

STOP NUCLEAR VERDICTS: **COMPENSATE LIKE PLAINTIFF LAWYERS**

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Here is a question for insurers: You are in the business of managing risk, but what have you and your defense counsel done differently in the last decade to manage or stop nuclear verdicts?

The risk is real. Jury verdicts of \$10 million or more have exploded over the last 10 to 15 years. The number of \$100 million jury verdicts, and even billion-dollar verdicts, are also on the rise. But for the most part, insurers and their defense counsels have yet to do anything meaningful to lower the risk of such verdicts.

This has to stop. And insurance companies can stop nuclear verdicts, **today**.

HOW NUCLEAR VERDICTS OCCUR

To effectively defend against nuclear verdicts, you must first understand why they occur. What has happened over the last decade to cause their dramatic increase? Is there a new law or bill in favor of plaintiffs that mandates they must recover millions in pain and suffering damages? Are there novel lawsuits being filed that lead to new types of exorbitant damages that did not exist before? Are people just getting more severely injured nowadays?

The answer to all these questions: **No!**

The rise in nuclear verdicts is a direct result of the changes plaintiffs' lawyers have made in the way they try lawsuits. Previously, plaintiffs' lawyers tried to elicit sympathy for their client from a jury to drive settlements and jury verdicts. Today, those tactics have morphed into creative ploys to incite anger among jurors. Anger is the number-one motivator of nuclear verdicts – and **may prove to be even more effective post-COVID-19** in light of shifting juror attitudes.

The plaintiffs' bar has become so effective in achieving nuclear verdicts because they have **countless resources to share information** and teach these winning tactics to each other. They have listservs, seminars, books – you name it. The infamous “Reptile Theory,” for example, teaches plaintiffs' lawyers how to get juries angry and has purportedly achieved over \$8 billion in settlements and jury verdicts since its publishing in 2009.

THE BEST WAY TO
GET A **NUCLEAR
VERDICT** IS TO
ASK FOR IT!

Plaintiffs' lawyers also now **outright ask juries for astronomical amounts of money**. Twenty years ago, that would have been unthinkable – a jury would have found it offensive. But today, every nuclear verdict involves a seemingly outrageous “ask” from plaintiffs' counsel. Through research and psychology, they have figured out that the best way to get a nuclear verdict is to ask for it!

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THE DEFENSE IS FALLING BEHIND

So, what is the defense industry doing differently? Go ahead, spend a minute to think of all the things you and your company are doing differently in response to the avalanche of verdicts hitting our industry. Maybe make another list of all the things your defense counsels are doing differently in the last 10 years to fight nuclear verdicts. Now, how long are your lists? Anything? Probably not.

Despite skyrocketing verdicts achieved by creative plaintiffs' lawyers, **the defense industry has not changed its approach to defending cases.** The routine remains the same: fight everything at all cost and shy away from the worst parts of the case – especially damages.

Well, let's do something! For the first time, the defense now has a proven strategy for defeating plaintiff lawyers: defuse anger by accepting responsibility (not necessarily liability) in every trial; give the jury a reasonable defense number; personalize the corporate defendant; and learn how to argue the biggest component of any nuclear verdict – noneconomic damages.

But the defense industry is slow and resistant to change. And it is not just the lawyers. We regularly receive pushback from insurers and corporate clients when we recommend these strategies.

So, if you want to stop nuclear verdicts, what else can you do? Education and communication are vital, but as explained below, **compensation may be the best place to start.**

YOU GET WHAT YOU PAY FOR

Obviously, most corporations are not going to want to hire or pay plaintiff lawyers to defend their cases. There are, of course, excellent defense lawyers who are both good trial lawyers and affordable. But has that been enough?

Why not **incentivize your defense lawyers**, on only your biggest cases, to act like plaintiff lawyers?

