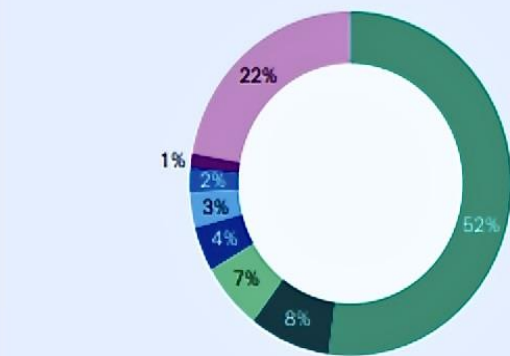


The US is the world's largest third-party litigation funding market, accounting for more than half (52%) of global activity.

TPLF investment globally rose 16% year-on-year to USD 17 billion in 2021.



US Australia UK Germany
France Japan Spain Row

Note: the sum of percentages may not add up to exactly 100% due to rounding.
Source: Research Nester, Swiss Re Institute

PART 3: THE FUEL GROWING SOCIAL INFLATION -THIRD PARTY LITIGATION FINANCING

ABSTRACT

Third Party Litigation Financing is driving artificial growth of capacity among the plaintiff law sectors. Such an expansion of capacity is draining funds from U.S. households and businesses, challenging affordable housing and transportation. Among the major components in the Social Inflation growth engine, TPLF will prove to be the most difficult to combat. Capturing, and transparently sharing, key data elements are essential first steps.

Guy Fraker

October 3, 2024

Third Party Litigation Funding

Please participate in this [anonymous survey](#) to support ongoing research in Social Inflation solutions. Responders will receive this series condensed into a single report; Analysis of the aggregated survey results, Invitation to schedule a 1 hour Zoom or Teams briefing/Q&A session

Introduction:

Installments 1 and 2 in this series focused on understanding Social Inflation in the context of what has become a fully evolved Litigation Economy. Secondly, the case was put forth the growth of the litigation economy hit an exponential growth curve following 2020. Finally, key vulnerabilities within the insurance model, as well as in P&C claim events were examined as points of exploitation. To be certain, each can be combatted. That said, the difficulty of fighting back will vary with each operational arm of the Social Inflation system. For review, Social inflation is a complete and diversified system operating on a short list of core components:

1. Third Party Litigation Funding: The emergence, and rapidly iterated, expansion of a new business models. TPLF is experiencing exponential growth by exploiting 2 laws that severely inhibit disclosure and discovery. Their target market segments now extend well beyond plaintiff attorneys to include litigation lead gen aggregators and health care providers for example. Thus far, the markets generating the highest returns using the most diverse array of business models include California, Missouri, Florida, Maryland, Louisiana, Georgia and Illinois. ¹
2. A highly effective and complex influence strategy often misunderstood as a marketing plan. Countering this component will require diverting some traditional ad spends in favor of developing an authentic influence strategy. ^{2,3}
3. Sophisticated technological capabilities that any insurer can replicate, if not improve upon. Specifically, Machine Learning, Augmented Intelligence, and Natural Language Processing, and SEO Strategies^{4,5}
4. Aggressive talent recruitment strategies, recruiting insurance defense panelist, insurance in-house counsel, and regulatory staff attorneys.

Each of social inflation's individual attributes began organized development as unrelated efforts as far back as 2016, including TPLF. This installment examines Third Party Litigation Funding, with a focus on how diversified the business model has become.

Recent research from the Insurance Information Institute (III) titled: *Impact of Increasing Inflation on Personal and Commercial Auto Liability Insurance*, examined the surge in U.S. auto insurer claim payouts due to economic and social inflation. "Between 2013 and 2022, a perfect storm of economic and social inflation fueled a \$96 billion to \$105 billion increase in combined liability claim payouts for U.S. personal and commercial auto insurers." ⁶

¹ SwissRe Institute: [US litigation funding and social inflation: The rising costs of legal liability](#), p2

² The Geneva Association [Social Inflation: Navigating the evolving claims environment](#), p20

³ ATRA: [Legal Services Advertising in the United States](#)

⁴ [The Plaintiff Bar Is Winning in AI | Insurance Thought Leadership](#).pdf, by **Taylor Smith, John Burge** MARCH 10, 2024

⁵ [Milliman: The role of NLP and AI in third-party litigation funding](#)

⁶ Insurance Information Institute, [NEW TRIPLE-I ISSUE BRIEF TAKES A DEEP DIVE INTO LEGAL SYSTEM ABUSE](#). Feb 2024

Unfortunately, such an erosion of profitable results across all liability lines of insurance has a deceptively familiar feel to previous hard markets. The industry is no stranger to profit and loss cycles. The industry's historically successful solutions have relied predominantly upon adjustments to rates, risk selection, and contract language. Those exploiting social inflation are redistributing wealth from policyholders to themselves and thus are counting on the continued reliance of these same solutions.

Recent reports from The Insurance Journal, AM Best, Insurance Information Institute, and Fitch Ratings all describe improved results across the auto insurance industry in 2024 given the rate increases cited from 2023 and 2024. Forecasted industry combined ratios range from 98.5 to 102.9. Without question the potential for price stability is good news. However, the likelihood of sustained stability remains extremely low. Growth of money in the insurance ecosystem will result in expansion of the litigation economy as well as motivating resentful consumers to become participants.

