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ARE NUCLEAR VERDICTS OUT OF CONTROL?

FREIGHTWAVES FREIGHTINTEL RESEARCH

Key Highlights

- Nuclear verdicts have been a growing phenomenon in trucking over the past several years, and the pressure on carriers from rising insurance premiums appears to have no end in sight. This is despite the fact that deaths and injuries from accidents involving large trucks have been declining — down double digits year-over-year as of the latest count.

- A "nuclear verdict" is commonly defined as a jury award of $10 million or greater. However, this definition is simplistic and bears further clarification. We believe there are two classifications of nuclear verdicts: one numerical (a $10 million or greater jury award) and one based on the outcome relative to expectations (e.g., if "x" is the expectation a priori but the jury award is five-10x ex-post).

- Our research shows that only about 5% of cases go to trial. When it comes to blockbuster nuclear verdicts relative to commercial-vehicle-accident-related deaths in the U.S. (approximately 5,000 annually), we are talking about a minuscule number — maybe five to 10 — per year. However, a handful of such massive verdicts is enough to drive double-digit annual insurance inflation for the entire trucking industry.

- Nuclear verdicts typically occur because the jury determines that the defendant is willfully or purposely denying any responsibility or involvement in the accident.

- Nuclear verdicts have become prominent in trucking relatively recently. But they have been around in other sectors of the economy for about 30 years. The original such verdict dates back to the 1990s with the iconic McDonald's hot coffee case.

- The proliferation of nuclear verdicts in the trucking industry has occurred over the past decade or so. Alan Pershing, CEO of CaseMetrix, a database of court verdicts and settlements primarily in the Southeast, says, "... [T]here are five times as many verdicts that are $20 million-plus in the last five years compared to the prior five years (2010-2014.)"

- Our survey data shows gamesmanship plays a big part in nuclear verdicts because carriers often shun responsibility, trucking insurance inflation is running at approximately 20% a year on average currently and more than a third of our survey respondents do not carry excess excess liability coverage.

- Regarding plaintiff strategy, the overriding conclusion of our research is that plaintiff lawyers are much better connected and collaborate to a much higher degree than their defense counterparts.

- Plaintiff attorneys typically employ one of four primary strategies in the courtroom to obtain nuclear verdicts: Reptile Theory, Gamesmanship, Anchoring and The Dirty Five.

- Defense strategy is primarily organized around pretrial preparation and selection of the jury and witnesses, the “Primate Brain” strategy and offering counter numbers.

- The growing trend of juries awarding nuclear verdicts has forced some insurance providers to exit the trucking industry altogether.

- Social inflation is the massive, broader issue underlying nuclear verdicts and insurance inflation across all sectors and industries of the U.S. economy. The Wall Street Journal defines social inflation as follows: “In insurance-industry parlance it typically refers to an upward creep in perceptions by an injured party of what they are owed, their willingness to pursue that via the legal system, and what that means for insurance policies covering companies’ liabilities.”

- Technology can help carriers fight nuclear verdict risk. New technologies such as sensors, cameras and autonomous technology can help provide an unequivocal, factual account of what occurred, which helps in settling claims.

- Brokers and shippers will increasingly be drawn into the nuclear verdict world in coming years because they bear some responsibility for vetting carriers whose drivers become involved in accidents.

- Large payouts in trucking-related death and injury accidents are statistically unpreventable in our view and a cost of doing business in trucking. However, exposing oneself to the asymmetric, unlimited risk from a nuclear verdict is only possible if the defense or their insurers insist on going to court.

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Executive Summary

Nuclear verdicts have been a growing phenomenon in trucking over the past several years, and the pressure on carriers from rising insurance premiums appears to have no end in sight. This is despite the fact that deaths and injuries from accidents involving large trucks have been declining (down double digits year-over-year as of the latest count).

A nuclear verdict is defined as a jury award in which the penalty exceeds $10 million (though there are several alternate definitions that are more intricate, as we describe later). Rising insurance premiums and nuclear verdicts are often cited as the primary causes in carrier bankruptcies. In addition, the growing trend of juries awarding nuclear verdicts has forced some insurance providers to exit the trucking industry altogether.

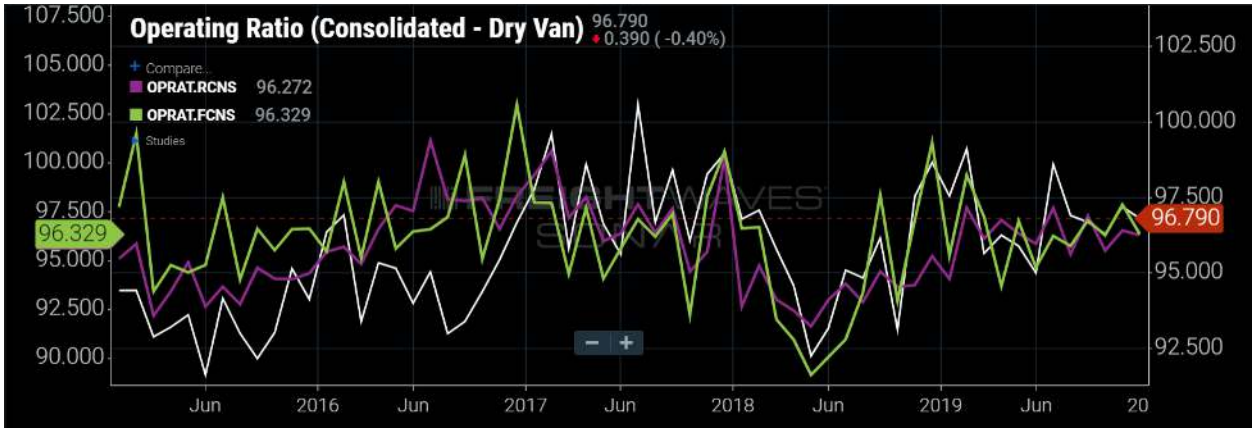
Nuclear verdicts are changing the complexion of the trucking industry. Economists often argue that there is currently little to no inflation, with Consumer Price Index readings consistently registering below 2%. In the case of trucking insurance, however, it is not unusual for premiums for a smaller fleet to rise 50-100% or more in any given year (while overall premiums are growing by roughly double digits, according to our math). The inflation of trucking insurance rates makes healthcare inflation — which garners endless headlines for being out of control — look downright paltry in comparison.

For an industry with profit margins that average just 5%, insurance as a cost line item (now averaging 3-4% of revenue) doubling every few years is an enormous problem and a systemic risk. Estimates are that trucking bankruptcies in 2019 nearly quadrupled compared to 2018. Worse, this trend is growing ad infinitum, with nuclear verdicts continuing to increase in prominence, frequency and absolute dollar amounts. If trucking insurance rates continue to inflate at recent levels, a significant portion of the industry may no longer be “going concerns” and be at risk of going out of business. The potential negative impact of nuclear verdict risk is that dramatic.

Figure 1 - Average Insurance Expense for Dry Van, Reefer and Flatbed

SONAR: INSURE.VCFOO, INSURE.RCFOO, INSURE.FCFOO

Figure 2 - Operating Ratio for Dry Van, Reefer and Flatbed



SONAR: OPRAT.VCNS, OPRAT.RCNS, OPRAT.FCNS

In this white paper, we examine nuclear verdicts from all relevant angles. For example, what are nuclear verdicts? Why do they occur? How has this growing trend developed over time? What are some examples of the biggest and most important nuclear verdicts ever handed down in trucking? What are the strategies of all parties with a vested interest: plaintiffs, defense and insurance companies?

One challenge of analyzing and predicting nuclear verdicts is their intangible nature. They are often so disconnected from reality in terms of the award amounts compared to actual economic damages that there are no computer programs or algorithms that can effectively forecast or manage risk.

At the most basic level, the plaintiff's primary strategy is to trigger the reptilian, emotional side of jurors' brains, whereas the defense's strategy is to counter by

appealing to facts and rationality. Whichever side is more effective in influencing the jurors wins. And if the plaintiff attorneys win in the sense that they have really "triggered" the jurors, there is theoretically no upper limit on the potential verdict — leading to runaway inflation in insurance premiums. The open sharing of best practices among plaintiff lawyers is magnifying this phenomenon, creating fast followers and thus nuclear verdicts that are rapidly growing in number.

This is certainly not to say that carriers are usually innocent or not often well defended by highly prestigious and expensive defense attorneys. But the rising incidence of nuclear verdicts is nonetheless indisputable. When innocent motorists die or are permanently injured in an accident involving a large truck and have dependents who need to be cared for, a large remuneration is absolutely necessary and justified.

But what is the proper amount to measure the loss of human life? Is it seven figures? Eight? Nine? This is a very difficult question to answer and points to why nuclear verdicts are such an important and relevant topic. The numbers are trending ever higher, and at some point the trucking industry will reach a tipping point where something has to give: Insurance becomes unaffordable and carriers go out of business, insurers exit the market, or insurance premium inflation eventually levels off because the underlying nuclear verdicts do, too. Perhaps defense attorneys will devise their own clever strategies to quell the tide. Time will tell.

What is a nuclear verdict?

A "nuclear verdict" is commonly defined as a jury award of $10 million or greater. However, this definition is simplistic and bears further clarification. We believe there are two classifications of nuclear verdicts: one numerical (a $10 million or greater jury award) and one based on the outcome relative to expectations (e.g., if "x" is the expectation a priori but the jury award is five-10x ex-post).

A plaintiff attorney with whom we spoke believes that nuclear verdicts should be defined by "an outperformance factor" rather than an absolute dollar amount. In other words, what is the multiple of "x" (the expectation) that was awarded? The initial question to ask rhetorically is: "Was 'x' the correct expectation (or number) in the first place?"

A key distinguishing factor of a nuclear verdict is its disproportionately in terms of having little to no relation to a plaintiff's actual economic damages, meaning the majority of the verdict is in the form of punitive and compensatory damages. Therefore, one good way to summarize a nuclear verdict is an award that is

significantly higher than would be expected given the injuries in the case, as opposed to any particular threshold.

In addition, a verdict technically need not be more than $10 million in some cases if we are dealing with a small carrier with scant revenue and profitability. A few million dollars in that instance could certainly be nuclear relative to the defendant's insurance coverage, earnings power and net worth.

Some casual observers and media outlets seem to define every verdict as "nuclear," though this is often not the case. Some numbers are large simply because they must be: The economic damages and the economic needs that must be met are large (e.g., a surviving family with no remaining breadwinner).

Why do some cases go to court in the first place?

