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ARTICLES

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RISK AND RESPONSIBILITY: INSURANCE AND THE UNIVERSITY OF CONNECTICUT SCHOOL OF LAW

TIMOTHY FISHER[*] & LEAH SMITH[**]

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[*] Dean Emeritus and Professor of Law, University of Connecticut School of Law.

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We owe a great deal to the many people who have helped us learn and tell this history. Bob Googins was a central part of this history, and his recollections were crucial in framing the foundational story of the Insurance Law Center. Tom Baker was tremendously helpful and generous with his time, explaining the emergence of University of Connecticut School of Law's central role in the study of the theory of insurance and of risk and responsibility more broadly.

Many others at the University of Connecticut School of Law helped this effort along the way. Kent Newmyer provided valuable guidance on how to contribute to this series of centennial histories, as did his former research assistant John Khalil, J.D. '16. Lisa Rodino, Lea Wallenius, Tanya Johnson, Alison Swain, Ron Fleury, and Jeanne Leblanc all provided key resources to our research and writing.

Our thanks to Matt Fratamico, J.D. '22, who did crucial work in checking our sources and preparing citations.

We drew on stories and themes from our other former and current Insurance Law Center Directors, Interim Directors and staff: Patricia McCoy, Brendan Maher, Peter Siegelman, Travis Pantin, Peter Kochenburger and Yan Hong, as well as many of the present faculty and staff who have taught and published in the field, and shared their reflections with us: Rick Kay, Richard Pomp, Carol Weisbrod, Stephen Utz, Mark Janis, and Sean Griffith.

We drew on the recollections of many alumni who conveyed the experience and history of the insurance program and its influence on their careers: Walter Welsh, J.D. '72, Marilda Gandara, J.D. '78, Jonathan Starble, J.D. '95, Keith Moskowitz, J.D. '98, Richard Johnston, J.D. '61, Richard Tomeo, J.D. '70, Robert Fiondella, J.D. '68, Andres Avila, L.L.M. '17, Stephani Roman, J.D. '19, and former Connecticut Insurance Commissioner Thomas Leonardi, J.D. '79; as well as our global partners and colleagues, Angelo Borselli, L.L.M. '09, Qihao He, L.L.M. '12 and S.J.D. '16, and Chih-Feng Li, L.L.M. '06.

We also received valuable reflections from a tremendous cadre of part-time professors who helped make the program possible, including many who shared their experiences teaching: Dan Sullivan, Kip Dwyer, Charlie Klippel, Sean Fitzpatrick, Greg Ligelis, Bill Goddard, Pat Salve, Doug Simpson, Richard Baxter, Noreen Shugrue, Jim Cohen, and Michael Wilder.

We relied on records from the UConn Dodd Center Archives and Special Collections, and on Mary Beth Davidson, Director of Records Management at

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Travelers, for her diligent search of the archives at The Travelers Insurance Companies.

Our thanks to the Connecticut Insurance Law Journal editorial board and its Editor-in-Chief, Kendra McGuire, J.D. '22, for providing the initial publication of this history.

And finally, our thanks to Dean Eboni Nelson for her support and advocacy for this, and all of our centennial celebrations.

INTRODUCTION

Since its founding a century ago, the University of Connecticut School of Law ("UConn Law") has had a deep engagement with insurance. Such engagement has not only involved the industry located in Hartford, Connecticut, but throughout the nation as well. It is global, with an ever-expanding network of alumni, visiting scholars, and teachers. UConn Law's Insurance Law Center has become the focal point of a global community of thought leaders who explore the myriad of ways in which insurance both mirrors and structures human society.

The combination of these missions is one of the great successes of the school. The intellectual culture of UConn Law attracts academics, regulators, and industry professionals alike to explore the role and future of insurance. At the same time, it provides focused and advanced training to practitioners and students heading towards insurance careers.

This booklet traces the story behind UConn Law's current program. It was not a straight line, and its first half-century was quite modest, but thanks to the vision of its founders, a sound mission, and several key leaders, the Insurance Law Center at UConn Law has become a major center for the teaching and learning of insurance law.

I. THE LILLARDS' VISION

The Hartford College of Law, which later became UConn Law, was founded in 1921 by two individuals, George and Caroline Lillard.[1] The Lillards moved to Hartford, Connecticut, in 1918 for George to carry out an assignment for the U.S. Department of Justice.[2] Upon finishing the assignment, George took a job at The Travelers Insurance Co. ("Travelers") as a clerk in its claims department.[3] There, George recognized the value of legal training in an industry that is based on legal liability and rules about allocating loss, and the need for a school that could give such training in

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[1] *History*, UNIV. OF CONN. SCH. OF L., https://law.uconn.edu/about/history/ (last visited May 17, 2022).

[2] *George W. Lillard, 56, Law School Founder: Taught at Hartford Institution, which he Established in 1921*, N.Y. TIMES, Oct. 25, 1940, at 26.

[3] *See id.*; Interview by Bruce M. Stave with Hugh Campbell, former Senior Vice President & Gen. Couns., Phoenix Mut. Life Ins. Co. (June 10, 1998), at 2 (transcript on file with author) [hereinafter Campbell Interview].

Hartford, where so many insurance companies were headquartered.[4] Thus, George and Caroline took it upon themselves to singlehandedly create a law school.[5]

Portrait of Caroline Lillard[6]

George Lillard (first on the left) and Caroline Lillard (third from the left) among faculty of Hartford College of Law[7]

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[4] KENT NEWMYER & JOHN KHALIL, HARD TIMES AND BEST OF TIMES: THE UNIVERSITY OF CONNECTICUT SCHOOL OF LAW AT 39 WOODLAND STREET 1–2 (2016).

[5] *Id.*

[6] Portrait of Caroline Lillard, *in The Face of the Law School Now*, UCONN TODAY (Apr. 29, 2019), https://today.uconn.edu/2019/04/face-law-school-now/.

[7] Photograph of George and Caroline Lillard among faculty of Hartford College of Law, *in* NEWMYER & KHALIL, *supra* note 4, at 30.

The Lillards' vision was a law school that provided the full standard range of courses. Accordingly, the curriculum they created covered topics that one would seek in any fine law school and would prepare its graduates for any legal career. That said, a significant part of the motivation for its founding were the needs of the insurance industry and the career aspirations of workers in that industry.[8] That was to be the focus of the first twenty-five years of Hartford College of Law's operation, until its affiliation with the University of Connecticut.[9]

Given the large role of the insurance industry in Hartford, the connection with insurance was natural. Informal insurance arrangements had begun in Connecticut in the eighteenth century and then accelerated in the early nineteenth century.[10] Hartford-based insurance companies' fortunes accelerated after they very publicly paid all claims from large fires in New York City in 1835 and 1845, while other companies became insolvent and left policyholders stranded.[11] Several factors combined to build the industry in the city, including the availability of liquid capital to establish new companies' reserves and a well-educated workforce able to master actuarial and accounting systems.[12] Hartford was the wealthiest city in the United

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[8] *See* Interview by Sharon Fowler with Lawrence J. Ackerman, Acting Dean from 1942–46, Univ. of Conn. Sch. of L. (1982–83), at 6 (transcript on file with author) [hereinafter Ackerman Interview]:

> The concept there was that Hartford was an insurance community, and therefore it would be a good idea to run, in tandem, a college of insurance and a school of law, having the students take courses in both areas, so as to train them for the insurance business in the City of Hartford.

[9] *See infra* Section II.A.

[10] Kevin Flood, *How Hartford Became the Insurance City*, HARTFORD HIST., https://www.hartfordhistory.net/insurance_city.html (last visited May 17, 2022).

[11] *Id.*

[12] *See generally* WILLIAM CAHN, A MATTER OF LIFE AND DEATH: THE CONNECTICUT MUTUAL STORY (1970); CHARLES W. BURPEE, A CENTURY IN HARTFORD BEING THE HISTORY OF THE HARTFORD COUNTY MUTUAL FIRE INSURANCE COMPANY (1931); CONNECTICUT GENERAL LIFE INSURANCE COMPANY, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, 1865-1965: 100 YEARS IN PERSPECTIVE (1965); RICHARD HOOKER, AETNA LIFE INSURANCE COMPANY: ITS FIRST HUNDRED YEARS (1956); HAWTHORNE DANIEL, THE HARTFORD OF HARTFORD: AN INSURANCE COMPANY'S PART IN A CENTURY AND A HALF OF AMERICAN HISTORY (1960).

States in the years after the Civil War,[13] and it trained and attracted capable and creative executives. Hartford-based insurance companies were, for example, the "first to offer accident, auto, and aviation policies, among other innovations."[14] Thus, Hartford became the natural home to many of the largest and oldest insurers in the nation.[15]

In this setting, the new law school had several advantages. Legal training was an attractive career boost for people already employed in the insurance industry. There were no other law schools between New York and Boston other than Yale, which catered to a very different demographic and hardly admitted more than a handful of Connecticut residents per year.[16] Equally important, the law school was able to find many capable teachers from among the leading lawyers in the city, including two from Travelers' legal department: James E. Rhodes—who taught torts to first-year students starting in 1921[17]—and George Lillard himself.[18]

Fifty students, seven of them women, enrolled at the Hartford College of Law in its debut semester.[19] Though many of the first students had graduated from college when they entered the law school, the majority of entrants were high school graduates seeking an opportunity to enter the

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[13] Paul Zielbauer, *Poverty in a Land of Plenty: Can Hartford Ever Recover?*, N.Y. TIMES (Aug. 26, 2002), https://www.nytimes.com/2002/08/26/nyregion/poverty-in-a-land-of-plenty-can-hartford-ever-recover.html.

[14] Flood, *supra* note 10.

[15] *See, e.g.*, *Our history*, AETNA, https://www.aetna.com/about-us/aetna-history.html (last visited May 30, 2022); *Travelers History*, TRAVELERS, https://www.travelers.com/about-travelers/travelers-history (last visited May 30, 2022); *A Legacy of Innovation and Social Commitment*, NASSAU, https://nfg.com/insurance-company-history.html (last visited May 30, 2022) (formerly Phoenix Mutual Life Insurance); *Our History*, THE HARTFORD, https://www.thehartford.com/about-us/insurance-history (last visited May 30, 2022); *The History of HSB*, HARTFORD STEAM BOILER, https://www.munichre.com/hsb/en/about-hsb/hsb-group/history.html (last visited May 30, 2022) (Hartford Steam Boiler, now under Munich Re).

[16] Ackerman Interview, *supra* note 8, at 7.

[17] *Fifty Students Start Law Course: New Hartford College Begins Sessions with Outline of Work*, HARTFORD COURANT, Oct. 26, 1921, at 20.

[18] *See, e.g.*, THE HARTFORD COLLEGE OF LAW: CATALOG AND LIST OF STUDENTS 1936–1937, 19 (1936) (on file with the UConn Thomas J. Dodd Research Center) (listing George Lillard teaching Property I, Pleading and Procedure I, Persons, and Crimes in 1936–37).

[19] *Fifty Students Start Law Course*, *supra* note 17.

legal field.[20] The seven women admitted were a mix of schoolteachers and employees of the Hartford-based insurance companies.[21]

Hartford College of Law taught classes five nights per week and required its students to commit ten to fourteen hours of schoolwork each week.[22] The program was originally three years long[23] and included staple courses in its curriculum like contracts, criminal law, and property.[24] By 1929, the school witnessed an enrollment of 110 students—twenty-five of whom were women.[25] In 1931, Hartford College of Law began complying with the American Bar Association's new requirement that students had to have completed at least two years of college study to be admitted into law school.[26] Then in 1935, the school established its day division program.[27]

The school's first fifteen years saw steady progress, including a special charter from the state,[28] accreditation from the American Bar

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[20] *Women Enroll for Study of Law: Several Included in Class of Fifty in Hartford College*, HARTFORD COURANT, Oct. 25, 1921, at 8.

[21] *Id.*

[22] *Fifty Students Start Law Course*, *supra* note 17.

[23] The curriculum for the evening division was later changed from three to four years. *See* JOSEPH LAPLANTE, UNIVERSITY OF CONNECTICUT LAW SCHOOL DEDICATION, MAY 1, 1964 (1964) (available at: https://library.law.uconn.edu/about-archives-special-collections-law-school-archives/university-connecticut-law-school-dedication) ("[T]he administration concluded that the volume of work necessary for graduation required more than three years' work for most students and consequently changed the curriculum to coverage four eight-month years.").

[24] *Fifty Students Start Law Course*, *supra* note 17.

[25] *Hartford Law School Opens Fall Session: Twenty-Five Women Listed in Enrollment of 110–Classes Held Four Nights a Week*, HARTFORD COURANT, Sept. 18, 1929, at 6.

[26] *Hartford College of Law and Hartford College of Insurance Advertisemen*t (Hartford radio broadcast Sept. 8, 1940) (on file with author).

[27] LAPLANTE, *supra* note 23. *See* THE HARTFORD COLLEGE OF LAW, ANNOUNCEMENT 1934–1935, 4 (1934) (on file with the UConn Thomas J. Dodd Research Center) ("As soon as sufficient demand develops the College is ready to add a regular three-year full-time day-school course."); THE HARTFORD COLLEGE OF LAW, CATALOG AND LIST OF STUDENTS 1935–1936, 7–8 (1935) (on file with the UConn Thomas J. Dodd Research Center) (including separate sections for day school and evening school).

[28] An Act Incorporating The Hartford College of Law, 1925 Conn. Spec. Acts 292.

Association,[29] and forming a Board of Trustees that included leaders of the insurance industry and the city's most prominent law firms.[30] Chief among the Board members was William Brosmith, Vice President and General Counsel of Travelers.[31] Brosmith was recognized nationally as one of the foremost insurance scholars in the country.[32] His dedication to the school and his leadership provided prestige and wise guidance as it built its reputation and the quality of its educational program.

The school was honored by the leadership of the state's legal and political establishments, as well as the insurance industry.[33] Governor Wilbur Cross spoke at the annual banquets of the school.[34] The school likewise saw the support of many judges, the state tax commissioner, and the leading law firms of the city, including Day, Berry & Howard; Robinson, Robinson & Cole; and Shipman & Goodwin.[35]

This support only went so far, however. The insurance and law firm leaders of the city rarely hired the graduates of the law school.[36] Hartford was still a place of social hierarchies in the early and mid-twentieth century.

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[29] The school was approved and accredited by the American Bar Association on September 18, 1933–the first day of the 1993 semester. Meeting Minutes, Bd. of Trs. of The Hartford Coll. of L. (Sept. 25, 1933) (on file with the UConn Thomas J. Dodd Research Center).

[30] *See generally* Meeting Minutes, Bd. of Trs. of The Hartford Coll. of L. (July 13, 1933) (on file with the UConn Thomas J. Dodd Research Center); Meeting Minutes, Incorporators of The Hartford Coll. of L. (July 15, 1925) (on file with the UConn Thomas J. Dodd Research Center); *Hartford Law School Opens Fall Session, supra* note 25, at 6.

[31] *Brosmith is Elected Chairman of Hartford Law College Trustees,* HARTFORD COURANT, July 14, 1993, at 4.

[32] *See* TRAVELERS PROTECTION AND AGENT RECORD, TRAVELERS 3–6 (1937) (on file with the UConn Thomas J. Dodd Research Center).

[33] *See, e.g., Law College Wins Praise of Speakers: School Lauded for Keeping Ideal of Public Service Before Students, Graduates*, HARTFORD COURANT, May 5, 1939, at 12 (noting several speakers, including Insurance Commissioner, John C. Blackall).

[34] Roger W. Davis, President, Hartford Coll. of L., Remarks on Founder's Day on the Occasion of the Unveiling of a Portrait of George William Lillard (Oct. 20, 1948) (transcript available at: https://library.law.uconn.edu/about-archives-special-collections-law-school-archives/history-hartford-college-law) [hereinafter Roger Davis Remarks].

[35] *Id.*

[36] Telephone Interview with Robert Fiondella, former Chief Exec. Officer, Phoenix Life Ins. (Oct. 29, 2021) [hereinafter Fiondella Interview].

The legal departments of Hartford-based insurance companies, like the leading law firms, sought out employees with Yale and Harvard law degrees. The histories that the major insurance companies of the city published in the twentieth century omit references to Hartford College of Law.[37] Ironically, many insurance employees attended the law school—especially in its evening program—and advanced their careers with their legal training despite many of them not starting their careers in the insurance companies' legal departments.[38]

An exception to this is the story of Hugh Campbell, who later became the General Counsel of Phoenix Mutual Life Insurance Co. ("Phoenix Mutual"). Campbell came from a modest background—son of a plumber and graduate of Hartford Public High School.[39] He was a day (non-boarder) student at Trinity College and, upon graduation, paid a deposit to attend Yale Law School.[40] But this was 1932, and he did not have the funds for Yale's tuition, so he forfeited his Yale deposit and enrolled in the Hartford College of Law, where he eventually graduated in 1937.[41] After graduating, he saw an advertisement for a law clerk position at Phoenix Mutual and "camped out" on their doorstep until they finally gave him the job.[42] Campbell did not forget the value of Hartford College of Law's education, later hiring Robert "Bob" Fiondella, J.D. '68, who eventually succeeded him as General Counsel.[43] Fiondella felt that Phoenix Mutual and Connecticut Mutual were the only two insurance companies that were open to the law school's graduates prior to the 1970s.[44]

II. SUCCESS AND CRISIS

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[37] *See* sources cited *supra* note 12.