Litigation Economy Drivers: Third Party Litigation Financing

In December 2021, R Street published a report, *The Scourge of Social Inflation*. This report stands out as they were among the first to connect social inflation, "phantom billing", and third-party litigation funders. They also captured concrete means used by plaintiff attorneys to be unified, focused, and collaborative. "Today's plaintiff bar is characterized by a collegial, cooperative model. Plaintiff attorneys share strategies, information and witnesses. National plaintiff firms typically work as co-counsel with local personal injury firms." ⁷

Lisa Baker Morgan, writing in the legal publication, *The Daily Journal*, wrote an outstanding primer on TPLF in August 2024. ⁸ Most people understand TPLF as a form of non-recourse funding. The funds are invested in most models, thus not bound by lending laws. The source of the funds invested has become a growing concern among state and federal agencies. Capital sources include hedge funds, SEC listed companies, closed funds, family investment offices, and dividend re-investors. Morgan also explains that two types of funding are used by most TPLF entities. The first is consumer funding providing personal funds to plaintiffs engaged in personal injury suits. These dollars do not fund the actual litigation. The 2nd type of funding is dedicated to commercial litigation otherwise known as alternative litigation funding (ALF) ⁹ which does invest in the legal fees and costs of litigation, arbitration, and most recently mediation. While the comparison to Venture Capital investors is not a perfect match, the comparison will help in understanding what TPLF has become.

Thanks in large part to years of experience during the growth of insurtech investing, insurers, reinsurers, and risk managers gained first-hand experience with non-recourse financing in the form of venture capital investing. Likewise, many insurtech investors also gained experience in start-up success rates which for many highlighted risk more than profits. In the world of TPLF, think of litigation investments as though lawsuits represent early-stage firms, with exponentially higher success rates than VC investments.

While Chief Innovation Officer at Insurance Thought Leadership, venture capital deal-flow was tracked by first dividing the start-ups into two groups. Figure 1 is categories of startups known as Insurtech's, or firms improving rating and recovery. The 2nd group, Figure 2, titled "risktechs", startups predicting and preventing losses. What was not known in 2019 was that a portion of the risktechs investors were developing advanced Social Inflation capabilities, such as Morgan & Morgan CEO John Morgan being the single angel investor in Litify in 2018. Setting that aside for a moment, the reason for this comparison is to put the status of TPLF investing into perspective.

⁷ R Street Policy Study No. 247: [THE SCOURGE OF SOCIAL INFLATION](#), By Jerry Theodorou

⁸ [The rise of third party litigation funding: What you need to know, Lisa Baker Morgan, 8/12/2024](#)

⁹ [The rise of third party litigation funding: What you need to know, Lisa Baker Morgan, 8/12/2024](#)

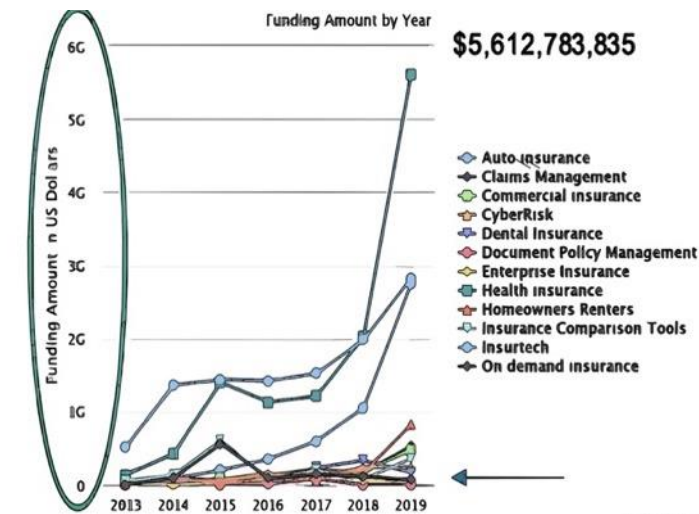


Figure 1: Insurtech Investment Growth 2013-2019

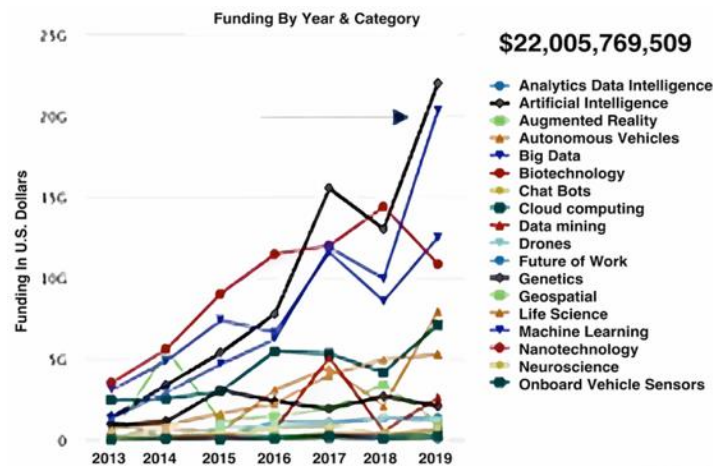


Figure 2: Risktech Investment Growth 2013-2019

Keep in mind the \$27.6B combined figure from both charts represents funds invested in nearly 48,000 early-stage new companies operating across 146 countries. By comparison, as of 2023, \$15.6B has been invested in just U.S. litigation by TPLF entities. Furthermore, the \$15.6B is not even the total volume of dollars being invested in U.S. plaintiff litigation.

