

Issue Paper

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Is There a “Deep-Pocket” Bias in the Tort System?

The Concern over Biases Against Deep-Pocket Defendants

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Under the “deep pockets” theory favored by many juries, big companies end up subsidizing consumers and lawyers.

Barbara Hackman Franklin,
U.S. Secretary of Commerce,
Los Angeles Times,
September 9, 1992.

As Secretary Franklin’s quote illustrates, there is a widespread perception that America’s tort system is biased against so-called deep-pocket defendants—defendants with extensive financial resources, such as corporations, governments, and wealthy individuals. Critics believe that deep-pocket actors are treated differently at several points in the tort process. According to this view, everything else being equal:

- *Injured parties* are more likely to blame and sue deep-pocket targets;
- *Attorneys* are more likely to accept cases against deep-pocket targets; and

- *Juries* are more likely to find liability, and award more money, when cases involve deep-pocket defendants.

Why are deep-pocket biases a concern? It is easy to understand why deep-pocket actors would be concerned about biased treatment, particularly since they are often “repeat players” in the tort system. But these biases, if they exist, might be troublesome for the system as a whole for more fundamental reasons.

Our tort system is premised on the notion that liability should be based on a factual determination that the defendant failed to meet certain standards. (Under the negligence doctrine, the standards refer to the defendant’s conduct. Under the strict liability doctrine, the standards refer to the design, manufacture, and warnings associated with products.) By holding the defendant to certain standards, the tort system is viewed as a mechanism for promoting two objectives: just compensation and deterrence of future harms. *Just compensation* is achieved when the liable party bears the

consequences by helping to make the injured party whole. *Deterrence* is achieved when the tort system provides clear signals regarding standards of conduct and safety, and clear disincentives against violating those standards.

When the tort system treats wealthy defendants differently (whether favorably or unfavorably) solely because of their wealth, this intended linkage between standards and consequences is weakened. As a result, the just compensation and deterrence objectives are undermined. In a standard-based system, it is unjust to allow the defendant's ability to compensate an injured party to influence the evaluation of whether the appropriate standards were met. Similarly, it is unjust to award compensation in excess of true losses solely because the plaintiff is needy and the defendant can afford to pay. And when wealth matters more than conduct in determining tort outcomes, the system provides ambiguous signals as to what is considered "negligent conduct" in our society. This makes the system's deterrence function less effective. Thus, the existence of significant deep-pocket biases would suggest that the tort system is not working properly.

Many of the proposed tort reforms that are currently under debate are seen as mechanisms for mitigating deep-pocket biases. For example, some argue that statutory ceilings (*caps*) on noneconomic and punitive damages, more extensive judicial review, or more widespread adoption of itemized "special verdicts" should be used to adjust for possible deep-pocket biases in jury awards. Others would modify or eliminate the *joint and several liability* rule. According to this rule, a single defendant can be required to pay the total cost of injurious actions, even when multiple actors are at fault. Unlike the other biases discussed above, the joint and several liability rule is one mechanism by which some deep-pocket effects are explicitly built into the tort system. But critics complain that it is unfair to ask deep-pocket defendants to shoulder more than their share of responsibility for compensating injured parties.

The perception that deep-pocket biases exist is pervasive. Indeed, some readers may even view the existence of these biases as an obvious fact. This is certainly understandable. The deep-pocket notion is consistent with widespread stereotypes about the tort system, e.g., caricatures of greedy claimants and jurors whose sympathy overcomes their common sense. And for many in the business community, it accords with perceptions that seemingly nonmeritorious suits are common.

But an evaluation of the functioning of the tort system and the need for reforms should be based on systematic empirical evidence. What is the evidence that deep-pocket effects actually exist?

There has been relatively little research directly addressing this issue. This issue paper summarizes what we know and don't know about deep-pocket biases. The data are drawn from a variety of sources, including a number of ICJ studies. These studies involve a variety of research methods, including statistical analyses of archival data on jury verdicts, experiments with prospective juries drawn from jury pools, and survey data on claiming and blaming among injured parties. The data are suggestive rather than conclusive. However, the findings indicate that the conventional wisdom about deep pockets appears to oversimplify a complicated reality.

Is There a Deep-Pocket Bias in Jury Verdicts?

At least two conditions must be met to demonstrate a deep-pocket bias in jury verdicts: (1) verdicts in similar cases should be less favorable to deep-pocket defendants, and (2) this effect must be attributable to defendant wealth per se, and not to some other factor that is merely correlated with wealth.

