Social Inflation: Navigating the evolving claims environment

December 2020

Social Inflation: Navigating the evolving claims environment

Darren Pain, The Geneva Association

The Geneva Association

The Geneva Association was created in 1973 and is the only global association of insurance companies; our members are insurance and reinsurance Chief Executive Officers (CEOs). Based on rigorous research conducted in collaboration with our members, academic institutions and multilateral organisations, our mission is to identify and investigate key trends that are likely to shape or impact the insurance industry in the future, highlighting what is at stake for the industry; develop recommendations for the industry and for policymakers; provide a platform to our members, policymakers, academics, multilateral and non-governmental organisations to discuss these trends and recommendations; reach out to global opinion leaders and influential organisations to highlight the positive contributions of insurance to better understanding risks and to building resilient and prosperous economies and societies, and thus a more sustainable world.

The Geneva Association—International Association for the Study of Insurance Economics
Talstrasse 70, CH-8001 Zurich
Email: secretariat@genevaassociation.org | Tel: +41 44 200 49 00 | Fax: +41 44 200 49 99

Photo credits:
Cover page— Shutterstock.com

December 2020
Social Inflation: Navigating the evolving claims environment

Published by The Geneva Association—International Association for the Study of Insurance Economics, Zurich.

Contents

Acknowledgements

We are indebted to the members and affiliates of the Working Group of The Geneva Association's Evolving Liability work stream, namely:

- Tom Allebone-Webb, Trevor Maynard and Alex Wickett (Lloyd's of London)
- Ciara Brady and Arne Holzheuer (Allianz Global Corporate & Specialty)
- Ina Ebert, Gerard Skalka and Joachim Haun (Munich Re)
- Tim Fletcher (Gen Re)
- Estelle Hascoet and Keith Thomas (AXA)
- Pierre-Yves Loertscher (Partner Re)
- Keesha-Lu Mitra, Ryan Gammelgard, Bob Watkins and Chase McCall (State Farm)
- Pierpaolo Marano (Catholic University of the Sacred Heart, Milan)
- Mehul Mehta and Philip Myers (Chubb)
- Carolina Ochoa Pinzón, Andrew Guarnori, Jane Mandigo and Dana Franzetti (Swiss Re)
- Chris Paar (Intact)
- Edward Barron, Andrew Redman, Cindy Koehler and Rich Olsen (AIG)
- Kai-Uwe Schanz (The Geneva Association)
- Viola Zsédely-Takács (Ageas)

This report has benefitted significantly from their comments and input.

In addition, we would like to thank a number of external interlocutors who kindly agreed to share their thoughts and insights as background to the report. In particular:

- Adam Boesen (Boesen Consulting)
- Luke Baker (Generali)
- Clint Cox (Clint Cox LLC)
- Tom Geroulo (Bardsley, Benedict and Cholden LLP)
- Alex Guillamont (Kennedys)
- John Hall (Hall Boot Smith, P.C.)
- Leo Martinez (Emeritus Professor of Law, UC Hastings San Francisco)
- Nick Pace and Lloyd Dixon (Rand ICJ)
- Robert Reville (Praedicat)
- Damon Vocke and Ron Lepinskas (Duane Morris LLP)
- Gordon Woo (RMS)

Foreword

Insurers need to accurately model the risks they underwrite and price them accordingly. Otherwise, unexpected claims payments can seriously damage insurers' balance sheets and challenge their capacity to provide vital support to society.

Social inflation linked to liability risks, gone unchecked, poses such a threat. Social inflation is no longer plaguing only the United States but starting to spread to other jurisdictions around the world. The number of liability claims pursued through litigation is increasing along with the compensation awarded to plaintiffs.

Liability insurance is long-tail in nature, meaning that large claims may occur far in the future and ultimately prove underpriced. That is why the recent rise in social inflation is cause for concern: insurance premiums may no longer adequately compensate insurers for the liability risks they assume, including the cost of capital needed to cover unexpected or underestimated losses.

Against this backdrop, insurers should be proactive: strengthen their claims management processes, focus on better understanding and measuring liability exposures – as rigorously as they do in property – and develop new products and risk-absorbing mechanisms.

COVID-19 may exacerbate the identified underlying drivers of social inflation, including social inequality. As emphasised in a recent Geneva Association report, insurers have a role in addressing this, too. Although private insurance was not designed to mitigate social inequality per se, the financial protection it can provide to vulnerable segments of society is a means of tackling social inequality as well.

By combining these approaches to stem the rise of social inflation, insurers can safeguard their role in protecting people and businesses against liability risk.

Jad Ariss
Managing Director
The Geneva Association

1. Executive summary

Social inflation is a term that is widely cited in insurance debates but it is often ill-defined or at best only loosely explained. On a broad definition, 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. More narrowly defined, social inflation refers to legislative and litigation developments which impact insurers' legal liabilities and claims costs.

On a broad definition, social inflation refers to all ways in which insurers' claims costs rise over and above economic inflation.

It is not a new phenomenon. Social inflation tends to occur in bouts or waves and respond to changes in the liability landscape. Earlier episodes occurred most notably in the 1980s and 1990s/2000s, especially for product and professional liability as well as medical malpractice insurance. Recently, social inflation has emerged again as a disruptive issue for companies and their insurers. The number of claims being pursued through the courts has risen noticeably over the past few years and the level of compensation awarded has increased sharply. Though largely a U.S. issue, there are signs of social inflation elsewhere with potential for further international contagion, albeit not to the same degree as in the U.S. For instance, class action lawsuits, especially for securities litigation, are driving up directors' and officers' liability (D&O) insurance claims in Australia.

The long-run implications for insurers depend on how far recent developments represent an enduring shift to a significantly higher *trend* in claims growth that far outstrips estimates assumed when policies were originally underwritten. Such persistent social inflation that goes unrecognised for years can lead to chronic under-reserving and under-pricing, especially since liability lines are often long-tail in nature and large claims may come to light only slowly. An unexpected change of claims inflation has a leveraged effect on required reserves – a change of 2% could increase liabilities by around 16% on a portfolio which takes eight years to settle.

Persistent social inflation that goes unrecognised can lead to chronic under-reserving and under-pricing.

The scale and persistence of social inflation will depend on what is currently driving it as well as any policy and industry response. Among candidate explanatory factors, aggressive strategies of the plaintiffs' bar throughout the litigation process from client acquisition, pre-trial discovery to the trial itself have been significant. Combined with deepening third-party litigation finance and hardening juror attitudes towards social inequalities and corporate responsibility, this is creating a challenging litigation environment for companies and insurers. Widespread shifts in liability doctrines and practices in favour of defendants do not seem to have been especially influential recently. However, COVID-19 creates additional uncertainty over future liabilities, particularly as the pandemic could accelerate/amplify some of the recent underlying drivers of social inflation.

To the extent that insurers are not adequately compensated for the risks they assume, including social inflation, this impairs their ability to fulfil their societal function. While it may be tempting to rely on the recent upswing in the underwriting cycle to bolster insurers' results, such an approach leaves insurers vulnerable to a sudden spike in required reserves should the long-term outlook for claims deteriorate. Instead, alongside engaging with public policy debates to promote tort reform, encourage increased transparency over litigation processes and curb excessive legal costs, insurers should prioritise three areas:

- Enhanced defence case management to offer a more effective counter to the plaintiffs' bar
- Investment in forward-looking liability exposure management to pre-empt new emerging perils and assess the potential liability costs of shifts in future social inflation
- Product innovation to ensure liability insurance remains fit for purpose, including promoting more radical solutions such as risk participation arrangements, parametric solutions and, possibly in time, transfer of certain liability risks to capital markets.

Insurers must proactively pursue initiatives to counter that threat.

2. What is social inflation?

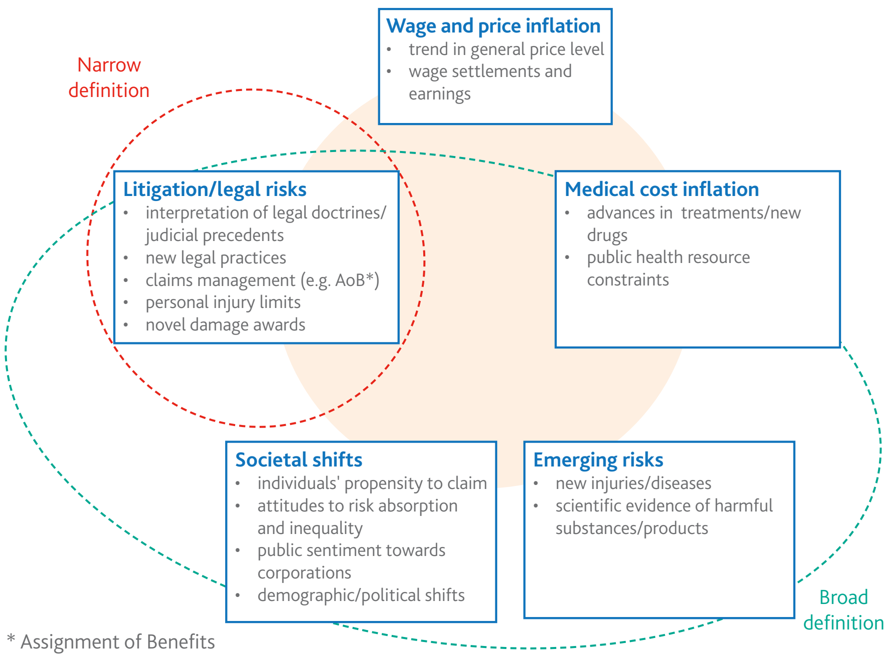
Social inflation is a term that is widely mentioned in insurance circles but it is often ill-defined or at best only loosely explained. In truth, it means different things to different people, including actuaries, lawyers, politicians and policyholders, let alone the general public. Even among insurers there are differing views as to what social inflation actually includes, as well as a lack of consistency in the approaches taken to measure it.

2.1. Broad and narrow interpretations

> Broadly defined, social inflation refers to all ways in which insurers' claims costs rise over and above general economic inflation.

On a broad definition, social inflation refers to all ways in which insurers' claims costs rise over and above general economic inflation (i.e. growth in wages and prices) which will influence the cost of repairs and/or replacing damaged property.[a] It therefore captures the growth in costs associated with: unanticipated emerging perils associated, for example, with new materials or technologies, shifts in the legal environment, evolving social attitudes and preferences towards equitable risk absorption and demographic and political developments (Figure 1).

Figure 1: A stylised typology of social inflation



* Assignment of Benefits

Source: The Geneva Association

a In 1977, Berkshire Hathaway's Warren Buffett in a letter to investors defined social inflation as 'a broadening definition by society and juries of what is covered by insurance policies'.

Insurance actuaries typically label such growth in claims costs 'superimposed inflation', and also separately include increases in claims handling costs and medical expenses to which insurers are often especially exposed. The latter will usually already feature in regular indicators of economic inflation, yet such measures may not adequately account for advances in medical technology, which create new therapies, change the costs of treatment and increase the lifespan of seriously injured claimants.

More narrowly defined, social inflation refers to legislative and litigation changes which shape and ultimately impact insurers' legal liabilities and claims costs. These include higher jury awards, legislated rises in compensation benefit levels, changes in legal interpretations by courts, shifts in jurors' sentiment towards claimants/perceptions of fairness and new concepts of tort and negligence. Such considerations are particularly important in underwriting and pricing risks such as workers' compensation, directors' and officers' (D&O) liability, medical malpractice, general liability and public liability, which are most vulnerable to this phenomenon.[1]

2.2. Episodic swings in the liability environment

> It is not a new phenomenon but tends to occur in bouts and respond to episodic shifts in the liability landscape.

Social inflation, broadly or narrowly defined, is not a new phenomenon. It tends to occur in bouts or waves and respond to episodic shifts in the liability landscape. Sometimes these can be triggered by single, high-profile events. For example, in the wake of the Deep Water Horizon drilling rig explosion and resulting oil spill in the Gulf of Mexico in 2010, there was widespread discussion about driller liability, including unlimited liability, for economic and environmental damages and even talk of retroactive legislation.[2,3] More generally, changes in the scope and nature of liability tend to evolve in response to a range of issues including emerging risks, new regulations and legislation, latest judicial precedent and litigation practices.

Notably in the 1980s, moves towards no-fault liability, pursuit of claims against defendants with deep pockets, under the doctrine of joint and several liability, and the emergence of environmental hazards such as asbestos, greatly expanded liability beyond what insurers originally contemplated when entering contracts.[b] These unanticipated increases in claims significantly strained many insurers' financial resources and ultimately led to widespread reductions in the availability and/or sharp repricing of cover in many casualty lines. In turn this episode prompted a number of reforms to the civil justice system aimed at reducing the ability of victims to bring tort litigation or the amount of damages they could receive.

> The large increase in liability claims in the 1980s prompted reforms to the civil justice system aimed at reducing the ability of victims to bring tort litigation or the amount of damages they could receive.

The early 2000s in the U.S. also saw a sharp increase in medical malpractice claims and generous jury awards against doctors, as individuals increasingly looked to the judicial system to secure compensation for injuries suffered in the course of treatment. Again, this ultimately led to further tort reforms, at least for individual states, to cap noneconomic and punitive damages as well as amend joint liability rules. A similar episode occurred around the same time in France following a landmark court judgement in November 2000, which established the principle of compensation to children born with severe disabilities due to medical errors.[4] This prompted the French authorities to introduce measures to mandate insurance for medical malpractice albeit typically on a claims-made basis, whereby claims must be made during the current policy period.

2.3. Recent escalation in litigation and claims

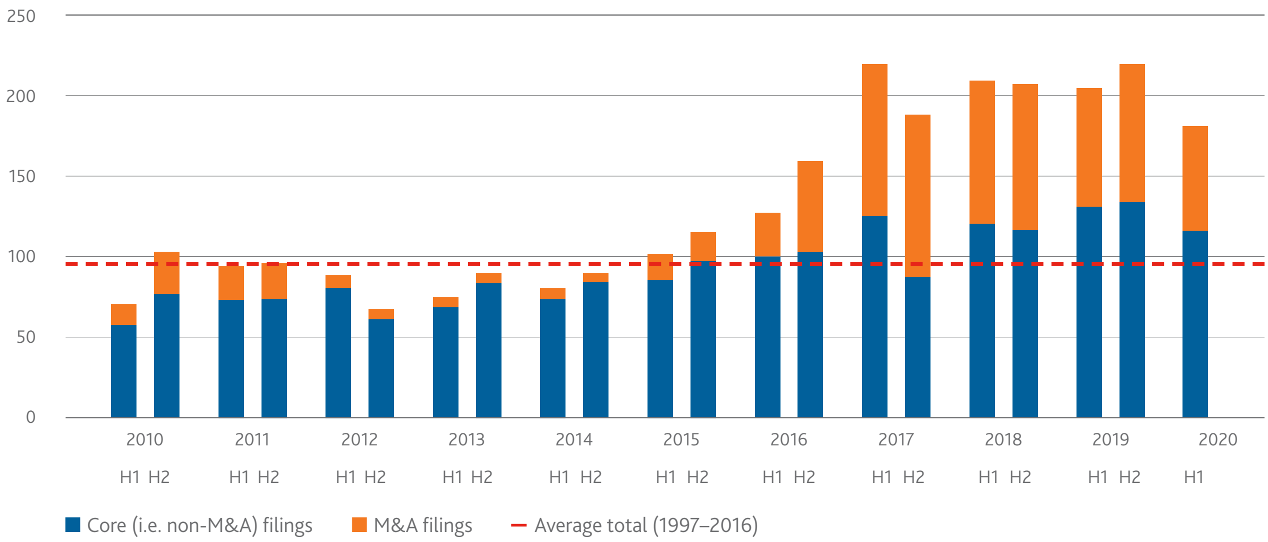
> There are signs that social inflation has emerged again as a disruptive issue for companies and their insurers.

Recently, there are signs that social inflation has emerged again as a disruptive issue for companies and their insurers. The number of claims being pursued through the courts has risen sharply over the past few years, especially class actions (a lawsuit that allows a large number of people with a common interest in a matter to sue or be sued as a group). According to one study,[5] between 2017 and 2019 securities class actions across U.S. federal and state courts were more than double the average number in the previous five years (Figure 2).

b In 1980, environmental liability was expanded with enactment of the Superfund law. Lead paint, toxic mould, tobacco, Chinese drywall, and firearm litigation followed that.

