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Insurance Bureau of Canada Report

Emerging Trends in Canadian Commercial Liability Insurance Market

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I. ABOUT THIS REPORT

The Insurance Bureau of Canada commissioned Dentons Canada LLP to analyze the scope and implications of the rapid expansion of litigation exposure in the United States (“**US**”), and the impact on the commercial insurance landscape. This Report provides context on whether the identified liability trends are impacting Canada’s insurance landscape and insurance consumers, and also recommends countermeasures to mitigate litigation exposure growth in Canada and to protect the stability of the commercial market.

II. EXECUTIVE SUMMARY

The rapid expansion of litigation exposure in the US has played a significant role in shaping the current commercial liability landscape, leading to higher claims costs for insurers, and higher insurance premiums for the consumer. For example, the US Chamber of Commerce Institute for Legal Reform estimates that Americans pay an annual “tort tax” of more than \$3,600 due to the surge in litigation across the country that has ultimately raised the costs of products and services.

Our analysis finds that many of the trends that affect insurers and policyholders in the US are at play in Canada, although to a lesser degree. The most relevant trends in the Canadian commercial liability context are the increase in legal advertising, the rise in class action litigation with respect to product liability, and third-party litigation funding. Left unchecked, these trends could further impact Canada’s property and casualty (“P&C”) market and impact insurance affordability.

Three trends that have contributed to social inflation in US litigation are now driving increased litigation costs in Canada: (1) class actions, mass litigation, and nuclear verdicts; (2) legal advertising; and (3) third-party litigation funding.

- **Class action litigation** is becoming more pervasive in Canada, especially within the areas of environmental and health litigation. The number of class action filings has increased over the past decade and this increase has come about as Canadian plaintiffs’ lawyers have gained experience and increased coordination among themselves and with US plaintiffs’ counsel. There are also signs that governments are channeling resources to address public health issues through class actions.

British Columbia has an especially plaintiff-friendly class action regime, such that class members in more restrictive jurisdictions have begun to choose that province to certify a class action. We recommend that insurers review their policies with their insureds to strengthen risk management in pricing of new insurance policies

to combat the costly impacts of class actions and so-called “nuclear verdicts,” which are damage awards that exceed \$10 million.

Legal advertising in Canada is expanding. For instance, the Canadian Bar Association reports that over the past 30 years, legal advertising has skyrocketed, and recent lawyer disciplinary decisions include lawyers facing citations for breaching the regulations relating to the advertising of legal services.

The regulations concerning advertising are well defined and contain robust requirements for the marketing of legal services in Canada. However, these regulations currently rely, at least in part, on public engagement to report advertising that falls afoul of the regulations. We recommend a change in practice where consumers take on a more active role to report advertisements to provincial and territorial law societies would help curtail aggressive and wide-spread advertising that contravenes the regulations.

- **Third-party litigation funding (“Litigation Funding”)** is prevalent and will continue to expand as a means to fund large-scale litigation in Canada. Litigation Funding is becoming increasingly common in arbitrations, insolvency proceedings, IP (“**intellectual property**”) enforcements, construction disputes, business to business commercial disputes, judgment enforcements, as well as various other types of litigation. However, the extent to which litigation is financed by litigation funding firms cannot be known for certain, given the private nature of third-party funding agreements.

Litigation Funding is virtually unregulated in Canada, and its use in private civil suits, excluding class actions and bankruptcy litigation, is rarely disclosed. The most efficient response to barring or limiting the use of Litigation Funding in Canadian courts is by way of regulatory action. The strongest justification for regulatory amendments that restrict Litigation Funding is that it no longer promotes access to justice, as was initially intended; it is now used as an investment tool that uses the court system to generate profits for large financial firms. We recommend

lawmakers make efforts to explain why Litigation Funding no longer adheres to the public-good justification, and task regulators to address the issue.

III. INTRODUCTION

The three emerging trends we focus on in the US context are as follows: (1) class actions, mass litigation and nuclear verdicts; (2) third-party litigation funding; and (3) bad faith claims.¹ The purpose of analyzing how these trends negatively affect the US commercial insurance industry, including the insureds, is to gain insight regarding the extent to which similar pressures in Canada's P&C market are driving up Canadian policyholder premiums. In our investigation, we discovered that there is significant overlap of these trends between the US and Canada. But there are some notable differences; namely, while class actions and third-party litigation funding is a driving force in both countries, bad faith claims, mass litigation, and nuclear verdicts are less impactful in Canada, while legal advertising appears to be an emerging catalyst in the Canadian litigation market.

Finally, we identify measures the insurance industry can implement through insurers, policyholders, and regulators to address these trends and their detrimental effects on the commercial insurance industry. In the concluding section of this Report, we discuss risk pricing adjustment, legislative and regulatory reform, and enhanced defence strategy and analytics as countermeasures and adaptive strategies.

¹ See Glossary for definitions of terms.

IV. LIABILITY LANDSCAPE IN THE US AND CANADA

A. Litigation Costs: US and Canada

Overview:

- Litigation and litigation expenses in the US are increasing, with hundreds of billions of dollars spent per year on civil claims.
- The number of active civil cases and arbitration in Canada are increasing.
- Canada is experiencing an increase in litigation related to cybersecurity, privacy, and regulatory matters, including environmental and securities disclosures.
- Despite experiencing similar trends, Canada sees significantly lower damages awards than the US.

1. Increasing Litigation Costs in the US

In the US, increasing litigation has resulted in mounting liability pressures and exposure, particularly for the country's insurance industry. As a result, the cost of litigation is a significant financial expenditure for insurance companies.

The Facts

2016

The total cost and compensation disbursed in civil suits was \$429 billion, or 2.3 percent of US gross domestic product. Of that amount, nearly 60 percent went to plaintiffs, while the balance covered costs of litigation, insurance, and other risk transfer costs. Additionally, \$250 billion, or 58 percent, was attributable to commercial and general liability exposure, with \$160 billion attributed to auto exposures, and \$19 billion stemming from medical malpractice suits.

The Facts

**Between
2018 & 2023**

Litigation management expenses for the P&C industry grew by 19 percent, resulting in an increase of \$4 to \$5 billion.

2022

The top 50 US insurance carriers spent an average of \$500 million on litigation expenses.

**In the last 5
years**

Claims on average rose 16 percent per annum, exceeding economic inflation of 4 percent per annum.

For instance, in 2022 the top 50 US insurance carriers spent an average of \$500 million on litigation expenses.² Between 2018 and 2023, litigation management expenses for the P&C industry grew by 19 percent, resulting in an increase of \$4 to \$5 billion.³ Claims on average rose 16 percent per annum in the last 5 years, exceeding economic inflation of 4 percent per annum.⁴ In 2016, the total cost and compensation disbursed in civil suits was \$429 billion, or 2.3 percent of US gross domestic product.⁵ Of that amount, nearly 60 percent went to plaintiffs, while the balance covered costs of litigation, insurance, and other risk transfer costs.⁶ Additionally, \$250 billion, or 58 percent, was

² Nationwide Mutual Insurance Company, "Third-Party Litigation Funding Is a Burden for Insurers and Policyholders" (18 September 2024), online: <agentblog.nationwide.com/commercial-insights/general-industries/third-party-litigation-funding-is-a-burden-for-insurers-and-policyholders/#:~:text=The%20increased%20litigation%20can%20also,leave%20policyholders%20covering%20the%20costs.> [Nationwide Mutual Insurance Company].

³ *Ibid.*

⁴ Thomas Holzheu & James Finucane, "US Liability Claims: The Shadow of Social Inflation Still Looms" (28 September 2023), online: <swissre.com/institute/research/sigma-research/Economic-Insights/us-liability-claims.html#:~:text=US%20liability%20claims%20costs%20have,inflation%20remains%20alive%20and%20kicki> [Holzheu & Finucane].

⁵ Christopher Mandel, "Bad Faith, Litigation Trends, and Emerging Tactics" (10 January 2020), online: <irmi.com/articles/expert-commentary/bad-faith-litigation-trends-and-emerging-tactics> [Mandel].

⁶ *Ibid.*

attributable to commercial and general liability exposure, with \$160 billion attributed to auto exposures, and \$19 billion stemming from medical malpractice suits.⁷

Litigation trends in the US are one factor contributing to its P&C insurance market experiencing significant increases in claim numbers, claim severity, risk exposure, and defence and indemnity costs to its commercial lines. The reasons for this US litigation expansion are multi-factored:

- expanded liability in state and federal courts;
- a flood of class actions and mass litigation spurred by an aggressive plaintiffs' bar;
- financially backing by third-party litigation funding;
- claimant-friendly statutory bad-faith regimes; and
- tort reform.

2. Increasing Litigation and Arbitrations in Canada

In Canada, there has been an increase in active civil litigation cases across the country over the past few years, with 768,615 active cases in Canadian courts in the 2022–23 fiscal year, an increase from 765,967 in 2021–22, and 697,320 in 2020–21.⁸ This increase may be partly the result of an upward correction from a low number of cases filed during the COVID-19 pandemic—with 2020 to 2023 recording the lowest number of initiated cases since 2005.⁹

Nevertheless, small businesses in Canada appear to have taken on significantly more litigation claims over the past decade. According to one research survey, as of 2023, 70% of small businesses report they were engaged in at least one civil claim in the

As of 2023, 70% of small businesses report they were engaged in at least one civil claim in the past three years, which was an increase of over 200% from a similar 2015 survey.

⁷ *Ibid.*

⁸ Stats Canada, "Civil Courts: Number of Cases Increases Again in 2022/2023" (14 May 2024), online: *Statscan* <statcan.gc.ca/o1/en/plus/6251-civil-courts-number-cases-increases-again-20222023>.

⁹ Stats Canada, "Civil court cases, by level of court and type of case, Canada and selected provinces and territories" (27 March 2024), online: *Statscan* <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011201>>.

past three years, which was an increase of over 200% from a similar 2015 survey.¹⁰ That same report showed that most Canadians (69.8%) would not be deterred by a small business owner's financial stability when deciding whether to sue them.¹¹ In a survey of in-house counsel, 50% of respondents in Canada stated that they expect regulatory investigations to increase in the next 12 months, with 20% stating they expect a significant increase. Taken together, this data suggests that businesses in Canada believe they are under significant pressure of litigation.¹²

Furthermore, there is some indication that arbitration has also increased since 2020. One survey of Canadian arbitrators found that 48% of respondents saw an increase in arbitrations between 2020 and 2023, and only 11% saw a decrease.¹³ While litigation claims declined during the COVID-19 pandemic, arbitration hearings continued as usual as they were already conducted remotely.¹⁴ Following the end of the COVID-19 pandemic, arbitration has steadily increased as a means for resolving disputes both in the US and Canada.¹⁵ With the increases in arbitrations, there would likely be a corresponding increase in liability since arbitrations are binding, with limited avenues to appeal, meaning parties may have limited recourse if they receive an unfavourable decision.

¹⁰ Liam Lahey, "Survey: A Shocking Majority of Canadians Would Sue a Small Business" (2 April 2024), online: *Zensurance* <zensurance.com/blog/a-shocking-majority-of-canadians-would-sue-a-small-business>.

¹¹ *Ibid.*

¹² Norton Rose and Fullbright, "Annual Litigation Trends Survey" (January 2025), online (pdf): *Nortonrosefullbright* <nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/norton-rose-fulbright---2025-annual-litigation-trends-survey.pdf?revision=eed3c13d-b945-4a47-adea-1de9b1b3d3d2&revision=5250428011837387904> [*NRF Annual Trends*].

¹³ FTI Consulting, "Canadian Arbitration Report 2024" (May 2024), online (pdf): *FTIconsulting* <fticonsulting.com/-/media/files/insights/reports/2024/may/canadian-arbitration-report-2024.pdf>.

¹⁴ Zena Olijnyk, "New Report Shows How Arbitration in Canada is Increasing as a Means of Dispute Resolution" (7 June 2024), online: *CanadianLawyerMag* <canadianlawyermag.com/practice-areas/adr/new-report-shows-how-arbitration-in-canada-is-increasing-as-a-means-of-dispute-resolution/386633>.

¹⁵ Norton Rose and Fullbright, *supra* note 12 at 7; Zena Olijnyk, "Arbitration Booming for Canadian Law Firms" (21 November 2024), online: *CanadianLawMag* <lexpert.ca/news/litigation-law/arbitration-booming-for-canadian-law-firms/389870>.

3. Types of Legal Disputes on the Rise

Canada has also seen an increase in litigation and arbitration centred on privacy breaches and regulatory investigations and proceedings, especially with respect to climate and environmental disclosure violations.¹⁶

A 2023 survey of in-house counsel in Canada found that 50% of respondents expect regulatory investigations and proceedings against their companies to increase in 2024, with the majority anticipating exposure to come from the federal courts, and only 14% expecting the

greatest impact to come from the municipal level.¹⁷ Nearly half of in-house counsel respondents predict an increase in litigation risk from cybersecurity and data privacy claims.¹⁸

A 2023 survey of in-house counsel in Canada found that 50% of respondents expect regulatory investigations and proceedings against their companies to increase in 2024, with the majority anticipating exposure to come from the federal courts, and only 14% expecting the greatest impact to come from the municipal level.