[38] For example, Morrison Beach, a UConn Law graduate, was hired by Travelers as an Assistant Actuary in 1939 and worked his way up to Chief Executive Officer and President in 1973 and 1974, respectively. *See Chairman Beach Retires After 42-Year Career; E.H. Budd Assumes Broadened Responsibilities*, TRAVELERS PROT., Feb. 1982, at 2; *Board Elects Mr. Wilkins Chairman, Names Mr. Beach President; Messrs. LaCroix, Resony Assume New Posts*, BULL., Jan. 14, 1971, at 1.

[39] Campbell Interview, *supra* note 3, at 1.

[40] *Id.* at 2.

[41] *Id.* at 2, 4–5.

[42] *Id.* at 5.

[43] *Id.* at 21.

[44] Fiondella Interview, *supra* note 36.

By the end of the 1930s, the leaders of the Hartford College of Law and its supporters in the industry had achieved a high level of confidence in its future. This led the school to look for a permanent home in the form of a building that it could own, having previously occupied rented space in downtown Hartford, and then in the Kindergarten Building of the West Middle School, located in Hartford's Asylum Hill neighborhood.[45] Owning its quarters would convey the sense of permanence that the school was ready to assume. This goal was bolstered by the emergence of a companion school, the Hartford College of Insurance.[46] The two had some board members in common and shared some curricula.[47] The law school's leadership undertook

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[45] Roger Davis Remarks, *supra* note 34.

[46] *See* Interview by Edwin Tucker with Harlan S. Don Carlos, Professor, Hartford Coll. of L., in Hartford, Conn. (July 29, 1968), at 1 (transcript on file with the UConn Thomas J. Dodd Research Center) [hereinafter Don Carlos Interview]:

> At the time, we began discussing a College of Insurance to go along with the College of Law, and upon the same general basis of teaching, not so much by professor as by practicing lawyers in the Law School and practical and experienced junior executives in the Insurance College.

THE HARTFORD COLLEGE OF INSURANCE, ANNOUNCING THE HARTFORD COLLEGE OF INSURANCE (date reference 1939–41) (on file with the UConn Thomas J. Dodd Research Center):

> Known as the Hartford College of Insurance, this new and unique institution, a non-profit, tax-exempt corporation, in cooperation with the Hartford insurance companies and the Hartford College of Law, is offering for the first time in this country a complete and practical training for an insurance career, geared to the standard academic regulations of colleges and universities, and leading to the Bachelor's Degree.

[47] *See Bill Signed for College of Insurance: Local Institutional Will Be First Degree-Granting, Post-Graduate School on Subject in Nation*, HARTFORD COURANT, May 16, 1939, at 1; *Board Named for College of Insurance: 18 Leading Executives to Act As Advisers, Help in Administration of New Local School*, HARTFORD COURANT, June 28, 1939; THE HARTFORD COLLEGE OF INSURANCE, supra note 46; HARLAN DON CARLOS, THE HARTFORD COLLEGE OF INSURANCE BINDER (date reference 1939–41) (listing officers, executive committee, and board of trustees) (on file with the UConn Thomas J. Dodd Research Center); THE HARTFORD COLLEGE OF LAW: CATALOG AND LIST OF STUDENTS 1939–1940, 4–5 (1939) (on file with the UConn Thomas J. Dodd Research Center).

a fundraising campaign to purchase their new building at 39 Woodland Street, Hartford, Connecticut.[48] The major insurance companies of Hartford challenged each other and collectively raised half of the $50,000 needed to purchase and occupy the building; the other half was raised with the help of 462 individual donors.[49]

39 Woodland Street[50]

In the fall of 1940, the Hartford College of Law moved into its new quarters.[51] It furnished the building, a former residence, to house classes and offices, and built out its law library, led by Caroline Lillard.[52] The future looked bright for the school. Its connections with the insurance industry were deep, reflecting the wide support in teaching and leadership from the industry.[53] At the same time, the presence of the Hartford College of

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[48] Roger Davis Remarks, *supra* note 34.

[49] Don Carlos Interview, *supra* note 46, at 1–2; *Two Colleges Today Take Jacobus Site: Insurance Law Schools to Alter Woodland Street Property for Class Use in Fall*, HARTFORD COURANT, June 20, 1940, at 1; Roger Davis Remarks, *supra* note 34.

[50] Photograph of 39 Woodland Street, *in* NEWMYER & KHALIL, *supra* note 4, at 1.

[51] Roger Davis Remarks, *supra* note 34; Don Carlos Interview, *supra* note 46, at 2.

[52] *See* Don Carlos Interview, *supra* note 46, at 1–2; Ackerman Interview, *supra* note 8, at 5; A Call and Agenda for a Meeting of the Board of Trustees, Bd. of Trs. of The Hartford Coll. of Ins. (Dec. 20, 1940) (on file with the UConn Thomas J. Dodd Research Center) (recommending that Caroline E. Lillard "be appointed Librarian of the College").

[53] *See Spellacy Urges Law, Insurance Colleges Support: Calls $50,000 Campaign to Purchase Home 'of Vital Importance'*, HARTFORD COURANT, May 19, 1940, at 4:

Insurance in the building enhanced its role as a center of educational attainment. What no one anticipated in 1940, however, was that the war raging in Europe would soon reach America and dramatically change the country's labor market and university enrollments.

Within months of the declaration of war in December 1941, most of the day division students had enlisted and departed from the school, as had some of the part-time faculty.[54] While most of the female students and the older evening division students remained, they would not provide sufficient tuition revenue to cover the school's costs.[55]

A. A NEW NAME AND A NEW IDENTITY

Fate intervened to provide a new lease on life for the law school. In a story well told in our companion history, *Hard Times and Best of Times*,[56] a happenstance conversation during a train ride to New York led to discussions between Hartford College of Law and the University of Connecticut ("University") about merging the law school into the University.[57]

> This institution has now added to the law college the Hartford College of Insurance. This city is the home of 44 insurance companies. Many thousands of our citizens earn their livelihood in the home office of these companies. This school is the first post-graduate school in this country to devote a complete training of university grade in the field of insurance. That such an institution is essential is demonstrated by the fact that every insurance company in Hartford is taking a practical interest in this new college.

[54] "By the end of the war, there were only twenty-nine students enrolled." NEWMYER & KHALIL, *supra* note 4, at 5–6. As compared to the 170 to 175 students enrolled prior to the war. *See* Don Carlos Interview, *supra* note 46, at 6.

[55] *See* Don Carlos Interview, *supra* note 46, at 6; NEWMYER & KHALIL, *supra* note 4, at 5–6 ("Had it not been for the evening division, which continued during the war years, the school would surely have folded."). The school was not at risk of losing its home as the new building on Woodland Street had been purchased without a mortgage loan due to the successful fundraising campaign. *See* Don Carlos Interview, *supra* note 46, at 1–2; *Two Colleges Today Take Jacobus Site: Insurance Law Schools to Alter Woodland Street Property for Class Use in Fall*, *supra* note 49, at 1; Roger Davis Remarks, *supra* note 34.

[56] *See generally* NEWMYER & KHALIL, *supra* note 4.

[57] Don Carlos Interview, *supra* note 46, at 7.

The law school's leaders were concerned about a merger, however, due to the prospect of losing their independence.[58] They were especially worried that the University might diminish the law school's traditional role of providing an avenue for social and economic advancement to those otherwise unable to advance in the profession and in the insurance companies of the city.[59] These concerns were addressed at a key joint meeting of the Boards of Trustees of the Hartford College of Law and Hartford College of Insurance on August 24, 1942.[60] Present at this meeting was an assortment of the leading figures of the legal profession and insurance companies.[61] Some of the schools' leadership felt hesitation in the prospect of becoming an employee of the University, including then-Dean Edward Baird, who did not attend the meeting.[62] But the weight of opinion in the room was that the schools had little choice and needed to join with the larger institution in order to survive.[63]

The terms of that survival, however, were open to negotiation. The President of the University was Albert Jorgenson, who did much to transform it from an agricultural college into a center of research and teaching.[64]

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[58] Ackerman Interview, *supra* note 8, at 4.

[59] *See, e.g.*, Joint Meeting, Bd. of Trs. of Hartford Coll. of L. & Bd. of Trs. of Hartford Coll. of Ins. 2 (Aug. 24, 1942) (on file with the UConn Thomas J. Dodd Research Center) [hereinafter Joint Meeting of the Boards of Trustees] (noting one insurance company's "favor of the general proposition, but wished to make sure that the University of Connecticut would carry on the policies of the College of Insurance in such a way as to attain the purposes for which the College was founded.").

[60] *See generally id.*

[61] *See id.*; Ackerman Interview, *supra* note 8, at 3–4.

[62] Originally the Joint Boards proposed that the Colleges be leased to the University for a short duration, only to be returned thereafter. *See* Joint Meeting of the Boards of Trustees, *supra* note 59, at 2; Ackerman Interview, *supra* note 8, at 3–4. This was ultimately denied by the University. *See id.* at 4 ("If you want to become part of the University of Connecticut family, you'll have to give up the Colleges of Law and Insurance and join the university.").

[63] Joint Meeting of the Boards of Trustees, *supra* note 59, at 1 ("[I]t is the sentiment of the Board[s] . . . that the purpose for which both institutions were founded will be best served in the future by both Colleges being operated by the University of Connecticut . . . .").

[64] Laurence J. Ackerman, *A Sentimental Journey: The Law School Joins the University*, STARR REP. (Univ. of Conn. L. Sch. Alumni Ass'n, Hartford, Conn.), Summer 1984 (transcript available at: https://library.law.uconn.edu/about-archives-special-collections-law-school-archives/sentimental-journey).

Jorgenson could see the benefits to the University of having a law school. He discussed those benefits with Lawrence Ackerman, then-dean of the University's School of Business.[65] Jorgenson had even suggested to Ackerman that if the Hartford College of Law was unwilling to join the University, then it would establish a law school of its own in Storrs, Connecticut.[66] Ackerman urged Jorgenson to be flexible, emphasizing the benefits of the support the law school currently enjoyed in Hartford.[67]

The negotiations eventually succeeded in a phased merger. Hartford College of Law and Hartford College of Insurance ("Colleges") would undergo a trial period of sorts under the operation of the University for one year starting on September 1, 1942.[68] The Colleges lent the entire 39 Woodland Street property to the University at no expense, provided that the University would bear all costs to operate and maintain the Colleges over the year.[69] Meanwhile, the Colleges would then submit to the Connecticut General Assembly for approval of its proposal to lease its assets to the University for a five-year period.[70] That would allow the institutions to explore the workability of a permanent merger. If successful, at the end of the five-year period the institutions would fully merge, and the law school would become the University of Connecticut School of Law.[71]

There were two conditions that the law school included in the arrangement, both crucial to the school's continuing engagement with the

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[65] *See* Ackerman Interview, *supra* note 8. *See also* Letter from Roger Davis, Hartford Colls. of L. & Ins., Albert Jorgensen, President, Univ. of Conn., to the Univ. of Conn. Bd. of Trs. (Sept. 3, 1942) (on file with the UConn Thomas J. Dodd Research Center) [hereinafter 1942 Letter].

[66] Ackerman Interview, *supra* note 8, at 4.

[67] *Id.* at 4–5 ("[I]n my opinion we've got a library, we've got a faculty, we've got a reputation in the community— we can get a lot of support from the community. It would be ridiculous for us to start a school and start competing with them.").

[68] 1942 Letter, *supra* note 65, at 1.

[69] *Id.* at 2.

[70] CONN. GEN. STAT. § 450g (1943) (effective June 1, 1943).

[71] 1942 Letter, *supra* note 65, at 2. *See also* Ackerman Interview, *supra* note 8, at 5 ("[L]egislation was passed, transferring the ownership of the Colleges of Law and Insurance to the University of Connecticut."); CONN. GEN. STAT. §§ 449g–452g (1943) (effective June 1, 1943). Both Colleges were acquired by the University of Connecticut but were separated. *See* Ackerman Interview, *supra* note 8, at 20 ("They always remained in Hartford, both the School of Law and the College of Insurance, but they were controlled out of Storrs. They were separated as a result of the accreditation problem in the law school.").

insurance industry. The first was that it would maintain its evening division.[72] The second was that it would remain in Hartford.[73] These two points enabled the law school to preserve its accessibility to the employees of the insurance industry, who could earn a law degree while continuing their daytime employment. Hundreds of students could now become lawyers, even while working as their families' breadwinners. This advanced the school's founding mission as a path for social and economic advancement. With these terms agreed to the interim period of affiliation was successful, and in 1948 the Hartford College of Law became the University of Connecticut School of Law.[74]

The years following the affiliation with the University of Connecticut were a time of growth. With Congress's passage of the G.I. Bill, students who had departed to enlist during the war now returned and filled the classrooms, thanks to federal tuition support.[75] UConn Law went from a graduating class of four in 1944, and one in 1945, to sixty-five in the class of 1951.[76] It also made a notable contribution to the advancement of insurance lawyers starting in 1977 when it began the Hartford Insurance Institute[77]—an annual program featuring national authorities on insurance law—drawing audiences of new attorneys in the corporate law departments of the local insurance companies.[78] But UConn Law was not yet a school with national prominence; nor had it yet realized its full potential as a leading center for the teaching and study of insurance law.

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[72] Ackerman Interview, *supra* note 8, at 4.

[73] *Id.*

[74] *History*, *supra* note 1.

[75] University of Connecticut School of Law, American Bar Association Reaccreditation Inspection I–2 (May 1992) (unpublished self-study) (on file with UConn Thomas J. Dodd Research Center) [hereinafter ABA Reaccreditation Inspection].

[76] *See* UNIVERSITY OF CONNECTICUT SCHOOL OF LAW, 2008 DIRECTORY OF GRADUATES 204–05 (2008) (on file with the UConn Thomas J. Dodd Research Center).

[77] *See* ABA Reaccreditation Inspection, *supra* note 75, at XII-1, XII–2; UNIVERSITY OF CONNECTICUT SCHOOL OF LAW, SIXTH ANNUAL INSURANCE INSTITUTE (1982) (on file with UConn Thomas J. Dodd Research Center).

[78] ABA Reaccreditation Inspection, *supra* note 75, XII–2, XII–3 (noting forty-eight new attorneys and thirty academics attended the First Annual Insurance Institute in 1977).

III. BECOMING A NATIONAL LAW SCHOOL

Major changes were underway at UConn Law during its first several decades as part of the University of Connecticut. In 1967, after years under the leadership of members of its own faculty, UConn Law reached out to Harvard Law School to recruit Howard Sacks as its new dean.[79] Dean Sacks envisioned a bigger future for UConn Law and saw the importance of clinical education, which made UConn Law a pioneer in the field.[80] When Dean Sacks stepped down in 1972,[81] the search for his successor represented a turning point for the school. While some envisioned a return to its role as a local institution, key people on the search committee believed that the school's proper destiny was as a national law school.[82] Accordingly, they hired Phillip Blumberg, a former Wall Street lawyer and corporate executive who had left to teach at Boston University School of Law.[83]

A. PHILLIP BLUMBERG

Dean Blumberg brought a vision and an energy that UConn Law had never seen. He set about recruiting a new kind of faculty—individuals whose scholarly reputation would be known and respected throughout the country.[84] And he succeeded, building a faculty that, to this day, earns the respect of

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[79] *See* KENT NEWMYER & TATYANA MARUGG, BORN FIGHTING: CLINICAL EDUCATION AT THE UNIVERSITY OF CONNECTICUT SCHOOL OF LAW 2 (2020).

[80] *Id.*

[81] *See id.* at 15–17; Jeanne Leblanc, *Remembering Former UConn Law Dean Howard Sacks*, UCONN TODAY (Feb. 26, 2018), https://today.uconn.edu/2018/02/remembering-former-uconn-law-dean-howard-sacks.

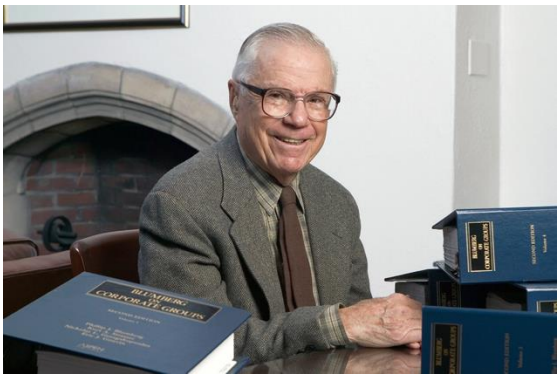
[82] *See* Interview by R. Kent Newmyer & Bruce M. Stave with Phillip I. Blumberg, Acting Dean from 1974–1984, Univ. of Conn. Sch. of L., in Hartford, Conn. (Sept. 24, 2009), at 33–36 (transcript on file with author) (discussing the differing perspectives he encountered during his interview).

[83] *Id.* at 15.

[84] *See id.* at 35–36:

> I am interested in building a first-class law school. So, I wound up that when budgets permitted, I would have six new appointments. For faculty, it was then twenty-eight or so. This was extraordinary. And with those six appointments, I re-made the school. . . . Everybody talks about my contribution in getting our beautiful new campus. I think the six new faculty people played a more important role in the growth of the school.

peers at the top schools of the country.[85] With relentless effort and crucial support from UConn Law alumni in the Legislature, he also engineered the purchase of the new campus in Hartford's West End from the Hartford Seminary.[86] Admissions standards rose, and the school's rigorous curriculum was raising the school's profile throughout the profession. Gradually, UConn Law was becoming a fertile ground for recruiting the best new lawyers sought by the insurance industry and the elite law firms of the city.



