



INVENTING SOCIAL INFLATION 2023

(An Update to the March 2020 study, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation*)

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**CENTER FOR JUSTICE & DEMOCRACY
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INTRODUCTION

In early March 2020 — days before the COVID pandemic hit — the Center for Justice & Democracy (CJ&D) and Consumer Federation of America (CFA) released *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation*¹ (hereinafter referred to as *Fake Social Inflation*). At that point in time, businesses were seeing insurance rates increase (also known as a “hard market”) after 13 years of low or stable rates (also known as a “soft market”). The CJ&D and CFA study documented in significant detail how the overcapitalized property/casualty insurance industry was charging many businesses far too much in premiums while threatening even greater increases, all while attempting to create the perception that it was too financially troubled to pay claims and blaming a concept they invented: “social inflation.”

The report also took a historical look at the up and down economic cycle of the insurance industry, and showed how, since the 1970s, insurance companies have not been forthcoming about why jumps in insurance premiums happen. Put simply, premiums go up and down in sync with a well-established cycle and are never reflective of any trends in paid claims. This has been confirmed by decades of insurance loss and premium data.

For example, in the decade before *Fake Social Inflation* was released in 2020, the industry’s own data showed that total commercial insurance payouts had not spiked and generally tracked the rate of inflation and growth of population. In order to increase premiums in 2019 at the start of the most recent hard market, insurers used an accounting trick to inflate their “incurred losses”² by increasing or padding reserves — the money set aside to pay claims — despite, at the same moment, experiencing no increase in payouts or any trend suggesting large future payouts. This “over-reserving” is part of a decades-long pattern, often politically inspired and used by insurers as a way to show poor income statements, which it then uses to falsely claim large “losses” and, in turn, to justify imposition of large premium increases.

As shown throughout the *Fake Social Inflation* study, a great deal of industry coordination is necessary to push the country into a hard insurance market, because the entire industry must collude and raise rates together.³ As part of their narrative, industry leaders publicly spin the notion that the industry is financially beleaguered and cannot pay claims without significantly raising rates. The most common story presented historically by industry leaders is that lawyers, lawsuits, judges, and juries have suddenly and jointly become more “aggressive” after not being this way for the 10 to 15 years of the prior soft market. This alleged aggression only lasts three to four years, after which the lawyers, juries, and judges apparently become meek again. It is a narrative used not only to push for a cycle turn but also to maintain rate hikes for the entirety of a three-to-four-year hard market, which we are still in but nearing the end of today.

To make the case for the current hard market, the insurance industry settled on a new PR term — “social inflation” — to cover a number of wildly disconnected things that corporate and insurance lawyers complain cause them to lose cases and increase payments to claimants. These include: #MeToo and child sexual abuse claims; lawyer advertising and case funding; securities class actions; millennials as jurors; and verdicts in worsening truck crashes. There has been little consistency regarding industry descriptions of social inflation. What’s more, as shown in *Fake Social Inflation*, others within the industry privately doubted its existence.⁴ Nonetheless, in 2019, insurance industry representatives began a coordinated effort to market the idea that “social inflation” was hurting insurers financially.

The term never caught on with the general public, or at least much beyond insurance industry trade publications. Perhaps this was due to the fuzziness of the term, or its confusion with economic inflation — an actual global problem. Or maybe it was the fact that complaining about jurors — aside from juries being a bedrock element of the U.S. Constitution — seemed absurd when juries resolve an extremely low percentage of state tort cases⁵ and large verdicts are almost never paid.⁶ In fact, experts write that civil jury trials have been “nearly eradicated” in this country.⁷ Or perhaps it was the disclosure that the insurance industry was sitting on an \$800 billion record surplus — a surplus that quickly grew to over one trillion dollars by the end of 2021.⁸

And then, just a few months after the hard market kicked in, we were in a global pandemic. When COVID hit, courthouses shut down. Jury trials stopped.⁹ New case filings dropped.¹⁰ Tort caseloads in state trial courts — already representing an extremely low percentage of incoming civil caseloads¹¹ — dropped by over 4 percent between 2019 and 2020, and continued to drop in 2021.¹² Juries resolved an extremely low percentage of state tort cases in 2020, with rates ranging from 0.0 to 1.59 percent.¹³ In 2021, the range was 0.0 to 1.79 percent.¹⁴ This rate has remained incredibly low for the past decade.¹⁵

In addition, for months during the height of the pandemic, people stopped driving.¹⁶ The public drastically cut down on non-essential medical care. At the same time most states passed laws immunizing hospitals and nursing homes from liability. In sum, no one believed that suspended jury trials, non-existent victims, or lawyers who couldn’t get their cases heard could possibly be driving insurance rate hikes. And now, the civil justice system has a backlog so large that “the already rare civil jury trial is likely to lay dormant for the foreseeable future.”¹⁷

Yet almost as if to demonstrate the meaninglessness of the “social inflation” concept, insurance industry consultants and representatives were so fully invested in their anti-jury PR strategy that they never stopped complaining about jury verdicts even when there weren’t any.¹⁸ Now, the industry is clearly struggling to make sense of the term. For example, medical liability insurer The Doctors Company recently issued the *Medical Malpractice Claims-Made Social Inflation and Loss Development Report*, accompanied by a press release with a screaming headline about how social inflation causes billions in

medical malpractice losses.¹⁹ Yet a quick look through this report finds, among other things, that medical malpractice claims have actually been dropping and social inflation has, *according to the Doctors Company*, “disappeared.”

Of course, it never existed in the first place, particularly when it came to medical malpractice. As we demonstrated in *Fake Social Inflation* and show again here, for decades insurers have misrepresented their actual losses, sometimes by large percentages. The result is that doctors were and continue to be unfairly price-gouged. (See later section on Medical Malpractice.)

Now, three years after releasing *Fake Social Inflation*, we have updated the same premium and claims data overall and in several specific lines of insurance that we examined in 2020. We specifically charted, on a Direct Business basis, “Premiums Written” (the amount of money that insurers collected in premiums during that year), “Premiums Earned” (the portion of premium collected that applies to the expired portion of a policy), and “Incurred Losses” (paid losses plus estimates of future claims that they know about, or “reserves,” as well anticipated claims they do not even know about yet, called “incurred but not reported” [IBNR]). Some of these claims may result in no payment and others may take years for payout to occur. And finally, we charted “Losses Paid.” This is what insurers *actually* paid out that year to people who were injured — all claims, jury awards, and settlements. All data are adjusted for inflation and population changes.²⁰

We sought to discover if trends had changed since our March 2020 report. We find that, most assuredly, they have not. In fact, things have only gotten worse for the commercial policyholder as well as for everyday Americans whose legal rights have been stripped away or are currently threatened based on the fabricated “social inflation” rhetoric.

