

Best's Insurance Law Podcast

[How Social Inflation is Changing Liability Insurance - Episode #185](#)

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John Czuba: Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

We're pleased to have with us today attorneys Alan Russo and Marie Castronuovo from the law firm [Russo & Gould](#) in New York.

Alan Russo has tried high exposure civil liability cases for more than 35 years. Since founding Russo & Gould in 1996, he has taken the firm from a civil litigation practice to a full service insurance defense law firm.

He vigorously defends insurance companies, corporations and individuals against personal injury lawsuits handling every aspect of litigation from inception through trial, and has strategically grown Russo & Gould to include a high level mediation practice. Alan is committed to providing high quality work for his clients and protecting them and their interests.

He currently handles complex, high exposure trials and regularly advises major insurance carriers and self-insured entities on matters relating to tort liability, trial practice, insurance coverage, and litigation strategy.

He's tried over 65 jury trial cases to verdict and has successfully argued many appeals. Alan has been selected to Super Lawyers as a top rated personal injury attorney from 2010 to 2021. He's also a regular lecturer for the National Business Institute on trial advocacy, and an instructor for the Corporation Counsel's Trial Advocacy Program at Fordham University Law School and regular contributor to Lawline.

Alan earned his JD from Villanova Law School and is admitted to practice in New York, New Jersey, Pennsylvania, and the federal courts in New York and New Jersey.

Marie Castronuovo handles New York Labor Law and premises liability cases through all phases of litigation including discovery, making and arguing discovery motions and motions for summary judgment, negotiating and mediating settlements, trial, and appellate proceedings.

She regularly defends insurance carriers and cleaning contractors in premises liability cases, and she has extensive experience in New York Labor Law, defending corporations and contractors in construction site accident claims.

Marie is a graduate of the National Institute of Trial Advocacy and is a member of the Claims and Litigation Management Alliance. Before joining Russo & Gould in 2007, she was in house counsel at Atlantic Mutual for 18 years. Previously, she held a limited license to practice law in a legal clinic in Washington State, where she served indigent and elderly clients and helped to lay the foundation for a mediation and arbitration center in Spokane.

A graduate of the Gonzaga University School of Law, Marie is admitted to practice in New York and the US District Courts for the Southern and Eastern Districts of New York. Outside of practicing law, Marie is a freelance writer and has been published in New Jersey newspapers, "ParentGuide" magazine, and in several online publications. She served as president of a women's writers' collective in New Jersey for two years, and regularly runs groups for writers.

Alan and Marie, thank you both so much for joining us today.

Alan Russo: Thank you, John.

Marie Castronuovo: Thank you. It's nice to be here.

John: Nice having you both. Today's podcast discussion is social inflation and its impact on liability insurers.

Marie, we're going to start our questioning with you today. Tell our audience what is social inflation.

Marie: Broadly defined, social inflation is an increase in a defendant and insurers' claim costs over and above general economic inflation. A more narrow definition and one that more thoroughly represents the true meaning of what social inflation is, is that it's the rise of settlement values and jury verdicts and the broadening of a defendant and an insurer's liability exposure as a result of factors outside the actual litigation.

These factors can include an aggressive plaintiffs' bar that shares techniques and information with each other. They use reptile tactics at trial, they use social media and technology and ad campaigns that portrait defendant companies and insurers as the bad guys.

Then there's litigation funding, which is unregulated across the country, and recently there have been legislative reforms that have revived old claims and extended the statutes of limitations in some cases.

Social inflation is not a new phenomenon, John, though. It's been around probably since the 1980s, where it negatively impacted corporations and insurers defending asbestos class actions, through the 1990s and 2000s. We've seen it right up until today with respect to medical malpractice cases and mass tort litigation against large pharma.

Most recently, though, we see the impact that social inflation is having on the trucking industry. There've been huge jury verdicts in these cases, nuclear verdicts, if you will, John. These are defined as verdicts in excess of \$10 million dollars.

My research into this issue revealed that the American Transportation Research Institute compared data for 600 cases between 2006 and 2019. They found that from 2006 through 2011 there were 26 cases which resulted in awards over one million dollars. In the five year period, from 2014 through 2019, there were nearly 300 cases where the verdicts exceeded one million dollars. Since then it's only gotten worse. In early 2020, a motorcycle rider injured in an accident was awarded \$441 million by a Florida jury.