Phillip Blumberg[87]

B. GROWING PROSPECTS FOR ALUMNI

The insurance companies were nearly a decade ahead of the leading law firms, hiring significant numbers of UConn Law graduates into their

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[85] *See id.* at 36–42 (listing Richard Pomp, Director of International Tax at Harvard Law School; Thomas Morawetz, Assistant Professor of Philosophy at Yale University; Carol Weisbrod, Professor of Commercial Law at Western New England Law; John Brittain, Attorney; Loftus Becker, Professor of Constitutional Law at University of Minnesota School of Law).

[86] *See* Phillip I. Blumberg, *Report from the Dean*, STARR REP. (Univ. of Conn. L. Sch. Alumni Ass'n, Hartford, Conn.), Winter 1977, at 1 (on file with author).

[87] Photograph of Dean Phillip Blumberg, *in* Jeanne Leblanc, *In Memoriam: Phillip I. Blumberg, Former UConn School of Law Dean*, UCONN TODAY (Feb. 19, 2021), https://today.uconn.edu/2021/02/in-memoriam-phillip-i-blumberg-former-uconn-school-of-law-dean/.

legal departments.[88] While Tom Groark, J.D. '65, and Sam Bailey Jr., J.D. '69, were the first UConn Law graduates to be hired at Day Pitney and Robinson & Cole in 1965 and 1969, respectively, it was not until 1980 that the top firms were hiring UConn Law graduates on a regular basis.[89] The insurance companies, in contrast, opened their doors sooner. Walter Welsh, J.D. '72, remembers a number of his classmates going to Aetna, The Hartford, and Connecticut Mutual.[90] In 1978, Marilda Gandara, J.D. '78, found that one-third of the lawyers in Aetna's legal department were women, and she was not even the first Latin-American lawyer hired there.[91] The Hartford's General Counsel, Michael Wilder, was familiar with the unfair barriers female lawyers faced—thanks in part to the experiences of his wife, Marjorie Wilder, J.D. '72—and was looking at UConn Law for talent to bring into The Hartford's legal department early on.[92]

The progressive vision of the Hartford-based insurance companies was reflected also in their cultures and leadership. Aetna, under its Chief Executive Officer, John Filer,[93] was a national leader in corporate civic responsibility.[94] Its initiative in local community development and advancing diversity among its outside counsel provided advancement opportunities to its women and minority lawyers.[95] Marilda Gandara, for example, moved up to leadership positions in Aetna's real estate investment portfolio and then to President of the Aetna Foundation.[96]

The work of lawyers is a central part of the insurance companies' operations. In the words of Walter Welsh, "[t]he insurance company lawyers, as well as the actuaries, are like the engineers in a manufacturing

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[88] Telephone Interview with Marilda Gandara, President, Aetna Found. (Dec. 6, 2021) [hereinafter Gandara Interview]; Telephone Interview with Michael Wilder, retired General Counsel, Hartford Ins. Grp. (Jan. 5, 2022).

[89] Telephone Interview with Dick Tomeo, Retired Partner, Robinson & Cole (Oct. 26, 2021).

[90] Telephone Interview with Walter Welsh, Adjunct Professor, Univ. of Conn. Sch. of L. (Dec. 2, 2021) [hereinafter Welsh Interview].

[91] Gandara Interview, *supra* note 88.

[92] *Id.* (describing her summer internship experience at The Hartford as positive).

[93] *John H. Filer, 70, Philanthropist and Former Chairman of Aetna*, N.Y. TIMES (Sept. 20, 1994), https://www.nytimes.com/1994/09/20/obituaries/john-h-filer-70-philanthropist-and-former-chairman-of-aetna.html.

[94] Gandara Interview, *supra* note 88.

[95] *Id.*

[96] Patricia Seremet, *She's Putting More Chairs at the Taable (sic) Diversifying the Seats of Power is Alfonso's Mission*, HARTFORD COURANT, June 8, 1999, at D1.

company."[97] After all, the products of an insurance company are contracts: agreements on how to apportion risk in the event of certain events.

The lawyers are the ones responsible for the design of those contracts to assure that they will function as intended. And as society becomes more complex and businesses engage in ever more novel ventures, these contracts must evolve through creative legal work. Over the decades more lawyers were needed to deal with the multiple regulatory schemes of different states, the tax implications of their products, and securities law governing their products and capital structure. Insurance companies needed lawyers who had not only technical skill but also a grasp of how the law evolves over time to changed conditions like these. That put a premium on hiring lawyers whose education went beyond teaching the rules of the law to a grasp of the internal dynamics of the legal system, and the way that new rules are developed to address new problems.

C. BOB GOOGINS

Robert "Bob" Googins had no family or personal connection with insurance when he started college.[98] He entered the University of Connecticut in Storrs, Connecticut, in 1954 as a freshman in the Business School where he was exposed to insurance courses.[99] It turned out to be a good fit, and he chose to major in the subject.[100] Upon graduation he landed a summer job at Connecticut Mutual Insurance Co. ("Connecticut Mutual") thanks to a referral from a Business School professor.[101] As a result, by the time Googins entered UConn Law in 1958, he saw a career in insurance ahead of him. He performed well, eventually graduating first in his class.[102] Meanwhile, he returned to Connecticut Mutual for both his summers during law school and was offered a job in its legal department at graduation.[103] Before accepting, however, a law professor suggested that given his academic performance, he should interview with one of the top Hartford law

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[97] Welsh Interview, *supra* note 90.

[98] Interview with Robert Googins, Founder, Univ. of Conn. Ins. L. Ctr., Former Professor, Univ. of Conn. Sch. of L., in Hartford, Conn. (Nov. 16, 2021), at 1–2 (transcript on file with author) [hereinafter Googins Interview].

[99] *Id.*

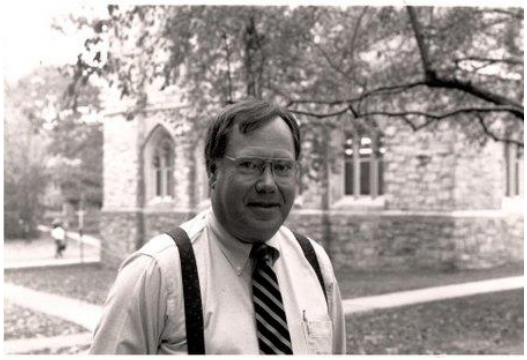
[100] *Id.*

[101] *Id.* at 3.

[102] *Id.*

[103] *Id.* at 2–3.

firms, Robinson, Robinson & Cole.[104] Googins did so, but could tell that the interviewing partner—who talked mostly about competition between the firm's Harvard and Yale law graduates—was not very interested.[105]



Robert "Bob" Googins[106]

In 1961, Googins started his full-time career in Connecticut Mutual's legal department.[107] But he was back at UConn Law within three years, when the long-time adjunct professor of insurance law, Wendell Brown, passed away.[108] The school remembered Googins' excellence as a student, and sensed his prospects as an alumnus. So in 1964, Googins began a forty-two year career teaching insurance law at UConn Law, beginning as an adjunct professor while maintaining his employment at Connecticut Mutual until 1988.[109] He taught the core Insurance Law course (Principles of Insurance) in the evening division, drawing a mix of day and evening-division students.[110] Most of them did not go on to careers with insurance companies, but took the class, he found, recognizing the importance of insurance in so many other industries.[111] But many other students were

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[104] *Id.* at 4.

[105] *Id.*

[106] Photograph of Robert Googins, UCONN L. LIBR. (date reference 1992) (on file with the UConn Law Library).

[107] Googins Interview, *supra* note 98, at 5.

[108] *Id.*

[109] *Id.* at 5–7.

[110] *Id.*

[111] E-mail from Robert Googins, Founder, Univ. of Conn. Ins. L. Ctr., Former Professor, Univ. of Conn. Sch. of L., to Timothy Fisher (Jan. 15, 2022, 4:13 PM) (on file with author).

already working in the local insurance companies and hoping, like those of generations before, to advance their careers with law degrees.

One such student was Robert Fiondella, J.D. '68, who was working at Travelers, building on what was then the cutting-edge concept of computerization of policy records.[112] He entered UConn Law and graduated in 1968, when like others, he found that the doors of the large law firms were closed to people of his background.[113] But the General Counsel of Phoenix Mutual, Hugh Campbell, saw Fiondella's potential and added him to its legal department in 1969.[114] Fiondella rose quickly through the ranks at Phoenix Mutual, becoming General Counsel in 1978 and then advancing to Chief Executive Officer in 1994.[115] Along the way, he spotted other talent from UConn Law, including his eventual successor, Dona Young, J.D. '80.[116] Young worked for Fiondella during her second-year summer and then joined Phoenix Mutual's legal department in 1980,[117] eventually rising to take over as Chief Executive Officer from Fiondella in 2003.[118]

Around the same time that Googins was busy cultivating the role that insurance would play in the future of UConn Law, the role that the College of Insurance had played for over twenty-three years was fading.[119] In 1963, even though the College of Insurance, operated by the University, was thriving, there had been an increasing amount of insurance companies seeking business school graduates, rather than insurance college graduates for positions in the industry.[120] Bob Harvey, Lawrence Ackerman's successor as dean of the University of Connecticut's Business School,

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[112] Fiondella Interview, *supra* note 36.

[113] *Id.*

[114] *Id.*

[115] Diane Levick, *Phoenix Names Fiondella to Top Job*, HARTFORD COURANT (Dec. 22, 1993, 12:00 AM), https://www.courant.com/news/connecticut/hc-xpm-1993-12-22-0000000405-story.html.

[116] Fiondella Interview, *supra* note 36.

[117] *Id.*

[118] Diane Levick, *Will Phoenix Finally Rise?*, HARTFORD COURANT (Mar. 2, 2003, 12:00 AM), https://www.courant.com/news/connecticut/hc-xpm-2003-03-02-0303020503-story.html.

[119] *See* Ackerman Interview, *supra* note 8, at 15 ("It was tremendous in the law school. The applications just came in torrents. It was a cascade of applications, rushing into that school all the time. The College of Insurance, I would say, was more or less stable; it didn't really grow too much.").

[120] *Id.* at 16–17.

recognized the waning interest of insurance college graduates was perhaps due to the ability of students to major in insurance during their undergraduate years, to then be hired upon graduation.[121] Almost all of the students at the College of Insurance were already employees of insurance companies at a time when those companies were seeking new talent.[122] Accordingly, the College of Insurance was quietly run down under Harvey's post,[123] which left an opportunity for UConn Law to replace the College of Insurance as a center for academic and professional contributions to the field of insurance.

IV. BOB GOOGINS' VISION

As Googins watched the prospects of UConn Law and its students rise, he began to imagine a bigger role for the school in insurance. Geography made that a likely goal, while at the same time the school's growing reputation was establishing a platform from which it could be realized. He also had the support of the school's leadership. Both Dean Blumberg and his successor George Schatzki were working with the Law School Foundation to build endowments that could support an enhanced insurance program.[124] Dean Schatzki then prepared a proposal for a center on insurance law[125] at the start of his deanship in 1984.[126] But it was Bob Googins who brought the full vision, the energy, and the impressive industry contacts to make that possible. It was the late 1980s and Googins was preparing to retire from Connecticut Mutual, where he had become General Counsel in 1974.[127] He began conversations with UConn Law about joining the faculty as a full-time

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[121] *Id.*

[122] *Id.* at 16.

[123] *Id.*

[124] *See* Letter from George Schatzki, Dean from 1984–1990, Univ. of Conn. Sch. of L., to Thomas Dooley, Exec. Vice President, Cigna & Robert Rose, Gen. Couns., Cigna (Feb. 9, 1988) (on file with author) (soliciting gifts and pledges from Hartford insurance companies).

[125] The center was originally named the International Insurance and Commercial Law Center. *See* Memorandum from Dean Phillip I. Blumberg on Capital Fund Proposals of the School of Law to Vice President DiBenedetto and Development Director Bennett (Feb. 29, 1984) (on file with author) [hereinafter Blumberg Memorandum]. However, it was later to be called Insurance Law Center. *See* Googins Interview, *supra* note 98, at 9.

[126] *See* Blumberg Memorandum, *supra* note 125, at 1.

[127] Googins Interview, *supra* note 98, at 7.

member.[128] Hugh Macgill had been selected to become dean in 1990,[129] and he and Googins developed a position for Googins as a full-time member of the faculty—as professor and director of the new Insurance Law Center.[130]

Googins arrived and joined the full-time faculty in the fall of 1990 with a clear and audacious set of goals for the school.[131] He wanted to recruit insurance faculty from among the in-house and private practice lawyers who were experts in the field, and with them expand the insurance curriculum.[132] He envisioned a master's program that would attract lawyers back to school to further their education and credentials in insurance law.[133] He anticipated a series of conferences on legal issues of importance to multiple lines of insurance.[134] He saw the need for a tenured faculty position, held by someone who could bridge the gap between academic thought and the world of the insurance business.[135] With this, he also noted that a growing insurance law collection would require a librarian, and that a student-run insurance law journal would foster student involvement in insurance academia.[136] And finally, he saw that achieving this grand plan would require extra funding beyond what the school could carry in its annual budget.[137]

In all these proposals he had the enthusiastic support of Dean Macgill, who saw the potential to raise UConn Law's national profile while reinforcing its local ties. That support included multiple levels: founding of the Insurance Law Center, approval for the hiring of an Insurance Law Center support team, and both internal and external advocacy for such an effort.[138]

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[128] *Id.* at 9.

[129] Jeanne Leblanc, *In Memoriam: Hugh Macgill, Former UConn School of Law Dean*, UCONN TODAY (Feb. 14, 2022), https://today.uconn.edu/2020/02/memoriam-hugh-macgill-former-uconn-school-law-dean/.

[130] Googins Interview, *supra* note 98, at 9 ("I, of course, was not on a tenured track. I was still teaching my courses, and I was brought in on a full-time basis to develop and bring to fruition this concept of the Insurance Law Center.").

[131] *Id.* at 8–10.

[132] *Id.* at 9–10.

[133] *Id.* at 16–17.

[134] *Id.* at 10.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 10–11.

[138] *Id.* at 9–10.

After joining the full-time faculty in 1990, Googins had just started the implementation of his vision when he got an unanticipated phone call from the Governor's office. Lowell Weicker had been elected Governor in November 1990, in a surprise victory running on a third-party ticket.[139] His electoral success without party backing put Weicker in the unusual position of owing few debts to party regulars.[140] Therefore, he set about looking for a team distinguished by independence and integrity above partisan loyalty. That is what he saw in Googins when he asked Googins to serve as Connecticut's Insurance Commissioner.[141] Googins accepted, on the condition that he could continue teaching at UConn Law for the duration of his service as Commissioner, with the plan to return to the full-time position thereafter.[142]

True to form, in 1993 Weicker announced he would not run for reelection and released Googins to depart prior to the end of his term.[143] Googins returned to UConn Law and picked up in earnest where he had left off. Moving forward on all fronts, Googins made quick progress.

A. THE CONNECTICUT INSURANCE LAW JOURNAL

Googins found a pleasant surprise when he resumed his role as full time director. A group of students had already gathered and approached the faculty about creating a new insurance law journal.[144] Led by Jonathan Starble, J.D. '95, the journal's first Editor-in-Chief, they approached Dean

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[139] *Id.* at 11; *Connecticut: Gov. Lowell P. Weicker*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/lowell-p-weicker/ (last visited June 25, 2022).

[140] Googins Interview, *supra* note 98, at 11.

[141] *Id.* at 12.

[142] *Id.* at 13.

[143] *Id.* at 12; Kirk Johnson, *Weicker Rejects Re-election Bid In Connecticut*, N.Y. TIMES (Oct. 1, 1993), https://www.nytimes.com/1993/10/01/us/weicker-rejects-re-election-bid-in-connecticut.html.

[144] Googins Interview, *supra* note 98, at 15:

> It was part of the things that I was very interested in. And so I wanted very much to see it come to fruition. But the impetus for it was several students who wanted to have a journal. . . . And because I was not a part of the tenured faculty, the others stepped in and helped with respect to dealing with the editor and the associate editors and looking at proposed materials to go in it.

Macgill.[145] To their delight, Dean Macgill shared in the students' enthusiasm.[146] With the help of Julia Dunlop, the Director of Development, and guidance from the other two student journals, they proceeded.[147] Faculty was wholly supportive, and quickly approved the plan to create the Connecticut Insurance Law Journal ("CILJ").[148]

Jonathan Starble (left), CILJ Editor-in-Chief in 1995, with Alison O'Shea, CILJ Editor-in-Chief 2003[149]

The first volume included prominent authors who wrote articles specifically for CILJ's inaugural issue.[150] In 1999, CILJ's success was reflected in a ranking of sixth out of 100 specialized student law journals nationwide.[151] The students undertook a number of innovations in the early

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[145] Webex Interview with Jonathan Starble, Founding Editor-in-Chief, Conn. Ins. L.J. (Nov 12, 2021), at 1–2 [hereinafter Starble Interview].

[146] *Id.* at 2.

[147] *Id.* at 2–3.

[148] *Id.*

[149] TODD H. ROSENTHAL, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW: GRADUATE REPORT 4 (Julia B. Dunlop ed., 2003), http://www.starbleharris.com/site/assets/files/1034/alumni_report.pdf.

