The Ultimate Social Inflation Survival Guide:

Containing Rising Claims Costs in a World Rife with Economic Inflation, Litigation Funding, Nuclear Verdicts, and Anti-Corporate Sentiment

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Introduction

Insurance professionals, risk managers, and counsel deal with it on a daily basis, plaintiffs' personal injury lawyers are driving and benefiting from it, consumers and policyholders are paying for it, litigation funders are financing it, and pundits are addressing it with greater frequency now. Although it has been around since the 1970s, it is looming much larger in recent years and has amped up since the pandemic. When coupled with economic inflation, it appears to be on steroids. It, of course, is social inflation and a civil justice system that, in some respects, is out of control.

This commentary constitutes the ultimate social inflation survival guide for insurers and corporate policyholders:

- Part 1 defines the scope of social inflation.
- Part 2 outlines the costs and impacts of social inflation.
- Part 3 explores the factors that are endemic in the U.S. Civil Justice System, making it susceptible to social information.
- Part 4 examines the societal trends and litigation developments fueling social inflation.
- Part 5 discusses the potent combination of social inflation, economic inflation, and greenflation.
- Part 6 addresses the aspects of social inflation aimed directly at insurers.
- Part 7 concludes with a discussion of some important steps insurers and corporate policyholders are taking to contain and combat social inflation.[i]

Part 1: Defining Social Inflation and Identifying its Costs

Social inflation refers to the increasing costs of insurance claims (defense and indemnity) resulting from societal trends and litigious proclivities, high defense costs, nuclear jury awards, broad insurance policy interpretation, and a plaintiff-friendly and policyholder-friendly litigation environment. The *Wall Street Journal* described social inflation in insurance industry parlance as: "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."[ii]

Another way to define social inflation is the amount of liability claim costs rising above the rate of general economic inflation. Indeed, the Geneva Association notes that social inflation "refers to all ways in which insurers' claims costs rise over and above general economic inflation, including shifts in societal preferences over who is best placed to absorb risk."[iii]

Social inflation has existed at least since the 1970s. It appeared on the litigation scene shortly after mass tort liabilities expanded due to a panoply of factors, including the development of strict product liability, the enactment of environmental laws, and abuses in the U.S. civil justice system. As early as 1977, Warren Buffet referred to social inflation as "a broadening definition by society and juries of what is covered by insurance."[iv]

The impact of social inflation undoubtedly has been felt most heavily in the United States due to our civil justice system. Other countries such as Australia, Canada, and the U.K. have experienced social inflation, but to a much lesser extent. Social inflation appears to be gaining traction, however, in Europe. Collective actions, the rough equivalent to class actions in the U.S., have doubled between 2018 and 2020, even before a European Union directive gave rise to additional actions. There have been substantial litigation funding activities in Europe as well. Although jury trials are not available for civil actions in the United Kingdom, there are plaintiff-oriented judges (just as there are plaintiff-oriented jurors), and many of the societal aspects driving social inflation that influence jurors also may influence judges.

There are two prongs of social inflation. The first involves abuses in the tort system, which impact both corporate policyholders and insurers. Corporate policyholders feel the effects insofar as they are subjected to large verdicts and defense costs for which they are self-insured and, to some extent, in the form of higher costs of doing business (including insurance premiums). Where insurers are required to fund or pay for the defense and/or to indemnify policyholders under policies issued to businesses and other entities, the impact of social inflation directed at these policyholders ultimately is visited upon insurers. Accordingly, as to this component of social inflation, the interests of corporate policyholders and insurers generally are aligned. In fact, many of the avenues available for controlling this prong of social inflation – such as damage limitations, tort reform, requiring full disclosure of litigation funding, and dialing down the abuses in the tort system – often are best traveled together through cooperative efforts of the defense bar, businesses, and insurers. This is the aspect of social inflation that has garnered the most attention and will serve as the focus of this commentary.

Insurers, however, face a second prong of social inflation aimed directly at them at the hands of their policyholders and others in the insurance coverage arena. This prong includes such things as: expansive reading of policy coverages in favor of policyholders and rulings by courts in coverage litigation, shifting of policyholder attorney fees in coverage litigation, increasing bad faith liability and extracontractual damage awards, use of time-limited demands to insurers, rising independent counsel fees, efforts to hold adjusters personally liable, and some legislative and regulatory pronouncements impacting insurers specifically. Social inflation lies behind enhanced exposures for bad faith and extra-contractual liabilities insurers face.

Concerning this component of social inflation, the interests of corporate policyholders and insurers usually diverge.[v] Although particular policyholders may benefit in some cases by advancing this second prong of social inflation, the aggregate impact may ricochet on policyholders by contributing to the atmosphere, fueling the first prong of social inflation.

Part 2: The Large Costs Exacted by Social Inflation

The United States is the most litigious country in the world. According to one source, 65.5 million lawsuits were filed in the U.S. in 2022, 64.3 million in 2021, and 61.5 million in 2020 (a year in which there were numerous court closures due to the COVID-19 pandemic). Approximately 98 percent of cases are filed in state courts.[vi] According to Statista, large domestic companies spent more than $23 billion on litigation alone in 2021. Businesses and their insurers have been victimized by numerous nuclear verdicts (verdicts

that surpass $10 million) and thermo-nuclear verdicts (verdicts over $100 million) and have faced increasing costs in settling and defending claims.

In November 2022, the U.S. Chamber of Commerce Institute for Legal Reform published a comprehensive examination of the tort costs of social inflation in America.[vii] The entire report is worth reading, but the report's key conclusions are set forth below:

> We find that in 2020 (the latest year for which full data is available), tort costs amounted to $443 billion, or 2.1 percent of U.S. gross domestic product (GDP). These tort costs include: $229 billion in general and commercial liabilities, which cover a broad range of personal injury, consumer, and other claims; $196.5 billion in automobile accident claims; and $17.5 billion in medical liability claims. . . .
>
> To provide comparative context, we extend our analysis from 2020 back to 2016 and explore the development of tort costs throughout that period. Overall, the direct economic costs of the tort system have grown at an annual rate of six percent a year over the period 2016 to 2020, with commercial liability growing at a faster rate than personal or medical professional liability. This rate exceeds both the growth in inflation, which averaged 1.9 percent, and GDP, which grew at 2.8 percent over the same period.
>
> Because growth in the tort system has outpaced GDP, tort costs as a percentage of GDP grew from 1.88 percent to 2.13 percent. This result has been exacerbated by the contraction in GDP in 2020 caused by COVID-related shutdowns, but even through 2019, tort costs grew at a faster rate than GDP. . . .
>
> We estimate that U.S. tort costs in 2020 equate to $3,621 per household.
>
> [T]his per-household figure has grown consistently since 2016. . . .
>
> The results reveal significant variations across states. Florida has the highest tort costs as a percentage of state GDP (3.6 percent), while Nebraska, New Hampshire, and South Dakota have among the lowest (less than 1.5 percent). Tort system costs per household are about $2,000 in states such as Maine, New Hampshire, South Dakota, and West Virginia but over $4,500 in states such as California, Florida, and New Jersey, and as high as $5,408 in New York. . . .
>
> Finally, we estimate that the tort system is relatively inefficient at delivering compensation to claimants. Compensation to claimants only represents 53 percent of the total size of the tort system, while the remaining 47 percent covers litigation costs and other expenses. . . .[viii]

Further, the report indicates, "for every dollar paid in compensation to claimants, 88 cents were paid in legal and other costs."[ix] It also details the methodology used and provides interesting breakdowns by tort category and state.

The U.S. Chamber of Commerce Institute for Legal Reform's 2024 updated report details further deterioration in the legal system. "[Tort] expenses amounted to a staggering $529 billion in 2022, representing 2.1 percent of the U.S. GDP and $4,207 per American household. This highlights the growing financial burden that the tort system places on the economy. The tort system plays an important role in compensating victims and deterring irresponsible behavior.

However, the costs associated with it have been rising faster than both inflation and GDP growth. From 2016 to 2022, tort costs grew at an annual rate of 7.1%, outpacing the average annual inflation rate of 3.4 percent and GDP growth of 5.4 percent. This rapid increase is largely driven by commercial liability, which has been growing at an even faster rate of 8.7 percent per year."[x] States with the highest per household costs are: Delaware $8,026, New York $7,027, Florida $5,768, New Jersey $5,525, California $5,429, Connecticut $5,133, Georgia $5,050, Nevada $4,603, Texas $4,594, and Massachusetts $4,593.[xi] The

Consumer Price Index (CPI) "rose 10.5% from 2017 through 2021, while property and casualty industry general liability incurred losses have skyrocketed more than 57% during this same period."

A study released by the Insurance Information Institute and the Casualty Actuarial Society estimates that commercial auto insurers cumulatively paid out $20 billion more (or approximately 14 percent more) on liability claims between 2010 and 2019 than would otherwise have been expected because of social inflation-related factors.[xii] In February 2024, Morgan Stanley estimated that social inflation caused $13.3 to $24.5 billion of excess losses on commercial auto liability from 2013-2022, accounting for 7 to 14 percent of total commercial auto losses and $27 to $44.1 billion in general liability losses from 2014 to 2023, accounting for 6.5 to 10.6 percent of industry general liability losses.[xiii]

Nuclear verdicts, discussed in further detail later in this commentary, are both a measure or cost of social inflation and also one of the causes of social inflation. Advisen found that, from 2015 to 2020, the median cost of a jury award over $10 million increased by 35% from $20 million to $27 million. It also found that the number of cases with verdicts over $20 million rose from 89 in 2017 to 102 in 2019.[xiv]

In addition to increasing verdicts and settlement costs, defense costs have increased as well. According to one report, the average defense costs of large companies increased by 10 percent annually between 2018 and 2023.[xv] The takeaway is clear: social inflation imposes definite, substantial costs.

Part 3: Social Inflation is Endemic in the U.S. Civil Justice System

A myriad of underpinnings in the U.S. civil justice system make it rife with social inflation. These include:

- an organized, well-funded plaintiffs' bar;
- the availability of punitive/exemplary damage awards for some claims;
- the availability of juries in civil actions;
- class actions (which foster litigation that would not or could not be brought economically as individual cases) and multidistrict litigation;
- securities and shareholder derivative litigation abuses;
- extensive pretrial discovery and disclosures (including interrogatories, document requests, requests for admission, physical and medical examinations, and depositions of fact witnesses, corporate representative witnesses, and expert witnesses) and abuses of the discovery process;
- the use of contingent fees in bodily injury and wrongful death cases;
- the American Rule on attorney fees, which generally works against corporate defendants as opposed to the winner-pays rule in the U.K.;
- use of junk science and lax evidentiary standards, including insufficient scrutiny of expert witnesses' testimony;
- fee-shifting statutes that, when applicable, usually benefit policyholders and some underlying claimants;

- doctrines such as *res judicata* and collateral estoppel that generally work against corporate defendants and insurers; and
- the availability of alternative fora to plaintiffs (carpetbagging and forum shopping).

These realities have necessitated protracted battles for tort reform waged on many fronts. Although some tort reform measures have improved affairs in particular jurisdictions in some respects, they have not had a meaningful impact in other jurisdictions. Challenges have been presented by plaintiff-oriented legislatures.

Even where tort reform has passed, sometimes – as in the state of Illinois – state supreme courts have struck down provisions based on state constitutional grounds; suffice it to say that tort reform has not been a panacea. At least from the perspectives of defendants and insurers, the civil justice system remains highly flawed. The battle to improve the U.S. civil justice system is one that insurers and corporate policyholders must fight in every case and legislative session, in every courthouse, and in the court of public opinion.

Part 4: Societal Trends and Litigation Developments Fueling Social Inflation

There are several developments, factors, and trends in modern society impacting litigation that are fueling social inflation in the United States. Indeed, in the current environment, social inflation appears to be on steroids. We examine some of the key trends and developments below.

A. Third-Party Litigation Funding

Under litigation funding arrangements, funders typically agree to cover all or some of the costs of litigation or arbitration in return for a share or percentage of the proceeds, whether from a jury verdict or settlement. The growth and mainstreaming of litigation funding – which by many accounts has more than doubled since 2012 – is a large factor driving social inflation.

Litigation funders include private equity firms, hedge funds, and even so-called "lien physicians" – physicians who treat under letters of protection pursuant to which the physician is promised that any payments owed by the plaintiff for medical treatment will be paid from the final lawsuit settlement amount or verdict award. There are various types of third-party litigation funding; some arrangements involve lawyer funding, and others involve client funding.

Funders are sometimes trolling patents, financing entire case portfolios in addition to individual cases, and covertly controlling cases. A secondary market has even developed for litigation funding where a litigation funder may sell a piece of its existing portfolio of deals, providing liquidity where deals extend beyond the length expected by investors.

Litigation funding has been advanced under the mantra of promoting justice for wrongfully injured individuals and providing them with access to the civil justice system. The realities belie this mantra in the context of personal injury claims. Contingency fees have provided access to virtually all putative plaintiffs with meritorious claims. Traditionally, they have allowed plaintiffs to bring bodily injury or wrongful death claims that would not be pursued if plaintiffs were required to pay lawyers an hourly fee concurrently and in the absence of recovery. The costs of prosecuting such cases and the risk of no recovery at least

served as modest checks on the willingness of plaintiffs' counsel to take on some representations, particularly where claims are unsupported, speculative, lacking in merit, or highly defensible.

Significantly, litigation funding and litigation financiers have altered this balance, engendered injustice, clogged the civil justice system, and raised the costs of cases. Litigation funding has benefited plaintiffs' counsel and litigation funders pursuing profit at the expense of litigants – defendants and many plaintiffs as well and has proven to be a significant driver of social inflation.

The use and surge of third-party litigation funding in recent years have been a boon for plaintiffs' counsel. Litigation funding has increased the volume of cases being pursued. It has enhanced the ability of plaintiffs to take cases further and pursue larger recoveries, extending the litigation timeline, increasing the costs of defense, and increasing the potential for larger verdicts and settlements. It has enabled plaintiffs to invest in experts, research, studies, and other weapons to deploy against defendants.

Litigation funding presents numerous challenges to defendants and courts, including compromising lawyers' ethical duties, contributing to mass filings of speculative or unsupported tort claims, making settlements more difficult and costly to achieve, undermining U.S. companies, and creating a possible path for theft of trade secrets and disclosure of sensitive information.

Because of the larger awards associated with compelling cases, litigation funders can justify a greater investment of funds, thus allowing creative plaintiffs' lawyers to run wild in civil litigation. According to the CEO of one litigation funder, "[o]n an average basis, we'll largely double our money . . . [w]e're right about 90% of the time . . . ."[xvi]

Not only are compelling cases likely to result in larger awards, but the disposition costs of mediocre cases have also increased as plaintiffs' lawyers invoke cost-intensive discovery. With the proliferation of nuclear verdicts discussed below, funders view litigation funding as a good investment providing a high rate of return. Although litigation funding generally covers attorneys' fees and costs, it has broader uses, including providing operating capital for business parties during litigation.

