



Liability, litigation
trends, drivers
and strategies

Overview

In May 2020, Sedgwick [published an analysis](#) of liability claims litigation trends and practices. When that analysis was being published, the world became entrenched in the COVID pandemic that over the course of the last two years has had a tremendous impact on practically all aspects of our lives; it has been described as an emotional roller coaster creating skepticism in many things, institutions and even people that prior to the pandemic seemed irrefutable. How this translates into the future of liability litigation, social inflation and jury deliberations remains to be seen.

In *this* paper, we re-visit the subject of liability litigation trends, discuss recent developments, evaluate the impact of the pandemic and other factors influencing these trends, and share observations on litigation avoidance and mitigation strategies.

Key findings:

Trends indicate very little if any change in the key findings noted in our May 2020 publication:

- There continues to be an increase in the number of claims that have attorney involvement at first notice of loss.
- Litigation rates and costs continue to rise.
- “Social inflation,” among other factors, continues to be impactful, increasing the severity and frequency of litigation.
- Nuclear verdicts (those in excess of \$10 million) remain a serious concern and are becoming both larger and more frequent.
- Class-action lawsuit filings and settlements are growing in the number and size of the awards.
- The COVID-19 pandemic temporarily muted the effects of social inflation.

Attorney representation and its costs

There is no question that a primary precursor to litigation in the general liability (GL) and auto (AU) arena is attorney representation at the claim level. Over the course of the last five years, we have continued to see an increasing number of claims that are being filed with an attorney representing the claimant or notice of representation occurring within a short period of time after the initial filing.¹

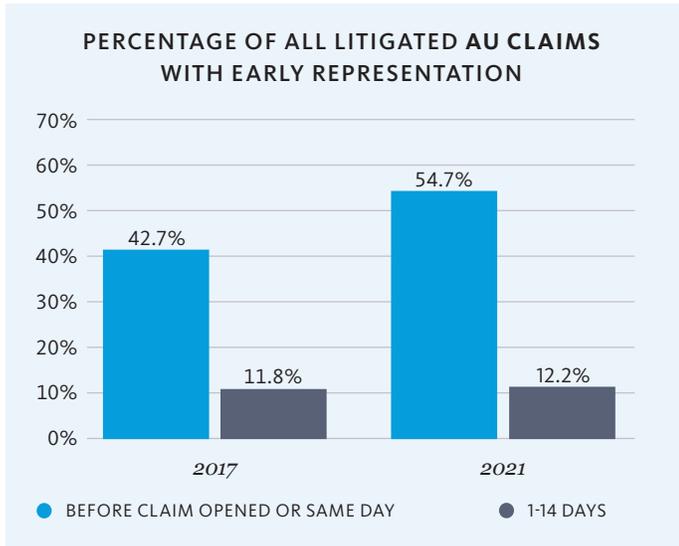


Figure 1

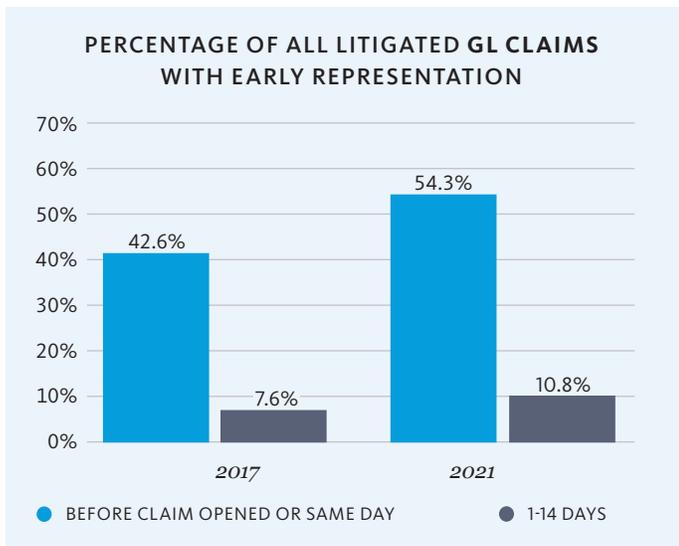


Figure 2

The percentage of all auto liability claims, and general liability claims that ultimately became litigated and had representation in place within 24 hours of reporting the incident were both just under 43% in 2017. By the end of 2021, the percentage for both had risen to over 54%, an increase of 25.5% over the five-year span.

