

Keeping the Empire Intact: Five Critical Operational Tips on Preventing Nuclear Verdicts

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Nuclear verdicts in catastrophic motor vehicle accidents litigation (and even not so catastrophic accidents) have been proliferating for motor carriers (and brokers) for the past several years, with no immediate letup in sight (other than some specific state statutory regulations). For example, the size of trucking accident verdicts has increased by 967% over the last 10 years. (A “nuclear verdict” is defined as a verdict of over \$10 million.) Even non-fatal, soft-tissue injuries have recently often rendered seven- and even eight-figure verdicts in many jurisdictions. These verdicts are spawned by a variety of factors, including, particularly, plaintiff’s counsel’s use of the “Reptile Theory” throughout casualty litigation. The Reptile Theory is a litigation strategy by which plaintiff’s counsel seek to vilify the motor carrier overall, in the community at large, even independently of the actual fault for the accident. There are many ways to battle these tactics in the litigation itself. However, operationally, motor carriers can also work to prevent such litigation, and to thus forestall commensurate nuclear verdict potential, via various operational calibrations and considerations. Five important examples are set forth below:

1. Have positive policies and project them outward in the community in news/social media and discovery.

As noted, plaintiff’s counsel throughout Reptile Theory litigation seek to vilify the motor carrier to portray it as a peril to the motoring public at large and quite simply a bad actor in the community in which the trial has been convened. The realities are often much different, however. Many motor carriers have excellent safety records to trumpet. They have excellent training programs, fatigue management programs, and sleep disorder treatment programs for their drivers. They have safety awards for thousands, and hundreds of thousands, of safe miles driven and for excellent, qualified drivers. Similarly, most motor carriers are very active in their communities in terms of community involvement and charitable participation. Every motor carrier should have safety programs, but also, as importantly, safety awards and recognitions for safe practices, including maintenance of the vehicles along with the actual driving itself, and highlighting the many good drivers, who are also good people. If and when litigation arises, these “positives” should be pushed out throughout the litigation process: in discovery responses, in briefs, in motions, in depositions, and at trial. They are factual; they are real; and they help to counter the improper vilification of motor carriers as bad citizens in these cases, which often lead to staggering punitive damage awards. Finally, having a policy itself is good, but, of course, *it must be followed*.

2. Select an excellent corporate representative/spokesperson and negotiator.

The spokesperson-company representative and “face of the firm” to the community and to the media in high-value casualty litigation-is now one of the most important personnel selections that a motor carrier can make. After an accident, but in advance of any complaint being filed, there should be a person within each organizational structure designated to supervise immediate accident response from various involved third parties on behalf of the motor carrier. However, as importantly, this should be the person who is a spokesperson to the employees of the company, and possibly to the victim and his or her family early on, before lawyers are retained. He or she should be the person who also responds to any media inquiries, and the responses should not automatically be “no comment.” Most importantly, he or she should be the designated representative at a “30(b)(6)” deposition of the company in high-value casualty litigation. These depositions have now become the cauldron in which the nuclear verdict stew begins to be stirred by plaintiff’s counsel. They are videotaped; they are played to judges and juries alike during the course of litigation and a trial. So, if this witness is not an astute, interpersonally skilled and very well-prepared witness, that testimony can often be devastating. Also, the witness should be prepared to tell the company’s story through redirect examination at that deposition. Figuring out who this person is within the enterprise is *critical* to succeeding and/or preventing nuclear verdict potential.

3. Have strict preservation of evidence policies in place on an ongoing basis and for accidents.

It is very important for the proverbial tail not to wag the dog in these cases. Often, lax preservation policies escalate potential nuclear verdict situations by enabling the plaintiff’s counsel to have the jury draw negative inferences about the company’s safety policies, practices, and procedures. *Do not let the tail wag the dog!* It is very important for motor carriers to be extremely vigilant as to their own preservation and retention of documents. It is also important to monitor the carrier’s data metronomically, and to fight hard on inaccurate data, including overweight tickets, speeding tickets, maintenance issues, and owner/operator drivers no longer under the carrier’s authority. These efforts should be chronicled, documented, and retained. Also, immediately after an accident, intensive, comprehensive efforts should be made to ensure that all electronic, paper, and physical evidence is preserved, chronicled, segregated, and retained. Similarly, all documentation relating to the driver, the involved tractor, trailer, shipper, consignee, and any freight intermediary should be preserved. An effective, comprehensive preservation policy can eliminate opportunities for plaintiff’s counsel to springboard into Reptile Theory tactics that could lead to a nuclear verdict.

4. Consider possible press releases and empathy toward the victim in advance of litigation.

In the new era of the nuclear verdict, many conventional notions of how motor carriers would handle a catastrophic accident, and its aftermath, have been somersaulted. For instance, there is an evolving school of thought that motor carriers, and their counsel, should consider directly reaching out to victims of catastrophic accidents, or their families, to attempt a rapprochement or settlement or even defray (without admitting fault) expenses such as medical expenses and funeral expenses. That school of thought posits that these undertakings can reduce and possibly eliminate some claims. These efforts also help to personalize the motor carrier, its personnel, and its driver if the case proceeds to trial. Obviously, a carefully selected appropriate spokesperson (as described above) is essential for this role.

Similarly, and as also referenced earlier in this article, the days of automatically intoning “no comment” to any question from anyone—media, social media, or otherwise—about pending litigation and the accident from which it emanates are also fading away. Plaintiffs and their counsel use the broad bands of social media to publicize their capabilities and their client’s injuries, and to vilify putative defendants across the spectrum. Potential jurors have very broad bandwidth these days. Motor carriers should consider *using* that bandwidth to promote their positive aspects and to tell at least a part of their side of the story.

5. Rigorously adhere to corporate formalities throughout the enterprise.

Many of the largest transportation logistics companies in the U.S. today started small. Often, these entities started in one particular mode of transport, with limited rolling stock and capital assets. However, as these enterprises grew, they expanded their services, their assets, and their commensurate revenues. Many motor carriers now conduct brokerage activities within their enterprise. There is also diversification into warehousing, dedicated transport, and, possibly, transportation in other modes and other value-added services. Often, investment banks and private equity firms are now involved in the ownership and management of these enterprises. In many situations, as these enterprises have grown, they have not separated and segregated corporate functions into separate corporate entities. This omission creates a risk that a single catastrophic accident will bring down the whole empire via a nuclear verdict. Consequently, transportation enterprises should essentially audit their corporate structure, with the aid of counsel, to ensure that separate endeavors within the enterprise are segregated into separate corporate entities to minimize enterprise risk. The structure should be carefully assessed so that as it minimizes risks, it also preserves organizational efficiencies. The plaintiff’s bar in nuclear verdict type litigation is much more attuned to these corporate structure aspects than it used to be. So, in this era, hypervigilance to the corporate structure, the requisite formalities, and the day-to-day operations of the enterprise and its intracompany relationships must be rigorously scrutinized for these dual purposes. *There are other nuances to this analysis, in light of the evolving expertise of the plaintiff’s bar, that cannot be disseminated in this article, out of precaution for unintended wider dissemination.* Suffice it to say, though, that although this is #5 in this article, for many transportation and logistics enterprises, *it is paramount important point number one.*

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