Insurtech investors started with traditional, established, venture capital firms and known angel investors. Over the subsequent decade, the population of investors became substantially more diverse, often equally less formal. Likewise, as Figures 1 and 2 indicate, the variety of insurance related new entities grew by leaps and bounds. These same evolutionary trajectories are now playing out in third party litigation financing. For example, litigation investing has benefited from the participation of iconic venture capitalist such as PayPal co-founder and Facebook angel investor Peter Thiel.¹⁰ What began as investing in plaintiffs, law firms, and individual cases, has now expanded into a significantly more diverse set of capabilities, better described as litigation investing. Understanding the diversification and prevalence of TPLF business models provides additional clarity, as well as highlights the need for insurers and self-insureds to quantify such impacts.

Venture capital investing was long considered to be the wild west of entrepreneurial financing. In reality, the regulatory requirements related to venture capital investing are largely effective, supports innovation, and include reasonable disclosure requirements. Disclosure and transparency are where the

similarities to V.C. investing ends. Litigation investing operates with a significant lack of transparency. As described by The U.S Chamber of Commerce Institute for Legal Reform:

“This industry (TPLF) operates almost completely in the shadows. In typical lawsuits, neither the court nor the defendant is aware if outside investors are funding the case, and due to a lack of transparency laws, investors are not obligated to disclose their involvement. This system thrives on secrecy and allows hidden TPLF players to manipulate civil litigation for their purported gain.”¹¹

By 2024, TPLF business models have an estimated \$20B of capital invested into expanding litigation capacity via additional diversified business models. For example, according to the U.S Chamber Institute for Legal Reform, litigation investors have added \$1B into plaintiff marketing and lead gen aggregators. To say this is a significant expansion of capacity would be an understatement. The largest litigation investment firm is Burford Capital. Burford issued an IPO in 2009, making them responsible for significantly greater reporting of results per SEC requirements. However, even with SEC required reports, they do not have to disclose details identifying investments, affiliates and subsidiaries. Burford Capital's 2023 financials serve to understand the economics. This diversification allows

¹⁰ [The rise of third party financing: What you need to know, September 2024](#)

¹¹ U.S. Chamber of Commerce Institute for Legal Reform: [Top Three Troubling Legal Trends to Watch in 2024](#)

invested dollars to flow into personal lines liability insurance policies.¹² According to their website, the firm's current "portfolio" exceeds 1,100 cases. The investment groups and returns are listed using the metric, return on invested capital (ROIC). According to Burford's 2023 year-end report they generated:

From fully litigated wins: \$966M on \$279M invested requiring 2.9 years; 247% ROIC
From fully litigated losses: \$18M on \$115M invested; -85% ROIC
From settled cases: \$1.7B on \$1B invested requiring 2.2 years; 58% ROIC.

By adopting advanced technological capabilities also used by top plaintiff firms, the time required to adequately vet a potential case has been reduced from months to weeks. Finally, Burford was one of half-dozen TPLF finance entities going into 2020 (See Figure 3). Now they lead among 49 known litigation financing firms. The volume of

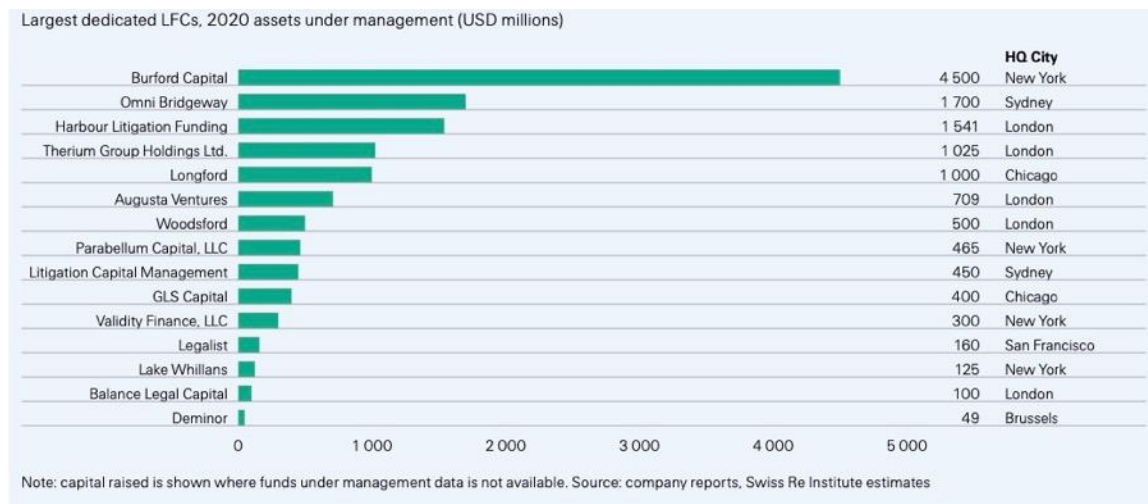


Figure 3: Swiss Re Institute list of top LFC's from 2020

capital being invested across these unregulated investment models are consistently generating three-digit returns within 36 months. Third party Litigation funding is like making VC investments in business models that have already achieved scale. These factors reinforce the challenges impacting reserving and rate setting are not going to return to pre-COVID in the foreseeable future.

