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Chaim Saiman

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IS INSURANCE “JUST A CONTRACT” OR A “JUST CONTRACT”?

CHAIM SAIMAN*

Courts never tire of saying an insurance policy is “just a contract” and subject to ordinary rules of contract law. Contract here signals a plain language approach that strives for formal neutrality between the parties. Yet courts also frequently rely on a narrative that an insurance policy strives to be a “just contract” with special pro-policyholder rules that reach beyond the plain language.

How is insurance simultaneously “just a contract” and a “just contract?” Prior scholarship has noted the confusion, but this Article aims to reconcile the dueling narratives. When the issue relates to scope or breadth of coverage—whether a loss is included within the bounds of the policy—strict construction gains the upper hand. But when the focus is on the suite of rights that flow from coverage—such as expanded remedies available upon an insurer breach—courts craft coverage rights which are deeper than what can be derived from the plain meaning of the policy. This distinction makes sense considering the degree of uncertainty posed in each setting. Broadening a policy to risks beyond its coverage base threatens to upend the match between risks and premiums. By contrast, the cost of deeper insurance is derivative of risks already assumed by the policy and thus more predictable to the insurer.

This analysis gives courts a framework to understand when they should treat insurance law differently from contract law. Furthermore, because plain language exerts a strong pull over the entire landscape of contract law, clearly presenting counterexamples and their rationale should prevent courts from importing plain language concepts into areas of insurance law that are anchored on competing normative foundations.

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INTRODUCTION

The platitude “insurance policies are contracts” that are subject to “ordinary principles of contract interpretation” serves as the opening headnote in thousands of insurance cases.¹ *Contract* in this context means

1. To cite a few recent examples from state supreme courts, see, for example, *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 118 (Del. 2021) (“Insurance policies are contracts, and Delaware courts apply the ordinary principles of contract interpretation to construe insurance policies.”); *Omega Protein, Inc. v. Evanston Ins. Co.*, 336 So. 3d 128, 133 (Miss. 2022) (“[I]nsurance policies ‘are contracts, and as such, they are to be enforced according to their provisions.’” (quoting *Corban v. United Servs. Auto. Ass’n*, 20 So. 3d 601, 609 (Miss. 2009))); *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 497 P.3d 625, 628 (Nev. 2021) (“[I]nsurance policies [are] treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies.” (second alteration in original)); *Butler v. Travelers Home &*

more than just an agreement. It functions as a normative argument for a plain-language approach to contract law that strives for formal neutrality between the policyholder and insurer. It means “no special rules” of insurance law.² It instructs courts to simply enforce the plain meaning of the agreement without being distracted by the “insurance context” or putting a thumb on the scale in favor of the policyholder. Most centrally, it means that arguments relying on the policy as a contract of adhesion, on the financial and informational imbalances between the parties, on the complex nature of the insurance product, on the special relationship between policyholders and insurers, or on the aim of compensating tort victims are all irrelevant to the contractarian ideal of formal neutrality. In short, an insurance policy is “just a contract.”

Yet insurance law also strives to create “just contracts.” Courts put forward a counter-contractual narrative that holds insurance contracts are unique and warrant special rules of interpretation.³ One insurance law textbook welcomes students “to the wonderful world of Insurance” where “the rules of the law of Contract are reflected as in a fun house mirror.”⁴ The preface to a hornbook in West’s *Nutshell* series begins by informing students

Marine Ins. Co., 858 S.E.2d 407, 410 (S.C. 2021) (“An insurance policy is a contract between the insured and the insurance company, and the policy’s terms are to be construed according to the law of contracts.” (quoting *Williams v. Gov’t Emps. Ins. Co.*, 762 S.E.2d 705, 709 (S.C. 2014)); *United Servs. Auto. Ass’n v. Riley*, 393 Md. 55, 79, 899 A.2d 819, 833 (2006) (“Insurance contracts are treated as any other contract.”); *Vestin Mortg., Inc. v. First Am. Title Ins. Co.*, 139 P.3d 1055, 1057 (Utah 2006) (“An insurance policy is merely a contract between the insured and the insurer and is construed pursuant to the same rules applied to ordinary contracts.” (quoting *Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274 (Utah 1993))); see also Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 814 & n.1 (2009).

2. See Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 447–48 (1998) (“[T]he existing rules of contract interpretation . . . are all that is necessary to interpret the [insurance] contract.”); Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 109–11 (2007) (noting that although insurance contracts are contracts of adhesion and have “distinctive characteristics[.] . . . [c]ourts are increasingly willing to treat insurance policies as ordinary contracts, subject to ordinary principles of contract law” (footnote omitted)); James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 1065 (1992) (noting that a neutral, textual approach to insurance policy interpretation provides greater certainty than a contextual approach); Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1056–57 (1991) (highlighting formalist aversion to judicial efforts to remedy perceived imbalances through insurance policy interpretation).

3. See *infra* Part II; *Miller v. Hartford Life Ins. Co.*, 268 P.3d 418, 427 (Haw. 2011) (“[T]he special relationship between insurer and insured is . . . atypical, and the adhesionary aspects of an insurance contract further justify the availability of a tort recovery.”); *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 414 (Colo. 2004) (“[I]nsurance contracts are unlike ordinary bilateral contracts.”); *Noble v. Nat’l Am. Life Ins. Co.*, 624 P.2d 866, 867 (Ariz. 1981) (“The special nature of an insurance contract has been recognized by courts and legislatures for many years.”); *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 196 (Pa. 1977) (“An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured.”).

4. KENNETH H. YORK & JOHN W. WHELAN, *CASES, MATERIALS, AND PROBLEMS ON GENERAL PRACTICE INSURANCE LAW*, at xv (3d ed. 1982).

how insurance law cases “frequently read like a chapter out of *Alice in Wonderland*.”⁵ Insurance “is a world unto itself,” and consists of “a mine field, full of hidden traps for those who expect that words in a contract will be applied according to their usual meanings.”⁶ Blackletter insurance law yields many pro-policyholder doctrines that do not even pay lip-service to the ideal of formal neutrality between insurer and policyholder. The numerous, expensive, and expansive obligations placed upon carriers include distinctive applications of doctrines of waiver and estoppel,⁷ conditions and forfeiture,⁸ implied duties of good faith and breach for bad faith,⁹ and expanded remedial schemes¹⁰—all of which are contrary to the letter and spirit of formalist contract rhetoric. Insurance treatises and textbooks brim with substantive doctrines through which courts construct a normative conception of what insurance “is” which cannot be credibly traced to plain-language reading of the policy.¹¹

Each version of insurance law is buttressed by its own narrative. The idea that insurance is “just a contract” relies on both the standard battery of freedom of contract arguments,¹² as well as several insurance-specific concerns. For example, insurance can only work if carriers can draft and price policies commensurate with the degree of assumed risk.¹³ When courts expand coverage to claims that are not actuarially accounted for, the product becomes either too expensive or leads to insurer insolvency—neither of

5. JOHN F. DOBBYN, *INSURANCE LAW IN A NUTSHELL*, at v (4th ed. 2003).

6. *Id.*

7. *See infra* Section II.C.3.

8. *See infra* Section II.A.2.

9. *See infra* Section II.B.

10. *See infra* Section II.D.3.

11. *See infra* Sections II.A–B.

12. Randall, *supra* note 2, at 110–11 (explaining how courts interpret insurance contracts according to “ordinary principles of contract law” in part to protect freedom of contract).

13. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1539, 1542 (1987) (observing that “it is essential to the insurance function to define risk pools as narrowly as possible so that the premium for the pool is as close as possible to the expected loss of low-risk members of the pool,” and “[t]he insurance function . . . requires that the losses have some probabilistic character”); George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 *GEO. MASON L. REV.* 635, 637, 640 (2017) [hereinafter Priest, *Principled Approach*] (describing insurance relationship as one where insurer and policyholder work together to minimize policyholder’s risks which can only happen if potential losses are “probabilistic”); Popik & Quackenbos, *supra* note 2, at 431 (the insurance mechanism only works if the insurer can “calculate its anticipated losses relatively accurately” and set premiums in accordance with this accepted level of risk, which insurers cannot do without being able to “predict in advance and with reasonable certainty how the policy terms will be interpreted”); David S. Miller, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 *COLUM. L. REV.* 1849, 1860 (1988) (arguing that insurers can only remain viable if insured risks are clearly defined so that insurers can accurately estimate probable losses to fix premium rates).

which serve the interests of insureds.¹⁴ Moreover, despite the persistent rhetoric that insurance policies are non-negotiable, in many cases endorsements are available which expressly offer the coverage the policyholder is later seen demanding in court.¹⁵ Having failed to purchase the coverage *ex ante*, courts argue they should not grant the policyholder the same coverage *ex post*.¹⁶ Rather, a fair, efficient, and solvent insurance system requires a so-called, “Willistonian” approach to contract law,¹⁷ where courts simply adhere to the plain language of the agreement and enforce the coverage actually purchased.¹⁸

Viewed from one angle, this version of insurance law seems to be gaining ground. In 2018, the Tennessee legislature went so far as to formally encode that insurance policies should be interpreted according to their

14. See Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation*, in REGULATION THROUGH LITIGATION 212, 213 (W. Kip Viscusi ed., 2002) (labeling this an “uncertainty tax” that attends to insurance contracts); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 131 (5th ed. 2012) (discussing how expanding coverage to claims not expressly accounted for in policies “expands the pool of covered risks beyond that which the insurer intended” which results in price increases for all insureds); James M. Fischer, *The Doctrine of Reasonable Expectations Is Indispensable, If We Only Knew What For?*, 5 CONN. INS. L.J. 151, 155–56 (1998) (highlighting that deviations from plain-language “require[] rational carriers to provide and charge for more coverage than a policyholder would prefer *ex ante* in order to guard against having to provide coverage the policyholder desires *ex post*”).

15. See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 2.8(c) (2d ed. 1988) (“[C]onsumers are afforded considerable latitude in selecting or arranging some aspects of the insurance contract and certain types of coverage features in such insurance policies.”).

16. See Michelle Boardman, *Penalty Default Rules in Insurance Law*, 40 FLA. ST. U. L. REV. 305, 306–09 (2013) (arguing that the benefits of the *contra proferentem* rule, in which courts construe ambiguous policy terms against the insurer, are outweighed by the costs imposed on policyholders); JERRY & RICHMOND, *supra* note 14, at 130 (policyholders should not expect courts to expand coverage when policyholder and insurer “agreed to plain language” in which policyholder “should have understood . . . that they would be held to the objectively reasonable meaning” of terms regardless of actual expectations); Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 199–202 (1995) (discussing how insurers purposely design contracts to ensure risks are insurable and when courts expand coverage, the cost of providing insurance could rise to the point where it is unaffordable); Miller, *supra* note 13, at 1863 (explaining that “the parties to an insurance contract are generally in better positions than courts to determine which party is the better risk avoider,” and that expanding coverage due to perceived ambiguity of policy language “automatically place[s] the risk of loss on the insurer”).

17. Professor Samuel Williston (1861–1963) was of the founding generation of Harvard Law School and author of a still influential treatise on contracts. Williston was a powerful advocate for the formalist method of contract interpretation. He served as the Reporter for the *Restatement (First) of Contracts*. See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 26 (2014) (discussing how textualists follow Samuel Williston and counsel courts to consider contract’s “formal language” and disregard contextual evidence that contract was meant to have “special meaning”).

18. See JERRY & RICHMOND, *supra* note 14, at 130 (emphasizing that plain language “provides increased certainty for the insurer” and the savings of increased certainty benefits policyholders as well as insurers).

“ordinary meaning.”¹⁹ Moreover, as noted insurance law scholar Kenneth Abraham has observed, to the extent there are special rules of insurance contract interpretation, it is because courts allow for *less* extrinsic context in insurance law than under general contract law.²⁰

Yet the idea that insurance is a “just contract” is nourished by a counter-contract narrative that is also well represented in the caselaw. Insurance is the domain of contracts of adhesion beset by financial and informational asymmetries between the parties.²¹ Insureds pay good money up front for nothing more than impenetrable fine print and legalistic exclusions. Carriers promise security, certainty, and peace of mind, yet deliver cold adherence to dense language.²² Because the carrier alone determines when the claim will be paid,²³ insureds have limited options to protect themselves against the company’s opportunism following a potentially covered loss.²⁴ Courts respond to these imbalances by developing a substantive conception of

19. TENN. CODE ANN. § 56-7-102(c) (West 2021); *see also* Laura A. Foggan & Rachael Padgett, *Rules of Policy Interpretation Reflect Lingering Policyholder Bias in the ALI’s Restatement of the Law, Liability Insurance*, 50 BRIEF 26, 30 (2020); Lorelie S. Masters, “Plain Meaning” and the Meaning of “Plain”: Section 3 of the Restatement of the Law, Liability Insurance, 50 BRIEF 36, 40–41 (2020) (explaining how the National Conference of Insurance Legislators encouraged states to adopt similar plain-meaning as Tennessee).

20. *See* Kenneth S. Abraham, *Plain Meaning, Extrinsic Evidence, and Ambiguity: Myth and Reality in Insurance Policy Interpretation*, 25 CONN. INS. L.J. 329, 335 & n.18 (2018) (explaining that introduction of extrinsic evidence is permitted to interpret general contract provisions “regardless of ambiguity” but not permitted to interpret unambiguous insurance policy provisions); Masters, *supra* note 19, at 39 (“It can be argued that the RLLI’s principles of policy interpretation are less favorable to policyholders than those applied under the *Restatement (Second) of Contracts* contextual approach.”); Jeffrey W. Stempel, *What Is the Meaning of “Plain Meaning”?*, 56 TORT TRIAL & INS. PRAC. L.J. 551, 564–68 (2021) (contrasting stricter plain meaning approach of RLLI with more contextual approach of *Restatement (Second) of Contracts*).

21. *See* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966–67 (1970) (noting that insurance contracts are contracts of adhesion in which insureds are unable to bargain for policy provisions other than standardized provisions drafted by the insurer); *see also* Fischer, *supra* note 2, at 1047–48 (explaining that “the average insurer is much more sophisticated and knowledgeable than the average insured” since insurer is a “repeat player” in the insurance industry and based on the complicated nature of insurance).

22. *See* Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1400, 1408 (1994) (describing how insurers often market insurance policies as “complete protection from the risks addressed by any given line of insurance” but then deny claims by pointing to policy language); *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1047 (D.C. Cir. 1981) (noting that when an insured purchases a policy, it is buying a promise of security from insurer).

23. *See generally* JAY M. FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON’T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT (2010).

24. *See* Baker, *supra* note 22, at 1401–02 (explaining how insureds are dependent on insurers for payment once they suffer a loss and how insurers make more money when they avoid paying for such losses); Jay M. Feinman, *Contract and Claim in Insurance Law*, 25 CONN. INS. L.J. 153, 160, 162 (2018) (noting that policyholders are susceptible to “catastrophic” losses and have “very limited means to control” the risk of insurers denying coverage).

insurance law that forgoes the neutrality of contract law to affirmatively protect and honor the “reasonable expectations” of the insured.²⁵

How can insurance law simultaneously be both much more *and* much less contractarian than contract law? The field becomes more coherent once we realize that the dueling narratives are not evenly distributed across the doctrinal landscape. The central insight of this Article is that when the issue relates to scope or breadth of coverage—whether a given loss is covered within the bounds of the policy—strict construction gains the upper hand. By contrast, the rhetoric that portrays insurance as a “just contract” seems more persuasive when depth—or structural aspects of coverage—are in play. Here, courts are willing to adopt a substantive, thick, and normative view of what insurance *is*—or at least should be. The insurance policy is seen as less of a contract to be strictly construed and more of a device that imposes duties on the insurer and confers status rights on the policyholder.

The implicit compromise between these two visions is framed as a simple heuristic between deeper and broader coverage. The concept is most legible when examining the degree of uncertainty attending to each setting. Willistonian contract rhetoric is favored to prevent courts from expanding coverage both to risks that are expressly excluded and to liabilities that fall outside the coverage base and pricing of the policy.²⁶ Because this form of

25. See Keeton, *supra* note 21, at 967 (“The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.”); Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535, 560 (2017) (“[A] staple of policy interpretation doctrine is that a policy should be construed to fulfill the reasonable expectations of the policyholder.”); Feinman, *supra* note 24, at 167 (suggesting that courts improve the insurance relationship by “realizing the parties’ legitimate expectations” since insurer and policyholder have different understandings of the insurance contract at formation).

26. Previous scholarship has approached this issue from a variety of perspectives. One response follows theorists like Duncan Kennedy and note that this tension simply reflects the endemic competition between the legal desideratum of policyholders and their insurers. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1701, 1713 (1976) (discussing the incommensurability between individualistic and altruistic theories of contract interpretation); see also Kenneth S. Abraham, *The Expectations Principle as a Regulative Ideal*, 5 CONN. INS. L.J. 59, 60 (1998) [hereinafter Abraham, *Expectations Principle*] (suggesting a “healthy and inevitable tension” between insurers’ need for predictability and policyholders’ comparative lack of information about the scope of the coverage). Another approach is for scholars to argue about whether insurance contracts are special as a prelude to an argument over which hermeneutic assumptions should dominate. See JERRY & RICHMOND, *supra* note 14, at 135 (describing differences between courts); Feinman, *supra* note 24, at 157 (the relationship between insurer and policyholder requires more attention than “the four corners of the policy”). More sophisticated analyses show how several conceptions of insurance law live together within the law, each promoting a different normative vision of how insurance should be interpreted. See Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653 (2013) [hereinafter Abraham, *Four Conceptions*] (reviewing different understandings of insurance law); Feinman, *supra* note 24, at 153 (noting that “[i]nsurance law scholars are fond of reconceptualizing their subject” and that

expansion has the greatest chance of upending the match between premiums and risk, strict construction rhetoric is deployed to tailor coverage to policy language.

