The Case for Pausing Any Immediate Embrace of the Social Inflation Argument for Legal System Reforms

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This paper brings a critical eye to the current conversation about "social inflation," reaching the conclusion that the current calls for legal system reform—whether that be controls on attorney advertising, clamping down on litigation financing, revisiting of fee recovery rules, or other similar reform proposals—currently lack the empirical support and analytical comprehensiveness for . regulators and legislators to act with confidence that the requested reforms will do more good than harm.

In a variety of States, insurance premiums are rising faster than general inflation, some insurers are becoming insolvent, and some insurers are leaving markets entirely. Insurers are pointing to social inflation as a major cause. "Social inflation" is the terminology for the assertion that lawyers, litigation financers, contractors, and other opportunists including perhaps policyholders themselves, are increasingly causing insurers to overpay claims and incur unwarranted LAE, often in litigation settings where the problem is exacerbated by gullible jurors and changing societal attitudes toward businesses and insurance companies.

This paper explores several potential concerns with the arguments for legal system reform. Three concerns in particular are whether the literature adequately not only models the possible benefits to insurers of legal system reforms, but also the possible harm to consumers; whether the literature adequately explains why the proposed reforms are likely to be more successful than prior reform efforts; and whether there is yet sufficient development of the social inflation argument to act on it..

This paper concludes that so far, there is not enough data for a regulator or legislator to confidently embrace further legal system reform. The reforms may be advisable. But it is too soon to tell, and there is significant risk that the reforms would do more harm than good.

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ABSTRACT

This paper explores whether regulators and legislators need more information before embracing the current argument that social inflation necessitates immediate legal system reforms to stabilize insurance markets. Social inflation is a term describing how insurers are overpaying claims and incurring unwarranted loss adjustment expenses (LAE), often in litigation settings where the problem is exacerbated by gullible jurors and changing societal attitudes toward businesses and insurance companies. Social inflation generally is thought to be caused by lawyers, litigation financers, contractors, and other opportunists, including perhaps policyholders themselves. In a variety of states, a connection is perceived between social inflation and some insurers either becoming insolvent or leaving markets entirely.

This article analyzes whether data presented in recent literature on social inflation is sufficient for regulators and legislators to adopt a new wave of requested legal system reforms. This paper explores several potential concerns of legal system reform: Whether the literature adequately models the possible benefits to insurers of legal system reforms, as well as the possible harm to consumers. Whether the literature adequately explains why the proposed reforms are likely to be more successful than prior reforms. And whether there is yet sufficient development of the social inflation argument to act on the asserted conclusion that suspect actors are illegitimately changing societal attitudes to achieve unwarranted results.

This paper concludes that as yet, there is not enough data for a regulator or legislator to confidently embrace further legal system reform. The reforms may be advisable, but it is too soon to tell, and there is significant risk that the reforms would do more harm than good.

1. Insurance is one of the focuses of the author's teaching and research. The author has published several scholarly papers on insurance topics, including having placed multiple papers in peer-reviewed journals. The author has been an invited presenter on insurance topics to the FHFA and the NAIC. The author presently serves as a Consumer Representative to the NAIC. The author formerly was a business litigation attorney, primarily for the defense.

Introduction

Social inflation is a term that broadly refers to the same concepts as the prior terms: litigation crisis, malpractice crisis, legal system abuse, and lawsuit crisis. Overall, the concern is that a combination of factors outside of insurer control and extraneous to the merits of a claim are causing the size and frequency of frivolous plaintiff's verdicts and judgments to explode. These factors include changing societal attitudes, which are opportunistically exploited by third-party actors, such as lawyers and third-party litigation financers (TPLFs) (e.g., APCIA et al., 2022; IRC, 2020; III, 2022a; Fan et al., 2021). Recent scholarly research and white papers on social inflation can be divided into work attempting to measure social inflation (descriptive literature) and work arguing that social inflation requires legal system reforms (prescriptive literature). The prescriptive literature argues that without legal system reforms, the stability and solvency of insurance is at best uncertain (e.g., APCIA et al., 2022; IRC, 2020; III, 2022a; Fan et al., 2021).

This paper analyzes those arguments by first providing an overview of the recent literature and then describing any potential concerns in the overarching analytical approach of the literature. Finally, the paper discusses any potential concerns with the particular arguments made for reform and concludes that the literature does not yet provide sufficient data for regulators and legislators to act.

The assertion that social inflation merits legal system reform is not a new hypothesis but is, once again, in vogue. In recent years, "social inflation is among the most talked-about phenomena in property and casualty insurance and civil justice circles. There is hardly an insurer earnings call or industry conference where social inflation is not addressed." (Theodorou, 2021). "The proportion of conference calls among the largest insurers that contain the phrase 'social inflation' has stayed essentially at zero until 2017 while rising to over 50% in 2020." (Oh, 2022). In the January 5, 2023 "social inflation" email newsletter of the Insurance Information Institute (III), the III CEO stated: "… we've leveraged our immense digital capabilities and driven thousands of people per day to our website and some 8,000 key decision makers to our research through social media campaigns. As we kick off 2023, our team knows there's still much to be done to draw attention to this important issue. The year ahead will be pivotal for addressing legal system abuse."

Prior iterations of a call for legal system reforms have faced the criticism that the data did not align with the requested reforms. In 1986, for example, the prominent academic, Michael Saks, wrote, "If the lawsuit crisis exists, serious evidence of it should not be too difficult to find. In fact, the more awful the problem, the more plentiful and glaring should be the evidence. I have begun such an inquiry, but so far, the hard evidence has been, to put it mildly, elusive." (1986a). That same year in a different publication, Saks (1986b) wrote, "Legal policy-making often goes on in grand indifference to and occasionally even in defiance of available relevant empirical evidence." As Saks (1986a, 1986b) concluded, and as Hunter et al. (2020), among others (e.g., Kysar, et al., 2006; Stanoch, 1987; Miller, 2003; Nye & Gifford, 1988; Moore, 2015) have further detailed, the prior arguments for judicial reform due to a lawsuit or litigation crisis did not fare well under scrutiny. This paper seeks to determine if the current literature fares better; in that regard, this paper reaches several conclusions.

First, the prescriptive social inflation literature provides insufficient information for a regulator or legislator to know that the benefits of reforms outweigh the potential harms. In an economic segment as large as insurance and insurance claims, there are inevitably instances of misbehavior at all junctures and by everyone, including due to actors and other factors both external to insurers ("exogenous") and internal to them ("endogenous"). Some consumers file false claims. Some claims adjusters knowingly adjust claims unfairly. Some attorneys, litigation financers, and contractors seek to inappropriately profiteer. Some insurers and their third parties seek to inappropriately profiteer. This paper concludes that due to the likelihood of misbehavior on all sides, the prescriptive social inflation literature fails to provide a regulator or legislator with adequate data on the relative probable impacts of legal system reforms on frivolous litigation, on the one hand, and on meritorious litigation, on the other.

Second, this paper notes that the study of the impacts of prior reforms struggled to find evidence that those reforms worked, and this paper concludes that the prescriptive social inflation literature has given inadequate attention to explaining why there is reason to expect better success this time.

Finally, this paper examines each of the primary arguments of the social inflation hypothesis, including shifting societal attitudes, the impact of external actors, and outcomes, concluding that while there is data in harmony with each piece of the social inflation hypothesis, the evidence remains too ambiguous at present for a prudent regulator or legislator to adopt the argued-for reforms.

The Significant, Existing Social Inflation Literature

Academic Literature

Oh (2022), using novel data from commercial auto liability insurance, analyzed social inflation (defined as "shifts in the insurer's loss distribution from factors such as large jury awards and broader definitions of liability") and found "that the rise in nuclear verdicts and settlements is real and economically significant;" "the price impact is (i) greater in regions with higher legal exposure, (ii) greater for insurers that are more financially constrained, and (iii) economically significant even for insurers that are not directly affected by nuclear awards;" and "social inflation is likely to persist given the presence of factors that contribute to both a larger supply of potential jury awards and the increased tail risk in each case."

In the last 20 years, the U.S. Supreme Court has adopted procedural reforms seeking to reduce the perceived high incidence of frivolous litigation, and in the wake of those court reforms, legal academics have empirically examined the pre- and post-landscape of frivolous litigation in the federal courts, concluding that the data does not (yet) support a pre-reform frivolous litigation crisis or a reduction in frivolous litigation post-reform (Dodson, 2012; Reinert, 2015; Gelbach, 2016; Hubbard, 2017). The National Center for State Courts (NCSC) and the State Justice Institute (2015) have collaborated to inform litigation reform discussions by reporting with granularity on the landscape of civil litigation in state courts, including tracking the type of claims and the disposition of claims. The NCSC data, like the data on the federal courts, does not describe a civil litigation system in crisis.

