Debunking the Myths of ATRI's "Nuclear Verdict" Report

A Factual Response to Exaggeration, Inaccuracy and Misinformation Contained in the American Trucking Research Institute's Report "*Understanding the Impact of Nuclear Verdicts on the Trucking Industry* "

A Response by The Truck Safety Coalition®

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TABLE OF ABBREVIATIONS

AEB	Automatic Emergency Breaking
ALD	ATRI Litigation Database
ATA	American Trucking Associations
ATRI	American Transportation Research Institute
FMCSA	Federal Motor Carrier Safety Administration
FMCSR	Federal Motor Carrier Safety Regulations
JIT	Just-In-Time
NTSB	National Transportation Safety Board
SMS	Safety Measurement System
TSC	Truck Safety Coalition®

A Note From TSC:

The Truck Safety Coalition would like to recognize the significant in-kind expertise provided by Truck Safety Coalition Board members and volunteers in preparing this rebuttal. Without their considerable help and expertise this much needed document would not have seen the light of day. *The Truck Safety Coalition stands in solidarity with the needs and interests of truck crash victims, roughly 5,000 of whom lose their lives every year and another 150,000 are injured in truck-related crashes. To the best of our knowledge, the content below is accurate and reliable. Those with any questions or comments are encouraged to email info@trucksafety.org.*

INTRODUCTION

When the American Transportation Research Institute ("ATRI") released its report, "*Understanding the Impact of Nuclear Verdicts on the Trucking Industry"* ("Report") in June of 2020, members of the Truck Safety Coalition® ("TSC") recognized it as a document full of errors, exaggerations, and misinformation.[1] At that time, TSC believed that no response to the Report was necessary because the Report was so poorly done. However, the continued citation by the industry press of the Report as though the findings were accurate, and the fact that ATRI was allowed to present its inaccurate findings as part of the Federal Motor Carrier Safety Administration's ("FMCSA") annual Analysis, Research, and Technology session in March of 2021, required a response by the TSC.[2]

The Report claims that verdict amounts are driving large increases in insurance premiums but fails to examine which, if any, of the verdicts were paid, and fails to analyze the difference between large verdicts rendered by juries and any actual payments made to plaintiffs based on those verdicts. Furthermore, the Report fails to demonstrate that verdicts are valid surrogates for payments. The available data shows that, in practice, actual payments are frequently much smaller than the verdicts that juries render, and that many verdicts are never paid. The American legal system has several effective ways to mitigate verdicts that may be excessive or otherwise unfair. Many verdicts are reduced, settled, or reversed outright (and many final judgments are never paid due to woefully inadequate insurance coverage). Making conclusions regarding the supposed financial impact of large verdicts on insurance premiums without any information regarding whether any payment was ever made on such verdicts is invalid and misleading.

The Report fails to show any causal link between the size and number of such unpaid verdicts (or any verdicts) and insurance premiums rising to the point that they cause other motor carriers to go out of business. The Report cites only three examples of high premiums or verdicts allegedly putting motor carriers out of business. The first motor carrier had five crashes in eight months before its insurance was canceled. The second had a history of two fatalities caused by an impaired driver and had recently lost a major client. The third hired a drug-using driver who killed six people and injured several others on his first run for the company. These examples of increases in premiums or cancellation of

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[1] ATRI. (2020) Understanding the Impact of Nuclear Verdicts on the Trucking Industry. Retrieved from https://truckingresearch.org/wp-content/uploads/2020/06/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-2.pdf

[2] *As the TSC was about to distribute this rebuttal, ATRI released its "Impact of Small Verdicts and Settlements on the Trucking Industry." While TSC has not had time to do an extensive review of the recent report, a preliminary review is provided as an Addendum at the end of this paper.*

insurance were self-inflicted and cannot validly be generalized. The Report contains no discussion of the many factors that go into actuarial calculations by insurance companies when setting premiums. The assumption of causation without proof (or even evidence) further invalidates ATRI's conclusions.

In fact, ATRI's own calculations show that insurance premiums, on average, represent a small percentage of carriers' total marginal costs, and have remained at a constant four or five percent of costs for the last decade (and that insurance costs went down by 19 percent in 2019). The industry is now operating in a favorable business environment for trucking, as shown below. ATRI's claim that unpaid verdict amounts against dangerous motor carriers are causing other safe companies to go out of business has no support in the Report.

None of ATRI's findings that are based on a comparison of the number and size of verdicts over time has any general validity whatsoever. In making its findings regarding large increases in verdicts, the Report relied on a database that failed to include a very large number of large verdicts in the "early years" bin, and therefore cannot be considered as being representative nationally across the time periods analyzed. In addition, there are several problems with the description of the database that give rise to multiple other questions, including a very serious question of whether the database includes settlements in addition to verdicts. If that is the case, all the findings about "verdicts" or recommendations for changing the law regarding limits for jury verdicts are even more baseless. Settlements are compromises by the parties involved and are based the parties' evaluation of the pros and cons of likely outcomes.

The Report fails to acknowledge that its claimed increase in the number and size of verdicts happens to coincide with the dramatic increase in catastrophic truck crashes beginning in 2009.[3] Instead, the Report blames the increase in large verdicts on the legal system and desensitized juries, not the trucking industry's own failure to improve safety and prevent crashes. While the comparative findings of the Report are grossly exaggerated due to the failure to include a very large number of verdicts in the early years, it should come as no surprise that large verdicts should increase as the number of catastrophic truck crashes increased over that same time-period, but the Report completely failed to consider this correlation. The Report fails to recommend a single specific required safety improvement to reduce the frequency or severity of crashes to address this serious increase in truck crashes.

The Report is replete with factual and mathematical errors. None of the major findings are true and some of the assertions in the Report are false statements about findings in

[3] Accessed online September 15, 2021 <Trends Table 4. Large Truck Fatal Crash Statistics, 1975-2018 | FMCSA (dot.gov)>

other studies. In addition to the factual and math errors, and the non-representative database, the Report suffers from the selective use of some data, omission of other relevant data, and inclusion and leveraging of unexplained outliers.

The Report fails to measure what it purports to measure. The title and content of the Report, along with the conclusion summary, make it appear that ATRI examined the "consequences from verdicts…that dramatically exceed compensatory costs." Report, at 65. However, there was no analysis whatsoever regarding whether any of the analyzed verdicts represented anything other than completely fair, accurate, and "righteous" jury findings of the proper amount necessary to compensate plaintiffs fairly for their damages. When plaintiffs suffer catastrophic damages, correspondingly sized compensatory findings cannot be considered unfair or "extreme." In such cases, it is that crashes that are "nuclear," not the verdicts.

The Report recycles the same arguments the trucking industry has been making for decades about an insurance "crisis," but this time ATRI tries to present these arguments as objective analysis. ATRI's Report puts style over substance and adds nothing to the previously discredited industry complaints.[4]

It is no surprise that when there are more truck crashes with more serious injuries caused by motor carrier negligence, there are more verdicts and larger verdicts. Truck crashes have steadily and dramatically increased since 2009, and truck involvement in some of the most catastrophic types of crashes, such as work zone crashes, have also increased substantially.[5] Greater crash risk and increasing numbers of catastrophic crashes are the root causes of everything about which ATRI complains. That is why insurers are being more selective when deciding which carriers they will insure, and why premiums "definitely scale" based on a motor carrier's safety record. The problem of steadily increasing catastrophic truck crashes is caused by widespread disregard for safety by motor carriers and a failure of adequate safety leadership in the industry; it is not caused by the legal system or jurors. The solution is for the trucking industry to put a higher priority on reducing the frequency and severity of truck crashes. The solution is not to change the legal system or limit crash victims' rights of recovery when unsafe motor carriers negligently cause crashes.

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[4] This paper sets forth the opinions and conclusions of the Truck Safety Coalition® ("TSC") after examining the support cited in ATRI's Report. TSC encourages the reader to carefully examine the ATRI Report, check the cited authorities, and to come up with the reader's own conclusions.

[5] Accessed online September 15, 2021 <Large Trucks are Involved in 1/3 of All Fatal Crashes Occurring in Work Zones | FMCSA (dot.gov)>

A STUDY OF THE FINANCIAL IMPACT OF VERDICTS WITHOUT ANALYZING PAYMENTS PRODUCES INVALID AND DISTORTED RESULTS

Real-world financial impact conclusions based on sizes of verdicts without regard to whether the verdicts have been paid are invalid and deceptive. Large jury verdicts often make news. Many people believe that a jury verdict represents the amount paid by a defendant against whom the verdict is entered because they never hear about the post-verdict proceedings. The Report confuses verdict with payment. In fact, large personal injury jury verdicts, especially those that make news, seldom represent the amount actually paid by the defendant or the insurance company that represents them. A "substantial" number of verdicts are reduced, reversed, or settled on appeal, and many are never paid due to inadequate insurance or assets.[6] Since the Report purports to be about verdicts, some discussion of what a verdict is, and what a verdict is not, is required. A verdict is a jury's finding of fact on a disputed issue. A verdict is not a final judgment, and it is not a recovery. ATRI's report failed to make any distinction between a verdict and a payment and failed to discuss the process that a verdict must go through before an enforceable judgment is entered.

Verdicts Do Not Equal Payments

In a civil negligence injury or wrongful death case, a verdict usually has three types of findings. First, there is a finding of whether the defendant's conduct was negligent based on instructions of the applicable law and definitions given by the judge. Second, if a finding of negligence is made based on the law and the evidence, a determination as to whether the defendant's negligence contributed to cause the plaintiff's harm is required. Third, only then does the jury make a valuation of the plaintiff's damages, also based on the instructed law and the evidence. But a verdict is not the same as a liability payment or an order for the payment of money. [7]

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[6] Russell Smith, *White Paper: Headline Blues: Civil Justice In The Age of New Media*; Center for Justice>; See also Emily Gottlieb, *Reading Between the Headlines: The Media and Jury Verdicts* Center for Democracy and Justice (2001); October 19, 2011< White Paper: Headline Blues: Civil Justice In The Age of New Media | centerjd.org>; See also Emily Gottlieb, *Reading Between the Headlines: The Media and Jury Verdicts* Center for Democracy and Justice (2001).

[7] *The Truth about Large Jury Verdicts*, FindLaw https://corporate.findlaw.com/litigation-disputes/the-truth-about-large-jury-verdicts.html> Quoting a five year National Law Journal Study of actual payments of verdicts. "In 1994, after a five-year study of million dollar plus verdicts published in the National Law Journal, one hundred such verdicts were researched. Of the hundred, 32 were set aside by trial judges or reversed by appellate courts, 33 were reduced by trial or appellate court judges, and some were settled swiftly after the verdict but for far less than the jury award. Some reductions by judges were massive. The study shows that most verdicts of $1 million or more are hollow or reduced." See Also *Huge jury awards often pared before going to*

An unpaid verdict does not have the same financial impact as the payment of money. The Report examines the numbers and sizes of verdicts but omits any discussion of the difference between the mere potential for liability represented by a verdict and an actual payment. The difference is great. Consider: if all the verdicts in the ATRI Litigation Database ("ALD") were later reversed outright, or partially paid at amounts far less than the verdict (or were not paid at all), the financial effect on the industry would be significantly different than the impact that would occur if all the verdicts were fully paid. The Report fails to address the difference.

The Report frequently refers to verdicts as "awards" and discusses verdicts (and their effects) as though they represent payments. But jury "awards" are not payments. An example of the actual difference is a widely publicized $411 million verdict rendered in Gadsden County, Florida, against Top Auto Express that resulted in a payment of only $1 million because that was the limit of insurance available, and the company was defunct.[8] An example of the potential difference is the 2018 verdict against Werner for $90 million discussed by the Report at page 12. The Report states "the family sued the motor carrier in Texas and were awarded $90 million in 2018." But a verdict does not represent the final outcome of a lawsuit, and to this day, three years later, the family has not received that payment. This case is still on appeal as of the time of this writing.[9] The Report presumably included this 2018 verdict as one of the 2018 outlier verdicts that caused the large spikes in Figures 5 and 6 of the Report. This verdict was included in ATRI's calculations and charts purporting to show its financial impact without regard to whether the verdict might be reversed and result in a payment of zero. In terms of ATRI's analysis, the result of the Werner appeal will not matter and the verdict on appeal will have the same financial effect on the trucking industry, win or lose. The difference in financial impact between a $90 million payment that might ultimately be required and $0 payment, depending on the outcome of the case, was not considered by the Report.

Irrespective of the eventual outcome of the $90 million verdict, the same is true of all the verdicts analyzed in the Report. None of the verdicts are shown to reflect the outcome of any case. The Report provides no information on whether any verdicts were ultimately

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compensate victims of Philly police abuse , WHYY Public Radio, June 28, 2018.< Huge jury awards often pared before going to compensate victims of Philly police abuse - WHYY>

[8] Kevin Davis, *Costly Collisions: A small-town personal injury case sends a powerful message to the trucking industry,* ABA Journal, Oct 1 ,<Accessed online October 4, 2021>

[9] *$92M Werner Verdict From 2018 Becomes A Hot Potato On Appeal*; FreightWaves; August 2, 2021; https://www.benzinga.com/government/21/08/22282433/92m-werner-verdict-from-2018-becomes-a-hot-potato-on-appeal; See also *Werner Enterprises, Inc. v. Blake,* Appeal from 127th District Court of Harris County Fourteenth (dissenting opinion) <https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2021/14-18-00967-cv-0.html>

paid or not. However, a "substantial number" of verdicts never make it through the post-trial and appeal process.[10] The American legal system has a variety of ways for a defendant to challenge a verdict it believes was the product of improper passion or prejudice, or that was otherwise improper. Although the verdict comes at the close of a jury trial, it is by no means the end of the court process. The verdict amount may then be subjected to additional legal scrutiny. After a jury renders its verdict, a judge must decide whether to enter a judgment on the verdict, and the judgment must become final before one penny can be collected on it.

