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## 2020 WHITE PAPER SERIES

# The Infinit-I Workforce Solutions Nuclear Verdict Mitigation Playbook

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## The Offense and Defense of Managing Preventable Risk

If you're a CEO, Risk Manager, or Safety Manager in the trucking industry, you've probably followed recent "nuclear verdict" cases closely. In one case from 2014, the driver of a pickup truck lost control on icy roads, crossed the median, and spun into a tractor-trailer owned by a very large trucking company. The truck driver was driving under the speed limit, never lost control of his rig, and brought it to a complete stop after impact. Tragically, a seven-year-old boy died, and his sister suffered catastrophic brain injuries. The truck driver was not issued a citation and investigating officers did not find the driver at fault. Nevertheless, in May 2018, a Houston, Texas, jury awarded the family \$89.7 million after the plaintiff attorneys argued the truck shouldn't have been driving at all under icy conditions!

A recent string of bankruptcies was described as a "bloodbath" in a December 2019 article in *Business Insider*.<sup>1</sup> The *Wall Street Journal* reported that 640 carriers went out of business in the first half of 2019, compared to 175 in 2018, a 367% increase, and double the total number that was forced to close the doors in 2017.<sup>2</sup> Part of this is the result of a tougher pricing environment but rising insurance costs, some as much as doubling year-over-year, was an equally important factor.<sup>3</sup>

Chris Spear, past president and CEO of the American Trucking Association (ATA), effectively declared war on plaintiff attorneys and nuclear verdicts. He vowed to use ATA's "Call on Washington visits and new Independent Contractor Ambassadors Program to set the record straight."<sup>4</sup> He promised to expand the ATA Litigation Center with donations from ATA members.<sup>5</sup>

**Jay J. Wommack**

**CEO of Infinit-I Workforce Solutions, powered by Vertical Alliance Group**

**The question you need to ask yourself is, "Can you afford to wait years for legislation to protect your company and your drivers?"**

**At Infinit-I Workforce Solutions, we believe the answer is, No! You can't wait for legislation. You must protect your company now by managing your preventable risk. That's why we wrote this white paper.**



## “What is a ‘nuclear verdict’ and should I really be worried?”

A “nuclear verdict” is a verdict in excess of \$10 million. Nuclear verdicts have little or no relationship to a plaintiff’s actual financial damages, meaning that most of the verdict is punitive and compensatory damages.<sup>7</sup> *Yahoo! Finance* reported this month that “rising insurance premiums and nuclear verdicts are often cited in carrier bankruptcies as the primary causes for shutting down.”<sup>8</sup> You cannot manage all risk or guarantee an outcome if you are sued. So, managing your controllable risk is more important than ever.

This isn’t just media hype. On November 1, 2019, Country Wide RV Transport (CWRV), America’s second largest RV and motor-home transportation provider, was forced to close, putting 540 drivers out of work.<sup>9</sup> The cause? A \$26.6 million nuclear verdict in a wrongful death suit. The driver, who fell asleep at the wheel and killed a husband and wife, was an independent contractor. The family of the victims used their tragedy to make a point about drowsy driving and driver hours, arguing that carriers should be responsible for their drivers, even independent contractors.<sup>10</sup> The jury agreed, finding the driver should be treated as an agent of the company, making CWRV liable.<sup>11</sup>

The *Wall Street Journal*<sup>12</sup> reported

- a more than a 300% increase in the frequency of \$20-million-plus verdicts in 2019 across industries
- a 5x increase in verdicts that are \$20 million-plus in the last five years in the trucking industry

Plaintiff attorneys look for flaws in how transportation companies manage their business. Having a company policy that outlines expectations is the first step. Ensuring they have read, understood, and are following the policies is the next step. The final step is documenting each of these steps. Being prepared with solid documentation helps build a wall with fewer or no flaws.