The ICJ's archival analyses of twenty years of verdicts in Cook County, Illinois (which includes Chicago), provided support for the first condition. Specifically, Audrey Chin and Mark Peterson (1985) discovered that, after controlling for injuries and other case characteristics, Cook County juries awarded significantly more money in cases with corporate or government defendants than in cases with individual defendants. Moreover, in cases involving serious injuries, these deep-pocket defendants were also more likely to be found liable (see Figure 1). Other recent archival analyses (reviewed by MacCoun, 1993) have found a similar pattern.

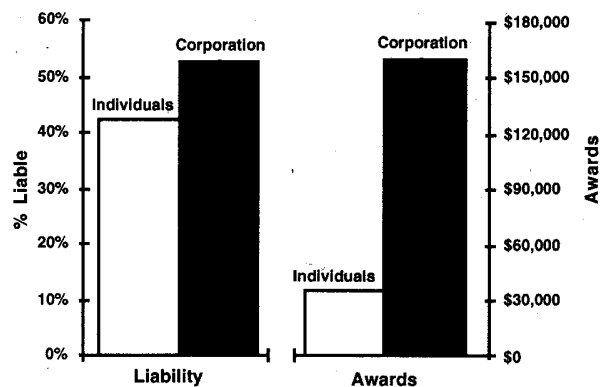


Figure 1—Distribution of Liability and Average Award Size for Individual and Corporate Defendants in Cases with Serious Injuries: Cook County, 1959–1979 (adapted from Chin and Peterson, 1985)

On the face of it, this differential treatment appears to indicate a deep-pocket bias, in which corporations pay more because juries think they can afford it. One limitation of archival analyses, however, is that it is impossible to compare exactly identical cases involving individual versus corporate defendants. (See MacCoun, 1989, 1993, for a detailed discussion of jury research methodologies.) Although Chin and Peterson used statistical methods in an attempt to compensate for this limitation, we cannot rule out the possibility that these verdict differences are actually due to some unmeasured difference in the type of cases that involved individual versus corporate defendants (e.g., differences in pretrial settlement patterns or trial strategies).

To get around this problem, Valerie Hans and David Ermann of the University of Delaware replicated Chin and Peterson's finding using a *mock jury experiment*, in which college students evaluated a fictitious toxic tort case. In this experiment, students who were told that the defendant was "the Jones Corporation" were more likely to find liability, and awarded significantly more money, than students who were told that the defendant was "Mr. Jones," even though the other facts of the case remained the same.

Thus, the first condition for a deep-pocket account has been met: Both archival analyses and mock jury experimentation indicate that in similar cases, juries do treat corporations differently from individuals.

What about the second condition: Is this effect attributable to defendant wealth and not to some other factor? It is important to bear in mind that the finding that corporations are treated differently from individual defendants need not imply a deep-pocket bias. This point is illustrated graphically in the Venn diagram in Figure 2. Note that the deep-pocket account attributes differential treatment of corporations to their greater financial resources. If so, then wealthy individuals who can also afford to "make the plaintiff whole" should be treated more like corporate defendants than like poorer individual defendants. Thus, we can distinguish two possible effects: A *deep-pocket effect*, and a *corporate identity effect*. The corporate identity effect would imply that there is something else about corporations (and governments) that leads to differential treatment.

How can we test these two alternative hypotheses? Ideally, we would like to try the same case but vary whether the defendant is a corporation, a rich individual possessing the same amount of wealth as the corporation, or a poor individual. If jurors treat the rich individual the same as they would treat a corporation, but less favorably than a poor individual, we would have supported the *deep-pocket* interpretation. If jurors treat the rich individual the same as they would treat a poor individual, and more favorably than they would

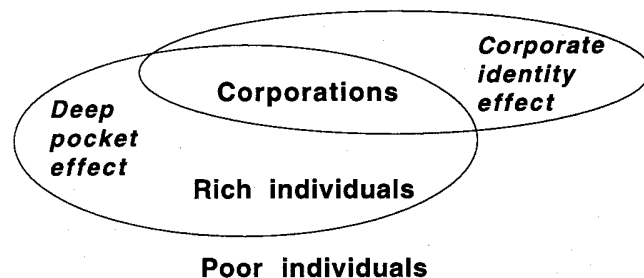


Figure 2—Distinguishing Deep-Pocket and Corporate Identity Effects

treat a corporation, we would have supported the *corporate identity* interpretation.