[150] For the inaugural issue of the Connecticut Insurance Law Journal see 1 CONN. INS. L.J (1995), https://cilj.law.uconn.edu/wp-content/uploads/sites/2520/2019/03/Vol1-95.pdf.

[151] Tracey E. George & Chris Guthrie, *An Empirical Evaluation of Specialized Law Reviews*, 26 FLA. ST. U. L. REV. 813, 831 (1999). See *also* ROSENTHAL, *supra*

years of the journal, including the introduction of peer review of articles in 2000[152] and publishing papers presented at UConn Law's insurance symposia.[153] Their stated goal was to "bridge the gap between academia and industry" with discussion of public policy as well as technical insurance law.[154]

B. BUILDING AN ENDOWMENT

Next, Googins turned to fundraising. He prepared the comprehensive Proposal for the Insurance Law Center ("ILC") to present to donors.[155] Then his first stop was his old company, Connecticut Mutual, which had already donated $200,000 to start the ILC endowment.[156] Over the next couple of years, two events coincided to raise the possibility of a substantial increase to the $200,000 donation. The first was that the Connecticut General Assembly passed the UConn 2000 Act, that provided capital funding not only for a substantial expansion of the Storrs campus, but also for matching funds for major gifts to the University's endowments.[157] The second was the 1995 announcement that Connecticut Mutual was negotiating a merger into a larger company to the north, Mass Mutual.[158]

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note 149, at 4; Starble Interview, *supra* note 145, at 12 (discussing the Florida State University Law Review's 1999 rankings of specialized law journals).

[152] *See* 7 CONN. INS. L.J. (2000), https://cilj.law.uconn.edu/wp-content/uploads/sites/2520/2019/03/Vol7.2-0001.pdf.

[153] For example, 5 CONN. INS. L.J. (1998) is one of the early Symposium volumes, containing papers presented on Jan. 7, 1998, at the Annual Meeting of the Association of American Law Schools in San Francisco, CA.

[154] Starble Interview, *supra* note 145, at 4.

[155] Googins Interview, *supra* note 98, at 10. *See* Memorandum from the Univ. of Conn. Sch. of L. on Proposal for the Ins. L. Ctr. (June 1996) (on file with the University of Connecticut School of Law Library).

[156] Googins Interview, *supra* note 98, at 11.

[157] 1995 Conn. Pub. Acts 230 (codified as CONN. GEN. STAT. §§ 10a-109a–109y (2019) ("The act creates a permanent endowment fund to encourage private donations to UConn for endowed professorships, scholarships, and program enhancements. It requires state matching grants for these private donations of up to $20 million over a three-year period."). *See also UConn 2000 Four Year Progress Report 1995–1999*, UCONN REPORTS, https://reports.uconn.edu/2015/02/13/four-year-progress-report-1995-1999/ (last visited May 30, 2022).

[158] *See* Diane Levick, *Connecticut Mutual Talks Merger*, HARTFORD COURANT (June 17, 1995, 12:00 AM), https://www.courant.com/news/connecticut/hc-xpm-1995-06-17-9506170221-story.html.

Googins and Dean Macgill went to David Sams, the new Chief Executive Officer of Connecticut Mutual, with a proposal.[159] If Connecticut Mutual would add another $400,000 to the endowment, the State would match it dollar for dollar, which when added to the original $200,000, would yield a principal endowment of $1,000,000.[160] That sum would be sufficient to establish a new endowed faculty position to be named the Connecticut Mutual Professor of Law.[161] Googins pointed out to Sams that with the impending merger, the company and its name would cease to exist.[162] The professorship, however, would ensure that the name would live on in perpetuity in an honored role.[163] The deal was done.[164]

With the major portion of the endowment in place, Googins then approached the other major insurance companies in Hartford. Phoenix Mutual, under Fiondella's leadership, made a major contribution; Hartford Steam Boiler gave a significant amount; and other companies contributed as well.[165] Some of the insurance companies, especially Phoenix Mutual, urged their outside law firms to donate.[166] By the time Googins finished his fundraising campaign, he had in place a principal sum of just over $2,200,000.[167] To this day, the ILC endowment remains the largest single endowment at UConn Law.[168]

This generous support enabled an acceleration of Googins' ambitious plans: the launching of a Master of Laws in Insurance Law; building an insurance law library collection; the hiring of staff to support those operations; and the hiring of a tenured professor of insurance to hold the Connecticut Mutual chair. Each plan—discussed separately below—proceeded apace.

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[159] Googins Interview, *supra* note 98, at 11.

[160] *Id.*

[161] *Id.* at 13.

[162] *Id.* at 11.

[163] *Id.*

[164] *Id.* at 11–13.

[165] *Id.* at 13.

[166] *Id. See also* Fiondella Interview, *supra* note 36.

[167] Email from Ronald Fleury, Senior Dir. of Dev., Univ. of Conn. Sch. of L., to Leah Smith (Feb. 8, 2022, 7:51 AM EST) (on file with author).

[168] *Id.*

C. THE CONNECTICUT MUTUAL PROFESSOR OF LAW

The hiring of a tenured professor was the crucial step, as such person would largely define the role of insurance among the tenured faculty of the school. This was not an easy task since many law professors, like the public at large, view insurance as a staid field, not recognizing its influence on the major social trends of the day. To the UConn Law faculty, insurance seemed to be an area where one might describe or explain the law, but not one where legal scholarship could change our understanding of society.[169] Tom Baker was to prove them wrong.

Baker was an Associate Professor at the University of Miami School of Law, spending a year on leave studying and teaching at Hebrew University in Jerusalem.[170] In late 1996, he published what is still a seminal work on the theory of insurance, *On the Genealogy of Moral Hazard*, staking his position as one of the most creative thinkers in the field of insurance law.[171] Baker heard of UConn Law's search for a tenured professor of insurance and responded.[172]

When Tom Baker came to Hartford for his interviews and job talk, the faculty readily saw that he was someone who thought outside the box. Baker certainly offered UConn Law the chance to be relevant to Hartford's largest industry and help students in their pursuit of the many employment opportunities around them. But beyond that, the faculty saw in Baker someone who could broaden their own thinking and heighten their awareness of the ways in which insurance, like all sharing of risk, underlies and structures a huge range of social relationships.

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[169] Telephone Interview with Carol Weisbrod, Professor Emerita, Univ. of Conn. Sch. of L. (Oct. 22, 2021).

[170] Interview with Tom Baker, William Maul Measey Professor of L., Univ. of Pa. Carey L. Sch. (Nov. 9, 2021), at 3 (transcript on file with author) [hereinafter Baker Interview].

[171] *Id.* at 5. *See* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

[172] Baker Interview, *supra* note 170, at 4.

Tom Baker[173]

When Tom Baker arrived in the fall of 1997, he set out two parallel sets of tasks: completing the process of building the ILC's programs and putting UConn Law at the center of a global conversation about the way that insurance, risk, and responsibility influence human behavior and institutions.[174] He succeeded tremendously at both.

The tasks facing Baker included the following programs not yet completed by the time of his arrival: (1) building an insurance collection in the UConn Law library that would be the most comprehensive in the English-speaking world; (2) launching a Master of Laws in Insurance Law that would draw lawyers from around the nation and the world; and (3) hosting conferences every semester that would bring the foremost thinkers and leaders in the field to the law school campus.[175]

D. THE INSURANCE LAW LIBRARY COLLECTION

Thanks to the ILC endowment that Googins built, Baker had the budget to build an insurance law collection. In 1998 UConn Law posted a hiring notice for the position, which came to the attention of Yan Hong, who was living with her husband, Hongjie Hong, in Burlington, Vermont, at the

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[173] Photograph of Tom Baker *in New Ideas in Insurance: Virtual Speaker Series*, UCONN SCH. OF L.: INS. L. CTR. (2022), https://ilc.law.uconn.edu/new-ideas-in-insurance.

[174] Baker Interview, supra note 170, at 6.

[175] *See generally id.*

time.[176] Hong had left her home province of Szechuan, China, to attend Brigham Young University for her undergraduate studies, and then found her way with her husband to Vermont where she was a government documents librarian at the University of Vermont.[177] When her husband was offered a position at the University of Connecticut Health Sciences Library, Hong applied for the ILC's librarian job.[178] She interviewed with Tom Baker and Darcy Kirk, UConn Law's library director and professor, who saw her clear potential.[179]

While Hong had no background in insurance, she was able to get up to speed quickly by taking some of the courses already offered at UConn Law.[180] She then took on the task of building the insurance law library which, at her arrival, had only the most basic insurance titles.[181] At Baker's direction, she set about locating and acquiring all newly published work in the different areas of insurance, including law practice, history, statistics, statutory, caselaw, and even fiction works based on insurance issues.[182] In the years since, she has moved the collection into the digital age by creating a website for the insurance collection that is still operating today.[183] She also shifted the collection over time to digital titles, e-books, etc.[184]

Hong continues to manage the purchasing and maintenance of an insurance law collection that has become globally renowned. As she says:

> [W]hen people think about insurance law research, they think about our law library. When they think about being trained as an insurance law attorney, they (sic) think about our LLM program. When they think about publishing insurance articles, they think about our insurance law journal. And when they have a good topic to talk about, they

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[176] Interview with Yan Hong, Dir. of Graduate Admissions & Dir. of Ins. L. Rsch., Univ. of Conn. Sch. of L. (Dec. 1, 2021), at 3 (transcript on file with author) [hereinafter Hong Interview].

[177] *Id.* at 2–3.

[178] *Id.* at 3.

[179] *Id.*

[180] *Id.* at 4.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 5. For the insurance collection see *Insurance Law*, UCONN SCH. OF LAW: THOMAS J. MESKILL L. LIBR., https://library.law.uconn.edu/insurance-law (last visited May 30, 2022).

[184] Hong Interview, *supra* note 176, at 5.

(sic) want to collaborate with us for a conference, for a symposium.[185]

Yan Hong[186]

E. LAUNCHING THE L.L.M. IN INSURANCE LAW

The next element of the ILC plan was a new degree program, the Master of Laws in Insurance Law ("L.L.M. in Insurance Law").[187] Googins knew the number of course offerings needed to fill a master's degree program and had started recruiting part-time adjunct faculty after he returned to full-time leadership of the ILC.[188] He recalled hoping to find enough teachers for six different courses in insurance.[189] Instead, Googins, Baker, and their team succeeded beyond expectations, with some thirty different insurance courses, along with over a dozen more courses on related issues in finance.[190] Just as the Hartford College of Law succeeded in its early

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[185] *Id.* at 16.

[186] Photograph of Yan Hong *in Directory*, UCONN SCH. OF L., https://law.uconn.edu/person/yan-hong (last visited May 23, 2022).

[187] UConn Law already offered a Master of Laws for foreign students, an L.L.M. in United States Legal Studies, which provided a template for the necessary academic regulations and registrar and bursar functions. For an overview of the current L.L.M. in Insurance Law see *Insurance Law LLM*, UCONN SCH. OF L. LLM PROGRAMS, https://llm.uconn.edu/programs/insurance-law/ (last visited May 30, 2022).

[188] Googins Interview, *supra* note 98, at 10.

[189] *Id.*

[190] *Id.* For list of courses, see *infra* app. B.

decades, thanks to the teaching by many leading lawyers, the same was true with the ILC's courses. The deep roster of insurance lawyers—many of them UConn Law alumni—employed by the insurance companies and law firms of Hartford, readily volunteered to teach evenings at the law school.[191] Over time, the reach went further with faculty from as far as Washington, D.C., and Houston, traveling to Hartford to teach.[192]

In recognition of its support from Phoenix Mutual, the program was named the Phoenix Master's Program in its initial years.[193] As anticipated from the start, it drew a mixture of part-time evening students who were already working in insurance, full-time students wishing to redirect their careers, and international students.[194]

Again, Yan Hong was crucial. While maintaining her role as the insurance law reference librarian, she became the Director of Graduate Admissions in 2015, and set about recruiting international students to the insurance and other L.L.M. programs.[195] UConn Law was easily the leading program in insurance law in the world, with far more offerings than any other school.[196] Consequently, it found no shortage of interest in many regions. One of the steadiest sources of students was China.[197] Naturally, Hong brought a significant advantage in recruiting, having lived there through her college years. She established partnerships with multiple law schools in China, especially Renmin University Law School, the highest ranked law school in China.[198] By co-sponsoring conferences with Renmin, UConn Law drew professors and other authorities from all around China to hear UConn Law faculty presentations and learn about its program.[199] All told, students from thirty-seven different countries have come to UConn Law for their

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[191] *Id.* at 16.

[192] *See, e.g.*, *John G. Buchanan III*, COVINGTON, https://www.cov.com/en/professionals/b/john-buchanan (last visited June 23, 2022); *Marcos A. Mendoza*, UCONN SCH. OF L., https://law.uconn.edu/person/marcos-mendoza/ (last visited June 23, 2022).

[193] ROSENTHAL, *supra* note 149, at 5. *See also* Googins Interview, *supra* note 98, at 13.

[194] *See* ROSENTHAL, *supra* note 149, at 5.

[195] Hong Interview, *supra* note 176, at 7–9; Email from Yan Hong, Dir. Graduate Admissions, Univ. of Conn. Sch. of L., to Leah Smith (June 22, 2022, 2:54 PM EST) (on file with author).

[196] Email from Yan Hong, *supra* note 195.

[197] *See infra* app. A.

[198] Hong Interview, *supra* note 176, at 8.

[199] *Id.*

insurance L.L.M.,[200] and the student body has consisted of roughly an equal number of domestic and international students.[201]

Around 300 students have earned their L.L.M. in Insurance at UConn Law since 1998.[202] They constitute a global alumni community that stays in touch with each other and the law school. They express overwhelmingly positive memories of their experience at UConn Law.[203] Indeed, many feel more affinity to UConn Law than they do to their home country undergraduate institutions.[204] They contribute to UConn Law's global recognition as a force in insurance.

F. CONFERENCES

After the CILJ, the insurance law library collection, the expanded course offerings, the L.L.M. in Insurance Law, the endowment, and the hiring of the Connecticut Mutual Professor, the seventh and final element of the grand plan for the ILC was a series of conferences on insurance. Since beginning in 1997, these conferences have explored the role and the workings of insurance in myriad ways and became the place where leading insurance scholars heard and debated each other's ideas.[205] They have included, for example: privatization of social security; the medical malpractice crisis; insuring catastrophic losses; cyber liability; climate change; big data; and federalism in international law and the globalization of financial services.[206] All conferences examine the balancing of security, risk, and personal responsibility, along with the balancing of public regulation against unfettered experimentation and competition.

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[200] *See infra* app. A.

[201] Hong Interview, *supra* note 176, at 9, 15.

[202] *Id.* at 15. *See also infra* app. A (listing 269 graduates since 2000).

[203] *See generally* Hong Interview, *supra* note 176.

[204] Conversations between Timothy Fisher and alumni at gatherings in Berlin, Germany and Beijing, China.

[205] Appendix C to this history gives a list of the conferences sponsored by the ILC over the years, and Appendix D lists the tables of contents of the CILJ. Together those indicate the richness of the field, and the fundamental role that insurance concepts play in society.

[206] *See infra* app. C.

G. FILLING OUT THE TEAM

When Tom Baker arrived in 1997, Bob Googins was not the only faculty member on hand to support the ILC. In 1992, UConn Law had hired John Day as its first Professor-in-Residence.[207] Day had retired from a long and illustrious career in insurance, having served as Senior Vice President and Chief Counsel of CIGNA, President of the Insurance Association of Connecticut, in addition to serving in the federal administration early in his career and teaching at York University's Osgoode Hall Law School in Toronto.[208] Day taught several insurance courses, including while Googins was serving as Insurance Commissioner.[209]

A job posting also led to the reuniting of Baker with his Harvard Law School classmate Peter Kochenburger, who arrived in 2004 following an eleven-year career at Travelers.[210] In addition to his faculty responsibilities of teaching insurance law and creating new online courses for distance learning, Kochenburger took on the role as Director of Graduate Programs, with primary responsibility for recruiting and coordinating adjunct faculty, as well as placing students in externships.[211] Along the way he achieved prominent roles in the regulatory community, including serving for over a decade as the Consumer Representative for the National Association of Insurance Commissioners.[212]

An impressive array of faculty coalesced around the exploration of risk and responsibility and furthered UConn Law's reputation nationally and globally as the center of the best thinking in the field.[213] Many of the full-time faculty were engaged in teaching insurance courses in addition to the many specialized courses taught by adjunct faculty. The ideas and conversations of the faculty were conveyed not only in their publications but

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[207] Googins Interview, *supra* note 98, at 20.

[208] Baker Interview, *supra* note 170, at 19; *John Grant Day Obituary*, LEGACY: PLAIN DEALER (Feb. 9, 2014), https://obits.cleveland.com/us/obituaries/cleveland/name/john-day-obituary?id=21945139.

[209] Baker Interview, *supra* note 170, at 19.

[210] Interview with Peter Kochenburger, Exec. Dir. of the Ins. L.L.M. Program, Deputy Dir. of Ins. L. Ctr. & Assoc. Clinical Professor of L., Univ. of Conn. Sch. of L., at 2 (Dec. 7, 2021) (transcript on file with author).

[211] *Id.*

[212] *Id.* at 3.