Litigation funding can adversely affect plaintiffs as well. Litigation funding or funders often are hidden from plaintiffs. Funders do not have ethical or professional obligations to plaintiffs, and their motivation is to pursue large recoveries (in an individual case or a portfolio of cases). Insofar as they can make or influence litigation decisions, in some cases, they may push plaintiffs or counsel to reject a reasonable settlement offer in pursuit of a nuclear verdict.

Alternatively, a funder may pressure law firms to accept a settlement because the company desires a guaranteed return on its investment. Unlike individual claimants, funding companies can spread the costs of litigation over a broad portfolio of cases and among numerous investors. Lack of regulation or reasonable limitations on interest in many states has caused many recoveries to go to funders in the form of interest and charges in numerous cases.

Litigation funding does not simply fund litigation; it also generates litigation. Data from the Judicial Panel on Multidistrict Litigation and the United States Courts, analyzed by the group Lawyers for Civil Justice, shows that, as of the end of fiscal year 2023, MDL cases constituted 71.3% percent of the pending federal civil caseload, up from 29 percent 12 years earlier.[xvii] Empirical evidence from Lawyers for Civil Justice shows that there are tens of thousands of unsupported claims in some of the largest MDLs. For example, in the Mentor Corp. Transobturator Sling Products MDL, 75 percent of cases were dismissed; in the Ethicon, Inc. Pelvic Repair System Products Liability Litigation MDL, 53 percent of cases were dismissed; in the Zofran MDL, approximately 40 percent of cases were dismissed; and in the Cymbalta (California Judicial Council Coordination Proceedings), 31 percent of cases were dismissed.

A report by the Swiss Re Institute highlights the impact of litigation funding:

> The US is the center of the world's third-party litigation finance (TPLF) industry, in which investors such as hedge funds and family offices finance legal action against companies. More than half of the USD 17 billion investment into litigation funding globally in 2020 was deployed in the US. Litigation funding companies (LFCs) invest in consumer and commercial litigation by funding legal action in return for a percentage of a successful claim sum.
>
> We see TPLF as a contributing factor to the trend of social inflation in the US. US general liability and commercial auto lawsuit data show a strong rise in the frequency of multi-million-dollar claims over the past decade. LFCs back claims in many of these areas, such as trucking accidents, bodily injury, product liability mass tort, medical liability claims, etc. We find TPLF contributes to social inflation by incentivizing litigants to initiate and prolong lawsuits. Higher claims costs drive up insurance premiums, can reduce the availability of liability cover, and lead to higher uninsured legal liability risks for US businesses. US casualty insurers have incurred many years of underwriting losses linked to outsize legal awards[.][xviii]

The American Tort Reform Foundation, in its 2024-25 "Judicial Hellholes" report, notes that outside money flowing into U.S. litigation is growing exponentially, with more than $15 billion invested in U.S. litigation in 2023 from 39 active funders.[xix] In the mass tort context, the "funding provided to individual law firms now regularly exceeds $50 million," and at least one plaintiffs' law firm has received "$250 million in funding." [xx] Litigation funding has transformed lawsuits into investment vehicles.

Litigation funding was once widely prohibited by the legal doctrine of "champerty" or "maintenance," which generally barred strangers to a lawsuit from funding litigation fees and costs in exchange for a financial interest in the case's outcome. Litigation funding has gained traction as most states have abandoned or substantially limited their anti-champerty laws over the past couple of decades.

The primary focus of the defense bar has been to seek requirements of disclosure of third-party funding. Disclosure of litigation funding is necessary for a variety of reasons. The presence of a litigation funder can prejudice defendants by changing a two-party negotiation into a multi-party settlement with an unknown, undisclosed funding constituent. Disclosure is necessary for defendants to challenge and judges to assess potential conflicts of interest, to ensure compliance with ethical rules, to protect the legitimate interests of all litigants, and to prevent or limit mass tort cases that are filed without proper vetting and support (*i.e.*, cases where the claimant did not use the product at issue, did not suffer from the injury that is the focus of the litigation, or the claim is time-barred). Reform directed at litigation funding must be sought on a comprehensive basis. Some advocate for the return of anti-champerty laws, but that ship is unlikely to return to harbor.

Many believe that disclosure of litigation funding is also necessary for the even-handed administration of justice and to guarantee that defendants are able to "secure the just, speedy, and inexpensive determination of every action and proceeding" required by Federal Rules of Civil Procedure, Rule 1. For decades, the Federal Rules of Civil Procedure and many state rules have required that a defendant's litigation funding be disclosed in discovery through the production of copies of the defendant's insurance policies that might apply to the claim. One justification for allowing the disclosure of insurance coverage – enabling counsel for both sides to make the same realistic appraisal of the case – applies with equal force to the plaintiff's litigation funding.

Numerous settlements fail because of a medical, workers' compensation, or Medicare lien that must be repaid. Third-party litigation funders often hold a lien or right of refusal and must be repaid first, creating another hurdle to early settlement. Additionally, it is undeniable that the presence of third-party litigation funding and the need to pay the funder at rates that are sometimes usurious affects a plaintiff's reasons for not settling at what might otherwise be deemed a reasonable value.

Further, given the advancements of proceeds and the need to repay the funder, often a plaintiff has little incentive to settle and would rather proceed to trial in the hopes of obtaining a nuclear verdict. The presence of funding can result in cases going to trial that would otherwise settle, causing unnecessary expense and use of resources – for both the court system and the defendants – that ought not to have been incurred. That alone is the reason for the existence and the terms of such funding to be transparent to all concerned in the litigation.[xxi]

Proposed federal legislation to require disclosure of litigation funding failed to make it out of committee in the last Congress, but legislative action remains a possibility in the current Congress. A few states have laws or rules requiring disclosure of litigation funding, including Indiana (Ind. Code § 24-12-11-5 (2024); Louisiana (La. Rev. Stat. § 3580.12(B); Montana (Mont. Code § 31-4-108 (2023); West Virginia (W. Va. Code § 46A-6N-6 (2024); and Wisconsin (Wis. Code § 804.01 (2018).

The National Council of Insurance Legislators (NCOIL) formulated a "Transparency in Third Party Litigation Financing Model Act"[xxii] that would subject third-party litigation funding to state regulation and would set requirements regarding disclosure, registration, funding company, and attorney responsibilities and limitations, and would include a rate cap for consumer litigation funding transactions. The Model Act would prohibit both consumer and commercial litigation financing transactions from being directly or indirectly financed by foreign entities, countries, or persons of concern. It would also require a plaintiff or the plaintiff's counsel to provide the other parties in a civil proceeding, as well as each insurer that has a duty to defend another party in the civil proceeding, with written notice that the plaintiff has entered into a litigation funding contract.

Some courts, such as federal district courts in New Jersey and Delaware, have issued orders or rules requiring disclosure of litigation funding.[xxiii] However, court decisions on disclosure have been mixed. Some courts have denied discovery of litigation funding information as irrelevant[xxiv], while other decisions have permitted discovery.[xxv] In addition, courts have reached different conclusions as to whether such materials are subject to attorney work product protection or the attorney-client privilege.[xxvi]

Disclosure of litigation funding should be required as an important first step, but disclosure itself may prove to be inadequate. Some states have enacted legislation addressing litigation funding. For example, Illinois enacted the Consumer Legal Funding Act (CLFA).[xxvii] The Illinois CLFA includes licensing and contractual requirements, limitations on consumer legal funding fees, preclusions against funder control of litigation and settlement decisions, and disclosure and acknowledgment requirements. The CFLA prohibits a litigation funder from certain activities, such as lawyer and medical provider referrals or referral fees, and limits the amount of funding (generally $100,000).

Notably, the CLFA does not contain any provision requiring disclosure of the legal funding agreement or information to courts or opposing counsel. Instead, it provides that disclosure of information to the funder does not waive or abrogate the attorney-client privilege or work product doctrine. Other states, such as Arkansas, Indiana, Maine, Nebraska, Nevada, Ohio, Oklahoma, Tennessee, Vermont, and West Virginia, have required registration or licensure, imposed disclosure requirements, and/or regulated interest rates or fees for funders.

Effective August 1, 2024, litigation funders in Louisiana are generally precluded from controlling litigation or settlement, and litigation financing contracts are discoverable in civil cases.[xxviii] In addition, copies of funding agreements involving entities from "countries of concern" (including Russia, China, and Iran) must be provided to the state's attorney general. This requirement reflects the growing national security concern about foreign litigation funders facilitating interference in the U.S. civil justice system and attacks on U.S. companies and industries.

Insurance fraud takes a variety of forms, much of which is outside of the claim context. The Coalition Against Insurance Fraud estimates that insurance fraud costs the U.S. $308.6 billion annually, broken out as follows: property and casualty - $45 billion; workers' compensation - $34 billion; premium avoidance - $35.1 billion; healthcare - $36.3 billion; Medicare and Medicaid Fraud - $68.7 billion; life - $74.7 billion, disability - $7.4 billion; and auto theft - $7.4 billion.[xxix] Financiers have been involved in fraudulent schemes. For example, a New York City financier accused of bankrolling a $31 million litigation settlement scam was sentenced to three years in prison for his role in a five-year scam involving staged trip and fall incidents, unnecessary surgeries, and fraudulent personal injury lawsuits.[xxx] These costs of insurance fraud, on top of social inflation, impact insurers.

American Bar Association Model Rule of Professional Responsibility 5.4 precludes a lawyer or law firm from: sharing legal fees with a nonlawyer; forming a partnership with a nonlawyer; or practicing law for profit if a nonlawyer owns any interest in the lawyer's or law firm's practice. These prohibitions protect client confidentiality, preserve the exercise of a lawyer's independent professional judgment, and ensure that client representations are conducted by individuals qualified to render legal representation and bound by applicable ethical rules.

Despite this rule, some litigation funders are attempting to gain ownership in law firms and are engaged in efforts to end or limit these restrictions. It is important that such efforts by litigation funders are opposed and defeated.

B. Hamstrung Defense

While plaintiffs are investing in achieving bigger verdicts and settlements, many corporate defendants and insurers have relinquished to plaintiffs the large budgetary and leverage advantages that defendants historically enjoyed by what appears, at times, to be a myopic focus on limiting defense expenditures. The need to control costs and ensure expenses are reasonable is undeniable. But at times, it seems that the pendulum has swung too far, and too much attention has been focused on attorney hourly rates, legal bills, fee audits, and appeals. This focus, at times, appears to have come at the expense of devoting the money and efforts needed to contain swelling indemnity numbers and discourage future litigation.

Apart from contributing to nuclear verdicts, the long-term impact is that defendants and insurers are losing quality legal talent to deploy in personal injury and wrongful death cases. Concerns have been expressed about the ability of defense firms to compete against plaintiff firms and other corporate practice areas for top legal talent. Millennial and Generation Z attorneys appear to be less receptive to being tied to tracking billable hours, complying with litigation and billing guidelines, responding to audits, and "paying their dues" for advancement in law firms than prior generations of attorneys. Rate limitations further limit the ability of law firms to acquire and retain top-quality legal talent in this arena.

According to one commentator, the excessive focus by some claim departments on legal spending combined with a "dose of complacency" has helped the plaintiffs' bar forge ahead and left defense counsel scrambling to play catch-up.[xxxi]

One senior claims executive put it this way:

> One thing that has hampered the insurance industry is its historical focus on controlling legal spending and defense costs. That's a prudent and practical strategy, but at times, it seems quite "penny wise pound foolish," I think carriers need to recognize the necessity for appropriate investments in litigation that [are critical for] properly preparing their cases. It comes down to getting a better understanding of the psychology behind what's driving the plaintiffs' bar and their trial strategies or tactics, as well as better preparing defense witnesses for where the plaintiff attorneys will likely try and take them.

> We are strong advocates of mock jury exercises and trying to understand earlier on in the lifecycle of a case how the defense's [arguments] might resonate with the average layperson. That exercise will require some upfront expense, but it will enable [insurers/defendants] to recognize what they're up against at an earlier point in time and how well their defense arguments and witnesses will resonate with a jury. Then, they can pivot, if necessary, to use differing tactics or explore settlement at an earlier point in the case and prior to allowing a jury to price the case.[xxxii]

Corporate policyholders and their insurers must ensure that adequate resources are committed to defending cases and protecting their litigation interests.

C. Keeping Up With the Times

The plaintiffs' bar has adapted to the changing demographics of jurors and judges. Key among the changing juror demographics is the increasing number of Millennials and Generation Z jurors in the jury pool. "Reptilian tactics or theory" employed by plaintiffs, discussed further below, has particular appeal to the values, approach, and mindset of these younger jurors—though studies are mixed as to whether they are more likely to actually render nuclear verdicts.

It appears younger jurors do not value money in the same way as baby boomers. Younger jurors also tend to be more plaintiff-orientated and distrustful of corporations, according to many commentators.[xxxiii] Illinois State University researchers concluded that younger jurors (Millennials and Generation Z) are somewhat more likely to favor a plaintiff and to favor higher damages.

Though defendants and their counsel appear to be doing a better job, sometimes they simply have not adequately defended against reptilian tactics and have failed to mount a compelling defense. Magna Legal Services reported that 84 percent of over 3,500 prospective jurors surveyed around the country over the 18 months prior to its report agreed that juries needed "to be 'guardians of the community' by forcing companies to change bad behavior with large damage awards."[xxxiv]

In addition, 37.6 percent of juror respondents strongly agreed that the primary purpose of damages was to punish defendants rather than compensate plaintiffs, while 44.5 percent somewhat agreed.[xxxv] This report is troubling. Although punishment may be a consideration in appropriate punitive damages claims, it should play no role whatsoever in our civil justice system with respect to liability or compensatory damages.

D. Attorney Advertising

Plaintiff trial lawyers spent approximately $6.8 billion on advertising from 2017 to 2021.[xxxvi] Lawyering up and the proliferation of attorney advertising – elements that have been around for some time – serve as potent recruiting tools for plaintiff's counsel, which they have employed masterfully. This has generated more, and sometimes better, plaintiffs. It also has created great expectations for recovery.

At some hours, you cannot turn on the television without seeing an advertisement by a plaintiff's personal injury firm. In 2021, for example, more than 15 million ads for legal services aired on local television broadcast networks, and more than 71,000 ads on national cable television.[xxxvii] Add to that radio ads and billboards, and it is easy to see that, beyond recruitment, this plaintiff-oriented messaging is impacting the views and mindset of prospective jurors and society as a whole in a manner favorable to plaintiffs and unfavorable to insurers and corporate policyholders.

Many advocates are seeking to curb exploitative attorney advertising through regulation. Even though there are many instances of deceptive ads, this tactic is unlikely to alter the landscape to any significant

degree. Instead, more public service messaging on the abuses of the tort system and its costs to consumers must be undertaken. Plaintiffs enter the courtroom with the considerable advantage of having the jury pool conditioned favorably to them as a result of advertising. Insurers, corporate policyholders, and trade organizations must devote more resources to counter this concerted messaging effort.

E. Anti-Corporate, Anti-Insurer, and Anti-Institution Sentiment

Hostility toward and distrust of large companies is hardly a new development – it has been something plaintiffs' counsel have exploited for a long time. But anti-corporate sentiment has increased markedly in recent years due to, among other things, residuals from the Great Recession, the Occupy Wall Street movement, the #MeToo movement, protests, and the COVID-19 pandemic.

