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THE SCOURGE OF SOCIAL INFLATION

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EXECUTIVE SUMMARY

Social inflation is among the most talked-about phenomena in property and casualty insurance and civil justice circles. There is hardly an insurer earnings call or industry conference where social inflation is not addressed. In this paper we analyze social inflation by exploring the following four questions:

1. What is social inflation?
2. Is social inflation real?
3. What drives social inflation?
4. What can be done about social inflation?

Social inflation refers to factors unrelated to general inflation in the economy that underlie rising court awards. Although there are some who deny the existence of social inflation, the preponderance of evidence shows that social inflation and its effects are real.

Although there are multiple drivers of social inflation, chief among them is the behavior of the plaintiff bar. In recent years personal injury lawyers have effectively deployed new strategies to secure large court awards, whether through jury verdicts or out-of-court settlements. The defense bar has been slower and less successful to push back against large "nuclear verdicts" that are out of proportion to damages. This has resulted in historically large losses across various liability lines of primary insurance and reinsurance.

Other drivers of social inflation include attorney advertising, litigation funding, phantom damages and a defense bar on the back foot in a world of torts with swelling court awards. Insurers would do well to understand the drivers and potential impact of social inflation on future financial results. Just as the plaintiff bar has deployed creative new courtroom strategies to push awards ever higher, the defense bar should respond with strategies of its own to arrest the continued inflation of awards. Failure to do so will result in impaired insurer balance sheets and higher insurance premiums for all, amounting to a "hidden tax" burdening individuals and making businesses less competitive. Just as there are multiple drivers of social inflation, there must be a multipronged response, incorporating public policy action as well as defense bar retooling.

INTRODUCTION

Social inflation refers to factors unrelated to general inflation in the economy that underlie rising court awards. Although there are some who deny the existence of social inflation, the preponderance of evidence shows that social inflation and its effects are real. A simple working definition of social inflation is that it is insurance loss cost inflation driven by non-economic factors. Non-economic factors are distinguished from economic factors, which also affect insurer loss costs. Known economic factors include:

- **The Consumer Price Index (CPI).** The CPI has been rising at an uncharacteristically high rate in recent months, driving up the cost of all manner of goods and services, including those contributing to claims payments. The CPI rose 6.2 percent in the 12 months ending October 2021.[1]

- **Supply chain constraints.** Shortages of lumber and other building materials drive up the cost of property repairs.[2] Shortages of microchips drive up costs to build and repair properties and to manufacture goods that include chips.[3]
- **Medical inflation.** The medical CPI is outpacing the all-items CPI. Liability insurance loss costs are heavily influenced by medical costs for injured third party plaintiffs.[4]
- **Catastrophic injury costs.** 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, but come at high cost.[5]

Non-economic factors, by contrast, relate to societal attitudes regarding responsibility and blame, which influence jurors' and judges' decisions and the magnitude of court awards.

THE MEANING OF SOCIAL INFLATION

The term social inflation was first encountered in Berkshire Hathaway's 1977 letter to shareholders wherein CEO Warren Buffett wrote that social inflation was "a broad definition by society and juries of what is covered by insurance policies."[6] The term hibernated until the 2010 white paper on social inflation by reinsurance company PartnerRe. PartnerRe expanded on Buffett's thumbnail description, stating that:

> social inflation is the increase in insurance losses caused by such factors as higher jury awards, more liberal treatment of claims by workers' compensation boards, legislated rises in compensation benefit levels, and new concepts of tort and negligence. It is of concern for re/insurers because it is hard to predict social inflation trends, making it challenging to underwrite and price risks such as workers' compensation, directors' and officers' liability, medical malpractice, and general liability and public liability, which are most vulnerable to this phenomenon.[7]

In the past few years there has been a veritable explosion in the frequency of the term's use. A June 2021 University of Chicago study on social inflation counted the number of times the term was mentioned in earnings calls of the largest publicly-traded commercial automobile insurers.[8] The study found the number of unique mentions of the term hovered close to zero each year from 2008 to 2017, and then rose steeply to 29 in 2018 and shot up to over 80 in 2020.

Since 2018 social inflation has been identified as a cause of more numerous "nuclear verdicts," which is a term that describes jury verdicts exceeding $10 million. The phenomenon is discussed in reinsurance industry publications, in the general insurance trade press and in publications by insurers.[9] In addition to its coverage in industry publications and the trade press, there have been in-depth studies on the phenomenon spreading globally, exemplified by a 2020 paper by the Geneva Association.[10]

MYTH OR REALITY

Social inflation is not universally agreed upon, and some believe that it simply does not exist. There are two major positions disputing social inflation; the first position maintains that social inflation is a fiction invented by a collusive, greedy insurance industry in order to raise rates and increase insurers' earnings. The second position opposes the first by holding that social inflation is real, and is not a new phenomenon, but rather the manifestation of a cyclical pattern of alternating soft and hard markets that has long existed in the insurance industry. This view holds that social inflation represents nothing more than the recurrence of a phase in the familiar insurance cycle.

1. "Consumer Price Index Summary," Bureau of Labor Statistics, Nov. 10, 2021. https://www.bls.gov/news.release/cpi.nr0.htm.

2. See, e.g., Lance Lambert, "Lumber Prices are Rising Again – Fast," Fortune, October 4, 2021. https://fortune.com/2021/10/04/lumber-prices-rising-2021-wood-price-per-board-foot; "Construction Inflation Alert," Association of General Contractors, June 2021. https://www.agc.org/sites/default/files/AGC%202021%20Inflation%20Report_Version5_S_0.pdf.

3. Yishan Cao and Geraldine Sundstrom, "Global Chip Shortage: The Winners and Losers," PIMCO, April 8, 2021. https://blog.pimco.com/en/2021/04/global-chip-shortage-the-winners-and-losers.

4. "Medical Cost Trend: Behind the Numbers," PwC Health Research Institute, 2021. https://www.pwc.com/us/en/industries/health-industries/library/assets/pwc-hri-behind-the-numbers-2022.pdf.

5. Travis M. Andrews, "Robotics are Helping Paralyzed People Walk Again, but the Price Tag is Huge," *Washington Post*, June 12, 2017. https://www.washingtonpost.com/news/morning-mix/wp/2017/06/10/robotics-are-helping-paralyzed-people-walk-again-but-the-price-tag-is-huge.

6. "To the Stockholders of Berkshire Hathaway Inc., 1977," Berkshire Hathaway, March 14, 1978. https://www.berkshirehathaway.com/letters/1977.html.