[213] For roster of full-time insurance law faculty see *Full-Time Faculty*, UCONN SCH. OF L.: INS. L. CTR., https://ilc.law.uconn.edu/faculty-staff/full-time-faculty (last visited May 30, 2022).

also in the semi-annual conferences hosted by the ILC.[214] They were also explored in the Insurance and Society Study Group that Baker organized.[215] Meeting at UConn Law, Harvard Business School, and elsewhere in the Northeast from 1997 to 2008, Baker and his co-leader Deborah Stone brought together historians, political scientists, economists, and law professors.[216] In discussions around works in progress and recent papers in the field, the group reflected on the multiple ways society encourages both the sharing of risk and assignment of personal responsibility, not only through insurance but also many other social structures.[217]

Insurance Law Center Faculty Members[218]

V. INSURANCE, RISK AND RESPONSIBILITY

Tom Baker led the full implementation of the programs envisioned by Bob Googins, but Baker had a more fundamental influence on UConn Law's engagement with insurance. Tom Baker's great insight was that insurance is merely one facet of one of the most basic human relationships: the sharing of risk to increase personal security. As he conveyed it to the

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[214] *See generally infra* app. C (listing all ILC symposia).

[215] ROSENTHAL, *supra* note 149, at 8.

[216] *See id.*; Email from Tom Baker, William Maul Measey Professor of L., Univ. of Pa. Carey L. Sch., to Timothy Fisher, Professor of L., Univ. of Conn. Sch. of L. (Jan. 9, 2022, 12:28 PM EST) (on file with author).

[217] Email from Tom Baker, *supra* note 216.

[218] Photograph of Insurance Law Center Faculty Members, *in* ROSENTHAL, *supra* note 149, at 1.

school's faculty, "[t]ell me about almost any legal issue, and I'll tell you the insurance angle in it."[219]

Society provides security by sharing risk, and in doing so provides the assurance that we can invest and take chances knowing that all will not be lost if we judge wrong or are unlucky. Responsibility, in contrast, reflects the belief that personal accountability for our actions is a powerful motivator for good behavior. Thus, society may choose not to share some risks lest doing so encourages bad behavior. The study of risk and responsibility, and insurance more specifically, is the exploration of how society seeks to encourage only socially beneficial risk-taking while protecting people from harms that could impair their productive membership in society.

Risk and responsibility are at the heart of commercial insurance products, and in that form are the core of the insurance curriculum. But the balance between risk and responsibility applies far more broadly in government programs, like social security, in religious and other voluntary communities, and all the way to the family, where parents balance the support of their children with demanding that they take responsibility for their actions and start earning for themselves.

This breadth of inquiry led to an impressive series of published research by UConn Law faculty such as Carol Weisbrod's book, *Grounding Security: Family, Insurance and the State*.[220] UConn Law professors have also explored other topics including systemic risk in the financial markets, such as Professor Patricia McCoy's work on securitization, which found spreading collective risk in an untransparent fashion created much broader systemic risk.[221]

In the 1990s, and thereafter, UConn Law became a center of creative thinking and research around financial structures that share and assign risk. Professor Peter Siegelman brought his training as an economist to his large volume of work, including studies of core insurance issues such as adverse selection, as well as insights from behavioral economics to insurance law.[222]

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[219] E-mail from Tom Baker, William Maul Measey Professor of L., Univ. of Pa. Carey L. Sch., to Timothy Fisher, Professor of L., Univ. of Conn. Sch. of L. (Feb. 17, 2022, 6:20 PM EST) (on file with author).

[220] CAROL WEISBROD, GROUNDING SECURITY: FAMILY, INSURANCE AND THE STATE (1st ed. 2006).

[221] Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, 41 CONN. L. REV. 1327 (2009).

[222] *See Peter Siegelman*, UCONN SCH. OF L., https://law.uconn.edu/person/peter-siegelman/ (last visited May 30, 2022).

The faculty's work included new methodologies of research, such as the "sociological" approach to legal research that looked to the lived experience of insurance executives that revealed more than their companies' published reports. An example of this type of work is by Professor Sean Griffith, a securities and corporation law expert, who sought to explore how Directors' and Officers' Liability Insurance could be a vehicle to improve directors' oversight and thereby avoid large payouts when they are sued after corporate frauds.[223] In the absence of public information, a series of in-person interviews of the underwriting and claims officers revealed cultural limitations on insurance companies' influence over the behavior of the companies and directors they insured.[224]

Tom Baker's work has been at times controversial—at times aligned with the positions of major insurance companies and sometimes at odds.[225] While always valuing the academic freedom necessary to promote creative ideas and open discussion, UConn Law also achieved the goal of making the ILC highly relevant to the exploration of insurance. It is thanks to its concentration of energized thinkers in constant dialogue with the leaders of the industry, as well as the regulatory community, that UConn Law has been the center of new ideas and new understandings of the role of insurance in shaping society.

VI. THE PART-TIME FACULTY

From its first decades through well into the 1970s, the school's insurance curriculum consisted of a single course taught by a part-time professor.[226] The reliance on adjunct faculty continued as Bob Googins built the insurance curriculum. The array of subjects they offered was impressive indeed—core courses like property insurance, life insurance, liability insurance, and insurance litigation.[227] There were multiple courses on health

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[223] Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755 (2008).

[224] *Id.* at 782.

[225] *See, e.g.*, TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2005).

[226] "Insurance Law" was the only insurance course listed in course catalogs. *See First Year Course of Study*, *in* HARTFORD COLLEGE OF LAW 1922–23, 7–9 (1922); *Directory of Courses*, *in* THE UNIVERSITY OF CONNECTICUT SCHOOL OF LAW 1950–51, 16–21 (1950); *Description of Courses*, *in* THE UNIVERSITY OF CONNECTICUT SCHOOL OF LAW 1976–77, 22–36 (1976).

[227] See *infra* app. B for list of insurance courses ever offered by UConn Law.

insurance and the regulation of insurance, as well as more arcane topics like marine insurance, captive insurance companies, insurance company insolvency, reinsurance, surety, and taxation of insurance.[228] There have also been courses on global issues such as International Aspects of Insurance Law, and a week-long program in the United Kingdom on the London Insurance Market.[229] UConn Law is unique around the world for providing such an array of courses and assembling such a community of talented teachers and researchers.

All this was possible because of the generous contributions of time and effort by the ILC's adjunct faculty. At the same time, they consistently expressed gratitude for the experience of teaching at the law school. A constant theme is the desire to give back in recognition of the benefits they received in their education and careers, as well as a desire to improve society and the profession through teaching the law. They found the interaction with students energizing. As one faculty member said, "I found myself more energized at the end of each class than at the beginning."[230] Another reported that he always seemed the happiest on the evenings that he taught at the law school.[231]

There was another benefit from teaching emphasized by private practice lawyers among UConn Law's adjunct faculty. The cases in their day jobs tended to make them focus on specific insurance policy clauses and particular laws governing the facts. Teaching a full course, in contrast, required that they learn the entire range of policy provisions and legal rules applicable to an area of insurance. It enabled them to explain how the interpretation of one policy clause related to the full scope of the policy. As one remarked, "learning how each clause fit into the full policy, and how it developed over the years, made me a better lawyer."[232]

The students also appreciated the adjunct faculty, whose background was different from, and complementary to, the full-time faculty. Full-time faculty are especially skilled at the classroom dialogue that trains students in critical thinking—learning to test the assumptions and logic behind any

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[228] *Id.*

[229] Email from Tanya Johnson, Reference Librarian, Univ. of Conn. Sch. of L., to Leah Smith (June 27, 2022, 2:22 PM EST) (on file with author).

[230] Telephone Interview with Kip Dwyer, Partner, Robinson & Cole (Nov. 4, 2021) [hereinafter Dwyer Interview].

[231] Telephone Interview with Daniel F. Sullivan, Partner, Robinson & Cole (Nov. 1, 2021) [hereinafter Sullivan Interview]. *See also* Dwyer Interview, *supra* note 230 (expressing same).

[232] Sullivan Interview, *supra* note 231.

proposition and to assess it in relation to the language of statutes or holdings of precedents. The adjunct faculty, in contrast, share experiences and examples that demonstrate the real-life applications of the rules learned in school. Many alumni have emphasized how the courses with adjuncts enabled them to translate their learning to future professional settings and focus their own career ambitions.[233]

VII. A NATIONAL AND GLOBAL COMMUNITY OF STUDENTS AND SCHOLARS

The L.L.M. in Insurance Law degree program has made use of distance learning to enable students from around the country to participate by synchronous video or asynchronous web-based courses.[234] At the same time, from its start the ILC has brought lawyers from around the world to the Hartford campus[235] where the Insurance L.L.M. is the premier program in the world for lawyers pursuing careers in insurance.[236] The well-developed laws in the U.S. and the diversity of state-based regulatory systems, coupled with the constant emergence of new insurance products and technologies, make the U.S. the best place to explore the workings and potential of insurance systems. The L.L.M. program has attracted regulators, teachers, industry executives, and practicing lawyers from over thirty-five different countries.[237] They learn from UConn Law's faculty as well as each other.

Some remarkable people have come to UConn Law to advance their learning. Qihao He, L.L.M. '12 and S.J.D. '16, arrived from China as a Masters student.[238] His experience was so positive that he returned a few years later to be part of UConn Law's doctorate program, going on to earn

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[233] Various informal alumni conversations with Timothy Fisher.

[234] *Insurance Law LLM*, UCONN: UCONN SCH. OF L. LLM PROGRAMS, https://llm.uconn.edu/programs/insurance-law/ (last visited May 30, 2022).

[235] *Id*. *See generally* Hong Interview, *supra* note 176.

[236] *See Insurance Law Center*, UCONN SCH. OF LAW, https://ilc.law.uconn.edu/ (last visited June 25, 2022).

[237] *See infra* app. A. *See also Insurance Law LLM*, *supra* note 235; Hong Interview, *supra* note 176.

[238] Telephone Interview with Qihao He, Professor, China Univ. of Pol. Sci. & L. (Nov. 8, 2021) [hereinafter He Interview].

the school's first S.J.D. degree in 2016.[239] Returning to China, Professor He was hired by China University of Political Science and Law, one of the foremost universities, where he earned tenure.[240] He also has the distinction of having his UConn Law doctoral dissertation published by the British publishing house *Edward Elgar Publishing Ltd.*[241] Similarly, Angelo Borselli, L.L.M. '09, originally arrived as a Masters student before returning to Italy where he is now on the faculty at Bocconi University in Milan.[242]

One of the ILC's best known global partners is Francois Ewald, who gained international renown as the assistant to the French philosopher Michel Foucault.[243] Ewald, for many years an affiliated member of the UConn Law faculty, was awarded France's highest national award, the Legion d'Honneur, for his contributions (especially his work on the emergence of the French welfare state).[244] His work explores the balance of risk and personal responsibility, and the divergent roles of the welfare state as opposed to social groups like insurance companies and employers.[245] This led to his leadership in the Movement of French Companies (Mouvement des Entreprises Français), or Medef,[246] now the largest employer association in France.[247] He continues to be the foremost scholar of the insurance industry

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[239] *See List of Faculty: Qihao He*, COLL. OF COMP. L.: CHINA UNIV. OF POL. SCI. & L., http://bjfxyjy.cupl.edu.cn/info/1053/2710.htm (last updated Sep. 27, 2018); Email from Yan Hong, *supra* note 195.

[240] *List of Faculty: Qihao He*, *supra* note 239; He Interview, *supra* note 238.

[241] *See* QIHAO HE, CLIMATE CHANGE AND CATASTROPHE MANAGEMENT IN A CHANGING CHINA: GOVERNMENT, INSURANCE AND ALTERNATIVES (2019).

[242] *See Faculty and Research: Angelo Borselli*, BOCCONI, https://didattica.unibocconi.eu/docenti/cv.php?rif=136914 (last visited May 24, 2022); Telephone Interview with Angelo Borselli, Acad. Fellow, Dep't of L. at Bocconi (Dec. 7, 2021).

[243] *See People: François Ewald (2014–2016): Visiting Senior Scholar*, COLUM. L. SCH.: COLUM. CTR. FOR CONTEMP. CRITICAL THOUGHT, https://cccct.law.columbia.edu/people/francois-ewald-2014-2016 (last visited May 30, 2022); Email from Pat McCoy, Liberty Mut. Ins. Professor of L., Bos. Coll. L. Sch., to Timothy Fisher (Dec. 13, 2021, 9:45 PM EST) (on file with author).

[244] *See* Michael C. Behrent, *Accidents Happen: François Ewald, the "Antirevolutionary" Foucault, and the Intellectual Politics of the French Welfare State*, 82 J. MOD. HIST. 585 (2010).

[245] *See generally id.*

[246] *See id.* at 619.

[247] *See generally* MEDEF, LE MEDEF: THE LARGEST NETWORK OF FRENCH COMPANIES (2019), https://www.medef.com/uploads/media/default/0009/03/10779-plaquette-medef-2019-en.pdf.

in France, exploring the struggle to maintain personal responsibility in systems of social insurance.[248]

The international and domestic students have learned from each other in their classes, as have those coming straight from college, mixing in classes with mid-career lawyers. They learn from each other about the way systems are both similar and different in various countries at the same time as they learn the fields of insurance. The maturity of mid-career students adds a model for professionalism in the classroom to those who are younger. Many of them form networks that continue through their later careers. Indeed, in several countries, including Brazil, Germany and China, there are vibrant networks of UConn Law alumni.[249] At one alumni gathering in Berlin, the L.L.M. alumni said they felt greater affinity to UConn Law, after only one year on campus, than they did to their German universities after four years of study.[250] In China, UConn Law's alumni have organized a social media community that stays in touch through the years.[251] As UConn Law's first S.J.D. graduate, Qihao He has said that Chinese students have gone through three phases of study abroad: from Japan, to Russia, then to the U.S.[252] Those who studied abroad in the earlier phases did not bring back good memories, but those who studied in the U.S. remain grateful for their experience.[253]

Along with foreign students, a great number of visiting scholars have come to UConn Law from universities around the world. Insurance scholars have come to UConn Law from: Free University (Berlin, Germany); Catholic University of Milan (Milan, Italy); Bocconi University (Milan, Italy); University of Siena (Siena, Italy); University of York (Heslington, England); University of Buckingham (Buckingham, England); Kagawa University (Takamatsu, Japan); University of South Africa (Pretoria, South Africa); China University of Political Science & Law (Beijing, China); UIBE School of Insurance (Beijing, China); and Renmin University (Beijing,

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[248] *See* Johannes Boehme, *"What Do You Want Me to Regret?": An Interview with Francois Ewald*, L.A. REV. OF BOOKS (Nov. 3, 2017), https://lareviewofbooks.org/article/what-do-you-want-me-to-regret-an-interview-with-francois-ewald.

[249] Email from Yan Hong, *supra* note 195.

[250] Various informal alumni conversations with Timothy Fisher.

[251] Email from Yan Hong, *supra* note 195.

[252] He Interview, *supra* note 238.

[253] *Id*.

China).[254] Meanwhile, UConn Law faculty have visited: Queen Mary University of London (London, England); UIBE School of Insurance (Beijing, China); and Renmin (Beijing, China); Guangzhou Academy of Arts & Sciences (Guangzhou, China); Hong Kong Polytechnic University (Hong Kong, China); Universita degli Studi di Napoli "Federico II" (Naples, Italy); and the University of Pretoria (Pretoria, South Africa), among others.[255]

VIII. NEW LEADERSHIP AND NEW HORIZONS

In 2002, Baker and Macgill welcomed Professor Patricia "Pat" McCoy[256] to UConn Law, who was excited about joining its vigorous cadre of scholars of financial systems and business organizations.[257] Her focus later widened to the role of risk spreading devices throughout the economy.[258] McCoy steadily became one of the more energetic voices and thinkers in the ILC's community of scholars, both before and after her year leading the mortgage banking regulatory unit of the incipient Consumer Finance Protection Bureau.[259] In 2008, when Baker left for the University of Pennsylvania Law School, Pat McCoy was the natural person to step up to lead the ILC.[260]

McCoy brought a great energy to the ILC, leading several new initiatives. Chief among those was an annual conference co-sponsored by UConn Law and the highest ranked law school in China, the Renmin University School of Law in Beijing.[261] Alternating between programs

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[254] Email from Pat McCoy, *supra* note 243.

[255] *Id.*

[256] *See Faculty Directory: Patricia McCoy, Liberty Mutual Insurance Professor of Law*, BOS. COLL. L. SCH., https://www.bc.edu/bc-web/schools/law/academics-faculty/faculty-directory/patricia-mccoy.html (last visited May 31, 2022).

[257] Telephone Interview with Pat McCoy, Liberty Mut. Ins. Professor of L., Bos. Coll. L. Sch. (Nov. 19, 2021).

[258] *Id. See e.g.*, Patricia A. McCoy, *Systemic Risk Oversight and the Shifting Balance of State and Federal Authority Over Insurance*, 5 U.C. IRVINE L. REV. 1389 (2015).

[259] *See* Zoë Atchinson, *The Money Side of Injustice*, BOS. COLL. L. SCH. MAG. ONLINE (Nov. 11, 2020), https://lawmagazine.bc.edu/2020/11/the-money-side-of-injustice/.

[260] *See About*, UCONN SCH. OF L.: INS. L. CTR., https://ilc.law.uconn.edu/about/ (last visited May 31, 2022).