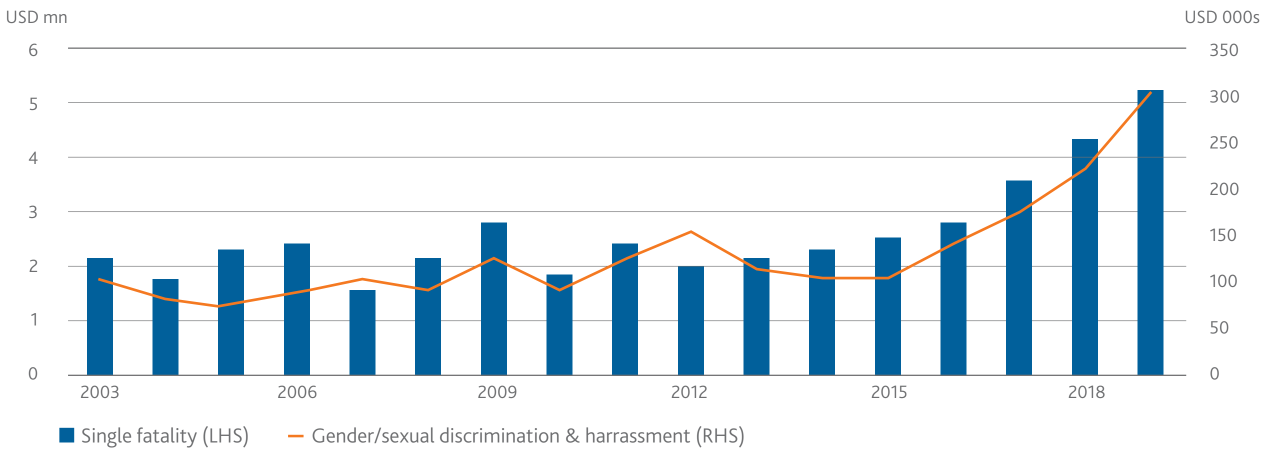
Similarly, a recent survey found that the number of class actions U.S. companies handle in any given year has more than tripled since 2011, from an average of 4.4 to a projected average of 15.1 in 2020, with the number of new matters filed accelerating over the past three years. The litigation rate – the likelihood that a public company will be named in a securities class action – rose in 2019 for the seventh consecutive year in the U.S. to 8.9% compared with an average of 3% for the period 1997–2018.[5]

Figure 2: Number of securities class actions in the U.S.



Source: Cornerstone Research

Figure 3: Median value of awards in the U.S. for selected case features, by disposition date



Source: Advisen

As well as a pick-up in civil litigation activity, the level of compensation awarded has increased. For instance, researchers found the median of the top 50 single-plaintiff bodily injury verdicts in the U.S. climbed from USD 27.7 million in 2014 to USD 54.3 million in 2018.[6] The number of plaintiffs achieving outsized awards has also jumped sharply. A review of U.S. cases reported to VerdictSearch shows that the number of verdicts of USD 20 million or more in 2019 has risen more than 300% from the annual average between 2001 and 2010.[c] According to U.S. data from Advisen, since 2015 the median award for a case involving a single fatality has more than doubled; for a case involving sexual harassment, it has tripled (Figure 3).

c https://blog.distinguished.com/index.php/2020/07/umbrella-liability-insurance/

A review of U.S. cases shows that the number of verdicts of USD 20 million or more in 2019 has risen more than 300% from the annual average between 2001 and 2010.

Within the total, payouts for bodily injuries resulting from accidents involving commercial vehicles have become particularly prominent in recent years, contributing significantly to the landscape of 'nuclear verdicts' (loosely defined as awards greater than USD 10 million). The total amount awarded for commercial auto liability involving nuclear verdicts has grown rapidly in the past decade from USD 300 million in 2011 to nearly USD 1 billion in 2018 and 2019, with non-economic damages becoming increasingly important.[7,d] Similarly, payouts have risen sharply for securities class actions; the median settlement in 2019 was USD 11.5 million, unchanged from 2018 (adjusted for inflation) but over 30% higher than the median in the prior nine years.[5] Partial data for 2020 suggest no let-up in outsized settlements: 15 of the 36 cases settled in the first half of the year involved awards of USD 20 million or more.[8]

Given their scale, U.S. court awards often grab the headlines. But some other countries have also seen a pick-up in litigation and payouts, especially for non-economic damages. Litigation in a number of European countries has expanded the categories of compensation – so-called 'heads of damages' – available to a victim of tort. For example, in France cases have been brought alleging prejudice of anxiety relating to asbestos exposure and disruption to victims' living conditions. And in Belgium, damages have been awarded for prejudice d'établissement – not being able to create a family.[9]

Securities class actions have reportedly surged recently in Australia with ever larger sums awarded to plaintiffs.

Beyond personal injury cases, securities class actions have reportedly surged recently in Australia with ever larger sums awarded to plaintiffs.[e] Shareholder class actions are now the most common class actions in the Australian Federal Court, with 34% of all class actions filed in the last five years being shareholder claims.[10] Australia´s continuous disclosure regime for public companies is particularly stringent and has created fertile ground for shareholder class actions.[f] Canada has also seen increased legal actions by investor groups in recent years, including cross-border claims. U.S. litigation may have indirectly stimulated securities class actions in other jurisdictions. In particular, following the decision of the U.S. Supreme Court in Morrison v. National Australia Bank, foreign investors who purchased shares in an international company on a foreign exchange, cannot pursue claims in U.S. courts and must look elsewhere for redress.[11,g]

Collective action by both consumers and shareholders is also a growing theme in Europe. Many European countries now offer some form of collective action mechanism, even if it is just a process for consolidating linked actions rather than a distinct legal procedure.[12,h] In recent years such mechanisms have been utilised for collective actions in increasing numbers, although their impact remains modest. The proposed EU Directive on collective redress could add further impetus by allowing representative legal actions to be brought across the Union, including cross-border proceedings filed in one member state to address infringements spanning jurisdictions. The Directive will empower qualified entities such as consumer organisations to pursue litigation on behalf of a group of individuals that have been harmed, albeit representative actions are limited to consumer protection concerns such as data breaches and health and safety infringements.[i]

2.4. Isolating the underlying claims trend

Summary measures of either the frequency of trial activity or the value of associated damages may not, however, offer a reliable guide to social inflation. Not all insurance claims are resolved through the judicial system and indeed, of those that do, many settle out of court or have their damages reduced on appeal. Comparing developments over time in such indicators will also reflect shifts in the nature of cases such as the type of issue litigated and

d According to Oh,[7] between 2006 and 2019 the number of nuclear awards for commercial auto liability cases was broadly stable at around 15 to 20 per year. However, the composition has changed with the share of awards greater than USD 20 million increasing substantially over the past few years.

e https://insuranceasianews.com/australian-market-calls-out-sharp-do-premium-hikes-reports/

f In Australia, the continuous disclosure rule can give rise to personal liability for directors in the absence of any misleading or culpable conduct. Moreover, there is no ´safe harbour´ from liability for forward-looking statements, even when such statements are based on sound application of business judgement and appropriately qualified. https://aicd.companydirectors.com.au/membership/company-director-magazine/2018-back-editions/december/class-actions-freehills

g This has reportedly been a driver of collective actions in, for example, England, including a widely publicised action against the supermarket chain Tesco, which was in part prompted by the inability of investors who bought shares on the London Stock Exchange to join proceedings filed in the U.S.. See Aspen Re.[11]

h For example, Germany, the Netherlands and the U.K., have established collective redress procedures. See AGCS.[12]

i https://www.europarl.europa.eu/doceo/document/TA-8-2019-0222_EN.html the circumstances of the defendants and plaintiffs. Most obviously, developments in average jury awards will vary with the amount of damage incurred, either because injury severity changes or because plaintiffs with more severe injuries are relatively more likely to litigate and go to trial. Similarly, shifts in the mix of cases over time (e.g. prevalence of product liability versus medical malpractice) as well as variations in trial lengths affect overall reported average jury verdicts in any one period.

Moreover, to the extent that insurers set premiums to cover expected increases in claims costs (allowing for both projected economic and superimposed inflation) and hold capital to absorb unexpected losses, temporary bouts of social inflation that quickly subside, though unwelcome, should be manageable. U.S. insurers' liability claims for commercial auto as well as financial and professional liability lines accelerated rapidly over the past five years, growing at a rate well in excess of consumer price inflation. The pick-up for some other lines represented a reversal of earlier falls, leaving their 2019 levels, after adjusting for economic inflation, broadly unchanged from 2007 (Figure 4).

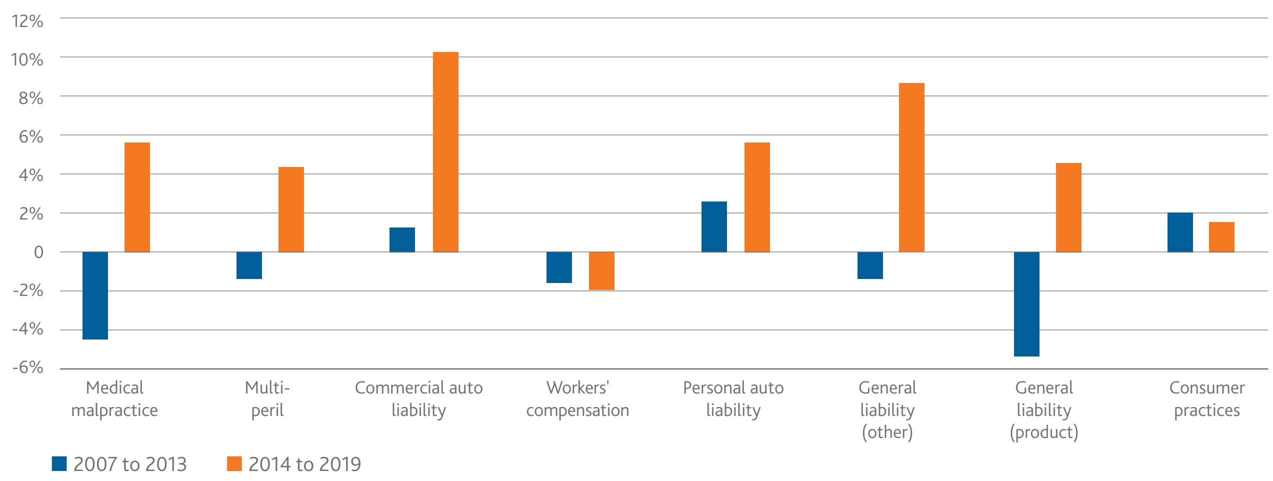
The challenge for insurers is when outsized claims represent an enduring shift to a sharply higher trend in claims growth that far surpass the estimates made when policies were originated.

Much more problematic for insurers is when outsized claims represent an enduring shift to a sharply higher trend in claims growth that far outstrip estimates assumed when policies were originated.[j] Similar to property insurers needing to differentiate the claims impact of climate change from weather events, casualty insurers have to assess how far their liability costs have moved to a permanently higher growth path; or put another way, whether losses on liability polices once fully developed are likely to be materially and persistently higher than initially projected.

Such persistent social inflation that goes unrecognised for years can lead to chronic under-reserving and under-pricing, especially since liability lines are often long-tail in nature and large claims may come to light only slowly. As a rule of thumb, the impact can be approximated by multiplying the change in inflation with the number of payment years.[13] Hence, an unexpected change of claims inflation by 2% could increase liabilities by around 16% on a portfolio which takes eight years to settle. Such a leveraged effect leaves liability insurers highly vulnerable to a sudden re-appraisal of the outlook for claims costs which could hit both their profitability and solvency.

Table 1 summarises growth in U.S. liability claims for those insurance lines for which long historical time series are available and how they compare with developments in overall U.S. economic activity and selected economic inflation indicators. Over the whole period (1975 to 2019), U.S. aggregate liability claims for most lines rose at around the same average rate as or slightly slower than nominal GDP. That is faster than retail price inflation in the U.S. although not too far ahead of growth in medical costs and wages, which has also affected overall liability costs.

Figure 4: Annualised growth in U.S. liability claims and consumer prices



Note: Financial and professional lines are included in General liability (other).

Source: Swiss Re and The Geneva Association calculations

j For pricing and reserving purposes, insurance actuaries often assume superimposed inflation is a single average rate meaning that over any one-year time period the actuary is always likely to be wrong. Even if the long-term rate is on average correct any 'allowance' in liability valuations will be released to profit for most years yet be inadequate when the bout occurs creating earnings volatility and potential capital impairment. The challenge is to recognise when there has been a shift in the environment that would justify a permanent increase in the estimated parameter.

Table 1: Annualised growth in U.S. liability claims incurred (by major line) and economic inflation indicators	
1975 to 2019	
General liability	6.9%
Medical malpractice	5.0%
Multi-peril	5.6%
Commercial auto liability	5.9%
Workers' compensation	4.0%
Personal auto liability	6.3%
Nominal GDP	6.0%
Consumer prices	3.6%
Medical costs	5.5%
Employment costs	3.8%
Average wages	4.3%

Source: Swiss Re and The Geneva Association calculations

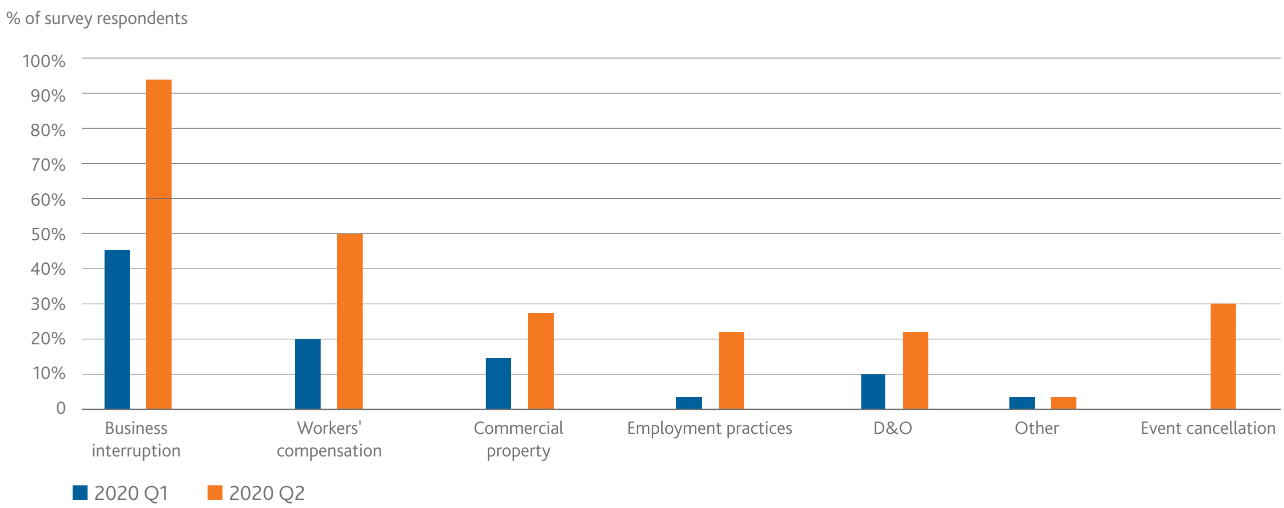
A key question therefore is whether the recent acceleration in claims for some liability lines such as commercial auto will unwind so that the level of claims ultimately converge back to their prevailing historical long-run trends. The aggregate time series properties indicate that this is not assured; unanticipated developments in liability claims incurred often persist and may never fully reverse.[k] That is perhaps unsurprising. The accumulation of casualty losses may take time to show up as the full effects of unexpected litigation or latent perils gradually emerge and insurers only slowly adjust their policies and reserves (for both existing unpaid liabilities and future reported claims) to reflect the new risk landscape.

The accumulation of casualty losses may take time to show up as the full effects of unexpected litigation or latent perils gradually emerge and insurers only slowly adjust their policies and reserves to reflect the new risk landscape.

Some insurance actuaries advocate calibrating social inflation by comparing the evolution of settlements for like-for-like claims.[14] By stripping out the effects of changing claims frequency, which itself will respond to changes in overall economic activity (both cyclical and secular), this can help isolate the underlying severity trend. It also affords a cleaner comparison with economic inflation indicators which typically measure price developments for a common basket of goods and services and adjust, for example, for changes in the quality of products.

Unfortunately, comprehensive, granular claims data are not publicly available. Nonetheless, data on jury awards do indicate a sustained recent escalation in payouts for selected similar case types such as asbestos-related claims in particular venues. Furthermore, asbestos litigation is back in the news, setting the scene for a potential renewed escalation in associated settlements. In July 2018, a trial court ordered Johnson & Johnson to pay USD 4.69 billion for failing to warn customers that its baby powder contained asbestos, which naturally occurs in talc.

