



# NEWS BRIEF

## THE RISING RISK OF NUCLEAR VERDICTS IN MANAGEMENT LIABILITY LITIGATION

Nuclear verdicts, which refer to exceptionally high jury awards, have become increasingly common. Several factors have contributed to this trend, including a shifting litigation landscape, emerging regulatory developments and deteriorating public sentiment toward businesses. While these verdicts initially primarily impacted the product and auto liability segments, they have also become more frequent in the management liability space, leaving business leaders with greater exposures. The firm attributed the 9% rise in U.S. breach costs to regulatory fines and "higher detection and escalation costs."

Amid growing corporate distrust, businesses are being expected to meet higher standards in their operations, while their directors and officers are being held more accountable for making poor management decisions—actual or alleged. Upon being sued and taken to court, businesses and their leaders have often encountered juries that, due to their sympathy toward plaintiffs and the perception that corporations can afford to pay substantial damages, have fewer reservations when awarding damages, prompting nuclear verdicts.

Nuclear verdicts can carry serious consequences for businesses and their leadership teams, causing lasting reputational harm, insurance challenges and financial losses. It's vital for businesses to better understand these verdicts and how to protect their directors and officers against them. This article provides an overview of nuclear verdicts, explains their impact on the management liability space and outlines related mitigation strategies.

### UNDERSTANDING NUCLEAR VERDICTS

Nuclear verdicts are generally defined as jury awards exceeding \$10 million. In some cases, these verdicts may be deemed "thermonuclear," indicating jury awards

surpassing \$100 million. Nuclear verdicts have been on the rise for much of the past decade. Although they somewhat cooled during the beginning of the COVID-19 pandemic due to prolonged court closures, these verdicts have surged once again over the last few years.

According to a recent report from communications and research firm Marathon Strategies, nuclear verdicts are currently at a 15-year high, up 27% since 2022. Among the 89 nuclear verdicts spanning nearly 50 different industries in this report, the median verdict totaled \$44 million, more than doubling from \$21 million in 2020. Additionally, 27 of these verdicts reached thermonuclear status. Altogether, such verdicts cost a combined sum of \$14.5 billion.

Multiple elements are fueling the continued growth of nuclear verdicts. Key cost drivers include:

- **Social inflation**—Changing societal values, juror expectations, media coverage and public advocacy all contribute to social inflation, which pertains to the rising costs of insurance claims. As society becomes more skeptical of businesses and their leaders and demands corporate transparency, stakeholders may be more willing to take companies' perceived wrongdoings to the courtroom, exacerbating social inflation and nuclear verdicts.

- **Broadened definitions**—In recent years, many courts have expanded the definitions of "liability" and "duty" to hold corporations and their directors and officers legally responsible for a wider range of alleged shortcomings. This, in turn, has prompted an increase in class action lawsuits and associated nuclear verdicts.

- **Litigation shifts**—The cost of engaging in legal disputes may have deterred some plaintiffs from taking action against businesses and their leaders for perceived failures in the past.



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However, today's shifting litigation landscape, namely the growing prevalence of litigation financing, has eliminated that barrier. Also known as litigation funding, this concept refers to a third party investing in a lawsuit in exchange for a percentage of the proceeds if the lawsuit is successful. This arrangement lowers financial risk for plaintiffs and enables more individuals to pursue corporate litigation, increasing the potential for nuclear verdicts.

• **Evolving trial tactics**—In addition to litigation shifts that have allowed more plaintiffs to take businesses and their leaders to court, attorneys have become more likely to deploy specific trial tactics to seek higher—sometimes nuclear—jury awards. Common tactics include the reptile theory, in which attorneys try to appeal heavily to jurors' emotions while presenting or arguing a case, and anchoring, where attorneys suggest a particularly high verdict amount in hopes that the number will remain "anchored" in jurors' minds. Attorneys may also take the joinder approach to certain claims, which entails conjoining different lawsuits or parties into one case so they can "shop around" for a more favorable litigation jurisdiction (i.e., a venue with a history of delivering nuclear verdicts).

• **Regulatory changes**—While not a primary cause of nuclear verdicts, evolving federal, state and industry-specific regulations can influence how juries interpret corporate responsibilities and may contribute to their decisions regarding punitive judgments when businesses and their leaders are found noncompliant.

