No. 17-1213

IN THE

Supreme Court of the United States

GENERAL MOTORS LLC,

Petitioner,

v.

MICHAEL BAVLSIK & KATHLEEN SKELLY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of concern to the business community.

The Chamber's members and the broader business community are particularly concerned about the risk of unjust awards in damages-only retrials where there are serious doubts as to whether the first jury reached consensus on liability. The Chamber's members—and all defendants facing damages-only retrials—are entitled to certainty that the prior jury's binding liability finding did not reflect an unlawful compromise.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief, and all received timely notice of *amicus curiae*'s intention to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the application of the presumption against partial retrials that this Court announced in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931), to cases in which there is strong evidence that the defendant was held liable only as a result of an improper compromise verdict. In *Gasoline Products*, this Court held that a court may grant a partial retrial only when "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.*

Here, the Eighth Circuit ordered a damages-only retrial despite compelling evidence that the jury reached a compromise verdict in finding petitioner General Motors (GM) liable on one of respondents' claims while awarding indisputably inadequate damages. That decision is clearly inconsistent with *Gasoline Products*: given that the initial jury evidently adjusted its damages award to account for its doubts about whether GM should be held liable, liability and damages are hardly "distinct and separable." *Id.* What is more, by requiring the new jury to take liability as given, the damages-only retrial subjects GM to a significant risk of an increased damages award even though it may not properly have been found liable in the first place.

The Eighth Circuit's decision thus gives rise to the potential for significant unfairness that will fall disproportionately on defendants. The standard that the Eighth Circuit applied—it required that the record as a whole "clearly demonstrate[]" a compromise verdict—will make it virtually impossible to demonstrate that a

damages-only retrial is inappropriate because the jury issued a compromise verdict. That result cannot be squared with *Gasoline Products*' contrary presumption. It is also cause for particular concern because subsequent developments in tort law and the increasing complexity of determining liability in tort cases have only increased the need for, and importance of, the *Gasoline Products* presumption.

Once a court grants a damages-only retrial, moreover, the artificially limited nature of the retrial necessarily requires courts to make difficult judgments about how to conduct the retrial. The court must decide whether to admit or exclude evidence that bears on both damages and liability, as well as how much, if anything, to tell the second jury about the actions of the first. When the initial trial ended in a compromise verdict, excluding evidence that led the first jury to question or limit liability may be highly prejudicial to the defendant, as it creates a real danger that the second jury will subject the defendant to a higher damages award. Finally, the unjust consequences of compromise verdicts and damages-only retrials fall particularly heavily on corporate defendants, because compromise verdicts are more likely when a case involves a sympathetic individual plaintiff and a corporate defendant, and the damages award resulting from a damages-only retrial is more likely to skew upward in view of the defendant's corporate status.

These concerns mandate a rule that makes damages-only retrials presumptively impermissible when there are any "indications" that the jury "may have rendered a compromise verdict." *Collins v. Marriott Int'l, Inc.*, 749 F.3d 951, 960 (11th Cir. 2014). As GM has persuasively demonstrated, the Eighth Circuit's

contrary decision is wrong, and it conflicts with the decisions of other courts of appeals. Because the decision will inflict severe prejudice on businesses and create substantial confusion in the lower courts, the question presented is extremely important. This Court's review is warranted.

ARGUMENT

I. THE DECISION BELOW LICENSES TRIAL COURTS TO IGNORE STRONG EVIDENCE OF COMPROMISE VERDICTS

The court below refused to grant a full retrial because it did not believe that the record, "viewed in its entirety, clearly demonstrate[d]" that the jury had reached a compromise verdict. App. 18. The Eighth Circuit conceded that GM had made "a strong case" that the jury had rendered a compromise verdict, but held that the evidence was insufficient. In fact, the evidence of a compromise verdict was overwhelming.