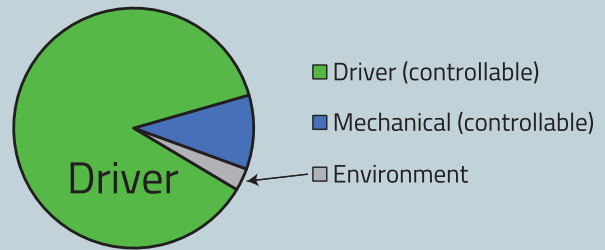


# What is controllable risk?

While some of the risk that drives skyrocketing insurance premiums can't be controlled, much of that risk is controllable. Current technology is a basic expectation of trucking companies who wish to manage their risk as effectively as possible. Documented online training, sensors, cameras, electronic control modules, and other technology help you prove what actually happened and can be critical resources when battling a lawsuit. Mike Hudzik, managing director and head of U.S. and Canadian underwriting for Swiss Re Group suggested, "New technologies will ultimately pay off if you look at them from a casualty underwriting perspective."<sup>13</sup> And, when driver error is involved, they can also make the plaintiff's case. That's why managing risk is so important.

Surprisingly, the Federal Motor Carrier Safety Administration (FMCSA) found that just 3% of crashes were the result of environment (traffic, weather, road conditions, and other unpredictable factors).<sup>14</sup> The majority of risk for crashes (87%) was caused by either the passenger vehicle or truck driver error, with the remaining 10% caused by mechanical issues with the truck!<sup>15</sup> In other words, with proper safety training and truck maintenance, 97% of risk is manageable and controllable. Staying competitive requires insulating your company from nuclear verdicts by managing preventable risk. We address specific strategies starting on page 7!

## Controllable Risk



There are four kinds of accidents. Only the first on this list is truly unpreventable.

- True accidents (traffic, sudden bad weather, animal in the road)
- Accidents caused by negligent vehicle driver error (driving distracted, falling asleep, medical conditions, drug use) plus truck driver error (hours of service)
- Accidents caused by company negligence (poor hiring practices, inattention to proper maintenance, lack of driver training, policy inconsistency)
- Accidents caused by both negligent driver error and company negligence

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<a href="#">View</a>	Axle Alignment and Maintenance - Part 1	VIDEO	6:13	<a href="#">View</a>
<a href="#">View</a>	Axle Alignment and Maintenance - Part 2	VIDEO	6:18	<a href="#">View</a>

▼	Vehicle Maintenance	CSA	2:46	1
Select	Content Name	Type	Length(HH:MM:SS)	Test / Answers
<a href="#">View</a>	Vehicle Maintenance - No Pre-Trip Inspection	VIDEO	2:46	<a href="#">View</a>

▼	Vehicle Maintenance	CSA	2:28	1
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An online training program with maintenance-related content for your drivers is a must.

# How Can Nuclear Verdicts Affect My Company?

## Your Company Size

Not surprisingly, plaintiff attorneys are more likely to go after the big trucking companies like Werner or Schneider, who have “deeper pockets.” In fact, industry experts have reported that plaintiff’s attorneys keep and share data on CSA points, violations, and courtroom payouts to help them determine which cases to take on and how big a verdict to pursue.

However, while big companies have larger capital reserves and often carry more insurance, including excess or corridor insurance, *Yahoo! Finance* reports that it is not unusual “for premiums for a smaller fleet to rise 50% to 100% or more in any given year” in spite of the fact that “overall premiums are growing roughly double digits.”<sup>16</sup> Whether you have one truck or 1,000 trucks, your risk is the same. Furthermore, the *Wall Street Journal*’s transportation analyst, Jason Seidl, reported that some trucking executives “believe the recent spate of smaller carrier bankruptcies will give ‘larger carriers added control and pricing power in the marketplace.’”<sup>17</sup> This is not good news for smaller carriers.

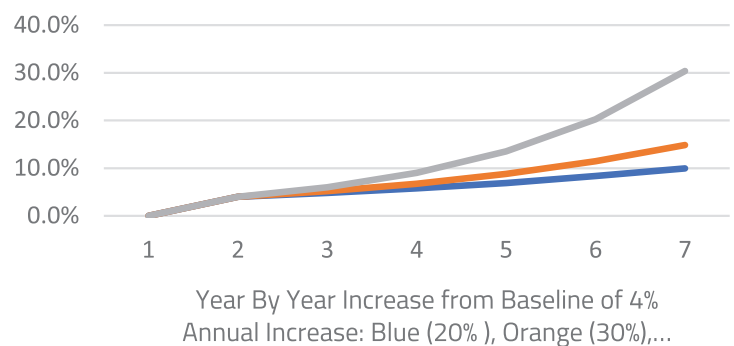
### Are you a “lay down?”