As noted by Milliman in its report, Trends in Attorney Representation: US Commercial Automobile Insurance, claims with representation come with a cost. For claims closed in 2019:

- The average cost of claims with attorney representation was 14.3 times higher than the average cost of those without an attorney.
- The average cost to resolve a claim with an attorney was 34.0 times higher than the cost to resolve a claim without an attorney; and
- The average total loss and allocated loss adjustment expenses (ALAE) for claims with an attorney was 15.3 times higher than claims without an attorney.²

Rising rates and expenses

Although litigation in GL and AU represents a very small percentage of claim activity (less than 1%), the overall rate continues to increase incrementally with each passing year. Yet, when evaluating the disproportionate cost associated with litigated claims versus non-litigated claims, any increase adds significantly to claim costs.

Additionally, litigated claim expenses, such as legal defense, surveillance, appraisals, and special investigations, continue to rise. According to National Association of Insurance Commissioners (NAIC) data, these costs as a percentage of the total incurred losses increased by 4% from 2017 to 2019 and, depending on the specific line of liability business, can account for as much as one-third, or even one-half, of total incurred losses.³

The impact of the growing costs of litigated cases is a significant driver of total claims costs, and the growth is significantly outpacing normal inflationary factors. Between 2014 and 2019, the average bodily injury claim cost nationwide grew by an average of 5.5% each year - which equated to three times the inflation rate.⁴ The commercial auto sector in particular has been affected to a greater extent than many other lines with awards surpassing \$10 million increasing in frequency. A 2020 study found that between 2010 and 2018, the size of jury awards grew by 33%, while inflation grew 1.7% and healthcare costs grew 2.9%.⁵

DEFENSE COSTS AND COST CONTAINMENT EXPENSES AS A PERCENT OF INCURRED LOSSES, 2017 - 2019¹ (\$'000)

Liability	2017		2018		2019	
	Amount	As a percent of incurred losses	Amount	As a percent of incurred losses	Amount	As a percent of incurred losses
Product liability	\$645,190	66.4%	\$861,155	66.4%	\$668,304	50.4%
Medical professional liability	1,660,939	43.7	1,690,271	41.8	1,891,994	40.5
Other liability	3,778,162	38.2	3,966,294	35.0	4,421,983	35.7
Commercial multiple peril ²	2,117,223	34.8	2,276,023	31.2	2,529,989	32.8
Workers' compensation	2,956,635	13.6	3,065,540	14.3	2,783,923	13.2
Commercial auto liability	1,746,182	11.2	1,823,716	10.2	2,123,461	10.4
Private passenger auto liability	5,380,006	5.9	6,007,796	6.5	6,573,122	6.8
All liability lines	\$18,284,337	12.3%	\$19,690,776	12.7%	\$20,992,776	12.8%

¹Net of reinsurance, excluding state funds ²Liability portion only.

Source: NAIC data, sourced from S&P Global Market Intelligence, Insurance Information Institute.

Figure 3

Increasing awards

While most lawsuits are still resolved prior to trial, awards in cases litigated to a decision continue to rise. According to Thomson Reuters data, the personal injury suit award median (half of all awards are below this amount and half are above) rose by 33% to \$100,000 between 2012 and 2018. The mean (the average of all personal injury suit awards) rose by more than 50% over the same period to \$1,669,340.⁶ Thomson Reuters notes that mean average awards are skewed by high awards. The median size of large awards in general liability suits increased by 26% between 2010 and 2019.

Accompanying the advancing size of jury verdicts in general, “nuclear” verdicts, defined as cases with awards greater than \$10 million, are on the rise as well. A study by Verdict Search found that between 2019 and 2020, there was more than a 300% increase in awards of \$20 million or more compared to a previous study on verdicts between 2001 and 2010.⁷ Between 2010 and 2018, the average size of transportation verdicts over \$1 million increased by 1,000% and the number of cases with verdicts over \$1 million grew by over 200% according to the American Transportation Research Institute.⁸