First, to dispel a possible misconception, our research shows that only about 5% of cases go to trial. When it comes to blockbuster nuclear verdicts relative to commercial-vehicle-accident-related deaths in the U.S. (approximately 5,000), we are talking about a minuscule number — maybe five to 10 — per year. However, a handful of nuclear verdicts is enough to drive double-digit annual insurance inflation for the entire trucking industry.

As nuclear verdict expert and attorney Cassandra Gaines puts it, "If you injure someone while driving your truck, you've got to pay for it. When it's a he-said, she-said, trucking companies lose." So, whether the case goes to court or not, trucking companies will be paying a large sum if a driver injures someone in an accident. This is a cost of doing business.

Viewed from the defense side, cases often go to court because some defense lawyers want to make a name for themselves. Reputations in law are based around trial experience, and lawyers can be opportunistic. While it is a risky strategy, winning can be a career-maker in some cases. In general, however, the rising trend of nuclear verdicts is causing more defendants in severe injury and death cases to choose to settle because otherwise they risk being liable for a nuclear verdict.

On the plaintiff side, in cases with large medical bills, there is no risk in going to trial until the trucking company and its insurance firm(s) offer enough to adequately cover those bills. From the plaintiff's perspective, the needs of the client are of utmost importance, and if those needs are not met, going to court is the only option.

On the insurance side, many times the insurance company wants to go to trial even when the trucking company does not want to. Critics argue that rising nuclear

verdicts and cases going to court are due to insurance companies being unreasonable and increasingly refusing to accept fair settlement offers pretrial, instead opting to gamble on their chances of winning in court. Thus, critics contend, insurance companies could avoid nuclear verdicts and pay out far less by simply agreeing to settle. Legal experts say insurance companies and the defendant's executives, not defense attorneys, usually control the settlement process.

Systemic issues can also play a part. Examples could include reputation, previous lawsuits and settlements, etc. It is entirely possible that the circumstances of the incident itself are not that bad but the company has a poor reputation. A plaintiff attorney with whom we spoke believes the same can be true in reverse. If a case involves a horrible wreck but a good company, this setup can work to the advantage of the defense, though to a lesser degree.

The growth of litigation financing is likely playing a part in trials increasingly going to court as well. Litigation financing involves a third-party plaintiff agreeing to take on a case for free upfront in exchange for a cut of the proceeds, if any, eventually awarded in the lawsuit. Proponents of litigation financing argue that it democratizes the legal process and levels the playing field, while critics argue that it causes third-party financiers to overexert their influence and more cases to go to trial and exaggerates the injuries of the case in order to obtain higher awards due to a clear vested interest for the financiers.

The venue also plays a role in whether the case goes to court. For example, there can be cases in which the judge formerly worked for one of the law firms in the trial.

However, to summarize, generally both sides want to settle — and usually do.

Why do nuclear verdicts occur, and why are award amounts increasing?

Nuclear verdicts typically occur because the jury determines the defendant is willfully or purposely denying any responsibility or involvement in the accident.

One source with whom we spoke characterized it this way: "It's not that the truck ran a red light. Everyone runs red lights. It's not that a truck was speeding. Everyone speeds. It's not even that a trucking company is having internal problems. Jurors know companies can have problems." It's the arrogant and wanton disregard of responsibility on the part of the defendant that drives nuclear verdicts.

Even for carriers with a mostly spotless reputation and safety record, given there are millions of truck drivers on the road, it takes only one bad apple or accident to

expose a trucking company to millions or hundreds of millions of dollars in damages. Statistically speaking, nuclear verdicts are virtually impossible for the trucking industry to avoid entirely.

Our defense contact suggested that smaller companies are often at risk of large verdicts and settlements because they have less procedures and training in place.

A big reason nuclear verdict settlement values are increasing is rampant underlying medical bill inflation. Other reasons include an effective shifting of strategies by plaintiff attorneys (Reptile Theory) as well as the highly publicized nature of major trucking accidents. Plaintiff lawyers are increasingly moving away from blaming individual drivers to blaming a lack of systemic corporate oversight and adequate safety procedures and regulations.

Another huge driver is an increasing punitive damage component in nuclear verdicts, whereas in the past there was more correlation to a formulaic approach based on economic costs incurred by the plaintiff. There is also the now widely accepted societal expectation implicit in nuclear verdicts that verdicts should sustain plaintiffs and their dependents for the remainder of their lives, in addition to providing monetary compensation for suffering.

A final issue to consider is the gruesome and devastating nature of some accidents involving large trucks. When a truck weighing 80,000 pounds collides with a much smaller vehicle at even modest speeds, the damage can be catastrophic and completely debilitating, if the victims even survives.

The original nuclear verdict

Nuclear verdicts have become prominent in trucking over the past decade or so. But they have been around for about 30 years. The original nuclear verdict dates back to the 1990s with the iconic McDonald's hot coffee case.

For decades prior, McDonald's was known for serving coffee in the 180- to 190-degree range (for reference, boiling is 212 Fahrenheit). At the time of the case's settlement, McDonald's serving coffee that unreasonably hot was the cause of over 700 critical burns.

The case involved a 79-year-old woman who was critically burned as a result of spilling hot coffee on her pants when she attempted to remove the lid while riding in her grandson's car. This resulted in severe burns and permanent scarring, and required reconstructive surgery.

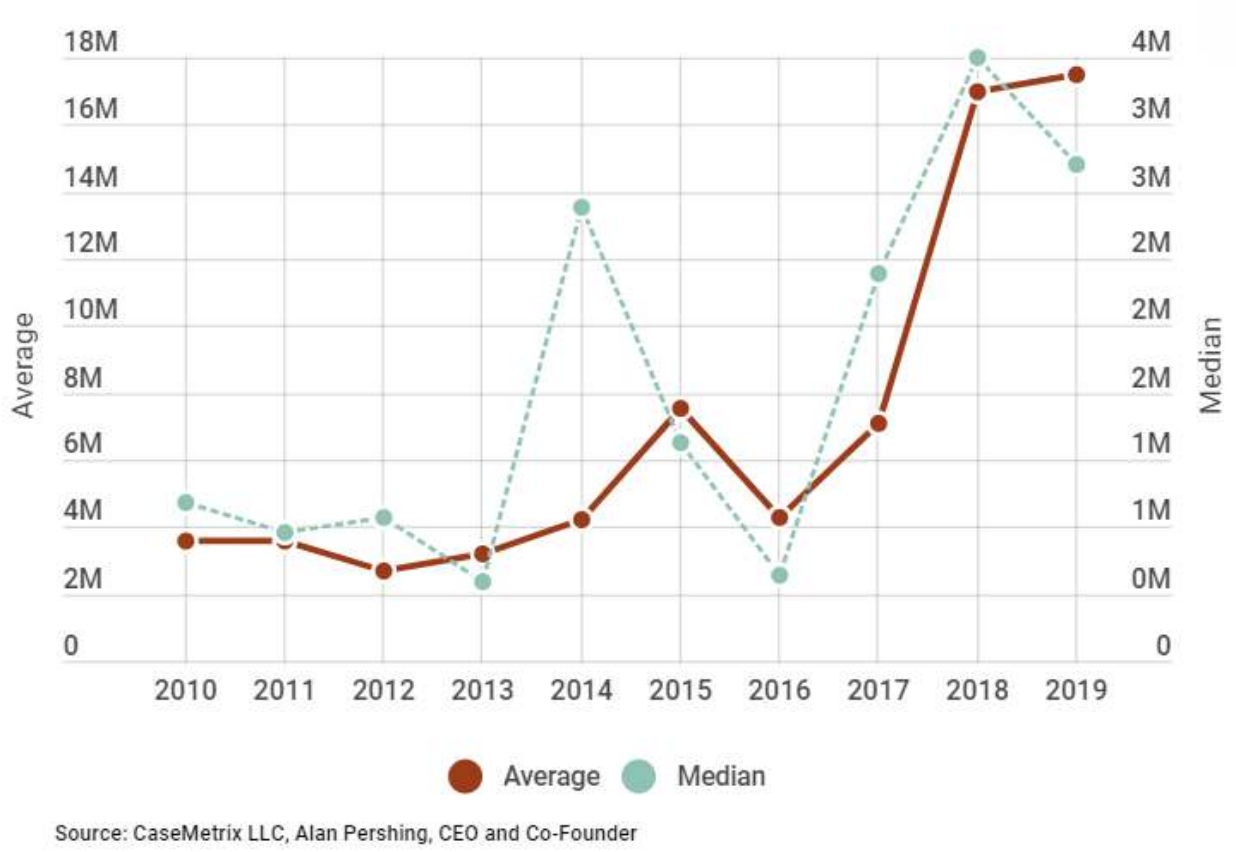
The core issue in the case was not just the severe injuries to the woman in question. It was the fact that McDonald's was allegedly willfully and knowingly continuing to serve coffee that was slightly below the boiling point despite hundreds of known instances in which it was causing third-degree burns on contact.

Even though the plaintiff's attorney was able to prove the coffee was dangerous as sold, McDonald's executives never admitted blame nor apologized in court. Furthermore, McDonald's testified through management that it had no intention of lowering the temperature of its coffee. This complete indifference to the welfare of its customers is a form of gamesmanship on the part of the defense. As a result of McDonald's refusing to accept responsibility as a company or acknowledge any fault on the part of their executives, a nuclear verdict of $2.9 million was returned. This would be equivalent to about $5 million in today's dollars assuming 2% inflation, which gives perspective on how much what constitutes a nuclear verdict has grown in recent years.

Notable examples of nuclear verdicts in trucking

The proliferation of nuclear verdicts in the U.S. is a relatively new phenomenon. The Wall Street Journal recently published an article analyzing data from VerdictSearch that reports a more than 300% increase in the frequency of $20 million-plus verdicts in 2019 from the annual average from 2001 to 2009. The trucking industry is no different. Alan Pershing, CEO of CaseMetrix, a database of court verdicts and settlements primarily in the Southeast, says, "... [T]here are five times as many verdicts that are $20 million-plus in the last five years compared to the prior five years (2010-2014)". Not only is the number of verdicts increasing, but so is their size.

Figure 3 - Verdicts in Motor Vehicle Accidents Involving Trucking Companies



Source: CaseMetrix LLC, Alan Pershing, CEO and Co-Founder

The largest nuclear verdict handed down in trucking to date is the $281 million Schnitzer Southeast verdict from August 2019. We spoke with an attorney with knowledge of the case about the facts and strategy from both sides. A handful of factors resulted in this enormous verdict:

1. The facts of the wreck were horrendous. A grandmother and her twin sister, her grown daughter and that woman's two children were killed in July 2016 when a Schnitzer truck hit their car head-on.

