



Risk Management – Changing Liability Landscape

Lori Medders, Appalachian State University

GFOAA Conference
Embassy Suites by Hilton – Tuscaloosa, Alabama

February 2, 2022

Overview

Investors demand and carriers must deliver an acceptable return on investment to remain viable

As operational and claim costs increase, premiums are adjusted to cover anticipated liabilities to deliver acceptable profit margins

Compounding the costs associated with losses and operations is the limited number of carrier participants in the public entity market

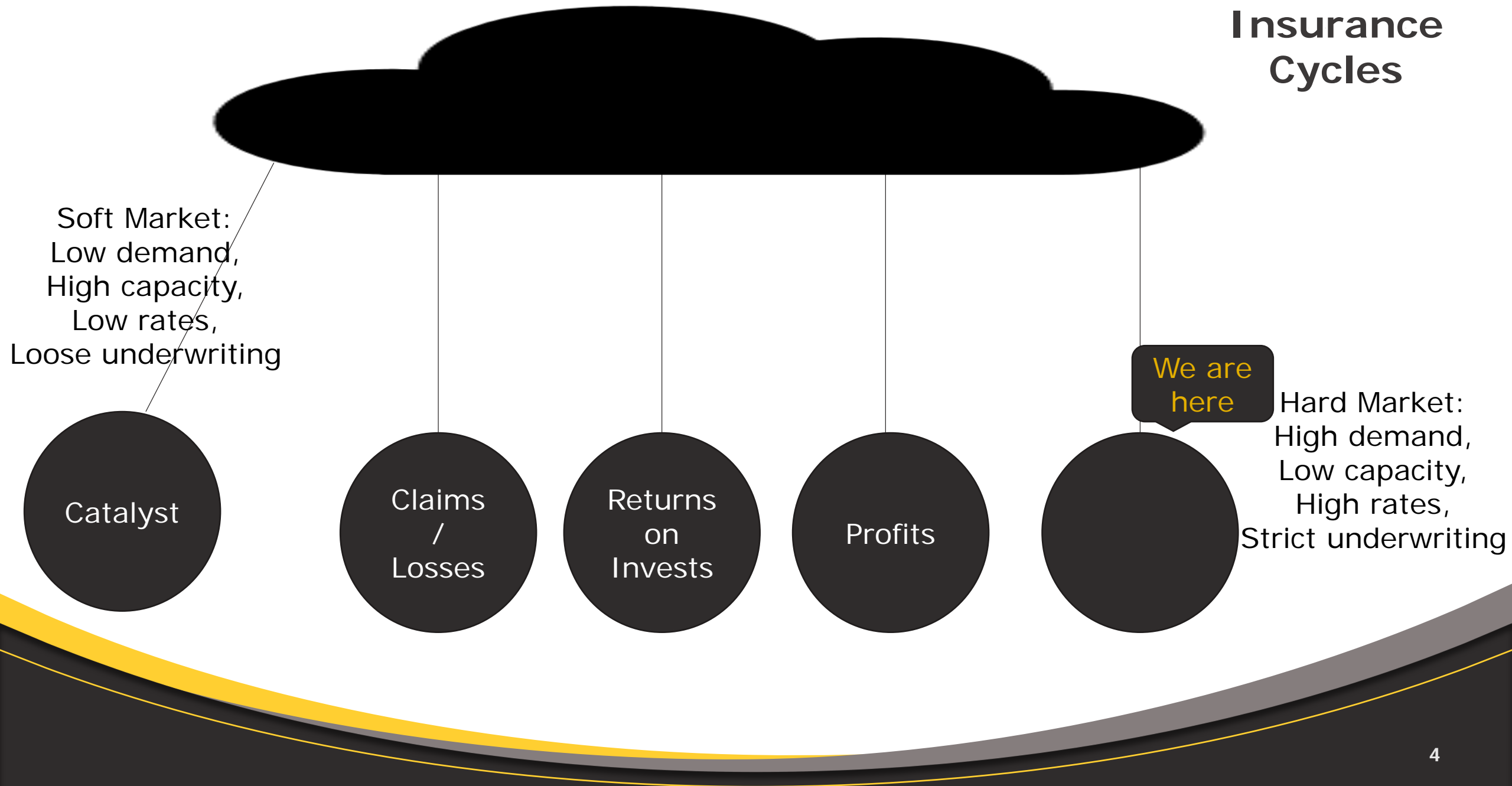
Over the last 18-24 months, several carriers have exited the public entity sector due to rising risks and lower profits