This additional scrutiny is intended to uphold the fairness and the integrity of the judicial process. If there is a question about the legality or basis for a verdict, a judge may grant a defense motion for judgment "notwithstanding the verdict" and enter judgment for the defendant. If a defendant believes a verdict does not have a factual basis or is the result of unfair passion, bias, or prejudice of the jury (the original definition of "Nuclear Verdict" and the one preferred by the Report's interviewed experts), the judge may grant a motion for a new trial or may also grant a motion for remittitur and reduce the amount for a variety of reasons. If the trial judge doesn't grant these motions, and the defendant believes the trial judge is in error, the case may be appealed and the same relief can be sought in the courts of appeal, and thereafter, relief can be sought from a court of last resort.

There is evidence that the larger the verdict, the more likely it is to be reduced or reversed on appeal. [11] While a case is on appeal, a settlement is often reached among the parties for an amount much less than the actual verdict. And finally, in those cases in which a verdict happens to survive through the appellate process and the judgment becomes final and "collectible," a substantial number of final judgments are never paid due to a lack of adequate insurance or assets. In other words, the amount of a large verdict is not the same as the amount actually paid.[12] Although the Report omits analysis of the fact that verdicts and payments are not the same, in one instance the Report acknowledges that one large truck verdict was reduced by the court by more than 62% and thereafter settled for an undisclosed amount, but this is mentioned only in the context of providing an

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[10] Erik Moller, *Trends in Civil Jury Verdicts: New Data from 15 Jurisdictions.* Santa Monica, CA: RAND Corporation, 1996, at 4.

[11] See, Erik Gotlieb, "*Reading Between the Headlines - The Media and Jury Verdicts,* at 12- 13. supra, Note 3. See also, Margaret Cronin Fisk, "The Way Of All Mega-Verdicts," The Recorder, October 9, 1998.

[12] *Supra,* notes 2,3,4,5, and 6.

example of a case that resulted in a large verdict.[13] Report at 13. Beyond this brief mention, the Report contains no analysis or discussion of the post-trial legal procedures by which a verdict may be reduced, settled, or reversed, how many verdicts in the litigation database were challenged, or what the ultimate results of any challenges were or whether any of the verdicts were ever paid. The Report argues for drastic changes to our legal system to fix a purported crisis of large and excessive recoveries that the Report fails to demonstrate even exists.

This confusion of verdict amount and actual payment is amplified in ATRI's Report because the Report includes large outlier verdicts with no explanation of their effect in order "to include verdicts that fall outside of 'typical'." Report, at 18. If even a small number of these atypically large verdicts were reversed or reduced (or unpaid) and the results were considered, the Report's numbers, charts, and findings would change dramatically, as would the extent of any possible financial "impact" of the cases. The Report fails even to attempt to make a correlation between larger verdicts and actual increases in insurance premiums.

Even if unpaid verdicts could be considered as the equivalent of payments, the Report fails to show how payments of a particular verdict amount by a particular defendant or its insurer affect premiums across the industry. The Report contains no discussion of the many factors that go into actuarial calculations by insurance companies when setting premiums. This assumption also invalidates ATRI's conclusions. Nowhere in the report is there any analysis of what factors insurance companies consider when setting premiums for their insureds. ATRI appears to assume that the sole actuarial consideration is the number and size of unpaid verdicts that are entered against other defendants that are not their own insureds, without regard to a particular insured's safety history or whether the insured has implemented appropriate management strategies that mitigate their risk, but the Report provides no evidence that is the case.

The Report's conclusions and recommendations regarding the financial impact of these potentially unpaid verdicts have no validity because of the omission of analysis of what was actually paid after the respective verdicts were rendered and the lack any connection between a verdict against an insured of one insurance company on the premiums of other insurance companies. Indeed, the whole analysis of any financial "impact" in the Report based on verdicts that may or may not have been reversed, reduced, settled or unpaid is so flawed and disingenuous that it should be disregarded in its entirety. The Report

[13] Discussing a different topic, the Report also mentions the McDonalds "Hot Coffee" verdict which also was reduced after the verdict was rendered, appealed, and settled for an undisclosed amount but likely much less than the already reduced verdict. Report at 12.

provides no evidence that the American legal system is not working as intended to promote safety and responsible actions by the trucking industry.

THE REPORT RECYCLES PREVIOUSLY DISCREDITED TRUCK INDUSTRY ARGUMENTS

The industry has complained about large verdicts becoming commonplace, desensitized jurors, and rising insurance premiums for decades. Tort reform has been on the industry's wish-list at least since the mid-1980's. In 2001, the American Trucking Associations (ATA) created an insurance "task force" to address the problem of a claimed 32% average rise in truck company insurance premiums, "with some carriers experiencing a 47 percent jump." ATA's report in 2002 blamed large jury verdicts for these increases and called for "tort reform" to limit the rights of claimants to recover their full damages. At that time, the chair of the task force, Fred C. Burns, compared the situation to the "war on terrorism," and indicated that they were not going to put the issue back on the shelf, as was done after a prior "insurance crisis" in the mid-1980s. That task force's report at least acknowledged that improved safety would help keep insurance premiums down and called for specific educational programs for ATA members on risk management and loss control, including training, education, and benchmarking programs. It also called for a nationwide speed limit for trucks of 65 miles per hour with the goals of reducing the overall costs of trucking risks and lowering insurance premiums.[14] Unfortunately, any lasting efforts toward these recommended safety improvements were not apparent and did not result in any significant permanent decreases in catastrophic and fatal crashes. The industry still does not have a benchmarking program, and still does not have an industrywide 65 mph speed limit for trucks or required use of speed limiters. The current ATRI Report does not even bother calling for requiring either of these or for any other specific required safety improvements.

On November 4, 2002, *TruckingInfo.com* reported that "Once rare, million-dollar awards have become almost commonplace." They blamed jurors who have been desensitized to large sums of money, provided their version of a then-recent "we did nothing wrong" case with an $18 million verdict, and called for an attack on the jury system in each state. The current ATRI Report is a recycled presentation of these claims.[15]

There have always been reasons other than large verdicts for premiums to increase and for motor carriers to leave the industry. In 2000, for example, insurers announced insurance rate increases were being made because they were dropping "the aggressive

[14] See, *Panel Finds No 'Quick Fix' for Insurance Rates*, Transport Topics, February, 2002

[15] *U.S. Liability Claims Total $180 Billion A Year*; Truckinginfo.com ,October 2, 2002 < U.S. Liability Claims Total $180 Billion A Year - Drivers - Trucking Info>

discounts they once offered to carriers to gain market share."[16] There were other non-claim-related reasons for premiums to rise and for motor carriers to leave the industry. On June 25, 2001, *The Wall Street Journa*l reported that truck insurance costs had risen, and a few insurers exited from the business "as insurers have tried to make up for paltry investment gains," and that these issues, along with "the overall economic slow-down" and large increases in fuel costs, had caused a "record number" of small trucking firms to fold.[17] Indeed, the current Report quietly acknowledges this with a single sentence. Industry representatives reported that there are many reasons that motor carriers may go out of business other than as a result of increased insurance premiums or large verdicts, such as **"inability to compete in a competitive freight market, poor operation and business practices and inability to adequately adjust their prices quickly**…" Report, at 50 (*emphasis added*). The rest of the Report, however, attempts to make it appear that increases in insurance premiums resulting from large verdicts are the cause of motor carriers leaving the industry without examination of any reasons that any motor carrier closed its doors.

THE REPORT USES A NON-REPRESENTATIVE AND PROBLEMATIC DATABASE

The Report uses a non-representative database, uses analyzed data from that database that contain multiple math errors, and makes exaggerated claims from this flawed data all to argue that insurance premium increases caused by large verdicts against motor carriers are putting other motor carriers out of business. This, they argue, justifies limiting truck crash victims' right to recover their true damages caused by negligent motor carriers. The Report argues that the problem of large verdicts is something new that began with a "watershed" truck crash verdict of $40 million in 2011 that has given rise to the need to limit truck crash victims' rights. But the Report omits reporting many very large recoveries from 2005 - 2010 and fails to explain how the more recent verdicts were different from the many (not counted by the Report) earlier large verdicts.

For decades the trucking industry has been negligently injuring and killing thousands of truck crash victims per year, as well as paying very large liability amounts because of its refusal to adequately prioritize safety. Many in the industry have been blaming truck crash victims, desensitized jurors, and the legal system for just as long. ATRI's Report attempts to show all of this as a new development, apparently to separate the arguments in the Report from the industry's prior identical and meritless claims. The Report repeats the decades-old claims and asserts that there is a new insurance premium crisis that can

[16] See, *Truckers Struggle as Insurance Costs Near Crisis*. Transport Topics, May 29, 2000.

[17] *Record Number of Small Trucking Firms are Folding*, Wall Street Journal, Jun3 25, 2021, PG A2

only be solved by not holding motor carriers fully accountable for the damages they cause. The argument had no merit in past decades and has none now.

Non-Representative Database: Serious Undercount of Verdicts in the Early Years

The Report's quantitative analysis is devoid of any description of the specifics of how ATRI decided to put together the sample dataset of verdicts it used. The Report states that "This data was collected and amalgamated from multiple external sources in the industry, including [an unnamed] litigation database firm." Report, at 14. Yet there is no adequate description of whether or why their inclusion criteria for cases reflects a representative sample of cases nationally over the period in question. Furthermore, ATRI does not describe the methodology used in excluding or omitting data samples, the reasons for discarding 149 of the 600 verdicts collected, or any description of the discarded verdicts.

The very small numbers of verdicts included in the early years' bin are wrong. Given the industry's complaints since at least 2002 that million-dollar verdicts had become "commonplace," the very low numbers of such verdicts included in the early years bin raised serious concerns about the accuracy and representative nature of ATRI's database that required further inquiry.

The TSC performed a simplified data check using a single source for verdicts and found that the ALD failed to include a very large number of reported verdicts for the years 2005-2010. In addition to demonstrating that the database is non-representative, this undercounting provided cover for the Report to omit data relating to the average verdict amounts for the years 2005 – 2009, which the Report acknowledges at page 17: "Due to the small number of verdicts before 2010 in the ALD, the analysis of means over time used data from 2010 and beyond." The Report completely omits the average verdicts for the earlier years, which means that this relevant data was not disclosed.[18]

The Report cites the low numbers of cases in the early years as showing that "cases with awards over $1 million have increased dramatically over the last 14 years" and that "From 2012 to 2019, the number of cases with verdicts over $1 million increased [from 79 cases in the early bin – of fewer years] to 265 cases, an increase of over 235 percent." Report at 17. But the Report seriously undercounts verdicts for the early years, so these comparisons are inaccurate and misleading. The single source of verdicts for TSC's simplified data check was Triple L Publications, LLC (Triple L.), which publishes *Tractor-Trailer Torts*.[19]

[18] *See* additional discussion regarding the effect of the omission of data, below, at page_17, infra.

[19] Information regarding the number of verdicts that exceeded $1 million reported in 2007-2010 is from issues No. 1 though No. 74 of *Tractor-Trailer Torts*, published at that time by Lewis Laska, of Nashville, TN. *Tractor-Trailer Torts* is not affiliated with any professional organization of lawyers, manufacturers, or insurance companies.

Unfortunately, that publication did not publish its first issue until June of 2007, so it could not provide reported verdict information for 2005, 2006, or the first half of 2007. *Tractor-Trailer Torts* did provide data for verdicts involving tractor-trailer crashes reported from the second half of 2007 through 2010. Reported verdicts involving other commercial motor vehicles such as dump trucks, box trucks, tow trucks or otherwise, were not included in Triple L's count. The large number of truck crash verdicts reported by Triple L and not reported by ATRI demonstrates a serious undercount of verdicts in the early years of the Report. For example:

- 2007:
  - The Report claims there were two or three verdicts of $1 million or greater for the entire year. In fact, the number of such verdicts reported that year was at least 26 (one of which was a $36.5 million verdict against Swift, which appears not to have been counted).
- 2008:
  - The Report claims there were zero large verdicts when in fact the number reported that year was at least 38 (and the average verdict size of those 38 was over $8 million).
- 2009:
  - The Report claims there were seven or eight verdicts when the number was at least 26 (the average of those 26 verdicts was over $9.7 million).
- 2010:
  - The Report claims there were six or seven verdicts when the number in fact was at least 29.

Of the verdicts reported in just these three and one-half years of the early years, there were:

- 47 verdicts over $5 million;
- 28 verdicts over $10 million;
- 14 verdicts over $20 million;
- 4 verdicts over $30 million;
- 1 verdict at $49 million;
- 1 verdict at $65 million.

But the Report makes it appear that these verdicts did not happen and contends that significant numbers of large verdicts did not occur until after a "watershed" for large verdicts that occurred in 2011. From reports from just 3.5 of the 7 years in the early years bin, there were at least 100 more such verdicts than counted by the Report for those years. In 2008 alone, when the Report indicated zero verdicts over $1 million, 16 of the 38 verdicts over $1 million that were reported by Triple L were over $10 million, 7 were over $20 million, one was over $30 million, and the average of the 38 cases reported to

TSC was over $8 million. The average of the 29 verdicts reported to TSC for 2009 was over $9.7 million.

