Social Inflation
Is The Industry Ready?

By: Emma Kendall

Abstract

Despite new developments in risk management and steps to adjust for climate change, are insurers truly equipped to deal with social inflation? "Social inflation" is defined as an increase in costs to insurers beyond inflation rates, accompanied by a shift in social and cultural attitudes regarding who should be responsible for absorbing risk (National Association of Insurance Commissioners, 2023). Despite doubts of its existence, social inflation does have measurable drivers, many of which are likely to be an inevitability that insurers must mitigate. This essay will provide insight into social inflation and its contributors, as well as some possible and effective mitigation strategies.

Introduction

As the U.S. insurance industry faces increasing and emerging threats associated with climate change and both domestic and international political tensions, is the industry also prepared to face threats posed by consumers? Since 2020, the industry has grappled financial pressures associated with the pandemic including volatile financial markets and rapid inflation. Prior to the pandemic, general inflation remained relatively stable wherein annual inflation rates averaged around 2% from 2017 to 2020. Following the pandemic, inflation increased to 7% in 2021 and 6.5% in 2022 (US Inflation Calculator, 2023). However, claim payouts have spiked in recent years beyond inflation, as the insurance industry reported a 47% increase in litigation rates across all product lines (Frechette & Koonce, 2023), and an increase of $30 billion in commercial automobile costs (Barry, 2023) in 2022. The term used to describe this phenomenon is "social inflation", which is defined as how an insurers' claim costs rise beyond what is justifiable by general economic inflation, accompanied by perceived shifts in who should absorb risks and held responsible for losses (National Association of Insurance Commissioners, 2023).

Despite opinions that social inflation is a new issue, historical data suggest social inflation has been an ongoing phenomenon that has gone unchecked and unaccounted for in recent years. In fact, the term social inflation was first coined in 1977 by Warren Buffet (Mitchell, 2023), and tends to occur in waves, responding to "episodic shifts in the liability landscape", which may include a single, high-profile triggering event, or shifts in juror attitudes and legislative practices (Pain, 2020).

More recently, social inflation has birthed another term: "nuclear verdicts", defined as an award by a jury of over $10 million in punitive and compensatory rewards (Silverman & Appel, 2022), or an award exponentially larger than considered reasonable for the case. According to a study produced by Wall Street Journal, a review with VerdictSearch showed a more than 300% increase in the frequency of verdicts exceeding $20 million in 2019 compared to annual averages from 2001 to 2010 (Silverman & Appel, 2022). Additionally, a more than 27.5% increase was seen in the median nuclear verdict from 2010 to 2019 (Freiwald, 2023). From 2010 to 2019, the industry reported a $20 billion (14%) increase in commercial automobile liability payouts (Worters, 2022) most likely driven by social inflation. Non-economic damages, which account for monetary awards to plaintiffs that cannot be attributable to any measurable loss (like punitive or compensatory damages), make up approximately 50-80% of jury trial verdicts (Campbell, Bernard, & Robertson, 2017). Nuclear verdicts tend to be most prevalent in liability claims, wherein plaintiffs are more likely to suffer bodily injuries and claim damages including pain and suffering and requests for medical treatments

reimbursement. With their marketability from both attorneys and news media, nuclear verdicts have seen a surge in headline presence over the past decade, a key contributor to social inflation itself.

While social inflation has observed episodic trends, there are some observable contributors, including changing social and financial demographics, accessibility of information, growing anti-corporate bias, and evolving tactics used by plaintiff attorneys. Furthermore, these contributors are enabled and bolstered by limited government regulation and an increasingly hostile litigation environment for insurers. Social inflation poses a threat to the insurance industry by increasing claims costs and loss ratios, resulting in higher premiums and less accessibility for consumers, potentially fueling distrust and dissatisfaction with insurers resulting in more social inflation. Ultimately, it is imperative that insurers and reinsurers are prepared to deal with this type of risk, to protect their consumers and prevent insolvency.

