



# The Rising Risks of Social Inflation

October 14, 2021

# Meet the Panelists

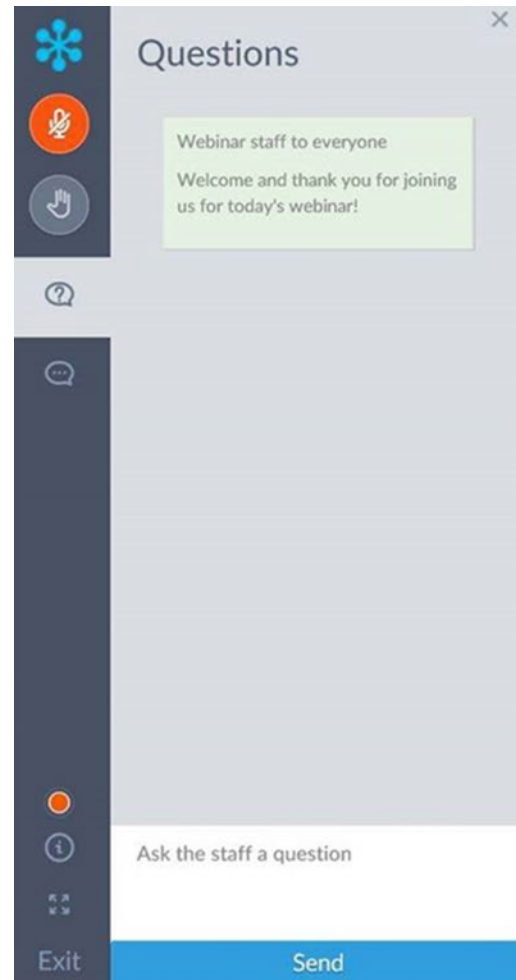


Geoff Dobran  
Claims Manager, Safety National



Alfred Von Kessler IV  
Litigation Attorney, Taylor Anderson

# Webinar Housekeeping



You may submit questions and comments via the Questions panel.

**Note:** Today's presentation is being recorded and will be provided within 48 hours.

# Learning Objectives

Today's presentation will cover:

- Nuclear Verdicts: They are real. They are growing. They are here to stay.
- What are the causes of nuclear verdicts?
- Defense mistakes.
- Defense strategies.



# **Nuclear Verdicts**

**They are real.  
They are growing.  
They are here to stay.**



# The Disturbing Trend

- There has been a clear trend of inflated verdicts over the past few years.
- There seldom is one factor that leads to a runaway verdict.
- “**Nuclear verdicts**,” those exceeding USD \$10 million, or awards that are greater than the expected payout, based upon the circumstances of the loss, are now commonplace in the U.S., and there are three key drivers behind the rise.



# Large Verdicts Across the U.S.

## Florida (Nassau County)

- In August 2021, a jury awarded **\$1 billion** in damages related to a **single death case**.
- Facts of incident: While the decedent was stopped, a truck crashed into his car, killing him. The semi-truck driver was on his cellphone and was traveling at 70 mph.
- Plaintiff effectively portrayed the defendants' conduct as a threat to the safety of the general public. The verdict was a deterrent to protect the community at large. **Message: Large companies need to play by the rules or pay.**

Nassau County is conservative. In the 2020 election, voters went 72% R and 27% D.



# Large Verdicts Across the U.S.

## Washington (Tacoma)

- In July 2021, the Washington Supreme Court overturned an appellate court ruling that held that a jury verdict was excessive and reinstated an **\$81.5 million verdict** in a single death action.
- In a 2021 opinion, the justices unanimously concurred that the Court of Appeals “overstepped its limited role and inappropriately substituted its own judgment for that of the trial court, and most importantly, the jury.”
- “We trust juries to render verdicts based on their assessment of the evidence according to the law as instructed by the trial court.”

The case is *Gerri Coogan et al. v. Genuine Parts Co. et al.*, No. 15-2-09504-3  
in the Pierce County Superior Court in Tacoma.