Triple L informed TSC that the number of verdicts it reported to TSC could not be considered a comprehensive tally, because of the limitations of the publication. Triple L does not contend that this data is a census or is statistically representative, and the exact timing of the reports of these verdicts may vary from the timing that ATRI used to include verdicts in particular years in the ALD. *See*, Report, at 14. The comparison of data used by ATRI, and the number of verdicts reported by Triple L, shows:

> (1) a very serious problem in the validity of the low numbers that ATRI's Report attributes to the earlier years;
>
> (2) that ATRI's data sample does not reflect a representative sample nationally over that time period; and
>
> (3) the Report's comparative findings cannot be considered valid or representative.

ATRI Failed to Consider Increases in Crashes as a Cause of Increases in Verdicts

Although the Report's comparative findings are exaggerated and not valid due to its non-representative database and the failure to include so many verdicts in the early years bin, TSC suspects that there may well still have been some increase in the number and size of verdicts, beginning sometime in late 2010 or 2011 due to the dramatic increase in the number of catastrophic crashes between 2009 and 2019, and the steady increase in truck crash involvement in fatal work zone crash (which are some of the most catastrophic of crashes). The Report acknowledges a time delay between crash and verdict (Report at 32), so these increases in crashes beginning in 2009 correlate very closely with the comparison of the two "bins" of cases in the ALD.

When the number of catastrophic and fatal (or "nuclear") truck crashes increases, the number and size of verdicts would be expected to increase accordingly. Nonetheless, ATRI's Report failed even to examine this correlation as a possible cause for any increase in claims or verdicts.

Misleading Language and Poor Technique

Although the title of the Report is "*Understanding the Impact of Nuclear Verdicts on the Trucking Industry*", and although ATRI's definition of Nuclear Verdicts includes "in excess of $10 million", there is no analysis of Nuclear Verdicts (verdicts in excess of $10 million) anywhere in the Report. The only count provided for the largest verdicts is the number of verdicts over $5 million. *See* Report, at 16. The omission of the number of Nuclear Verdicts as defined by the Report, and the failure to analyze such verdicts separately, confirm that,

in fact, such verdicts are quite rare and "do not directly cause motor carriers to go out of business." Report, at 50. For example, the Report admits that the number of all verdicts above $5 million comprised only 16.6 percent of the cases in the ALD. Report, at 16. Because the ALD did not report any verdicts that were below $1 million, the percentage of verdicts over $10 million would be a very small fraction of all truck crash verdicts. This is consistent with the opinions of the fleet managers and truck insurance representatives who responded to ATRI's Litigation Impact Survey that "Nuclear Verdicts are not common." Report, at 50.

The admitted scarcity of verdicts over $10 million also means that the large differences in averages shown in various places in the Report are likely due to a comparatively small number of outlier verdicts. This is also indicated by the Report's analysis. The standard deviation stated in the Report (Report, at 15) is more than two times greater than the mean, and while the Report admits that it did not eliminate outliers, it failed to explain how the outliers affected its findings and failed to provide the size or number of outliers. The Report on page 18 indicates "Means were utilized in this analysis as opposed to other measures of central tendency as it is extremely important to include verdicts that fall outside of 'typical.'" Why this was considered "extremely important" is not addressed.

The Rand Study of verdicts, cited by the Report at fn. 8, explains why it used medians (midpoints) instead of means (averages): "The median award is a better measure of central tendency because it is less sensitive to extreme values." Rand Study, at 20. Even assuming there was some legitimate reason to include the exaggerated averages that included "verdicts that fall outside of 'typical,' sufficient information should have been provided to determine what effect the outliers had. Legitimate research findings are expected to either eliminate outliers or address the effect that outliers had on conclusions. ATRI includes the exaggerated differences caused by the outliers but fails to address the effect of the outliers or to provide information from which the effect can be compared or measured.

A hint at this extreme effect can be seen in Figure 5 of the Report. Report, at 18. Mean size of verdicts over $1 million go up and down mildly on an annual basis from 2010 through 2017 (averages for the earlier years are not provided), then shoot up dramatically in 2018, presumably because outliers were included for that year. Rather than explain the effect, the Report attempts to leverage the effect of outliers by making the misleading claim that "From 2010 to 2018, mean verdict awards increased 51.7 percent per year." Report, at 60. This is yet another example of selective use of math calculations and misleading and ambiguous language. While the Report does not provide the figures it used to calculate this number, ATRI's Figure 5 had already presented the annual mean verdict increases (and decreases) and clearly shows that the mean verdicts did not increase 51.7 percent per year. That claim by ATRI is an attempt to leverage the outliers in 2018 to make

the growth sound much higher than what truly happened. If ATRI's claim of an actual increase in mean verdicts of 51.7 percent per year from 2010 to 2018 were true, average verdicts would have increased from $2,305,736 in 2010 to $64,668,714 in 2018, as reflected in the following chart. Such increases did not happen in the real world.

	Increase of 51.7% Per Year	
2010	**2,305,736**	51.7%
2011	3,497,802	51.7%
2012	5,306,165	51.7%
2013	8,049,452	51.7%
2014	12,211,019	51.7%
2015	18,524,116	51.7%
2016	28,101,083	51.7%
2017	42,629,344	51.7%
2018	**64,668,714**	51.7%

The data collection and analysis did not stop in 2018, but ATRI's Figures 5 and 6 make it appear as though the data stopped in 2018. The average verdict and the percent change for 2019 were omitted.

ATRI's Figures 5 and 6 make it appear that the data ended in 2018 with a large increase in average verdicts by omitting any information about the average of verdicts and percent change in 2019. In fact, the number of verdicts (in the ALD) went down in 2019 (*See* ATRI's Figure 1), but for some reason, the Report omits the average verdict amount and the percent change for the final year of their Report. If included, the data would have reflected the most current situation. Since ATRI decided not to include this data, one is left to assume that the data would have shown that these numbers decreased. Any significant decrease would make clear that the outlier spike in 2018 was not typical or indicative of a trend.

Possible Inclusion of "Settlements" - Faulty and Ambiguous Description of the Database

ATRI's description of its database raises huge concerns. The description of their method for collecting and discarding data is opaque. The Report lacks any rationale showing how or why the data collected could be considered representative. There is also a very serious concern whether the data included settlements in addition to verdicts. If this is true, it is yet another reason that the entire Report must be disregarded. A settlement is not a verdict. Settlements are compromises made voluntarily by the parties involved based on their respective beliefs regarding the reasonableness of the agreement under the circumstances, while verdicts are findings by a jury, outside the control of the parties. While the Report is supposed to be about "verdicts," the formula in the Report used for analysis

uses "year of **settlement**" as a factor. This is defined as the "year in which a **verdict or settlement** was reached." Report, at 28 (*emphasis added*). Elsewhere, the Report speaks in terms of **"verdicts and awards,"** and no definition of a separate category of "award" is provided. *See* Report, at 50. And of great concern is Figure 12 at page 32 of the Report. That graphic shows the "Time between Crash and Verdict and Verdict size." Figure 12 includes verdicts that occurred very shortly after the crash. While it might be possible after a crash for crash victims to hire a lawyer, put the case on file, serve the defendant, do the necessary discovery to prepare for trial, and have a full jury trial that results in a verdict in a matter of months, this is sufficiently outside the norm that, together with the inclusion of "settlement" as a listed factor, calls for examination. Indeed, ATRI reports that the mean time between crash and verdict is greater than three years. Report at 60. While it is not clear from the information provided, the combination of the Report's use of the term "settlement" in describing its analysis and the data reflected by Figure 12 indicating that some of the "verdicts" were rendered within a matter of months after the respective crash raises significant concern regarding the inclusion of settlements in the ALD.

The division of cases into the "bins" of the stated years is also not clear. Although the Report states that the division of bins "splits the timeframe observed by the ALD in half," this does not appear to be true. The earlier bin includes fewer years (**2005**-2011 vs. 2012-2019) so the comparison of numbers of cases in the respective bins (*See* Figure 3) appears to compare the number of verdicts in seven early years to the number of verdicts in eight later years. And Figure 3 may actually compare only six early years to the eight later years. The description provided for the "dependent variable, Verdict Awards," measures the dollar value of verdicts awarded from "**2006** to 2019." Report, at 28. *See also*, Table 7 at page 29 of the Report, which defines "Verdict Awards" as "Dollar value of verdicts awarded from **2006** to 2019." To add additional confusion, on page 28, ATRI states that the variable "year of **settlement"** takes the values of 0 to 13 to represent the years 2005 through 2019. However, the values of 0 to 13 would not represent the span of years as described. **A year is missing.** If 2005 is represented by 0, 2019 would be represented by 14, not 13. Furthermore, no data were charted for 2005. *See*, Fig. 1. Report, at 15. It is at least unclear whether the early years bin included six or seven years for the comparison of the number of verdicts in the eight years of the later years bin. Either way, the division did not split the time frame observed by the ALD in half as the Report represents.

There are additional problems with the database. The descriptions provided for the ALD for the dates during which the verdicts were rendered and for the number of observations analyzed fluctuate. The ALD is described in the Report's Table 1 as including 451 observations. This is reported to be the result of excluding 149 observations from the originally compiled data of 600 cases "due to missing information and the lack of statistical merit." Report, at 15. The totals for verdicts greater than $1 Million from Figure 3 (79 plus 265)

added to the number of defense verdicts from Figure 2 (107) also total 451 observations for the ALD. But on page 24, the Report indicates it used a "**subset of the ALD containing 491** cases…to determine if specific crash factors and issues that plaintiffs raised…had a higher probability of generating a plaintiff verdict." (*Emphasis added*). And the conclusion speaks of the database used to analyze verdicts between **2006** through **2018** as having 600 "trucking-related jury awards." Report at 60. However, Appendix A "Quantitative Methods," indicates that their regression used data covering "approximately 600 cases between **2005** and **2019.**" Report, at 66. The Report fails to make clear whether these differing descriptions mean that some of ATRI's analysis used the data from the 149 excluded observations that had "missing data" and lacked "statistical merit" and whether data from the years 2005 and 2019 were included for all analysis.

The ***largest and most glaring omission of data*** is the lack of data regarding the number of verdicts purportedly of primary interest – verdicts over $10 million and the lack of any information or analysis regarding those verdicts.

Faulty Analysis of Data

Even if the Report's data could be considered representative, ATRI's findings are still wrong and misleading. The claim in the Report at page 18, that there was a "967 percent" increase in average verdicts, is a mathematical error. The calculation of a percentage of increase is properly made by subtracting the original amount ($2,305,736) from the increased amount ($22,288,000) to find the amount of the increase ($19,982,264) and then dividing that increase by the original amount to determine the number of times the increased amount is greater than the original amount (8.666), and then multiplying by 100 to make this number a "percentage increase" (866 percent – not 967 percent). While this re-calculated number still results in a large percentage increase (if it were true), the Report, once again, miscalculates.

The same miscalculation is made elsewhere. On page 17, [t]he Report states that "the number of verdicts greater than $1 million, but less than $2 million, increased by 300 percent" over the time periods studied. Figure 4 on page 17 shows that from 2005 to 2011, the number of verdicts greater than $1 million but less than $2 million was approximately 33, while between 2012 and 2019, that count was approximately 99. This would be an increase of 200%, not 300%.

Basic Math Errors Demonstrate the Inaccuracy of ATRI's Work and the Unreliability of Their Calculations and Conclusions

If the Report does not make basic mathematical calculations related to percentages accurately, there can be no confidence in the accuracy of the much more complicated calculations described in the remainder of the Report (for which there is no way to check). The Report not only has the reliability problems associated with an incorrect and non-

representative database; the Report also suffers from errors in calculations using this poor-quality data.

In short, the Report contains many mathematical errors and claims that invalidate ATRI's conclusions. For example:

- There was not an increase of 967 percent in average verdicts between 2010 and 2018;
- There was no annual mean verdict increase of 51.7 percent between 2010 and 2018;
- Trucking litigation verdicts did not increase by 90 percent between the periods of 1985 – 1989 to 1990 – 1994 as stated by the Report;
- The number of verdicts greater than $1 million, but less than $2 million did not increase by 300 percent.

Huge Selectivity and Transparency Problems

Beyond its problems with bad data, math errors, and misstatements of fact, the Report has huge selectivity and transparency problems. The Report does not provide the average verdict amounts for any of the years before 2010 or for 2019. The missing information makes ATRI's Figure 5 on page 18 (that shows the upward spike in 2018) wholly inaccurate. A clue to the effect of this selectivity is provided in Figure 6 of the Report on page 19. While the missing averages are still not provided, Figure 6 shows that in 2010, the average verdict decreased by approximately 95 percent from 2009, to $2,305,736, so the 2009 average verdict was very high. If, as reported by ATRI, there was approximately a 95 percent decrease to reach the provided 2010 average of $2,305,736, this means that the 2009 average verdict would have been $46,114,720. [*The estimate of this 2009 average relies on the accuracy of ATRI's calculation of the percentage decrease between 2009 and 2010 in Figure 6*]. If this number had been used to calculate the change in average for the decade through 2018, the percentage difference would have gone down from the stated (and incorrect) "increase of 967 percent" to a *decrease* of more than 51 percent.

If the data for 2009 had been included and charted in the Report, Figure 5 would have a vastly different appearance. Instead of the sharp rise shown in Figure 5, there would have been a clear downward trend…even with the high outliers included in the 2018 average. And the decrease in averages would be even more pronounced if 2009 could be compared to the most current year of ATRI's data, 2019. But the Report also omits that information.