"Kids These Days"

If there's one thing people fear, it's the unknown. Because social inflation is so difficult to measure, its increasing threat to insurers fuels speculation and argument about probable causes, resulting in controversy and misinformation. One common theory by experts is that social inflation is fueled by generational changes, wherein changing youth attitudes towards insurers and corporations are the cause of sympathetic jurors and inflated verdicts. This theory specifically names Millennials and Generation Z as the culprit, alleging that these generations are responsible for anti-corporate bias in courtrooms due to their growing presence in jury pools. In other words, this theory asserts that younger jurors tend to be more sympathetic and that a verdict should be a "punishment" to those with deep pockets for some wrongdoing, in circumstances where this attitude is not warranted.

However, evidence that younger people are inherently more litigious or are contributing to inflated verdicts is lacking and follows a centuries-long prejudice that young people are the problem to any new social issue. This dismissive behavior points to a much larger issue that continues to inhibit the success of young people today: ageism.

Traditionally, "ageism" refers to discrimination against older adults in the workplace wherein there is prejudice against their ability to perform at a job because of their age. Because of this belief, ageism towards young people generally goes unnoticed and can be enabled by older adults who also make up the leadership of many corporations. According to the American Psychological Association, younger people are more likely to experience age discrimination than older adults, partially due to structural support established to assist older adults (Bratt, Abrams, & Swift, 2020). In fact, the US government only lists "age" as a protected class when the person is above 40, offering no protections for age-related discriminations faced by young people. So, when it comes to social polarization, there are no protections for young people who are blamed for social inflation or otherwise.

Furthermore, the assertion that young jurors are the cause of large verdicts is not only unsubstantiated, but untrue. Older generations still make up most juries (Pain, 2020), due to attorney bias during voir dire and because young people tend to have less leisure time than retired people. Older juries have also proven to be more generous with plaintiffs, especially without prior instruction of the case from a judge when compared to younger jurors (Fitzgerald, 2000). Baby boomers are known for their ambition for wealth and title, also nicknamed the "me" generation due

to such competitive attitudes. So why are Millennials to blame for large verdicts if Baby Boomers are the ones awarding them?

While age itself is not a contributor to social inflation, its underlying theory has merit – litigation costs are fueled by changing social attitudes. Specifically, young people currently face economic instability and financial distress that their parents may not have dealt with. According to a 2017 study, Millennials are not only the first generation to earn less than their parents but have earned half of what Baby Boomers earned at the same age, when adjusted for inflation (Allison, 2017). While age alone does not make a person more litigious, their attitudes, fueled by their financial struggles and the attitudes of those above them, most certainly do. This association with age makes false correlation difficult to identify, but it is important the distinction be made to not fuel further frustration by consumers.

Potential Problematic Trends?

A stronger argument for social attitudes is that the digital age and accessibility of information and communication significantly contributes to negative plaintiff attitudes. The increase in accessibility of information to the public through social media and online news outlets is a known contributor to general distrust and political or social polarization. The propensity for fostering and sparking arguments and debates about real-time information results in shifts in consumer attitudes about different issues, such as inequality, political tension, and anti-corporate bias. Many believe that growing anti-corporate bias held by consumers is a main contributor to social inflation, due to the theory that those with deeper pockets (corporations) have a greater duty of care than individual defendants, and therefore must be held to a higher degree of accountability. However, while it is easy for experts to cast blame on consumer attitudes for such behaviors, it is important to recognize how harmful it can be to blame consumers for what is out of their control.

On another note, social media does pose significant identifiable risk with trial litigation, as its inclination for debate often results in the spread of misinformation. Misinformation is a massive and growing problem for litigators, as jurors with access to the internet may form their own conclusions based on information obtained online rather than facts presented during trial. In fact, 57% of people stated they would ignore a judge's instructions to avoid internet usage if they believed they could obtain important information online (Pain, 2020). These externally dictated and influenced decisions could lead to a nuclear verdict, especially if there is pre-existing publicity with the case. The uprising in misinformation and political tensions perpetuated by social media are more likely contributors in disproportionate jury verdicts than anti-corporate bias or Millennials entering jury pools.