Both the defense bar and the insurers need to study this issue on a greater level and determine how to combat it. They've got to start by understanding how the plaintiff's bar uses social inflation to influence juries and increase these awards.

John: Al, let's turn it over to you now. How is social inflation used by the plaintiff's bar to increase verdicts and settlements?

Alan: From using human empathy and emotion to motivating people to award their clients large sums of money.

They do this through relentless advertising, planting stories in the news, and generally desensitizing the general public to the concept of awarding extraordinarily high awards at jury trials. It is most evident in the storytelling that goes on in litigation, when you finally get to the trial of a case. If the defendant is not prepared for it, the plaintiff's bar will emphasize all the themes that they're hearing every day on television.

Bad corporations, deep pocket insurance companies, unsympathetic tortfeasors, all in an effort to drive emotional jurors to hand out large jury awards, and it has been very successful. I have found, over the last five years, an extraordinary increase in not only the verdicts that we've seen, but also the verdicts driving the size of settlements as a result of these kind of emotional techniques and advertising campaigns by plaintiffs' attorneys.

It used to be years back, when the McDonald's coffee case was a big story, that the plaintiff's attorneys during voir dire would constantly bring up the McDonald's case in an effort to try to prevent the jury from thinking that all plaintiff's cases were overblown and exaggerated, by diffusing the issue during jury selection.

The roles have completely reversed. In fact, I find, when I pick a jury now on cases, the most important thing I need to do is expose what's going on to the jurors and take it away from the plaintiff's attorneys.

When you're exposed constantly to advertising with lawyers intoning..., "you may be entitled to money damages, and that our law firm has got millions and millions of dollars to deserving plaintiffs"...people begin to hear those numbers, and they assume everyone gets that kind of money.

Probably the greatest example of how advertising is driving this are the commercials in the New York metro area by Cellino & Barnes. I call it the "Cellino & Barnes Effect". They have all these professional actors, who would say, "I was offered \$20,000 by the insurance company. I went to Cellino & Barnes, and they got me a hundred times what the insurance company offered me. I got two million dollars for my motorcycle accident."

Then you look at the person, he looks like he's in great shape. There's no issues with him, no physical disability, and the message to people is that everybody gets lots of money. You don't really need to be hurt to get lots of money. That's the subliminal message.

The discussion of insurance companies, it used to be verboten to discuss insurance as having any effect or anything to do with liability lawsuits when you get to the courtroom. But on television, you could talk about insurance companies, and how much money they have, and how much money they're giving out.

Jurors now are completely desensitized. They don't think anything of giving someone two to five million dollars, because they're constantly bombarded with those kinds of numbers.

John: Marie, has this had an impact in increasing damage awards in liability exposure?

Marie: It has, John, yes, very much so. As Alan says, it has increased jury awards across the country. Not only that, it's increased plaintiffs' expectations, so it's made it more difficult to even settle a case before you get to a trial. The plaintiffs are thinking, "Well, you know, I'm going to get more money from a jury," because the plaintiff's attorney has sold it to them that way. There's a caveat in there for the plaintiffs' attorneys, too.

I've had plenty of plaintiffs' attorneys who eventually do try to settle the cases, when they realize they don't have a case worth the value that they're trying to sell it for, but now they've got a client who believes what they told them. They've got to be careful with the client they sell this bad corporate idea to, this idea that their case is valued so high, because some clients, at the point where you've got to settle, they're not controllable.

Then you end up trying a case with questionable liability, when you might have been able to settle it for a good value, and you can't settle it because you've oversold the idea to your client. There are carriers that will go only so far, and then they'll dig in their heels and try the case, although some carriers are more risk tolerant than others, and they will try the case.

A lot of plaintiffs' attorneys bargain on the fact that carriers like to control the numbers and that they will eventually settle, but more and more that's not the case with these kinds of large settlement demands.

Social inflation has also increased the risk exposure to insurers, and that's driving up the cost of the insurance premiums. Premiums have to make sense in light of the risk they're covering. If a nuclear verdict is a concern in the industry that's being insured, then the premium is going to have to reflect that.

Social inflation and nuclear verdicts and settlements of that ilk have driven insurers from certain marketplaces also. If there's less insurance companies in the marketplace, then there's less competition, and that hurts those individuals who are going to buy insurance. The competition is less, there's less people to buy from, and then the premiums are going to be higher. We all know that competition is what keeps the numbers down.