Figure 5: U.S. brokers reporting increasing COVID-19-related claims in commercial lines



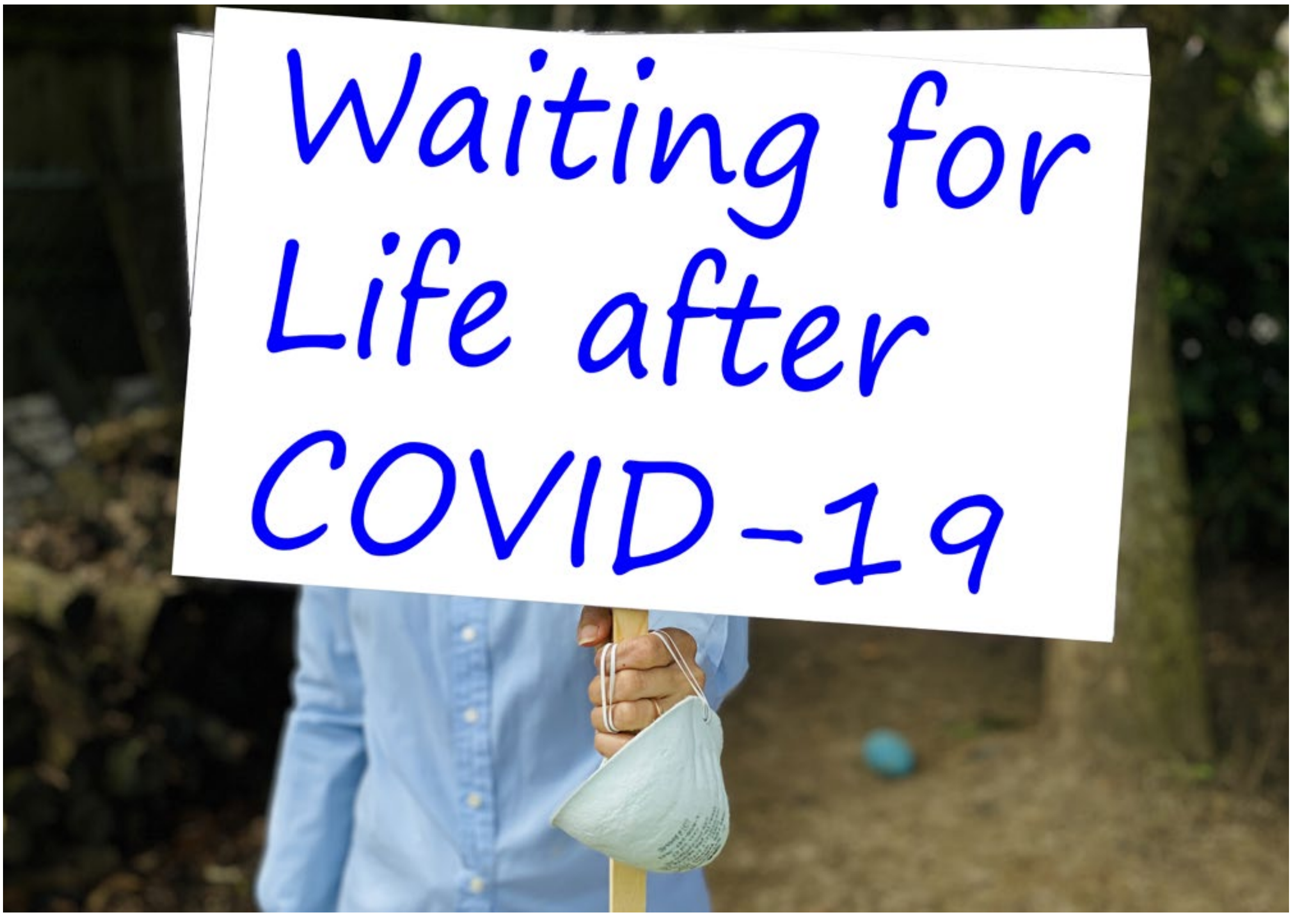
Source: Council of Insurance Agents & Brokers

k Formal statistical tests indicate the presence of stochastic trends for a number of U.S. liability lines, albeit some series may also have deterministic long-run drivers. This indicates that once disturbed claims do not necessarily revert to their prevailing long-term trend but instead evolve along a new secular path. Moreover, such long-run behaviour cannot be solely explained by the trend in nominal GDP, suggesting other societal factors are also influential in shaping claims trends.

COVID-19 creates additional uncertainty about the liability claims landscape, especially over the longer term.

The ongoing COVID-19 situation provides an illustration of the challenges in figuring out whether the liability environment and hence future claims has materially and permanently deteriorated. A survey of U.S. insurance brokers indicated a sharp pick-up in reported COVID-19-related claims in Q2 2020 (Figure 5), although most respondents noted few successful cases so far. To the extent that the effects of the pandemic are temporary and localised – for example, increased claims against employers who fail to adequately protect their workers from contracting the virus or business interruption losses limited to those explicitly covered under existing policies – the adjustment for insurers should be relatively smooth. However, COVID-19 could yet prompt international shifts in the liability landscape, as changes in the risk environment and social preferences over who best to absorb these risks become reflected in legislation and judicial interpretations of laws and contracts.

Against that backdrop, insurers must continually monitor and assess the dynamics of social inflation and anticipate its likely path. This requires an appreciation of the historical and possible future time series properties of the frequency and severity of claims costs. In turn, this will ultimately depend on understanding the underlying drivers behind such inflationary trends.



3. What are the underlying drivers?

Social inflation developments reflect a complex set of interacting socioeconomic, institutional and behavioural factors which can and do change over time. Many factors are most pronounced in the U.S. where adversarial legal procedures often combine with a litigious culture to promote lawsuits and high jury awards/settlements, including large punitive damages. But some resonate more widely, suggesting potential international sources of social inflation, at least for certain types of cases. Monitoring the underlying drivers is therefore important for all insurers both in assessing latest claims developments and projecting forward potential liabilities.

3.1. Legislative and judicial developments

The tort reforms enacted across the U.S. in the late twentieth century remain largely intact. Indeed, over time, the statutes have tended to be amended further in favour of defendants. A number of states have moved progressively to apply additional restrictions on joint and several liability, to ensure compensation is more proportionate with defendants' culpability. Caps on non-economic damages have been found to be especially effective in controlling tort liability costs. According to one account, 38 states had enacted caps on non-economic damages by 2019. In six states, caps applied to economic as well as non-economic damages.

Outside of the U.S., legislative changes have also directly or indirectly worked to curb frivolous or abusive litigation and limit damages, at least for personal injury cases. For example, in the U.K., the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and in particular its provisions for fees and after-the-event insurance premiums to be paid out of the successful claimant's damages, has reportedly reduced unwarranted claims.[15,l] Likewise, in Italy legislation passed in 2012 has generally restricted payments for whiplash and other minor personal injuries.

3.1.1. Recent localised reversals in tort reform

> There are signs in some U.S. jurisdictions of a recent judicial backlash against tort reforms such as limits on non-economic damages.

There are, however, signs in some U.S. jurisdictions of a recent judicial backlash against ongoing tort reform. Of the 32 states that have reformed punitive damages, four had reforms struck down as unconstitutional and have not enacted additional reforms. Likewise since 2010, the supreme courts of at least five states with caps on non-economic damages have overturned the reforms. For instance, in 2017 the

l After-the-event (ATE) insurance provides cover for legal expenses incurred in the pursuit or defence of litigation and arbitration. The policy is purchased after a legal dispute arises. Following the introduction of LASPO, for the vast majority of ATE policies the premium is no longer be recoverable from the losing opponent.

Florida Supreme Court held that the limit on non-economic damages is unconstitutional in all medical liability cases.[16]

Legislation to extend civil statutes of limitations and retroactively apply the new time limit have also been initiated, at least for certain claims. From 2015 to 2019, more than 10 U.S. states and the District of Columbia made changes to their laws on civil statute of limitations for sexual assault victims. Most of these laws became effective in 2019.[17] In addition, case law has developed to allow some civil litigation to be pursued in U.S. state courts, which are generally viewed as more plaintiff friendly than federal courts.[m]

Similarly, several high-profile lawsuits have been pursued in U.S. courts which have sought to expand the public nuisance theory of liability far beyond its traditional scope. Most notably these cases focused on injuries linked to climate change, use of talcum powder, opioids and vaping. Plaintiffs frequently argue that standards generally applied to establish causation in tort claims should not apply to public nuisance, but rather that the existence of a nuisance and some nexus of that nuisance to the defendant is enough to establish liability.[18]

Proponents of tort reform point to these sorts of developments as evidence that the balance of litigation in the U.S. is gradually shifting back towards plaintiffs. By increasing the potential damages that may be awarded, additional incentive is created for more lawsuits to be filed and for claimants and plaintiffs to seek higher settlements from insurers and defendants[19] The recent approval of the Restatement of the Law and Liability insurance (RLLI) – an initiative by the American Law Institute intended to provide guidance on the standards and rules that come into play in insurance coverage litigation – has also raised alarm among some commentators given that some of its proposals involve changes to principles and rules that could expand insurer liability.

Increasing the potential damages that may be awarded creates additional incentive for more lawsuits to be filed and for claimants and plaintiffs to seek higher settlements from insurers and defendants.

3.1.2. Broader implications for liability landscape so far contained

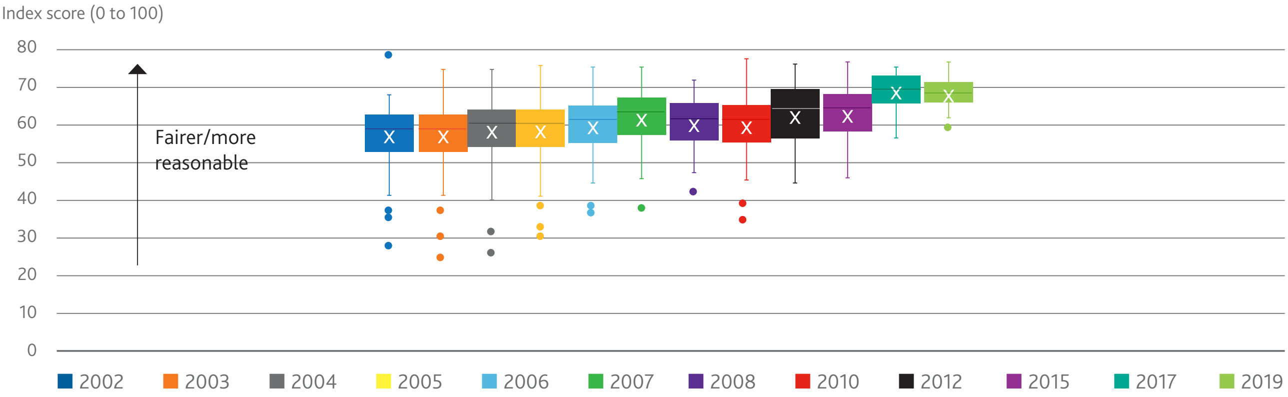
It is not obvious that changes in judicial protocols and reinterpretations of legal doctrines can explain the recent pick up in compensation awards.

Compared with earlier episodes, however, it is not obvious that changes in judicial protocols and reinterpretations of legal doctrines can explain the recent pick up in compensation awards, at least so far. There is at best only a weak correlation between those jurisdictions where the very highest jury awards have occurred and those states with a relatively poor reputation for fair and reasonable liability systems.[n] In some jurisdictions too, trial judgements have prevented proceedings from being brought in venues favoured by plaintiffs.[20]

m In March 2018, the U.S. Supreme Court ruled unanimously in Cyan Inc. et. al. v. Beaver County Retirement Fund et. al., that securities offerings litigation can be heard in state court in addition to federal courts.

n The rank correlation between those U.S. states with high jury awards in 2018/2017 and those states perceived to have relatively fair overall liability systems over the period 2012–2017 was -0.2. This result was broadly echoed for the rank correlation between high jury awards and perceptions of the overall treatment of tort and contract litigation across states.

Figure 6: Corporate views of fairness and reasonableness of liability systems across U.S. states



Notes: The width of the boxes represents the inter-quartile range of overall scores for each state based on 10 key criteria evaluated by in-house general counsel, senior litigators or attorneys, and other senior executives who are knowledgeable about litigation matters at public and private companies with annual revenue of at least USD 100 million. The lines indicate variability outside the upper and lower quartiles, and any point outside those lines or whiskers is considered an outlier. X refers to the mean score across states.

Due to changes in overall ranking criteria in 2017, recent scores are not strictly comparable to earlier years.

Source: U.S. Chamber Institute for Legal Reform

More generally, the perceptions of companies' senior attorneys and executives of the litigation environment have improved over recent years despite the pick-up in jury verdicts.[o] According to the U.S. Chamber of Commerce, there has been a general increase in the overall average score attached to state liability systems over the past couple of years, continuing a trend since the early 2000s, although variations persist across states (Figure 6).

Furthermore, although the RLLI was finalised, approved and published in 2019, considerable uncertainty remains over what role it could (and should) play in courts' decision-making. Some legislatures have already enacted statutes and resolutions rejecting the RLLI as inconsistent with the law and policy of their jurisdictions.[p] As reviewed in Box 1, some legal scholars at least foresee limited effects of the RLLI on social inflation.

Box 1: The Restatement of the Law of Liability Insurance (RLLI) and Social Inflation (by Leo P. Martinez)[q]

The American Law Institute's Restatement of the Law of Liability Insurance (RLLI), adopted in May 2018, strives to create a uniform regime of liability insurance law in the U.S.[r] Despite the relatively abrupt appearance of the RLLI on the legal landscape, its disruptive effect on social inflation will likely be minimal. Instead, it should help insurers and policyholders better predict loss exposure and risk.[21]

Previous Restatements have been influential and have both attracted and survived criticism.[22,s] The RLLI has followed suit. One critic noted that the RLLI 'ignores the economics of the provision of insurance'.[23] Another critical theme, common to all Restatements, suggests the RLLI departs from existing law.[24] Some critics resort to hyperbole, describing the RLLI as a usurpation of legislative and executive (if not judicial) power.[24] The criticisms have largely covered the same ground over time and are misplaced for three primary reasons:

- The criticisms exaggerate the role of the RLLI. While it does have persuasive value, not least because it transparently lays out the sources of its pronouncements, the RLLI is not law. Courts and legislatures are not bound to follow it, and it has no talismanic effect.
- There is general utility in critically examining legal concepts that are central to a discipline.
- Uniformity and predictability of the law are worthy goals in themselves. If there are multiple possible results with nearly every legal issue that arises, society is ill-served.

o The survey results are based on interviews with a nationwide sample of 1307 U.S. in-house general counsel, senior litigators or attorneys, and other senior executives who are knowledgeable about litigation matters at public and private companies with annual revenue of at least USD 100 million.

p In Ohio, for example, legislators recently amended the insurance statute to state that the Restatement 'does not constitute the public policy of this state'. Similarly, the Kentucky House of Representatives adopted a resolution officially opposing the Restatement.

q Dean Emeritus and Albert Abramson Professor of Law Emeritus, University of California Hastings College of the Law. Dean Martinez was an Adviser to the RLLI project.

r The McCarran-Ferguson Act gives the individual states within the United States the power to regulate their insurance markets. 15 U.S.C. § 1012(a) (2018). The result is that each of the 50 states is free to formulate the statutes and regulations that govern insurance within their borders. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946).

s By 2014, U.S. courts had cited various provisions of the Restatements and Principles of the Law 195,000 times.[22]

Box 2: COVID-19 and social inflation (by Damon Vocke and Ron Lepinskas, Partners at Duane Morris LLP)

Roughly 5,000 suits relating to COVID-19 have so-far been filed. The majority of litigation has concerned business interruption coverage, mostly conducted in the U.S. federal court. Payouts for such contract cases are typically only modestly affected by broader social inflation themes. This is not least because damages are often contractually limited and U.S. federal judges are fairly reliable in applying policy limitations, such as virus exclusions.[v]

The major threat of social inflation manifesting in COVID-19 litigation is elsewhere; namely, a future wave of litigation for injury and other tort claims, especially in U.S. state courts. Only about 100 personal injury suits have been filed thus far. But social inflation may play havoc in future pandemic-related cases, potentially permitting looser standards for allowing scientific testimony, for defining a legal duty of care, and for sanctioning outsized damages. Such a wave of COVID-19 litigation would show up most in insurers' general liability exposures, and, to a lesser extent, in workers' compensation, employment and professional lines. Some industries, such as healthcare and hospitality, would continue to be hit hard. Yet a resurgence of COVID-19 mortality during future outbreaks of the virus would likely trigger wrongful death litigation against a wide set of corporate defendants.