7. "Social Inflation in the U.S.: What is it and why is it a Concern?" PartnerRe, November 26, 2010. https://partnerre.com/opinions_research/social-inflation-in-the-u-s-what-is-it-and-why-is-it-a-concern.

8. Sangmin S. Oh, "Social Inflation," *SSRN*, p. 3. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685667.

9. See, e.g., Luke Gallin, "Social Inflation Adding Pressure on Loss Costs for Insurers: Analysts," Reinsurance News, Jan. 27, 2020. https://www.reinsurancene.ws/social-inflation-adding-pressure-on-loss-costs-for-insurers-analysts; Bethan Moorcroft, "What is Social Insurance and Why is it Hurting Insurance?," Insurance Business, Jan. 3, 2020. https://www.insurancebusinessmag.com/us/news/breaking-news/what-is-social-inflation-and-why-is-it-hurting-insurance-195626.aspx; "Four Factors Causing Social Inflation," Travelers, last accessed Nov. 22, 2021. https://www.travelers.com/business-insurance/general-liability/4-factors-causing-social-inflation.

10. Darren Pain, "Social Inflation: Navigating the Evolving Claims Environment," The Geneva Association, December 2020. https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public/social_inflation_web_171220.pdf.

The social inflation denial argument was advanced most forcefully in a 2010 joint publication by two public interest groups, the Consumer Federation of America and the Center for Justice & Democracy. The report proposed an alternative origin for the term social inflation and flatly declares that it is a hoax. Although this extreme view is not widely espoused, is worth understanding how social inflation is described in this context, and why their perspective is flawed:

> In the current run-up to a new hard market, the insurance industry needed a new public relations term to make the case for higher rates. It has settled on a new name to describe its current interest in raising prices: "social inflation." Over the last several months, insurance industry representatives have begun a seemingly coordinated effort to market the idea that "social inflation" (i.e., lawsuits by injured, harmed, and defrauded consumers and policyholders) are hurting insurers financially. The term has appeared in numerous news articles since the summer of 2019 and the mounting drumbeat appears to be coordinated. But it is a hoax, a way for insurers to once again try to deflect blame away from the industry's own accounting and underwriting practices as an attempt to justify unnecessary rate hikes.[11]

This perspective is flawed in both its explicit and implicit implications. The claim that social inflation is a fiction flies in the face of empirical evidence that non-economic cost drivers exist. They do, as we shall demonstrate, and by failing to mention the role of plaintiff attorney behavior, the above position ignores a significant factor in jury decision-making.

The second position that believes social inflation is real and holds that it is not a phenomenon worthy of alarm maintains that social inflation is a manifestation of the current hard phase of the long-familiar insurance market cycle. The insurance cycle is characterized by alternating periods of rising insurance rates (hard phase of the cycle) followed by a phase of falling rates (soft phase of the cycle). The cycle is driven by competition among insurers which causes insurers to lower their rates to attract new business, followed by responding to underwriting losses from underpriced business by raising rates. It may therefore be no coincidence that the timing of the two earliest mentions of social inflation (Buffett's and PartnerRe's) coincided with past hard phases of the insurance cycle.

It is possible that social inflation may be part of a cycle (rather than being a trend) because of the cyclicality in tort climate. In the past several decades, there have been alternating periods of pro-defense tort reform enactment, followed by periods of pro-plaintiff tort liberalization, followed by tort reform again, etc. For example, the 1970s shift in the civil justice pleading standard from negligence to strict liability ushered in more litigation activity, leading to the insurance crisis of the 1980s, in which many insurers pulled out of writing liability insurance altogether.[12] The move to no-fault liability, coupled with litigation against corporate defendants with "deep pockets" driven by the doctrine of joint and several liability, compounded by ballooning asbestos lawsuits, ultimately led to a spate of insurer failures. In the 1969 to 1988 period, there were 150 property-casualty insolvencies, half of which took place between 1983 and 1988.[13]

After the 1980s liability crisis, tort reforms were introduced in numerous states in the attempt to bring frivolous runaway litigation under control. This was succeeded by a period in the 1990s when tort reforms were eroded, which in turn led to higher insurer losses. The cycle returned to a pro-business phase in the years of the George W. Bush administration, from 2001 to 2009, when tort reforms in many states, patterned on the reforms introduced in Texas became a major priority, especially for Republicans.[14] In the current pro-plaintiff Democratic administration, that comes on the heels of four years of Trump-style populism, the cycle has again shifted toward anti-corporate sentiment, influencing juries to hand down large pro-plaintiff awards.

SOCIAL INFLATION DRIVERS

Social inflation is neither a hoax nor the latest insurance industry buzzword, but it is also not just another hard market phase of the insurance cycle. This paper argues that social inflation is a strong and durable trend (that may have cyclical elements) driven by factors and phenomena that have not been encountered in prior iterations of the insurance market cycle. To firmly found this argument, we discuss the following drivers of social inflation:

- Structure and strategy changes in the plaintiff bar
- Attorney advertising
- Litigation funding
- Phantom billing
- Weaknesses of the defense bar

11. J. Robert Hunter et al., "How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation," Center for Justice and Democracy, March 9, 2020. https://consumerfed.org/wp-content/uploads/2021/04/How-the-Cash-Rich-Insurance-Industry-Fakes-Crises-and-Invents-Social-Inflation.pdf.

12. F. Patrick Hubbard, "The Nature and Impact of the 'Tort Reform' Movement," *Hofstra Law Review* 35:437 (2006), p. 468. https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v35n02_cc1.hubbard.final.pdf.

13. Peter H. Stone, "Excesses of the 1980s now Haunt the Insurance Industry: Finance: While Hardly in a League with Failed Savings & Loans, Insurers have Lost Billions in Failed Investments and Need Tougher Regulation," *Los Angeles Times*, Dec. 16, 1990. https://www.latimes.com/archives/la-xpm-1990-12-16-op-8958-story.html.

14. "10 Years of Tort Reform Bring Fewer Suits Lower Payouts," Insurance Journal, Sept. 2, 2013. https://www.insurancejournal.com/news/southcentral/2013/09/03/303718.htm.

Structural and Strategy Changes in the Plaintiff Bar

The 2001 to 2009 era of tort reforms created headwinds for the plaintiff bar. It introduced limitations on non-economic damages, often the largest of the three components of court awards (the other two being economic damages and punitive damages).[15] Another setback of that era was the 2009 *Ashcroft v Iqbal* decision, which raised the pleading standard from defendants' actions "possibly" being the cause of alleged plaintiff injury to defendants' actions "plausibly" being responsible.[16] This change in the pleading standard has made it more difficult for cases to survive motion for summary judgement or motion to dismiss.

