

Social Inflation is Alive and Well!

(Although Currently Sheltering in Place)

Casualty Actuaries in Reinsurance

June 1, 2020

ABOUT ASSURED RESEARCH

- ◆ Assured Research is a research firm focused exclusively on the P/C insurance industry. (Re)insurers controlling some \$175 billion in premiums subscribe to the Assured Research Package.
- ◆ We also offer educational presentations to subscribers.
- ◆ We offer investment-oriented research through our affiliation with Gordon Haskett Research Advisors.
- ◆ More information and research at www.assuredresearch.com
- ◆ Follow us on Twitter @AssuredResearch

ABOUT US

◆ William Wilt, President

In Bill's 30-year+ insurance career, he has played many roles: (re)insurance executive, equity and credit analyst, and actuarial consultant. His wide range of experience gives him a unique perspective on the industry.

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◆ Alan Zimmermann, Managing Director

Alan is a long-time insurance industry analyst who while working on Wall Street was for many years named to *Institutional Investor Magazine's* All America Research Team. In addition to being an analyst, Alan was the Head of US Equities and Director of Research at insurance research boutique, Fox-Pitt, Kelton.

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Research and Analysis for Insurance and Investment Professionals

SOCIAL INFLATION IS ALIVE AND WELL!

- ◆ **Introduction**
- ◆ **Definition**
- ◆ **Legal Trends**
- ◆ **Judiciary**
- ◆ **Third Party Litigation Finance**
- ◆ **Inequality: People/Juries are Discontent and Angry!**
- ◆ **Tort reform won't help this time!**
- ◆ **Concluding Remarks**

SOCIAL INFLATION – A TOPIC SINCE EARLY 2017

We began our series entitled *Social Inflation is Back!* in early 2017. Prior to the pandemic it had become our most requested topic as to speaking engagements, forwards to industry contacts, or requests for use in internal presentations.

Our efforts these past few years have been directed toward trying to define and quantify elements of social inflation. But *quantify* is probably the wrong word – trying to find **objective signals of social inflation in the economy** better describes our efforts.

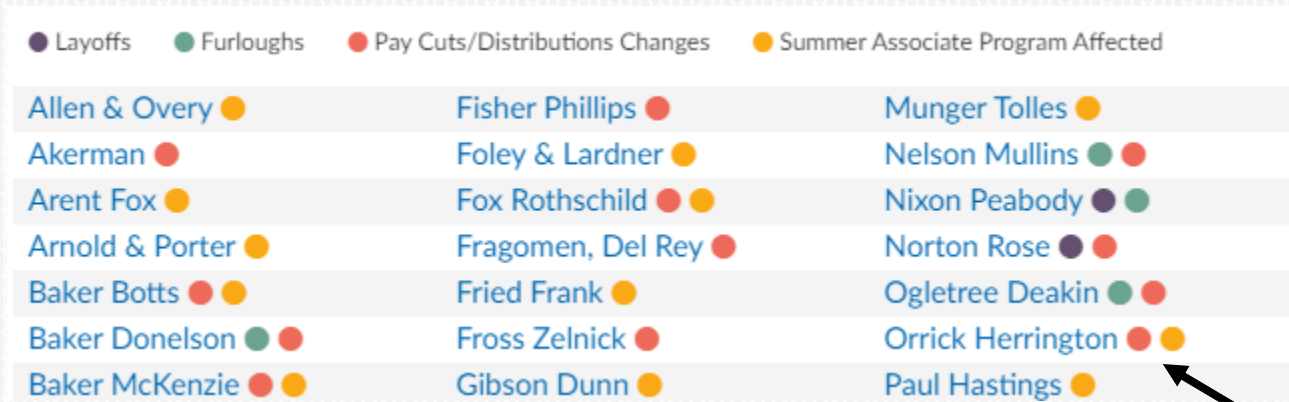


Social inflation is currently in a pause as courts and law firms retrench; we expect it to re-accelerate as pandemic issues subside.

SOCIAL INFLATION IS SHELTERING IN PLACE

Law360 (May 4, 2020, 5:22 PM EDT) – The number of new legal matters has fallen significantly during the first four months of 2020 compared to the previous year as the world reels from the coronavirus pandemic, and many lawyers are now anxious about the success of their practices, research released Monday shows.

The number of new legal matters that have been opened since the beginning of the year is down 30% when compared to the same time period last year, according to the report by practice management software company [Clio](#).



Just a sampling from a long list of firms

Source: Law360, Assured Research

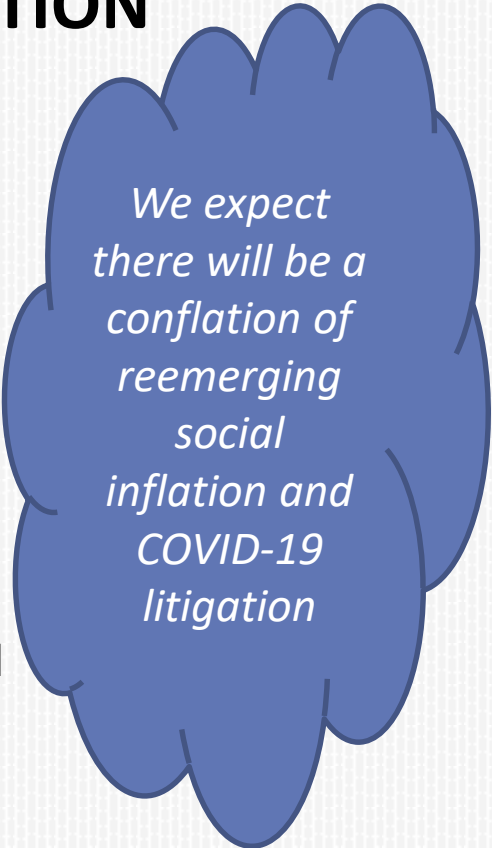
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SOCIAL INFLATION AND COVID-19 LITIGATION

History shows that litigation typically accelerates after a recession and we expect that will be the case as we emerge from this Lockdown Recession.

Litigation specific to COVID-19 could add to (overwhelm?) the litigation already in the legal pipeline. But there are calls for federal grants of immunity (related to COVID-19) and this could spread to the states.

Our focus here is on claims ('social inflation') already in the legal pipeline and emerging socioeconomic conditions that could exacerbate pre-COVID legal trends.



We expect there will be a conflation of reemerging social inflation and COVID-19 litigation

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SOCIAL INFLATION – ON RADAR OF EXECUTIVES (ALTHOUGH NOW TOPIC #2)

Virtually every conference call during the 3Q19 and 4Q19 included extensive discussion of ‘social inflation’ or ‘the worsening tort environment’, etc.

The quote below is from Bill Berkley (WRB); but he is not the only executive asking if people are ‘just angry’

*...we're really seeing a group of people who are fermenting **resentment of those who have**. We're seeing **court decisions** that make **no economic sense** that the court is just trying to **punish people**. The trends are not going to change. We have a while before you are going to see it change, a while meaning you probably have on the **short end**, it would be **18 months; on the longer end, 3 years**. People are unhappy and angry, and that resentment is coming through in court decisions...*

SOCIAL INFLATION – WHAT IS IT?

- It captures an increased propensity to sue; rising jury awards and expanding judicial theories beyond the ‘four corners’ of a contract.
- Our efforts to find signals of social inflation have included examining: 1) court statistics, 2) judicial appointments, 3) legal advertising, 4) third party litigation funding, 5) measures of inequality

We place inflation in 3 buckets. 1st bucket measures ‘stuff’ – CPI; 2nd measures medical inflation; 3rd measures everything else – social inflation

SOCIAL INFLATION IS ALIVE AND WELL!

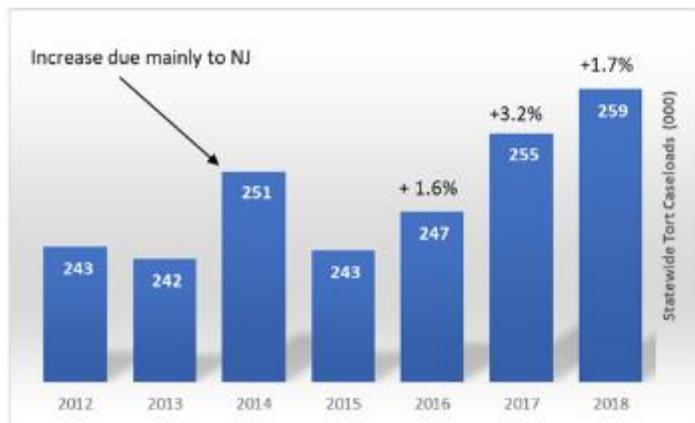
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SOCIAL INFLATION IS ALIVE AND WELL! *LEGAL TRENDS AT STATE COURTS*

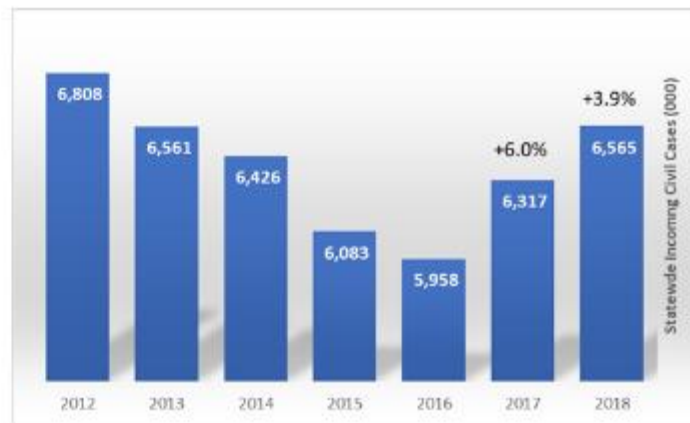
look for 2015/2016 inflection points

Tort Caseloads



Tort cases from 17 states representing about 33% of Liability Premiums.