Cybersecurity and data privacy is an area of Canadian law that is likely to become more contentious in the near future given recent caselaw developments. The Federal Court of Appeal upheld a requirement that individuals who have had their data collected must be given the opportunity to provide meaningful consent before a company can share their personal data with third parties. And there has been developing provincial class action jurisprudence in which courts have entertained the possibility of imposing liability on data custodians for inadequately protecting personal information.¹⁹

¹⁶ Dentons, “Litigation and Dispute Resolution: 2024 Outlook” (13 February 2024), online: *Dentons* <[dentons.com/en/insights/guides-reports-and-whitepapers/2024/february/13/-/media/125a848e136743da80877b5d81a49acf.ashx](https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2024/february/13/-/media/125a848e136743da80877b5d81a49acf.ashx)> [*Dentons LDR 2024 Outlook*]; *NRF Annual Trends supra* note 12 at 7.

¹⁷ *NRF Annual Trends supra* note 12 at 26.

¹⁸ *Ibid.*

¹⁹ *Canada (Privacy Commissioner) v Facebook, Inc* 2024 FCA 140; see *GD v South Coast British Columbia Transportation Authority*, 2024 BCCA 252.

Further, businesses will likely face continued risks related to climate and environmental securities disclosures. New amendments to Canada's Competition Act impose stricter regulations on environmental marketing practices—so-called “greenwashing”— which will create greater legal risks for companies whose business operations involve environmental goods and services.²⁰

4. Differences in Damage Awards between the US and Canada

While there has been a notable increase in litigation in both the US and Canada since 2020, it is important to point out the difference in markets between both jurisdictions and the effect of those differences on litigation costs. There is an extraordinary delta in the size of the damages that are awarded between the two countries, which must be born in mind when comparing their respective litigation trends.

Damage awards in Canada continue to pale in comparison to those awarded in the US. For instance, in the US, punitive damages (i.e., damages intended to punish the defendant for egregious behaviour as opposed to general damages intended to compensate for pain and suffering) can reach tens to hundreds of millions of dollars. By contrast, in the recent case of *Baker v Blue Cross Insurance Company Canada*, the record for punitive damages in Canada was set at \$1.5 million.²¹

Similarly, general damages in the US reach tens to hundreds of millions of dollars, with a number of cases reaching into the billions of dollars. In Canada, general damages also tend to be a fraction of those awarded in the US. For example, non-pecuniary personal injury claims (for pain and suffering) were capped by the Supreme Court of Canada in the “1978 trilogy cases” (“Damages Trilogy”) which established a maximum of \$100,000 for pain and suffering, indexed to inflation. The Court's rationale for capping non-pecuniary damages was, in part, to prevent runaway insurance premiums. The Damages Trilogy cap in 2024 is roughly \$420,000, whereas general damages for

²⁰ *Ibid*; Torys, “Securities Class Action Risk Arising from Environmental and Climate-related Disclosures” (2025), online: *Torys* <[torys.com/our-latest-thinking/publications/2024/12/lr-2024/hausse-des-actions-collectives-liees-a-linformation-environnementale?>](https://www.torys.com/our-latest-thinking/publications/2024/12/lr-2024/hausse-des-actions-collectives-liees-a-linformation-environnementale?>)>.

²¹ 2023 ONCA 842.

personal injury claims in the US can be tens of millions of dollars, with outlier cases reaching into the hundreds of millions of dollars.²²

With that said, there are cases in Canada in which massive damages were awarded. The largest settlement in Canadian history was \$23 billion in a First Nations child welfare agreement between the Assembly of First Nations and the Government of Canada. But that case is a significant outlier in Canadian law, given the unprecedented widespread and historical trauma suffered by the plaintiffs. There have been a handful of other awards or settlements in Canada above \$100 million, but those cases are exceedingly rare in the commercial liability context.

The current reality is that the litigation landscape in the US is coloured by the number and size of awards granted by courts in comparison to those awarded in Canada. While the two jurisdictions share characteristics in litigation trends, especially in recent years, the differences are likely rooted largely in the contrast of the number and size of major damage awards.

B. Social Inflation

Overview:

- The presence of social inflation, where episodic periods in which costs and liability outpace economic inflation, points to non-economic factors that influences costs and liability.
- Identified drivers of social inflation include marketing and advertising, and third-party litigation funding.

²² See the Damages Trilogy: *Andrews v Grand & Toy Alberta Ltd*, 1978 CanLII (SCC); *Arnold v Teno*, 1978 CanLII 2 (SCC); *Thornton v Prince George School District No 57*, 1978 CanLII 12 (SCC).

1. Social Inflation: Explained

The term social inflation describes trends of increased costs and liability that outpace economic inflation.²³ Another definition applicable to insurance claims is the “social and behavioral trends that are said to expand the liability of parties allegedly responsible for harms and their insurers.”²⁴ Social inflation often emerges in waves responsive to changes in societal and behavioral preferences.²⁵

Social and economic drivers are interrelated and jointly affect changes in litigation trends. On their own, economic drivers can spike the price of goods and services each year, which can have a knock-on effect on claims severity. For instance, in the US, car insurance prices rose 19.1 percent between 2022 and 2023, reflecting a similar increase in used car prices and repairs.²⁶ Similar claim severity increases are seen where surges in healthcare wages and expenditures have corresponding increases in claims costs.²⁷ Together, economic and social drivers have increased US claims by as much as \$105 billion between 2013 and 2022.²⁸

The damaging effects of social inflation on the legal market and insurance industry are noticeable and costly. These effects have caused a sharp increase in claims, claim size and resulting verdicts, as well as a rise in certain types of litigation.

According to the US Chamber of Commerce Institute for Legal Reform, the average American family, individual, and business pays over \$3,600 in "tort tax" each year for

²³ The Geneva Association, *Social Inflation: Navigating the Evolving Claims Environment* (Zurich: The Geneva Association—International Association for the Study of Insurance Economics, 2020), online (pdf): <genevaassociation.org/sites/default/files/social_inflation_web_171220.pdf> at 6 [Geneva Association].

²⁴ Lloyd Dixon et al, *What is the Evidence for Social Inflation? Trends in Trial Awards and Insurance Claim Payments* (Santa Monica: RAND Corporation, 2024), online (pdf): <rand.org/content/dam/rand/pubs/research_reports/RRA2600/RRA2645-1/RAND_RRA2645-1.pdf> at iii, 104 [Dixon et al].

²⁵ See generally Holzheu & Finucane, *supra* note 4.

²⁶ Holzheu & Finucane, *supra* note 4.

²⁷ Holzheu & Finucane, *supra* note 4.

²⁸ Jim Lynch, Dave Moore & Dale Porfilio, *Impact of Increasing Inflation on Personal and Commercial Auto Liability Insurance* (Insurance Information Institute, 2023), online (pdf): <iii.org/sites/default/files/docs/pdf/triple-i_auto_inflation_trends_2023.pdf?_gl=1*11mvyfp*_ga*NTM1OTY4NDQ4LjE3MzkwNjU4OTM.*_ga_RLMX21NG0L*MTczOTA2NTg5Ni4xLjEuMTczOTA2NTk1Ni42MC4wLjA.> at 2, 24 [Lynch, Moore & Porfilio].

unnecessary and abusive litigation.²⁹ A “tort tax” is premised on an idea that the costs associated with lawsuits, like high legal fees and large damage awards, can be spread out to others, which means that it could lead to higher premiums, increased municipal taxes or increased costs for goods and services.

Social inflation is historically episodic in the US. The US is currently in such an episode, and other common law countries are following suit, including Canada.³⁰ The first liability crisis stemming from social inflation was reflected in the asbestos claims and mass tort environmental litigation in the mid-1980s.³¹ A more litigious society and changing public perspectives often cause an upswing in social inflation—through expanded liability in courts, aggressive legal marketing, and shifts in societal perceptions.³²

Changes due to social inflation have impacted the market both inside and outside the judicial system. Judges today appear more receptive to claims and plaintiffs’ arguments.³³ This increase in receptivity among judges has caused a rise not only in the number of cases by expanding the theoretical causes of actions under which a claimant can file, but also the likelihood of success on the merits—through pre-trial proceedings, motion practice, trial and appeals.³⁴ This expanded liability is seen in the growth of new types of claims as well. Claims on theories such as obesity, per- and polyfluoroalkyl substances (“**PFAs**”—also known as “forever chemicals”), climate change, algorithmic liability, and others, are rapidly growing.³⁵

Partly because of this expansion of liability, the US is seeing increased claim severity, plaintiff verdicts and verdict sizes.³⁶ But these figures are exceeding inflation.³⁷ US

²⁹ Angela Sabarese, “Addressing Legal System Abuse Tops APCIA 2024 Priority List” (11 January 2024), online: <theclm.org/Magazine/articles/addressing-legal-system-abuse-tops-apcia-2024-priority-list/2799>.

³⁰ Holzheu & Finucane, *supra* note 4; Swiss Re Institute, “Social Inflation: Litigation Costs Drive Claims Inflation (7 September 2024), online: *SwissRe* <swissre.com/institute/research/sigma-research/sigma-2024-04-social-inflation.html>.

³¹ Holzheu & Finucane, *supra* note 4.

³² Dixon et al, *supra* note 24 at 9.

³³ Dixon et al, *supra* note 24 at 9.

³⁴ Dixon et al, *supra* note 24 at 9.

³⁵ Holzheu & Finucane, *supra* note 4.

³⁶ Dixon et al, *supra* note 24 at 85.

³⁷ Dixon et al, *supra* note 24 at 12.

liability claims on average rose 16 percent per annum between 2017–2022, exceeding the yearly 4 percent in economic increases.³⁸ Claims are more frequent and more severe than they were 10 years earlier.³⁹ Increased filings per capita rose 10 percent between 2012 to 2019.⁴⁰ Plaintiff win rates at trial have increased.⁴¹ More so, award severity—whether that award is by settlement, arbitration or trial verdicts—has inflated.⁴² While the average inflation-adjusted award from 2010 to 2019 is relatively consistent, the median inflation-adjusted award per plaintiff between 2010 and 2019 increased \$10 million, from \$2 million to \$12 million.⁴³ In motor torts, commercial automobile liability claims have increased between \$30 billion and \$43 billion from 2013 to 2022, an 18 to 23 percent increase.⁴⁴

The simple economics of legal market demand growth is altering the US litigation market. Looking at legal market demand growth, litigation spearheaded that demand growth in 2023.⁴⁵ Litigation accounted for a 3.2 percent increase, a 15-year high, in demand growth, followed by bankruptcy and labour and employment.⁴⁶ Hiring trends and lawyer headcounts, lawyer billable rates, direct expenses and overhead expenses are all increasing at law firms—in 2023, midsize firms saw headcount growth in excess of 7 percent and associate headcount growth by 11.8 percent.⁴⁷

In the US, trial tactics have changed to account for the way juror’s existing societal perceptions might influence how they see the case, which can cause grossly inflated verdicts.⁴⁸ For example, plaintiffs’ lawyers in the US have adopted a controversial trial

³⁸ Holzheu & Finucane, *supra* note 4.

³⁹ Dixon et al, *supra* note 24 at 85.

⁴⁰ Dixon et al, *supra* note 24 at 33, 85.

⁴¹ Dixon et al, *supra* note 24 at 36, 85.

⁴² Dixon et al, *supra* note 24 at 85.

⁴³ Dixon et al, *supra* note 24 at 43.

⁴⁴ Lynch, Moore & Porfilio, *supra* note 28 at 24.

⁴⁵ James W Jones et al, *2024 Report on the State of the US Legal Market: The Challenge of Targeting the Right Markets with the Right Offerings* (Georgetown University Law Center on Ethics and the Legal Profession & Thomson Reuters Institute, 2024), online (pdf): <thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2024/01/State-of-US-Legal-Market-2024.pdf> at 8 [Jones et al].

⁴⁶ Jones et al, *supra* note 45 at 8.

⁴⁷ Jones et al, *supra* note 45 at 14–15.