According to Infnit-I’s industry experts, low-dollar cases, especially for smaller trucking companies, are often settled out of court for \$25,000 to \$50,000. However, too many out of court settlements may make you a target for lawsuits because plaintiff’s attorneys perceive you to be a “lay down,” a company that just pays under pressure.

## Profit Margins and Bankruptcy

Industry estimates indicate that trucking bankruptcies nearly quadrupled in 2019 compared to 2018.<sup>18</sup> As a decision-maker in the trucking industry, you know that profit margins average 5%.<sup>19</sup> Insurance costs average 3% to 4% of your revenue.<sup>20</sup> Our experts did the math. If 4% of your costs increase just 20% a year, without a similar increase in revenue, your insurance costs will eat up your entire profit within five years. If your insurance goes up 30% a year, that window shrinks to three years. If your insurance goes up 50% a year, you face the possibility of not being able to operate in just two years. And that’s just considering increasing insurance costs. Add in a single nuclear verdict and even a big carrier is at risk for bankruptcy or insurance non-renewal.

Increase in Insurance Costs as a Percentage of Revenue



Another factor to consider is while a legal bill or settlement is a “hard” cost associated with the accident, what are the “soft” costs associated with the case? A legal proceeding is a tremendous distraction to you and your company. Time spent on the case is time that is not spent on earning your company money. It will be felt in your bottom line.



## Finding Fault

If you have documented communication, text messages, and/or emails that use phrases like “my driver,” plaintiff’s attorneys will use this in discovery to try to prove that you are controlling and supervising your drivers; therefore, you are responsible for them.<sup>21</sup> If you, as a broker, tell a driver to be on the road in inclement weather or when they are tired, you may put yourself at risk for being found liable for that driver.<sup>22</sup>

Swiss Re’s Hudzik explains this as a combination of anti-corporate feelings and potential jurors’ exposure to rich celebrities, creating a sense that we all deserve more.<sup>23</sup> There is also a tendency for jurors to have empathy for the victims and their families.<sup>24</sup> When a jury can create a high-dollar verdict for a victim’s family, they win for the little guy, who they identify as “like them” in facing down wealthy corporations who gain their money off the backs of regular people like them.

### Vicarious Liability & The Kardashian Effect

You may think you’re safe because you use independent owner operators or freight brokerages. Unfortunately, juries are often sympathetic to the victims and place blame on the carriers and brokers. This is called “vicarious liability.”<sup>25</sup>

Jurors may also perceive your company to be wealthy, and thus responsible for sharing your wealth. This is called “the Kardashian effect,” named for the celebrity family.<sup>26</sup>





## How Can Nuclear Verdicts Affect My Insurance?

This trend of sympathetic juries awarding nuclear verdicts has created increasingly unsustainable claims and increased loss-ratios for insurance companies.

Your insurance company wants to do business with the least risky bet—Who is doing the best they can to protect themselves from litigation? Having a positive safety culture is one of the things they're looking for. And they're not just looking at what you do at renewal, they're looking at what you do all year long to ensure you're trending in the right direction. How does an underwriter gauge the quality of your safety culture? He will look at how your company trains its employees, if training participation and completion is tracked, how your company responds to CSA violations, the kind of technology used in your trucks, and other factors.

Premium increases are unavoidable. What isn't unavoidable is what you're doing to minimize those increases and improve your company's position. Do you want a relatively small premium increase of 3% year over year because you buttoned up your safety training and documentation to cover all your bases? Or do you want to fly by the seat of your pants and find yourself on the receiving end of a 125% increase in premium? Or for your insurance company to tell you sorry, but they won't do business with you anymore. There are trucking companies experiencing this each and every day. What are you doing to make sure you're in the category you desire?