The plaintiff bar responded to the setbacks of 2001 to 2009 with a change in strategy that included the following elements:

Plaintiff Bar Strategy Changes	Examples
Effective use of human psychology	Sympathy for plaintiff replaced by anger at "faceless" corporate defendants putting profits over people Reptile theory Psychodrama Anchoring
Cooperation	Education and sharing of techniques in conferences, workshops, podcasts and books Collaboratively working as co-counsel
Specialization	Acquisition and deployment of deep technical knowledge of accident factors
Migration	Movement from practice areas with diminishing potential for large awards to richer profit center practice areas Movement from insurance company employment to plaintiff bar

Source: R Street Analysis.

EFFECTIVE USE OF HUMAN PSYCHOLOGY

Arguments rooted in arousing an emotional reaction from jurors have traditionally been eschewed in the courtroom. Rule 403 of the Federal Rules of Evidence authorizes trial courts to exclude evidence that induces decisions on a purely emotional basis or that lead to decisions on an improper basis "commonly, though not necessarily, an emotional one."[17]

Anger

Pace rule 403, civil trials involving a severely injured plaintiff typically do arouse emotions of sympathy or pity. Review of the language and tone of summations in litigation that have resulted in nuclear verdicts suggests the plaintiff bar has dispensed with traditional legal restraint on stimulating emotions, and is not averse to stoking juror anger. Anger is incited in order to deliver retributive, punitive justice and "send a message."[18] An example of this was seen in the $101 million verdict in *Patterson v. FTS International*.[19] Joshua Patterson was injured by a truck in the FTS International fleet. The jury awarded $101 million, $75 million of which was for punitive damages.[20] In his closing argument, Patterson's attorney made a direct effort to convince the jury to punish FTS, stating:

> a corporation isn't like an individual, it doesn't have a heart, it doesn't have a brain. You can't punish it the way we punish children or the way we punish adults. The only way to punish a corporation is in their pocketbook.[21]

Tort law is meant to compensate, not to punish.[22] Defense attorneys Jonathan Shaub and Tim Capowski of Shaub, Ahmuty, Citrin & Spratt LLP have characterized plaintiff tactics to arouse retributive justice as "how dare they defend."[23] They maintain that "rather than provide just compensation, [nuclear verdicts] are thinly veiled efforts to punish the defendant that are nearly always awarded at the specific request of plaintiff's counsel."[24] Such tactics are designed to "gin up anger at the defendant" because they "do not seek to prove the measure of plaintiff's harm, but to stoke outrage at defendants' supposed wrongdoing or callousness.

15. W. McDonald Plosser, "Sky's the Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule," Butler Snow, Dec. 11, 2017. https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/sky39s-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule.

16. *Ashcroft v. Iqbal*, 556 U. S. 662 (2009).

17. See, e.g., Todd E. Pettys, "The Emotional Juror," *Fordham Law Review* 76:3 (2007), p. 1610. https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4334&context=flr; "Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons," Legal Information Institute, last accessed Nov. 24, 2021. https://www.law.cornell.edu/rules/fre/rule_403.

18. "Careful Defendants, the Reverse Reptile Could be a Boomerang," JD Supra, Jan. 7, 2019. https://www.jdsupra.com/legalnews/careful-defendants-the-reverse-reptile-72495.

19. "*FTS International Services v. Patterson* Memorandum Opinion," Justia, 2020, p. 25. https://cases.justia.com/texas/twelfth-court-of-appeals/2020-12-19-00040-cv.pdf?ts=1598530560.

20. "Recent 'Nuclear Verdict' Highlights Importance of Motor Carrier Compliance with Safety Policies and Procedures: *Joshua Patterson v. FTSI, LLC. et al*.," Franklin and Prokopik, last accessed Nov. 24, 2021. https://www.fandpnet.com/insight/joshua-patterson-v-ftsi-llc-et-al.

21. *FTS International Services v. Patterson*. 12 19 00040 CV, Tex. App. (2020).

22. *Sharapata v. Town of Islip*, 82 A.D.2d 350, 441 N.Y.S.2d 275 (N.Y. App. Div. 1981).

23. Timothy Capowski et al., "Ahead to the Past: The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts," New York Law Journal, July 13, 2020. https://www.sacslaw.com/media/publication/14_NYLJ%20-%20Ahead%20to%20the%20Past.%20The%20Evolution%20of%20New%20Rules%20of%20Engagement%20in%20the%20Age%20of%20Social%20Inflation%20and%20Nuclear%20Verdicts%20-%2007-13-20%20_011392_1.pdf.

24. Timothy Capowski et al., "Ahead to the Past: The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts. Part III of III," New York Law Journal, July 27, 2020. https://www.law.com/newyorklawjournal/2020/07/27/ahead-to-the-past-part-iii-of-iii-the-evolution-of-new-rules-of-engagement-in-the-age-of-social-inflation-and-nuclear-verdicts-course-correcting-the-culture-of-civil-litigation-away-from-punishmen.

They are punitive in nature and therefore improper."[25] This method allows for disproportionate compensation by fueling emotional outrage. They use specific language, such as "big corporations" and "hired guns" when speaking to the jury.[26]

The interview excerpt below from a podcast on a plaintiff attorney-oriented website embodies the strategy of stimulating anger and stoking emotional outrage. It strikes one as a pep talk to get plaintiff attorneys into an emotionally charged mindset to attack the defense relentlessly.

> These defense lawyers . . . They're not your pals. They are the enemy. Because they're working for the enemy . . . They want you to play by their rules and they want to wine and dine you and be your pal and take advantage of you and . . . the person you've . . . sworn to represent. You can be kind to them in trial, you can accommodate them in litigation, but when it comes to money, settling the case, don't hold anything back, let them have it. Expose what's really, really going on.[27]

The above passage is consistent with other elements of plaintiff strategy designed to cast defense as a villain, recognizing that villains are not just people—they can be corporations too.