⁴⁸ Lynch, Moore & Porfilio, *supra* note 28 at 9.

strategy called “reptile theory,” which is a rhetorical approach during jury trials in which the lawyer attempts to elicit emotional responses from the jury to foster animosity toward the other party.⁴⁹ This strategy aims to increase the likelihood of finding liability by invoking in the jurors primitive, “reptilian,” reactions to the defendant as if the defendant had caused the jurors harm personally.⁵⁰

Furthermore, plaintiffs’ lawyers are also able to draw on public attitudes promoting distrust of large corporations or resentment of income inequality to garner sympathy for their client.⁵¹ These tactics make it easier for lawyers to justify larger damage numbers to juries.⁵²

In Canada, however, trial tactics that are focused on influencing juries are of limited application. Civil jury trials are rare in Canada, and in Quebec they are entirely prohibited. There are stricter requirements in Canada for using a jury in civil litigation than in the US, and even when those requirements are met, the judge generally has broad and final authority to deny the use of a jury at trial. Whereas in the US the right to a civil jury trial is enshrined in the US Constitution, there is no such constitutional protection to such a right in Canada. Furthermore, civil jury trials tend to be available only in limited circumstances. For instance, in Alberta, a party can apply for a civil jury trial in actions for defamation, false imprisonment, malicious prosecution, breach of promise of marriage, or where an action based in tort or contract involves a claim for an amount greater than \$75,000.⁵³ Yet, under the *Jury Act*, a judge has wide discretion to forego a jury trial if the judge determines that a jury cannot conveniently deliberate over the case.⁵⁴

⁴⁹ Lynch, Moore & Porfilio, *supra* note 28 at 9. See also Cary Silverman and Christopher E Appel, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* (Washington DC: US Chamber of Commerce Institute for Legal Reform, 2024), online (pdf): <instituteforlegalreform.com/wp-content/uploads/2024/05/ILR-May-2024-Nuclear-Verdicts-Study.pdf> at 5 [Silverman & Appel].

⁵⁰ Thomson Reuters, “What Attorneys Need to Know About Reptile Theory” (19 September 2022), online: <legal.thomsonreuters.com/blog/what-attorneys-need-to-know-about-reptile-theory/>.

⁵¹ Geneva Association, *supra* note 23 at 22–24.

⁵² Silverman & Appel, *supra* note 49 at 5.

⁵³ *Jury Act*, RSA 2000, c J-3, s 17(1).

⁵⁴ *Ibid.*

There is no indication that civil jury trials will become more prevalent in the next 5 years in Canada; however, if there were a sea change in judicial receptiveness to civil jury trials, we would expect to see more litigants apply to the court for their proceedings to be tried by a jury. In that case, trial tactics that focus on the emotional responses of jury members could make its way into Canada.

2. Marketing and Advertising as Drivers of Social Inflation

Outside the courtroom, in the US, lawyers have increased their marketing.⁵⁵ Lawyers advertise increased verdict sizes, which not only reaches more potential clients but changes potential jurors' perception regarding what is fair compensation.⁵⁶

Lawyers in both the US and Canada have increased their marketing.⁵⁷ In Canada, though there is no publicly available comprehensive data on legal advertising expenditures, legal advertisements appear to have increased in recent years, with legal advertisements regularly appearing during TV and sport programs, on billboards in cities, and on social media, where such advertisements were previously rarely seen. However, the type of mid-scale marketing for class action suits and mass litigation that are seen in the US are generally not seen yet in Canada.

Legal advertising is a significant driver of social inflation in the US. Because legal advertising is a significant driver of social inflation in the US, it should be monitored closely in Canada.

⁵⁵ Canadian Bar Association, "The Ethics of Advertising," online: CBA <[cba.org/resources/practice-tools/the-ethics-of-advertising-a-toolkit-for-lawyers/introduction-495691403196302a16d355dd05d28db9/#:~:text= Over%20the%20past%2030%20years,firm%20to%20grow%20and%20thrive](http://cba.org/resources/practice-tools/the-ethics-of-advertising-a-toolkit-for-lawyers/introduction-495691403196302a16d355dd05d28db9/#:~:text=Over%20the%20past%2030%20years,firm%20to%20grow%20and%20thrive)> and Legal Services Advertising in the United States – 2020-2024 – ATRA.

⁵⁶ Silverman & Appel, *supra* note 48 at 5; Dixon et al, *supra* note 24 at 9.

⁵⁷ Dixon et al, *supra* note 24 at 9.

In Canada, each province's law society regulates the advertising of legal services by legal professionals. Each province and territory have their own legislation and rules governing the legal professions in that province, and thus regulations may differ from one province to another. However, the

Legal advertising is a significant driver of social inflation in the US. Given this, legal advertising should be monitored closely in Canada.

Federation of Law Societies of Canada has also developed the *Model Code of Professional Conduct* in collaboration with the law societies across Canada. Thirteen of the fourteen provincial and territorial law societies have adopted the *Model Code of Professional Conduct*, or at least taken steps to ensure that their rules governing the professional conduct of legal professionals are consistent with the *Model Code of Professional Conduct*.⁵⁸ Despite potential variation between provinces, the *Model Code of Professional Conduct* serves as the foundation for most provinces' codes of conduct, and it states that legal professionals may market their services so long as their marketing is demonstrably true, accurate and verifiable; is neither misleading, confusing nor deceptive; and is in the best interests of the public and consistent with a high standard of professionalism.⁵⁹

For instance, according to the *Alberta Code of Conduct*, a lawyer or law firm in that province may be found in violation of the *Code of Conduct* for stating their past litigation successes without adding a disclaimer specifying that past results are not necessarily indicative of future results.⁶⁰ Additionally, legal professionals are also barred from making qualitative statements about their capabilities. For example, a lawyer in Ontario was reprimanded for advertising that he was “the best” personal injury lawyer in

⁵⁸ Federation of Law Societies of Canada, “Consultation Report: Draft Amendments in Response to Call to Action 27 *Model Code of Professional Conduct*” (28 Nov 2023), online (pdf): <<https://flsc.ca/wp-content/uploads/2023/11/Code-Consultation-Report-2023v2.pdf>>.

⁵⁹ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (amended Apr 2024), online, pdf: <<https://flsc.ca/wp-content/uploads/2024/11/2024-Model-Code-of-Professional-Conduct.pdf>> at s 4.2.

⁶⁰ Law Society of Alberta, *Code of Conduct* (updated 7 June 2024), Commentary to s 4.2–1.

Toronto.⁶¹ While specific advertising regulations may vary from province to province, advertisement of legal services in Canada is highly regulated.

As a result of the regulation of legal advertising in Canada, legal professionals in Canada are more restricted in their marketing practices than lawyers in the US, which likely contributes to the fact that legal advertising is less frequent in Canada. However, as discussed above, legal advertising in Canada still appears to be increasing, and there have been instances where legal professionals have contravened marketing regulations.⁶² Given the increase in marketing of legal services and the potential for a corresponding increase of marketing that contravenes applicable regulations, law societies need to be alerted by the public to potential infractions through each law society's reporting and complaint process. Marketing that contravenes the applicable regulations may therefore be curtailed by simply taking an active approach toward monitoring and reporting contravening advertisements.

3. Third-Party Litigation Funding as a Driver of Social Inflation

Law firms in Canada and the US also use Litigation Funding to fund an increasing number of filed claims that would not otherwise be pursued.⁶³ Litigation Funding is often considered a contributor to social inflation.⁶⁴

In the US, there are also indicators that lawyers are less likely to accept reasonable offers and are more inclined to file suit.⁶⁵ At trial, jurors are more likely to rule for plaintiffs and award higher damages.⁶⁶ A poll conducted in June 2022 showed public trust in corporations had decreased 9 percent from 2019 to 2022.⁶⁷ However, whether this corporate distrust had a greater impact on individual versus corporate lawsuits was

⁶¹ *Law Society of Ontario v Mazin*, 2019 ONLSTH 35.

⁶² See e.g. *Law Society of Ontario v D'Alimonte*, 2018 ONLSTH 86, where an Ontario lawyer was reprimanded for advertising that he was a "specialist," among other misleading statements.

⁶³ Silverman & Appel, *supra* note 48 at 5.

⁶⁴ Mark Popolizio, *Follow the New Money Trail: The Rise of Third-Party Litigation Funding* (ISO Claims Partners & Verisk Analytics, 2021) at 17 [Popolizio].

⁶⁵ Dixon et al, *supra* note 24 at 9.

⁶⁶ Dixon et al, *supra* note 24 at 9.

⁶⁷ Gallup, "Do Americans Like or Dislike 'Big Business'?" (27 June 2022) *Gallup* online: <news.gallup.com/poll/270296/americans-dislike-big-business.aspx>.

less clear.⁶⁸ In the US, social inflation appears to have had multiple impacts on the insurance market, as insurers' claims costs are exceeding economic inflation figures.⁶⁹ The impact is often seen by claims growth that far outperforms the underwritten risk estimated at policy origin.⁷⁰ Tort claims within policy limits tend to show greater increases in claim numbers than those in excess of limits. In the US, the awards for tort claims within limits has grown faster than economic inflation between 2001 and 2019 and grew 2.7 percent compound annual growth rate ("**CAGR**") between 2010 and 2019.⁷¹ Similarly, small and medium-sized businesses see greater claim severity than large businesses, with high limit policies increasing more rapidly than lower limit policies.⁷²

For example, bodily injury claims on commercial policies with \$1 million per occurrence and \$2 million aggregate, and individual policies with \$100,000 per occurrence and \$300,000 aggregate, saw the greatest increases in award size—claims on these small to mid-sized policies rose 3.5 percent from 2010 to 2019.⁷³ This pattern of growth in bodily injury claim awards mirrors increasing trial awards, where trial awards rose 7.6 percent CAGR between 2010 to 2019 for these smaller businesses.⁷⁴

Defence and indemnity costs are also increasing. Defence costs are higher not only due to the number of claims filed but also increased lawyer billable rates, an increase in the number of lawyers on a case and associated contingency fees. Due to this increased risk exposure and cost, adjusters are more likely to settle; for those settling, the cases usually settle at much higher sums.⁷⁵ Finally, social inflation is causing a decline to the

⁶⁸ Dixon et al, *supra* note 24 at 55.

⁶⁹ Martin Boerlin et al, "Social Inflation: Litigation Costs Drive Claims Inflation" (7 September 2024), online: <swissre.com/institute/research/sigma-research/sigma-2024-04-social-inflation.html>.

⁷⁰ Geneva Association, *supra* note 23 at 6.

⁷¹ Dixon et al, *supra* note 24 at 62–63, 74.

⁷² Dixon et al, *supra* note 24 at 77.

⁷³ Dixon et al, *supra* note 24 at 85.

⁷⁴ Dixon et al, *supra* note 24 at 85.

⁷⁵ Dixon et al, *supra* note 24 at 9–10.

investment market financially underscoring most insurance companies. Current trends show that the social impact outweighs market investment in long-tail lines.⁷⁶

Combined, the factors discussed above potentially place carriers in negative equity, or at least a financially disadvantaged position. This position discourages the industry from underwriting future business. Social inflation is disruptive to liability insurance—it is hard to predict and can increase exposure in cases of long-tail lines, where claims may be made long after the end of the policy period, such as environmental claims.⁷⁷ The impacts are unraveling in current and past litigation because of its unsustainable growth and uncertainty.

The growth is slow and can go unrecognized, which has for many years caused under-reserving and underpricing for failure to account for the extra cost associated with social drivers.⁷⁸ The end result is often cyclical. Increased claims combined with increased and more expensive verdicts and compensation fuels a societal expectation of windfalls, which then increases the number of claims filed.⁷⁹

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⁷⁶ Holzheu & Finucane, *supra* note 4.

⁷⁷ Holzheu & Finucane, *supra* note 4.

⁷⁸ Geneva Association, *supra* note 23 at 6.

⁷⁹ Dixon et al, *supra* note 24 at v.

V. EMERGING TRENDS

A. Class Actions

1. The Landscape in the US

The US has seen a sharp rise in class actions, mass tort and other mass litigation, and claims resulting in exorbitant awards called nuclear verdicts.⁸⁰ Mass actions in the US are often seen in the scenario of multi-district litigation (“**MDLs**”)—judicial groupings of massive numbers of similar lawsuits to be adjudicated at the pre-trial stages in a single court. Nuclear verdicts are considered verdicts in excess of \$10 million.⁸¹ “Mega-nuclear” or “thermonuclear” verdicts are a subset of this—usually defined as verdicts with damages exceeding \$100 million.⁸² The term “nuclear” also defines these verdicts’ monumental effects on the market. They are nuclear in the sense that these awards carry “devastating impacts on businesses, entire industries, and society at large, even when a verdict is later thrown out or substantially reduced by an appellate court.”⁸³

The increasing frequency in US class actions in the past 10 years is startling. In 2023 alone, there was a 13 percent increase in class actions filed from the previous year.⁸⁴ This occurred despite a 36 percent decline in initial public offerings in 2023 from the decade’s average.⁸⁵ 2023 saw 9,705 class actions filed in federal district courts, a 4 percent increase from 2022, but not as high as 2020, which saw 10,194 class actions filed.⁸⁶ The increase was due to general class action types as well as subsets, such as consumer protection and employment actions.⁸⁷ The most active defendants from 2021

⁸⁰ Geneva Association, *supra* note 23 at 9–11.

⁸¹ Silverman & Appel, *supra* note 48 at 2.

⁸² Silverman & Appel, *supra* note 48 at 2–3; Marsh McLennan, “Nuclear Verdicts Are on the Rise: How Can You Minimize Your Risks?” (27 September 2024), online: <marsh.com/en/services/claims-management/insights/nuclear-verdicts-are-on-the-rise-how-can-you-minimize-your-risks.html#:~:text=Vigorously%20preparing%20for%20and%20defending,often%20lead%20to%20lower%20verdicts.> [Marsh].

