Social Inflation

Fighting Back Against the Rise in Nuclear Verdicts

By Joseph Moriarty

Left unchecked, the plaintiffs' bar's sustained, organized, and unified strategy of using social inflation to drive bigger and bigger verdicts is potentially catastrophic.

The nation, once proud of its frontier individualism, has gradually adopted a no-risk mentality based on the belief that if anything bad happens, someone should be made to pay. But as damage awards lose any connection to actual damages and insurance companies flail around anxiously, that someone is turning out to be everyone.

(Church, George J., Time Magazine, Nation: *Sorry, Your Policy is Canceled* (Mar. 1986)).

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The March 1986 Time magazine cover story alerting Americans to the rise in $1 million jury verdicts, referring to them as "giant awards," echoes the same fears surrounding the recent rise in the size and frequency of large jury verdicts.

Over the last few years, insurance carriers and industry professionals are probing the causes behind this significant uptick in runaway verdicts. Many point to "social inflation," *i.e.*, the factors increasing insurers' claims costs above normal economic inflation. Social inflation is typically blamed on three main factors: (1) shifts in society's perception of litigation, including public sentiment about corporations and the appropriate risk-bearing party; (2) increased involvement of third-party litigation funding in bodily injury and wrongful death claims; and (3) plaintiffs' attorneys' use of aggressive psychological tactics, such as the reptile theory and anchoring, that influence jury decisions by playing to their emotions and bias.

The large awards, so-called "nuclear verdicts," are jury awards worth $10 million or more. The U.S. Chamber of Congress Institute for Legal Reform recently published a paper examining 1,376 nuclear verdicts in state and federal courts from 2010-2019. (Cary Silverman & Christopher E. Appel, *Nuclear Verdicts: Trends, Causes, and Solutions,* U.S. Chamber of Commerce Institute for Legal Reform, September 2022). The paper reported that nuclear verdicts grew significantly in frequency and size in the 2010–2019 study period, with the median verdict rising from $19.3 million in 2010 to $24.6 million in 2019. *Id*. That's a 27.5% increase, far outpacing the inflation rate of 17.2% over the same period. *Id*.

The large jury verdicts happening around the country drive up the settlement costs in catastrophic injury and wrongful death claims. In Virginia this past year, for instance, a personal injury plaintiff recovered $47.5 million in settlement, reportedly the largest amount ever recovered by a single personal injury plaintiff in Virginia history. (*Plaintiff nets record-setting personal injury settlement — $47.5M settlement,* Virginia Lawyers Weekly, Oct. 10, 2022). The previous record was $30 million, so the $47.5 million settlement was 58.3% greater than any in Virginia history. *Id*.

This social inflation phenomenon significantly increases liability claims costs. The most significant effects arise in the commercial liability markets, with the commercial auto and products liability segments hit hardest. The Insurance Information Institute collaborated with the Casualty Actuarial Society to measure the excess losses unexplainable by regular increases in economic inflation. (Jim Lynch & Dave Moore, *Social Inflation and Loss Development,* Casualty Actuarial Society and Insurance Information Institute, 2022). The analysis attributed $20.7 billion in commercial auto losses from 2010 to 2019 to loss-development factors unrelated to general inflation. *Id*. This amount is equal to 14% of the total $148 billion in claims paid during that time.

Social inflation impacts more than just insurance carriers and large corporations. Insurance carriers react to higher costs and loss ratios by increasing premiums, and markets prone to nuclear verdicts see a higher frequency of increased premiums. This impacts many small businesses, including owner-operator trucking companies. Ultimately, the higher costs are passed through to consumers, who pay for more costly products and services. If not combatted and reigned in, social inflation may cause significant insurability problems, especially in the trucking industry, which plays a critical role in the nation's supply chain and economy.

Thus, a deeper analysis of the three main drivers of social inflation is timely and critical.