2. The venue of trial was not the same as the location of the accident. The case was filed in Columbus, Georgia (where Schnitzer Southeast is located), though the collision occurred in Russell County in east Alabama on U.S. Highway 80. The defense attorney for Schnitzer believes this deliberate move led to "home cooking" as the plaintiff attorney was well known and regarded in Columbus.

3. Media and news coverage were unusual. In uncommon fashion, a local news reporter was allowed access to the courtroom throughout the trial and preceding hearings. This TV reporter aired several pro-plaintiff reports throughout the trial.

Both lawyers acknowledged their counterpart tried a good case, but the facts of the accident were gruesome and the local news coverage weighed on the minds of the jury and the Columbus community.

The plaintiff's attorney also executed a clever strategy against Schnitzer before the trial ever began. Think of the strategy as a three-piece chess move: First, when Schnitzer executives called the family to apologize, the plaintiff team answered and told the executive it wasn't enough and they would see him in court; second, the plaintiff filed a motion in limine to prevent any sort of apology from the defendant in court; lastly, the plaintiff made note in court of the fact Schnitzer hadn't properly apologized to the plaintiff's family. The jury knew nothing about the attempted apology pretrial, nor the motion in limine. In their minds, it seemed Schnitzer wasn't accepting full responsibility for the accident. This is a form of gamesmanship on the part of the defense.
https://www.freightwaves.com/news/georgia-verdict-against-steel-hauler-may-be-the-biggest-ever-by-a-lot

Another notable aspect of the Schnitzer case was it didn't involve any of the "Dirty Five" — which is a plaintiff's attorney strategy. The Dirty Five are five details that are often used to win over jurors against trucking companies and secure huge settlements.

The Dirty Five generally refer to the following:

1. Fatigue
2. Distracted driving
3. Driving under the influence of drugs and alcohol
4. Lack of equipment maintenance
5. Inexperienced or improperly trained driver

Fatigue: $75 million JNM Express verdict — May 2019

Juries are terrified of the idea of tired drivers maneuvering 40-ton vehicles at 65 mph — and plaintiff's attorneys use this to their advantage. It is the reason electronic logging devices (ELDs) have become federally mandated, and it's the reason for strict hours-of-service (HoS) requirements. In this case, it was a company driver who won a case against his employer. A driver for Texas-based JNM Express was pressured by the owner of the small trucking company to alter his logbook in order to be able to take on an 1,800-mile reefer haul from Texas to Maryland. The driver had already exceeded his HoS limits but altered them in order to keep his job. On the way to

Maryland, he fell asleep at the wheel, plowed into another truck and suffered serious injuries.

The defense attorney stated, “This was a case where the plaintiff’s lawyer asked the jury to send out a message to the community and to the trucking industry that certain types of behavior would not be tolerated — overworking drivers and making them drive beyond legal limits.”

https://www.freightwaves.com/news/75-million-jury-award-for-driver-meant-to-send-message

Driving under the influence and insufficient carrier vetting on behalf of a brokerage: $15.57 million J.B. Hunt verdict — October 2017

Just as juries are terrified by the idea of a tired driver behind the wheel of a class 8 truck, they are equally fearful of an intoxicated driver. This case involved an owner-operator and J.B. Hunt, the broker of the load. The accident occurred when the independent contractor ran off the side of the road and struck a man who was helping his friend fix his vehicle on the shoulder. After the collision, the driver fled on foot. When detained, his blood alcohol content was more than quadruple the legal commercial vehicle limit, at 0.17.

The jury found the driver was 60% at fault and the broker was 40%. This is because J.B. Hunt never vetted the driver it hired to haul the load — if they had conducted even the most basic background check, he never would have been driving. J.B. Hunt and its defense argued they had no legal requirement to screen the driver because federal requirements state motor carriers are responsible for screening their own drivers. Therefore, the defense argued the driver should have screened himself.

The plaintiff’s attorney, Alan M. Feldman, stated he was “pleased the jury recognized that freight brokers have an obligation to retain careful and competent motor carriers and drivers. Had J.B. Hunt performed even the most cursory background check, it would have discovered Hatfield’s driving history, which included a DUI while operating a tractor-trailer, a reckless driving charge, and a discharge from employment with a trucking company for failing a drug and alcohol test, during which he attempted to bribe the person administering the test.

https://www.freightwaves.com/news/2017/10/20/todays-pickup-jury-holds-broker-partially-responsible-for-truckers-crash

Poor fleet maintenance: $281 million Heckmann Water Resources verdict — December 2013

One key example of the maintenance portion of the Dirty Five is the 2013 verdict for $281 million against oil services firm Heckmann Water Resources. In this case, a drive shaft broke off of a Heckmann tractor trailer involved in activity in the Eagle Ford shale. It flew off and crashed through the windshield of a pickup truck, killing the driver. The plaintiff's attorney alleged that the drive shaft broke off due to a lack of proper maintenance by the defendant, Heckmann. Due to the jury finding Heckmann negligent in its maintenance, $100 million in punitive damages was awarded.

https://www.mysanantonio.com/news/local/article/Shale-company-ordered-to-pay-281M-in-wrongful-5044466.php

Inadequate driver training: $90 million Werner verdict — May 2018

In 2014, a truck with a mother and three children crossed over the median and into the path of a Werner truck driven by a student driver. The truck struck the vehicle and killed a 7-year-old boy, left a 12-year-old girl with catastrophic brain injuries and injured the other brother and mother. While the driver was not going over the speed limit, road conditions were icy. Werner's witnesses testified that Werner did not allow the driver to have basic safety equipment such as a CB radio or an outside temperature gauge, either of which would have alerted him to the dangerous road conditions.

On average, Werner hires nearly 4,000 drivers fresh out of its internal driving schools each year.

https://www.freightwaves.com/news/werner-verdict-texas-crash

Other notable examples

No company is immune, no matter the scale: $165 million FedEx verdict — Accident 2015, appeal upheld in 2018

No transportation company in America is immune to the possibility of being hit with a massive verdict, no matter the legal experience retained or the cash on the balance sheet. This accident occurred during the "danger zone" for 18-wheeler fatalities — between midnight and 6 a.m., accidents are seven times more likely. A contracted FedEx driver struck a parked pickup truck on the side of the road in Texas, killing two people, including a 4-year-old girl.

https://www.santafenewmexican.com/news/local_news/jury-hands-record-million-award-in-fedex-crash-case/article_2e977375-d392-563c-b345-eecdbaa92d74.html

Example of a nuclear verdict that directly led to the closing of a company: $26.6 million Country Wide RV Transport verdict, September 2019

Country Wide RV Transport (CWRV), was the nation's second-largest RV and motorhome transportation provider. CWRV is an exclusive hauler for the RV retail chain Camping World (NYSE: CWH). CWRV utilizes independent contractors to haul RVs from Camping World to buyers' homes. The accident occurred in July 2017, when the contractor allegedly fell asleep at the wheel and killed a husband and wife. The jury determined that the independent contractor should be treated as an agent of the company and therefore the company should be liable in the accident.

In the past, trucking companies that used independent owner-operators were able to avoid nuclear verdicts by insulating themselves from direct responsibility. But lawyers who sue trucking companies reportedly have found juries to be sympathetic to the victims and willing to place blame on carriers, even if the driver wasn't an employee.

The jury awarded nearly $30 million to the children of the deceased couple. CWRV closed down less than a month later and blamed the civil suit for the shutdown.

https://www.freightwaves.com/news/nuclear-verdict-kills-540-truck-carrier

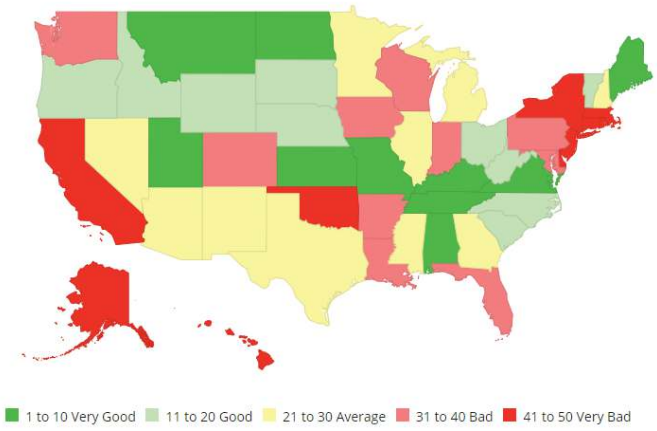
Figure 4 - Injury and Fatality Data

State	2013 - 2019 Injuries per 10,000 Hwy Miles	2013 - 2019 Fatalities per 10,000 Hwy Miles
Florida	1470.35	78.30
California	1084.80	73.01
Texas	1100.97	71.67
Delaware	2065.13	70.76
New Jersey	3344.90	70.60
Maryland	2049.60	66.36
Louisiana	2125.99	56.45
Pennsylvania	1179.06	54.20
Hawaii	1017.39	52.78
Georgia	840.69	52.33
Indiana	853.96	51.68
North Carolina	1787.20	50.23
South Carolina	1161.33	49.61
Tennessee	746.15	49.36
Ohio	1144.79	46.53
Connecticut	903.51	46.13
Virginia	942.60	45.58
Wyoming	478.71	42.02
New York	1432.08	41.50
Alabama	684.05	40.97
Oklahoma	494.35	39.85
Mississippi	471.66	39.75
Kentucky	748.20	39.23
West Virginia	488.92	38.05
New Mexico	221.00	35.43
Missouri	655.80	34.58
Arizona	38.85	33.31
Illinois	891.03	32.92
Arkansas	399.93	32.61
Massachusetts	824.70	30.84
Michigan	501.08	30.76
Colorado	219.28	30.71
Maine	764.95	29.44
Rhode Island	828.49	27.10
Nevada	220.46	25.08
Washington	157.05	25.02
Oregon	314.81	24.85
Utah	344.18	24.73
Idaho	244.40	24.33
Wisconsin	434.53	24.33
New Hampshire	390.58	23.53
Iowa	291.41	20.66
Kansas	149.08	19.75
Nebraska	289.54	18.30
Vermont	228.66	17.75
Minnesota	275.57	15.57
North Dakota	113.37	14.39
Montana	110.11	8.63
South Dakota	23.86	7.69
Alaska	88.24	6.96
United States of America	757.08	40.79

Fatality/Injury Data by State

The states with the highest injury and fatality totals unsurprisingly coincide with the some of the most populous states — Florida, California and Texas are the three most populous states. These states are also home to four of the top 10 freight markets by outbound tender market share (OTMS) in SONAR.