Overall Commercial Insurance – What is Happening

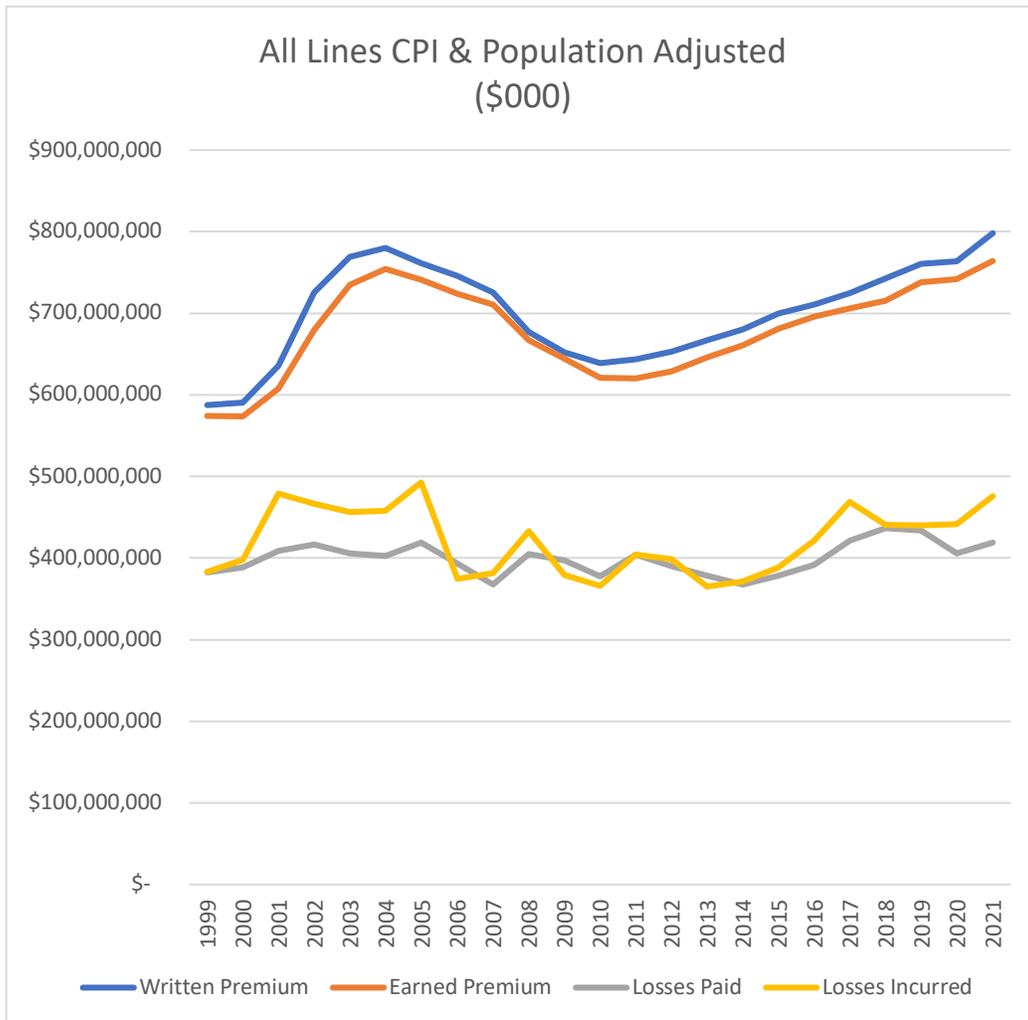
As fully documented in *Fake Social Inflation*, in 2019 the insurance industry pushed the nation into an unnecessary hard insurance market, characterized by rising insurance premiums. Rate hikes continued throughout the pandemic. As of publication, the nation remains in a hard market, with commercial insurance rates “up 5.1% in the fourth quarter of 2022.”²¹ This is despite rising interest rates, which will increase insurers’ investment income considerably.²² Even more astonishing is that insurers’ surplus — already at all-time record levels — reached over a trillion dollars in 2021.²³ (In the first half of 2022, industry surplus fell to just under a trillion dollars in conjunction with the stock market pull-back,²⁴ but it remained higher than any other year in history save for 2021.)

In *Fake Social Inflation*, we examined A.M Best insurance data to show that adjusted paid claims had stayed essentially flat for the prior two decades while premiums went up and down in sync with the insurance industry’s economic cycle.²⁵ That data also illustrated how the industry manipulated its own reserves during “hard market” periods as a way to justify unnecessary rate hikes.

We also showed that when making reasonable adjustments for inflation and population growth for the other lines, losses increased relatively little over the prior 20 years and actually decreased in three major areas: Commercial Multi-Peril, Commercial Auto Liability, and Medical Malpractice. At the same time, adjusted premiums grew faster (or shrunk less) than losses. With regard to medical malpractice, for example, insurers saw major loss reductions yet doctors' premiums dropped only \$1 for every \$3 in reduced claim payments.

Now, three years later, we have reviewed updated A.M. Best insurance data, which confirm once again that adjusted claims have stayed essentially flat while premiums have gone up and down in sync with the insurance industry's economic cycle.

Figure 1



Source: A.M. Best, *Best's Aggregates & Averages* – (Property/Casualty)

What's more, while adjusted paid claims clearly dropped during the pandemic, incurred losses (*i.e.*, including reserves) steadily rose as did premiums. This shows that the industry is, once again, inflating its reserves without basis and price-gouging its policyholders without restraint.

Directors and Officers Insurance

As we showed in *Fake Social Inflation*, one category of insurance that had been targeted for dramatic rate hikes before the pandemic was Directors and Officers (D&O) insurance, which many businesses carry. The insurance industry alleged that it needed to raise premiums because of growing numbers of lawsuits brought by shareholders defrauded by public companies, which it called “social inflation.”²⁶