Civil Caseloads

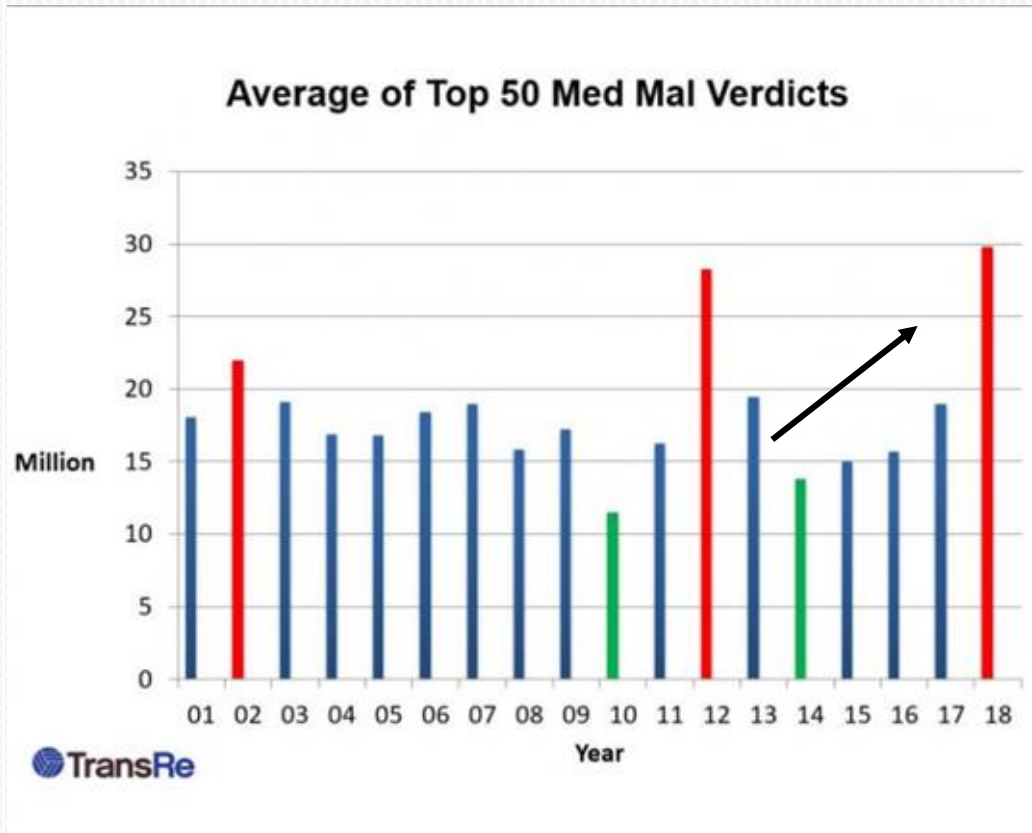


Civil cases from 7 states representing about 50% of Liability Premiums

Source: National Center for State Courts, Assured Research

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MEDICAL PROFESSIONAL - 2015/16 INFLECTION POINT



The largest MPL jury verdicts have been rising (and at all size ranges such as \$10, \$25, and \$50 mil.)

Verdicts are small fraction of total claims but have outsized influence on claim settlements

Source: *Captive International* with data and analysis by TransRe, Assured Research. Arrow added by A/R for emphasis

COST OF A FATALITY – 2015/16 INFLECTION POINT

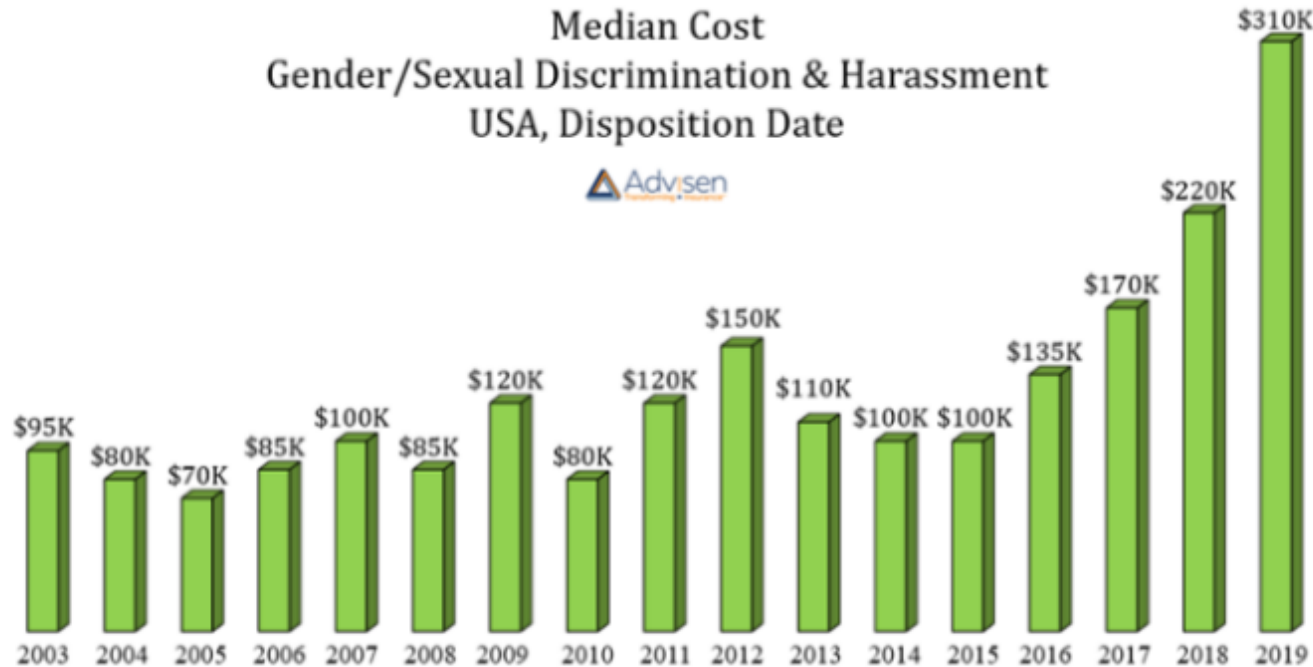
Exhibit 1:



Appears to us that all slides showing data on severity of claims show an inflection point in the 2015/2016 timeframe

Source: Advisen (3/13/2020), Assured Research

COST OF EPLI – 2015/16 INFLECTION POINT

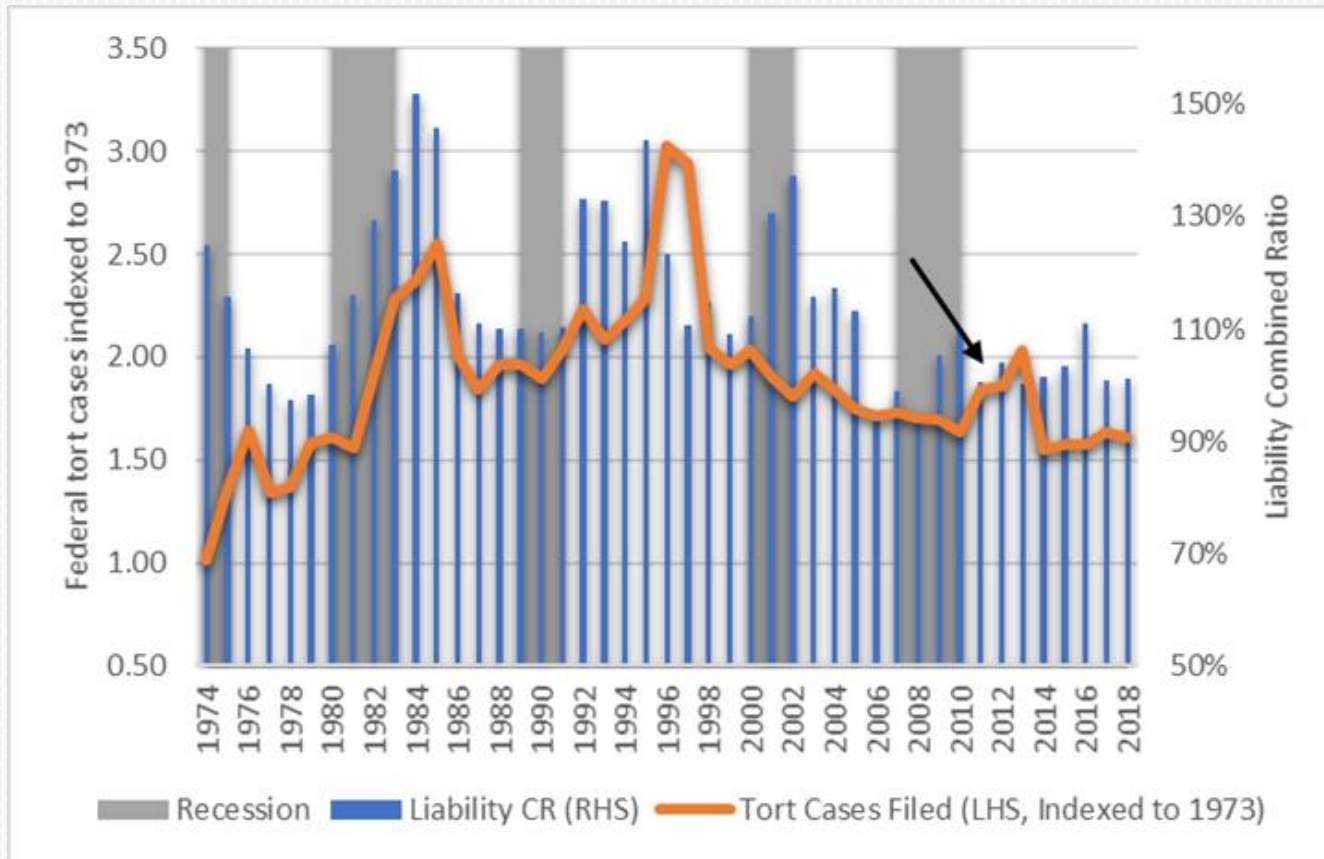


And again...2015 /2016 inflection point. Actuarially, inflection points are hard to capture or anticipate

