

Taming Plaintiffs' Thriving 'Reptile' Tactics: Why It's Time

By **Scott Seaman and Diane Webster** (July 19, 2022, 6:43 PM EDT)

Insurers and their corporate policyholders have been confronting social inflation since the 1970s.

Social inflation, which is the increasing costs of defending and resolving claims, has raged on — with various ebbs and flows — until the court closures and delays associated with the COVID-19 pandemic provided a temporary abatement in 2020.[1]

Since emerging from pandemic-related shutdowns and court closures, insurers and their corporate policyholders have confronted something they have not encountered in any significant way before — a dangerous double barrel of social inflation coupled with significant price level inflation.

Indeed, the U.S. is experiencing the highest price level inflation in more than 40 years. On July 13, the U.S. Department of Labor reported that consumer prices increased 9.1% compared with a year earlier, representing the largest yearly increase since 1981.[2]

The next day, the U.S. Department of Labor reported the U.S. producer price index increased 11.3% — 18% for goods and almost 8% for services.[3]

This is a harbinger of more inflation to come. Simply stated, reports that price level inflation was transient have turned out to be false.

As insurers and their corporate policyholders now are looking down the dangerous double barrel of price level and social inflation, it makes sense to examine what they can do to contain one of the leading drivers of social inflation — the reptile theory employed by plaintiffs counsel.

In this article, we will explain briefly what reptile theory is and why jurors are susceptible to the reptile's bite. We will then examine how reptile tactics thrive in an environment supercharged with social inflation, and how the reptile drives and is driven by other phenomena fueling social inflation.

Understanding Reptile Theory

One of many phenomena fueling social inflation and nuclear verdicts is the reptile tactics employed by



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plaintiffs counsel.

The reptile was unleashed on the U.S. civil justice system to attack defendants and insurers through the book "Reptile: The 2009 Manual of the Plaintiff's Revolution," by David Ball and Don Keenan. The reptile is now a teenager and some reptiles will not die of natural causes until they reach the age of 30, 50 or even 80.

Accordingly, it is incumbent upon defendants, insurers and their counsel to contain the beast and ultimately render it a nonfactor in litigation and trials. The reptile should not be allowed to live beyond its teenage years.

Reptile theory is purportedly based upon the work of neuroscientist Paul MacLean, dating back to the 1950s.

Plaintiffs counsel attempt to activate the reptile portion of the brain that involves survival, flight and fight. By activating the jurors' reptile brain, Ball and Keenan argue jurors will render higher damage awards to protect society and, in particular, the jurors themselves from future harm.

Although the actual science behind it is debatable at best, reptile theory has proven to be a successful litigation strategy for plaintiffs.

Essentially, reptile theory is intended to appeal to jurors' fears and prejudices in order to have them render verdicts driven by their instincts and emotions rather than by logic and facts.

The reptile general plan of attack goes like this:

1. Convince jurors that the defendant is a threat to jurors and to society at large;
2. Establish universal safety rules that all responsible persons or entities should abide by or conform to, e.g., products should be safe or businesses should not needlessly endanger the public;
3. Emphasize that following those safety rules is the only way to keep society and jurors safe;
4. Demonstrate the defendant violated — or better yet, flagrantly violated — the safety rules;
5. Argue that the jury has the power to improve the safety of their families and society by rendering a verdict that punishes the defendant's unsafe conduct;
6. Urge jurors to protect themselves and society by awarding damages sufficiently large to send a message, and make the defendant and others like it think twice before violating the safety rules in the future.

What Impact Is the Reptile Designed to Have?