Moreover, the pandemic could have feedback effects on the broader liability landscape. Society's frightening experience with COVID-19 may accelerate the prevailing shifts in claims frequency and severity and/or amplify the factors that have contributed to social inflation. Such effects include:

- **Further hardening of juror/judge attitudes:** In light of continuing social and income inequalities and a backlash against elites, recent years have witnessed greater personal incivility among juries. Research has shown jury anger tends to translate into less scope for compromise and more extreme verdicts. The COVID-19 episode could further divide and incite juries. Excluding key workers, most people low down in the earnings distribution are in sectors that have been forced to shut down, and a significant majority are either in a shut-down sector or are unable to do their work from home. The pandemic has also disproportionately affected women and people of colour, perhaps because they comprise the majority of health and service care workers. To the extent that COVID-19 exacerbates inequality of income/wealth/opportunity, outsized compensation awards achieved through litigation might increasingly come to be seen as a vehicle to redress the balance.

  If COVID-19 exacerbates inequalities, outsized compensation awards might increasingly be used to redress the balance.

- **Continued expansion in the duty of care:** In recent years, a 'safety' culture has developed with the onus on those in power to identify and eliminate risks. This has led juries and judges to think more in terms of expanded liability and reject defences based on assumptions of personal responsibility. COVID-19 litigation may accelerate this shift. A number of U.S. states have already extended presumption laws for infected workers, so that the burden of proof about the source of the injury, which normally rests with the injured worker, falls on the employer. Beyond workers' compensation, plaintiffs have claimed that companies failed to properly warn others of a COVID-19 outbreak and did not take reasonable steps to prevent the virus from spreading. This has prompted lawsuits for public nuisance, a strategy that echoes efforts by the plaintiffs' bar to assert liability in opioid, tobacco and environmental litigation.

  The pandemic could also lead to a further expansion in the liability standards required of companies.

- **Further weakening of liability waivers:** With less legal protection from the notion of personal responsibility, companies have increasingly come to rely on explicit liability waivers. In recent decades, however, those waivers have come under attack from the judiciary and legislatures, often on grounds that they are too one-sided or harmful to the public. During the COVID-19 episode, many businesses have required waivers in a gamble to re-open, but their enforceability will no doubt be tested in court. Even if such liability waivers are clear and unambiguous, they may still be deemed contrary to public policy, and it is highly unlikely that they can cover reckless or intentional misconduct.[w]

  Liability waivers may come under increasing scrutiny on public policy grounds.

3.1.3. COVID-19-related uncertainties

Most COVID-19 litigation has thus far centred on property-related business interruption (BI) losses resulting from the pandemic or associated business closure orders. At the U.S. federal level, legislation has been proposed that would require insurers to offer coverage and void any previous exclusion of that coverage, effectively extending insurance beyond pre-agreed contractual boundaries. Similarly, policymakers or legislators in other jurisdictions have made inquiries (or statements of expectations) on how insurers will respond to BI claims related to COVID-19.[25] In the case of the U.K, that includes the Financial Conduct Authority bringing a test case about the efficacy of common pandemic exclusion clauses in business interruption policies, which concluded in favour of policyholders on a number of key issues.

This contractual uncertainty in property-related BI covers ought to be straightforwardly resolvable even if coverage disputes prove to be protracted. But the ongoing COVID-19 situation likely has broader, long-lasting effects. In the near term, the accompanying economic recession will most probably reduce overall liability claims activity, although the downturn could trigger some fraudulent and/or opportunistic claims. In addition, existing claimants facing cash flow pressures might become inclined to settle rather than prolong legal actions in search of higher damages.[t] COVID-19 liability waivers introduced in some countries to support business activity also provide short-term legal immunity.[u] Further out, as explained in Box 2, the pandemic may ultimately trigger more deep-seated change in the liability environment if it acts as an accelerant/amplifier of the underlying factors behind recent social inflation. This includes possibly encouraging a shift in the required standards of care companies owe to their employees, customers and investors.

> The COVID-19 pandemic may yet trigger more deep-seated change in the liability environment.

Drawing parallels with earlier innovations in tort law prompted by asbestos cases, some commentators highlight the potential for 'take-home' COVID-19 litigation, whereby negligence lawsuits are brought against employers whose workers created secondary exposure for family members.[26] The pandemic itself could also be a source of new risks that promote litigation. COVID-19-related cases have already been filed against cruise lines and video communication companies, although legal ambiguity persists about the scope of insurers´ first- and third-party liability.

3.2. Aggressive strategies of the plaintiffs' bar

Relative to their counterparts on the defence side, lawyers for plaintiffs have become much more effective in securing judicial remedies for litigants. They have strengthened their activities throughout the litigation process, from client acquisition and pre-trial preparation to their courtroom tactics, in what seems like a structural change in legal practices.

> Lawyers for plaintiffs have strengthened their activities throughout the litigation process, from client acquisition and pre-trial preparation to their courtroom tactics, in what seems like a structural change in legal practices.

3.2.1. Proactive marketing and client acquisition

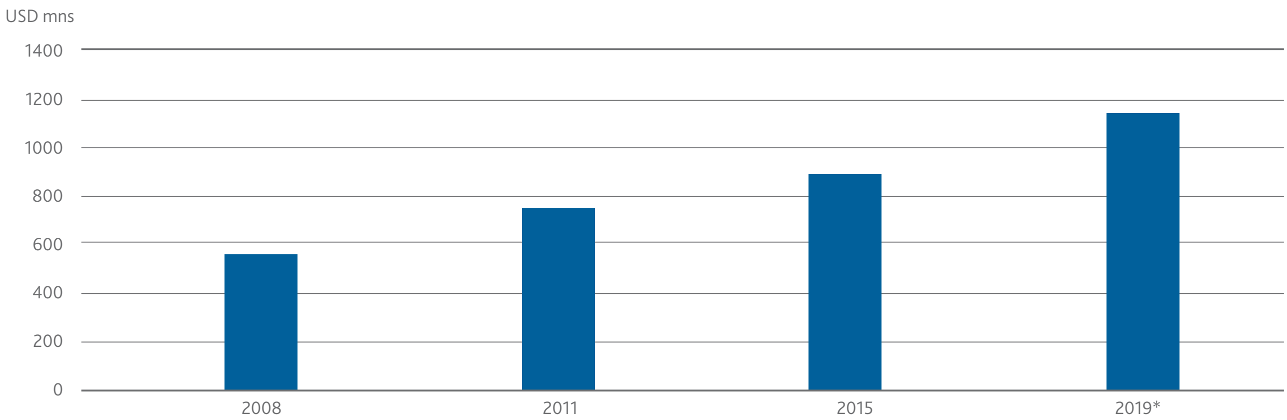
Plaintiffs' lawyers in the U.S., as well as companies that specialise in advertising and gathering claims (known as 'lead generators') now collectively spend over a USD 1 billion on television advertising each year. Such spending has consistently outpaced growth in the overall economy and has accelerated over recent years as part of intensive campaigns to recruit new clients, especially for class action lawsuits (Figure 7). Alongside traditional print and broadcast media, U.S. law firms devote millions of dollars to the creation and maintenance of websites, Facebook pages, Twitter handles, blogs and YouTube channels as well as online pay-per-click marketing.[27,v]

t https://www.insurancejournal.com/news/international/2020/09/15/582627.htm

u For example, a number of U.S. states have passed COVID-19 liability shield laws although their scope and provisions differ considerably. See, for example, https://www.genre.com/knowledge/blog/will-the-covid-19-liability-shields-protect-your-business-from-customer-lawsuits-en.html

v According to PPC Protect, an online marketing security firm, the prices per click paid by U.S. law firms for online advertising are among the highest prices paid by any advertisers.27 This echoes earlier research by the CMAG and the U.S. Chamber Institute for Legal Reform which found that nine out of the top 10 and 23 of the top 25 Google keyword search terms in GoogleAds were legal terms.

Figure 7: U.S. legal TV advertising spending



* Latest data based on Kantar CMAG via ATRA.

Source: Based on information from ATRA and Kantar CMAG

Lawyer advertising and claims lead generation is also well established outside the U.S., with digital channels increasingly taking up a bigger share of marketing budgets. For example, 2019 was reportedly a record breaking year for legal marketing spend in the U.K., and while claims leads business fell when COVID-19 struck, online search activity for potential litigants has rebounded across all areas (personal injury, employer liability, public liability and road traffic accidents).[w]

The proliferation of attorney advertising has created awareness of and access to the civil litigation system for segments of society who might otherwise have been denied justice. Yet it has also been accompanied by questionable marketing practices. These include: creating websites that appear as informational sites or patient support groups for specific types of diseases, counselling services for people who might have been assaulted or injured, and even websites and chat rooms that appear to the casual viewer as official government sites or advocacy organisations but are in fact, affiliated to or sponsored by law firms.

This misleading advertising has not only generated thousands of lawsuits and associated fees for lawyers, including cases related to insurance programs originally designed to substantially reduce, if not eliminate, attorney involvement such as personal injury protection (PIP).[x] It may also indirectly have pressured some defendants and their insurers into settlements due to the cost of never-ending litigation and the risk of damage to their reputations.[y] Furthermore, the adverts influence the thinking of citizens who might one day serve on a civil jury. A survey conducted by Trial Partners, Inc. found that 90% of jurors would be concerned if they saw an advertisement claiming a company's product injured people while 72% of jurors agreed that if lawsuits have been filed against a company, there is probably some truth to the claim.[z]

3.2.2. Use of trial consultants and data analytics

> A whole sub-industry has developed involving consultants and lawyers specialising in mock trials and focus groups, fact and expert witness preparation and jury selection.

Pre-trial theme development and testing by plaintiffs' attorneys have also become more sophisticated. A whole sub-industry has developed involving consultants and lawyers specialising in mock trials and focus groups, fact and expert witness preparation and jury selection. Likewise, plaintiff lawyers often collaborate – for instance, the American Association for Justice, the U.S. organisation of plaintiffs' attorneys, has litigation groups, which work to compile knowledge and documents from similar cases, identify successful litigation strategies and share advice.[28]

w https://jointhepanel.first4lawyers.com/news-and-research/marketing-review-2019-marketing-spend-at-record-levels/ and https://www.claimsmag.co.uk/2020/09/what-marketing-can-tell-us-about-the-outlook-for-claims-leads/16910

x According to the IRC, attorney involvement in personal injury protection (PIP) claims in no-fault states rose from 28% in 2002 to 39% in 2017.[19]

y Such misleading legal marketing also raises important public health concerns. In September 2019, the U.S. Federal Trade Commission (FTC) sent letters to seven legal practitioners and lead generators warning about lawsuit ads that cause, or are likely to cause, viewers to discontinue their medications might constitute an unfair act or practice, and could prompt official intervention. In addition, two U.S. states—Tennessee and Texas—passed laws this year prohibiting common deceptive lawsuit advertising practices, which could lead to state attorney general enforcement actions.

z http://www.atra.org/2019/01/10/study-226-million-spent-trial-lawyers-advertising-quarter-3-2018/

Such pre-trial procedures and cooperation, especially if deployed early in the litigation cycle, can increase advocate effectiveness should the case come to trial. They help establish and build a narrative that plays to the advantage of their client in front of the court. While available to lawyers on both sides, 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.

The same is arguably true in terms of applying new data analytics to support litigation, at least in terms of claims management and pre-trial discovery and disclosures.[aa] Previously these new data-driven techniques were only available to jury consultants or large law firms with plentiful resources. Now investigative programmes that provide easy access to data are emerging as powerful, everyday tools for many more lawyers, especially for complex securities fraud and antitrust class actions as well as mass tort cases.[ab]

Armed with more data and insights, the plaintiffs' bar has also become expert at identifying impersonal defendants in order to create enterprise liability. A good recent example is the proliferation of commercial trucking accident cases in the U.S. The data collected by on-board electronic logging devices have allowed plaintiffs' lawyers to turn what once would have been a case about a negligent trucker into a case about a trucking company with an unsafe record of ignoring safety violations.[29]

3.2.3. Pursuit of litigation to expand liability

As well as attempts to expand the scope of public nuisance litigation, plaintiffs' lawyers press hard to expand theories of liability, often putting new twists on old torts such as conversion (the appropriation of another's property) to blur the distinction between culpable and non-culpable conduct or widen the set of possible plaintiffs.[ac] Some commentators highlight how privacy and data security has become particularly prone to such tactics with a rapid pick up in case filings over recent years, often driven by lawyers seeking out cases they believe will yield a big payday, and only then trying to find a class representative to name in their complaint.[30] According to a recent survey, close to 60% of U.S. companies believe that data privacy and security will be the next wave of class actions as litigation from new privacy statutes develops.[31]

> Virtually every major U.S. merger or acquisition involving a public company is met with a lawsuit alleging that disclosures to shareholders relating to the transaction were false and deceptive.

Plaintiffs' attorneys have recently targeted securities class actions.[32,ad] Virtually every U.S. merger or acquisition with a value of USD 100 million or more that involves a public company is met with a lawsuit alleging that the disclosures to shareholders relating to the transaction were false and deceptive. Similarly, a new wave of 'event-driven' securities claim has emerged that seeks to capitalise on adverse events in a company's underlying business, such as a product recall or data breach.[33,ae] For example, many companies are seeing more securities-related lawsuits filed against directors following settlements of #MeToo-related claims with employees.[34]

Legal scholars and practitioners often question the validity of many M&A and event-driven securities lawsuits and these cases have a high dismissal rate.[35,af] But that may be a secondary consideration. The rapid filing of claims, typically with little or no investigation, is often designed to encourage settlements from defendants who want to avoid the reputational harm and high costs of defence associated with protracted litigation. Plaintiffs' attorneys may also seek to file a lawsuit in a jurisdiction most favourable to a plaintiff and thereby increase pressure on the defendant. This includes pursuing parallel litigation in both U.S. state and federal courts – 49 federal securities class actions were filed in U.S. state courts in 2019, more than four times the 2010–2018 average.[36]

---

aa https://www.law.com/thelegalintelligencer/2020/01/27/a-tidal-wave-of-change-plaintiffs-firms-are-tapping-data-analytics-but-some-are-still-reluctant/

ab For instance, in preparing for the Risperdal trial that resulted in an USD 8 billion jury award in 2019, the plaintiffs' lawyers were quickly able to search the massive database of tort records for the words 'halo' and 'spill over effect', terms allegedly used by the defendant's marketing department to describe off-label sales, so they could be referenced before the jury.

ac Some commentators highlight fourth-party liability litigation – whereby a plaintiff who may never have had any interaction with say, a product (or its alleged manufacturers), nonetheless sues them for the indirect harm they suffered – could be the next frontier. For example, following the recent opioid crisis in the U.S., a number of counties and states are seeking to hold pharmaceutical companies, distributors, pharmacies and other parties liable for the costs of the epidemic. https://www.praedicat.com/who-will-pay-for-the-opioid-epidemic/

ad For example in the U.S., three law firms – Rosen Law Firm, Pomerantz LLP, and Glancy Prongay & Murray LLP – have been responsible for the majority of first-filed securities class action complaints in federal courts in each year since 2015.[32]

ae The securities class action lawsuit itself does not seek damages for harm from the underlying event, which is addressed through other lawsuits. Rather, the securities claim asserts that the company defrauded investors by intentionally or recklessly failing to warn that the adverse event might occur.[33]

af For example, event-driven securities actions have a dismissal rate approaching 60%, higher than financial misstatement cases.

3.2.4. New trial tactics that leverage insights from behavioural science

Together with insights from data, advances in neuroscience and behavioural science have provided a much better understanding of how humans make decisions, which in turn has influenced plaintiff lawyers' desire to pursue cases through the courts and how they conduct jury trials. One popular tactic builds on the influential reptile theory – a method for trying plaintiffs' cases by portraying the defendant's actions not only as affecting the injured party but as a potential threat to jurors' own safety and the safety of others should similar incidents occur. The aim is to activate jurors' own survival instincts and make them more likely to rule in favour of plaintiffs based on their emotions, rather than simply interpreting the facts presented as evidence.[ag]

> Plaintiff lawyers use 'reptile theory' tactics to activate jurors' own survival instincts and make them more likely to rule in favour of plaintiffs based on their emotions, rather than interpreting the evidence.