Societal Shifts Against Corporations

Jurors' biases against large corporate defendants in serious personal injury and wrongful death lawsuits is hardly new. The plaintiffs' bar historically attacked large corporate defendants to entice higher jury awards—it is the classic plaintiff's trial theme of pitting a sympathetic injured individual against a greedy corporate behemoth ("people vs. profit"). In recent years, though, jurors are becoming more receptive to these anti-corporate arguments. Indeed, confirmation bias tells us that when a person's previously existing beliefs or biases align with your story, it becomes easier to convince them your story is true. In recent years, the public's view of large corporations has become much more negative. In a recent Pew Research survey, 71% say corporations negatively affect the country's trajectory. (Pew Research Center, Survey of U.S. Adults conducted Oct. 10-16, 2022). This means that the plaintiffs' bar's classic story resonates with more individuals' personal biases, increasing the chances of nuclear verdicts.

This trend will likely keep growing as the composition of jury pools shifts to Millennial and Gen Z age groups. Millennials (born between 1981 and 1996) recently surpassed Baby Boomers (born between 1946 and 1964) as the largest generation group in the United States. The oldest Millennial is now 41 years old. While Millennials are more educated and employed more frequently as white-collar workers than members of preceding generations, they have accumulated less household wealth and are more likely to be paying off debt than older generations at the same stage in their lives. Gen Z (born between 1997 and 2012) is the third-largest generation. The full effect of the COVID-19 pandemic and its ensuing disruption in education and careers on members of Gen Z is still largely unknown. Gen X (born between 1965 and 1980) is now the fourth-largest generation. The life experiences and viewpoints held by each generation from Baby Boomers to Gen Z impacts decision-making and damages awards.

Another societal shift is a marked desensitization in the public's perception of large amounts of money. In 2022, there were two lottery drawings with jackpots over $1 billion; Elon Musk purchased Twitter for $44 billion; and the Denver Broncos were sold to Walmart heir Rob Walton's owner team for $4.65 billion, a North American sports team record. My team, the Washington Commanders, is reportedly for sale, with a potential price tag over $7 billion. In addition, the media reported heavily on the federal government's payouts during the COVID-19 pandemic–spending $800 billion in Paycheck Protection Program ("PPP") forgivable loans to small businesses, and $931 billion in direct stimulus checks to individuals.

The public is inundated with these large numbers, usually attributed to large corporations, which takes the sting out of requests for outrageous jury awards against

corporate defendants. Our ability to comprehend numbers logically decreases as the number increases—for example, the human brain has difficulty comprehending how much more a billion is than a million. While a billion is 1,000 multiplied by 1 million, visualizing the magnitude is difficult for an average person. By way of comparison, spending 1 million dollars in a year would require spending about $2,739.73 per day, while spending 1 billion dollars in a year would require spending about $2,739,726.03 per day. On the other hand, the public's perception of money is often divorced from reality. In a recent YouGov survey, respondents believed that 10% of households have an annual income of $1 million or more. (Taylor Orth, *From millionaires to Muslims, small subgroups of the population seem much larger to many Americans*, YouGov (Mar. 15, 2022), ***https://today.yougov.com/topics/politics/articles-reports/2022/03/15/americans-misestimate-small-subgroups-population***). According to the U.S. Census Bureau, less than 0.5% of households earn that much. The distortion is even greater for households earning $500,000 or more. The survey showed that the public believed these households accounted for 20% of the total, while in reality it is only about 1%.

Juries face the same conundrum. Not only are jurors ill-prepared to determine the damage awards at trials, but they poorly understand the true magnitude of money the plaintiffs' attorney is requesting. This disparity creates a vicious cycle of nuclear verdicts reported in the media and in plaintiff attorneys' advertisements, and these reports consequently influencing future jurors' awards.

Third-Party Litigation Funding

The United States is the world's largest third-party litigation funding market. Litigation funding companies finance tort and commercial litigation, and American litigation funders account for a 52% share of the global, multi-billion-dollar industry. (Irina Fan et al., *US Litigation Funding and Social Inflation,* Swiss Re Institute (Dec. 2021)). They are not just supporting large commercial and mass torts lawsuits, but also individual personal injury lawsuits. *Id.* (reporting that 25% of the $17 billion investment in third-party funding is in personal injury cases). In personal injury cases, this acts as a cash advance with a "no win, no fee" provision. The catch for the personal injury plaintiffs is that the interest rates charged are much higher than for traditional loans. Lawsuits in various states have challenged the interest rates charged under usury statutes to varying success. These litigation funding agreements also raise ethical concerns because they require the plaintiff's attorney to sign-off and participate in the loan by providing the finance company with case information and documents. There is no question that the litigation funding agreements negatively impact the settlement process. Litigation funding increases the costs of settlements because plaintiffs are usually unwilling to agree to a settlement that puts little-to-no money in their pocket after legal fees, costs, and repaying the litigation funder.