Carriers that remain in the market are reducing limits or requiring a higher Self-Insured Retention (SIR), but offering no reduction in premium in return

What is going on with insurers and why are local governments under pressure?



Insurance Cycles



Overview (continued)

Insurance carriers, like other industries, are struggling with the effects of inflation

Talent management is a challenge, and the acquisition and retention of staff relies upon competitive salaries, training, benefits, and a manageable workload

Wages and benefits are driving the cost of doing business up as is the demand to improve systems to increase efficiency while preventing malicious cyber-attacks in a remote work environment

Volatility and increase in claim value:

Claim-related expenses such as medical costs, public sentiment toward target defendants, inconsistent jurisdictions, and defense costs contribute

Public entities are struggling to maintain a balance between settling cases or defending vehemently:

In either case, the public entity's reputational capital may be at risk

Large losses & reduction of investment income reduce profitability

Premiums + Investment income not offsetting carriers' increased claims and operational expenses

Claims

- Catastrophic property/fire/flood losses

- Nuclear verdicts and target defendants (social inflation)

 - Especially Big Pharma and Law Enforcement

 - Historically high costs to settle and defend

 - Failure to personalize or humanize corporate or public entity defendants (increasing litigation, broader definitions of liability, more plaintiff-friendly legal decisions, and larger compensatory jury awards)

Operations

- Inflation and expense – Workforce salary & benefits

- Cyber Security/Systems

 - Security threats

 - Telecommunication technology

Reduction in public entity market participation continues to inflate premiums

Several carriers who write public entities exited the marketplace

Fewer insurance carriers with an appetite for public entities

Contributing causes:

- Erosion of qualified immunity defense

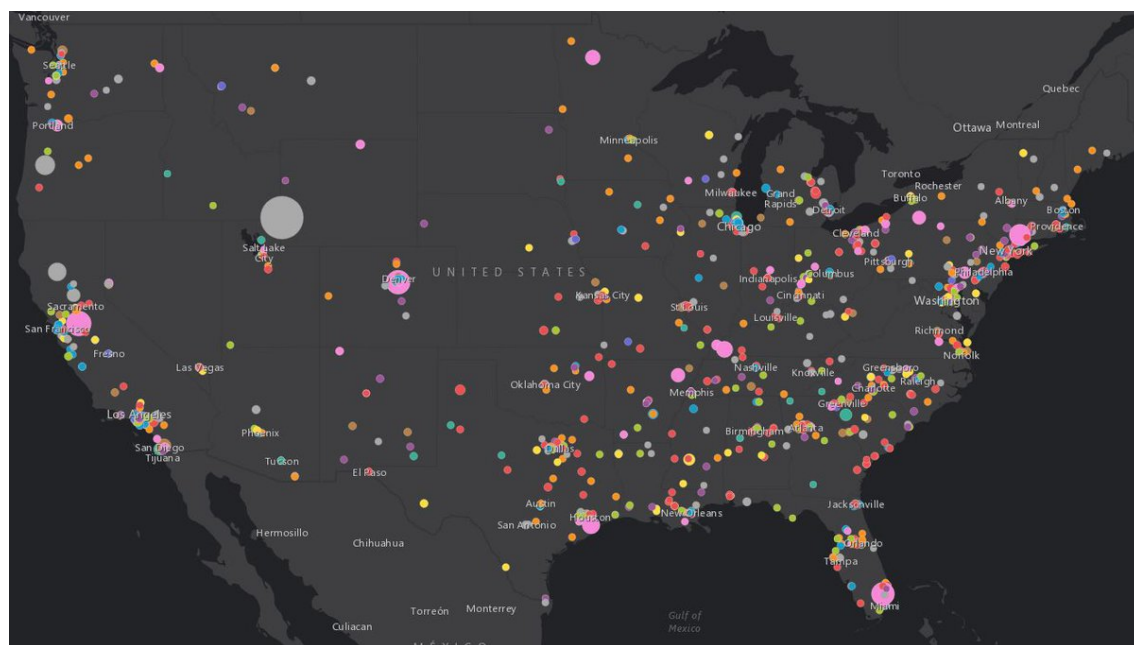
- Difficult to defend public entities (social inflation)