The Reptile

The book by David Ball and Don Keenan, *Reptile: the 2009 Manual of the Plaintiff's Revolution*, has had a major impact on courtroom of plaintiff attorney strategies. The reptile strategy involves convincing the jury that: [28]

- Jurors are the protectors of the community
- Corporations put profits over people and over safety
- Jurors should punish defendants
- Award deliberations should be anchored on high monetary awards based on calculations of future lifetime needs

The reptile theory has been deployed to such great effect in the past decade that the defense bar regularly organizes training seminars on how to defend against or defang the reptile.[29]

A representative example of the reptile in action was seen in *Raoul Lopez v. City of New York*. Lopez, a heroin addict with 19 prior arrests and 13 prior convictions was stopped by two police for running a traffic light.[30] Lopez dragged one of the police officers with his car, and the second policeman shot Lopez, allegedly in order to prevent his partner from being dragged to his death. A Bronx jury awarded Lopez $11 million because of the injury sustained by the policeman's shot. In the courtroom the defendants attempted to prevent the plaintiff attorney from using the reptile when the plaintiff attorney asked the jury to "send a message to the City and police officials" about "what we want as a community".[31] Although the Court found that, "in some circumstances . . . implorations to juries to 'send a message' are improper," the court ultimately found for plaintiff Lopez.[32]

Psychodrama

Training plaintiff attorneys to employ "psychodrama" in the courtroom is a prominent element of the instruction at the Trial Lawyers College in Wyoming, which offers instruction to trial attorneys. Several of the College's course materials are dedicated to psychodramatic techniques.[33] In one of these, psychodrama is defined as having the subject "dramatize certain events as a spontaneous play on a "stage" in a group setting.[34] The subject literally goes through the motions of physically acting out the scene." Instructors at Trial Lawyers College include trained actors, including one who "specializes in applying theater and film communication techniques to the art of trial advocacy."[35]

Trial Guides, a publishing firm focused on the plaintiff bar explains that "a psychodrama gets people involved emotionally; it moves them and stimulates their desire and need to help the person working through his or her issues."[36] Psy-

25. Patricia Kane, "Ahead to the Past: The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts. Part II of III," New York Law Journal July 30, 2020. https://www.sacslaw.com/media/publication/15_Ahead%20to%20the%20Past%20_Part%20II%20of%20III_%20The%20Evolution%20of%20New%20Rules%20of%20Engagement%20in%20the%20Age%20of%20Social%20In.pdf.

26. Ibid.

27. Michael Cowen, "Episode 58 – Nick Rowley – Brutal Honesty," Trial Lawyer Nation, last accessed Nov. 24, 2021. https://triallawyernation.com/episode/58-nick-rowley.

28. Dean Arruebarrena, "Primal Fear: The Reptile Theory," ALFA International Practice Group Seminar, January 2018. https://www.alfainternational.com/course-book-materials/course%20material/ALFA_Hospitality_FINAL_WEB%20%281%29/course/en/pdf/Sessions/Gen_5.pdf.

29. Tyler J. Derr, "Recognizing and Defeating the Reptile: A Step-by-Step Guide," *Stetson Journal of Advocacy and the Law* (2016). https://www2.stetson.edu/advocacy-journal/recognizing-and-defeating-the-reptile-a-step-by-step-guide.

30. Julia Marsh, "Heroin Addict Allegedly Drags NYPD cop with his Car – and wins $11 million in Court," *New York Post*, Oct. 30, 2019. https://nypost.com/2019/10/30/heroin-addict-drags-nypd-cop-with-his-car-and-wins-11-million-in-court.

31. *Lopez v. City of New York*. 192 AD3d 634. (2021).

32. Ibid.

33. "Course Materials," Trial Lawyers College, last accessed Nov. 24, 2021. https://www.triallawyerscollege.org/register-for-a-course/course-materials.

34. Dana K. Cole, "Psychodrama and the Training of Trial Lawyers: Finding the Story," *The Warrior* (2002), pp. 1-10. https://www.triallawyerscollege.org/wp-content/uploads/2020/11/2225.pdf.

35. Joshua Karton, "Joshua Karton – Trial Consultant," Trial Guides, last accessed Nov. 24, 2021. https://www.trialguides.com/blogs/authors/joshua-karton.

36. Alex Miller, "The Power of Psychodrama in Law" Trial Guides, March 5, 2021. https://www.trialguides.com/blogs/news/the-power-of-psychodrama-in-law.

chodramatic training appears to be a mix of psychotherapy with instruction in performative dramatic arts. One subject of COVID era instruction focuses on how to use one's eyes effectively because mask-wearing dampens the potential power of facial expressions to achieve dramatic effect.[37]

In an example of employing drama/psychodrama from the triallawyerscollege.org site in a hypothetical birth injury case, the presenter explains: "if I represent the child, I will speak as the unborn child. I will speak in first person at some point, to the jury, what is happening in the womb, what I am feeling, that I know something is going wrong, and how terrified I am."[38] Psychodrama is used as a tool that can "bring the fear and terror and horror and anxiety to life for the jury."[39]

Anchoring

Anchoring is the plaintiff attorney practice of asking for a court award amount above and beyond what has historically been considered reasonable, and remains excessive when compared to comparable cases even when reduced in *remittur*. A 2021 article on anchoring presents evidence that it is a "highly effective tactic for generating excessive verdicts."[40] The article presents findings from mock trials employing anchoring, recent examples of anchoring, and points to research by trial consultants and to plaintiff attorney literature that show anchoring to have been effective.[41]

There have been numerous recent examples of civil litigation cases where anchoring was used to help secure extraordinarily large verdicts. For example, in *Hedges v. Planned Security Services*, the court refused to disallow anchoring.[42] The case involved Marion Hedges, who was severely injured after being struck by a shopping cart thrown off the 4th floor of a Target store in northern Manhattan. The jury returned a verdict of $14.5 million for future pain and suffering, $1.9 million for past and future lost earnings, $3.2 million for the cost of a home health aide, and $2 million to her husband for loss of services and society. In the appeal, in which the pain and suffering was reduced to $7 million, the judge intoned that "This Court declines the invitation of amici to announce a new rule prohibiting the practice of anchoring."[43]

Another example of anchoring was seen in *Patterson v. FTS International*, where Patterson's attorney said in his summation, "I'm going to ask you to award up into the tens and millions of dollars, into the tens of millions of dollars because that's the only way to stop it."[44] Improper anchoring creates a greater than 80 percent inflation beyond appellate-court-determined highs for "reasonable compensation."[45]

Many states do not allow anchoring because "Jurors . . . should not be unduly influenced by closing statements that inflame passions, suggest extraordinary sums that are beyond amounts sustained in comparable cases, or manipulate jurors with formulas and calculations intended to produce such results."[46] Advocacy to prohibit the use of anchoring is a public policy area that should be pursued in states that allow its practice.