Vidmar (1993) analyzed pain and suffering awards in medical malpractice cases to test the research findings of jury antipathy against wealthy defendants. Vidmar found the prior work "methodologically flawed beyond redemption" and further through his own empirical work found "no support for the deep pockets effect." Paik et al. (2013a, 2013b) published a pair of papers analyzing the effectiveness of damages caps as a response to perceived medical malpractice crises and found no correlation of reforms to reduction in damages awards. Peters (2022) analyzed the case for social inflation and nuclear verdicts accounting for sinking profits of medical malpractice insurers and found the cause was not jury verdicts but rather insurers' "competitive strategies that keep premiums from keeping up with inflation." Black et al. (2021) published a book that broadly analyzed the possible efficacy of legal reforms capping medical malpractice damages by limiting them and forestalling a medical malpractice crisis. The book largely concluded there was no efficacy. More targeted work on aspects of medical malpractice reform or tort reform has been done by Vairo (2016), Helland and Seabury (2015), and Geisman (2013), among others. This work finds no clear evidence of the net success of reforms. Hawkins and Knake (2019) undertook a self-described "first-of-its-kind empirical project" on attorney advertising, concluding further regulatory intervention is needed "to expand access to information about legal representation for those in need." Several scholars have studied TPLFs and found that while there is a need for greater attentiveness to consumer protection, even in the current regulatory regime the negative consequences of TPLFs are outweighed by the positive impacts (Kidd 2012, 2016; Avraham & Seebok, 2019; Avraham et al., 2021; Lera et al., 2022; Antill & Grenadier, 2022).

Government Reports

In 2020, the Florida State University College of Business (Nicholson et al.) published its contracted-for exposure analysis of the State's insurer of last resort, Citizens Property Insurance Corporation. While social inflation was not the primary focus of the analysis, the work identified and analyzed seven hindrances to a robust private insurance market, one of which was the litigation environment. The analysis correlated financial stress on insurance markets with increases in litigation claims and costs but did not disaggregate meritorious and frivolous claims. The analysis suggested judicial reordering that could reduce the frequency and cost of litigation.

The Florida Office of Insurance Regulation (FLOIR) (2021a, 2021b, 2022) has published three reports to the Florida legislature analyzing its peculiarly stressed insurance market, concluding that a material contributor is an architecture of incentives (such as the rules on attorney fee recovery) resulting in a dramatically high frequency of litigated claims compared to all other states.

Industry and Consumer-Advocacy Reports

The American Transportation Research Institute (Murray et al., 2020) performed an in-depth quantitative and qualitative analysis of large verdicts against the trucking industry and concluded that the economic incentive architecture and resulting resource allocation decisions of insurers, defense counsel, plaintiff's counsel, and litigation financiers cohere to create an environment of increasing litigation claims and increasingly large awards.

The Geneva Association studied social inflation (which it defines as "all ways in which insurers' claims costs rise over and above general economic inflation" and defined narrowly as "legislative and litigation developments which impact insurers' legal liabilities and claims costs"), concluding under both definitions "social inflation has emerged again as a disruptive issue for companies and their insurers." (Pain, 2020).

The Insurance Research Council (IRC) (2020) analyzed "attorney advertising, third-party litigation financing, class action lawsuits, tort reform rollbacks, and nuclear verdicts," concluding they "play important roles in prompting and facilitating potential claimants and litigants to file insurance claims and initiate litigation" and thus were "having a direct and significant impact on liability insurance results, generating rapid increases in insurance claim losses."

In a white paper sponsored by the III and the Casualty Actuarial Society (CAS), Lynch and Moore (2022) used the chain-ladder method to analyze lines of business that did not have catastrophe exposure and concluded that social inflation, defined as "the inflation component of loss development factors," "increased losses in commercial auto liability by more than $20 billion, or approximately 14 percent of all losses in that line from 2010 to 2019." Lynch and Moore (2023) updated their work a year later, estimating "that social inflation increased commercial auto liability estimates by more than $30 billion between 2012 and 2021, with most of the increase coming from the addition of 2020 and 2021 to the analysis."

The Consumer Federation of America (CFA) and the Center for Justice and Democracy (CJD) published a white paper presenting the data case that insurer profits were at an all-time high, concluding that the prescriptive social inflation literature was trying to manufacture an unsupported justification to raise premiums and to become even more profitable (Hunter et al., 2020). Three years later, CFA and CJD updated this research, reaching largely the same conclusions (Doroshow et al., 2023).

The Coalition Against Insurance Fraud (CAIF) (2022) has located, reviewed, and analyzed all currently available research and data sources, and on that basis estimated the impact of insurance fraud in the U.S. as $308.6 billion annually.

An Analysis of the Premise of the Prescriptive Social Inflation Hypothesis

Within the prescriptive literature, social inflation refers to a set of exogenous factors alleged to cause verdict/judgment frequency and size to increase faster than general inflation, resulting in financial stress on insurers.[2] The premise of the literature is that the claims underlying this outcome predominantly are frivolous. From that premise, the prescriptive social inflation literature posits a hypothesis about how various exogenous

2. In theory, pressure on pricing of risk could be expressed in multiple ways. There is the direct impact on premiums and solvency of the verdict awards themselves. There is the increased incentive to settle (and settle for more) future claims that otherwise would not have been perceived as a material risk to litigate. There is the difficulty of accurately actuarially modeling and predicting outcomes perceived as unsupported by and unexplainable by evidence (Frese, 2021). And since social inflation describes a perceived set of societal trends and behaviors, predictive modeling may reach accuracy on timelines asynchronous to the timelines of regulatory rate approval processes. These all are ways that a judicial system failing to identify and dismiss (early in the process) frivolous claims could create economic uncertainty and pressure on insurer business models.

factors cohere into a wave of successful frivolous litigation and argues for particular reforms in response.

There are two possible concerns with the premise that legal system reform is justified because frivolous litigation is causing an unwarranted increase in the size and frequency of verdicts and judgments. Because the premise assumes that plaintiff's victories predominantly are frivolous, the first concern is whether the proponents of reform have adequately addressed the possibility that the cost of reforms—the reduction of not only successful frivolous claims but also of meritorious claims—may outweigh the benefits. Because the reform movement is not writing on a clean slate but rather follows a series of earlier reform movements that did not clearly achieve their desired impacts, the second concern is whether the proponents of the current movement have adequately described why a regulator or legislator should expect a different outcome this time.

Neither of these concerns are dispositive. The suggested reforms may be well conceived and may work. However, the validity of these two concerns bears further exploration.

Turning to the first concern, frivolous litigation undoubtedly carries a cost to insurers. Through a combination of paid judgments on meritless litigation, paid judgments that are larger than the evidence justified, and settlements overpaid because of fear of such outcomes, frivolous litigation could cause insurers to experience a vicious cycle of unsustainable loss ratios and/or premium rises to account for these loss ratios, all tracking back to claims that had no merit.[3]

However, creating barriers to frivolous litigation may also carry costs to consumers. A consumer typically has less power, resources, knowledge, and ability to absorb loss than an insurer and is under more economic pressure to resolve a claim than an insurer. These asymmetries create a moral hazard-like incentive for insurers to adjust claims below fair value.[4] In these circumstances, litigation may be the best or only tool to level this playing field. Therefore, barriers to litigation can leave consumers uncompensated or under-compensated.

Litigation reforms would not only make frivolous claims harder to file, more expensive to pursue, harder and less profitable to win, and more expensive to lose, but the reforms would also place these barriers on meritorious claims. Therefore, a regulator or legislator being asked to adopt such legal system reforms should know not only the impact of reforms in reducing frivolous litigation, but also in reducing meritorious litigation.

The prescriptive social inflation literature typically models the positive impacts of reform on insurers but does not adequately acknowledge or model the possible offsetting negative impacts on consumers. The problem can be hard to spot because the prescriptive social inflation arguments are not presented in these terms. Often, the literature simply characterizes all rising verdict frequency and size as unfair, unmerited,

3. While the social inflation literature sometimes uses the terms "verdict" and "judgment" interchangeably, the terms are not synonymous. A jury's decision is a "verdict." A judge's acceptance of that decision is a "judgment." Not all verdicts become judgments. Under rules of civil procedure, a judge should not enter a verdict as a judgment if the judge concludes the verdict is not supported by the evidence. A defendant is only required to pay a judgment.

