



Healthcare

# ALERTBULLETIN®

A Risk Management Update | 2024 Issue 1

## Social Inflation: Understanding and Addressing Rising Claim Costs

The cost of U.S. liability claims continues to outpace the general rate of inflation by at least 10 percent. The difference between the increase in costs associated with professional liability claims resolution and the inflation rate is known as “social inflation,” a reference to the underlying political and cultural factors that influence the legal system. Left unchecked, social inflation may result in rising premiums, diminishing coverage capacity and underfunded loss reserves. It also increases healthcare costs, potentially leading to some providers leaving the profession, and may result in bankruptcies and the closure of healthcare facilities.

The current escalation in indemnity payments reflects a tendency toward plaintiff-friendly judgments by juries and the proliferation of so-called “nuclear verdicts” – i.e., damage awards in the tens and even hundreds of millions of dollars. Patterns of recurrent, serious medical errors are another factor precipitating astronomical verdicts and escalating claim-related costs. (See CNA *Vantage Point*® 2024-Issue 1 “Medical Error Prevention: Reinvigorating Patient Safety Measures.”)

Although viewed by many as a marked departure from traditional concepts of jurisprudence, social inflation is a reality, reflecting evolving attitudes about risk, accountability and valuation of harm. Responding to this inflationary trend will require the collective effort of insurers, risk managers, legislators and insurance regulators, as well as lawyers, judges and healthcare professionals, among others. To help healthcare leaders and providers better understand and respond to this problem, this edition of *AlertBulletin*® offers a primer on social inflation, examining its causes, its effects on insurance and the role of the plaintiff’s bar, as well as suggestions of useful countermeasures.

Left unchecked, **social inflation** may result in **rising premiums, diminishing coverage capacity and underfunded loss reserves.**

### Quick Links

- Cappelletti, A. “Developments in Social Inflation.” *Insights*, June 2021.
- McGuigan, M. and Riggs, V. “ESG Social Inflation Affects MPL Carriers.” *Inside Medical Liability*, Second Quarter 2021.
- “U.S. Litigation Funding and Social Inflation,” a report issued by the Swiss Re Institute, December 2021.

## Contributing Factors

Although social inflation is a verifiable fact, the forces that sustain it may be difficult to isolate and quantify, and there are widely divergent views about the nature and source of the problem. Nevertheless, many observers broadly agree about the most significant causes of upward claim severity trends. Some of the primary and secondary factors are summarized in the chart below:

<p><b>Primary Factors</b></p>	<p><b>Changing Legal Environment:</b></p> <ul style="list-style-type: none"> <li>• <b>Reversals in legislative tort reform efforts</b> and the erosion of statutory limits on non-economic damages, among other protections.</li> <li>• <b>Proliferation of class action lawsuits</b>, which may result in high damage awards.</li> <li>• <b>Inflated jury awards</b> that desensitize the public with respect to future verdicts.</li> <li>• <b>Jurors</b> increasingly seeking to punish defendants in order to make a political statement.</li> <li>• <b>Longer legal proceedings</b> due to the judicial system's decreased willingness to screen out unsubstantiated claims and/or inflammatory evidence.</li> <li>• <b>New legal funding methods</b>, by which financiers invest in lawsuits in exchange for a percentage of the award or settlement. (See <a href="#">page 3</a>.)</li> </ul>	<p><b>Shifting Social Attitudes and Beliefs:</b></p> <ul style="list-style-type: none"> <li>• <b>Changing expectations</b> regarding consumer protection and quality of care.</li> <li>• <b>Generational attitude shifts</b> concerning social responsibility and the redress of perceived grievances.</li> <li>• <b>Negative sentiment toward corporations</b>, coupled with increased awareness of executive salaries.</li> <li>• <b>Greater interest in equitable risk absorption</b> among judges and juries.</li> <li>• <b>Ubiquity of social media</b>, enabling activists to leverage information to promote a particular narrative.</li> <li>• <b>Growing sense of political disenfranchisement</b> and concomitant proliferation of populist views.</li> </ul>
<p><b>Secondary Factors</b></p>	<p><b>Emerging Healthcare Exposures:</b></p> <ul style="list-style-type: none"> <li>• <b>Consolidation of healthcare entities</b> into larger, deeper-pocketed potential defendants.</li> <li>• <b>More scientific evidence of harmful risk exposures</b>, e.g., opioids, medication side effects, off-label use of drugs and devices.</li> <li>• <b>Mass torts stemming from multi-plaintiff harms</b>, such as medical device and pharmaceutical injuries, as well as patient data breaches.</li> </ul>	<p><b>Rising Medical Costs:</b></p> <ul style="list-style-type: none"> <li>• <b>Aging population</b> with growing medical needs.</li> <li>• <b>Medical advances</b>, including costly new procedures and technologies.</li> <li>• <b>Exorbitant prices for newly introduced drugs</b>, as well as price increases on existing medications.</li> <li>• <b>Chronic workforce shortages</b>, leading to higher wages and training costs.</li> <li>• <b>Political pressure to expand insurance coverage</b> for expensive new therapies.</li> </ul>