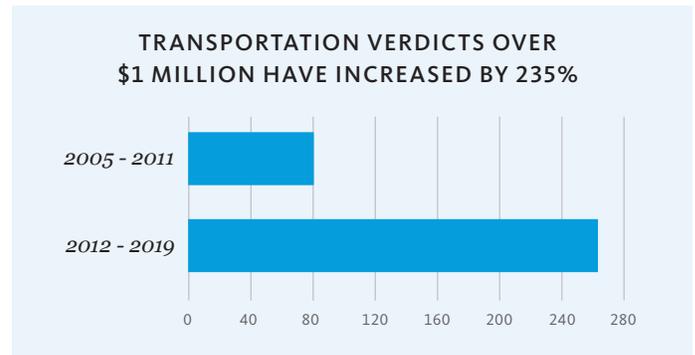
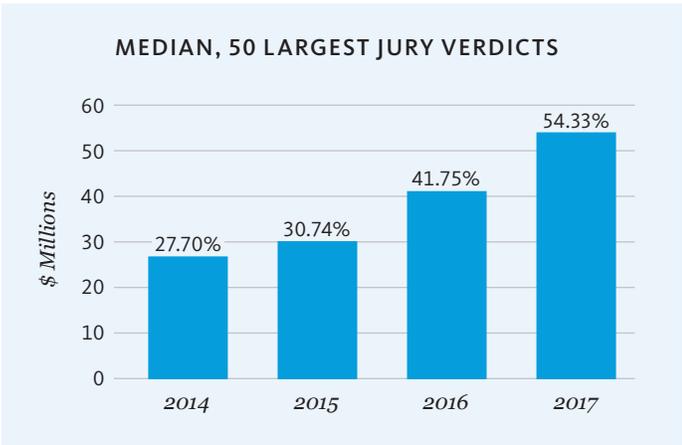


Figure 4

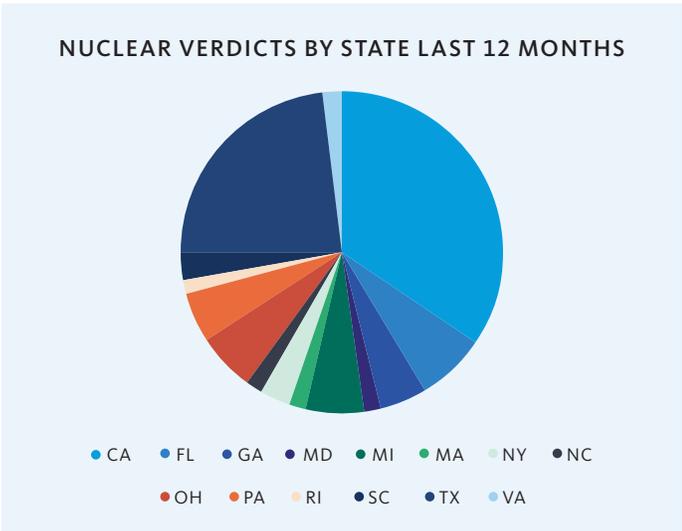
Nuclear verdicts

In a May 2021 article, author Kiara Taylor observed: “Although the generally accepted definition of a nuclear verdict is one that exceeds \$10 million, this arbitrary damages threshold fails to capture the problem adequately. A nuclear verdict is the classic disproportionate response: it so far exceeds a reasonable damages amount that only emotional or punitive juror motives can explain it.”⁹ Taylor goes on to note that social inflation and nuclear verdicts play off of each other in a vicious cycle. Leading into Sedgwick’s 2020 analysis of litigation trends, the nation’s largest verdicts were already on the rise.



Sources: Swiss re Economic Insights, Burford Capital.

Figure 5



Source: Trellis Research, Inc.

Figure 6

In the two years since, amid a slowdown in court activity caused by the pandemic and a brief lull in “blockbuster” verdicts in 2020, nuclear verdicts overall continued to increase in both frequency and size. They manifested the first \$1 billion award in 2021, a record that lasted only months before a \$301 billion award followed it.

- Dudek, et al. v. IKEA et. al., Jan. 6, 2020: Rather than a risk a jury decision, IKEA agreed after mediation to a \$46 million settlement in a case involving the death of a child due to a dresser falling.¹⁰
- Ramsey, et al. v. Landstar Ranger, Inc., et al., Nov. 21, 2021: A Texas jury awarded \$730 million to the family of a 73-year-old woman killed in a truck collision.
- Dzion et al. v. Kakhkashan Carrier, Aug. 20, 2021. A Florida jury awarded \$1 billion in a trucking case.
- Kindred et al. v. Beer Belly Sports Bar Dec. 7, 2021: A Texas jury awarded more than \$301 billion in a dram shop case involving a Corpus Christi bar. The suit was brought by the family of a woman and her granddaughter killed in a collision with a drunken driver.