4. There is at least one documented, anecdotal example of an insurer acting upon this conclusion (Gursten, 2011).

and/or frivolous (e.g., APCIA et al., 2022[5]). Other times, the literature implicitly (and occasionally explicitly) assumes that increased claims litigation and increased adverse outcomes (to the insurer) are reasons sufficient to adopt legal system reforms (e.g., Djazayeri, 2020[6]), at which point the literature simply turns to a discussion of what the reforms should be.[7] Or as Gen Re puts the point, "As social inflation has been more widely examined in recent years, it has grown to encompass almost any unfavorable aspect of modern Casualty insurance." (Mackeprang and Karol, 2021).

Even the academic literature is susceptible to unreflectively assuming that increasingly frequent and large plaintiff's verdicts or judgments predominantly are primarily (if not entirely) comprised of frivolous litigation. For example, Oh's (2022) modeling of social inflation does not disaggregate verdicts supported by sufficient evidence from all other verdicts but rather implicitly assumes that increases in negative outcomes for insurers are predominantly explained by exogenous social inflation factors.

The concern with these approaches is that they do not engage in any analysis that the advocated-for reforms also will impact meritorious litigation and simply assume the benefits of the reforms will outweigh the costs. Perhaps more frequent big verdicts are explained by policyholder, attorney, TPLF, contractor, and juror misbehavior, or maybe more frequent big verdicts are explained by insurer misbehavior. The most likely scenario is that more frequent big verdicts are explained by a mix of all these factors. But due to the absence of data on the relative contribution of each to the mix, there is no clarity about which reform is best and what the relative positive and negative consequences of any reform might be. A regulator or legislator generally should not act in that environment.

The second concern with the new prescriptive social inflation literature is that it gives no insight into why the current advocated-for reforms have a better chance of success than prior reform efforts. This should give pause to a regulator or legislator because post-reform studies find the evidence of success ranges from "hasn't worked" to "mixed" to "unclear" (e.g., Black et al., 2021, Vairo, 2016; Helland & Seabury, 2015; Geisman, 2013).

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5. "At its essence, social inflation reflects changing attitudes of what is fair compensation for harm and how to pursue it." In this context, "unfair, "frivolous, and unmerited" are synonymous terms. In a legal and regulatory environment, "fair" is an objective metric for measuring the accuracy of a factual finding. In this context, "fair' means a factual conclusion supported by sufficient evidence and reached through constitutionally adequate due process (Klein, 2016). In courts, conclusions unsupported by sufficient, plausible evidence are unmerited and characterized as "frivolous."

6. "When a private citizen prevails in a law suit against a corporation, the financial damage to the business can be crippling … Social inflation is considered one of the major emerging risks the insurance industry must face … social inflation essentially refers to the trend of rising insurance costs due to increased litigation, plaintiff-friendly judgements and higher jury awards."

7. There is one paper explicitly attentive to distinguishing between legitimate and illegitimate litigation. In December 2021, the Perryman Group published its assessment of the total cost of "excessive litigation" in the U.S., and thus argued for broad tort reform. The Perryman Group sought to isolate the "excessive tort costs" of what it called "exorbitant levels of damages or numbers of awards" (2019). It did so by comparing "the current overall direct costs of the liability system" in the U.S. with "costs … in other developed areas with similar standards of living and well-developed judicial systems (such as the European Union)," and assuming all of the difference was excessive costs due to exorbitant levels of damages or numbers of awards. However, that does not control for a host of variables. For example, nations with nationalized healthcare would have a very different incentive structure underlying personal injury lawsuits. Also, one cannot casually conclude that if a nation does not have strict liability or product liability or wrongful death causes of action (many European nations do not), then an award in such cases in the U.S. are unjust, factually unsupported, unfair, frivolous or exorbitant.

This concern can be illustrated by looking at a litigation reform approach by the U.S. Supreme Court, designed to reduce the negative economic impacts of frivolous litigation (e.g., Dodson, 2012). Through a pair of opinions colloquially referred to by the mashup nomenclature *Twiqbal*, the Court imposed reform across the entirety of civil litigation in the federal courts.

The first case, *Bell Atlantic v. Twombly*,[8] was a consumer class action against several local telecommunications companies for alleged conduct that today may seem anachronistic. The alleged conduct was conspiring to stifle competition in selling access to the internet and telephone long distance calls to consumers, which is in violation of antitrust laws. The Supreme Court, noting that the prohibitive expense of even engaging in discovery in such a case could lead to large settlements even when the lawsuit had no apparent merit, held that to survive an early motion to dismiss, the plaintiff had to "plausibly" allege facts that suggest a conspiracy; merely alleging facts consistent with a conspiracy was not enough.

The second case, *Ashcroft v. Iqbal*,[9] was brought by an expatriate Arab male, Javid Iqbal, who had overstayed his student visa and was arrested during the post-9/11 arrests and detentions. Iqbal contended that the conditions of his arrest and detention violated his civil rights, and that the post-9/11 policies could not have happened without the signoff of the then U.S. Attorney General, John Ashcroft, and the then Director of the FBI, Robert Mueller. The Supreme Court held that the case should be dismissed pre-answer because Iqbal had no "non-conclusory" evidence that plausibly supported the allegation of Ashcroft's and Mueller's personal involvement. Notably, in *Iqbal*, the Court did not confine its decision to its factual and procedural context or to the *Twiqbal* context; rather, the Court explicitly said that it was expanding the plausibility screening standard of *Twombly* across the entirety of the federal court civil litigation system.

The so-called *Twiqbal* decisions resulted in a reformed standard of pleading. The key to the holdings was how cases were to be identified as frivolous and thus to be dismissed. *Twiqbal* directed that a trial judge, applying their personal "judicial experience and common sense," should evaluate the lawsuit as merited or frivolous at the time of filing (even before defendants were required to answer with their own side of the story). The *Twiqbal* decisions thus put in place a system for a presumptively neutral expert in civil litigation, a trial judge, to screen out frivolous claims before a defendant had to expend any significant resources in defense (e.g., Spencer, 2013).

Lawyers, judges, and academics disagreed about the desirability of the *Twiqbal* approach, but all predicted the impact of *Twiqbal* would be palpable. The empirical studies of *Twiqbal's* impacts have belied those predictions, finding the evidence of impacts has been unclear or mixed (Dodson, 2012; Reinert, 2015; Gelbach, 2016; Hubbard, 2017). That said, some consensus among researchers does emerge: There actually is no good methodology for confidently identifying at the initiation of a lawsuit when a claim is factually frivolous. Empiricists have been unable to find data supporting the existence of or any element of the intuitively suspected and anecdotally described "frivolous litigation crisis" (meaning, of increasingly numerous, evidence-free

8. 550 U.S. 544 (2007).
9. 556 U.S. 662 (2009).

claims reaching exorbitant and ever-increasing final judgments, which in turn lead to ever-increasing settlement of latter, evidence-free claims) that either preceded, survived, or were remedied by the *Twiqbal* decisions. And much of the disparity in the findings of the empiricists were not about the frequency of frivolous litigation but rather about the degree to which attempted reforms aimed at reducing frivolous litigation also has reduced the frequency of meritorious litigation. In other words, despite the intuitions of the U.S. Supreme Court, there is a lack of data that there was a frivolous litigation crisis, that system reforms aimed at curing it worked, or that the harms from reforms outweighed the benefits. As two of the studies concluded, the analytical challenge was that in retrospect, the economics of filing lawsuits may have never supported filing frivolous claims, either before or after the *Twiqbal* decisions (Hubbard, 2017; Reinert, 2015).

In summary, there are two overarching concerns with the premise of the prescriptive social inflation literature. Because the premise assumes that plaintiffs' victories predominantly are frivolous, the first concern is whether the proponents of reform have adequately accounted for the possible negative impacts of reforms on meritorious litigation. Secondly, because the reform movement is not writing on a clean slate but rather follows a series of earlier reform movements that did not clearly achieve their desired impacts, there is concern about whether the proponents of the current movement have adequately described why a regulator or legislator should expect a different outcome this time. Both concerns are independent of the force of any specific hypothesis made in the literature, and the literature does not yet engage on either concern. In other words, the advocated-for legal system reforms might work, but there is no evidence that past efforts have, and the current proponents neither have identified why a regulator or legislator should expect different outcomes this time nor have they yet given regulators or legislators data to conclude that the achieved likely benefits would justify the incurred likely harms.