Social media also enables broader access to information for plaintiff attorneys, including during the juror's selection process. While there are existing laws that prohibit or limit attorneys from searching for juror information on social media before voir dire, that does not necessarily stop them from doing so. In fact, federal law only prohibits attorneys from viewing public information if the juror does not realize it is public (Professional Ethics Committee, 2012), and therefore public social media may be used by attorneys to scope out jurors they can better cater their arguments to. Attorneys may use information such as political, social, or religious beliefs, which can often be identified on social media, to manipulate the opinion of the juror in their favor. The misuse of social media may prove

more effective for plaintiff attorneys in achieving a nuclear verdict than external social factors involving social media.

Litigation Climate

Studies are still being conducted on social behaviors and changing biases on insurance litigation. However, there is robust data supporting the current litigation environment as a key driver and growing challenge for insurers. A notable change is attorney strategies both in and outside of the court room. A common and newer strategy used by plaintiff attorneys is the "reptile theory", in which the plaintiff attorney uses fear and anger to play on juror sympathy and fuel hatred towards defendants to such an extent that the juror awards the plaintiff with massive damages (Hurzeler, 2021). Essentially, attorneys use emotional manipulation and scare tactics to paint defendants as villains with the goal of awarding excessive non-economic damages. The "reptile" part of the theory refers to the idea that reptiles will go into defense mode when threatened or scared (Mintzer Sarowitz Zeris Ledva & Meyers, L.L.P., 2018). This method is effective when the plaintiff is a corporation, as plaintiffs can latch onto internalized anti-corporate biases and convince jurors that corporations had a duty of care that was unconscionably breached. While many feel it is unethical, use of this strategy often goes unchecked due to the lack of government regulation. Considering and defending against the use of this method is not only important, but an integral part of defending any case.

Another significant contributor towards social inflation is the growing popularity of "third party litigation funding" (TPLF), an arrangement where outside investors (typically a hedge fund or special purpose litigation fund) invest in a lawsuit in exchange for a portion of the settlement or award (Institute for Legal Reform, 2023). This arrangement makes litigation more accessible to individuals with lower income. Ideally, a TPLF should even out the litigation playing field for plaintiffs and reduce financial inequalities between parties. If the claim is unsuccessful, the litigation costs are covered by the entity funding it, removing the financial burden from the litigant. While this type of arrangement sounds beneficial at face value, in practice it can fuel frivolous or vindictive litigation and may unduly influence the potential outcomes of the case (Institute for Legal Reform, 2023). TPLFs inflate costs for insurers, prolonging the amount of time needed to settle claims and increasing both defense costs and payouts to plaintiffs. This prolongation of the claims process also trickles down to reinsurers, making it more difficult to reserve and resulting in higher losses.

In 2021 alone, TPLF investments were estimated at around $17 billion, up 16% from 2020, despite the disruption of claims settlements from the pandemic (Holzheu, et al., 2021). These investments also target liability segments, achieving returns of up to 35%, correlating with an increase in the share of verdicts over $5 million from 29% to 37% for general liability (Holzheu, et al., 2021). Additionally, the three-year averages for average awards for general liability awards has increased by 224% from 2009 to 2019 (Holzheu, et al., 2021).

While TPLFs were intended to level out the playing field between plaintiffs and defendants, they tend to worsen the disparity. TPLFs are less likely to go for the "David and Goliath" cases and typically opt for those with higher potential success and returns, with 75% of investment supporting commercial litigation and mass torts (Holzheu, et al., 2021). Litigation investors often take more plaintiffs' compensation than those cases without, as well as spending significantly more on

plaintiffs' legal costs to win the case. Ultimately, TPLFs have proven to be costly for insurers, and boast higher benefits to plaintiffs than reality. These agreements also pose conflict of interest for attorneys, as their best interests lie with the investor rather than with their client. As a result of this, investors may threaten the relationship between attorney and client, and pose undue influence on the outcome of the case.