By convincing the jury they are the protectors of the community and that corporations are putting profits over safety, the plaintiffs' bar hope to persuade jurors to 'punish' defendants and anchor their deliberations on ever-higher monetary awards. This need not necessarily be in the form of large punitive damages, which anyway may be capped by legislation. Instead, plaintiffs' lawyers present detailed empirical research and call expert witnesses to substantiate large compensation awards for future lifetime needs. For example, life care plans – documents which project the variety of goods and services that an individual will need over the course of their life as a result of the injury – are often used in the U.S. to justify astronomical awards, even if, in some instances, the plan bears little relationship to the therapy, treatment or accommodation which the injured party may truly need.[37,ah]

3.3. Shifts in judge and jury attitudes

Alongside the actions of lawyers, the beliefs and behaviours of judges and jurors are also crucial in understanding the workings of the civil (and criminal) justice system. Anytime discretion is at play, both explicit and implicit bias – attitudes or stereotypes that affect our understanding, decision making and behaviour without our even realising it – may influence the outcome of a trial. These attitudes change over time as societal structures and norms evolve and could, in principle, also have contributed to the recent rise in court verdicts.

> Shifts in judge and juror attitudes could, in principle, also have contributed to the recent rise in court verdicts.

Even in civil law systems where juries seldom feature and which rely instead much more on judicial adjudication, judges will in practice look to follow legal precedents. Their interpretations of statutory codes and standards of liability are also often informed by existing case law as well as their assessment of public sentiment and evolving social norms. By the same token, even if a case does not go to trial, plaintiffs' attorneys and claims executives adjust claims against the backdrop of potential court decisions which could influence their willingness to negotiate and agree to high settlements.

3.3.1. Anti-corporate bias

Distrust in large companies is not new, although it tends to vary over time, often in reaction to highly-publicised corporate scandals such as Waste Management, Enron, Tyco or Bernie Madoff.[38,ai] A 2019 poll by the PEW Research Center indicated that 82% of U.S. adults believe that large corporations have too much power and influence in society, an increase from the more than three quarters who thought the same in 2011.[aj] Legal commentators highlight how anti-corporate beliefs are leading to greater anger among jurors towards corporate

---

ag In negligence cases jurors must consider the circumstances in which a defendant's actions took place and determine whether such actions were 'reasonable' under all the circumstances. Reptile approaches, in contrast, suggest to jurors they should find the defendant liable simply because the plaintiff was injured – i.e., the plaintiff's injuries are proof per se that the defendant 'needlessly endangered' the plaintiff by not making the 'safest possible choice' under the circumstances. In essence, reptile approaches seek to turn negligence cases into strict liability cases in a way that potentially misleads jurors about the law. https://www.jdsupra.com/legalnews/challenging-use-of-reptile-theory-28528/

ah An analysis of recent large verdicts for U.S. trucking accidents found that when an expert witness is called for the plaintiff and not the defence, the jury award was boosted by around 15%.[37]

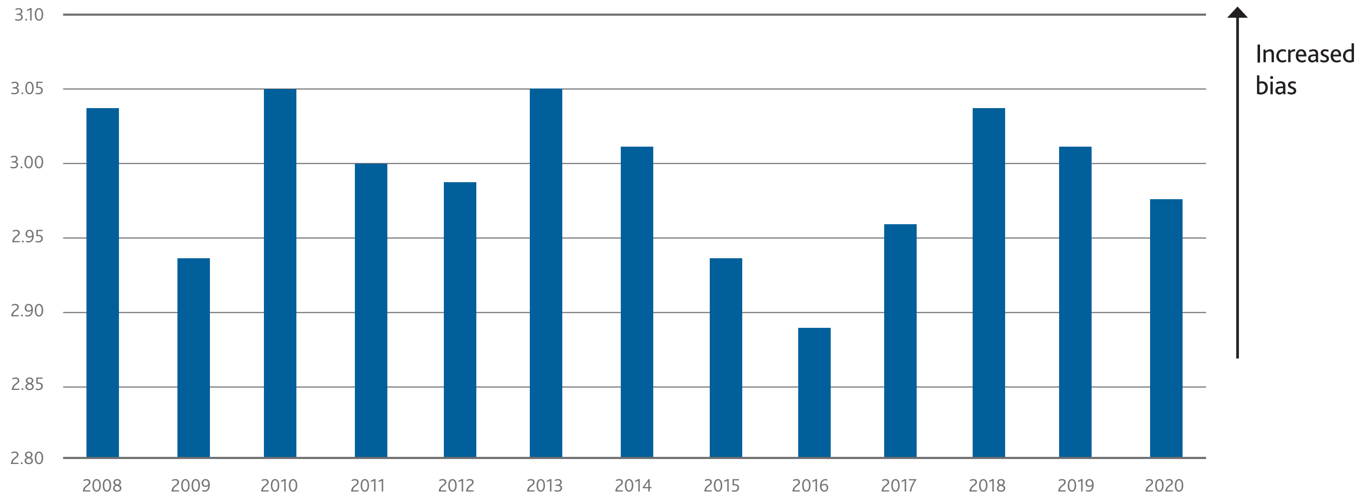
ai In the wake of Enron, WorldCom and other recent corporate scandals, Bowne DecisionQuest conducted a nationwide telephone survey, which identified deeply-felt and well-thought-out distrust of corporations, even among people who are ordinarily the strongest supporters of corporations.[38]

aj https://www.pewsocialtrends.org/2020/01/09/most-americans-say-there-is-too-much-economic-inequality-in-the-u-s-but-fewer-than-half-call-it-a-top-priority/

defendants who are perceived to neglect long-term goals in favour of short-term financial gain.[39] Some recent surveys also point to greater juror bias against corporates compared with earlier years, although this does not appear to be part of secular adverse shift – one survey suggests a fall most recently in overall anti-corporate sentiment (Figure 8). Globally, consumers' trust in business has generally been improving over the past few years.[40]

Some surveys point to increased juror bias against corporates, although this does not appear to be part of secular adverse shift.

*Figure 8: U.S. jurors' anti-corporate bias score**



* Measure based on average responses across seven survey questions.

Source: Persuasion Strategies

The empirical evidence for the link between anti-corporate bias and jury awards is mixed. Early studies on the treatment of corporate defendants in civil trials consistently found a so-called 'corporate identity effect', wherein firms are judged more harshly than their individual counterparts. But this seemed more related to jurors attaching a higher standard of liability/duty of care to corporations, as opposed to individuals, rather than any deep-seated juror hostility toward business or perceptions that, on average, companies have more wealth to absorb damages.[41,42,ak]

More recent analysis has provided stronger support for the view that anti-corporate bias can translate into pro-plaintiff verdicts and higher awards. Based on an online survey of mock jurors for a real-world product liability case, one 2018 study found that greater anti-corporate sentiment tended to predict higher compensatory awards, especially when the juror was unfamiliar with the defendant company.[43,44,al] While statistically significant, the effect of anti-corporate bias on the size of jury awards was still reportedly modest.[am]

3.3.2. Awareness of social injustices and income inequalities

If anti-corporate bias per se doesn't really account for recent extreme jury verdicts, in combination with environmental factors, shifts in public attitudes could still have been influential. Greater recognition of income and wealth disparities across society may have encouraged juries to decide awards with less emphases on fault and greater focus on company responsibility as a way to address such inequalities. Put differently, any general positive regard civil jurors might have for the

ak Hans and Ermann showed that mock jurors find corporate defendants significantly more reckless, more morally wrong, and owing higher monetary damages than individual defendants – even when all case facts except defendant identity are held constant. Later experiments, reported in MacCoun[42], confirmed Hans and Ermann's findings while debunking the 'deep-pocket effect' hypothesis that defendant wealth is a primary predictor of jurors' verdict decisions; jurors do not tend to award liability and damages to plaintiffs in civil cases involving wealthy defendants more frequently than for civil cases involving non-wealthy defendants.

al Hints of a similar familiarity effect, with 'faceless corporate defendants' suffering greater damage awards than less well-known defendants, were reported in Rebeck.[44]

am One possible explanation for only a minor effect of anti-corporate bias is that the study design used a fact pattern in which liability was admitted. When a company denies fault and is then subsequently found to be at fault, pre-existing bias against that company could play a greater role. See https://www.persuasivelitigator.com/2019/02/understand-anti-corporate-bias-the-extent-of-the-bias-and-the-effect-of-familiarity.html aims of business have been undermined by a sense of injustice that the benefits of economic prosperity have not been fairly shared.

The positive regard civil jurors might have for the aims of business have been undermined by a sense of injustice that the benefits of economic prosperity have not been fairly shared.

The Global Financial Crisis of 2008/09 could have been a pivotal moment. Following what many citizens perceived as a bail out for financiers, the subsequent economic recovery was accompanied by stagnant real wages and heightened job insecurity for the average worker. This has fuelled a growing divide between the haves and have-nots. According to researchers at PEW, most Americans believe there is too much inequality in the U.S. And a majority of those survey respondents who perceive heightened inequality attribute responsibility for reducing it to large businesses and corporations. [an] At a global level, peoples' faith in capitalism is reportedly under strain with high scores among survey respondents for both a sense of injustice in the system and a desire for change.[40]

Recent research would seem to confirm an empirical link between court outcomes and income inequality. Comparing U.S. county-level and state-level data for court verdicts and measures of inequality indicates jury awards tend to be higher in areas with greater levels of income inequality, a relationship that appears to have strengthened over time.[45] Notably, damage awards were only higher for trials with juries, whereas awards in trials by judges did not appear to be related to income inequality. This might be because a jury of peers will seek to alleviate that inequality, while judges (who tend to be more affluent) are more neutral.

3.3.3. Impact of the information age

Modern communication technologies give jurors ready access to more news and opinions than ever before which frames their own views even before they arrive at court. The veracity and objectivity of that information however cannot be assured, and increasingly, the emphasis on factual reporting is often secondary to promoting a particular narrative and/or fostering arguments. This contributes to the polarisation of opinions across society which ultimately filters through to juror attitudes.

Frequent media reports of multimillion and multibillion dollar verdicts have desensitised the public to such mega awards. This, in turn, creates a new baseline from which jurors believe awards can be made to the plaintiff. Likewise, social media provides a platform for negative public sentiment about particular companies to proliferate, which colours jurors' views and influences their attitudes about appropriate compensation.

At trial, limiting jurors' access to information other than admitted evidence has always been challenging. It is virtually impossible in the modern information age, with instant access to the internet and social media. According to a 2019 Sound Jury Consulting study, 57% 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.[46]

3.3.4. A Millennial effect?

Shifts in juror attitudes may be amplified by generational factors. Many commentators highlight the different perceptions and values held by Millennials (those born between the early 1980s and the early 2000s), the influence of which will only expand as they come to make up an increasing share of the jury pool. Millennials, having grown up in a highly safety-protected environment, understand the notions of 'victimisation' and 'vulnerability' different than previous generations. Their consumer-protection expectations for corporate behaviour may therefore be outsized relative to older generations.[39] One survey reported that 84% of Millennial respondents agreed that corporations should take every precaution for safety, 'no matter how practical or costly', with 63% agreeing strongly.[47]

Nevertheless, the empirical relevance of such a systematic age cohort effect so far remains unclear. First, older generations still make up the majority of juries. Second, similar surveys show that the differences between generations can be exaggerated. For example, 63% of both Millennials and non-Millennials agreed that 'there should be limits on how much money a jury can award to a plaintiff in a lawsuit'.[ao] As a result, some researchers maintain that any difference with Millennial jurors is not so much in their inherent attitudes and beliefs, but in their general learning styles. Millennials have a greater appetite for scientific evidence to support conclusions, rather than just opinions, compared with older generations.[48] Third, Millennials tend to be independently minded and do not simply follow others' views. According to a 2019 U.S. poll, 82% of jury-eligible Millennials said they would decide a case based on their own individual beliefs about right and wrong even if those beliefs conflicted with the law.[ap]

an https://www.pewsocialtrends.org/2020/01/09/most-americans-say-there-is-too-much-economic-inequality-in-the-u-s-but-fewer-than-half-call-it-a-top-priority/.

ao http://soundjuryconsulting.com/blog/2019/10/03/making-your-case-relevant-to-millennial-jurors/

ap http://soundjuryconsulting.com/blog/2020/01/24/the-importance-of-letting-jurors-be-egocentric-in-voir-dire/

3.3.5. Limited screening by the judiciary

All justice systems place great importance on the judge's oversight and interventions.[aq] However, changing approaches of trial judges mean they are now often less willing to act as gatekeepers to counteract aggressive tactics of the plaintiffs' bar, including screening out unproven scientific evidence or flaky testimony of expert witness. U.S. attorneys bemoan that judges no longer see their role as to try cases but instead to manage settlements which can make them overeager to broker a settlement.

U.S. attorneys bemoan that judges no longer see their role as to try cases but instead to manage settlements which can make them overeager to broker a settlement.

One area where courts have been slow to respond is the use of reptile theory and other similar courtroom tactics. Requests to restrain such argumentation are often dismissed on grounds that it is an abstract concept that is impossible to rule upon. Or such decisions are deferred until the parties are engaged in the heat of closing argument and an objecting attorney runs the risk of reprimand from the court in front of the jury. In another development, some jurisdictions now permit mini-opening statements which give attorneys the opportunity to sway potential jurors before they are even selected.

Part of the explanation for judges' reticence to adjudicate on permissible legal tactics could be linked to their lack of familiarity and experience with them. But the fact that in the U.S., judges at the state level are elected officials probably also plays a role. A 2019 national telephone and online survey found that 50% of likely U.S. voters believe politics influence the decisions of most judges.[ar] Not only are judges motivated to raise contributions and seek the approval of voters, their election campaigns are often heavily sponsored by plaintiff attorney firms.

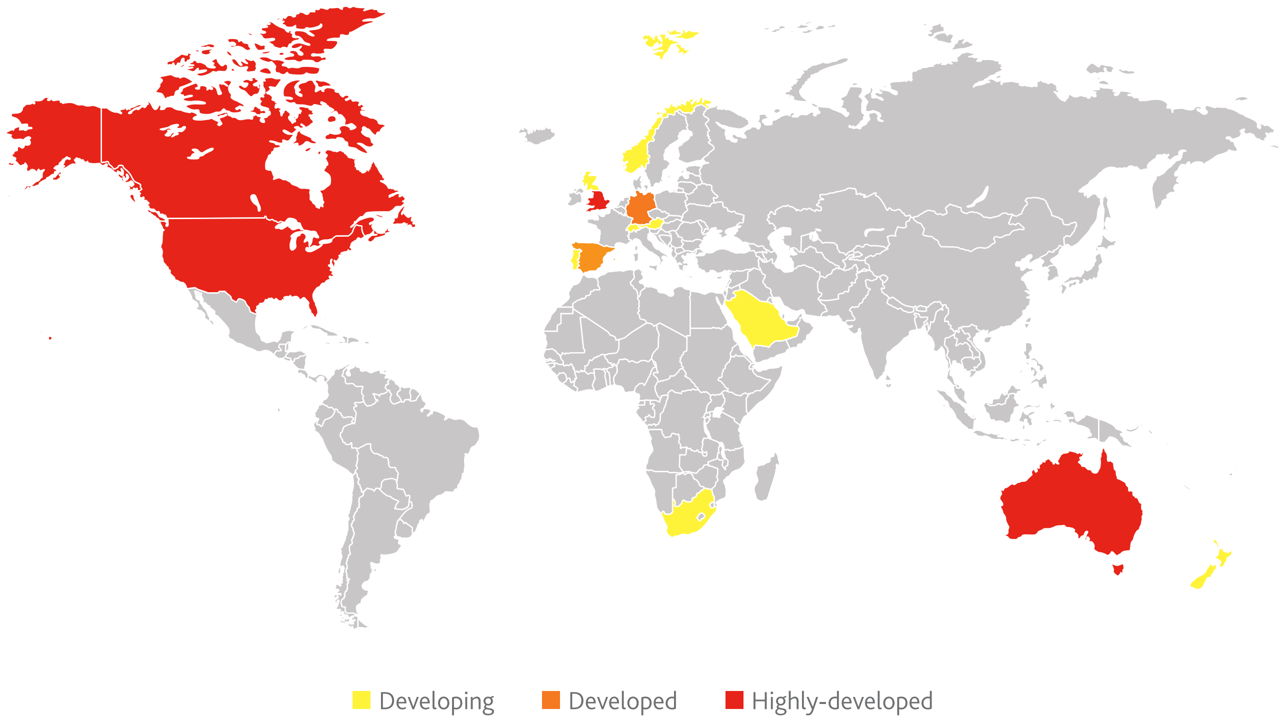
3.4. Evolving litigation finance

Third-party litigation funding (TPLF) has emerged as an increasingly viable alternative to traditional funding of litigation through internal cash flows, which in principle could have contributed to social inflation developments. Outside investors – typically a hedge fund or special purpose litigation fund – seek out litigants with substantial potential claims, but who may be unable or unwilling to make the financial commitment required to litigate. They may also buy direct stakes in judgments or legal claims from clients who hold them rather than investing in a case at the outset.[as] The investment is usually done on a non-recourse basis in exchange for a financial interest in the outcome of the claim.[at] Returns take the form of an agreed amount or a share of the proceeds of the dispute. In the event that the claim does not succeed, the costs are covered by the funder.