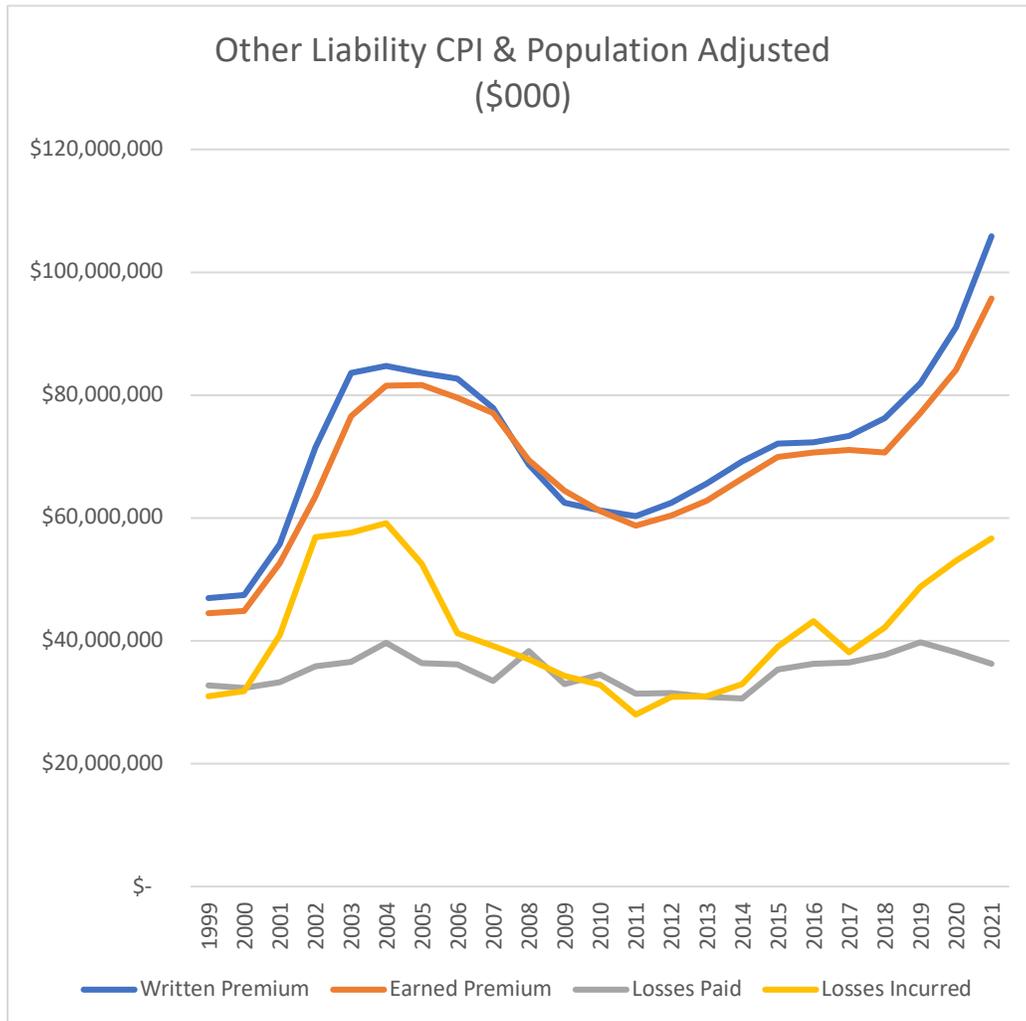
We showed that these lawsuits were not growing.²⁷ Before the pandemic, the frequency of cases brought by defrauded shareholders against public companies had been flat for the prior three years, and in 2019, the average settlement value dropped to the lowest in a decade.

Since then, the data trends maintained the same direction — down. In 2020, class action securities filings dropped 22%,²⁸ with more declines to come. A recent report from Cornerstone Research and the Stanford Law School Securities Class Action Clearinghouse found that “the volume of securities class action lawsuit filings fell for the third straight year in 2022.”²⁹ In fact, filings in 2022 were even lower than those for 2021.³⁰

In *Fake Social Inflation*, we laid bare the insurance industry response to the securities class action landscape: raising premiums. Specifically, D&O insurance is part of a larger line of coverage called “Other Liability,” so in *Fake Social Inflation*, we examined data in this line.³¹ We found that adjusted claims had stayed essentially flat for two decades while premiums went up and down in sync with the insurance industry's economic cycle. What's more, there was an astonishing jump in reserves during the last hard market (2002-2005), driving up premiums even though paid losses were flat (both during those years and the decade thereafter). The concurrent premium spike shows that businesses were clearly being price-gouged.

Bringing those data up to date in Figure 2, we see a continuing unjustified jump in incurred losses (reserves) and premiums, far beyond what dropping paid losses indicate they should be. In fact, of all the lines of insurance we examined, “Other Liability” — which also includes umbrella policies, professional and contractual liability, among others, and is the largest line of commercial insurance — exhibits the most aggressively growing chasm between incurred losses and paid losses, suggesting that the industry is over-reserving in order to push up rates far beyond what is needed.

Figure 2



Source: A.M. Best, Best’s Aggregates & Averages – (Property/Casualty)

Insurers have begun to at least say they are responding to these trends by causing D&O rates to “decelerate,” although the data have yet to show this. For example, Aon reported “a 17.8% adjusted decrease in average price per million for their D&O liability policies in 2022’s fourth quarter, compared with the same period in 2021.”³² As we noted in *Fake Social Inflation*, data clearly indicated that there never was any need for rates to spike in the first place, social inflation rhetoric notwithstanding.

Commercial Auto Liability Insurance

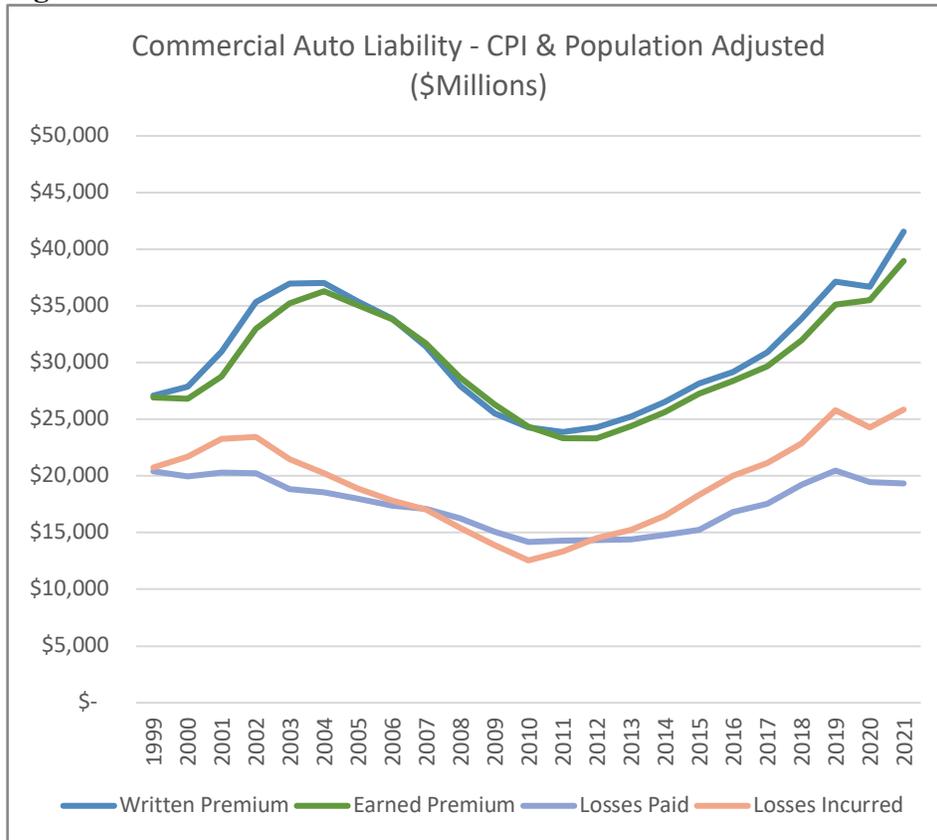
Large truck crashes in the United States are far too frequent, horrific, and costly. The trucking industry’s own studies show that crashes are increasing³³ while government oversight is weakening.³⁴ Research by the Center for Justice & Democracy show that too

many trucking companies are knowingly disregarding public safety.³⁵ Sometimes lawsuits, which are extremely rare following truck crashes (less than 2% of trucking insurance claims turn into lawsuits³⁶), and large jury verdicts, which are rarer still, are necessary to get a bad company's attention and alert an entire industry that reckless disregard for public safety will not be tolerated in a community.

