



Brown&Riding

Annual Healthcare Market Update

Preparing you for what lies ahead



As we look forward to 2023, we also think it's a good time to reflect on 2022. In our prior newsletter, we discussed certain risks and segments in the insurance industry that continued to see rate increases, claims-made step factors being enforced by carrier partners, and new capacity entering the marketplace. As we look back at 2022, our newsletter was fairly accurate, except for one element. The new capacity that has come into the marketplace and the incumbent carriers' desire to retain business has garnered more stable premium levels than we expected, and in some cases, we even saw double digit percentage decreases from expiring with no change in exposure.

2023 is going to be another year of insureds pushing for accounts to be shopped, and we expect the competition amongst carriers to continue. New market entrants will look to aggressively write business, while incumbent carriers will look to retain as much business as possible while still getting rate where they can. With that being said, we are still in the middle of a hard market which is being driven by nuclear verdicts, third party litigation funding, and staffing challenges, which we will discuss below. In addition to discussing these challenges, we will also touch on what you and your insureds can expect in 2023 and how to best prepare your insureds for the coming year.

Challenges Facing the Healthcare Industry in 2023

- [Nuclear Verdicts](#)
- [Third-Party Litigation Funding](#)
- [Staffing](#)

Nuclear Verdicts & The Court Systems

By now you've almost certainly heard the term "nuclear verdict" when discussing the state of the insurance market with your broker or underwriters. A nuclear verdict is defined as a jury verdict that is typically \$10million or greater. A study conducted by the U.S. Chamber of Commerce Institute for Legal Reform which analyzed 1,376 nuclear verdicts in the United States between 2010 and 2019 showed that of those cases, 20.6% stemmed from medical liability personal injury and wrongful death suits. The average verdict of those nuclear medical liability cases was \$36.8 million, which is being driven by plaintiffs' attorneys using "reptile theory" and "anchoring" tactics in the courtroom; methods used to manipulate the jury to make them more sympathetic to the plaintiff or to set unrealistic damage amounts in the jurors' minds as a means for higher awards when the verdict is handed out. Per the U.S. Chamber of Commerce study, of the nuclear verdicts that provided a breakdown of damages by type, the verdicts consisted "primarily of awards for noneconomic damages, such as pain and suffering, or punitive damages" and only about 14% of damages were economic compensatory damages (i.e., lost wages, medical expenses, etc.).

In addition to the increase in nuclear verdicts, the delay in medical malpractice cases making their way through the judicial system due to courts being shut down by the COVID-19 pandemic is taking a toll on healthcare systems. Criminal cases take precedence over civil cases, so courts are just recently starting to hear jury trials on medical malpractice claims that were filed before and during the COVID-19 pandemic. Healthcare systems and insurance carriers alike are now shouldering higher costs and expenses than they would have pre-pandemic due to inflation and the increase in damages awarded due to advertisement of nuclear verdicts to the public. There is reason to believe that claims will continue to file in as staffing shortages and post-pandemic burnout amongst healthcare providers continues to rise.

While only a small number of insureds may incur a nuclear verdict, it's important to inform all insureds of this phenomenon as carriers who are responsible for paying these large verdicts must attempt to make up for the loss by increasing rates. These rate increases are likely to affect all medical professional liability classes that they write, not just those classes that are incurring large losses, such as hospitals, senior care, correctional medicine, etc.

In addition to advising your insureds regarding nuclear verdicts and the state of the market, we recommend working with your insured, broker, and carrier to stay on top of claim development throughout the year. Claims that have been open for several years with no movement due to the pandemic may see increases in indemnity and expense reserves given changes in the legal landscape in certain venues and due to inflation. Being proactive so there are no surprises will go a long way in making sure that appropriate expectations are set ahead of renewals and that strategies amongst insureds, retail agents, and brokers align leading up to renewals.