# Large Verdicts Across the U.S.

## Nevada (Las Vegas)

- In August 2021, a jury awarded a **\$38 million** in a single wrongful death case.
- A garbage truck struck and killed an 11yo. Garbage company claimed that decedent entered the crosswalk before the traffic signal indicated it was safe.
- **Anchoring is POWERFUL:** Plaintiff asked for \$65m in opening and closing. The defense asked for \$10m.
- Effectively, the jury split the “asks” in the middle  $((\$65m + \$10m))/2 = \$37.5m$



# Large Verdicts Across the U.S.

## Kentucky (Boone County)

- In July 2021, a Boone County jury awarded a verdict of **\$74 million** in a **single death case** that involved a motor vehicle accident.
- Plaintiffs sued Eaton, a paving company, after a driver of a medium-sized truck lost control of his vehicle. Its tires dropped off the roadway, which caused the truck to strike the decedent's car, resulting in her death. This stretch of highway was being resurfaced by Eaton, and the asphalt was not milled down properly, nor were there proper safety barriers in place until the milling was completed.

Boone County, Kentucky is a fairly conservative area situated along the Ohio River.



# What are the causes of nuclear verdicts?



# Social Inflation

- Social inflation describes the rising cost of insurance claims resulting from things like increasing litigation, broader definitions of liability, more plaintiff-friendly legal decisions, and larger compensatory jury awards.
- Social inflation is NOT price inflation, which is an increase in the price of a basket of goods/services over a specific period. Social inflation is not caused by price inflation.



# Causes of Social Inflation

- Pervasive negative feelings in society today.
- Corporate mistrust: Lack of public faith in corporations and their responsibilities (i.e., safety) to society and the community is likely playing a role leading to juries to feel more sympathy for injured plaintiffs—and wanting to punish the offending companies.
- Several industry types and social factors are contributing to the increase in litigation and class action lawsuits.
  - Utility – Wildfire
  - Medical – Opioid Crisis
  - Chemical – Monsanto Roundup (cancer)
  - Public Entity / School / Religious – Sexual Molestation Litigation
  - Environmental / Natural Resources – Climate Change



# Causes of Social Inflation Cont.

## Social Pessimism and Jury Sentiment Favoring Plaintiffs

- This sentiment leads to a loss of faith and desire for change, motivating people to shift their trust over things they can control – like verdicts.
- This attitude can lead juries to be biased toward the rights of plaintiffs, **thinking businesses should bear a greater share of responsibility than individuals.**



# What Factors Contribute to Large Verdicts?

## Changes in Jury Demographics

- More millennials are in the jury pool than baby boomers:
  - Value experiences rather than dedication to work and careers.
  - Demand far more perks from employers.
- They often have a different cultural context for evaluating corporate conduct than baby boomer and generation X jurors.
- Shorter attention spans; less attention to complex defenses.



# What Factors Contribute to Large Verdicts?

## A Millennial Effect?

- Millennials, having grown up in a highly safety-protected environment, understand the notions of “victimization” and “vulnerability” different than previous generations. Their consumer-protection expectations for corporate behavior may therefore be outsized relative to older generations.
- **One survey reported that 84% of Millennial respondents agreed that corporations should take every precaution for safety, “no matter how practical or costly,” with 63% agreeing strongly.**





# What Factors Contribute to Large Verdicts?

## Less Attention to Expert-Driven, Lengthy Testimony

- The average attention span of a healthy adult is anywhere from 10 to 20 minutes. That same adult's reading level, on average, will be equal to that of a 7th or 8th grader.
- This is not conducive to the current way cases are presented, with lengthy arguments and extensive medical presentations from the defense's physicians and experts.
- The defense's strategy must change to appeal to the younger millennial generation jury pool and employ videos, animations, graphics, and virtual reenactments of an accident scene as part of the defense.



# What Factors Contribute to Large Verdicts?

- Jury awards are higher in areas with greater levels of income inequality, all else being equal.

- In one study, income inequality explains up to 40% of the observed nuclear verdict outcomes in a jurisdiction, and *each additional percentage point in the poverty rate translates into a six percent increase in the median damage award.*

- Interestingly, income inequality does not predict the likelihood of plaintiffs winning a case. This implies that the merits of the case still determine whether a party is entitled to compensation, but the size of that compensation is related to income inequality.