If any in the insurance industry have doubts about the systemic nature of disruption brought by litigation investing, consider the clarion call to action by The U.S. Chamber of Commerce Institute For Legal Reform in their report, "*The National Security Risk of Third Party Litigation Funding*".¹³ This report details how foreign litigation investment funds can be used to weaken the U.S. economy by funding roadblocks to innovation and causing inflation. Additionally, the report clearly states, "In short, "[l]awsuit finance is no longer in its infancy in the United States"; rather, it is an entrenched feature of the country's litigation system."¹⁴

TPLF and Phantom Billing

One specific expansion of litigation investing commands attention. The challenges of phantom medical billing are well known by liability insurance providers. What is less understood is the convergence of TPLF capital and phantom billing. For example, Sedgwick's Winter 2024 report cites auto insurance atty rep rates in new claims of

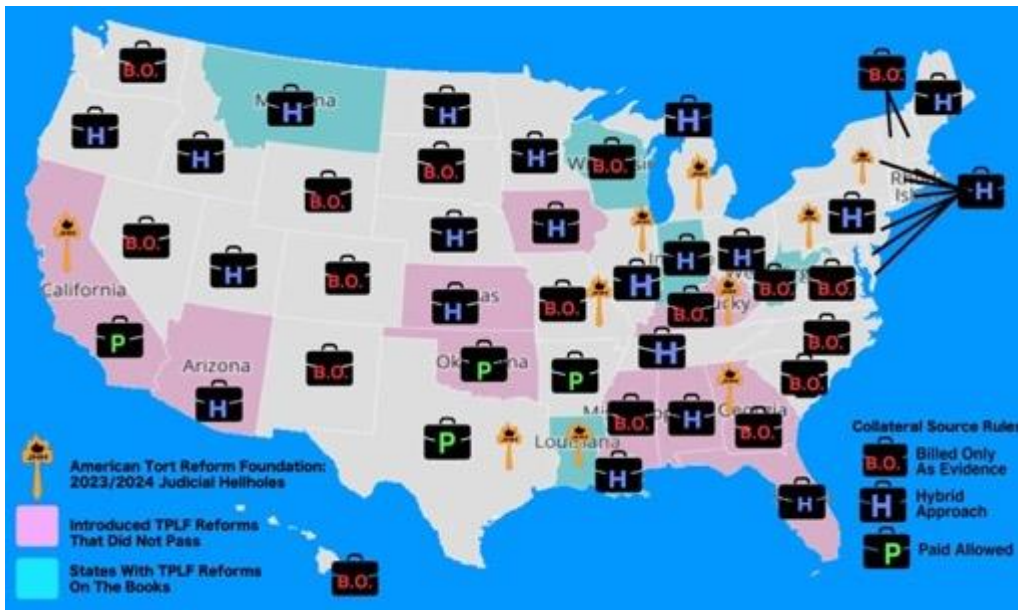
¹² [Burford Capital 2023 Annual Report](#)

¹³ [The National Security Risk of Third Party Litigation Funding](#)

¹⁴ [The National Security Risk of Third Party Litigation Funding](#)

"57% of the new Auto Liability (AU) claims that become litigated have representation in place within 24 hours of first notice, and three-fourths of all new AU claims that become litigated have representation in place within 14 days."¹⁵ A LexisNexis 2023 survey of auto liability claimants found 85% of the respondents were solicited by an attorney after the collision with 60% hearing from more than one law firm. More enlightening is that 71% of those who did hire an attorney stated their attorney encouraged them to seek additional medical treatments beyond those initially sought post-accident. TPLF entities have expanded their portfolios into "phantom medical billing" thus driving their investments into mainstream insurance litigation with claim valuations as low as \$25K.

First, how is phantom billing in liability claims connected to TPLF? As a level set, the American Tort Reform Association (ATRA) defines "Phantom damages" as occurrences when plaintiffs are billed for a medical service based on "charge master rate". Upon billing, adjustments are then made based on schedules aligned with their health insurer, Medicare, Medicaid, or workers' compensation carriers. These adjustments result in a significantly lower figure accepted as final payment by healthcare providers. For example, a medical facility may bill \$20,000 for a treatment only to accept an adjusted payment \$8,000. The \$12,000 difference is not owed or ever paid for the treatment.¹⁶— i.e. phantom damages. Notably, the difference is profit rather than claimant damages. Insurance defense panelist are only allowed to see the amounts billed due to statutes limiting discovery known as Collateral Source Rules.



Map1: State by state jurisdictional status re- TPLF Regs, Collateral Source Rule restrictions, ATRA

the paid amount to be a consideration only after litigation to seek adjustments, or on appeals. A handful of states do allow the Paid (P) amount to be used as evidence in discovery. Map 1 also reinforces the challenges insurers face acting cohesively with respect to developing needed national public policy strategies.

Map 1, (also included in installment 2: Vulnerabilities), indicates which states have TPLF regulations, states where attempts to enact TPLF regulations have failed, Collateral Source Rule status, and 2023 Judicial Hellholes.

States with the most restrictive Collateral Source restrictions allow only the higher billed amount (Billed Only: B.O.) to be used as evidence. The liability insurer is not allowed to use the paid amount as evidence or in calculating settlement offers. Most states operating with "Hybrid" (H) Collateral Source Rule, allow

Recognizing opportunity, unregulated TPLF firms entering the medical billing business, absent disclosure requirements is new and growing. How do TPLF investments, Collateral Source Rule restrictions, phantom billing, and liability claims converge into an operational business model? Meet Total Medical Concepts, LLC, owner of Crescent View Surgical Center (CVSC). Total Medical Concepts was founded by a team of 4 plaintiff attorneys and 2 hedge fund managers. Crescent View Surgical Center, located at 3434 Houma Boulevard, Suite 300, Metairie, LA.