Reptile tactics may circumvent the principles necessary for the fair and proper functioning of the U.S. civil justice system. Specifically, these tactics are used to:

- Cause jurors to substitute fear for logic and trigger a mindset that makes jurors more likely to render an award for plaintiffs and render a larger award than they otherwise might render;

- Focus on safety rules, rather than the standard of care or breach of the standard of care;
- Increase the standard of care from the "reasonable person" to "as safe as possible";
- Divert attention away from the fundamental issues of causation in cases where causation is lacking or nonexistent;
- Divert the focus away from the requirement that the defendant be at fault and toward the wealth and corporate status of defendants;
- Focus jurors on their own safety rather than the plaintiffs' harm, damages or lack thereof;
- Transmogrify compensatory damages into punitive damages, circumventing the evidentiary rules and constitutional protections applicable to punitive damages and turning on their head the bedrock limits and purposes of compensatory damages under the U.S. civil justice system;
- Prey upon jurors' desire to make a positive impact on society rather than their obligation to decide a particular case based upon the facts of the case and law applicable to the case;
- Capitalize on the anti-corporate and anti-institutional bias that seems to be raging throughout society;
- Minimize or avoid the consequences of comparative fault or contributory negligence on the part of the plaintiff; and
- Repackage evidence and arguments in an attempt to avoid traditional rules of evidence that would preclude their admission.

As described, reptile theory focuses jurors on being guardians against dangers for society rather than seeking to invoke sympathy from the jury for the particular plaintiff. To the extent this is true, plaintiffs may fail to take advantage of the facts and sympathies that exist in a particular case in pursuit of the reptile.

Our experience, however, differs in that we often see plaintiffs counsel continue to seek to invoke sympathy, particularly where the plaintiff has serious injuries or the defendant's actual conduct — as measured against traditional elements of the causes of action — is particularly egregious.

In other words, reptile theory is often blended into a plaintiff's overall trial strategy enabling plaintiffs to take advantage of the actual facts, conduct and damages when it is in their interest to do so, and to spew like a reptile when the facts and law are not on their side.

The adage in these reptile times seems to be: Plaintiffs will argue the facts when the law is against them, argue the law when the facts are against them, and go reptile when neither the law nor facts support them.

Are Jurors Susceptible to the Reptile's Bite?

The reason that the reptile theory has migrated from the book of Ball and Keenan to courtrooms across the country is because it is effective.

There has been extensive jury research conducted on the reptile theory, both to ascertain its effectiveness and in looking for ways to contain or defeat it. For illustrative purposes, we consider some research conducted by Litigation Insights in 2018.[4]

Litigation Insights surveyed 141 mock jurors across the country following mock trials of personal injury and wrongful death claims. They classified the jurors as either plaintiff jurors or defendant jurors based upon the verdicts they reached in the mock cases.

Its findings demonstrate that jurors are susceptible to the reptile and suggest many common defense themes are ineffective against reptile tactics.

Among the findings, it reports:

- 138 jurors agreed that safety should always be a top priority;
- Nearly 70% agreed that a company should never produce a product that could hurt people;
- More than 90% agreed policies and procedures are needed to ensure people do not get hurt, and documentation must be thorough to ensure safety policies are followed;
- 73% agreed bad behavior should be punished even if it does not hurt anyone;
- 70% disagreed that it is OK to produce a potentially harmful product as long as the benefits outweigh the risks;
- Only 26% agreed that, if companies took every possible safety precaution, products would be far too expensive;
- 75% agreed that cost should never be a factor when it comes to increasing safety; and
- Fewer than 60% agreed that it is not a manufacturer's fault if someone gets injured by using a product improperly.

Litigation Insights notes a difference in intensity of beliefs between plaintiff and defense jurors as opposed to a difference in beliefs.

Reptiles Thrive on Social Inflation — It Provides a Perfect Environment for Reptiles to Proliferate

There is a symbiotic relationship between social inflation and the reptile. To be sure, reptile theory has been a major factor contributing to social inflation and nuclear verdicts.

Concomitantly, an environment supercharged with social inflation provides a fertile environment for reptiles to reproduce. Many of the social trends identified as contributing to social inflation tie directly into and enhance the success of reptile tactics.

The plaintiffs trial bar is — and long has been — well organized, collaborative, resourceful and creative. The creation and successful deployment of reptile theory exemplifies their talent.

Reptile theory, however, crosses the line, and reptile tactics should be barred as nothing more than an

elaborate repackaging of arguments, evidence and tactics, long precluded and excluded as improper, inadmissible and unethical.

Here are how some other social inflation drivers have empowered the reptile.

Litigation funding has effectuated a sea level change.

The use and surge of litigation funding in recent years has been a boon for plaintiffs counsel.