Figure 5 - Road Conditions by State



Source: Reason Foundation

Unfortunately, many of the most heavily trafficked highways in America are in states with the poorest highway conditions. For example, New Jersey has the worst highways in America, according to the Reason Foundation's 2019 Highway Report, and subsequently also has the most commercial vehicle injuries — nearly five times the national average.

Figure 6 - United States Commercial Vehicle Fatalities

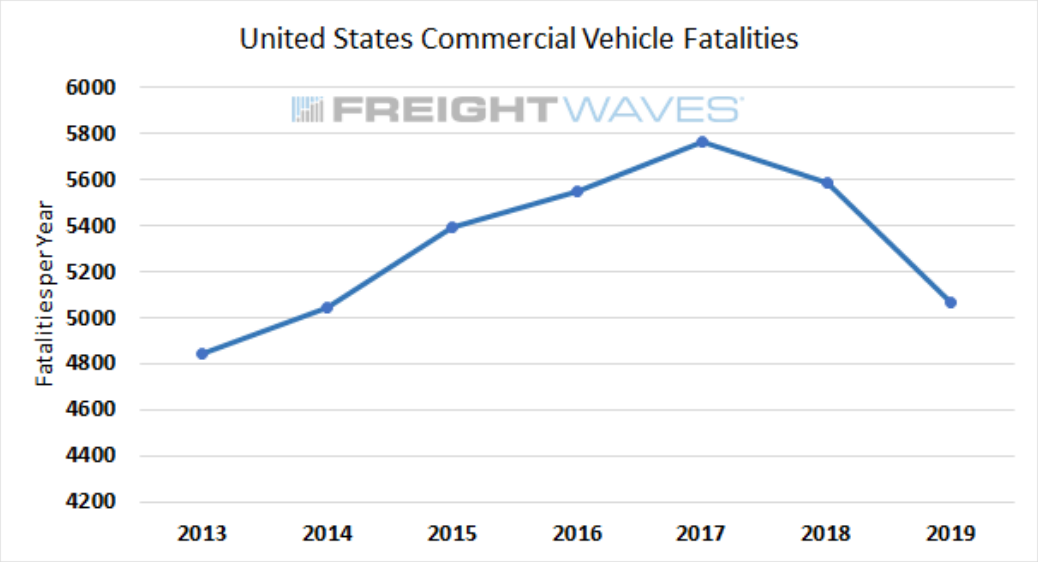
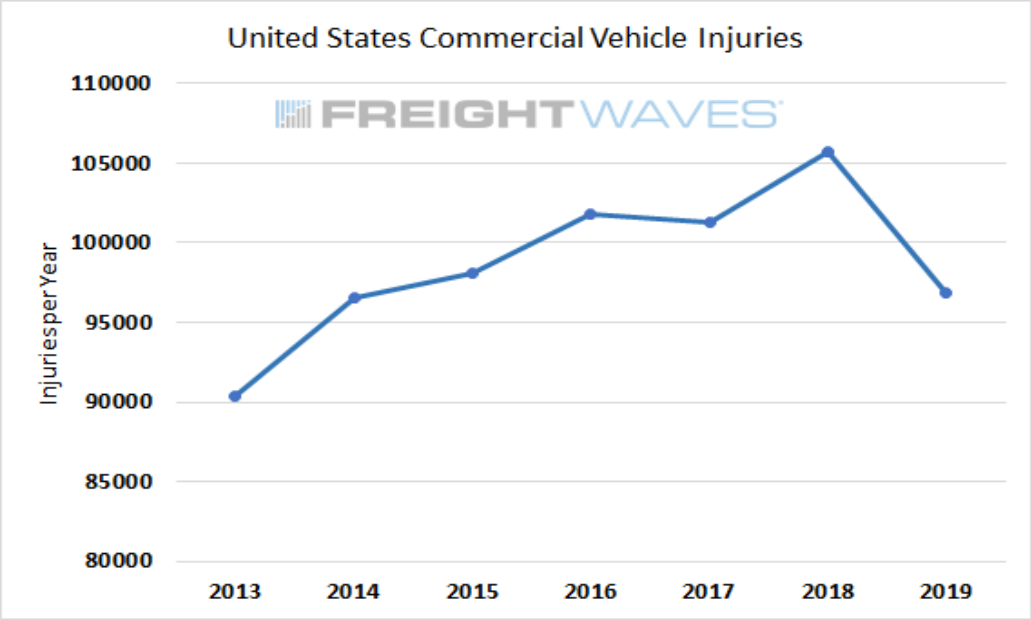


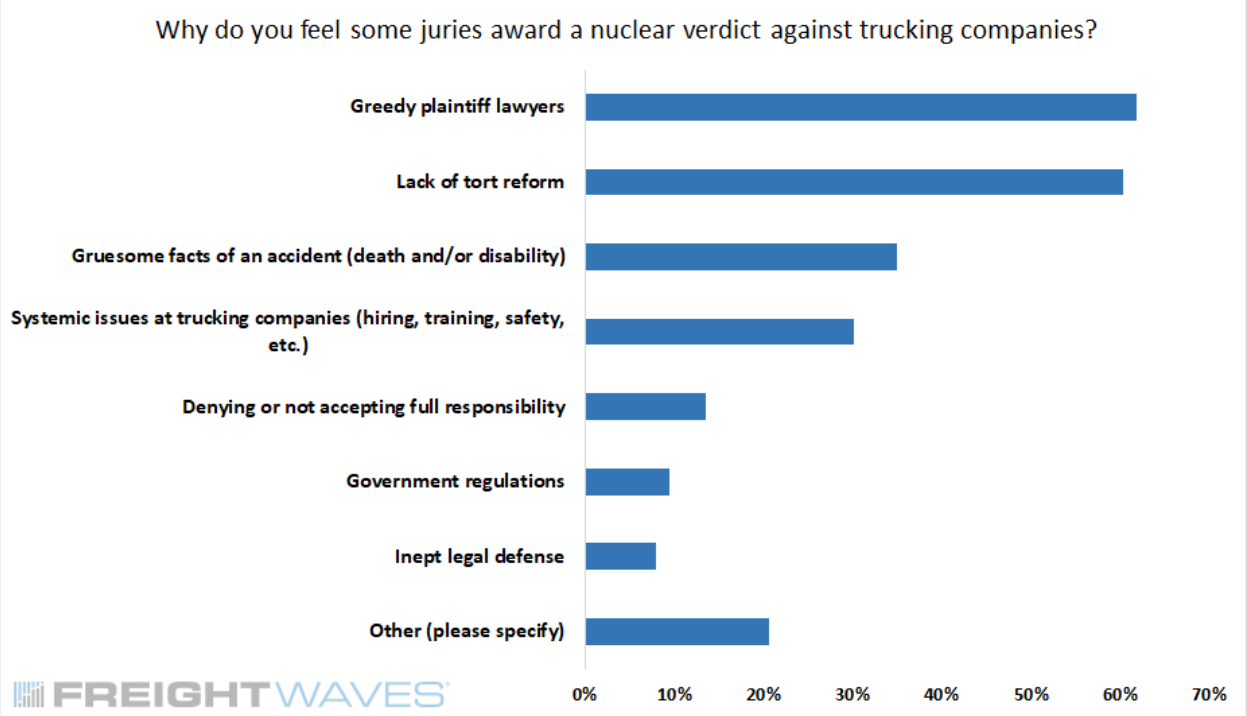
Figure 7 - United States Commercial Vehicle Injuries



On the surface, it seems 2019 will reverse a recent upward trend in injuries and fatalities, but this may not be the case. The Department of Transportation (DOT) revises this data set every month, so both the injury and fatality totals are likely to be revised up in the coming months. That being said, the revisions may not be as significant as expected and 2019 may indeed reverse the trend.