The point of this discussion is not to claim that any amount is the actual amount of any increase (or decrease) between any years (the Report's data is too flawed to allow any accurate calculation), but to demonstrate the extent to which the Report has used the selection and exclusion of data and erroneous calculations in reaching its conclusions and in creating its graphics to support a desired narrative.

With or without the multiple mathematical errors and the non-representational nature of the dataset, the claimed large increases of numbers of cases between the two bins, shown on page 17 of the Report, are misleading. **In both sets of the reported years, the number of cases with verdicts more than $2 million is approximately 60% of verdicts over $1 million (58% from 2005-2011, 63% from 2012 – 2019, a difference of only five percentage points).**

	Verdict Amount			
	Over $1 Million	Greater than $1 Million but Less than $2 Million	$2 Million or More	Percentage of Verdicts $2 Million or More
Year	Fig. 3	Fig. 4	Fig. 3 - Fig 4	(Fig 3. – Fig. 4) / Fig. 3
2005-2011	79	33	46	58.2%
2012-2019	265	99	166	62.6%

ATRI provides no analysis regarding whether the reported increase in the number of verdicts was due to an increase of claims that occurred in the 2012 – 2019 period than in the 2005 – 2011 period, or if they simply failed to gather a representative sampling from the earlier periods. The answer is both: In addition to failing to include a very large number of verdicts in the early years bin, the Report completely fails to consider the well-known dramatic increase in the number of catastrophic truck crashes in the later years. According to FMCSA's Trends in Commercial Vehicle Safety, March 10, 2021, fatal truck crashes increased by double-digit percentages between 2009 and 2018. When the trucking industry causes more catastrophic crashes, which result in more claims being filed, the problem of a greater number of claims or verdicts should not be blamed on the legal system or juries. The correlation seems at least to merit examination: more crashes, more claims, more verdicts.

In addition, nowhere in the Report is there a discussion of the possibility that more cases may have gone to trial in the later years due to more frequent litigation defense errors, such as low-ball offers, improper case evaluation, and failure to settle early by the defense. All three of these are listed as factors in higher verdicts by ATRI's consulted experts. Report, at 37-38.

As noted above, the percentage of cases with verdicts of $2 million or more stayed roughly the same over time. Moreover, the **Report's analysis is lacking any detail on the**

specific verdicts mentioned in the title of the Report; verdicts over $10 million. The Report fails even to provide the number of such verdicts, let alone analyze them. If the actual number of verdicts greater than $10 million were included, the percentage of such cases would be small. The Report's figure 2 on page 16 shows that 23.7 percent of cases went to the defendant, and 29.2 percent of cases were between $1 million and $2 million. Combined, these account for more than half, 52.9%, of cases. The Report acknowledges that only 16.6 percent of cases examined were for $5 million or more, meaning that cases between $2 million and $5 million accounted for 30.5 percent of cases in their sample. **Thus, a whopping 83.4% of cases were either for the defendant or were for less than $5 million, well below the threshold established for a Nuclear Verdict.** And this percentage completely fails to include any cases from any period that resulted in verdicts for plaintiffs of less than $1 million. This confirms again the opinions of the experts ATRI consulted and quoted: "Nuclear Verdicts are not common and do not directly cause motor carriers to go out of business." Report, at 50.

Effect of Inflation and More Serious Injuries

The Report inadequately addresses the effect of inflation on average large verdicts. Figure 6 on page 19 shows average verdicts were roughly in line with inflation, except for the year 2018, which is the result of unexplained outliers. Based on this single year's spike, the Report concludes that "jury awards increased substantially faster than either inflation or healthcare costs." The Report, referring solely to the comparison caused by this single outlier year, concluded that this "indicates that the non-economic damages associated with a lawsuit are increasing." Report, at 19. What Figure 6 really shows is that average verdicts from 2010 to 2018 tracked inflation well, except for one unexplained outlier year.

ATRI's unsupported claim regarding non-economic damages not only relies wholly on outlier verdicts from a single year out of nine (or out of ten if 2019 is included), and therefore represents an attempt to leverage the effect of unexplained outliers, but it completely **fails to consider that technologies for the crashworthiness of passenger cars and highway safety design characteristics have greatly improved over the past 15 years.** More injured people are surviving truck crashes who might have been killed in an earlier crash and, therefore, are suffering more medical damages and greater damages overall.[20] More extensive survivable injuries would require more extensive medical attention which is a likely cause of increased verdict amounts. Indeed, some of the largest recent verdicts cited by the Report (including the apparent largest outlier from 2018) involved paralyzed or brain-injured children, who will require medical care for the rest of their long lives. This

[20] See, Report, at 46 ("Improvements in automotive safety technologies have altered the severity and type of injuries that people experience when in a crash. … crashes have become less lethal, and instead may lead to long-term injuries rather than fatalities.")

cause for dramatic increases in damages is supported by the Report's Figures 8 and 9 (the presence of children and spinal cord injury charts) and Table 8 (Regression results for Brain Injuries, Spinal Injuries, and the presence of children). Report at 21-22, 30. This cause is also presented as a likely "Additional Factor" in the Report's Expert Interview Section (Report, at 46), but it is completely ignored in the Report's analysis of the meaning of the (purported) change in average verdict size on page 19**.** Once again, in Figure 6, the data from 2019 is not included. See discussion of the effect of omitted/concealed data under Huge Selectivity and Transparency Problems at page 17 *above.*

Even apart from the weaknesses of the comparison to inflation in Figure 6 of the Report, the analysis would have benefited from calculating the verdicts in the same time value of money, as has been done by legitimate studies of verdicts, such as the Rand Study cited by the Report at page 10, footnote 8. The Rand Study, which compared verdicts in several jurisdictions across time, "adjusted all award amounts for inflation in 1992 dollars."[21] Accurately accounting for inflation when comparing verdicts over $1 million in current dollars would mean that even more verdicts would have fallen into the early years bin, which would have further discredited the Report's comparative findings. It also would have resulted in an increase in the reported averages of the verdicts in each of the early years and would have provided a more accurate and fairer picture of the actual differences in verdicts over time.

For example, with the exact injuries and damages and no changes other than inflation, a verdict in 2005 of $764,000 or greater would be equal to a verdict of $1,000,114 or greater in 2019, and therefore would have fallen within the $1 million cut-off. This would have increased the "before" numbers in the earlier years bin. Comparing the average increase in verdicts with the rate of inflation, as the Report purported to do, does nothing to the analysis of the count of verdicts over the $1,000,000 equivalent level or the comparison of the average sizes of verdicts.

According to the regression results, the growth in the size of verdicts by year ($118,343 per year) is one of the smallest of the factors considered**.** Even including outliers, this accounts for a total of only $1,538,460 (which ATRI reports as "approximately a $2 million increase") to the baseline average of $1,411,573 (from 2005), which change based on time brings the average verdict to only $2,950,033, nowhere near the Nuclear Verdict range, even under the Report's misguided definition. If the variable for "year of

[21] Erik Moller, Trends in Civil Jury Verdicts: New Data from 15 Jurisdictions. Santa Monica, CA: RAND Corporation, 1996. <Trends in Civil Jury Verdicts: New Data from 15 Jurisdictions | RAND>

settlement" goes to 14 and not 13, the new total would be $3,068,376. This still would fall well below ATRI's "Nuclear Verdict" threshold.

The Report's Use of "Means" and "Average" is Misleading

In addition to the problems with the data and the analytical flaws, the Report compounds the confusion regarding its findings by its use of language. Throughout, the Report refers to a variety of findings with respect to "average verdicts," when those numbers do not include any plaintiffs' verdicts below $1 million. The methodology used by the Report (that ATRI intentionally omits verdicts below $1 million in their "average verdict" numbers) is described in the Report, but the omission produces extremely misleading information and specious conclusions. **These points make it seem as though average truck-crash verdicts are significantly higher than they really are because no verdicts under $1 million were included, so these "average" numbers are averages of only the highest verdicts.** ATRI's "Conclusions" section on page 60 does not describe the elimination of verdicts under $1 million, and announces to the world several unqualified "bullet points" regarding "average verdicts" which are called "statistically significant findings," such as:

- "From 2010 to 2018, mean verdict awards increased 51.7 percent per year…"
- "The average size of verdicts increased 483 percent from 2017 to 2018." Report, at 60.

These misleading claims are false without the open and transparent qualification regarding the limitations of the ATRI database (which have been shown to be unreliable in any event) and have been predictably picked up in news reports as statements regarding averages of all trucking verdicts. These statements are hyperbolic exaggerations without clarification of the Report's definition of "average," which invariably is missing when these conclusions are publicly reported.

The claimed increases are false and without foundation. They never occurred in the real world, yet much of the public and several policy makers have been misled into taking these statements as fact. Beyond the problems associated with the exclusion of all the verdicts below $1 million when discussing "average verdicts", these talking points ignore the fact that virtually all of the claimed increase resulted from an unusual spike that is claimed to have happened in 2018 that is clearly: (1) based on a non-representative database that seriously undercounted verdicts in the early years: (2) the result of the use of selected data and the omission of relevant data to fit a particular narrative; (3) the result of outliers which have not been explained anywhere in the Report; and (4) exacerbated by the failure to account for inflation in the size of the earlier verdicts.

THE REPORT IS REPLETE WITH EXAGGERATIONS AND MISSTATEMENTS

Beyond the failures relating to the database, the errors in calculations, the leveraging of unexplained outliers, and the omission of relevant data, the Report suffers from gross exaggerations and misstatements of facts.

The Report Completely Misstates the Findings of The Rand Jury Verdict Study

Without any support, the Report complains about verdicts becoming "more lucrative from 1985 through 1994, whereby the legal environment incentivized lawsuits" Report, at 10. The median dollar value **of every case won** "increased from "just over $100,000" between 1985 and 1989 to "approximately $190,000" for cases between 1990 and 1994, "a 90 percent increase" Report, at 10 (*emphasis added*). The data cited for this increase, however, is not taken from anything close to "every case won" but from a small part (one county out of 15) of the 1996 Rand Study, Trends in Civil Jury Verdicts since 1985 (the "Rand Study") (cited at page 10, footnote 8 of the Report).

The Rand Study looked at verdicts in nine different categories of cases that had gone to trial in 15 counties throughout the U.S. The study did not include a case category specifically for truck crashes. The closest category was called "Auto Personal Injury." Rather than citing the difference in median verdicts from all the counties reviewed (which would still not constitute "every case won,") the ATRI Report took data from one county, Los Angeles County, California.

The comparison of the median verdicts from only a single county out of the 15 counties studied and stating that the increase represented "all cases won" was not the end of the exaggeration. ATRI then changed the numbers used in the Rand Study in a way that exaggerated the percentage of increase in median verdicts over the examined period for that single county. The ATRI Report changed the actual numbers (from Table A.6 of the Rand Study) as follows: the median of $119,000 from the earlier years was reduced to "just over $100,000," and the median from the later years of $183,000 was increased to "approximately $190,000" which created the inaccurate "90 percent increase" when the actual increase for that one county was under 54 percent. While a 54 percent increase may still be noteworthy if applicable, ATRI's Report failed to point out that for the category of jury verdicts that would include highway crash cases (Auto Personal Injury), the Rand Study **found that the median award amount in that venue *went down* between those two periods by just over 4 percent.** *See*, Rand Study, at p. 48, Table A.6

The Rand Study Shows Crash Verdicts Went Down, Not Up, Contrary to the Report's Claims

In discussing the results of the Rand Study, the ATRI Report misstates the size of the database ("every case won" vs. cases from a single county); misstates the size of the overall increase of non-crash cases (90% vs. 54% increase); and fails to mention that the median verdict in the type of case most relevant to this Report – crash cases – in fact, went down slightly in that county over that time-period.

ATRI's misrepresentations about the Rand Study findings continue. In the Report's Conclusion, to try to make a causal connection between an increase in trucking verdicts and the U.S. Supreme Court's 1977 case that "re-allowed litigation advertising," the ATRI Report indicates that the Rand Study's numbers (regarding median verdicts from only Los Angeles County) were somehow about "trucking litigation": "The median dollar value **of trucking litigation awards** from 1985 to 1989 was slightly more than $100,000. And in the next five years the average [Note: the "median" data is now referred to as the "average"—which is associated most with the mean] award increased by 90% to $190,000." Report, at 60 (*emphasis added*).

The cited Rand Study **contained no data specifically related to trucking litigation**. And the closest category, Auto Personal Injury, showed a *decrease* in the median over those periods in the county the ATRI Report examined, L.A. County. There is no basis for these "findings" by ATRI.

Trucking Bankruptcies Are Not "Caused" by Insurance Premium Increases and Large Verdicts

The Report asserts that verdicts over $1 million (which the Report's analysis does not distinguish from its own definition of "Nuclear Verdicts"), and larger verdicts have been the cause of motor carrier bankruptcies because of "untenably higher insurance premiums distributed among all motor carriers." Report, at 13. An examination of the basis for this claim reveals that unsafe, poor business practices, and other economic conditions were the actual causes.