¹⁵ [Auto Report \(Winter 2024\) | Sedgwick.pdf](#),

¹⁶ [ATRF \(ATRA\) 2023_2024 Judicial Hellholes](#)

This treatment facility has hospital beds, a limited amount of diagnostic equipment, but relies on a network of independent physicians. Plaintiff attorneys are alerted of a BI liability loss, possibly from a lead gen provider or a local source. Upon claimants converting into clients, they refer clients to CVSC for treatment. Internal billing specialist, generate procedural codes the initial bills. The adjusted acceptable fees then invoiced, then paid, by the patient's health insurer, or TPLF investor, or attorney. During litigation against the insurer, evidentiary protections return a healthy profit via the difference between billed and paid. The physicians get on board due to the speed of payment processing. How the phantom billing profit is distributed and to whom remains a secret thanks to the lack of TPLF disclosure laws, Attorney Privilege, and Collateral Source Rules. ¹⁷



Figure 4: Crescent View Surgical Center

Nuclear Verdicts

For most liability insurance providers nuclear verdicts do represent an immanent threat. However, the growth of jury verdicts more than \$100M each is yet another byproduct of litigation investing. Dr. Jérôme Jean Haegeli, group chief economist, and Gianfranco Lot, chief underwriting officer, property & casualty reinsurance at Swiss Re recently published a study titled, "[Litigation costs drive claims inflation: indexing liability loss trends](#)."¹⁸ In short, the report is based on the record number of 27 nuclear verdicts awarded in 2023. The aggregated impacts of these awards combined with other social inflationary factors resulted in a staggering statistic. "US commercial casualty insurance losses grew by an average annual rate of 11% over the last five years, reaching US\$143 billion in 2023." "To put this number into context, the US casualty claims total was 33% more than last year's global insured losses from natural catastrophes of \$108 billion in 2023. Nuclear verdicts do impact the P&C market by being yet another source of increased capacity.

How Can Insurers Begin To Fight Back?

Recommendation #1: Capture the right data & increase transparency.

As stated in the introduction, countering the growth of litigation investing is going to be difficult, will require time, and collaboration. Step 1 is to focus on quantifying the impacts of social inflation upon the company. Tables 1 & 2 provide comparisons of liability related results between an actual carrier, XYZ Insurer, and industry data. These highlight potentially significant vulnerabilities. Table 1 provides a distribution of claims by loss size for both XYZ Insurer and the industry. Sources for industry data are Sedgwick, AM Best and Milliman. Claims below \$100K are comparable. That said, XYZ Insurer percentages are slightly lower than industry figures, and declining.

However, for claims between \$100K and \$500K, XYZ Insurer is experiencing roughly twice the loss volume as the industry. Finally, for claims exceeding \$500K, the industry percentages appear to be twice the distribution within XYZ Insurer. However, this specific category is hiding a disconcerting trend for XYZ Insurer. Within the category of \$100K-\$500K, not only is XYZ Insurers' distribution nearly twice the industry per Table 1, but per Chart 2, the insurer's post 2020 aggregated growth is also higher than the industry. Secondly, despite losses exceeding \$500K being the lowest volume of claim exposures, XYZ Insurer's aggregated growth exceeds the industry by a factor of 3X.

¹⁷ See **WAYLAND COLLINS, et al. VERSUS JOHN C. BENTON, et al. Case 2:18-cv-07465-NJB-MBN**

¹⁸ "[Litigation costs drive claims inflation: indexing liability loss trends](#)."

This quick comparison indicates vulnerabilities worthy of further exploration for insurers. Targeted growth of litigation at higher damage limits with a simultaneous decline among lower damage limits is a direct reflection of increased litigation capacity.