Litigation finance, in its modern form, originated in Australia in the mid-1990s to assist company administrators and liquidators to pursue debts on behalf of creditors. TPLF has recently expanded both in terms of scope and jurisdiction and is now well established in Australia, North America and in the U.K. across a variety of litigation classes[12] It is also on the rise in a number of parts of Europe and South Africa, especially for collective action cases (Figure 9). Even in countries where third-party involvement in litigation is largely prohibited, attitudes towards TPLF are changing.[au] For example, authorisations for litigation funding for arbitration cases have recently been granted in Singapore and Hong Kong, with speculation that similar moves could happen in India and parts of the Middle East.[49]

aq The court, for example, must exercise its discretion in ruling on the permissibility of evidence and testimony throughout the litigation process.
ar https://www.rasmussenreports.com/public_content/politics/general_politics/may_2019/voters_see_judges_as_political_but_hold_the_criticism
as https://news.bloomberglaw.com/business-and-practice/burfords-payday-shows-litigation-finance-not-just-about-lawyers
at A non-recourse loan is one where, in the case of default, a lender can seize the loan collateral. However, in contrast to a recourse loan, the lender cannot go after the borrower's other assets.
au The torts of maintenance and champerty, which originated in England, have historically prohibited unconnected parties from funding litigation in a number of jurisdictions (e.g. in Ireland and in respect of court proceedings in Hong Kong and Singapore). Maintenance is the act of a third party encouraging or maintaining litigation, usually by providing financial assistance. Champerty is a type of maintenance where a third party funds litigation in return for a share of any judgment proceeds.

Figure 9: Spread of third-party litigation funding



Source: Based on information from Clyde & Co. and The Third Party Litigation Funding Law Review (2019)

Measuring the size of the litigation finance market is difficult. Dedicated litigation funders, both private and publicly traded, only represent a portion of the available financing for the legal industry. And those dedicated funds do not always disclose the amount of capital they have and what they deploy annually. Estimates suggest global litigation finance capacity could be in excess of USD 13 billion. While this is still a small share of the overall market for legal services – around 1 to 1.5% in the more mature markets for litigation finance – TPLF is growing rapidly, perhaps doubling over the past three years.[av] Moreover, awareness of TPLF continues to rise.

According to recent surveys, in 2019 close to 70% of lawyers were 'very familiar' with litigation finance, a significant increase from 50.3% in 2018, and its use has reportedly risen by 105% since 2017.[50,51]

Third-party litigation funding (TPLF) is growing rapidly and expanding internationally.

av https://litigationfinancejournal.com/commercial-litigation-finance-how-big-is-this-thing/

Box 3: Potential expansion of social inflation outside the U.S. (by Carolina Ochoa and Andrew Guarnori, Swiss Re)

The recent pick-up in social inflation is most acute in the U.S., with its impact being felt across various insurance lines including commercial auto, medical malpractice, professional liability and D&O coverage. So far international contagion has been relatively limited, perhaps because of a unique constellation of factors that exist in the U.S.; most obviously, the pre-eminence of juries in the U.S. civil justice system combined with changes in the legal environment, especially the aggressive strategies of plaintiffs' attorneys. The more limited scope for punitive damages in other countries and strict 'loser pays' rules (which require the defeated party to pay the legal costs of the successful party thereby discouraging frivolous lawsuits) also constrains the spread of severe social inflation beyond the U.S.

However, some of the recent underlying drivers in the U.S., if not entirely the same, have echoes overseas. In particular:

- TPLF and collective redress mechanisms in a number of jurisdictions are changing the economics of litigation and the appetite and ability of claimants to file lawsuits.
- Shifts in the political/regulatory landscape, partly in response to growing recognition of social inequalities, are reframing debates internationally about who is best placed to bear risk and the appropriate duty of care firms and institutions should extend to individuals.
- The proliferation of social media is allowing quicker and wider dissemination of information about events and cases well beyond national borders and shaping public (and judge/juror) opinions about culpability, victim empathy and appropriate compensation for victims.

Figure 10 summarises our best collective judgement of the potential scope for social inflation to emerge in other major developed insurance markets, using recent U.S. drivers as a benchmark. It is informed where possible by objective criteria, but some empirical indicators have ambiguous effects on social inflation, so the analysis is necessarily subjective. In addition, not all lines of business will be equally affected – for example, some countries have compensation systems for personal injury cases which restrict associated damages – so the overall assessment is simply illustrative.

Figure 10: Subjective assessment of social inflation risks across selected countries

Driver	Description	U.S.	Australia	U.K.	Canada	Nether	Spain	France	Germany	Japan
Youth population	Proportion of population below 15 years old	H	H	H	H	H	M	H	M	L
Social media	Indicator of active engagment in accessing and sharing information online.	H	H	M	M	M	M	L	L	H
Litigation funding	Presence of mechanisms to finance formal litigation or alternative dispute resolutions	H	H	H	M	H	M	M	M	L
Collective redress	Existing mechanisms of collective redress or indications of their likely introduction in the short-to-medium term	H	H	H	H	M	M	M	M	L
Politics and regulation	Government actions that may foster social inflation (e.g. taxes, rules, laws or regulations)	L	M	L	M	M	H	H	M	M
Legal environment	Features of common law versus civil law systems	H	H	H	M	M	L	L	L	L
Income inequality	Gini coefficient	H	M	H	M	L	M	L	L	M

High Medium Low

There are structural features in the U.S. that mean social inflation tends to be far more severe than other markets, e.g. punitive damages, jury trials, political appointment of judges, etc.

Despite the signals, social inflation in other countries is not expected to reach the extremes of the U.S.

Source: Swiss Re using publicly available indicators from, for example, the OECD and Statista

Australia and the U.K. stand out as having significant high-risk factors that could foster social inflation, although probably not to the degree seen in the U.S. The threat is more nuanced in medium-rated countries with a more neutral mix of signals. Among this group, the Netherlands shows the highest propensity, mainly as a result of increased litigation funding activity in conjunction with reforms to their system of collective redress. At the other end of the spectrum, Japan currently appears less susceptible to heightened litigation and social inflation.

3.4.1. Pros and cons

At face value, TPLF ought to be a positive development. It permits individuals to pursue litigation and retain legal representation they otherwise could not afford, thereby increasing the likelihood that cases are decided on their legal merits rather than which party is better financed.[37] In much the same way as liability insurance itself supports defendants, litigation funding can help level the playing field in dispute resolution.[52] Put another way, when imbalances between plaintiffs' and defendants' risk preferences over possible litigation outcomes skew settlements away from their merits, this is just as much a market failure as a failure of procedure.[53]

However, potential conflicts of interest can arise which will affect the achievement of efficient and fair legal outcomes. In the case of TPLF, the charge is that it promotes frivolous and/or vindictive litigation, unduly influences trial strategy or settlement dynamics and otherwise allows intermeddling by non-parties in the conduct of litigation. For example, a funder may hold out for a large settlement to maximise her own return even if an early settlement might actually most benefit the plaintiff. Similarly, the presence of a funder, particularly in high-profile collective litigation, can shift the balance of power so far that defendants feel compelled to settle even if the claim is weak.[54]

TPLF creates potential conflicts of interest which can affect the achievement of efficient and fair legal outcomes.

Ultimately, the extent to which litigation funding has unwanted effects is an empirical matter. But there are more than suspicions that it is already encouraging litigation activity and fuelling claims inflation, in particular in securities class actions.[aw] Whereas previously financiers would fund specific cases, now they can commit funds across multiple cases, often with a particular legal firm. Typically, such a portfolio is structured so that the funders' outlay plus return, is paid from the cumulative gains and losses across a collection of cases. As a result, lawyers who might not have had the financial wherewithal to take on marginal cases can now broaden their case book, especially if they can target defendants with deep pockets.[ax]

3.4.2. A source of international contagion?

TPLF has reportedly been pivotal in the development of collective actions against financial institutions and commercial entities and their D&O insurers in a number of jurisdictions, including the U.K .and Australia.[12] Furthermore, funders have contributed to and accelerated the spread of different types of claims and litigation from one country to another. They have linked with the American plaintiffs' bar, which is also exporting knowhow and tactics globally, and have been prominent in some of the largest multi-jurisdictional claims against companies and directors.[ay] More broadly, as discussed in the Box 3, TPLF is one of a number of key influences that could promote social inflation to spread to other developed insurance markets although probably not to the same degree as in the U.S.

Changes in litigation funding is one of a number of key influences that could promote social inflation to spread to other insurance markets although probably not to the same degree as in the U.S.

From the investor side, litigation funders are reportedly raising capital at an unprecedented rate and are actively seeking out new jurisdictions in which to fund litigation and innovating to provide new forms of finance, including defence-side hybrid funding and success fee arrangements.[az] Given the low-interest rate environment, deploying funds to finance litigation is likely to remain an active strategy in investors' on-going ´search for yield´. By implication, its effects on the overall litigation environment are only likely to persist.

aw Related to litigation funding, various state-level initiatives in the U.S. alter the litigation playing field between policyholders and insurers. Florida, for example, has an assignment-of-benefits, or AOB, law that not only allows a policyholder, without insurer consent, to assign benefits to a third party, but permits plaintiffs' attorneys to collect their fees when they prevail in AOB litigation. This fee-shifting has paved the way for a high increase in the filing of claims and lawsuits.[46]

ax According to a 2019 Litigation Finance Survey by Morning Investments, the use of litigation finance by U.S. law firms rose by 745% between 2015 and 2019.

ay For example, litigation funders and U.S. attorneys were behind the formation of the Volkswagen Investor Settlement Foundation in The Netherlands, which seeks to recover losses on Volkswagen securities that were publicly traded outside the U.S. under the Dutch Act on Collective Settlement of Mass Damages ('WCAM').[11]

az See https://www.mindingyourbusinesslitigation.com/2019/04/defense-funding-the-next-frontier-for-litigation-financing/

4. How can re/insurers respond?

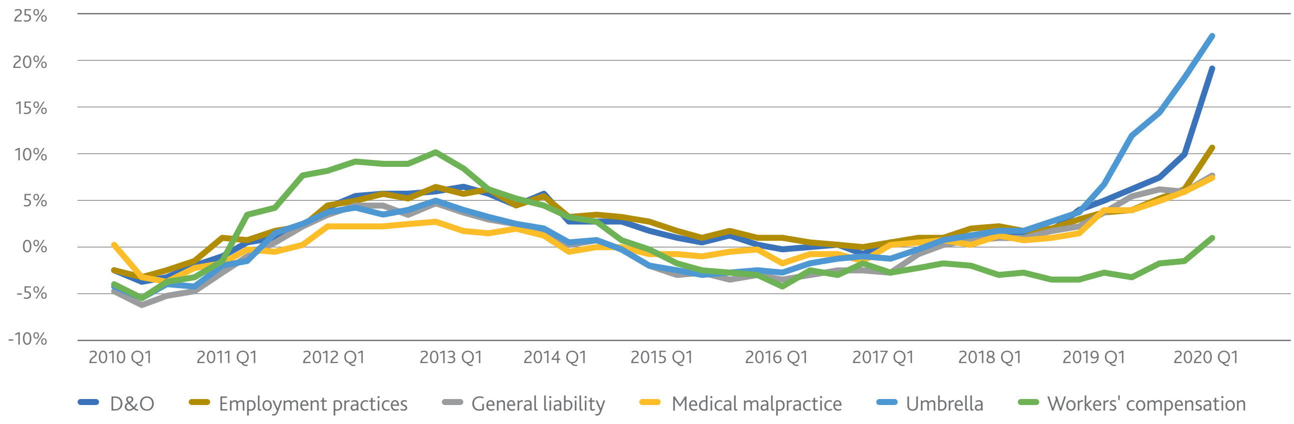
The recent pick-up in social inflation so far appears less severe than the past heightened episodes, largely impacting insurers' earnings rather than significantly impairing their balance sheets. Yet it cannot be ignored, especially since some of the underlying drivers are structural in nature and could spread across insurance lines and jurisdictions. Moreover, even if the latest episode of social inflation does not prove to be permanent, i.e. the recent outsized claims represent a temporary deviation around a broadly unchanged long-run trend in claims, greater uncertainty around future social inflation is something insurers must still consider in their underwriting. Such uncertainty about the expected average frequency and severity of claims due to changes, for example, in economic, environmental, and legal factors that influence trends in losses, increases the amount of capital that insurers need to hold and thus affects the level of premiums needed to supply coverage.

Insurance plays a vital role in the economy, fostering entrepreneurial risk-taking, research, product development, the availability of goods and services, and risk sharing. Without it a good deal of economic activity would simply not take place. But for insurance markets to work effectively, it is imperative that the premiums, terms and conditions for insurance reflect the costs of providing protection, including the cost of capital needed to cover unexpected losses. If insurers are not adequately compensated for risks they assume, including social inflation, this impairs their ability to fulfil their societal function. Ultimately, if insurers' future potential exposures to workers, customers and investors become too great, some traditional corporate liability risks may simply become uninsurable, prompting insurers to implement policy exclusions or withdraw cover entirely.

It is imperative that the premiums, terms and conditions reflect the costs of providing protection, including the cost of capital needed to cover unexpected losses.

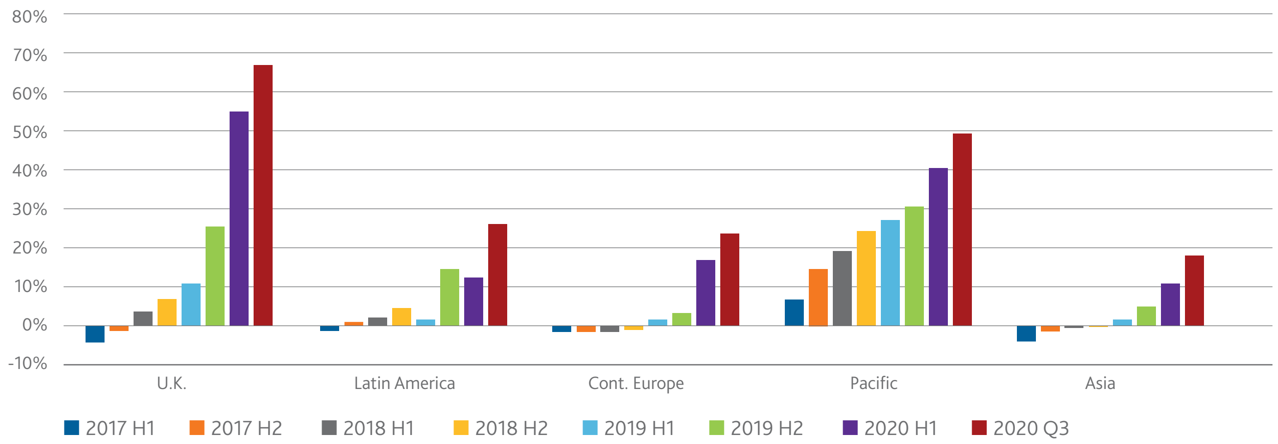
Part of the adjustment in risk pricing is already underway. According to the Council of Insurance Agents and Brokers, premium rates for commercial casualty insurance in the U.S. have risen on average by over 30% since mid-2019 following a prolonged period of weakness. The recent acceleration has been particularly notable for umbrella insurance – a type of excess cover which applies should the prevailing limits of underlying policies such as general liability or commercial auto be exceeded – as well for some financial lines such as D&O (Figure 11). These rate developments are broadly echoed globally, with pricing for financial and professional lines in particular rising sharply over the past year in other major insurance markets (Figure 12). Terms and conditions have similarly hardened.