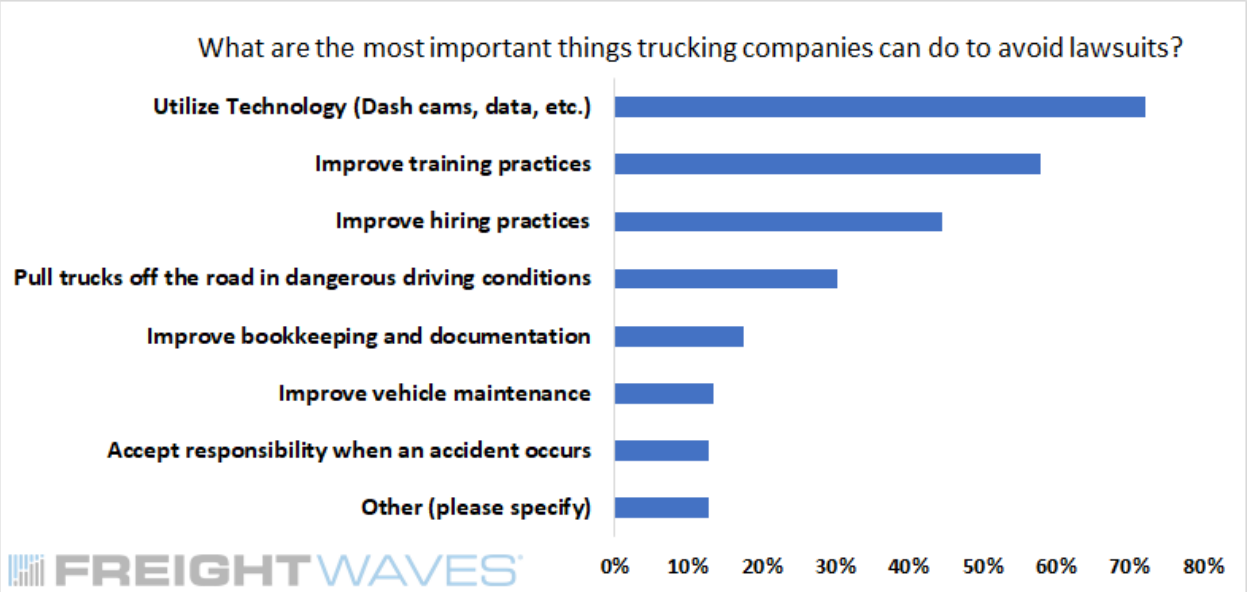
Survey Data

Figure 8 - Survey Question One



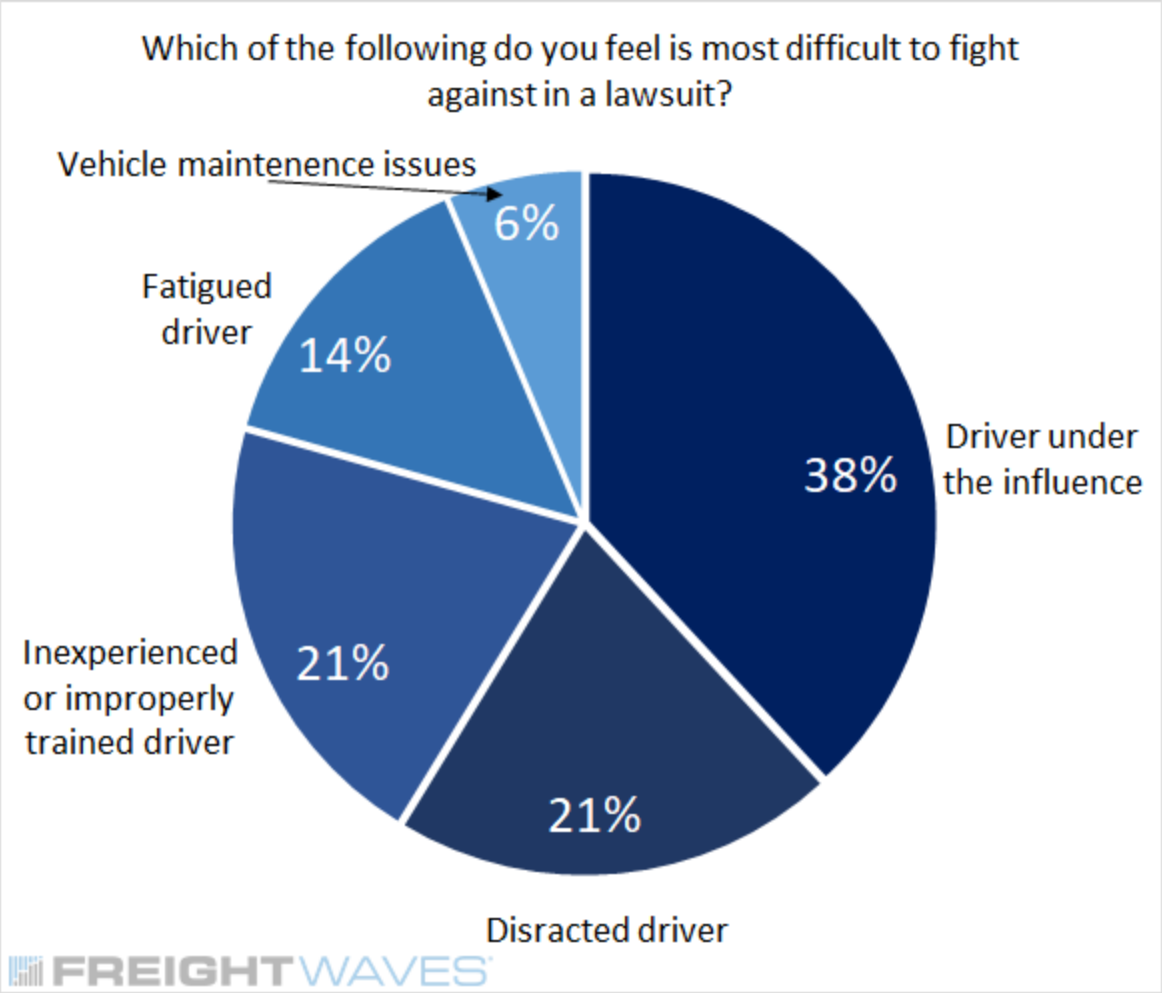
- Many of the *Other* responses echoed the top response - notions that the plaintiff seek to take advantage of the large insurance coverage plans trucking companies hold.
- "Only in America" is a common theme of these astronomical verdicts. The topic of tort reform has been debated in the U.S. since the 1950's. America is an anomaly in the developed world when it comes to punitive damage awards in the tens of millions.
- It should come as no surprise that "gamesmanship" (denying or not accepting full responsibility) is so far down the list for carriers. Our plaintiff lawyer sources told us this was the number one reason verdicts become nuclear.

Figure 9 - Survey Question Two



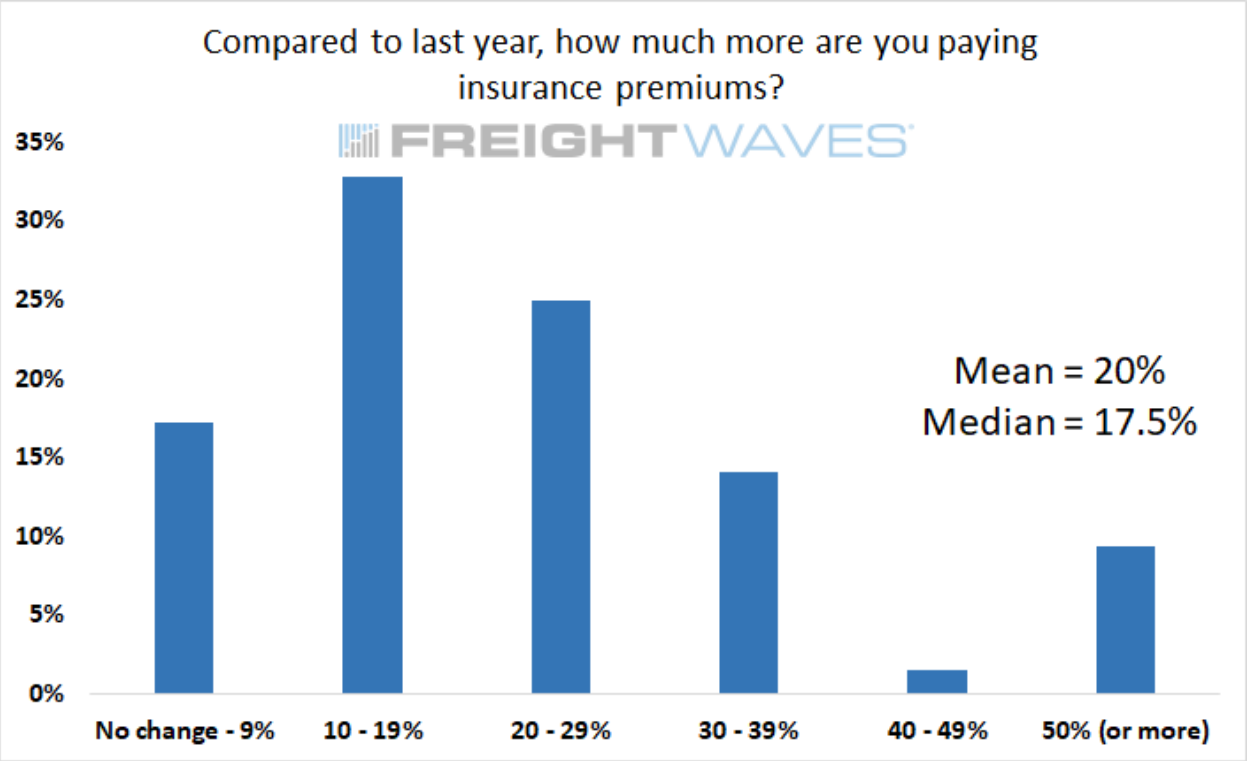
- The digital revolution in trucking is well underway, but still in its infancy. Trucking has historically been a highly manual industry (phone calls, handshakes, emails). This is rapidly changing and utilizing technology such as dash cams and big data will lead to a safer transportation of goods.
- Confirming the "gamesmanship" answer from above, trucking companies do not believe accepting full responsibility will help them avoid large lawsuits. Our plaintiff lawyer sources argue otherwise.
- More than half of the respondents believe improving training and hiring programs will lead to better chances of avoiding lawsuits. This is in-line with the next question - the second most difficult of the "Dirty Five" to defend against is improperly trained drivers according to carriers.

Figure 10 - Survey Question Three



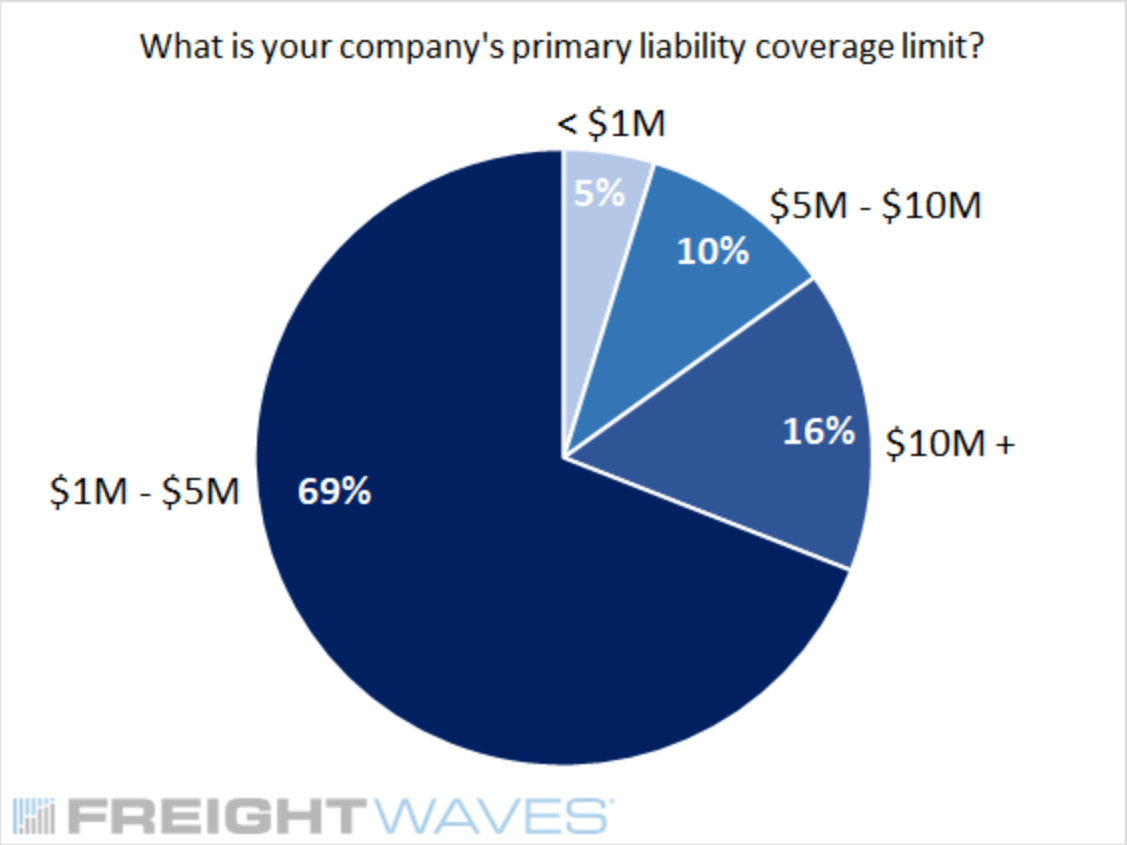
- Carriers believe drivers under the influence of drugs or alcohol are the most difficult to explain and defend against. This may be because driving under the influence is the easiest to prove and most difficult to disprove.
- Distracted drivers are also fairly easy to prove by looking at the driver's cellphone records. Cassandra Gaines, a trucking legal consultant, says one of the first steps she takes when a client is involved in a "major" (major accident) is to get the driver's cellphone in order to assess whether or not she/he may have been distracted at the time of accident.

