# Reducing Legal Exposure in Real Estate: Leveraging Litigation Risk Insurance

*Latosha M. Ellis and Charlotte Leszinske**

**In this article, the authors explain that, for companies facing or concerned about costly litigation, litigation risk insurance offers a little-known yet highly effective way to manage legal risks. They note that this custom and versatile category of insurance may cover defense costs, indemnity, punitive damages, and more.**

Litigation is inherently risky. Plaintiffs may spend years fighting it out in court before obtaining a verdict, only for that verdict to be challenged on appeal, postponing relief even further or denying it entirely. This prolonged uncertainty can drain financial resources, disrupt business operations, and create emotional and operational stress.

For defendants, the risks are equally daunting. They face dramatically increasing verdicts: between 2020 and 2022, the median verdict climbed by about 95%.[1] Rising verdicts can strain a company's cash flow, leaving limited resources to reinvest in the business or meet day-to-day operational needs. In extreme cases, these financial pressures can push a company to the brink of bankruptcy, particularly when combined with the costs of prolonged litigation, such as attorneys' fees and court expenses. These risks underscore the critical need for businesses to assess and mitigate litigation risks in order to avoid long-term financial hardship or reputational damage.

Companies concerned about or currently facing costly litigation should consider litigation risk insurance. This often overlooked but highly effective category of insurance is designed to help mitigate the financial risks associated with either pursuing or defending a lawsuit. Unlike traditional insurance, litigation risk insurance focuses specifically on the unpredictable and often substantial costs of legal proceedings. While beneficial for both sides, litigation risk insurance can be particularly helpful for plaintiffs, who, unlike many insured defendants, must pay out of pocket for litigation-related risks.

Litigation risk insurance works in tandem with traditional insurance, offering comprehensive protection where conventional policies fall short. Given that litigation risk policies are typically custom-tailored to the specific needs of the policyholder, they provide the flexibility to address unique exposures and risks in the litigation process. For instance, a company involved in complex or high-stakes litigation might require more robust coverage for certain

*The authors, attorneys in the Washington, D.C., office of Hunton Andrews Kurth LLP, may be contacted at lellis@hunton.com and cleszinske@hunton.com, respectively.

legal threats, while another might need focused protection on specific defense costs. Litigation risk policies offer a proactive and strategic approach to managing litigation exposure.

Three key types of litigation risk policies include judgment preservation insurance, adverse judgment insurance, and punitive wrap insurance. Each of these products offers specific protection for different stages or aspects of litigation, helping businesses manage the financial risks associated with legal battles.

## JUDGMENT PRESERVATION INSURANCE FOR PLAINTIFFS

For plaintiffs who have successfully fought their way to a favorable verdict, judgment preservation insurance (JPI) can provide crucial financial protection. After years of litigation, securing a verdict can feel like a hard-earned victory, but the risks are far from over. Verdicts are often appealed, and those appeals can take months or even years to resolve. During this time, the plaintiff may choose to collect funds based on the original verdict. However, if the verdict is reversed, amended, or modified on appeal, the plaintiff must return any amounts exceeding the amended or modified verdict (or all amounts, if the verdict is reversed completely). This creates considerable financial uncertainty.

JPI addresses this risk by offering coverage in case the verdict is reversed, amended, or modified. By securing a JPI policy, plaintiffs can confidently collect and spend amounts from the verdict - whether to cover defense costs, business expenses, or other ongoing financial needs - knowing that if the judgment is modified, the policy will cushion the amount of any repayment. This protection can provide much-needed peace of mind during the appeal process.

JPI is also a valuable tool for protecting against unexpected reduced or reversed fee awards. A notable example of this occurred with a large law firm that had secured a remarkable $3.7 billion for its clients. The firm was awarded about $185 million in attorneys' fees and obtained a JPI policy to safeguard that amount.[2] As the appeal process unfolded, the firm distributed the award to its partners. When the award was ultimately reduced to $92.4 million, the law firm was able to rely on its JPI policy to cover the difference, effectively safeguarding its financial position.[3] This case highlights how JPI enables plaintiffs to use cash payouts from judgments to fulfill business or legal strategy, without the looming concern of potential future modifications to those judgments.

## ADVERSE JUDGMENT INSURANCE FOR DEFENDANTS

For companies facing litigation and concerned about the potential impact of an adverse verdict on their financial health, adverse judgment insurance (AJI) offers a valuable form of protection. AJI allows businesses to mitigate the risk of significant financial loss by providing coverage for indemnity costs in the event of an unfavorable judgment. Generally, AJI is obtained for one lawsuit or a set of related, high-value lawsuits. It is particularly useful for companies that are involved in high-stakes litigation, where the outcome could dramatically affect their bottom line.

By securing AJI, policyholders can specifically target and protect themselves against the risks of particular lawsuits or groups of lawsuits that pose the greatest threat. In the event of an adverse verdict, AJI can significantly reduce, or even eliminate, the out-of-pocket costs that the company would otherwise face. This coverage not only provides financial relief but also helps companies preserve cash flow by freeing up funds that would otherwise be set aside to cover the potential verdict. The flexibility that AJI provides can also improve a company's financial outlook, making it more attractive to potential buyers or investors by reducing or reallocating litigation risk.

