



EXECUTIVE SUMMARY

Liability litigation trends and practices

Over the last decade, business has placed tremendous focus on improving the safety of their products, their establishments, and the services they provide to their customers. They have taken advantage of data, technology, and enhanced risk management practices driving safety and quality for their respective companies. Despite this focus and its success, we continue to see, read, and hear about extreme verdicts, social inflation, and “hell hole jurisdictions” in the liability arena. The question is what more can be done? After analyzing trends in liability and auto losses, both litigated and non-litigated, we note the following:

Key findings:

- Nuclear verdicts continue to be a concern for the business and insurance community. Just one of these verdicts can have a major impact on individual programs. Media coverage and advertisement of these verdicts may motivate increased litigation that, in turn, creates an increased litigation burden on carriers and companies.
- Litigation costs continue to rise.
- There are more attorney-represented claims at first notice of loss.
- The “social inflation” factor is real and is likely driving some of the increasing litigation cost.
- Litigation prevention / avoidance practices will have a positive impact on liability claim costs and control over the litigation rate.
- Plaintiffs’ bar has become increasingly coordinated in approach and strategy in tort suits. An awareness of how plaintiffs’ strategies have evolved is a critical part of managing the defense of any claim.
- Advocacy and early intervention are important factors in mitigating the likelihood that claims could evolve into more expensive disputes.

Emerging tactics and best practices for litigation

There are a variety of factors, strategies, and tactics that can reduce the exposure to unusually expensive or unexpected results in civil litigation, as well as improve the outcomes of more routine litigation.

1. Attorney selection – In order to have an effective settlement strategy, it is critical that counsel be willing and able to try cases. Utilization of data-based attorney scorecards and evaluations helps identify the best attorneys for various types of cases.
2. Leveraging artificial intelligence (AI) and predictive analytics - The best way to avoid the risk of nuclear verdicts is to avoid unnecessary litigation. Using data to identify claims likely to end up in litigation and to focus early on those claims for settlement is key to reducing litigation costs and risk.
3. Attitudes toward corporations – There is an increasingly negative perception of corporate defendants among some jurors. At trial, ensure corporate defendants have a “human face” either through witnesses or presence of a corporate representative throughout trial.
4. Mitigating the “reptile brain” tactic –The tactic is about fear and using it to create a reaction in the jury. Identifying those plaintiffs’ attorneys that are planning on using this approach and planning accordingly will be critical.
5. Mitigating anchoring tactics – “Anchoring” occurs when an individual depends on an initial piece of information to make subsequent judgments in the process of making decisions. Consider whether it is appropriate for the defense to talk about the actual amount of damages at trial rather than try to defend against plaintiff’s number.
6. Mitigating “third party funding” tactics – There is an increasing trend in litigation in which some jurisdictions and courts have begun to allow discovery into funding relationships. Defense counsel should be exploring that thoroughly when allowed.
7. Case Evaluation - The days of a favorable settlement at the 11th hour seem to be the exception now. It is critical to have an early and thorough understanding of the case and its value.
8. Settlement approach – The obvious and effective way to manage litigation costs is to avoid them. Be prepared to try cases. However, it is just as critical to identify and resolve the cases that should not or need not be tried. The key is not to change how you handle cases, but how you think about them and create a cost/benefit analysis of trial.

Summary

The bottom line is that some cases are appropriate for trial, and some are not. With the risk of nuclear verdicts, some that seem to shock even seasoned litigators, the reality is that until there's a clear understanding of what verdicts are likely to go "nuclear," it is prudent to have a plan in place to limit litigation only to those claims that should or must be litigated to verdict.

To free up time to focus litigation efforts on cases that will go to trial, claims teams must improve their ability to identify cases for resolution and resolve them at the appropriate time. A case that gets to the eve of trial and settles then with no change in evidence or information is an outcome that should be avoided. That is a case that could have settled earlier.

Identifying cases to resolve requires focus by claims professionals, but also requires the effective use of data, predictive modeling, attorney scorecards, and other tools. Timing is critical and once a claim has gone into litigation, even if the ultimate settlement amount is the same, the overall cost will increase due to litigation and defense costs.

In those cases that do go into litigation, a litigation plan must be developed. Claim teams must take a direct hand in the course of the litigation. The "litigation plan" obviously must incorporate counsel's evaluation of the claim, steps to take in the litigation process and, just as critically, a "resolution plan" to make sure that the discussion gets redirected back to conclusion—whether the case ultimately is tried or settled.

Throughout the litigation, the discussion of the claim should always include the resolution plan for those cases that should or could resolve. And just like an effective litigation plan, the resolution plan must have concrete steps, and not just follow an automatic path without a clear plan tailored to each case.

Risks associated with general liability and auto liability claims can be managed to allow for predictable outcomes, even in an environment with "social inflation", "nuclear verdicts" and tough jurisdictions. Numerous resources, tools and best practices are available to ensure that a very small percentage of claims do not drive oversized verdicts, while ensuring an appropriate approach to dispute resolution.

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