Even if your insureds currently have a clean loss history, now is a good time to perform a review of their current insurance coverage to make sure that policy terms and conditions are favorable to the insured. Not all coverage is created equally, and carriers may exclude non-economic and punitive damages, which could potentially have to be paid directly by the insured if they are ever subject to a jury verdict, nuclear or not. While these coverages may not always be available to insureds because of class of business, certain exposures, loss history, etc., it's important to push for these to be included so you are providing the broadest coverage possible to your client.

In summary, the factors above are adversely affecting the medical malpractice insurance industry as premiums will continue to rise, coverage may be difficult to find for some segments of the industry, and some terms and conditions may become more restrictive. While we expect overall rate increases to be in the single digits this year, certain classes of business that are more prone to nuclear verdicts will feel increased pressure in 2023, and carriers may amend terms and conditions to be less favorable to the insured. We encourage you to reach out to your broker well in advance of upcoming renewals to discuss expectations and come up with a plan of attack for challenging accounts.

Learn more

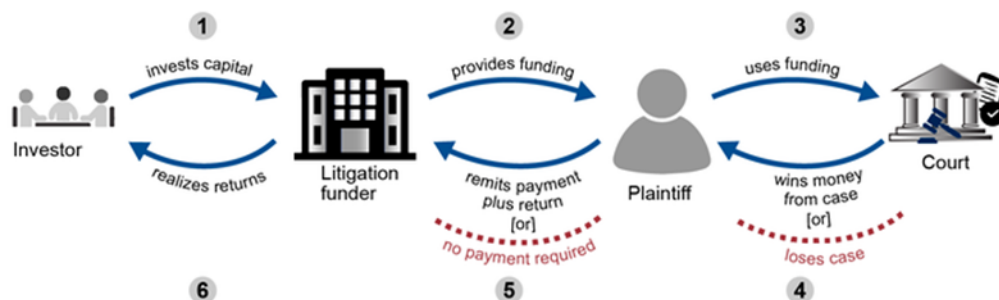
- [Judicial Hellholes — Executive Summary](#)
- [Runaway Juries](#)
- [U.S. Chamber of Congress Nuclear Verdicts Trends, Causes, and Solutions](#)
- [Health System Performance Trends](#)
- [Delayed Court Cases](#)



Third Party Litigation Funding

Third party litigation funding (TPLF) is becoming a multi-billion-dollar industry with little regulation and little attention. Third party litigation funding is when investors finance legal action against companies or individuals in hopes of a return on investment. A November 2021 study conducted by Swiss Re found that half of the \$17 billion invested globally went to United States litigation funding companies. TPLF companies fund costly lawsuits and in return will receive a portion of the award if the plaintiff wins their case. If the lawsuit is not won, the litigation funder and its investors will not receive their financial investment back. The most common suits that are funded are personal injury, commercial litigation, and Mass Tort lawsuits as the largest settlements typically occur with these cases.

Example of Third-Party Litigation Financing for Plaintiffs



While third-party litigation funding has grown substantially over the years, courts have little knowledge of the phenomenon due to the funding arrangements not being disclosed to all parties involved and states not having laws in place that require attorneys or clients to disclose third-party litigation funding agreements. The lack of transparency can

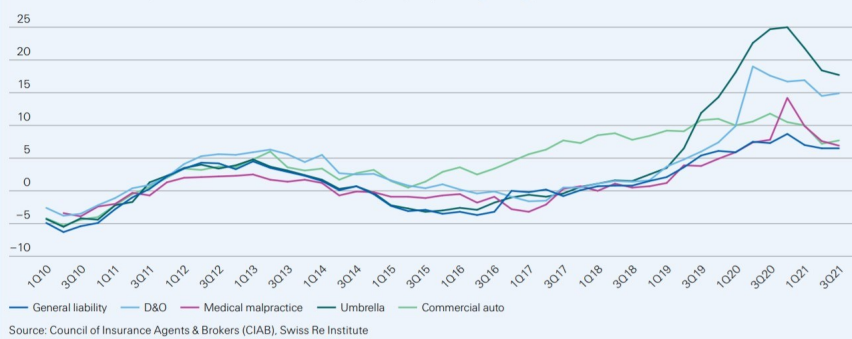
lead to unfair advantages for one party as it can create challenges managing legal risks and costs. Additionally, there is an increasing concern of security threats as classified information can be disclosed to foreign parties.