A change in the progressing trend of increasing awards, including nuclear verdicts, does not appear to be indicated presently.

Social inflation

Social inflation is a general term that has been used to describe the phenomena driving the increasing frequency and severity of litigated claims. It is one of the chief emerging risks facing insurers and their policy holders.

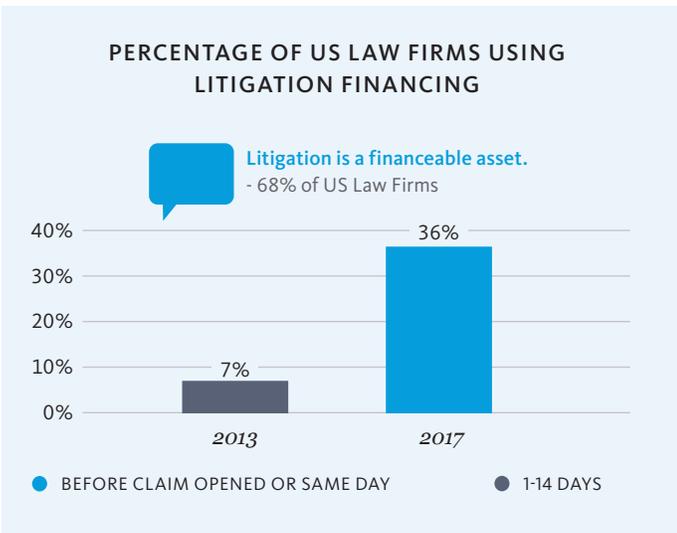
The Insurance Research Council¹¹ attributes several trends and developments to the advancement of social inflation, including:

- Changes in underlying beliefs about the appropriateness of filing lawsuits and expectations of higher compensation.
- Rollbacks of previously enacted tort reforms intended to control costs.
- Legislative actions to retroactively extend or repeal statutes of limitations.
- Increased attorney advertising and attorney involvement in liability claims.
- Increasing numbers of very large jury verdicts, reflecting an increase in juries’ sympathy toward plaintiffs and in their willingness to punish those who cause harm to others.
- Reporting via both traditional news outlets and social media that normalizes extreme verdicts can shape public opinion and foster beliefs that corporations can and should pay increasingly larger sums.
- Proliferation of class-action lawsuits.
 - The rate at which class action litigation is rising, is double that of other litigation spending and reached an all-time high in 2020. Also, of note, workplace class actions grew by 230%, from \$1.58 billion in 2020 to \$3.62 billion in 2021.¹²



Figure 7

- The emergence and growth of third-party litigation financing.
 - Third-party litigation funding (TPLF) is the financing of the costs of litigation in exchange for a portion of the award. According to a study by Swiss Re, litigation funding reached an estimated \$17 billion world-wide in 2020 and is contributing to social inflation. Notably, 52% of the funding occurred in the U.S. TPLF is currently unregulated and there have been reports of predatory lending practices and allegations of conflicts of interest in cases involving TPLF. In March 2021, Congress reintroduced the Litigation Funding Transparency Act, which, if enacted, would force plaintiffs' counsel to disclose third-party funding.¹³



Sources: Swiss Re Economic Insights, Burford Capital.

Figure 8

According to a 2021 Milliman study, losses are growing at a faster pace than insurance premium rate increases, possibly as an additional consequence of social inflation. The study asserts that because actuarial estimates and loss projections rely on a theory reliant on consistencies, social inflation presents a challenge to the common theory by generating data inconsistent with past patterns.¹⁴ By examining claim development over time intervals, shorter-term anomalies of frequency and severity are smoothed, and a relative variance can be measured. The Milliman study examined loss triangles for commercial auto liability and medical professional liability losses and concluded that losses are continuing to grow more rapidly than is being forecasted.