While the trucking industry may complain about the rare large jury verdict — cynically identifying them as “nuclear” and an element of “social inflation” — they privately admit that any large verdict is entirely of the industry's own making. A recent report from the trucking industry's research arm, the American Transportation Research Institute (ATRI), made the obvious point: “[C]rash avoidance is everything and that strictly adhering to safety and operational policies is essential to staying out of court and/or reducing award sizes.”³⁷

In *Fake Social Inflation*, we showed exactly how the Commercial Auto Liability line has been responding to the growing safety problem of truck crashes over the prior decade. Specifically, the data showed that reserves (*i.e.*, incurred losses) jumped above paid losses by the end of 2012 and have stayed that way. In other words, while the horrific safety impact of truck crashes has led to some actual upward loss movement over the past decade, the industry has been significantly over-correcting through excessive reserving and unnecessary rate increases, as shown in Figure 3 below. This is leaving trucking industry policyholders with high premiums driven by insurance company overreach, not by elusive and nebulous “social inflation.”

Figure 3



Source: A.M. Best, Best’s Aggregates & Averages – Property/Casualty (premium and loss data); The World Bank (population data); U.S. Bureau of Labor Statistics (CPI data)

As this chart makes clear, adjusted paid losses turned higher between 2016 and 2018, before slowing in 2019 and then reversing course during the pandemic.³⁸ But paid losses have not come close to catching up with the incurred losses insurers have been reporting over the past decade, and the dramatic spike in incurred losses in 2019 has not materialized in the form of paid losses in the years since. During that decade, led by the incurred losses that were never paid out, insurers’ commercial auto liability premiums written increased by 71% (premiums earned were up 67%), or about twice as much as the 34% increase in paid claims over the same time period.

Numbers don’t lie. The insurance industry has been over-correcting through excessive reserving and unnecessary rate hikes for years. Commercial auto liability policyholders are being price-gouged.

Medical Malpractice

As we showed in great detail in *Fake Social Inflation*, perhaps no commercial insurance policyholders have been victims of the industry’s manufactured economic cycle crises more than doctors. Each time the industry raises rates on doctors during insurance hard

market periods, it has blamed lawyers, lawsuits, and juries even though claims never jump.³⁹ The Appendix in *Fake Social Inflation* demonstrates this in extensive historical detail.

In fact, doctors have regularly been charged high premiums during periods when paid claims were dropping. For example, during the prior hard market, medical malpractice insurers misrepresented their actual losses by an incredible annual average of 37% and doctors paid the price with completely unjustified premium hikes.

In December 2019, while insurance consultants tried to tie their rate hikes to litigation, there was a clear disconnect between insurance industry rhetoric and what was actually happening in the courts. For example, in an interview about the “legal challenges” facing doctors and patients for 2020, the top litigator for the American Medical Association (AMA) did not even mention juries, insurance rate hikes, or premiums that might be tied to litigation.⁴⁰ This stood in stark contrast to the AMA’s response to the 2002 to 2005 hard market, when the Association embarked on a huge campaign around these issues.⁴¹

Of course, the AMA had no idea what actual challenges the medical profession was about to face in 2020. Stresses on the medical profession caused by the pandemic have been so acute that doctors are leaving the profession in troubling numbers, exacerbating an ongoing problem of physician shortages.⁴² For example, 45 percent of more than 1,260 primary care clinicians surveyed in 2021 “personally know clinicians who have retired early/quit; 29% know practices that have closed.” In addition, 21 percent of those surveyed are “unable to hire clinicians for open positions; 54% are unable to hire staff for open positions.”⁴³

As is well-documented, patient safety clearly suffered during that period. There were large increases in hospital-acquired infections in 2020 compared to 2019.⁴⁴ There were new types of errors such as “Missed or delayed COVID-19 diagnoses,” “Missed or delayed non-COVID-19 diagnosis because it was assumed to be COVID-19,” and “Missed or delayed non-COVID-19 or secondary diagnosis in a patient being treated with known COVID-19 disease.”⁴⁵ In addition, nursing home infections and deaths soared. According to the most recent data, as of the week ending February 26, 2023, more than 1.56 million nursing home residents had contracted COVID-19 and over 164,400 residents had died from COVID-19.⁴⁶

But when asked whether they’d been sued for a COVID-related allegation, 100 percent of surveyed doctors said no.⁴⁷ In fact, during the pandemic, nearly every state adopted rules — either by legislation or executive order — shielding negligent healthcare operators and providers from liability for medical malpractice. Some laws limited immunity to COVID-related negligence, while others were much broader.⁴⁸

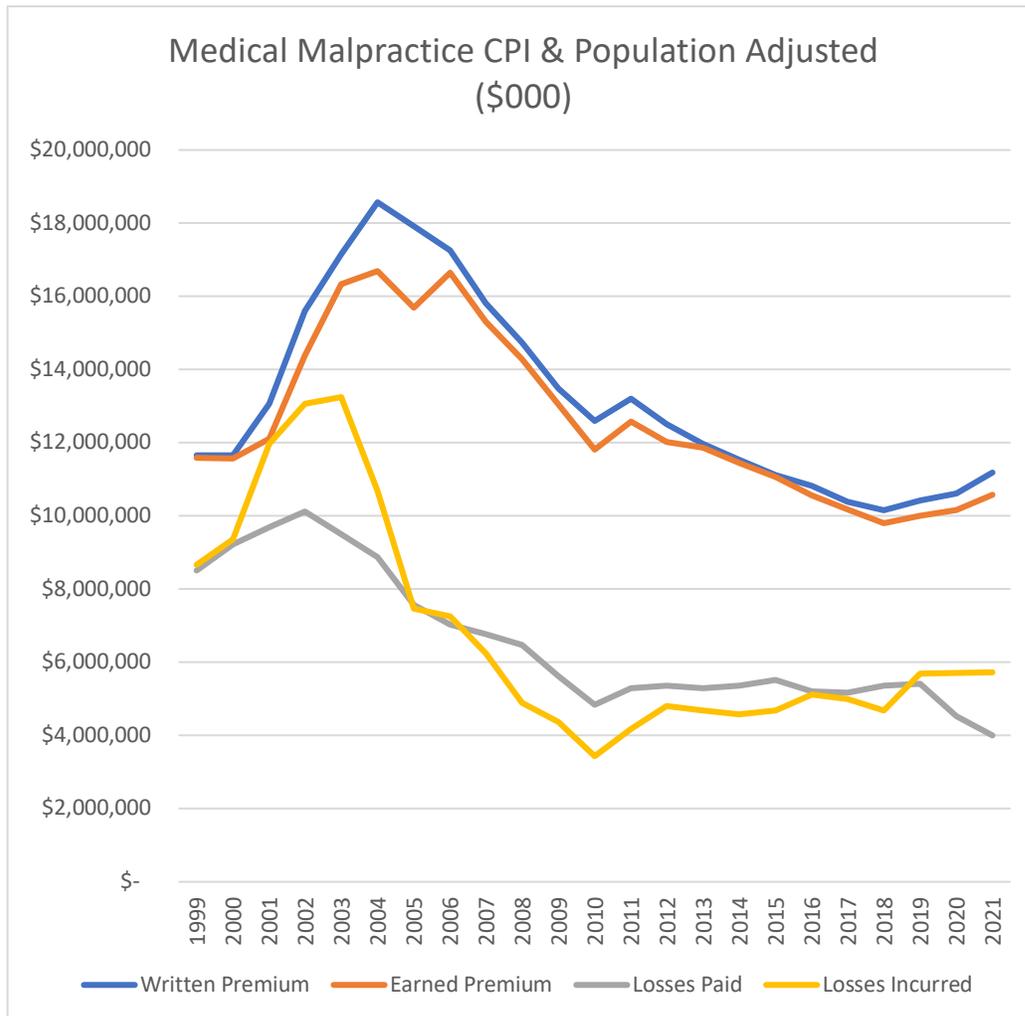
Indeed, according to a survey of over 4,300 doctors across 29 specialties conducted from May 21 through August 28, 2021, “U.S. physicians saw a decline in malpractice lawsuits during the pandemic.”⁴⁹ Yet despite the fact that litigation significantly dropped,