The example discussed in support of ATRI's otherwise unsupported claim is that one motor carrier "reported an increase in a single-year's insurance rates of more than 100 percent. The cost increase ultimately forced the motor carrier out of business." Report, at 13. The Report omitted that, according to the Safety Measurement System ("SMS") records of the FMCSA, this motor carrier had five crashes within an eight-month period, between October 18, 2018, and June 6, 2019, or that the motor carrier's insurance was canceled shortly after the fifth crash. The article cited by the Report also mentioned another company that had gone out of business. That company had caused a double fatality crash by an impaired driver. In addition to any insurance premium increase that was caused by

its own negligence, that company had "also recently lost a large account that generated 30 percent of total revenue."[22]

These two examples constitute the only support provided for the Report's claims that "Multiple other fleets, many decades-old family businesses, experienced similar outcomes." Report, at 13. If the Report means by this that many other unsafe companies with very poor crash histories (and that were already losing key clients) went out of business, that may well be true. There may well be many examples of poorly run companies with horrible crash histories that have lost major customers that have had to shut their doors. If, however, the Report intended to generalize the "similar outcomes" to companies with good safety records that are not losing major customers (which appears to be what ATRI attempted to do), these examples provide no support for their claims. Proof by mere assertion is not proof.

The Report also contends that "reform" is necessary to "protect the industry from exorbitant non-economic damages, which have bankrupted smaller trucking companies." Report, at 56. For authority to support this statement, ATRI cites an article related to the bankruptcy of a Kentucky motor carrier, making it seem as though the motor carrier was somehow a victim of an unfair large verdict. Report, at. 56. **This example, possibly above all others in the Report, highlights the inaccuracy of the proposition that large verdicts are responsible for the trucking industry's insurance problems and financial woes.**

The company ATRI referred to by this reference is Cool Runnings, which failed to have appropriate safety measures in place and allowed a dangerous drug-using driver to continue driving its equipment, even after they had reason to know he was an unsafe driver. Cool Runnings hired the driver without performing an appropriate review of his crash background and employment history (he had had multiple prior crashes and had been fired by a former employer after testing positive for drugs in a post-crash drug test). On the return of this driver's first trip for Cool Runnings, he caused a crash that killed six people, injured many others, and destroyed multiple vehicles.

The National Transportation Safety Board (NTSB) investigated the crash and found that the driver experienced two mechanical breakdowns, a minor crash, and was on duty for 50 consecutive hours during the first leg of his trip. Furthermore, "**NTSB investigators discovered that the carrier did not have written policies and procedures for hiring or firing, training, hours-of-service, safety, dispatch, drug or alcohol testing, or vehicle maintenance. The carrier did not have a cell phone use policy or a fatigue management program. Nor did it have safety meetings or a safety person overseeing safety**

[22] Trucking Nuclear Verdicts Drive Premiums Up - InsuranceDefenseMarketing.com, Jan 22, 2020 <Trucking Nuclear Verdicts Drive Premiums Up - InsuranceDefenseMarketing.com>

activities."[23] According to plaintiffs' counsel in the case, there is evidence that supports the allegation the company knew they should fire him, but they waited to do so because they wanted him to drive their equipment back to their terminal. On his way back to Kentucky from his delivery in Florida, with clear weather and a dry roadway, the driver crashed into stopped and slowing traffic, plowing into seven vehicles, and traveling 453 feet from the initial impact to the final resting point. The driver was convicted of six counts of vehicular homicide, four counts of aggravated assault, driving under the influence of drugs, and speeding. He was sentenced to 55 years in prison, without parole.[24]

None of the civil cases filed against Cool Runnings had even gone to trial at the time ATRI issued its Report, so the Report's citation of Cool Runnings' bankruptcy as an example of a small trucking company going bankrupt due to "exorbitant non-economic damages" being assessed against it has no factual basis. Cool Runnings filed for bankruptcy because their negligent conduct put a drug-using driver behind the wheel of its tractor-trailer, and they had caused actual damages exceeding many millions of dollars. Cool Runnings had $1,000,000 of liability coverage, and few other assets. Moreover, under federal law, filing for bankruptcy puts an automatic stay on civil suits, state or federal, and limits the liability that can be imposed against the bankrupt. It is a legal tactic to avoid liability. Cool Runnings' bankruptcy had nothing to do with any jury's imposition of "exorbitant non-economic damages" as claimed.

For ATRI to use the bankruptcy of this company to support limiting truck crash victims' rights to be fully compensated is contrary to the promotion of safe practices and presents a very poor image of the trucking industry. To suggest that crash victims' rights should be limited to allow such negligence to continue is not fair to safety-minded members of the trucking industry that do their best to operate safely and to prevent crashes. The NTSB used this example to recommend a variety of specific safety improvements. ATRI used this example to call for limiting truck crash victims' legal rights.

Verdicts are not Entered Against Motor Carriers in Cases in Which They "are Doing What We are Supposed to be Doing"

Without any cited support, the Report asserts that large verdicts "can exist on tenuous legal grounds" (Report, at 9), and announces that "[t]he often-disparate relationship between liability and negligence has created an environment where large verdicts have become relatively commonplace." (Report, at 12). Liability in trucking cases against motor

[23] Multivehicle Work Zone Crash on Interstate 75 Chattanooga, Tennessee June 25, 2015 (ntsb.gov), at pg.18 (*emphasis added*). <Multivehicle Work Zone Crash on Interstate 75 Chattanooga, Tennessee June 25, 2015 (ntsb.gov)>

[24] Bre*wer sentenced to 55 years in Tennessee crash*; The sentinel Echo; March 14, 2018 < Brewer sentenced to 55 years in Tennessee crash | News | sentinel-echo.com>

carriers is always, without exception, based on a finding of negligence (or greater fault, such as recklessness). While there is a concept of strict liability under which liability may be imposed without a defendant's negligence in certain product liability claims, the concept has never been applied to a truck crash case against a motor carrier.

The trucking industry has promoted the idea that motor carriers are frequently held liable when they "were doing what we're supposed to be doing," and this Report is no exception. *See*, Report, at 47. The Report notes that carriers that experience large verdicts may build litigation costs into future safety assessments, "even when the carrier does not deem itself to be negligent" Report, at 48. The Report then describes several cases that resulted in large verdicts to make the motor carriers appear to have been victims, while omitting critical facts. On examination, the examples and details given of these cases demonstrate that the motor carriers involved had not acted reasonably and had not adequately prioritized safety. 140 years ago, Oliver Wendell Holmes could have been writing about this kind of attack on the jury trial system by the trucking industry when he wrote:

> **"The question is not whether the defendant thought his conduct was that of a prudent man, but whether [the jury] think[s] it was."**[25]

For example, a $90 million verdict was reached by a jury in a case described by the Report as involving a driver who was "driving under the posted speed limit in inclement conditions when a car traveling in the opposite direction lost control and veered into the truck's path" Report, at 12. What ATRI failed to mention is that the plaintiff contended that the motor carrier dispatched a brand-new driver (with approximately 55 hours logged behind the wheel as a driver) on a Just-In-Time (JIT) delivery at a time when meteorological reporters had issued a winter-weather storm warning. According to plaintiff's counsel and a witness in that case, the motor carrier not only failed to advise the new driver of that warning but also reminded the driver that this was a JIT delivery that must be delivered on time. In addition, on the same stretch of icy road, the truck driver had passed at least three other crashes but proceeded to drive on the ice at over 60 miles per hour. Shortly before the crash, the truck driver allegedly tailgated a SUV, so he had to reduce his speed to approximately the mid-40s, but after getting out from behind the SUV, the truck driver began to increase his speed again and was traveling over 50 miles per hour on the ice as the crash occurred.

The federally approved Commercial Driver Licensing ("CDL") training manual, a version of which is used in all states, instructs truck drivers to match their speed to the road surface; reduce speed by one-third in the presence of rain, in packed snow, reduce speed by one-

[18]. Holmes, The Common Law, 1881, at 107. (*Emphasis added*)

half, and if the surface is icy, reduce speeds to a crawl, and to stop driving as soon as it is safe to do so.[26]

The manual also instructs truck drivers to watch for hazards involving other vehicles. One of the foreseeable hazards of driving in icy conditions is the danger of other vehicles losing control, and it is imperative for a truck driver to follow the CDL manual instructions to reduce speeds to a crawl in such conditions because large trucks are hard to control and stop on ice and they do much greater damage at higher speeds.

Reported injuries in the passenger vehicle car were enormous. They included the death of a 7-year-old boy, quadriplegic paralysis of a 12-year-old, and extensive brain damage to another child and to the driver. The Report failed to mention that the evidence in the case included that, during the same ice storm and on that same stretch of road, another car traveling in the opposite direction also lost control and veered into a different semi's path in a similar way as in the $90 million crash and was also hit by that semi. In that crash, however, the truck driver was traveling "at a crawl" – approximately 5 mph, as called for by the CDL manual, and the occupant of the car was not injured. She testified she wasn't even sore the next day. We believe that this fits the purpose of the CDL manual's instruction to drastically reduce speeds in those conditions and to watch out for other vehicles having problems.

In addition, according to plaintiff's counsel, the defense position at trial was that the motor carrier and its driver did everything right and company executives claimed that its drivers and the company did nothing wrong and did not intend to make changes in the company's safety training operations, or equipment. According to plaintiff's counsel, the jury placed 70 percent of the fault on the company, 14 percent on the new truck driver and, 16 percent on the plaintiff driver.

The case is still on appeal.[27] Nonetheless, if the company did not train its driver to follow the CDL manual instructions for driving in extremely hazardous road conditions and failed to inform the driver as the road conditions worsened; and if instead, they instructed him to be sure to make the JIT delivery on time; and if they continued to maintain that they did nothing wrong and would not do anything differently, and they believe it is reasonable

[26] The manual instruction appears to describe recommended procedures to comply with 49 C.F.R.§ 392.14. Hazardous conditions: "Extreme caution in the operation of a commercial motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist. If conditions become sufficiently dangerous," the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated."

[27] See note 10, *Supra*

to drive a semi at 50 miles per hour on ice, the result does not appear to be out of line, especially considering the extreme damages suffered by the plaintiffs.

Other examples in the Report are just as weak. The Report refers to the 2011 $40 million verdict in the case of *Foster v. Landstar* as the "watershed moment in trucking-related Nuclear Verdicts" Report, at 12. As described by the article cited by the Report on page 12, footnote 21, the case involved the death of a 45-year-old husband who had regularly been earning $470,000 per year, but at the time of his death, was involved in a business venture that would have increased his income to $1.8 million per year (which came to fruition two years after his death). The evidence was that the loss of the decedent's future income was in the range of between $15 million and $42 million. The jury verdict for the wrongful death of the husband was $28.7 million. That amount was for all the damages relating to his death, not just the future lost income claim. The rest of the $40 million total was for the spouse's own injuries and other non-wrongful death damages.

The case was filed in a rural county in Georgia, and as reported in a May 2020 article in the Commercial Carrier Journal, "consensus among those involved in [the defense of] the case was that the judgment against the fleet would be about $10 million, **but the fleet's insurer took the case to court hoping for a smaller settlement."**[28] After fighting liability during the entire case, the defense finally admitted liability shortly before trial (the truck driver reportedly had run a stop sign). It appears that this case is the result of the lack of at least three preferred litigation strategies mentioned to avoid large verdicts by the Report's interviewed experts: early and objective risk assessments, avoiding "insulting low-ball offers" that can push a case to trial, and settling early in mediation for a reasonable amount Report, at 37-38. This was apparently a clear liability case in which the known projected range of just the lost income of the decedent was between 15 and 40 million dollars, but the defense evaluation was that they could (or should be able to) resolve the case for under $10 million, a number that was lower than the low end of the known and projected range for plaintiff's lost income claim, alone. This does not appear to be an example of something going wrong with the legal system; it appears to be another example of a self-inflicted wound.

"Compliance" is Not the Same as "Reasonable Care"

Surveyed fleet managers and insurance adjusters complained of plaintiff attorneys attacking company practices, even if the companies are in compliance with the Federal Motor Carriers Safety Regulations ("FMCSR") and expressed "frustration that it is a litigation shortfall when they are doing 'what we're supposed to be doing'" Report, at 47. This

[28] Mega settlements in truck crash lawsuits 'strangling the industry' as calls for reforms mount, CCJ, May 12, 2020 <Truck crash settlements 'strangling the industry' | Commercial Carrier Journal (ccjdigital.com> (*emphasis added*)

statement epitomizes why the industry seems not to be able to do a better job of preventing crashes. Many motor carriers focus solely on compliance and do not evaluate other reasonable steps they should take to reduce the frequency and severity of crashes. The FMCSA is a government regulatory agency that promulgates uniform regulations with which all motor carriers must comply to be "legal." The regulations cannot and do not purport to create a standard for what a reasonable motor carrier would do in the circumstances of its particular operation to prevent reasonably foreseeable harms, which is the common-law standard for negligence.

A Civil Negligence Action is Not a Regulatory Enforcement Action

While a violation of law is frequently evidence of negligence, such a violation is not necessary for a finding of negligence. A motor carrier does not have to violate a regulation to be found to have acted negligently. The standard is not whether an action was legal, but whether an action or failure to act was negligent. For example, a motor carrier can be 100% compliant with the Hours-of-Service Regulations, yet still, have a very dangerous operation with severely fatigued drivers because the company has no fatigue management program to address the specific hazards and risks presented by their specific operation.

The FMCSRs are standards that apply to all motor carriers. Under our civil legal system, each motor carrier is expected to act in a reasonably prudent way to reduce the foreseeable harms that their specific operations may pose, while complying with the regulations that apply to *all* interstate motor carriers. Until motor carriers understand and accept that they must do what is reasonable to reduce the frequency and severity of crashes, beyond the requirements of the FMCSRs, truck crashes will continue to maim and kill thousands of our friends and neighbors every year and claims for catastrophic damages will tragically persist**.** Reasonableness under the circumstances to prevent crashes is required, not mere compliance with regulations.