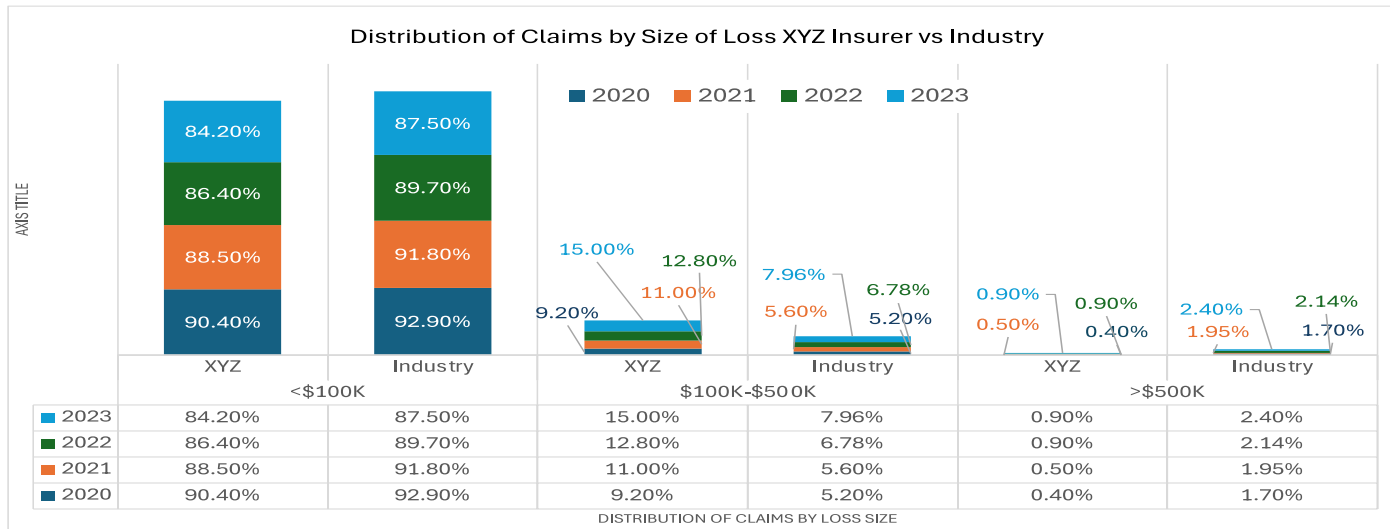


Table 1 Distribution of Claims By Size Of Loss

Increased litigation capacity represents the convergence of litigation investing, increased technological sophistication, growth in marketing, and becoming involved in more claims prior to notifying insurers. Growth among liability claims represented by an attorney lends clarity to trends in growth of claim damages. Further clarity comes from breaking down liability claim attorney rep rates by line of business, coverage limits, and geography.

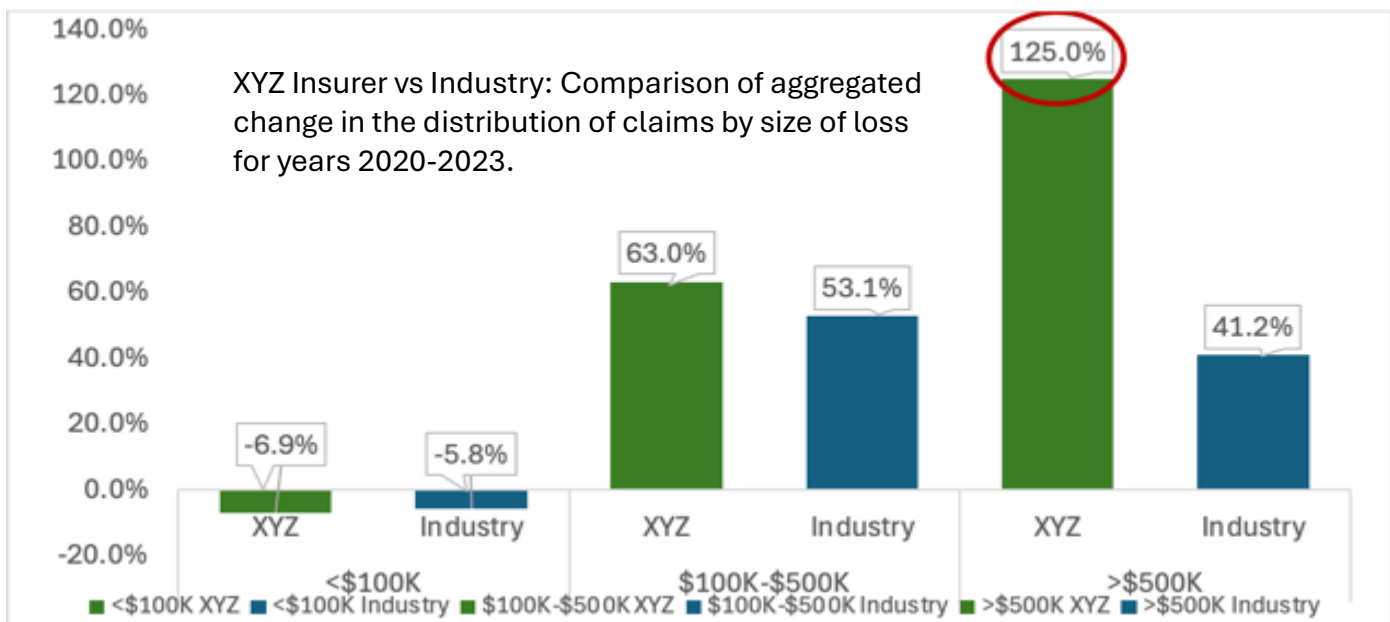


Table 2: Cumulative Change In Auto Claims By Loss Size

Growth of claims involving attorneys, and the exponentially higher total claim costs per file, points to the need to track claims in real time while employing technological tools to mitigate these rising costs. Table 3 provides the percentage of personal lines liability claims involving plaintiff representation at the first notice of loss (FNOL).

However, a significant variance in reported percentages of claims involving attorney representation reported across the industry highlights the challenge of capturing cohesive industry data within the insurance market.

PL Auto Liability Claims with Atty Rep At FNOL		
Year	PL Auto Liability Claims	Claim Cost
2015	24.9%	\$ 106,773
2016	27.3%	\$ 110,407
2017	27.3%	\$ 123,777
2018	28.3%	\$ 124,237
2019	29.9%	\$ 133,969
2020	35.6%	\$ 144,463
2021	43.2%	\$ 145,323
2022	49.3%	\$ 162,559
2023	56.0%	\$ 191,150
Source APCIA		

Table 3: APCIA Changes in Liability Claims with Atty Representation from 2015-2023

Attorney represented claims on an industry wide basis is also creating growth of trial rates from 1.5% in 2022 to 3.3% in 2023. The growth of fully litigated claims as opposed to those settled pre-trial is a direct result of litigation investing. Capturing liability claim cycle times and trial rates is essential to formulating an offensive counter strategy. Additional Milliman Research found attorney involvement beginning in 2021 also correlates to increasing settlement cycle times, growth of lag times, growth in medical treatment billings, and a 6% annual compounding growth in final settlements. This illustrative set of comparisons are provided as just one example of how insurers can begin to peel back various layers of vulnerabilities and/or ongoing exploitation.