premiums continued to go up. In a July 2022 survey, “More than 6 in 10 medical groups report[ed] their doctors’ malpractice premiums have increased since 2020,” with the average increase being 14.3 percent. Respondents confirmed, “[A]lthough premiums have risen during this period, overall claims throughout the United States have dropped.”⁵⁰

Meanwhile, medical malpractice insurers made plenty of money, with the medical professional liability industry’s top-line revenue growth “its strongest in nearly two decades,” resulting in “a positive year as reflected in a variety of financial metrics” and better results “than many anticipated just 12 months ago.”⁵¹

In *Fake Social Inflation*, we showed how doctors have been severely price-gouged during hard market periods with premiums rising despite declines in paid claims. Bringing the 2020 findings up to date in Figure 4, we see a recent and unjustified jump in incurred losses (reserves) and premiums, despite the clear indications of declining claims payments. Indeed, on an unadjusted basis, 2021 saw medical liability insurers pay out less on claims than any year since 2011. On a CPI- and population-adjusted basis, insurers paid out significantly less than any year over the past 23 years reviewed for this report. The industry’s incurred loss estimates, however, went in the other direction, making 2021 *appear to be* the highest loss year of the last 14 years, on an adjusted basis. Following those reserves are the highest adjusted (by inflation and population) annual earned premium for medical liability insurers since 2015.

Figure 4



Source: A.M. Best, Best's Aggregates & Averages – (Property/Casualty)

The data and history suggest not that rates should be going up, but that once again doctors and healthcare providers are the victims of insurers' price-gouging.

CONCLUSION

For five decades, businesses and consumers have been victims of periodic eruptions in insurance premiums caused by the property/casualty insurance industry's economic cycle, the industry's unique accounting methods, and laws that allow anti-competitive pricing by this industry. While insurers try to convince the public that lawsuits and juries, or "social inflation," are to blame, historical data are clear that this has never been true — and it is not true today. The only way to stop volcanic eruptions in insurance premiums is

through better oversight and regulation of the industry's mismanaged accounting, particularly of padded reserves, and the cyclical nature of the insurance business.

AUTHORS

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Joanne Doroshow, an attorney, is Executive Director of the Center for Justice & Democracy at New York Law School, where she is an Adjunct Professor of Law. CJ&D is the only consumer organization in the nation dedicated exclusively to fighting attacks on the civil justice system. She is also co-founder of CJ&D's project, Americans for Insurance Reform.

Ms. Doroshow has worked on civil justice and insurance issues since 1986, when she first directed a project for Ralph Nader on liability and the insurance industry. With Nader, she was author of several reports and numerous materials on civil justice and insurance issues. At CJ&D, Joanne has written or co-authored major CJ&D studies, frequently testifies before Congress and state legislatures and was a member of the New York State Governor's task force on medical malpractice in 2007 and 2008.

Ms. Doroshow is the recipient of the AAJ Partnership Award, 2016; the Distinguished Service Award, Kansas Association for Justice, 2012; Consumer Advocate of the Year, Consumer Attorneys of California, 2009; Esther Weissman Award, Worker Injury Law and Advocacy Group, 2008; Consumer Education Award, Consumer Attorneys Association of Los Angeles, 2005; Certificate of Recognition, California State Assembly, 2005; Consumer Advocacy Award, Massachusetts Academy of Trial Attorneys, 2003; Consumer Advocate of the Year, Trial Lawyers Association of Metropolitan Washington, DC, 2003; and the Hoosier Freedom Award, Indiana Trial Lawyers Association, 2000.

DOUGLAS HELLER

Douglas Heller is Director of Insurance for the Consumer Federation of America. He is a consumer advocate and nationally recognized insurance expert conducting insurance-related research and advocacy on behalf of consumer organizations around the country, including Consumer Federation of America. He is an appointed member of the Federal Advisory Committee on Insurance, which advises the U.S. Treasury Department's Federal Insurance Office. He also sits on the Executive Committee of the Board of the Coalition Against Insurance Fraud.

Since 2013, Mr. Heller has been an appointee of California's Insurance Commissioner, serving as a Consumer Representative on the California Automobile Assigned Risk Plan (CAARP) Advisory Board, which oversees that state's residual auto insurance market and innovative Low-Cost Auto Insurance Program for low-income drivers. During more than two decades of work on public policy and regulatory matters related to property-casualty insurance, Mr. Heller has authored reports, articles, and op-eds on issues related to insurance laws and markets in the United States; overseen regulatory challenges to insurance company rates and practices; served as a consulting expert in insurance-related litigation; and testified before dozens of state and federal legislative committees in support of consumer rights and protections. His peer-reviewed article — "An Auto Insurance Lifeline for Safe Driving, Lower-Income Marylanders" — was published by

the Abell Foundation in November 2019. For nine years (2004-2012), Mr. Heller served as the Executive Director of the national consumer advocacy organization, Consumer Watchdog. His work has saved policyholders hundreds of millions of dollars on insurance premiums, helped curb unfair auto insurance pricing practices, and increased access to insurance markets for lower-income consumers.

Between 1994 and 1996, Mr. Heller was a classroom teacher in St. John Parish, Louisiana through the Teach for America program. He holds a B.A. in Political Science from the University of California, Berkeley and a Master of Public Administration degree from the University of Southern California.

BOB HUNTER

J. Robert “Bob” Hunter, FCAS, MAAA is the Insurance Director Emeritus of Consumer Federation of America, after having served as CFA’s Director of Insurance for more than 25 years until his retirement in 2022. A Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries, from 1993 to 1994, Mr. Hunter was the Commissioner of Insurance for the State of Texas and served as a member of the Executive Committee of the National Association of Insurance Commissioners. He founded and led the National Insurance Consumer Organization (NICO) from 1980-1993, during which period he regularly testified before Congress, regulatory agencies, and every state legislature in the country. Between 1974 and 1978, he served as Administrator of the Federal Insurance Administration under Presidents Ford and Carter, during which time he had responsibility for administering the Urban Property Protection Program, the National Flood Insurance Program, and the Federal Crime Insurance Program. Prior to being named Administrator, he served as Chief Actuary of the Federal Insurance Administration from 1971 to 1974.