A. Empirical Evidence Shows That Trials Typically Have Clear Winners and Losers

In civil litigation, liability is a binary proposition: the jury concludes that the defendant is liable to the plaintiff on a particular claim, or it does not. The Eighth Circuit's pattern jury instructions for civil cases, for instance, instruct jurors that "[i]t will be your duty to decide from the evidence whether the plaintiff is entitled to a verdict against the defendant." 8th Cir.

Civil Jury Instr. § 1.03 (2017).[2] The jury is then instructed to conduct the damages inquiry taking liability as given. *E.g.*, *id*. § 15.70 ("If you find in favor of the plaintiff, then you must award the plaintiff such sum as you find will fairly and justly compensate the plaintiff.").

Empirical evidence indicates that juries generally execute their instructions faithfully: jury trials typically produce clear winners and losers, rather than compromise verdicts. *See, e.g.*, Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. Rev. 1, 7, 40–45 (1996) (concluding, from a sample of civil jury trials in California state courts, that compromise verdicts "hardly ever happen"). In general, if a jury finds the defendant liable, it then calculates damages based on the factors on which it is instructed, rather than its view about the strength of the liability case. Jury experiments have shown that increasing the strength of a plaintiff's case on liability typically does not lead jurors to increase their compensatory damages awards. *See* Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wis. L. Rev. 297, 321 (1998).

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[2] http://www.juryinstructions.ca8.uscourts.gov/8th%20Circuit%20Manual%20of%20Model%20Civil%20Jury%20Instructions.pdf.

B. Inadequate Damages Awards Strongly Suggest Improper Compromise, and Were Viewed As Virtually Dispositive Evidence of Compromise At the Time *Gasoline Products* Was Decided

Because juries tend to obey their instructions, aberrant damages awards—those that are plainly inconsistent with the facts introduced at trial—are strong evidence of improper compromise. Indeed, at the time *Gasoline Products* was decided in 1931, the common law considered such an award virtually dispositive evidence of a compromise verdict. In *Simmons v. Fish*, 97 N.E. 102, 106 (Mass. 1912)—cited repeatedly by *Gasoline Products*, and hailed as the "leading case" on the subject of compromise verdicts as of 1937, *see James Turner & Sons v. Great N. Ry. Co.*, 272 N.W. 489, 502 (N.D. 1937)—the issue of liability was hotly contested in a tort suit involving an injury that "necessitated the removal of the eye of a boy under 21 years of age." *Simmons*, 97 N.E. at 106. Though there was "no contest as to the injury done," the jury awarded only $200. The court had no trouble concluding that the inadequate damages alone evinced an improper compromise:

> The jury said $200. It is inconceivable that any jury, having agreed upon the issue of liability, should have reached such a determination as to damages. They had no right to consider the subject of damages until they had settled the liability in favor of the plaintiff. The verdict itself is almost conclusive demonstration that it was the result not of justifiable concession of views, but of improper compromise

> of the vital principles which should have controlled the decision.

Id.; *see also James Turner*, 272 N.W. at 503 (collecting cases "giving the rule where smallness of damages awarded by jury indicates compromise verdict"). The *Simmons* court went on to observe that "it would be a gross injustice" to set aside the verdict as to damages alone, because it would force the defendant into "a new trial with the issue of liability closed against him when it is obvious that no jury had ever decided that issue against him on justifiable grounds." 97 N.E. at 106.