Figure 11: Quarterly percentage change in U.S. commercial insurance premium rates



Source: The Geneva Association calculations based on data from The Council of Insurance Agents & Brokers

Figure 12: Average year-on-year percentage change in financial and professional liability insurance prices – outside of the U.S.



Source: Marsh

Insurance carriers cannot rely solely on a continued upswing in the general underwriting cycle to insulate themselves from social inflation.

Liability insurers cannot however, rely solely on a continued upswing in the general underwriting cycle. This is not least because unrecognised inflationary trends disproportionately affect long-tail lines, impacting required loss reserves for multiple accident years. Rather, insurers must pursue initiatives both to counter social inflation and insulate themselves more from its effects.

4.1. Engage with the public policy debate

Although in general the legal environment and in particular the topology of civil justice systems remain aligned with reducing tort litigation and excess damages, there are nonetheless some pockets of the law and some jurisdictions where the reform agenda has slowed. For example, in some U.S. states if an accident victim sues for pain and suffering, there is still no limit to the financial award a jury can give, which not only invites outsized jury verdicts but also affects incentives to pursue/defend cases with limited legal merit.

Insurers must continue to engage in the public policy debate to promote changes in the legislative framework that further level the litigation playing field between plaintiff and defendant.

Insurers need to continue to engage actively in the public policy debate to promote changes in the legislative framework that further level the playing field between plaintiff and defendant in order to ensure fairness and financial practicality in settlement awards. This might for instance include moves towards specialised courts overseen by specially trained judges and/or juries comprised of experts for complex financial or professional liability cases. Arguments for further tort reform will be strengthened by being better able to evidence and calibrate adverse social inflation developments and demonstrate their impact on insurance pricing and availability.

4.1.1. Promote transparency and disclosure

One area for action concerns the whole notion of transparency and the exchange of information relevant to the calculation of damages. In the case of personal injury cases in the U.S., a long-standing controversy surrounds the collateral source rule which prevents a defendant from introducing evidence at trial that a plaintiff has received payment from a third party (for example, a health insurer). The rationale for the rule is that the defendant should not benefit from the plaintiff's foresight in taking out insurance. But this potentially allows insured plaintiffs to be compensated twice for the same injury, to the extent that their medical bills and lost wage claims have already been paid by their insurance carrier. Or at the least they may benefit financially if their payout from the defendant (based on the nominal billing for medical services) exceeds the sums actually paid to the health care providers by their insurer – so-called 'phantom damages'. [ba] Because of such distortions, a number of U.S. states have repealed or modified their laws to allow collateral source payments to be taken into account when determining damages, although such reform is far from universal with considerable variation remaining across jurisdictions.

Increased disclosure of information relevant to the calculation of damages could promote fairer outcomes.

Another issue where increased disclosure could promote fairer outcomes relates to the involvement of TPLF. In assessing the proportionality of information requests and settlement possibilities, both the court and the defendant ought to know who is sitting on the other side of the table. Just as transparency over defendants' insurance agreements can shine light on their motives and incentives, the details of a third party funder can help uncover any potential conflicts of interest and/or ethical concerns about contracts interfering with the normal fiduciary lawyer-client relationship.

The extent and nature of required disclosure will need to weigh up the cost burden of additional information and/or scope for tactical delays against the insights likely to be gleaned from information sharing. But basic transparency about who has invested in a lawsuit and the terms of that investment would surely always be useful. The same is true of details of the relationships between plaintiffs and their lawyers, including the role of intermediaries in introducing the parties.[bb]

Several U.S. state legislatures have passed laws mandating disclosure of TPLF arrangements to other parties in the case. In other countries too, authorities have proposed measures to require litigants to disclose TPLF involvement. In Europe, the proposed EU Directive on representative actions for the protection of the collective interests of consumers explicitly mandates disclosure of the 'source of funding' to the court in order to demonstrate the absence of conflict of interest. However, some commentators are sceptical that these sorts of initiatives go far enough to curb the scope for unfair and abusive litigation, arguing for tougher regulation of corporate governance standards in the TPLF industry.[54] Insurers need to stay close to this debate to ensure their interests are adequately represented in any policy analysis of the costs and benefits of TPLF.

ba The insurance company in these circumstances will typically be subrogated, meaning that the injured party will be required to pay back their insurer any money paid due to the accident.

bb https://clsbluesky.law.columbia.edu/2018/09/24/the-market-for-lead-plaintiffs/

4.1.2. Campaign to reduce unnecessary legal costs

The involvement of lawyers in claims settlement is almost inevitable given the need in many cases to establish legal culpability. This creates significant costs that ultimately have to be borne by someone, either directly by the companies being sued or indirectly by their shareholders and customers. According to data from Chubb, half of the nearly USD 23 billion in securities claims costs in the period 2012—2017 went to plaintiff and defence lawyers. In the case of merger objections, this proportion rose to nearly two thirds (65%).[34] Surveys also indicate that a significant majority of voters (63%) believe that lawyers are the main beneficiaries of lawsuits against companies. Among investors, that view was even more strongly held — 73% see lawyers are benefitting the most.[54]

While courts typically review and approve attorney fees, submissions to recover legal costs are often rubber stamped by judges. This creates an incentive for plaintiffs' attorneys to seek inflated awards. Initiatives to curb exorbitant fees or at least ensure they are proportionate to the legal work involved would therefore be welcome. By the same token, measures to expedite the dismissal of cases with no legal merit or prevent duplicative litigation in different jurisdictions would reduce the risk and costs to companies of defending themselves.

Initiatives to curb exorbitant legal fees and prevent duplicative litigation would reduce the risk and costs to companies of defending themselves.

In particular in the U.S., repeal of case law that allows securities class actions to be brought in both state and federal courts would remove unnecessary costs and discourage plaintiffs from forum shopping for friendly jurisdictions.[55] Similarly, measures to promote class actions on an opt-in basis, so claimants must proactively consent to take part should they wish to take a portion of any damages recovered, would avoid firms also having to defend similar claims brought by individuals thereby reducing costs and legal uncertainty.[bc] It might also help to curb lawyer-driven litigation which has been a feature of class actions in the U.S.

4.2. Proactive defence case management

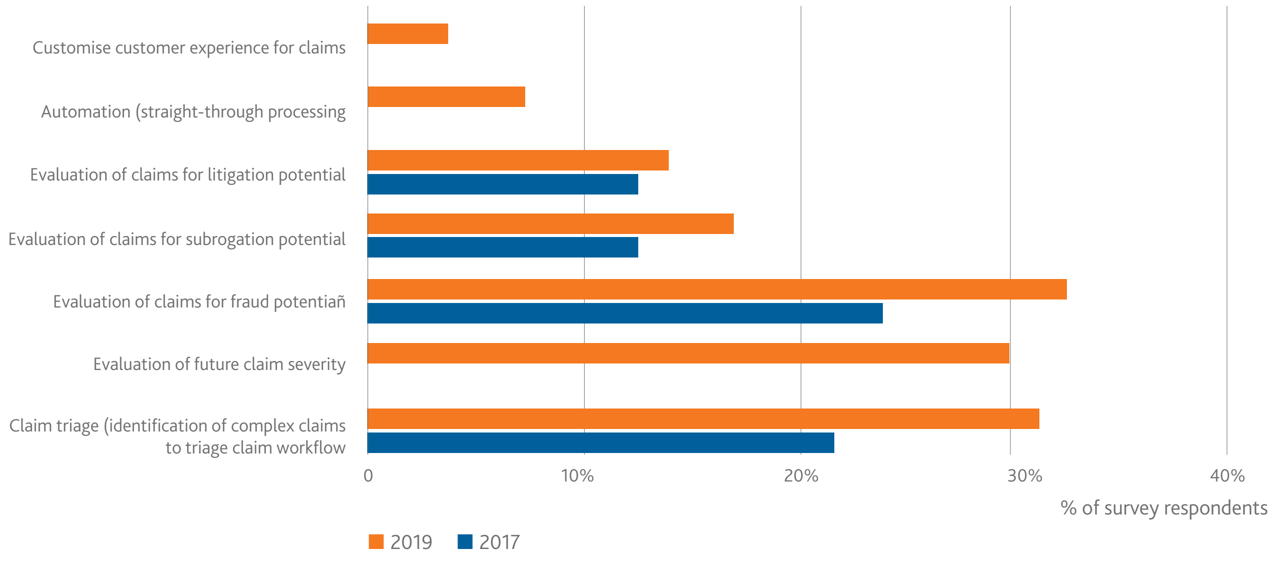
Further tort reform on its own is unlikely to be sufficient to restrain social inflation. For their part companies and their insurers can do a better job at defending liability claims, if only to confront the stiffer challenge presented by the plaintiffs' bar. Consistent with that, according to a recent U.S. study, close to three quarters of interviewees thought that plaintiff attorneys were increasingly better at arguing truck crash cases than their defence counterparts.[37] Such a disparity could reflect different business models with plaintiffs' attorneys often incentivised to be innovative and efficient with time while defence lawyers often get paid by hours spent.

Historical claims information, court data and social media data can be used to develop predictive tools that help decide whether to litigate or settle claims, evaluate potential fraud, and assess which firms and even which lawyers to use before a specific judge or court.

Greater use of new technology and enhanced data analytics would help support claims management. Court data and filings provide a wealth of information about judges, their rulings, the litigants, their attorneys, expert witnesses and more. Analysis of social media data might also provide local insights about the potential for large settlements in particular jurisdictions. Combined with insurers´ historical claims information, such data can be used to develop predictive tools that help decide whether to litigate or settle claims, evaluate potential fraud, and assess which firms and even which lawyers to use before a specific judge or court. Advanced analytics are increasingly being integrated across a whole range of U.S. P&C insurers' claims processes (Figure 13).

bc In contrast to initial proposals, the latest text for the EU Directive on collective redress grants each member state discretion on whether to introduce an opt-in or an opt-out system. However, consumers who are not resident in the member state in which an action is brought would only become part of the represented group by opting in to the proceedings.

Figure 13: Aspects of claims for which U.S. P&C insurers use advanced analytics



Source: Willis Towers Watson

Such an approach is not without challenges. Operationally, combining various structured and unstructured data from internal and external sources often across different legacy IT systems presents many hurdles. Compared with property insurance, assessing and quantifying the complex factors that influence long-tail liability claims is very difficult. This perhaps goes some way to explaining why insurers´ progress in deploying data analytics in claims management (and indeed other business areas) has tended to fall short of expectations over recent years, although they remain hopeful of future breakthroughs especially in the use of techniques such as decision trees, text mining and natural language processing.[56]

Alongside analytics, defence attorneys and their clients could also borrow more from the plaintiff side's playbook. In particular, more frequent and earlier utilisation of mock jury exercises in order to understand and evaluate possible outcomes should the case go to trial. Similarly, mimicking the psychological tactics of the plaintiffs' bar to develop alternative narratives that allow juries to identify with the defendant's position and counter any inflation bias in awards.[57] This includes potentially accepting some responsibility (without conceding liability), acknowledging difficult aspects of the case and framing jurors' expectations around possible reasonable damages. A ´zero´ responsibility/loss position is often untenable as it hands the initiative to the plaintiff's side to anchor upwards jurors' awards, which then often become the minimum benchmark for future cases.

4.3. Improved exposure monitoring and analysis

Tracking and quantifying overall changes in liability exposure due to social inflation, let alone calibrating the marginal contribution attributable to particular underlying drivers, is extremely difficult. Nonetheless, insurers can and must continue to upgrade their underwriting to mitigate against surprises in the frequency and severity of future claims.

4.3.1. Spotting new potential perils

Some risks are genuinely unimaginable until they crystallise – think unknown-unknowns or black swans. But some emerging risks relate to activities or events about which there are indications/justified beliefs that they could occur yet where the background knowledge is weak and develops only gradually, resulting in difficulties in specifying consequences and possibly also the event itself.[58] As a concrete example, published medical research existed to anticipate the risk from asbestos as early as the 1920s, but the body of evidence came to light only slowly over the next 50 years before the first litigation emerged.

Building on that insight, insurers need better early-warning systems that identify shifts in social inflation drawing on information from across their organisations about current and prospective lawsuits, their own and competitor liability cases as well as new data sets from social and digital media.[59,bd] Some researchers advocate using machine learning and artificial intelligence to improve insurers' understanding of emerging liability

bd Munich Re advocates that insurers analyse social inflation developments from a cross-functional perspective, pulling expertise from claims, legal, underwriting and data analytics departments to understand and respond.[59]

risks. For example, Praedicat, a risk and data analytics firm, mines data from published, peer-reviewed scientific research associated with potential liability risks, and deploys statistical analytics to assess the probability that exposure to a substance or product causes a particular form of injury and could trigger successful litigation.[be] Such initiatives would augment rather than replace human underwriting expertise and qualitative judgement, which is often still crucial in assessing the interconnection between emerging risks.

4.3.2. Better risk modelling

As data quality and computing power continues to improve, actuaries should look to build richer, more sophisticated empirical underwriting models that can better explain and account for actual claims developments. However, while such models may provide greater insight into the dynamics of past superimposed inflation, this may not necessarily be a good guide to what will happen in the future, especially if there are discrete regime shifts in, for example, the litigation or overall risk landscape.

Insurers should look to build richer empirical models to inform their underwriting of liability risks.

Moreover, compared with short-tail property lines, casualty insurance is especially prone to the build-up in accumulated loss exposure that can lay hidden in portfolios for years and is revealed only in the wake of a particular event or ruling. For example, a defect in the design or manufacture of a product might cause multiple losses, which can all be clearly linked back to the faulty product or a single corporate failure, out of which multiple professional indemnity and D&O losses could arise.[4] Insurers need to incorporate those potential risk concentrations and correlations in valuing their liabilities and allocating capital.

To gain a better handle on future liability developments some insurers have embraced so-called 'forward-looking exposure models' (FLM). Unlike traditional predictive models which project future liabilities based largely on extrapolating from historical claims developments, FLMs use a scenario-based approach to model the underlying factors that influence future exposure and the possible causal mechanisms that give rise to claims. Most FLM approaches adopt a deterministic approach in the sense that they seek to derive estimates of possible liabilities if a particular event or set of events were to happen. [bf] Given the multifaceted nature of social inflation, drawing on the combined expertise of underwriters, claims managers, actuaries, lawyers, scientists and others is essential in constructing such hypothetical scenarios and calibrating the potential cause-effect processes.

Quantifying possible losses nonetheless remains challenging; the number of parameters is high and not all can be assessed based purely on data, either because data are not available or because the risk driver concerned, such as the general level of litigiousness, escapes objective quantification.[4] A further drawback is the difficulty of establishing the plausibility of losses under adverse scenarios. It is always possible to design a scenario that generates extreme losses, but without a mechanism to quantify the likelihood of those events, let alone how that compares with the probability of alternative outcomes, it is difficult to know how much weight to place on the resulting estimated losses.

In response, a number of researchers are developing probabilistic approaches. In particular, some authors advocate using counterfactual analysis to articulate the likelihood and impact of alternative versions of past actual events. As discussed in Box 4, such an approach can help to augment existing loss-event datasets and improve insurers' assessments of probable maximum loss scenarios.[60]

be The data mining approach is centred on the search for saliency, which is defined as the state or quality by which the potential harm attached to a product or substance stands out relative to its neighbours in the scientific literature. See https://www.the-digital-insurer.com/blog/insurtech-praedicat-and-insurtech-making-the-world-a-safer-place/

bf A number of external model vendors have developed realistic disaster scenarios (RDS) describing catastrophic mass litigation events such as might follow scientific and legal confirmation of a link between the use of a particular product or substance and harm to human health. Topical examples include glyphosate, opioids and talcum powder. See for instance https://www.praedicat.com

Box 4: Counterfactual analysis of social Inflation developments (by Gordon Woo, Catastrophist at RMS)

The starting point for any insurance loss model is the historical record of the events that have occurred. For extreme events, this historical catalogue is inevitably sparse. Fortunately, much more information can be gleaned from history than just the actual losses themselves. History is just one realisation of what might have happened in a world of natural and human complexity. Through reimagining history numerous times in a simulation process, a stochastic model of the loss phenomenon can begin to be constructed.

A modelling window into future losses can be opened by exploring the complexity of past events and alternative outcomes. This counterfactual approach is of universal application in insurance and is especially relevant for liability risk assessment, where there are a broad range of legal, judicial and behavioural factors that can greatly influence settlements. These influences need to be analysed for the past before they can be meaningfully projected into the future.