As the degree of uncertainty drops, however, so does the cost of more contextual interpretation that structures and regulates the insurance relationship. While doctrines articulating a normatively thicker view of insurance likely increase the price of insurance, courts are willing to favor policyholders when they see such costs as derivative of risks already assumed within the policy. The cost of more comprehensive coverage is referred to back to the entities specializing in pricing and distributing risk across the insurance pool.

While this distinction is present in the case law, it is hazy, imperfect, and undertheorized. This Article constructively reads insurance law to make these latent views more conscious. Recognizing this heuristic sharpens our understanding of how insurance law functions and why the law has settled into its current shape. It further allows us to see why plain language formalism is most justified as applied to the threshold issue of scope of coverage, while preventing this contractarian approach from creeping into doctrines governing the status of the insured and the incidents of coverage. Finally, greater awareness of how the law is already functioning provides modest encouragement for courts to nudge the law further in this direction, and make more deliberate decisions when confronting these dueling narratives.

The ensuing sections proceed as follows: Part I charts how the rhetoric of insurance as “just a contract” came to dominate threshold matters of policy coverage. Part II examines doctrinal areas where courts fashion a more “just contract” by reading deeper substantive obligations into sparse policy language. These include the treatment of insurance law conditions in Section II.A, the approach to insurance bad faith and remedies in Section II.B, and the articulation of insurance statuses in Section II.C. Part III considers how the doctrine of *contra proferentem* fits into this scheme, and the Article concludes with the implications of this analysis.

there are many different conceptualizations of insurance policies); David F. Tavella, *Are Insurance Policies Still Contracts?*, 42 CREIGHTON L. REV. 157 (2009) (addressing whether courts actually treat insurance policies as contracts).

I. “JUST A CONTRACT”: THE PLAIN MEANING NARRATIVE

A. *The Rise of Reasonable Expectations and Pro Coverage Interpretation*

The modern insistence on plain language is best understood in light of the regime that it replaced. Prior to becoming a mass-marketed commodity in the middle decades of the twentieth century, insurance policies were understood as simple contracts with no special interpretive rules.²⁷ In the years that followed, courts and scholars began to take account of an insured’s reasonable expectations in determining the scope of coverage under the policy.²⁸ As articulated by professor (later judge) Robert Keeton, the unique aspects of insurance contracts—principally, the power imbalance between the parties and the unfamiliar, non-negotiable structure of the policy forms—justify honoring the “objectively reasonable expectations of [insureds] regarding the terms of insurance,” even if “painstaking study of the policy provisions would have negated those expectations.”²⁹

Several structural features made insurance ground zero for Keeton’s ideas. Long before standard form contracts came to dominate the entire contract law landscape, insurance policies were held up as the primary example of adhesive contracts.³⁰ These contracts are also “aleatory,”³¹ a term that is derived from the Latin word for dice, with “aleator” meaning “gambler.”³² Colloquially, this means insurance is a product that one buys but hopes to never use, because in most cases the policyholder pays money for the carrier’s promise of coverage that is not triggered. This structure puts pressure on the insurer to uphold its bargain on the rare occasion when a covered loss does occur. The same features make insurance litigation a high-stakes event for each side: If the loss is covered, the insurer will pay out much

27. See Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1401 & n.37 (2007) (citing sources).

28. Though the concept is briefly referenced in comment f of Section 211 of the *Restatement (Second) of Contracts*, its primary impact has been in insurance law. See *id.* at 1401–02 (explaining that in the 1950s and 1960s, the practice of treating insurance policies as ordinary contracts was questioned and the reasonable expectations doctrine was created “to combat the perceived risks associated with contracts of adhesion”).

29. Keeton, *supra* note 21, at 966–67 (arguing this is a descriptive account of what courts do and a prescriptive guide to interpretation).

30. See Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (introducing concept of adhesion contracts while describing life-insurance policies).

31. RESTATEMENT (FIRST) OF CONTS. § 291 cmt. a, illus. 1 (AM. L. INST. 1932).

32. See Bob Works, *Excusing Nonoccurrence of Insurance Policy Conditions in Order to Avoid Disproportionate Forfeiture: Claims-Made Formats as a Test Case*, 5 CONN. INS. L.J. 505, 580 (1999) (citing PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* 47 (1996)); see also *Aleatory*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining aleatory as “[d]ependent on the throw of a die; hence, dependent on uncertain contingencies”).

more than it has collected in premium, while if it is uncovered, the insurer owes nothing and the insured must bear the loss itself. Small policyholders are particularly vulnerable in this situation, as loss may put them in dire financial and/or emotional straits. With no alternate sources of contractual performance available, the hope of recovery rests on the insurance carrier.³³

These structural features make “heartbreak” cases endemic to the insurance field. Having paid its premium for precisely such an occasion, the policyholder arrives pleading for coverage for an amount trivial to the insurance company’s balance sheet. Yet the policyholder is confronted with the insurer’s parsimonious reading of unnegotiated policy terms that are often delivered only after the contract was formed.³⁴ As a common pro-coverage refrain narrates, “[t]he function of an insurance company is more than that of premium receiver.”³⁵

Heartbreak logic propelled Keeton’s reasonable expectation idea in both simple and complex insurance disputes. A simple example arises out of commercial burglary policies that are written to cover theft by “outsiders,” but exclude theft by “insiders” because other forms of coverage were available for these losses.³⁶ Rather than follow the legal meaning of burglary, these policies adopt a narrower definition that requires entry by force and violence that leaves “visible marks made” to “the exterior of the premises at the place of entry.”³⁷ This language is stress-tested when, notwithstanding evidence pointing to an outside intruder, a thief is able to force their way into the premises without leaving markings on the exterior.³⁸ Drawing on Keeton, the Iowa Supreme Court found that a small business purchasing such a burglary insurance policy could reasonably expect this loss to be covered, even if “painstaking study of the policy provisions would have negated those expectations.”³⁹

33. See *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 447 (Del. 1996) (explaining that policyholders cannot engage in cover transactions if the insurer denies its claim).

34. These features are all heightened in the liability insurance context, where the consequences of denial generally fall on the third party tort victims. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 *LAW & SOC’Y REV.* 275, 276 (2001) (tort recoveries that transfer “real money” from “real people” are the exception not the norm); Stephen G. Gilles, *The Judgment-Proof Society*, 63 *WASH. & LEE L. REV.* 603, 606 (2006) (noting that because many Americans are judgment-proof, “[i]n the absence of liability insurance, plaintiffs are effectively barred from bringing suit” unless the negligent policyholder happens to be wealthy enough to pay judgment).

35. *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052, 1058 (8th Cir. 1979).

36. See *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 177 (Iowa 1975); *Atwater Creamery Co. v. W. Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 277–78 (Minn. 1985).

37. *C & J Fertilizer*, 227 N.W.2d at 171.

38. *Id.*

39. *Id.* at 176 (citing *Rodman v. State Farm Mut. Ins. Co.*, 208 N.W.2d 903, 905–08 (Iowa 1973)). Notably, a few years following its decision in *C & J Fertilizer*, the Iowa Supreme Court

However, even scholars sympathetic to the reasonable expectation doctrine have questioned this framing because it is unclear how insureds’ expectations are generated and what makes them reasonable.⁴⁰ A more precise account is that courts used reasonable expectations to develop a thicker normative view of what an insurance policy is and what it should cover.⁴¹

The full impact of this mode of interpretation was borne out in far more complex litigation, exemplified by *Keene Corp. v. Insurance Co. of North America*.⁴² The case arose out of the massive waves of asbestos litigation of the middle to late decades of the twentieth century.⁴³ To simplify the facts: Assume that workers who installed asbestos materials inhaled the dangerous fibers in year one. The fibers became lodged in the workers’ lungs, and the disease associated with the fibers slowly took hold but could be diagnosed by medical imaging in year five. Patients were exhibiting symptoms by year eight. Thereafter, insurers ceased offering coverage for asbestos related claims.

Insurance programs were built and priced on the assumption that catastrophic risk is unlikely to occur—and even less likely to recur to the

reversed course and limited the application of the reasonable expectations doctrine. See *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 112 (Iowa 1981).

40. See Randall, *supra* note 2, at 114 (arguing that reasonable expectations doctrine is of “waning importance”); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 182 (1998) (noting that reasonable expectations is more attractive to academics than bench and bar); Abraham, *Expectations Principle*, *supra* note 26, at 60 (claiming that the analytical framework of reasonable expectations has not impacted most significant insurance law disputes); Schwarcz, *supra* note 27, at 1396–97, 1427–30 (documenting decline of reasonable expectations doctrine and summarizing critiques by otherwise friendly voices); Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 333 (1998) (while policyholders require protection due to lack of bargaining power “reasonable expectations doctrine rests on dubious assumptions”); Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 824 (1990) (questioning whether courts can apply reasonable expectations in a “predictable and evenhanded manner”).

41. See Fischer, *supra* note 2, at 1017–18 (interpreting insurance policies is not about determining reasonable expectations of insureds but the “bundle of rights that the insured *should* be deemed to have obtained from the insurer”); Randall, *supra* note 2, at 109 (arguing that courts should “recognize[] the important public policies which justify insurance regulation” to protect policyholders’ “substantive rights regarding insurance coverage”); French, *supra* note 25, at 570 (“[C]ourts decide the factual issue regarding the expectations of a reasonable policyholder . . . based upon their own idiosyncratic ideas regarding justice and fairness.”). For these reasons, some scholars argue that contract law is an ill-suited model through which to understand insurance law, which is better seen as a “product,” a “thing,” or subject to forms of administrative regulation. See Schwarcz, *supra* note 27, at 1405–06; Stempel, *supra* note 1, at 816, 818.

42. 667 F.2d 1034 (D.C. Cir. 1981).

43. For a full recounting of this history, see Kenneth S. Abraham, *The Long-Tail Liability Revolution: Creating the New World of Tort and Insurance Law*, 6 U. PA. J.L. & PUB. AFFS. 347 (2021) [hereinafter Abraham, *Long-Tail Liability*].

same insured several years in a row.⁴⁴ This policy design is challenged by slowly-developing harms that worsen over time.⁴⁵ For example, does bodily injury occur when the particles were first inhaled, when the disease developed asymptotically in the body, when it could be diagnosed via medical imaging, when symptoms developed and worsened—or all of the above?⁴⁶

Keene was one of the earliest seminal cases on the topic and offered extraordinarily pro-policyholder answers to each of these questions.⁴⁷ Injury was held to occur continuously from the point of inhalation and for as long as the illness caused harm.⁴⁸ This “continuous” approach triggered policies reaching back to the earliest possible exposure and straight through successive policy-years. This creates the potential of “long tail” liabilities that could extend decades beyond when the policy was inception.⁴⁹

Moreover, though the disease’s effects get progressively worse over time, *Keene* conceptualized the symptoms creating an indivisible harm, that allowed nearly every policy for every relevant year to be tapped for the entirety of the damage.⁵⁰ Finally, insurers were deemed jointly and severally liable, such that an insurer on the risk at any point over the entire period could be liable for the entire amount—including the periods when the company was uninsured.⁵¹ Along with holdings that followed, *Keene* generated hundreds of billions of dollars in insurance liability,⁵² and the industry responded by redesigning many aspects of the standard liability policy.⁵³

Though billions were at stake, none of these interpretive questions were squarely addressed by the text of the policy. In place of plain language, *Keene* relied on phrases such as the “principles” of insurance, the “dominant purpose of indemnity,” and “reasonable expectations,” to construct a normative view of what an insurance policy is and how it ought to function.⁵⁴ Per the court, the essence of an insurance policy is an exchange of premium dollars for financial certainty in the face of unknown liabilities.⁵⁵ Because a

44. *See id.* at 370 (insurers did not believe “policies could cover liability for bodily injury or property damage that occurred during the policy period, but was not actually discovered until many years later”).

45. *Id.* at 367–78.

46. *Id.*

47. *Id.* at 374 n.93; *see also* Fischer, *supra* note 2, at 1007–08 (citing *Keene* as example of “[c]ourts accept[ing] the fact of pro-insured bias without qualification or question”).

48. *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1042–48 (D.C. Cir. 1981).

49. *See Abraham, Long-Tail Liability*, *supra* note 43, at 376–80.

50. *Keene*, 667 F.2d at 1042–48.

51. *Id.* at 1050.

52. *See Abraham, Long-Tail Liability*, *supra* note 43, at 376–80.

53. *Id.* at 386–92.

54. *See Keene*, 667 F.2d at 1041.

55. *Id.*

policyholder’s uncertainty over the scope of its liability runs contrary to the policy’s purpose,⁵⁶ a result that granted less coverage “would violate very reasonable expectations.”⁵⁷

B. The Fall of Reasonable Expectations and the Re-Emergence of Plain Meaning

In the wake of these holdings, insurers urged courts to install “plain language” and “ordinary rules of contract” as the hallmarks of insurance law.⁵⁸ Courts responded by positioning insurance as “just a contract” where ordinary rules apply,⁵⁹ while giving minimal deference to the allegedly unique characteristics of insurance that draw courts to look beyond the plain language of the policy.⁶⁰ Courts went so far as to enlist the rhetoric of reasonable expectations to fortify the case for plain meaning, arguing that it would be *unreasonable* for policyholders to maintain expectations contrary to clear policy language.⁶¹

This transition became evident through the peregrinations of the interpretation provisions in the newly released *Restatement of the Law, Liability Insurance*⁶² (“*RLLI*”).⁶³ Initially classified as an ALI *Principles* project, the *RLLI*’s early drafts followed Keeton in defining plain meaning as

56. *Id.* at 1044.

57. *Id.*

58. See *supra* notes 12–14 and accompanying text. See generally Symposium, *The Insurance Law Doctrine of Reasonable Expectations After Three Decades*, 5 CONN. INS. L.J. 1 (1998).

59. See *supra* note 58 and accompanying text; see also Henderson, *supra* note 40, at 838; Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 370–71 (1986); Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 803 (Utah 1992) (“[A]fter more than twenty years of attention to the doctrine in various forms by different courts, there is still great uncertainty as to the theoretical underpinnings of the doctrine, its scope, and the details of its application.”); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1140 (Fla. 1998).

60. See, for example, the black-letter statements to this effect collected in Stempel, *Plain Meaning*, *supra* note 20, at 595–96 (“[U]nambiguous terms of an insurance policy require no construction, and the plain meaning of such terms must be given full effect.” (quoting *Cont’l Cas. Co. v. H.S.I. Fin. Servs., Inc.*, 466 S.E.2d 4, 5 (Ga. 1996))).

61. See TOM BAKER, KYLE D. LOGUE & CHAIM SAIMAN, *INSURANCE LAW AND POLICY: CASES AND MATERIALS* 49–52 (5th ed. 2021) (providing examples of how reasonable expectations rhetoric is used to fortify plain meaning).

62. See RESTATEMENT OF THE L., *LIAB. INS.* § 2–4 (AM. L. INST. 2019).

63. See Masters, *supra* note 19, at 37 (noting that interpretation sections “generated as much, and perhaps more, controversy than any of the other black-letter statements included in the *RLLI*”); see also Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. PA. J. BUS. L. 718, 724–31 (2020) (discussing insurers’ objections to interpretation sections and ALI’s response); Michael F. Aylward & Vanita M. Banks, *The Fight for Plain Meaning: How the ALI Renounced the “Plain-Meaning” Rule for Insurance Policies Before Finally Embracing It (but Did They Really?)*, 13 IN-HOUSE DEF. Q. 6 (2018) (highlighting “firestorm of criticism” surrounding these sections).

what “a reasonable policyholder would ascribe” to a term.⁶⁴ As the project transitioned to a Restatement, the draft eliminated this pro-policyholder bias—though intermediate drafts maintained a lingering tilt as plain meaning could be trumped by “extrinsic evidence show[ing] that a reasonable person in the policyholder’s position would give the term a different meaning.”⁶⁵ The finalized *RLLI* however, responded to insurer concerns and states an unadorned “plain meaning” rule with no preference towards the insured.⁶⁶ Indeed, comparing the blackletter interpretation rules of the *Restatement (Second) of Contracts*⁶⁷ with the *RLLI* leads to the conclusion that insurance calls for a stronger plain meaning hermeneutic than contract law itself.⁶⁸ In the fifty years since Keeton introduced reasonable expectations to insurance, the law has come full circle.

II. A “JUST CONTRACT”

While the plain language narrative proves very influential as applied to gateway issues of coverage, in other areas of insurance law, courts generate insurance duties that contradict or arise independently of the interpretation of the policy’s plain language.