An Evaluation of the Specific Steps of the Prescriptive Social Inflation Hypothesis

The prior section of this paper identifies possible concerns about the premise that underlies the prescriptive social inflation literature. This section examines the three steps of the social inflation hypothesis that flow from that premise.

Broadly stated, the social inflation hypothesis is comprised of three steps—assertions about attitudes, actors, and outcomes. The hypothesis asserts that changing societal attitudes create an environment that external actors exploit to achieve frivolous outcomes. As will be developed below, each step of the hypothesis is supported by data and arguments that suggest it is plausible. But each step also is vulnerable to data and arguments that raise doubts about the step. So, in the end, it remains uncertain what, if any, legal system reform is called for.

Changing Societal Attitudes

The first step of the social inflation hypothesis is a broad assertion about societal attitudes. The assertion is that changing societal attitudes are creating fertile ground

for frivolous legal outcomes. As the Institutes phrase this position: "Younger and more diverse jurors are more distrustful of corporations, whether due to suspicions about 'capitalist greed' or concerns about systemic discrimination. … many potential jurors see corporate America as hoarding massive profits at the expense of the average person. And they will be more likely to try and punish corporations due to 'fairness,' even if the punishment is disproportionate to the actual issues in a case" (Taylor, 2021; accord, Daly & Mandel, 2020; Fan et al., 2021; III, 2022a; Pain, 2020; IRC, 2020; Mackeprang & Karol, 2021).

The concern about changing societal attitudes is not new. For example, in 1976, the President of Aetna Insurance wrote about "…the concept of entitlement, which holds that everyone is entitled to whatever coverage he or she wants or needs," which he concluded was resulting in "…an epidemic of litigation" because "…people are increasingly prone to sue over just about anything … and they're likely to sue just about anybody," in no small part because of "…feelings of hostility against insurance companies, which are imagined as big and rich enough to pay big court awards" and "…a feeling that everyone is entitled to a big piece of the action, if only they have the opportunity to sue." (Watkins, 1976).

Because the concern is not new, there has been ample time to study the veracity of the intuitions about changing attitudes. The resulting data, however, remains unclear (Pain, 2020). In the 1990s, the question about whether generational shifts in attitudes translated into greater or larger verdicts for plaintiffs was studied, and the academic work did not support the conclusion (Vidmar, 1993; Hans, 1998; Vidmar et al., 1998). Academic work on the overall attitude of Millennials and Gen X'ers does confirm a heightened sense of entitlement compared to the 1990s (Chatzopoulo & de Klewiet, 2020). But based on claims frequency data, Verisk concludes that still, "there has not been an increasing propensity to sue." (McCarthy, n.d.). And Mackeprang (2020) finds that while all else being equal, jury awards are higher in areas with greater levels of income inequality, "inequality does not predict the likelihood of plaintiffs winning a case."

Anti-business and anti-insurer attitudes translating into improperly awarded and inflated judgments still may occur. Kelley et al. (2018) theorize that with the increased prevalence of artificial intelligence, there will be an increased number of eliminated jobs causing greater wealth inequality and, in turn, increased social inflation. But there is no evidence that the feared shift has happened yet or is going to happen.

Which is not necessarily surprising. Trial by jury of civil actions in the U.S. is an intentionally designed "cradle to grave" system imposing procedures when lawsuits are filed to screen out frivolous cases, procedures on appeal to reverse judgments unsupported by sufficient evidence, and multiple procedures during trial to ensure verdicts do not become judgments if based on bias or if lacking sufficient evidentiary support. These trial procedures include that potential jurors who in jury selection are identified as being unable to hear the evidence without bias are excused for cause, and parties are given peremptory strikes to excuse potential jurors whose answers to jury screening questions do not rise to the level of a "for cause" strike but nonetheless the parties have doubts about. Jurors are reminded and instructed throughout trial to decide matters only on the evidence presented at trial. Jurors then deliberate until

they collectively can, depending on the jurisdictional rule, either unanimously or by super-majority agree upon a verdict. And the verdict is subject to trial court review to confirm that it has support by sufficient evidence, resulting in the verdict either being vacated or modified if the factual support for it is insufficient. This entire design of the court system is to eliminate bias in verdicts and to eliminate outcomes unsupported by evidence. At least within legal scholarship, the efficacy of these procedures is a matter of frequent study, and there is no data that the system is failing.

In summary, there is no clear data that current societal attitudes are shifting, and there is no data that current attitudes result in verdicts that are unsupported by the evidence.[10]

External System Actors

The second step of the social inflation hypothesis is a broad assertion about external actors. Social inflation literature identifies four categories of external actors that, per the hypothesis, are undermining the fair resolution of insurance claims either intentionally or unintentionally. The four categories of these external actors are lawyers, TPLFs, contractors, and government regulators/legislators. The social inflation hypothesis asserts that these actors (predominantly but not exclusively plaintiff's attorneys and TPLFs) are unjustifiably making it harder, more expensive, and less likely to reach reasonable, evidence-based and just outcomes in claims disputes. As APCIA et al. (2022) phrases the argument, "Insurers are facing increasing legal system abuse across the country as litigious environments combine with rampant lawsuit inflation to create a windfall for bad actors looking to capitalize on insurance claims."

As with other aspects of the social inflation hypothesis, the assertion about external actors has some intuitive appeal and is supported by some data. But also, as with other aspects of the social inflation hypothesis, there are reasons to remain unsure that the assertion is correct.

For example, consider the starting assumption of this argument—that the involvement of external actors typically decreases the likelihood of what would otherwise have been a just outcome and thus increases the likelihood of an unjust one. While that assumption may be true, the studies done so far actually suggest the opposite—that the involvement of external actors typically decreases the likelihood of what would otherwise have been an unjust outcome and increases the likelihood of a just one. That said, the involvement of external actors certainly makes reaching resolution harder, more expensive, and more time consuming. For example, there is data that shows:

- while most liability claims reach amicable resolution without attorney involvement (Daly & Mandel, 2020), attorney involvement raises the average loss for claims and the average cost for resolving claims (Jones & Borba, 2022; Daly & Mandel, 2020).
- A primary precursor to litigation is attorney representation at the claim level (Sedgwick, 2022).

10. It merits brief mention, of course, that an implicit assumption of the entire discussion about changing societal attitudes is that the business and insurers are moral actors that are not improperly harmful to consumers, and so verdicts entered based on an anti-business or anti-insurer sentiment are wrong. That assumption is one that not everyone would necessarily accept.

- While litigation rates are infinitesimal and declining (Daly & Mandel, 2020), litigated claims can cost multiple amounts more than non-litigated claims (FLOIR, 2021a; Daly & Mandel, 2020).
- Also, the total dollars expended in the tort system (both costs and awards) is perhaps as much as $429 billion (U.S. Chamber, 2018; accord, Daly and Mandel, 2020).

However, studies suggest that these time and money costs are necessary to avoid unfair results. Antill and Grenadier (2022) looked directly at the issue. They created a model to test the competing arguments that "litigation financing encourages frivolous lawsuits that waste the time and resources of the defendant" and "litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets." They describe their findings:

"First, we show that litigation financing deters defendants from engaging in wasteful bullying strategies. Because of this effect, litigation financing can actually improve the joint surplus of plaintiffs and defendants. Second, we show that litigation financing does not lead to the filing of risky frivolous lawsuits. In fact, litigation financing encourages lawsuits that are less risky than lawsuits that are filed without financing." While the work focused on TPLFs, Antill confirms that these findings should be equally applicable to plaintiff's attorneys.[11]

In other words, external actors are necessary to level an otherwise unfairly insurer-friendly playing field. And while Antill's and Grenadier's work is the only study so far that directly analyzes the issue, it is not the only study that informs on the issue. For example, Murray et al. (2020) studied the impact of expert witness involvement on mean verdicts. This data describes that if neither side has an expert or if both sides have an expert, then outcomes are roughly the same as when only the plaintiffs call an expert, but if only the defense has experts, the average dollar amount of verdicts drops. These findings are consistent with the hypothesis that the defendant has a built-in advantage until lawyers and their resources are deployed for the plaintiff.

Future studies may reach contrary results, but the findings so far are consistent with what basic economics might predict. External actors are putting their own money at risk when they invest in a claim. Basic economics would suggest that they do so only because in their experience, there is a return on the investment with sufficient frequency, meaning that a judge concludes that the evidence supports a jury's conclusion that without litigation, the insurer was not willing to fairly adjust the claim.