Of course, we cannot conduct this test in a real trial, but this is the type of problem for which mock jury experimentation is useful. We created highly realistic but fictitious personal injury cases in which the facts of the case were held constant while we varied whether the defendant on trial was a corporation, a rich individual, or a poor individual. For example, one case involved a pedestrian who sustained serious injuries after being struck by a car driven by either a rich individual, a poor individual, or an employee of a corporation; in the latter case the corporation was sued through the doctrine of vicarious liability. Another case involved a slip-and-fall accident that occurred on property owned by a corporation, a rich individual, or a poor individual. We were careful to establish that the rich individual was perceived as being significantly wealthier than the poor individual but no less wealthy than the corporation.

We then asked 256 citizens who were serving on jury duty at a local county court to serve as mock jurors. Jurors were randomly assigned to one of the three versions of each case. After studying each case, and reading California's patterned jury instructions for these types of cases, jurors indicated whether they believed the defendant was liable, recommended awards for both economic and noneconomic compensatory damages, and answered a number of questions about their decisions.

Jurors' liability judgments and recommended awards are summarized in Figure 3. (Note that for ease of presentation, we have combined results across a number of different personal injury scenarios and placed liability rates and compensatory damages on a common metric.) The results indicate a significant corporate identity effect, but no deep-pocket effect. In other words, rich individuals were treated more like poor individuals than like corporations, even though jurors perceived that the rich individuals were as wealthy as the corporations. Thus, our experiment indicates that *jurors do treat corporations differently, but not because of wealth.*

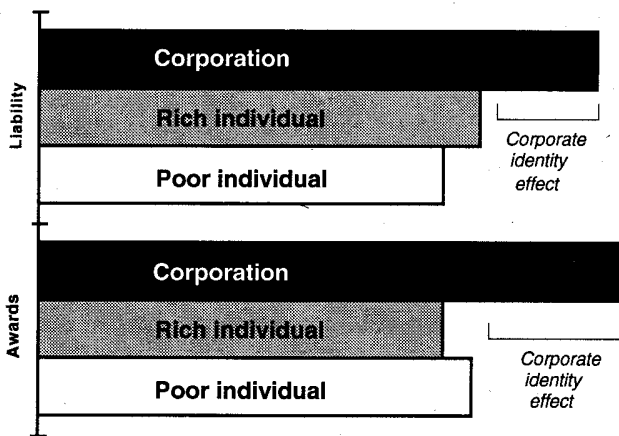


Figure 3—Jurors Do Treat Corporations Differently, but Not Because of Wealth (summary of results from mock jury cases, transformed to a common metric for ease of presentation)

Is it possible that the deep-pocket bias exists but that we somehow failed to detect it? We think it is unlikely, for several reasons: First, our design and sample size provided a high level of statistical power. This means that we had a high probability of detecting an effect if it existed. Second, we did replicate the pattern found in archival studies of actual jury verdicts—corporations were treated differently from individuals. We should note that the corporate identity effect we observed was statistically significant, but fairly weak. This may indicate that the effect in actual cases is also weak, although we caution that the mock jury method is appropriate for *explaining* effects, but it is inappropriate for determining the *size* of effects (MacCoun, 1989, 1993).

Perhaps jurors believed that *all three* defendants had deep pockets, via insurance, or perhaps only *extremely wealthy* corporations trigger a deep-pocket effect. Again, we think these alternative explanations are unlikely. First, neither explains why we found a corporate identity effect; both predict that the corporations in this study should have been treated the same as the wealthy individual defendants. Second, we also found that jurors believed that both the wealthy individual and the corporation, but not the poor individual, were financially capable of compensating the plaintiff. It would certainly be worthwhile to conduct additional tests for deep-pocket effects in jury verdicts, but at this point, our results seriously call into question the deep-pocket account.