Even after *Gasoline Products* sanctioned the constitutionality of damages-only retrials, courts continued to regard full, rather than partial, retrials as obligatory when juries awarded "grossly unjust and inadequate" damages for severe injuries. *Schuerholz v. Roach*, 58 F.2d 32, 34 (4th Cir. 1932) (holding that an award of just $625 for loss of an eye necessarily gave rise to the inference of "a compromise of the controversy at the expense of both litigants" for which a full retrial "was the only way in which justice could have been done"); *see also Rose v. Melody Lane*, 39 Cal. 2d 481, 489 (1952) ("When the jury fails to compensate plaintiff for the special damages indicated by the evidence, and despite the fact that his injuries have been painful, makes no award or allows only a trifling sum for his general damages, the only reasonable conclusion is that the jurors compromised the issue of liability, and a new trial limited to the damages issue is improper."); Donald R. Wilson, *The Motion for New Trial Based on Inadequacy of Damages Awarded*, 39 Neb. L. Rev. 694, 707–08 (1960) ("[T]he typical substantial though inadequate verdict involves an illicit compounding of liability and damage questions and assuming that there is

no other apparent explanation for the inadequacy—a simple mathematical error by the jury, for example—all substantial though inadequate verdicts should be presumed to represent illicit compromise verdicts.").

Academic studies of jury behavior have confirmed what the courts have long understood: juries that reach consensus on a defendant's liability ordinarily do not award the plaintiff grossly inadequate damages. *See, e.g.*, Wilson, *supra*, at 694 ("[T]he fact that the vast majority of inadequate verdict cases found involve extremely close liability questions clearly illustrates that the most important cause of the inadequate verdict lies in the widespread tendency of jurors to reduce the amount of plaintiff's award because of a general uncertainty over defendant's liability or as a means of compromising their differences on defendant's liability."). Particularly when a plaintiff's injuries are severe, courts have rightly regarded such an award as virtually *per se* evidence of improper compromise.

The Eighth Circuit's rule deviates from that long-held understanding. By framing the question as "whether the record, viewed in its entirety, clearly demonstrates the compromise nature of the verdict," the Eighth Circuit invites trial courts to dismiss grossly inadequate damages as insufficiently probative, even absent any competing explanation for the award. "Injustice" is the predictable result. *Gasoline Products*, 283 U.S. at 500.

That is just what happened below. As the Eighth Circuit's opinion acknowledged, the plaintiff's injuries were "permanent" and severe, and the damages award undercompensated him for his injuries. For instance, GM did not argue at trial that the jury should award

nothing for future damages or loss of consortium, but the jury did so anyway. App. 17. Under the circumstances, the "verdict itself is almost conclusive demonstration" of a compromise. *Simmons*, 97 N.E. at 106. In the calculus required by the Eighth Circuit's standard, though, it "falls short." This is precisely backward: "Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution." *Vieth v. Jubelirer*, 541 U.S. 267, 311 (2004) (Kennedy, J., concurring).

II. THE *GASOLINE PRODUCTS* PRESUMPTION AGAINST DAMAGES-ONLY RETRIALS APPLIES WITH PARTICULAR FORCE IN CONTEMPORARY LITIGATION

In *Gasoline Products*, this Court held that partial retrials are consistent with the Seventh Amendment only when "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." 283 U.S. at 500. That was nearly 90 years ago. At that time, the American tort system still resembled the one that obtained in the nineteenth century, characterized by strict bars on recovery and—compared to today—straightforward questions of liability. Today—in an era of complex consumer products, professional expert witnesses, and novel theories of liability—the questions of liability that juries are called upon to resolve are substantially more difficult, and more likely to be closely contested, than they were a century ago. *See generally* U.S. Chamber Institute for Legal Reform, *Labora-*

tories of Tort Law 1–2 (2014).[3] Because liability determinations today often require juries to make complex assessments of a defendant's fault, modern jury verdicts in tort cases also exhibit more variance than they did when *Gasoline Products* was decided. For these reasons, treating damages-only retrials as presumptively impermissible when there is reason to think that the jury may have compromised is even more vital today than when Justice Stone was writing in 1931.

In the nineteenth century, and continuing through the first decades of the twentieth century, tort law reflected the prevailing view that in most circumstances individuals were accountable for their own personal injuries. *See generally* Lawrence Friedman, *A History of American Law* 350–66 (3d ed. 2005). Civil lawsuits did not frequently pose complex liability questions, in part because of strict doctrines barring plaintiffs from recovering damages: the fellow-servant rule, contributory negligence, an expansive assumption-of-risk doctrine, and more.