Cooperation

Today's plaintiff bar is characterized by a collegial, cooperative model.[47] Plaintiff attorneys share strategies, information and witnesses. National plaintiff firms typically work as co-counsel with local personal injury firms. Seminars and training offer instruction in effective techniques. Information is available freely in two websites that carry extensive podcast interviews with prominent plaintiff attorneys. One website has (as of November 10, 2021) 93 podcasts, each approximately one hour in duration.[48] Another features 120 podcasts, each approximately 30-45 minutes in duration.[49] This amounts to approximately 175 hours of testimonials, stories, and free training presented by many of the nation's most successful plaintiff attorneys.

One site is associated with the Trial Lawyers College, established in Wyoming in 1994 by prominent personal injury

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37. "TLC Podcast Episode 100: Chandler Loupe on Adapting to Masks in the Courtroom," Trial Lawyers College Podcast, April 20, 2021. https://www.triallawyerscollege.org/tlc-podcast-episode-100-chandler-loupe-on-adapting-to-masks-in-the-courtroom.

38. "TLC Podcast Episode 42: Birth Injury Attorney Nelson Tyrone on Incorporating Psychodrama," Trial Lawyers College Podcast, Nov. 15, 2018. https://www.triallawyerscollege.org/tlc-podcast-episode-42-birth-injury-attorney-nelson-tyrone-on-incorporating-psychodrama.

39. Ibid.

40. Mark Behrens et al., "Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?" *American Journal of Trial Advocacy* 44, (2021). https://cumberlandtrialjournal.com/2021/10/12/summation-anchoring-is-it-time-to-cast-away-inflated-requests-for-noneconomic-damages.

41. Sonia Chopra, "The psychology of asking a jury for a damage award," *Plaintiff Magazine*, March 2013. https://www.njp.com/wp-content/uploads/article/article2.pdf.

42. *Hedges v. Planned Securities Services, Inc.* 190 AD3d 485 (2021).

43. Ibid.

44. *FTS International Services v. Patterson*. 12 19 00040 CV, Tex. App. (2020).

45. Timothy R. Capowski and Jonathan P. Shaub, "Improper Summation Anchoring is Turning the New York Court System on its Head and Contributing to the Demise of New York State," *New York Law Journal*, April 28, 2020. https://www.sacslaw.com/media/publication/21_NYLJ%20-%20Improper%20Summation%20Anchoring%20Is%20Turning%20the%20New%20York%20Court%20System%20on%20Its%20Head%20and%20Contributing%20to%20the%20Demise%20of%20New%20York%20State%20_%20N_1.pdf.

46. Behrens et al. https://cumberlandtrialjournal.com/2021/10/12/summation-anchoring-is-it-time-to-cast-away-inflated-requests-for-noneconomic-damages.

47. Doug Greene, "Who is Winning the Securities Class Action War – Plaintiffs or Defendants?," D&O Discourse, May 8, 2017. https://www.dandodiscourse.com/2017/05/08/who-is-winning-the-securities-class-action-war-plaintiffs-or-defendants-part-ii.

48. "Award-Winning Podcasts for Trial Lawyers," Trial Lawyer Nation, last accessed Nov. 10, 2021. https://triallawyernation.com.

49. "Home," Trial Lawyers College, last accessed Nov. 10, 2021. https://www.triallawyerscollege.org.

attorney Gerry Spence. Many of the most successful plaintiff attorneys are graduates of the college's three-week summer course.

Migration and Specialization

Tort reforms introduced from 2001 to 2009 were heavily focused on medical malpractice litigation, where runaway claims led to introduction of tort reforms, prominently in Texas.[50] Reforms proved effective in arresting adverse claims trends and were copied in other states.[51] This led to medical malpractice being a less profitable litigation target for plaintiff attorneys, and to medical malpractice attorneys moving to practice areas where large awards were more readily attainable, such as commercial auto (truck and bus accident) liability litigation and directors' and officers' liability litigation.[52]

Another form of plaintiff attorney migration is attorneys moving from working as insurance company defense attorneys to the plaintiff bar. A move from defending insurance company clients to suing insurance company clients allows them to put their "defense knowledge to work" for the benefit of plaintiffs.[53] Even defense firms are taking on plaintiff work.[54]

ATTORNEY ADVERTISING

An increase in attorney advertising is contributing to more litigation, particularly for class actions. Attorney advertising became legal in 1977.[55] The *Bates v. State Bar of Arizona* decision[56] removed earlier prohibitions against advertising by attorneys. Since 1977 attorney advertising had expanded from listings in the yellow pages (telephone books) to billboards on highways, ads on city buses and benches and an advertising inundation on television, radio and the Internet. The volume of attorney advertising has risen sharply in recent years. Data on attorney advertising spend is tracked by firms such as Kantar and has been reported by X Ante.[57] The rise in attorney advertising has been dramatic. In 2015, nearly $900 million was spent on television ads related to legal services. X Ante head Rustin Silverstein reported that represented a jump of approximately 70 percent from 2008.[58]

LITIGATION FINANCING

Recent expansion of the litigation funding (or financing) industry gives plaintiff attorney firms more access to capital with which to pursue litigation. In litigation financing there is a third party in a legal dispute (the litigation funder) providing capital to support a lawsuit. The plaintiff attorney firm receiving the funding agrees to share proceeds with the funder. The funder's interest in the case is purely financial. Litigation financing firms, such as the publicly-traded Burford Capital, receive funding from investors drawn to the industry because it is a diversifying asset class uncorrelated with the capital markets.

A report by litigation funding tracker Westfleet Advisors found that the number of active litigation funders active in the United States rose from 41 in 2019 to 46 in 2020.[59] The 46 funders had combined assets under management of $11.3 billion, with an increase of $1.7 billion, representing over 18 percent growth in the past year. Litigation funding firms closed an aggregate 312 new U.S. litigation finance deals, with $2.47 billion committed, representing a 6 percent increase from 2019.

Growth in the litigation industry has been supported by regulatory changes reversing historical prohibitions of the practice, which is also called "champerty." The legality of champerty varies from state to state, with sixteen states permitting it explicitly by statute and twelve states permitting it implicitly.[60]

Recent developments are in the direction of overturning historical prohibitions of champerty. Examples include the Minnesota Supreme Court striking down Minnesota's champerty doctrine in 2020, and the New York City Bar Associ-

50. Patricia H. Born et al., "The net effects of medical malpractice tort reform on health insurance losses: the Texas experience," Health Economics Review, 2017. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5701901.

51. "10 Years of Tort Reform in Texas Bring Fewer Suits, Lower Payouts," Insurance Journal, Sept. 3, 2013. https://www.insurancejournal.com/news/southcentral/2013/09/03/303718.htm.