Further, AJI can increase the likelihood of reaching a settlement. AJI policies can serve as collateral for a loan to settle the case. For example, if a defendant wants to settle a lawsuit but its insurers have refused to fund the settlement and the defendant lacks the necessary funds, the defendant can sue the insurance company and secure a loan to pay for the settlement. The AJI policy can act as collateral for the loan, providing protection against the risk that the lawsuit against the insurers may not be resolved in the defendant's favor. Alternatively, AJI can serve as leverage to demonstrate to a plaintiff that a company is prepared to proceed to trial unless an agreement is reached that falls below the AJI's attachment point. In both cases, AJI can enhance a company's negotiation position, providing it with the financial security to take a more assertive stance in settlement discussions or litigation generally.

## PUNITIVE (PUNI) WRAP POLICIES FOR DEFENDANTS

Punitive damages are designed to penalize alleged wrongdoers or deter similar conduct in the future. However, unlike ordinary compensatory damages, plaintiffs do not have to specify a sum of desired punitive damages; punitive damages are often decided by the jury without guidance from either party. Punitive damages are therefore highly unpredictable and often exceed compensatory damages by multiples, making it difficult for companies to calculate their overall exposure. As an example, in 2022, a Texas jury awarded $375 million in compensatory damages and seven billion in punitive damages.[4]

Worse still, in states like California, New York, Florida, and Pennsylvania - where punitive damages tend to be among the highest - there are laws that specifically prohibit insurance coverage for punitive damages. As a result, even if an insurance policy appears to cover punitive damages, it may not provide protection if it is governed by the laws of a state that prohibits insuring punitive damages.

This is where punitive wrap policies come into play. These policies are designed to fill the coverage gap left by standard insurance policies that cannot cover punitive damages due to legal restrictions. Typically, a punitive wrap policy is issued alongside a "lead" policy, which covers defense costs and compensatory damages. If punitive damages are awarded and the relevant law prevents the lead policy from insuring them, the punitive wrap policy steps in and provides coverage.

One key benefit of punitive wrap policies is that they are not tied to a specific case (unlike AJI, which is typically case-specific). Instead, punitive wrap policies offer broader coverage, potentially providing protection across multiple lawsuits up to the policy limits. This makes them particularly valuable for companies that face ongoing legal risks in various jurisdictions or industries. With a punitive wrap policy, companies can protect themselves against potentially crippling punitive damages awards, providing financial security and allowing them to focus on defense strategy without the constant fear of unforeseen punitive liability.

## CONCLUSION

Companies concerned about litigation exposures should strongly consider obtaining litigation risk insurance. For both plaintiffs and defendants, litigation risk insurance provides a safety net in the event that legal proceedings do not unfold as expected. For plaintiffs, JPI policies can offer protection against the uncertainty of appeals and modifications to verdicts, while defendants can benefit from AJI and punitive wrap policies that mitigate the financial impact of an adverse judgment or unexpected punitive damages.

Given the customized nature of litigation risk insurance–tailored to each company's specific needs and legal circumstances–it is essential that these policies are negotiated by experienced coverage counsel. For policies tailored to a particular lawsuit or set of lawsuits, the insurer will require information about the facts and legal theories advanced in those lawsuits, often including defense counsel's analyses and valuation of the case. It may be easier to obtain coverage for lawsuits with developed factual records since the insurer will have more information to evaluate the risk. For punitive wrap policies, the insurer will need information about the company's risk profile generally, including past and anticipated litigation exposures.

Negotiating litigation risk policies should be done in close collaboration with the company's risk management team to ensure that the coverage obtained aligns with the organization's broader legal strategy and risk profile. By working with legal and risk management experts, companies can secure the right coverage that not only protects against potential legal costs but also provides peace of mind in navigating the complexities of litigation.

## NOTES:

[1]Marathon Strategies, Corporate Verdicts Go Thermonuclear (2024), available at https://marathonstrategies.com/corporate-verdicts-go-thermonuclear-report/.

[2]Health Repub. Ins. Co. v. U.S., No 16-259; Common Ground Healthcare Coop. v. U.S., No. 17-877 (consolidated), Order (Nov. 22, 2024) [ECF 242] at 1.

[3]Health Repub. Ins. Co. v. U.S., No 16-259; Common Ground Healthcare Coop. v. U.S., No. 17-877 (consolidated), Order (Nov. 22, 2024) [ECF 242] at 1.

[4]Marlene Lenthang and Diana Dasrath, Cable Company Ordered to Pay Over $7 Billion in Damages to Family of Texas Grandmother Murdered by Employee, NBC News (July 29, 2022), available at https://www.nbcnews.com/news/us-news/cable-company-ordered-pay-7-billion-damages-family-texas-grandmother-m-rcna40586. Ultimately, the verdict was reduced to $1.15 billion and the case settled. Dave Simpson, Spectrum Ordered to Pay $1.15B In Stabbing Case, Law360 (Sept. 20, 2022), https://www.law360.com/employment-authority/other/articles/1532327/spectrum-ordered-to-pay-1-15b-in-stabbing-case; Charter Comm'ns, Inc. v. Goff, et al., No. 05-22-00953-CV (Tex. Ct. App. 5th Dist.), Memo. Op. (June 23, 2023) (noting case settled and dismissing appeal).