A. *Conditions in Contract and Insurance Law*

1. *Contract Law*

Contract law defines “condition” broadly: an event that must (or must not) occur before a specified counter-performance is due—and it rarely matters whether the event is in control of the parties.⁶⁹ The aleatory nature of insurance, however, means that the insurance company’s performance is always conditioned on events deemed fortuitous from the perspective of the insured and thus beyond its control insured (e.g., auto accidents, fires, storm

64. PRINCIPLES OF THE L., LIAB. INS. § 3(2) (AM. L. INST., Tentative Draft No. 1, Apr. 9, 2013).

65. RESTATEMENT OF THE L., LIAB. INS. § 3(2) (AM. L. INST., Proposed Final Draft, Mar. 28, 2017).

66. Aylward & Banks, *supra* note 63, at 6 (2018); Glenn Lammi, *Restate or Rewrite?: Stark Choice Faces ALI Leaders on Liability Insurance Law Project*, WASH. LEGAL FOUND. (Jan. 16, 2018), <https://www.wlf.org/2018/01/16/wlf-legal-pulse/restate-or-rewrite-stark-choice-faces-ali-leaders-on-liability-insurance-law-project/#more-17895>.

67. See RESTATEMENT (SECOND) OF CONTS. § 201–03 (AM. L. INST. 1981).

68. The *RLLI* affirmatively rejects the more open textured view presented in the *Restatement (Second) of Contracts* by explaining how courts have consistently aligned with a more plain meaning approach in the liability insurance setting. See RESTATEMENT OF THE L., LIAB. INS. § 3 cmt. a (AM. L. INST. 2019) (“This Section does not follow the Restatement Second of Contracts contextual rule because a substantial majority of courts in insurance cases have adopted a plain-meaning rule.”).

69. See RESTATEMENT (SECOND) OF CONTS. §§ 224, 226 cmt. a, illus. 1–2.

damage, and slip and fall lawsuits).⁷⁰ “Conditions” in insurance law thus do not refer to events that trigger coverage, but to actions the insured must fulfill before the carrier’s duty to pay for a covered loss initiates.⁷¹

Differentiating insurance from general contract conditions allows courts to employ specialized rules of construction. Hornbook contract law brims with citations to cases declaring that express conditions are strictly construed.⁷² When the impact of an unfulfilled condition proves oppressive to the non-performing side, however, courts use interpretive devices to mitigate the forfeiture caused by the failure of the condition. A classic example is *Jacob & Youngs v. Kent*, a case often studied by first-year law students, where the contractor expressly agreed to install Reading brand pipe in Kent’s home.⁷³ Lexically, the agreement was clear that the contractor’s failure to perform this condition would force it to forfeit rights to further payment.⁷⁴ Yet though the wrong brand of pipe was installed, Judge Cardozo insisted it would be a “sacrifice of justice” to “visit venial [i.e., minor] faults with oppressive retribution.”⁷⁵ In balancing the minimal difference of quality between the two brands of pipe to the homeowner and the significant impact of non-payment on the contractor, the court refused to strictly enforce the condition.⁷⁶

The *Restatement (Second) of Contracts* fashions this into a general rule. The doctrine that allows courts to excuse a condition “to the extent that the non-occurrence of a condition would cause disproportionate

70. See Robert H. Jerry, II, *Insurance Law’s Fundamental Concepts and Assumptions*, in 1 NEW APPLEMAN ON INSURANCE LAW § 1.05[2][a] (Jeffrey E. Thomas & Francis J. Mootz eds.), LEXIS, (database updated Aug. 2022) (stating that the covered loss must be accidental, not certain to occur, and must not have already occurred); JERRY & RICHMOND, *supra* note 14, at 414 (noting that even if the policy does not provide that the loss must be fortuitous, “courts will imply such a requirement”).

71. RESTATEMENT OF THE L., LIAB. INS. § 34 cmt. a (“In insurance law . . . the term ‘condition’ typically is employed only in connection with events that are under the control of insureds or insurers.”). Conditions in insurance law do not encompass required events that “trigger coverage under the policy.” *Id.*

72. 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 38:6 (4th ed.), Westlaw (database updated May 2022) (“As a general rule, . . . conditions which are either express or implied in fact must be literally met or exactly fulfilled, or no liability can arise on the promise qualified by the conditions.”); 13 CORBIN ON CONTRACTS § 68.9[3] (John E. Murray, Jr. ed., rev. ed.), LEXIS (database updated Nov. 2021) (“As with any other express condition in a contract, the conditions of termination should be strictly construed.”); see also 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 8.3, at 422–23 (3d ed. 2004) (“If the occurrence of a condition is required by the agreement of the parties . . . a rule of strict compliance traditionally applies.”).

73. *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

74. See RICHARD DANZIG & GEOFFREY R. WATSON, *THE CAPABILITY PROBLEM IN CONTRACT LAW* 95–120 (2d ed. 2004).

75. *Jacob & Youngs*, 129 N.E. at 891. This point is underemphasized in Cardozo’s opinion. See DANZIG & WATSON, *supra* note 74, at 96–100.

76. *Jacob & Youngs*, 129 N.E. at 891–92.

forfeiture . . . unless its occurrence was a material part of the agreed exchange.”⁷⁷ The blackletter law carefully stresses the discretionary nature of the rule, a point reinforced in the comments, which note the doctrine is “of necessity, a flexible one” and lies “within the sound discretion of the court.”⁷⁸

The discretionary and weak nature of the doctrine is manifest in Illustration 2 of the relevant section of the *Restatement (Second) of Contracts*, which describes a type of insurance relationship:

A, an ocean carrier, carries B’s goods under a contract providing that it is a condition of A’s liability for damage to cargo that “written notice of claim for loss or damage must be given within 10 days after removal of goods.” B’s cargo is damaged during carriage and A knows of this. . . . [F]ive days later[,] [B] informs A over the telephone of a claim for that damage and invites A to participate in an inspection within the ten day period. A inspects the goods within the period, but B does not give written notice of its claim until 25 days after removal of the goods. Since the purpose of requiring the condition of written notice is to alert the carrier and enable it to make a prompt investigation, and since this purpose had been served by the written notice of damage and the oral notice of claim, the court *may excuse the non-occurrence of the condition* to the extent required to allow recovery by B.⁷⁹

Notably, notwithstanding how every substantive purpose of the notice condition was satisfied in this Illustration, when framed as a doctrine of general contract law, the *Restatement of Contracts* offers no more than discretionary relief to the forfeiting party.

Much the same is confirmed in the opinion of *Aetna v. Murphy*,⁸⁰ authored by Connecticut Chief Justice Ellen Peters, who previously served as a contract law scholar at Yale Law School.⁸¹ *Murphy* deals with a “late notice” claim⁸²—the most common disproportionate forfeiture scenario in insurance settings. This occurs when, notwithstanding express policy language that conditions the insurer’s payment on timely notice of the claim by the insured, the claim is presented late. Strict application of the condition would allow the insurer to walk away from the claim.⁸³ Though in *Murphy*,

77. RESTATEMENT (SECOND) OF CONTRS. § 229 (AM. L. INST. 1981).

78. *Id.* § 229 cmt. b.

79. *Id.* § 229 cmt. b, illus. 2 (emphasis added). This is based on *Delaware Steel Co. v. Calmar S.S. Corp.*, 378 F.2d 386 (3d Cir. 1967).

80. *Aetna Cas. & Sur. Co. v. Murphy*, 538 A.2d 219 (Conn. 1988), *overruled by* *Arrowood Indem. Co. v. King*, 39 A.3d 712 (Conn. 2012).

81. *Ellen Ash Peters (LL.B. 1954)*, YALE L. WOMEN, <https://ylw.yale.edu/portraits-project/ellen-ash-peters-ll-b-1954> (last visited Jan. 17, 2024).

82. *See Murphy*, 538 A.2d at 219.

83. *See e.g.*, *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 194–95, 200 (Pa. 1977) (describing an insurance policy stating “[i]n the event of an accident, occurrence or loss, written

the contract at issue is an insurance policy, the case frames the issue in terms of contract law⁸⁴ and excuses the condition to the extent the non-complying party (policyholder) can show that its counterparty (the insurer) was not materially harmed due to failure of the condition.⁸⁵

2. *Conditions and Forfeiture in Insurance Law*

When courts approach late notice questions from an insurance perspective, however, a more robust version of the doctrine known as the “notice prejudice rule,” takes hold.⁸⁶ For example, Tennessee adhered to the “traditional” contractarian view, which strictly enforced notice conditions, but in 1998, its supreme court followed the “modern trend” developed in insurance cases to craft a decidedly pro-coverage rule.⁸⁷ The Tennessee court relies on three staples of insurance counter-contract narrative: “1) the adhesive nature of insurance contracts; 2) the public policy objective of compensating tort victims; and 3) the inequity of the insurer receiving a windfall due to a technicality.”⁸⁸ Other state supreme courts explain how the “strict contractual approach” is “based on the view that insurance policies are private contracts in the traditional sense,”—a view that is “no longer persuasive.”⁸⁹ In this setting, courts rely on the counter-narrative to craft an insurance specific rule that flips the general presumption. Thus, a policyholder’s late notice is excused, unless the *insurance carrier* can show it was materially harmed (prejudiced) by the late notice.⁹⁰

The unique position of the insurance-specific rule was confirmed by the U.S. Supreme Court. In the context of ERISA preemption litigation, the

notice . . . [s]hall be given by or for the insured to the company or any of its authorized agents as soon as practicable,” or else “[n]o action shall lie against the [insurance] company” (emphasis omitted)).

84. *Murphy*, 538 A.2d at 222 (“This case law [drawn from general contract law] demonstrates that, in appropriate circumstances, a contracting party, despite his own default, may be entitled to relief from the rigorous enforcement of contract provisions that would otherwise amount to a forfeiture.”) The string cite of insurance related cases are cited at the end of the analysis mainly as ancillary support. *Id.* at 223–24.

85. *Id.* Notably, when the Connecticut Supreme Court revisited this question in an insurance-specific framing, it reversed course and placed the burden of showing prejudice on the insurance carrier. *See Arrowood Indem. Co. v. King*, 39 A.3d 712, 726 (Conn. 2012).

86. *See BAKER, LOGUE & SAIMAN, supra* note 61, at 548–49. The rule discussed here only applies to occurrence policies. Notice requirements in claims made policies are typically understood as conditions material to the contract and are interpreted differently. *See* RESTATEMENT OF THE L., LIAB. INS. § 35(2) (AM. L. INST. 2019).

87. *Alcazar v. Hayes*, 982 S.W.2d 845, 849–50, 853 (Tenn. 1998).

88. *Id.* at 850; *see also* RESTATEMENT OF THE L., LIAB. INS. § 35 cmt. b.

89. *Brakeman v. Potomac Ins. Co.*, 371 A.2d 193, 196–97 (Pa. 1977) (excusing strict enforcement of a policy condition because “[a]n insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured”).

90. *See Alcazar*, 982 S.W.2d at 850 (citing multiple insurance treatises).

Court was asked to determine whether California's notice prejudice rule was a general contract law of disproportionate forfeiture (thereby preempted), or an insurance-specific law that survives preemption.⁹¹

The Court found it to be an insurance-specific rule.⁹² This is because while general contract law *allows* a court to excuse the non-occurrence of a condition in cases of disproportionate forfeiture, insurance law *requires* this result—unless the carrier shows prejudice.⁹³ The rationale was grounded in the justifications of the “just contract” canon: Insurance policies are “an instrument of a social policy” designed to compensate the victims of negligence,⁹⁴ rather than private contracts negotiated between the policyholder and the carrier. Therefore they are interpreted to “fulfill[] the reasonable expectations of the [insurance] purchaser.”⁹⁵

This view of notice prejudice reflects the majority approach.⁹⁶ The question is: What drives mainstream opinion to the counter canon in the condition context, when it is so hesitant to do the same when scope of coverage is at issue? The core difference aligns with the deeper/broader heuristic. Notice prejudice cases arise only when the risk is already covered under the plain language of the policy and incorporated into the risk and premiums. The rule allocates to the carrier the risk of the policyholder's negligence in failing to give timely notice of the claim—capped at the amount deemed to materially harm the carrier. While this deepens the incidents of coverage, it neither broadens the base of coverage nor opens floodgates to covering risks wholly outside the policy. From an actuarial perspective, the cost of “immaterial” breach of notice conditions is relatively knowable. And while this protection is likely to marginally increase the cost of the overall policy, courts are willing absorb this protective feature into the basic cost structure of the policy to make the insurance policy a more “just contract.”

91. UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999).

92. *Id.* at 360, 371.

93. *See id.* at 369–71.

94. *Id.* at 372–73 (quoting Cooper v. Gov't Emps. Ins. Co., 237 A.2d 870, 874 (N.J. 1968)).

95. *Id.* at 373 (quoting Great Am. Ins. Co. v. C. G. Tate Construction Co., 279 S.E.2d 743, 774 (N.C. 1986)).

96. *See* Sherilyn Pastor & Nicholas M. Insua, *Giving Notice of the Claim*, in 12 NEW APPLEMAN ON INSURANCE LAW § 149.01 (Jeffrey E. Thomas, Laura A. Foggan & Lorelie S. Masters eds.), LEXIS (database updated Aug. 2022); Richard L. Suter, *Insurer Prejudice: Analysis of an Expanding Doctrine in Insurance Coverage Law*, 46 ME. L. REV. 221, 221 (1994); Eugene R. Anderson, Richard G. Tuttle & Susannah Crego, *Draconian Forfeitures of Insurance: Commonplace, Indefensible, and Unnecessary*, 65 FORDHAM L. REV. 825, 840 (1996). Some courts further extend the rule by demanding a high threshold for what constitutes carrier harm. *See* RESTATEMENT OF THE L., LIAB. INS. § 34 reporters' note to cmt. d (AM. L. INST. 2019).

B. Bad Faith in Contract and Insurance Law

The second area where insurance law significantly departs from contract principles relates to the duty to act in good faith and the specialized remedies available upon an insurer’s breach of this duty.⁹⁷

1. The Contract Law Origins of Insurance Bad Faith

Insurance bad faith arose early in the last century when courts began allowing insureds to sue third-party liability insurers in “excess verdict” claims.⁹⁸ These occur when the carrier’s failure to accept a within-limits settlement offer from the plaintiff results in a jury verdict against the insured in excess of the policy limits.⁹⁹ Early caselaw grounds the action in the implied covenant of good faith and fair dealing attending to any contract. In the words of an early New York decision, the insured’s rights “go deeper than the mere surface of the [written] contract,” since implied obligations are “based upon those principles of fair dealing which enter into every contract.”¹⁰⁰ This anti-contractarian phrasing recurs in a number of seminal cases that popularized bad faith law across the country.¹⁰¹

The emergence of bad faith in insurance law tracked then-current trends in general contract law. The idea of good faith entered the American mainstream when incorporated into the *Uniform Commercial Code* (“UCC”) and *Restatement (Second) of Contracts*.¹⁰² This period was also the heyday of the non-textualist approaches to contract law. Unconscionability was on the rise and formalist understandings of parol evidence and plain meaning

97. See generally Chaim Saiman, *Why Insurance Needs a Restatement: The Case of Settlement Decision Law*, 28 CONN. INS. L.J. 162 (2022).

98. See *Hilker v. W. Auto. Ins. Co.* (*Hilker I*), 235 N.W. 413, 414 (Wis. 1931); *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm’n App. 1929); *Douglas v. U.S. Fid. & Guar. Co.*, 127 A. 708, 711 (N.H. 1924); *Brassil v. Md. Cas. Co.*, 104 N.E. 622, 624 (N.Y. 1914). See generally Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1116–17 (1990); William T. Barker & Ronald D. Kent, *Liability Insurance, Policy Limits, and the Development of the Duty to Settle*, in 3 NEW APPLEMAN ON INSURANCE LAW § 23.01 (Jeffrey E. Thomas & Francis J. Mootz III eds.), LEXIS (database updated Aug. 2022); Roger C. Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. MICH. J.L. REFORM 1, 19–22 (1992).

99. Saiman, *supra* note 97, at 180.

100. *Brassil*, 104 N.E. at 624.

101. *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 200–01 (Cal. 1958) (quoting *Hilker v. W. Auto. Ins. Co.* (*Hilker I*), 231 N.W. 257, 258 (Wis. 1930), *aff’d on reh’g*, *Hilker II*, 235 N.W. 413)).