Source: Advisen (3/13/2020), Assured Research

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SOCIAL INFLATION IS ALIVE AND WELL! *LEGAL TRENDS IN FEDERAL COURTS*



Tort cases have tended to rise/spike in the years after a recession

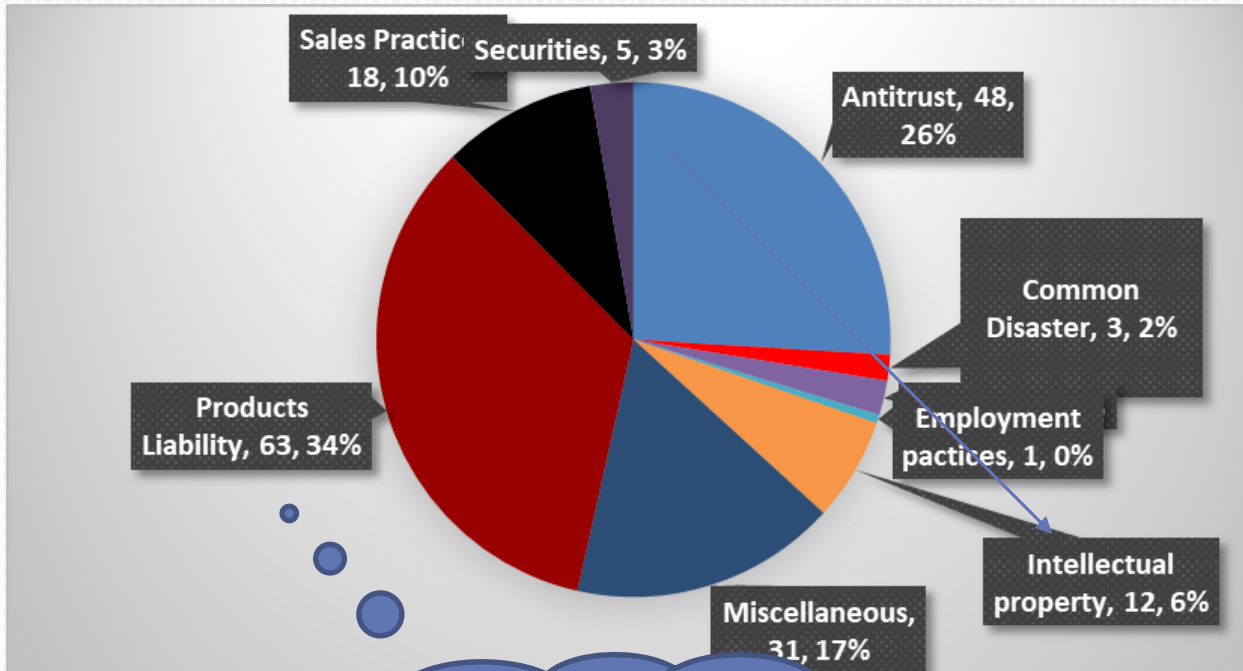
Source: Office of the U.S. Attorney, National Bureau of Economic Research, Assured Research

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MULTIDISTRICT LITIGATION; GOOD NEWS AND BAD NEWS

- ◆ **As part of our continued study of social inflation, we look at trends in multidistrict litigation.**
- ◆ **While overall cases are down 36% since 2012 (good news), products liability cases, the largest classification, are only down 13% (bad news).**
- ◆ **And, the number of large cases is up significantly (more bad news).**

TRENDS IN MULTIDISTRICT LITIGATION



Products liability is the largest category.

Several petitions have been filed to consolidate all COVID-19 business interruption cases. Judicial panel will have to decide.

Sources: Judicial Panel on Multidistrict Litigation, Assured Research

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MULTIDISTRICT LITIGATION –THERE’S GOOD NEWS AND THERE’S BAD NEWS

The good news-MDL cases are down 36%

The bad news – products liability cases only down 13%

	Cases			Percentage	
	Total	Products Liability	All Other	Products Liability	All Other
2012	291	72	219	25%	75%
2013	287	67	220	23%	77%
2014	290	70	220	24%	76%
2015	273	70	203	26%	74%
2016	250	71	179	28%	72%
2017	221	70	151	32%	68%
2018	207	68	139	33%	67%
2019	196	65	131	33%	67%
Current	185	63	122	34%	66%
Change	-36%	-13%	-44%		

The real bad news-the number and size of large cases (over 1,000 claimants) is up big time

	2012	Current
Large cases	14	18
Claimants	47,815	116,755

Source: Joint Panel on Multidistrict Litigation, Assured Research

LARGE CASES AND SETTLEMENTS HAVE PARALLELS TO THE 1980s

<u>Present</u>	<u>1980s</u>	<u>Link</u>
Opioids	Tobacco	Products that cause societal health issues force states and municipalities to sue responsible parties for reimbursement.
Talcum powder Pelvic mesh	Silicone breast implants Intrauterine devices	Personal care products lead to injuries and diseases and eventually class actions.
California wildfires	Bhopal gas disaster	Industrial accidents lead to environmental disasters and numerous claims.
PFAS chemicals	Asbestos	Chemical exposures lead to various types of cancer.
Sex abuse	xxxxx	No parallel

The insurance impact of these cases may not be material, but their influence over jurors and the cascading affect on 'regular tort' awards is real

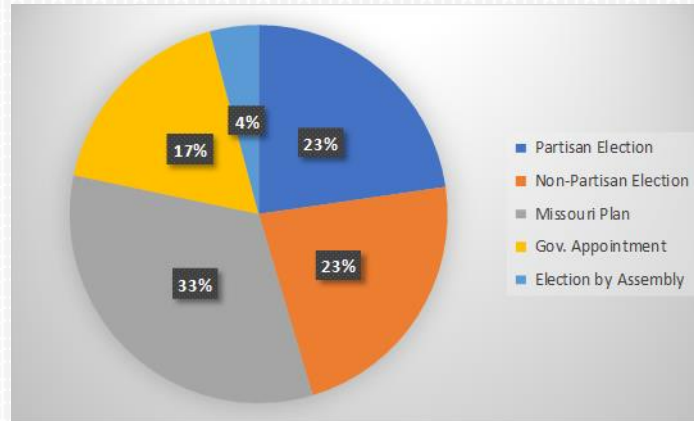
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OTHER ASPECTS OF SOCIAL INFLATION - JUDICIARY

3 Key Points:

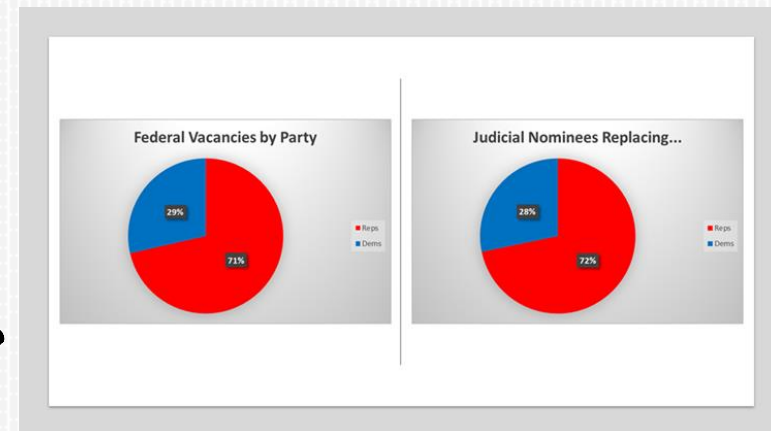
- 1) State courts matter more than federal courts (to P/C insurers);
- 2) Watching federal appointments can be misleading;
- 3) Change is slow – lifetime appointments (federal) 6-10 years states



Politics are a factor in most state judicial election processes



Most federal judges appointed through 2019 were a R-for-R swap



Sources: uscourts.gov, S&P Global (population), Assured Research

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DECONSTRUCTING LITIGATION FINANCE – 3 ELEMENTS

1. Commercial Litigation Finance



Not us!

- Esoteric B2B litigation; some involvement in mass torts

2. Consumer Litigation Finance



Not us!

- Involved in 'regular torts' like auto, premises liability, professional liability, etc.
- But amounts advanced are small (~\$4,000) and used for daily living

3. Specialty Finance Firms



If not them, who?