Figure 11 - Survey Question Four



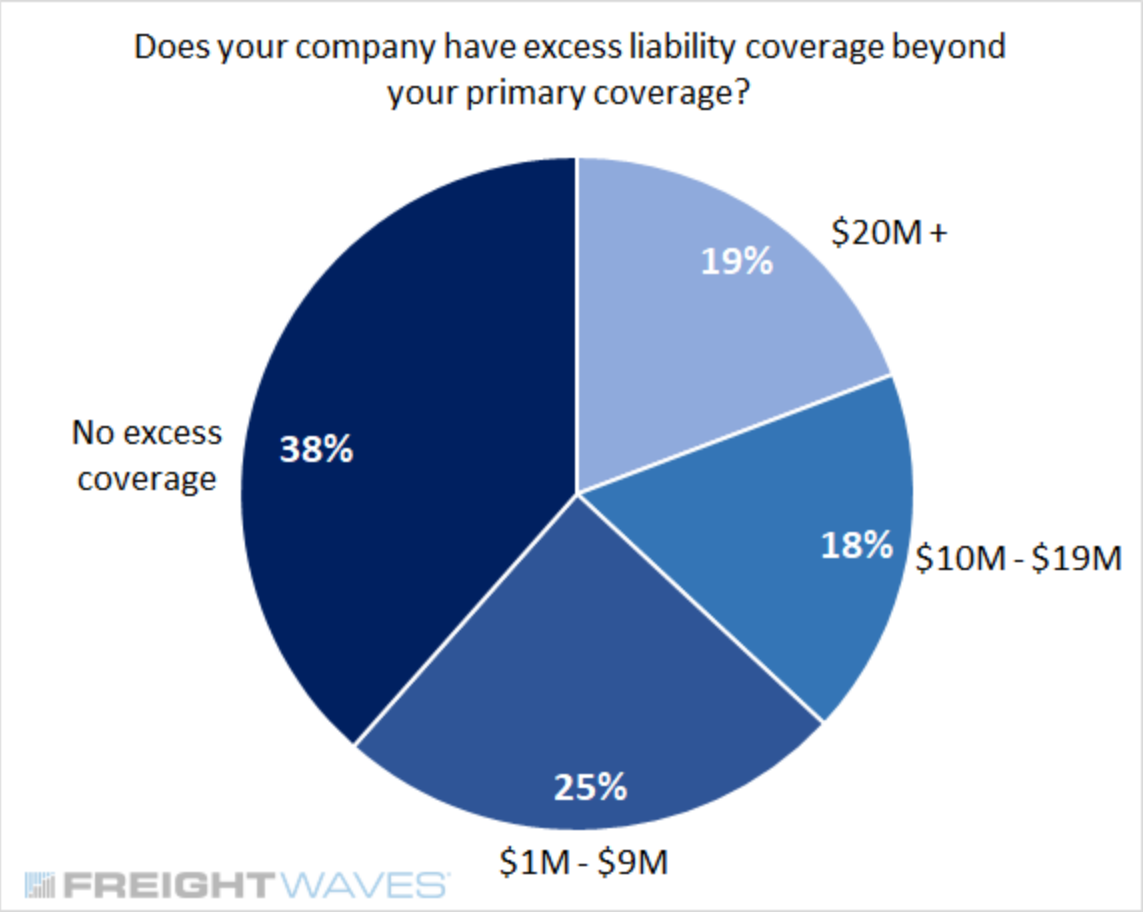
- Most carriers have seen their insurance premiums increase between 10 - 29% year-over-year. This is directly in-line with our Trucking Profitability Program data in SONAR - according to INSURE.VCFOO, insurance premiums have increased 18.77% in the past 18 months.
- Although we did not qualify the respondents based on fleet size, we believe it is the smaller fleets that are incurring the largest insurance premium increases. It is likely those that responded with a 50% or more increase are the respondents with the smallest fleets.

Figure 12 - Survey Question Five



- Our legal defense contacts believe the vast majority of carriers carry at least a $1 million primary liability coverage plan. Most of the carriers they have worked with in the past carried between $3 - $5 million.

Figure 13 - Survey Question Six



- More than one-third of respondents do not carry excess liability coverage. Of those that do, the highest grouping is those carrying between $1 and $9 million.

Plaintiff strategy

Regarding plaintiff strategy, we spoke to plaintiff attorney Joe Fried of Fried Goldberg law firm to gain a good understanding of the plaintiff's point of view. The overriding conclusion that we found in our research is that plaintiff lawyers are much better connected and collaborate to a much higher degree than their defense counterparts. This is strategic in nature and driven by the common good on their behalf. On the plaintiff side, what is best for the individual attorney is best for the group. The interesting part is that there was not even much debate from the defense side regarding this point.

Contrary to defense attorneys, plaintiff lawyers often feel if someone wins a large lawsuit in one part of the country, it may positively affect them in a different part of

the country. These large verdicts can serve as a form of precedence and set benchmarks for future arguments.

Fried indicated that he spends about 50% of his time educating other plaintiff lawyers. While this may not be the norm, we believe it is generally indicative of the broader sharing ethos present in the plaintiff community.

Furthermore, before trial the plaintiff's counsel often will go to defendant's to determine policy limits and then target that number for awards to avoid going to trial. When this is not effective and the defense (or the insurer) refuses to settle, plaintiffs' attorneys typically employ one of four primary strategies in the courtroom to obtain nuclear verdicts as we discuss below.

One important thing to keep in mind is that there are often enormous differences between verdict amounts and ultimate cash settlement (which is confidential). This occurs because there are appeals and there are policy limits. Plaintiff attorneys will go for huge numbers because it bolsters their reputation and helps them get more clients — even though their clients will not receive headline award numbers in reality. In cases involving smaller carriers, when a nuclear verdict is handed down, all the insurance gets eaten up and oftentimes the carrier goes out of business.

Lastly, it is important to note that many plaintiff attorneys are vehement in their conviction that extraordinary verdicts are the result of extraordinarily bad conduct and justified based on the facts of the case, the severity of the conduct and the size of the defendant. One thing is clear with nuclear verdicts: The cases are never cut and dried.

Reptile Theory: The primary plaintiff strategy

The Reptile Theory was first published in 2009 in the book "Reptile: The 2009 Manual of the Plaintiff's Revolution" by Don Keenan and David Ball. According to their website, the Reptile Theory has been responsible for more than $8 billion in nuclear verdicts since 2009. One of our lawyer sources indicated the Reptile Theory "is the act of pissing off the jury. It is about making the jury angry."

What is the Reptile Theory? It's the principal strategy of plaintiffs and when employed, plaintiffs attempt to activate the jurors' reptilian brains and send them into survival mode, where they look to protect their genes and process information presented to them using emotions.

Three defining characteristics of the Reptile Theory include the following:

1. It relies on invoking fear and danger reactions in juries.
2. The plaintiff's lawyer implies that the defendant's conduct poses danger to jurors, as well as to their families and communities.
3. Safety and society rules have been broken.

According to Joe Pappalardo of law firm Gallagher Sharp LLP, a primary goal of the plaintiff in trial is "to show the immediate danger of the kind of thing the defendant did — and how fair compensation can diminish the danger within the community." The emphasis is on the defendant's conduct, not the plaintiff's injuries. Plaintiffs attempt to demonstrate the maximum amount of potential harm that could have been caused as opposed to the actual harm caused.

In terms of the physiology of the Reptile Theory, a key aspect is that it focuses on the "subcortical" part of the brain. The subcortical includes the brain stem and the amygdala, which respond and react to threats and fear and invoke the fight-or-flight response. When the subcortical is in control, reactions are involuntary, natural and automatic instead of reasoned. Therefore, the Reptile Theory seeks to tap into primitive unevolved basic instincts.

A byproduct of the Reptile Theory is that jurors feel personally threatened and fear for the safety of the community. The courtroom becomes viewed as a safe place (which jurors seek when they sense they are in danger) and awarding damages is believed to increase safety and decrease danger.

Opponents of the Reptile Theory argue that it is not based on the law and that it preys on the fears and emotions of jurors over the facts of the case. Prior to the widespread implementation and acceptance of the Reptile Theory, plaintiffs' attorneys were banned from using the "put yourself in the shoes of the plaintiff" approach by the Golden Rule in order to remove bias, sympathy and prejudice in jury decisions.

Critics scoff that the Reptile Theory is simply a reincarnation and restatement of the Golden Rule argument. The Reptile Theory has gotten around this by appealing to jurors' emotions indirectly.

Historically, plaintiff lawyers were taught and generally observed the practice of not overreaching, the same way defense lawyers are taught not to give up any ground. This is now changing somewhat. Plaintiffs' attorneys used to fear angering the jury by asking for a large value. Now the strategy is to ask for large values as juries have become accustomed and desensitized to large numbers. Moreover, juries typically anchor to the number suggested by the attorney.

Because of this human anchoring bias present in juries, some plaintiff attorneys will not even introduce economic damages as a strategic tactic to prevent juries from anchoring to that lower number. Lawyers say that the numbers tossed out can be totally fictional, yet the strategy statistically works.

Gamesmanship

Gamesmanship is defined as games played by the defense whereby the jury comes to perceive that the defense is not fully accepting responsibility for what occurred. This scenario is often painted as a large, greedy corporation emphasizing profits over the public's safety.

As we stated earlier, if "x" is the expected jury award but 5x, 10x or 20x is awarded, what are the jurors reacting to? Typically the answer to this is gamesmanship.

Even in highly conservative geographical locations with conservative jurors, people respond to games played by the defense. One of those is neglecting responsibility — that is, not fully accepting responsibility for what occurred. Defense attorneys do not want to accept responsibility and are even taught not to. While a risky strategy, it can be a career-making and defining case for a defense attorney.