Third party litigation investors are looking for large returns, and on average, the Internal Rate of Returns (IRRs) are 20-35% which is becoming more attractive for investors, based on Swiss Re's December 2021 findings. Third party litigation funders can get involved in litigation at any point in the process, which is leading to longer and more drawn-out cases. In addition to increases in attorney fees, the costs for expert witnesses, additional court time, travel, and lost wages can all add up considerably. If a case settles, it is typically much less expensive than when it is heard by a jury. Research shows that third party litigation funding is leading to the growing number of nuclear verdicts and the rising issue of social inflation.

Large legal awards to plaintiffs are causing escalating insurance claim losses to defendants' insurers.

Connig, a US insurance asset manager, estimates the average combined ratio for US general liability in 2020 at 105.7%, and for medical malpractice at 117.5%, the seventh consecutive year of underwriting losses for both lines. In response, insurers are increasing premium rates, limiting policy coverages, and in some cases exiting the market altogether.

US commercial insurance premium trends, 1Q 2010 to 3Q 2021 (year-on-year percentage change)



The increase in the cost to defend a suit and rise in nuclear verdicts will ultimately affect everyone. Businesses fighting claims with the help of the insurance companies will have larger losses shown on their claims history, which will lead to possible non-renewals, increases in renewal premiums, and insurance carriers pulling out of venues or classes of business if losses continue to increase and become unsustainable. According to the Swiss Re Report, the average 2020 combined ratio for medical malpractice was 117.5%, which was the seventh consecutive year of underwriting losses. Insurance companies are having to pay more in claims which ultimately leads to increased rates and limited capacity, creating challenges for insureds seeking proper coverage.

IMAGES

¹ "Example of Third-Party Litigation Financing for Plaintiffs" (GAO. | GAO-23-105210)

² "Large legal awards to plaintiffs are causing escalating insurance claim losses to defendants' insurers" (Swiss Re Institute "US litigation funding and social inflation: The rising costs of legal liability" December 2021 report)

Learn more

- [GAO Report](#)
- [Litigation Funding](#)



Staffing Challenges

Staffing concerns are being fueled by multiple factors and seem to be public enemy number one in 2023 for health care providers, with numerous news outlets reporting about staffing challenges. Even before the pandemic, staffing of health care providers was a challenge. According to the [AHCA](#), nursing homes are at their lowest workforce numbers since 1994. During the pandemic, this portion of the industry lost approximately 221,000 workers.

The Silver Tsunami has been talked about for years, and as baby boomers continue to age, the healthcare industry seems completely unprepared to handle the tidal wave heading its way. According to a [report](#) by the Kaiser Family Foundation, from 2020 to 2030, it is projected that we will have 72,700,000 people over the age of 65 in the United States, an increase of close to 30% from 2020. The influx of elder citizens needing assistance and care for the foreseeable future has the health care industry on its heels. Mark Parson, President and CEO of the American Health Care Association/ National Center for Assisting Living, recently stated in a McKnights [article](#), “It’s impossible to exaggerate the challenges that providers face in providing care because of the inability to hire workers.”

The challenges regarding the inability to hire workers continue to snowball in our purview. Low staffing ratios lead to greater risk of adverse outcomes, which lead to greater risk of claims. More claims leads increased likelihood of carriers paying out more in indemnity and expense for claims. Carriers paying more for claims drives up their loss ratio, which leads to rate increases or carriers pulling out of venues. Insureds will then have a difficult time finding competitive or broad terms and may need to take on larger deductibles and higher premiums, which puts pressure on the insureds financial position.

In an effort to avoid and combat the challenges of low staffing, insureds should consider investing in technology and automation which increases efficiency and reduces the workload for healthcare providers on staff. Providing training and education programs to employees, addressing burnout and stress among healthcare workers, and improving working conditions by providing more flexible work schedules and daycare options onsite are also creative solutions to attract new talent and retain current staff.