In summary, existing data suggests external actors more often contribute to the solution, but the data is not conclusive. In the end, it may not be correct, but if the goal is to maximize the frequency of just outcomes, there is not yet adequate data to conclude this goal is advanced by legal system reforms broadly curbing the involvement of external actors.

With that conclusion in mind, let's now briefly turn to arguments about the specific categories of external actors.

11. July 13, 2022, email from Antill to author.

Lawyers Assertions about plaintiff's lawyers take two rhetorical forms: "Look at the level of attorney advertising," and "Look at the tactics they use in court." The initial evidence on each is appealing. For example, there is a lot of attorney advertising, and there seems to be more every day. But does this initial evidence connect these behaviors to increasingly unfair outcomes? There is no evidence of that yet.

Advertising. The prescriptive social inflation literature frequently identifies increasing attorney advertising as one of the drivers of social inflation (e.g., APCIA et al., 2022; Theodorou, 2021; Pain, 2020; IRC, 2020). There is data showing an increasing prevalence of attorney advertising (ATRA, 2022; Fan et al., 2021), and there is theoretical work suggesting attorney advertising could change verdict outcomes (Hawkins & Knake, 2019; ATRA, 2022).[12] But there is no data that the resultant changes in outcomes are making matters worse rather than better.

The necessity of such data before curbing attorney advertising is especially important because the case certainly could be made that attorney advertising results in a greater frequency of just (meaning evidence-supported) claims outcomes. The reasoning is straightforward: attorneys would stop advertising if that advertising did not result in lucrative judgments or settlements; insurers would not pay settlements if they were not facing a substantial risk of an even more expensive judgment; and while a jury might reach a verdict unsupported by evidence, that verdict does not become a judgment and survive appeal without evidence. So, the fact that attorneys not only continue to advertise but also may be advertising more is consistent with the conclusion that clients obtained by advertising predominantly are clients with meritorious claims, and without advertising, those clients would be under-compensated or uncompensated by the insurer.

Reptile Theory and Other Plaintiff Lawyer Trial Strategies. The prescriptive social inflation literature also identifies the trial tactics of plaintiff's attorneys as a factor contributing to frivolous outcomes, with disproportionate focus to the tactic colorfully labelled as "Reptile Theory" (e.g., APCIA, 2022; Sedgwick, 2022; Pain, 2020; Fan et al., 2021; III, 2022a; Cianflone, 2022; Theodorou, 2021; Campbell et al., 2016; Mackeprang & Karol, 2021).

APCIA et al. (2022) describes Reptile Theory as, "… a trial attorney tactic that aims arguments at a more primitive portion of the brain that is conditioned to seek safety and survival. The plaintiff's bar has increasingly used documented techniques to appeal to jurors' emotions and play on their sympathies. At its core, the reptile theory is a psychological ploy designed to trigger a 'fight-or-flight' reaction, painting the defendant as hazardous, dangerous, or a menace to society." In addition to reptile theory, APCIA et al. (2022) identifies two other attorney tactics that it asserts lead to outcomes unsupported by the evidence: "…jury anchoring, where the plaintiff's attorney directly asks for an outsized damage award, often exaggerated when compared to the actual evidence and relying on animus toward defendants, which serves as a baseline from which the jury will be reluctant to retreat;" and "phantom damages," where the "submission into evidence of billed amounts alone (instead of what was actually paid or could have been paid) as well as related medical financing, liens, and letters of

12. There also is theoretical work suggesting counter-advertising works (King & Tippett, 2019).

protection are all vehicles being used to build up paper damages that then form the basis for inflated settlements or judgments."

Again, it is possible the litigation procedures that are meant to prevent entry of judgment of verdicts unsupported by sufficient evidence are failing, but there is a dearth of clear data supporting the point (Abraham, 2022[13]). And in the few reported instances of a trial judge considering the matter, the judge has rejected the assertion that the procedures failed in their trial.[14]

Conclusions About Attorneys. Murray et al. (2020), on behalf of the American Transportation Research Institute (ATRI), comprehensively studied the role of attorneys—both plaintiff and defense—as an explanation for increasing verdict frequency and size. They found that to the extent that attorneys were part of the explanation, as often as not the issue was on the defense side, where the combination of client dictated cost minimization and the business model of defense attorneys (paid by the hour) were the predominant "attorney" factors in outcomes. Pain (2020) comes to a similar conclusion in his paper for the Geneva Association. Neither ATRI nor the Geneva Association are positionally inclined as cheerleaders for the plaintiff's bar. Plaintiff's attorneys may be a big part of the problem, but the evidence supporting this conclusion so far is lacking.

TPLFs Another focus of the prescriptive social inflation literature is on litigation financers (sometimes called either "TPLFs" or "TPLF") (e.g., APCIA et al., 2022; Pain, 2020; Fan et al., 2021; III, 2022b; Cianflone, 2022; Theodorou, 2021; IRC, 2020; Murray et al., 2020). As Fan et al. (2021) assert: "We are concerned that TPLF is an expensive and blunt tool to enable legal disputes, with potentially harmful economic and ethical consequences. …We see TPLF as a contributing factor to the trend of social inflation in the U.S. …We find TPLF contributes to social inflation by incentivizing litigants to initiate and prolong lawsuits." As with plaintiff's attorneys, the intuitive appeal of this argument may seem strong, but the data supporting the conclusion is less clear.

TPLFs certainly are an increasingly frequent player in claims disputes, and there is some evidence that when they are present, they change the cost and course of cases. Both Fan et al. (2021) and Sedgwick (2022) report a material rise in the involvement of TPLFs in litigation. Abrams and Chen (2013) find litigation funders create greater backlog in courts, fewer finalizations, and lower clearance rates (although they note these may be transitory effects of the entry of litigation funders that do not persist). Fan et al. (2021) find the increased presence of TPLFs correlates to the frequency of large jury verdicts, which in turn puts financial stress on insurers. Oh (2022) similarly finds "third-party funding corresponds to an increase in litigation and court caseloads."

On the other hand, Kidd (2016) finds TPLFs make "very little difference to whether a case is brought." And a recent empirical study utilizing an extensive database main-

13. As to reptile theory in particular, the underlying neuroscience is "open to question;" it "is impossible to say exactly how much the reptile figures in depositions, motion practice, and trial court proceedings;" and "there is no evidence…, systematic or otherwise, that the reptile increases plaintiffs' success at any stage of a tort case" (but neither "is there any evidence…that it does not").

14. See e.g., *Turner v. Salem*, Civil Action No. 3:14-CV-289-DCK, 2016 WL 4083225 (W.D. N.C. July 29, 2016); *Aidini v. Costco Wholesale Corporation*, Case No. 2:15-CV-00505-APG-GWF, 2017 WL 10775082 (D. Nev. April 12, 2017) (citing additional cases); *Gannon v. Menard*, Inc., Case No. 1:18-CV-00251-JMS-MJD, 2019 WL 7584294 (S.D. Ind. August 26, 2019) (citing additional cases).

tained by the U.S. Federal Judicial Center found that TPLFs expand access to justice and the plaintiff's reward is not directly affected (Lera et al., 2022).[15]

All these findings are interesting, but none of them speak directly to the social inflation hypothesis, which is that TPLFs contribute to the frequency and size of *frivolous* outcomes. And in that regard, the data so far is not supportive. Rather, as described earlier in this paper, through a model of the settlement negotiation between a plaintiff and a defendant as a continuous-time stochastic bargaining game, Antill and Grenadier (2022) found that litigation financing does not lead to the filing of risky frivolous lawsuits but does encourage lawsuits that are less risky than lawsuits that are filed without financing, and litigation financing does deter defendants from engaging in wasteful bullying strategies.

So, in the end, the assertions about TPLFs seem to fare similarly to the assertions about plaintiff's attorneys. The assertions may be right, but so far, the confirming data either is absent or undermined by the work done so far.

Contractors and Similarly Situated Non-Attorney Actors The third category of external actors identified as part of the social inflation problem are third parties, such as contractors, who are asserted to be sources of persistent fraud (APCIA et al., 2022). Everyone involved in insurance in any way seems to agree that when it comes to insurance, there is a lot of fraud. The challenge in determining what to do about fraud, however, turns out to be that fraud is a particularly difficult problem to get a clear, granular understanding about. Or put another way, it is unclear precisely who is doing it, how they are doing it, and how much it is costing, which makes suspicion about rising fraud a perilous thing for a regulator or legislator to act upon.

