

THE AM LAW LITIGATION DAILY

The Post-Pandemic Uptick in BIG Damages Awards (and What to Do About it)

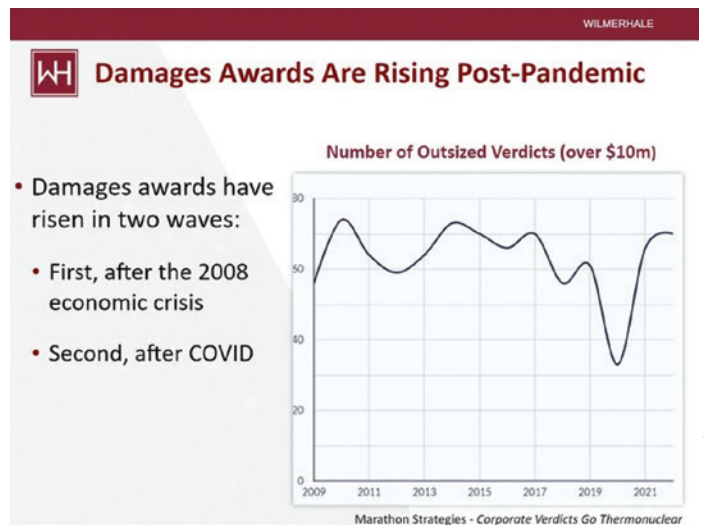
By Ross Todd
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Being the Litigation Daily columnist has its privileges. About a week ago, an Am Law 100 litigation practice group leader I was meeting with told me about a presentation she recently sat in on where **Bill Lee** told members of the **American College of Trial Lawyers** about an uptick he’s seen in big damages awards in the wake of the pandemic and what he thinks litigators should be doing about it.

For most folks, hearing about something like that after the fact, would elicit an: “Oh well. That would have been something interesting to hear.”

My reaction?

I fired off an email to Lee, the **Wilmer Cutler Pickering Hale and Dorr** trial stalwart and winner of at least a nine times Litigator of the Week awards, and asked if he could share his slide deck with me. Not only did Bill share the deck, he arranged a command performance of the ACTL presentation alongside his co-presenter, **Jamie Laird**, the president of **Laird Trial Consulting, L.L.C.**, with whom he estimates he’s gone to trial more than 50 times over the past two decades.



Slide from “Addressing Damages in Post-Pandemic Trials,” a presentation **Bill Lee** and **Jamie Laird** delivered to the **American College of Trial Lawyers** (and **The Litigation Daily**).

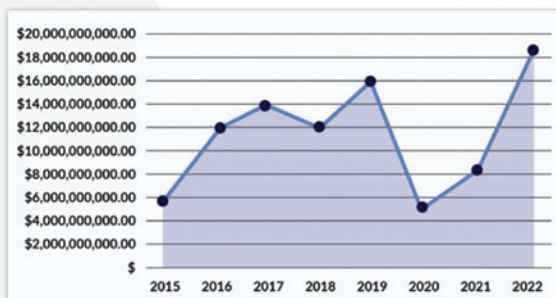
So what’s going on out there on the damages front according to Lee and Laird?

They take as their starting point a report released this spring by public relations and research firm Marathon Strategies digging into more than 1,300 eight-digit plus verdicts found on Law.com’s VerdictSearch and LexisNexis’ Jury Verdicts & Settlements database. As part of their findings, the folks at Marathon showed the median nuclear verdict against corporate defendants—those of \$10 million or more—

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Damages Awards Are Rising Post Pandemic

- Aggregate damages totals from 2015-2022 show the recent spike



Marathon Strategies - Corporate Verdicts Go Thermanuclear

Courtesy photo

Slide from “Addressing Damages in Post-Pandemic Trials.”

increased by 95% from 2020 to 2022, from \$21.5 million to \$41.1 million. You can see that uptick in the chart atop this column. Over that same period, the aggregate amount of all these verdicts—which Lee and Laird, in their presentation, labeled “outsized”—grew from \$4.9 billion to \$18.3 billion in 2022, something you can see in the chart here:

While the recent jump identified in the Marathon report comes after a period of court activity highly affected by COVID-related courthouse shutdowns, Lee and Laird note that the uptick is actually the second such increase in damages awards recorded over the past couple of decades. The first came in the wake of the financial crisis in the late 2000s.

“Somehow after the financial crisis, after the bailouts, after the references to trillions of dollars, the concept of billions of dollars seemed to be much more normal or acceptable to a juror,” Lee said.

Laird said that something similar seems to have taken hold in the wake of the pandemic as certain companies have had their valuations reach the trillions. Laird said that her own in-house research using case-neutral statements showed that mock jurors had more pro-plaintiff sentiment in 2021 and 2022 than before, especially in cases involving an individual lined up against a big company. Although she said that has moderated “a little bit” this year, she’s curious to see if the spike in damages awards of the past two years levels off or signals a continued upward trend.

So, in sum, there’s been a marked increase in the magnitude of damages and in the aggregate amount of damages.

But, Lee says, more importantly, those two facts are “reflective of the fact that jurors are more comfortable with bigger numbers, numbers in the billions.”

And he and Laird have three things they think lawyers should be doing to address that new reality: First, encourage courts to be more consistent in how they approach *Daubert* challenges to damages demands that are disconnected from the facts. Second, change approaches to jury selection to better identify the sorts of jurors apt to award big damages. Third, simplify the way damages are presented at trial and integrate it with the overall trial story.

Over the course of the next few columns, we’ll dig into all three of their suggestions at length.