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Public Comment on Proposed Amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the New York Supreme Court and County Court (22 NYCRR §§ 202.67 & 207.38) Relating to Litigation Financing Agreements

On behalf of the Insurance Information Institute
Comment Date: May 24, 2024

Introduction

The Insurance Information Institute (Triple-I) is the trusted source of unique, data driven insights on insurance to inform and empower consumers, industry professionals, media, and public policymakers. We have been educating and informing consumers about our growing concern with third party litigation funding within the broader umbrella of what we refer to as "legal system abuse." Please allow me to provide some brief context.

Triple-I defines legal system abuse as policyholder or plaintiff attorney practices which increase costs and time to settle insurance claims. While litigation is considered a policyholder's last resort, legal system abuse exploits litigation when a disputed claim could have been resolved without judicial intervention. Legal system abuse contributes to higher costs for insurance operations and policyholder pricing.

Our growing concern with third-party litigation funding is based on the change in the motivation of the investors. TPLF can be an effective tool for judicial good. Yet, in recent years, TPLF has devolved in unfortunate ways. Without any direct ties to litigated cases and minimal transparency, institutional investors and even sovereign nations are contributing significant amounts of capital toward litigation for the sole intent of making a profit.

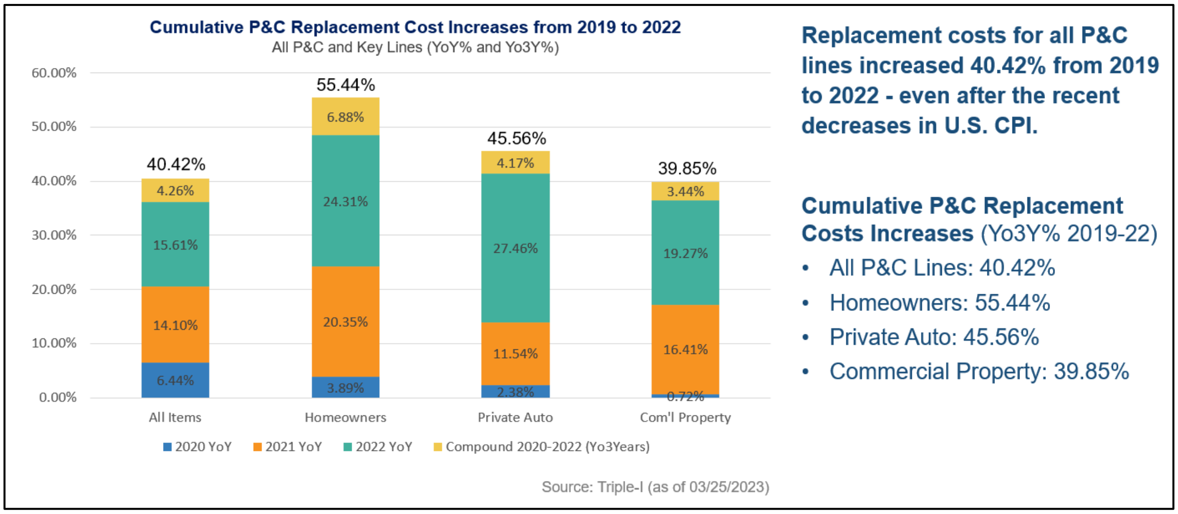
Without transparency, we are not able to provide deep data-driven insights about TPLF's impacts on consumers and the insurance industry. Therefore, Triple-I supports mandatory disclosure of TPLF so we can study the impacts on consumers and carriers alike.