102. See, e.g., Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989); Zipporah B. Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987); see also Robert H. Jerry, II, *The Wrong Side of the Mountain: A Comment on Bad Faith’s Unnatural History*, 72 TEX. L. REV. 1317, 1319 (1994) (detailing the “ancestral heritage” of good faith law).

gave way to contextualist ideals such as usage of trade and course of dealing that were canonized in the *UCC*.¹⁰³

Since the 1980s, however, the good faith doctrine has come under extensive critique by neo-formalist judges and theorists, and the fates of insurance and general contract law have diverged.¹⁰⁴ Under the neo-formalist canon, legal obligations can only be created via express contractual language¹⁰⁵ rather than from amorphous principles or implied covenants such as good faith.¹⁰⁶

The assault on good faith was led by the most respected voices in the legal establishment. Sitting on the D.C. Circuit, then-Judge Antonin Scalia explained how a rigorous textualist would “virtually . . . read the doctrine of good faith . . . out of existence.”¹⁰⁷ Judge Frank Easterbrook held that parties are entitled to enforce the written agreement “to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of ‘good faith.’”¹⁰⁸ The implied covenant “is not an invitation to the court to decide whether one party ought to have exercised privileges expressly reserved in the document” and does not allow courts to ask “whether a party had ‘good cause’” to breach.¹⁰⁹ Judge Richard Posner sounded similar notes,¹¹⁰ and more recently, a unanimous U.S. Supreme Court approved a scholarly assessment that “[t]he concept of good faith in the performance of contracts ‘is a phrase without general meaning (or meanings) of its own.’”¹¹¹

This critique changed doctrine. The 1990’s amendments to the *UCC* explain that it “does not support an independent cause of action for failure to

103. John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 *FORDHAM L. REV.* 869, 880–82 (2002).

104. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541 (2003) [hereinafter Schwartz & Scott, *Contract Theory*]; Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 *VA. L. REV.* 1523 (2016) [hereinafter Schwartz & Scott, *Default Rule*].

105. See, e.g., David Charny, *The New Formalism in Contract*, 66 *U. CHI. L. REV.* 842, 849 (1999); John E. Murray, Jr., *supra* note 103, at 891–95; Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 *OR. L. REV.* 1131, 1171–72 (1995).

106. See generally Joseph M. Perillo, *Damages*, in 11 *CORBIN ON CONTRACTS* § 59.2 (John E. Murray, Jr. ed., rev. ed.), LEXIS (database updated Nov. 2021) (noting damages for breach of duty of good faith are rare).

107. *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1154 (D.C. Cir. 1984).

108. *Kham & Nate’s Shoes No. 2, Inc. v. First Bank*, 908 F.2d 1351, 1357 (7th Cir. 1990).

109. *Id.*

110. See *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 280 (7th Cir. 1992) (explaining that “[t]here is no blanket duty of good faith” since “[c]ontract law does not require parties to behave altruistically toward each other”).

111. *Nw., Inc., v. Ginsberg*, 572 U.S. 273, 285 (2014) (quoting *Tymshare*, 727 F.2d at 1152).

perform . . . in good faith,”¹¹² because good faith “does not create a separate duty of fairness and reasonableness which can be independently breached.”¹¹³ Contemporary treatises likewise take pains to emphasize the limited scope of the principle.¹¹⁴ This shift is alternately celebrated, noted with detached neutrality,¹¹⁵ or bemoaned,¹¹⁶ but few contest the shrinking or “underenforced” nature of the doctrine.¹¹⁷

The doctrinal implications of this turn are concisely captured via four limiting principles articulated by the Supreme Court of Utah:

- First, this covenant [of good faith] cannot be read to establish new, independent rights or duties to which the parties did not agree *ex ante*.
- Second, this covenant cannot create rights and duties inconsistent with express contractual terms.
- Third, this covenant cannot compel a contractual party to exercise a contractual right “to its own detriment for the purpose of benefiting another party to the contract.”
- Finally, we will not use this covenant to achieve an outcome in harmony with the court’s sense of justice but inconsistent with the express terms of the applicable contract.¹¹⁸

Seen in light of these contract principles, insurance law offers a particularly *weak* case for implying rigorous good faith obligations. To the extent theorists such as Posner and Easterbrook allow *any* justification for implying obligations by law, it is when the issue was “not resolved explicitly by the parties” because it “*could not have been contemplated at the time of*

112. U.C.C. § 1-304 cmt. 1 (AM. L. INST. & UNIF. L. COMM’N 2021); *see also* U.C.C. § 1-201(1)(19) prelim. cmts. (draft for approval 2001) (documenting changes in definition of good faith).

113. U.C.C. § 1-304 cmt. 1.

114. *See, e.g.*, Peter Linzer, *Parol Evidence and Implied Terms*, in 6 CORBIN ON CONTRACTS § 26.11 (John E. Murray, Jr. ed., rev. ed.), LEXIS (database updated Nov. 2021) (“Like bad faith breach of contract, the related area of lender liability has a spectacular beginning, but seems to have lost its steam.”); *see also* Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2052 (2015) (“The case law [on good faith] is replete with judges expressing the need for caution . . .”). *See generally* FARNSWORTH, *supra* note 72, § 7.17b (providing examples of contexts in which courts are unwilling to expand duty of good faith).

115. *See* Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviving a Revered Relic*, 80 ST. JOHN’S L. REV. 559, 562 (2006); Edward J. Imwinkelried, *The Implied Obligation of Good Faith in Contract Law: Is It Time to Write Its Obituary?*, 42 TEX. TECH. L. REV. 1, 10–12, 21 (2009).

116. *See* Emily M. S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1029 (2003); Jay M. Feinman, *Good Faith and Reasonable Expectations*, 67 ARK. L. REV. 525, 525–26 (2014).

117. MacMahon, *supra* note 114, at 2051–52.

118. *Oakwood Vill. L.L.C. v. Albertsons, Inc.*, 104 P.3d 1226, 1240 (Utah 2004) (citations omitted) (presented in bullet form for emphasis and ease of reference).

*drafting.*¹¹⁹ By contrast, the conflicts surrounding insurance bad faith and settlement practice are well-known to all sophisticated players in the insurance arena. Under the dominant contract law paradigm, insureds should be estopped from seeking rights via implied covenants not expressly bargained for. Yet courts continue to wring expansive obligations on the insurer from the implied covenant of good faith.

2. *The Rise of First-Party Insurance Bad Faith*

In the middle decades of the twentieth century, courts transitioned bad faith law from third- to first-party insurance settings. They established a general duty for insurers “to act in good faith and fairly in handling the claim[]” to not “withhold unreasonably payments due under a policy,”¹²⁰ mandating that decisions should “be the result of the weighing of probabilities in a fair and honest way.”¹²¹ First-party bad faith may be available for a carrier’s dilatory claims handling,¹²² inadequate communication with the insured,¹²³ or failures to understand the law¹²⁴ or the facts.¹²⁵

Because the first-party context lacks the agency and fiduciary principles present in third-party insurance, these actions stand at even greater odds with contract law. Courts justify these deviations by appealing to the “special nature of an insurance contract.”¹²⁶ One classic expression ties all the strands of the insurance counter-contract narrative together:

119. *Indus. Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128, 130 (7th Cir. 1996) (emphasis added) (quoting *Kham & Nate’s Shoes No. 2, Inc. v. First Bank*, 908 F.2d 1351, 1357 (7th Cir. 1990)). “Notably, while Judges Posner and Easterbrook have led the charge against expansive good faith duties in general contract law, few of these sensibilities are imported into their insurance law holdings.” Saiman, *supra* note 97, at 188 n.120.

120. *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1037 (Cal. 1973) (noting that first- and third-party settings are “merely two different aspects of the same duty”).

121. *Anderson v. Cont’l Ins. Co.*, 271 N.W.2d 368, 375 (Wis. 1978) (discussing a “responsibility of fair dealing” toward insureds and citing *Gruenberg*); see also *Rancosky v. Wash. Nat’l Ins. Co.*, 170 A.3d 364, 372 (Pa. 2017) (noting importance of the *Gruenberg* and *Anderson* decisions).

122. STEPHEN S. ASHLEY, *BAD FAITH ACTIONS: LIABILITY & DAMAGES* § 5:9 (2d ed.), Westlaw (database updated Oct. 2022); *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 414 (Colo. 2004) (noting first-party bad faith breaches may occur when insurer delays payment to insured).

123. ASHLEY, *supra* note 122, § 5:17; *Kump v. State Farm Fire & Cas. Co.*, 18 F. Supp. 3d 604, 609 (M.D. Pa. 2014) (observing first-party insurer could violate duty of good faith by failing to communicate with policyholder).

124. ASHLEY, *supra* note 122, § 5:8; *Walz v. Fireman’s Fund Ins. Co.*, 556 N.W.2d 68, 70 (S.D. 1996) (noting worker’s compensation insurer may act in bad faith by “failing to review caselaw”).

125. ASHLEY, *supra* note 122, § 5:8; *Selective Ins. Co. v. Sela*, 11 F.4th 844, 848–51 (8th Cir. 2021) (observing first-party insurers may breach duty of good faith by recklessly disregarding facts during claims investigations).

126. *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1155 (Alaska 1989) (quoting *Noble v. Nat’l Am. Life Ins. Co.*, 624 P.2d 866, 867 (Ariz. 1981)).

An insurance policy is not obtained for commercial advantage; it is obtained as protection against calamity. In securing the *reasonable expectations of the insured* under the insurance policy there is usually an unequal bargaining position between the insured and the insurance company. . . . Often the insured is in an especially vulnerable economic position when such a casualty loss occurs. The whole purpose of insurance is defeated if an insurance company can refuse or fail, without justification, to pay a valid claim.¹²⁷

Some courts draw on these features to establish a tort of bad faith,¹²⁸ while others arrive at similar results through contract concepts.¹²⁹ Others explain that certain forms of insurance such as disability insurance are not simply a promise to pay money when a covered event occurs. Rather they are designed to “promote peace of mind and avoid the insecurity”¹³⁰ of contending with an insurance company to obtain policy benefit post-loss.¹³¹

The gap between first-party bad faith liability and general contract law is further emphasized by the courts and scholars who dissent from this consensus. These courts stress that insurance is simply a financial contract with a promise to pay money under stipulated conditions, and that first-party bad faith confuses the unique agency/fiduciary aspects found in the liability insurance setting with the arms-length structure of a first-party insurance contract.¹³² Damages should therefore usually be limited to standard contract

127. *Id.* (citing *Noble*, 624 P.2d at 867–68) (emphasis added).

128. *See Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 416–17 (Colo. 2004) (en banc) (detailing rationales for allowing first party bad faith tort actions for emotional harms even in the absence of property or economic loss); *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 152 (Kan. 1980) (summarizing rationales developed by many states though refusing to extend the cause of action).

129. *Nicholson*, 777 P.2d at 1155 (citing *Noble*, 624 P.2d at 867–68).

130. *Kewin v. Mass. Mutual Life Ins.*, 295 N.W.2d 50, 57 (Mich. 1980); *see* 1 WILLIAM T. BARKER & RONALD D. KENT, *NEW APPLEMAN INSURANCE BAD FAITH LITIGATION* § 6.03 (2d ed.), LEXIS (database updated Nov. 2023).

131. *See Lawton v. Great Sw. Fire Ins. Co.*, 392 A.2d 576, 579 (N.H. 1978) (holding that “financial injuries . . . suffered as a result of the [insurer’s] failure or delay in payment” may be foreseeable and recoverable); *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 802 (Utah 1985) (holding that given “unique nature and purpose of an insurance contract[,] [a]n insured frequently faces catastrophic consequences if funds are not available within a reasonable period of time to cover an insured loss[,] [making] damages for . . . mental anguish” potentially recoverable).

132. *See Spencer*, 611 P.2d at 155 (contrasting fiduciary nature of liability insurance with more typical first party contract relationship); *Kewin*, 295 N.W.2d at 54 (same); *see also* John H. Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 *DRAKE L. REV.* 717, 749–53 (1998) (highlighting controversy surrounding first-party bad faith actions based on first-party insurance relationships lacking a fiduciary element).

measures,¹³³ typically no more than the monies owed plus prejudgment interest.¹³⁴

This strand of thought further questions why first-party insureds deserve more solicitous treatment than other contracting parties. Many contractual arrangements can be characterized as designed to supply peace of mind over future contingencies, but insurance alone warrants special damages rules. Moreover, insureds are one of the few classes of contract claimants entitled to potentially flip the “American rule” and obtain attorneys’ fees upon successful litigation of their contractual rights.¹³⁵ By contrast, despite decades of academic prodding,¹³⁶ outside the insurance setting, contracts of adhesion have not merited interpretive standards that are more consumerist than those used in negotiated contracts.¹³⁷ Finally, though every breach of contract carries the potential of frustrating the non-breaching party’s plans and expectations, other settings do not warrant a different set of substantive rules.¹³⁸ Instead, these dissenting voices argue that since insurance is a heavily regulated industry buffered by a welter of legislative and

133. *Spencer*, 611 P.2d at 155 (refusing to find independent tort of insurance bad faith); Alan O. Sykes, “Bad Faith” Breach of Contract by First-Party Insurers, 25 J. LEGAL STUD. 405, 407 (1996) (“A theoretical argument for such damages can be made under proper assumptions, but it appears that the courts have extended bad faith remedies to circumstances in which the case for them cannot be made and that reining in the remedy more properly may be exceedingly difficult.”); Bauman, *supra* note 132, at 743 (questioning why breach of contract action against first-party insurer is not enough to compensate policyholder).

134. *E.g.*, *Kewin*, 295 N.W.2d at 53–54 (holding standard contract damages are “adequate compensation by reference to the terms of the contract.”); Jay M. Feinman, *The Law of Insurance Claim Practices: Beyond Bad Faith*, 47 TORT TRIAL & INS. PRAC. L.J. 693, 695–96 (2012) (noting that under *Hadley* rule, damages for breaching insurers are amount owed to insured plus interest).

135. See Robert Kelly, *Costs and Attorney’s Fees*, in 12 NEW APPLEMAN ON INSURANCE LAW, *supra* note 96, § 156.07[2]; see also BARKER & KENT, *supra* note 130, § 1.07[3] (noting that tort remedies for breach of duty of good faith do not generally extended to non-insurance contracts).

136. *E.g.*, Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135 (2019); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 84 (2013); Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983) [hereinafter Rakoff, *Reconstruction*]; Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006).

137. See Rakoff, *Reconstruction*, *supra* note 136, at 1190 (observing that modern doctrine governing contracts of adhesion “remains tied to the traditional formulation that a signed document is, as an initial matter, a binding contract”); Kar & Radin, *supra* note 136, at 1196 (noting that “case law suggests ever-expanding assimilation of boilerplate text to ‘contract’”); RESTATEMENT (SECOND) OF CONTS. § 211 cmt. c (AM. L. INST. 1981) (stating that “standard terms imposed by one party are enforced”).

138. See Linzer, *supra* note 114, § 26.10 (“[T]he bad faith breach concept is at best moribund, outside the insurance law area.”); see also ASHLEY, *supra* note 122, §§ 11:2–4 (“[C]ourts have . . . uniformly declined to extend . . . bad faith beyond the insurance context.”).

administrative rules, courts should be precluded from using their common law powers to enact additional forms of insurance regulation.¹³⁹

3. Remedies for Bad Faith Breach

Insurance bad faith actions also generate a distinct remedial scheme. In contract terms, the insurance company’s obligation to pay money is akin to a contract obligating a party to make a loan or investment. Because “[i]n contemplation of law, money is always in the market, and procurable at the lawful rate of interest,”¹⁴⁰ alternate performance is usually assumed and damages are limited to increased interest rates or borrowing costs. Finally, since a claimant’s failure to access the debt market will generally run afoul of contract law’s doctrines of avoidability and mitigation, the breaching party is usually spared from consequential liabilities.¹⁴¹

While in the late nineteenth century the U.S. Supreme Court applied these assumptions to insurance cases,¹⁴² contemporary first-party bad faith law inverts them. Rather than demand particularized facts, courts explain how the insurance relationship makes these consequential harms potentially foreseeable to the carrier.¹⁴³ Insurance caselaw therefore rarely speaks of a “duty to mitigate” or demands insureds seek market-rate loans to plug the gap for expected insurance payouts. Cases either skip the issue of avoidability

139. See *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 158 (“Where the legislature has provided such detailed and effective remedies, we find it undesirable for us to expand those remedies by judicial decree.”); see also *D’Ambrosio v. Pa. Nat’l Mut. Cas. Ins. Co.*, 431 A.2d 966, 970 (Pa. 1981) (“[W]e have no reason to believe[] that the system of sanctions established under the Unfair Insurance Practices Act must be supplemented by a judicially created cause of action.”). Ten years after *D’Ambrosio*, the Pennsylvania legislature created a statutory cause of action. See 42 PA. CONS. STAT. § 8371 (1990).

140. *Lowe v. Turpie*, 44 N.E. 25, 33 (Ind. 1896).

141. RESTATEMENT (SECOND) OF CONTS. § 351 cmt. e (AM. L. INST. 1981) (“Because credit is so widely available, a lender often has no reason to foresee at the time the contract is made that the borrower will be unable to make substitute arrangements in the event of breach.”); see also, e.g., *In re Transact, Inc.*, No. SACV 13-1312-MWF, 2014 U.S. Dist. LEXIS 109746, at *61 (C.D. Cal. Aug. 6, 2014) (requiring detailed case-specific showings that downstream losses were foreseeable to impose liability on breaching lender for failure to fund a construction project).

142. See *New Orleans Ins. Co. v. Piaggio*, 83 U.S. 378, 386 (1872) (“[Insured] plaintiff cannot recover special damages for the detention of money due to him beyond what the law allows as interest.”); BARKER & KENT, *supra* note 130, § 1.03[2][a] (“Until recently, insurance policies, at least in the first-party situation, were ordinarily treated as contracts to pay money, and a plaintiff’s recovery for a failure to pay benefits was limited to the amount due under the policy, plus interest.”).

