

Nuclear Verdicts Drive Need For Insurers' Litigation Change

By **Shawn Rice**

Law360 (September 8, 2021, 12:30 PM EDT) -- So-called nuclear verdicts, jury awards of \$10 million or more, have generated splashy headlines in recent years as plaintiffs lawyers have seized on jurors' anger toward corporate defendants to secure such awards, signaling that a change in strategy is needed for insurers that handle these corporations' defense efforts.

The plaintiffs bar is getting the best of defense lawyers, according to Robert Tyson of Tyson & Mendes, by making juries angry in civil cases to motivate these nuclear verdicts. Plaintiffs lawyers assume defense lawyers and insurance companies will behave the same way as in the past, he told Law360.

"It's time for change. It's time to do something on how to defend these big cases," said Tyson, whose firm launched a subsidiary, TM Halo, to defend corporations against nuclear verdicts.

Though the term commonly refers to a jury award that exceeds \$10 million, experts said nuclear verdicts also encompass awards where the noneconomic damages are extremely disproportionate.

On Aug. 23, two trucking companies **were hit with a \$1 billion award** by a Florida state jury, which found them responsible for a college student's death in a big rig crash. A week later, a Georgia state jury **awarded \$200 million** to parents of a young boy who died in a boating accident, finding the boat maker at fault.

Verisk Analytics reported in August that, between 2010 and 2018, the average size of verdicts exceeding \$1 million rose nearly 1,000% from \$2.3 million to \$22.3 million. And 2019 saw a 300% spike in verdicts of \$20 million or more when compared to the prior decade's average, the data analytics and risk assessment firm said.

Experts noted plaintiffs' litigation style has changed, with the focus shifting to provoking a jury's anger toward corporate defendants rather than sympathy toward plaintiffs. This is known as "reptile strategy," according to experts, designed to trigger primitive brain function and a "fight or flight" response.

Rachel York Colangelo, national managing director of jury consulting at Magna Legal Services, said 84% of people surveyed around the country by her company over the past 18 months felt juries needed to be guardians of the community by forcing companies to change bad behavior with large damages awards.

Many jurors also see damages as punishment for defendants rather than compensation for plaintiffs, Colangelo told Law360, adding this common sentiment means many potential jurors have the mindset that their job is to be punitive if a corporate defendant is determined to have acted badly.

"Jurors recognize that their power, and the only way to get the attention of a big business with deep pockets — the means through which to motivate change at the corporate level — is through a verdict that will hit the defendant where it hurts the most: the bank account," Colangelo said.

While jury trials were temporarily halted at the start of the COVID-19 pandemic, experts are now again seeing nuclear verdicts return as trials resume, and expect to see more in the future.

"When juries get the chance to control something and take back power, which will happen once they start up again, it will be dangerous times for insurance companies and corporations," Tyson said.

The immediate impact to the insurance industry and other industries has been the rise in "social inflation," or increased insurance claims costs, according to experts.

Social inflation affects policyholders, experts said, through the prices of goods and insurance. From a policyholder perspective, experts said, there is concern about what is covered by an insurance policy and whether a nuclear verdict will lead to the end of a policyholder's business. Insurance premiums have risen and in some cases there is a fear among companies that they will become uninsurable, experts said.

An underappreciated aspect of social inflation is the desensitization of jurors to large verdicts due to media coverage of hefty awards, said Beth Diamond, New York-based group head of claims for Beazley PLC. She explained that typical jurors have come to think that these huge amounts are "normal" when they deliberate in the jury room.

Juries are still returning verdicts in favor of corporate defendants, but the media rarely report on defense verdicts, "which means perceptions, and plaintiffs' expectations, don't comport with reality," Diamond said.

Another benefit the plaintiffs bar has in its favor is litigation funding, which allows plaintiffs lawyers to have a more focused investment in certain cases to take to trial, according to experts.

Nuclear verdicts happen across the country, but experts agreed that California, New York, Florida, Illinois, Nevada and Texas are well-known "judicial hellholes," as plaintiffs lawyers in those states are connected and share more information among themselves compared to their defense counterparts.

"What is troubling is that venues considered to be more reasonable and fair for defendants may be increasingly dangerous," Diamond added.

While corporate mistrust, social inflation and litigation funding have contributed to nuclear verdicts, experts said there is one key area where the insurance industry can improve — its defense style.

The plaintiffs bar has upped its game and been honing its trial skills, said Michael Coffey of Coffey Modica O'Meara LLP, who represents insurance companies. He told Law360 that plaintiffs lawyers have gotten better with multiple media presentations and use of jury consultants to put on a much better production.

Litigation funding has been a formidable part of aiding plaintiffs lawyers in lawsuits, said Coffey, who added that defense lawyers need to get back to the basics. That means understanding evidence and how to introduce documents and giving persuasive closing arguments, he said.

The August Verisk report suggested that defense attorneys can take a number of steps to counter the reptile strategy and humanize the corporate defendant.

For instance, lawyers could put a corporate representative on the stand to describe their interactions with the plaintiff and put a human face on the business, according to the report, which was authored by Stephanie Fox, senior director of legal claims management at Verisk unit ISO Claims Partners. Defense lawyers should also avoid merely rebutting the plaintiff's claims and instead "show the defendant understands the plaintiff's experience and cares about their well-being," the report said.

Coffey used an analogy from the popular "Rocky" film franchise to describe the needed shift in defendants' litigation strategy.

"When Rocky is fighting Hulk Hogan like a boxer but Hulk Hogan is just throwing him around, Rocky's manager, Mickey, tells him to cut the gloves," Coffey said. "So, [defense lawyers] must adapt to the battle and cut the trial gloves off to win this battle."

--Additional reporting by Hailey Konnath and Rosie Manins. Editing by Abbie Sarfo.