Ultimately, the importance of capturing the data some may consider symptomatic, comes when that data is shared with regulators and lawmakers. Reforms must be passed compelling data calls and disclosures with respect to litigation investing. Likewise, evidentiary restrictions from Collateral Source Rules must be revised with respect to liability claims.

Recommendation #2: Updating Defense Panelist Selection and Evaluation Processes

One illustrative case study of an existing practice seen through an updated lens based on social inflation disruption, is the relationship between insurers and their defense panelist/firms. For context, two recent studies can be compared highlighting a disconnect between insurers and defense firms with respect to technological adoption and understanding of the possibilities. CLM's study collected data from 90 insurance senior corporate leaders¹⁹. Lex Machina's 2024²⁰ Insurance Defense Analytics study is based on information collected from 358 defense counsel.

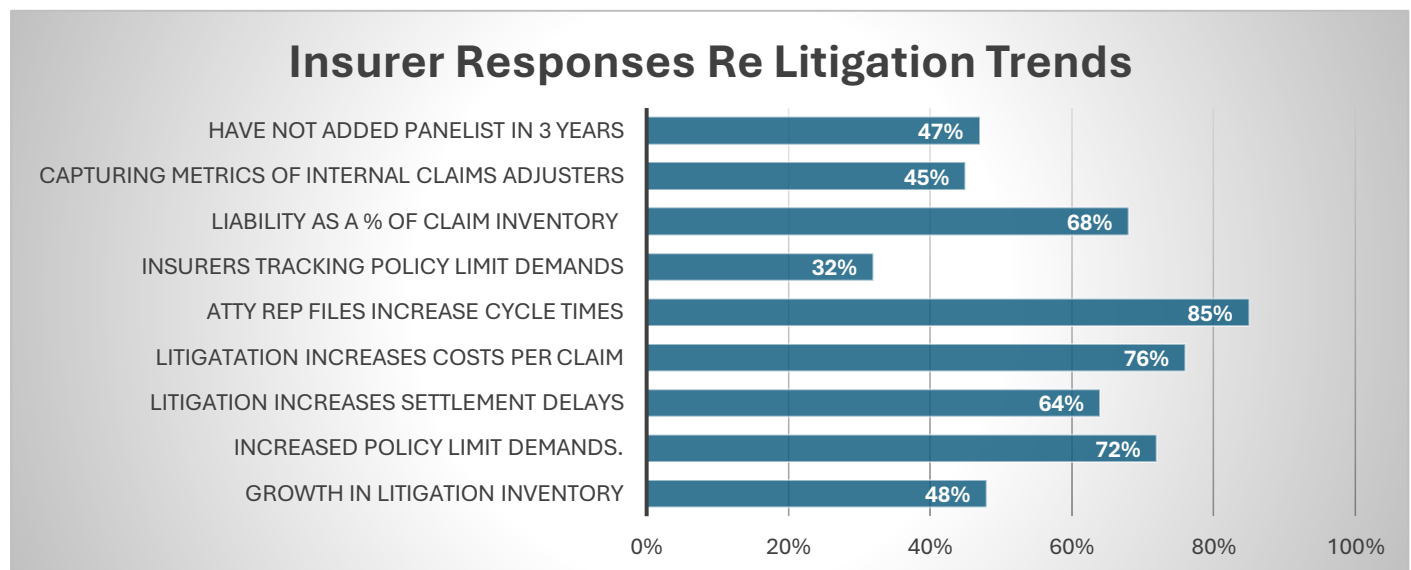


Table 4: Insurer responses re the management of defense pane list

¹⁹ [CLM Litigation Management Study, 2023](#)

²⁰ [Lex Machina Legal Analytics Study 2024](#)

Milliman's report contains aggregated use data from Insurance clients. As Table 4 indicates, insurance executives who participated in the CLM study clearly understand the liability markets have challenges across all lines of business.²¹ However, a comparison of these studies also indicates an underestimation re the scale of disruption as well as how technologies can improve results.