[261] *See, e.g.*, *2014 International Symposium on the Improvement of the Liability Insurance System*, UCONN SCH. OF L.: INS. L. CTR. (May 10, 2014), https://

hosted by each school in Beijing and Hartford, the conferences focused on areas of insurance law that were guiding development of the industry in China.[262] As the second largest insurance market in the world,[263] China had become a center of creative exploration in insurance products, industry structure, and regulatory regimes. The conferences gave UConn Law faculty the opportunity to guide senior Chinese decision-makers at a formative stage of their systems and build bridges that could enable continued cooperation and investment.[264]

The reputation of Renmin and the high level of attendance at its conferences[265] gave UConn Law access to the leadership of many Chinese law schools. That in turn helped accelerate recruitment of L.L.M. candidates from China—thanks also to the work of Yan Hong.[266] Hong traveled throughout China to set up partnerships between UConn Law and various Chinese law schools, creating a pipeline of students coming to Hartford.[267] Meanwhile, the faculty and staff at the Hartford campus worked hard to make the experience here a positive one for Chinese students. While other U.S. law schools established separate programs and classes for foreign students, UConn Law integrated them into the regular J.D. classes.[268] This exposed U.S. and foreign students to each other, enabling them to learn across national and cultural boundaries and facilitate global networks that could follow them through their careers.

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ilc.law.uconn.edu/2014/05/10/2014-international-symposium-on-the-improvement-of-the-liability-insurance-system/.

[262] Email from Yan Hong, *supra* note 195.

[263] *See Top 10 of the Global Insurance Market 2020*, ATLAS MAG., https://www.atlas-mag.net/en/article/top-10-of-the-global-insurance-market-in-2019 (last visited May 30, 2022).

[264] Email from Yan Hong, *supra* note 195.

[265] *Id.*

[266] *See supra* Sections IV.D–IV.E.

[267] *See* Hong Interview, *supra* note 176, at 9. *See also* AJ Wyman, *New Program Introduces Students from China to U.S. Law, Culture*, UCONN TODAY (Aug. 8, 2019), https://today.uconn.edu/2019/08/new-program-introduces-students-china-u-s-law-culture/ ("[N]ew partnership between UConn and Southeast University in Nanjing, China.").

[268] Email from Yan Hong, *supra* note 195.

In 2015, Professor Brendan Maher assumed the leadership of the ILC[269] after Professor McCoy departed to become the Liberty Mutual Professor of Law at Boston College. Maher is a nationally recognized leader in retirement systems, ERISA, and employment-based benefits.[270] Maher's leadership enlivened the ILC's programs just as his teaching enlivened his classes. One student remarked in their course evaluation that his ERISA course was so exciting that they wished they could take the course "for six hours per week instead of three."[271]

Maher's leadership coincided with the successful implementation of the Affordable Care Act ("ACA"), widely praised as having achieved its promise by its fifth anniversary in 2015.[272] Recognizing that achievement, Maher organized the country's premier conference on the ACA, featuring as keynote Secretary Kathleen Sebelius, who as Secretary of Health and Human Services in 2010 had guided the Congressional efforts and implementation of the Act.[273]

Several other ground-breaking conferences followed, including some touching on core structures of the American insurance industry. They included national leaders such as Tom Sullivan, Chief of Insurance Regulation at the Federal Reserve, on the boundaries between state and

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[269] *See* Symposium, *The U.S. and China: New Insurance Products, New Regulatory Challenge*, UNIV. CONN. SCH. L. INS. L. CTR. (Oct. 9, 2015), https://ilc.law.uconn.edu/2015/10/09/the-u-s-and-china-new-insurance-products-new-regulatory-challenge/ (mentioning Brendan Maher as Director of the Insurance Law Center).

[270] *See Brendan S. Maher: Professor of Law; Director of the Health Law, Policy, and Management Program*, TEX. A&M UNIV. SCH. OF L.: FAC. & STAFF, https://law.tamu.edu/faculty-staff/find-people/faculty-profiles/brendan-maher (last visited May 30, 2022).

[271] *See* UCONN SCH. OF L., 2013 STUDENT EVALUATION FOR PROFESSOR MAHER'S EMPLOYEE BENEFITS/ERISA COURSE 3 (2013) (on file with author).

[272] *See, e.g.*, Michael Hiltzik, *On Obamacare's 5th Anniversary, Americans are Starting to Feel Appreciation*, L.A. TIMES (Mar. 23, 2015, 10:59 AM), https://www.latimes.com/business/hiltzik/la-fi-mh-on-obamacares-fifth-anniversary-20150322-column.html.

[273] Brendan S. Maher & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Health Insurance Under the ACA*, 31 YALE L. & POL'Y REV. 275 (2013) (presenting paper at 2012 conference); Symposium, *The Affordable Care Act Turns Five*, UNIV. CONN. SCH. L.: INS. L. CTR. (Apr. 17, 2015), https://ilc.law.uconn.edu/2015/04/17/the-affordable-care-act-turns-five/.

federal regulation of insurance.[274] Another, built around a paradigm-shifting article by Minnesota Law Professor, Daniel Schwarcz, which posed the question of whether handbooks and manuals produced by the National Association of Insurance Commissioners and incorporated by reference into state law were an unconstitutional delegation of state power.[275] And the ILC continues hosting weekly "new ideas" seminars by leaders in the regulatory, industry and academic communities.[276] These gatherings continue to make UConn Law a magnet for some of the foremost academic minds and industry and regulatory leaders in the country.

IX. THE ROAD AHEAD

The ILC's foundations built by Googins and Baker are strong. The insurance industry and insurance law are as dynamic as any aspect of society and will continue to evolve. However, the effort to find balance between risk and security is permanent. Lawyers will always need to explore the social values, and the rules that express them, that influence the sharing of risk and the need for personal responsibility. The Insurance L.L.M. program and the CILJ are unique to UConn Law. The semi-annual conferences, which bring together practitioners, regulators, company executives, and theoreticians, continue to make UConn Law the center of thinking about both the core principles and the future direction of the field.

Now, in UConn Law's centennial year, a new leader has assumed the role of guiding the ILC: Travis Pantin.[277] Professor Pantin brings a deep

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[274] Thomas Sullivan, Associate Director Federal Reserve, Board of Governors, Keynote Address at the 3rd Annual Connecticut Risk Management Conference, Sponsored by UConn's School of Business & Insurance Law Center at UConn School of Law (Mar. 20, 2015). *See* Symposium, *supra* note 269.

[275] Symposium, *The Law and Economics of Insurance*, UNIV. CONN. SCH. L. INS. L. CTR. (Oct. 4, 2013), https://ilc.law.uconn.edu/2013/10/04/the-law-and-economics-of-insurance/. *See also* Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, 25 CONN. INS. L.J. 197 (2018).

[276] *See New Ideas in Insurance Virtual Speaker Series*, UCONN SCH. OF L.: INS. L. CTR., https://ilc.law.uconn.edu/new-ideas-in-insurance/ (last visited May 31, 2022).

[277] *Travis Pantin Named Director of Insurance Law Center*, UCONN SCH. OF L. INS. L. CTR. (AUG. 25, 2021), https://ilc.law.uconn.edu/2021/08/25/travis-pantin-named-director-of-insurance-law-center/.

background in academic work on the role of insurance in a legal system, coupled with tremendous energy and a first-rate reputation in the field.[278]

CONCLUSION

A century of history confirms the importance of insurance to the University of Connecticut School of Law. It is part of the school's founding DNA, and the school has become a global center of teaching and research in the field. This focus understandably reflects the economy and employment opportunities of the surrounding community. What makes the story remarkable is how much the school has done with the opportunity.

The preeminent role of the Insurance Law Center at University of Connecticut School of Law is a consequence of the combined visions and energy of two remarkable leaders, Bob Googins and Tom Baker. What they did together is more than any one person could have achieved alone. Bob Googins launched the effort that assembled a broad range of courses with a deep bench of part-time faculty that is unique in the world. Connecticut Insurance Law Journal continues to be the go-to reference and resource in the field. The Insurance Law Center endowment Googins built makes it possible to host conferences and bring leading thinkers from all over the world, the insurance law library is the greatest source of material on insurance law to be found anywhere, and he laid the foundation for the Master of Laws in Insurance degree program. With these programmatic assets as a springboard, Tom Baker's vision demonstrated that insurance concepts are central to the ordering of society. Baker established University of Connecticut School of Law as a center of research on the broadest reaches of insurance theory and application. He highlighted the unending tension between personal responsibility for risk and the need for security from sharing of risk and showed how this tension is found everywhere.

The University of Connecticut School of Law is fortunate to be the foremost center of teaching in insurance law and at the same time the foremost center of research in the field. This combination of teaching and research goes to the heart of the research university model, in which advanced research informs the most advanced teaching; it is the hallmark of great universities throughout the world.

The school's founders, George and Caroline Lillard, would be proud. The law school has achieved their vision and much more. It remains what they hoped for—a law school that enables insurance company employees to change the trajectory of their lives, in a center of that industry,

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[278] *Id.*

where no other law school could make that possible. As a public law school, University of Connecticut School of Law's mission is dedicated to the people of Connecticut who support it, in return enabling them and their children to achieve a legal education whose cost would otherwise be out of their reach. It is an engaged law school, with deep ties to the institutions of law and government around it in the state capital. And it has become the foremost center of learning and teaching about insurance in the world.

APPENDIX A: ORIGINS OF INTERNATIONAL L.L.M. GRADUATES, 2000–2021[279]

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	**Total**
Azerbaijan															1								**1**
Bangladesh														1									**1**
Brazil			2					1															**3**
Bulgaria		1																					**1**
Canada																	1						**1**
Chile												1											**1**
China				3				1	1	3	1	3	6	1	2	1	1	2	4	1	4	3	**37**
Colombia							1	1											1				**3**
Costa Rica	1										1												**2**
Ecuador																1							**1**
Eritrea												1											**1**
France	1																						**1**
Germany						1					1												**2**
Ghana																1		1		1			**3**
Honduras																	1						**1**
India						1		1															**2**
Italy									1	1			1				1		1				**5**
Jamaica				1											1								**2**
Japan												1											**1**
Kenya																						1	**1**
Korea, Republic of																					1		**1**
Malawi																						1	**1**
Mexico														1									**1**
Nigeria																						1	**1**
Pakistan							1																**1**
Puerto Rico							1			1				1	1		1						**5**
Russian Federation													1			1	1						**3**
Saudi Arabia						1			1			1	2	1	1	3	4						**14**
Spain						1																	**1**
Taiwan				1		1	2																**4**
Uganda								1		1													**2**
United Kingdom							1													2			**3**
United States	4	6	5	7	6	2	13	10	6	14	6	9	5	7	5	6	7	4	7	7	8	4	**148**
Unknown	1	1					1		1		1	2		1		1		3					**12**
Venezuela	1																				1		**2**
Total	**8**	**8**	**7**	**12**	**6**	**7**	**20**	**15**	**10**	**20**	**10**	**18**	**15**	**13**	**11**	**14**	**17**	**10**	**13**	**11**	**14**	**10**	**269**

[279] Excel Spreadsheet, *Insurance LLMs from 2000-2021*, UNIV. OF CONN. SCH. OF L. (on file with author and UConn Law Registrar).

APPENDIX B: INSURANCE COURSES OFFERED, 1922–PRESENT[280]

Course	Dates	Professor(s)
Admiralty & Marine Insurance	1999–2001	Gregory Ligelis
Alternative Risk Management	2016–Present	Douglas Simpson
Alternatives to Managing Risk	2007–2015	Patrick Salve; Douglas Simpson
Captive Insurance Law	2019–Present	Phillip England
Comparative Insurance Regulation	2009–2018	Peter Kochenburger
Comparative Regulation of Health Insurance Markets	2010–2020	Charles Klippel
Economics of Insurance	1999–2008	Peter Siegelman
Ethics of Insurance	2007	Unknown
Executive Protection & Professional Liability Insurance	2002–2014	Sean Fitzpatrick; Jeffrey Neidle
Fidelity and Suretyship	1999–2007	John Harris
Health Care Financing; Health Care Organization & Financing; Health Care Insurance & Finance;	2013–Present	John Cogan; Charles Klippel
Health Care Law and Regulation (Health Care Law: Regulation & Finance; Health Care Policy & the Law)	1995–2013	John Day; Stephen Utz; Robert Bard; Elliott Pollack
Healthcare Liability Insurance	2011–Present	Joshua Stein
Current Issues in Insurance	2021–Present	Peter Kochenburger; Peter Siegelman; Travis Pantin

[280] Numerous Course Catalogs, dating 1922 through 2021, UNIV. OF CONN. SCH. OF L. (on file with author); Excel Spreadsheet, *All Insurance Courses*, UNIV. OF CONN. SCH. OF L. (on file with author and UConn Law School Registrar).

Insurance & Discrimination	2020–Present	Robert Yass
Insurance Finance	1999–Present	Peter Austin; Lynne Grinsell; Mark Parsons; William Wilcox
Insurance Law	1922–1997	Mr. Maxwell; Mr. Bartels; Edward Baird; Mr. Susco; Robert Googins; Tom Baker
Insurance Law Analysis & Writing	2016	Jill Anderson
Topics in Insurance Law	2010–2016	Francois Ewald
Insurance Litigation	2005–Present	Elena Gervino; Mark Gurevitz; John Buchanan III; Bethany Barrese; Bill Goddard; Kip Dwyer; Charles Fortune; Stuart Rosen; Jeffrey Vita; W. Mark Wigmore
Current Issues and Trends in Insurance Litigation	2021–Present	Bethany Barrese; Kip Dwyer
Insurance Regulation	1998–Present	Tom Baker; Annie Engel; Patrick Salve; Barbara Rezner
Insurance Regulation in the EU	2008	Unknown
Topics in Insurance Regulation	2001	Unknown
Insurance Solvency	2007–Present	James Meehan; Scott Birrell; Bill Goddard
Insurance Taxation	1999–2009	Richard Baxter; Tracy Rich; William Malchodi
International Aspects of Insurance Law	1998–2002	Mark Janis
Health Care Policy & the Law	1982– 2013	John Day; Stephen Utz; Robert Bard
Liability Insurance	1991–Present	Tom Baker; Robert Googins; Peter

		Kochenburger; Laura Foggan
Life & Health Insurance Law	1992–1997	John Day
Life Insurance & Health Care Finance	1999–2014	John Day; Charles Klippel
Life Insurance, Annuities & Disability Income Insurance Law	2014–Present	Walter Welsh
London Insurance Market	2001–2007	W. Mark Wigmore
Marine Insurance	2010–Present	Scott Birrell; Terence Harris; Mike Eisele
Principles of Insurance	1998–Present	Robert Googins; Tom Baker; Annie Engel; John Day; Patricia McCoy; Peter Kochenburger; Jill Anderson
Principles of Reinsurance	2000–Present	Thomas Farrish; Andrew Noga; Louis Ricciuti; Adam Scales; W. Mark Wigmore; Paul Aiudi; Scott Fischer
Professional Liability Insurance	2018–2019	Marcos Mendoza
Property Insurance	1998–Present	Raymond Demeo; Stephen Goldmann; Daniel Sullivan; Kip Dwyer
Regulation of Insurance Transactions	2003–2010	Paul Eddy; Mike Wilder
Surety Law	2008–Present	Stephen Utz; John Harris
Surplus Insurance Lines	2001–2006	James Meehan; David Cass; Patrick Salve
Advance Topics in Tort & Insurance Law	2009	Sachin Pandya

APPENDIX C: INSURANCE LAW CENTER SYMPOSIA (1997–2021)[281]

1. **LIABILITY INSURANCE CONFLICT AND PROFESSIONAL RESPONSIBILITY**
   Date: Oct. 17, 1997 [1st Conference]

2. **INSURANCE, RISK AND RESPONSIBILITY: TOWARDS A NEW PARADIGM**
   Date: Apr. 11–12, 1999

3. **CONFERENCE FOR LATIN AMERICAN REGULATORS** (Fall 1999)
   Date: Fall 1999
   Speakers: Alejandro Quiroga (Argentina); Jose Luis Contreras (Bolivia); Helio Portocarrero (Brazil); Ernesto Rios Carrasco (Chile); Javier Chaves (Costa Rica); Guillermo Argumedo (El Salvador); Edgar Baltazar Barquin Duran (Guatemala); Manuel Aguilera Verduzco (Mexico); Rosario del mar Fernandez Lopez (Panama); Carlos Alberto Lopez Chavez (Paraguay); Jorge Sanchez (Uruguay); Joel Herrera Campos (Venezuela).
   Sponsors: ILC; CILJ.

4. **FEDERALISM, INTERNATIONAL LAW AND THE GLOBALIZATION OF FINANCIAL SERVICES**
   Date: Mar. 20, 2000

5. **CONFERENCE ON INSURANCE AND FINANCIAL SERVICES: CHINA AFTER WTO**
   Date: Oct. 15–17, 2000

6. **SOCIAL SECURITY: PRIVATIZATION AND REFORM**
   Date: Spring 2001

7. **LIABILITY AND INSURANCE AFTER SEPTEMBER 11TH**
   Date: Mar. 21–22, 2002
   Introductory Remarks: Patrick Liedtke (Secretary-General, Geneva Association) & Congressman John Larson.

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[281] *See Upcoming Symposia & Events*, UCONN SCH. OF L.: INS. L. CTR., https://ilc.law.uconn.edu/symposia/ (last visited June 30, 2022); Word Document, *Symposium 1997-2016*, UNIV. OF CONN. SCH. OF L. (on file with author).