⁸³ Silverman & Appel, *supra* note 48 at 2.

⁸⁴ Woodruff Sawyer, *Databox™ 2023 Year-End Report* (Woodruff Sawyer, 2024), online (pdf): <woodruff Sawyer.com/sites/default/files/wp-content/2024/02/Databox-Year-End-Guide-2023.pdf> at 2 [Woodruff Sawyer].

⁸⁵ *Ibid* at 2.

⁸⁶ Lex Machina Data Team, *Class Action Litigation Report 2024* (Lex Machina, 2024) at 3, 5 [Lex Machina]

⁸⁷ *Ibid* at 3.

to 2023 were financial institutions, retail businesses, technological companies and automotive corporations.⁸⁸

The US class action settlement numbers are also staggering: \$4.4 billion was paid in class action settlements in 2023, the highest annual payout in more than 10 years.⁸⁹ From 2014 to 2023, the general range of settlement damages in class actions remained between \$6 billion and \$14 billion per year.⁹⁰ However, in 2016, \$24 billion in class action settlement damages were awarded.⁹¹ Damages have increased rather steadily in the last four years, with roughly \$11 billion in settlement damages awarded in 516 cases in 2023.⁹²

US class actions have seen an expansion in certain types of litigation in recent years. Privacy, data breach and financial service class actions exploded in 2023.⁹³ Cases challenging “green” claims in the field of products liability have expanded as well.⁹⁴ From 2014 to 2023, the highest number of class action cases filed was predominantly consumer protection (43,395), followed by civil rights (15,715), then employment (7,082), and securities (5,694).⁹⁵ Regarding insurance coverage claims, from 2014 to 2023, insurance class actions saw 2,415 claims filed, and product liability and torts saw 2,752 and 1,739 claims filed, respectively.⁹⁶

The US has also seen a major rise in mass tort litigation since the 1980s when the enactment of Superfund laws—that is, legislation aimed at remediating environmental contamination from hazardous waste and imposing liability and compensation—saw

⁸⁸ *Ibid* at 15.

⁸⁹ Woodruff Sawyer, *supra* note 84 at 7.

⁹⁰ Lex Machina, *supra* note 86 at 25.

⁹¹ Lex Machina, *supra* note 86 at 25.

⁹² Lex Machina, *supra* note 86 at 25.

⁹³ Dentons, “Keeping Up With Global Class Action Trends: Perspectives From the US, UK, Europe and Canada” (11 April 2024), online: <[dentons.com/en/about-dentons/news-events-and-awards/events/2024/april/11/keeping-up-with-global-class-action-trends](https://www.dentons.com/en/about-dentons/news-events-and-awards/events/2024/april/11/keeping-up-with-global-class-action-trends)> [Dentons]; Robert J Herrington, Stephen L Saxl & Jonathan H Claydon, “5 Trends to Watch: 2024 Class Actions” (6 February 2024) *The National Law Review*, online: <[natlawreview.com/article/5-trends-watch-2024-class-actions](https://www.natlawreview.com/article/5-trends-watch-2024-class-actions)>.

⁹⁴ *Ibid*.

⁹⁵ Lex Machina, *supra* note 86 at 6.

⁹⁶ Lex Machina, *supra* note 86 at 6.

expansion in actions like lead paint, mold, tobacco, Chinese drywall and firearm litigation.⁹⁷ Although the types of mass tort litigation have changed over the years, this litigation trend continues to have a large impact on US litigation and its insurance industry.

Similar to class actions, in the US, plaintiffs' lawyers engage in nationwide marketing campaigns, then subsequently file massive numbers of lawsuits to promote big settlements.⁹⁸ 2023 brought an 18 percent increase in federal civil case filings, including against massive policyholders like 3M and Johnson & Johnson, from prior years that likely were disrupted by the COVID-19 pandemic.⁹⁹ PFAs actions also saw a large increase in filings in 2022.¹⁰⁰

As a result of class actions, MDLs, and other mass tort litigation, nuclear verdicts are unavoidable and getting bigger. For example, commercial automotive nuclear verdicts increased from \$300 million in 2011 to approximately \$1 billion in 2018 and 2019.¹⁰¹ Outsized jury verdicts can impact businesses and industries.¹⁰² Insurers are then reluctant to offer higher limits, or it becomes financially prohibitive for policyholders to purchase higher limit coverage.¹⁰³

Outsized jury verdicts can impact businesses and industries. Insurers are then reluctant to offer higher limits, or it becomes financially prohibitive for policyholders to purchase higher limit coverage.

⁹⁷ Geneva Association, *supra* note 23 at 9.

⁹⁸ Philip Goldberg, "How Mass Tort Litigation Is Gaming the Judicial System" (2 March 2023) *Bloomberg Law*, online: <news.bloomberglaw.com/us-law-week/how-mass-tort-litigation-is-gaming-the-judicial-system>.

⁹⁹ Nate Raymond, "Mass torts against 3M, J&J fueled spike in new federal lawsuits in 2023" (12 March 2024) *Reuters*, online: <reuters.com/legal/government/mass-torts-against-3m-jj-fueled-spike-new-federal-lawsuits-2023-2024-03-12>.

¹⁰⁰ Alexander Vitruk, Kamran Ahmadian & Jonathan Maddalone, "Top 10 Consumer Class Action Trends of 2022" (31 January 2023) *American Bar Association*, online: <americanbar.org/groups/litigation/resources/newsletters/consumer/top-10-consumer-class-action-trends-2022/>.

¹⁰¹ Geneva Association, *supra* note 23 at 11.

¹⁰² Marsh, *supra* note 82.

¹⁰³ Marsh, *supra* note 82.

Often there is a greater impact on industries like “trucking, healthcare, and senior care.”¹⁰⁴ Insurers are combating these potentially massive verdicts by increasing reserves, but that has the adverse problem of potentially tying up capital that could otherwise be invested or used for business expansion.¹⁰⁵

According to a report from the US Chamber of Commerce Institute for Legal Reform, in recent years plaintiffs’ lawyers have increasingly used mass arbitrations to file an increasing number of nearly identical claims, without proper vetting, in the hopes of increasing profits.¹⁰⁶ These arbitrations trigger greater upfront costs to insured businesses to pay for what often turn out to be meritless claims.¹⁰⁷

Along with this upswing in mass tort litigation comes a surge in mass tort advertising. Plaintiffs’ lawyers are spending tens of millions of dollars for television and digital advertisements to seek clients for mass tort cases, according to a recent front-page story in *The Wall Street Journal* (“**WSJ**”).¹⁰⁸ The *WSJ* reported the advertisements shown most frequently in 2023 solicited individuals who might have been exposed to contaminated water at the Camp Lejeune Marine base in North Carolina; used Johnson & Johnson’s talc products; or were exposed to AFFF, a firefighting foam which allegedly contained cancer-causing chemicals.¹⁰⁹

For insureds in both the US and Canada, economic issues that include employment rates, declining/cautious consumer spending, supply chain disruptions, housing affordability, and now the US and Canadian tariff war all contribute to the risk of the

¹⁰⁴ Marsh, *supra* note 82.

¹⁰⁵ Marsh, *supra* note 82.

¹⁰⁶ Andrew J Pincus et al, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* (Washington DC: US Chamber of Commerce Institute for Legal Reform, 2023), online (pdf): <institutelegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf> at 2, 18, 62.

¹⁰⁷ US Chamber of Commerce Institute for Legal Reform, “Top Three Troubling Legal Trends to Watch in 2024” (17 January 2024), online: <institutelegalreform.com/blog/top-three-troubling-legal-trends-to-watch-in-2024/> [Institute for Legal Reform].

¹⁰⁸ Erin Mulvaney, “The Latest Ad Boom: Lawyers Seeking Plaintiffs for Mass Litigation” (19 January 2024) *The Wallstreet Journal*, online: <wsj.com/us-news/law/the-latest-ad-boom-lawyers-seeking-plaintiffs-for-mass-litigation-6774f82b> [Mulvaney].

¹⁰⁹ *Ibid.*

public company.¹¹⁰ But in the US, unlike Canada, these compound issues expose policyholders to an ever-growing number of claims and an increased chance of mass litigation. Additionally, mass litigation can be very public, resulting in brand and reputation damage to policyholders.¹¹¹

The combination of aggressive advertising and the nuclear size of these verdicts has contributed to normalizing these enormous verdict sizes to the American public. “Frequent media reports of multimillion and multibillion dollar verdicts have desensitised the public to such mega awards.”¹¹² As a result, Americans serving on jury panels in these cases use the advertised millions and billions as a general baseline, repeating the cycle of grossly overvaluing lawsuits in the US.¹¹³ The compounded effects drive up the costs of premiums when writing insurance policies and evaluating risk, thereby overburdening both insurers and policyholders alike in the front and back end of the market.

One troubling problem with mass tort litigation, despite being clouded as a potential avenue for global resolution of many claims, is that many of these claims are of questionable legal merit.¹¹⁴ The sheer astronomical numbers the policyholders and insurers face pushes these claims to settlement as quickly as those with any merit—making the judicial process nothing less than a numbers game for insureds.¹¹⁵

A similar pattern is seen with insurers working with their insureds on potentially covered claims. The claim numbers are so massive that limits quickly extinguish beyond what was estimated when the risk was written, and coverage disputes are highly accelerated to ascertain from a mountain of claims what is and is not covered. Similarly, the US civil

¹¹⁰ Woodruff Sawyer, *supra* note 84 at 5.

¹¹¹ Russ Johnston, “Is Litigation Funding the New Cost of Doing Business?” (28 August 2024) *Leader’s Edge*, online: <leadersedge.com/p-c/is-litigation-funding-the-new-cost-of-doing-business> [Johnston].

¹¹² Geneva Association, *supra* note 23 at 24.

¹¹³ Geneva Association, *supra* note 23 at 24.

¹¹⁴ Institute for Legal Reform, *supra* note 107.

¹¹⁵ See Deborah R Hensler & Mark A Peterson, “Understanding Mass Personal Injury Litigation” (1995) *RAND*, online: <rand.org/pubs/research_briefs/RB9021.html#:~:text=SOURCE%3A%20RAND%20Institute%20for%20Civil,extraordinary%20interdependence%20of%20case%20values> [Hensler & Peterson].

judicial system is so inundated with these mass claims that organization and judicious administration of the cases can at times take priority over the actual legal validity of a single claim.¹¹⁶

US regulation has tried to limit the financially deleterious impacts that these large class actions and mass litigation actions have on businesses and the insurance market. For example, tort reform has implemented caps on non-economic damages in 38 states as of 2019.¹¹⁷ However, only six states have an economic cap.¹¹⁸ In 2021, Texas enacted a law, known as House Bill 19, aimed at restricting plaintiff's counsel in certain cases involving commercial motor vehicles from using the so-called "reptile theory."¹¹⁹ A group of states, including "Maine, have proposed or adopted measures to expand liability in wrongful death cases."¹²⁰ Other tort reforms that have been considered or adopted include increased transparency about Litigation Funding and caps on liability damages.¹²¹ Implementation and the interlap of state-based laws like comparative and contributory negligence, and joint and several liability laws, can be beneficial or harmful to insureds and insurers, and sometimes are both.

2. The Landscape in Canada

Canada has seen a similar increase in class action suits. There has been a marked increase in class actions related to opioids litigation against drug manufacturers and retailers.¹²² There are currently four class actions underway across Canada seeking

¹¹⁶ *Ibid.*

¹¹⁷ Geneva Association, *supra* note 23 at 15. See also Insurance Research Council, *Social Inflation: Evidence and Impact on Property-Casualty Insurance* (The Institutes, Risk & Insurance Knowledge Group, 2020), online (pdf): <insurance-research.org/sites/default/files/news_releases/IRCSocialInflation2020.pdf> at 8.

¹¹⁸ Geneva Association, *supra* note 23 at 15.

¹¹⁹ Marsh, *supra* note 82.

¹²⁰ Marsh, *supra* note 82.

¹²¹ Marsh, *supra* note 82.

¹²² Jessica Mach & Tim Wilbur, "Legal Experts on the Biggest Class Action Trends in Canada" (21 November 2024), online: *Lexpert* <lexpert.ca/news/litigation-law/legal-experts-on-the-biggest-class-action-trends-in-canada/389871> [Mach & Wilbur].

damages from opioid manufacturers and sellers, signaling a mounting trend in product liability litigation in the commercial liability context.¹²³

The remedies sought in those recent claims range from damages for false and misleading advertising to compensation awarded to municipalities for costs associated with social support and policing services.¹²⁴ In addition to the ongoing class action proceedings against pharmaceutical companies and drug retailers, there have been a number of settlements for significant sums. For instance, British Columbia, acting on behalf of all Canadian governments, reached a \$150 million settlement with Purdue Pharma in 2022.¹²⁵ Litigation against opioid manufacturers and retailers is expected to continue into the foreseeable future, and there is a potential that this litigation will open the door for class proceedings for other drug-related claims.