In my mind, John, the most important thing is it's given birth to this whole idea of litigation funding. Litigation funding is a very big problem. It makes it very hard to resolve cases for any kind of reasonable number.

Many of these funding companies are backed by private equity and hedge funds, and these people, these investors see litigation as an investment, so they're willing to put their money in it for several years in the hopes that it's going to resolve for a bigger payout for them.

The money is given anonymously, there's no due diligence done with respect to whether or not the case has any value. It's easily obtainable with no questions asked. As long as there's insurance coverage available, these funds will loan money to plaintiffs at exorbitant rates.

A plaintiff who may be borrowing a small amount of money in two years' time, they're paying exorbitant rates back, and they're all shocked to hear that, "Wait, I only borrowed 10,000. How do I now owe you 100,000?"

At this point, there's no regulations across the country. There's no regulation of these funding companies.

Defendants and insurers being required to disclose the full amount of coverage available including the existence of any excess coverage, it puts them at a great disadvantage when a funding company, who knows the kitty is large, loans a sum of money to a plaintiff with a minor injury or a case with questionable liability.

Even if the amount that's loaned is not so large, it turns out large because of the exorbitant interest rates over that period of time over the life of that litigation. It just becomes unmanageable.

At the end of the day, it's got to be paid. I've already had that experience several times with different cases that we had settled, we thought we had settled, then the plaintiff's attorney goes back to his client and finds out that there's a funding loan.

The client thought that he only owed \$10,000 back, but now he owes \$80,000 back, and that's going to eat up too much of his settlement, and he doesn't want to settle. Those are just with minor value cases. With the larger value cases and people taking out money to pay for medical expenses and lost income, it really makes it very difficult.

Social inflation also has caused a sort of avalanche, a sort of normalization of the very large numbers that we're hearing with these nuclear verdicts. Jurors are seeing these numbers in the newspapers, in the Internet, professional athletes who make \$400 million to play a game for three years. They're getting very desensitized to these numbers. The numbers, they don't have value anymore, it's like Monopoly money.

When they end up having to decide a case, they end up giving larger numbers, because plaintiff's attorneys have told them this is what it's worth, this is the value, and look at my poor client, and look at these evil corporations. They feel like they're not hurting anybody, and they're helping this poor little guy that's been injured. With the number climbing that high, a lot of times judges will reduce the awards, but when you're starting at 80 million, [laughs] they can't reduce them down to what the case is really worth. You're still ending up in the stratosphere.

John: Alan, how can liability insurers and their attorneys combat all these tactics?

Alan: First of all, close cooperation from the outset of the case is critical. The partnership between the defense attorney and the insurance carrier has to start at the beginning.

There needs to be an identification early on in the litigation, if this is a potentially dangerous case? If it is, then it's incumbent upon the defense attorney and the insurance carrier to develop a strategy to combat it, which includes, first of all, very early on establishing a rapport and a relationship with your client.

If it's a big corporation, a big land owner, an insurance company, or some other large entity, you can rest assured that the plaintiff's attorney will try to play good guy versus bad guy. You've got to make your guy the good guy. Every company is not just in business to make money.

It also employs a lot of people and produces a lot of wealth and produces a good life for many people. You have to start early on in the litigation developing those themes with your client.

If your client employs a lot of people, identify who the best witnesses might be at depositions, and start preparing the defense to focus on "the people" at the corporation who may be held responsible. It's not the big corporation, it's these people who you're going to meet at the trial who are responsible for, let's say, maintaining the lobby of a building or shoveling the snow and ice. It's the little guy actually, who's being called into account. The big guy's going to survive.

It's he or she that you're blaming. Make your client sympathetic, and then also, identify, if it is a bad case and you got bad players on your side, look for an off ramp as soon as possible, because that's a dangerous case.

You will also want it where the plaintiff's credibility is a serious issue. You've got to go after it, and you've got to have the goods on them. If you can puncture the sympathetic persona of a plaintiff by exposing that he or she is a bit of a phony or fraud in certain respects, that really lets a lot of the air out of the balloon when the plaintiff's attorney sums up looking for a large award.