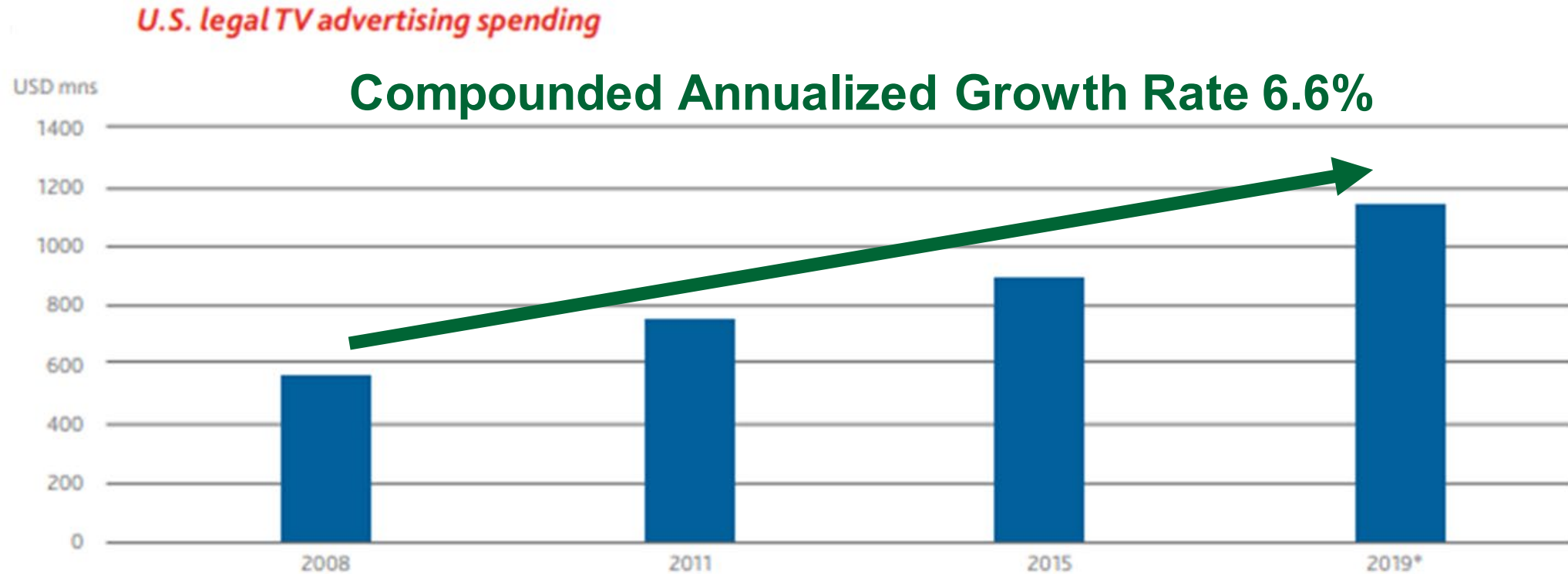
# What Factors Contribute To Large Verdicts?

## Changes in the Value of Money

- Jurors are increasingly numb to high dollar figures as they are increasingly aware of massive legislation (COVID Relief Bill – \$1.9T, Reconciliation Bill - \$3.5T), big lottery payouts, sports salaries, CEO salaries, etc.
- Exposure to social media – Facebook, Twitter, Instagram, etc. – pushing awareness of large awards, which acts to desensitize jurors.
- Personal injury lawyers are normalizing litigation through relentless multimedia advertising, showing extreme verdicts.



# What Factors Contribute To Large Verdicts?



\* Latest data based on Kantar CMAG via ATRA.

Source: Based on information from ATRA and Kantar CMAG

Average inflation from 2008-2019: 1.61%



# What Factors Contribute To Large Verdicts?

**Reptile Approach:** Not about the case but about keeping community safer.

- Fear
  - This type of accident could happen to me, my family or someone in my community.
  - Motivates to protect the vulnerable.
- Anger
  - Attacking the plaintiff's character.
  - Minimizing the damage to the plaintiff.
  - Singling out a low-level employee for blame.
  - Downplaying the mistake.



# What Factors Contribute To Large Verdicts?

## Legal and Political Factors

- Plaintiffs' grassroots influence and significant money spent on state-based elected judgeships vs. insurance industry influence and spend.
- Reversal and rollback of tort reform in many jurisdictions.
  - In 2022, California is going to vote whether to raise the medical malpractice non-economic damages caps.
- Courts expanding theories of liability (in 2012, Cal. SC, created a new cause of action against a public entity).