52. Doug Green, "Who is Winning the Securities Class Action War—Plaintiffs or Defendants? (Part II)," D&O Discourse, May 8, 2017. https://www.dandodiscourse.com/2017/05/08/who-is-winning-the-securities-class-action-war-plaintiffs-or-defendants-part-ii.

53. Jeremy Jessup, "Life as a Defense Attorney and the Transformation to Representing Plaintiffs," Plaintiff, January 2017. https://www.plaintiffmagazine.com/recent-issues/item/life-as-a-defense-attorney-and-the-transformation-to-representing-plaintiffs.

54. John M. Cunningham, "Defense Lawyers and Others are Trying Plaintiff's Work for the First Time," Sheff Law, last accessed Nov. 24, 2021. https://www.shefflaw.com/defense-lawyers-others-trying-plaintiffs-work-first-time.

55. "A Brief History of Attorney Advertising," FindLaw Lawyer Marketing, last accessed Nov. 24, 2021. https://www.lawyermarketing.com/services/solutions/attorney-advertising-that-was-then-this-is-now.

56. David L. Hudson Jr., "*Bates v. State Bar of Arizona* (1977)," First Amendment Encyclopedia, last accessed Nov. 24, 2021. https://www.mtsu.edu/first-amendment/article/72/bates-v-state-bar-of-arizona.

57. "Tracking Litigation Advertising," X Ante, last accessed Nov. 24, 2021. https://www.x-ante.com; "Our Solutions," Kantar, last accessed Nov. 24, 2021. https://www.kantarmedia.com/us.

58. Jessica Karmasek, "AMA: Lawyer Ads are Alarming Prescription Drug Users, Jeopardizing Health Care," *Forbes*, July 21, 2016. https://www.forbes.com/sites/legalnewsline/2016/07/21/ama-lawyer-ads-are-alarming-prescription-drug-users-jeopardizing-health-care/?sh=6a585333369e.

59. "The Westfleet Insider: 2020 Litigation Finance Market Report," Westfleet Advisers, 2020. https://f.hubspotusercontent30.net/hubfs/6148136/The%20Westfleet%20Insider%20-%202020%20Litigation%20Finance%20Market%20Report.pdf.

60. "Champerty," Legal Information Institute, last accessed Nov. 20, 2021. https://www.law.cornell.edu/wex/champerty.

ation endorsing the practice, even though the same group issued an opinion in 2018 that litigation finance could violate rules prohibiting fee-sharing with non-attorneys.[61]

There should be pushback against the practice of litigation financing because it violates attorney-client privilege by introducing a third party with an interest in a case, and because it may pressure pursuit of a big-ticket jury trial even if the litigant is content to settle and does not wish to risk losing in front of a jury. Pushing back and prohibiting litigation funding should be an area of public policy focus.

PHANTOM DAMAGES

Phantom damages are the difference between medical costs billed and medical bills actually paid. When plaintiff's medical bills are presented in court that are higher than the amount paid, plaintiffs and plaintiff attorneys profit from the difference. In many cases the amount billed is several times higher than the amount actually paid. There may be fraud as well in cases where expensive soft tissue procedures, such as laminectomies, spinal fusions and imaging are billed but never performed. Other abuses involve the performance of unnecessary procedures to drive up the billing. According to Schwartz and Silverman "these illusory amounts serve no compensatory purpose for those who are injured, but drive up the costs of products and services."[62] The authors find further that the practice is expanding.

Some states have statutes to characterize phantom medical billing as a form of insurance fraud. The Texas Department of Insurance identifies numerous related practices that fall under its rubric of insurance fraud.[63] These include:

- Health care provider bills for services and/or supplies not provided
- Provider deliberately performing medically unnecessary services while claiming they were medically necessary
- Clinic or hospital bills for services provided by an unlicensed provider
- Durable medical equipment provider bills for new equipment when used parts were utilized or bills for equipment that was never provided
- Cross border billing, such as a Texas provider billing for services provided in Mexico
- Third party administrator bills for services not performed or bills with a reimbursement code for a complicated procedure rather than the simple procedure provided

Laws allowing full recovery of phantom damages exist in 25 states.[64] In these states, recovery is allowed under most or all conditions and defendants have minimal opportunity to question juries about whether medical bills reflect a reasonable market value. In 11 more states juries are allowed to consider evidence of phantom billed amounts.

Because phantom damages are allowed in a majority of states, loss costs for insurers are inflated. Pushing back against allowing phantom damages is a public policy area where advocacy and education needs to be done to spread awareness of abuses and fraud related to the practice.

DEFENSE BAR ON BACK FOOT

In contrast to the plaintiff bar, which regularly develops and deploys dramatic strategies that exploit human psychology, the defense bar is more conservative and less willing to take risks lest it lose a verdict. Such conservatism is also the result of the contrasting compensation structure. Contingency fee arrangements incentivize plaintiff attorneys to be aggressive and creative, whereas defense counsel is salaried or retained on an hourly basis. In a podcast on nuclear verdicts, Paul DeGiulio, SVP of Allied World Insurance Company, reported that "this is no secret—defense lawyers are much more academic, rule-following, [and] not willing to bend the rules."[65] Other participants on the podcast commented that in most major cases, plaintiff firms encounter a formidable opponent, in the form of a top attorney who:

- Has a national reputation
- Is a skilled manipulator in the courtroom
- Is an actor
- Is an orator
- Is likable to the jury

To the extent that insurance company claims departments

61. Roy Strom, "Litigation Finance Scores Big Win in Minnesota Supreme Court," Bloomberg Law, June 3, 2020. https://news.bloomberglaw.com/business-and-practice/minnesota-supreme-court-abolishes-champerty-prohibition; Roy Strom, "NY City Bar Group Backs Change to Aid Litigation Finance," Bloomberg Law, March 2, 2020. https://news.bloomberglaw.com/business-and-practice/ny-city-bar-group-backs-ethics-change-to-aid-litigation-finance; "Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees," New York City Bar, July 30, 2018. https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees.

62. Victor Schwartz and Cary Silverman, "Truth in Damages: Florida Juries Should Base Personal Injury Awards on Actual Costs of Treatment, Not Inflated Medical Bills," Shook, Hardy, and Bacon, last accessed Nov. 20, 2021. https://www.fljustice.org/files/124353479.pdf.

63. "Types of Fraud," Texas Department of Insurance, last accessed Nov. 24, 2021. https://www.tdi.texas.gov/fraud/types-of-fraud.html.