Another area emerging as a battleground for mass litigation and class actions in Canada is personal injury claims stemming from the use and manufacture of polyfluoroalkyl substances (“PFAs”), also known as “forever chemicals.” A number of class actions have been filed in Canada against chemical manufacturers and users of PFAs. There are currently separate class actions underway in British Columbia, Ontario, and Quebec from private water well owners alleging PFA contamination of drinking water.¹²⁶

The class actions in British Columbia, Ontario and Quebec and the potential awards or settlements stemming from that litigation will be instructive for assessing litigation risks and costs moving forward.

Furthermore, the class action litigation against PFAs could signal a more wide-reaching development. In particular, the British Columbia government, which successfully sued

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Government of British Columbia, “Settlement Reached with Purdue Pharma (Canada) for Opioid Damages” (29 June 2022), online: *Gov.BC.ca* <news.gov.bc.ca/releases/2022AG0044-001031>.

¹²⁶ See Notice of Civil Claim, *Lynch v 3M Company et al*, BCSC S-246407 <kmlaw.ca/wp-content/uploads/2024/09/Notice_of_Civil_Claim_S246407_filed_September_16_2024.pdf>; and Demande d'autorisation d'action collective, *Giard c. 3M et al*, QCCS No. 500-06-001320-247 <https://www.slatervecchio.com/wp-content/uploads/2024/07/2024-07-05-demande-dautorisation-500-06-001320-247_redacted.pdf>.

opioid manufacturers and retailers in the aforementioned litigation, and who also achieved a historical settlement against big tobacco companies over two decades ago, is seen as a trailblazer in its tendency to seek compensation for public health injuries through industry-wide litigation. On March 14, 2024, the British Columbia government tabled Bill 12, the Public Health Accountability and Cost Recovery Act, which would have allowed the government to pursue individual and corporate wrongdoers to recover a broad range of health-related expenditures. Bill 12 was considered to have cross-border implications as the US Chamber of Commerce Institute for Legal Reform wrote a letter of opposition to the Ambassador of Canada asking for time to allow for more consultation and an economic impact assessment.¹²⁷ In the end, Bill 12 was not enacted, and did not make it past the introduction stage or first reading in the legislature. But, recently, as reported by CBC News on March 6, 2025, the British Columbia government is to receive \$3.7 billion through a settlement with tobacco companies to invest in cancer treatment and research, and to promote smoking cessation. The money will be paid over 18 years.¹²⁸

The class actions brought by Canadian governments against opioid and PFA retailers and manufacturers could signal a growing shift toward governments' remediating public health issues not just through legislation but through large-scale litigation. These class actions should be monitored carefully. The significant financial costs associated with defending class action litigation can result in driving up insurers' costs and policyholder premiums.

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Finally, jurisdictional differences provide a more favourable landscape in some provinces for plaintiffs filing class action lawsuits. Specifically, litigants in Ontario are

¹²⁷ US Chamber of Commerce Institute of Legal Reform newsletter, April 30, 2024, British Columbia's Bill 12 Put "On Hold".

¹²⁸ Tessa Vikander & Rafferty Baker, "B.C. to receive \$3.7B through Canadians settlement with tobacco companies, March 5, 2025".<https://www.cbc.ca/news/canada/british-columbia/32-5-billion-canadian-tobacco-settlement-1.7477008>>.

tending to file class actions in British Columbia, which has a “no costs” regime for proposed class actions.¹²⁹ This tendency is likely to continue, as a 2023 Ontario Superior Court decision imposed a more rigorous analysis for class certification in the province, creating a higher bar for meeting procedural criteria.¹³⁰

This is an emerging trend that potentially highlights important signals in Canada’s class action landscape—namely, that caselaw and legislative procedural restrictions on class action proceedings can affect the prevalence of class action suits in a given jurisdiction. Consequently, class action procedural rules in jurisdictions across Canada should be monitored carefully, as the degree to which they restrict

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certifications will likely indicate what jurisdiction poses the biggest risk for class action litigation and the significant costs that are often associated with that litigation. Right now, British Columbia has arguably the most plaintiff-friendly class action certification rules; by extension, there is a continuing trend of class actions being filed in British Columbia.¹³¹

Mass torts litigation is in an embryonic stage in Canada. Historically, large-scale, multi-plaintiff torts have been litigated through class actions. The bar for class action certification in Canada is generally much lower than in the US, so the prevalence of

Ontario’s amendment to its class action legislation to make certification more strenuous has potentially opened the door to mass litigation in that province.

¹²⁹ *Dentons LDR 2024 Outlook* supra note 16 at page 6.

¹³⁰ *Banman v Ontario*, 2023 ONSC 5246.

¹³¹ *Mach & Wilbur*, supra note 122.

mass torts is not as pronounced.¹³² However, Ontario's amendment to its class action legislation to make certification more strenuous has potentially opened the door to mass litigation in that province. Some commentators believe this may result in an increase in mass litigation instead of class actions in Ontario. Such a shift remains to be seen, but it is important to bear in mind the trend of certifying class actions in more plaintiff friendly jurisdictions will likely play a part in whether mass litigation becomes more common in Canada.

Mass litigation is not as common in Canada as it is in the US because class certifications in Canada are easier to achieve, which makes class actions the usual form of litigation in large-scale multi-party disputes. There has been a shift in legislation in Ontario that may give rise to an increase in mass litigation in that province, but the shift is equally, if not more, likely to drive class actions to other jurisdictions, such as British Columbia.

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A consequence of any increase in class action litigation is that there is a significant financial cost to defend the class action litigation, which might lead to the settlement of claims, thus increasing liability concerns in Canada and potentially impacting premiums.

B. Third-Party Litigation Funding

1. The Landscape in the US

The US is seeing rapid commercial growth in Litigation Funding. Litigation Funding involves “the non-recourse funding of a claim by a non-party for a share of the proceeds if the claim is successful.”¹³³ It is common for the loans to have a sliding interest scale,

¹³² Deborah Templer, Byron Shaw & Daniel Moholia, “Inventory Litigation of Mass Torts in Canada: An Uncertain Future” (26 January 2023), online: *McCarthyTetraul* <mccarthy.ca/en/insights/articles/inventory-litigation-mass-torts-canada-uncertain-future>.

¹³³ Popolizio, *supra* note 64 at 1.

where the longer it takes to resolve the lawsuit, the higher the interest rate becomes.¹³⁴ There are generally two types of Litigation Funding: (1) consumer-litigation funding for non-commercial personal injury, family law and other non-commercial actions; and (2) commercial litigation funding for securities, antitrust, intellectual property (“IP”) and business actions.¹³⁵

Litigation funding is a speculative financial industry that is in many respects unregulated. It has caused a surge both in claim numbers and award sizes, as well as an upswing in defence costs and other expenses required to litigate these actions.¹³⁶ At least \$2.3 billion, if not closer to \$5 billion, has been invested in Litigation Funding since it began to rise in the US.¹³⁷ There has been a 300 percent

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rise in the frequency of verdicts in excess of \$20 million, with an average award of \$2.6 million in 2012, to over \$17 million in 2019.¹³⁸ The top 50 single plaintiff bodily injury verdicts rose from \$27.7 million on average per verdict in 2014, to \$54.3 million in 2018.¹³⁹

Law firms in the US are using commercial Litigation Funding to fund expenses, and Litigation Funding is used in both single case arrangements and portfolio financing.¹⁴⁰

¹³⁴ Popolizio, *supra* note 64 at 3.

¹³⁵ Popolizio, *supra* note 64 at 3.

¹³⁶ Transatlantic Reinsurance Company, “Claims Update: Third Party Litigation Funding (Transatlantic Reinsurance Company, 2024), online: <transre.com/claims-update-third-party-litigation-funding/> [Transatlantic Reinsurance Company].

¹³⁷ Popolizio, *supra* note 64 at 4.

¹³⁸ Popolizio, *supra* note 64 at 17.

¹³⁹ Popolizio, *supra* note 64 at 17.

¹⁴⁰ Michael E Clements, *Third-Party Litigation Financing: Market Characteristics, Data, and Trends*, GAO-23-105210 (Washington DC: US Government Accountability Office, 2022), online (pdf): <gao.gov/assets/gao-23-105210.pdf> at 8 [Clements].

US Litigation Funding facts

Between \$2.3 billion and \$5 billion has been invested in Litigation Funding since it began to rise in the US.

There has been a 300% increase in the frequency of verdicts in excess of \$20 million, with an average award of \$2.6 million in 2012, to over \$17 million in 2019.

The top 50 single plaintiff bodily injury verdicts rose from \$27.7 million on average per verdict in 2014, to \$54.3 million in 2018.

Either way, Litigation Funding is generating more claims and higher costs. The surge in mass tort litigation is partially driven by Litigation Funding.¹⁴¹ Loans of \$20 million to \$100 million are being provided to individual law firms from funders, with prospective returns for funders reaching 20 percent for riskier mass tort litigation cases.¹⁴²

Nearly 800,000 television advertisements for mass tort cases ran in the US 2023, costing over \$160 million.

Litigation Funding is profitable for the investor—bringing in \$328 million in after-tax profits in 2018, 24% higher than in 2017.

There has been a 24 percent increase in US federal civil cases filed in 2023, driven in part by a rise in mass tort lawsuits.¹⁴³ "In almost all the mass tort cases, you can find big law firms that have taken [Litigation Funding], or if they haven't, they've considered it," Michael McDonald, a partner with Morning Investments, a financial advisory firm, recently told *The Wallstreet Journal*.¹⁴⁴ Litigation Funding is profitable for the investor—

¹⁴¹ *Ibid* at 11.

¹⁴² Mulvaney, *supra* note 108.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid*.

bringing in \$328 million in after-tax profits in 2018, 24 percent higher than in 2017.¹⁴⁵ Tens of millions are being spent by plaintiffs' lawyers in advertising alone—a surge also driven by Litigation Funding.¹⁴⁶ Nearly 800,000 television advertisements for mass tort cases ran in the US 2023, costing over \$160 million.¹⁴⁷ More than \$106 million alone was spent in 2023 by the 10 biggest digital legal advertisers on social media and digital advertising, according to the US Chamber of Commerce.¹⁴⁸

Despite growing acceptance of Litigation Funding in the legal industry, the use can be troubling for insureds and insurers alike—increasing claim frequency, severity, and costs.¹⁴⁹ It comes at a high cost and those high costs encourage protracted and expensive litigation. Extensive and expensive litigation is then coupled with the risk of zero return.¹⁵⁰ That boom in costs and an overburdening of the

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judicial system leads many to argue against the proliferation of Litigation Fundings in the US. Concerns include their legality, frivolous claims, consumer protection violations and whether Litigation Funding may even pose a threat to the US economy and business, the federal judiciary and national security.¹⁵¹

Litigation Funding may also violate state usury laws.¹⁵² One study showed that 225,293 litigation funding requests were made to one of the largest funders for mass tort and

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Evyatar Ben Artzi, "Some Law Firms Are Thinking About AI All Wrong" (1 February 2025) *American Bar Association*, online: <americanbar.org/groups/journal/articles/2025/some-law-firms-are-thinking-about-ai-all-wrong/>.

¹⁴⁹ Johnston, *supra* note 111.

¹⁵⁰ Johnston, *supra* note 111.

¹⁵¹ Jarrett Lewis, "Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?" (2020) 33:687 *Geo J Leg Ethics* 687 at 691 [Lewis]; Institute for Legal Reform, *supra* note 107.

¹⁵² Popolizio, *supra* note 64 at 6.

personal injury claims from 2001 to 2016.¹⁵³ Another study found the effective annual interest rates imposed was 68 percent in mass tort claims and 60 percent in motor tort claims.¹⁵⁴

However, there are some who argue Litigation Funding is a financial tool that can encourage access to justice,¹⁵⁵ fairness, and leveling the playing field by minimizing a disparity in resources.¹⁵⁶

There is a large concern that third-party profit motives have an inappropriate influence on claims. As a result, the discoverability of Litigation Funding agreements is significant for insurers and insureds. This lack of transparency can cause ethical conflicts, excessive control over litigation and settlement, and some are advocating the US Federal Rules of Civil Procedure be amended, specifically Rule 26, to require financial disclosure.¹⁵⁷ Under the current US Federal Rules of Civil Procedure, Litigation Funding discoverability is not expressly required.¹⁵⁸

While Litigation Funding can increase access to justice and monetize claims for underfunded plaintiffs, it comes at a price to the market.¹⁵⁹ Increased litigation and ballooning costs driven by Litigation Funding have caused insurers to be less willing to provide coverage, resulting in a reduction in access to coverage across the US market.¹⁶⁰ Simply, insurers are walking away

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¹⁵³ Popolizio, *supra* note 64 at 6.

¹⁵⁴ Popolizio, *supra* note 64 at 6.

¹⁵⁵ Johnston, *supra* note 111; Popolizio, *supra* note 64 at 4.

¹⁵⁶ Popolizio, *supra* note 64 at 4.

¹⁵⁷ Popolizio, *supra* note 64 at 7. See also Lewis, *supra* note 151 at 698 (a lawyers' tri-partite relationship both to the client and to the insurer can be ethically disrupted by Litigation Funding where the relationships demand separate economic incentives).

