

Nuclear boom

Art Kirkner discusses the rise of nuclear verdicts and the emergence of litigation funding.

Anyone in the specialized transportation or broader trucking industry knows that there's a heightened sense of awareness surrounding nuclear verdicts. They are increasing in frequency and size, and new trial tactics (like the reptile theory) being employed by plaintiff trial lawyers are forcing trucking companies of all types to shore up their safety and risk management programs. And, as investors seek new ways to maximize their assets, they've turned to litigation funding – a low-risk, high-payoff endeavor that adds even more complexities to an already difficult environment, essentially incentivizing plaintiffs to go after fleets with one goal in mind: large sums of money.

Knowledge is power, and before we can discuss actionable steps you can take to build up your risk management defenses, we must first outline exactly what the legal landscape looks like in light of these changes. This article will cover a discussion of nuclear verdicts, the current state of litigation funding, what it all means for specialized transportation companies and how to prepare for the rare catastrophic lawsuit.

We've heard the term a lot by now, but how exactly is "nuclear verdict" defined? According to a paper by George Speckart, Ph.D. and Bill Kanasky, Jr., Ph.D., the term "nuclear verdict" is used to refer to "unexpectedly high damage awards that appear to exceed rational parameters in civil cases."

Speckart and Kanasky point out that while "nuclear verdict" is a relatively new term, the occurrence of verdicts with monetary awards that exceed expectations or seem to be outsized or even predatory is anything but new.

They also note the difficulty of a clear definition; where a quick Google search indicates that nuclear verdicts are considered anything where the award is at or above \$10 million, a look at trial records and verdicts over the last few decades reveals situations that include a clear mismatch between the plaintiff's situation and the related monetary award, but where said award is less than \$10 million.

Nuclear verdicts occur in a wide variety of sectors, but industries involving large companies or corporations with high-value assets and equipment – such as trucking, crane and rigging, and general construction – are especially at risk of finding themselves in the defendant position.

This past summer, the American Transportation Research Institute (ATRI) released comprehensive research (Understanding the Impact of Nuclear Verdicts on the Trucking Industry, June 2020) that confirms that large verdicts against trucking fleets are increasing dramatically, both in their frequency and the sums awarded by juries. Their research was based partially on a newly created trucking litigation database that examines detailed information on 600 cases between 2006 and 2019. One key finding: "In the first five years of the data, there were 26 cases over \$1 million, and in the last five years of the data, there were nearly 300 cases. The number of verdicts over \$10 million nearly doubled in that time."

Clearly, we are in the midst of a major boom in these earth-shattering verdicts and awards. This nuclear verdict boom creates an environment that puts fleets at risk and creates an urgent need for safety and risk management measures that can help protect trucking companies and, hopefully, start to even the playing field again. Unfortunately, the issue is being even further complicated by plaintiffs and their lawyers who have noticed this trend and found new ways to capitalize on it.

against large companies. By providing plaintiffs with low-risk financing to cover legal fees and living expenses, investors, hoping to cash in on large settlements and nuclear verdicts, ultimately fund the very types of lawsuits causing news headlines in a variety of sectors.

Since emerging in the 1990s, the litigation funding industry has grown into a multi-billion-dollar industry. Between 2013 and 2017, litigation funding expanded 414%, according to Burford Capital.

Third-party lenders make litigation more affordable for accident victims and encourage them to hold out for longer trials and larger settlements. As we've noted, American Transportation Research Institute shows that lawsuits targeting trucking have increased exponentially in both the volume of cases and the amounts awarded by juries. Now, as more lenders continue to invest in litigation, more victims are empowered to seek large verdict awards.

The Tripartite system

By funding a significant injury claim with the potential for a large verdict, investors stand to make a large return on investment – collecting on high interest rates, management fees and often a significant cut of the settlement. Before anyone else, the financier gets paid their part, which can range from 10 to 20 percent, according to US News & World Report.

Not only are litigation loans favorable for lenders, they're also financially attractive for plaintiffs and attorneys. Plaintiffs who have been severely injured get an immediate windfall of cash to help cover legal fees and living expenses, with no immediate risk. In many cases, keeping even a small percentage of their settlement can be more than a plaintiff could afford to leverage on their own.

Plaintiff attorneys, on the other hand, can command high contingency fees, regardless of the outcome. On top of that, they can possibly receive a cut of the resulting settlement – a high reward for very little risk. The risk to the plaintiff attorney and the financial institution that



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A growing industry

Litigation funding is the act of loaning money to plaintiffs to pursue litigation

“ The ability of defense attorneys to document carrier or driver safety activities that exceed FMCSRs carries great weight with juries. ”

ATRI, Understanding the Impact of Nuclear Verdicts on the Trucking Industry

loaned the money is that the plaintiff is not successful at trial. This is overall quite low since 90% of all trials result in a verdict for the injured plaintiff.

Litigation funding further complicates an already challenging legal landscape for specialized transportation companies. Eliminating the financial barrier for plaintiffs likely means a continued increase in claims and litigation. Coupled with trends in reptile theory and social inflation, it's easy to imagine how one transportation-related incident could result in a debilitating verdict for your company.

Leveraging tools

However, it's not all doom-and-gloom. There are steps you can take to help ensure that your company isn't the target of one of these unfortunate situations. It's widely agreed-upon that what

companies do before a crash, accident or incident is crucial. The ATRI report notes that pre-crash actions by motor carriers are critical, and that "the ability of defense attorneys to document carrier or driver safety activities that exceed FMCSRs carries great weight with juries."

To help companies be proactive instead of reactive, the insurance industry – and NBIS specifically – implements risk-management programs to help improve driver habits and lower accident

frequency. It's easier to make upfront investments on relatively low-cost behavior modification measures such as training, telematics and dashboard cameras than to try and withstand a nuclear verdict. When an incident inevitably occurs, tools such as NBIS Driver Insights will provide you with information to defend your drivers or settle earlier. In fact, such tools can help demonstrate your organization's commitment to adhering to Federal Motor Carrier Safety Regulations (FMCSRs) – and to documenting compliance.

Remember – tactics like the reptile theory target companies who are left scrambling after an incident happens. Preparation is the best defense, and NBIS can help you with that. Reach out to us at NBIS.com or by calling (866) 668 – 6247.



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