- Public sentiment to hold law enforcement officers and officials accountable
- Disdain or lack of confidence in the justice system

- Trial by media

 - 24/7 Media coverage: Stories based on camera footage, not all facts are known

 - Disconnect between the public entity and the community they serve



Casualty (including liability) insurance are relatively long-tailed lines

For casualty underwriters, keeping on top of social inflation is challenging because not only do they have claims occurring in the present, but they also have to factor in issues that have been lingering or developing for a long time

Example: Claims resulting from the opioid crisis

Claimants have successfully brought suits against major drug companies for the 'harmful' role they played in the North American opioid crisis over the past 10-15 years

Opioid crisis remains a "big question mark" for the industry and could be the cause of further astronomical liability claims moving forwards

Insurers struggle to make up for prior under-reserving

What's driving "social inflation"?

"Nuclear" verdicts

From 2014 to 2018, U.S. plaintiff awards have *almost doubled* in total dollar amounts, with a few *exceeding \$1 billion*

Class actions

Class action defense estimated to account for 11-12 % of U.S. litigation spending

Rise in the size of securities class action settlements to \$2.4 billion in 2018 from \$1.4 billion in 2017

Virtually all proposed M&As involving public companies now trigger lawsuits alleging false and deceptive disclosures to shareholders

1,300+ COVID-19-related employment complaints filed in federal and state courts in 2020, 67 of which were class actions (Source: Jackson Lewis COVID-19 Employment LitWatch)

Litigation funding

Litigation funders assume all or part of litigation costs for an agreed-upon percentage of any settlement or judgment

Allows plaintiffs to employ experts, investigators, and witnesses to develop effective strategies – options once only available to corporate defendants

What's happening to coverage?



Reduction in capacity or limits, premiums maintained or increased

Lower aggregate limits (carriers taking on less risk)

Increase SIR

Expectation of strong risk management practices and claim prevention strategies

But premium not reduced

Emerging trends: By coverage line

No line of coverage is immune from premium increases

Each line of business is associated with a unique risk driving financial exposure up

In 2020, many states extended the statute of limitations or postponed hearings and trials which resulted in prolonged litigation

The backlog continues into 2022

Inconsistent court decisions, deteriorating infrastructure, inflationary costs & unsettled case law are drivers of unpredictable exposures that must be considered in anticipation of future losses

Emerging trends: Auto coverage

New and expensive vehicle technology and difficulty obtaining parts lengthen the loss of use and increase indemnity costs

Because of the increased costs associated with repairs, technology, special equipment and claim settlements, premiums are expected to increase

Costs of replacement vehicles increased due to lower supply

Technology improvements in vehicles increase costs to repair or replacement

Repair and replacement parts are not readily available

Bodily Injury Costs

Medical treatment costs, wage loss, future medical and home care costs have all increased and impacted settlement value

Auto claims involving law enforcement carry over the general community sentiment (positive or negative) toward law enforcement

Emerging trends: Liability

Legal environment for liability claims against public entities is evolving

As populations shift from state to state, the jury pools are changing, and past outcomes may not be indicative of future results

Judges are reluctant to grant summary judgment based on immunity and cases are forced through the litigation process

Additionally, tort caps are often sensitive to inflation and many will increase in 2022

In 2021, 20 weather/climate disaster events with losses exceeding \$1B

Public entity infrastructure for water and sewer has been tested with the surge in storms

Across the country, hurricanes, 100-year floods, tornadoes test the capacity of water and sewer systems