- Specialty finance firms providing capital to personal injury firms
- Video Clip – [Advocate Capital Inc.](#) View this for insight into the 3rd element of Litigation Finance

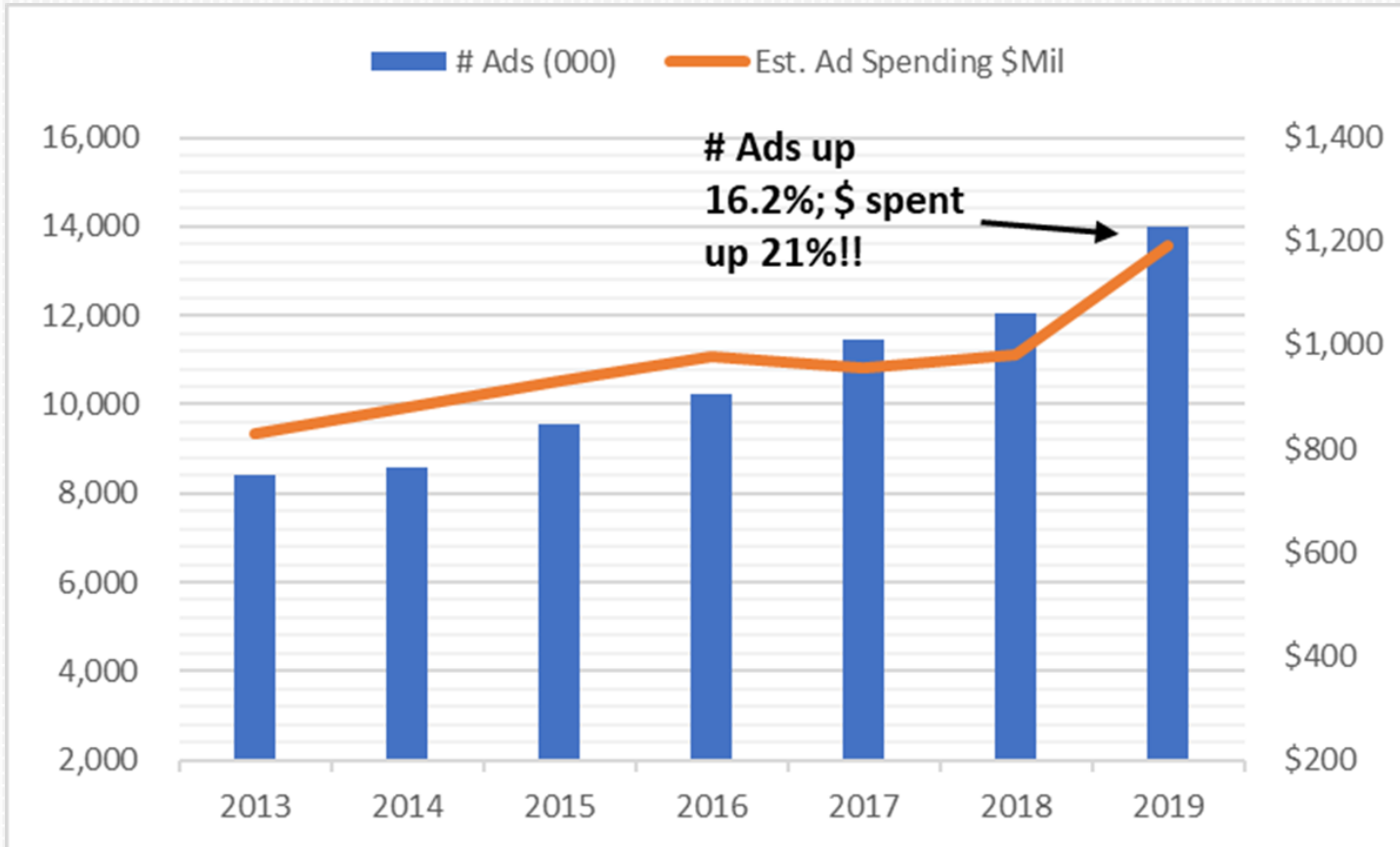
SPECIALTY FINANCE FIRMS ARE “GAME CHANGERS”

“We are a game changer for contingency fee law firms. We help them give them the confidence to be able to go into negotiations and reject low settlement offers.”

Advocate Capital (and peers) are specialty finance firms that provide ‘working capital’ to contingency fee law firms

Tina Burns, VP of Advocate Capital, Inc. speaking on a promotional video found at their website.

SOCIAL INFLATION – LEGAL ADVERTISING IN U.S.



Source: X Ante analysis utilizing data provided by Kantar Media CMAG, Assured Research

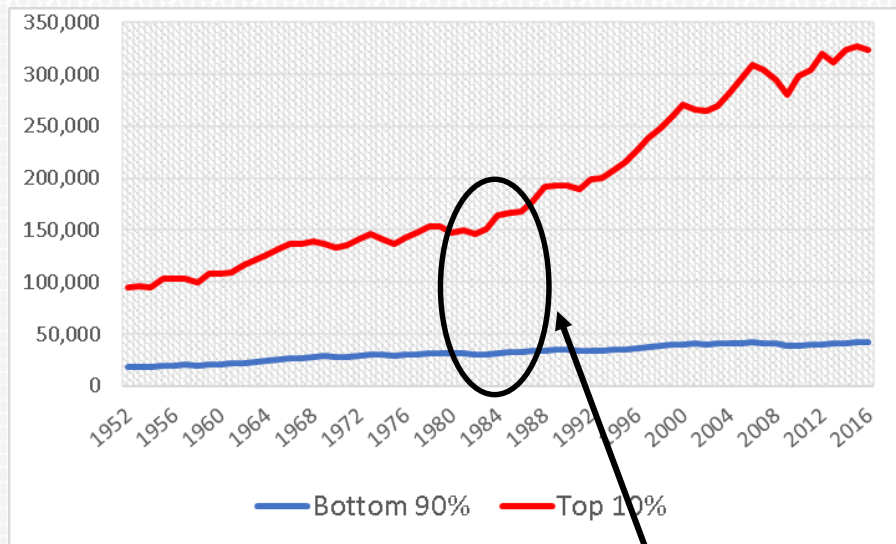
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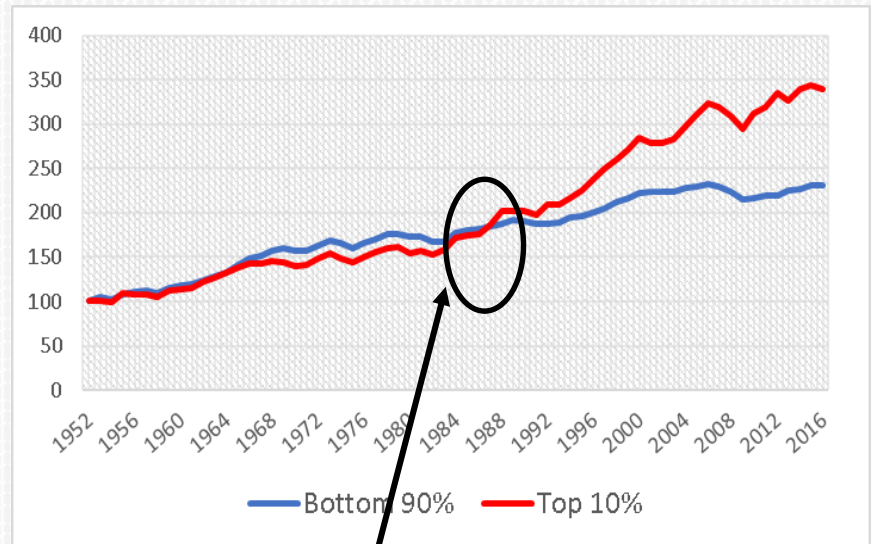
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Income for the top 10% has been outdistancing the other 90% since the mid-1980s; Not Fake News

Income levels: Top 10% vs remaining 90%



Same data: Index basis



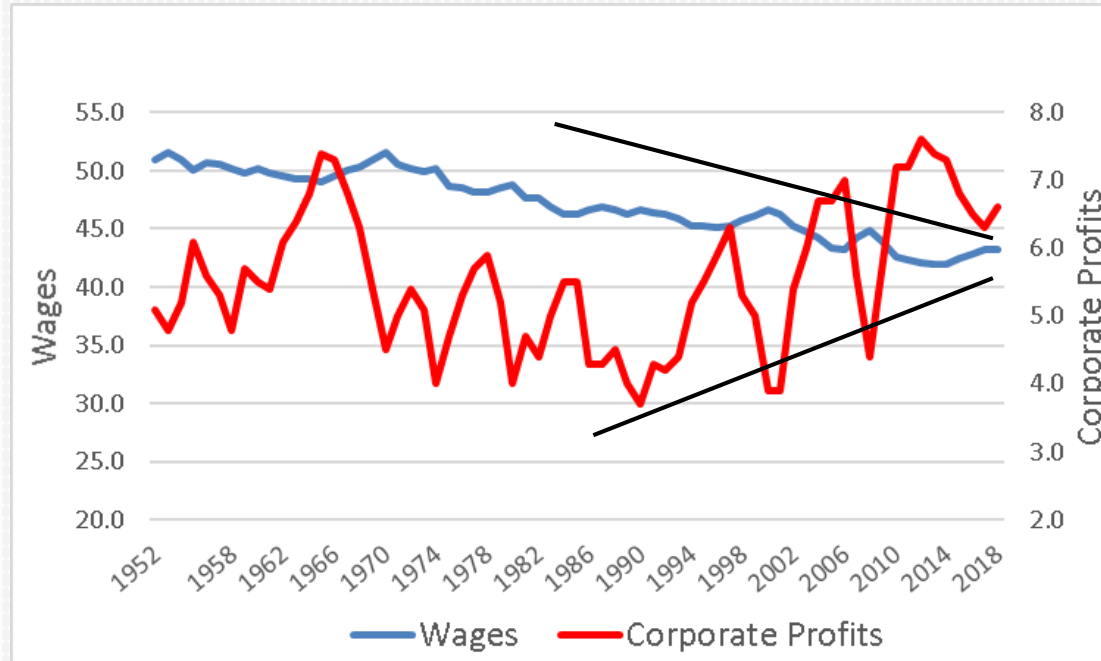
Note inflection point in mid-1980s

Source: *Distributional National Accounts: Methods and Estimates for the United States*, Picketty, Saez, Zucman.