Litigation funding has resulted in an increase in the volume of cases that are being pursued. It has enhanced the ability of plaintiffs to take cases further and pursue larger recoveries — extending the litigation timeline, increasing the costs of defense, and increasing the potential for larger verdicts and settlements.

Specifically, it has enabled plaintiffs to invest in experts, research and studies, and in other weapons to deploy against defendants like never before. Not only are compelling cases likely to result in larger awards, the disposition costs of mediocre cases has increased as well.

A December 2021 report from the Swiss Re Institute identifies the costs and problems generated by litigation funding.[5]

The US is the centre of the world's third-party litigation finance (TPLF) industry, in which investors such as hedge funds and family offices finance legal action against companies. More than half of the USD 17 billion investment into litigation funding globally in 2020 was deployed in the US. Litigation funding companies (LFCs) invest in consumer and commercial litigation by funding legal action in return for a percentage of a successful claim sum.

We see TPLF as a contributing factor to the trend of social inflation in the US. US general liability and commercial auto lawsuit data show a strong rise in the frequency of multi-million-dollar claims over the past decade. LFCs back claims in many of these areas, such as trucking accidents, bodily injury, product liability mass tort, medical liability claims etc. We find TPLF contributes to social inflation by incentivising litigants to initiate and prolong lawsuits. Higher claims costs drive up insurance premiums, can reduce the availability of liability cover, and lead to higher uninsured legal liability risks for US businesses. US casualty insurers have incurred many years of underwriting losses linked to outsize legal awards and are being forced to raise premium rates. ...

Concerns about litigation funding centre on its effect on the length, cost and resolution of legal action. We find TPLF contributes to higher awards, longer cases and greater legal expenses. Longer cases increase claim costs, on average, due to higher legal expenses and compound interest on the litigation finance.

At the same time that plaintiffs have benefited from litigation funding, some commentators have expressed concerns that defendants have relinquished to plaintiffs the traditional budgetary and leverage advantages that some corporate defendants enjoyed insofar as the increased focus on defense expenditures in recent years has come at the expense of efforts to contain swelling indemnity numbers.[6]

Concerns also have been expressed about the ability of defense firms to compete against plaintiff firms and other corporate practice areas for top legal talent.

Millennials and Generation Z attorneys appear to be less receptive to being tied to tracking billable hours, complying with litigation and billing guidelines, responding to audits, and paying their dues for advancement in law firms than prior generations of attorneys.

Millennial and Gen Z jurors appear to have an affinity for the reptile.

The plaintiffs bar has adapted to the changing demographics of jurors and judges.

Key among the changing juror demographics is the increasing number of millennials and Gen Zers in the jury pool. Reptile theory has particular appeal to the values, approach and mindset of these younger jurors, though studies are mixed as to whether they are more likely to actually render nuclear verdicts.

Attorney advertising has proven to be a powerful reptile recruitment tool.

Lawyering up and the proliferation of attorney advertising — which have been around for some time — serve as potent recruiting tools for plaintiffs counsel, which they have employed masterfully.

This has generated more and sometimes better plaintiffs. It also has created great expectations for recovery, making plaintiffs themselves more receptive to deploying the reptile.

Anti-corporate, anti-insurer and anti-institution sentiment cry out to the reptile.

Hostility toward and distrust of large companies is hardly a new development — it has been something plaintiffs counsel have exploited for a long time.

Still, anti-corporate sentiment has amped up in recent years due to, among other things, residuals from the financial crises, the Occupy Wall Street movement, the #MeToo movement, the murder of George Floyd, and various protests.

Social media provides a platform for corporate haters to gather and organize and for negative public sentiment about companies and institutions to proliferate.

Reptiles are political creatures, and political discourse infiltrates the jurors' mindsets.

Notions of socialism, social justice, wealth and income disparities, and wealth distribution that abound on the airwaves and other political discourse fosters an environment that feeds the reptile.

Jurors are more inclined to render awards with less emphasis on fault, greater emphasis on company reputation and safety practices, and based upon the perceived ability of corporate defendants and their insurers to absorb losses.

