident-leaves-residents-facing-higher.html>.

⁶² *Shuta*, 896 F.2d at 744. The Third Circuit has allowed plaintiffs’ counsel to make less precise per diem-type arguments. *See, e.g.*, *Rutter v. Rivera*, 74 F. App’x 182, 185-86 (3d Cir. 2003) (finding the suggestion that jury quantify one hour of pain and suffering by considering the cost of taking three children to the movies “much too imprecise to be considered the equivalent of suggesting an actual dollar value”).

⁶³ *In re DePuy Orthopaedics, Inc.*, 888 F.3d 753, 792 n.71 (2018) (alteration omitted) (quoting *Foradori v. Harris*, 523 F.3d 477, 512 (5th Cir. 2008)).

⁶⁴ DOUGLAS O. LINDER & NANCY LEVIT, *THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW* 151-52 (2014).

“troubling question.”⁶⁵ They conclude that, given anchoring’s effectiveness, “[t]he attorney who decides to unilaterally disarm, and swears off any conscious manipulation of human irrationalities, does a disservice to his or her client, the person to whom an attorney’s highest duty lies.”⁶⁶ As a result, anchoring practices will continue so long as the law allows them to continue.

In some instances, however, anchoring tactics may arguably violate rules of professional conduct. Model Rule of Professional Conduct 3.3(a)(1) prohibits a lawyer from making a false statement of fact or law to a tribunal.⁶⁷ In urging jurors to return a certain sum for pain and suffering, a lawyer implicitly indicates to the jury that the suggested sum is supported by facts or by law. When an attorney suggests an amount that is well beyond any award sustained for a similarly situated individual with comparable injuries, or is certain, if awarded, to be reduced by the court, he or she may be stepping over the ethical line.

Nevertheless, many states allow plaintiffs’ lawyers to request that juries award a specific amount for noneconomic damages, make per diem arguments, or both. In a few states, statutes explicitly permit plaintiffs’ lawyers to request that a jury award a specific sum,⁶⁸ which plaintiffs’ lawyers may argue opens the door to seek any amount. Meanwhile, defense lawyers reflecting on this national trend of aggressively seeking ever-higher amounts ask, “How have we gotten to the point in a single-

⁶⁵ *Id.* at 151.

⁶⁶ *Id.* at 152.

⁶⁷ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1) (“A lawyer shall not knowingly: make a false statement of fact or law to a tribunal.”).

⁶⁸ See CONN. GEN. STAT. ANN. § 52-216b(a) (2020) (“[C]ounsel for any party to the action shall be entitled to specifically articulate to the trier of fact during closing arguments, in lump sums or by mathematical formulae, the amount of past and future economic and noneconomic damages claimed to be recoverable.”); GA. CODE ANN. § 9-10-184 (2020) (“[C]ounsel shall be allowed to argue the worth or monetary value of pain and suffering to the jury”); HAW. REV. STAT. § 635-52(b) (2020) (“[C]ounsel shall be entitled to argue the extent of damages claimed or disputed in terms of suggested formulas for the computation of damages”); MASS. GEN. LAWS ch. 231, § 13B (2020) (“[P]arties, through their counsel, may suggest a specific monetary amount for damages at trial.”); TENN. CODE ANN. § 20-9-304 (2020) (“[C]ounsel shall be allowed to argue the worth or monetary value of pain and suffering to the jury”); VA. CODE ANN. § 8.01-379.1 (2020) (“[A]ny party in any civil action may inform the jury of the amount of damages sought by the plaintiff”).

death case where a plaintiff's lawyer feels comfortable asking for almost \$400 million?"⁶⁹

IV. How Can States Address Improper Anchoring Practices?

Scholars, who have closely studied anchoring, recognize "[t]he fact that a plaintiff can recover substantially more money simply by asking for it may suggest that this tactic should not be permitted."⁷⁰ The damaging effects of improper anchoring on the civil justice system can be avoided if courts and legislatures adopt prophylactic measures.