143. *Lawton v. Great Sw. Fire Ins. Co.*, 392 A.2d 576, 579, 581 (N.H. 1978).

and substitute performance entirely,¹⁴⁴ or conclude as a matter of law or upon minimal evidence that insureds lack the bandwidth to access debt markets.¹⁴⁵

A parallel trend holds with respect to damages for an insurer's bad faith. Contract law typically excludes recovery for emotional harms.¹⁴⁶ Exceptions to this rule usually evince unique facts, as when courts assess damages against funeral homes for improper burial practices or stalkers for breach of a settlement agreement to stay away from a protected party.¹⁴⁷ First-party insurance cases, however, do not typically require the claimant to establish case-specific facts showing that emotional harms were foreseeable.¹⁴⁸ Instead, they focus on how the insurance contract promises peace of mind, such that it falls within the narrow set of contracts for which emotional harms are traditionally compensable.¹⁴⁹

The standard justifications for first-party bad faith explain how enhanced damages are necessary to ward off insurers opportunistically refusing to pay claims when due. The issue is particularly salient in insurance since the aleatory structure of the contract makes it impossible to condition any of the policyholder's obligations on the insurer's performance. To alleviate the stresses faced by a policyholder following a loss when no substitute performance is available, they are entitled to an extra dose of legal protection.¹⁵⁰

144. See *Lloyds of London v. Lock*, 454 N.E.2d 81, 83–84 (Ind. Ct. App. 1983) (when insurer wrongfully delayed payment for stolen or damaged trucks, policyholder was awarded lost profits for the trucks without any discussion as to whether the insured should have borrowed money to replace the vehicles while awaiting payment); *Olson v. Ruglowski*, 277 N.W.2d 385, 387–88 (Minn. 1979) (same).

145. See *Lawton*, 392 A.2d at 579 (quoting Phyllis Savage, Note, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 *FORDHAM L. REV.* 164, 169 (1976)).

146. RESTATEMENT (SECOND) OF CONTS. § 353 (AM. L. INST. 1981).

147. See *id.* § 353 cmt. a; *Stockdale v. Baba*, 795 N.E.2d 727, 734 (Ohio Ct. App. 2003) (stalker case); see also *Goldstein v. United Lift Serv. Co.*, No. 09-826, 2010 U.S. Dist. LEXIS 113797, at *5–7 (E.D. Pa. Oct. 25, 2010) (permitting emotional damages against in-home chair lift installer who ignored service calls and left its customer trapped on the upper floors of a house).

148. Some courts seek to avoid these anomalies by defining bad faith as a tort rather than contract, but this does not change the outlier status of insurance law. Tort law typically requires the wrongful conduct to cause physical harm to body or property, while courts in insurance settings hold that physical manifestations of an insured's emotional harms can satisfy the physical injury requirement, or that insurance fits into narrow class of relationships where negligent conduct is especially likely to cause emotional harm. See *Bauman*, *supra* note 132, at 722–32.

149. See *Lawton*, 392 A.2d at 579–80 (holding enhanced damages may be available to insureds on contract theory); *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801–02 (Utah 1985) (providing enhanced damages under contract owing to the “unique nature and purpose of an insurance contract”).

150. See *Feinman*, *supra* note 134, at 694–95 (noting that bad faith actions are available to policyholders since the standard contract remedy inadequately compensate and fail to deter insurer opportunism).

Because these problems are so well known, however, a contractarian perspective would counsel for changes in the insurance contract, rather than insurance law. Parties could be offered an endorsement expressly calling for enhanced damages upon insurer breach, which would grant them the freedom to choose between higher price/higher damages contracts and discounted price/discounted damages models.¹⁵¹ Yet in refusing to reduce the contract to a simple financial hedge, the “just contract” narrative constructs the policy as providing a safety net whose value derives from the peace of mind of knowing such a net is in place. When the net fails to catch the falling policyholder, courts hold that damages are greater than simply the *ex-ante* cost of the net.

While these obligations may be both expensive and extensive, they fit the rubric of deeper- not- broader coverage. This is particularly true in the first-party context, where establishing coverage under the policy is generally a prerequisite for bad faith liability.¹⁵² The enhanced liabilities thus correspond to acts or omissions by the insurer in cases where the contract required the underlying claim to be paid. This puts first-party bad faith liability almost entirely within the baseline risks of policy coverage and within the control of the insurer. Many jurisdictions therefore maintain that insurers are only liable when they act without a reasonable basis *and* in reckless disregard of their duty to perform.¹⁵³ Because courts do not see first-party bad faith as expanding coverage beyond the scope of claims already priced into the policy, they willingly trade these costs for the benefits of protecting policyholders from insurer opportunism and dilatory claims management.

C. *Insurances Statuses*

Beyond specialized doctrines for conditions and remedies, insurance law conceptualizes the relationship between insurer and its insured as a legal status that offers a thicker interpretation of the insurance relationship than can be derived from a plain language reading of the policy.

151. See Schwartz & Scott, *Default Rule*, *supra* note 104, at 1585 n.194 (claiming that parties designing their contracts know better than courts “the agreements they wish courts to enforce, . . . the interpretive style they prefer courts to use in resolving disputes, and . . . how best to reduce the risks of opportunism in contract performance”); see Schwartz & Scott, *Contract Theory*, *supra* note 104, at 549 (arguing that because parties to commercial contracts are incentivized to “maximize the surplus from their deals” they are better positioned than courts to “choose efficient terms and strategies”).

152. BARKER & KENT, *supra* note 130, § 5.06[2][a] (stating that in the first party setting, “[m]ost jurisdictions hold, properly, that a valid claim for policy benefits is a necessary predicate for a bad faith claim, absent injury to noninsurance interests”).

153. RESTATEMENT OF THE L., LIAB. INS. § 49 cmt. b (AM. L. INST. 2019). Some jurisdictions only find liability when the insured would have succeeded in obtaining coverage on a motion for summary judgment. See Feinman, *supra* note 134, at 702–05.

1. Contractual Subrogation

Subrogation is the law that governs “how, if, and when an insurer may recover monies that it has paid to its insured.”¹⁵⁴ This arises in the insurance setting when a carrier pays a claim to its policyholder and then seeks to step into its shoes and obtain recovery from the parties ultimately responsible for the loss.¹⁵⁵ Subrogation initially emerged as an equitable doctrine arising by operation of law,¹⁵⁶ but most contemporary policies include an express clause that secures these rights as a matter of contract.¹⁵⁷

Though subrogation provisions are very common, the parameters of these rights are often under-defined, and decades of litigation demonstrate how policy clauses often fail to address foundational subrogation matters.¹⁵⁸ For example, suppose *A* causes \$1,000,000 in bodily injury to *B* in a car accident. *B* files a first-party claim with its auto insurer, ABC Insurance, which pays the \$200,000 limit under the policy. *B* then files a claim against *A*'s auto insurer, XYZ insurance, which settles the claims against *A* for \$300,000. Can *B*'s first-party insurer (ABC) lay claim to the \$200,000 paid out to its policyholder?¹⁵⁹

Under a strict plain-meaning reading of many basic subrogation clauses, the answer might be yes. But courts draw on the doctrine's equitable roots to read a pro-insured principle, known as the “made whole” doctrine into the policy. The doctrine prevents insurers from recovering monies from their policyholders unless the policyholder has been “made whole” from the relevant injuries.¹⁶⁰ Courts take a capacious view and pro-insured view of what it means to be made whole. For example, the policyholder is not made whole if claims are settled for less than the full extent of the injuries,¹⁶¹ and subrogation is typically denied unless the settlement includes full

154. Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 LOY. U. CHI. L.J. 49, 50 (2008).

155. Elaine M. Rinaldi, *Apportionment of Recovery Between Insured and Insurer in a Subrogation Case*, 29 TORT & INS. L.J. 803, 803 (1994).

156. See Maher & Pathak, *supra* note 154, at 51; Rinaldi, *supra* note 155, at 804.

157. Rinaldi, *supra* note 155, at 804.

158. See Matthew W. Peaire & Jessica M. Skarin, *Fundamentals of Insurance Subrogation*, in 13 NEW APPLEMAN ON INSURANCE LAW § 158.01 (Jeffrey E. Thomas & Francis J. Mootz eds.), LEXIS (database updated Aug. 2022).

159. See, e.g., *Wimberly v. Am. Cas. Co. (CNA)*, 584 S.W.2d 200, 201 (Tenn. 1979) (considering whether insurer was entitled to settlement proceeds after it paid policy limits when policyholder collected less from tortfeasor than total loss resulting from injury).

160. See Maher & Pathak, *supra* note 154, at 64–65 (detailing history of made whole rule).

161. See Philip T. Carroll & Christopher Hemphill, *Limits on the Right of Subrogation*, in 13 NEW APPLEMAN ON INSURANCE LAW, *supra* note 158, § 159.03[11][h][i]; *Rimes v. State Farm Mut. Auto. Ins. Co.*, 316 N.W.2d 348, 350–53 (1982).

compensation for any loss.¹⁶² Likewise, if the injured party pays its attorneys’ fees as a percentage of the gross settlement amount, courts find the insured has not been made whole until the *net settlement* is equal to the full value of injuries.¹⁶³ Because these conditions rarely hold,¹⁶⁴ the made whole doctrine works against the plain meaning of the policy and defangs the insurers contractual subrogation rights.¹⁶⁵

The made whole doctrine rests on a thick normative understanding about how insurance policies ought to function. Though the contrary to plain meaning interpretation is often explained in terms of subrogation’s equitable roots,¹⁶⁶ this approach is unsatisfying because once the clause is inserted into the policy, rules of contract interpretation, not equity, should govern.¹⁶⁷ A better explanation is that the policy establishes a status relationship whose substantive duties exist somewhat independently of the express contractual terms.¹⁶⁸ The made whole rule can be conceptualized as a “sticky default,”¹⁶⁹ that presumptively applies even though it can be modified through express drafting.¹⁷⁰ For this reason, so-called “first-dollar” policies—which permit the subrogation carrier to recover the first dollar obtained from a collateral

162. Carroll & Hemphill, *supra* note 161, § 159.03[11][e]–[f]. This includes claims for loss of consortium and future medical expenses.

163. *Id.* § 159.03[11][h][i] (“Generally, courts will not allow an insurer to pursue a subrogation action if the insured settles for less than the loss incurred, because the insured has not been made whole.”).

164. See Rinaldi, *supra* note 155, at 805 (“An insured often settles with a third-party tortfeasor for an amount less than the total loss.”).

165. See *id.* at 811 (noting that courts using the made whole rule to deny insurer recovery pursuant to its subrogation rights is based on “the apparent willingness of the courts to disregard the provisions of the insurance policy and the standard subrogation receipt”).

166. Maher & Pathak, *supra* note 154, at 59–72; see also 16 STEVEN PLITT ET AL., COUCH ON INSURANCE § 223:136, Westlaw (3d ed.) (database updated June 2022) (explaining equitable basis for made whole rule).

167. See, e.g., *Fireman’s Fund Ins. Co. v. TD Banknorth Ins. Agency*, 644 F.3d 166, 169–71 (2d Cir. 2011) (analyzing whether Connecticut’s made whole doctrine superseded a subrogation clause incorporated into an insurance policy).

168. See, e.g., Jay M. Feinman, *The Insurance Relationship as Relational Contract and the “Fairly Debatable” Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 563 (2009); see also Abraham, *Expectations Principle*, *supra* note 26, at 65, 67 (describing conceptions of insurance law other than treating the policy as a contract).

169. See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2086–87 (2012) (noting that “[t]he stickiness of a default derives from the relative difficulty of contracting around,” and when using sticky defaults, “lawmakers want to impede some private parties from achieving particular contractual results”).

170. See Carroll & Hemphill, *supra* note 161, § 159.01[2] (noting that made whole rule can be contracted around via clear language); *Wilson v. Educators Mut. Ins. Ass’n*, 416 P.3d 355, 359 (Utah 2017) (same). *But see* *Drinkwater v. Am. Fam. Mut. Ins. Co.*, 714 N.W.2d 568, 572–73 (Wis. 2006) (“[I]n Wisconsin the made-whole doctrine can trump express language in an insurance contract.”). Federal ERISA law maintains less stringent standards for contracting around the made whole rule. See generally *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013).

source such as other insurance policies—are enforceable so long as the term is stated with sufficient clarity.¹⁷¹ Yet interpretation of these provisions also does not take place on neutral ground, as courts set an unusually high bar for identifying language that is sufficiently clear to contract around the made whole rule.¹⁷²

2. *Duty to Defend*

As with subrogation, the express language establishing an insurance liability carrier's defense obligations is sparse.¹⁷³ The insuring clause common to many general liability policies states that the insurer has the “right and duty” to defend claims against its insured that fall within the scope of coverage.¹⁷⁴

Over time, courts have interpreted the duty to defend found in the basic insuring agreement to create “litigation insurance,” which includes a suite of rights that cannot be derived from plain language analysis of the policy text.¹⁷⁵ Some examples include:

- Carriers cannot simply deposit the policy limits in escrow on behalf of the insured but must defend the claim until designated milestones are reached.¹⁷⁶
- The duty to defend extends not only to claims clearly covered by the policy but even to claims that are *potentially* covered.¹⁷⁷
- A carrier must determine its defense obligations based on the allegations in the underlying complaint. It cannot extract itself from defending the claim by challenging the veracity of the plaintiff's allegations.¹⁷⁸
- Insurers are usually allowed to control the defense and appoint a counsel of their choosing. When a conflict between the carrier and the policyholder arises, the insurance company must appoint an independent counsel and relinquish control of

171. See Carroll & Hemphill, *supra* note 161, § 159.03 [11][e]–[f].

172. See Reeds v. Walker, 157 P.3d 100, 115 (Okla. 2006) (stating that court has “found only a few cases containing ‘genuinely unambiguous’ reimbursement provisions” that are sufficiently clear in their intent to contract around the made whole rule).

173. See BAKER, LOGUE & SAIMAN, *supra* note 61, at 578–89 (observing that “not much” is said in the policy about insurer's duty to defend).

174. *Id.* at app. B.

175. See Robert H. Jerry, II, *The Insurer's Right to Reimbursement of Defense Costs*, 42 ARIZ. L. REV. 13, 19–21 (2000) (language in a standard liability insurance policy is “indefinite” regarding the insurer's duty to defend); James M. Fischer, *Broadening the Insurer's Duty to Defend: How Gray v. Zurich Insurance Co. Transformed Liability Insurance into Litigation Insurance*, 25 U.C. DAVIS L. REV. 141 (1991).

176. RESTATEMENT OF THE L., LIAB. INS. § 18 & cmt. a (AM. L. INST. 2019).

177. *Id.* § 13 cmt. b.

178. *Id.* § 13 cmt. a.

the defense while maintaining financial responsibility for defense costs.¹⁷⁹

- If at least one claim is potentially covered, insurers must defend uncovered claims brought in the same suit.¹⁸⁰

Though none of these obligations are provided for in the policy language, courts have used the gaps in the policy to craft a normatively thick conception of a liability insurer’s defense obligations.¹⁸¹ At least some courts justify this in terms of satisfying the policyholder’s “legitimate expectations” of a defense.¹⁸²

The uneasy tension between plain language and the duty to defend is exemplified through the Texas Supreme Court’s relatively recent holding in *Richards v. State Farm Lloyds*.¹⁸³ Following decades of judicial expansions, insurers began to modify the policy’s articulation of the insurer’s defense obligation. Some policies removed the insurer’s promise to defend against claims that are “groundless, false, or fraudulent,” as courts had traditionally relied on this language to justify broad readings of the insurer’s defense obligation.¹⁸⁴ The insurer in *Richards* argued that in removing this language, it had closed the gap between claims for which it owed a defense and claims for which it owed indemnity, thereby narrowing its defense obligations.¹⁸⁵

The Texas court opened with a pious recitation of contractarian ideology, denying that the duty to defend was anything but straight-up contract law: “As with any contract, the parties may displace default rules of construction by agreement.”¹⁸⁶ The court added that the duty “does not arise

179. See *id.* § 16; Douglas R. Richmond, *Independent Counsel in Insurance*, 48 SAN DIEGO L. REV. 857, 858 (2011).

180. Seth D. Lamden, *Triggering the Duty to Defend*, in 3 NEW APPLEMAN ON INSURANCE LAW, *supra* note 98, § 17.01[1][b][i].

181. See Tom Baker & Kyle D. Logue, *Mandatory Rules and Default Rules in Insurance Contracts*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW 377, 387 (Daniel Schwarcz & Peter Siegelman eds., 2015) (the duty to defend is a “quasi-mandatory” . . . implied contract term[]” that is difficult to contract around).

182. See *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 828 (Colo. 2004) (en banc) (“[B]asing the determination of the duty to defend on the complaint when an insurer refuses to defend protects the insured’s ‘legitimate expectation of a defense.’” (quoting *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991))); *Pompa v. Am. Fam. Mut. Ins. Co.*, 520 F.3d 1139, 1146 (10th Cir. 2008) (following the court’s reasoning in *Cotter* and *Hecla*).

183. 597 S.W.3d 492 (Tex. 2020).

184. See *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 173–74 (Cal. 1966) (finding policies with this language “would lead the insured reasonably to expect the insurer to defend him” in all suits).