Distrust and negative views of corporations have increased and become more of a bipartisan phenomenon in the wake of the COVID-19 pandemic. A survey of potential jurors conducted in 2023 by Orrick Herrington & Sutcliffe LLP shows that 77 percent of respondents had either a neutral or negative impression of lawyers who represent corporate defendants compared to a clear majority of 58 percent of respondents who had a positive view of lawyers representing injured plaintiffs. Areas with higher income inequality, higher layoff rates, a greater proportion of low-wage workers, or a general lack of opportunity are likely to produce higher rates of nuclear verdicts.[xxxviii]

CNN reported that "Democrats and Republicans have mostly negative — and nearly identical — opinions of banks and financial institutions and large corporations," according to Pew Research Center polling conducted earlier this year. Just 38 percent of Republicans and Democrats view banks positively, according to Pew Research Center. Republicans and Democrats have similarly negative opinions of large corporations – just 32 percent of Republicans and 26 percent of Democrats view their impact positively. But polling also shows that Americans trust business more than other institutions like the government, and people say they have high levels of trust for their own employers and CEOs."[xxxix]

In the wake of the murder of UnitedHealthcare's CEO last year, companies took several steps to protect their executives, including temporarily closing headquarters, scrubbing websites of their photographs, and increasing security details for key leaders.[xl]

F. Living in a Social Media World

Social media provides a platform for users to gather and organize and for negative public sentiment about companies and institutions to proliferate. It also impacts how jurors receive and use information in some profound ways. Further, it has interposed a degree of randomness in terms of what does and does not resonate on social media. With the potential for massive "viral" impact, one individual's negative experience may inform millions of other individuals and reinforce anti-corporate bias or begin to instill it.

With the flood of information available at one's fingertips and invisible algorithms serving up preferred types of information, users seeking social validation have no shortage of content to reinforce their bias. 'Echo chambers' of like-minded individuals on the internet reinforce and further polarize individuals' views because no one provides a balanced or opposing viewpoint, and there is little social incentive to do so.

G. Political Views Enter the Jury Deliberation Room

Political discourse infiltrates the jurors' mindsets. In a world of "identity politics," politics play an increasingly pervasive role in how individuals define themselves, function, and view the world. Notions of socialism, social justice, wealth and income disparities, and wealth re-distribution that abound on the

airwaves and in social media and other political discourses foster an environment that plays into the hands of plaintiffs.

Illinois State University researchers have found that counties with a higher proportion of Democrat voters are more likely to find plaintiffs and return higher verdicts than counties with a higher proportion of Republican voters. Jurors do not automatically discard their political views when they enter the deliberation room.

H. Jurors are Less Inclined to Follow Jury Instructions

Jurors – especially Millennials and Generation Z jurors – are more inclined to render awards with less emphasis on fault greater emphasis on company reputation and safety practices, and based upon the perceived ability of corporate defendants and their insurers to absorb losses. A national survey conducted by Sound Jury Consulting in 2019[xli] found that three-quarters of respondents eligible for jury service stated that they would decide a case based on their personal beliefs of right or wrong if those beliefs conflicted with the law as instructed by the judge.

The civil justice system places great importance on jury instructions, and the rule of law depends, in large part, upon jurors following the judge's instructions. Although "limiting instructions" have been known to be of questionable utility, the inclination to ignore court instructions on the law is very troubling and threatens the fair administration of justice.

According to the Sound Jury Consulting survey, 57 percent of respondents say they would ignore a judge's instructions to avoid internet research on the case if they believe they could obtain important information. 52 percent say they would not take the time to look at the jury instructions during deliberations if they believed they understood the issues in the case. Additionally, 75 percent of respondents said they would disregard the judge's instruction to ignore inadmissible testimony if they believed the testimony was important.[xlii]

In some states, such as New York, Washington, California, Massachusetts, and Minnesota, efforts are underway or being considered to update pattern jury instructions. Given jurors' increasing proclivity to ignore jury instructions, it is far from clear whether additional, better, or more specific instructions will be followed. In any event, defendants and their insurers must address concerns about jurors not following instructions—the plaintiffs' bar will not.

I. Access to Information From Sources Outside the Courtroom

The influence of social media, the information age, and immediate access to high-powered computers known as cell phones make it much more likely that jurors receive information outside of the courtroom. Limiting jurors' access to evidence only admitted at trial has always been a challenge. However, absent complete sequestration and cellphone confiscation, it is virtually an impossible undertaking in the information age with instant access to the internet and social media. The Sound Jury Consulting Study shows that jurors are not above the lack of self-discipline permeating our society today—they often refer to outside materials.

J. The Increasing Numbers, Amounts, and Normalization of Nuclear and Thermonuclear Verdicts

Nuclear verdicts generally have been defined as verdicts in excess of $10 million. The term "thermonuclear verdict" has been coined to describe verdicts over $100 million. The amount of a verdict,

standing alone (without reference to the damages sustained and the facts), does not always mean that it is excessive, improper, or unsupported by the evidence. Placing a monetary value on a case can be difficult, subjective, and subject to conflicting views. Nonetheless, nuclear verdicts often serve as a good proxy for excessive or runaway jury verdicts.

The growing number of nuclear verdicts and thermonuclear verdicts is alarming. A May 2024 report from the U.S. Chamber of Commerce Institute of Legal Reform examined 1,288 verdicts of $10 million in personal injury and wrongful death cases from 2013 to 2022.[xliii] The report concludes that, although nuclear verdicts dropped significantly during the COVID-19 pandemic, they nearly returned to prior levels by the third quarter of 2021. According to the report,

> When excluding the pandemic years, the data shows an upward trend in the frequency of reported nuclear verdicts at all levels over the 10-year study period. Approximately half of nuclear verdicts during this period were between $10 million and $20 million, and over one-third were between $20 million and $50 million. The remaining 19% of nuclear verdicts exceeded $50 million, a group that included 115 "mega" nuclear verdicts of $100 million or more. Awards at higher levels have become more common since the previous study. There were a record number of mega nuclear verdicts in 2022, which preliminary data indicates was again broken in 2023. The median nuclear verdict during the study period was $21 million, though it was higher in product liability and intentional tort cases. The median nuclear verdict in product liability cases peaked at $36 million in 2022—a 50% rise over a decade. The mean nuclear verdict overall was $89 million, which is considerably higher than the median because it is affected by the most extreme awards. This level is a significant increase from the earlier study, particularly for product liability, auto accidents, and other negligence trials. The study also revealed concentrations of nuclear verdicts with respect to certain types of cases and jurisdictions. Product liability, auto accident, and medical liability cases continue to comprise two-thirds of the reported nuclear verdicts. Juries in state courts, as compared to federal courts, produced the vast majority of all nuclear verdicts. Only about one-quarter of nuclear verdicts included punitive damages, although, when awarded, they were often extraordinary sums. Economic damages, such as awards for lost income, medical costs, or other expenses, in comparison, accounted for only about 10% of total damage awards. Many reported nuclear verdicts do not include a complete breakdown of each component of damages, but where that information was available, it showed that nuclear verdicts consist primarily of awards of noneconomic damages, such as pain and suffering.[xliv]

Four states—California, Florida, New York, and Texas—are responsible for approximately half of all nuclear verdicts, and Georgia and Washington also have many nuclear verdicts.

A report from Marathon Strategies provides some additional data and analysis on mega verdicts. It found, among other things:

> [I]n the decade following the Great Recession, the median verdict greater than $10 million against corporate defendants grew 55%. The five years leading up to the COVID-19 pandemic saw a particularly sharp rise in both the sum of these verdicts (178% increase) as well as their median (41% increase).
>
> Though this trend was interrupted amid court closures in 2020, the sum of corporate nuclear verdicts nearly quadrupled in the following two years, from $4.9 billion in 2020 to over $18.3 billion in 2022. The median verdict also rose from $21.5 million in 2020 to $41.1 million in 2022 – a 95% increase – while the number of verdicts doubled. Civil court juries are once again issuing verdicts for damages in amounts that often rival the annual budgets of small countries, threaten to take down businesses and provoke spikes in insurance premiums. . . . Juries [rendered] twenty verdicts against companies for over $100 million in 2022, including four that topped $1 billion.

Overall, since 2009, 191 of these verdicts were "thermonuclear," including 48 that exceeded $500 million and 23 that reached above $1 billion.

* * *

Industry sectors enduring the biggest financial hits due to nuclear verdicts since the Great Recession include tobacco, pharmaceuticals, automobiles, finance, and IT software. Many of the verdicts made mainstream news headlines, including juror awards of $23.6 billion against tobacco and $9 billion against pharmaceutical giants in products liability matters. While the top industries for these verdicts may be self-evident – wrongful death cases from smoking have been litigated for decades, motor vehicle accidents are an entire practice area to themselves, finance is an industry with frequent contract disagreements, and technology is an industry fraught with patent disputes – few sectors have been immune to supersized verdicts. Marathon's analysis found that since 2009, juries have ordered nuclear verdicts against some 712 companies across 117 sub-industries. Since the pandemic, the top sectors have included semiconductors, trucking, and big tech firms.

While each case is unique, Marathon's analysis found that nuclear verdicts against companies most often stemmed from cases in products liability (37%) and intellectual property (23%) matters. Since 2009, there have been 211 products liability nuclear verdicts for $63 billion and 173 intellectual property verdicts for $41 billion. The next-largest case topics, breach of contract or breach of fiduciary duty, combined for 105 verdicts for $17.5 billion total. Other top cases for nuclear verdicts include motor vehicle (83 verdicts for $7.8 billion) or wrongful death accidents (6 verdicts for $8.2 billion), worker or workplace negligence matters (71 verdicts for $4.6 billion), and fraud (47 verdicts for $4.9 billion). As many cases contained allegations across several of these categories, Marathon's data sorting prioritized the classifications determined by The National Law Journal and LexisNexis' Jury Verdicts & Settlements database.

Nuclear verdicts span state and federal civil court districts across the country, but juries in some states have been more prone to handing them out than others. Since 2009, Texas, Florida, California, and Pennsylvania topped the list of states that have awarded the largest sums. Overall, state courts accounted for $108 billion in corporate nuclear verdicts compared to federal courts' $61 billion. Interestingly, state verdicts dominated in Florida, California, Georgia, and Pennsylvania, while federal verdicts led in Louisiana and Delaware. While it is difficult to account for these discrepancies nationwide, generally, Marathon identified factors like local laws that encourage certain types of cases more prone to large verdicts, the presence or absence of limits on punitive damages, and court procedures that favor plaintiffs, among other factors.[xlv]

The report concluded that 2022 produced $18.3 billion ordered on 70 verdicts.[xlvi] The report properly notes that most studies look at the verdict rendered without taking into account any post-verdict reductions through post-trial motions, appeals, or otherwise. It provides detailed information and breakdowns by state, industry, and type of claims.

In some respects, nuclear and thermonuclear verdicts can be viewed as a measurement of social inflation. However, the normalization and publicity associated with such verdicts also fuel social inflation. Frequent media reports of multi-million dollar verdicts have desensitized jurors and, to an extent, have normalized such awards since jurors have been exposed to information regarding large jury awards long before being empaneled in the jury box.

Nuclear verdicts also implicate the second prong of social inflation aimed directly at insurers. For example, nuclear verdicts have the potential to give rise to bad faith claims against insurers. However meritless such claims may be, notwithstanding the fundamental exorbitant nature of nuclear verdicts,

based upon a policyholder's motivation to divest itself of the financial burden associated with an excessive verdict.

Plaintiffs, attempting to capitalize on the atmosphere of fear perpetuated by nuclear verdicts, are increasingly utilizing time and policy limit demands to obtain a settlement above the inherent value of a case. Insurers are well-served by engaging coverage counsel to assist in evaluating and responding to such demands. Coverage counsel can, among other things, evaluate whether the demand complies with the legal requirements in the controlling jurisdiction, identify areas of non-compliance to take into account in the insurer's evaluation and response to the demand, evaluate and assist in reducing the potential for bad faith claims, opine on and value the claim and assist in evaluating defense counsel's valuation, help in proper documentation, prepare the appropriate response to the demand, and help negotiate a resolution.

K. Nuclear Rulings by Courts and Nuclear Legislation

Although considerable attention has understandably been directed at nuclear jury verdicts, improper, unwarranted, and excessive legal rulings, and evidentiary rulings by judges, have also led to nuclear verdicts. Additionally, legislative bodies sometimes produce nuclear legislation that fosters the rendering of large and unfair verdicts against corporate defendants and insurers.

Unwarranted expansion of liability theories such as public nuisance fuels social inflation. The tort of public nuisance was the basis for the imposition of a $1 billion award against lead paint manufacturers, which was later reduced to approximately $400 million.[xlvii] Coverage issues associated with the same underlying judgment were litigated in three separate coverage actions. Insurers prevailed at the trial court and on appeal in California in the *ConAgra* case based on California Insurance Code Section 533, as the policyholder's predecessor had actual knowledge of the harms associated with lead paint when it promoted lead paint for interior residential use.[xlviii]

In the *Sherwin-Williams* coverage case, the Ohio Supreme Court reversed the lower court ruling and held that payment into an abatement fund was not to compensate individual plaintiffs for past harm but instead was made to eliminate future harm, and such payments are not covered as they are not damages under the policies.[xlix] Conversely, in the *NL Industries* coverage case, policyholders prevailed in the intermediate appellate court in New York with respect to the same underlying judgment.[l]

Public nuisance has figured prominently in opioid litigation. A 2022 bipartisan congressional report found that the opioid epidemic costs the United States approximately $1 trillion annually. More than 3,000 state and local governmental entities have sought to recover the costs of public services associated with opioids from drug manufacturers and distributors. The $26 billion settlement, which a coalition of state attorneys general reached with Johnson and Johnson and three distributors in 2021, grabbed the headlines.

In what some would characterize as a nuclear judgment, a California federal judge ruled that Walgreens, a drug store chain, substantially contributed to the public nuisance in San Francisco associated with opioids. The court indicated a subsequent trial would be held to determine the extent to which Walgreens must abate the public nuisance it helped to create. The ruling resulted in a large settlement. The tort of public nuisance is a growing concern in some states, including California.

Legislative bodies also contribute to social inflation. The Illinois Biometric Privacy Act (BIPA) has produced large awards. BIPA has given rise to damages awards far above any actual damages sustained. In *Rogers v. BNSF Railway Co.,*[li] for example, a federal jury awarded $228 million to a class of more than 45,000 truck drivers who used finger print scanning technology on a gate system to enter and exit rail yards. As BIPA provides for $5,000 in statutory damages for intentional and reckless violations

and $1,000 for each negligent violation, the jury found that BNSF violated BIPA 45,600 times (once for each class member) and, therefore, imposed the maximum penalty of $5,000 for each violation.

On the heels of a plaintiff-friendly ruling in February 2023 on the applicable statute of limitations, the Illinois Supreme Court held that a separate claim accrues under BIPA each time biometric data or information is collected or disclosed. In the interest of balance, it should be pointed out that businesses received a victory from the Illinois Supreme Court in March 2023, a case in which it held that a unionized employee had to have his claim resolved by the grievance and arbitration mechanisms of a collective bargaining agreement and not by filing a court action.

