

NUCLEAR JURY VERDICTS:

WHAT THEY ARE AND HOW TO AVOID THEM

BY BRIAN DEL GATTO

Civil jury trials are a constitutional hallmark of the United States. In 2019, the U.S. saw a 300 percent increase in the frequency of \$20 million-plus civil jury verdicts from the 2001 to 2009 annual average – and 2019 was not a fluke. More recently, mediation nuclear verdicts against corporate defendants jumped from \$21.5 million in 2020 to \$41.1 million in 2022 – a 95% increase. The largest verdicts have also been growing, from \$1.1 billion in 2020 to \$7.3 billion in 2022. Juries ordered twenty verdicts for over \$100 million last year, including four for over \$1 billion.

The rise in so-called nuclear verdicts has been an ongoing trend over the past several years, presenting unique challenges for insurers and insureds. This article explores what causes jury verdicts to go nuclear; examines the effect of nuclear verdicts on future litigation, insurance, and business; and identifies legal tools that can be employed to successfully combat nuclear verdicts.

In 2019, a Pennsylvania jury delivered a head-turning verdict to pharmaceutical and medical-device giant Johnson & Johnson.

In the lawsuit, the plaintiff claimed that his use of Johnson & Johnson's antipsychotic drug Risperdal as a child caused his breasts to become enlarged and that the company failed to properly warn of this risk in marketing the product. At trial, the plaintiff argued that Johnson & Johnson put "profits over patients" and should be punished for doing so.' The jury agreed and awarded the plaintiff \$8 billion in punitive damages, even though his compensatory damages award was only \$680,000.

This case is an example of a nuclear jury verdict—a verdict in excess of \$10 million that is significantly higher than would be expected given the plaintiff's damages. While eliciting juror sympathy is important, it is not the primary driver of nuclear verdicts. Instead, nuclear verdicts are driven primarily by juror anger and frustration and delivered to "send a message" to the defendant. Juries typically use punitive damage and noneconomic damage awards as the messengers.

Factors Giving Rise to Nuclear Verdicts

The rise in nuclear verdicts does not appear to be tied to any one particular cause, but rather a confluence of several factors over the past several years.

This phenomenon has coincided with the rise of a trial strategy deployed by the plaintiffs' bar known as the reptile approach. The theory underpinning this strategy, which was laid out in the book, *Reptile: The 2009 Manual of the Plaintiff's Revolution*, is that attorneys can get jurors to

access their reptile brain, which in terms of evolution is an older part of the brain and is said to control a person's fight or flight response.

The idea behind the trial strategy is to make jurors feel threatened so that they are more likely to lash out at the perceived attacker—the public safety rule-breaking defendant. The plaintiffs' bar has been using this strategy for the past decade to drum up the requisite jury anger to deliver a nuclear verdict.

The recent rise in nuclear verdicts can also be attributed to social inflation or normalization of high monetary amounts, which some refer to as the “Kardashian” effect. News of one large verdict or settlement lays the groundwork for a jury's understanding of what a reasonable award may be in a future case. And access to news and social media 24 hours a day has made it easier than ever to accomplish this effect.

Social media is now pervasive in American society, with 82% of Americans using it in 2021. Social media contains user-selected content, resulting in content consumption that, ironically, may not reflect social or financial reality. Jurors regularly exposed to social media are more susceptible to becoming immune to jury awards not grounded in social or financial reality.

The past decade has also seen the infusion of millennials into the jury pool. Millennials are individuals born between 1981 and 1997, and they now represent the majority generation in society. As such, it is important to understand the lens through which millennials may view a case.

Millennials expect companies to be socially conscious and incorporate those values into their business practices. They also expect businesses to be proactive in improving the workplace for employees. Thus, millennials tend to deny organizations the benefit of the doubt when they believe a wrong may have been done—and they tend to hold other people and entities responsible for keeping them safe.

Millennials also tend to require a rationale for ideas; they don't necessarily accept information merely because an authority figure has conveyed it. The result is that millennial values are often at odds with traditional business practices and legal defense arguments.

Economic wealth disparity also serves as a wedge between millennials and corporate defendants. Millennials have experienced slower economic growth since entering the workforce than any other generation in U.S. history. Consequently, a plaintiff can likely more easily sow the seeds of anger and frustration among jurors in a case against a corporate defendant, motivating jurors to send a message consistent with their sometimes false perceptions of the wealth of an individual or a corporate defendant.

Finally, increased distrust in American institutions has played a role in the recent rise in nuclear verdicts. According to 2022 research by the Pew Research Center, trust in American institutions, including corporations, is now at near-historic lows. In polling about the public's attitudes towards large corporations, 24% of those polled acknowledged they had a bias against large corporations prior to the pandemic. During the pandemic, this figure doubled and 48% acknowledged having a bias against large corporations.

Reptile trial tactics from the plaintiffs' bar are effective at tapping into institutional distrust to generate anger. At trial, the corporate defendants is often portrayed as prioritizing profits over safety and doing everything to maximize profits, even if it means engaging in unethical practices.

