The Defense Bar Must Push Back On Social Inflation

By **Christopher Carroll, Joshua Wirtshafter and Rachel Kim** (August 12, 2022)

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The term "social inflation" refers to increased liability risks and consequently, increased costs to insurers due to social and litigation trends.

This type of inflation regularly creates settlement demands and verdicts that are exponentially higher than normal economic inflation rates. Unlike typical claims projections that are attributable to relatively measurable variables, social inflation is based on often immeasurable variables and random perceptions about liability and damages findings.

The wide disparity of social inflation factors on any given claim has made it more challenging for the defense bar and insurers to predict trial outcomes and to quantify and predict loss, and manage risk. Insurers have taken note and have quickly adopted additional means of evaluating risks and managing outside counsel on cases.

As social inflation becomes a significant consideration, the way forward includes increased efforts for tort reform and congressional awareness, regulation of litigation funding, awareness and communication of these issues, as well as increased involvement and coordination among the various players in the insurance market — insureds, insurers, outside counsel and brokers.

The defense bar has additionally been galvanized to heed the call to coordinate among itself, sharing information and strengthening its network, vis-à-vis defense bar organizations as well as other platforms.

Contributors to Social Inflation

In the U.S., certain aspects of the legal system have long been drivers of social inflation: allowance of punitive damage awards, the vehicles of class action and multidistrict litigation, the wide disparity of venue-related risk factors, the use of contingent fees to drive higher settlements, and verdicts and fee-shifting statutes in select circumstances.

While these deeply rooted factors are unquestionable drivers, social inflation is also driven by litigation funding, the erosion of tort reform, negative public sentiment toward businesses and corporations, and desensitization to large jury awards.

Notable Areas of Impact

In the past several years, there has been an increase in litigation and claims in numerous sectors — pharmaceuticals, sexual assault or abuse, medical products, mass shootings, chemical manufacturing, and now, things related to the COVID-19 global pandemic.

Sexual abuse and opioid-related claims are two examples of areas where social inflation has had a significant impact recently and is expected to continue to play a prominent role in the next few years.

Sexual Abuse Claims and the #MeToo Movement

The 2017 publication of groundbreaking stories in The New York Times and The New Yorker, detailing allegations of sexual abuse against Hollywood movie mogul Harvey Weinstein, triggered the #MeToo movement and led to a significant increase in sexual abuse claims.

While sexual abuse claims in general are not a new phenomenon, the sudden explosion of the #MeToo movement not only incepted a huge increase in such claims, but also resulted in the passing of reviver statutes by state legislatures throughout the U.S. These laws reopened the statutes of limitations to allow sexual abuse victims to bring claims against their abusers and their abusers' employers for abuse that took place years ago.

The #MeToo movement brought attention to the pervasive issues of sexual abuse harbored in nearly every industry and created recourse for victims to obtain justice from and against perpetrators.

At the same time, the erosion of tort reform in the form of reviver statues amplified a tidal wave of lawsuits by victims against their alleged abusers and the various institutions alleged to be responsible for allowing the sexual misconduct to take place — i.e., religious institutions, educational institutions, corporations, sports teams, social groups, Olympic organizations, etc. This in turn implicated all types of insurance held by those companies over the past half-century.

The increase in claims was further aided by the plaintiffs bar's abilities to identify sexual abuse victims through sweeping advertising campaigns. Once retained, the combination of contingency agreements with easily obtainable litigation funding has afforded victims the ability to pursue otherwise costly litigation in hopes of a significant recovery through settlement or even trial.

Understanding that the public sentiment likely favors and sympathizes with these victims, plaintiffs appear to have been emboldened to push for jury trials.

Opioid Litigation

Similar to the sudden uptick in sexual abuse claims filed in the U.S., courts have recently been overrun by lawsuits against manufacturers, distributors and retailers of opioids. It is generally alleged that manufacturers have been aware for several decades of the risks of abuse and diversion of opioids, but made misrepresentations and failed to adequately warn the public about those risks.

It is further alleged that distributors and retailers participated in a supply chain scheme where they reaped vast financial rewards as a result of their failure to monitor and prevent improper distribution of opioids.

More than 3,500 separate lawsuits have been filed by states, counties, municipalities, medical providers and social service administrative agencies for pecuniary losses. These include the increase in the costs of medical treatment, social services, law enforcement, prisons, job service programs, resources, etc. that the claimant entities have been forced to incur in order to counteract the opioid epidemic.

The exposures posed by opioid lawsuits appear to have the potential to result in, and in some cases already have resulted in, unprecedentedly large verdicts, ranging in the hundreds of millions to the billions. Thousands of claims are outstanding today, including

claims by many governmental entities against key opioid manufacturers, as well as prominent wholesale distributors and retailers.