Millennials and Gen Z jurors appear to be more wired in this direction.

The greater the disregard for jury instructions, the bigger the reptile will be.

The increasing inclination or willingness of jurors to disregard jury instructions presents great concern in the land of reptiles.

A national survey conducted by Sound Jury Consulting in 2019 found three-quarters of respondents eligible for jury service stated they would decide a case based on their own personal beliefs of right or wrong if those beliefs conflicted with the law as instructed by the judge. The number is higher for millennials.

The civil justice system places great importance on jury instructions and the rule of law depends, in large part, upon jurors following the judge's instructions.

According to the 2019 Sound Jury Consulting study:

- 57% of respondents say they would ignore a judge's instructions to avoid internet research on the case if they believe they could obtain important information;
- 52% say they would not take the time to look at the jury instructions during deliberations if they believed they understood the issues in the case; and
- 75% say they would disregard the judge's instruction to ignore inadmissible testimony if they believed the testimony was important.

We do not vouch for this particular study, but its results are concerning. A growing disinclination to follow jury instructions feeds the reptile and threatens to undermine the proper operation of the civil justice system.

Reptiles are social media junkies.

The influence of social media and the information age makes it much more likely that jurors receive information outside of the courtroom.

Limiting jurors' access to evidence only admitted at trial has always been challenging. However, absent complete sequestration, it is virtually an impossible undertaking in the information age with instant access to the internet and social media.

The normalization of nuclear verdicts increases the reptile's appetite.

Frequent media reports of multimillion- and multibillion-dollar verdicts have desensitized jurors and, to some extent, have normalized such awards.

Jurors have been exposed to information regarding large jury awards long before being empaneled in the jury box. Some believe that younger jurors do not view or value money in the traditional way.

Expanded liability and disappearing defenses provides the reptile with more room to roam.

Unwarranted expansion of liability theories such as public nuisance, e.g., the California lead paint litigation, state legislation suspending or abolishing statutes of limitation, e.g., for sexual abuse and assault cases, and the abolition of or limitation on nondisclosure agreements add fuel to social inflation.

Similarly, an expanding universe of potential plaintiffs with government entities and others seeking recovery on tort theories has had an impact as well. In this environment, it is not surprising that jurors are willing to view their mission as extending beyond the case before them.

Given these social inflation dynamics it is easy to see how reptile tactics have flourished in courtrooms across the country.

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[1] We previously discussed the two prongs of social inflation and identified the factors associated endemic to the U.S. civil justice system and the societal trends fueling social inflation. See S. Seaman, et al. "The Legal Trends Behind 'Social Inflation' In Insurance" Law360 (Feb. 21, 2022). See also S. Seaman & J. Schulze, Allocation of Losses in Complex Insurance Coverage Claims (10th Ed. Thomsen Reuters 2021-22) at Chapter 19; S. Seaman & S. Anderson, "Key U.S. Insurance Decisions, Trends, & Developments: ESG, Social Inflation, COVID-19, Cyber/Privacy, Civil Unrest, Opioids, Lead, Sexual Assault & Other Perils Figure Prominently," Mealey's Litigation Report Cyber Tech & E-Commerce, Vol. 23, No. 11 (Jan. 2022).

[2] "Wholesale inflation in June surged 11.3% from a year ago" Associated Press (July 14, 2022), available at <https://abcnews.go.com/US/wireStory/wholesale-inflation-june-surged-113-year-ago-86809421>.

[3] Id.

[4] C. Marinakis & J. Wilinski, "Re-Examining The Reptile Does Fear Drive Plaintiff Verdicts?" Litigation Insights.

[5] See "US litigation funding and social inflation: The rising costs of legal liability" Swiss Re Institute (December 2021), available at <https://www.swissre.com/institute/research/topics-and-risk-dialogues/casualty-risk/us-litigation-funding-social-inflation.html>.

[6] See, e.g., J. Theodorou, The Scourge of Social Inflation, R Street Policy Study No. 247 (Dec. 2021), available at https://www.rstreet.org/wp-content/uploads/2021/12/RSTREET247.pdf?hsamp_network=linkedin&hsamp=bHs2nbYsdw7Z.