I can go on and on and on, this is a very interesting topic. Understanding that we have some time limitations here, I will just say that all the insurance companies need to--sometimes insurance companies don't like to hear it, but it pays to spend a little more money defending the cases, because if you come up with good ammunition against a plaintiff's and you spend the time working with your clients in establishing a consistent theme that makes your client sympathetic, it'll pay off in millions and millions of dollars in savings.

John: Marie, we've been through some crazy times. What effect, if any, will the pandemic have on social inflation and its impact on damage awards?

Marie: Look, John, people have lost their jobs, they've lost family members and friends to this virus, some of them, unfortunately, because of issues of being in nursing homes or hospitals, entertainment venues, grocery stores, you name it. People are open to blaming any corporate defendants they can for a loved one's catching this virus.

Then, there's a group of people who think that the vaccine is an attempt by the government and big pharma to control them, or that there's some kind of evil conspiracy underfoot. There's anger everywhere over this virus, and it's translating into a greater mistrust of corporate defendants and their insureds, which, by the way, is a great environment for the use of reptile tactics by the plaintiffs' bar.

We also are seeing claimants with cash flow problems, again, seeking out litigation funding to hold them over until they can settle or resolve their claims. Given the slowdown at the courthouses, these cases may not get to trial in quite a long time.

At the excessively high rates being charged by the funding companies, as I said earlier, these plaintiffs are going to be pursuing settlements at a well over the actual case value, given the injury sustained or the liability picture that may appear defensible to an insurer.

On the other hand, we've got unemployed claimants and claimants with medical expenses, who may be more inclined to quicker or earlier settlements. Then, there's the issue that's been caused and I expect that it will be even more of a problem in the near future by the extension of the statutes of limitations in New York, especially in New York.

I don't know if it's across the country, but in New York, the governor tolled the statute of limitations during the COVID, which ultimately adds several more months to the life of some new claims. Plaintiffs who had claims that were expiring during the COVID now have extra time to file their claims.

At this point, with the court system starting to get back to normal and some opening for business, and trials beginning in some jurisdictions, it's likely that the rush to the clerk's office to file those new claims is not far behind. In 2022 and 2023, we're likely to see a lot of cases brought by plaintiffs who have been through the COVID, maybe lost their jobs, maybe lost some family members, some friends. There's going to be a general sense of "someone owes me something."

There's going to be anger out there, not only among the plaintiffs, but among the jurors, too. They're going to blame big corporations; they're going to blame the defendants if the plaintiffs' bar has their way.

The scene is ripe for nuclear verdicts. Ultimately, this is going to lead to insurers having to address losses they didn't anticipate in the premiums charged.

John: Alan, Marie, it is a very interesting topic. Alan, you have the final word for today. What does the future hold for the liability, property, and casualty insurance industry in light of the impact?

Alan: In the short term, you're definitely going to see an increase in overall exposure on claims. It's going to be much more difficult to settle cases for the amounts reserved, because the plaintiffs' attorneys keep on pushing up the numbers. Getting nuclear verdicts, it emboldens them and forces the number up.

It's going to be more difficult to settle cases, and that's also going to result in higher costs. The cycle time of cases is going to increase, your insurance defense costs are going to increase. It may also have the effect of driving certain carriers out of certain venues, if this gets really bad in certain areas, which will shrink the number of liability insurers. That's the short term prognosis.

The longer term, it may reach such a crisis point that maybe a call to action will be taken seriously in the state legislatures around the country. It may also motivate insurance companies who years ago put a lot of money into lobbying and advertising to expose the abuse of the trial lawyers and revive public outcry to put caps on pain and suffering awards. This has all but disappeared, so it may revive that move.

I anticipate as well, counter-advertising. Something that insurance companies really haven't spent any money on that trying to attack using psychologists the same way the plaintiffs' bar uses psychologists to attack the problems of social inflation, by lowering the expectations of people across the board and lowering what's expected of jurors in the minds of jurors, when awarding money.

That's how I see things right now. It'll be difficult to tell. It's always impossible to predict the future, and we're in very unsettled times right now. It's going to take a while to see how this all shakes out.

John: Agreed. Alan and Marie, thank you so much for joining us today.

Marie: Thank you, John.

Alan: Thank you, John. It was a pleasure.



John: You've just listened to Alan Russo and Marie Castronuovo from the law firm of [Russo & Gould](#) in New York. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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