The challenge of getting a firm grasp on fraud is well-illustrated by the APCIA's attempt to put a number on the cost. Citing FBI data, APCIA et al. (2022) quantify the impact "intentional and criminal acts perpetrated against an insurance company" as $40 billion in aggregate and $400-$700 on average per household. But the cited FBI data describes premium diversion by insurance agents, fee churning by insurer intermediaries through reinsurance agreements, asset diversion when insurance companies are acquired by other companies, and fraudulent sale of workers comp insurance (FBI, 2010). In other words, the FBI is not quantifying fraud against insurers; rather, the FBI is quantifying fraud by insurers. And further, the FBI gives no insight into how it calculated its numbers.

What conclusions should one draw about what transparency might have shown about the reliability of the FBI work? Consider the recent thoughtful and careful work of CAIF. In 2022, CAIF, in partnership with the International Association of Special Investigation Units (insurance fraud investigators), APCIA, the National Insurance Crime Bureau, and III, published a lengthy study conducted with the Colorado State University Global White Collar Crime Task Force 2022. The study estimates the cost of insurance fraud annually in the U.S., across all lines of business, is $308.6 billion, and of this amount, property and casualty insurance fraud (which is the focus of the social inflation literature) is $45 billion.

15. The National Association of Mutual Insurance Companies (2011) derides the notion, characterizing it as one that "has taken hold among many legal elites…."

The study is commendably transparent. Here is what was done: In "approximately 1995," CAIF estimated the cost of insurance fraud in the U.S. as being $80 billion every year. The $80-billion figure was not from a published report but rather was a CAIF figure presented at a press conference.[16] There is no archival documentation within CAIF of the press release, what fraud was measured, or how it was measured. Yet for decades, it was the most cited figure on insurance fraud.

In 2022, CAIF used the $80-billion figure as "a basic first step" to estimate the cost of fraud more rigorously, starting with converting the baseline of $80 billion from 1995 into "present-day" dollars, which was $145 billion. The researchers next considered several methodologies to generate their own data on fraud but rejected doing so because each had its own flaws. Therefore, the researchers used existing data from other sources. For P&C, the researchers concluded one of the most credible fraud estimates was the above-referenced 2010 FBI calculation of $40 billion. The second most credible and reliable data source was a III report from 1980, which estimated fraud accounted for 10% of all P&C claims[17] based on interviews of claims adjusters or, as the researchers noted, equated to $38 billion if applied to 2016 LAE estimates. The primary data source the researchers relied upon was Insurance Research Council (IRC) data (including an IRC study of casualty fraud claims payments for automobile insurance bodily injury in 2012), leading to estimates that fraud in 2012 added between $5.6 billion and $7.7 billion to paid claims. The researchers decided to apply the III 10% figure to reported annual amounts of total LAE in P&C, which considered in comparison to "the costs … from FBI ($40 billion), III ($38 billion), and the IRC (between $5.6 and $7.7 billion in casualty fraud)," led them to find "a current estimate of $45 billion appears credible and reliable."

CAIF's work reveals just how hard it is to understand insurance fraud. The researchers derive confidence in their conclusions by pointing to similar figures from III data and FBI data, but the III data is estimating fraud on insurers, while the FBI data is estimating fraud by insurers. The researchers ultimately rely upon and apply III estimates despite conceding uncertainty about how the III itself derived its figures. The entire foundation of the CAIF study, in some sense, was the original "approximately 1995" press release, of which virtually nothing is known. And while the driving force for the new study was revisiting dated research, the new research itself grabs data spread over multiple decades, thus introducing potentially a host of unaccounted for variables.

None of which is to say that the CAIF work isn't the best possible work that has been done thus far, and perhaps the best that can be done. Rather, the point is that if this is the best that can be done, or the greatest clarity that can be had, then there is peril in concluding there now is sufficient data to reach conclusions about targeted legislative or regulatory reform of legal systems to address fraud (as the CAIF report itself also seems to conclude).

Government Actors Finally, when the prescriptive social inflation literature discusses external actors, some of that discussion is (somewhat obliquely) about regulators and

16. Email to author Nov. 4. 2022.

17. Although the researchers note that III "did not specify how they derived this figure," the researchers believed they could reconstruct it.

legislators themselves. The assertion is that some changes in the law are widening the opportunity for frivolous verdicts and judgments. The literature primarily points to two examples—rollbacks of tort reforms and extensions of statutes of limitations. For example, IRC (2020) posits that because the supreme courts of at least eight states have overturned tort reforms, additional incentives are created for more lawsuits to be filed and for claimants to seek higher settlements. And other prescriptive social inflation literature points at the extension of statutes of limitations (primarily for bringing claims of sexual abuse of minors, although sometimes for COVID-related claims), arguing that this could stress insurer financial health (e.g., IRC, 2020; Bhagavatula et al., 2019). Both assertions briefly are addressed below. The conclusion reached is that there is not yet data connecting either rollbacks of tort reforms or extensions of statutes of limitation to rising insurance premiums.

The referenced "tort reforms" are damages caps. The necessary predicate of the argument is that damages caps work as a mechanism to control insurance premiums, but the literature does not give clear support for that conclusion.

For example, the IRC cites the work of Nelson et al. (2007) on medical malpractice damages caps. But Nelson et al. "could find only one study that looked at the broader issue of whether consumers benefit from lower health insurance premiums as a result of damages caps, and that study found no impact." Similarly, Paik et al. (2013a & 2013b) found that "damage caps may be a good idea or a bad idea—but, increasingly, they are a small idea." And in the most comprehensive analysis of the issues, Black et al. (2021) found that "premium spikes are real but can be caused by factors internal to the litigation system (e.g., number of claims, payouts per claim, or defense costs)," paid claims and premiums do not correlate to damages caps, and while damages caps don't fix the problems with costs and compensation, they do sometimes make them worse.

These studies could, of course, be wrong. That said, insurers presumably have data on whether their incurred losses have risen or fallen in a pattern that correlates to the timing of either the adoption of tort reforms or the rollback of tort reforms (and insurers have not publicly reported that data yet), which leaves the current state of matters to be that there is insufficient data supporting reinstating damages caps or instituting further damages caps. What data there is seems to support the opposite conclusion.

Two final observations about tort reform merit mention. First, damages caps limit recovery in all cases, not just in frivolous ones, which means damages caps also limit recovery in meritorious lawsuits but, problematically, only in the meritorious lawsuits where the incurred losses were the worst. Second, the rollbacks of damages caps in states where that has occurred did not happen because of public policy disagreements, but instead they happened because in those states, damages caps have been found unconstitutional. In other words, a legislator/regulator in those states has no constitutional authority to reinstate damages caps.

There is far less to be said about statutes of limitation extensions. Like damages caps, insurers presumably have data on whether their incurred losses have risen or fallen in a pattern that correlates to the timing of statutes of limitations extensions, but that data is not public facing. In the absence of such data, there simply is nothing for a regulator or legislator to act upon.

Outcomes

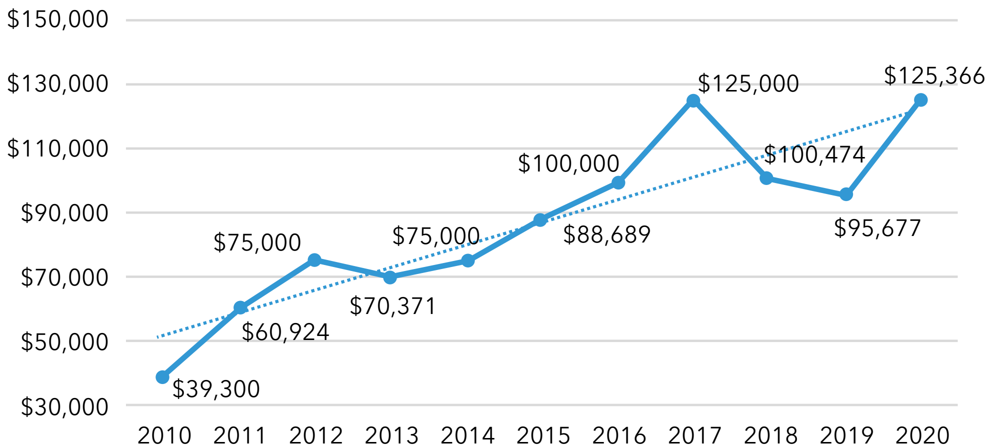
The final step of the social inflation hypothesis is outcomes. The literature often takes a deep dive into verdict and judgment data, and with some frequency, the data is pointed to as in and of itself being evidence of a social inflation problem meriting immediate legal system reform.

