

Stemming the tide of social inflation

Runaway jury verdicts have been on the rise for 10 years, and their impact is apparent in claims that go to trial — there is a perception that someone must pay.

BY PATRICIA L. HARMAN

The rise of social inflation in the insurance industry or **nuclear verdicts**, as they are known in the legal industry, is creating a chilling effect for insurers. Jury verdicts have been steadily climbing for at least 10 years but seemed to reach an all-time high more recently.

Defense attorney Robert F. Tyson, Jr., managing partner of the California-based law firm Tyson & Mendes, finds that the number of jury verdicts over \$10 million have risen dramatically since 2009 when the ‘reptile theory’ came out. “That changed the way plaintiffs lawyers tried cases. The great recession was also well underway then,” explains Tyson. “Since then, insurers have not been focused on nuclear verdicts. They took a hard look at expenses and their lawyers focused on cutting expenses for these cases, while plaintiffs focused on indemnity.” It was this disconnect that aided the rise of social inflation for claims-related cases.

Tyson pinpoints several factors that have contributed to social inflation. “Plaintiffs’ attorneys have changed the way they try cases. They used to go for sympathy, and it will still get them paid, but now the big paydays come from anger. They are motivating the juries to action through anger,” he says.

The challenge for insurers and their counsel is to identify what will make juries angry and then figure out a way to diffuse it. “It’s not about how to defend or fight it, the plaintiff’s bar has

come up with a whole new way to try cases and they’re assuming that you are going to fight everything,” Tyson adds.

He has written a new book entitled, “Nuclear Verdicts, Defending Justice for All,” that provides an insider’s view on how to mitigate the impact of these verdicts based on decades of personal experience.

“If you’re going to lose, own it, accept responsibility, and you’re a lot closer to winning,” he counsels. “You will seem like the most reasonable person in the room, and you’re not fighting them.”

Tyson believes that **insurance companies have the power to do away with nuclear verdicts**, and it is this perspective that led to his writing the book. “It’s the culmination of years of fighting this battle,” he shares. He wanted to put his strategies into writing for his staff because they do a lot of internal training and it was important to have information they could share with their insurance clients.

He says there was some initial pushback from his partners who thought he was “giving away the playbook and secrets.” However, Tyson believes that justice has to matter. “These people deserve to be compensated; however, the amount of money for these verdicts doesn’t even resemble justice. The system is being manipulated by very good plaintiffs’ attorneys.”

Errors that raise the stakes

Tyson finds that many defense attorneys believe they have to win every battle to win the war, but in



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Defense attorney Robert F. Tyson, Jr., believes that insurance companies have the power to do away with nuclear verdicts.

reality, winning all of the battles can cost an insurer more in the long run. “What happens is we all become very entrenched in our sides, and we’re used to fighting everything. Justice doesn’t just happen. You have to fight for it. The way we do that is to seem like the most reasonable person in the room. That’s why we concede certain things and dig in on others,” he clarifies. “Transfer this to the claims process. What would a reasonable person say in this instance? Put yourself in your claimants’ shoes.”

In addition to thinking they need to win every argument, defense attorneys also fail to provide the jury with a realistic figure that will offset the plaintiff’s demand. Tyson says that a University of Iowa study found that providing a number helps to ground the jury in the realities of what a settlement will mean to the plaintiff and is instrumental in limiting nuclear verdicts. “Some see it as a sign of weakness, but the study found that by giving a number, you are more likely to get a defense verdict,” says Tyson.

“We give a number in every single trial, and this is borne out by our experience.”

Defense counsel should also carefully consider whether to use experts. “A lot of times claims folks hire experts, and that can be good, or it can be a death knell,” cautions Tyson. “What we want is for the experts to offset what the plaintiffs say. However, someone may be more persuasive in saying the exact opposite of your experts.”

The role of insurance

In court, juries may not know if the plaintiff had insurance to help offset any costs. However, insurers can still be responsible for paying above the policy value if a case goes to trial. How can this happen?

Say there is a \$1 million policy and a plaintiff makes a demand for the entire \$1 million policy. For whatever reasons, the insurer denies the claim. The plaintiff then sues the insurer for \$20 million and wins. The judge tells the insurer, “**You had the opportunity to settle within the policy limits**, but chose not to. Now you have to pay the whole \$20 million.”

Sometimes there isn’t enough insurance to cover a claim and the insurer is willing to pay the policy limit. However, jurors don’t always accept the policy limits, especially when they think the insurer can pay more.

Plaintiff attorneys want to argue their cases in front of a jury because they need jurors to be emotionally invested in the case, and they want to perpetuate the “someone has to pay” scenario. Some of these cases are overturned on appeal; however, the outcome isn’t always what the insurer expects. Tyson cited a wrongful termination case involving the Los Angeles Times, where the jury returned a \$7 million verdict. The case was retried within the last nine months, and that

jury returned a \$15 million verdict because they didn’t believe the first verdict was sufficient. “Sometimes appealing can make it worse,” he warns.

Occasionally, the jury verdict is too low. There was a damage award where this happened and the judge stepped in and raised the amount that the jury awarded. “That kind of negates having a jury trial,” counters Tyson.

Even though the book highlights 10 different factors that can affect a verdict’s outcome, Tyson says, “there are four things that must be done without exception when you realize this could be a bad case. You have to accept responsibility for something, you have to give a number, you have to personalize the corporate client, and you have to know how to argue the biggest component, the non-economic damages. You have to do these four things without exception. There isn’t just one thing. If you do all of these things, it won’t be a nuclear verdict. You will have diffused the anger because you will be the most reasonable person in the room.”

Some attorneys make the mistake of waiting until their closing argument to give the jury a number to consider, but Tyson has found this is a mistake. He advises giving a number early and often, and never changing it. “Don’t wait until the closing argument — it won’t play out well.”

The secret to success in social inflation cases is incorporating these steps in every case. “The book assumes that everyone will have a different delivery,” observes Tyson, “but here’s the playbook and how you can defend the case to avoid a nuclear verdict. It makes you seem like the reasonable person.”

Tyson concedes that some people may think the ideas in the book are radical. “They are new. If you want to avoid nuclear verdicts, you have to do

something new and different. There is a whole methodology that assumes the defense industry will do what they’re always done for the last 30 years,” he says. “We’ve been doing things the same way for the last 30 years, and there’s comfort in that. It works. Some of this will be intuitive, and some will be counterintuitive.”

It’s that desire to operate the way they always have that can work against insurers and defense counsel. The reality is that jury verdicts continue to grow with carriers and their policyholders paying the price. As plaintiffs and their counsel become more aggressive in their demands, it will be up to insurers and their counsel to choose another path — whether that means utilizing alternative methods to settle claims before they get to court or taking a more proactive approach to mitigate nuclear verdicts.

Editor’s Note: If you’d like more information on this topic, FC&S will be **sponsoring a free webinar** on March 18 at 2 p.m. EST that will examine the issues surrounding hard markets, soft markets and social inflation. The discussion will look at the impact of policy language, coverage and jury verdicts are increasing claims costs. “*Nuclear Verdicts, Defending Justice for All*” is available on Amazon.

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