185. See *Richards*, 597 S.W.3d at 495–98 (disclaiming duty to defend insureds because the parties contracted around the “eight-corners rule” by removing certain language from the policy); see also Douglas R. Richmond, *Using Extrinsic Evidence to Excuse a Liability Insurer’s Duty to Defend*, 74 SMU L. REV. 119, 136 (2021) (documenting shift in CGL policies in which “groundless, false, or fraudulent” language has been removed).

186. *Richards*, 597 S.W.3d at 497 (citing *Wenske v. Ealy*, 521 S.W.3d 791, 792, 796 (Tex. 2017)).

merely from the courts' say-so,"¹⁸⁷ and it is surely not a "judicial amendment to parties' agreement[]." ¹⁸⁸ Therefore, "if an insurance policy contained language inconsistent with [the judicial construction of the duty to defend], the policy language would control."¹⁸⁹

At the point of decision, however, *Richards* backs away from this contractarian view. *Richards* held that since Texas courts had routinely applied expansive readings of the duty to defend for decades, this interpretation had become a "settled feature of Texas law."¹⁹⁰ The duty to defend did not change simply because the insurer removed a particular clause from the insuring agreement.¹⁹¹

Putting its contractarian protestations aside, *Richards* offers a substantive reading of the policy that demonstrates how defense obligations stem at least as much from the insured's status as from policy language. Though initiated by contract, the insurance policy creates status-based rights that take shape from the accumulated practices of courts and the daily functioning of the insurance system. While insurers can opt out of undertaking a duty to defend entirely,¹⁹² policies that state a defense obligation are interpreted in light of the body of "overwhelming precedent" that normatively elaborates the content of this duty.¹⁹³

3. Reservation of Rights Letters

The practical impact of duty to defend law raises a host of timing issues. While an insured needs a defense as soon as it is sued by a third party, it may take considerable time to determine whether the allegations pled in the complaint call for coverage under the terms of the policy. The law responds by requiring insurers to resolve doubts in favor of coverage and provide a defense immediately, while allowing them to reserve the right to subsequently withdraw the defense and disclaim coverage should the

187. *Id.* at 499.

188. *Id.* at 499–500.

189. *Id.* at 497.

190. *Id.* at 499.

191. *Id.*

192. Notably, most D&O policies are written as "cost reimbursement policies" which expressly exclude defense duties. *See, e.g.*, RESTATEMENT OF THE L., LIAB. INS. § 22(1) (AM. L. INST. 2019) ("A defense-cost-indemnification policy . . . does not undertake the duty to defend.").

193. *Richards*, 597 S.W.3d at 500 ("State Farm . . . is well aware of the courts' longstanding interpretive approach to contractual duties to defend, and it knows how to contract around that approach."). The same court repeated this understanding in *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 203 n.12 (Tex. 2022) ("[P]arties dissatisfied with the common-law rule [are free to contract] for additional or different rules governing the scope of the duty to defend" (citing *Richards*, 597 S.W.3d at 497)).

underlying claims prove beyond the scope of the policy.¹⁹⁴ This requires notifying the insured via a “reservation of rights letter” that “fairly informs” the insured that the carrier may withdraw the defense and deny coverage down the road.¹⁹⁵ While this requirement has no basis in policy language,¹⁹⁶ many courts maintain that failure to alert the policyholder/insured of the potential for denial may be deemed a waiver of the carrier’s coverage defenses, leaving the carrier liable for all claims in the suit.¹⁹⁷

These ideas were initially developed out of the general contract doctrines of waiver and estoppel.¹⁹⁸ The rationale was that since the policy allocated control to the insurer over the entire litigation, it would be unfair to leave insureds responsible for the resulting judgement should the insurance company successfully extricate itself from coverage and liability.¹⁹⁹ Courts were particularly concerned the insurer may litigate in a sub-optimal manner knowing it may not ultimately be responsible for providing indemnity.

Modern reservation of rights doctrine, however, has become institutionalized as a standalone doctrine with principles that often depart from contract law.²⁰⁰ For example, when an insured looks to broaden coverage beyond the policy language by claiming it was misled by a statement of an insurance agent or broker, the *RLLI* applies general contract principles of estoppel. This sets a high bar and requires the claimant to specifically show that it detrimentally relied on the statements of the insurance agent by undertaking specific actions.²⁰¹ For example, suppose an insured selects a policy relying on an agent’s representation that risk *R* is covered—but the agent was mistaken and *R* is not covered by the policy. Per the *RLLI*, merely transmitting inaccurate policy information is *insufficient* to trigger coverage via estoppel. Rather, the insured must show that but for the agent’s

194. 14A PLITT ET AL., COUCH ON INSURANCE § 202:39 (3d ed.), Westlaw (database updated June 2023) [hereinafter 14A COUCH ON INSURANCE].

195. *Richards Mfg. Co. v. Great Am. Ins. Co.*, 773 S.W.2d 916, 919 (Tenn. Ct. App. 1988) (explaining that a reservation of rights letter “will be held sufficient only if it fairly informs the insured of the insurer’s position”).

196. See RESTATEMENT OF THE L., OF LIAB. INS. § 15 reporters’ note to cmt. a (noting that reservation of rights requirement is a court-created insurance law doctrine).

197. See 14A COUCH ON INSURANCE, *supra* note 194, § 202:39.

198. See *Tozer v. Ocean Accident & Guar. Corp. of London, Eng.*, 103 N.W. 509 (Minn. 1905); *Oehme v. Johnson*, 231 N.W. 817 (Minn. 1930); RESTATEMENT OF THE L., LIAB. INS. § 15 reporters’ note to cmt. a.

199. See RESTATEMENT OF THE L., OF LIAB. INS. § 15 cmt. a; *Tozer*, 103 N.W. at 511; *Oehme*, 231 N.W. at 822.

200. See *Emps. Ins. of Wausau v. Ehlco Liquidating Tr.*, 708 N.E.2d 1122, 1135 (Ill. 1999); RESTATEMENT OF THE L., LIAB. INS. § 15 reporters’ note to cmt. a (citing sources).

201. RESTATEMENT OF THE L., LIAB. INS. § 6 cmt. a (“Estoppel is a general contract-law doctrine that permits the enforcement of terms different from those in the original contract . . . Estoppel requires some action or representation on the part of the promisor and reasonable and detrimental reliance on the part of the promisee.”).

assurances it either would not have undertaken *R*, or it would have purchased a different policy that in fact covers *R*.²⁰² Because these are difficult standards to meet, many estoppel claims fail.²⁰³

These presumptions are flipped in the reservation of rights setting where at least some courts do not require the insured to expressly show its detrimental reliance. Instead, courts are willing to presume that insureds will be harmed if the insurer defends the claims without giving notice of potentially uninsured liabilities.²⁰⁴ Because reservation of rights letters have been “so well established” in insurance practice, the *RLLI* explains that “an insurer that does not raise a ground for contesting coverage should be understood to have waived its right to contest coverage in nearly all cases.”²⁰⁵

Finally, while the concept of reserving rights exists in general contract law, case law suggests that an actual notice of reservation is sufficient and the reserving party is rarely required to satisfy specific procedural requirements for effective notice.²⁰⁶ Initially, the same regime applied to insurers,²⁰⁷ but modern case law often requires considerably more than actual notice.²⁰⁸ Courts have found reservation of rights letters ineffective for being

202. *Id.* § 6 *illus.* 1–3.

203. *See id.* § 15 *cmt.* a. (recognizing situations in which it would be “difficult for the insured to demonstrate detrimental reliance”).

204. *See id.* § 15 reporters’ note to *cmt.* a; *Knox-Tenn Rental Co. v. Home Ins. Co.*, 2 F.3d 678, 684 (6th Cir. 1993); *Transcon. Ins. Co. v. J.L. Manta, Inc.*, 714 N.E.2d 1277, 1283 (Ind. App. 1999); *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 845 P.2d 746, 750 (Mont. 1993). The matter is subject to some dispute, however. According to one influential treatise, the position of the *RLLI* is unsound. *See Paul E.B. Glad, William T. Barker & Michael Barnes, Initiating Coverage, in 3 NEW APPLEMAN ON INSURANCE LAW, supra note 98, § 16.03[3][c][v]; see also Com. Union Ins. Co. v. Int’l Flavors & Fragrances, Inc.*, 822 F.2d 267, 274 (2d Cir. 1987) (estoppel requires insurer to prejudice policyholder following defense without reservation of rights); *Doe ex rel. Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 374 (Fla. 1995) (“[T]he insured must demonstrate that the insurer’s assumption of the insured’s defense has prejudiced the insured.”). Notwithstanding disagreement about how the rule is articulated, in practice the difference may be minor because an insured may demonstrate prejudice if the insurer made significant decisions related to discovery or litigation tactics that the policyholder can argue it would have made differently. *See Glad, Barker & Barnes, supra, § 16.03[3][c][v]; see also Merchs. Indem. Corp. v. Eggleston*, 179 A.2d 505, 511 (N.J. 1962).

205. RESTATEMENT OF THE L., LIAB. INS. § 15 *cmt.* a.

206. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(1) & *cmt.* d (AM. L. INST. 2011) (“The significance to such a claim of a formal ‘protest’ or ‘reservation of rights’ is to repel any inference that the disputed performance is being rendered pursuant to compromise, and to give adequate notice to the recipient that the parties’ dispute remains to be adjusted, by litigation or otherwise.”); *see also Venture Stores, Inc. v. Pac. Beach Co.*, 980 S.W.2d 176, 185–86 (Mo. Ct. App. 1998) (holding that tenant did not relinquish right to recover payments because landlord had actual notice that tenant planned to make rent payment and bring restitution action later).

207. *See Oehme v. Johnson*, 231 N.W. 817, 821 (Minn. 1930) (concluding that insurer failing to notify policyholder of potential intention to disclaim liability amounts to waiver).

208. *See* RESTATEMENT OF THE L., LIAB. INS. § 15(3); *Hoover v. Maxum Indem. Co.*, 730 S.E.2d 413, 417 (Ga. 2012) (finding insurer’s reservation of rights letter “inadequate because it did not unambiguously inform [policyholder] that [insurer] intended to pursue” a particular defense); *Glad,*

too generic and not specifically identifying either the coverage defenses raised²⁰⁹ or the policy language supporting the reservation.²¹⁰ The same holds when the letter is deemed ambiguous²¹¹ or when it fails to establish how the reservation creates a conflict of interest.²¹² These requirements are difficult to square with the contract principles of waiver, estoppel, and rights reservation that govern outside the insurance setting.

4. Insurance Statuses as Deeper Insurance

These insurance statuses generally align with the trend that courts are willing to draw on the insurance counter-canon to deepen coverage but not broaden it. This distinction is clearest with respect to the made whole rule, which simply deepens existing coverage by severely limiting the potential carve out of coverage enabled by the subrogation clause.

Reservation of rights practice under the *RLLI*'s schema follows similar principles. When determining whether an otherwise uncovered claim crosses the coverage threshold due to the carrier's or agent's actions, insureds must specifically show they detrimentally relied on the carrier's promises. But once the insured has come within the boundaries of defense coverage, the burden shifts and it can presume the claims are covered unless otherwise notified by the carrier. While this deepens the insurer's notice obligations, the carrier can prevent the scope of coverage from broadening by properly reserving its rights.

The scope of defense obligations presents a more difficult fit with the deep/broad schema. Courts commonly explain how “[t]he insurer's duty to defend is . . . broader than its obligation to indemnify,”²¹³ reflecting how

Barker & Barnes, *supra* note 204, § 16.03[d] (reservation of rights “must ‘provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.’” (quoting *Sauer v. Home Indem. Co.*, 841 P.2d 176, 182 (Alaska 1992))).

209. See *Bogle v. Conway*, 433 P.2d 407, 412–13 (Kan. 1967); *Mobil Oil Corp. v. Md. Cas. Co.*, 681 N.E.2d 552, 560 (Ill. App. Ct. 1997); *Cowan v. Ins. Co. of N. Am.*, 318 N.E.2d 315, 326 (Ill. App. Ct. 1974); *Weber v. Biddle*, 483 P.2d 155, 159 (Wash. Ct. App. 1971).

210. See Glad, Barker & Barnes, *supra* note 204, § 16.03[d][i] (“A reservation of rights should identify any policy language relevant to the coverage issue and explain the way in which that language supports or may support denial of coverage based on the facts of the matter.”).

211. See *Richards Mfg. v. Great Am. Ins. Co.*, 773 S.W.2d 916, 919 (Tenn. Ct. App. 1986) (holding that insurer's coverage defenses must be “clearly and fairly communicated to the insured”); *Hoover*, 730 S.E.2d at 417 (Ga. 2012) (finding reservation of rights insufficient because insurer failed to unambiguously inform policyholder of a particular defense).

212. See *Cowan*, 318 N.E.2d at 326 (“[B]are notice of a reservation of rights is insufficient unless it makes specific reference to . . . the potential conflict of interest.”).

213. Robert D. Goodman, John C. Dockery & Matthew S. Hackell, *Obligations of Insurer*, in 1 NEW APPLEMAN LAW OF LIABILITY INSURANCE § 1.05[2][a] (Matthew Bender ed., rev. ed.), LEXIS (database updated Aug. 2023); Jerry, *Reimbursement of Defense Costs*, *supra* note 175, at 17; Douglas R. Richmond, *Reconnoitering Reservations of Rights in Liability Insurance*, 51 TORT TRIAL & INS. PRAC. L.J. 1, 1 (2015).

defense obligations sometimes apply to claims that are squarely beyond indemnity coverage. Nevertheless, the degree to which the duty to defend broadens policy coverage comes into clearer focus by dividing the cases where defense obligations outstrip indemnity obligations into different analytical categories.

First, several judicially crafted defense obligations simply offer a deeper, pro-insured interpretation of the contractually ambiguous duty to defend. These include mounting a rigorous defense commensurate with the risk to the insured and demonstrating that false or baseless allegations should be dismissed.²¹⁴ This also includes the requirement for the insurer to actively defend the claim rather than simply submit the policy limits to the policyholder.²¹⁵

A second class of duties arise from the distinct fiduciary logic embedded in the liability insurance relationship. Because insurers maintain sole rights to control and settle the claims, their relationship to insureds shifts from a standard arms-length contractual arrangement towards a fiduciary model—parallel to other cases where A is contractually granted broad discretionary rights over B’s financial affairs.²¹⁶ The carrier is called upon to litigate fairly between covered and uncovered claims and to appoint independent counsel should its interests in the litigation become sufficiently adverse from its insured. This also explains why the insurance carrier must defend the claims based on the allegations in the complaint, rather than setting up a conflict with its insured by undermining the factual veracity of the pleaded allegations in order to extricate itself from coverage.²¹⁷ These concepts certainly create deeper definitions of the defense status, but they do not broaden the policy beyond the categories of risks as defined through the insuring agreement and its relevant exclusions.

Nevertheless, a third category of duties undeniably expands defense obligations to claims *not covered* under the policy’s indemnification provisions. These duties generally arise due to the timing constraints and practicalities of defending third-party suits. When a suit contains both covered and uncovered claims, nearly all jurisdictions require the insurer to

214. RESTATEMENT OF THE L., LIAB. INS. § 13 (AM. L. INST. 2019).

215. *Id.* § 18 cmts. a, g.

216. *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 154 (Kan. 1980) (finding that liability insurers and insureds are in a fiduciary relationship and that “insurer[s] must act in the best interests of [their] insured[s]” in defense); Karon O. Bowdre, “*Litigation Insurance*”: *Consequences of an Insurance Company’s Wrongful Refusal to Defend*, 44 DRAKE L. REV. 743, 762–63 (1996) (recognizing insurers’ fiduciary obligations when they defend insureds).

217. Commentators also note that the carrier’s obligation is to defend against “claims” which are comprised of allegations and thus the duty to defend is based on allegations, not facts. *See* Michael Keeley, C. Adam Brinkley & Justin P. Melkus, *Unraveling the Duty to Defend: Evaluating, Applying, and Understanding Its Limits*, 47 BRIEF 16, 16–22 (2018).

defend the entire suit—including claims plainly outside the bounds of the policy.²¹⁸ In other cases, however, it may not be clear whether the alleged claims are covered when the complaint is filed. Because the insured requires a defense as soon as the suit is initiated, the insurer is called upon to resolve doubts in favor of coverage and providing a defense immediately.²¹⁹ The insurer may then reserve its rights and subsequently litigate whether coverage is actually due under the policy.²²⁰

While nearly all jurisdictions follow this approach,²²¹ courts are divided on whether insurance carriers can obtain restitution or recoupment for costs of defending claims eventually held to be beyond the scope of the policy’s indemnity. Roughly half the jurisdictions maintain that—barring an express provision to the contrary—carriers must absorb these defense costs, while the other half disagree and allow insurers to recover these defense costs in recoupment actions.²²²

While fiduciary and timing aspects militate towards temporarily broadening defense obligations and requiring insurers to defend uncovered claims, it would be more consistent with the functioning of insurance law to allow insurers to recover the cost of defending claims not covered by the policy. This approach better recognizes the pattern reflected in the deeper/broader heuristic where courts rely on the ideal of making insurance

218. Lamden, *supra* note 180, § 17.01[1][b][i].

219. See Richmond, *supra* note 213, at 2.

220. William T. Barker, *Insurer Obligations and Options When Coverage is Disputed*, in 2 NEW APPLEMAN LAW OF LIABILITY INSURANCE § 6.03 (Matthew Bender ed., rev. ed.), LEXIS (database updated Dec. 2022); Kenneth S. Abraham, *The Liability Insurer’s Duty to Settle Uncertain and Mixed Claims*, 68 RUTGERS U.L. REV. 337, 358–59 (2015).