¹⁵⁸ Popolizio, *supra* note 64 at 7.

¹⁵⁹ Clements, *supra* note 140 at 18, 20.

¹⁶⁰ Nationwide Mutual Insurance Company, *supra* note 2.

from “lines of business due to the threat of continuous litigation.”¹⁶¹ One insurer exited its excess and surplus commercial automobile book in 2023 in part due to litigation costs fueled by Litigation Funding.¹⁶²

Litigation Funding can also transfer risk from claimant to funder, like defendants transfer risk to their insurers.¹⁶³ The problem, though, is that transferred risk comes with interest and fees.¹⁶⁴ To the extent insurers are adapting to Litigation Funding by increasing risk pricing on future insurance programs, the increased premiums create higher upfront financial burdens to policyholders.

US regulation of Litigation Funding is limited.¹⁶⁵ Litigation Funding is not regulated by US federal law. But as an investment vehicle, Litigation Funding can be subject to general US regulatory agencies like the Securities Exchange Commission if the investor has public reporting obligations.¹⁶⁶ There is some state regulation, but it is also limited, usually in the form of limits on interest rates, fees allowable, or registration or disclosure requirements in funding contracts.¹⁶⁷

In US litigation, there is no nationwide requirement for disclosure of Litigation Funding agreements within the course of litigation.¹⁶⁸ Certain federal courts have sought disclosure in their cases by implementing local rules or by deeming the agreement relevant to the case.¹⁶⁹ Efforts have been made to amend the federal rules to account for Litigation Funding.

In 2014 and 2017, for instance, the US Chamber of Commerce Institute for Legal Reform proposed such an amendment to the Advisory Committee on Civil Rules.¹⁷⁰

¹⁶¹ Johnston, *supra* note 111.

¹⁶² Johnston, *supra* note 111.

¹⁶³ Clements, *supra* note 140 at 19.

¹⁶⁴ Clements, *supra* note 140 at 20.

¹⁶⁵ Clements, *supra* note 140 at 23.

¹⁶⁶ Clements, *supra* note 140 at 23–24.

¹⁶⁷ Clements, *supra* note 140 at 23, 25.

¹⁶⁸ Clements, *supra* note 140 at 26.

¹⁶⁹ Clements, *supra* note 140 at 26–27.

¹⁷⁰ Popolizio, *supra* note 64 at 7.

Federal legislation to require Litigation Funding disclosure has also been proposed.¹⁷¹ Policy reform is likewise being undertaken to curtail foreign investment in Litigation Funding.

Finally, there are legal and ethical concerns that in some respects are still being determined as courts adapt to presiding over suits where Litigation Funding is involved. For example, disclosure of documents during the litigation process could lead to a waiver of the confidentiality of solicitor-client communications and the privilege that protects the work prepared for the case.¹⁷² Fee-splitting, in this case between the plaintiff's lawyer and funders, also implicates ethical rules if it is to promote the exchange of referrals or other benefits.¹⁷³ Because Litigation Funding remains a recent development, the availability of data to measure Litigation Funding's impacts on US markets, such as funders' rates of returns, number of funders and total funding provided, is often not available.¹⁷⁴

2. The Landscape in Canada

Canada's Litigation Funding market is in its infancy compared to the US. No governmental agency specifically regulates Litigation Funding in Canada.¹⁷⁵

For nearly two centuries in Canadian common law, Litigation Funding was prohibited. It is only relatively recently that Litigation Funding has received gradual approval in Canadian courts and is now accepted in Canadian jurisprudence. Courts increasingly recognized the cost of litigation has increased to such an extent as to become a barrier to justice. Litigation Funding has now been accepted at all levels of the judiciary across the country, including the Supreme Court of Canada.¹⁷⁶

¹⁷¹ Clements, *supra* note 140 at 27 (citing the *Litigation Funding Transparency Act of 2021*, S 840, 117th Cong (2021)).

¹⁷² Lewis, *supra* note 151 at 696.

¹⁷³ Lewis, *supra* note 151 at 697.

¹⁷⁴ Clements, *supra* note 140 at 15.

¹⁷⁵ Clements, *supra* note 140 at 34.

¹⁷⁶ 9354-9186 *Quebec Inc (Bluberi) v Callidus Capital Corp*, 2020 SCC 10.

Litigation Funding is most often involved in class action litigation and insolvency-related proceedings, though Litigation Funding agreements in these proceedings often require court approval given the court's supervisory role. Litigation Funding agreements do not require court approval in private commercial arbitration and litigation, and such agreements are often kept private and are free from scrutiny of the court's oversight.

Litigation Funding has now been accepted at all levels of the judiciary across the country, including the Supreme Court of Canada.

Furthermore, Litigation Funding can be secured not just to fund claims but also to secure judgments, which allows firms to allocate resources, including working capital, on core business activities.¹⁷⁷ Because litigation funding agreements are kept private outside of class actions, it is impossible to know the extent to which Litigation Funding factors into private litigation and arbitration, which is also true in the US.

Nevertheless, it is well understood that Litigation Funding is increasingly being deployed in legal proceedings in Canada, from class actions to insolvency proceedings to IP disputes and various other types of litigation.¹⁷⁸ For instance, in the class action

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lawsuit, *Pinizzotto v TILT Holdings*, the court approved the third-party funders agreement.¹⁷⁹ "In exchange for indemnifying Pinizzotto for adverse cost awards and advancing \$20,000 for disbursements, the funding agreement provided for payment to the funder of 8% from net recovery if it was resolved before commencement of the

¹⁷⁷ Gavin H Finlayson & Monica Faheim, "Levelling the Playing Field: The Rise of Litigation Funding in Canada" (28 October 2021), online: *Miller Thomson* <millerthomson.com/en/insights/uncategorized/levelling-the-playing-field-the-rise-of-litigation-funding-in-canada/#:~:text=The%20Recognition%20of%20Litigation%20Funding%20in%20Canada&text=The%20basis%20of%20this%20historical,third%20parties%20to%20fund%20litigation.>>.

¹⁷⁸ *Ibid.*

¹⁷⁹ 2021 ONSC 8001.

certification and leave or summary judgment motions, or 10% of net recovery afterward, plus \$131,300 payable from counsel for the class action.”

There is a robust market of national and multinational Litigation Funding firms in Canada, and the number of firms appear to be increasing, indicating the growing use of Litigation Funding in Canadian litigation.

There is no governing body that directly regulates Litigation Funding in Canada. Courts have a supervisory role over Litigation Funding agreements in class actions and insolvency-related proceedings, but they generally do not have authority to oversee such agreements in single-party private litigation. Certain entities may have an indirect role in governing such agreements; law societies, insurance regulators, financial services regulators, and securities regulators may all have some involvement in regulating Litigation Funding agreements.¹⁸⁰ But in general, Litigation Funding agreements are not directly monitored.

Although they do not have direct authority over governing Litigation Funding agreements, lawyers’ professional obligations may have the most direct effect on limiting such agreements. For instance, Professional Codes of Conduct regulating fee splitting, conflicts of interest, and, perhaps most directly, duties of confidentiality may affect the extent to which Litigation Funding agreements can be utilized where the funded party is represented by counsel.¹⁸¹

There is a robust market of national and multinational Litigation Funding firms in Canada, and the number of firms appear to be increasing, indicating the growing use of Litigation Funding.

It is also possible for Litigation Funding firms to be subject to orders for costs in a litigation. It is typical for funders of class actions to provide a guarantee to its funded

¹⁸⁰ Paul Rand & Naomi Loewith, “Litigation Funding Comparative Guide” (21 October 2024), online: *Mondaq* <mondaq.com/canada/finance-and-banking/1288624/litigation-funding-comparative-guide>.

¹⁸¹ *Ibid.*

clients.¹⁸² In Ontario, under the *Class Proceedings Act*, the defendant who successfully defends against a class action is permitted to seek costs directly from the Litigation Funding firm that funded the plaintiffs. Furthermore, security for costs is commonly ordered against a funder in a class action.

Similar drivers of Litigation Funding in the US are likely to feature in Canada, though on a smaller scale. In particular, as in the US, Litigation Funding agreements lead to a cycle where litigation costs keep increasing: as Litigation Funding firms charge interest and fees on the loan, plaintiffs become more motivated to seek greater amounts to offset the amount of the loan to be repaid to the Litigation Funding firm, as well as any costs paid to their counsel¹⁸³ The result is a cycle that puts gradual upward pressure on damages and awards sought in litigation.

One crucial difference between Litigation Funding in Canada and the US is the effect the large-scale damage awards have on the Litigation Funding market. Litigation Funding firms are exacting in their selection of cases to fund in the US; those chosen generally involve large-scale claims that are high enough to trigger the firm's interest in funding the litigants. In other words, the potential for nuclear awards in the US entices Litigation Funding firms to invest in litigation in the US to an extent not seen in Canada, where awards pale in comparison. Furthermore, the firms must have a significantly high-level of confidence in the outcome of the case to satisfy their risk analysis of the investment.

With that said, cases where liability is not at issue do present circumstances in litigation where the outcome is likely, and the main battleground is centered on damages. Such cases often arise in the area of personal injury. If the damages in a personal injury claim are assessed at or close to nuclear verdict levels, and liability is not at issue, the claim would likely be of interest as an investment to a Litigation Funding firm.

¹⁸² *Ibid.*

¹⁸³ Clements, *supra* note 140 at 20.

However, as discussed above, damages in Canada are generally much lower than in the US, and that is especially true for personal injury claims. Given the relatively low damages for injuries in Canada, Litigation Funding firms might not see personal injury cases as suitable vehicles for their investment.

Litigation Funding available in Canada appears to be vastly smaller in scale than in the US. Still, the availability and prevalence of Litigation Funding in Canada, and their continued acceptance by Canadian courts, poses a risk for Litigation Funding to continue to grow in the country and create a cycle that gradually increases damage awards and therefore, costs to the insureds and insurers.

C. Bad Faith Claims

1. The Landscape in the US

Like the increased claims and costs associated with social inflation, mass litigation and Litigation Funding, the steep growth in claims that fall outside of the standard insurance contract (or “extracontractual losses”) have changed how insurers assess risk. Many carriers in the past simply were not accounting for the actuarial risk of extracontractual losses when writing risk and quoting premium.¹⁸⁴ In some ways, bad faith risk exposure is an even greater potential cost—extracontractual damages associated with bad faith filings against insurers surpass many state and federal damage caps. Even where bad faith is considered when underwriting risk, the undefined expectations of claims handling and conduct make this risk exposure more difficult to quote.¹⁸⁵

In the US, the trends of bad faith statutory regimes in state jurisdictions are usually claimant friendly. Courts often find liability against carriers and their adjusters even where acts were unintentional and an expanded definition of “excess judgment” to

¹⁸⁴ Andrew Pauley, *The Deleterious Effects Expansive Bad-Faith Litigation Has on Insurance Markets* (Washington DC: National Association of Mutual Insurance Companies, 2019), online (pdf): <namic.org/wp-content/uploads/legacy/publicpolicy/191212_badfaith.pdf> at 7 [Pauley].

¹⁸⁵ *Ibid* at 7–8.

include settlements and stipulations. Defences to bad faith are unstable and inconsistent.¹⁸⁶

For instance, the highest court in the state of Georgia held that an insurer can be liable for bad faith and an excess judgment for the failure to settle the tort claim where the insurer had notice of the claim but was unsuccessful in negotiating a settlement and received no notice from the insured of the subsequently filed lawsuit.¹⁸⁷

Finally, US states like Washington have sought to hold adjusters liable for their failure to have baseline knowledge of applicable insurance law in that jurisdiction. This arguably places a higher burden on insurers and their employees when defending against a bad faith claim.¹⁸⁸

In some US jurisdictions, the law allows for policy language terms or conditions to limit only contractual obligations. This means where, for instance, the insured has an independent cause of action to assert bad faith by statute, policy provisions can be less effective, or even completely ineffective, in extinguishing the insured's right to seek extracontractual damages.

The Washington Court of Appeals in *West Beach v Commonwealth Ins. Co.*,¹⁸⁹ held the policy's suit-limitation clause had no effect on extra-contractual claims where the bad faith claim arose from an independent statutory scheme.¹⁹⁰ US courts have held damages already paid by the insurer cannot be used to set off a bad faith damage award.

In *Alberta S. Ellison v Randy Willoughby*,¹⁹¹ the Supreme Court of Florida held the prior damages the carrier paid under the policy to settle a bad faith claim were not

¹⁸⁶ See generally Steven Plitt & Jordan R Plitt, *Practical Tools for Handling Insurance Cases* (Thomson Reuters, 2022) at § 7:10 [Plitt & Plitt].

¹⁸⁷ *GEICO Indemnity Co v Whiteside*, 311 Ga 346 (Ga Sup Ct 2021).

¹⁸⁸ *Security Nat'l Ins Co v Construction Associates of Spokane, Inc*, No 2:20-cv-00167-SMJ, 2022 WL 884911 (ED Was 2022).