The volume of opioid cases is one issue, but the management of these cases is an entirely separate issue that is important in the context of social inflation. Plaintiffs attorneys litigate these cases to their fullest extent and put on display the allegedly intentional, bad acts of pharmaceutical companies and distributors of opioids.

This tactic has the potential to result in massive verdicts and settlements reaching the many billions of dollars, for which coverage has been and will be sought from insurers.

Additionally, these cases involve claims based on public nuisance, which seek damages that are forward-looking — as opposed to traditional past damages.

Increased Claims of Public Nuisance

As noted above, there has been a rise in claims based on public nuisance, seeking damages that are forward-looking — as opposed to traditional past damages — or the alleged amounts to abate the public nuisance. While the cause of action of public nuisance is not novel, what is unprecedented are the various ways that the plaintiffs bar is seeking to utilize public nuisance as a catch-all cause of action for any alleged public harm.

For instance, there has been an emergence of public nuisance claims in various products-related litigation, third-party COVID-19 claims, mass shooting cases, climate change litigation and pollution-related claims alleged to cause third-party bodily injury.

Compounding the perfect storm of increased tort filings are the statutory mechanisms that allow for public nuisance causes of action to be upheld — i.e., each state has its own consumer fraud protection statutes and certain state statutes permit a regulatory body to have standing to pursue claims for public nuisance on behalf of the public.

Plaintiffs attorneys continue to seek high amounts of damages, and early trials have centered on how public nuisance damages are calculated, resulting in a battle of the economic or other experts.

Preparing to Confront Social Inflation

The current landscape of social inflation, nuclear verdicts and nuclear settlements represents an inflection point for the insurance industry and the defense bar. Insurers and the defense bar alike have become increasingly cognizant of the risks and concerns posed by social inflation. The general response has been one of increased coordination, communication and attention to detail.

The defense bar has at times pivoted from its old playbook and has adopted litigation and trial strategies that are proving more effective at trial. Insurers have become increasingly selective in defense counsel, ensuring that defense counsel have been trained in combating reptilian and other themes presented by the plaintiffs bar.

Defendants more commonly coordinate with each other and their respective counsel through joint defense groups that are subject to common interest privileges regarding strategy on how to combat the various tactics of the plaintiffs bar. The natural result of such joint defense efforts is increased uniformity in defense.

For instance, defendants may be expected to sign onto an agreed set of arguments or jointly file motions or letters. And where the claims and issues are the same or similar, the defense bar may be expected to use or potentially share the same experts even across multiple cases pending in different jurisdictions.

Defendants have increased their use of deposition and trial consultants to prepare witnesses — both fact and expert witnesses — prior to them giving testimony. This extra cost expended to ready witnesses serves to prepare them to identify and confront certain tactics that they might face during cross-examination and avoid framing testimony that might imply a negative message or the existence of what might be perceived as an unsavory business practice.

Additionally, there are now occasions where defendants will hire specialists to try their cases, especially high-exposure cases. Insurers and defense counsel are additionally increasing their utilization of focus groups and mock trials to test themes and to create strong counternarratives to present at trial.

From a more macro level, defense bar organizations have also created new training programs for both insurers and defense counsel, with the goals of providing widespread training and awareness to combat the effects of social inflation, nuclear verdicts and nuclear settlements.

Moving forward, insurers and the defense bar should continue in all the above described efforts to increase collaboration, think outside the box, exhibit flexibility in strategy, and utilize social trends and perceptions to predict what themes may work best at trial to build an effective strategy.

Practically speaking, this can be achieved through early and frequent litigation planning. Such strategy-making not only helps to identify risks posed by social inflation relative to a particular matter, but also establishes a foundation upon which insurers and their defense counsel can discuss ways to counteract those risks, whether it be through revising their strategy as facts become known throughout a case, retaining consultants or particularized experts, or even engaging additional counsel to assist at trial or in the context of alternative dispute resolution efforts.

Other strategies include anchoring, the use of focus groups, mock trials, shadow juries, early mediation, early identification of corporate representatives for depositions, early preparation for depositions by hiring consultants who are experts in combating reptilian questioning, creative use of experts as warranted by each case, and utilizing defense counsel who are well versed in tactics utilized by the plaintiffs bar.

Additionally, insurers and the defense bar should be prepared to increase their tort reform efforts. To the extent that the plaintiffs bar has had success at the legislative level in expanding the scope of potential damages in various respects — e.g., expanding recovery rights of surviving family members in wrongful death cases to include emotional or noneconomic damages — insurers and the defense bar will need to consolidate their lobbying efforts to combat such advances in order to keep the costs of claims down.

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Disclosure: Kennedys currently represents clients in #MeToo and opioids cases. Sompo International handles insurance claims related to ongoing sexual abuse and opioids cases.