Roads and traffic design are also impacted by increases in population and public entities must budget and expand roads to alleviate congestion

Emerging trends: Liability (continued)

The capital improvements and related construction require public entities to contract services and construction work

Many contracts continue the tradition to require minimum limits of \$1MM/occurrence, which is inadequate to cover the cost of catastrophic claims and places public entities in jeopardy of being on the hook for a portion of the loss

Contracts for high hazard construction like dams and roadways need to be adjusted to require higher minimum limits for contractors

Public entities are experiencing increased volume of road design cases

Minimum financial responsibility laws of each state typically inadequate to cover injury more severe than soft tissue

Claimants injured more severely are inclined to develop theories of poor road design or inadequate traffic signals to pursue damages against a public entity

Emerging trends: Liability (continued)

Tort Caps/ Immunities

Tort Caps increase with the cost of living in many jurisdictions

Example: Colorado increased the tort cap in 2020 from \$468,010 to \$613,760 for noneconomic loss or injury – cap will be reviewed every two years

Oregon increased the tort cap for claims against local public bodies for personal injury or death from \$769,200 (2020) to \$782,600 (2021)

Alabama tort cap is at \$100,000/pp (\$300,000 per occurrence)

Erosion in the application of immunity to preclude litigation means more expense to defend and higher potential for jury trial

Emerging trends: Liability (continued)

Population shifts bring changes to the jury pool

<https://qz.com/2106080/these-are-the-states-where-most-americans-moved-in-2021/>

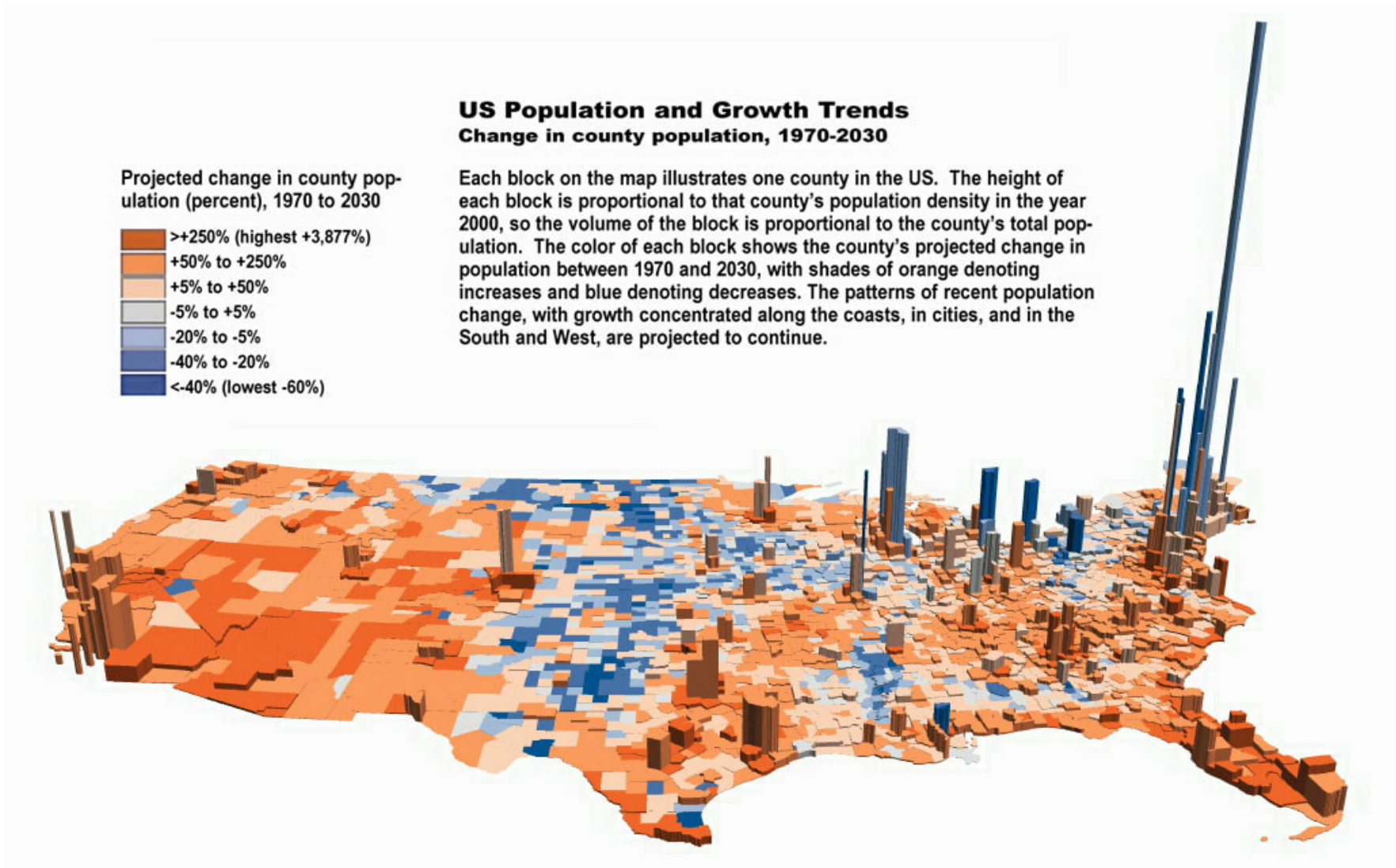
Texas, Florida, and Arizona added the most residents in 2021