Beginning in the 1960s, liability determinations in tort cases became considerably more complex, along several dimensions. Mass-tort and product-liability litigation exploded, involving products ranging from the Dalkon Shield to asbestos to cigarettes to the Ford Pinto. A defining characteristic of such cases is the difficulty of establishing the defendants' direct causal responsibility, which may arise from a variety of factors: the long delay between plaintiffs' exposure to these products and their claimed injuries; the large number of natural and human factors capable of caus-

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[3] http://www.instituteforlegalreform.com/uploads/sites/1/tort-labs.pdf.

ing or exacerbating the alleged harm; the technological complexity of many modern consumer products; and the uncertainty of scientific studies demonstrating a link between particular products or practices and particular harms. *See* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 941 & n.1 (1995). At the same time, changes in the law have imposed new burdens on juries. For example, the gradual replacement of strict contributory negligence regimes with systems of comparative negligence, *see, e.g.*, *Li v. Yellow Cab Co.*, 13 Cal. 3d 804 (1975), required juries to assume a new responsibility to apportion liability between plaintiffs and defendants. Similarly, the frequency with which plaintiffs sought noneconomic damages increased dramatically in the middle of the twentieth century. *See* Edward J. McCaffrey et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 Va. L. Rev. 1341, 1343 (1995). These damages are particularly difficult for jurors to determine in a principled manner. *E.g.*, *Duarte v. Zachariah*, 22 Cal. App. 4th 1652, 1665 (1994) ("Garden-variety pain and suffering defies a nice standard for calculation.").

One consequence of these characteristics of modern tort litigation is that there is a high degree of randomness in civil verdicts: juries are "apt to render verdicts that substantially differ, even when based on nearly identical facts." Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 Temple L. Rev. 1013, 1018 (2007). In one study, jurors watched the same products-liability trial on videotape and rendered verdicts; 51 percent of jurors rendered verdicts for the plaintiff. *See* Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages:*

Sources of Variability and Ways to Increase Consistency, 48 DePaul L. Rev. 301, 305 (1998). In another study of verdict variability in which jurors viewed the identical case, the mean award deviated from the median award by nearly $5 million. *Id.* at 308. It follows that compromise verdicts may be more likely as well: presented with a close, complex liability question and a sympathetic plaintiff, juries may respond by compromising on liability.

Because determinations of both liability and damages are highly variable in the contemporary tort system, severe prejudice results if a court mistakenly orders a damages-only retrial following a compromise verdict. A new trial on damages alone "locks in" an adverse liability determination that could well have come out in the defendant's favor in a retrial on all issues. In other words, a damages-only retrial eliminates variability with respect to liability (where variability is likely to inure to the benefit of the defendant), but not with respect to damages (where variability is likely to inure to the benefit of the plaintiff).

Contemporary civil litigation is more complex and variable than it was when *Gasoline Products* was decided—and improper compromise verdicts are thus more likely. For that reason, *Gasoline Products*' presumption against damages-only retrials applies with even greater force today.

III. BECAUSE DAMAGES-ONLY RETRIALS POSE A HEIGHTENED RISK OF ARBITRARY DAMAGES AWARDS, COURTS SHOULD HESITATE TO ORDER THEM WHERE THERE MAY HAVE BEEN A COMPROMISE VERDICT

The concept of the damages-only retrial is appealingly straightforward. The jury is instructed that the defendant has already been found liable in a prior proceeding; the parties offer testimony and argument regarding the amount of money that will compensate the plaintiff for her injuries or punish the defendant for its malfeasance, without regard to questions of fault or causation; and the jury renders an award of damages, free from whatever error tainted the initial damages verdict.