Nevertheless, numerous rulings have been rendered under the Illinois Biometric Privacy Act (BIPA), demonstrating the broad scope of the act. Amendments to BIPA in 2024 benefit businesses to a limited degree by allowing them to obtain written releases by electronic signature and limiting damages by restricting litigants to a single claim per section of the statute. However, the statutory damages remain harsh and still pose significant challenges for companies handling unauthorized biometric data.

Another example of legislation that is calculated to increase jury awards and likely to spur additional social inflation can be found in Illinois, where legislation, signed into law on August 11, 2023, allows punitive damage awards in wrongful death and survival actions. Previously, punitive damages were unavailable in Illinois for wrongful death actions and rarely available (only when expressly authorized by statute) in survival actions.[lii] Now, punitive damages are recoverable in Illinois for wrongful death claims pending or filed on or after August 11, 2023. Punitive damages still are not recoverable in actions against doctors, lawyers, and public entities.[liii]

Adding to the problem of new liabilities is the issue of disappearing defenses. The suspension or elimination of statutes of limitation (*e.g.,* for sexual abuse and assault cases) is an example of disappearing defenses. Since 2002, approximately 17 states have allowed for the assertion of sexual abuse claims that otherwise would be barred by statutes of limitation. In April 2023, legislation was enacted, eliminating the statute of limitations for childhood sexual abuse cases against institutions in one state. In 2017, the Maryland statute of limitations for such claims was expanded to allow plaintiffs to assert claims until age 38 instead of age 25.

Reviver statutes produced an onslaught of lawsuits by sexual misconduct victims against their alleged abusers and the various institutions alleged to be responsible for allowing the sexual misconduct to take place (*e.g.*, religious and educational institutions, sports teams, and social groups). This, coupled with plaintiffs' bar advertising efforts, had a significant effect on Boy Scouts of American litigation, with more than 82,000 claims against Boy Scouts of America and a resulting multi-billion settlement trust. There are sound reasons for statutes of limitation. Defending stale claims can be very challenging considering witness deaths, aged and infirm witnesses, faded or distorted memories, lack of surviving physical and documentary evidence, and the super-charged nature of the allegations. The abolition of or limitation on nondisclosure agreements adds fuel to social inflation.

L. Government Regulator and Agency Involvement in and Pursuit of Damages and Other Relief Through the Civil Justice System

An expanding universe of government entities acting as plaintiffs seeking recovery on tort theories has impacted social inflation. In this environment, it is not surprising that jurors are willing to view their mission as extending beyond the case before them. Too often, governmental entities extend well beyond their role as regulators and seek to use litigation proceeds to reduce government deficits and expand their domains.

In a report discussed further below, the American Tort Reform Foundation (ATRF) pointed out that the focus of the National Association of Attorneys General (NAAG) has shifted from promoting collaboration to promoting entrepreneurial litigation. It reports that NAAG has primarily turned into an organization with the goal of suing businesses for profit. NAAG has played a significant role in mass tort litigation, including opioids and tobacco. For instance, NAAG was involved in and received $15 million from last year's McKinsey & Co. opioids settlement.

The practice of attorneys general, regulators, and agencies working in concert with private lawyers to target a company or an entire industry through investigation and litigation is becoming more common. Apart from public nuisance, claims and investigations involving alleged unfair practices or false claims are often employed. Increasingly, cities, counties, and local officials have been suing corporations seeking recovery for costs associated with opioid and other addictions, climate change, litter, data privacy breaches, and other issues. At least two states have passed legislation curtailing this process: Illinois enacted legislation prohibiting governmental entities from becoming a party to opioid litigation without approval from the Illinois Attorney General, and Texas requires municipalities to use an open process when retaining outside counsel on a contingency fee basis.[liv]

When governmental entities act in concert with the plaintiffs' bar, questions may be raised regarding their regulatory and enforcement activities, undermining the public's confidence in the agency and raising concerns about conflicts of interests. Improper encroachment by governmental entities into the civil justice system also can foster unfairness.

Broad public policies are inherently political matters best left within the providence of the political branches for debate and resolution by public officials and the electorate. Courts are not the proper forum, and litigation is not the appropriate vehicle for setting public policy under public nuisance or other causes of action. Holding companies hostage to litigation costs, reputational damage, and the potential for nuclear verdicts associated with litigating such matters contributes to social inflation.

M. Judicial Hellholes – The Home of Nuclear Verdicts – Are Super Highways of Social Inflation

Many cases can potentially produce nuclear verdicts, but some jurisdictions are worse than others for defendants. The most dangerous jurisdictions have earned the reputation of being "judicial hellholes." Corporate policyholders and their insurers seek to avoid judicial hellholes wherever possible, but one characteristic of a judicial hellhole is that it allows carpet-bagging plaintiffs in and does not let defendants out.

The American Tort Reform Foundation (ATRF) recently released its report "Judicial Hellholes" (2024-25), which identifies judicial hellholes across the country.[lv] The ATFR 2024-25 report lists the following as the top ten Judicial Hellholes: the Philadelphia Court of Common Pleas and the Pennsylvania Supreme Court, New York City, South Carolina Asbestos Litigation, Georgia, California, Cook County, Illinois, St.

Louis, Missouri, the Michigan Supreme Court, King County, Washington, and Louisiana. On the "watch list" is Texas' Court of Appeals for the Fifth District (Dallas) with Madison and St. Clair Counties (plaintiffs' preferred jurisdiction for asbestos claims), Maryland High Court (rejecting proposed Rule 702 amendment), Tennessee (a new hotspot for abusive Americans with Disabilities Act litigation) listed as dishonorable mentions.[lvi]

The 2022-23 report[lvii] was very similar, listing Georgia, Pennsylvania (the state supreme court and Philadelphia Court of Common Pleas), California, New York, Illinois (Cook County), South Carolina (for asbestos litigation), Louisiana, and Missouri (St. Louis) as "judicial hellholes."[lviii] Florida's Legislature, New Jersey, and Texas' Court of Appeals for the Fifth District (Dallas) were placed on the "watch list."[lix] "Dishonorable mentions" included: the American Law Institute's adoption of the Restatement of "Consumer Contract" Law, Madison and St. Clair Counties in Illinois (plaintiffs' lawyers preferred jurisdictions for asbestos litigation), the Montana Supreme Court ruling that an insurer waived Montana's statutory cap on damages by providing excess coverage, and a Wisconsin Appellate panel's decision affirming a judgment despite unreliable expert testimony.[lx] Corporate Verdicts Go Thermonuclear (Marathon Strategies)[lxi] identifies Texas, Florida, California, Pennsylvania, Louisiana, Missouri, Delaware, Virginia, Georgia, New York, and Illinois as the top states of corporate nuclear verdicts from 2009 to 2022. This report concludes that state courts accounted for $108 billion in corporate nuclear verdicts compared to federal courts' $61 billion.

The ATFR 2020-23 report answers the simple question of what makes a jurisdiction a judicial hellhole: the judges. The report also explains what characteristics make jurisdictions problematic. This serves as a helpful checklist for corporate policyholders and their insurers.

> What Judicial Hellholes have in common is that they systematically fail to adhere to core judicial tenets or principles of the law. They have strayed from the mission of providing legitimate victims a forum in which to seek just compensation from those whose wrongful acts caused their injuries.
>
> Weaknesses in evidence are routinely overcome by pretrial and procedural rulings. Judges approve novel legal theories so that even plaintiffs without injuries can win awards for "damages." Class actions are certified regardless of the commonality of claims. Defendants are targeted not because they may be culpable but because they have deep pockets and will likely settle rather than risk greater injustice in the jurisdiction's courts. Local defendants may also be named simply to keep cases out of federal courts. Extraordinary verdicts are upheld, even when they are unsupported by the evidence, and may be in violation of constitutional standards. Hellhole judges often allow cases to proceed even if the plaintiff, defendant, witnesses, and events in question have no connection to the jurisdiction.
>
> Not surprisingly, personal injury lawyers have a different name for these courts. They call them "magic jurisdictions." Personal injury lawyers are drawn like flies to these rotten jurisdictions, looking for any excuse to file lawsuits there. When Madison County, Illinois, was first named the worst of the Judicial Hellholes last decade, some personal injury lawyers were reported as cheering, "We're number one, we're number one."
>
> Rulings in Judicial Hellholes often have national implications because they can: involve parties from across the country, result in excessive awards that wrongfully bankrupt businesses and destroy jobs, and leave a local judge to regulate an entire industry.
>
> Judicial Hellholes judges hold considerable influence over the cases that appear before them. Here are some of their tricks of the trade:
>
> PRETRIAL RULINGS

Forum Shopping. Judicial Hellholes are known for being plaintiff-friendly and thus attract personal injury cases with little or no connection to the jurisdiction. Judges in these jurisdictions often refuse to stop this forum shopping.

Novel Legal Theories. Judges allow suits not supported by existing law to go forward. Instead of dismissing these suits, Hellholes judges adopt new and retroactive legal theories, which often have inappropriate national ramifications.

Discovery Abuse. Judges allow unnecessarily broad, invasive and expensive discovery requests to increase the burden of litigation on defendants. Judges also may apply discovery rules in an unbalanced manner, denying defendants their fundamental right to learn about the plaintiff's case.

Consolidation & Joinder. Judges join claims together into mass actions that do not have common facts and circumstances. In situations where there are so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.

Improper Class Action Certification. Judges certify classes without sufficiently common facts or law. These classes can confuse juries and make the cases difficult to defend. In states where class certification cannot be appealed until after a trial, improper class certification can force a company into a large, unfair settlement.

Unfair Case Scheduling. Judges schedule cases in ways that are unfair or overly burdensome. For example, judges in Judicial Hellholes sometimes schedule numerous cases against a single defendant to start on the same day or give defendants short notice before a trial begins.

DECISIONS DURING TRIAL

Uneven Application of Evidentiary Rules. Judges allow plaintiffs greater flexibility in the kinds of evidence they can introduce at trial while rejecting evidence that might favor defendants.

Junk Science. Judges fail to ensure that scientific evidence admitted at trial is credible. Rather, they'll allow a plaintiff's lawyer to introduce "expert" testimony linking the defendant(s) to alleged injuries, even when the expert has no credibility within the scientific community.

Jury Instructions. Giving improper or slanted jury instructions is one of the most controversial yet underreported abuses of discretion in Judicial Hellholes.

Excessive Damages. Judges facilitate and sustain excessive pain and suffering or punitive damage awards that are influenced by prejudicial evidentiary rulings, tainted by passion or prejudice, or unsupported by the evidence.

UNREASONABLE EXPANSIONS OF LIABILITY

Private Lawsuits under Loosely-Worded Consumer Protection Statutes. The vague wording of state consumer protection laws has led some judges to allow plaintiffs to sue even when they can't demonstrate an actual financial loss that resulted from an allegedly misleading ad or practice.

Logically-Stretched Public Nuisance Claims. Similarly, the once simple concept of a "public nuisance" (*e.g.*, an overgrown hedge obscuring a STOP sign or music that is too loud for the neighbors, night after night) has been conflated into an amorphous Super Tort for pinning liability for various societal problems on manufacturers of lawful products.

Expansion of Damages. There also has been a concerted effort to expand the scope of damages, which may hurt society as a whole, such as "hedonic" damages in personal injury claims, "loss of

companionship" damages in animal injury cases, or emotional harm damages in wrongful death suits.

JUDICIAL INTEGRITY

Alliance Between State Attorneys General and Personal Injury Lawyers. Some state attorneys general routinely work hand-in-hand with personal injury lawyers, hiring them on a contingent-fee basis. Such arrangements introduce a profit motive into government law enforcement, casting a shadow over whether government action is taken for public good or private gain.

Cozy Relations. There is often excessive familiarity among jurists, personal injury lawyers, and government officials.[lxii]

N. ESG and Sustainability

Environmental, social, and governance (ESG) factors – sometimes called sustainability – have profoundly impacted insurers and policyholders.[lxiii] For this commentary, five points are worth making:

1. First, the "all-of-government" approach to ESG taken by the Biden Administration and many states contributes to social inflation in a number of ways, including generating new claims and claim types, such as greenwashing claims
2. Second, the Second Trump Administration is taking a decided different approach to ESG, abandoning the "all of government" approach in favor of an environmentally responsible "drill baby drill" approach and replacing diversity, equity, and inclusion ("DEI") policies with a merits-based approach to hiring.
3. Third, although federal policies and regulations are important, companies must comply with state and international laws in the states and countries in which they do business. Insurers must also comply with state insurance departments of insurance.[lxiv] So-called red states have enacted and proposed anti-ESG legislation, and blue states have enacted proposed pro-ESG legislation, so ESG considerations may change in direction and quantum but will not disappear. Indeed, compliance with environmental, hiring, and other laws will nonetheless be required under whatever name is used.
4. Fourth, ESG pressures are not only being applied by external forces, but increasingly, internal forces within companies are also seeking to exact change. The reality is that Millennials and Generation Z individuals are now dominant members of the workforce and management as they replace baby boomers. The educational, experiential, methodological, and demographic differences between generations are undoubtedly having a large influence on internal decision-making. Not only have corporations adjusted to create a workplace that attracts and retains this younger talent, but these workers are also increasingly becoming corporate decision-makers.

   Thus, corporations are now becoming entities that will effect change rather than resist change. The "great resignation" and "great attrition" following the pandemic have impacted industries, including the insurance industry workforce, making companies more responsive to employee values and providing employees with greater leverage. Simply stated, companies are not opposing ESG forces and other various factors fueling social inflation in the same way or with the same intensity as they had previously. Stated differently, younger individuals are impacting corporate decisions as well as decisions in the jury room.
5. Fifth, in recent years, insurers have been reviewing policyholder ESG policies and performance with increasing frequency and in greater depth. Many believe that policyholders with ESG awareness had a better risk profile than those not focused on ESG or policyholders with poorly

> conceived ESG policies or strategies. Insurers also recognized that when a policyholder's ESG awareness becomes ESG activism, additional risks are presented, resulting in other claims against the policyholder, including securities actions and greenwashing claims.

To be sure, the regulatory and policy landscape has changed appreciably in recent months, and many companies have eliminated, phased out, or dialed back their ESG and DEI programs. Nonetheless, insurers and companies must comply with federal, state, local, and international law and make decisions consistent with their business interests.

O. COVID-19 Pandemic

Court closures and litigation delays associated with COVID-19 and governmental shutdown orders effectuated a short-term abatement in social inflation. Data released in January 2022 shows that the number of bench trials dropped by 39 percent, and jury trials dropped by 64 percent in 2020.[lxv] At least some antidotal reports suggest the delay in cases moving forward has resulted in some plaintiffs' settlement demands being more reasonable. In such instances, justice delayed may actually have been justice achieved. As companies and courts emerged from the pandemic, social inflation emerged on steroids with a flurry of post-pandemic nuclear verdicts.

Although the COVID-19 business interruption coverage litigation produced thousands of cases (with only a few policyholder victories), it does not appear to have produced significant social inflation. More important is any lasting or long-term impact the pandemic will have on jurors and their proclivities. Losing friends and family members from the pandemic, witnessing illness of friends and family members, and experiencing illness themselves may have a lasting impact on jurors. The impact of pandemic-related closures and experiences must be monitored closely.