¹⁸⁹ 11 Wash App 2d 791 (2020) [*West Beach*].

¹⁹⁰ *Ibid* at 804.

¹⁹¹ 373 So 3d 1117 (Fla 2023) [*Ellison*].

benefits.¹⁹² As such, the *Ellison* court held, because they were not benefits, they were not a payment as contemplated by the bad faith statute, as bad faith claims arise from statute and not the contract.¹⁹³

For the number of bad faith claims currently being litigated in the US, the expanding bad faith regime ties up insurance industry capital that was not tied up previously.¹⁹⁴ There are increased expenditures to defend suits. In a scenario where a court hearing the bad faith claim will not postpone the case pending completion of the underlying action, the result increases not only the potential liability exposure but also the upfront defence costs for insurers funding two actions simultaneously.¹⁹⁵

On the regulatory front, US states are moving to an even more expansive bad faith regime.¹⁹⁶ Inconsistencies between jurisdictions further hamper the insurance market.¹⁹⁷ In March 2023, Florida Governor Ron DeSantis signed House Bill 837 “Civil Remedies” to curb abusive bad faith claims by establishing standards for handling bad faith actions.¹⁹⁸ Court systems are lessening standards while handling an oversaturation through increased filings and resulting verdict sizes..¹⁹⁹

Litigation trends in the US show marked growth in the number of bad faith actions filed against insurers. Bad faith actions involve extracontractual or direct liability exposure to the insurer, and sometimes the insurer’s individual adjusters, in excess of contracted limits and premiums.²⁰⁰

Each US state applies its own bad faith standards of proof. Generally, though, an insured filing a bad faith claim against its insurer must prove that payment of the claim due under the policy was withheld and the reason for withholding such payment was

¹⁹² *Ibid.*

¹⁹³ *Ibid* at 1123.

¹⁹⁴ Pauley, *supra* note 184 at 8.

¹⁹⁵ Pauley, *supra* note 184 at 8–10.

¹⁹⁶ Pauley, *supra* note 184 at 14.

¹⁹⁷ Pauley, *supra* note 184 at 14.

¹⁹⁸ House Bill 837 (2023) (Florida Tort Reform Act 2023)<flsenate.gov/Session/Bill/2023/837>.

¹⁹⁹ Pauley, *supra* note 184 at 14.

²⁰⁰ Pauley, *supra* note 184 at 3.

unreasonable.²⁰¹ The National Association of Insurance Commissioners (“**NAIC**”) promulgated the Model Unfair Trade Practice Act (“**Model UTPA**”) to provide model insurer parameters on claims handling.²⁰² US state jurisdictions vary on the statutory adoption of these Model UTPA or other model practices.²⁰³ The NAIC’s Model UTPA does not create an independent cause of action for claimants. Instead, bad faith causes of action, both first- and third-party, are established by common law and state statute.²⁰⁴

The US has seen an upward trend in insureds’ success rates with bad faith claims, in part caused by relaxed standards of proof of liability. For instance, bad faith claims can be successful in certain US state jurisdictions even where the insurer was correct to deny a claim for a lack of coverage.²⁰⁵ In *Coventry v American States Ins. Co.*,²⁰⁶ the state of Washington’s highest court reversed the lower court decision to hold the insured can maintain an action for a bad faith investigation, regardless of whether the insurer properly denied the claim for no coverage.²⁰⁷ As such, statutory violations can cause patterns of increasing liability for insurers. Similarly, a Texas court upheld the insurance statute which recognized a private right of action against an insurer for statutory violations despite there being no creation of coverage, to include a failure to provide benefits.²⁰⁸

The earlier trend in the US was the insured was required to reach a final jury verdict or adjudication of its underlying suit at trial before it could proceed with filing a bad faith claim. That requirement has been softened, or outright eliminated in some US states, allowing settlements, arbitrations, or stipulations above limits to constitute an “excess judgment” for the purpose of pursuing bad faith. In *McNamara v. Government*

²⁰¹ Mandel, *supra* note 5; Pauley, *supra* note 184 at 3–4.

²⁰² Pauley, *supra* note 184 at 4.

²⁰³ Pauley, *supra* note 184 at 4–5.

²⁰⁴ Insurance and Reinsurance Committee, “50 State Insurance and Bad Faith Quick Reference Guide” (2014) *International Association of Defense Counsel*.

²⁰⁵ Rick Hammond, “Bad Faith in the Absence of Coverage: Recent Trends and Developments *Coventry v. American States* and its Progeny” (Paper delivered at the American College of Coverage Counsel 2022 Annual Meeting, Chicago, 11–13 May 2022) at 2, 9 [Hammond].

²⁰⁶ 136 Wash 2d 269 (1998).

²⁰⁷ Hammond, *supra* note 205 at 2.

²⁰⁸ *USAA Texas Lloyds Co v Menchaca*, 545 SW 3d 479 (Tex Sup Ct 2018).

Employees Ins. Co.,²⁰⁹ the court permitted the insured vehicle owner to recover in a bad faith failure to settle an action against its insurer even though the insured entered consent judgments (a document presented to the court demonstrating consent of both parties) formalizing settlements.²¹⁰ The *McNamara* court held that a settlement in excess of limits satisfies the causation element of an insurer bad faith claim.²¹¹

In fact, some US jurisdictions are codifying avenues of redress for injured third parties to pursue a tortfeasor insured's carrier via a bad faith suit without assignment of the insured's rights to that third party.²¹² The *New Jersey Insurance Fair Conduct Act* ("**IFCA**"), signed into law January 18, 2022, does just that, allowing recovery for actual damages, pre- and post-judgment interest, fees, and expenses for violation of the IFCA.²¹³

In some states, the US is seeing a shift from liability where acts are intentional to liability for mere carrier negligence.²¹⁴ In *Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Association*,²¹⁵ the South Carolina Supreme Court affirmed the appellate court ruling that the carrier did not act unreasonably in its basis for not settling.²¹⁶ However, the *Doe* court reasserted that an insurer who does act unreasonably in failing to settle a covered claim faces liability for the insured's entire judgment.²¹⁷ In *Vanderhall v. State Farm Mutual Automobile Insurance Company*,²¹⁸ the question at summary judgment in the district court was whether the carrier acted without reasonable basis in proposing additional language in the settlement.²¹⁹ The Fourth

²⁰⁹ 30 F 4th 1055 (11th Cir 2022) [*McNamara*].

²¹⁰ *Ibid*.

²¹¹ *Ibid* at 1063. See also, *Potter v Progressive Am Ins Co*, No 21-11134, 2022 WL 2525721 (11th Cir 2022) (affirmed *McNamara* in holding a consensual settlement pursuant to a proposal for settlement can be an excess judgment for the purpose of pursuing a bad faith claim).

²¹² Pauley, *supra* note 184 at 11.

²¹³ See Jeffrey W Stempel, "The 2022 New Jersey Insurance Fair Conduct Act and the Incomplete Evolution of Policyholder Protection" (2022) 75:1 Rutgers U L Rev 185 at 187, 239.

²¹⁴ Pauley, *supra* note 184 at 10.

²¹⁵ 347 SC 642 (SC Sup Ct 2001) [*Doe*].

²¹⁶ *Ibid*.

²¹⁷ *Ibid* at 649.

²¹⁸ 632 Fed Appx 103 (4th Cir 2015) [*Vanderhall*].

²¹⁹ *Ibid*.

Circuit affirmed the district court's holding that it did not—on facts where the insured's mother did not have apparent authority to act on behalf of the insured in negotiating settlement terms.²²⁰ Courts are also demonstrating more leniency toward insureds in a tendency to deny motions to split proceedings at trial into two phases, being liability and damages.²²¹

As a result of an expanding bad faith litigation regime in the US, costs for these actions are ballooning. These claims place huge burdens on insurance companies with present bad faith litigation, including excessive discovery costs and lawyer fee awards. Costs are increased through incorporating the additional exposure when underwriting risk. The 10 largest bad faith verdicts in the US from 2013 to 2018 averaged \$21 million.²²² In 2019, some of the largest bad faith verdicts included those in the cyber security, employment, and securities legal sectors.²²³

Where extracontractual liability is at play, there is a potential for exorbitant punitive damages when left uncapped. Studies show that in many US jurisdictions, juries are awarding more than 100 to 150 times the policy limits in bad faith damages.²²⁴ In *Mosley by and Through Weaver v Progressive Am. Ins. Co.*,²²⁵ the underlying

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²²⁰ *Ibid* at 104–05. See also *First Acceptance Ins Co of Ga Inc v Hughes*, No 305 Ga 489 (Ga Sup Ct 2019) (Georgia Supreme Court reversed the appellate court in holding the insurer did not act unreasonably in failing to accept offer where no deadline was made and ruling was based on contract interpretation, but did not reach whether the insurer's presumably negligent act amounted to bad faith).

²²¹ Bryan M Weiss, "Bifurcation of Bad Faith Claims" (Paper delivered at the American College of Coverage Counsel 2022 Annual Meeting, Chicago, 11–13 May 2022) at 26–39.

²²² Mandel, *supra* note 5.

²²³ Mandel, *supra* note 5.

²²⁴ Pauley, *supra* note 184 at 17.

²²⁵ No 14-cv-62850-BLOOM/Valle, 2018 WL 6171417, at *3 (SD FI 2018) [*Mosley*].

motor tort trial in Broward County, Florida, resulted in a final judgment of \$22.7 million entered against the insured.²²⁶ The insured filed a bad faith suit against its insurer. The *Mosley* court denied the carrier's motion for summary judgment because there was a question of whether the carrier breached its duty of good faith to the insured by not explaining the financial affidavit form for the insured to fill out.²²⁷ This holding potentially exposed the insurer to at least a \$22.7 million judgment despite previously tendering its \$10,000 policy limits.²²⁸

2. The Landscape in Canada

There has not been a noticeable increase in bad faith claims against insurers in Canada. The bad faith framework in Canadian law bears significant differences from US legislation and caselaw, and those differences yield far fewer and less substantial bad faith claims in Canada.

The US generally has a relaxed standard of proof of liability for such claims, there is no such relaxed standard in Canada. Unlike some jurisdiction in the US, a bad faith claim against an insurer will not stand where the insurer was merely negligent.

Furthermore, damages for bad faith in Canada, when found, are typically a fraction of what they tend to be in the US. The average bad faith verdict in the US between 2013 and 2018 was \$21 million. Such amounts are unheard of in Canada.

In fact, the largest punitive damages award in Canadian history involved a bad faith claim decided in 2023. In *Baker v Blue Cross Life Insurance Company of Canada* ("*Baker v Blue Cross*"), the Ontario Court of Appeal awarded punitive damages of \$1,500,000.²²⁹

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.* See also *Madrigal v Allstate Indem Co*, No. CV 14-4242 SS, 2015 WL 12747906 (CD Ca 2015) (The ultimate bad faith award was \$14 million despite the carrier twice tendering \$100,000 limits on the claim); *Gruber v Est of Marshall*, 59 Kan App 2d 297 (2021) (\$11.6 million was awarded against the general liability insurer on an extracontractual claim where \$100,000 limits were not offered for nearly a year).

²²⁹ 2023 ONCA 842 [*Baker v Blue Cross*].

Although *Baker v Blue Cross* might persuade a court in Canada to decide a case in a similar way, any court outside of Ontario does not have to follow the decision. Whether a court in another province will follow the reasoning and damages award in *Baker v Blue Cross* remains to be seen. But even if that case is applied charitably to a plaintiff in another jurisdiction, the award will be commensurate with the award granted by the Ontario Court of Appeal. In other words, we do not anticipate that the court's ruling on bad faith in *Baker v Blue Cross* will result in a precipitous increase in damages in bad faith claims.

In Canada, an insurer may be found to have acted in bad faith if they fail to provide a reason for denying a claim, they do not investigate a claim fully, they delay payments for no lawful reason or they make false statements to the policyholder. These claims are more difficult to establish in Canada than in the US, where the common law and state legislation tend to make it significantly easier for plaintiffs to prove bad faith, in addition to making it much more lucrative to the plaintiff when they do establish the claim.

While *Baker v Blue Cross* will likely inform bad faith caselaw to some extent in Canada, it is not expected to shift the jurisprudence to substantially impact the number of bad faith claims or drastically inflate damages stemming from bad faith awards.

VI. CONCLUSION: CURRENT LIABILITY LANDSCAPE AND MITIGATING FACTORS

To better understand emerging liability pressures and their effects on the commercial insurance market, an analysis was conducted of the market in the US. Much of the litigation trends that affect insurers and policyholders in the US are at play in Canada, though to a lesser degree. The sheer size of damage awards in the US sets it apart from Canada, and it is exceedingly unlikely that such awards in Canada will reach the level of those seen in the US within the next five years.

Analyzing these trends in the US does, however, provide some insight into the commercial liability horizon in Canada. In particular, the litigation trends driving liability pressure in the US are, for the most part, the same as those in Canada. Accordingly, by assessing those driving forces in the US, we can glean the consequences of those same driving forces in Canada if no action is taken to curtail their effect.