James Lynch, chief actuary of the Insurance Information Institute, has studied the correlation between social inflation and rising loss development factors (LDFs) in actuarial projections. He confirms the same findings across commercial auto, medical malpractice, and other liability lines. In a recent presentation, Lynch referenced the steep ascent in commercial auto losses since 2010 and the delta between expected and actual losses attributable to social inflation.



Sources: NAIC data, sourced from S&P Global Intelligence; Insurance Information Institute.

Figure 9



Sources: NAIC data, sourced from S&P Global Intelligence; Insurance Information Institute.

Figure 10

Affects of the COVID-19 pandemic

Litigation trends were somewhat subdued by the COVID-19 pandemic, but the extent appears to have been brief. The closures of many types of business and mandated lockdowns reduced the frequency of many exposures as a result of diminished activity. But other effects might not be fully intuitive. For example, while less road traffic resulted in a lower frequency of auto claims, the less congested roads also influenced severity levels; average driving speeds increased, resulting in fewer low speed crashes, and more high speed crashes generating higher impact forces and increasing the risk of injuries (and severity of injuries) to vehicle occupants.¹⁵ While driving patterns are beginning to return to pre-pandemic levels, driving behaviors have not yet followed. The U.S. Department of Transportation's National Highway Traffic Safety Administration estimates a 12% increase in traffic crash fatalities in the first three quarters of 2021, the highest number since 2006 and the highest increase in their reporting history.¹⁶

During the pandemic, we also saw court cases delayed. In 2020, bench trials dropped by 39% and jury trials dropped by 64%.¹⁷ The cases that did manage to conclude were often virtual and/or non-jury trials that tended to result in fewer over-inflated outcomes in 2020. Nonetheless, litigation rates nevertheless increased incrementally in 2020.

Yet, the COVID-19 pandemic itself is projected to generate more litigation than any incident in U.S. history. Over 6,300 pandemic-related cases were filed prior to December 2020 (The Deepwater Horizon oil spill resulted in less than 1,000).¹⁸

Litigation involving vaccine mandates and workplace issues relating to the pandemic accounts for a significant portion of the near-doubling of workplace-related class actions between 2020 and 2021. Business interruption and related coverage issues, interrupted contract performance, event refunds, tuition refunds, civil rights (closure mandates, stay-at-home orders group gathering bans, etc.), product claims (including alleged insufficiencies of personal protective products, cleaning supplies, etc.), price-gouging claims, and securities stock value loss claims are among the evolving and growing assortment of lawsuits associated with the pandemic that we're seeing in unprecedented numbers. An additional concern is that the pandemic may influence the evolution of social inflation by causing liability standards to be broadened, adding to a growing anti-corporate sentiment. In addition to commercial auto, social inflation trends are having noteworthy adverse impacts on lines including medical malpractice, directors and officers, excess and umbrella.

Avoidance and mitigation strategies

Promoting litigation avoidance at the claim stage must be a focus. Tactics such as advocacy, timely communication and a resolution focus will help ensure that claims do not become litigated. Further, utilization of predictive modeling to identify claims likely to become litigated can prompt an aggressive workflow to push appropriate and timely resolution. Resolution prior to a claim becoming litigated remains a primary avoidance strategy.

Companies should likewise cultivate an enterprise risk management culture that sets the highest expectations for safe and responsible practices and processes throughout the organization. Loss control consultation and assessments, using data and predictive analytics, and leveraging emerging technologies like telematics can all be useful in developing overall avoidance and mitigation plans. Adopting a cadence of regular re-assessment of risks, adequacy of limits, and retentions is crucial to understanding exposures and being prepared. Corporate environmental, social and governance (ESG) programs that establish an organization's documentable commitment to safe and responsible conduct of its operations bolster sustainability and make it more difficult to depict companies as indifferent, institutions focused only on profits.

Once a suit is at hand, seek to reach an amicable pre-trial settlement. Identifying counsel with the specific knowledge and expertise of the relevant area of law, the jurisdiction and of current plaintiff strategies is foundational to favorable outcomes. Companies and their counsel should attempt to settle all appropriate cases expediently. Alternative dispute resolution mechanisms generally present less volatile forums to reach settlements, and bench trials are often preferable to jury trials. Mandatory arbitration clauses in contracts can also be an effective step in creating an alternative to a default remedy through litigation.