**By 2017, many insurance companies were paying out \$111 for every \$100 they earned in premiums, for a loss ratio of 111. As a result, insurance companies have raised premiums and deductibles to stay in the industry.<sup>27</sup>**

Unsustainable loss ratios led AIG and Zurich International to exit the trucking insurance sector entirely in 2015.<sup>28</sup> In 2017, Westfield Insurance, another big underwriter in the industry, left.<sup>29</sup> This has created a particularly difficult time for trucking companies who use "excess insurance" to insulate themselves from nuclear verdicts, making gap insurance unaffordable for many smaller carriers.

Those underwriters who are left have adopted increasingly stringent underwriting standards. Many insurers now require a minimum driver age of 25.<sup>30</sup> New owner operators are having trouble finding affordable insurance.<sup>31</sup> Prospective customers at Infiniti-I Workforce Solutions have reported that their insurance companies began requiring 40-60% of their annual insurance premium upfront in order to insure them, not the usual one-month premium. Other prospective customers have reported that they were required to set aside money for potential nuclear verdicts, similar to escrow, in order to be renewed.

Another emerging trend are captive insurance groups: Responsible carriers who can establish their safety records and practices participate in an insurance pool. They set the standards for the rest of the carriers who are allowed into the group. As more responsible carriers join such groups, insurance companies will be left with the carriers who have proven to be of a greater risk, which will drive up insurance premiums for that group even further.

A strong culture of safety is the best way to control insurance premium increases and litigation risk. And, this is where **Infiniti-I's Nuclear Verdict Mitigation Playbook** comes into play.



# The Infinit-I Workforce Solutions Nuclear Verdict Mitigation Playbook

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It is far easier for a plaintiff's attorney to create doubt than it is for your attorney to dispel it. **Infinit-I's Nuclear Verdict Mitigation Playbook** is based on a four-part strategy:

- Avoid accidents in the first place by creating a culture of safety that utilizes short, frequent, consistent online safety awareness training partnered with real-time documentation.
- When accidents do happen, mitigate liability and the likelihood that the case goes to trial by making sure that A) the driver is prepared to begin your company's defense at the site of the accident, and B) your office is prepared to quickly produce consistent documentation and safety records that discourage litigation
- You never know when an accident will occur. Driver training, company policies, licensing, and medical records should be thoroughly followed and documented at all times, reducing the threat of nuclear verdicts
- **PREPARE NOW.** Simulate an accident or roleplay an accident deposition to gauge your company's preparedness. Is the information you will need to defend yourself readily available and are your employees prepared?

Plaintiff's attorneys have access to considerable data that they use in deciding when to go to trial, when to settle out of court, and when to drop a case altogether. Plaintiff's attorneys have a sophisticated bag of tricks to lead juries to agreeing to nuclear verdicts. **Infinit-I's Nuclear Verdict Mitigation Playbook** is designed to address each area of attack used by plaintiff's attorneys to undermine your company's defense strategy.





Settle out of court	Use cloud-based, real-time documentation to encourage attorneys to drop the plaintiff's case entirely: company policies and manuals, driver medical records, licensing, driver orientation, monthly driver training, and training test scores proving completion and comprehension
Expose company process flaws	As mentioned above, deliver documentation showing policies and processes are followed and part of your company's safety culture
Appeal to juror's emotions	Show the driver's good faith with documented medical records and licensing, driver orientation, monthly driver training, and training test scores
Use a corporate greed strategy	Demonstrate the carrier's commitment to creating a culture of safety through investing in high-quality, frequent, consistent training
Use the "Reptile Theory" by convincing juries to award a nuclear verdict based on their anger at the situation and they, the jurors, can make a difference	Manage jurors' anger by showing driver good faith and company commitment to investing revenue to create a culture of safety



Plaintiff’s attorneys are well known for their vicious attacks on drivers. The attacks fall into five categories, known as “The Dirty Five.”<sup>32</sup> [Infinit-I Workforce Solutions’ Nuclear Verdict Mitigation Playbook](#) is designed to protect your drivers as well.