Part 5: The Unprecedented Tripple Barrel Threat of Social Inflation, Economic Inflation, and Greenflation

The United States recently has experienced the highest price level inflation in more than 40 years. On July 13, 2022, the U.S. Department of Labor reported that consumer prices increased 9.1 percent compared with a year earlier, representing the largest yearly increase since 1981. The next day, the U.S. Department of Labor reported that the U.S. producer price index increased 11.3 percent — 18 percent for goods and almost 8 percent for services.[lxvi] Although price level inflation has decreased, predictions that price level inflation was transient turned out to be inaccurate. The consumer price index for the 12 months ending in February 2025 stood at approximately 2.82 percent.

The current rate of inflation is not outside the norm that corporate policyholders and insurers have confronted historically. However, for a period of three or four years, economic inflation was a significant concern. All other things being equal, price level inflation increases the costs of defending cases, increases settlement values, and produces higher jury verdicts. As Julian James, Sompo International's CEO of EMEA, recently pointed out:

> Looking at the economy, we're entering a period of high inflation and if we think about what that means, it means the cost of claims is going to increase, it means the cost of rebuilding basic things is going to increase, and it means that companies themselves are going to have to weather the impact of those inflationary demands.[lxvii]

James also noted the impact inflation will have on insurers themselves in terms of their reserves, assets, solvency requirements, and capitalization in times of high inflation.

Supply chain constraints have produced shortages of lumber and other building materials, driving up the costs of property repairs. Construction costs increased significantly reflecting an increase in costs of key building materials as well as energy, transportation, and labor costs. Shortages of microchips have also increased the costs of building and repairing properties and other goods that incorporate chips.

The Medical Consumer Price Index has outpaced the overall Consumer Price Index, and medical costs for injured plaintiffs influence liability insurance losses. Although recent advances in medical treatments for trauma victims (such as skin grafts for burn victims, robotic exoskeletons, and advanced prosthetics) have extended longevity and improved patients' quality of life, they have also been known to increase the cost of care.

Shortages impose a reduction in supply and put upward pressure on prices. Shortages of numerous items such as baby formula, food items, and other consumer and producer goods have been widely reported. In addition, some insurance policies, by their express terms, increase limits based upon increases in price levels.

There likely is a synergistic effect between many of the factors driving social inflation and price level inflation. For example, an inflationary environment will likely increase the size of verdicts, increase the number of nuclear verdicts, and create expectations of large and continuing price increases in the minds of jurors, which can be expected to be factored into their awards. As previously noted, media reports of multi-million and multi-billion dollar verdicts have desensitized jurors and, to some extent, have normalized large awards. Similarly, media reports of significant price increases likely will result in even larger verdicts to account for jurors' inflationary expectations.

Many economists subscribe to John Maynard Keyes' view that some wages and prices are "sticky" downwards, meaning that prices increase quickly when demand is increasing but decrease slowly when demand is decreasing.[lxviii] It is not unreasonable to believe that jury verdicts will rise quickly to keep up with and even outpace inflation. A surge in defense costs, settlement values, and jury verdicts may result from the combination of price inflation and social inflation. Some suggest that social inflation is "sticky downwards" in line with Keynesian economics.

The most direct effect of high inflation on insurance is upward pressure on claims verdicts and settlements, potentially leading to losses beyond those contemplated by insurers when issuing policies and setting premiums. Greater precision will be required to account for inflation in connection with reserving and pricing, as elevated price levels increase the stakes of accurately accounting for the impact of inflation. It is likely more complicated than simply plugging in a new number for the inflation rate or the proper discount rate. Inflation can impact claims frequency and severity. The rising cost of claims can erode underwriting profits in the current year and increase liability through reserve or INBR deterioration. Inflationary concerns—both price level and social inflation—require careful scrutiny to ensure the adequacy of reserves.

Inflation impacts each line of insurance differently. Property insurers and aviation insurers, for example, must pay attention to the accuracy of declared values. There can be a large delta between declared values and replacement costs attributable to inflation.

Inflation increases defense costs and presents particular concern for lines of insurance that contain defense obligations. Directors and officers liability, professional indemnity, auto, and general liability policies, for example, are particularly susceptible to inflationary pressures through rising legal defense costs as well as higher settlement values and nuclear verdicts.

Law firms are required to increase rates to attract and retain the caliber of attorneys needed to provide the expected level of service to clients. Similarly, internal law departments are required to pay more for legal talent in this highly competitive and mobile market. Top legal talent and even mediocre talent are more expensive in the current market.

On the underwriting side, inflation generally imposes upward pressure on premiums. This is particularly true as risks and uncertainties make policyholders unlikely to self-insure. Insurers are called upon to examine contract language and evaluate whether changes in contract language are warranted or whether the terms of coverage otherwise should be changed to account for inflation. High inflation may alter the volume mix of policy types issued by an insurer and impact the industries or individual policyholders an insurer is willing to underwrite. Some insurers have turned to index-based policy wording for contractors for policy limits and sub-limits, such as construction cost indexing and factoring in delay in start-up or completion of projects.

Increases in reinsurance costs cannot be ignored. Inflation may impact the type of reinsurance cover to secure as well as reinsurance pricing and availability. Some suggest that excess of loss cover may limit exposure to significant inflation in terms of an increase in claims severity. Others point out that aggregate covers can more effectively manage inflation associated with claims frequency.

High price level inflation impacts other aspects of insurer operations and activities. Inflation may result in real and even nominal reductions in investment income and may impact the availability and cost of capital. Elevated price inflation will likely impact insurers' investment strategies and investment portfolios.

Like many other companies, insurers are facing challenges in retaining a vibrant workforce. Insurers have experienced difficulties in attracting Millennials and younger workers to join the insurance industry workforce. These dynamics present a problem given the number of people expected to retire in the near term.[lxix] Rising gross wages and shrinking net wages may exasperate these issues and fuel additional turnover and position vacancies.

The emergence of greenflation is the third barrel of the triple crown. With the recent intense focus on ESG/sustainability, insurers and their corporate policyholders are now looking down a "triple barrel" of social inflation, price level inflation, and greenflation. The "E" or environmental component of ESG has several facets, perhaps the most significant of which has been the effort to reduce greenhouse gas emissions and reach carbon neutrality.

Greenflation reflects the increasing costs associated with "transitioning" to a green economy and striving to reach carbon neutrality. In actuality, greenflation is not an additional form of inflation but a component of price-level inflation. In other words, the increasing costs of energy and the resulting increases in the costs of many products are significant components of price-level inflation. The significant shift in policy under the Second Trump Administration going away from the "all of government" approach to ESG of the Biden Administration figures to reduce greenflation significantly. However, legislation in states such as New York, Connecticut, and California will prevent greenflation from disappearing.

Part 6: Social Inflation Aimed Directly at Insurers

The second prong of social inflation involves factors aimed directly at insurers. Policyholders generally believe that this prong benefits them. In actuality, it may advance policyholders with respect to a particular coverage dispute, but the collective impact boomerangs back on policyholders by driving up premiums and costs of doing business, burdening the civil litigation system, and adding fuel to the social inflation fire

that is ablaze. Comprehensive treatment of this topic would require an extensive discussion, but this commentary will merely identify some of the issues.

Some courts' unduly broad interpretation of insurance coverage and jurors' liberal application of insurance policy provisions mightily add to this social inflation factor. Rulings such as multiple policy triggers, "all sums" allocation, and construction of the "temporal" component out of the term "sudden" are some examples.

Court decisions expanding insurance bad faith law further contribute to social inflation. Additionally, legislation, such as the "New Jersey Insurance Fair Conduct Act" ("IFCA")[lxx] signed into law in January 2022, may contribute to social inflation. The IFCA creates a cause of action for insurance bad faith in the handling and payment of claims for uninsured and underinsured motorist benefits.

Under this statute, an individual injured in a motor vehicle accident who is entitled to uninsured or underinsured motorist coverage under an insurance policy may sue an insurer that has "unreasonably denied" or unreasonably delayed payment of benefits. A successful insured shall be entitled to actual damages caused by the violation of the act, including three times the applicable coverage amount together with interest, reasonable attorney's fees, and reasonable litigation expenses.

The expanding number of time and policy limit demands has also contributed to social inflation. Plaintiffs are increasingly using such demands in an attempt to capitalize on the atmosphere and fear perpetuated by nuclear verdicts and to divide insurers and policyholders. The frequency and amount of large verdicts are making it increasingly difficult to not consider the potential for a nuclear verdict in some cases when evaluating the appropriateness of these demands.

Defense costs exposures have surged over the decades due to an increase in the number and severity of claims, inflated claims, and claimant expectations, and to counter well-funded plaintiffs. Sophisticated policyholders' counsel have been more aggressive and successful in having insurers pay for independent counsel. This contributes substantially to the high costs of defending lawsuits incurred or reimbursed by insurers.

With greater frequency, insurers face exposure for paying the attorneys' fees incurred by the policyholder in coverage actions in the event that the policyholder is deemed to be a prevailing party, whether by statute, court rule, or case law. This runs contrary to the American Rule on attorney's fees, under which each party pays its own counsel.

Efforts such as the policyholder advocacy piece that is masquerading as the American Law Institute's Restatement of the Law of Liability Insurance are viewed by many as an improper and adverse development for insurers. On several important points, the document actually misstates and threatens to distort insurance law.[lxxi] Legislatures in at least two states, Kentucky and Indiana, passed resolutions opposing the Restatement, and several others have taken steps to inhibit its use based on conflicts with existing state insurance law.

Policyholders are, with increasing frequency, also seeking to hold insurance adjusters personally liable for claims determinations under various state insurance and consumer protection statutes and bad faith law. Whether policyholders are seeking to destroy diversity jurisdiction, attempting to intimidate insurance adjusters or the insurance industry, wishing to infuse division between insurers and their employees, looking for litigation leverage, or attempting to expand their potential recovery, such tactics are improper and should be vigorously opposed by insurers.

Part 7: Countering and Controlling Social Inflation

The impact of social inflation has been felt across multiple lines of coverage, including commercial auto, medical malpractice, and professional liability coverages, primary, umbrella, and excess general liability coverage, and directors and officers liability coverage.[lxxii]

Insurance plays a vital role in the economy – fostering entrepreneurial risk-taking, research, product development, the availability of goods and services, and risk sharing. The unavailability of insurance would bring the economy to a halt. Yet, this critical sector of the economy constantly is under siege from claimants, policyholders, courts, governmental regulators, and media.

A. Employing the Talents of Insurance Professionals to Contain and Control Social Inflation

Insurers recognize that social inflation is a multifaceted problem that requires the expertise of claims, legal, underwriting, actuarial, data analytics, loss control, and marketing to understand and formulate appropriate responses. Fortunately, insurers endeavor to employ bright and talented people who have always found ways to meet the challenges presented. Insurers have several tools to address social inflation.

On the underwriting side, insurers may assess and better quantify the risks; raise premiums to account for the risks; lower limits, including sub-limits (where appropriate); draft policies with appropriate terms, conditions, and exclusions to contain the risks; exercise underwriting discipline; employ artificial intelligence and technology; identify macro-factors that can influence underwriting strategy; and explore new and non-traditional data sources such as economic, public, and proprietary data.

On the claims side, artificial intelligence, data, and technology can also be employed. Earlier and better use of mock juries and jury research can help in valuing cases, evaluating potential outcomes, selecting jurors, and formulating arguments and strategies to counter or neutralize applicable social inflation factors in the courtroom.

When employing mock juries, it is important to consider appropriate variables and make sure that the realities of the jurisdiction are taken into account, as well as fairly portraying the evidence and arguments likely to be adduced by plaintiffs. Care must be used to ensure that the views and beliefs of defense counsel do not undermine or bias the results. There are several options that can be used in addition to or in lieu of full mock jury trials, such as focus groups, shadow juries, surveys, and polls to test themes, arguments, and evidence and to create successful narratives and counternarratives for trial.

Insurers are relying upon an expanding scope of data to include current and historical activity by examining internet activity and social media trends that shed light on behavioral activity. Insurers are often well-served by involving coverage counsel to address social inflation drivers such as policy limit demands and bad faith risks, evaluate the impact of covered versus non-covered claims, and identify issues and protect the interests of the insurer throughout the pendency of the litigation.

Prompt and accurate claims and case evaluation by claims examiners and counsel is critical. Some attorneys' practice of maintaining that a claim is lacking in merit or fully defensible for months or years only to advocate paying large settlement amounts or caving late in a case was always troubling. It is particularly dangerous in times of social inflation. It is important to encourage a culture of no surprises and candid evaluation and to avoid adopting a kill-the-messenger mentality.

On both the claims and underwriting sides, training personnel and retaining skilled counsel and experts remain important. Internal communication plays a pivotal role in quickly identifying social inflation factors

and formulating strategies to address them. Policyholders similarly employ bright and talented people to evaluate their exposures, limit or eliminate them, and work on strategies to minimize exposures. Insurers will continue to work with policyholders to employ cogent loss control, safety, and best practices to avoid and limit liability even in an environment supercharged with social inflation.

Educating policyholders and seeking ways for insurers and policyholders to work together in identifying and responding to social inflation is more important than ever. Understandably, insurers are emphasizing active safety, quality control programs, and loss control.

Insurers and defense organizations have created and participated in seminars and training programs to promote awareness of social inflation and to develop ways to combat it. For example, DRI's Center for Law and Public Policy recently created a social inflation task force. Many insurers have assigned specific individuals to identify and respond to issues associated with social inflation.

In terms of the reinsurance market, the general wisdom appears to be that, all other things being equal, social inflation causes reinsurers to have a greater affinity for reinsuring commercial risks on a proportional as opposed to non-proportional basis.

What is critical to understand is that social inflation is dynamic and requires continual attention.

B. Engaging in an Expanded, Well-Funded, and Sustained Battle for Meaningful Tort Reform Across the Country

The factors endemic to the U.S. civil justice system and changes in the legal landscape and society have been the targets of the protracted battle for sensible tort reform. Although some meaningful tort reform measures have improved affairs in some jurisdictions and for some types of cases, they have not had a significant impact in others. Still, other jurisdictions have dialed back tort reform or have seen provisions struck down by courts.

Suffice it to say that tort reform has been helpful, but it has not been a panacea. At least from the perspectives of defendants and insurers, the civil justice system remains highly flawed.[lxxiii] Companies and insurers have been engaged in efforts to improve the civil justice system for decades. The results have been mixed and countered by a well-funded, well-incentivized, resourceful plaintiffs' bar. Fighting for fairness in the civil justice system is a continuing battle that must be waged wherever and whatever unfairness exists. As significant as social inflation has been, the situation would be considerably worse in the absence of these efforts and the positive changes they have achieved.

The most meaningful tort reform must be done at the state level. The pursuit of tort reform has resulted in some tort reform and preemption arguments at the federal level. Most federal relief has come from advocacy in cases resulting in the U.S. Supreme Court and other rulings by other courts and from amendments to the Federal Rules of Civil Procedure. Insurers and their corporate policyholders should capitalize on opportunities at the federal level. One of the leading candidates currently is legislation or amendment of the Federal Rules of Civil Procedure to require meaningful disclosure of litigation funding.