The reality is more complicated. Even when a court concludes that *Gasoline Products* permits a damages-only retrial because the damages issues are "distinct and separable" from the liability issues, 283 U.S. at 500, the evidence relevant to liability may be relevant to, or have some bearing on, damages questions. The rules governing what the jury is told about the prior trial—and what evidence it is allowed to hear in a damages-only retrial—vary from jurisdiction to jurisdiction, and practices vary from judge to judge. These uncertainties compound the unfairness of damages-only retrials when there is reason to think that the first jury's doubts about liability influenced its verdict.

1. Courts have taken different approaches to the problem of whether the jury in a damages-only retrial should be permitted to see evidence that is relevant to the damages inquiry, but that also bore upon liability.

The Seventh Circuit, for instance, requires that the parties to a damages-only proceeding "have an opportunity to present to the second jury whatever evidence … from the liability phase of the trial may be regarded as relevant in any way to the question of damages." *Watts v. Laurent*, 774 F.2d 168, 181 (7th Cir. 1985). Although district courts conducting damages-only retrials in the Seventh Circuit are required to instruct jurors "that the relevant issues of liability have been previously decided" and on "the legal basis of defendants' liability," those instructions may not preclude the "free presentation of evidence" from the liability phase, provided it is relevant "in any way" to damages. *Id.*; *see also Wheatley v. Beetar*, 637 F.2d 863, 867 (2d Cir. 1980) ("The new trial on damages in this case will necessarily require introduction of some of the evidence which came in during the liability stage of the first trial."); *Whitehead ex rel. Whitehead v. K Mart Corp.*, 173 F. Supp. 2d 553, 560 (S.D. Miss. 2000) ("strong presumption that evidence from the liability phase of the first trial was relevant in some way to damages"). Indeed, some courts allow evidence of liability to be introduced in a damages-only retrial precisely because they view that evidence as "inextricably intertwined" with evidence relevant to damages—even though the damages-only retrial should not have been granted if damages and liability issues were so closely related. *Edman v. Marano*, 177 F. App'x 884, 887 (11th Cir. 2006).

Other jurisdictions apply a more stringent rule, holding that "evidence of fault or liability should not be relevant" in a damages-only retrial. *In re Air Crash at Lexington, Kentucky*, No. CIV.A 5:06-CV-316-KSF, 2009 WL 6056005, at *1 (E.D. Ky. Nov. 10, 2009). And some forbid new trials on damages entirely when "evidence

on the issue of liability" is "intertwined with the issue of damages." *Lindenfield v. Dorazio by Dorazio*, 606 So. 2d 1255, 1258 (Fla. Dist. Ct. App. 1992). In *Pryer v. C.O. 3 Slavic*, 251 F.3d 448 (3d Cir. 2001), the plaintiff, an inmate of a state prison, asserted excessive-force claims against his guards. *Id.* at 450–51. Following a trial in which the jury rendered a verdict for the plaintiff but was improperly instructed as to the applicable law on damages, the district court ordered a new trial on damages only. *Id.* at 454. The guards argued on appeal that the new trial should have been extended to all issues because "the issues of liability and damages were so closely interrelated." *Id.* Expressly rejecting the Seventh Circuit's solution in *Watts*, the Third Circuit agreed, holding that a new trial on damages was improper where evidence "establishing the respective culpabilities" of the defendants was "entangled" with evidence of the plaintiff's injuries. *Id.* at 456, 458.

2. When new trials on damages are allowed, individual judges exercise substantial discretion to determine whether and to what extent to admit evidence that is relevant to the damages award, but that was also relevant to liability, with potentially significant consequences for the resulting verdicts. A recent California appellate opinion involving a new trial on punitive damages in an asbestos case is illustrative. In *Casey v. Kaiser Gypsum Co., Inc.*, No. A133062, 2016 WL 258670, at *1 (Cal. Ct. App. Jan. 21, 2016), the jury returned a verdict finding the Kaiser Gypsum Company 3.5 percent liable for plaintiffs' mesothelioma-related injuries. *Id.* The jury awarded $21 million in compensatory damages, but could not reach a verdict on punitive damages. The trial court ordered a limited retrial on that issue, and the second jury awarded

plaintiffs $20 million in punitive damages. *Id.* The trial court made a series of discretionary decisions to exclude liability-related facts that were arguably relevant to determining punitive damages:

- It refused to inform the second jury that the first jury had already awarded $21 million in compensatory damages, or that it had found that Kaiser Gypsum was only 3.5 percent at fault. *Id.* at *12.