221. See RESTATEMENT OF THE L., LIAB. INS. § 15(1) (AM. L. INST. 2019) (stating the rule that insurers have “the right to contest coverage for an action before undertaking the defense of the action if [they] give[] timely notice to the insured of any ground for contesting coverage”); Timothy P. Law & Lisa A. Szymanski, *Reserving the Right to Contest Coverage Under the Proposed Restatement of the Law of Liability Insurance*, 68 RUTGERS U.L. REV. 29, 37 (2015) (recognizing that the RLLI’s rules regarding reservation of rights letters “accord[] with basic principles of insurance law recognized by commentators and courts across jurisdiction”).

222. See RESTATEMENT OF THE L., LIAB. INS. § 21 reporters’ note to cmt. a (noting “a division of authority regarding insurer recoupment of defense costs” when there is no express contractual language permitting recoupment); see also RANDY MANIHOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE 260 (4th ed. 2018) (noting that litigation on this issue “has been active for the past twenty years . . . both sides can claim many victories[,] [b]ut insureds have won several at the supreme court level in the past few years”).

The ALI itself is divided on this issue. Compare RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 (2011) (stating that an insurer “may recover” costs associated with defending an uncovered claim if it proceeded with a sufficient reservation of rights letter), with RESTATEMENT OF THE L., LIAB. INS. § 21 (disallowing recovery unless recovery was explicitly called for in the policy).

a “just contract” to deepen coverage, but refrain from broadening the scope of coverage beyond the policy language.²²³

III. CONTRA PROFERENTEM IN CONTRACT AND INSURANCE LAW

A. *Two Versions of Contra Proferentem*

In general contract law, the doctrine of *contra proferentem* is a tool of last resort and not particularly significant.²²⁴ Courts faced with lexical ambiguity are first instructed to consult extrinsic evidence.²²⁵ They are directed to construe the term against the drafting party only when there are no better options and extrinsic evidence proves unavailing.²²⁶

This narrow version of *contra proferentem* is affirmed by leading contract treatises, in both *Restatements of Contracts*,²²⁷ and recently expressed by a majority of the U.S. Supreme Court.²²⁸ English courts also hold *contra proferentem* is “rarely if ever of any assistance,”²²⁹ “of uncertain application and little utility,”²³⁰ and per the U.K. Supreme Court, “very much a last refuge, almost an admission of defeat.”²³¹

223. Scholars have noted that for many individual and small policyholders the value of the recoupment right to insurers is negligible and in effect converts the temporary expansion of the duty to defend to a permanent one. See BAKER, LOGUE & SAIMAN, *supra* note 61, at 593. But even here we should recall that broadening the defense coverage is generally less dramatic than expanding indemnity coverage. Though defense costs may be considerable, they ultimately fall short of full indemnity. In addition, insurers have a greater degree of control over these costs as they can typically engage captive or panel counsel to offer a defense at below market and discounted rates. See KENNETH S. ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 584–86 (6th ed. 2015). This puts defense in a different category from the expansions described in Part II.

224. For a history and survey of the doctrine at common law, see Joanna McCunn, *The Contra Proferentem Rule: Contract Law’s Great Survivor*, 39 OXFORD J. LEGAL STUD. 483 (2019); David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431 (2009) (surveying history in American law); Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773 (2015).

225. Rappaport, *supra* note 16, at 182 (stating that less ambiguities would result if extrinsic evidence would be permitted).

226. HERBERT BROOM, *A SELECTION OF LEGAL MAXIMS* 556 (6th ed. 1884) (stating that the doctrine “is the last to be resorted to and is never to be relied upon but when all other rules of exposition fail”).

227. 5 CORBIN ON CONTRACTS § 24.27 (John E. Murray, Jr. ed., rev. ed.), LEXIS (database updated Nov. 2021) (*contra proferentem* is rule of last resort); 11 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 32:12 (4th ed.), Westlaw (database updated May 2023); see also RESTATEMENT (FIRST) OF CONTS. § 236 (AM. L. INST. 1932) (noting secondary status of the rule outside of insurance cases); RESTATEMENT (SECOND) OF CONTS. § 206 (AM. L. INST. 1981) (characterizing *contra proferentem* as last resort though the reporters’ notes express some doubt about this view).

228. See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019) (citing 3A CORBIN ON CONTRACTS § 559 (1960)).

229. *K/S Victoria Street v. House of Fraser* [2011] EWCA (Civ) 904, [68].

230. *CDV Software Ent. v. Gamecock Media Europe* [2009] EWHC 2965, [56].

231. *BNY Mellon Corp. Tr. Servs. v. LBG Cap. No. 1* [2016] UKSC 29, [53].

This anemic version is contrasted with the robust conception found in insurance law.²³² Courts and leading scholars have characterized *contra proferentem* as “the most familiar expression in the reports of insurance cases,”²³³ and the “first principle” of insurance law.²³⁴

Justifications for the doctrine draw heavily on the insurance as a “just contract” narrative: the adhesive nature of insurance policies,²³⁵ the idea that insurers bear responsibility for their own ambiguous language,²³⁶ and the economic imbalances between the parties.²³⁷

Under the expanded—sometimes called “strict liability”—version found in insurance law,²³⁸ *contra proferentem* shifts from a last resort to a next-best rule. So long as the insured can demonstrate the term is ambiguous and has no plain language in the context of the claim, courts interpret the term

232. See, e.g., Jeffrey E. Thomas, *Contra Proferentem and Ambiguity*, in 1 NEW APPLEMAN ON INSURANCE LAW, *supra* note 130, § 5.02[1] (contrasting *contra proferentem*’s status as last resort in contract law with primary status in insurance law); see also Fischer, *supra* note 2, at 1001–05 (contrasting general contract law and insurance law versions of *contra proferentem*). Consider how the *Restatement of the Law, Liability Insurance* places the doctrine in Sections 3 and 4, while the *Restatement (Second) of Contracts* lists it in Section 206, which groups together several second order rules of interpretation. Also compare the prominent placement the doctrine obtains in two of the most popular insurance law casebooks, ABRAHAM & SCHWARCZ, *supra* note 223, and BAKER, LOGUE & SAIMAN, *supra* note 61, with its treatment in popular contracts law casebooks, for example, CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (8th ed. 2016), and E. ALLEN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS (9th ed. 2019).

233. *Kunin v. Benefit Tr. Life Ins. Co.*, 910 F.2d 534, 539 (9th Cir. 1990) (quoting 2 GEORGE J. COUCH, RONALD A. ANDERSON & MARK S. RHODES, COUCH ON INSURANCE § 15.74 (rev. ed. 1984)).

234. The phrase was put forth by Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 531 (1996) (“The first principle of insurance law is captured by the maxim *contra proferentem* . . .”). Numerous other writers have cited this claim. See, e.g., Christopher Serkin, *Insuring Takings Claims*, 111 NW. U. L. REV. 75, 105 n.156 (2016) (citing Abraham); Mark A. Geistfeld, *Interpreting the Rules of Insurance Contract Interpretation*, 68 RUTGERS U. L. REV. 371, 371 (2015) (citing Abraham in the second sentence of the article); Ethan J. Leib. & Steve Thel, *supra* note 224, 773–74 (citing Abraham in the first paragraph); see also Thomas, *supra* note 232, § 5.02[1] (“*Contra proferentem* has been cited and used in thousands of insurance cases.”); RESTATEMENT OF THE L., LIAB. INS. § 4 reporters’ note to cmt. d. (AM. L. INST. 2019).

235. Horton, *supra* note 224, at 441.

236. *Id.* at 442 (noting that “the drafter’s control over the contract” was the common rationale for strict liability *contra proferentem*); Abraham, *supra* note 234, at 533–34 (observing that the frequent rationale for employing *contra proferentem* is that “the drafter has control over the language used in the policy” and that such a justification “makes *contra proferentem* more closely resemble a version of strict liability”).

237. Horton, *supra* note 224, at 444–45; Thomas, *supra* note 232, § 5.02[2][b].

238. Abraham, *supra* note 234, at 554 (categorizing robust version of *contra proferentem* as “[t]he traditional [insurance law] conception of *contra proferentem*” and a “[s]trict [l]iability with a [p]enalty [s]tandard”).

in its favor. This applies even when extrinsic evidence favors the insurer,²³⁹ and in some cases, even when the insured's proposed interpretation is less reasonable than the insurer's.²⁴⁰ *Contra proferentem* does not guarantee victory for insureds, but as compared to other contract settings: (i) insureds have a better chance of obtaining an ambiguity determination, and (ii) once deemed ambiguous, the insured's chances of success rise considerably.²⁴¹

B. *Contra Proferentem and the Deep/Broad Heuristic*

At first glance, these applications of *contra proferentem* challenge the deep/broad heuristic. Like the doctrines surveyed in Part II, the insurance-specific version of this contract law doctrine is far more pro-policyholder than in general contract law.²⁴² But unlike these other doctrines, courts routinely use *contra proferentem* to not only deepen, but broaden insurance coverage beyond plain language. To the extent the deep/broad heuristic reflects the structure of insurance law, *contra proferentem* seems to break the mold.

One approach is to focus on how *contra proferentem* functions differently from the other pro-policyholder rules reviewed above. While these doctrines conflict with plain meaning, courts treat them as substantive insurance law that reflects the accumulated praxis of the insurance system.²⁴³

239. See RESTATEMENT OF THE L., LIAB. INS. § 4 cmt. c (providing that extrinsic evidence is admissible only if the policyholder could be reasonably expected to be aware of it but that small policyholders are not expected to be aware of such evidence); Abraham, *supra* note 234, at 537–54 (observing that many courts will ignore extrinsic factors and rule in favor of coverage when policy language is ambiguous); Horton, *supra* note 224, at 436 (same); Randall, *supra* note 2, at 120 (same).

240. See *Adrian Assocs. v. Nat'l Sur. Corp.* 638 S.W.2d 138, 140–41 (Tex. App. 1982) (noting that construction urged by insured must be adopted as long as it is not unreasonable and even when construction offered by insured appears a more reasonable or accurate reflection of the intent of the parties); Boardman, *supra* note 16, at 314–15 (calling attention to the formulation in *Adrian Associates*).

241. See 1 BARBARA O'DONNELL, LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION § 1:11, Westlaw (database updated June 2023) (describing how modern *contra proferentem* doctrine is “a pro-insured rule in which any ambiguity in the relevant policy language is automatically construed in favor of coverage, without any need to evaluate extrinsic evidence concerning the parties' intent”); Fischer, *supra* note 2, at 1005 (ambiguity in insurance policies “is frequently found even in the most painstakingly drafted terms”); see Stempel, *supra* note 1, at 815–16 (noting courts treat “even highly problematic language [as] crystal clear” and that “difficulty in translating the words of a policy immediately triggers the ambiguity principle requiring resolution of controversies against the insurer.”).

242. See Boardman, *supra* note 16, at 310–18 (noting that *contra proferentem* is a penalty and information-forcing default rule); see Abraham, *supra* note 234, at 545 (noting that some courts will “penalize[] the insurer for including ambiguous language in its policy”).

243. See, e.g., *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 499 (Tex. 2020) (holding that the “eight-corners rule” had become “a settled feature of Texas law” rather than responding to specific policy language); see also *Alcazar v. Hayes*, 982 S.W.2d 845, 856 (Tenn. 1998) (affirming the notice-prejudice rule as developed in insurance caselaw).

Hence the decision to ignore plain meaning in favor of insurance-specific doctrines is made at the “wholesale” level rather than by examining particular language on a case-specific basis. The tension between the two narratives becomes submerged under insurance-specific doctrine.

By contrasts, courts structure the plain meaning/*contra proferentem* regime, so that the two doctrines are not in conflict. Strict plain meaning analysis is primary, while *contra proferentem* is relevant only if the court has determined that there is no plain meaning as applied to a particular claim.²⁴⁴ Because *contra proferentem* necessarily depends on plain language, it is only invoked in more “retail,” or case-by-case settings, where courts are alert to the fact that they are deviating from a neutral to a pro-coverage reading.

Contra proferentem thus switches the court’s interpretive framework from plain language neutrality to one that frames the insurance policy as a risk transfer device from the policyholder to the carrier. This purposive approach presents the insurer as the residual risk bearer tasked with bearing the cost of contractual uncertainty.²⁴⁵ Assigning this risk to the insurer is especially compelling when the interpretive difficulty can be blamed on the insurer who failed to address known interpretive quagmires in policy language.²⁴⁶

While this account has some analytic and explanatory power, scholars have nevertheless noted the difficulty in disaggregating the question of whether *contra proferentem* should apply (when the term has no plain meaning) from a normative assessment of whether a given loss should be covered under the policy. Some observers point to a sliding scale, which requires somewhat less lexical ambiguity where reasonable expectation ideals militate in favor of coverage.²⁴⁷ For example, the text of the “absolute pollution” exclusion found in many liability policies makes no distinction between: (i) “traditional” pollution caused by chemicals released into the environment; and (ii) chemicals that “escape” or “pollute” in everyday settings such as peeling lead paint chips in residential dwellings or ammonia leaking from copy and blueprint machines.²⁴⁸ Roughly half the jurisdictions

244. See RESTATEMENT OF THE L., LIAB. INS. § 4 cmt. g (“The rule in this Section applies only when the term in question has no single plain meaning when applied to the claim in question; rather, the term is ambiguous.”).

245. See Boardman, *supra* note 16, at 347 (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 413 (6th ed. 2003)).

246. See sources cited *supra* note 242.

247. Abraham, *supra* note 234, at 568 (“A weak version of *contra proferentem* may thus lead to stronger versions of the expectations principle, whereas the traditional conception of *contra proferentem* may more typically be allied with a weaker version of the expectations principle . . .”).

248. *Peace ex rel. Lerner v. Nw. Nat’l Ins. Co.*, 596 N.W.2d 429, 448 (1999) (lead paint); *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1136 (Fla. 1998) (blueprint machine).

employ plain meaning to find “traditional” pollution claims excluded from coverage, yet deem the same language ambiguous as applied to more ordinary settings—thereby resulting in coverage.²⁴⁹ The results are best understood as employing ambiguity/*contra proferentem* tools to distinguish between the categories of pollution that are reasonably expected to be either covered or excluded from standard liability policies.²⁵⁰

Moreover, though ambiguity determinations are often dispositive of the coverage question,²⁵¹ scholars across the spectrum bemoan inconsistencies in application. Kenneth Abraham finds the doctrine provides “no guidance as to the criteria to be used in determining when a policy provision is or is not reasonably subject to two interpretations.”²⁵² Michelle Boardman is less generous, noting the doctrine occupies the dangerous spot of being “inscrutable but ubiquitous,” with “patchy and unpredictable” applications.²⁵³ James Fischer explains that though the bias in favor of the insured “appear[s] to be a systemic bias,” it is “episodic in implementation.”²⁵⁴ Jeff Stempel demonstrates the incongruity between courts sometimes finding highly problematic language clear, while holding even the slightest interpretive difficulty can lead to a pro-coverage result in others cases.²⁵⁵

Similarly, blackletter refrains found in the caselaw greet lawyers with an avalanche of clichés. Courts admonish that a policy is “[not] ambiguous just because some people have difficulty understanding it”²⁵⁶ or because several courts have come to different conclusions regarding its interpretation.²⁵⁷ At the same time, judicial disagreement over the meaning of a term renders it “by definition, ambiguous” and should be “interpreted in

249. A summary of the issue can be found in Abraham, *Long-Tail Liability*, *supra* note 43, at 380–82. *See also* Sauer v. Home Indem. Co., 841 P.2d 176, 181 n.8 (Alaska 1992) (reviewing history of courts’ interpretations of pollution exclusion’s language); MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1208–11 (Cal. 2003) (same).

250. *See* Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the “Absolute” Exclusion in Context and in Accord with Its Purpose and Party Expectations*, 34 TORT INS. L.J. 1, 32 (1998) (“[A]bsolute pollution exclusion was designed to serve the twin purposes of eliminating coverage for gradual environmental degradation and government-mandated cleanup such as Superfund response cost reimbursement.”).

251. Abraham, *supra* note 234, at 537 (“[S]o much turns on whether a disputed policy provision is ambiguous”); Thomas, *supra* note 232, § 5.02[2][a] (stating that “the critical determination is whether the policy is ambiguous” since clear policies will be enforced according to their terms and ambiguous terms will be interpreted to allow coverage).

252. Abraham, *supra* note 234, at 538.

253. Boardman, *supra* note 16, at 309.

254. Fischer, *supra* note 2, at 998.

255. Stempel, *supra* note 1, at 815–16.

256. JERRY & RICHMOND, *supra* note 14, at 137 (citing *Nordi v. Keystone Health Plan W. Inc.*, 989 A.2d 376, 381 (Pa. Super. Ct. 2010)).