Think about it. Why are insurers hiring lawyers who get paid the same amount of money whether they win or lose a \$30 million products liability trial? Why would you pay a lawyer the exact same amount of money for delivering a winning closing argument as you would for a medical records summary?

LIKE IT OR NOT, **MONEY** **MOTIVATES PEOPLE.**

Deposition summaries and records reviews are not what keep you up at night. You probably are not worried about having the right defense attorney summarizing interrogatory responses. No, your biggest concern is **the risk of losing a big trial!**

Like it or not, money motivates people. It may not be the only motivator, or the biggest motivator, but it can be a driver of success. Plaintiff lawyers are constantly pushing the envelope in high stakes litigation. Is it simply because they are more creative, or care more about justice than the defense? Of course not. **It is because of the money they stand to gain if they win.**

HIRE THE COMPETITION?

This may sound like a radical idea, but if you want to stop nuclear verdicts, **why not hire the attorneys who are the best at achieving them?** Yes, insurance companies could hire successful plaintiff lawyers to defend their biggest cases.

Plaintiffs' attorneys claim to be fighting for justice, just like you! At least, that is what their websites and TV commercials say... So why not hire them to defend your company or insured in its most complex, high-exposure lawsuits?

Likely because they would never take the case! Not if you are only going to pay \$500, \$1,000, or even \$2,000 an hour to defend a \$50 million products liability trial. Not when that same attorney can make \$20 to \$25 million for prosecuting that same case.

Plaintiffs' counsel gets 40% or more of any recovery they achieve. So, the bigger the verdict, the more plaintiffs' counsel stands to earn. It doesn't matter if that is fair or just. **Money is the motivator.**

INCENTIVIZE AND REWARD WINNING – SUCCESS FEE

On your biggest cases, it is time to stop paying defense attorneys the same amount of money for every task. It is time to incentivize your defense counsel to focus on your risk – and win. One way to do this, and arguably the best way, is with a **success fee**.

As an addition to the hourly rate or fixed fee you pay your counsel, a success fee can **encourage your defense counsel to be more financially invested in your large jury trial** versus preparing a monthly report at the same rate somewhere else in your portfolio.

IT IS TIME TO INCENTIVIZE YOUR DEFENSE COUNSEL TO FOCUS ON YOUR RISK – AND WIN.

Success fees can be added to the handful of cases you are truly worried about in many ways. Here is one example:

In a big wrongful termination and discrimination case, the settlement demand is \$50 million, and liability is not good. You lost your summary judgment motion and you are in a notorious judicial hellhole. You are pitted against one of the best plaintiffs’ lawyers in the country, and you know he may be asking for \$100 million at trial if it does not settle. But you do not believe the \$50 million demand is reasonable, or there is some other reason you cannot settle.

In this example, if your defense firm can bring this case in for a \$10 million jury verdict, they would have “saved” you \$90 million off the \$100 million trial request. It would also be a savings of \$40 million off the lowest settlement demand of \$50 million. Either way, it would be quite the win for the defense.

Based on scenario above, if your defense firm receives a success fee of 25% of the savings from the settlement demand (not the ask at trial), they would get 25% of the \$40 million savings – \$10 million – on top of their hourly rate.

This example is a lot of money, but did you receive value for your defense spend? Remember, **you only pay a success fee if you win**. You are not increasing your defense spend unless you reduce your indemnity payment.

AND WOULDN'T IT BE BETTER TO PAY YOUR DEFENSE COUNSEL FOR WINNING THAN PAYING PLAINTIFF'S COUNSEL WHEN YOU LOSE?

PAY FOR VALUE, NOT TIME

Nuclear verdicts are not going away, but you have the power to minimize your risk of receiving them at trial!

Pay your outside defense counsel for the value they bring to a case, not just the hours they spend on it. **Incentivize them to change the way they try lawsuits**. Make winning a behavior you measure and reward – especially on the risks that keep you up at night. Your defense counsel will respond to your concerns, and your money. Compensate like plaintiff lawyers and **see the results**.



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