

Companies can take steps to avoid ‘nuclear’ verdicts: Experts

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Companies can reduce the anger reflected in jurors’ so-called nuclear verdicts by taking steps such as having a company representative sitting at the defense table who appears empathetic, experts say.

It is also a good idea to suggest a settlement number early and often, according to panelists who spoke during a session on preventing nuclear verdicts during the Minneapolis-based Professional Liability Underwriting Society’s virtual annual conference Wednesday.



Beth Diamond, New York-based group head of claims for Beazley PLC, who defined nuclear verdicts as those that appear outsized in response to the alleged wrong, said, “We certainly see the impact of nuclear verdicts and social inflation in all professional lines, so it’s quite important for companies to think about the strategies” needed to mitigate such awards.

Social inflation, which impacts nuclear verdicts, reflects juries’ seeing cases “through their own prisms,” she said. It is not about the plaintiff, but “truly putting themselves in the shoes of the plaintiff.”

The panel pointed to cases including a 2018 verdict in San Bernardino, California, that resulted in a plaintiff verdict of \$113.4 million that included \$85 million for pain and suffering.

Robert Tyson, managing partner of insurer defense firm Tyson & Mendes LLP in San Diego, said contributing to the issue is that while in the past plaintiff attorneys were paid on a contingency basis, third-party litigation financing has permitted them to spend more on advertising to attract more clients.

There is also no tort reform movement, which is “the last thing” President-elect Joe Biden will do, he said.

Another contributing factor is attorneys will point to huge verdicts elsewhere and say they want the same. “These plaintiff attorneys share everything,” Mr. Tyson said.

Jurors feel like “they’re the guardians of the community” and plaintiff attorneys “are tapping into that sensitivity,” said Mark Calzaretta, partner and vice president of litigation consulting at Magna Legal Consulting in Brick, New Jersey, who is a jury consultant.

He said plaintiff attorneys try to tap into jurors’ anger, “and we go for, ‘We did nothing. It’s not our fault.’” That approach fails to defuse the anger, he said.

“There’s often a real reluctance to accept responsibility, to concede, at times, liability,” which companies are better off accepting under certain circumstances and then “really talking about damages,” Ms. Diamond said.

Panelists also stressed the importance of having the appropriate company representative, one who projects empathy. Companies may have a strong liability defense, but if their representatives say they did nothing wrong without showing empathy it often “comes across as very cold to jurors,” Ms. Diamond said.

Mr. Calzaretta related the story of one company representative who acknowledged a little girl had been molested but said she “wasn’t molested that badly.”

“You’ve got to take responsibility,” he said. Companies must demonstrate empathy “in a way that meets jurors’ expectations.”

Who is sitting at the defense table is important, including how they are dressed and whether they show empathy, Ms. Diamond said. “The jury will read that quite clearly. If you’re arrogant, if you look really disengaged with what is going on” during emotional testimony, this adds to jurors’ anger, she said.

Defendants should suggest a settlement number early on “and use it often,” she said, adding that too often she has heard that this shows weakness. “It absolutely does not.”

Mr. Tyson said a study has shown that offering such an “anchor number” makes it less likely a jury will reach a nuclear verdict.

Ms. Diamond also recommended companies follow the advice suggested by mock jury exercises. “There’s no reason to do it if you’re just going to say, ‘No, they’ve got it wrong,’” she said.

The session was moderated by Heather Fox, general counsel and chief broking officer for ARC Excess and Surplus LLC, based in Garden City, New York.