If not because of wealth, why *do* juries treat corporations differently? We think there are several possibilities:

- *Different standards*: Perhaps juries hold corporations to a higher standard than individuals. If so, this may not constitute a bias—tort doctrine does not clearly address the question of whether corporate and individual defendants should be held to a common standard. Indeed, tort scholars point out that the *reasonable person standard* should be adapted to the physical attributes of the actor in question (Prosser and Keeton, 1984, p. 32); this suggests that jurors should apply a “reasonable corporation” standard when evaluating corporate conduct. Tort law appears to give jurors the discretion to define this standard differently.
- *Distrust of corporations*: Juries may be more skeptical of the testimony of corporations or may believe that corporations are less cautious in regulating their own conduct. For example, jurors may feel that the profit motive creates an incentive for corporations to “cut corners.”
- *Impersonal nature of corporations*: Perhaps jurors find it easier to impose costly sanctions against an aggregate, impersonal entity than a real, flesh-and-blood individual. Trial lawyers appear to anticipate this possibility; we have heard anecdotes about how defense lawyers try to personalize their corporate clients, while plaintiffs’ lawyers try to depersonalize them.

These possibilities are not mutually exclusive, and all seem at least plausible. Future jury research will have to test these hypotheses to see if any or all of them account for the well-documented corporate identity effect.

Are There Deep-Pockets Biases Elsewhere in the Tort System?

Of course, even if there is no deep-pocket effect in jury verdicts, it is still possible that deep-pocket biases exist at other points in the tort process; e.g., in decisions by claimants to file a lawsuit, or in decisions by plaintiffs’ attorneys about which cases to pursue and which to turn down. Recall that a deep-pocket effect in claiming behavior would indicate that injured parties (and possibly even some *noninjured* parties) differentially seek out wealthy targets for compensation. A deep-pocket effect in lawyer behavior would indicate that plaintiffs’ attorneys are more likely to accept cases that involve deep-pocket actors who might be named as defendants. As in the jury context, at least two conditions must be met to demonstrate a deep-pocket bias in claiming or in attorney behavior: (1) Deep-pocket targets must be treated differently from shallow-pocket defendants in similar situations, and (2) this effect must

be attributable to their wealth and not to some other factor. However, it is less clear whether a deep-pocket effect should be labeled a “bias” in the case of claimant or attorney behavior.

It is helpful to distinguish two types of situations. In the first, there is compelling evidence that a defendant is at fault for harms, but the defendant does not appear to have the financial resources needed to compensate the plaintiff. If so, it might be quite reasonable for the potential claimant and attorney to forgo the lawsuit. Such decisions would reduce the number of lawsuits filed against “shallow-pocket” defendants, contributing to a deep-pocket effect. From a public policy perspective, such decisions prevent protracted and expensive litigation that would be unlikely to serve a compensatory purpose, although the litigation might have served valid punitive or deterrent objectives. In the second type of situation, the defendant clearly has the financial resources to compensate the plaintiff, but the evidence of fault is less compelling. If claimants and attorneys pursue such cases, this also would contribute to a deep-pocket effect, but the public policy consequences would be less desirable.

At present, we are unaware of an existing database that can provide an adequate test of deep-pocket biases in *attorney* behavior. On the other hand, we can test for deep-pocket biases in *claiming behavior* by using the ICJ’s *compensation survey*, a national survey of accidental injury victims who were located by screening more than 25,000 American households (Hensler, Marquis, et al., 1991).

One important finding of the ICJ compensation survey was that among accidentally injured people, claiming behavior was extremely rare. Overall, only 19 percent even considered filing a claim, only 4 percent hired an attorney, and only 2 percent filed a lawsuit. Because actual claiming is so rare, we need to use *blaming*—whom does the person blame for his or her injuries, if anyone?—as a substitute for claiming in our search for deep-pocket effects. In fact, in some ways blaming is actually a more useful indicator than claiming. First, claiming may be influenced by an attorney’s behavior; thus, blaming may be a purer measure of the individual’s own propensity to claim. Second, some injury victims may believe someone is at fault for their injuries, and yet choose not to sue that person because the likelihood of recovering compensation is negligible, or because the expected value of the claim falls short of the expected transaction costs. This is an interesting effect in its own right, but it does not seem appropriate to refer to it as a “bias.” On the other hand, the finding that injured parties are more likely to *blame* potential targets who are wealthy would

clearly indicate biased treatment of those with deep pockets.

At this point, we have conducted the first, descriptive phase of our analyses of blaming and claiming in the compensation survey, so our findings are suggestive but by no means conclusive. One fairly weak test is to look at types of accidents that generally involve potential deep-pocket targets to see how often they get blamed. *Auto accidents* are one example; the majority of drivers are insured, automobiles have manufacturers, and the accidents generally take place on public property. And indeed, our results suggest that blaming patterns following auto accidents may well be biased, because almost everyone blames someone else—few accept responsibility for the accident. For example, 97 percent of the injured pedestrians in our sample blamed the driver of a motor vehicle. This may not be surprising, but we also found that in multivehicle accidents, 91 percent of the injured drivers in our sample blamed the other driver. Thus, “blaming the other guy” is pervasive in American auto accidents.