Alabama not in Top 10, but 5-6 Southern states are (6 only if you count Texas as Southern)

California and New York shrank by 1 – 2%

Jury pools may not be as consistent or reliable as in the past

Emerging trends: Liability (continued)



Emerging trends: Liability (continued)



Emerging trends: Liability (continued)

Infrastructure

Weather and climate disasters: 2021 there were 20 events exceeding \$1B

<https://www.ncdc.noaa.gov/billions/>

1 drought, 2 floods, 11 severe storms, 4 tropical cyclones, 1 wildfire, 1 winter storm

Lagging capital improvements to infrastructure like water and sewer

Hinder public entities' ability to meet community demands for distribution (quality, and quantity)

Pressure on older systems to manage storms and flooding

Water breach claims presented by multiple plaintiffs (class actions)

Costs to defend

Tort caps critical to limit collectible damages

Many communities are experiencing surges in population

Traffic congestion increases and road design improvements lead to more claims



Emerging trends: Liability (continued)

Third-Party Risk Transfer

Despite the increase in claim costs and potential of nuclear verdicts, mandatory contractual risk transfer limits have not increased over the years

Many contracts continue to require minimal limits of \$1MM/occurrence

Ambiguous contract language results in contribution to settlements rather than complete risk transfer



Emerging trends: Liability (continued)



Most states, including Alabama, have a minimum liability limit of \$25k/pp

Florida's minimum limit is \$10k/pp

State minimum financial responsibility limits for personal auto have not kept pace with claim costs

The low limits encourage claimants to pursue cities and counties for road design to recover damages

Emerging trends: Liability – Law enforcement

Civil unrest related to law enforcement negatively impacted social sentiment toward law enforcement in many communities and defending law enforcement has become more challenging

Congress did not pass the George Floyd Act and there are no statutory changes at the federal level

Many states: however, have passed legislation that limited immunity, required body worn cameras, changed policies related to search and seizures, added restrictions on restraining methods, and other initiatives

It is anticipated that in the states that have passed legislation, that more cases will be brought in state rather than federal court

New legislation has not been tested in state courts; interpretations of the statutes remain to be seen Across the country, the successful defense of officers and departments depends in large part on how the department interacts with the community

Emerging trends: Liability – Law enforcement

Use of Force



U.S. Supreme Court has upheld longstanding common law that an officer is held to a reasonable standard based on clearly established case law

Congress did not pass the George Floyd Act; qualified immunity remains viable for suits in federal court

States responded with passing legislative acts that reduce or eliminate qualified immunity: many did not set tort caps

Anticipated results:

- More litigation filed in state courts rather than federal
- Fewer cases disposed via Motion for Summary Judgment:
- Prolonged litigation, and associated costs
- Unlimited damages

Emerging trends: Liability (continued)

Social sentiment regarding use of force generally negative toward law enforcement



Plaintiff's and their attorneys have confidence to demand higher settlements- regardless of liability

Litigation finance firms fund social justice cases that increase the capital to pursue litigation and demands for higher returns on investments

Notable Settlements

George Floyd: \$27MM

Breonna Taylor: \$12MM

Emerging trends: Liability – Sexual molestation

Settlements for sexual abuse and molestation have reached record levels

Many states extended the statute of limitations and the publicity surrounding allegations of abuse encourages additional claimants to step forward

Good hiring practices, training and accountability are key to preventing claims

“Look back windows” increase the statute of limitations for pursuing a molestation claim

Target defendants are schools, religious, and non-profit classes of business

Multiple plaintiffs/class actions

Notable settlements

- USC: \$1.1B/ 3 separate settlements over 700 victims

- Michigan State \$500MM over 300 victims

Personnel

- Desperate need for personnel

 - Hiring and background check failures

 - Accountability: termination versus transfer

Emerging trends: Liability – Employment law

COVID and diversity and inclusion efforts are on the radar for potential risks to public entities

Mandatory vaccinations, work from home accommodations requests & potential breach of privacy may give rise to future claims

Public Readiness and Emergency Preparedness (PREP) Act and workers compensation may offer effective defenses for employment claims brought related to COVID

PREP Act provides immunity of liability for entities and individuals involved in the development, manufacturing, testing, distribution and/or administration of countermeasures against a present or credible threat to public health

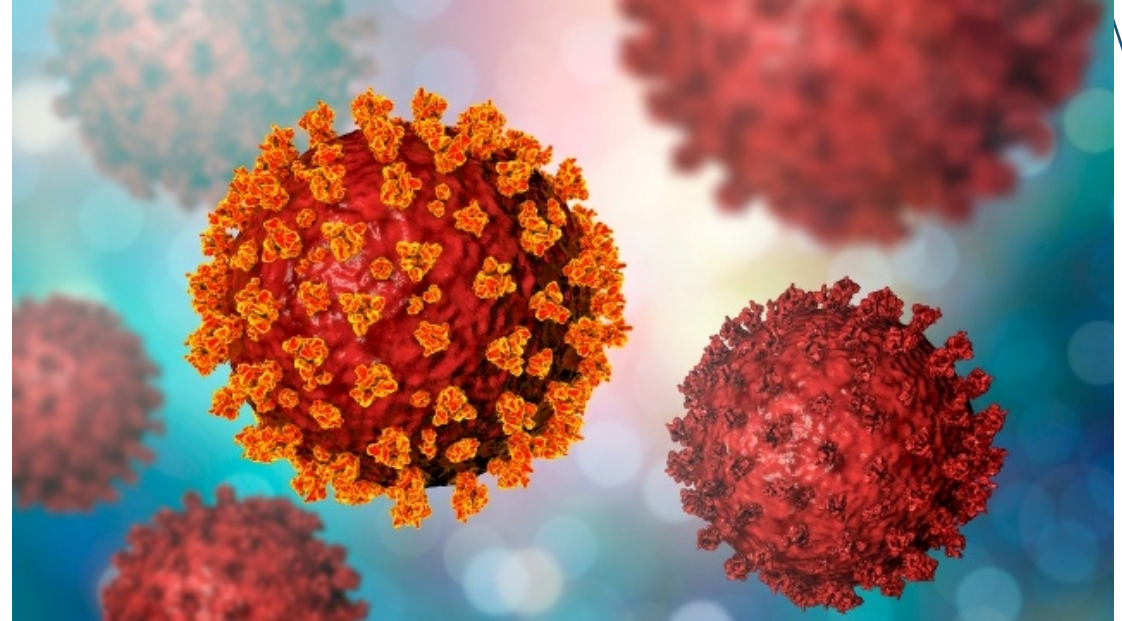
As diversity and inclusion efforts intensify, related claims are surfacing