Data available at: <http://Gabriel-Zucman.eu/usdina/>, Assured Research

WEALTH HAS BEEN STEADILY TRANSFERRED FROM INDIVIDUALS TO CORPORATIONS

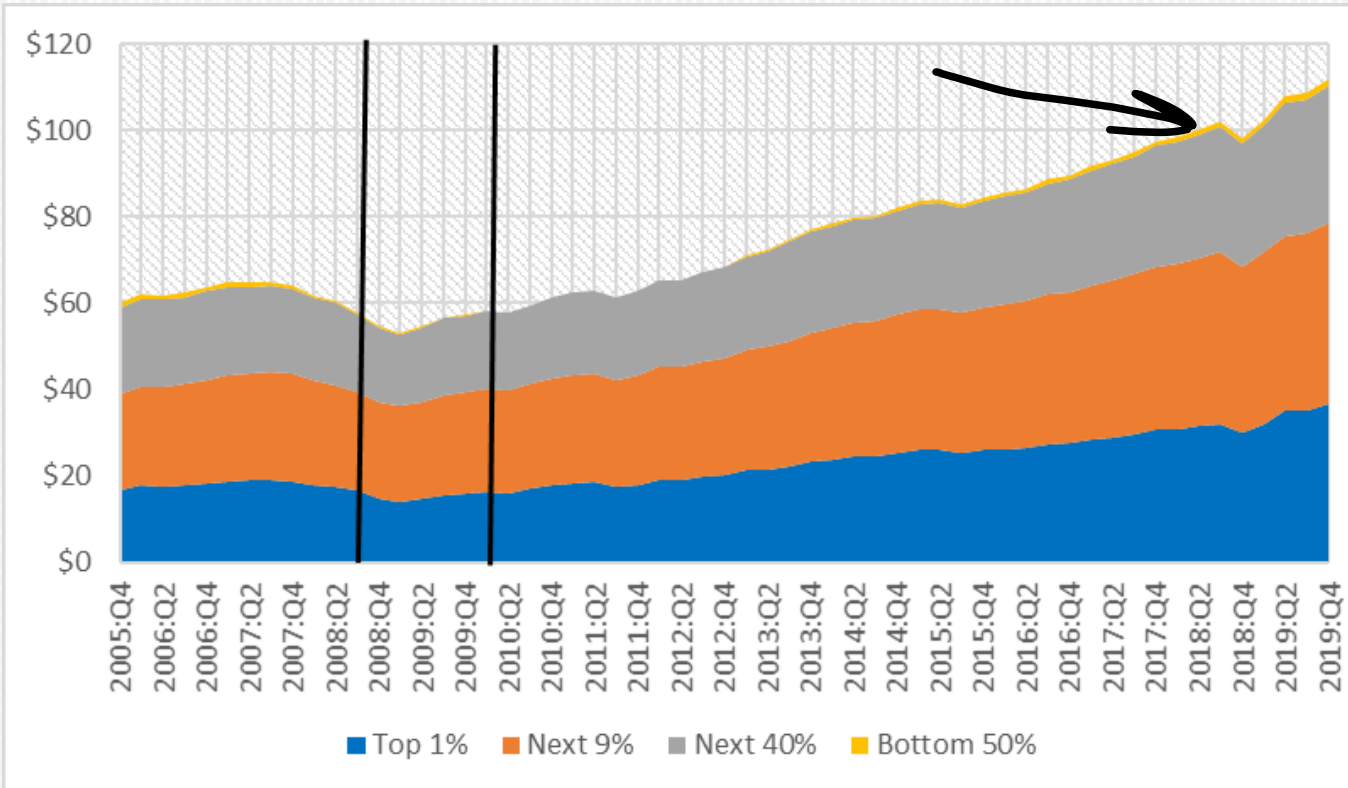
Wages and corporate profits as a % of national income



Sources: Federal Reserve Bank of St. Louis (FRED), Assured Research

Note the differing trend lines, with inflection points in mid-1980s

WEALTH INEQUALITY HAS BEEN EXPANDING

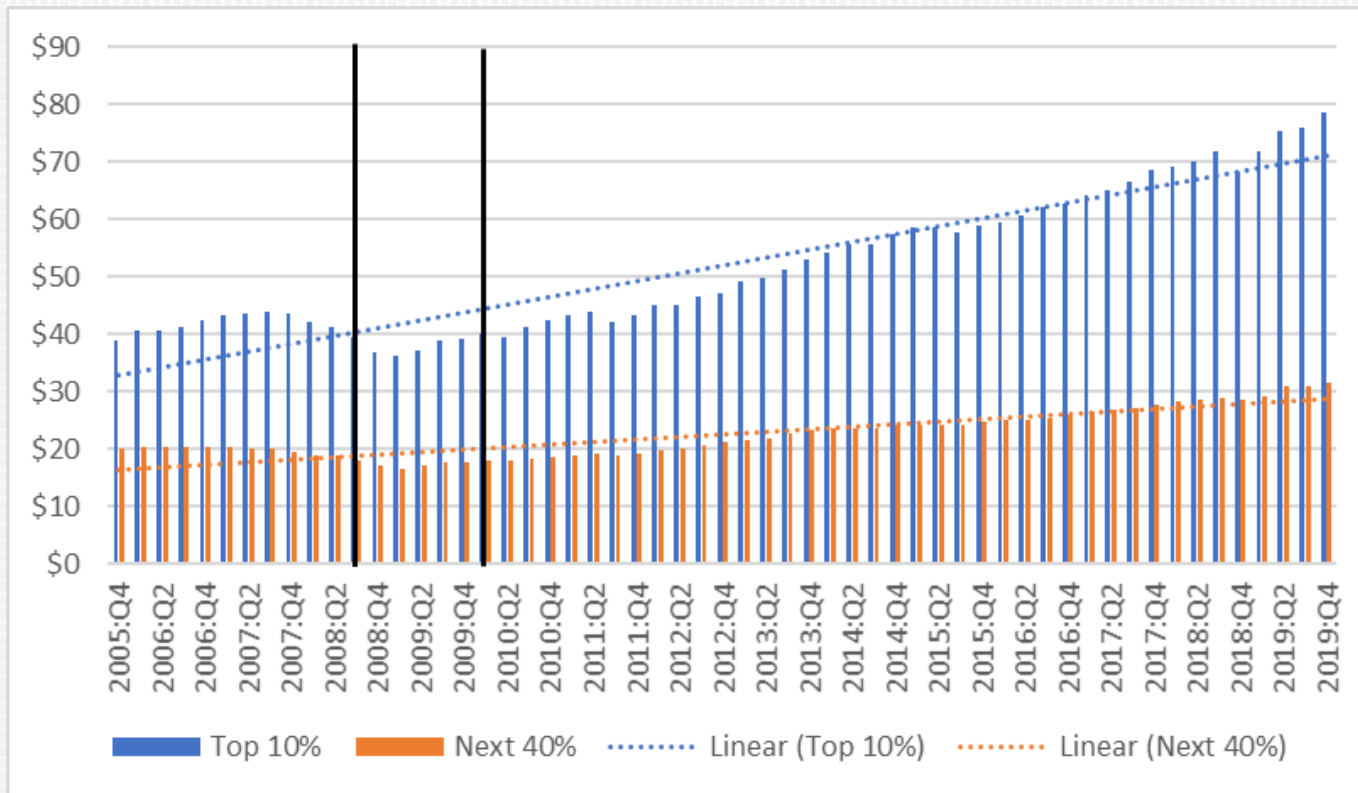


Wealth inequality continues to grow. Look at the tiny share of HHNW attributed to the bottom 50%

Sources: Federal Reserve, Assured Research

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WEALTH INEQUALITY HAS BEEN EXPANDING



And the trends for the top 10% are MUCH better than the next 40% (and certainly the bottom 50%)

Sources: Federal Reserve, Assured Research

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TORT REFORM STOPPED SOCIAL INFLATION IN THE '80S

- ◆ 39 states passed reform measures between 1985 and 1990 in response to difficult tort environment and public pressure. Time Cover March 1986
- ◆ That reduced the number of lawsuits and stopped the growth of industry losses.

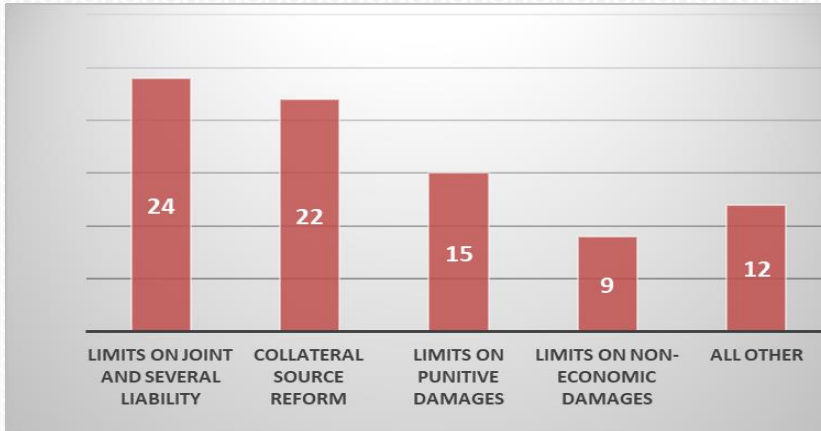
BUT WE DON'T EXPECT THAT NOW!

- ◆ Industry losses are not too bad!
- ◆ Difficult legal states are not suffering
- ◆ There is no political will for a tort reform fight.

