



Property & Casualty Trend Spotlight

Social inflation: The new defense playbook

We've been bombarded with news stories and alarming anecdotes about the exponential rise in settlement and verdict values. It would be easy to get lost in a sea of statistical evidence or analysis of the drivers of social inflation. Another approach, which is more effective, is to methodically attack the problem by studying the strategies of the plaintiffs' bar and to implement concrete measures to counter (and copy) the tactics of the plaintiffs' bar.

See the plaintiffs' bar for what it is

We need to address how the plaintiffs' bar has created a well-oiled mechanism with respect to case approach and psychology. We also need to pay attention to the techniques that the plaintiffs' bar employs and why it has been effective in producing nuclear verdicts.

Some of the strategies include:

- Employing extensive tactical and information sharing across the entire plaintiffs' bar
- Using expert psychological techniques to persuade mediators, jurors or even claims handlers that a case could bring, or deserves, an enormous value
- Playing on the insight that jurors respond to archetypes and that jurors will identify victims and villains in a case
- Compartmentalizing non-economic damage components and making them seem reasonable and warranted
- Conducting extensive letter or e-mail campaigns designed to stoke anxiety and concern among insureds, claims handlers or defense counsel
- Using specific strategies to create a wedge between an insured and their insurer
- Associating big name counsel to add weight to a case
- Making increasing settlement demands that come with short time limits in which to respond
- Asking clients to sign rejection documents in advance of mediation, to be used at mediation

Objectively analyze and adjust defense management

We must address how to re-engineer defense and defense management. Traditional defense approaches are outdated or simply aren't effective. How do we take up this challenge with a defense bar that hasn't led the charge? It will start with a complete overhaul of defense relationships and expectations. Carriers must insist on hiring counsel with a thorough understanding of social inflation drivers and the expertise to address these issues in all aspects of case defense.

Litigation planning has changed very little in the last quarter of a century. Relationships between insurers and their defense counsel haven't changed either. In addition, jury experts have warned that the defense bar has focused too much on logic and not enough on the psychology of case presentation. By studying the tactics of the plaintiffs' bar and reviewing defense results, we are learning:

- Refuting the plaintiffs' case is not effective. Jurors do not understand and cannot follow a piecemeal refutation. They get lost in the points that the defense is trying to make and fall back on the plaintiffs' narrative. Even if the defense does not have a burden of proof, it is a mistake not to present a defense with a full thematic story.
- Humans are deeply invested in their existing beliefs. If the defense story does not fit the jury's existing beliefs, they will likely tune out the defense. Defense counsel must consider how a defense story will align with a juror's existing beliefs.
- The plaintiffs' bar is not afraid to ask for astronomical damages, yet the defense bar has routinely avoided offering an anchoring figure. This reluctance stems from a fear that the number will appear inconsistent with a "no liability" position.
- Studies show that offering an anchoring number more often than not

produces a lower verdict or a no-liability verdict than if the jury only hears the plaintiffs' number. Anchoring works effectively in a variety of dispute resolution forums including mediation, trial and arbitration.

- Jurors have become desensitized to the value of money based on lifestyles they see on television and social media. They also see nuclear verdicts and settlements reported in the news. The defense has to ground jurors in the real value of money and what it would take to make a plaintiff whole – not what it would take to make a plaintiff rich.
- Corporate defendants are commonly portrayed as villains. The defense must expertly prepare, position and humanize corporate defendants in the media and in dispute resolution forums.

Respect media's influence and tell our story

Perception is reality. The public continually sees examples of affluent lifestyles, massive verdicts and a distrust of big corporations. These so-called "reference points," like anchoring, produce a sense of what is considered normal. When it comes to nuclear verdicts and settlements, these reference points greatly influence what people consider normal or reasonable. Unfortunately, there are other important reference points that have not been a part of the current cultural dialogue, including whether such verdicts and settlements truly alter behavior, who ultimately pays for such verdicts and who benefits from such verdicts and settlements. Plaintiffs' messaging has permeated media offerings.

We must respond by employing alternative messaging that questions the value of such verdicts. The New York Law Journal recently queried: "Why shouldn't nuclear verdicts be portrayed as a failure of the system, an overstepping by counsel, or a jury mistake?"¹

Address social inflation in a post-Covid world

Just as the topic of social inflation was capturing the attention of the insurance industry, COVID-19 arrived, and research suggests that the pandemic will likely exacerbate social inflation. Anxiety, frustration and fear tend to trigger sentiments that cause jurors to want to punish defendants. Other indicators that point to an exacerbation of social inflation include a surge in mass tort advertising, an uptick in applications for litigation funding and heightened profit expectations of litigation funding firms. These developments are materializing in the midst of the hundreds of COVID-19 class action filings. Apprehension about social unrest and an impending economic recession or depression may also intensify social inflation.

Failure to change traditional ways of managing cases and relationships with defense counsel will produce the same results. Change starts with making new demands of defense counsel, including an analysis of the competencies and capabilities required to respond to the factors driving social inflation and a willingness to adopt a new playbook.

¹ <https://www.law.com/newyorklawjournal/2020/07/13/ahead-to-the-past-the-evolution-of-new-rules-of-engagement-in-the-age-of-social-inflation-and-nuclear-verdicts/>

10 plays from the new defense playbook

Here are 10 concrete and proven measures that insurers and their counsel must take to stem the tide of social inflation and reestablish a defense advantage.

1. Interview your panel counsel as though you haven't previously hired them. Determine if they are experts in the drivers and strategies that produce nuclear settlements and verdicts.
2. If mock trials are too expensive, conduct in-house mock issues and panels. Tap people within your organization and outside of your claims department to participate in roundtable discussions with your counsel.
3. Require counsel to present an opening mediation statement to your group. Many lawyers never practice a live feedback session before the day of presentation; allow anonymous and candid feedback to encourage improvement.
4. Hold mandatory quarterly meetings of all panel counsel to collectively share best practices for addressing social inflation issues.
5. Offer advice and training to insureds on how to change the public narrative about their company and effectively reshape their corporate image in the media.
6. Update case analysis/litigation plan requirements. Require counsel to identify strategies, themes, stories and potential anger triggers, in addition to the traditional analysis of Duty, Breach, Causation and Damages.
7. Give a number! Consider offering anchoring values at mediation or trial.
8. Understand the technology the plaintiff will use to support its case. How do your defense visualizations or presentations compare? Are they persuasive?
9. Associate a plaintiff's lawyer as a consultant.
10. Train claims staff on detecting and countering the nuanced tactics of the plaintiffs' bar; these tactics will materialize as early as the first letter, e-mail or phone call.

Bonus:

Engage in extensive corporate witness preparation. Deposition performance substantially defines the opposing counsel's assessment of case value and whether the plaintiff will push for a trial.

We're smarter together