Nuclear Verdict Fertile Ground

The American Tort Reform Foundation (“ATRF”) has identified judicial “hellholes” where nuclear verdicts and other lawsuit abuse and misuse of the court system are more prevalent than other jurisdictions. These jurisdictions are plaintiff-friendly and the state court judges in these jurisdictions are more likely to make rulings based on expediency, efficiency, or bias. ATRF has identified the following jurisdictions as 2023’s judicial hellholes:

- (1) Georgia
- (2) The Supreme Court of Pennsylvania and the Philadelphia Court of Common Pleas
- (3) California
- (4) New York
- (5) Illinois (Cook County)
- (6) South Carolina
- (7) Louisiana
- (8) Missouri (St. Louis)

Wide-Reaching Impact within the Industry and Across Borders

Nuclear verdicts significantly affect future litigation. Jury verdicts influence the behavior of users of the civil justice system by raising the monetary bar for determining case values. This creates legal precedents that set the stage for even higher verdicts in future cases.

A history of excessively high-dollar verdicts also affects party claims and settlement behavior. Plaintiffs may demand higher settlement dollars and be reluctant to resolve claims outside the courtroom if the amount is not high enough. Claims professionals may have to reconsider settlement values, especially in jurisdictions susceptible to excessively high-dollar verdicts.

This drives up claims costs and insurance premiums for insureds and affects insurers' profitability. Together, this behavior ultimately affects the mix of cases that future juries will see and the outcomes and precedents that will guide future system participants.

Nuclear verdicts also have a significant impact on insurers and the businesses they insure. This has been most evident in the commercial transportation industry. In response to nuclear verdicts, many insurers have raised insurance premiums for transportation companies, and some have even exited the market. In response to rising insurance premiums, many transportation companies have declared bankruptcy or shut down.

A rising trend is for companies to go without insurance at higher levels in their insurance towers. This is because there is less capacity at certain levels, and if there is capacity, the premiums may be double or triple the rates from the year before at half the limits.

A major consequence of this is that underinsured companies will not be able to limit liability through corporate veil protections. Courts are increasingly piercing the corporate veil of companies to compensate injured involuntary tort plaintiffs who neither chose to associate with the company nor had an opportunity to obtain compensation or protections from the company's owners before being injured.

Canadian and Mexican companies operating in the U.S. or considering entering the U.S. market should be aware of nuclear jury verdicts trends and what can be done to mitigate the risk they present. The ability to transfer risk may well be impacted by a reduction in the capacity being offered by insurers, higher deductibles, and/or increased pricing. Companies should begin negotiations with insurers well ahead of insurance renewals with a focus on differentiating risk both in terms of exposure and the risk management steps taken to mitigate the risk.

Combating Nuclear Verdicts

The best defense starts with proactive risk management and an initial investigation of the case. To set the stage for an effective defense, claims professionals should adopt best practices in determining the facts surrounding the incident; document evidence that is relevant, material, and competent; objectively evaluate the insured's liability; and realistically value the plaintiff's damages.

Early retention and involvement of defense counsel is also critical. This allows the insurer and its counsel to develop and coordinate a comprehensive theory of defense that will minimize the potential for a nuclear verdict. Specifically, defense counsel will help the insurer:

- Analyze the strengths and weaknesses of the case
- Determine potential exposure
- Identify the appropriate experts needed to defend the case and engage them early in the process
- Assist with investigation
- Incorporate strategic venue and jurisdiction considerations to ensure the case is not presented in a judicial hellhole jurisdiction
- Provide peace of mind

In nuclear verdict exposure cases, claims professionals and defense counsel must keep the insured advised as the case progresses. With the potential for a judgment in excess of policy limits, the insured may want to use in-house counsel or engage its own outside counsel to follow the defense strategy, provide input, and make recommendations.

If the case reaches trial, defense counsel that has been battle tested and has a record of trial success should be retained. Today, defense counsel must be able to demonstrate that it can connect with jurors, especially millennials. Defense counsel must also be able to humanize its corporate client and be empathetic enough to question the extent of the plaintiff's injury without alienating the jury.

The insured plays a significant role at trial. Being a good community citizen can help reduce verdict uncertainty. An insured's representatives must also appear reasonable, balanced, and accountable. Even if liability is disputed, the insured should accept accountability for its actions. While this may seem counterintuitive, accepting responsibility will remove that issue from the plaintiff's arsenal and potentially diffuse jurors' anger.'

Insurers, too, must carefully select who will represent them at trial. Although it may sound superficial, the appearance of the representative should be carefully considered. The insurer's representative may or may not be asked to testify, but jurors can typically identify that person in the gallery and will make a decision as to whether he or she looks fair and honest. So care must be taken with respect to the image the insurer wants to convey.

What If a Nuclear Verdict is delivered?

No matter how prepared the defense may have been, how great its strategy appeared, how knowledgeable its witnesses were, or how convincing its evidence was, a nuclear jury verdict can still occur. If it does, the best thing the defense can do is invest in an appeal.

Appellate courts can and sometimes do reduce nuclear jury verdicts, especially those driven by large, disproportionate punitive damages awards. Case in point: Pennsylvania's appellate court reduced the 2019 Johnson & Johnson Risperdal verdict from \$8 billion in punitive damages to \$6.8 million.

Such reductions may determine whether both the insured and in-surer can stay in business or must completely exit the market. The moral is to remain hopeful, have a strategy in place before the event occurs, and execute on that strategy consistently.

Insurers, insureds, and their defense counsel can create the best opportunity to mitigate nuclear verdict exposure and have a successful case resolution by understanding what causes nuclear verdicts, developing a coordinated defense strategy that addresses those issues, and then executing consistently on that strategy.