## Effects of Social Inflation on Insurance

Social inflation has significantly augmented claim severity [across the medical professional liability insurance marketplace](#). In response, insurers are taking the following actions, among others:

- **Examining risks more closely**, with input from the insured's risk control team.
- **Adjusting premium rates** to ensure adequate reserves.
- **Revising policy terms**, conditions and exclusions to limit loss exposures.
- **Lowering limits of liability** on covered claims or including policy sub-limits (i.e., capping coverage for specified losses within the larger policy limit).
- **Imposing coverage restrictions** to limit or exclude certain higher risk medical services and treatments.
- **Discontinuing higher risk coverage lines** associated with unfavorable claim frequency and severity trends.
- **Partnering with policyholders** to enhance loss control and risk management practices.

Insurers also have increased their use of data to more accurately predict claim costs and price premiums. As social inflation factors continue to generate volatility within the legal system and professional liability marketplace, the use of advanced actuarial analytic tools to guide the claims and underwriting processes is expected to increase.

## Plaintiff Attorney Strategies

The legal landscape has been affected not only by social and political factors, but also by an increasingly aggressive plaintiff bar. The diagram below summarizes some of the methods used by plaintiff attorneys to prevail in medical professional liability cases.

### Advertising and client solicitation

In addition to print and broadcast media, many plaintiff attorneys maintain websites and other online platforms to publicize their firm's services. Such intense marketing serves to attract potential clients and also to influence individuals who may one day serve on a jury.

### Trial consultants and data analytics

An industry of consultants dedicated to the plaintiff bar has emerged over recent decades. Specializing in mock trials, focus groups and data analysis, these legal advisors help plaintiff attorneys model and refine their courtroom narratives and strengthen their overall presentation.

### Aggressive trial practices

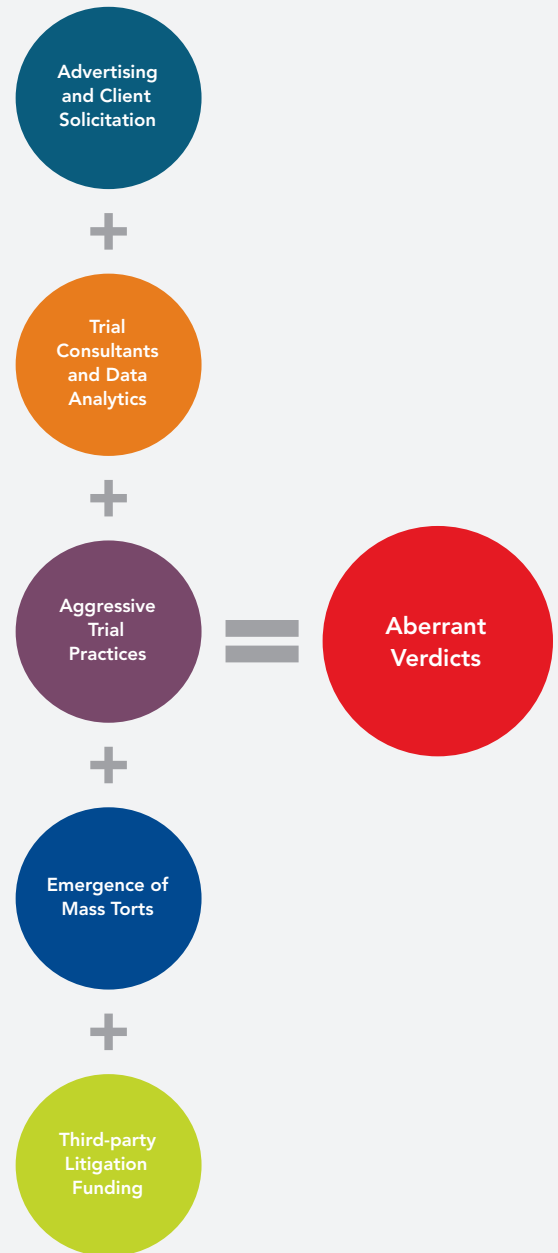
Building upon behavioral science insights into the decision-making process, plaintiff attorneys liberally apply the reptile theory, while using "anchoring" techniques to sway jurors. The former involves appealing to jurors' fears by exaggerating the threat to society theoretically posed by the defendant, while the latter refers to the strategy of proposing unrealistically high starting figures to jurors in order to "anchor" prospective damage awards.