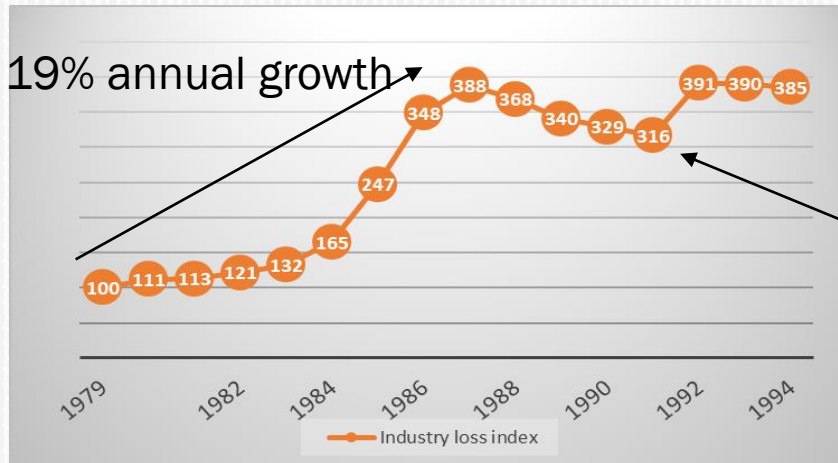


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TORT REFORM STOPPED SOCIAL INFLATION IN THE '80S



39 states passed 82 tort reform measures between 1985 and 1990



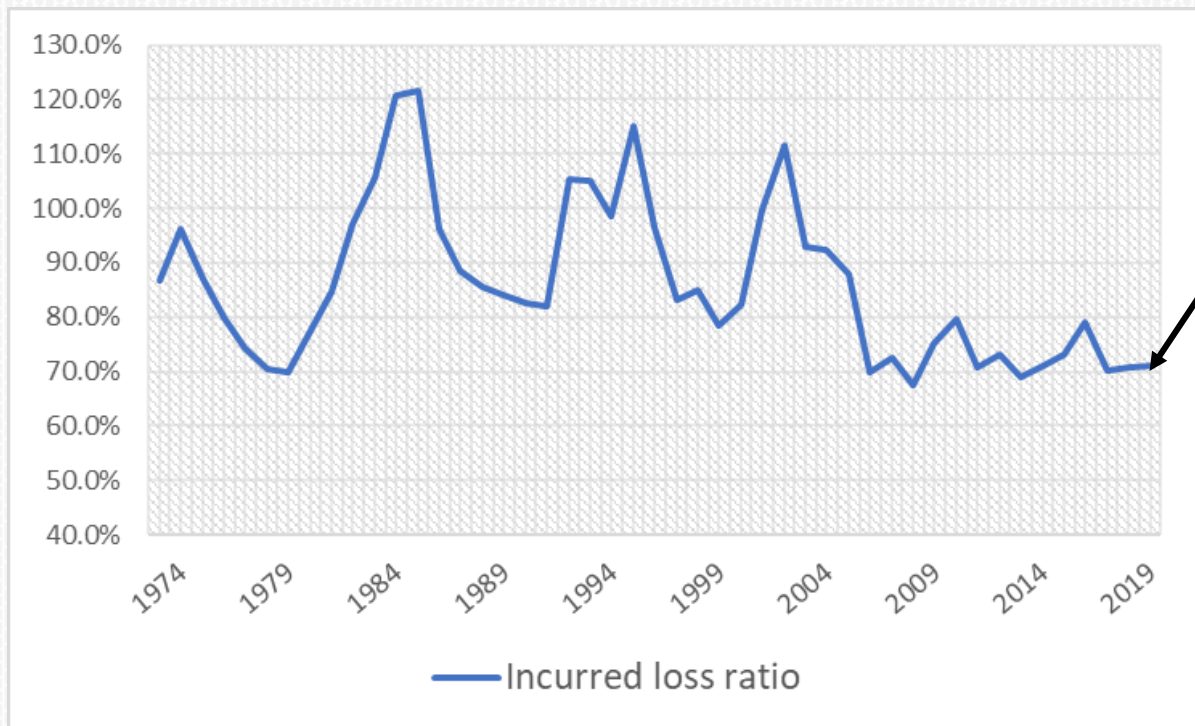
That stopped the growth of industry losses

Sources: American Tort Reform Association, A.M. Best, Assured Research

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TORT REFORM STOPPED SOCIAL INFLATION IN THE '80S

Other liability loss ratios: 1974-2019



Difficult to argue "social inflation" is an urgent problem when industry results are some 50% below past crisis level

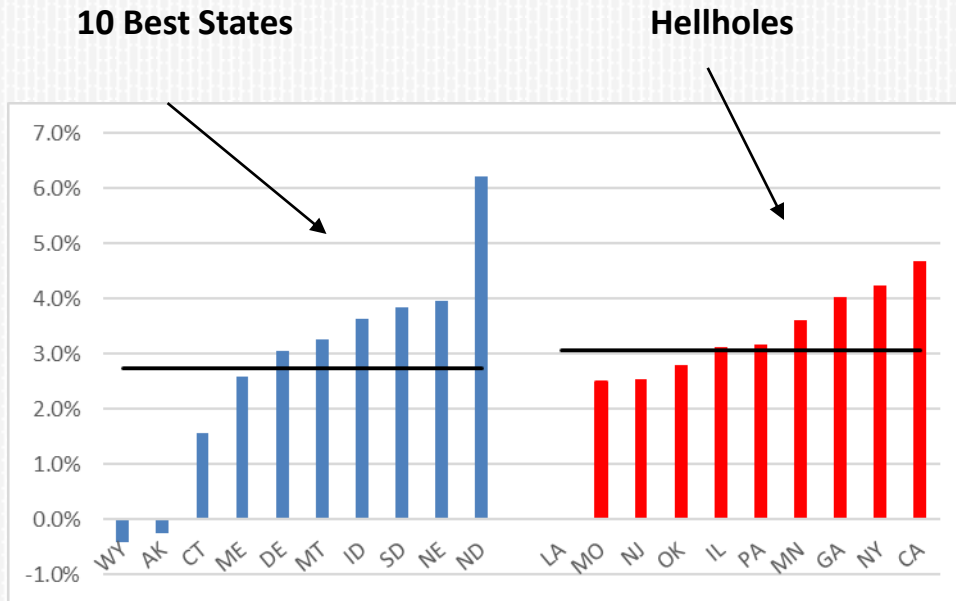
Perspective: From 1995-2000 commercial premiums grew 1% pa vs. nominal GDP at 6% (very similar 1980-1983)

From 2014-2019 commercial premiums grew at 2% pa vs. nominal GDP at 4%. In need of a correction, but of a different order of magnitude

Source: A. M. Best, Assured Research

TORT REFORM STOPPED SOCIAL INFLATION IN THE '80S

State Legal Environment vs. 10-yr GDP Growth



States with difficult legal environments are growing faster than "best" states: 3.1% vs 2.7%

Source: Institute for Legal Reform (State rankings), American Tort Reform Association (Hellholes), Bureau of Economic Analysis (GDP), Assured Research

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SOCIAL INFLATION IS ALIVE AND WELL!

The political cycle during 2020 is likely to extend (and maybe exacerbate) the social divisiveness in the U.S. that seems both simultaneously symptom and contributing cause to social inflation.

It's hard to disagree with Mr. Berkley that social inflation will last for 18 months on the short-end to 3 years on the longer side. The good news we can offer – we see the 2016/2017 timeframe as when tort inflation began to resurface.

Much to be sorted out with COVID-19 litigation. Even if COVID-specific litigation is curtailed through federal/state grants of immunity, litigation usually spikes following recessions and it seems unlikely this will be an exception.

Questions?

Assured Research Series: Social Inflation is Alive and Well!

Casualty Actuaries in Reinsurance

June 1, 2020

Thank you!

Social Inflation

Actions, strategies, and intelligence for
insurers

Dana Franzetti, Swiss Re



Signs of social inflation evident in highest-in-14 years med mal loss ratio

-S&P Global 12/3/2019

US jury payouts leave insurers 'facing \$200bn hole'

-Financial Times 11/21/2019

The Specter of Social Inflation Haunts Insurers: Insurance executives' talk about bigger jury awards and increased litigation worry investors

-Wall Street Journal 12/27/2019

With New Trial Tactics Fueling 'Nuclear' Verdicts, Can Defense Catch Up?

-Legal Intelligencer 10/22/2019

Jurors Want to Punish: A Look at Why A Jury Verdict Goes 'Nuclear'

-Legal Intelligencer 10/21/2019

Monsanto hit with staggering \$2 billion verdict in Roundup cancer suit

-San Francisco Chronical 5/13/2019

Jury Orders \$280 Million Payment, Largest Ever Verdict Against Trucking Company

Truckers Report

New Mexico Appeals Court Upholds Ruling in \$165M Suit Against FedEx

-Insurance Journal 2/12/2018

Baltimore jury awards record \$229 million for brain injury during child's birth at Johns Hopkins Bayview