While TPLFs yield quantifiable increases in legal costs and payouts from insurers, they also result in changes to legal practices, such as enabling attorney advertising. The funding provided by TPLFs allows attorneys to not only win large awards but spend those earnings on advertisements that boast about them. A study by the American Tort Reform Association revealed that from 2017 to 2021, $6.8 billion was spent on more than 77 million national and local ads for trial lawyers (American Tort Reform Association, 2022). According to Lunio, an online marketing security firm, the prices per click paid by law firms for advertising are the highest prices paid by any advertisers (Pain, 2020), with the highest cost-per-click topping out at $815 for an offshore accident lawyer (Carr, 2021). In fact, nearly the entire list of "top payers" consisted of different types of attorneys, each costing several hundred dollars each. Furthermore, the Supreme Court only struck down prohibitions against attorney advertising in 1977 (Thomson Reuters, n.d.), meaning that the entire practice of attorney advertising is just over 40 years old.

While it may seem beneficial for the consumer that attorneys make themselves more accessible, it results in a host of problems for insurers, such as an increase in litigious claimants, desensitization to large verdicts, and general negative sentiment towards defendants. In fact, a survey conducted on behalf of the IRC by Dynata, Inc. examined public attitudes on attorney marketing and its impact specific to insurance and found that most Americans believe attorney advertising increases the number of liability claims and lawsuits, and more than half of them link these ads to increased premiums (Insurance Information Institute, 2022). The Insurance Information Institute also notes that studies consistently show claims involving attorneys took longer to settle and issue payments than those without (Insurance Information Institute, 2022). Regardless of needed involvement, many attorneys use aggressive marketing strategies and manipulation to push vulnerable claimants into unnecessary litigation. Many of these advertisements cater to consumer greed and encourage frivolous lawsuits, explicitly sharing their winnings using language such as "over $1 billion awarded" or similar language to entice consumers into litigation with the prospect of making a profit.

Consequentially, these suit outcomes have significant influence on the American legal system, as the law is written based on precedence set by court decisions. This means that if this problem persists and penetrates the legal system enough, then unfavorable and uneducated jury decisions will become the law that decides future cases, and social inflation will continue to worsen.

What is the Real Remedy?

Because of its cyclical nature and penetration in the American legal system, the most effective approach to handling social inflation is from the legal system itself: tort reform. Although there is debate as to its constitutionality, tort reform has historically proven effective in reducing the number of large jury verdicts. Tort reforms have been most notably used in the early 2000s on medical malpractice suits, limiting non-economic damages nationally and lowering medical malpractice costs

for both insurers and physicians. With success in the past, the best way to address social inflation among other lines would be to consider the expansion of tort reform.

Of liability cases, non-economic damages make up roughly 50-80% of jury trial verdicts. From 2010 to 2019, six out of the ten years saw the total amount of non-economic damages awarded in nuclear verdicts exceed the total amount of economic and punitive damages combined (Silverman & Appel, 2022). Another tort reform adopted by several states are laws that require trial courts to "bifurcate a jury's consideration of compensatory and punitive damage claims" (Silverman & Appel, 2022), separating the liability portion of the suit from the damages. If defendants are not found liable, no damages will be awarded, reducing the risk of high damages to insurers (Tiveron Law, 2018).

In addition to addressing damages, tort reform must also address the problem from the ground up, which stems from jury attitudes and attorney behaviors. There is little regulation and limitations on attorney advertising and ethical standards, enabling litigious claimants and manipulation of the jury. As outlined earlier in this essay, attorney marketing has long been a subject of ethical debate and many Americans believe it is a direct contributing factor to the abuse of the legal system. Thus, legislation must be enacted to reduce and regulate attorney marketing.