Courts can act through their power to exclude arguments that inflame the jury or suggest levels of damages that are unsupported by admissible evidence or law. This is not a novel proposal. Courts place limits on zealous advocacy by prohibiting attorneys from making factual statements that are unsupported by the evidence, mentioning that a defendant is insured, suggesting jurors place themselves in the plaintiff's position, commenting on witness's credibility based on personal opinion, or misstating the law.⁷¹

Trial court judges can preclude plaintiffs' lawyers from suggesting specific monetary sums for pain and suffering or formulas by granting a defendant's motion in limine.⁷² Even in jurisdictions in which statutes

⁶⁹ Meredith Hobbs, *Are Megamillion Georgia Verdicts 'Nuclear' or Sign of the Times?*, DAILY REP. (Oct. 8, 2019, 4:14 PM) (quoting Bobby Shannon, a defense attorney who tries catastrophic injury and death cases around the country), <https://www.law.com/dailyreportonline/2019/10/08/are-megamillion-georgia-verdicts-nuclear-or-sign-of-the-times>.

⁷⁰ Campbell et al., *supra* note 31, at 564.

⁷¹ See *DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993) ("We have ruled that it is improper for counsel to make a factual statement which is not supported by evidence; to comment on the legitimacy of a client's claim or defense; to mention that the defendant is insured; to suggest to the jury that it place themselves in the plaintiff's position (the 'golden rule' argument); to comment on a witness' credibility based on personal knowledge or evidence not in the record; to vouch for a client's credibility; or to make an erroneous statement of law." (citations omitted)).

⁷² See *Rushing et al.*, *supra* note 10, at 386-89 (discussing how defendants' lawyers can use a motion in limine "to exclude plaintiffs' attorneys' suggestions of specific monetary sums").

or longstanding precedent permit presentation of a specific sum, courts can rule that it is improper for attorneys to suggest that jurors award an amount for pain and suffering or suggest a formula that is inconsistent with providing reasonable compensation to the plaintiff for his or her injuries. Courts can expect attorneys to familiarize themselves with the permissible range of noneconomic damage awards for similar injuries before presenting an amount to the jury. Courts can also admonish counsel when an unjustifiable anchor is “dropped” during summation and instruct the jury to ignore the anchor and determine appropriate compensation for pain and suffering based on their own experiences and judgment. On appeal, courts should squarely address the propriety of anchoring practices, rather than simply affirming a trial court’s remittitur or order further reduction of the unsustainable awards that result.⁷³

In some jurisdictions, courts may have statutory grounds available to address improper anchoring. For example, a New York statute expressly permits attorneys to suggest a specific sum that he or she feels is “appropriate compensation” for any element of damages.⁷⁴ Another New York statute provides that an award cannot be sustained if it “deviates materially from what would be reasonable compensation.”⁷⁵ Courts have recognized that the latter statute “tighten[ed] the range of tolerable awards”⁷⁶ and thus evaluated excessiveness based on awards sustained for comparable injuries. Courts should read these statutes together to find that while personal injury lawyers may request a lump sum, the suggested

⁷³ For example, in one recent decision, a New York appellate court ordered a \$29 million award for future pain and suffering, which the trial court had remitted to \$14.5 million, then further reduced to \$10 million, but declined to address the plaintiff’s use of anchoring during the summation. *Hedges v. Planned Sec. Serv. Inc.*, No. 101854/12, 2021, 2021 WL 96276, at *3-4 (N.Y. App. Div. Jan. 12, 2021). The appellate court took the same approach after a jury returned an \$85.75 million pain and suffering award prompted by plaintiff’s counsel request for an \$85 million award. *See Perez v. Live Nation Worldwide, Inc.*, No. 158373/13, 2021 WL 1373712, at *1-2 (N.Y. App. Div. Apr. 13, 2021) (ordering further reduction of the pain and suffering award from \$40.6 million as remitted by the trial court to \$20 million).

⁷⁴ N.Y. C.P.L.R. 4016(b) (McKinney 2019).