The Dirty Five Attack Strategy	Infinit-I Workforce Solutions Nuclear Mitigation Playbook Strategy
Driver fatigue	Keep good logs, provide frequent training and reminders for drivers on drowsy driving and log maintenance
Distracted driving	Provide in-cab cameras, provide frequent training and reminders for drivers on distracted driving
Driving under the influence	Require frequent drug/alcohol testing, provide frequent training and reminders for drivers on the dangers of impaired driving
Poor pre- and post-trip inspections and maintenance	Have solid policies for maintenance, keep maintenance records up to date, provide frequent training and reminders for drivers on maintenance issues like tires, oil changes, and pre- and post-trip safety checks
Inexperienced or poorly trained driver	Have rigorous policies for hiring, require all medical and licensing documentation before hiring, require all orientations to be complete before a driver goes on the road, provide frequent training and reminders for drivers on safety issues like tailgating, speeding, driving in traffic or bad weather

The 97% of accidents associated with nuclear verdicts are preventable and controllable. Research points to two factors being the leading source of most accidents: 1) an act leading to distraction and 2) irresponsible carriers. If the plaintiff's attorney can effectively prove or demonstrate that any of the above took place, the potential for a nuclear verdict grows significantly. Don't wait until you have a fatality and are threatened with a nuclear verdict to take action. You need to be prepared, with your Nuclear Verdict Mitigation Playbook ready.

The key is frequent and consistent online safety awareness training supported by real-time, on-demand paperless documentation and reporting. Proactively implementing a 360-degree system that builds a culture of safety is no longer a business accessory in trucking; it's a necessity for competitiveness, profitability, and sustainability.

If your company takes no action, you will undoubtedly see higher premiums and deductibles to be insurable, making it difficult to stay in business. If you don't have an effective safety training program, simply implementing **Infinet-I's Nuclear Verdict Mitigation Playbook** will outweigh the costs. If you currently are only using in-person safety training, our online training can save you up to 70% of your training costs while dramatically increasing productivity, comprehension, and retention.

Online training can also help your drivers reduce maintenance costs and improve fuel efficiency due to driver behaviors. And, it can help you reduce the cost of accidents beyond the impact on your insurance premiums (workers comp costs, driver down time, truck repairs). Paired with automated, paperless documentation, you effectively safety-proof your safety program against nuclear verdicts while saving money on insurance premiums long term.

### The Ticking Clock

An additional benefit is you are better prepared when approaching your insurance provider for renewal. Showing that your company has a well-designed, ongoing, and documented safety training program helps your insurance provider know your working to manage risk, which, in turn, helps you secure the best rate possible.



#### Running out of time?

**Infinet-I Workforce Solutions** stands ready to help your company take the steps to better manage your risk and make you more defensible in court, while saving your company money.

# About Infinit-I Workforce Solutions

**Infinit-I Workforce Solutions** is the industry leader and best in class online safety awareness training provider that empowers our clients' success. Our model has a proven track record of more than two decades providing results for over 1,500 companies and 300,000 employees. We stand ready to help you take the steps to make your company more insurable and more defensible in court.

## FREE DEMO

We hope you have found value in this white paper and we invite you to a no-obligation demonstration of our online platform.

## IN-PERSON SAFETY BOOT CAMP

If you like what you see in the demonstration and you seriously want to explore implementing our complete safety awareness training program, you can join us for one of our complimentary Engage Boot Camps where you will:

- Learn industry-tested strategies to control insurance costs and litigation risk
- Meet with industry experts
- Find answers to your most pressing business challenges
- Test-drive our online system
- Network with other professionals in the industry

Give us a call today at 866-904-5087 and take the first steps to creating a culture of safety to help you manage your preventable risk and safety-proof your company from nuclear verdicts.

### Key Infinit-I Results of Current Clients

- Up to 100% training completion rate
- Up to 70% reduction in training costs
- Up to 50% reduction in violations
- Up to 40% reduction in accidents
- Decrease in accident frequency & severity
- Immediate corrective action training
- Automated Documentation



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<sup>2</sup> Smith (2019)  
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<sup>6</sup> Senoff (2019)  
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<sup>10</sup> Hindi (2019)  
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<sup>14</sup> FMCSA (2007)  
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<sup>25</sup> Fuller (2019)  
<sup>26</sup> Moorcraft (2019)  
<sup>27</sup> Solomon (2018)  
<sup>28</sup> Solomon (2018)  
<sup>29</sup> Solomon (2018)  
<sup>30</sup> Solomon (2018)  
<sup>31</sup> Solomon (2018)  
<sup>32</sup> Holm (2020)



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