The following table highlights some of the significant events impacting the United States civil justice system since the 1950s. It is derived, in part, from a timeline on the U.S. Chamber Institute for Legal Reform website and is provided for illustrative purposes.[lxxiv]

1950s	Significant rise in pain and suffering damage awards
1960s	Adoption of strict product liability

1963	Amendment to Rule 23 of the Federal Rules of Civil Procedure to permit opt-out class actions in federal cases
1975	California adopted the Medical Injury Compensation Act, which limits noneconomic damages (pain and suffering) to $250,000 against health care providers based on professional negligence. More than half of states now place limits on damages for pain and suffering in medical liability cases or all personal injury lawsuits.
1970s	Partial no-fault insurance laws adopted for auto accidents in several states and the onset of asbestos-related litigation
1977	U.S. Supreme Court invalidated a state's blanket ban on attorney advertising, paving the way for attorney television, radio, and print ads
The early 1980s	Plaintiffs' lawyers began to use Alien Tort Statute to assert claims against corporations for conduct taking place outside the U.S.
Mid-1980s	Several states enact tort reform that includes items such as statutes of repose establishing outer time limits on bringing product liability claims, abolishing or limiting joint and several liability, providing relief to innocent product sellers, and establishing punitive damages reforms.
1986	National Childhood Vaccine Injury Act was enacted to reduce the liability of vaccine makers and create a federal no-fault system for compensating vaccine-related injuries and deaths.
1990	The first wave of cases in which the U.S. Supreme Court addresses punitive damages. In various decisions, it: expressed concern over punitive damages running wild; warned that unlimited jury/judicial discretion in awarding punitive damages presents constitutional issues; required judicial review of the size of a punitive damage award; and established guideposts for courts to evaluate whether a punitive damage award is unconstitutionally excessive
1993	U.S. Supreme Court raised the standard for admitting expert testimony by directing federal district court judges to serve as gatekeepers to ensure the reliability of expert evidence and exclude "junk science" expert testimony, which subsequently has been followed by most states
1994	State attorneys general partnered with plaintiff contingency fee lawyers on tobacco suits. Years later, such partnering was

	eliminated by an executive order signed by President George W. Bush that remains in effect
1994	Congress enacted the General Aviation Revitalization Act establishing an 18-year statute of repose for lawsuits against manufacturers of noncommercial general aviation aircraft and component parts, which is credited for reviving the industry
1994	Congress enacted section 524(g) of the Bankruptcy Code, which established a statutory procedure for dealing with future personal injury asbestos claims against a bankrupt company
1995	Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA) to limit abusive securities lawsuits, which was later strengthened
Late 1990s	Asbestos litigation reaches "crisis" level
Late 1990s – early 2000s	Alaska, Florida, Mississippi, Texas, Alabama, Tennessee, Wisconsin, South Carolina, and Oklahoma were among the states to enact comprehensive legal reforms. Tort reform was struck down in Illinois and Ohio
2005	Class Action Fairness Act enacted by Congress expanded federal jurisdiction over multistate class and mass actions seeking over $5 million and limiting lawyer fees for token/coupon settlements.
2005	U.S. District Court Judge Janis Graham Jack for the Southern District of Texas, who presided over federal silica multidistrict litigation, found that all but one of 10,000 silica cases aggregated for pretrial purposes were based on "fatally unreliable" diagnoses. Judge Jack stated that the claims "were driven by neither health nor justice: they were manufactured for money." This brought greater scrutiny to abuses in mass tort litigation
2007-2009	U.S. Supreme Court tightened liberal pleading standards somewhat, allowing courts to dismiss a complaint if it does not set out a "plausible" claim
2011	U.S. Supreme Court enforced class action waiver in consumer arbitration agreement, relying upon the primacy of federal arbitration law to compel arbitration
2012	Ohio enacted asbestos trust transparency law requiring asbestos plaintiffs to file bankruptcy trust claims before trial and allowing defendants to demonstrate alternative causation for plaintiffs' injuries. Similar laws have been enacted in other

	states such as Michigan, Kansas, Mississippi, North Dakota, and South Dakota
2013	U.S. Supreme Court rendered multiple decisions holding that the Alien Tort Statute does not apply extraterritorially except in limited circumstances, strengthened class certification standards by rejecting a proposed class action that featured an improper damages model, and reaffirmed the right of contracting parties to pursue resolution through arbitration including for claims alleging violations of federal law
2015	Amendments to the Federal Rules of Civil Procedure required discovery to be "proportional to the needs of the case" and authorized courts to enter orders shifting the cost of discovery to the requesting party and many states have since followed
2016	U.S. Supreme Court ruled that plaintiffs must allege a concrete injury to have standing to bring a lawsuit. A bare allegation of a statutory violation is inadequate to show injury-in-fact
2017	U.S. Supreme Court restricted the ability of plaintiffs to file cases in courts they view to be most favorable by generally limiting court jurisdiction over a business defendant to its state of incorporation or principal place of business unless there is a connection between the specific claim and another location (such as place of injury)
2017-18	Several groups renew a proposal to amend the Federal Rules of Civil Procedure to require the disclosure of third-party litigation funding arrangements in any civil action filed in federal court. Wisconsin required disclosure of litigation funding
2018-19	Five states repudiate the new Restatement of the Law, Liability Insurance and another adopts broad legislation instructing courts that they are not bound to follow Restatements
2019	U.S. Food and Drug Administration and American Medical Association expose that misleading lawsuit advertising has scared patients to stop taking needed medications, leading to injuries and deaths. Tennessee and Texas enact legislation prohibiting common deceptive practices in plaintiff attorney advertising. In addition, the Federal Trade Commission sends warning letters to law firms and lead generators that have run television ads soliciting clients for lawsuits against drug and medical device makers. The FTC states that the ads could be deceptive or unfair for misrepresenting the risks of certain products and not for basing the claims on competent and reliable scientific evidence

A couple of examples of recent, meaningful tort reform are worth noting. The first is a commercial auto tort reform bill (H.R. 19) passed in Texas effective September 1, 2021, aimed at curbing reptile theory and other abuses in commercial vehicle cases.[lxxv] The act provides, among other things, that on a defendant's motion, courts must bifurcate a trial into two phases.[lxxvi] In the first phase, the trier of fact determines liability for the accident and compensatory damages.[lxxvii]

If and only if the trier of fact finds the defendant driver liable can the trial proceed to consider vicarious liability against a motor carrier and exemplary damages in the second phase. The legislation limits the admissibility of evidence of a defendant's failure to comply with a regulation or standard in Phase 1 of a bifurcated action and contains other provisions.[lxxviii]

In 2022 and 2023, Florida enacted substantial tort reform measures to bring balance to the litigation environment and in an attempt to lose its status as a judicial hellhole. A property insurance reform bill was signed into law in Florida on December 16, 2022, which was designed to help stabilize the property insurance market. Florida Senate Bill 2-A:

- eliminates the one-way attorney fees recovery on property insurance claims that ran in favor of policyholders;
- addresses policyholder assignment of post-loss benefits abuse that has plagued the state;
- enhances the Office of Insurance Regulation's ability to complete market conduct examinations of property insurers following a hurricane to hold insurance companies accountable and prevent abuse of the property appraisal process;
- reduces timelines for insurers to pay policyholders;
- specifies conditions to mandatory binding arbitration; and
- commits additional funding to provide temporary reinsurance support, building upon legislation (S.B. 2-D) passed earlier in the year.[lxxix]

In March 2023, HB 837 became law. Among other things, the law provides that in any action in which attorney fees are determined or awarded by the court, there is a strong presumption that a lodestar fee is sufficient and reasonable. This presumption may be overcome only in a rare and exceptional circumstance with evidence that competent counsel could not otherwise be retained. The law also limits the assignability of attorney fees awards and fees awarded in declaratory judgment actions where coverage was denied to those incurred in the action brought under this chapter for declaratory relief to determine coverage of insurance issued under the Florida Insurance Code. It further provides that a defense offered by an insurer pursuant to a reservation of rights does not constitute a coverage denial of a claim and reduced the statute of limitations on an action founded on negligence from four years to two years.

In addition, HB 837 states that an action for bad faith involving a liability insurance claim, including any such action brought under the common law, shall not lie if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of a claim which is accompanied by sufficient evidence to support the amount of the claim. If an insurer does not tender the lesser of the policy limits or the amount demanded by the claimant within the 90-day period provided, the existence of the 90-day period and that no bad faith action could lie had the insurer tendered the lesser of policy limits or the amount demanded by the claimant is inadmissible in any action seeking to establish bad faith on the part of the insurer. If the insurer fails to tender pursuant within the 90-day period, any applicable statute of limitations is extended for an additional 90 days.

Mere negligence alone is insufficient to constitute bad faith. The insured, claimant, and representative of the insured or claimant have a duty to act in good faith in furnishing information regarding the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim. This duty does not create a separate cause of action but may be considered by the trier of fact to reduce the amount of damages awarded against the insurer. It limits recovery to policy limits where two or more third-party claimants have competing claims arising out of a single occurrence where the insurer interpleads or arbitrates in accordance with the act.

The Florida law also addresses letters of protection and evidence of medical expenses. It limits damages that may be recovered by a claimant in a personal injury or wrongful death action for the reasonable and necessary cost or value of medical care rendered and also may not exceed the sum of the following:

> (a) amounts actually paid by or on behalf of the claimant to a health care provider who rendered medical treatment or services;
>
> (b) amounts necessary to satisfy charges for medical treatment or services that are due and owing but at the time of trial are not yet satisfied; and
>
> (c) amounts necessary to provide for any reasonable and necessary medical treatment or services the claimant will receive in the future.

HB 837 addresses comparative fault by providing that any party found to be greater than 50 percent at fault for their own harm may not recover any damages. This subsection does not apply to an action for damages for personal injury or wrongful death arising from medical negligence. The law now allows insurers to file an interpleader action where the damages of multiple claimants exceed policy limits but does not provide for interpleader for multiple policyholder situations.

In advance of HB 837's effective date, Plaintiffs inundated the Florida court system with over 280,000 lawsuits filed between March 1 and March 23, 2023, which will create a backlog of cases for some period of time. However, HB 837's efforts are beginning to take effect and improve the litigation dynamics in Florida.

Many other tort and litigation reforms and proposal activities exist throughout the country. The U.S. Chamber of Commerce Institute for Legal Reform has a publication that identifies many of the problems in the U.S. civil justice system requiring reform, highlights some meaningful reforms, and provides many suggestions for legal reform. [lxxx]

C. Educating the Public and Investing in Large and Enduring Public Messaging to Counter Plaintiffs' Efforts and Advertising

Education and public messaging are functions that require continuing efforts and activities. Insurers have been educating their staff on social inflation and have been educating their policyholders in earnest more recently. It is important to continue working with and educate policyholders. As discussed above, insurers, corporate policyholders, and trade associations are greatly outspent and out-messaged by the plaintiffs' bar. Considerably more investment in cogent public education and messaging is required.

D. Defeating Reptilian Tactics and Containing Social Inflation in the Bar and Courtroom

Corporate policyholders, insurers, and their counsel – at least to some extent – hold the ability to limit nuclear verdicts and reduce social inflation in their own hands. Fundamentally, ensuring that a stable of

highly qualified counsel and firms are engaged to protect and promote their interests through reasonable, competitive compensation and devoting the resources needed to adequately evaluate and defend cases—including providing for reasonable budgets, jury research, and scientific studies—are essential requirements. Simply stated, allowing the plaintiffs' bar to possess an economic advantage is not a sustainable state of affairs.

There are many steps that corporate policyholders, insurers, and their counsel may take to limit the effectiveness and ultimately defeat reptilian tactics employed by the plaintiffs' bar.[lxxxi] More broadly, many of these efforts can also help to contain social inflation.

Reptile theory is based, in large part, upon asking the jurors to consider their interests in safety, the interests of society in safety, and the conscience of society. In its early years, reptile theory provided plaintiffs' counsel with the advantage of surprise. Defendants were caught off guard and sometimes even unaware of its use at first. Once defendants caught on to the use of reptile theory, there was still a delay in effectively responding to the tactics.

The defense bar appears to have caught up with and become more adept at countering reptile theory. Remarkably, many judges were unaware that reptilian tactics were being unleashed in their courtrooms for a long time, and some judges still may not be fully cognizant of reptile theory. Accordingly, exposing the strategy and educating courts about the impropriety of reptilian tactics remain important functions for defense counsel.

There is no one-size-fits-all solution to limit reptilian tactics or social inflation, but there are many things defendants and their counsel can do to contain them. Defendants must identify and be prepared to address the strategy and tactics in the pretrial, discovery, and trial phases, employ the traditional tools available to defendants in civil litigation, adapt their strategies, and apply these tools to succeed. Here are some overarching themes and strategies that defendants may deploy, as appropriate, in a particular case.

1. Prompt and Proper Case Evaluation

Prompt case evaluation and early identification of cases with high nuclear verdict potential are more critical activities than ever. Early settlements of such cases on terms acceptable to defendants and their insurers, where achievable, often provide the most cost-effective resolution—even though the wisdom of such settlements may not be fully appreciated because the verdict alternative will never be known and because the parties move on to other cases and claims.

Strive to put a dollar value on a case or claim early and revisit it as the matter evolves. Proper "post-mortem" analysis of other cases involving nuclear verdicts may also yield a better understanding of them. Evaluation should extend to identifying parties that may bear some responsibility for a loss or as to which the risk may be spread or transferred.

2. Taking Appropriate Actions to Keep Out Inflammatory Evidence

The best way to defeat reptilian tactics is not to allow them into the courtroom. Motions to dismiss, motions to strike, motions *in limine*, objections to discovery, and motions for protective orders provide vehicles to limit the scope of discovery and evidence to the particular issues and incidents at issue in the case. They also foreclose or limit the discovery of extraneous issues. During discovery, counsel may also object to reptile theory-based discovery, prepare deposition witnesses for questions designed to further the plaintiffs' use of reptile theory-based tactics, and educate the court through briefs along the way so a judge will be aware of reptile theory by the time motions *in limine* are filed before a trial. To the extent a

court nonetheless allows this type of evidence, a defendant can decide what affirmative or rebuttal evidence it wishes to adduce to counter the reptile theory-based evidence.

It is worth elaborating on the importance of filing motions *in limine* and zealously pursuing to exclude improper arguments, evidence, and anticipated misconduct by the plaintiff's counsel before trial. Motions *in limine* have the advantage of educating the judge and making arguments outside the presence of the jurors. Obtaining rulings will also assist defendants in preparing for trial and marshaling evidence to counter the reptilian theory to the extent it is allowed to enter the courtroom.

Delayed or deferred rulings usually are friends of plaintiffs' counsel because they open the door for plaintiffs to adduce evidence—recognizing it may be more difficult for defendants to make a full argument and less likely that a court may give full consideration to such arguments during the heat of trial with a jury empaneled. Plaintiffs generally are not concerned with limiting instructions, as they know such instructions are not a panacea for venom already injected into jurors' minds. Also, courts and defendants may be more hesitant to interpose objections or interrupt arguments at trial before the jury.