Unfortunately, many, if not most, motor carriers do not employ anyone whose primary job is to evaluate the risks of their particular operation and implement reasonable steps to prevent crashes. Trucking company "safety departments" are too frequently, in effect, compliance departments, working to meet mandated minimum safety regulations, with little or no thought given to pursuing actual crash prevention or to implementing proven-effective safety management programs through an analysis of the hazards presented by their operations. The concepts of taking reasonable steps to place redundant barriers to prevent "foreseeable hazards" from becoming "adverse events", under Dr. James Reason's *Swiss Cheese Model*, or the classic four strategies of dealing with risk (Accept, Transfer, Avoid, Reduce) are considered common terms and practice in the safety departments of other industries. Unfortunately, they are all-but-unheard-of in many trucking company "safety departments."

Impact on Economic Costs – Average Insurance Costs are a Small Percentage of Average Marginal Costs

The Report attempts to put all the blame for unsafe companies going out of business and increased transportation costs on increases in insurance premiums but provides no support for such a claim and ignores all other cost increases. Report, at 50. All costs of a business should be calculated into the price of its goods or services, so the effect shown in the Report's Figure 15 on page 50 should apply to all cost increases, not only insurance premiums. Insurance costs do not make up a large percentage of average motor carriers' costs. ATRI's prior published calculations show that insurance premiums constitute only a small percentage of motor carriers' average marginal costs and have remained at a constant level of four or five percent of such costs since 2011, and in 2019, average insurance costs actually decreased by 19%.[29] While one might expect that a Report in which ATRI is claiming that motor carriers are experiencing large insurance premium increases that put them out of business might mention ATRI's existing research that shows how average insurance costs compare to total costs for motor carriers, but it did not. ATRI did cite its research when discussing different insurance costs per mile for different sized carriers and also when discussing a percentage increase in insurance costs between 2017 and 2018, but failed to mention this important and relevant prior finding: Average insurance costs constitute a small percentage of motor carriers' average costs and have remained at the same level of four or five percent for at least the last decade. *See* Report, at 47, fn. 51. and 49, fn. 52.

ATRI's Report presents a "sky is falling" picture of the industry that is unsupported by any facts or data cited in the Report. According to the ATA's economists, this is not quite accurate: "both the strength and pricing power for trucking is going to exceed expectations," and "the trucking industry can expect "a very strong business environment for trucking."[30] The Report then fails to present a single example of a safe and well-run trucking company that has had to close its doors due to an increase in insurance premiums.

The Report also ignores the effect of a large portion of the industry buying inadequately low minimum coverage insurance policies, while responsible companies pay premiums for higher coverage. If all motor carriers were required to carry higher levels of liability coverage, the cost of losses would be more fairly spread across the entire industry, underwriting and safety would improve, and the cost of insurance premiums for the higher

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[29] American Transportation Research Institute, *An Analysis of the Operating Costs of Trucking: 2020 Update*, at 22. See also, ATRI-Operational-Costs-of-Trucking-2019-1.pdf (truckingresearch.org)

[30] Trucking Turns From Pandemic to Prosperity | Transport Topics (ttnews.com)

coverages would go down. The ultimate benefit, of course, would be that, as greater numbers of unsafe motor carriers are weeded out of the industry, the number of crashes, deaths, and injuries would go down, as would the overall liability costs to the entire industry. This is what was supposed to have happened with deregulation more than 40 years ago. All safe motor carriers and the trucking industry itself benefit from a culling of unsafe motor carriers and would benefit even more from the improved underwriting that would accompany an increase in the required minimum amount of insurance for all trucking companies.

THE LEGAL SYSTEM AND INSURANCE PREMIUMS ARE BEGINNING TO WORK AS CONGRESS INTENDED

ATRI's Report ignores the fact that having insurance premiums rise substantially for unsafe motor carriers is exactly what was intended by Congress when Congress deregulated the industry and is what is supposed to happen when motor carriers do not adequately prioritize safety. Congress intended that rising insurance rates would help weed out unsafe motor carriers from the trucking industry.

In 1980, as Congress deregulated the trucking industry, there was great concern regarding the imminent exponential increase in the number of trucking companies, since virtually all the barriers to entry into the industry were being removed. Congress believed it would be difficult for federal safety regulators alone to provide effective oversight for safe operations of the expected large increase in the number of trucking companies due to deregulation. Congress intended the Secretary of Transportation to set insurance minimums at a level sufficiently significant, not only to provide an appropriate means of compensation to truck crash victims if crashes occurred but to cause insurance companies to provide effective underwriting so that the insurance market would provide effective incentives for safe operations of motor carriers. Congress intended that rising insurance premiums should keep unsafe motor carriers off our highways:

> To protect against any potential impairment to safety, arguments were made that some precautions should be taken to require higher financial responsibilities for motor carriers. Thus, the action of the Committee in increasing financial responsibility is to encourage carriers to engage in practices and procedures that will enhance the safety of their equipment so as to offer the best protection to the public. ... **The carrier who wants to maintain high safety levels will be under pressure to cut his costs to meet his competitors, some of which may cut costs by operating in violation of minimum safety standards.** Specifying minimum insurance levels is one way to help improve motor carrier safety. Insurance companies are equipped to evaluate the performance of the motor carriers. The premiums they assess are in direct relation to the risks they assume. **Therefore, an unsafe carrier will have an increased premium and a totally**

> **unsafe carrier may not be able to obtain the insurance necessary to operate, or at best will be at an insurance cost disadvantage.**[31]

Although the absolute minimums set by Congress in 1980 ($750,000 for interstate for-hire property carriers) were set too low to generate the intended initial underwriting protection to prevent crashes in the first place, at least the after-the-crash underwriting and premium increases appear to have finally reached a point to keep at least the worst-of-the-worst repeat offenders off the road. The article cited by ATRI about insurance premium increases at page 13, footnote 25, listed two companies that had experienced large premium increases after multiple crashes and after injuring and killing members of the public in crashes and found that:

> "**Pressure from insurance companies has forced trucking companies to place a greater focus on safety. Carriers are now utilizing equipment with collision avoidance systems, using speed limiters on their tractors (excessive speed is one of the leading causes of truck crashes), [and]adopting hair testing to identify lifestyle drug users….'"**[32]

According to ATRI's *Predicting Truck Crash Involvement: 2018 Update* (cited at fn. 27 of the Report), prior crash involvement continues to be an indicator of future crash involvement" with a 74% increase of the likelihood of being involved in a future crash. It seems logical, and is the intended result, that unsafe motor carriers with drivers that have crashes should pay higher insurance premiums, and if they continue to be unsafe, they *should* go out of business. That was Congress' intended plan to keep our highways safe after deregulation of the trucking industry.

Rather than recognize that the system is beginning to work as intended to attempt to rid the industry of unsafe practices, and rather than encourage the requirement of safer equipment and safer operational practices, ATRI's Report bemoans the fact that motor carriers with very bad crash histories had significant increases in insurance premiums and attempts to blame large verdicts against other unsafe motor carriers for the increases.

Impact on Safety

Despite the Report's attempt to assert that "large verdicts have a negligible positive impact on promoting safety" (Report, at 47), if one looks closely and reads carefully, it is possible to find insightful passages in the Report that point to large verdicts as having

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[31] House Report No. 96-1069*, Motor Carrier Act of 1980*. P.L. 96-296, page 42-43 (*emphasis added*).

[32] *Trucking Nuclear Verdicts Drive Premiums Up* - InsuranceDefenseMarketing.com, Jan 22, 2020 <Trucking Nuclear Verdicts Drive Premiums Up - InsuranceDefenseMarketing.com>; See Also As Nuclear Verdicts Drive Up Costs, Focus Is on Safety, Data; Transport Topics (2021) pointing out that carriers are emphasizing safety and building a culture of safety to reduce and noting that verdicts are not the only thing driving up insurance costs.

undeniable positive impacts on safety. The Report acknowledges that respondents to the surveys sent to fleet business managers and insurance analysts indicated that due to a fear of Nuclear Verdicts **"motor carriers have generally increased their focus on safety and hiring practices," and that "carrier scrutiny of existing safety policies has increased."** Report, at Pgs. 47, 49 (*emphasis added*). Additionally, some **"carriers may be updating their training programs and safety procedures as a proactive mechanism for dealing with the threat of a large verdict."** Report at 48 (emphasis added).

The Report also indicates that the result of holding motor carriers responsible for the damages they cause is consistent with the above-stated intent of Congress in that the Report recognizes that insurance companies are increasing their efforts concerning **"research, underwriting and risk."** Report, at 47 (emphasis added). In addition, insurance companies are **"being more selective in who they insure"** and that while insurance costs have increased for everyone, **"premiums definitely scale based on safety records."** Report, at 49 (emphasis added) This means that safe companies pay less for insurance, less safe or unproven companies pay more, and substantially unsafe companies pay substantially more or are priced out of business. This is exactly what is supposed to happen under Congress' plan to make our highways safer.

This not only conforms with Congress' plan, but it is also consistent with the fundamental purposes of our civil justice system. In his review of the history of the development of the common-law tort system, Justice Oliver Wendell Holmes, Jr. wrote: **"The safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken."**[33] By holding companies accountable for the damages that they cause when they fail to take reasonable precautions to prevent harm, the legal system incentivizes companies to increase their focus on safety. The determination of what precautions are reasonable to avoid harm depends on the availability and effectiveness of precautions, and the extent of harm that is foreseeable. Everyone in the trucking industry knows that the harm potential in a commercial vehicle crash is catastrophic. Therefore, reasonable motor carriers should adopt commensurate practices, equipment, and technologies that reduce the risk and extent of harm. Instead, ATRI's Report recommends undermining the system and Congressional intent by limiting accountability of motor carriers for causing catastrophic pain and suffering for the most severely injured truck crash victims. **ATRI's recommendation would reward negligent motor carriers and would decrease the existing incentive to invest in reasonable safety measures** such as Automatic Emergency Breaking ("AEB"), improved rear-and-side underride guards, real-time telematics, dash cams, fatigue management programs, and more.

[33] O. W. Holmes, Jr., "The Common Law" (1881), at 117. (*Emphasis added*)

While some responsible motor carriers have adopted available safety measures and have thereby significantly reduced the risk of harm, many have not. It was commonly noted by the interviewed experts that **"motor carriers typically do not allocate enough resources toward safety and crash prevention."** Report, at 36 (emphasis added). Accordingly, the FMCSA reports that commercial vehicle crash deaths and injuries continue to rise (48% over the past decade) with over 5,000 deaths and 159,000 injuries in 2019 alone[34].

The legal system is doing what it is supposed to do to discourage harm and to encourage reasonable precautions. "The ability of defense attorneys to document safety activities that exceed FMCSRs carries great weight with juries," and "the more safety activities motor carriers engaged in to prevent crashes, the lower the likelihood that a Nuclear Verdict would result."[35] So, although truck crash verdicts, generally, are encouraging motor carriers to put a greater focus on crash prevention and encouraging insurers to be more selective in the risks they insure and to improve underwriting to set premiums in direct proportion to the risks of particular motor carriers, the Report's conclusions do not call for requiring motor carriers to adopt any specific crash prevention strategies, safety technologies, better training, or improved supervision. Instead, the Report suggests that this trend of verdicts encouraging improved safety should be disregarded and that verdicts should artificially be reduced by limiting the damages that can be recovered by the most severely injured truck crash victims. Relieving negligent motor carriers of their legal obligation to pay the full damages of the people they injure and kill would reward motor carriers that do not invest in safety, and at the same time take away the competitive advantages gained by those motor carriers that do the right thing.

THE REPORT CONFLATES THE TERM "NUCLEAR VERDICTS" WITH ALL LARGE VERDICTS

The Report disregards the advice of its interviewed experts and conflates the term "Nuclear Verdicts" with all verdicts over $1 million, even completely fair and "righteous" verdicts. The conflation of terms begins in the first sentence of the first paragraph in the Introduction, by equating the term "Nuclear Verdicts" to "Large Legal Verdicts" without regard to whether the verdict reflected a reasonable assessment of the damages sustained by the plaintiff. The term "Nuclear Verdict" was initially coined as a pejorative term to imply the connotation of an unfair "runaway verdict" that is unreasonably high and was the result of juror passion and prejudice and that has no reasonable basis, and no connection to the facts or damages involved in the case or that was "out of proportion

[34] https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813110

[35] Note 29, *supra*

with the damages suffered." [36] By this original definition, even an extremely large verdict is not considered a "Nuclear Verdict" if the amount of the verdict is rationally related to the damages sustained. That is the very function of jury verdicts in our legal system: to hold negligent entities fully accountable for the damages they cause by their negligence.

This accountability is not only intended to compensate victims, but also to discourage negligence and to avoid harm. The goal of the legal system in requiring negligent actors to pay for all damages they cause is to promote safety. **"Nearly two-thirds" of the experts interviewed in the Report preferred the above definition and concurred "that the context of the case and verdict is necessary to define 'nuclear'" in order to determine whether the verdict was beyond "rational application of the given law to the admitted evidence,"** rather than simply referring to the dollar amount of the verdict. Report, at 35. The Report ignores that advice and applies the pejorative term indiscriminately to completely fair and rational verdicts.

