Nuclear Verdicts and the Retail and Restaurant Industry

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By now we have all received a barrage of news regarding “nuclear verdicts.” These are generally thought of as verdicts of $10 million or more, or those significantly above what anyone expected. They usually refer to causes of action arising outside of the mass tort arena and class actions. When I started defending civil litigation matters 25 years ago, verdicts in single plaintiff matters at these levels were almost unheard of. Now, I seem to post about them with increasing frequency, and in a broader range of cases. Once reliably conservative to moderate Georgia venues have thrust our state into the number one “Judicial Hellholes” spot, ahead of California. Several of these exposures involved defendants in the retail and restaurant sectors. Why are we seeing this, what are some of the potential commonalities in the cases, and what can we do to avoid being the next victim of these verdicts?

The rampant inflation in the past several years can certainly be seen as one factor. To the extent that special damages may be considered as an anchor for compensatory damages and pain and suffering awards, it is only natural that we should see some increase. This doesn’t alone justify a ten-fold increase in awards, for example, in trucking verdicts, over the last ten years. Perhaps the answer lies more in how jurors are thinking, generally, about what a “significant” award for damages could and should be, and in how jurors’ minds are impacted by other influences personally, socially, and politically.

De-sensitivity to larger numbers is probably a major factor in how 12 (or fewer) jurors gauge what a recovery should be. These may often be the same jurors who don’t get excited about playing the lottery when it is “only” at $10 million or $20 million, but would rather wait to win a “real” jackpot of $500 million to $1 billion. Budgets, deficits, and bail-outs are numbly discussed with references to trillions of dollars. In the dawn of my legal career, a $1 million award was enormous. Now we are seeing awards exceeding “one thousand million dollars” ($1 billion) and politicians are discussing “one million million dollar” ($1 trillion) spending. Georgia saw a $1.7 billion award involving two fatalities earlier this year.

Public sentiment toward corporations may be an even larger factor. With activists, pundits, and mainline party platforms focusing on corporations “paying their fair share” and “paying nothing in taxes” it appears we do have a “social justice” or “Robin Hood” influence on jurors. This can even prompt some juries to push past common-sense

views of liability, fault, personal responsibility, apportionment, and the law discussed in jury instructions.

Three retail involved nuclear verdicts from the past few years seem to show some commonalities that may shed light on the current negative trends. In February of this year, 7-Eleven recorded a pre-trial settlement of $91 million for an Illinois case. The loss involved a parking lot incident where a vehicle driver depressed the accelerator instead of the brake pedal and struck the plaintiff, who suffered bi-lateral “above the knee” amputations. Evidence was presented about an alleged failure to utilize bollards sufficient to protect pedestrians from such harm, and detailed the substantial history of parking lot incidents over 15 years. With a settlement at this amount, one would expect that jury verdict projections were significantly worse.

In 2021, a plaintiff was shot and paralyzed during a robbery in a CVS parking lot in Georgia. The plaintiff was known to sell electronics from his vehicle. The plaintiff and jury focused on the high crime levels in the area and an alleged lack of appropriate lighting. The perception of a lack of importance on safety resonated with the jury.

In 2019, a young navy veteran was shot multiple times in the parking lot of a Kroger grocery store in Georgia. It was in a high crime area, and the shooter was allegedly known in the area. After over a dozen surgeries and over $4.5 million if medical treatments, a jury awarded the plaintiff just under $70 million. The jury heard about security in the store, but none in the parking lot. They found that Kroger had no security in the parking lot “and knew they should have had it.” Plaintiff’s counsel was the same in the CVS and Kroger cases.

In all three of these cases, plaintiffs focused on conditions that were known to a corporate defendant, involved personal safety for the public, and may have been corrected or improved for sums perceived to be nominal compared with the risks. In discussing these cases with a prominent plaintiff’s attorney, the message I received was that these are not outrageous results compared to what they see as an outrageous disregard for the safety of patrons and public. Each matter could have been settled early on for a substantial amount, that may now seem trivial compared to the awards. They also all involved some component of contested liability, apportionment to a third party, or to the plaintiff. It was suggested that nuclear verdicts could be avoided by not making “bad early decisions” in cases, according to the injury bar. As an aside, the advent and proliferation of litigation funding is enabling plaintiffs to roll the dice more on contested liability cases.

While there is likely no panacea for avoiding nuclear verdicts, there are likely several things that risk managers, claims professionals, and the defense bar can do to try to avoid these exposures. Public perception of how a corporation views its role in safety issues is certainly a key. Positive messaging, public outreach, and community involvement impacts future jurors. Customer and employee safety is important to all retailers and restaurants, and showing it before and after an event helps. Looking to

see what actions may be viewed as protecting people over profits, where feasible, helps. Similarly, working with counsel on presenting positive company representatives in discovery and at trial yields results. We don't want someone on the stand suggesting that incidents, given the number of opportunities for such an event, were "statistically insignificant…"

Impacting claims results often starts before the incident occurs. Most of us have robust plans for how to receive and process incidents, but we need to make sure that programs are in place identify significant events and respond accordingly. Treating many matters with a "worst case potential" may assist in this process. Similarly, lining up resources in advance of their need enables better identification of future time bombs, and helps preserve critical information and resources.

In addressing the injury lawyer's accusations that nuclear verdicts result from bad decisions, having realistic evaluations of potential exposures early, regardless of liability, may help to focus on de-escalation or resolution. Many of the nuclear verdicts in the news started with a belief that there was no liability. Reevaluate those decisions and challenge all involved in the decision-making process. Some defense firms offer 24/7 response teams who can coordinate with early investigations and evidence preservation efforts. These teams can also assist in early evaluations, discussions of liability, recommendations for expert reviews, and potentially even peer and jury review studies. Similarly, consider early use of jury review or mock trial vendors to test liability theories and potential public perceptions. Finally, consider the rich and varied resources available to industry members in NRRDA, and consider more intercompany roundtables and brainstorming. We have the best in the business available for each other!