Of the trends identified in the US in this Report, the most relevant in the Canadian commercial liability context are the increase in lawyer advertising, the rise in class action litigation with respect to product liability and Litigation Funding. Less relevant are mass litigation, nuclear verdicts, and bad faith claims. Yet, even though those trends are not as prevalent in Canada, they still provide useful guidance when comparing them to their iterations in the US.

Much of the litigation trends that affect insurers and policyholders in the US are at play in Canada, though to a lesser degree. The sheer size of damage awards in the US sets it apart from Canada, and it is exceedingly unlikely that such awards in Canada will reach the level of those seen in the US within the next five years.

A. Mass Litigation

Mass litigation is a significant liability driver in the US, but it plays little role in the commercial liability landscape in Canada. That is largely due to Canada's lower standard for certifying a class action, which makes class actions much more frequently used than mass litigation in Canada.

Mass litigation may become more prevalent in Canada in the wake of legislative changes that make class action certification more difficult. However, we do not anticipate statutory reform that would have a wide-enough reaching effect to drive mass litigation upwards. Furthermore, if there is legislative change to class action certifications in one province, class actions may simply continue to be filed in other jurisdictions, as we have seen in the increase of class action filings in British Columbia following legislative changes in Ontario making class certifications more difficult.

B. Nuclear Verdicts

Damages in Canada are generally far less than in the US, where damages regularly exceed tens of millions of dollars. The largest punitive damages award in the US exceeded \$100 million. In contrast, the record for punitive damages in Canada was set in 2023 at \$1.5 million.

While there have been nuclear and thermonuclear verdicts in Canada, those decisions generally apply to class actions and are relatively uncommon. Canada has not seen the type of damages growth that is occurring in the US. We do not anticipate nuclear verdicts to become widespread on a level with the US in the next five years. Damage awards tend to increase gradually in Canada; they will likely continue to increase due to social inflation but not to the extent of nuclear verdicts.

C. Bad Faith

Bad faith claims against insurers are far less common in Canada than they are in the US. Establishing bad faith in Canada is a high bar, and there are no legislative regimes that are plaintiff friendly as is the case in the US. We do not anticipate bad faith legislation being enacted that would precipitate an increase in successful bad faith claims.

Furthermore, as is the case with damages generally, damages for bad faith are minor compared to the US. The highest punitive damages awarded in a bad faith claim was recently decided, but that amount—\$1.5 million—is still relatively small, especially relative to bad faith claims in the US. We do not expect bad faith claims to increase precipitously following that case, as bad faith damages have increased only incrementally since 2005.

D. Legal Marketing

We have seen an increase in legal marketing in Canada, specifically related to personal injury law. With that said, we have not seen the type of mass-marketing or aggressive

advertisements as in the US. Nevertheless, legal marketing will likely increase into the near future in the personal injury space, and could extend into other forms of litigation, such as class actions. The near unfettered mass-marketing and aggressive legal advertising in the US, which has contributed to social inflation, foreshadows the effects of unchecked legal advertising in Canada. We believe that lawyers' advertisements will increase and potentially extend into realms outside of personal injury law. This expansion of legal marketing could give rise to further social inflation in Canada.

In Canada, the provincial and territorial law societies regulate how legal professionals can advertise legal services. The regulation concerning advertising is well defined and contains robust requirements for the marketing of legal services in Canada, but these regulations currently rely, at least in part, on public engagement to report advertising that is misleading. A change in practice where insurers take on a more active role to report advertisements to the law society in that province would help curtail aggressive and wide-spread advertising that contravenes the regulations.

E. Class Actions

Class actions should be monitored in Canada and considered a meaningful driver of liability. Recent class action trends suggest that class action litigation will likely continue, especially with respect to environmental and health related claims, in the field of product liability litigation. Furthermore, the involvement of British Columbia in opioid and PFA litigation could signal willingness by governments to engage in class action suits as a means to remediate public health issues, which would result in significant further class actions against an indeterminate number of defendants. We also note that British Columbia has an especially plaintiff-friendly class action regime, such that class members in more restrictive jurisdictions have begun to chose British Columbia to certify a class action.

We also advise monitoring British Columbia in particular, as there are indicators that the province may use class actions as a means to remedy large-scale environmental and health issues.

Legislation that mirrors that of Ontario's recently amended class action statute may curtail certifications of classes in other provinces. Furthermore, to maintain solvency and meet financial obligations, insurers should take efforts to ensure reserve adequacy in the management of class action and mass tort litigation claims. Adjusters managing a claim should ensure substantial reserves are set aside to cover any potential nuclear verdicts.

Insurers should review their policies with their insureds to strengthen risk management in pricing of new insurance policies to combat the costly impacts of mass actions and potential nuclear verdicts.²³⁰

F. Third-Party Litigation Funding

We expect Litigation Funding to become more prevalent in Canada in the next five years. Litigation Funding will likely not create the type of liability pressure as it does in the US, but its continued unregulated use will result in increased social inflation if no checks are set in place. Litigation Funding is virtually unregulated in Canada, and its use in private civil suits, excluding class actions and bankruptcy litigation, is rarely disclosed. Consequently, we cannot be sure the extent to which Litigation Funding operates in the Canadian legal system. Nevertheless, we believe Litigation Funding is prevalent in Canada, and its continued unregulated acceptance by Canadian courts poses a risk for Litigation Funding to continue to grow in the country and create a cycle that gradually increases damage awards.

The most efficient response to barring the use of Litigation Funding in Canadian courts is by way of regulatory action. The strongest justification for regulatory amendments that restrict Litigation Funding is that Litigation Funding no longer promotes access to justice, as was initially intended; it is now used as an investment tool that uses the court system to generate profits for large financial firms.

²³⁰ Marsh, *supra* note 82.

The market of Litigation Funding is essentially unregulated, making it ripe for legislative oversight given its role in what is otherwise an essential public enterprise that is Canada's legal system. Efforts should therefore be made to explain to lawmakers why Litigation Funding no longer adheres to the public-good justification for allowing it into Canadian courts, and what regulators can do to address the issue.

Adjusters managing a claim should ensure substantial reserves are set aside to cover any social inflation.

Early and effective defence strategies that acknowledge the outer limits of potential exposure can be integral to cost mitigation. If unchecked, it has the potential to impact consumers by driving up premiums, or cause insurers to scale back or put further limits on policies.

GLOSSARY:

Affidavit: a sworn written statement that is used as evidence in court.

Alternative Dispute Resolution: dispute resolution techniques, such as arbitration, which are conducted outside of a court process.

Antitrust: broadly, an area of law concerned with encouraging business competition and limiting monopolies.

Appeal: in a dispute, the formal request to have the next highest level of decision-maker review the lower-level decision-maker's findings.

Arbitration: a formal alternative dispute resolution process for resolving disputes outside of the courts in which one (or more) independent and neutral third party (see Arbitrator), issues a binding decision on the parties to the dispute.

Arbitrator: an independent and impartial third party that issues a binding decision at Arbitration.

Bad Faith Claims: in relation to an insurance company, bad faith describes blatantly unfair conduct that exceeds basic negligence; a bad faith claim/bad faith lawsuit/extracontractual claim is a claim against an insurance company alleging that the insurance company acted in bad faith.

Billable Rate: the amount a lawyer or other legal professional charges per unit of time.

Canadian Bar Association: the association that represents the interests of legal professionals in Canada.

Cause of Action: a set of facts that justifies a legal claim to allow a party to seek relief via a formal court proceeding.

Civil Litigation/Lawsuits: legal disputes and court proceedings between parties, such as businesses and people, which do not involve criminal charges.

Class Actions: are lawsuits brought forward by one or more plaintiffs on behalf of themselves and all other persons having an identical interest in the alleged wrong, i.e., part of the same "class" based on that interest.

Class Action Certification: a court process in which a judge decides whether a group lawsuit can proceed as a class action.

Commercial Liability: broadly, is the legal responsibility that a business may face if its operations, services, products, etc., cause a loss to another party; such risk is usually covered under a commercial general liability policy.

Common Law: a system of laws based on precedents that are derived from judge made decisions, as opposed to written statute law.

Contingency Fees: the amount charged by a lawyer when a particular claim is successful, usually charged as a percentage of the total amount awarded, i.e., the lawyer's fee is 'contingent' on the success of the claim.

Contributory Negligence: a legal defence in which the plaintiff is found to have contributed to their own loss as a result of their own action or omission.

Defendant: in a lawsuit, the party that is alleged to have caused harm or loss to another party (the plaintiff).

Discovery: in litigation, the process in which each party learns the other parties' version of events in support of their claim or defence.

Disclosure: the process and rules governing the exchange of information between parties to litigation.

Economic Inflation: the decrease in purchasing power of money over time, reflected by the rate of increase in prices, such as the increase in prices of goods and services.

Exposure: the risk of loss that a party faces; for an insurance company, the risk of having to pay out an insurance claim.

Federation of Law Societies of Canada: the national association of the fourteen provincial and territorial law societies that regulate the legal professions in Canada.

General Damages: are damages awarded to compensate a plaintiff for intangible losses, such as for pain and suffering, loss of enjoyment, emotional distress, and other intangible losses caused by the wrongdoing.

Greenwashing: a deceptive practice in which a company makes claims about their products, services, etc., being more environmentally friendly or sustainable than they actually are.

In-House Counsel: lawyers that work internally for a company.

Indemnity: in the broadest sense, is protection against, or compensation for, a loss or liability.

Insured: the party who experiences the benefit of insurance under an insurance policy provided by an insurer.

Insurer: the party providing insurance.

Intellectual Property: refers to intangible creations of the human intellect, such as inventions, artistic works, symbols, etc.

Joint and Several Liability: a legal concept in which multiple parties are jointly responsible for the loss.

Judicial System: the system of courts that interpret and apply law to resolve disputes.

Jurisprudence: the law built upon the decisions of the courts; case law; court decisions.

Jury: in a court case, is a sworn group of people that are required to hear evidence, make findings of fact, and make a decision (issue a verdict) about the court case based on the evidence and arguments presented at trial.

Law Society: a statutorily appointed body that is responsible for the regulation of legal professionals, in the public interest, in a particular province or territory in Canada.

Liability: the legal responsibility of Party A to Party B when Party A caused Party B to suffer a loss.

Litigant: a party involved in a lawsuit.

Litigation: the legal process and steps involved in resolving a dispute in court; a lawsuit.

Litigation Management Expenses: the total cost that a party pays related to litigation, including costs such as lawyer fees, expert witness fees, court fees, etc.

Litigious: the tendency to engage in litigation.

Mass Litigation/Mass Torts: an act or omission that harms or injures numerous people resulting in groupings of individual lawsuits alleging the same issues against the same defendant(s).

Mitigating Actions: steps taken to reduce risk or its potential impact.

Motion Practice: a method of managing the progression of a lawsuit through the court system that involves bringing applications, or motions, to the court to have the judge decide specific issues.

Multi-District Litigation: judicial groupings of massive numbers of similar lawsuits to be adjudicated at the pre-trial stages in a single court.

Nuclear Verdicts: verdicts of \$10 million or more. (see also, Thermonuclear Verdicts)

Property and Casualty (P&C) Insurance: insurance that protects an insured person's property and that also protects them from liability for injury or damage to others, under certain conditions.

Plaintiff: in a lawsuit, the party that starts the lawsuit against one or more defendants; also known as a claimant.

Punitive Damages: damages awarded by a court in addition to compensation to punish the defendant for particularly bad behaviour; also known as exemplary damages.

Reptile Theory: an approach during jury trials in which the lawyer attempts to elicit emotional responses from the jury to foster animosity toward the other party.

Securities: financial instruments, including stocks, bonds, mutual funds, etc.

Security for Costs: is a court order that requires a party to pay money into court, or to provide some other form of bond or guarantee, as security for the other party's costs.

Settlement: an official agreement between parties to resolve a dispute.

Social Inflation: describes trends of increased costs and liability that outpace economic inflation; social and behavioural trends that are said to expand the liability of parties allegedly responsible for harms and their insurers.

Speculative Financial Industry: investment in ventures with abnormally high risk and the potential for high returns on investment.

Standard of Proof: the amount of evidence needed to establish a claim in court.

Statutory: required, permitted, or enacted by a written law (statute).

Superfund Laws: legislation aimed at remediating environmental contamination from hazardous waste and imposing liability and compensation.

Thermonuclear Verdicts: verdicts of \$100 million or more; also known as Mega Nuclear verdicts. (see also, Nuclear Verdicts)

Third-Party Litigation Funding: the process where third party funders provide money to a plaintiff or plaintiff's lawyer in exchange for a cut of the award resulting from the underlying litigation or settlement; typically involves a funding agreement that contains the funder's identity, investment amount, payment schedule, and whether the funder may exercise any strategic control over the litigation.

Tort: in the simplest sense, is a civil wrong that causes harm to another person or their property.

Tortfeasor: a party that commits a tort.

Verdict: formally, a court's decision on a disputed issue in a lawsuit.