257. *Id.* at 138 (citing *Giacomelli v. Scottsdale Ins. Co.*, 221 P.3d 666, 673–74 (Mont. 2009)).

favor of the insured.”²⁵⁸ Courts are likewise required to interpret a policy via its plain meaning, but policies should also be construed to achieve the primary purpose of providing indemnity.²⁵⁹

C. *Contra Proferentem and Underwriting Criteria*

Numerous scholars have attempted to describe a way out of this thicket, or at least offer a more nuanced description of its parameters. Of particular relevance is Daniel Schwarcz’s idea that when applying *contra proferentem*, courts should proceed with greater awareness of the function that a term or exclusion performs within the insurance underwriting criteria.²⁶⁰ This inquiry focuses on the degree to which a risk is measurable, observable, involves low correlation with similar risks, presents low risks of moral hazard and adverse selection, while considering the administrative and transactional costs involved in investigating and paying a claim.²⁶¹ Under this framework, the best case for expanding coverage arises when such coverage could be easily included within the underwriting principles of the policy: The more a risk is given to cost-effective underwriting within the boundaries of the policy, the stronger the claim for *contra proferentem* interpretation that produces this result. By contrast, the more the issues of moral hazard, adverse selection, correlated risk, and costs of administration prevail, the less compelling a case for using interpretation to expand coverage.²⁶²

Schwarcz’s appeal to underwriting principles offers a refined articulation of the deeper/broader heuristic tailored to the complexities of plain language and *contra proferentem*. Courts should deploy ambiguity to expand coverage when doing so is consistent with existing underwriting criteria (a version of deeper coverage), but refrain when expansion broadens

258. *Crawford v. Prudential Ins. Co. of Am.*, 783 P.2d 900, 908 (Kan. 1989); *see also* *Sec. Ins. Co. of Hartford v. Invs. Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. Dist. Ct. App. 1981) (finding policy language ambiguous because courts had come to different conclusions as to the meaning of similar language); *Allstate Ins. Co. v. Hartford Acc. & Indem. Co.*, 311 S.W.2d 41, 47 (Mo. App. 1958) (concluding that since courts had conflicting interpretations of the meaning of a term, that term could be reasonably interpreted multiple ways).

259. *See, e.g.*, Fischer, *supra* note 2, at 1004; *Fageol Truck & Coach Co. v. Pac. Indem. Co.*, 117 P.2d 669 (Cal. 1941); *see also* *White v. W. Title Ins. Co.*, 710 P.2d 309, 313 (Cal. 1985).

260. *See* Schwarcz, *supra* note 27, at 1399.

261. *Id.* at 1448 (first citing Neil A. Doherty & Alexander Muermann, *Insuring the Uninsurable: Brokers and Incomplete Insurance Contracts* 4 tbl.1 (Wharton Sch., Univ. of Pa., CFS Working Paper No. 2005/24, 2005); and then citing EDWIN W. PATTERSON, *ESSENTIALS OF INSURANCE LAW* § 68 (1935)).

262. Schwarcz maintains this analysis should replace reasonable expectations theories and presumably apply even in the absence of an express ambiguity finding. It has been critiqued on this ground that it supposes identifying the purpose of various insurance and exclusion clauses proves difficult and will itself be subject to contested litigation. *See* Abraham, *Expectations Principle*, *supra* note 26, at 67–83. Nevertheless, when applied to language already deemed ambiguous, the proposal stands on firmer grounds in light of existing dissatisfaction with ambiguity determinations.

the base of policy coverage past its central underwriting parameters. Considered in light of the wholesale/retail account developed above, this suggests that even in the tangled zone of *contra proferentem*/ambiguity, the basic deeper/broader heuristic helps explain which version of insurance contract law predominates. It further suggests that attempts to differentiate between deeper and broader coverage recur throughout insurance law and at different points of the deep/broad spectrum.

While the distinction hardly resolves all close cases, following Schwarcz, thinking in underwriting terms may be useful in assessing how the deeper/broader heuristic provides normative guidance in applying *contra proferentem*. Two recent cyber coverage decisions offer a relevant contrast: In *Travelers Indemnity Co. of America v. Portal Healthcare Solutions*,²⁶³ the insured specialized in managing electronic medical data for health care providers. It accidentally posted patient medical records online, making them publicly accessible to anyone who searched the patients' name on the internet.²⁶⁴ Liability coverage turned on whether this constituted an "electronic publication of material" within the CGL's Coverage B.²⁶⁵ While the carrier argued that "publication" requires *intent* to make the data public, the court used *contra proferentem* to adopt the insured's definition, which focused on the fact that information was made *accessible* to the public.²⁶⁶ In light of the lexical ambiguities surrounding how "publication" latches onto these facts, and that Coverage B includes coverage for negligent as well as intentional acts, interpreting "publication" to include the unintentional release of information on the internet does not introduce new risk factors that materially alter the type of coverage in the policy. It is closer to deeper insurance.

Contrast this result with *G&G Oil Co. of Indiana v. Continental Western Insurance Co.*,²⁶⁷ a decision by the Indiana Supreme Court involving a hacker who unleashed ransomware that locked an oil company out of its computer system.²⁶⁸ Faced with few other options, the oil company paid \$35,000 bitcoin ransom, and then sought recovery from a policy covering losses to money or property "resulting directly from the use of any computer to fraudulently cause a transfer."²⁶⁹ Lower courts denied coverage, arguing that the transfer was not fraudulent because the ransom was voluntarily paid in

263. 35 F. Supp. 3d 765 (E.D. Va. 2014), *aff'd*, 644 F. App'x 245 (4th Cir. 2016).

264. *Id.* at 772.

265. Brief of Appellee at 2, *Portal Healthcare*, 35 F. Supp. 3d 765 (No. 14-1944), 2015 WL 7294366.

266. *Portal Healthcare*, 35 F. Supp. 3d at 772.

267. 165 N.E.3d 82 (Ind. 2021).

268. *Id.* at 85-86.

269. *Id.*

full awareness of the circumstances.²⁷⁰ The Indiana Supreme Court reversed, finding the policy ambiguous since fraud “embraces all the multifarious means which human ingenuity can devise . . . to gain an advantage over another.”²⁷¹ By interpreting that the hack itself constituted fraud, the court held the resulting bitcoin ransom payment to be a “fraudulently cause[d] . . . transfer” that was covered by the policy.²⁷²

This extension seems closer to creating broader insurance. The court’s use of *contra proferentem* converted a term designed to cover insureds hoodwinked into paying under false pretenses to one that reimburses ransom payments made with full knowledge of the underlying facts. This move shifts the risk basis of coverage from unknowing to knowing acts thereby broadening the underlying parameters of what is covered.²⁷³

The same reflex generally guided courts against initiating broad scale coverage expansions in the recent mass of COVID litigation.²⁷⁴ Thousands of COVID-related cases turned on the question of whether the virus caused “physical loss [of] or damage to” property²⁷⁵—the phrase that serves as the gatekeeper for many business interruption and civil authority coverages available to commercial property holders. While insurance carriers generally defeated these claims, policyholder success came when courts found this language ambiguous as applied to the COVID virus’s impact on business facilities.²⁷⁶ The no-coverage consensus seems the better course since the claim of lexical ambiguity is not particularly strong and because courts should hesitate to hang wide-scale and systemic expansions of coverage on

270. See *G&G Oil Co. of Ind. v. Cont’l W. Ins. Co.*, No. 49D06-1807-PL-028267, 2019 WL 12023254, at *4 (Ind. Super. Ct. May 30, 2019) (“The hacker deprived G&G Oil of use of its computer system and extracted bitcoin from the Plaintiff as ransom. While devious, tortious and criminal, fraudulent it was not.”), *aff’d*, 145 N.E.3d 842, 847 (Ind. Ct. App. 2020) (“Here, the hijacker did not use a computer to fraudulently cause G&G to purchase Bitcoin to pay as ransom. The hijacker did not pervert the truth or engage in deception in order to induce G&G to purchase the Bitcoin.”), *vacated* 165 N.E.3d 82 (Ind. 2021).

271. *G&G Oil*, 165 N.E.3d at 88 (quoting *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000)).

272. *Id.* at 87–88. The supreme court found the policy “unambiguous” in favor of the insured and that “its straightforward definition was construed too narrowly by the courts below.” *Id.* at 88.

273. Notably in *G&G Oil*, the insured declined an endorsement that expressly covered cyber hacks. See *id.* at 86.

274. See data collected at *Covid Coverage Litigation Tracker*, UNIV. OF PENN. CAREY L. SCH., <https://cclt.law.upenn.edu> (last visited Feb. 20, 2024).

275. See Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L.J. 1, 7–8 (2020).

276. See, e.g., *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 801 (W.D. Mo. 2020); see also Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L.J. 185, 264 (2020) (citing cases in which courts deem coverage clauses containing some variation of the phrase “direct physical loss of or damage” ambiguous in the wake of COVID-19 and adopt a definition that favors coverage).

hook of an ambiguity finding.²⁷⁷ Moreover, COVID is a textbook case of a correlated risk caused by a global pandemic that hit everywhere at once and would significantly broaden coverage over a wide number of cases.²⁷⁸ The deep/broad heuristic counsels that such coverage should not be read into a policy that purposefully limits exposure to disasters causing physical harm in specific locations.²⁷⁹

While applications of *contra proferentem* do not always neatly fit into the deep/broad heuristic, the judicial intuition reflected in this distinction may yet prove of value. When the relevant issue touches on liabilities that cannot be effectively insured or underwritten within the boundaries of the policy, the limited version of *contra proferentem* common to general contract law is most appropriate. By contrast, when the potential expansion results in costs that can be easily spread when incorporated into the policy, the more expansive version of the doctrine common to the insurance setting prevails.

CONCLUSION

Insurance cases contain an avalanche of blackletter rules promising that an insurance policy is just another contract and that trumpet plain language as insurance law's defining feature. This Article shows why this narrative is strongest when addressing gateway questions of whether a loss comes within the bounds of coverage. Conversely, the narrative should be resisted in circumstances where courts deploy specialized insurance law doctrines to fashion a more "just contract." Clearly demarcating these zones not only offers a richer descriptive account of how courts decide insurance cases, but is increasingly important in light of several trends.

First, though insurance is subject to a dense network of state-level regulation, the doctrines described in this Article are primarily developed through judicial interpretation, not administrative regulation.²⁸⁰ This

277. See Schwarcz, *supra* note 27, at 1451 & n.268 (discussing ineffectiveness of insurers when they are unable to "pool risks by grouping together a large number of policyholders who face similar but independent risks" and using example of policyholders seeking coverage from hurricane related flood damage despite flood damage being explicitly excluded from policies).

278. *But see* Knutsen & Stempel, *supra* note 276, at 239–48 (collecting insurance industry sources making this argument).

279. In this regard it is worth comparing the underwriting basis of business interruption insurance written in the U.K. with policies in the United States. While the U.K. Supreme Court found that many policies issued in the U.K. offered coverage for COVID closures, working off a different policy construct, American courts have not. See Daniel Schwarcz, *Redesigning Widespread Insurance Coverage Disputes: A Case Study of the British and American Approaches to Pandemic Business Interruption Coverage*, 71 DEPAUL L. REV. 427, 428–33 (2022).

280. For notice prejudice, see *supra* notes 86–96 and accompanying text; Pastor & Insua, *supra* note 96, § 149.01[d] (describing notice prejudice rule by assessing case law). For bad faith, see *supra* notes 120–153 and accompanying text; BARKER & KENT, *supra* note 130, § 23.01 (outlining development of bad faith in insurance law without mentioning state regulations). For interpretation

structure pushes back against the claims that insurance regulation is wholly a function of state insurance departments and the parallel argument that the presence of regulating agencies preempts or limits judicial involvement in the field.²⁸¹ The counter-canon emphasizes how judicial regulation of the insurance relationship is a central feature of insurance law that functions independently of administrative regulations.

Second, scholars have recently raised awareness of “concept creep” and particularly, “contract creep,” where doctrines forged with the assumptions of one area of contract law creep into other areas where those assumptions are less warranted.²⁸² This is particularly relevant to plain language/contractarian assumptions which loom large in the American legal psyche. They take the form of contractarian textualism in statutory interpretation;²⁸³ the absence of specialized laws relating to standard form contracts or arbitration provisions in general contract law;²⁸⁴ and the contractarian aspects of insurance law itself.²⁸⁵ Because these theories exert a strong pull over the entire legal culture, a clear presentation of

of subrogation clauses, the insurer’s duty to defend, and reservation of rights letters, see *supra* notes 154–223 and accompanying text; Maher & Pathak, *supra* note 154, at 64–65 (documenting common law history of subrogation and made whole rule without speaking of state regulations); Lamden, *supra* note 180, § 17.01 (compiling case law to explain insurer’s defense obligations); 14A COUCH ON INSURANCE, *supra* note 194, § 202:39 (noting that the effect of a reservation of rights letter “is often governed by statute and *almost always by case law*” (emphasis added)).

281. See Baker & Logue, *supra* note 181, at 25–27 (describing arguments that when regulators approve policy terms, courts should not be able to override the regulator’s decision); Spencer v. Aetna Life & Cas. Ins. Co., 611 P.2d 149, 158 (Kan. 1980) (“Where the legislature has provided such detailed and effective remedies, we find it undesirable for us to expand those remedies by judicial decree.”); D’Ambrosio v. Pa. Nat’l Mut. Cas. Ins. Co., 431 A.2d 966, 970 (Pa. 1981) (“There is no evidence to suggest, and we have no reason to believe, that the system of sanctions established under the Unfair Insurance Practices Act must be supplemented by a judicially created cause of action.”); Sykes, *supra* note 133, at 422 (arguing that bad faith damages in insurance law are unnecessary because legislatures and insurance regulators have alternative options).

282. Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L. REV. 1277, 1279 (2019) (“[J]udges and scholars tend to overlook how contract doctrines that are developed in one track creep into another and, in doing so, threaten to undermine the goals of distinctive tracks.”).

283. See e.g., Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002) (explaining that purposivist readings of federal statutes are inappropriate even in light of apparent statutory incoherence). The Supreme Court’s contractarian reading of the legislative process renders potential incoherence as “often the cost of legislative compromise . . . [in a] battle among interest groups” where “highly interested parties attempt[] to pull the provisions in different directions.” *Id.* For this reason, “deals brokered during [the complexities of the legislative process] are not for us to judge or second-guess.” *Id.*

284. For standard forms, see sources cited *supra* notes 136–137. For arbitration, see AT&T v. Concepcion, 563 U.S. 333, 343 (2011); Rent-a-Ctr., W. Inc. v. Jackson, 561 U.S. 63, 80 (2010); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417 (2019).

285. See *supra* notes 58–68 and accompanying text.

counterexamples bears significance both for insurance law and the broader questions of contract term regulation.²⁸⁶

Third, because the insurance industry controls the language of insurance policies, its interests are generally served through doctrines that emphasize plain text over normative analysis carried out by judges. Therefore, understanding the different areas of insurance law where each narrative holds sway can forestall insurers' efforts to leverage the contractarian doctrines influential in interpretation context from creeping into other doctrinal zones.²⁸⁷ By the same token, demarcation should preclude courts from relying on the insurance counter narrative to expand coverage to new and expressly excluded categories of claims.

Fourth, though some pro-coverage doctrines emerge from the quasi-fiduciary context of liability insurance, they are not limited to these settings. The distinction between deeper and broader coverage cuts across both first- and third-party settings, as demonstrated by the notice prejudice rule, liability for bad faith, and *contra proferentem*. Recognizing that the distinction between deep and broad is more salient than the distinction between first- and third-party insurance precludes attempts to restrict the "just contract" narrative and doctrines to liability insurance settings.

Finally, as reflected in Part II and III, the deep/broad heuristic offers courts an initial metric to determine whether a contractarian or substantive conception of insurance law should prevail. To the extent the issue presents a gateway question of whether a given loss is covered, ongoing practice counsels towards a plain meaning approach. By contrast, once the loss itself is within the ambit of the policy, these assumptions are relaxed. We have endeavored to show why in these cases, courts articulate a more robust understanding of what insurance coverage entails.

286. See Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 286 (2020) (calling for greater scholarly awareness of when and how mandatory rules of contract are designed and deployed).

287. Much of the debate surrounding the drafting and eventual approval of the *RLLI* took this form. See Kim V. Marrkand, *Duty to Settle: Why Proposed Sections 24 and 27 Have No Place in a Restatement of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 201, 206–07 (2015). Marrkand argues for a contractarian approach to insurer settlement duties and critiques early drafts of the *RLLI* on the basis that that insurance policy is a contract between two parties that "articulates the rights and duties of the insurer and the policyholder. While case law over many years and jurisdictions has construed policies and found implied duties, . . . a court . . . may not create explicit new duties outside of the four corners of the policy." See also Priest, *Principled Approach*, *supra* note 13, at 651 (critiquing early versions of the *RLLI* on grounds that insurance is a contract). In some cases, these arguments succeeded in altering the substantive provisions stated in the *RLLI*. See Jeffrey W. Stempel, *From Quiet to Confrontational to (Potentially) Quiescent: The Path of the ALI Liability Insurance Restatement*, 50 BRIEF 10, 14–15 (2020).