### Emergence of mass torts

Attorney-driven mass torts and class action lawsuits, encompassing multiple plaintiffs allegedly harmed by the same act or omission, are increasing. Areas of increased scrutiny include opioid mismanagement, sexual misconduct by providers, defective medical devices and prescription drug-related injuries, among others.

### Third-party litigation funding

This alternative legal funding practice involves an outside entity – e.g., a private equity firm or hedge fund – financing civil litigation in exchange for a percentage of the recovery. Now a multibillion-dollar industry, third-party litigation funding enables plaintiff attorneys to pursue lawsuits that they may not have been able to handle previously. It also potentially contributes to prolonged litigation, as well as more costly settlements and jury awards.



## Risk Mitigation Strategies

Social inflation is a complex, multifaceted problem, requiring concerted legislative action at the state and federal levels. In the interim, the following six proactive measures, among others, may help healthcare organizations and providers minimize their own exposure to litigation and financial loss during this inflationary period:

**1. Partner with insurance professionals.** Tackling the effects of social inflation is a shared obligation of insurance companies and insureds. By collaborating with underwriting and risk control experts, including the mutual sharing of risk-related data, healthcare leaders may gain insight into liability patterns and trends, thereby fostering a more proactive claim management posture.

**2. Remain informed.** The first step in diminishing the impact of social inflation is to learn what encourages it. By hosting roundtable discussions with healthcare professionals and insurance representatives on social and political factors affecting the liability environment, organizational leaders and administrators may play an active, knowledgeable role in efforts to produce a more equitable, rational and predictable tort system.

**3. Strengthen risk management programs.** A robust risk management plan represents the best line of defense against inflationary effects. Leaders may reduce exposures in high-risk areas by promoting a culture of safety, evaluating exposures on an ongoing basis, reporting and analyzing all incidents and near misses, and implementing and adjusting action plans.

**4. Enhance litigation management practices.** An aggressive approach to managing claims permits defense counsel to file motions early in a legal proceeding, thus potentially limiting plaintiff counsel's use of prejudicial or inflammatory litigation techniques, such as the "reptile theory" (see [page 3](#)). By adopting a proactive claim reporting protocol – which includes thorough and prompt investigation of events, timely case evaluation by defense counsel, early identification of potentially large damage exposures and retention of medical experts – organizations may significantly strengthen their defense posture.

**5. Implement social responsibility initiatives.** At the same time that the healthcare industry is consolidating into larger systems, anti-corporate sentiment is growing among the public. To maintain community support, it is important for organizations to engage in charitable endeavors, cultivate a positive relationship with the community through event and committee participation, operate in an environmentally conscious manner, and treat employees with fairness and respect.

**6. Advocate for transparency in lawsuit funding.** As previously noted, hidden sources of third-party litigation funding exacerbate social inflation by enabling the filing of more claims, as well as protracted and more costly legal proceedings. Healthcare professionals may help achieve transparency, accountability and regulation in this area by supporting organizations – such as the [American Hospital Association](#), [American Medical Association](#) and [LeadingAge](#)<sup>®</sup> – that lobby for change on behalf of facilities and providers.

Rising professional liability claim costs impose a burden on most of the relevant stakeholders, including healthcare professionals and facilities, insurers and patients, as litigation costs are translated into higher medical bills. By understanding the sources of social inflation, as outlined in this article, administrators and providers can help protect their own organizations and practices, as well as the industry as a whole, from the threat of a more costly and onerous claim resolution process.

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