# Defense Mistakes



# Defense Mistakes Contribute to Nuclear Verdicts

- In addition to savvy plaintiff attorneys, defense mistakes contribute to nuclear verdicts:
  - Failure to prepare against a reptile attack
  - Failure to have a trial theme
  - Failure to anchor
  - Inflaming the jury – can be unreasonable argument or failing to accept blame when obvious





# Defense Mistakes Contribute to Nuclear Verdicts

## Avoid Getting “Reptiled!”

- The reptile theory is a trial strategy that preys on the jury's fear by arguing the defendant's action/inaction increased danger to the community.
- The plaintiff's attorney then convinces the jury it has the power to improve the safety of the community by returning a large verdict against the defendant, thus protecting the community from future harm.
- The goal of the Reptile Theory is to inflame and anger jurors.
- Witness preparation will defeat a reptile attack.



# Defense Mistakes Contribute to Nuclear Verdicts

## Spot Reptile in Action – Truck Driver Example

- You would agree, wouldn't you, that if a truck co. has a trucker that operates a truck in an unsafe manner, the truck company should pay for the harms and losses it caused?
- Do you agree that speed laws are designed to keep motorists safe?
- Do you agree that driving 56 mph in a 55 mph zone is breaking the law?
- You would agree, wouldn't you, that truckers who break the law are putting others in danger?
- And if a trucker does not operate the truck in accordance with the law and a person is injured, then the trucking company is responsible for the harm caused to that person, isn't it?



# Defense Mistakes Contribute to Nuclear Verdicts

- In addition to the techniques of savvy plaintiff's counsel, the shortcomings of defense counsel have contributed to these large verdicts.
- Failure to advance a theme
  - Defense counsel have conveyed weak themes, or most often, no theme at all.
  - There is no story for the jury.
  - Defense counsel just tries to poke holes in plaintiff's claims.



# Defense Mistakes Contribute to Nuclear Verdicts

## Failure to Provide a Number (Failure to Anchor)

- **Anchor Early, Anchor Often!**
- A predominant mistake defense attorneys made in closing arguments was failing to provide a damages number for the jury. They gave no alternative for the ridiculously high number suggested by the plaintiff's attorney.
- The jury thus had nothing to anchor or provide a counter-balance to the multimillion dollar "ask" by the plaintiff.
- The number must be reasonable. It must make sense and you must explain why.



# Defense Mistakes Contribute to Nuclear Verdicts

## Inflaming the Jury

- Responsibility
  - Accepting responsibility **does not necessarily mean accepting liability**.
  - For instance, defense counsel can take responsibility for being a corporate defendant (or school) that has, as a top priority, a safe environment. However, it cannot safeguard against unforeseeable acts (or even criminal acts).



# Defense Strategies



# Defense Strategies

- “The Good Company” – humanize the company as a group of people.
  - In order to personalize a corporate entity, it is important to learn about the employees and to tell their stories
  - Every organization is made up of people. Who are these people? Why do they come to work every day?
  - Has the company had any positive impact in the local community?
  - Once the jury sees the corporate defendant is made up of good people doing good things, it is less prone to return a verdict motivated by anger



# Defense Strategies

- Know your case and know the risks
  - Know the facts, details, witnesses, and biases that increase or decrease your client's exposure
- The significance of pretrial rulings
  - Motion in Limine (i.e., exclude testimony requesting the jury to act as the conscience of the community, the jurors to put themselves in the plaintiff's shoes, etc.)
- Accept responsibility / accountability
- Whether or not to bifurcate the trial
  - Without the damages component in the liability trial, a plaintiff may not be able to fully convey the toll the incident at issue has had on their life





# Defense Strategies

## Must Address Noneconomic Damages

- Noneconomic damages represent the largest component of a nuclear verdict
- Ask your defense counsel what their strategies are to address noneconomic damages
- What is the No. 1 way the defense industry addresses noneconomic damages?
- Defense attorneys fall into a trap of overemphasizing economic damages at the expense of neglecting noneconomic damages during closing
- Meanwhile, plaintiff attorneys tend to overemphasize noneconomic damages
- Defense must attack noneconomic damages earlier in discovery



# Conclusion

- Nuclear verdicts are becoming the new normal
  - \$10 million is the new \$2 million
  - The jury pool is changing
  - Prevailing political attitude of stick it to the “rich” (i.e., corporations) – if you can afford to pay, pay
  - Legislators rolling back tort reform; allowing new types of damages to be recoverable / courts creating new causes of action
- Better economics allow plaintiff attorneys to outwork the defense
- Defense needs to catch up
  - Do not get reptiled
  - Prepare witnesses
  - Address noneconomic damages



# Comments & Questions?

*Thank  
you*

