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Social Inflation – Its Impact on Jury Verdicts and the Insurance Industry

I. The Problem of Social Inflation

What is Social Inflation?

Social Inflation is the increase in insurance losses due to social factors. These losses are increased both in the frequency with which they arise and the severity of the loss when it is assessed. These losses are influenced by circumstances entirely independent of the specific facts of a particular case or the actual level of liability a party may face. The independent nature of social inflation factors makes it particularly difficult to predict and subsequently combat, in both the prevalence with which social inflation arises and the degree to which it may affect insurance losses. Drivers of social inflation fall into a variety of categories, including social, political, legal, and economic. These areas result in sensationalized reporting of cases and jury awards, excessive publication by news and media, dramatization of cases through documentaries, podcasts, and other forms of entertainment, legal funding, alterations and erosion of tort reform laws, and the general trend of increased legal and medical costs in the United States. Understanding the variety of forms social inflation can take will aid insurance adjusters and attorneys alike in better valuing claims and cases for settlement and trial purposes. For example, a personal injury suit that is filed in a court located in a county that is urban, densely populated, and has a high percentage of lower socio-economic class, undereducated populations, and/or Black/African American, Asian, or Latino residents has an increased probability of resulting in a higher jury award compared to a more conservative, suburban, and less diverse region.

II. Excessive Jury Verdicts

The impact of social inflation manifests primarily in the number and severity of jury verdicts that are imposed against large corporations and their insurers. These jury verdicts are not just becoming more common, but the amount of non-economic and punitive damages that are being assessed against these defendants is becoming record-breaking. These types of windfall verdicts can certainly be traced back decades. For example, Stella Liebeck, a woman who sued McDonalds for burns allegedly caused by the

company's hot coffee, was awarded \$2.7 million. While that award may have been out of the ordinary at the time, it can be considered relatively mundane compared to some of the more recent windfall amounts awarded by juries.

Monsanto has faced a plethora of lawsuits over the past several years that allege that the company failed to adequately warn customers that the use of its product RoundUp, a common weed killer, could cause various forms of cancer. Among just a few of these awards includes \$289 million and \$80 million awards, each to single plaintiffs, and a \$2 billion award to a couple in May of 2019. This last award was the eighth largest product-defect award in history according to reports by Bloomberg. Although each of these awards were eventually decreased by a judge (\$78 million, \$26 million, and \$86.7 million respectively), the mere existence of them sets the scene for a legal landscape that not only recognizes such extreme awards, but incentivizes them. Potential jurors are made aware of these awards through social media and news reports, and then become disillusioned that such high awards are in fact the status quo.

Similar to RoundUp, products like talcum powder and Risperdal are also garnering significant jury awards against the manufacturing corporations. Allegation that talcum powder is correlated to an increased risk of ovarian cancer has resulted in the filing of thousands of suits across the country. One lawsuit in the string of talcum powder litigation suits resulted in a \$4.69 billion award to nearly two dozen plaintiffs, which was upheld by a judge in April of 2019. Similarly, a Pennsylvania court recently upheld a verdict of nearly \$8 billion to a single plaintiff who alleged that the manufacturer of the prescription drug Risperdal failed to warn users that the medication could cause side-effects such as the growth of breasts in genetically male users.

Additionally, not only are these verdicts becoming larger and more common, but courts and legislatures are creating more avenues for plaintiff's to bring civil liability claims against various corporate defendants. For example, in 2017, four women from Maryland brought suit against a hotel, alleging that the staff knew or should have known that the hotel was being used as a premises to traffic the women. The Maryland court ultimately concluded that the women had raised viable liability claims against the hotel, and would be permitted to proceed with their suits. This is one of the first suits of its kind, and establishes a precedent for third-party liability claims that could be assessed under a multitude of factual scenarios. Certainly, social trends such as the #MeToo movement play a significant role in shaping the opinions of judges and potential jurors and cases such as this.