There are, of course, subsets of data on verdicts and judgments that can be eye-popping. The challenge for a regulator or legislator, however, is that the closer one looks, the less persuasive that data becomes.

This concern is illustrated by reviewing how the literature characterizes and relies upon four categories of outcomes data: personal injury cases, trucking accident cases, so-called nuclear verdicts, and the current insurance crisis in Florida.

Personal Injury Cases The prescriptive social inflation literature frequently relies on verdict and judgment data from personal injury cases. APCIA's recent use of such data provides a dramatic example of how that can be problematic. APCIA et al. (2022) recently presented two graphs[18] to show that median personal injury verdicts are rising dramatically faster than general inflation:

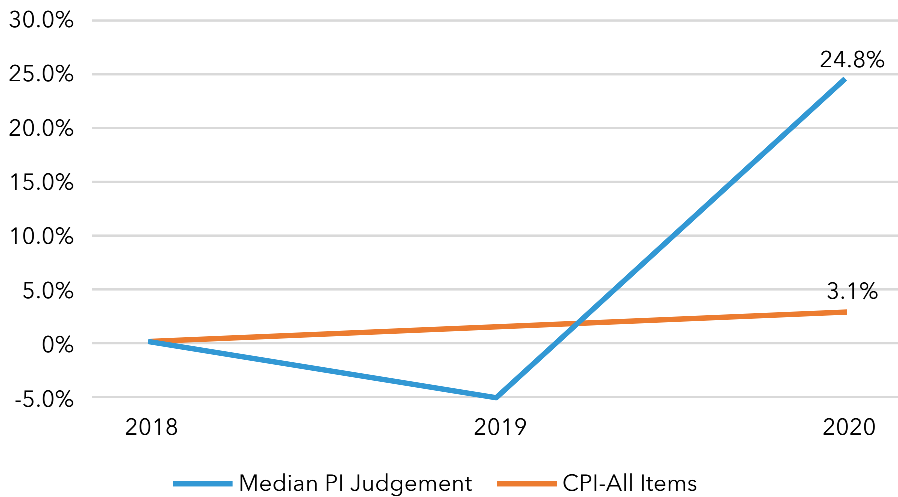
Figure 1: Median Personal Injury Judgement



Source: Current Award Trends in Personal Injury and Insurance Information Institute

18. Reproduced with permission of authors.

Figure 2: CPI Inflation vs. Median Personal Injusry Judgements



Source: APCIA using Bureau of Labor Statistics (CPI - U.S. city average, all urban consumers, not seasonally adjusted); Current Award Trends in Personal Injury via Insurance Information Institute (median personal injury judgement), 2020 most current.

However, upon closer inspection, the graphs use different years, a different number of years, and in the second graph, one line is a linear regression while the other isn't. If the graphs are redrawn to use the same years, the same number of years, and if both lines are presented as a linear regression, then the graphs look like this:

Figure 3: Median Personal Injusry Judgements

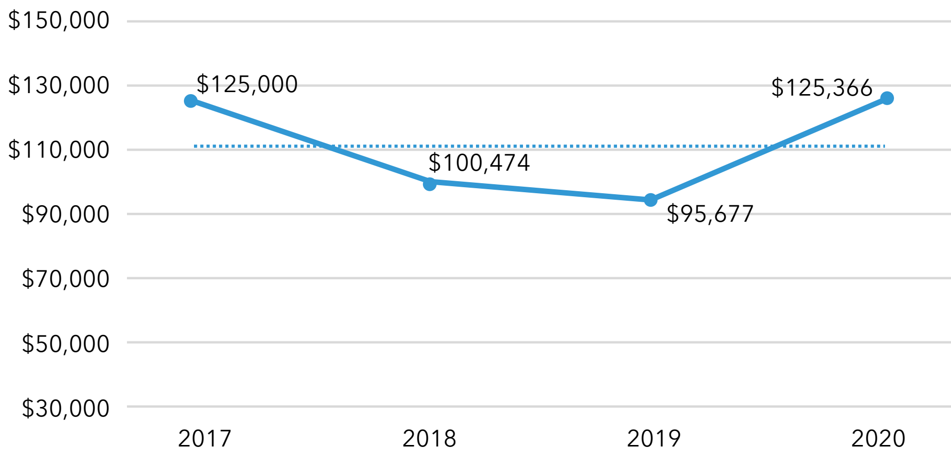
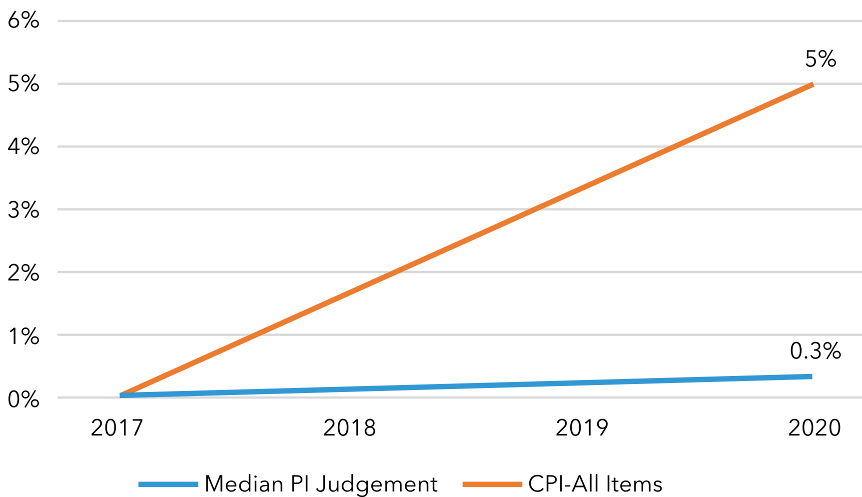


Figure 4: CPI Inflation vs. Median Personal Injusry Judgements



These redrawn graphs do not make the point that APCIA is asserting.[19] The point here is not to pick on APCIA, but rather to show that deep focus always is merited when deciding whether to act on data, and even sincerely presented data can be misleading.

Of course, the broader question remains: what does the personal injury data show? And the answer so far is that it does not clearly advance the social inflation hypothesis. Without belaboring the point, consider one more example: Advisen used loss data in instances of "single fatalities" (undefined) to conclude there is a social inflation problem (Gainsburg, 2020). But Advisen describes its casualty loss data as neither verdicts nor judgments nor covered losses nor even losses, but rather as "casualty-related events that have or could result in significant financial judgments or loss include[ing] litigated cases that are most likely to have been covered by a casualty policy" and offers no explanation for its standard for "most likely to have been covered."

There is a lot of data on personal injury cases. The data should be a fertile source for evaluating the social inflation argument, but it does not appear that work has been adequately done yet. Or if it has been done, it has been inadequate to establish the social inflation hypothesis.

Trucking Accident Cases Similarly illustrative of the problem of how the prescriptive social inflation literature uses outcomes data is the way advocates rely upon ATRI's study of trucking accident cases. ATRI did fulsome, careful empirical and survey work on verdicts in trucking cases—both quantitative research through a database of 600 trucking-related jury awards and qualitative research based on "expert input" from defense and plaintiff attorneys, insurance industry experts, motor carrier safety personnel, and industry economists.

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19. Because of the difference between 'verdicts' and 'judgments,' there is reason to question whether even the graphs as presented would establish social inflation.

ATRI found that "the size of verdicts have increased over time, independent of other factors," including "approximately a $2.0 million increase from 2005 to 2019 in large verdicts." ATRI identified among the major causal factors "the type of injury, number and type of parties involved, and even vehicle types have a statistically significant impact on verdicts;" "pre-crash actions by motor carriers (such as adherence to safety protocols and driver background checks);" and defense litigation strategies (case evaluation, settlement planning, and pre-trial preparation). ATRI further put on equal footing (as a causal factor of outcomes) the business model and approaches of defense counsel and the business model and approaches of plaintiff's counsel.

In other words, ATRI came to nuanced conclusions that do not isolate a plaintiff's lawyers or any other particular exogenous factor as a predominant factor explaining verdict size and frequency, much less increased frivolous verdict size and frequency.[20] Yet ATRI's work often is cited by the prescriptive social inflation literature as proving its hypothesis that there is a frivolous litigation crisis (e.g., APCIA et al. 2022).