In some cases, plaintiffs and their counsel will not be dissuaded from a trial, and specific trial tactics must be undertaken. In those instances, it is beneficial to identify an empathetic physical presence to represent the organization; make sure they are present and attentive throughout the trial. Defendant witnesses should be well prepared by counsel to provide unfettered positive testimony and not fall victim to opposing counsel tactics. A trial theme should be developed that seeks to "humanize" the company and demonstrates the competence and relatability of individuals as well as the commitment of the organization to responsible conduct and moral citizenship.

Since the publication of Don Keenan and David Ball's, "Reptile: The 2009 Manual of the Plaintiff's Revolution," plaintiffs' attorneys have successfully adapted the tactics described therein and others that similarly appeal to fears and psychologically create equivalence between punishment and protection by appealing to instincts for survival and protection. Defense counsel must adopt strategies to

counter these tactics through an understanding of the psychology behind them in the context of today's social climate. Astute defense counsel are referencing the devices of "reptile theory" and reverse engineering defenses in preparing opening arguments, closing arguments, and witness testimony.

As early as 2010, the book was quoted in a closing argument; against Keenan himself (an Atlanta attorney) that resulted in a defense verdict in a wrongful death case, although Keenan disputes that the trial strategies used in the case were "reptilian."¹⁹

Anchoring is another mechanism that has been used successfully by plaintiffs' counsel and can be countered by defense counsel. Anchoring is a cognitive bias to rely on a reference point for making later decisions or evaluations. Unfortunately, the "anchor" does not have to be predicated on a supported value, as proven in an MIT study. In the study, students were asked to bid on the same auction items after first writing down the last two digits of their social security numbers. The study found that the students who had written down higher digits were willing to spend 300% more than those who had written down lower digits.²⁰ While the two digits should have had no bearing on the value of the items to be bid on, the influence was apparent. Fortunately, anchors can be overcome. Defense counsel can and should begin shaping the narrative and setting anchored expectations early in interactions. But it is more than just a matter of being first, most repeated, or loudest. Further studies have shown that anchors that tie to understandable and believable derivations are more persuasive. Competent, affable experts, and explanations that are easily understood and resonate with jurors are imperative.

Emerging analytics can provide unprecedented insights into litigated matters. Millions of court documents are part of the public record. Leveraging machine learning, the data is being aggregated and processed to gain insights and predictive advantages to assist in defending cases. In a recent article, legal data expert, Ron Porter observed, "By utilizing this information, both in-house counsel and their law firms will be much better equipped to predict how long a case may take, how much it will cost, what damages might be expected, what strategy their opponent might employ, what strategy is likely to be successful, and many other important considerations."²¹

Conclusion

Given the substantial impact that the growing subset of claims that are litigated equates to and the indications that litigated claims are becoming more frequent, companies and their insurers are well served to allocate additional attention and resources to these claims and to identifying means and methods to avoid or mitigate them. In 2019 only 1.5% of all claims resulted in losses exceeding \$500,000; however, they represented almost half (45.4%) of all losses and ALAE.²²

It is now broadly accepted that social inflation (factors influencing rising court awards unrelated to general inflation) and its effects are real and driving increasing awards, and even nuclear verdicts.²³ Actuarial studies suggest that recent loss projections may be understated due to the phenomenon of social inflation being inconsistent with historical patterns that traditional reserving methodologies rely upon.

The COVID-19 pandemic is generating litigation on a scale exceeding any previous single event contributing even further volume and complexity into the present legal environment. Some of the social issues surrounding COVID-19 appear to be further deteriorating corporate sentiments and fueling additional social inflation.

The frequency and size of nuclear verdicts continues to increase, with some of the largest verdicts ever seen being handed down in the past 12 months.

In cases where actions (or lack thereof) are egregious and severe injury or loss of life results, defendants must recognize that the potential exposure to a punitive award far exceeding a reasonable damages amount is elevated.

The pandemic and other world events have created unrest and uncertainty, and change continues in 2022. Uncertainty and unrest are a recipe for dispute in an already increasingly litigious environment. However, change also brings opportunity. While indicators continue to suggest that the size of verdicts and even nuclear verdicts may continue to increase for the foreseeable future, insurers and their customers can collaboratively develop effective strategies to avoid and mitigate litigation and its costs. A better understanding of the challenges and deliberate planning chart the path to more predictable outcomes.

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