III. Factors Affecting Social Inflation

Social Media and News Publications

Social media and news reporting agencies contribute to the unfiltered publication and comments about "newsworthy" and hot-button topics, such as medical malpractice claims, civil suits against pharmaceutical companies, and the involvement of large corporations in suits brought by individuals and classes alleging some sort of harm or injury. The prolific publication of these events and cases in the media all but guarantee the influence and manipulation of the general public, and potential jurors and judges, to become predisposed to certain opinions and positions.

The news and media sources becoming inundated by stories of alleged wrongdoing by corporations and businesses results in a cumulative effect of creating bias in judges and jurors against these corporate defendants. Because media and news sites have a priority to sell stories rather than portray accuracy and truth, news sites are all but incentivized to paint an extreme and exaggerated picture of the parties, facts, and allegations. Importantly, public inundation of these stories results in what is referred to as the availability heuristic, a mental shortcut in which a person will rely on recently learned examples when presented with a similar and specific topic or decision. When news sites flood the media with biased and one-sided stories, those exposed to these stories will, subconsciously or otherwise, rely on them when evaluating the same or similar situations. For example, if a judge must decide whether a significant and determinative piece of evidence should be admitted in a trial, they may consider a recent article they read about why that piece of evidence is so vital to the case, when making their determination. Over recent years, the news has been laden with stories of police brutality and violence against people of color. The Black Lives Matter movement has significantly increased the publicity and value of the lives' of people of color. Where a claim involves a person of color who has been allegedly injured by someone who is white, particularly if this occurred in an urban and diverse community, the risk of loss could be quite significant. In situations such as this, the higher the consequences of a case, the more likely a judge or reader is to rely on what they have previously been exposed to.

This tactic results in cases not being litigated in the courtroom, with a plethora of due process and judicial protections, but in the public eye, where news sites are able to paint the parties on whatever light results in the most readership. When subsequently large verdicts are then publicized, the public and prospective jurors and judges come to consider these large amounts and windfall verdicts to be the norm, rather than the outliers.

Third Party Litigation Funding

Significant civil lawsuits are not only time-intensive, but also relatively expensive bring, often costing millions of dollars for each party to allege and defend the various claims being asserted. Naturally, such a substantial investment comes with it a significant risk of loss. In order to minimize these potential personal losses, plaintiffs and plaintiff lawyers will often employ the resources of third party funders. These are individuals and entities that will extend loans to plaintiffs and plaintiff firms to pursue litigation, and in return receive a percentage of the overall award if the case results in settlement of a favorable award at trial. This relationship varies from contingent fees that are frequently charged by plaintiff firms, in one significant way. Third party funding is not subject to usury regulations, which limits the percentage a party can charge or receive if a favorable award is obtained. This results in third party lenders charging and receiving a significant percentage payout, often 40% or higher.

For example, a third party lender may lend a plaintiff \$5 million to aid in their suit, in exchange for 40% of any award that may be obtained. If a plaintiff then obtains an award of \$50 million, the lender will receive \$20,000,000 of that award, a 400% return on investment. With this guarantee of funding, plaintiff lawyers are able to utilize highly skilled and convincing plaintiff experts, investigators, and witness to develop a convincing

and effective litigation strategy. Naturally, third party lending becomes a promising and lucrative business which further favors plaintiffs' claims.

Erosion of Tort Reform Laws

Tort reform laws have been enacted in a number of states in an effort to curb the frequency and severity of runaway juries and windfall jury awards. The majority of these laws came in the form of damage caps, which limit the amount of punitive damages (damages aimed at punishing the defendant rather than compensating the plaintiff) that a jury may award, and providing a mechanism for altering a punitive award that exceeds the statutory cap. Other forms of tort reform statutes include modifications to joint and several liability laws and evidentiary rules on experts and the quantification of non-economic damages such as pain and suffering.