Additionally, avoiding *in limine* rulings increases the chances that a plaintiff will be able to prevail on an appeal of a verdict that is the product of reptilian tactics based upon a defendant's failure to properly preserve an issue for appeal, notions of broad latitude at trial, and application of the harmless error doctrine. Some lost motions may be attributable to failing to educate the court on what reptile theory is or precisely explaining what evidence or types of evidence should be excluded and why their admission would be improper. Generally, the more specific and detailed the motion, the more likely it is to be successful. Counsel with awareness and repeated experience with countering reptile theory-based tactics and strategy is invaluable.

3. Adduce Evidence to Activate the Defense Reptile in Jurors

It is important to remember that defendants also can use reptile theory-based tactics in their favor. Fear and survival instincts—particularly those of so-called "defense jurors"—can be triggered in ways favorable to the defense. For example, fears associated with lawsuits and large awards, such as undermining the quality and availability of health care, may be deployed in a medical malpractice action.

In other cases, pointing out the harms of large awards on the economy, in terms of costing people jobs, increasing prices, and suppressing the introduction and development of products and services may be a beneficial approach.

4. Emphasizing the Importance of Following the Law and Evidence

If the court improperly allows the plaintiff to argue the role of jurors in keeping society safe, be prepared to explain to jurors what their proper role is and the importance of jurors being objective triers of fact based upon the specific evidence in the case before them, and the harm to society that would emerge from jurors stepping outside their appropriate role.

Point out the societal problems that would be created by the conduct or rules advocated by plaintiffs in order to resonate with jurors. Be sure to get the defendant's theory of the case and the defense message out early and often.

Show jurors that abstract safety rules and notions of corporate responsibility are inadequate substitutes for the required proofs. Emphasize appropriate details of a case as well as the evidence. Hammer home the deception in the plaintiff's use of generalizations and oversimplification. Continually direct the focus of witnesses and jurors back to the defendant, the plaintiff, the issues in the case, and the proofs and lack of proofs in the case.

Demonstrate throughout the trial that the plaintiff's reliance upon general notions of safety is nothing more than an attempt to deceive jurors and obfuscate the plaintiff's lack of evidence necessary to prove essential elements of the claim, such as failure to establish the standard of care, lack of evidence of any breach of the standard, and lack of causation and lack of damages. Jurors may not appreciate being manipulated by plaintiffs, which may cause a plaintiff's plan to backfire.

5. Humanize the Defendant

Remind jurors the defendant is compassionate and just like them. It is important to humanize the company and its witnesses throughout the trial. Demonstrate the humanity of the defendant.

Where appropriate, put the jurors in a position to understand the attributes of the individuals and to view the actions and statements from the perspective of the individuals taking or making them. The more jurors relate to the defendant, the less susceptible jurors will be to reptilian tactics.

6. Placing Jurors in the Defendant's Shoes

In the event that the court allows the plaintiff's improper use of reptilian tactics, attempt, wherever possible, to have jurors place themselves in the shoes of the defendant. Show that rules of evidence, the burden of proof, meeting the burden of proof, and proving elements of claims are important requirements to prevent jurors and others from being victimized.

Provoke anger or other emotions related to being falsely accused, wrongfully hauled into court, being subject to unfair or improper scrutiny, and being judged based upon generalizations or conduct of others. Distinguish between accusations and evidence, puffery and proof, and place the jurors in a position to challenge and evaluate the evidence.

It is important to present the defendant positively and project a tone of compassion and concern for safety. Speak about care demonstrated by individuals within the company. Emphasize the corporate responsibility and good corporate citizenship of the company. This should be reflected in the tone, words, and approach of the counsel and witnesses throughout the proceedings.

Where general safety rules or information on violations are admitted, counter with evidence of the defendant's systemwide safety processes, safety policies, and training regimen. Use handbooks, guidelines, signs, posters, memoranda, and other evidence demonstrating the defendant's positive actions and their concern and focus on safety. Point out the company's hiring and retention of experienced, qualified people.

Place safety rules in the appropriate context. Demonstrate that safety rules are not absolute and show why other considerations should influence actions. Show that any alleged violation was inadvertent, rare, minor, or reasonable or did not actually cause any harm. Show why the generic safety rule that plaintiffs advocate for presents dangers.

Demonstrating the defendant's conduct promotes societal interests, whether safety or otherwise, is a way to counter reptilian tactics and prevent nuclear verdicts.

7. Investing in Trial Preparation and Winning Defenses

There is no substitute for having an adequate budget to prepare for trial, to test themes and theories, and likely juror reactions. Use mock trials and jury research to properly value cases, develop themes, test theories, and evaluate evidence. Mock trials and juror research should be directed at damages as well as liability and defenses.

Proper preparation of witnesses for deposition and trial testimony is critical. Educate witnesses on reptile theory and prepare them to respond to reptile theory-based questions at deposition and trial. Prepare for questions that allow plaintiffs to flesh out and support the following reptile theory-based propositions: safety should always be the *top* priority; companies should not put profits over people; products should be *safe* for *all* consumers; businesses should not make or sell a product that *could* hurt people; cost should not be a factor when it comes to safety; policies and procedures are needed to *ensure* people do not get injured; a company should warn of *any* dangers with their products; and documentation must be thorough to ensure safety policies are followed.

Educating witnesses on how to properly address hypothetical questions is essential. Preparing witnesses to address the reptile theory-based questions will prevent the types of evidence the defendant seeks to exclude from existing in the first place. Remember to prepare the witnesses on the wording and tone, the content of responses, and the importance of proper demeanor.

Failure to adequately prepare creates portfolio problems for defendants that could extend beyond a particular case, including res judicata and collateral estoppel and/or showing an inability to try a case or vulnerability to particular arguments, claims, and jurisdictions that could add to a company's litigation burden.

8. Pointing to Empty Seats

A defendant does not necessarily have to outrun the reptile. Instead, it may often avoid the reptile's bite simply by outrunning other potential prey. Do not let reptilian tactics prevent you from focusing on the contributory negligence or comparative fault of the plaintiff or other defendants or utilizing an empty chair defense.

9. Taking Advantage of Traditional Evidentiary Rules

To defeat reptilian tactics, defendants must recognize them for what they are—an attempt by plaintiffs' counsel to circumvent traditional rules of evidence and adduce evidence and arguments that are traditionally barred. The use of traditional weapons and arguments can go a long way in defeating reptilian theory-based strategies.

Remember the importance of proper jury instructions and spending time during closing arguments reviewing key jury instructions with the jurors and explaining in detail how the instructions apply to the evidence.

Further, Federal Rule of Evidence 403 and state equivalents can be effective reptile slayers. Reptile theory implicates all the countervailing considerations warranting the exclusion of even relevant evidence under Rule 403. Reptilian tactics are riddled with engendering unfair prejudice, confusing the issues, misleading the jury, interposing undue delay, and wasting time.

Reptile theory also runs counter to the prohibition of Federal Rule of Evidence 404 of admitting evidence of any other crimes, wrongs, or acts to prove a defendant's character or to show that, on a particular occasion, the defendant acted in accordance with the character. Keep in mind that Rule 103(d) admonishes that, to the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

The exclusion of "golden rule" arguments should apply to reptilian evidence and arguments. Reptile theory is based, in large part, upon asking the jurors to consider their interests in safety, the interests of society in safety, and the conscience of society. As such, reptile theory violates the almost universal prohibition against asking jurors to place themselves in the shoes of another person and/or encouraging jurors to decide the case based on their personal interests or bias.

10. Conditioning the Jury Starting With *Voir Dire*

Depending upon the jurisdiction and judge, defense counsel may begin the process of conditioning the jury and exposing plaintiffs' tactics during *voir dire*. *Voir dire* should at least provide an opportunity to identify potential jurors who are reptile-friendly and to exercise peremptorily strikes and challenges for cause accordingly.

Questioning can include the traditional line of inquiry about whether or not jurors can agree to leave their personal views and experiences aside and instead follow the evidence as presented in the courtroom and the law as the trial judge will instruct them in reaching a decision. Their promises to follow the law at the beginning can be revisited in closing, along with showing that there is no place for the reptile in their decision-making.

11. Mounting a Vigorous Defense on Damages and Anchoring Down

In a world of nuclear verdicts, defendants can ill afford to ignore damages. Deemphasizing damages out of concern that it will make jurors more likely to find liability can be a risky strategy. Defendants must be aggressive in conducting discovery on damages and in challenging plaintiffs' damage proofs.

Plaintiffs have been inclined to set higher damage anchors recently, even at the risk of seeming unreasonable, based on studies showing that jury awards are increased by higher damages requests and decreased by lower damages requests. In many cases, defendants may be well-served by setting out their lower damage anchors earlier and more often at trial. Defendants should remember to present fact witnesses and experts to address damages issues.

12. Living in a Post-Pandemic World

Do not forget the impact of the COVID-19 pandemic on jurors. In selecting jurors and in trying cases, defendants must keep in mind the potential impact of the pandemic and related shutdowns on jurors who may have experienced physical, psychological, or emotional injuries themselves, suffered loss from the deaths of friends or family, and had their lives altered in a variety of ways. These events could make some jurors plaintiff-oriented and particularly susceptible to reptilian tactics.

These are some of the strategies defendants and their counsel can employ in the courtroom to contain social inflation and limit nuclear verdicts. Avoid spoliation of evidence claims, sanctions, adverse jury instructions, and anything that may allow plaintiffs to prevail on grounds outside of the merits of the claim. Proper document retention practices, placing litigation holds, and prompt identification and assembly of potentially relevant documents and electronic data are some of the ways to do this.

Outside the courtroom, insurers and their policyholders are well-served by developing and maintaining a culture of excellence, hiring, retaining, training, and promoting outstanding talent, and insisting upon excellence in underwriting, claims, and other functions.

Conclusion

Insurers and corporate policyholders have been confronting social inflation for the past six decades. Although the dangers and costs of social inflation are at an all-time high, the skills, talents, and commitment of insurance professionals (on the underwriting, claims, and loss control sides), corporate risk managers, and defense and coverage counsel have always been up to the task. This commentary provides information and suggestions that will assist them in containing and combating social inflation.

[i] For other materials on social inflation by this author, *see* Scott M. Seaman & Jason Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (12th Ed. Thomson Reuters 2024) at Chapters 19 and 20; Scott M. Seaman & Sarah Anderson, *Key U.S. Insurance Decisions, Trends, & Developments: ESG, Social Inflation, COVID-19, Cyber/Privacy, Civil Unrest, Opioids, Lead, Sexual Assault & Other Perils Figure Prominently*, Mealey's Litigation Report: Cyber Tech & E-Commerce, Vol. 23, No. 11 (Jan. 2022); Scott M. Seaman, et al., "*The Legal Trends Behind 'Social Inflation' In Insurance*," Law360 (Feb. 21, 2021), available at https://www.law360.com/articles/1245725/the-legal-trends-behind-social-inflation-in-insurance.

[ii] Telis Demos, "The Specter of Social Inflation Haunts Insurers," *Wall St. J.* (Dec. 27, 2019), available at https://www.wsj.com/articles/the-specter-of-social-inflation-haunts-insurers-11577442780.

[iii] Darren Pain, "Social Inflation: Navigating the Evolving Clams Environment," Geneva Association, (Dec. 2020), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.genevaassociation.org/sites/default/files/social_inflation_brief_web.pdf.

[iv] *Id.* (internal quotation marks omitted).

[v] For a discussion of this prong of social inflation, *see* Scott M. Seaman & Jason R. Schulze, *Allocation Of Losses In Complex Insurance Coverage Claims* (12th Ed. Thomson Reuters 2024) at Chapter 19.

[vi] "How Many Court Cases Are Filed Each Year In U.S. Courts?" Consumer Shield (Oct. 24, 2024), available at https://www.consumershield.com/articles/how-many-court-cases-are-filed-each-year. *See also* https://www.ncsc.org/newsroom/at-the-center/2024/court-statistics-project-releases-trial-court-caseload-trends ("National Center for State Courts" website).

[vii] U.S. Chamber of Commerce Institute for Legal Reform, Tort Costs in America: An Empirical Analysis of Coasts and Compensation of the U.S. Tort System (Nov. 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/11/Tort-Costs-in-America-An-Empirical-Assessment-of-Costs-and-Compensation-of-the-U.S.-Tort-System.pdf.

[viii] *Id.* at 2–4.

[ix] *Id*. at 8.

[x] U.S. Chamber of Commerce Institute for Legal Reform, Tort Costs in America: An Empirical Analysis of Coasts and Compensation of the U.S. Tort System (3rd Ed 2024), available at https://instituteforlegalreform.com/research/tort-costs-in-america-an-empirical-analysis-of-costs-and-compensation-in-the-u-s-tort-system-third-edition/.

[xi] *Id.* at 24.

[xii] J. Lynch and D. Moore, "Social Inflation and Loss Development" (Casualty Actuarial Society and Insurance Information Institute 2022).

[xiii] *See* "Social inflation driving billions of dollars of excess losses in commercial auto: Morgan Stanley" *Reinsurance News* (Feb. 28, 2024), available at https://www.reinsurancene.ws/social-inflation-driving-billions-of-dollars-of-excess-losses-in-commercial-auto-morgan-stanley/.

[xiv] "In the Know: Social Inflation and the Increasing Costs of Large Jury Awards" (Oct. 7, 2021), available at: https://www.vgminsurance.com/blog/post/in-the-know-social-inflation-and-the-increasing-cost-of-large-jury-awards.

[xv] "Social Inflation Drives 57% Surge in US Liability Claims Over a Decade" *Risk and Insurance (Sept. 11, 2024),* available at https://riskandinsurance.com/social-inflation-drives-57-surge-in-us-liability-claims-over-a-decade/.

[xvi] Lesley Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, CBS News: 60 Minutes (Dec. 18, 2022), available at https://www.cbsnews.com/news/litigation-funding-60-minutestranscript-2023-07-23/ [https://perma.cc/U8VB-QCBZ] (interview of Christopher Bogart, CEO, Burford Capital LLC).

[xvii] *Over 70% of Federal Civil Cases Remain in MDLs as of Fiscal Year 2023, Rules 4 MDLs (Apr. 4, 2024*), available at https://www.rules4mdls.com/over-70-of-federal-civil-cases-remain-i.

[xviii] Thomas Holzheu, *et al.*, "U.S. Litigation Funding and Social Inflation: The Rising Costs of Legal Liability," Swiss Re Institute (Dec. 9, 2021), available at https://www.swissre.com/institute/research/topics-and-risk- dialogues/casualty-risk/us-litigation-funding-social-inflation.html.

[xix] *Judicial Hellholes® 2024-2025: Pennsylvanians Stuck In Nation's Worst Judicial Hellhole*, *American Tort Reform Foundation*, at 85 available at https://www.judicialhellholes.org/wp-content/uploads/2025/01/ATRA_JH24_text_04b_smaller.pdf.

[xx] Tom Baker, *Where's the Insurance in Mass Tort Litigation*, 101 Tex. L. Rev. 1569, 1586 (2023); *see also* Emily R. Siegel, *Fortress' Billions Quietly Power America's Biggest Legal Fights*, Bloomberg L. (Oct. 16, 2024), available at https://news.bloomberglaw.com/business-and-practice/fortress-billions-quietly-power-americas-biggest-legal-fights ("What started as $5 million to $10 million investments in single commercial cases has grown into loans exceeding $100 million to law firms for their entire caseloads. It's a built-in diversified portfolio that hedges risk.").