Background

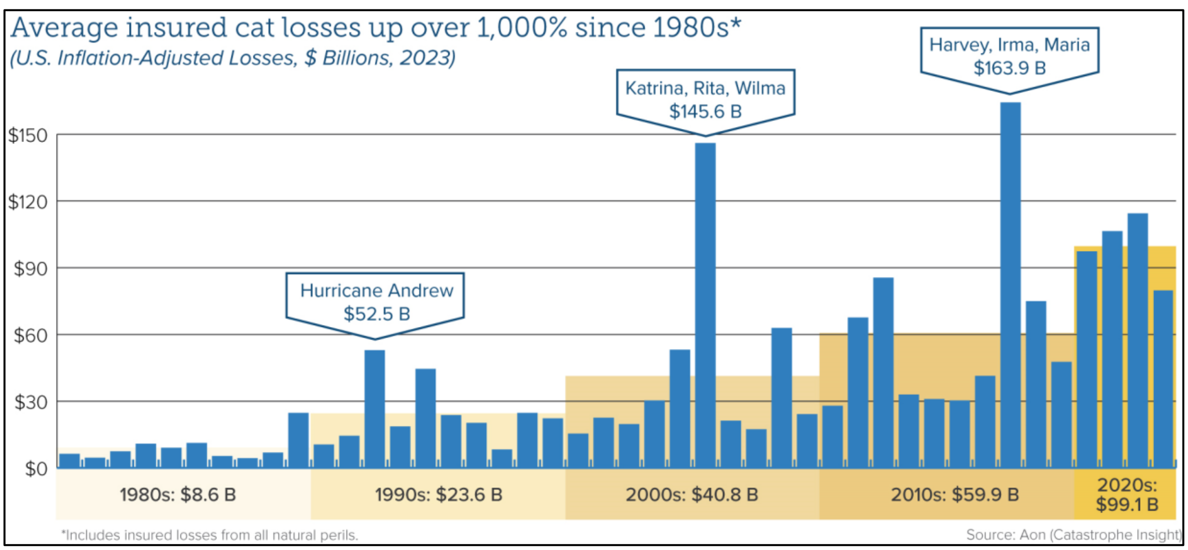
A foundational principle for the insurance industry is that prices need to reflect the expected loss payments and expenses for each policyholder. This means prices need to increase when losses or loss adjustment expenses increase. The industry has paid significantly higher losses in recent years, with some of the more influential drivers including:

- Increases in replacement costs for autos, homes, and businesses,
- Record-setting insured losses from natural catastrophes,
- Litigation costs,
- Theft and crime, and
- Risky behaviors like distracted driving.

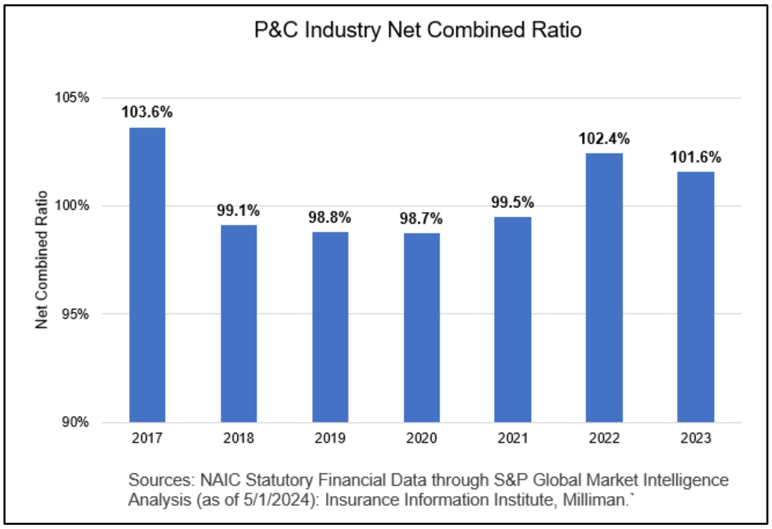
To elaborate with data-driven insights, replacement costs for all P&C lines increased 40% cumulatively from 2019 to 2022. Homeowners had the highest increase at 55%, with Personal Auto increasing 46%.



Regarding catastrophes, the industry has experienced over a tenfold increase in insured losses from natural catastrophes from the 1980's to the 2020's (even after adjusting for inflation).



The insurance industry's financial results have deteriorated significantly since the beginning of the COVID pandemic, with the overall P&C Net Combined Ratio rising from 98.7 in 2020 to 102.4 in 2022 before improving slightly to 101.6 in 2023. This means the industry is paying out on average $1.02 for every $1.00 of premium collected. Increased losses caused the insurance industry to increase rates to improve results and restore strong policyholder surplus to be the financial first responders for future losses. Triple-I expects this cycle of rate increases for the most heavily impacted product lines (i.e., personal auto and homeowners) to continue into 2025.