-The Baltimore Sun 7/2/2019

Social Inflation

**Increased
propensity
to sue**

**Higher
verdicts**

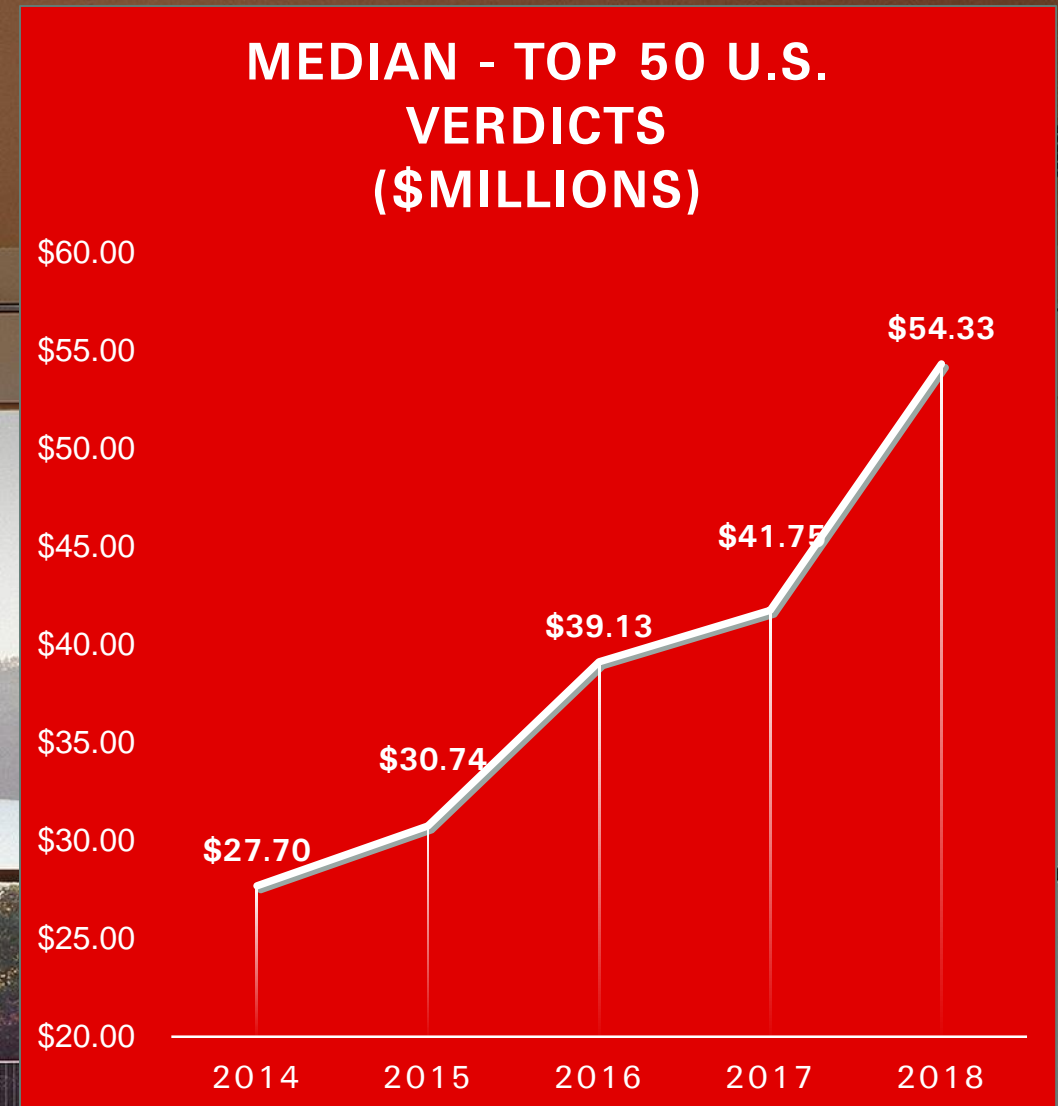
**Driving
higher
settlements**

**Expanding
legal
theories**

Top 50 U.S. Verdicts 2014-2018



- Median cost of the top 50 bodily injury claims in the United States has nearly doubled since 2014.
- The median skyrocketed from \$28M to \$54M



• Data compiled by Shaub, Ahmuty, Citrin & Spratt

Example Noteworthy Settlements and Verdicts, 2019

\$37m

Verdict

NJ Talc compensatory (4 pers. Mesothelioma), 2017
MO \$110m verdict overturned

\$65m

Settlement

Class action for 100k au pairs vs. 15 firms for keeping wages low

\$81m

Verdict

GA verdict to Navy veteran shot in Kroeger parking lot (1 plaintiff, paraplegic)

\$117m

Settlement

J&J/ Ethicon pay for deceptive marketing for surgical mesh (41 states + D.C.)

\$260m

Settlement

Opioid case 2 OH counties vs. McKesson, Cardinal, Amerisource, Teva

\$2b

Verdict

CA verdict against AG Bayer/ Roundup (2 pers), reduced to \$17m comp./ \$69m punitive

\$8b

Verdict

Punitive damages for Risperdal causing breast growth in a man. (1 plaintiff, 13k lawsuits)

Plaintiff Bar

We need to **stick together** and stand strong if we want to be more powerful than our opponents.

”



Nick Rowley,
Running with the Bulls

We're a team!



Plaintiff attorneys started “unionizing” a decade ago in the face of tort reform.

- The Plaintiff Bar is a **highly coordinated** network who regularly share strategy with one another.
- They applaud each other's success. A high verdict or settlement for you is a **new floor** for me.

Did you know?



Plaintiff attorneys text each other when they are presenting opening and closing arguments. **They show up** in court that day, en masse wearing street clothes and sit behind the plaintiff's side.

Do you know the Secret Knock?



- The plaintiff bar regularly shares strategy with each other via private websites, newsletters, memos and closed in person forums.
- They name names! Companies, individuals, claims adjusters, experts

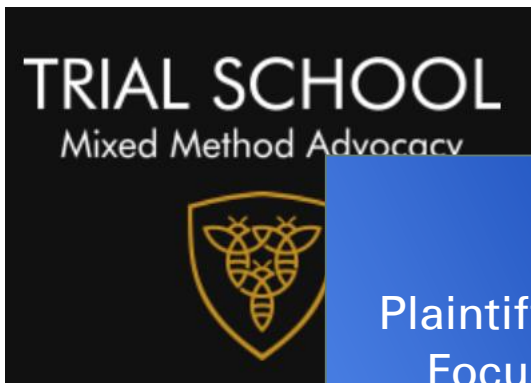
Did you Know?

Plaintiff attorneys share expert deposition transcripts with each other within minutes of receiving.

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Abundance of resources



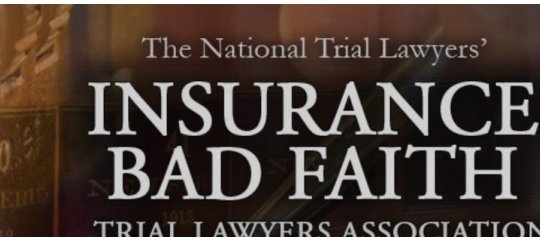
Plaintiff Training Focuses on:

- Strategy
- Communication
- Psychology
- "Justice"
- Money

MEDIA TRAINING:

AAJ staff works with members to help them best communicate their message. Our trainings cover the following:

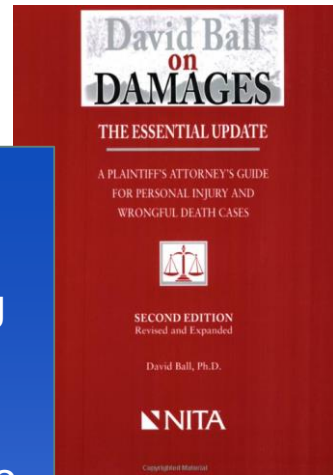
- The fundamentals of working with print, broadcast, and online media,
- Social media best practices for attorneys, and
- Guidelines for crafting an effective message.



Empowering Plaintiff Attorneys to Achieve Justice

Defense Training Focuses on:

- Motion Practice
- Ethics
- Specific Laws
- Responding to the reptile theory



Speaking of resources...

They have money!

- Large coffers and willing to invest
- Third Party Funding
 - Litigation Funding
 - Book of business funding
 - Increasing use in single plaintiff cases
 - Increasing number of litigation funding companies

Social Inflation: It's not just for trial anymore!



Large verdicts drive large settlements



Plaintiff attorneys utilize specific settlement tactics that start immediately

To be or not to be

How do I make this case go nuclear?

- **Story** What is the story of this case? How do I craft it to evoke anger against the defendant?
- **Corporate Witness** How did they perform during their deposition? Do they fall into traps?
- **Multiple Insurers** Are there multiple policies at issue or is there an insurance tower? Can I insert conflict and turmoil?
- **Type of Case** Is this a trucking, auto defect, child sex abuse, chronic pain or premises case?



Tell the story as if you are sitting at a dinner table...

Focus on
storytelling, not
the law

Conduct
multiple in-
house mock
issues

Did you know?
Plaintiff attorneys
dine with their
clients, pay their
bills, attend child
events.

Friend or frenemy

Plaintiff attorneys will:

- Call the claims adjuster early in a case to give a friendly heads up, “This one is going to be bad.”
- Contact the policyholder directly. They can be the most useful part of plaintiff’s team!
- If cannot contact directly, contact any attorney who has ever done work for them.
- “Educate” the policyholder in correspondence. Every letter written is addressed to both policyholder and defense counsel with a demand that it be provided to the policyholder.



Never feel bad, dirty
or greedy when you
ask for the full amount
of civil justice for
victims

”



Nick Rowley,
Running with the Bulls



Add it up!

Let's calculate damages

- 1) What specific damages are available in this jurisdiction? What are the jury instructions?
- 2) Match each damage element to what your client has experienced and suffered.
- 3) Determine the amount of time each damage element existed and will continue to exist.

Did you know?



Plaintiff attorneys calculate every element of non-economic damages. For example:

Pain = \$10k/ month, past and future

Suffering = \$1k/month, past and future

Loss of enjoyment = \$2k/month, past and future

Humiliation = \$1k/month, past and future

Loss of consortium = \$2k/month, past and future

Demand letter dos



Format

- **Email format**
- **Easy to forward and spread**
- **Use body of email**



To

- **Policyholder**
- **Claims Adjuster**
- **All insurance decision-makers**
- **Defense Counsel**



Timing

- **Policy limits demand early in case**
- **Before mediation**
- **After mediation**
- **Set response deadline**



Swap

- **Offer to dismiss policyholder and substitute insurance company**
- **Create conflict and chaos**



From

- **Associate in well-known counsel, if needed**
- **List their successes**

Apply pressure here



Plaintiff attorneys seek to increase pressure

- “Get the lid off!” An early time limit policy limits demand in attempts to open the limit
- Request an early trial date , preferential if young, old or ill
- Create fear in policyholder. Provide names of bad faith attorneys
- Communicate increasing demands with deadlines
- Use inflammatory statements and allege defense failures in demand letters with request to send to policyholder

Mediation is for losers!