The Report first applies the term Nuclear Verdicts to any verdict over $10 million, whether the verdict has any characteristics of an unfair "runaway verdict" or not. Report at 7. The effect of this is to attribute the negative connotation of "Nuclear Verdict" to all such verdicts, even perfectly logical, rational verdicts that are clearly appropriate findings based on the evidence (such verdicts can be referred to as "Righteous Verdicts"). Not only does the Report fail to follow the suggestion of a large majority of its interviewed experts regarding that definition, but it also carries the conflation two steps further. Once the Introduction strips the term "Nuclear Verdict" of its normal definition of an unfair, runaway verdict, the Report then equates $10 million "Nuclear Verdicts" to "large verdicts", and never goes back to any analysis of "Nuclear Verdicts" under anyone's definition. The Report then analyzes "large verdicts" as verdicts over $1 million. The theme and title of the Report are thereby disregarded throughout the analysis. The Report abandons its title and instead proceeds to analyze verdicts over $1 million. There is no separate analysis or count of verdicts of $10 million or more anywhere in the Report, and the Report ends up treating all the verdicts over $1 million as though they were "nuclear," even though they are nowhere near the $10 million threshold and irrespective of whether the verdicts were fair and Righteous Verdicts, or not. The Report effectively attaches the original negative connotation of unfairness of the term "Nuclear Verdicts" to *all* verdicts over $1 million by:

> 1) applying the negative connotation of "Nuclear Verdicts" to all verdicts over $10 million;

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[36] Law expert: Focus on safety to avert nuclear verdicts - Truck News; *See also*, Gotlieb, Emily, "*Reading Between the Headlines - The Media and Jury Verdicts*, at 1 *supra*, note 6.

2) equating the altered definition of "Nuclear Verdicts" for verdicts over $10 million to "large verdicts"; and then

3) examining "large verdicts" at the level of over $1 million.

By applying the term Nuclear Verdict to include all perfectly rational and "Righteous Verdicts" over $1 million, the Report does the trucking industry a disservice. If, as suggested by the title of the Report, a problem of unfair runaway verdicts exists – (and the Report does not make that case) – there might have been room to discuss potential solutions. The Report makes no inquiry to determine the relationship between the amounts of the analyzed verdicts and the damages sustained by the plaintiffs. The Report fails to raise or analyze any issue of unfairness or irrationality of verdicts, and completely fails to mention the many procedures that are already built into our legal system to address unfair verdicts, should they occur. Even though there is no such analysis of fairness of the verdicts, and no supporting evidence, the entire tenor of the Report suggests verdicts are uniformly excessive, tenuous, extreme, and exceeding compensatory amounts, as though there had been such an analysis.

While the Report abandoned any attempt to analyze the financial impact of verdicts over $10 million on the trucking industry, and even though the Report failed to provide any support for a causal connection between any verdict and any corresponding effect on the industry as a whole, the summary of its Conclusion pretends that is what was examined and pretends that verdict excessiveness was also part of its analysis: "The existence and impact of Nuclear Verdicts on the trucking industry is clear and expansive. All entities in the supply chain – far beyond those involved in a crash, are experiencing the negative financial consequences from verdicts and awards that dramatically exceed compensatory costs" Report, at 65. But misidentification of cause and proof by mere assertion, while effective tools of misleading persuasion, do not provide sound and cogent analysis of a purported problem. Emily Gotlieb recognized this type of faulty generalization years ago writing, "Since the 1980s, when this movement largely originated, anecdotal descriptions of a few atypical or seemingly "crazy" lawsuits have been the cornerstone of its anti-jury advertising and public relations campaign."[37]

The reason that no analysis of the impact of true nuclear (unfair) verdicts was made, and that no examination of the impact of verdicts greater than $10 million on the industry was attempted is that no supportable argument exists that unfair or "excessive" verdicts have had a *direct or demonstrable negative effect* on the overall industry. The Report, in fact, supports the opposite in the Expert Interviews and Surveys section of the Report: "**Survey respondents generally agreed that Nuclear Verdicts are not common and do**

[37] Gotlieb, Emily, "*Reading Between the Headlines - The Media and Jury Verdicts,* at 1 *supra*, note 6.

not directly cause motor carriers to go out of business. However, many respondents reported that increased insurance costs, an indirect consequence of large verdicts, is a primary reason for closing" Report, at 50 (emphasis added).

The interviews and surveys were completed before the Report misleadingly re-defined "Nuclear Verdict" to exclude the normal inference of unfairness or irrationality. True "nuclear [unfair] verdicts are not common" and are not the problem, but "insurance costs, an indirect consequence of large [fair] verdicts" were pointed out by some as a problem. But the Report still failed to provide a single example of a motor carrier that had to close its doors due to a premium increase that was not caused by that carrier's own unsafe safety record as demonstrated above.

Had there been a serious problem with irrational, unfair, excessive, or unjust verdicts affecting the trucking industry, the Report would have found it and publicized it. By complaining about all verdicts over $1 million, even if they are rationally related to the facts and the law (and none of the analyzed verdicts were shown to be otherwise), and never focusing on true "Nuclear [unfair] Verdicts" or excessive verdicts, the Report turns into a complaint about all verdicts greater than $1 million, even if the verdicts are 100 percent fair and unbiased Righteous Verdicts, and even if the verdicts were never paid. **ATRI's complaint isn't about unfair, irrational, or excessive verdicts; they just don't like large verdicts, and they want something done about them.**

By not differentiating unfair and excessive verdicts from fair and Righteous Verdicts, what the Report actually documents is that, based on the verdicts in the ALD, the trucking industry is causing more crashes and greater damage on our nation's highways**.** The Report attempts to blame the legal system, juries, and plaintiff lawyers for every time a jury fairly holds a negligent, unsafe trucking company accountable for the damages it causes, and fails to call for the requirement of any specific safety measures that would reduce the incidence of crashes in the first place.

The TSC agrees that something should be done about the ongoing increases in catastrophic crashes demonstrated by ATRI's Report, and that is for the industry to begin a long-overdue bona fide effort to reduce the frequency and severity of truck crashes. Rather than calling for limiting truck crash victims' recovery rights, ATRI and the trucking industry should advocate for requiring proven-effective safety technologies, such as AEB on all trucks, improved underride guards for rear and side impacts, real-time telematics to identify and monitor unsafe driving behaviors, and speed limiters to prevent unsafe speed. ATRI should call for improving reasonable safety practices, such as effective background checks for drivers, required use of FMCSA's Pre-Employment Screening Program, providing drivers warnings of severe weather alerts, elimination of JIT delivery, prohibition of distracting cell phone use, implementation of fatigue management programs, and requiring higher minimum insurance levels to improve before-the-crash underwriting.

Instead, the Report suggests the real problem is that juries are holding motor carriers too accountable by the verdicts they render, (even when the verdicts are fair and righteous) and recommends that grievously injured crash victims should be required to subsidize negligent motor carriers.

While ATRI's interviewed experts concurred that "motor carriers typically do not allocate enough resources toward safety and crash prevention," and that "the more safety activities motor carriers engaged in to prevent crashes, the lower the likelihood that a Nuclear Verdict would result" (*See*, Report at 36), the Report instead blames lawyers, juries, and the legal system for the horrible safety record of the industry's most unsafe motor carriers and suggests such dangerous motor carriers should be protected from the legal consequences of their own wrongdoing.

THE REPORT MISREPRESENTS THE CONCEPT OF A NEGLIGENCE CLAIM AS A RECENT LEGAL DEVELOPMENT

In addition to the unsupported attack on the U.S. legal system in the Introduction, the "Background" section of the Report follows by falsely indicating that the concept of holding companies legally accountable for the damages they negligently cause is a relatively new legal development, less than 90 years old. It suggests that because there were no such claims before 1932, the rise in number and size of personal injury claims in those 90 years has been a recent and rapid development, "at nearly an exponential rate" and as such, should be more subject to change. *See* Report, at 60.

The first sentence in the "Background" section states: "The history of large verdicts in the trucking industry can be traced back to the **first personal injury lawsuit,** which took place in 1932". Report, at 10 (emphasis added). The Report cites the 1932 English case of *Donoghue v. Stevenson*, which involved a woman who sued a drink manufacturer after she found a dead snail in a bottle of ginger beer she had been drinking, which made her sick. The Report says that, before this case, "the only legal recourse to injured consumers was through a breach of contract," and that this case established the "duty of care" to act "with the caution and prudence that a reasonably prudent person under the circumstances would use." The Report goes on to say that the standard created by this case thereafter "was generally adopted by the U.S. legal system, and still serves as the basis for most personal injury lawsuits, including large verdicts in the trucking industry". Report at 10.

This false claim is then cited in the first sentence of the "Conclusions" section of the Report: "From the 1932 case that first defined 'duty of care'…lawsuits have expanded at a nearly exponential rate" Report, at 60; The Report's statement that the concept of holding trucking companies accountable for their negligent actions that cause personal injuries is somehow based on a 1932 lawsuit in England, and that the 1932 case established

the duty of care of a reasonably prudent person demonstrates a profound and fundamental lack of understanding of the U.S. legal system. It also shows a fundamental lack of awareness of the role that the requirement of acting in a reasonable manner has played in our legal heritage to promote safety for at least five centuries. It also is another example of the Report's authors claiming "facts" that are demonstrably false.

Personal injury claims resulting from "road accident" cases have been brought against careless drivers at least since the sixteenth century, whether through the ancient writ of "*Trespass vi et armis*" or an "action on the case," raising issues of fault on the part of the defendant "saying either that the defendant had failed to perform a distinct duty, or that he had acted *negligenter, incaute, improvide*, and the like." Indeed, "highway injury cases" were inevitably the most common. [38]

By the mid-1800s, American courts had rejected the use of the English forms of action but had adopted the use of the "reasonable man" test sufficiently for the U.S. Supreme Court, in 1872, to cite multiple prior cases establishing that "negligence has been defined to be the omission to do something which a reasonable man...would do, or in doing something that a prudent and reasonable man would not do." [39] The *Donohue* case, cited in the Report, had nothing whatsoever to do with the law of negligence as applied in truck crash injury claims. The significance of that case was that it allowed product liability claims to be brought under the already-well-established law of negligence, without the need for having a contract ("privity") between the parties.[40]

The Report asserts that the fundamental common-law right to redress negligently inflicted personal injuries by recovery of the damages sustained, which is as old as the common law itself, is a recent legal development that should be altered in favor of the trucking industry due to questionably construed events of the past decade (or because of unexplained outliers in one year, 2018). The Report suggests making significant changes that go to the very foundation and fundamental purposes of the U.S. legal system, about which the authors of the Report are apparently completely unaware.

The Report Misrepresents the "Legal Landscape"
as Favoring Only Plaintiffs

After wrongly asserting that personal injury cases and the standard of care to act as a reasonably prudent person were created in a 1932 English product liability case, the Report purports to provide an overview of the law applicable to personal injury cases. This

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[38] *See*, S.F.C. Milsom, "*Historical Foundations of the Common Law*" Butterworths (1969), at 345-46.

[39] *Nitroglycerin Case,* 82 U.S. (15 Wall.) 524, 526 (1872).

[40] See, S.F.C. Milsom, "*Historical Foundations of the Common Law*" Butterworths (1969), at 352, 347

attempt to analyze the "legal landscape" in the United States is similarly less than correct and forthright.

The Background section points out the three basic kinds of negligence recognized in the various states; contributory negligence, comparative negligence, and modified comparative negligence. It states that "the shift from contributory negligence to comparative negligence has benefited individuals filing lawsuits, as their fault does not discredit their lawsuit." Report, at 11 (emphasis added) The Report states that these concepts, combined "with differing forms of liability…create a favorable environment for large verdicts." Report, at 11. These negative statements about our legal system are made with no citation or support, and therefore should be viewed as mere partisan opinion that demonstrate the bias of the authors and the unreliability of the Report.

The Report fails to point out that courts have largely rejected contributory negligence because of its draconian unfairness to injured victims and to defendants, alike. A relatively recent addition to the law of torts according to legal scholars, the doctrine of contributory negligence, kept an injured plaintiff who had been negligent in any way from claiming any recovery at all against a negligent defendant. This rule was a harsh and arbitrary, all-or-nothing rule that barred any recovery by an injured plaintiff if the plaintiff contributed, in any degree, even only one percent, to cause their own injuries. The Report also fails to acknowledge that the law of contributory negligence could also be unfair to defendants. Under the exceptions to the rule, such as "last clear chance", the "humanitarian doctrine," and "gross negligence" concepts, a plaintiff's claim was not barred by their negligence under many circumstances, and if an exception applied, the defendant had to pay for all damages, even if the plaintiff had a large percentage of fault. Because of unfairness to both plaintiffs and defendants, courts struggled with applying a doctrine that was so blatantly counter-intuitive and unfair. England, where the doctrine came from, abandoned it by statute in 1945, but the unfair rule persisted in almost all states.

The pressure for a fairer system mounted until four states adopted comparative negligence by statute in 1969. By 1980, the push for a more just system resulted in more than two-thirds of the states abrogating the doctrine of contributory negligence, adopting one form of comparative negligence or another by statute or by case law, under which a plaintiff may recover only a pro-rata amount of their damages depending on their degree of fault. The Report provides no support for its baseless claim that these concepts have created a legal landscape "conducive to large jury awards." Although it might be said that, since 1980 some cases have been allowed to proceed that would not have proceeded previously, the changes in our legal system have been made not in an effort "to create a

favorable environment for large jury verdicts," but to create a more fair and just system for all participants, including defendants.[41]

The Report further fails to mention that the same kind of push for fairness that gave rise to the doctrine of comparative fault also worked to eliminate unfair rules that had previously limited the rights of defendants. At common law, a plaintiff could pick which of several possible defendants to sue and the defendant had no right to bring an action for contribution against other negligent actors to have them share in the liability. Under the updated, more fair rules and procedures, defendants not only have the right to bring an action for contribution when they are found to be at fault, but they can also usually "implead" the other negligent party into the same action, even before they have been found to be at fault, so that everything can be considered by one jury.