- It refused to inform the jury about what conduct the first jury found tortious (*viz.*, whether Kaiser Gypsum warned the plaintiff about the dangers of its products too late, warned inadequately, or failed to warn at all). *Id.* at *15.

- It excluded evidence that the plaintiff had been exposed to numerous asbestos products in the course of his career. *Id.* at *16.

All of this evidence was relevant to the damages inquiry, and therefore would have been properly considered by the jury in the damages-only retrial. Nonetheless, the court of appeals approved the exclusion of this evidence on the ground that the trial court reasonably concluded that admitting the evidence would have "improperly intertwine[d] the issues of liability and damages." *Id.* at *15; *see also id*. at *12–16. But in the hands of a different trial judge, any of them could have come out differently. And the likelihood that excluding this evidence may have contributed to a higher punitive damages award is apparent.

3. In sum, the artificially limited nature of damages-only retrials necessarily requires courts to make

difficult judgments whether to admit or exclude evidence that bears on the appropriate damages award, but that also was relevant to the initial liability inquiry. Admitting too much evidence relevant to liability risks inviting the jury improperly to second-guess findings that the first jury made about liability; but admitting too little evidence risks prejudicing one party or the other, depending on whom the evidence favored. As the foregoing examples demonstrate, these judgments will vary according to the prevailing rules of the jurisdiction and the individual discretion of the judge making them. This variability is particularly concerning when the evidence indicates that the first jury reached a compromise verdict, for two reasons.

First, it magnifies the risk of arbitrary awards, with particularly unjust consequences for defendants whose "liability" is the result of an illicit compromise in the first place.

Second, because a compromise verdict reflects the fact that liability was closely contested and the jury was uncertain that the evidence justified a finding of liability, the outcome of a retrial is particularly likely to be influenced by difficult decisions to admit or exclude evidence bearing on liability. As an initial matter, because the second jury will determine the appropriate damages amount without regard to the first jury's doubts about liability, limiting the retrial necessarily makes a higher damages award likely. But evidentiary decisions may severely exacerbate that tendency. This is apparent from *Kaiser Gypsum*. The excluded evidence was relevant to the damages inquiry, and tended to suggest that a lower award would be appropriate. But because it was also relevant to liability, the court excluded it, thereby making the jury more likely to

render a larger damages verdict. By excluding this evidence as irrelevant to the question of the appropriate damages amount, therefore, the court created a significant risk of unfair prejudice. These concerns compel a rule that makes damages-only retrials presumptively impermissible when there are any "indications" that the jury "may have rendered a compromise verdict." *Collins v. Marriott Int'l, Inc.*, 749 F.3d 951, 960 (11th Cir. 2014).

IV. BUSINESSES WILL BEAR THE BRUNT OF A RULE FAVORING DAMAGES-ONLY RETRIALS FOLLOWING POSSIBLE COMPROMISE VERDICTS

The business organizations that compose the Chambers' membership will bear a disproportionate share of the burdens that flow from a permissive approach to damages-only retrials in the face of evidence of improper compromise. This is true both because compromise verdicts are more likely when corporate defendants are sued by individual plaintiffs and because juries render higher compensatory awards against corporations than other classes of defendants.

