

## Countering Economic And Social Inflation Effects On Verdicts

By **Edward Casmere** and **Patricia Brown Holmes**

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On Jan. 13, a lone ticket held the winning numbers to a \$1.35 billion Mega Millions jackpot.

A single lottery ticket hauled in a \$2 billion Powerball jackpot two months earlier in November 2022, and that prize followed a single Mega Millions ticket winning \$1.3 billion in July 2022. All told, there have been at least five billion-dollar lottery prizes won in the last five years.

Nine-figure contracts in professional sports have become commonplace, as have eight-figure salaries for entertainers.

A generation of social media influencers is earning seven figures a year for posting videos or playing games on the internet.

As society has become accustomed to large amounts of money publicly changing hands, the bar has been raised regarding what sums may shock the collective American conscience.

In addition to this social inflation, Americans are experiencing significant economic inflation for the first time in a generation — in September 2022, the U.S. Department of Labor's 2022 core consumer price index was at its highest rate since 1982.[1]

According to the U.S. Bureau of Labor Statistics' consumer price index, the cost of groceries in January 2023 was up 11.3% since January 2022.[2] A World Economic Forum analysis of BLS data from November 2021 to November 2022 found that the cost of many other products dramatically increased as well, such as school lunches, up 254%; fuel oil, up almost 66%; and eggs, up 49%.[3]

The one-two punch of social inflation colliding with significant traditional economic inflation is creating a dangerous storm for litigants and is sure to continue the normalization of big numbers in jury verdicts.

Now more than ever, this environment makes Winston Churchill's admonition that "great success always comes at the risk of enormous failure" seem particularly apropos for litigation defendants and their trial attorneys.

Trial verdicts are not immune from these inflationary effects, and it is no secret that the verdict amounts



Edward Casmere



Patricia Brown  
Holmes

in personal injury cases are on the rise.

The U.S. Chamber of Commerce's Institute for Legal Reform reported last September that so-called nuclear verdicts — defined as a jury verdict of \$10 million or more — are increasing in both amount and frequency across the country.[4]

The chamber's analysis found that the median reported nuclear verdict increased from \$19.3 million in 2010 to \$24.6 million in 2019 — a 27.5% cumulative increase in the median nuclear verdict over a 10-year period.[5]

In 2015, the average verdict in the National Law Journal's "Top 100 Verdicts" was \$64 million.[6] By 2019, it rose to \$214 million.[7]

The rise in verdicts is not limited to toxic tort, mass tort and product liability cases. According to a 2020 American Transportation Research Institute study of 600 trucking verdicts, between 2006 and 2010, there were 26 verdicts over \$1 million dollars.[8] Between 2015 and 2019, there were almost 300.[9]

The past few years have seen many record-breaking verdicts across various types of claims:

- In 2019, a jury awarded a \$110 million verdict in *Liciaga v. New York City Transit Authority*, then the highest non-medical malpractice personal injury verdict in New York history.[10]
- In 2021, an \$81.9 million verdict in the state of Washington was rendered in *Tisdale v. APRO LLC*, a suit filed against a convenience store after a robber attacked a bystander in the store's parking lot.[11]
- A California jury delivered a \$137 million verdict against Tesla in *Diaz v. Tesla Inc.* in 2021, believed to be the largest single-plaintiff discrimination verdict in history at that time.[12]
- In 2022, *Martinez v. Southern California Edison* resulted in one of the largest employment law verdicts in the amount of \$464 million to two plaintiffs in Los Angeles.[13]

The past few years also saw juries hand down enormous verdicts in automotive accident cases, such as the recent *Hill v. Ford Motor Co.* \$1.7 billion verdict in Georgia.[14]

The public rarely hears whether those massive jury verdicts hold up on appeal or in post-trial motions — that generally isn't headline-grabbing news. The reality is that today's jurors are accustomed both to seeing eye-popping numbers like these in news stories and lawyer advertising, and to paying more for just about everything as the country experiences its first bout of economic inflation in a decade.

So, how can defendants prevent the combination punches of economic and social inflation from affecting the outcome of their cases? Below we identify strategies companies and counsel can employ to help minimize the risk of an inflated verdict.

### **Strategies For Companies**

#### ***Cultivate and document the right company culture.***

The best antidote to avoiding a high verdict is evidence of a company's efforts to prevent the injury from

happening in the first place.

Nuclear verdicts happen most frequently in cases where the injury is purportedly preventable through a small or inexpensive change, or where it results from a pattern of behavior that could have been addressed, adjusted or stopped.

Outsize verdicts are often characterized as the jury's way of telling the company that their business practices are unacceptable.

To take steps to proactively prevent lawsuits, corporate defendants must hold a mirror to themselves and compile as well as evaluate the available facts and information across the entire enterprise — then act on that information.

In the product liability context, such product reviews and analyses are common, and most companies have robust testing protocols to try to ensure their products are safe before they are sold.

Similar risk-avoidance infrastructure and procedures should be considered beyond company research and development departments.

For example, how company engineers, supervisors and product developers are hired, supervised, promoted and managed matters not just in the context of an employment dispute, but in the context of product liability or negligence suits against the company, as it evidences the company's culture and commitment to its purported values.

Jurors will see, hear and evaluate a company's overall culture through each witness and their conduct. Impressions of the corporate culture will affect how jurors feel about the company — and that that will affect the verdict.

### ***Put a premium on likability for corporate witnesses.***

While having the right company culture will help make the company more likable, having a corporate witness who is likable is critical to keeping adverse verdicts in check.

What makes a company witness likable? Credibility, competence, empathy and humility is a solid starting point.

It is essential to show respect for the process and the plaintiff even — and especially — if the claim seems outlandish or baseless; it is the jury's job, not the defendant's job, to make that determination.

Likability correlates with credibility, and credibility with the jury is paramount. Being likable means that witnesses conduct themselves in a way that demonstrates respect to the entire process and its players — thus gaining respect from the jury in turn.

### **Strategies for Attorneys**

#### ***Find the right focus.***

Defense counsel must focus on telling a story that will redirect and persuade jurors on what really matters.

Proactively research and test trial themes in focus groups to see what resonates with jurors in the moment and jurisdiction, based on the specific facts of the case.

You cannot simply dust off the themes that worked in the last case.

Plaintiffs lawyers do this all the time, even in repeat mass tort litigation, and so should defendants.

***Relentlessly concentrate on your narrative.***

Once you find your narrative, tell it.

Trial defendants often focus too much on responding to plaintiff's arguments, pointing out the lack of proof or otherwise defending the case.

That is normally a recipe for failure. The best defense is usually a good offense — jurors want to hear a story, not just what's wrong with the other side's version.

Regardless of where the legal burden of proof technically resides, the burden of persuasion always exists. Embrace it.

**Conclusion**

Despite all the best efforts and all the right safety measures, accidents will unfortunately still happen, and litigation will still follow.

Jurors may be less receptive to the plaintiff lawyer's message if they see a defendant that takes a more proactive approach to reducing, eliminating and managing risk.

Coupling this company culture with effective and likable witnesses will help keep the jurors open to your carefully cultivated trial themes and narrative.

Taken together, these steps will mitigate the impact social and economic inflation have on your case, securing more defense verdicts and keeping adverse verdicts out of the stratosphere.

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*Edward Casmere is a partner and co-leader of the product liability, mass torts and environmental team at Riley Safer Holmes & Cancila LLP.*

*Hon. Patricia Brown Holmes (Ret.) is managing partner at the firm. She previously served as a judge in the Circuit Court of Cook County, Illinois.*

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