After failing to mention the benefits to defendants that the search for a more just system has provided, the Report points out only the changes that they say have "benefited individuals filing lawsuits", and then incorrectly states that under the comparative fault rules a plaintiff's "fault does not discredit their lawsuit." Report, at 11. **This is completely wrong, and again demonstrates a significant lack of understanding of the U.S. legal system.** All forms of the comparative-negligence doctrine "discredit" the plaintiff's case in direct proportion to their fault. In the case of pure comparative negligence, a plaintiff's recovery is reduced pro-rata by the plaintiff's percentage of fault. The same is true under all versions of modified comparative fault, but, in addition, if the plaintiff's fault is equal to or greater than the defendants, the plaintiff's claim will be completely barred. Under this rule, a plaintiff's case may now be completely barred, even if, under an exception to the contributory-negligence doctrine such as the "Last-Clear-Chance Doctrine," the defendant in the same type of case would have been liable for all of plaintiff's damages.

EFFECT OF ATRI'S SUGGESTIONS ON PARALYZED AND BRAIN-INJURED CHILDREN

Although the legal system is beginning to work exactly as intended to promote safety in the trucking industry, ATRI suggests that the system should be changed to make full and fair recovery by victims more difficult or impossible. They suggest several ways to "reform" the system, including "by setting a limit on the amount of non-economic damages that can be obtained by plaintiffs." Report, at 59. Most of the "reform" suggestions would make full and fair recovery more difficult, but the most arbitrary, unfair, and cruel suggestion is that the recoveries of some crash victims' "non-economic" damages should be "limited" to an arbitrary amount, irrespective of the actual damages sustained. ATRI fails

[41]See, John Wade, *Comparative Negligence, Its Development and Its Present Status in Louisiana*. LA Law Review, Vol. 40, No.2 (Winter 1980).

to point out that the inevitable effect of this suggestion would be that less-seriously injured truck crash victims would be able to recover their full and fair damages, but the most-seriously and catastrophically injured victims with the greatest injuries would not. In effect, ATRI is suggesting that the most-severely injured truck crash victims subsidize the negligent motor carrier that injured them by being prohibited from collecting their full and fair damages as determined by a jury.

ATRI's Report points out that, of all the losses suffered by truck crash victims, the very largest are the losses suffered by paralyzed and/or brain-injured children, whose injuries are inherently severe, and who will suffer for the entire length of their long-remaining lives. Report, at 21-22, 30. According to ATRI's Report, these are the cases in which ATRI's proposed limit on damages would be the most valuable to negligent motor carriers because the children's pain and suffering is immense and long-lasting. The trucking industry's attempts to gain these subsidies for unsafe motor carriers would result in brain-injured and paralyzed children bearing the greatest cost of this subsidy. Congress never intended for catastrophically injured individuals, especially children or surviving families to bear the expense of unsafe practices of motor carriers.

Relieving negligent motor carriers of their legal obligation to pay the full damages of the victims they injure and kill by limiting the rights of the worst-injured crash victims to recover full compensation for their non-economic damages would not only fly directly in the face of Congress' intent when it passed the *Motor Carrier Act of 1980 and* contradict the principle of fairness and the fundamental purposes of our legal system by casting the peril of negligent acts on the victim of the negligent action instead of on the negligent actor, but the truck crash victims it would hurt most would also be the ones who are the most vulnerable and who need the most help. This forced subsidy of negligent motor carriers would ultimately fall also on taxpayers who would have to support more of such under-compensated victims through Medicaid, Social Security, and other social welfare programs.

Certainly, there have been specific instances in which verdicts may have been unfair to the defendant or to the plaintiff. But our legal system already has built-in protections from potential unfairness to either party that can arise from the passion and prejudice of a jury. The Report made no analysis regarding these protections and did not purport to suggest making any change for the purpose of promoting fairness. It is unreasonable to propose an arbitrary cap on damages without regard to the real and actual damages that are caused in a crash and suffered by the victim. In addition, limiting full and fair recovery by crash victims would also reward motor carriers that cut corners and do not invest in safety, and at the same time take away the competitive advantages gained by those motor carriers that do the right thing.

Changing our legal system in a way that places the greatest burden on paralyzed and brain-injured children is not acceptable. Unsafe motor carriers cutting corners and making it difficult for safe companies that invest in safety to compete should not be tolerated. Knowledge, equipment, and technology exist now to prevent many more truck crashes. If ATRI wants to reduce claims and verdicts, it should focus on crash prevention and mitigation by calling for mandatory AEB , speed limiters, improved underride guards, improved driver training, and real-time telematics to monitor unsafe driving behaviors which in turn would reduce the claims made (and verdicts entered) against motor carriers, instead of suggesting that the most injured of truck crash victims should subsidize negligent and dangerous motor carriers that persistently refuse to operate safely.

The right of injured persons to recover their full damages as fairly determined by a jury, from a person or entity that negligently injured them, has developed over more than half a millennium, and is enshrined in our state and national constitutions. It is not a recent development that can be lightly cast aside to subsidize negligent or reckless motor carriers. The goal of the system is not only to achieve the fundamental fairness of requiring a negligent defendant to provide compensation to make their victim whole, but also to discourage dangerous activities and to spur the innovation, development of, and investment in safe practices so crashes occur with much less frequency. By suggesting that the right of full recovery of an injured party be limited, the Report makes clear its preference to place the risk of pain and suffering upon the most-injured victims solely to reduce the financial exposure of an unsafe motor carrier, not because paying for all losses is somehow unfair, but because it sometimes costs a lot, especially when catastrophic damages are caused. The motoring public deserves better than this from the trucking industry.

CONCLUSION

None of the primary findings of ATRI's Report on Nuclear Verdicts are valid or based on reliable data. There was no "increase of 967 percent" in the average size of verdict, mean verdict awards did not "increase 51.7 percent per year," and all ATRI's examples of motor carriers experiencing large premium increases were companies with horrible crash records that justified their premium increases based on their own actions. Furthermore, average insurance costs remain a small percentage of motor carriers' average marginal costs, as they have for the past decade.

In spite of the façade of quantitative analysis, the Report adds nothing to the same arguments the trucking industry has been making for almost 30 years. In finding an increase in verdicts over the past decade, the Report relies on a non-representative database that failed to include a very large number of verdicts in the early years, so all the Report's comparative findings are invalid. Beyond this dramatic under-inclusion of earlier verdicts, the Report wholly failed to consider the dramatic increase in catastrophic truck crashes

from 2009 through 2019 and the effect such an increase in crashes would have on the number of resultant claims and verdicts.

The Report is based on a false premise, begins with a misleading title about what the Report intends to examine, ends with a fabrication about what the Report actually examined, and in between its title and its conclusion the Report is filled with a non-representative database, erroneous calculations, misstatements of fact, exaggerations, unsupported assertions, and serious transparency and selectivity bias problems. The Report argues for drastic changes to our legal system to fix a purported crisis of unfair and excessive recoveries that the Report fails to demonstrate even exists. The Report as written does not hold up to scrutiny, lacks methodological and academic rigor and appears to be guided by highly motivated reasoning. The Report cannot and should not be used by any responsible person or entity as a basis for suggesting or making policy decisions.

ADDENDUM: ATRI's "THE IMPACT OF SMALL VERDICTS AND SETTLEMENTS ON THE TRUCKING INDUSTRY"

The TSC has not had time to perform a full analysis of ATRI's recent report "The Impact of Small Verdicts and Settlements on the Trucking Industry ("Small Verdict Report"), but even a preliminary review reveals that it suffers from the same deficiencies as ATRI's Nuclear Verdict Report: Utilization of a non-representative database, unsupported assumptions, misinformation, exaggerations, and misleading pejorative language.

Non-Representative Database

Like its predecessor, the Small Verdict Report analysis uses a selected non-representative database that cannot support generalized findings. ATRI selected 641 samples of settlements and verdicts from "multiple external industry sources," that spanned 14 years, out of the hundreds of thousands of possible examples of settlements, with no attempt to state how or why its small dataset was representative of anything. The examples came from 38 states, with no description of how or why the examples were selected or any information regarding examples or venues that were not selected or represented. While the data purports to include "settlements and verdicts" of less than $1 million, the data failed to include any settlements that were reached without the filing of a lawsuit or any defense verdicts in cases in which less than $1 million was claimed or requested at trial.

While ATRI admits that its data constitutes a "fraction" of claims during this period (641 claims out of hundreds of thousands of truck crash settlements), and that the data does "not necessarily capture all possible scenarios," it still purports to make findings about "average" settlements and verdicts as though they were real-world averages when they are clearly not. ATRI merely states that since the tiny fraction of selected cases came from 38 states, "the average payment size used for comparison in the analysis is presumed to approximate the national average." TSC notes that 27 examples (less than two per year) were selected from California, and 50 examples were selected from New Jersey (just over 3.5 per year). On the basis of this sample, ATRI found that California and New Jersey had the highest and second highest "average" payments for these kinds of cases. Other than stating that the data comes from 38 states, ATRI fails to state how this kind of data selection can be considered representative in any way.

Unsupported Assumptions and Exaggerations

ATRI begins its Background section with the unsupported statement about factors that have given rise to the "proliferation" of verdicts and settlements under $1 million over the past 20 years. While "proliferation" means "a rapid increase in numbers," ATRI's data, as reflected in its Figure 1, shows the highest number of cases and the highest total of payments made as having occurred in 2009 and 2010, with a steady decline in the

following years up through 2019, While ATRI makes excuses for these findings, its data does not support any "proliferation" of these recoveries, either in number or amount. Nonetheless, the word "proliferation" is used to describe an increase in such cases throughout.

ATRI blames "ambulance chasers," "settlement mills," and "litigation financing" for this purported "proliferation" of claims but cites no examples of a single truck crash claim that was brought as a result of any of these or other malicious tactics. Indeed, the ATRI article cited in support of the statement about settlement mills indicates that insurers actually "like" it when settlement mills are hired to represent claimants because they do not properly prepare their cases, reach settlements "at an attractive discount," rarely file lawsuits, and resolve cases at levels as low as between three to five times the incurred medical expenses.

Regarding the unsupported factor of "litigation financing" of cases (in which an investor fronts expenses in a case in exchange for a percentage of the recovery...as opposed to a true loan), not a single example is provided in which such financing was used to bring a truck crash claim. The article cited for such litigation financing being a factor in the "proliferation" of cases also provides no examples of such use in truck crash cases, but simply states that this practice has the "potential" to affect such cases. TSC performed an informal poll of over 400 plaintiff lawyers who have handled or are handling a truck crash case and not one responded that they have financed any truck crash case for a share of the recovery as described by ATRI.

As it did in its Nuclear Verdict Report, ATRI has again purported to cite multiple examples of motor carriers that have had to close their doors due to insurance premium increases, when those motor carriers closed their doors for other reasons. ATRI represented that its cited article (at fn. 21) listed "over half a dozen motor carriers" (out of more than half a million motor carriers) that closed their doors in 2019 due to "increased insurance premiums." Of the motor carriers listed in the article, only one listed increased insurance premiums as being the cause of it going out of business, and that motor carrier's premium increase was due to its horribly unsafe operations: almost one-third of its inspected vehicles were found to be unfit to be on the road, and the company had four crashes in two years, including one catastrophic fatal crash. The other motor carriers reported closing their doors due to low freight and lack of freight, the FMCSA's scoring system, a National Labor Relations dispute about whether it was the "alter ego" of a prior carrier that had been shut down, mismanagement, high labor costs, and the driver shortage.

Also, as it did before, ATRI equated verdicts with "payments," in spite of the fact that a verdict is not a payment and many verdicts are appealed, reversed or reduced by settlement. The actual payments made in these cases were not examined or revealed in ATRI's Small Verdict Report.

ATRI proposed tort "reform" as the answer to the assumed "proliferation" of cases, and the state of Tennessee (which ATRI cited as having enacted a statutory limit on non-economic damages) was cited as an example of the only state to significantly predict "lower than average payments." ATRI failed to disclose that Tennessee's limit on recovery for non-economic damages in injury cases has been overruled as constituting an unconstitutional infringement on a claimant's right to have a jury decide the amount of damages that were caused by a defendant's negligent or reckless conduct.

ATRI again fails completely to consider the effect the dramatic increase in all kinds of truck crashes over the past decade would have on the number of claims brought and then settled or tried. The TSC believes it should not come as a surprise to any reasonable person that an increase in truck crashes would result in an increase in truck crash claims, but this is simply not addressed by ATRI, yet again.

ATRI repeatedly includes purely partisan comments critical of the court system, which it attributes to "subject matter experts," which consist solely of insurance company employees and truck crash defense lawyers, with no input from any objective sources. These comments add nothing of substance to the discussion and should be seen as what they are: pure biased opinion by industry-paid spokespersons.

Conclusion

ATRI's Small Verdict Conclusion states that small verdicts "have increased" in both "frequency and severity" in spite of its findings that the number and "average" sizes of settlements and verdicts have gone down. They ignore their own data and cite only the "general consensus in the trucking industry" that there has been such an increase. ATRI attributes this perceived rise to "loose state tort laws" and other industry-imagined factors without any basis in their data. The primary factor of any increase in the number of claims at any level is the huge increase in the number of truck crashes over the past decade. These crashes injure and kill people who then must bring claims to recover their damages that have been caused by negligent motor carriers.

It is not surprising to the TSC that ATRI's non-representative data would not reflect real-world averages. ATRI's Small Verdict Report is cut from the same cloth as its Nuclear Verdict Report: Misinformation masquerading as research.