[xxi] *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 665 S.E.2d 767, 774 (2008) (plaintiff and counsel sought to avoid their payment obligations under litigation funding agreement). *See also Conlon v. Rosa*, 2004 WL 1627337, *6-8 (Mass. Land Ct. 2004) ("Such hidden funding can introduce a dynamic into a plaintiff's case—an agenda unrelated to the merits, a resistance to compromise—that otherwise might not be present and, unless known, cannot be managed or evaluated.").

[xxii] Available at: https://ncoil.org/wp-content/uploads/2024/03/NCOIL-TPLF-Model-Draft-3-13-24.pdf

[xxiii] *See* United States District Court for the District of New Jersey, Order (June 21, 2021), available at https://www.njd.uscourts.gov/sites/njd/files/Order7.1.1%28signed%29.pdf (amending Local Civil Rule 7.1.1 on the Disclosure of Third-Party Litigation Funding); United States District Court for the District of Delaware, Standing Order Regarding Third-Party Litigation Funding Arrangements (Apr. 18, 2022), available at https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf.

[xxiv] *Art Akiane LLC v. Art & Soulworks LLC*, 2020 WL 5593242, at *5–6 (N.D. Ill. Sept. 18, 2020) ("[B]roadly asking in discovery for 'documents relating to third-party funding for this litigation' is insufficient without some detailed, meaningful explanation to satisfy the requirement of relevancy."); *Ashghari-Kamrani v. United Servs. Auto. Ass'n*, 2016 WL 11642670, at *4 (E.D.V.A. May 31, 2016) (finding litigation funding is only relevant if the requesting party has an actual basis for the relevancy of the information other than mere speculation).

[xxv] *Electrolysis Prevention Solutions LLC v. Daimler Truck N. Am. LLC*, 2023 WL 4750822, at *5, 8 (W.D.N.C. July 24, 2023) (holding that litigation funding documents containing statements and analysis of the value of the asserted patent were discoverable in addition to "some limited discovery" to rebut potential David vs. Goliath trial themes); *In re* Bayerische Motoren Werke AG, 2022 WL 1422758, at *5 (N.D. Ill. May 5, 2022) (authorizing subpoena for litigation funding information relevant to plaintiff's "value-in-dispute claims"); *Impact Engine, Inc. v. Google LLC*, 2020 U.S. Dist. LEXIS 145636, at *4–5 n.2 (S.D. Cal. Aug. 12, 2020) ("[C]ourts have generally ruled that litigation funding agreements and related documents are relevant and discoverable in patent litigation [to] (1) establish the value of the patents at issue; (2) obtain statements made by [plaintiff] regarding the patents at issue; and (3) refute potential trial themes."); *Acceleration Bay LLC v. Activision Blizzard, Inc.*, 2018 WL 798731, at *2 (D. Del. Feb. 9, 2018) (holding that plaintiff's communications with litigation funder were relevant in patent dispute); *Odyssey Wireless, Inc. v. Samsung Elec., Co., Ltd.*, 2016 WL 7665898, at *6–7 (S.D. Cal. Sept. 20, 2016) (allowing discovery of documents regarding the valuations of plaintiff's patents). *See*, *e.g.*, *Cobra Int'l, Inc. v. BCNY Int'l, In*c., 2013 WL 11311345, at *3 (S.D. Fla. Nov. 4, 2013) (finding funding agreement relevant to establishing plaintiff's ownership of patent and standing to sue); *Gamon Plus, Inc. v. Campbell Soup*

Co., 2022 WL 18284320, at *2 (N.D. Ill. May 26, 2022); *Preservation Techs. LLC v. MindGeek USA, Inc*., 2020 WL 10965161, at *6 (C.D. Cal. Dec. 18, 2020); *Doe v. Soc'y of Missionaries of Sacred Heart,* 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014) (ordering sexual abuse plaintiff to produce redacted "fact work product" litigation financing materials potentially relevant to statute of limitations defense); *Gabarabe v. Chevron Corp*., 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (granting motion to compel production of plaintiff's litigation funding agreement and related documents as relevant to assessing class counsel's ability to adequately represent the putative class); *Haghayeghi v. Guess?, Inc.*, 2016 WL 9526465, at *1 (S.D. Cal. Mar. 21, 2016) (finding litigation funding documents relevant to whether Plaintiff would adequately protects the interests of the class); *Burkhart v. Genworth Fin., Inc*., 2024 WL 3888109, at *4 (Del. Ch. Aug. 21, 2024) (requiring production of unredacted litigation funding agreement in class action because of potential conflict of interest"); *Smartmatic USA Corp. v. Fox Corp*., 2023 WL 2626882, at *4–5 (N.Y. Sup. Ct. N.Y. Cty. Mar. 24, 2023) (requiring production of funding agreement as plaintiff's motivation to sue was an element of defendants' anti-SLAPP counterclaim); *Carroll v. Trump*, 2024 WL 97359, at *3 (S.D.N.Y. Jan. 9, 2024) (determining litigation funding generally is not relevant, but limited discovery allowed because of potential ligation funding arguably was relevant to credibility of one or two answers at deposition."); *Wopsock v. Dalton*, 2018 WL 1578086, at *5 (D. Utah Mar. 29, 2018) (allowing deposition questions about who was funding the litigation); *NantWorks, LLC v. Niantic, Inc*., 2022 WL 1500011, at *2 (N.D. Cal. May 12, 2022) (holding that litigation funding agreements are discoverable where there is a specific reason to suspect bias or conflict of interest); *Nunes v. Lizza*, 2021 WL 7186264, at *3–6 (N.D. Iowa Oct. 26, 2021) (permitted discovery to determine if congressman was funding the lawsuit as information relevant to real party in interest and to refute a potential David vs. Goliath narrative at trial); *Mize v. Kai, Inc*., 2018 WL 1035084, at *9 (D. Colo. Feb. 23, 2018) (finding funding and controlling lawsuit relevant to standing and fraud on the court).

[xxvi] *Compare Fulton v. Foley*, 2019 WL 6609298, at *4. (N.D. Ill. Dec. 5, 2019) (holding materials are protected by work product) and *Taction Tech., Inc. v. Apple, Inc*., 2022 WL 18781396, at *2 (S.D. Cal. Mar. 16, 2022) (holding the requested documents were protected work product) *with Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 740-741 (N.D. Ill. 2014) (holding materials disclosed to third-party funders in the absence of a confidentiality agreement are not subject to the attorney-client privilege or work product protection).

[xxvii] Effective May 2022, 815 ILL. Comp. Stat. 121/1, *et seq.*

[xxviii] *See 2024 Bill Text LA S.B. 355*

[xxix] This report is available at https://insurancefraud.org/wp-content/uploads/The-Impact-of-Insurance-Fraud-on-the-U.S.-Economy-Report-2022-8.26.2022-1.pdf.

[xxx] "NYC Financier Gets 3 Years In $31M Trip-And-Fall Scam Case" Law360 (Apr. 17, 2023), available at https://www.law360.com/insurance/articles/1596994?nl_pk=5b3a81eb-1fb5-49c9-bf6e-bb089cca1de6&utm_source=newsletter&utm_medium=email&utm_campaign=insurance&utm_content=2023-04-17&nlsidx=1&nlaidx=11.

[xxxi] J. Theodorou, "The Scourge of Social Inflation" (Dec. 2021), available at https://www.rstreet.org/wp-content/uploads/2021/12/RSTREET247.pdf.

[xxxii] Bethan Moorcraft, "The impact of social inflation on commercial liability claims," Insurance Business America (April 20, 2022) (quoting Michael Frantz, senior vice president and head of claims at Munich Re U.S.), available at https://www.insurancebusinessmag.com/us/news/specialty-insurance/the-impact-of-social-inflation-on-commercial-liability-claims-403103.aspx.

[xxxiii] *See generally* "Gen Z and Millennials are Less Trusting of the Average Brand," *Morning Consult*, 2020, available at https:// morningconsult.com/form/gen-z-millennials-trust/; "Striving for balance, advocating for change: The Deloitte Global 2022 Gen Z & Millennial Survey, available at: https://www.deloitte.com/content/dam/assets-shared/legacy/docs/about/2022/deloitte-2022-genz-millennial-survey.pdf

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[xxxv] "Impact of COVID-19 on Juror Perceptions", *Magna Legal Services* at p. 14, full survey results available at https://magnals.com/wp-content/uploads/2021/03/Magna-COVID-19-Survey-Results.pdf

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[xxxvii] *Id.*

[xxxviii] *See* "6 Factors That Can Make For A 'Nuclear' Juror" *Law360* (August 13, 2024).

[xxxix] CNN Website https://www.cnn.com/2024/12/27/business/companies-threats-ceo-unitedhealthcare/index.html (Dec. 27, 2024).

[xl] *Id.*

[xli] Thomas O'Toole, *The Causes of Social Inflation and "Nuclear" Jury Verdicts, Sound Jury Consulting* (Feb. 12, 2020), available at https://soundjuryconsulting.com/the-causes-of-social-inflation-and-nuclear-jury-verdicts/.

[xlii] *Id.*

[xliii] U.S. Chamber of Commerce Institute for Legal Reform, Nuclear Verdicts: An Update on Trends, Causes, and Solutions (May 2024), available at https://instituteforlegalreform.com/research/nuclear-verdicts-an-update-on-trends-causes-and-solutions/.

[xliv] *Id*. at 3.

[xlv] Corporate Verdicts Go Thermonuclear (Marathon Strategies), available at https://marathonstrategies.com/corporate-verdicts-go-thermonuclear-report/.

[xlvi] *Id.*

[xlvii] *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 112 Cal. Rptr. 3d 697, 235 P.3d 21 (2010).

[xlviii] *Certain Underwriters at Lloyd's London v. ConAgra Grocery Prods. Co., LLC*, 77 Cal. App. 5th 729, 292 Cal. Rptr. 3d 712 (2022).

[xlix] *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, 2024-Ohio-5773.

[l] *Certain Underwriters at Lloyd's, London v. NL Indus., Inc.*, 2022 NY Slip Op 02056, 203 A.D.3d 595, 164 N.Y.S.3d 607 (App. Div. 1st Dept.).

[li] *Rogers v. BNSF Ry. Co.*, 680 F. Supp. 3d 1027 (N.D. Ill. 2023).

[lii] *See Wrongful-Death and Survival Actions*, IICLE (2022) at 2.8. (S. Seaman General Editor). It has long been recognized that the purpose of the Wrongful Death Act is to compensate the surviving spouse and next of kin for pecuniary losses, not to punish the defendants. 740 Ill. Comp. Stat. 180/1, 740 Ill. Comp. Stat. 180/2, and 755 Ill. Comp. Stat. 5/27-6.

[liii] 735 Ill. Comp. Stat. 5/2-1115, 745 Ill. Comp. Stat. 10/2-102, and 745 Ill. Comp. Stat. 10/2-213.

[liv] *See* 735 ILCS 5/13-226; Tex. Gov't Code §§ 2254.1032, 1034, 1036, 1037, and 1038.

[lv] *Judicial Hellholes® 2024-2025: Pennsylvanians Stuck In Nation's Worst Judicial Hellhole*, *American Tort Reform Foundation*, available at https://www.judicialhellholes.org/wp-content/uploads/2025/01/ATRA_JH24_text_04b_smaller.pdf.

[lvi] *Id.* at Contents.

[lvii] The full report is worth reading and can be found at: https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf.

[lviii] *Id.* at 1–2.

[lix] *Id.* at 2.

[lx] *Id.* at 2, 66–68.

[lxi] Available at https://marathonstrategies.com/corporate-verdicts-go-thermonuclear-report/.

[lxii] *Judicial Hellholes (22-23)* at 79-80 (bold omitted), available at https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf; *accord Judicial Hellholes (24-25)* at 89-90 (bold omitted), available at *https://www.judicialhellholes.org/wp-content/uploads/2025/01/ATRA_JH24_text_04b_smaller.pdf*.

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[lxiv] *Id*.

[lxv] Cara Salvatore, Pandemic Put Deep Freeze On State Trials, New Data Show, Law360 (Jan. 12, 2022), available at https://www.law360.com/articles/1454943.

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[lxxi] *See generally* S. Seaman, ALI Draft Restatement Misstates Key Insurance Law Issues, Law360 (Sept. 18, 2017).

[lxxii] *See* Bethan Moorcraft, What is social inflation, and why is it hurting insurance?, I*nsurance Business America* (Jan. 3, 2020), available at https://www.insurancebusinessmag.com/us/news/breaking-news/what-is-social-inflation-and-why-is-it- hurting-insurance-195626.aspx.

[lxxiii] Many commentators believe that further tort reform efforts would materially benefit state economies. For example, in California, it is estimated that aggressive and/or abusive lawsuits cost the state $23.6 billion in annual output in 2019, further leading to an estimated loss of 242,761 jobs and a "tort tax" of $594.71 per person. *See* "Tort Reform will give California a better chance to recover," *Valley News* (May 21, 2020), available at https://myvalleynews.com/tort-reform-willgive-california-a-better-chance-to-recover/. Similar research shows that such litigation costs Missouri $2 billion and a loss of 32,205 jobs with a "tort tax" of $505.21 per person. *See* "Missouri Tort Reform, Abusive Lawsuits won't keep rolling

along," *Lexology* (May 20, 2020), available at https://www.lexology.com/library/detail.aspx?g=159021fe-ba2f-49dc-88a8-46529b8a6eb7. In Chicago, it is estimated that the "tort tax" costs residents $811 per year, and the city $3.8 billion in direct costs annually. *See* "Hidden 'tort tax' from heavy lawsuit activity costing Chicago area residents $800 each,

every year, new report says," available at https://cookcountyrecord.com/stories/513240758-hidden-tort-tax-from-heavy-lawsuit-activity-costing-chicago-area-residents-800-each-every-year-new-report-says.

[lxxiv] *See* https://www.instituteforlegalreform.com/pages/tort-reform-timeline.

[lxxv] *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 72.001, *et seq.* (2022).

[lxxvi] *Id.* at § 72.052.

[lxxvii] *Id.*

[lxxviii] *Id.* at § 72.053.

[lxxix] *See* News Release, Gov. Ron DeSantis, Governor Ron DeSantis Signs Two Bills to Support Disaster Relief and Help Stabilize Florida's Property Insurance Market (Dec. 16, 2022), available at https://www.flgov.com/2022/12/16/governor-ron-desantis-signs-two-bills-to-support-disaster-relief-and-help-stabilize-floridas-property-insurance-market/.

[lxxx] S*ee* "101 Ways to Improve State Legal Systems Eighth Edition A User's Guide to Promoting Fair and Effective Civil Justice" U.S. Chamber of Commerce Institute for Legal Reform (December 2024), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://instituteforlegalreform.com/wp-content/uploads/2024/12/101-Ways-2024-FINAL-WEB.pdf.

[lxxxi] *See, e.g.,* Scott M. Seaman & Jason R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (12th Ed. Thomson Reuters 2024) at Chapter 20.