64. Judicial Hellholes, "Phantom Damages and the Trial Bar's Efforts to Game the System," ATR Foundation, 2020-2021. https://www.judicialhellholes.org/phantom-damages-and-the-trial-bars-efforts-to-game-the-system.

65. Kevin Maloney, "Nuclear Claims Webinar," Allied World, April 2021. https://vimeo.com/519112623.

devote more attention to controlling defense expenditures with cost containment measures than to pushing back against swelling indemnity numbers, they may be penny wise and pound foolish. Defense and claims professionals were understandably loath to go on the record with their view of insurers nickeling and diming legal bills to control expenses while feeling powerless to combat ballooning indemnity amounts, but this trend was reported in a 2016 insurance law podcast where attorney Irwin Kramer of Kramer & Connolly reported that

> the prevailing philosophy inside of many claims departments is that every case has a value. I will have cases that I think are extremely defensible, indeed cases where I don't evaluate us as having any exposure, but there is such a concern over legal-spend, which is a new term that I and many of my colleagues have been introduced to by the insurance industry. Legal-spend. One word, actually. Carriers are very concerned about how much they spend on legal . . . they're concerned about that and **not as concerned, evidently, on cost of indemnification** [emphasis added].[66]

The Geneva Association study on social inflation made similar comments on negative consequences of insurer claims departments' focus on cost control rather than keeping up with plaintiff bar strategies that have led to runaway claims. "A very cost-control mind-set of insurers' claims departments, commercial sensitivities over sharing information, together perhaps also with a dose of complacency, have meant that the plaintiffs' bar has forged ahead in recent years, leaving the defence bar scrambling to play catch-up."[67]

Commenting specifically on securities class action litigation, securities and governance litigator Doug Greene reported that "defendants are losing the war" because of the defense's "lack of a centralized command, which creates a mismatch in expertise, experience, and efficiency."[68]

SHOW ME THE NUMBERS

Insurers seeking a quantitative understanding of the potential impact of social inflation on their companies rely on data that may show by how much social inflation drivers are affecting loss costs. In earlier sections of this report we presented data on the rise in attorney advertising and litigation funding. The impact of new plaintiff attorney strategies and the practice of phantom billing are more difficult to quantify. Perhaps the strongest quantitative evidence of a rise in court awards is the available data on court awards. Below in Figure 1 we present such data, originating from a variety of sources.

- Swiss Re reported the median cost of the top 50 bodily injury claims has risen from $28 million in 2014 to $54 million in 2018.[69]
- A medical malpractice insurer reported seeing a "tripling of verdicts over $10 million over the past three years."[70]
- A study on truck accident litigation by the American Transportation Research Institute (ATRI) found that from 2010 to 2018, the size of court verdict awards against trucking companies increased 51.7 percent a year—while standard inflation and healthcare costs grew 1.7 percent and 2.9 percent, respectively. 71 The ATRI reported that the average verdict size of trucking accident lawsuits over $1 million rose by a factor of ten from 2010-2018, from $2.3 million to $22.3 million.
- In New York City, the Metropolitan Transit Authority (MTA) saw its personal injury payouts rise from $43 million in 2007 to $150 million in 2019. 72 MTA attorney Lawrence Heisler reported that the pandemic created a new reality which "demands that courts condemn 'anchoring,' the practice of counsel asking the jury to return an unjustifiably high award. That practice yields results, seducing juries into delivering awards that differ wildly from reasonable compensation."[73]
- Data provider Advisen found that in 2001, the median cost of a single-fatality award was $1.45 million. It remained rather stable through 2015, when it was $2.0 million. It shot up from 2016 to $3.85 million in 2020. If it were to have risen at the rate of inflation with the 2001 figure as an anchor it would have risen to $2.25 million, but it rose at nearly twice the rate of inflation.

66. John Czuba and Irwin Kramer, "Litigating to Win in the Insurance Defense Industry," Best's Professional Insurance Resources, June 13, 2016. https://www.ambest.com/directories/PodcastTranscript/2016/Podcast_117.html.

67. Pain. https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public/social_inflation_web_171220.pdf.

68. Greene. https://www.dandodiscourse.com/2017/05/01/who-is-winning-the-securities-class-action-war-plaintiffs-or-defendants.

69. Oliver Ralph and Robert Armstrong, "US Jury Payouts Leave Insurance Facing $200 billion Hole," Financial Times, Nov. 21, 2019. https://www.ft.com/content/5fb9aef8-07fb-11ea-a984-fbbacad9e7dd

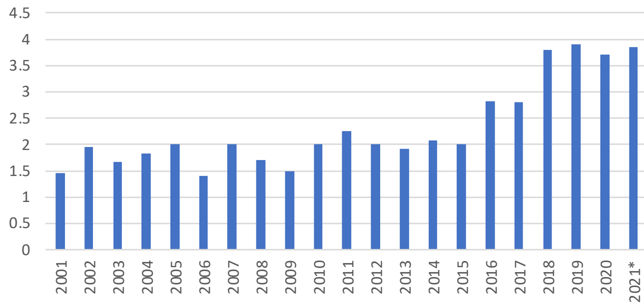
70. Staff, "Insurance Execs Concerned About Inflated Jury Payouts," PYMNTS, Nov. 22, 2019. https://www.pymnts.com/legal/2019/insurance-execs-concerned-about-inflated-jury-payouts.

71. "Understanding the Impact of Nuclear Verdicts on the Trucking Industry," American Transportation Research Institute, June, 2020. https://truckingresearch.org/2020/06/29/understanding-the-impact-of-nuclear-verdicts-on-the-trucking-industry.

72. Julia Marsh, "Woman's $45M personal injury payout puts cash-strapped NYC at risk: lawyers," *New York Post*, Sept. 20, 2020. https://nypost.com/2020/09/20/womans-45m-jury-award-puts-cash-strapped-nyc-at-risk-lawyers.

73. Ibid.

FIGURE 1: MEDIAN COST, SINGLE FATALITY IN $ MILLIONS

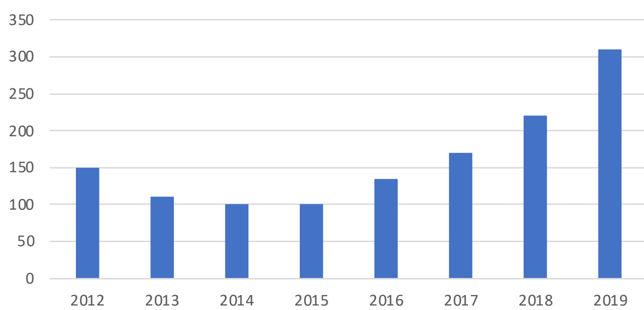


*through Q2 2021

Source: Advisen. https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/362243669.html?rid=362243669&list_id=1.