Moderator: John Day (Connecticut Law Professor and former Virginia Insurance Commissioner); George Reider (former President, NAIC, and former Connecticut Insurance Commissioner); Charles Welsch (Edwards & Angell); Robert Googins (University of Connecticut School of Law and former Connecticut Insurance Commissioner).

Panelists: Honorable Gregory Serio (New York Superintendent of Insurance); Roger Singer (General Counsel, OneBeacon); David Robb (Executive Vice President, The Hartford Financial Services); Frolly Boyd (Senior Vice President, Aetna); Robert Jerry II (University of Missouri School of Law); Howard Kunreuther (Wharton Business School); Richard Ericson (University of British Columbia); Christian Gollier (University of Toulouse); Christian Lahnstein (Munich Re R&D, Legal Counsel); Robert Hartwig (Chief Economist, Insurance Information Institute); Larry Stewart (President of Trial Lawyers Care); Richard Campbell (Chair, ABA Torts and Insurance Practice Section); Professor Linda Mullenix (University of Texas School of Law); Francois Ewald (Conservatoire National des Arts et Metiers, France); David Moss (Harvard Business School); Christopher Lewis (Managing Director, NetRisk, Inc.); Werner Schaad (Chief Risk Officer, Swiss Re, USA).

Sponsors: ILC; Geneva Association; CILJ.

8. CATASTROPHIC RISK INSURANCE

Date: Mar. 26, 2002

9. SHOULD THE FEDERAL GOVERNMENT CHARTER INSURANCE COMPANIES?

Date: Apr. 16, 2002

Panelists: Walter C. Welsh (Senior Vice President, Hartford Life Insurance Company); William B. Fisher (Vice President & Assistant General Counsel, Mass Mutual Insurance Company); Jim C. Sivon (Counsel, American Bankers Insurance Association).

Moderator: Ray Guenter

Sponsors: ILC; Connecticut Bar Association ("CBA").

10. CONNECTICUT INSURANCE LAW JOURNAL SYMPOSIUM: VISION 2020/: THE FUTURE OF THE CIVIL JUSTICE SYSTEM & INSURANCE

Date: Mar. 24–25, 2003

Speakers: Tom Baker (Professor, University of Connecticut School of Law); Sean Fitzpatrick (Chief Underwriting Officer, Chubb Executive Risk); Richard Murray (Chief Claims Strategist, Swiss Re); Joseph Sanders (A.A. White Professor of Law, University of Houston Law Center); Ralph Winter (Professor of Strategy, Business Economics & Finance, University of British Columbia); Sheila Birnbaum (Head of Products Liability Department, Skadden, Arps, Slate, Meagher & Flom LLP); Amy Bouska (Principal & Consulting Actuary, Tillinghast-Towers Perrin); Robert Hartwig (Senior Vice President & Chief Economist, Insurance Information Institute); Deborah Hensler (Judge John W. Ford Professor Dispute Resolution, Stanford Law School); Christian Lahnstein (Legal Counsel, Munich Re); Paul Rheingold (Partner, Rheingold, Valet, Rheingold, Shkolnik & McCartney LLP); Anthony Champagne (Professor of Government & Politics, University of Texas at Dallas); Theodore Eisenberg (Henry Allen Mark Professor, Cornell Law School); William Ide (Counsel, McKenna Long & Aldridge LLP); Robert Peck (President, Center for Constitutional Litigation, PC).

Moderators: Adam Scales (Assistant Professor, Washington & Lee University School of Law) & Elizabeth Benet (Vice President, General Reinsurance Corp.).

Sponsors: ILC; American Bar Association Trial Torts and Insurance Practice Section ("TTIPS"); Geneva Association; CILJ.

11. THE MEDICAL MALPRACTICE CRISIS IN CONNECTICUT: WHAT ARE THE CAUSES? IS THERE A CURE?

Date: Apr. 21, 2003

Panelists: Tom Baker (Professor, University of Connecticut School of Law); Chris Bernard (President, Connecticut Trial Lawyers Association); Susan Cogswell (Insurance Commissioner, State of Connecticut); Susan Huntington (Senior Vice President, Chubb Group); Dr. Henry Jacobs (President, Hartford County Medical Association); Andrew McDonald (State Senator '91, chairman, Senate Judiciary Committee).

Moderator: Ray Guenter (Professor, University of Connecticut School of Law).

Sponsors: ILC; Financial Service Section of the CBA; Student Health Law Society.

12. CORPORATE GOVERNANCE AT THE CROSSROADS

Date: Apr. 23, 2004

Panelist: Calvin H. Johnson (Andrews & Kurth Centennial Professor in Law, University of Texas); Charles J. Elson (Edgar S. Woolard, Jr., Chair, John L. Weinberg Center for Corporate Governance, University of Delaware); Lin Peng (Zicklin School of Business, Baruch College, City University of New York); Jonathan Macey (Yale Law School); Lawrence A. Cunningham, (Boston College Law School); Renee Jones (Boston College Law School); Jill Fisch (Fordham Law School); Meredith Miller (Assistant Treasurer – Policy, State of Connecticut, Office of State Treasurer); Beth Young (Senior Research Associate, The Corporate Library).

Sponsors: ILC; CILJ.

13. LITIGATION MANAGEMENT IN THE INSURANCE INDUSTRY; PROFESSIONAL RESPONSIBILITY: CLIENTS, CARRIERS AND COUNSELS

Date: June 14–15, 2004

Sponsors: ILC; TTIPS.

14. 200TH ANNIVERSARY OF THE NAPOLEONIC CODE

Date: Sept. 22, 2004

Speaker: Monsier Guy Canivet (Chief justice, Civil Supreme Court of France).

Sponsors: Office of the Dean; ILC.

15. THE ROLE OF INSURANCE IN PREVENTING MEDICAL INJURY: AN ANTIDOTE TO MEDICAL MALPRACTICE

Date: Apr. 4, 2005

Opening Remarks: Tom Baker (Professor and Director, Insurance Law Center, University of Connecticut School of Law).

Moderators: Eleanor DeArman Kinney (Professor & Director, Center of Law and Health, Indiana University-Indianapolis); Tom Baker (Professor & Director, Insurance Law Center, University of Connecticut School of Law).

Panelists: Leslie V. Norwalk (Deputy Administrator, Centers for Medicare and Medicaid Services); W. Allen Schaffer (FACP Chief Clinical Officer, CIGNA); Charles Silver (Professor, University of Texas School of Law); Fay A. Rozovsky (Manager of Clinical Risk Management Consulting Services, Chubb Specialty Insurance); Susan R. Chmieleski (Vice President, Darwin Professional Underwriters); Lynda Nemeth (Compliance Officer & Director of Risk Management, Norwalk Hospital).

Sponsors: ILC; CILJ; University of Connecticut School of Medicine, Office of Continuing Education; Connecticut AHEC Program.

16. ASBESTOS: ANATOMY OF A TORT

Date: Nov. 3–4, 2005

Opening Remarks: Adam Scales (Associate Professor, Washington & Lee University).

Moderators: Hon. Alex Kozinski & Deborah Hensler (Professor, Stanford Law School).

Panelists: Deborah Hensler, James Early (President, Early, Ludwick, Sweeney & Strauss, LLC); James Stengel (Partner, Orrick, Herrington & Sutcliffe, LLP); Mark Plevin (Partner, Crowell & Moring, LLP); Elihu Inselbuch; Lester Brickman (Professor, Cardozo Law School); Benjamin Zipursky (Professor, Fordham Law School); Ellen Pryor (Professor, Southern Methodist University, Dedman School of Law); Tom Baker (Professor, University of Connecticut School of Law); Glenn Brace (Claims Director, Equitas); Jeff Stempel (Professor, University of Nevada Las Vegas, William S. Boyd School of Law); V.J. Dowling (Partner, Dowling & Partners Securities, LLC); Craig Berrington (General Counsel, American Insurance Association); John Bowman (Associate Director of Public Affairs, Association of Trial Law Lawyers of America); Patrick Hanlon (Partner, Goodwin Procter); Laurie Kazan-Allen; Christian Lahnstein; Richard Murray (Managing Director, Swiss Re); Linda Mullenix (Professor, University of Texas School of Law); Michael Green (Professor, Wake Forest University); Tony Sebok (Professor, Brooklyn Law School); Peter Schuck (Professor, Yale Law School).

Closing Remarks: Adam Scales (Associate Professor, Washington & Lee University).

Sponsors: ILC; CILJ.

17. THE MEDICAL MALPRACTICE MYTH

Date: Dec. 5, 2005

Speakers: Tom Baker (Professor & Director, Insurance Law Center, University of Connecticut School of Law); Matthew Dolan (President, OneBeacon Professional Partners); Michael Koskoff (Partner, Koskoff, Koskoff & Bieder); Michael McCann (Professor, University of Washington).

Moderators: Adam Scales (Professor, Washington & Lee University School of Law).

Sponsor: ILC.

18. MORAL HAZARD & CONSUMER DRIVEN HEALTH CARE

Date: Spring 2006

19. CATASTROPHIC RISK INSURANCE: THE SEARCH FOR A LONG-TERM SOLUTION

Date: Mar. 23, 2006

Sponsors: ILC; Wiley Rein & Fielding, LLP.

20. INSURING CATASTROPHIC LOSSES: THE STATUS OF TRIA AND PROPOSED NATURAL DISASTER BACKSTOPS

Date: Nov. 15, 2006

Introductory Remarks: Thomas W. Brunner (Wiley Rein & Fielding, LLP); Craig A. Berrington (Wiley Rein & Fielding, LLP); Sandra Tvarian Stevens (Wiley Rein & Fielding, LLP); Adam Scales (Professor, Washington & Lee University School of Law).

Speakers: Todd M. Harper (Legislative Director, Office of Congressman Paul E. Kanjorski); Kenneth Feinberg (Special Master, Federal September 11 Victim Compensation Fund); Albert B. Crenshaw (News Editor, Washington Post); Mark A. Hoffman (Senior Editor, Business Insurance); Peter King (Wiley Rein & Fielding, LLP); Hon. George Dale (Commissioner of Insurance, State of Mississippi); J. Robert Wooley (Former Commissioner of Insurance, State of Louisiana); Christopher Walker (US Director, The Climate Group); Lawrence Cluff (Assistant Director, U.S. Government Accountability Office); Jeffrey D. DeBoer (President, The Real

Estate Roundtable); Gregory W. Heidrich (Senior Vice President, Property Casualty Insurers Association of America); Franklin W. Nutter (President, Reinsurance Association of America); George Zanjani (Economist, Federal Reserve Bank of New York); J. Stephen Zielezenski (General Counsel, American Insurance Association); Laura A. Foggan (Wiley Rein & Fielding, LLP); Rhonda D. Orin (Partner, Anderson Kill & Olick, P.C.).

Moderators: Craig A Berrington (Wiely Rein & Fielding, LLP); Lawrence H. Mirel (Wiley Rein & Fielding, LLP); Peter Kochenberger (Professor and Director, Insurance Law Center, University of Connecticut School of Law).

Sponsors: ILC; Wiley Rein & Fielding, LLP.

21. THE NATIONAL INSURANCE ACT OF 2006: IS A FEDERAL CHARTER FOR INSURANCE COMPANIES NECESSARY?

Date: Nov. 28, 2006

Sponsors: ILC; CBA Insurance Law Section.

22. INSURANCE LAW CENTER WORKSHOP: HANDLING EMPLOYEE DISHONESTY CLAIMS

Date: Feb. 28, 2007

Speakers: D.M. Studler, M.Acc. (CPA, Studler, Doyle & Company, LLC); Krista Doyle (CPA, Studler, Doyle & Company, LLC).

Sponsor: ILC.

23. D&O INSURANCE: SHAREHOLDERS' FRIEND OR FOE?

Date: Apr. 12, 2007

Moderators: Edward Rock (Associate Dean, University of Pennsylvania Law School); Sean J. Griffith (Professor, Fordham University School of Law); Jill E. Fisch (Professor, Fordham University School of Law); Sean M. Fitzpatrick (Senior Vice President & Special Counsel for Legal Compliance & Ethics, Chubb Corporation).

Panelists: Jeffrey Benner (Analyst, Moody's Investors Service); Ganapathi Narayanamoorthy (Professor, University of Illinois, Urbana-Champaign); Roberta Romano (Professor & Director, Yale Law School Center for the Study of Corporate Law); Keith Thomas (Zurich Financial Services); John C. Coffee, Jr (Professor and Director, Center for Corporate Governance, Columbia University Law School); Alicia Davis Evans

(Assistant Professor, University of Michigan Law School); Donald C. Langevoort (Professor, Georgetown University Law Center); Andrew Schatz (Schatz Nobel Izard, P.C.); Martin Boyer (Professor, Universite de Montreal); Lawrence A. Cunningham (Professor, Benjamin N. Cardozo School of Law); Kevin M. LaCroix (Director, OakBridge Insurance Services); Thomas Wollstein (Munich Re); Tom Baker (Professor & Director, Insurance Law Center, University of Connecticut School of Law); Steven Gladstone (Senior Vice President of Claims, XL Professional); John McCarrick (Edwards, Angell, Palmer & Dodge, LLP); Robert Wallner (Milberg Weiss).

Sponsors: ILC; CILJ; Edwards, Angell, Palmer, & Dodge, LLP.

24. INSURANCE & INTELLECTUAL PROPERTY INNOVATION

Date: Apr. 4, 2008

Participants: Tom Baker (Professor & Director, Insurance Law Center, University of Connecticut School of Law); Luigi Buzzachi (Professor, Politicnico di Torino); Frank Cuypers (Financial Risk Management, KPMG, Ltd.); Leib Dodell (President, Media/Professional Insurance); Michael Donaldson (Partner, Donaldson & Hart); Anthony Falzone (Executive Director, Fair Use Project, Stanford Law School); Robert Fletcher (CEO, Intellectual Property Insurance Services); David A. Fox (Partner, Cantor Colburn, LLP); Robert M. Hunt (Senior Economist, Federal Reserve Bank of Philadelphia); Ken Goldstein (Worldwide Media Liability Manager, Chubb Specialty Services); Hillary Greene (Associate Professor and Director, Intellectual Property and Entrepreneurship Clinic, University of Connecticut School of Law); Michael Knoll (Professor, University of Pennsylvania Law School); Debra Kozee (President, C&S International Brokers); Steven Kunin (Former Deputy Commissioner, U.S. Patent & Trademark Office); Willajeanne McLean (Professor, University of Connecticut School of Law); Richard Murray (Managing director, Swiss Re); Clarissa Long (Professor, Columbia University Law School); Mark Nowotarski (President, Markets, Patents & Alliances, LLC); Gideon Parchamovsky (Professor, University of Pennsylvania Law School); Guiseppe Scellato (Professor, Politicnico de Torino); Stefan Speyer (Allianz SE, Group Legal Services); Amadee Turner (Honorary Member,

European Parliament); Eskil Ullberg (Professor, George Mason University).

Sponsors: ILC; Intellectual Property & Entrepreneurship Law Clinic; Geneva Association; CILJ.

25. SUBPRIME CRISIS: GOING FORWARD

Date: Nov. 14, 2008

Introduction: Jeremy Paul (Professor, University of Connecticut School of Law).

Opening Remarks: Arthur E. Wilmarth, Jr. (Professor, George Washington University Law School).

Keynote Speaker: James H. Carr (CEO, National Community Reinvestment Coalition).

Commentators: Ren S. Essene (Policy Analyst, Federal Reserve Bank of Boston); Christopher A. Richardson (Vice President, State Street Corporation); David Reiss (Associate Professor, Brooklyn Law School); Steven Davidoff (Associate Professor, University of Connecticut School of Law).

Panelists: Anna Gelpern (Assistant Professor, Rutgers School of Law-Newark); Alan M. White (Assistant Professor, Valparaiso University School of Law); Marsha J. Courchane (Vice President, CRA International); Lauren E. Willis (Associate Professor, Loyola Law School); Andrew Davidson (President, Andrew Davidson & Co, Inc.); Kurt Eggert (Professor and Director, Elder Law Clinic, Chapman University School of Law); Steven L. Schwarcz (Professor, Duke University School of Law); Patricia McCoy (Professor, University of Connecticut School of Law); Susan M. Wachter (Professor, Wharton School of the University of Pennsylvania).

Sponsors: ILC; Connecticut Law Review.

26. REMAKING FINANCIAL SERVICES REGULATION

Date: Apr. 17, 2009

Keynote Address: Richard J. Hillman (Managing Director, Financial Markets and Community Investment, U.S. Government Accountability Office).

Moderators: John Clapp (Professor, University of Connecticut School of Business); Stephen Ross (Professor, University of Connecticut, College of Liberal Arts & Sciences); John Day (Professor, University of Connecticut School of Law); Peter Siegelman (Professor, University of Connecticut School of

Law); James Vitarello (U.S. Government Accountability Office).

Panelists: Tom Baker (Professor, University of Pennsylvania Law School); Todd Henderson (Professor, University of Chicago Law School); Dwight Jaffee (Professor, University of California-Berkeley, Haas School of Business); Edward J. Kane (Professor, Boston College, Carroll School of Management); Patricia McCoy (Professor, University of Connecticut School of Law); Heidi Schooner (Professor, Catholic University of America, Columbus School of Law); Michael Taylor (Central Bank of Bahrain); Therese Vaughan (National Association of Insurance Commissioners); Susan M. Wachter (Professor, University of Pennsylvania, Wharton School); Arthur E. Wilmarth, Jr. (Professor, George Washington University Law School).