The first step in combatting third-party litigation funding is to identify the funders and the exploitive terms in their financing agreements. The litigation funding market is largely unregulated and operates in the dark. Currently, only two states – Wisconsin and West Virginia – require disclosure of such agreements. *See* Wis. Stat. § 804.01(2)(bg) (2022)); W. Va. Code § 46A-6n-6 (2022). There is no uniform rule in federal courts across the country. Only two federal district courts – the U.S. District Court of New Jersey and U.S. District Court of Delaware – require disclosure of funding agreements. *See* Civ L.R. 7.1.1 (D.N.J. June 21, 2021); Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); *see also* Standing Order for All Judges of the Northern District of California Contents of Joint Case Management Statement 19 (N.D. Cal. Nov. 1, 2018) (requiring disclosure only in mass tort and class action cases). In addition, approximately 25% of district courts have local rules expanding on Federal Rule of Civil Procedure 7.1, which provides for corporate disclosure statements, to require disclose of the identity of litigation funders, but not the disclosure of the terms of their agreements. See U.S. Chamber of Commerce, *Third Party Litigation Funding: Federal and State Disclosure Requirements* (2022). There is an active effort to mandate a uniform approach, at least in federal courts. In 2021, the Litigation Funding Transparency bill was reintroduced in both chambers of the U.S. Congress, which would require disclosure of third-party litigation financing agreements in federal civil lawsuits. The bill aims to shed light on the billion-dollar industry and ensuring the court and opposing parties know who is financing the litigation and whether there are any conflicts of interest.

Psychological Tactics: The Reptile Theory and Anchoring

The final major driver of social inflation is the plaintiffs' bar's increased use of psychological tactics to manipulate juries into returning inflated damage awards. One such method, coined the "reptile theory" by authors David Bell and Don Keenan in their book *Reptile: The 2009 Manual of the Plaintiff's Revolution*, focuses on society as a whole and not the specific case. Bell and Keenan theorize that plaintiffs' attorneys use reptilian tactic phases (*e.g.*, "safety rules," "personal safety," "protecting the community," "unnecessary harm," and "needless endangerment") in order to trigger the reptilian part of the brain responsible for basic life functions and to overcome the cognitive parts of the brain. By linking each argument to a juror's sense of personal or community safety, the attorney manipulates the jurors into using emotion or a sense of danger rather than the facts and legal standards to decide the specific case. It further focuses the damages, not on the specific plaintiff, but on the larger potential harm to the community.

There is no place in court for the plaintiffs' bar's reptile theory tactics. Defense attorneys must object to such tactics in discovery and at trial. Special attention and time must be spent preparing corporate employees and representatives to aptly respond to reptile tactic questions. As importantly, the defense attorney needs to object to reptile tactic phrases and lines of questioning to create a record for a motion *in limine*. Plaintiff's attorney's suggestion that there is a community standard of care or community safety rule that supersedes the law in the jurisdiction should be precluded as irrelevant and unduly prejudicial. Similarly, the defendant's internal company rules should be excluded because a company can set private rules that create obligations greater than the legal require-

ment. The Golden Rule arguments at the root of retile theory practices are universally improper because they encourage jury decisions based on personal interest and bias rather than the evidence. The defense should make the court aware of these tactics and move *in limine* to prevent the plaintiff's attorney and their witnesses from suggesting the jury needs to send a message or prevent others from injury. This is particularly true in cases of admitted liability with no claim for punitive damages.

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Another psychological tactic is anchoring, in which the plaintiff's attorney requests an exorbitantly high damages award to manipulate the jury's sense of expected fair compensation. When a jury relies too much on the first number received (the anchor), they engage in anchoring bias, a mental error in which that first number serves as a relational point for all further decisions. People can easily become anchored to arbitrary numbers, even if irrelevant to the current situation. For example, anchoring bias arises in settlement negotiations. If the first settlement offer is low, a plaintiff may be more likely to accept a lower settlement offer than if the negotiations started with a higher initial offer. On the other hand, the plaintiffs' bar's strategy of starting with a high settlement demand is unlikely to work against sophisticated insurance professionals. This is because the more someone participates in an activity, the less likely they are to experience anchoring bias in that setting. This helps explain why jurors are so susceptible to anchoring bias when awarding damages. Outside the courtroom, jurors hear only about outrageously high awards through the news media and plaintiff attorneys' advertisements, but they do not hear about what happened to such awards on appeal, and they only rarely hear about low verdicts or defense verdicts.