Proceed with caution, ensure diversity and inclusion policies and practices are current, compliant & do not cross the line to exclusionary practices

Emerging trends: Liability – Employment law

The COVID factor

Potential claims to arise



Failure to accommodate work from home requests

Privacy violations – proof of vaccination

Unestablished law regarding terminations related to COVID and vaccinations

Public Readiness and Emergency Preparedness (PREP) Act may provide some immunity

Emerging trends: Liability – Employment law

Discrimination

Companies seek to diversify workforce

Notable settlements/verdicts

Michigan Department of Corrections: \$11.4 MM – race discrimination, hostile work environment and retaliation

St. Louis County: \$10.25MM settlement – sexual orientation discrimination

Novant Health/ North Carolina: \$10MM – reverse discrimination verdict

Fee shifting

Plaintiff attorney fees and litigation costs are shifted to defendant, then added on to verdict

Relief in sight?

Hmm....

Cyber losses to public entities on the rise

Terrorists may target small-to-medium sized public service

Critical infrastructure is being asked to innovate while at the same time much of it in need of repair

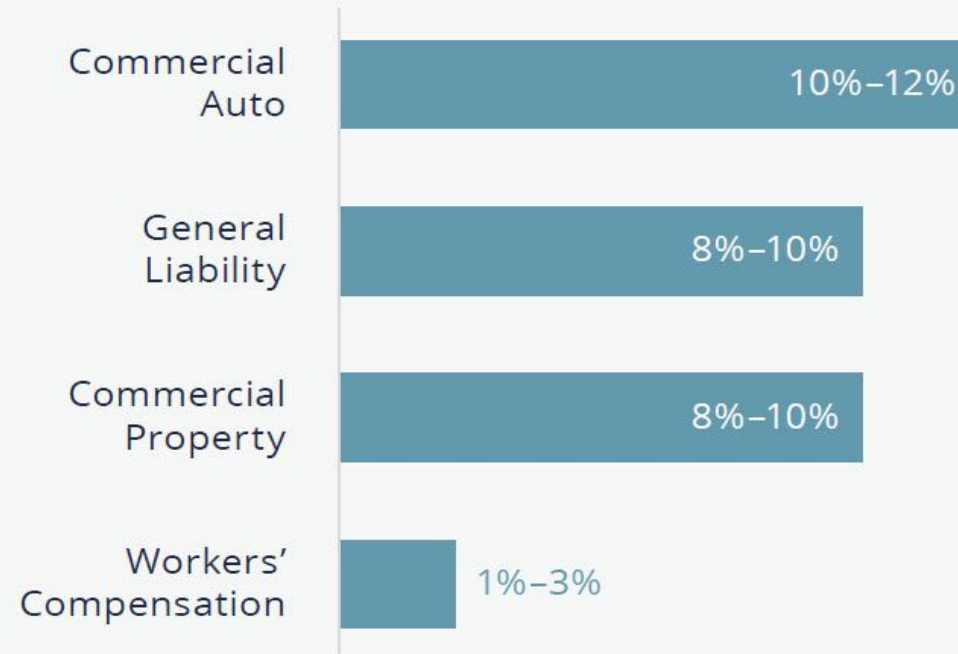
Limited public funding

Environmental-Social-Governance responsibilities are growing



2022 Insurance Pricing Outlook

2022 Direct Premium Growth Estimates by Line (Contemplates Rate and Exposure)



A slowing growth in premiums expected for most commercial lines

Source: CIAB

TAKE-AWAYS AND COMMENTS

The news has been bad for awhile – liability incidents, losses and premiums are way up and coverage down from 2016-17 levels

In Alabama, immunity and tort caps provide some “cover” nevertheless the future liability landscape is volatile, unpredictable and ambiguous

Several emerging risks on the horizon and several other nagging “old” risks, too

Premiums are beginning to level out & higher interest rates could help provide spreads that insurers haven’t enjoyed in years

Risk Management – Changing Liability Landscape

Thank You! Questions?

Aren't you glad you came?!

meddersla@appstate.edu