“While doctors’ offices and the home health and hospice sectors have recovered to pre-pandemic employment levels, skilled nursing facilities are short almost **250,000** employees.”

-- Towhey, 2023

Learn more

- [AHCA Battles Crisis](#)
- [The Rising Cost of Living Longer](#)
- [Being a Senior in 2030: The impact of staffing shortages and rising costs](#)
- [McKnight's 2023 Outlook Survey](#)



What to Expect in 2023

As we previously mentioned, we expect an increase in competition in 2023, but not necessarily a decrease in premiums. New market entrants will aggressively pursue favorable business to build their books, and incumbents will fight to keep that business, which could lead to decreases for some insureds. Certain classes of business can expect increased competition amongst existing carriers as well, which could lead to decreases in premium for accounts that have performed well. However, we are still expecting single digit rate increases on most renewal business, as well as double digit rate increases on tougher venues and classes of business.

Recently we have seen an increase in the frequency of Reservation of Rights letters being issued when an insured reports a claim to their insurance carrier. The majority of these Reservation of Rights letters are stemming from failure to notify the carrier of a potential circumstance that could give rise to a claim during the policy period, which in turn becomes a written demand for monetary damages in a following policy period. Carriers may have been more lenient regarding incident and claim reporting during the soft market, but as the market continues to harden, carriers are sticking to the terms of the insurance contract and will issue a Reservation of Rights letter if the insured does not report incidents in a timely manner subject to the terms and conditions of the claims made and reported policy. With that being said, we know that the policy language can be vague, and it's not always clear cut as to when an incident should be reported. We encourage all incidents that could potentially give rise to a claim to be reported, but refer you to resources, such as The Doctors Company website (<https://www.thedoctors.com/contactUs/reporting-a-claim/>) for additional guidelines on reportable incidents. It's very important to continue to educate yourself and your insureds regarding the importance of incident reporting and the terms and conditions of the claims made and reported policy forms that make up our medical malpractice insurance policies.

Helpful Tips & Information

- [Reporting a Claim or Incident](#)
- [Understanding Your Claims-Made Professional Liability Insurance Policy](#)
- [Claims-Made Step Progression Example](#)
- [Judicial Hellholes Report](#)



Articles & Podcasts We Found Interesting

- [Runaway Juries Podcast](#)
- [Medical malpractice lawsuits, delayed by the pandemic, are hitting hospitals harder than expected](#)
- [Fractures, ruptured tendons, and death: Jacksonville surgeon faces hundreds of lawsuits due to alleged mistakes](#)
- [CIAB Q3 Article and P/C Market Report](#)
- [Medical Malpractice is on the Rise - MPL Insurance Rates are Rising](#)



How to Prepare Your Insureds for the Year Ahead

We recommend taking a proactive approach to your insureds' insurance needs for the coming year to ensure a smooth renewal process. Steps that can be taken in advance of the renewal include the following:

1 Discuss challenging accounts and renewals with your client, broker, and carrier at least 90 days prior to the effective date. This will allow time to set expectations regarding changes to renewal terms and pricing, client expectations, and marketing strategy.

2 Review applications and warranty statements thoroughly with your client. It's important that insureds accurately forecast and notify carriers of all exposures to ensure that all aspects of the insured's business are properly covered and rated for. As the application and warranty attach to the policy, the insured should make sure that everything is properly disclosed to the carrier to prevent any gaps in coverage.

3 Return renewal submissions early. After discussing expectations and strategy with your client and broker, and after reviewing the application and renewal submission with your client, please aim to return the renewal submission at least 60 days in advance of the effective date. This will allow ample time to work with both the incumbent and other markets, if necessary, on the renewal to ensure that all client expectations are being met in a timely manner.

We look forward to working with you in 2023 and encourage you to reach out to one of our Healthcare practice group team members below for help or to continue the discussion.

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