The defense team needs to develop a strategy to respond to the plaintiff's attorney's anchoring tactic. Most jurisdictions have liberal rules on allowing attorneys in closing arguments to ask for large awards, and they may even allow attorneys to break down specific demands for different categories of recoverable damages. Defense attorneys should move *in limine* to preclude or limit the plaintiff's attorney from making such requests in voir dire and opening statements if improper in the jurisdiction. If allowed, defense attorneys should use their own voir dire and opening statements to expose and counter the anchor early in trial.

The real work needs to be done in closing arguments, remembering that the plaintiff's attorney always gets the last word. There are several approaches to rebut anchoring, which must be tailored to the specific case. (*Counter Anchoring and the Reverse Reptile*, DRI's For the Defense, 2021). Gone are the days of ignoring the anchor and arguing only the liability defense in closing. At the very least, defense attorneys should expose the anchor as a psychological tactic used by the plaintiff's attorney to create a cognitive bias towards a large damages award. This can be managed differently depending on how outrageous the plaintiff's anchor is. Some defense attorneys bluntly call out the plaintiff's attorney for using the trick to distract the jury from the evidence and jury instructions applicable to the specific case. Other times, defense attorneys explain the trap created by plaintiff's anchor by giving real life examples of anchoring in product sales and salary negotiations.

In addition, the defense team should consider using a counter-anchor (or at least providing different options for the jury to consider on damages). In some circles, defense attorneys and their clients fear that providing a counter-number on damages will be seen by the jury as an offer of money to set the floor for an award, despite there being a strong liability defense to support a defense verdict in the case. While this can be true in a particular case, letting the plaintiff's attorney's anchoring go unchecked may result in a nuclear verdict, even if the jury compromises down from the high ceiling proposed by plaintiff's attorney. There is a way to present a counter-number in a way that allows the jury to understand the defense does not concede liability but is suggesting a more reasonable assessment of damages. This can be done by providing a counter to the plaintiff's boarded pecuniary damages – based on the evidence and expert testimony in the case – and then arguing the non-pecuniary (*i.e.*, "pain and suffering") award. The defense attorney needs to link its suggested number to evidence and arguments to arm defense jurors, so that those jurors can convince the other jurors to return a more reasonable damages award. For example, in cases with large life care plans, one strategy is to offer a defense life care plan that reduces the disputed items, but at the same time adds in some quality-of-life items like additional therapies or home modifications. In the end, the defense attorney's counter-anchor must be credible and fact-based to overcome the inherit corporate bias faced at trial.

Fighting Social Inflation

There is no denying the recent trend in social inflation and nuclear verdicts is going in the wrong direction. The trucking industry and other markets prone to suffer the negative impacts of social inflation are taking steps to improve their safety and risk management programs. Companies are also turning to technology to prevent future nuclear verdicts. These efforts include installing drive cameras, using artificial intelligence data-driven software to identify certain risks, and looking into the future of autonomous-driving vehicles. In the claims area, insurance professionals and defense attorneys must work together to combat social inflation and nuclear verdicts going forward by looking at early claims resolution, defining clear litigation strategies, and developing trial themes for convincing juries.

Early Claims Resolution

It remains true that the most impactful litigation technique is to avoid litigation. Litigation exponentially increases claim duration and costs. When an acci-

dent occurs with exposure for significant bodily injuries or death, it is important to have an on-call, emergency response team ready to react. The claims professional should identify factors that are quickly escalated for an emergency response, such as bad venues, injuries involving children, traumatic brain injuries, burn injuries, and fatalities. The claims professional should quickly retain a defense attorney to coordinate experts and preserve evidence, including canvassing for witnesses and third-party cameras. The defense attorney can also be crucial in dealing with local law enforcement and other investigators. Claims with likely liability should be pushed aggressively towards early settlement. Even when liability is disputed, if the potential exposure is significant, an early proactive approach should be taken to resolve the claim for a discounted amount.