Nuclear Verdicts Another example of possible problems with the use of outcomes data comes from the prescriptive social inflation literature's discussion of so-called "nuclear verdicts." Nuclear verdicts is a term that colorfully describes very large verdicts. The prescriptive social inflation literature frequently points to data on nuclear verdicts as some of the best evidence of a social inflation problem meriting legal system reform. The bare data is less definitive.

Here is the data on nuclear verdicts: Murray et al. (2020) find that "nuclear verdicts are not common." Bhagavatula et al. (2019) find that "[t]he frequency of large awards is higher than ever before." Yet, Daly and Mandel (2020) find that "the total number [of +$10 million] verdicts has decreased." Using the definition of nuclear verdicts as verdicts greater than $10 million, Oh (2022) finds "the total dollar value of nuclear awards has increased threefold from $300 million in 2011 to nearly $1 billion in 2019." Taylor (2021) defines a nuclear verdict as one that "so far exceeds a reasonable damages amount that only emotional or punitive juror motives can adequately explain it," but then provides no methodology to identify such verdicts and no quantification of the frequency of such verdicts. Oh (2022) concludes: "Social inflation is not driven mainly by an increased sensitivity of the award amount to salient case characteristics, increasingly risky accident profiles, or salient macroeconomic trends. Rather, the results are consistent with the existence of a latent component that is orthogonal to the case profiles, such as the jury sentiment towards corporate defendants." Oh (2022) makes no attempt to disaggregate jury verdicts unsupported by sufficient evidence, nor does he assert the jury sentiment is wrong. Nor does any other researcher. Nor does any researcher take the analytical step of isolating what happened post-verdict, meaning what portion of the verdict, if any, survived to a final, paid judgment. Pain (2020) found "[t]here is at best only a weak correlation between those jurisdictions where the very highest jury awards have occurred and those states with a relatively poor reputation for fair and reasonable liability systems."

20. ATRI's guarded findings are not unanimously accepted. Gottlieb and Doroshow (2020) find incurred losses in truck cases are not correlating to pressure on the adequacy of premiums or profits.

So why is reliance on the data on nuclear verdicts possibly problematic? First, when considered as a whole, the data on nuclear verdicts is unclear. Second, large verdicts are not the same thing as large judgments. And finally, before adopting the advocated-for legal system reforms based on the data about nuclear verdicts, a regulator or legislator would need confidence that an alternative explanation for the increased frequency of large verdicts (nuclear verdicts are increasingly occurring because there is an increasing frequency of defendant harmful behavior coming to light in court) is wrong.

Florida No state has had more stressed insurance markets in recent years than Florida. No matter how incomplete the extant data is on social inflation, any argument that there is not adequate evidence of rampant legal system abuse must answer the question, "What about Florida?" As Read (1933) long ago described (in a different context) in his paper, "Mathematical Fallacies," when "an apparently correct chain of operations leads to an absurd result" one must "admit the conclusion to be false; the problem is to find the flaw in the reasoning." One cannot reject the prescriptive social inflation argument without accounting for Florida, which is why it is so important to give careful attention to understanding what Florida and its experience stands for.

The analysis starts with the obvious: Florida's reported frequency of opened claims and filed lawsuits is wildly at odds with the rest of the U.S. (FLOIR, 2022).[21]

Table 1

Year	Percent of Nationwide Homeowners' Claims Opened in Florida	Percent of Nationwide Homeowners' Suits Opened in Florida
2016	7.75%	64.43%
2017	16.46%	68.07%
2018	11.85%	79.91%
2019	8.16%	76.45%
2020	8.81%	79.16%
2021*	7.03%	76.32%

*Data as of May 20, 2022. 2021 MCAS data not considered finalized until July 2022.

The question is: why? FLOIR concedes that it "does not have a readily available explanation for Florida's outlier status other than to simply state that Florida is experiencing far more claims-related litigation than the 47 other reporting states." (FLOIR 2021a). However, FLOIR identifies the "cost drivers affecting Florida's insurance rates" as catastrophe claims, adverse loss reserve development, higher reinsurance costs and "an increase in claims with costly litigation, even with the passage of H.B. 7065 to curtail litigation abuse." FLOIR reports the fundamental problem has been the inability of actuaries to accurately predict and reserve against "catastrophe losses, litigation, and social inflation." FLOIR concludes: The insurance industry is inherently uncertain; for this reason, it is not expected that the established loss reserve will always exactly equal the ultimate cost of claims. However, it is also not expected that the ultimate cost

21. Reproduced with permission of the author.

of claims will be double or triple the estimated loss reserve. This uncertainty impacts an insurer's ability to set adequate rates, secure reinsurance, and attract investors.

To put it simply, Florida's insurers are struggling. In 2004, national writers and their affiliates were 63% of the Florida market. By 2019, they were only 24% of the market (Nicholson et al., 2020). This problem, in the view of FLOIR, has two possible explanations—hurricanes and lawsuit abuse.[22]

There is not much FLOIR can do legislatively to address the ability of insurers to predict hurricanes. Which leaves only lawsuit abuse as an identified causal factor that Florida could address. Which is problematic if Mackeprang (2020) is correct that Florida is not unusually plaintiff oriented.

The staff report of the Fiscal Committee of the Florida Senate comes to a different conclusion in the 2022 bill analysis predicate to Florida's adoption of an insurance reform package (Staff of Fiscal Committee, 2022). And yet whether Mackenprang (2020) or the staff are right may not matter, as neither makes any attempt to disaggregate meritorious and frivolous litigation or claims, and so they do not try to compare litigation resulting from insurer misbehavior from litigation resulting from claimant's attorney misbehavior.

So, what should Florida do? One way to approach the question is to test if Florida's already adopted, targeted reforms have worked. Per APCIA et al. (2022), third-party lawsuit abuse reform measures were implemented in 2021, but challenges persisted with first-party lawsuit abuse and bad faith issues. Almost a year after the passage of the 2021 property insurance reform bill (Senate Bill 76), which was intended to cut back on assignment of benefits (AOB) related roof-damage claims abuse and lawsuits, litigated claims increased by 12% in March 2022. AOB cases increased from 34% of total new cases in February to 37% in March.

And while FLOIR identifies a particular 2017 decision by the Florida Supreme Court (liberalizing attorneys fee recovery for plaintiffs) as key part of the problem (see also, III, 2022c), FLOIR does not attempt to correlate its litigation experience with the date of that decision (although from FLOIR's data, it appears that Florida's outlier status preceded this decision). In other words, FLOIR seems to be in the unenviably political position of having to act on intuition, a strategy that thus far has not yielded positive results.

Can we say that Florida is at least right in its intuition that there is no other potential explanation of Florida's problems? Perhaps, but not necessarily. Because of Florida's unique geography and demography, Florida is idiosyncratically positioned for repetitive, exogenous, fat-tailed, insured losses. Fundamentally, every structure in the state could fairly be considered at high risk for large loss. Accurately pricing that risk could threaten the affordability of insuring a large pool of insureds at a price they could afford. Underpricing the risk creates incentive (bordering on a necessity) to capture revenue and profit somewhere else. An obvious candidate is claims settlements, but the more aggressively an insurer acts in claim settlement negotiations, the more likely

22. Interestingly, the Final Report of Florida State University (Nicholson et al., 2020), which was contracted by the state's insurer of last resort, Citizens, to do a risk exposure analysis, does identify lawsuit abuse and fraud as possible causes of Florida's problems, but they were not centerpieces either of the identified problems or the proposed reforms.

the claim does not settle, and litigation ensues,[23] which exacerbates the pressure on claims settlement and, in turn, increases the likelihood of litigation. It is a vicious cycle, and that vicious cycle is at least theoretically another explanation for Florida's crisis.

Florida is a State in crisis. It has put in place aggressive reforms. The hoped-for results have not yet been realized and may not be realized for many years, if ever. It may be the that even in the best-case scenario for Florida — that legal system reforms in Florida ultimately do stabilize insurance markets (itself an open question) — the cost of stabilization will be outweighed by the cost of leaving harmed Floridians with inadequate recompense.

Conclusion

For many, the social inflation argument has strong intuitive appeal, but the argument is difficult to confirm, and adopting the requested reforms certainly will harm some consumers. If it is unclear whether reforms will do more harm than good, then it is likely too soon to act.

23. As Oh et al. (2022) find, another candidate is recapturing revenue by raising premiums in states that an insurer insures and that do not have Florida's catastrophes experience, and insurers do this. But as Nicholson et al. (2020) found, today national writers are less than one-quarter of the Florida market, and the trend is worsening.

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