When trucking companies, their insurance providers and defense attorneys don't accept responsibility, jurors see this as gamesmanship. Juries do not like gamesmanship, nor do they respond well to it. They envision themselves in the role of the plaintiff and react accordingly.

Corporate mistrust often can go hand-in-hand with nuclear verdicts and gamesmanship. According to Gallup, which conducts these polls annually, "nearly a third of Americans say they have very little or no confidence in big business." This number has steadily been growing since Gallup began surveying consumers on these attitudes 40 years ago.

Anchoring

Anchoring is another strategy employed by plaintiff attorneys. They start by tossing out a gargantuan, unreasonable number and then get the jurors to focus — or anchor — on that number as a baseline expectation. By anchoring around such large numbers, juries often will then tweak the large value up or down depending on how angry they are. At least that is the hope of the plaintiff's attorney.

Anchoring can be effective because even if the original number bears no resemblance to reality and the jury is skeptical, it may award half the anchor number to simply split the difference.

So, for example, if the anchoring number is $400 million and the jury is really angry, it will likely say $400 million is not enough. Conversely, if jurors are angry but do not think $400 million is fair, they may knock $100 million off of $400 million (which still would be an astronomical award, as was the case in the Schnitzer verdict).

The Dirty Five

The Dirty Five is a plaintiff strategy centering around five details that are often used to win over the minds of juries against trucking companies and win huge settlements.

The Dirty Five generally refer to the following:

1. Fatigue.
2. Distracted driving.
3. Driving under the influence of drugs and alcohol.
4. Lack of equipment maintenance.
5. Inexperienced or improperly trained driver.

If a plaintiff attorney can effectively prove or demonstrate any of the above took place, the potential for a nuclear verdict grows significantly.

Defense/carrier strategy

Defense strategy is primarily organized around pretrial preparation and selection of the jury and witnesses, the Primate Brain strategy and the offering of counter numbers.

Pretrial preparation or jury consulting can be critical to helping level the playing field for the defense. That includes picking the right jurors before the trial starts.

There is also pretrial preparation of the trucking company executives, employees and the driver involved in the accident (the defendants) for cross-examination on the stand from the plaintiff attorneys. Here, the defendants are taught how to best spot and counter the reptile as well as deflect and point out irrelevant lines of questioning.

According to our sources, defense attorneys are often more protective of their strategies when trying cases. They feel they may lose clients by sharing their trial strategies. As noted, it is the opposite for plaintiff lawyers, where sharing is commonplace and freely available.

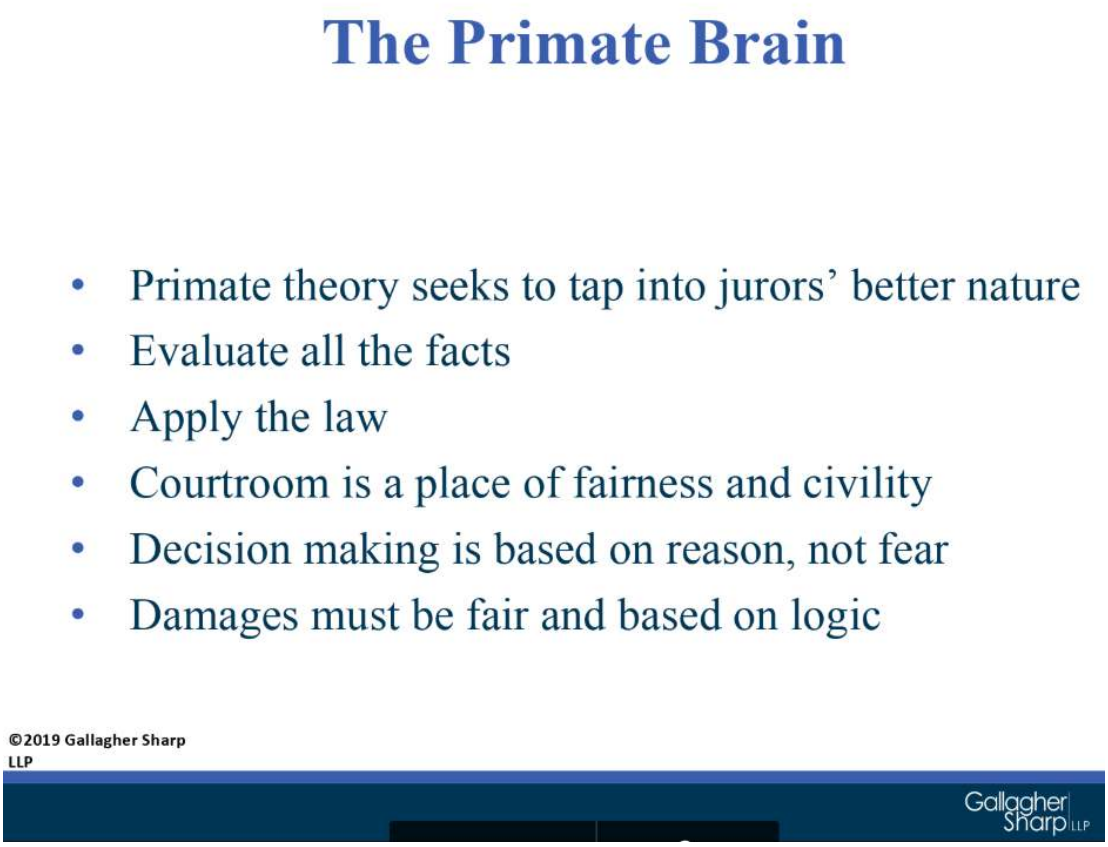
Because of the open sharing of best practices and information among plaintiff attorneys, one common and fair question is whether defense attorneys are falling behind, playing catch-up and not evolving with the times as fast as their counterparts.

Strategies to combat the Reptile Theory include the proper prepping of witnesses and primate brain appeal. The latter refers to appealing to jurors' intelligence and reason rather than their emotional sides. By doing so, this strategy attempts to flip the Reptile Theory on its head and make it backfire. If the plaintiff's strategy is to emphasize the frequency and danger of the risk, the defense attempts to prove the opposite. Also, in response to plaintiffs attempting to demonstrate corporate greed and fat cats with deep pockets, defense attorneys can effectively combat the Reptile Theory by attempting to demonstrate that the defendant is a caring corporate citizen.

The defense attempts to appeal to the primate brain, which is essentially the opposite and advanced form of the reptile brain. The primate brain is characterized by being evolved, logical, civilized and focused on reasoning and cognitive judgment. It is often referred to as "high-road processing." The primate brain is located in the frontal lobe or frontal cortex of the brain. The primate theory argues that damages must be fair and based on logic.

We spoke to defense attorney Joe Pappalardo to understand nuclear verdicts and strategy from the defense side. Pappalardo has represented carriers as the defense attorney in over 150 cases and is a foremost industry expert on nuclear verdicts. The legal strategy of the defense can be summarized below when employing the Primate Theory:

Figure 14 - The Primate Brain Strategy for Defense Attorneys



There are a number of strategies for countering the Reptile Theory in both the claim stage and the litigation stage. Strategies for countering the reptile in the claim stage include immediate post-accident response, the gathering of safety documents and evidence of safety efforts, researching reptilian counsel and looking for prior, similar cases handled by the counsel. In the litigation stage, some sample strategies for countering the reptile can be found below (depending on the stage of trial).

Figure 15 - Strategies for Countering the Reptile in Investigation and Discovery Stage