A key challenge for risk modellers is quantifying the probability distribution of extreme losses, conditional on a hazardous event occurring. For liability risk, the benefits of a counterfactual approach can be illustrated with a familiar household example: the danger posed to toddlers by unanchored bedroom dressers. Wrongful death lawsuits involving children tend to settle for around USD 1 million. But what is the maximum settlement for a furniture manufacturer?

In December 2016, a U.S. federal magistrate judge mediated a USD 50 million settlement, evenly split between three bereaved families whose toddlers died in dresser tip-overs. A few months later, in May 2017, another two-year-old died in a similar accident involving a dresser from the same furniture manufacturer. In January 2020, USD 46 million, the largest settlement for the death of a child, was awarded to the parents, who had not received any product recall message. Had the case gone to trial, the jury could plausibly have awarded up to USD 100 million, mostly in punitive damages.[bi] Such an outcome would have been consistent with classic reptile theory: every juror perceiving a duty to deter yet another toddler tragedy. In this way, social inflation would have built upon anger that the bereaved parents were not contacted about the recall, despite having paid with the furniture company's own credit card. Moreover, such a settlement for the death of a child would almost certainly have become an important benchmark for future jury awards.

In this particular case, the alternative trial outcome would have been clear. But in cases of disputed liability, legal teams can conduct mock trials to gain insight into how a jury might view a case. For liability modelling, legal experts might re-enact simplified mock trials for important cases of the past decade. Two important counterfactual questions such mock trials could address are: 1) how much worse could the legal outcome have been?, and 2) what would the impact have been if other drivers of social inflation had been present; for example, erosions in past tort reforms or TPLF?

By reimagining recent legal history, modelling insights can be gained into future social inflationary pressures. Stochastic simulation of salient historical events provides a practical framework for estimating the liability loss probability distribution conditional on a wrongful harm occurring. Quantifying the substantial variability in conditional loss is an essential step towards the modelling horizon of probabilistic liability risk assessment.

> Counterfactual analysis can provide a practical framework for estimating liability loss probability distributions.

4.4. Product innovation

In addition to better case management, improved underwriting and portfolio construction, liability insurers can employ product innovation strategies to mitigate their exposure to social inflation.

Typically such innovation has tended to focus on incremental changes – for example on the adaptation of exclusionary language, the use of claims-made or occurrence-notified triggers and measures to curtail policy stacking (i.e. the aggregation of multiple insurance coverages or limits to cover a single loss that might have occurred sometime in the past).[bg] These approaches still remain relevant, although there is scope for more radical innovation.

> Together with typical strategies such as adapting policy wordings and exclusions, insurers should embrace more radical product innovation.

The improved effectiveness of the plaintiffs' bar, including the collection and recycling of evidence, changes not only how cases are dealt with. It also influences the types of cases pursued, including more mass tort/class actions. Ultimately, this gives rise to more correlated exposures across types of liability; most obviously, shifts in litigation practices increase the possible correlation between insurers' general liability and D&O lines, with implications for natural diversification within their portfolios. This might argue for shifting away from the 'all risks' type of product, which has been a mainstay of liability insurance, towards more 'named perils' policies, perhaps as supplementary cover. This would offer more opportunities to tailor coverage to policyholders needs (e.g. different limits for different exposures) and provide more cover and contract certainty against emerging risks, including those directly linked to social inflation developments.

Such a shift in policy wordings should not come at the expense of introducing more complexity. Insurers will be able to provide more relevant, trusted products to customers and reduce any ambiguity over cover if they invest in ways to clarify and simplify their products. In that spirit, policies might ultimately be designed on a more modular basis – with individual covers sitting beneath a master policy – and/or focused on the outcomes that customers would be protected against, for example, a loss of revenue, rather than exclusively the perils which cause those outcomes.[61]

Insurers could also consider alternative ways to package and price certain liability insurance products to reflect the dynamic nature of risks. For example, D&O insurance for publicly quoted companies could in principle be priced each day based on their equity price movements and volatility and finalised at the end of the policy period, much like activity-based pricing works in marine cargo insurance, for example. This would go some way to better align pricing to risks and prevent nasty claims surprises should a company's equity valuation suddenly fall following an earlier run up in its stock price.

> This includes alternative ways to package and price certain liability insurance products to reflect the dynamic nature of risks.

Given the scale of potential liability exposures relative to the total risk-absorbing capacity of the re/insurance sector, co-participation arrangements to share risks could help to maintain and possibly expand the boundaries of insurability. This is especially true for large multinational corporations who often manage their risk exposures centrally through captive organisations. Parametric covers too might have a part to play in casualty insurance (for instance, in environmental liability), although the structuring challenges, particularly finding a trusted third-party index against which to reference any payout trigger, as well as the significant basis risk involved, have so far proved prohibitive.

> Beyond traditional re/insurance, transfer of liability risk to capital markets might eventually be possible, although that will likely depend on further advances in modelling liability exposures.

Beyond traditional re/insurance, transfer of liability risk to capital markets might eventually be possible. In addition to catastrophe bond instruments, sidecar structures that pool risks for corporates, funded captive-type vehicles or some form of contingent capital instruments could all yet emerge, allowing sophisticated capital market participants to take on peak liability exposures. That prospect, however, hinges on further advances in modelling liability exposures and the potential for accumulated losses which would afford investors more comfort in quantifying and

bg Simulations by some modellers suggest that stacking risk is a key source of aggregation in casualty insurance. https://www.praedicat.com/what-is-long-tail/

pricing the often complex risks. Even then, institutional investors' appetite for such risks might be limited without mechanisms to limit their exposure to the extreme tail of the distribution of possible losses, which can be significant and develop only slowly over time. Ironically, the development of litigation funding business models might eventually expand the set of available (albeit partial) hedging instruments for investors and insurers, especially if litigation outcomes develop into a fully-tradable asset class.[bh]

bh It might eventually be possible, for example, to develop a litigation index which can be traded, akin to say the VIX for equity prices, to hedge exposure for D&O, product liability or regulatory risk/fines.

5. Concluding remarks

Social inflation is not a new phenomenon. Earlier episodes occurred most notably in the 1980s and 1990s/2000s, especially for product and professional liability as well as medical malpractice insurance. Recent evidence suggests that after a prolonged hiatus a new wave may have begun. This is most acute in the U.S., with a sharp pick-up in litigation and a proliferation of outsized jury verdicts. However, there are signs that social inflation is spreading to other countries, albeit this has so far largely been confined to particular fields such as securities litigation and associated insurance like D&O.

Insurance plays a vital role but to function it requires a stable litigation and liability environment, otherwise underwriting risks becomes extremely challenging, if not impossible. Higher and more uncertain social inflation makes it difficult to assess the probability distribution of aggregate losses and expenses, which in turn affects the costs of providing insurance, including the cost of capital to cover unexpected claims. Most obviously, the emergence of 'nuclear' awards raises the prospect that future cases attract outsized settlements, even if the circumstances differ materially. Moreover, broadening definitions of liability and retrospective modification of existing policies challenge the very notion of an insurable event, potentially meaning some risks become uninsurable at any cost.

How long-lasting and how pervasive the latest episode will prove depends crucially on the scale and persistence of the underlying drivers as well as any policy and industry response. The worsening liability situation for insurers was becoming problematic before the onset of COVID-19. The pandemic just adds to the uncertainty about potential claims, particularly if it acts as an accelerant/amplifier of some of the prevailing driving factors behind social inflation, including shifts in societal preferences over who should bear risks.

Previous episodes of social inflation have often required tort reform to keep insurance both affordable and available. Additional legislative reforms and a strengthening of existing ones may be needed again, if only to offset other shifts in the legal ecosystem. In particular, the cocktail of aggressive plaintiff attorneys' practices, deepening third-party litigation finance and hardening public attitudes to income and wealth disparities across society is creating an increasingly challenging litigation environment for corporates and their insurers. Efforts to reinforce caps on damages and keep legal costs proportionate will be important. Likewise, greater transparency over litigation finance may help to curtail potentially explosive claims settlement dynamics.

For their part, insurers must adapt business models to ensure they continue to offer their customers vital protection from liability costs associated with unforeseen and unintended incidents. While it may be tempting to rely on the recent upswing in the underwriting pricing cycle to boost insurers' results, such an approach leaves insurers vulnerable to a sudden spike in required reserves should the long-run outlook for claims deteriorate. For long-tail casualty lines this can be potentially financially ruinous, if it triggers a rapid re-rating of liabilities on policies written many years previously.

Alongside engaging with the public policymakers, insurers should prioritise three areas:

- **Enhanced defence case management** to offer a more effective counter to the plaintiffs' bar
- **Investment in forward-looking liability exposure management** to pre-empt new, emerging perils and assess the potential liability costs of shifts in future social inflation
- **Product innovation** to ensure commercial liability insurance remains fit for purpose, including promoting more radical solutions such as risk participation arrangements, parametric solutions and, possibly in time, transfer of certain liability risks to capital markets.

References

1 Partner Re. 2010. Social inflation in the US: What is it and why is it a concern?

2 Perry, R. 2011. The Deepwater Horizon oil spill and the limits of civil liability. *Washington Law Review* 86: 1–68.

3 Richardson, N. 2010. *Deepwater Horizon and the patchwork of oil spill liability law.* Resourcesfor the Future.

4 CFO Forum. 2015. *Casualty accumulation risk.*

5 Cornerstone Research. 2020. *Securities class action filings – 2019 year in review.*

6 Shrub, Amity, Citrin & Spratt.

7 Oh, S. 2020. Social inflation. *University of Chicago Research Paper.*

8 Huskin, P. Why D&O insurance is costly despite fewer securities suits. *Law360*. 2 September 2020.

9 AXA. 2020. Unpublished memo.

10 Australian Law Reform Commission. 2018. I*nquiry into class action proceedings and third-party litigation funders.*

11 Aspen Re (in conjunction with Clyde & Co). 2017. *Litigation funding: Global trends and outlook.*

12 AGCS. 2020. *Collective actions and litigation funding and the impact on securities claims: A global snapshot.*

13 Jones, D., and T. Ryan. 2010. *Estimating the impact of claim inflation on self-insured liabilities.* Milliman.

14 Cutter, K., A. Cutter, J. Yick, M. Phan, and C. Chen. A claim pairing approach to measuring superimposed inflation – A NSW CTP example. *Paper presented to the Actuaries Institute Injury Schemes Seminar 8–10 November 2015.*

15 U.K Ministry of Justice. 2019. *Post-Implementation review of part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Civil litigation funding and costs.*

16 North Broward Hospital District v. Kalitan, No. 8C14-1858. FL. 8 June 2017.

17 Kirby M., and C. McCluskey. 2019. *Changes in state laws on civil statute of limitations for sexual assault victims.* Connecticut General Assembly Office of Legislative Research.

18 Payne, J. and J. Nix. 2019. *Waking the litigation monster: The misuse of public nuisance.* U.S. Chamber Institute for Legal Reform.

19 Insurance Research Council. 2020. *Social inflation: Evidence and impact on property-casualty insurance.*

20 Bristol-Myers Squibb v. Superior Court of California. June 2017.

21 Martinez, L. 2015. The restatement of the law of liability insurance and the duty to settle. *Rutgers University Law Review* 68 (11).

22 American Law Institute. 2014. Annual report, 2013-2014. https://www.ali.org/media/filer_public/1a/1e/1a1e43dc-0141-4cf3-82df-3fd210cb0527/2013-2014_annual_report.pdf

23 Priest, G. 2017. A principled approach toward insurance law: The economics of insurance and the current restatement project. *George Mason Law Review* 24 (3).

24 Feinman, J. 2019. A user's guide to the restatement of the law, liability insurance, Connecticut insurance. *Law Journal* 26 (1).

25 OECD 2020. *Responding to the COVID-19 and pandemic protection gap in insurance.*

26 Boudreau, M. and R. Reville. The risk of 'take-home' COVID-19 and the 'next asbestos'. *Carrier Management*. 6 July 2020.

27 Carr, S. 2019. *The most expensive adwords keywords.*

28 American Association for Justice. *Litigation groups*. https://www.justice.org/ membership/ litigationgroups

29 Duane Morris LLP. 2020. Unpublished memo.

30 U.S. Chamber Institute for Legal Reform. 2017. *Engineered liability: The plaintiffs' bar's campaign to expand data privacy and security litigation.*

31 Carlton Fields. 2020. *Class action survey 2020.*

32 Cornerstone Research. 2020. *Securities class action filings, 2020 midyear assessment.*

33 U.S. Chamber Institute for Legal Reform. 2018. *A rising threat: The new class action racket that harms investors and the economy.*

34 Chubb. 2019. *From nuisance to menace: The rising tide of securities class action litigation.*

35 Cornerstone Research. 2018. *Securities class action filings – 2018 mid-year assessment*.

36 U.S. Chamber Institute for Legal Reform. 2020. *An update on securities litigation.* ILR Briefly.

37 American Transportation Research Institute (ATRI). 2020. *Understanding the impact of nuclear verdicts on the trucking industry.*

38 The College of Labor & Employment Lawyers. *Spring 2004 newsletter.* 6 (1).

39 Boesen Consulting. 2020. *The impact of the COVID19 crisis on social inflation.*

40 Edelman. 2020. *Trust barometer 2020: Global report.*

41 Hans, V., and M. Ermann. 1989. Responses to corporate versus individual wrongdoing. *Law and Human Behavior* 13 (2).

42 MacCoun, R. 1996. Differential treatment of corporate defendants by juries: An examination of the "deep-pockets" hypothesis. *Law & Society Review* 30 (1).

43 Hunter, K. 2018. Company familiarity moderates anti-corporate bias and jurors' compensatory award amounts. *Doctoral dissertation, Fielding Graduate University.*

44 Rebeck, K. 2012. Understanding the corporate identity effect: An examination of how legal standards are applied to the behavior of corporate versus individual defendants in a civil lawsuit scenario. *University of Chicago (Masters Thesis).*

45 Mackeprang, C. 2020. *Quantifying social inflation - jury awards, income inequality and the Bronx Jury Hypothesis.* Gen Re.

46 Seaman, S., K. Burke, J. Selby, and P. Hernandez. 2020. *The legal trends behind 'social inflation' in insurance.* Hinshaw & Culbertson LLP.

47 Kuper, G., and D. Dukes. 2019. *The millennial invasion of jury pools. For the defence.*

48 Spiecker, S., and K. Oberdieck. 2017. *Jury consultant research in oil and gas disputes in light of "fake news", "alternative facts" and social media: Strategies for persuading millennials and every other generational cohort today*. Texas State Bar.

49 Allianz. 2019. *Directors and officers insurance insights 2020.*

50 Burford Capital. 2019. *2019 Legal finance report.*

51 Burford Capital. 2020. *2020 Legal finance report.*

52 Silver, C. 2014. Litigation funding versus liability insurance: What's the difference? *DePaul Law Review* 63 (2).

53 Molot, J. 2010. Litigation finance: A market solution to a procedural problem. *Georgetown Public Law Research Paper No. 11-134.*

54 US Chamber Institute for Legal Reform. 2019. *Uncharted waters: An analysis of third party litigation funding in European collective redress.*

55 Cyan, Inc. v. Beaver County Employees Retirement Fund. March 2018.

56 WillisTowersWatson. 2020. *Advanced analytics: Are insurers living the dream? 2019/2020 P&C insurance advanced analytics survey report (North America).*

57 Tyson, R. 2019. Prevent runaway jury verdicts by neutralizing the reptile theory. *Claims Journal.*

58 Flage, R., and T. Aven. July 2015. Emerging risk – conceptual definition and a relation to black swan type of events. *Reliability Engineering and System Safety 144.*

59 Munich Re. 2020. *Taking a team approach: A reinsurer's perspective on social inflation.*

60 Lloyd's of London (in collaboration with RMS). 2017. *Reimagining history: Counterfactual risk analysis. Emerging Risk report.*

61 Lloyd´s of London. 2020. *Building simpler insurance products to better protect customers.*

Uniquely, the latest episode of social inflation, prevalent not only in the U.S. but starting to spread to other countries as well, is the manifestation of changes in the litigation landscape. This report identifies three key underlying drivers of social inflation – drivers that could be accelerated by COVID-19 – suggesting how insurers can take a proactive approach to mitigating the impact of social inflation on the liability claims landscape and on their ability to provide meaningful support to society.

The Geneva Association

International Association for the Study of Insurance Economics
Talstrasse 70, CH-8001 Zurich
Tel: +41 44 200 49 00 | Fax: +41 44 200 49 99

secretariat@genevaassociation.org