In fact, good communication and transparency with litigants, judges, and everyone involved is integral to combating social inflation. Transparency should not only be practiced by insurers to build trust with their own policyholders, but also for third party litigation funding within a jury trial. In a survey by the Institute for Legal Reform, 69% of voters across all political party lines strongly support TPLF disclosure (McInturff & Hobart, 2022). While many states have already enacted laws on TPLF disclosure, the federal government has proposed the Litigation Funding Transparency Act, which has not seen any movement since its introduction In March of 2021 (Litigation Funding Transparency Act, 2021). This is the first major reintroduction of a law on the federal level, and at its highest potential may significantly reduce jury verdicts. However, the bill has not seen any movement since then and more pushing from lobbyists will be needed to broaden its reach. While specific data on the efficacy of these laws has been historically slim, it is integral that jurors are made aware of social inflation, ensuring a fair trial for all parties.

New Methods for Insurers

Beyond tort reform, it is important that insurers and reinsurers mitigate risk and claims before they go nuclear. This means being innovative with defense tactics and consistently adjusting risk models to reflect upcoming risks.

Traditionally, insurers use historical data to assess risks and price their business for policyholders. Examples of such data may include trends in settlement amounts by line, industry, geographic area, and demographics. Deloitte defines risk modeling as "a mathematical representation of a system" that incorporates probability distributions (Deloitte, n.d.). Risk modeling is used by actuaries to build underwriting models to predict future outcomes based on past data. While risk modeling continues to be integral for insurers' risk management, its key flaws are that it is backwards-looking and does not consider future risks and does not quantify non-mathematical risk drivers.

To adjust to this shortcoming, Swiss Re has invented the forward-looking exposure model (FLM) to account for future outcomes beyond historical data. FLMs go "beyond predictive models by

acknowledging a structured cause-effect chain" (Billeter & Salghetti-Drioli, 2016). This type of risk modeling is becoming more popular in predicting liability risks, where litigation is most affected by social inflation and most difficult to predict. FLMs identify potential contributors to specific risks and parameterize them, generating all possible cause-effect scenarios to be used by claim handlers to adjust for changing risks more accurately. Coupled with the growth and development of new technologies like artificial intelligence, forward-looking models can also factor in and quantify non-mathematical risk drivers, proving a major tool for mitigating social risks.

Moreover, the best way to avoid a nuclear verdict is to remove the jury from the equation entirely, preventing the case from ever seeing the courtroom. One common method that insurers use to assess and shorten a claim's life is by using mock trials or mock juries. A mock trial is a rehearsal or imitation of an actual claim in trial with individuals summoned to role play as the jury. They are used primarily for research and education, such as in a school setting, but many are used by litigators to determine the most likely outcomes, and worse-case scenarios of their claims. Mock trials can provide information to the insurer such as how their witnesses and defendants will be received by jurors, how well-understood the case will be by jurors, and even direct feedback from jurors on how attorneys handled the case. Early understanding of plaintiff attorney behavior may also better prepare defendants to deal with reptilian tactics or emotional manipulation. Additionally, mock trials have the potential to influence settlement amounts significantly if they prove to be discouraging enough to plaintiffs to lower their demands.

Another method insurers use for combatting nuclear verdicts is through early retention of appellate counsel. Contrary to its namesake, appellate lawyers do more than just appeals and can serve a key purpose in defense during pre-trial litigation. Appellate attorneys specialize in conducting research, writing documents, and recordkeeping during litigation, enabling defense counsel to focus on preparing for trial. Appellate attorneys may also have further expertise in combatting against the "reptile theory" outlined earlier in this essay, as they may pursue a motion in limine to bar any use of it by plaintiff counsel. Additionally, early retention of appellate counsel sends a message to both plaintiffs and jurors, signaling that defense counsel is taking the case seriously (Edwards, 2022), a potentially discouraging act to plaintiffs pursuing a nuclear verdict.

Concluding Remarks

Ultimately, although the problem itself permeates far into the culture and economy of the United States, it is important for insurers to realize that their actions play an integral role in both the growth of social inflation as well as intervention. Insurers and leaders within the industry must also recognize that social inflation is an expensive issue and that investing in defense tactics and better claims management is necessary for navigating the future claims environment. Awareness of its known causes, such as attorney behavior, third party litigation, and jury attitudes towards plaintiffs, are essential for insurers to consider when mitigating social inflation. As such, insurers must account for the inevitability of social inflation and work to adjust for future exposures.

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