Figure 2 shows Advisen's findings that found that the average cost of a gender/ sexual discrimination & harassment case from 2017-2019 was $2.6 million, an 86 percent increase from the three years prior—$1.4 million in 2014-2016. The median cost of a gender/ sexual discrimination & harassment case fluctuated from $70,000 to $150,000 from 2003 to 2016—averaging about $100,000—before rising sharply over the last several years.

FIGURE 2: MEDIAN COST, GENDER & SEXUAL DISCRIMINATION IN $1,000s

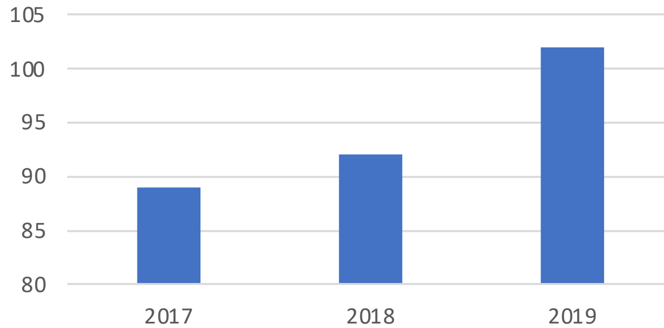


Source: Advisen. https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/362243669.html?rid=362243669&list_id=1.

Advisen found further that from 2015 to 2020, the median cost of a jury award over $10 million increased by 35 percent, from $20 million to $27 million which is shown in Figure 3.[74] It also found that the number of cases with verdicts over $20 million rose from 89 in 2017 to 102 in 2019.

74. "In the Know: Social Inflation and the Increasing Cost of Large Jury Awards," VGM Insurance, Oct. 7, 2021. https://www.vgminsurance.com/blog/post/in-the-know-social-inflation-and-the-increasing-cost-of-large-jury-awards.

FIGURE 3: NUMBER OF CASES WITH VERDICTS > $20 MILLION



Source: Advisen, Verdict Search. https://www.advisen.com/tools/fpnproc/fpns/articles_new_1/P/362243669.html?rid=362243669&list_id=1.

Impact on Insurers

Further evidence of social inflation is seen in disclosures by publicly-traded insurers. Examples include:

- RenaissanceRe commenting in its Q3 2021 earnings call (in which the CEO mentioned social inflation seven times), "social inflation will continue plaguing the industry and price inflation will increasingly push up loss costs."[75]
- The Hanover announcing in its Q3 2021 earnings call that "we're assuming social inflation is there. It hasn't gone away. The large cases are just delayed."[76]
- The Travelers CEO Alan Schnitzer commenting in the Q3 2021 earnings call that "I think of social inflation as being driven more by things like aggressive tactics by the plaintiffs' bar and advertising and litigation finance and things like that."[77]
- The Hartford's CEO Christopher Swift on Q2 2021 earnings call commenting to analysts, "you of all people know, given your views and writings, the impact, particularly in casualty lines of social inflation is real."[78]
- Donegal Insurance announcing in its Q3 2021 earnings call that it added $20.6 million to its reserves

75. "RenaissanceRe Holdings Ltd (RNR) Q3 2021 Earnings Call Transcript," Motley Fool, Oct. 26, 2021. https://www.fool.com/earnings/call-transcripts/2021/10/26/renaissancere-holdings-ltd-rnr-q3-2021-earnings-ca.

76. "The Hanover Group, inc. (THG) Q3 2021 Earnings Call Transcript," Motley Fool, Oct. 28, 2021. https://www.fool.com/earnings/call-transcripts/2021/10/28/the-hanover-insurance-group-inc-thg-q3-2021-earnin.

77. "The Travelers Companies Inc. (TRV) Q3 2021 Earnings Call Transcript," Motley Fool, Oct. 19, 2021. https://www.fool.com/earnings/call-transcripts/2021/10/19/the-travelers-companies-inc-trv-q3-2021-earnings-c.

78. "Hartford Financial Services Group (HIG) Q2 2021 Earnings Call Transcript," Motley Fool, July 29, 2021. https://www.fool.com/earnings/call-transcripts/2021/07/29/hartford-financial-services-group-hig-q2-2021-earn.

because they "see the potential for the impact of social inflation and other inflationary pressures."[79]

CONCLUSION

If unchecked, social inflation, driven by the myriad factors discussed in this study, will become a self-perpetuating phenomenon that sends improper signals regarding the value of damages to jurors, judges and defendants. This will lead to higher insurance premiums, financial strain on insurers, depletion of municipal resources and disincentives for businesses to take risks. This hidden "tort tax" benefits no one except plaintiff attorneys and their clients who engage in practices that lead to social inflation.

There are two broad responses that need to be pursued to combat the perpetuation of social inflationary pressures. One is to influence the development of public policy at the state and federal levels to reveal and control excesses. The second is for insurers and defense counsel to adopt and deploy more aggressive strategies that push back and formally object to tactics violating existing norms of courtroom behavior. Specific courses of action include:

- Pursuit of public policy education and advocacy to push back against litigation finance, anchoring and phantom damages in state capitols.
- Creation of broad-based coalitions that go beyond insurers, insurer associations, tort reform organizations and chambers of commerce. These should include credible business and municipal employees who represent those who would be harmed.
- Defense attorneys aggressively pushing back against use of anchoring and emotional appeals with objections citing violations of the Rules of Evidence and other checks on excessive non-economic damages, such as New York's Civil Practice Law & Rules 5501(c), which stipulates that, should the appellate division find that an award is excessive or inadequate because it deviates materially from what would be reasonable compensation, a new trial can be ordered.[80]

Social inflation has led to a profusion of court awards out of proportion to actual damages sustained. Beyond the adverse impact this trend has on insurers, it leads to higher costs to all because resulting increased insurance premiums amount to a hidden tax passed on to consumers of all goods and services.

79. "Donegal Group Inc. (DGICA) CEO Kevin Burke on Q3 2021 Results - Earnings Call Transcript," Motley Fool, Oct. 31, 2021. https://seekingalpha.com/article/4463880-donegal-group-inc-dgica-ceo-kevin-burke-on-q3-2021-results-earnings-call-transcript.

80. J. Douglas Barics, "Civil Practice Law & Rules 5501," J. Douglas Barics, last accessed Nov. 24, 2021. https://jdbar.com/statutes/cplr-5501.

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