First, compromise verdicts will be particularly common when individuals who have suffered debilitating injuries target corporations with the means to make recompense, such that the jury may (wrongly) assume the costs of an erroneous liability finding will be minimal. Courts have long been suspicious of verdicts that "indicat[e] a compromise between sympathy and law." *Mangan v. Foley*, 33 Mo. App. 250, 258 (1888) (granting a new trial in a case involving the death of a child). Jurors' sympathies and prejudices are *most* likely to influence their verdicts when liability is a

closely contested question and the evidence plausibly supports a verdict for either party. *See, e.g.*, Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 164–66 (1966); *see also Phav v. Trueblood, Inc.*, 915 F.2d 764, 768 (1st Cir. 1990) (noting that a "close question of liability" is a "telltale sign[] of a compromise verdict"). Jurors who are inclined to think that the corporate defendant is liable for the plaintiff's injuries will prefer a compromise verdict to a hung jury. And jurors who are inclined to doubt the defendant's liability may think that a compromise verdict is acceptable because the plaintiff is sympathetic and the corporate defendant can spread the cost of the judgment across all of its customers. In other words, when evidence of liability is contested, the risk of a compromise verdict is especially high when the jurors' natural proclivity to provide *some* relief to a sympathetic plaintiff merges with the temptation to extract that relief from a corporate defendant who jurors presume can bear the cost of a verdict as the price of doing business.

Second, and more troublingly, corporate defendants are likely to face systematically higher awards in the damages-only retrials compared to other types of defendants. Studies have repeatedly shown that jurors consider the financial resources of corporate defendants in assigning compensation to individual plaintiffs. *See, e.g.*, Valerie P. Hans, *The Jury's Response to Business & Corporate Wrongdoing*, 52 L & Contemp. Probs. 177, 195–98 (1989) (finding, in experimental study of jury behavior in a toxic-tort suit, that the amount awarded to the plaintiffs suing the "Jones Corporation" was almost twice the amount awarded to plaintiffs suing "Mr. Jones"); Audrey Chin & Mark A. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County*

Jury Trials 43 & tbl.4.5 (RAND Corp. 1985) (finding that civil juries awarded significantly more money in cases with corporate defendants than in those with individual or governmental defendants, and that the premium paid by corporations was particularly great when plaintiffs were "permanently and severely" injured).[4]

Importantly for American businesses, this phenomenon goes beyond the so-called "deep pocket" effect. In awarding damages, jurors treat business organizations differently regardless of whether they are wealthy or not. *See generally* U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Business* (2010).[5] In a pioneering investigation of "deep-pocket bias," Robert MacCoun observed that jurors' verdicts were insensitive to differences in defendant wealth alone, but highly sensitive to whether the defendant was a corporation; the awards he observed were significantly larger against corporate defendants than against wealthy individual defendants. Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 L. & Soc'y Rev. 121, 137–38 (1996); *see also* Edith Greene et al., *Compensating Plaintiffs and Punishing Defendants: Is Bifurcation Necessary?*, 24 Law & Hum. Behav. 187, 197 (2000) (finding no effects of defendant wealth alone on compensatory damages awards).

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[4] https://www.rand.org/content/dam/rand/pubs/reports/2007/R3249.pdf.

[5] http://www.instituteforlegalreform.com/uploads/sites/1/ilr_small_business_2010_0.pdf.

* * *

In sum, the unjust consequences of compromise verdicts and damages-only retrials fall particularly heavily on corporate defendants of all sizes and across all industry sectors. Compromise verdicts are more likely when a case involves a sympathetic individual plaintiff and a corporate defendant, and the damages award resulting from a damages-only retrial is more likely to skew upward in view of the defendant's corporate status. Individually and in the aggregate, compromise verdicts and damages-only retrials can impose significant costs on businesses. The potential that a particular class of defendants faces a great risk of prejudice warrants particular vigilance in reviewing the record for evidence of an improper compromise. And it justifies a legal standard that errs on the side of a new trial on all issues when the record reveals any plausible evidence of a compromise—not the other way around.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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