In serious situations where emotions run high, the claims professional and defense attorney need to collaborate on the most effective way to approach the claimant or the claimant's attorney. In any setting, effective claims handling involves communicating clearly, expressing sympathy, balancing the claimant's expectations, maintaining a sense of urgency, and explaining decisions on settlement proposals. When the claim cannot be resolved early because of ongoing medical treatment, the defense team should keep communication open with an eye toward prelitigation mediation. In the situation of especially bad injury claims – paraplegic, quadriplegic, burn injuries, severe traumatic brain injuries – the claims professional should consider making early payments towards essential goods or services that may not otherwise be available, such as intensive treatment facilities, electric wheelchairs, or handicap-accessible modifications to a residence. Parties can agree to deduct the cost of these items from any future settlement or judgment, but more importantly, it helps build good relationships for future settlement negotiations. Again, the most impactful strategy is to identify and resolve the claims most susceptible to going nuclear early in the claims process long before putting decisions into the hands of a jury.

Defined Litigation Strategy

When prelitigation resolution is not possible, the claims professional and defense attorney should critically evaluate the lawsuit. The defense team should identify early the preferred resolution strategy, whether it is dispositive motions, mediation, or trial. This requires identifying critical issues to resolve with further investigation, discovery, or motions practice. In most cases, the defense team should look at what prevented prelitigation settlement of the claim. After honing critical issues, the defense team should focus the strategy needed to achieve the preferred resolution. It is important to use the time and effort put into the case intentionally, and not just randomly use a set of forms or discovery plan that is designed for every case. Too often defense attorneys spin their wheels on issues that will be lost or pointless at trial. Early identification and acceptance into the defense theory and theme of the case is one key tool to preventing the case from becoming another nuclear verdict.

Even the most analytical and best-intentioned juror is susceptible to emotional arguments, which means it is imperative that the defense focuses on using honest and appealing broad-brush jury themes at trial, instead of relying on confusing minutiae. The use of mock trials and focus groups is critical to test how members of the public from the case's venue, or a similarly situated venue, may respond to certain issues and arguments. The plaintiffs' bar invests heavily in mock trials in significant cases, and the defense needs to equally test arguments and themes in advance of trial. Jury consultants can assist with identifying the ideal juror profiles and the worst juror profiles for the specific case and can then offer input on how to expose those underlying issues during voir dire.

As the case proceeds closer towards trial, the defense team should remain in close communication and collaborate on any changes in course and the costs of specific activities. At the same time, mediation should almost always be explored prior to trial. Further, a high-low settlement agreement, typically explored during trial, is another tool to cap the potential exposure from a nuclear verdict. In a high-low agreement, the parties agree that the outcome of the case will be no less than the agreed "low" value, and no more than the agreed "high" value. If the verdict is in favor of the plaintiff, and the damages award exceeds the agreed high value, the plaintiff gets only the high end of the agreement. If the verdict is between the low and high values in the agreement, then the plaintiff receives the actual damages award. If the jury returns a defense verdict or damages award below the agreed low value, then the plaintiff receives the low end of the agreement. The high-low agreement should be in writing or put on the record before the jury returns the verdict. The defense attorney should bring a draft high-low agreement to trial to ensure all terms are fully considered and enforceable in the jurisdiction. (*See generally,* Bryant, Gary, *Drafting an Effective, Enforceable "High Low" Agreement,* Virginia State Bar's Litigation News, Summer 2007). Lastly, the defense team should advise their clients on the benefits of appellate counsel attending trial to ensure the preservation of the appellate arguments, including plaintiff's attorney's improper arguments for the jury's emotions and bias.

Conclusion

The stakes could not be higher. Left unchecked, the plaintiffs' bar's sustained, organized, and unified strategy of using social inflation to drive bigger and bigger verdicts is potentially catastrophic for a wide range of stakeholders – including those who never directly face a lawsuit.

But by fighting back – engaging in early settlement negotiations, rebutting the plaintiffs' bar's reptilian tactics and anchoring bias, and using trial themes that pass the "gut check" or "smell test" of jurors – the defense bar and our clients can create a different narrative. In doing so, we can begin to reverse the rising tide of nuclear verdicts.