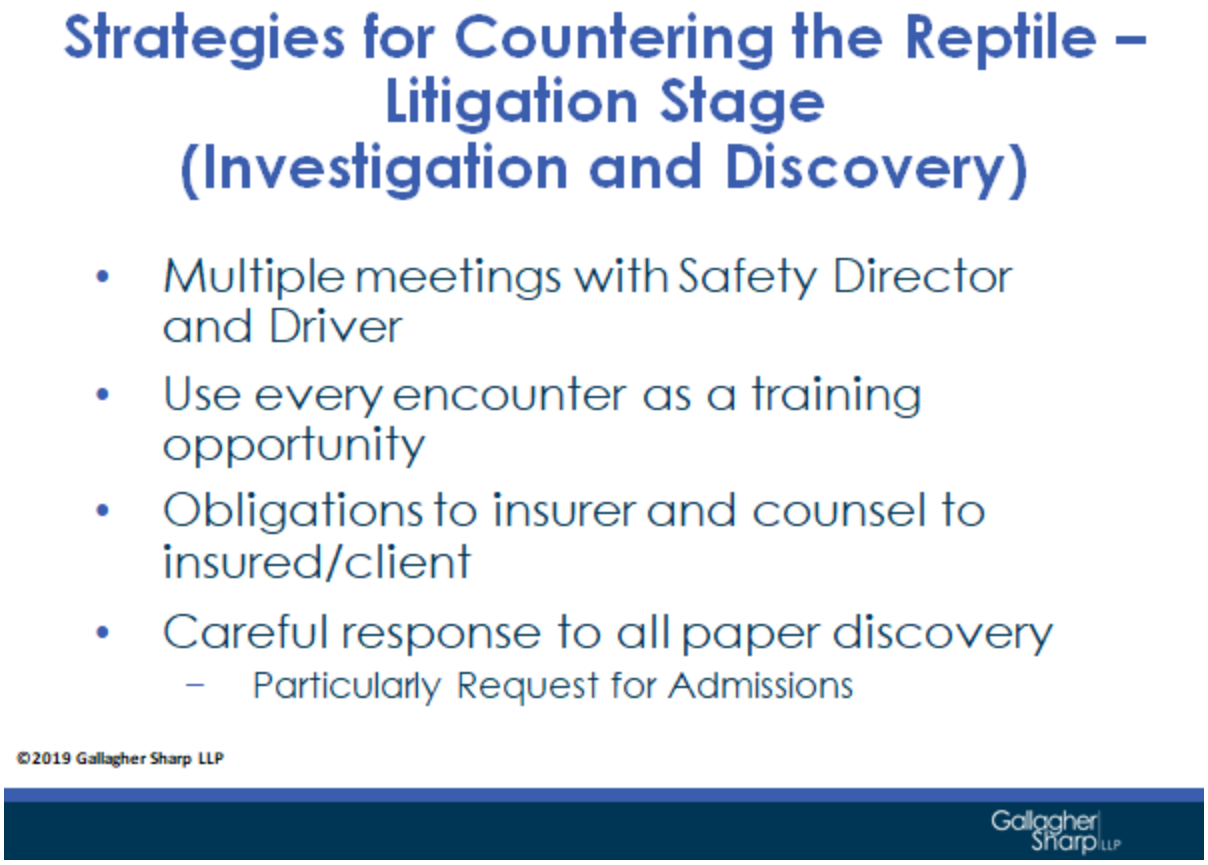
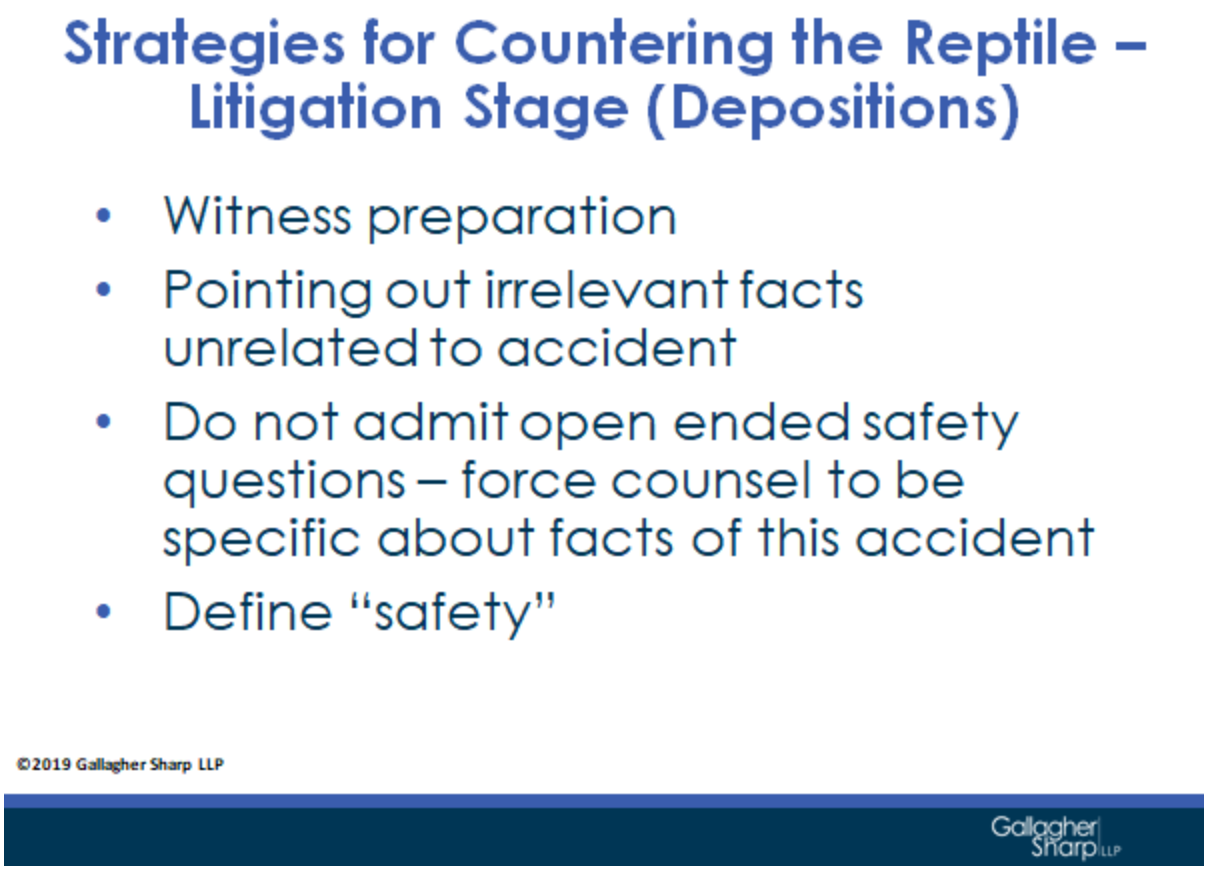


Figure 16 - Strategies for Countering the Reptile in Deposition Stage



Strategies for countering the reptile in the pretrial and trial stages can be best summarized as ensuring jury "voir dire" (commitment to fairness, relevant evidence and not being frightened) and identifying when the plaintiff attorneys are attempting to invoke the reptile and not walking into common traps, objecting if the plaintiff counsel strays and reminding the jury of the reason of the process in closing arguments.

One particularly important strategy for the defense is "motions in limine," which is when the defense files a motion to exclude certain reptilian evidence from being admissible during the trial. This approach cuts off the reptile before the move can even be attempted and is sometimes effective if the judge grants the motion.

There is a lot of back and forth between the plaintiff attorneys and defense attorneys and whether employing the reptile is effective often comes down to attorney tactics and skill and can depend on the judge, jury and the location of the trial.

One other strategy that is apparently effective and growing momentum is offering counter numbers when plaintiffs' attorneys throw out an unreasonably high anchor

number. This strategy is often seen by defense attorneys as unorthodox or counterintuitive because it may seem that by offering counter numbers a defense attorney is conceding. In cases in which plaintiffs employ a high anchor number, defense attorneys almost never counter with a number in response. But perhaps they should, as that is what the evidence demonstrates.

Insurance strategy and insurance tower

Insurance companies have formulas and algorithms they use to determine how much to offer pretrial.

An insurance tower is critical to understanding nuclear verdicts. Insurance companies have to manage risks. They have to understand the risk of writing a policy and how much it ultimately could cost.

The way an insurance tower works is as follows. For the first layer of protection, a trucking company may have a self-insured retention (SIR). For example, a trucking company or carrier may have a $500,000 deductible. Therefore, the trucking company is on the hook for any indemnity payment of up to $500,000 and they are also responsible for defense costs.

Once the $500,000 SIR is exhausted, then the primary coverage kicks in. Primary coverage usually covers between $1 million and $3 million. After primary coverage, there is excess liability coverage or reinsurance.

In summary, the different layers of the tower all have different incentives so settling a case can be extremely complicated. All layers of the tower have to agree to settle and be on the same page. For example, if the primary coverage provider decides it does not want to settle, then the excess liability coverage is not liable for their coverage.

The plaintiffs often try to turn all the parties in the tower (the insured and the insurers) against each other. When effective, the top of the tower will exert pressure on the bottom of the tower and the insured will put pressure on the insurers to settle the case.

Finally, for large carriers, they often will self-insure significantly beyond typical deductibles and into primary coverage territory, essentially meaning they will take a loss up to a certain level that is deemed the maximum loss they are willing to take but still be backed by excess liability coverage above that.

Insurers are exiting the industry because of nuclear verdicts

In the past several years, at least two notable insurers — Zurich Insurance and AIG's Lexington division — have dropped coverage of for-hire fleets because of escalating nuclear verdicts. Previously, these two insurers had been major underwriters of for-hire fleet insurance. Both insurers have retained their insurance arms for private fleets.

Despite the actual incidence and number of fatalities as a result of accidents involving large trucks being down materially, the financial consequences of nuclear verdicts and their unpredictability is increasingly causing insurers to aggressively raise premiums and even exit the industry.

The exit of major insurers can lead to price inflation, and a major panic and scramble among carriers can ensue as they may have to line up alternate coverage for thousands of trucks immediately (or on very short notice) to ensure no coverage gaps.

Surging premiums are likely to cause the most damage to smaller fleets with more spot exposure or thinner margins as they may not be able to stomach the cost increases or may not have the scale to qualify for discounts.

The concept of social inflation

Social inflation is the massive, broader issue underlying nuclear verdicts and insurance inflation across all sectors and industries of the U.S. economy. The Wall Street Journal defines social inflation as follows: "In insurance-industry parlance, it typically refers to an upward creep in perceptions by an injured party of what they are owed, their willingness to pursue that via the legal system and what that means for insurance policies covering companies' liabilities."

Insurance companies are increasingly citing social inflation as the primary cause for rising premiums, missing corporate earnings guidance and seemingly never-ending expense pressures. Though concrete data is hard to come by, research firm VerdictSearch "shows a more than 300% rise in the frequency of verdicts $20 million or over in 2019 from the annual average from 2001 to 2010."

Insurance companies and executives lament that America has morphed into a society in which victims of misfortunes and accidents turn to deep-pocketed insurance firms (and trucking companies) for compensatory damage for all of life's problems. While perhaps an exaggeration, the end result is that inflation in

insurance premiums either rises to a level that allows insurers to make an economic return or insurers go out of business and exit the industry.

Ways to rein in vehicle-related nuclear verdict risks

According to insurance company Marsh, there are four well-defined ways to rein in vehicle-related nuclear verdict risks:

1. Train, recruit and retain qualified drivers.
2. Eliminate personal use of business vehicles.
3. Bolster vehicle maintenance.
4. Mitigate driver distractions.

Technology can also help carriers fight nuclear verdict risk. New technologies such as sensors, cameras and autonomous technology can help provide an unequivocal, factual account of what occurred, which helps in settling claims. However, simply because the facts of an accident are recorded (on video or otherwise) do not ensure insulation from exposure to a nuclear verdict claim for a defendant.

Technology can be a double-edged sword for carriers. If carriers are collecting tons of data, plaintiff attorneys potentially can use that against them to prove that they had knowledge of trucks traveling too fast or in bad weather or of drivers over their hours-of-service limits, exposing them to additional liability. Thus, data has to be managed, stored, used and shared carefully. There is also the risk of data getting transferred or sold, either knowingly or unknowingly.

One other effect of nuclear verdicts could be that dispatchers increasingly remove trucks from the road when weather conditions become even slightly dangerous (more like the airline industry).

3PL strategy: Industry standards for vetting carriers

Brokers and shippers will increasingly become drawn into the nuclear verdict world in coming years because they bear some responsibility for vetting carriers that become involved in accidents. This is especially true when a broker or a shipper is putting undue pressure on a carrier to deliver a load quickly, on time or in bad weather.

A big risk to brokers involves who has access to the transportation management system (TMS) because there are compliance standards for vetting carriers and only a select few people in the organization should be allowed to and able to activate a

carrier. If this is not the case and standards or access are loose, it opens up brokerages to an added level of undue risk.

Conclusion

Whether the trucking industry hates it or wants to debate the inherent fairness, nuclear verdicts are a reality and increasingly a way of life. This fact will not be changing and soon the liability and risk will spread to brokers and shippers in our view.

This paper details a good strategy for settling and avoiding a nuclear verdict. We believe the most effective strategy is an avoidance strategy, not legal skill or tactics in court. It is also paramount that carriers and brokers have the proper procedures and training in place that will help protect them to the greatest degree possible.

Large payouts in trucking death- and injury-related accidents are statistically unpreventable in our view and a cost of doing business in trucking. However, exposing oneself to the asymmetric, unlimited risk from a nuclear verdict is only possible if the defense or its insurers insist on going to court.