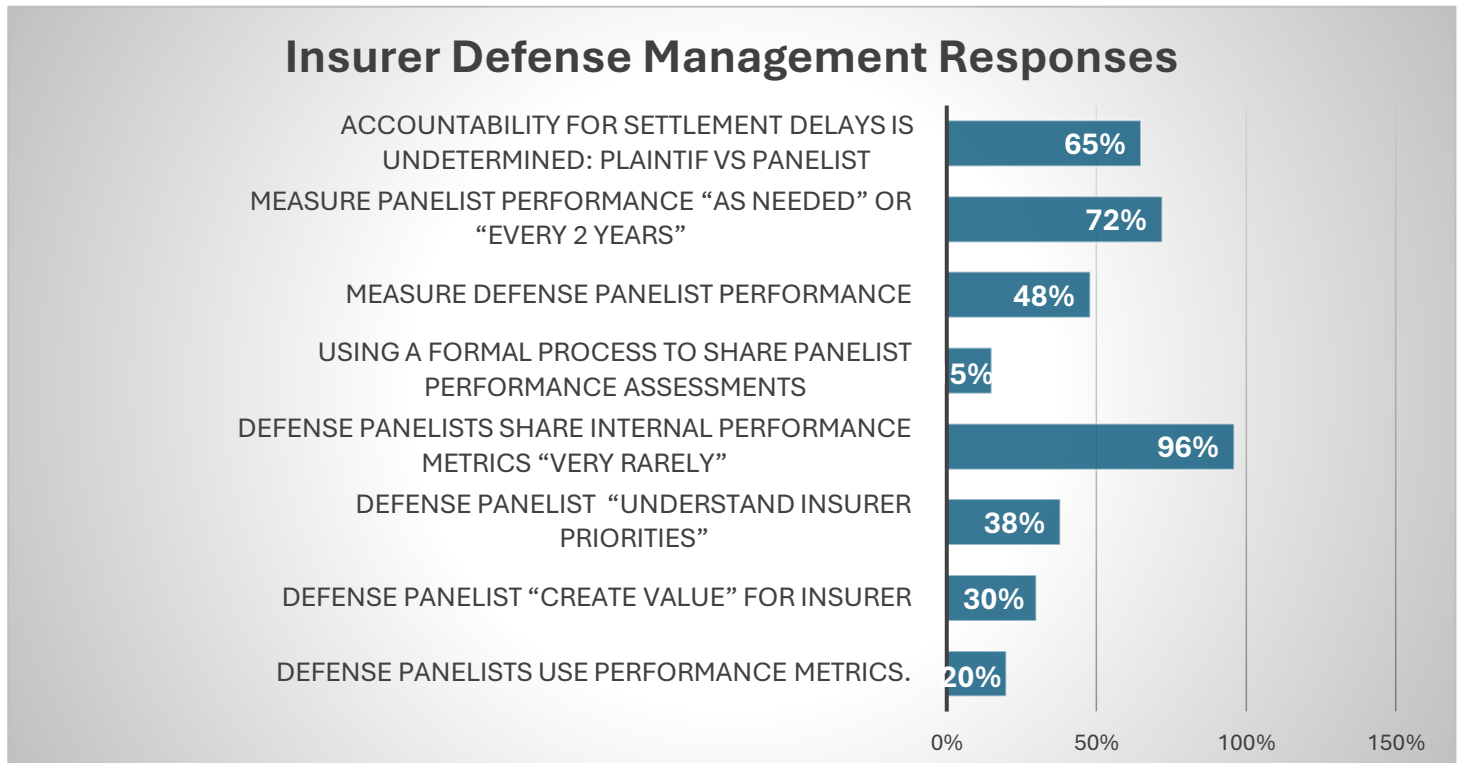


Table 5: CLM Defense Management Study- Insurer Responses

As Table 5 indicates, with respect to change in managing defense panelist and claim handler performance, few responses indicate urgency. A limited review of insurer proprietary defense panelist selection documents and processes for this report yielded similar findings. In short, However, a distinct minority of insurers have modified their processes for assessing or maximizing claim adjuster and defense panelist performance, nor formulating strategies to reverse detrimental trends. Considering the data points reviewed thus far, metrics focusing on managing defense panelist just do not align with the need.

Insurers who continue to see traditional solutions (rates and form filings) as the extent of their counter response to growth of the litigation economy, are in fact *unintentionally participating* in the success of exploitive practices by simply adding more money into the ecosystem. This bears repeating. For example, every liability and UM/UIM rate increase rewards those who are redistributing policyholder wealth for their own purposes.²² Can insurers combat these exploitive structures beyond rate and form changes, beyond leaking claim dollars to avoid litigation? The answer is an unequivocal yes. The following list of ideas range in complexity and anticipated improvements. They will be covered in greater detail in the final installment of this series on the technological applications. Without question, these are common everyday best practices within many, if not most insurers. However, the potential positive results from activities such as these grows in multiples in the context of outputs from augmented intelligence, machine learning, natural language processing and predictive analytics.

²¹ [CLM Litigation Management Study, 2023](#)

²² Clemente, Carina, Gracinda R. Guerreiro, and Jorge M. Bravo. 2023. Modelling Motor Insurance Claim Frequency and Severity Using Gradient Boosting. *Risks* 11: 163. [https:// doi.org/10.3390/risks11090163](https://doi.org/10.3390/risks11090163)

- Best case claim assignments to both claim consultant/adjuster and defense panelist
- Objective, consistent and continuous defense panelist performance assessments and panelist selection
- Continuous analysis of differential between expected vs actual claim resolutions, aiding reserving
- Maximize claim handler performance assessments
- Coordinate trade associations and lobbying efforts to focus on TPLF transparency, accident victim identity protection, and P&C claim reforms to Collateral Source Rules.

The final 2 installments will cover:

- Attorney advertising, digital influence strategies, and SEO tactics;
- The technological engine driving the litigation economy. Both installments include counter measures.

About Guy Fraker, and BAF Insurance Innovation Advisory

BAF Advisory, LLC has been working with insurers, early-stage companies, and lawmakers to convert complex scaled challenges into profitable opportunities for over a decade. Successes have been achieved establishing systematic and consistent innovation practices to discover and scale opportunities. Success has equally been achieved working with insurers, stuck midstream while attempting to either discover growth and/or problem-solving solutions. Beginning in 2020, advisory services have been dedicated to working with public and private entities as they navigate the new era of the litigation economy. This has included adoption of sophisticated technological platforms, reverse engineering disruptive practices, and working with legislative attorneys on enacting reforms.

Working across corporate leadership teams, entrepreneurs, regulators and legislative bodies, significant capital and new revenues have benefited both insurers and scaled markets. Social Inflation factors will continue to challenge the fundamental building blocks of the insurance business model. However, and hear this with confidence, SI trends and influences also hold significant opportunities for insurers to preserve, to grow, capital and profitable revenue streams.