NOTES

¹ J. Robert Hunter, Joanne Doroshov and Douglas Heller, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation*, Consumer Federation of America and Center for Justice and Democracy (2020), <https://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation>

² When a company has an “incurred loss,” this does not mean the insurer has actually paid out this money. This figure includes not just paid claims but estimates of future claims that they know about (reserves) and claims they do not even know about yet, called “incurred but not reported” (IBNR). Some of these claims may not even exist and others may take years for payout to occur. It is this figure that insurers file with state insurance departments when seeking rate hikes. The excess reserves used to justify rate increases are later, during the soft market, released into the insurer profit accounts.

³ The property/casualty insurance industry is allowed to collude in this manner because of the McCarran-Ferguson Act, a law that exempts the insurance industry from antitrust laws and allows the industry to collude on important components of insurance prices, an anti-competitive practice that is illegal for other industries. 15 U.S.C. 1012-1015. However, insurance companies may not boycott their insureds by agreeing to deny them coverage entirely. *St. Paul Fire & Marine Inc. Co. v. Barry*, 438 U.S. 531 (1978).

⁴ The term “social inflation” was created with “no scientific evidence behind it” and “no sound scientific basis for it.” Dr. Bill Kanasky, Senior Vice President of Litigation Psychology, Courtroom Sciences, speaking during A.M. Best webinar, “The Impact of Social Inflation on Insurance Claims,” November 10,

2020. *See also*, presentation by Ken Klein, “Unpacking ‘Social Inflation,’” during National Association of Insurance Commissioners Summer 2022 National Meeting, https://content.naic.org/sites/default/files/national_meeting/AttmtFive_Consumer_Social%20Inflation_ken_klein.pdf

⁵ Seventeen states plus the North Mariana Islands reported publishable data for total tort dispositions and jury trials in 2021. Their rates were as follows: Connecticut (0.8 percent), Hawaii (0.76 percent), Indiana (0.84 percent), Michigan (0.24 percent), Minnesota (1.79 percent), Missouri (0.88 percent), Nevada (0.9 percent), New Jersey (0.49 percent), New York (0.74 percent), North Carolina (0.62 percent), North Mariana Islands (0.0 percent), Ohio (0.4 percent), Oregon (0.52 percent), Rhode Island (0.16 percent), Texas (0.84 percent), Utah (90.48 percent), Vermont (0.29 percent), and Wisconsin (1.4 percent). Utah resolved 19 tort cases by jury trial in 2021. National Center for State Courts, “CSP STAT Civil: Trial Court Caseload Overview, Caseload Detail – Tort, Single Year Data, Jury Trial Rate, 2021,” State Court Caseloads,” July 8, 2022, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil>. The rate of tort trials resolved by juries has remained extremely low for the past 10 years. To view publishable data for total tort dispositions and jury trials in 2012-2022, *see* National Center for State Courts, “CSP STAT Civil: Trial Court Caseload Overview, Caseload Detail – Tort, Single Year Data, Jury Trial Rate,” July 8, 2022, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil>

⁶ Center for Justice & Democracy, “The Myth of Nuclear Verdicts,” June 21, 2021, <https://centerjd.org/content/fact-sheet-myth-nuclear-verdicts>

⁷ Richard L. Jolly, Valerie P. Hans, and Robert S. Peck, *The Civil Jury: Reviving an American Institution*. U.C. Berkeley School of Law, Civil Justice Research Initiative (September 2021), https://civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf

⁸ National Association of Insurance Commissioners, “U.S. Property & Casualty and Title Insurance Industries – 2021 Full Year Results,” <https://content.naic.org/sites/default/files/inline-files/2021%20Annual%20Property%20%26%20Casualty%20and%20Title%20Industry%20Report.pdf>. In the first half of 2022, industry surplus fell to just under a trillion dollars, but it remained higher than any other year in history save for 2021.

⁹ *See, e.g.*, Benjamin Gideon, “Maine Voices: To delay resuming civil trials is to delay justice,” *Press Herald*, April 30, 2021, <https://www.pressherald.com/2021/04/30/maine-voices-civil-trials/>

¹⁰ Nate Raymond, “Pandemic Fueled Federal Court Base Backlog Less Than Expected: study,” *Reuters*, December 2, 2022, <https://www.reuters.com/legal/government/pandemic-fueled-federal-court-case-backlog-less-than-expected-study-2022-12-02/>; National Center for State Courts, “CSP STAT Overview: Trial Court Caseload Overview, Incoming Trends, 2012-2021,” July 8, 2022, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-overview>

¹¹ Tort cases represented the following percentages of incoming civil cases in state trial courts in the eight years prior to COVID-19: 2012 (5 percent), 2013 (5 percent), 2014 (7 percent), 2015 (5 percent), 2016 (5 percent), 2017 (5 percent), 2018 (6 percent), and 2019 (5 percent). National Center for State Courts, “CSP STAT Civil: Trial Court Caseload Overview, Incoming Caseload Composition – Civil, 2012-2021,” July 8, 2022, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil>

¹² Twenty-eight states provided the National Center for State Courts with publishable data regarding incoming tort caseloads for the years 2017 through 2021. National Center for State Courts, “CSP STAT Civil: Trial Court Caseload Overview, Caseload Detail - Tort, Incoming Five-Year Trend,” July 8, 2022, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil>

¹³ Seventeen states reported publishable data for total tort dispositions and jury trials in 2020. Their rates were as follows: Alaska (0.0 percent), Georgia (0.89 percent), Hawaii (0.42 percent), Indiana (0.4 percent), Michigan (0.19 percent), Minnesota (1.59 percent), Missouri (0.4 percent), New Jersey (0.32 percent), Nevada (0.67 percent), North Carolina (0.26 percent), Ohio (0.28 percent), Oregon (0.91 percent), Rhode Island (0.21 percent), South Carolina (1.37 percent), Texas (0.63 percent), Utah (53.33 percent), and Vermont (1.44 percent). Utah resolved 8 tort cases by jury trial in 2020. National Center for State Courts,

“CSP STAT Civil: Trial Court Caseload Overview, Caseload Detail – Tort, Single Year Data, Jury Trial Rate, 2020,” State Court Caseloads,” July 8, 2022, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil>

¹⁴ Seventeen states plus the North Mariana Islands reported publishable data for total tort dispositions and jury trials in 2021. Their rates were as follows: Connecticut (0.8 percent), Hawaii (0.76 percent), Indiana (0.84 percent), Michigan (0.24 percent), Minnesota (1.79 percent), Missouri (0.88 percent), Nevada (0.9 percent), New Jersey (0.49 percent), New York (0.74 percent), North Carolina (0.62 percent), North Mariana Islands (0.0 percent), Ohio (0.4 percent), Oregon (0.52 percent), Rhode Island (0.16 percent), Texas (0.84 percent), Utah (90.48 percent), Vermont (0.29 percent), and Wisconsin (1.4 percent). Utah resolved 19 tort cases by jury trial in 2021. National Center for State Courts, “CSP STAT Civil: Trial Court Caseload Overview, Caseload Detail – Tort, Single Year Data, Jury Trial Rate, 2021,” State Court Caseloads,” July 8, 2022, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil>

¹⁵ See National Center for State Courts, “CSP STAT Civil: Trial Court Caseload Overview, Caseload Detail – Tort, Single Year Data, Jury Trial Rate,” July 8, 2022, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil>