The original tort law trend, however, has veered back towards pre-reform laws, and statutory damage caps are being challenged on constitutional grounds, and plaintiff lawyers are utilizing new and unique strategies for introducing admissible evidence in front of a jury. For example, plaintiffs who have not incurred significant amounts of medical expenses as a result of their treatment (either due to the limited nature of the injuries or some other reason) have been able to exclude the admission of the medical expenses so as to hide how little their medical costs were compared to significantly higher requests for pain and suffering damages. Accordingly, a plaintiff who only incurred a few thousand dollars of medical bills can pain a story of extreme loss and pain, and not have to reconcile the discrepancies between their medical bills and claimed losses.

Additionally, "experts" are being permitted to quantify, in economic terms, the value of a plaintiff's pain and suffering. These witnesses are often not experts or doctors, and have no real or significant qualifications to be asserting such claims. Juries are now being told the monetary value of the pain that comes from a broken bone, a bad reaction to a medication, or recovery from a medical surgery. The uncertainty and guesswork of quantifying pain and suffering is now being portrayed as an area of expertise that can be estimated with accuracy, leaving jurors with the inaccurate belief that they must award a certain amount of damages to fully "compensate" a plaintiff for their pain.

Reptile Theory and Anti-Capitalist Rhetoric

At the heart of social inflation is the impact that bias created by social media and various news agencies can have against corporations and businesses. The idea that corporations are always the bad actors, and the appeal that this depiction has on jurors is commonly referred to as the "reptile theory." This theory asserts that a party can prevail at trial, either in the courtroom or in the public eye, by speaking to and scaring the primitive part of jurors' and the public's brains (the part of the brain that humans share with reptiles). This part of the brain is conditioned to respond to fear in a protective manner. Accordingly, if this instinct is triggered by plaintiffs' attorneys and the media attempting to vilify corporations, jurors and members of the public will react in a negative way towards otherwise innocent corporate defendants. Plaintiffs' attorneys capitalize on stories published by news organizations and social media as a way to sway public opinion, and potential jurors, against their corporate opposing parties. In general, this is done by

representing and reinforcing the idea that what corporations value is profit over people. Inherently, this accompanies with it the idea that, if presumed true, the party (read: corporation) with the deepest pockets and least amount of remorse for the situation.

Medical Costs

Medical costs have been steadily increasing throughout the years, increasing approximately 85.5% between 2000 and 2018 according to the U.S. Bureau of Labor Statistics. Medical costs are an integral component of any civil liability suit and accompanying claims for damages. The amount of medical treatment and medical bills incurred will often play a significant role in determining the amount a judge or jury may award any one party in litigation.

Advancing medical science and ongoing medical inflation add fuel to the tort cost fire. With individuals living longer even in extremely critical conditions, damages more frequently contemplate the catastrophic costs of long-term critical care for an injured plaintiff. Moreover, because non-economic awards are often assessed as a multiple of economic damages, the higher costs associated with rising medical expenses result in non-economic awards that are higher still.

IV. The Importance of Understanding Social Inflation

The phenomenon of social inflation is particularly difficult to predict, because it is primarily controlled by social and political beliefs and trends. In order to accurately predict how social inflation will impact insurance risks and losses, an individual or entity will have to be able to accurately predict the social and political climate, and how the climate at any given time will effect a case. That being said, the first step towards addressing the consequences of social inflation is understanding what it is and what factors cause it. Understanding what factors drive social inflation will give individuals and entities a base level for better predicting potential risks and losses that could come from certain claims and suits.

There are also several independent efforts that can aid in combating social inflation. First, specialty underwriters are uniquely trained to identify changing social and political trends, and interpreting how those trends could impact losses. The development of technology and synthesis of data has given underwriters an additional level of accuracy in their predictions. Second, state have begun to pass various laws aimed at restricting and regulating windfall awards, including implementing damage caps and requiring procedures aimed at encouraging pre-suit communications and negotiations.

The primary take-away, however, is that while there are mechanisms that may be utilized to minimize the impact of social inflation, the first and best step is to become educated on what social inflation is and how it manifests. This will give corporations, insurers, and their employees, the base skills to identify when a claim has the potential to result in extreme losses, and how to proceed in their litigation strategy from there.