⁷⁵ N.Y. C.P.L.R. 5501(c) (McKinney 2019).

⁷⁶ *Donlon v. City of New York*, 284 A.D.2d 13, 16 (N.Y. App. Div. 2001) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 425 (1996)).

amount cannot exceed levels awarded to similarly situated plaintiffs. Such amounts are not “appropriate” or “reasonable” compensation.⁷⁷

State legislation can also act to curb aggressive anchoring practices, by prohibiting parties from requesting specific sums for pain and suffering, or suggesting use of per diems or other formulas in voir dire or in summation.⁷⁸ Some states, driven by a surge of nuclear verdicts,⁷⁹ have begun considering such legislation.⁸⁰ Statutory limits on noneconomic damages are another remedy for inflated awards.

Alternatively, where the use of lump sums or per diems is permissible and prohibiting them or enacting a cap on noneconomic damages is not politically viable, states can at least require plaintiffs to give notice to defendants of the amount they will request for noneconomic damages in summation. The defendant could then file a motion in limine, if needed, to preclude the plaintiff’s attorney from requesting an amount for noneconomic damages that vastly exceeds prior sustained awards to

⁷⁷ See Timothy R. Capowski & John F. Watkins, *CPLR 5501(c) Review in the Age of Summation ‘Anchoring’ Abuse*, N.Y.L.J. (June 26, 2019, 11:15 AM), <https://www.law.com/newyorklawjournal/2019/06/26/cplr-5501c-review-in-the-age-of-summation-anchoring-abuse> (discussing the reasonable compensation standard of N.Y. C.P.L.R. 5501(c) and that remittitur to the highest amount is appropriate only if the excess is not because of error).

⁷⁸ Comm. Sub. H.B. 148, 2021 Reg. Sess. (Mo. 2021) (providing that in any civil jury trial, “neither party nor their attorneys shall seek or make reference to a specific dollar amount or state a range for the jury to consider with respect to awards for noneconomic damages”). The American Legislative Exchange Council, the nation’s largest nonpartisan, voluntary membership organization of state legislators, recently adopted a model policy to address anchoring tactics in civil trials. See American Legislative Exchange Council, *Anchors Away Act* (updated Jan. 8, 2021), <https://www.alec.org/model-policy/anchors-away-act>.

⁷⁹ See, e.g., Greg Land, *Fretting Over High-Dollar Verdicts, Senate Panel Ponders Legislative Fixes*, DAILY REP. (Oct. 4, 2019, 3:40 PM), <https://www.law.com/dailyreportonline/2019/10/04/fretting-over-high-dollar-verdicts-senate-panel-ponders-legislative-fixes> (discussing a series of recent verdicts in Georgia ranging from \$35 million to \$1 billion against an amusement park, a healthcare provider, a pharmacy, a supermarket, a trucking company, an apartment building, and a security company).

⁸⁰ See, e.g., Comm. Sub. H.B. 148, 2021 Reg. Sess. (Mo. 2021); H.B. 1089, 2019-2020 Reg. Sess. § 1-3 (Ga. 2020) (proposing an amendment to GA. CODE ANN. § 9-10-184 (2020) that would prohibit arguing “directly or by analogy a specific worth or monetary value of pain and suffering or the value of any life in any wrongful death action”).

similarly situated individuals or suggests a punitive—rather than compensatory—purpose.

Conclusion

Anchoring practices may successfully help a plaintiff's lawyer obtain an inflated award for noneconomic damages, but these excessive awards are often reduced or overturned post-trial or on appeal. This cycle is costly and inefficient. Further, as defendants balk at settlement demands that reflect the chance for sky-is-the-limit awards, plaintiff recoveries are delayed. And to the extent extraordinary awards are upheld, the social inflation that results may not be beneficial in the long run since consumers will ultimately have to pick up the tab through higher prices for goods and services. Courts and legislatures should prohibit the practice of anchoring to allow jurors to decide appropriate compensation for noneconomic damages without manipulation by counsel.