¹⁶ Auto insurance companies made a windfall from COVID-19. Early into the pandemic, consumer groups (specifically the Consumer Federation of America and the Center for Economic Justice) began pressing auto insurance carriers for premium refunds as people stopped driving. While some companies responded with some premium relief, they did so only for a short time. As a result, as both groups put it, “The staggering drop in accidents this year resulted in a dramatic drop in claims paid by insurers, handing companies massive windfall profits even after accounting for the woefully inadequate premium relief provided in the spring.” Consumer Federation of America press release, “Auto Insurance Refunds Needed as New Data Show Crashes Remain Well Below Normal Due to Pandemic; 23% Fewer Accidents in September and October,” December 22, 2020, https://consumerfed.org/press_release/auto-insurance-refunds-needed-as-new-data-show-crashes-remain-well-below-normal-due-to-pandemic-23-fewer-accidents-in-september-and-october/; Leslie Scism and Allison Prang, “Travelers More Than Doubles Quarterly Income,” *Wall Street Journal*, October 20, 2020, <https://www.wsj.com/articles/travelers-profit-rose-in-third-quarter-11603192181> (“Property-casualty insurer Travelers Cos. more than doubled its net income in the third quarter, benefiting from auto policyholders driving fewer miles and increased premium rates.”)

¹⁷ Richard L. Jolly, Valerie P. Hans, and Robert S. Peck, *The Civil Jury: Reviving an American Institution*. U.C. Berkeley School of Law, Civil Justice Research Initiative (September 2021), https://civiljusticeinitiative.org/wp-content/uploads/2021/09/CJRI_The-Civil-Jury-Reviving-an-American-Institution.pdf

¹⁸ See, e.g., Amwins, “The Ripple Effect of Social Inflation and Nuclear Verdicts on the Insurance Industry,” December 8, 2020, <https://www.amwins.com/resources-insights/article/the-ripple-effect-of-social-inflation-and-nuclear-verdicts-on-the-insurance-industry>; A.M. Best webinar, “The Impact of Social Inflation on Insurance Claims,” November 20, 2020; Christina Commendatore, “Nuclear Verdicts Continue to Push Commercial Auto Rates,” *Claims Journal*, July 1, 2020, <https://www.claimsjournal.com/news/national/2020/07/01/297958.htm>

¹⁹ The Doctors Company press release, “Social Inflation Causes Between \$2.4 and \$3.5 Billion of All Medical Malpractice Losses,” January 23, 2023, <https://www.prnewswire.com/news-releases/social-inflation-causes-between-2-4-and-3-5-billion-of-all-medical-malpractice-losses-the-doctors-company-study-finds-301728462.html>

²⁰ In *Fake Social Inflation* (2020), we adjusted commercial auto liability to account for changes in inflation (CPI) and annual vehicle miles traveled. However, due to the unprecedented decline in driving during the final three quarters of 2020, the use of a mileage adjustment loses its utility. In lieu of that we have applied the same population adjustment applied to other lines.

²¹ “US Commercial Lines Insurance Composite Rate Increases 5.1% in Fourth Quarter 2022,” *MarketScout*, <https://marketscout.com/us-commercial-lines-insurance-composite-rate-increases-5-1-in-fourth-quarter-2022/>

²² Ibid. Richard Kerr, founder of MarketScout, forecasted the 2023 insurance environment by noting, “If there is a slowdown in the economy and/or the Fed continues to increase interest rates, we may well see moderation in insurance rates.” By way of explanation as to why interest rates matter, insurers make their

money primarily from investment income, investing the premium dollars they receive from policyholders. They invest the “float” that occurs during the time between when premiums are paid to the insurer and losses are paid out by the insurer. As a corollary to this, rarely do insurers achieve an underwriting profit (*i.e.*, when premiums taken in are more than “losses” and underwriting expenses). In many lines of insurance, an underwriting profit would produce a wildly excessive overall profit because the investment yield on the float is so great. This industry has hardly ever had an underwriting profit, occurring *in only 12 of the last 51 years*. Over this same period, despite almost always having an underwriting loss, the property/casualty industry thrived.

²³ National Association of Insurance Commissioners, “U.S. Property & Casualty and Title Insurance Industries – 2021 First Half Results,” <https://content.naic.org/sites/default/files/inline-files/Property-Casualty-and-Title-Insurance-Industries-2021-Mid-Year-Report.pdf>

²⁴ “Unrealized investment losses from recent equity market declines promoted a 2.9% decline in PHS [Policyholders’ Surplus] from mid-year 2021 and an 8.6% drop from year-end 2021 to \$961 billion.” Fitch Ratings, “US P/C Insurance Statutory Profits Slip on Rising Auto Losses,” September 8, 2022, <https://www.fitchratings.com/research/insurance/us-p-c-insurance-statutory-profits-slip-on-rising-auto-losses-08-09-2022>

²⁵ Simply described, the “boom and bust” insurance industry economic cycle occurs because insurers make most of their money from investment income, as described in note 22. During years of a strong stock market, high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to invest for maximum return. This is particularly true with regard to commercial insurance, like liability insurance for businesses or malpractice insurance. The personal lines market, like auto and homeowners insurance, is not as competitive because of the lack of knowledge of consumers and the resulting inertia in the marketplace. But in the commercial market, there is competitive *underpricing* of policies, when rates rise less than inflation. This is called the “soft market,” the duration of which is typically around a decade, give or take a few years. For about 13 years before 2019, we were in a “soft market” period, which is why rates were not rising. We are now in a “hard market” period.

²⁶ See, e.g., Willis Towers Watson, *Insurance Marketplace Realities 2020*, November 13, 2019, <https://www.wtwco.com/en-US/Insights/2019/11/insurance-marketplace-realities-2019-fall-update-executive-summary>. See also, Judy Greenwald, “D&O prices surge: Aon,” *Business Insurance*, January 16, 2020, <https://www.businessinsurance.com/article/20200116/NEWS06/912332618/D&O-policy-pricing-for-Aon-clients-surges-29-in-third-quarter>

²⁷ Contessa Brewer and Katie Young, “Companies are paying big bucks to insure boards against liability as class-action suits soar,” *CNBC*, January 9, 2020, <https://www.cnbc.com/2020/01/09/companies-are-paying-big-bucks-to-insure-boards-against-liability-as-class-action-suits-soar.html>

²⁸ Judy Greenwald, “New class action securities cases down 22% in 2020,” *Business Insurance*, February 3, 2021, <https://www.businessinsurance.com/article/20210203/NEWS06/912339565/New-class-action-securities-cases-down-22-in-2020>

²⁹ Cornerstone Research, “Securities Class Action Filing Activity Fell for Third Straight Year as Volume of M&A Class Actions Declined,” February 1, 2023, <https://www.cornerstone.com/insights/press-releases/securities-class-action-filing-activity-fell-for-third-straight-year-as-volume-of-ma-class-actions-declined/>

³⁰ Stanford Law School Securities Class Action Clearinghouse, “FEDERAL SECURITIES CLASS ACTION LITIGATION 1996 – YTD,” <https://securities.stanford.edu/charts.html>

³¹ As we noted in *Fake Social Inflation*, D&O Insurance is such a minor line that the National Association of Insurance Commissioners (NAIC) has not even broken it out in the Annual Statement data insurers must file. If this sub-line is to be studied, NAIC will have to make a closed claim study to analyze the issue. If this study is not done, the public cannot trust the claims of insurers that this sub-line is in crisis. We know this because, once before, insurers created a crisis based on lack of data, which ultimately proved not be based on any increase in paid claims. In 1975, the insurance industry asserted that medical malpractice and product liability insurance were in crisis, but closed claims data did not exist to establish this. Such a study was then ordered by NAIC at the request of President Ford. That study revealed that the so-called “crisis” was not based on a jump in paid claims at all. This led NAIC, for the first time, to break out those two lines on the Annual Statement, providing the necessary data to prove that later “crises” in the mid-1980s and early 2000s were fraudulent and drummed up by industry leaders, who were unafraid of any charge of price fixing because of the McCarran-Ferguson Act’s antitrust exemption.