Confidentiality of mediation = Can't use in bad faith case

Require hard
money offer
before
agreeing to
mediate

Agree not to
call
policyholder
so they can
be spared

If insurer says
problem with
policy limit
being open,
walk out!

At mediation
ask for more
than your
highest
demand

Present
pictures of
injured party,
sample
closing
argument

Did you know?
To prepare
claimants to
walk out, they
sign rejections
in advance of
mediation

Claims Management and Defense

An aerial photograph of a rowing team in a blue boat on dark water. The rowers are wearing white shirts with red and blue stripes on the sleeves. The boat is moving from left to right, and the rowers' oars are visible, dipping into the water. The background is a dark, almost black, water surface.

Knowledge is power

Sir Francis Bacon (1597)

”

Play to win

Know your
Opponent

Incumbent upon insurers to:

- change how they manage counsel
- incorporate knowledge of plaintiff's techniques and current cultural environment into claims management

Defense bar has
not adequately
met the calibre of
plaintiff's tactics



Defense bar must
be active—not
reactive

Defense bar must
be aggressive



Where to begin

Let's examine some of the myths of traditional defense concepts



Jump out of the box

Myth:

Refuting the plaintiff's story is an effective technique for building a defense

Fact:

Refuting does not provide jurors with a linear story to build ON BEHALF OF THE DEFENSE

- Jurors get lost in the counterpoints
- Their remaining linear narrative is the plaintiff's story
- It is confusing and (boring) to listen to a compartmentalized refutation; jurors get lost



Tell Me a Story

Myth:

Juries listen carefully and objectively to the law and how it should apply to a set of facts

Fact:

Juries focus on narrative aspects of a case and how it is presented

- STORYTELLING
- Your defense counsel should focus on telling an appealing story
- Jurors tend to want to reward victims and punish (perceived) villains
- Jurors rely on archetypes to make judgments about stories
- How does your story show why the plaintiff should lose?





Hearing Aids

Myth:

Jurors listen to all arguments at trial and assemble the most logical story

Fact:

Jurors apply confirmation bias to any story they hear

- Confirmation bias is the brain's way of fitting information into existing beliefs and paradigms.
- If the information is contrary to an existing point of view, it is likely to be discounted or dismissed entirely.
- What points will a jury hear that will allow them to reinforce existing views?
- How will the plaintiff exploit confirmation bias?
- How can the defense align existing bias to reinforce favorable elements of the defense

Sad, mad and greedy

Myth:

Large verdicts are based on sympathy

Fact:

Large verdicts are based on sympathy and anger and perceived greed

- The plaintiff's bar wants jurors to be angry
- Greed is often paired with 'disregard of safety'

Myth: Jurors appreciate that corporations provide jobs, security, and valuable goods and services, while minimizing unnecessary risks

Fact: It's not the 1950's anymore.

- Regardless of age, many jurors will have had unpleasant, unfortunate and even financially or personally devastating experiences as employees of corporations.
- Corporations no longer enjoy parental stature
- Corporations are viewed as untrustworthy, profit-mongering, exploitive entities
- Corporations must rehabilitate their images organically and through expert defense narratives

Corporations are people, too?



An aerial night view of a city, likely New York City, showing a dense cluster of skyscrapers. The buildings are illuminated from within, creating a warm glow against the dark sky. A prominent, tall, modern skyscraper with a distinctive facade of horizontal slats is the central focus. The surrounding buildings are also lit up, with some showing signs of activity. The overall scene conveys a sense of urban energy and financial power.

Greed is good.

(It's not the 1980's, either)

Gordon Gecko: 1987 Movie: "Wall Street"

Refining corporate image



- Corporate Executives are actively defining how companies are perceived
- Major participants include Apple, Pepsi, and Wal-Mart.
- They are revising statements regarding the purpose of Corporations
- “Breaking with decades of long-held corporate orthodoxy”, Roundtable members agreed that corporations should no longer only consider the interests of shareholders.
- They must also invest in employees, protect the environment and deal in fair and ethical ways.
- The actions are an ‘explicit rebuke’ to the notion that the role

<https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html> of the corporation is profit at all costs.



The art of giving



Myth:

The defense should never 'give a number' if it believes there is no liability

Fact:

Expert practice demonstrates that giving a number more often results in a lower verdict or a no-liability verdict

- Anchoring as a strategic response to plaintiff demands

(Campbell, J., Chao, B., Robertson, C., & Yokum, D. (2016). Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments. Retrieved from <https://ilr.law.uiowa.edu/print/volume-101-issue-2/countering-the-plaintiffs-anchor-jury-simulations-to-evaluate-damages-arguments/>)

Just stick to the facts?

Myth:

Invest in extensive witness preparation before trial

Fact:

Invest in extensive witness preparation before the first deposition.

- Plaintiff's counsel will make key assessments of case strength at the deposition stage
- How well a witness does at deposition can determine the expected value of a case
- The witness cannot be rehabilitated at trial after a tough deposition
- Witnesses should be 'subjected to' and trained to withstand Reptilian techniques, high pressure, badgering, cognitive dissonance and other psychological tactics.
- Depositions are about facts and sophisticated psychological techniques.



I “see” what you are saying

Myth:

Prioritize factual witness preparation: A good witness doesn't get tripped up on the facts

Fact:

Prioritize factual witness preparation and witness body language

- Juror focus:
- 55% Body Language
- 38% Voice Quality
- 7% Words

Robert Tyson, partner Tyson & Mendes and
Author: *Nuclear Verdicts: Defending Justice for All*



”

There is a universal
plaintiff juror profile,
and it is **not a
millennial**



Adam Boesen: Boesen Litigation Consulting

Targeting millennials



Myth:

Millennials are causing this wave of verdict headaches

Fact:

Plaintiff-friendly jurors are identifiable and are not all millennials

- Glass Half Empties
- Straight talk about Millennials
- Authenticity/Inclusiveness/Altruism/No Assumption of Inherent Corporate Value



The juror lens

Myth:

Jurors see through outrageous demands, plaintiff's techniques, and they understand that corporations are just trying to generally do the right thing.

Fact:

No, jurors must be presented with appealing stories, themes and numbers that make the defense story the more reasonable position.

- Refining the lens through Mock Trials, Panels, Focus Groups
- Voir Dire: Cases are won at jury selection-budget for jury consultant?
- Use of Appellate Counsel for consultation regarding instructions, appealable issues



Playing with fire?

Myth:
Never accuse the plaintiff of doing something wrong

Fact:
You must effectively point out what plaintiff's counsel is doing wrong and what the plaintiff did wrong

Corporations can take responsibility for actions without admitting liability

A second opinion

Myth:

Most lawyers are good at objectively evaluating their own performance as lawyers. (That's not even a myth)

Fact:

Most lawyers have a great relationship with the way they have always done things, they don't know you want things done differently, they don't know how to ask, they don't know where their weaknesses are, and even if they did, they wouldn't tell you.

- Opportunities for second opinions
- Mock Trial, Mock Jury, Online surveys, Internal Presentations
- Comfortably numb: Most master performances are not the first set on stage





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Great things never
come from **comfort**
zones.

New ballgame, new playbook

Ready for the new ballgame?

Don't underestimate
your power to
escalate the
effectiveness of
counsel

New ballgame, new playbook

- Insurers pay defense counsel, but they are not directing counsel in ways that promote change.
- In fact, most insurers have not changed anything about how they direct counsel
- If you are being paid to do the same thing, you are not going to change it
- Are you getting the value you want out of counsel?
- Example: Out-'technologied'/Out-lawyered : Does defense counsel have sufficient objectivity to see what is out-dated?



Media Influence



Media influences
the cultural
zeitgeist.

Riding the wave: Changing societal attitudes

1992

- There are too many frivolous lawsuits
- A corporation is just a corporation
- We need tort reform



2008

- Wall Street is rewarded while Main Street suffers
- Profit over people
- Corporate greed



Sign me up!

Attorney advertising

- Number of attorney lawsuit ads has tripled in the last decade
- Estimated that attorneys spent almost \$1 Billion in advertising in 2019
- Not based on scientific evidence or tied to recalls
- Social media facilitates targeted marketing to specific potential plaintiffs
- Accumulate as many plaintiffs as possible, valid or not, to overwhelm companies and create pressure to settle
- Scare the public and influence the jury pool



Life of a message



The story begins at the local level

Is replicated and bubbles to national attention

Then, social media carries it forward

Who's the villain?

- To arrive at a moral decision people connect to core values
- People are more interested in the villain than in the hero. There is only one villain!
- Post 2008 financial crisis, corporations became the villain.
- Connect to core values and make them actionable.
- Offer a new villain
- Position and Reposition



Social Inflation: Post COVID-19

COVID-19: Frustrating or ameliorating social inflation?

- Most experts predict **same or increased** levels of social inflation
- Why?
- Frustration with large corporations not taking 'adequate' precautions on behalf of employees
- Blending frustration with government actions with corporations: reducing workforce, employment, 'little man' loses
- Frustration and increased sense of fear, lack of control, powerlessness, identification with victim mentality, finding villains



But, some countervailing considerations



- Money is less important?
- Restructuring of priorities?
- What do you value and what is loss?
- We/Us vs. Us/Them





Social Inflation is one of the **biggest** disrupters facing the insurance industry.

<https://www.businessinsurance.com/article/00010101/NEWS06/912332630/Social-inflation-keeps-rising-for-insurers-Panelists#>

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