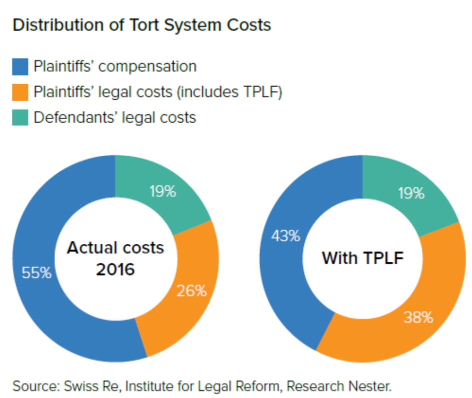


Litigation Costs and TPLF

The insurance industry retains claim adjusters, litigation managers, and defense attorneys to help settle claims. The portion allocated to defense costs are defined as "Defense and Cost Containment Expenses" (DCC). These expense dollars across all P&C products increased 29% from 2018 to 2023, while increasing 65% for General Liability (GL) products across these same years. GL products are where more of the complex and high limit litigation occurs for large corporations.

Because TPLF is not disclosed in New York as well as most other states, Triple-I cannot today quantify how much TPLF is contributing to the increase in DCC and industry's financial results. That said, the 2021 Swiss Re Institute's report entitled "US Litigation Funding and Social Inflation: The Rising Costs of Legal Liability" included several key data insights about TPLF.

- More than half of the USD 17 billion investment in litigation funding globally in 2020 was deployed in the U.S.
- They project this investment to grow to USD 30 billion by 2028, with most of the growth occurring in the U.S.
- TPLF investments have produced internal rates of return from 25% upwards in recent years.
- Plaintiffs receive only 43% of the tort system costs (on average) when TPLF is involved, 12 pts less than without TPLF.



Although merely an estimate, Swiss Re's study implies the insurance industry would be annually funding $7.5B (25% return on $30B) of investment returns for TPLF investors by 2028.

Conclusion
In 2022, the Triple-I issued the research report What is third party litigation funding and how does it affect insurance pricing and affordability?, in which we summarized four key conclusions.

Third party litigation funding:

- *is no longer about David vs Goliath, but about speculative investors getting richer as they focus on cases more likely to win the big settlements.*
- *Lacks transparency and a sense of fair play – if attorneys can communicate across the table about insurance coverage, why not disclose the involvement of TPLF?*
- *Creates a moral hazard as sharing the settlement pie in exchange for funding can fuel a desire for wanting a bigger pie to resolve the claim.*
- *Siphons value from the claims and risk management ecosystem – away from policyholders, claimants, and insurers – and transfers it to attorneys and investors.*

TPLF investment returns and any accompanying increase in claim payments would have a direct impact on insurance premiums. The investment proceeds to any TPLF of insurance claims would be paid within losses, and the insurance company defense costs would be captured within DCC. The higher losses and DCC would be considered in the pricing of future policies, alongside economic inflation and catastrophes. Thus, TPLF of insurance claims can impact the cost of insurance, which for businesses must be embedded in the price consumers pay for goods and services.

Triple-I is eager to assist with the quantification of how TPLF is impacting consumers and insurance carriers. But until disclosure of TPLF in insurance claims is standard procedure, no one will be able to quantify the impacts. Other state governments have recently taken steps to advance third-party litigation funding transparency in civil lawsuits. Indiana enacted House Bill 1124 which requires a plaintiff to disclose whether they've entered into a TPLF agreement. Montana acted similarly when passing Senate Bill 269. At the federal level, there's bi-partisan support for TPLF legislation called the 'Protecting Our Courts from Foreign Manipulation Act of 2023.'

On behalf of consumers, businesses, and the insurance industry, Triple-I supports the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court (22 NYCRR §§ 202.67 & 207.38) to require disclosure of litigation financing agreements.

Sincerely,

Dale Porfilio

Dale Porfilio, FCAS, MAAA
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