³² Judy Greenwald, “D&O liability rate decrease accelerates: Aon,” *Business Insurance*, February 6, 2023, <https://www.businessinsurance.com/article/20230206/NEWS06/912355380/D&O-liability-rate-decrease-accelerates-Aon-directors-and-officers>

³³ “Since 2011, both fatal crashes involving large trucks and total truck [vehicle miles driven] have seen an increase.” American Transportation Research Institute, *Predicting Truck Crash Involvement: 2022 Update* (October 2022), <https://truckingresearch.org/wp-content/uploads/2022/10/ATRI-Predicting-Truck-Crash-Involvement-2022.pdf>

³⁴ Center for Justice & Democracy, *Big Trucks: An Avoidable Public Safety Crisis* (November 2022), <https://centerjd.org/content/study-big-trucks-avoidable-public-safety-crisis>

³⁵ Ibid.

³⁶ American Transportation Research Institute, *The Impact of Small Verdicts and Settlements on the Trucking Industry* (November 2021), <https://truckingresearch.org/wp-content/uploads/2021/11/ATRI-Impact-of-Small-Verdicts-11-2021.pdf>

³⁷ American Transportation Research Institute, *Understanding the Impact of Nuclear Verdicts on the Trucking Industry* (June 2020), <https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf>

³⁸ In *Fake Social Inflation* (2020), we adjusted commercial auto liability to account for changes in inflation (CPI) and annual vehicle miles traveled. However, due to the unprecedented decline in driving during the final three quarters of 2020, the use of a mileage adjustment loses its utility. In lieu of that we have applied the same population adjustment applied to other lines.

³⁹ See Americans for Insurance Reform, *Stable Losses/Unstable Rates 2016* (November 2016), <http://centerjd.org/content/stable-losses-unstable-rates-2016>

⁴⁰ Tanya Albert Henry, “What legal challenges will affect patients and physicians in 2020?” American Medical Association, January 29, 2020, <https://www.ama-assn.org/health-care-advocacy/judicial-advocacy/what-legal-challenges-will-affect-patients-and-physicians>

⁴¹ “AMA: To Campaign For Malpractice Tort Reform,” *American Health Line*, March 13, 2002; Simon Avery, “Doctors vow tort reform to reduce insurance costs,” *Associated Press*, March 11, 2002. See also, CRICO Strategies, *Medical Malpractice in America: A 10-Year Assessment With Insights* (2019), https://cdn2.hubspot.net/hubfs/217557/crico_medmal_in_america_web.pdf

⁴² Physicians Foundation, *2020 Survey of America’s Physicians, COVID-19 Impact Edition, Part One: COVID-19’s Impact on Physicians’ Practices and Their Patients* (August 2020), <https://physiciansfoundation.org/wp-content/uploads/2020/08/20-1278-Merritt-Hawkins-2020-Physicians-Foundation-Survey.6.pdf>

⁴³ Larry A. Green Center and Primary Care Collaborative, “Quick COVID-19 Primary Care Survey: Series 30 Fielded August 13-17, 2021,” https://static1.squarespace.com/static/5d7ff8184cf0e01e4566cb02/t/615653643c3097648325ce4c/1633047398171/C19_Series_30_National_Executive_Summary.pdf

⁴⁴ “‘Perfect storm’: Some health care-associated infections spiked during pandemic,” *Healio*, September 3, 2021, <https://www.healio.com/news/infectious-disease/20210903/perfect-storm-some-health-care-associated-infections-spiked-during-pandemic>, discussing Lindsey M. Weiner-Lastinger et al., “The impact of coronavirus disease 2019 (COVID-19) on healthcare-associated infections in 2020: A summary of data reported to the National Healthcare Safety Network,” 43 *Infection Control & Hospital Epidemiology* 12 (2021), <https://www.cambridge.org/core/journals/infection-control-and-hospital-epidemiology/article/impact-of-coronavirus-disease-2019-covid19-on-healthcare-associated-infections-in-2020-a-summary-of-data-reported-to-the-national-healthcare-safety-network/8197F323F4840D233A0C62F4726287E1>

⁴⁵ Tejal Ghandi and Hardeep Singh, “Reducing the Risk of Diagnostic Error in the COVID-19 Era,” 15 *J. Hosp. Med.* 363 (June 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7289509/>. See also, Joyce Frieden, “Look at Patient Safety Through an Equity Lens, Expert Urges,” *MedPage Today*, October 26, 2021, <https://www.medpagetoday.com/meetingcoverage/sidm/95274>

⁴⁶ Centers for Medicare and Medicaid Services, “COVID-19 Nursing Home Data,” <https://data.cms.gov/covid-19/covid-19-nursing-home-data> (updated February 26, 2023).

⁴⁷ *Malpractice Report 2021*, *Medscape* (2021), <https://www.medscape.com/slideshow/2021-malpractice-report-6014604?faf=1#1>

⁴⁸ American Association for Justice, *Summary of State COVID-19 Healthcare Immunity Laws*. On file with CJ&D.

⁴⁹ Susan Kreimer, “Docs hit with fewer malpractice suits as COVID lockdowns curtailed procedures,” *Fierce Healthcare*, November 23, 2021, <https://www.fiercehealthcare.com/practices/docs-hit-fewer-malpractice-suits-as-covid-lockdowns-curtailed-procedures>, discussing *Malpractice Report 2021*, *Medscape* (2021), <https://www.medscape.com/slideshow/2021-malpractice-report-6014604?faf=1#1>

⁵⁰ Medical Group Management Association, *Maintaining Margin in the Inflation Era* (July 2022), <https://www.mgma.com/getmedia/787ac24f-d9ab-4743-9e37-745bdaaa2408/Cost-and-Revenue-DataReport-July2022-FINAL.pdf.aspx>. A.M. Best also reported that “direct written premiums for U.S. medical professional liability (MPL) insurers increased 10 percent . . . in 2021. A.M. Best, “U.S. Property/Casualty – 2021 Direct Premiums Written by Line – 2022 Edition,” https://www.ambest.com/review/displaychart.aspx?Record_Code=321910&src=43

⁵¹ Medical Liability Monitor, “Premium Growth Leads to Positive Year for MPL Specialty Insurers” (April 2022).