### IMPACT ON THE MANAGEMENT LIABILITY SPACE

Management liability pertains to various allegations and related losses that a company's directors and officers may face based on their leadership decisions and actions (or lack thereof). Typical claims in the

management liability space include:

• **Directors and officers liability (D&O)**—These claims allege that business leaders engaged in harmful acts that negatively impacted the company or its stakeholders.

• **Employment practices liability (EPL)**—These claims allege that business leaders implemented or failed to address poor employment practices, including harassment, discrimination, retaliation and wrongful termination.

• **Fiduciary liability**—These claims allege that business leaders mismanaged the company's employee benefits packages (e.g., health and dental insurance and retirement plans).

Historically, nuclear verdicts were most prominent in the product and auto liability segments, often stemming from lawsuits alleging bodily injuries and related pain and suffering due to problems with a company's products or auto accidents caused by commercial drivers. However, recent years have seen an uptick in litigation targeting corporate leadership decisions, ultimately resulting in more nuclear verdicts across the management liability space. When these verdicts occur, they can carry the following implications:

• **Financial and reputational fallout**—Besides the large-scale jury awards arising from nuclear verdicts, the legal defense costs associated with these lawsuits can also be significant. Furthermore, this litigation is often highly publicized in the media—particularly industry-specific outlets—which can call widespread attention to companies' and their leaders' perceived wrongdoings. As a result, these verdicts can wreak major financial havoc and erode stakeholder trust and loyalty, threatening the overall stability of companies' operations and limiting their directors' and officers' professional opportunities.







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+ **Coverage complications**—Depending on the nature of nuclear verdicts in the management liability space, businesses and their leaders may receive some coverage for the related losses from their D&O, EPL or fiduciary liability insurance policies. Yet, the total expenses from this litigation can often exceed standard policy limits, resulting in considerable out-of-pocket costs. What's worse, companies that experience such litigation may be considered higher risk by their insurers going forward, prompting elevated premiums, stricter underwriting standards and additional coverage restrictions for the foreseeable future.

+ **Heightened executive scrutiny**—Following nuclear verdicts, stakeholders may expect businesses to be more transparent about their boardroom selections and governance practices. Additionally, they may pay closer attention to corporate leaders' actions and management decisions. Companies that neglect to make necessary changes to their leadership standards and operational risk management strategies in response to nuclear verdicts could be subject to ongoing executive scrutiny.

### MITIGATION STRATEGIES

Considering the implications that businesses and their leaders could experience from management liability litigation and associated nuclear verdicts, it's crucial to implement effective mitigation strategies. Here are some best practices to help limit the likelihood and severity of such litigation:

+ **Address nuclear verdicts in risk assessments.** A company's management liability exposures and propensity for nuclear verdicts may vary based on its industry, operations and leadership structure. With this in mind, businesses should consider these unique elements and related exposures when conducting risk assessments and make sure this documentation

specifically addresses possible nuclear verdict scenarios.

+ **Utilize strong governance measures.** Businesses should establish effective governance policies and procedures by deploying proper vetting protocols for leadership positions, assigning clear roles and responsibilities for each board member, and promoting ongoing stakeholder engagement. Most importantly, businesses should ensure that all management decisions and actions consistently align with company values.

+ **Provide leadership training.** Businesses must offer routine leadership training to set their directors and officers up for success. This training should highlight the importance of upholding corporate standards, acting ethically, meeting legal obligations and fostering a culture of accountability and transparency.

+ **Maintain compliance.** By staying compliant with all applicable employment laws, financial regulations and industry standards, businesses can avoid costly regulatory penalties and lower the possibility of noncompliance influencing potential jury outcomes. It may be beneficial for companies to consult legal professionals for specific compliance guidance.

+ **Review coverage options.** Businesses should work with trusted insurance professionals to regularly assess their D&O, EPL and fiduciary liability policies and maintain up-to-date coverage. From there, they can determine whether any additional coverage or specialized insurance solutions are necessary to boost their protection against nuclear verdict losses.

+ **Prioritize proactive claims management.** Businesses should take any allegations against their directors and officers seriously and have documented protocols for handling claims as swiftly as possible. Early settlement strategies can also help reduce the risk of claims going to court, limiting potential financial and reputational





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### CONCLUSION

In today's litigious society, nuclear verdicts pose an ongoing threat to management liability. By understanding the main drivers behind these verdicts and implementing effective safeguards, businesses can minimize the risk of costly litigation and better protect their leadership teams. [Contact us today](#) for more risk management guidance.