On the other hand, we see a very different pattern when we look at *product-related accidents*—where manufacturers and vendors are available deep-pocket targets. Rather than blaming someone else, we found that 78 percent of those injured while using products blamed themselves; i.e., they basically said “I’m just a klutz.” Only 9 percent of our sample blamed product manufacturers, and only 2 percent blamed vendors.

Of course, simply looking at blaming rates in circumstances involving potential deep-pocket targets is not a very strong test. For example, auto accident victims may be biased against deep-pocket insurers, but our results might reflect a different, more self-serving sort of bias. Surveys have repeatedly found that almost everyone believes that they are safer than the average driver (e.g., Svenson, 1981)—clearly a statistical impossibility. (This pattern is reminiscent of radio-show host Garrison Keillor, whose mythical Lake Wobegon is a place “where the women are strong, the men are good looking, and all the children are above average.”)

A somewhat stronger test is to compare blaming in similar accidents involving either deep-pocket or shallow-pocket targets. A good example is the most frequent accident category, *slip and fall*, constituting 38 percent of the accidents in our sample. Figure 4 presents blaming patterns for slip-and-fall victims across different types of property owners.

We found that victims were significantly more likely to blame someone else, and less likely to blame themselves, when the accident occurred on property owned by deep-pocket targets—governments and businesses. This may reflect a deep-pocket bias. On the

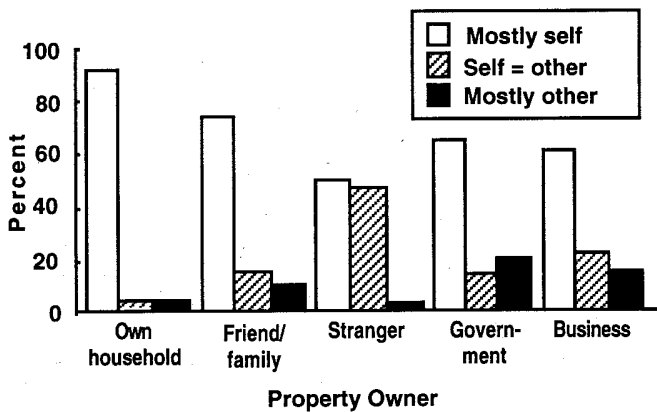


Figure 4—Blaming Patterns in Slip-and-Fall Accidents, from the ICJ Compensation Survey (Hensler, Marquis, et al., 1991)

other hand, rather than an *increased* propensity to blame deep-pocket targets, this may reflect a *decreased* propensity to blame others with whom we have ongoing relationships—our own household, our friends, and our relatives. In other words, it may reflect cultural norms that discourage conflict among acquaintances to preserve social harmony.

Thus, at this preliminary phase in our analyses, we see some intriguing leads that deep-pocket biases might exist in claiming behavior, but these patterns have alternative explanations, and some of the data conflict with a deep-pocket account. Our future analyses will attempt to provide more definitive conclusions using more rigorous multivariate statistical modeling of the data.

Conclusions and Questions for Further Research

Despite the widespread belief that deep-pocket biases are pervasive in the tort system, our research thus far has failed to provide conclusive evidence that they exist, and we even see some contrary evidence.

With regard to jury decisionmaking, there is clear evidence that juries treat corporations less favorably in similar circumstances, but this corporate identity effect does not appear amenable to a straightforward deep-pocket interpretation. Future research is necessary to clarify exactly what causes juries to treat corporations differently. Do we hold corporations to higher

standards? Do we distrust their conduct or their testimony? Do we find it easier to sanction impersonal entities? Of course, from a corporate executive's perspective, differential treatment is cause for concern, whatever its explanation. But from a policy perspective, we need to accurately diagnose the phenomenon before we prescribe a cure.

As stated above, the lack of a deep-pocket bias in jury decisions does not rule out biases elsewhere in the tort process. We see some indication of bias in claiming behavior, but more research is needed to clarify our results. A deep-pocket bias in attorneys' selection of cases for litigation is certainly plausible; if nothing else, it is consistent with the financial incentives of contingency fee arrangements. But to our knowledge, this hypothesis has not been systematically tested and must await future research.

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