Sponsors: ILC; CILJ.

27. CONSUMER FINANCE POST-APARTHEID: THE SOUTH AFRICAN EXPERIENCE

Date: Nov. 20–21, 2009

Keynote Address: Gabriel Davel (CEO, National Credit Regulator of South Africa).

U.S. Developments: Janis Pappalardo (U.S. Federal Trade Commission).

Panelists: Rashid Ahmed (FinMark Trust); Andre Boraine (Professor, University of Pretroia); Gerhard Coetzee (Professor, University of Pretoria); Hermie Coetzee (Professor, University of Pretoria); Rashmi Dyal-Chand (Professor, Northeastern University Law School); Kathleen C. Engel (Professor, Suffolk University Law School); Adam Feibelman (Professor, University of North Carolina School of Law); Frans Haupt (Professor, University of Pretoria); Cassandra Jones Havard (Professor, University of Baltimore School of Law); Penelope Hawkins (Feasibility Pty, Ltd.); Creola Johnson (Professor, Ohio State University, Moritz College of Law); Kathleen Keest (Center for Responsible Lending); Michelle Kelly-Louw (Professor, Univesrity of South Africa); John Kilborn (Professor, John Marshall Law School); Adam J. Levitin (Professor, Georgetown University Law Center); Patricia McCoy (Professor, University of Connecticut School of Law);

Kate McKee (World Bank); Harry Rajak (Sussex Law School); Elizabeth Renuart (Professor, Albany Law School); Melanie Roestoff (Professor, University of Pretoria); Peter Setou (National Credit Regulator of South Africa); Carel van Aardt (Professor, University of South Africa); Jay L. Westbrook (Professor, University of Texas School of Law); Alan M. White (Professor, Valparaiso University School of Law); Jacob S. Ziegel (Professor, University of Toronto).

Sponsors: ILC; CILJ; Black Law Students Association.

28. REGULATED LIVES: LIFE INSURANCE AND BRITISH SOCIETIES (1800-1914)

Date: Feb. 11, 2010

Introduction: Patricia McCoy (Professor and Director, Insurance Law Center, University of Connecticut School of Law).

Keynote Address: Timothy Alborn (Professor, City University of New York).

Moderator: Peter Kochenberger (Professor & Director, Insurance Law Center, University of Connecticut School of Law).

Panelists: Jill Anderson (Professor, University of Connecticut School of Law); Tom Baker (Professor, University of Pennsylvania Law School); Geoffrey W. Clark (Professor, State University of New York College at Potsdam); Sharon Ann Murphy (Professor, Providence College)**.**

Sponsor: ILC.

29. REGULATING RISK

Date: Apr. 16, 2010

Keynote Address: William D. Cohan (Author).

Special Remarks: Hon. Joel Ario (Insurance Commissioner, Pennsylvania Department of Insurance); Hon. Thomas R. Sullivan (Insurance Commissioner, Connecticut Insurance Department).

Panelists: Iman Anabtawi (Professor, UCLA School of Law); Tom Baker (Professor, University of Pennsylvania Law School); Larry A. Cunningham (Professor, George Washington University Law School); Steven M. Davidoff (Professor, University of Connecticut School of Law); Jeffrey N. Gordon (Professor, Columbia Law School); Claire A. Hill (Professor, University of Minnesota School of Law); John P. Hunt (Professor, University of California at Davis School of Law);

Patricia McCoy (Professor, University of Connecticut School of Law); Karl Okamoto (Professor, Drexel University, Earle Mack School of Law); Paul Rose (Professor, Ohio State University, Mortiz College of Law); Charles K. Whitehead (Professor, Cornell Law School); William J. Wilhelm, Jr. (University of Virginia, McIntire School of Commerce); David Zaring (Professor, University of Pennsylvania, Wharton School).

Sponsors: ILC; CILJ.

30. PANEL ON HEALTHCARE REFORM BILL

Date: May 5, 2010

Introductory Remarks: Jeremy Paul (Dean, University of Connecticut School of Law).

Keynote Speaker: Lowell Weicker (Former Governor, State of Connecticut)

Panelists: Michael Blumberg (Professor, University of Connecticut School of Law); Hugh Macgill (Professoer, University of Connecticut School of Law); Peter Kochenberger (Professor, University of Connecticut School of Law).

Sponsors: ILC; Professional Liability Underwriters Society.

31. DISCUSSION: LIABILITY INSURANCE IN SOUTH AFRICA

Date: Fall 2010

Speaker: Wenette Jacobs (Professor, University of South Africa).

32. BOOK EVENT: TAMING OUR INDUSTRIAL JUGGERNAUT: AMERICA'S FORGOTTEN PROGRESSIVE STATE MOVEMENT FOR INDUSTRIAL SAFETY AND HEALTH

Date: Mar. 14, 2011

Speaker: Donald Rogers (Author).

Sponsors: ILC; UConn Co-Op.

33. ACTUARIAL LITIGATION: HOW STATISTICS CAN HELP RESOLVE BIG CASES

Date: Apr. 15, 2011

Keynote Address: Kenneth R. Feinberg (Managing Partner, Feinberg Rozen LLP).

Panelists: Robert G. Bone (Professor, University of Texas School of Law); Edward K. Cheng (Professor, Vanderbilt University Law School); Howard M. Erichson (Professor, Fordham

University School of Law); Deborah R. Hensler (Professor, Stanford Law School); Samuel Issacharoff (Professor, New York University School of Law); Joseph B. Kadane (Professor, Carnegie Mellon University, Department of Statistics); Francis McGovern (Professor, Duke University School of Law); Adam F. Scales (Professor, Washington and Lee University School of Law); Alex Stein (Professor, Benjamin N. Cardozo School of Law).

Sponsors: ILC; CILJ.

34. CYBER LIABILITY WORKSHOP

Date: Apr. 15, 2011

Moderator: Timothy Francis (Travelers Insurance).

Panelists: Richard Bortnick (Cozen O'Connor); Peter Foster (Willis Insurance Brokers); Robert Wice (Beazley).

35. CONSTITUTIONAL CHALLENGES TO THE 2010 PATIENT PROTECTION AND AFFORDABLE CARE ACT

Date: Apr. 28, 2011

Speaker: Mark Weiner (Visiting Professor).

Sponsors: ILC.

36. INTERNATIONAL INSURANCE REGULATION IN A POST-CRISIS ENVIRONMENT: PERSPECTIVES FROM THE US, THE EU, CHINA AND THE MIDDLE EAST

Date: Sept. 23, 2011

Keynote Speaker: Gordon Steward (Chairman, Geneva Association Communication Council).

Opening Welcome: Keith Moskowitz (Partner, SNR Denton); Jeremy Paul (Dean, University of Connecticut School of Law); Dannel P. Molloy (Governor, State of Connecticut).

Introductory Remarks: Thomas B. Leonardi (Insurance Commissioner, State of Connecticut).

Panelists: Bob Cusumano (General Counsel, ACE Limited); Paul H. Eddy (General Counsel, Travelers Companies, Inc.); Pierpaolo Marano (Professor, Catholic University School of Banking, Financing and Insurance, Milan, Italy); Rosali Pretorius (Partner, SNR Denton); Anas Akel (General Counsel, AlAhli Takaful Company); Dr. Manfred Dirrheimer (Charmain, FWU AG); Umar F. Moghul (Partner, Murtha Cullina); George Sandars (Partner, SNR Denton); Muddassir Siddiqui, Partner,

SNR Denton); Xin Chen (Professor, University of International Business and Economics, Beijing); Charles Klippel (Senior Vice President, Aetna, Inc.); Richean Li Professor, University of international Business and Economics, Beijing); Frank Lucchesi (General Counsel, MassMutual International, LLC); Marth Thompson (Partner, SNR Denton); John Finston (Partner, SNR Denton); Trish Henry (Deputy General Counsel, ACE Ltd.); Peter Kochenberger (Professor, University of Connecticut School of Law); James Meehan (General Counsel, Arrowpoint Capital); Jim Mumford (Deputy Commissioner, Iowa Division of Insurance.

Closing Remarks: Peter Kochenberger (Professor & Director, Insurance Law Center, University of Connecticut School of Law).

Sponsors: ILC; SNR Denton.

37. HEALTHCARE REFORM IN THE UNITED STATES: LEGAL IMPLICATIONS AND POLICY CONSIDERATIONS

Date: Nov. 11–12, 2011

Introductory Remarks: Hon. Kevin Lembo (Comptroller, State of Connecticut); Hon. Joseph d. Courtney (U.S. Congressman for Connecticut's 2nd District).

Keynote Speakers: Timothy Jost (Professor, Washington & Lee University School of Law); Norman Daniels (Professor, Harvard School of Public Health.

Moderators: Susan Schmeiser (Professor, University of Connecticut School of Law); Peter Kochenberger (Professor and Director, Insurance Law Center, University of Connecticut School of Law); Kaaryn Gustafson (Professor, University of Connecticut School of Law); Willajeanne McLean (Professor & Associate Dean for Academic Affairs, University of Connecticut School of Law); Aviva Abramovsky (Professor, Syracuse University School of Law).

Panelists: Julian D. Ford (Professor, University of Connecticut School of Medicine); Lewis Kazis (Professor, Boston University School of Public Health); Efthimios Parasidis (Assistant Professor, Saint Louis University School of Law); Amy Campbell (Assistant Professor, Upstate Medical University); Charles Klippel (Senior Vice President, Aenta); Stephen Latham (Director, Yale University Interdisciplinary Center for

Bioethics); John Nyman (Professor, University of Minnesota School of Public Health); Patricia Baker (President, Connecticut Health Foundation); Jeannette B. DeJesus (Special Advisor to the Governor on Healthcare Reform); Kevin Galvin (Advisory Committee Chairman, Small Business for a Health Connecticut); John McDonough (Professor, Harvard School of Public Health); Jason Perillo (Representative, 113th District, State of Connecticut); Michael J. Deboer (Professor, Faulkner University, Jones School of Law); Allison Hoffman (Professor, University of California, Los Angeles School of Law); Brendan Maher (Assistant Professor, Oklahoma City University School of Law); Jessica Roberts (Assistant Professor, University of Houston Law Center); Ruqaiijah Ayanna Yearby (Professor, Case Western Reserve University School of Law); Frank Askin (Professor, Rutgers School of Law – Newark); Loftus Becker (Professor, University of Connecticut School of Law); Stewart Jay (Professor, University of Washington School of Law); Steven Schwinn (Associate Professor, John Marshall Law School); John V. Jacobi (Professor, Seton Hall Law School); Theodore Ruger (Professor, University of Pennsylvania Law School); Rex Santerre (Professor, University of Connecticut School of Business); Stephen Utz (Professor, University of Connecticut School of Law).

Sponsors: ILC; Connecticut Law Review; CILJ.

38. CLIMATE CHANGE RISKS & LIABILITY: THE FUTURE OF INSURANCE & LITIGATION

Date: Oct. 5, 2012

Introductory Remarks: Willajeanne McLean (Professor & Interim Dean, University of Connecticut School of Law); Patricia McCoy (Professor & Director, Insurance Law Center, University of Connecticut School of Law); Sarah Bronin (Professor & Director, Center for Energy & Environmental Law, University of Connecticut School of Law).

Keynote Speakers: Michael B. Gerrard (Professor & Director, Center for Climate Change Law, Columbia Law School); John H. Fitzpatrick (Secretary General, The Geneva Association).

Moderators: Kurt Strasser (Professor, University of Connecticut School of Law); Peter Kochenberger (Professor & Executive Director, Insurance Law Center, University of Connecticut School of Law).

Panelists: Laura A. Foggan (Wiley Rein, LLP); Rex Heinke (Partner, Akin Gump Strauss Hauer & Feld, LLP); William F. Stewart (Partner, Stewart Bernstiel Rebar; Joseph A. MacDougald (Professor & Executive Director, Center for Energy & Environmental Law, University of Connecticut School of Law); Anji Seth(Associate Professor, University of Connecticut, Department of Statistics); Butch Bacani (Program Leader, United Nations Environment Programme Finance Initiative); Francois Robert Ewald (Professor, Conservatoire National des Arts et Metiers, Paris, France); Richard Murray (Special Advisor to the Geneva Association on Liability and Legal Matters); David Snyder (Vice President, Property Casualty Insurers Association of America).

Sponsors: ILC; Center for Energy & Environmental Law; CILJ.

39. THE CHALLENGE OF RETIREMENT IN A DEFINED CONTRIBUTION WORLD

Date: Apr. 5, 2013

Keynote Address: Peter F. Drucker (Professor, Carroll School of Management).

Panelists: Zvi Bodie (Professor, Boston University, School of Management); Mercer E. Bullard (Professor, University of Mississippi School of Law); Samuel Estreicher (Professor, New York University School of Law); Lawrence A. Frolik (Professor, University of Pittsburgh School of Law); Teresa Ghilarducci (Professor, The New School for Social Research); Richard L. Kaplan (Professor, University of Illinois College of Law); David Laibson (Professor, Harvard University, Department of Economics); Kevin Lembo (Comptroller, State of Connecticut); Amy Monahan (Professor, University of Minnesota Law School); Dana M. Muir (Professor, University of Michigan, Stephen M. Ross School of Business); Russell K. Osgood (Professor, Washington University School of Law); Brishen Rogers (Professor, Temple University, Beasley School of Law); Megan Thibos (Consumer Financial Protection Bureau); Edward A. Zelinsky (Professor, Benjamin N. Cardozo School of Law).

Sponsor: ILC.

40. THE LAW AND ECONOMICS OF INSURANCE

Date: Oct. 4, 2013

Keynote Address: Hon. Thomas B. Leonardi (Insurance Commissioner, State of Connecticut).

Moderators: Patricia McCoy (Professor, University of Connecticut School of Law); John Cogan (Professor, University of Connecticut School of Law); Peter Kochenberger (Professor & Director, Insurance Law Center, University of Connecticut School of Law); Daniel Schwarcz (Professor, University of Minnesota Law School).

Panelists: Howard C. Kunreuther (Professor, University of Pennsylvania, Wharton School); Mark V. Pauly (Professor, University of Pennsylvania, Wharton School); Daniel Schwarcz (Professor, University of Minnesota Law School); Peter Siegelman (Professor, University of Connecticut School of Law); Joshua C. Teitelbaum (Professor, Georgetown University Law Center); Kenneth s. Abraham (Professor, University of Virginia School of Law); Pierre-Andre Chiappori (Professor, Columbia University, Department of Economics); Scott E. Harrington (Professor, University of Pennsylvania, Wharton School); James Kwak (Professor, University of Connecticut School of Law); Martin Grace (Professor, Georgia State University, J. Mack Robinson College of Business); Robert W. Klein (Professor, Georgia State University, J. Mack Robinson College of Business); Elizabeth F. Brown (Professor, Georgia State University, J. Mack Robinson College of Business); Tom Baker (Professor, University of Pennsylvania Law School); Kyle D. Logue (Professor, University of Michigan Law School); Michelle Boardman (Professor, George Mason School of Law); Richard Squire (Professor, Fordham University School of Law).

Sponsor: ILC.

41. BIG DATA AND INSURANCE

Date: Apr. 3, 2014

Keynote: Hon. George Jepsen, Connecticut attorney General

Panelist: Eric Brat (Director, Boston Consulting Group); Francois Ewald (International Research Fellow, UConn Law); Cyrille de Montgolfier (AXA Group, Senior V-P.); Christophe Geissler (Chief Scientific Officer, Quinten); Rick Swedloff (Rutgers School of Law-Camden); Tom Baker (William Maul Measey Professor of Law and Health Sciences, University of Pennsylvania Law School); Judy Ann Bigby (past Secretary of

Health and Human Services for the Commonwealth of Massachusetts); Sharona Hoffman (Co-Director of the Law-Medicine Center at Case Western Reserve University); Matthew F. Fitzsimmons (Assistant Attorney General and Chair, Privacy Task Force, Connecticut Office of the Attorney General); Andromachi Georgosouli (Senior Lecturer, Centre for Commercial law Studies, Queen Mary, University of London); Romain Paserot (Director of Cross Functional and Specialized Supervision, Autorite de controle prudential, France).

Sponsors: ILC; CILJ.

42. 2014 INTERNATIONAL SYMPOSIUM ON THE IMPROVEMENT OF THE LIABILITY INSURANCE SYSTEM

Date: May 10, 2014

Co-hosted by: Renmin Law School; The Insurance Law Center; The University of Connecticut School of Law at Renmin University in Beijing, China.

43. 3RD ANNUAL CONNECTICUT RISK MANAGEMENT CONFERENCE

Date: Mar. 20, 2015

Keynote: Thomas Sullivan (Associate Director Federal Reserve, Board of Governors).

Sponsors: UConn's School of Business; ILC.

44. THE ACA TURNS FIVE

Date: Apr. 17, 2015

Keynote speaker: Kathleen Sebelius (Former U. S. Secretary of Health and Human Services).

Moderators: Brendan S. Maher; Jill Anderson; Radha Pathak; Peter Siegelman; John A. Cogan.

Panelists: Mark Hall (Wake Forest University School of Law); Timothy S. Jost (Washington and Lee University School of Law); Amy B. Monahan (University of Minnesota Law School); Elizabeth Weeks Leonard (University of Georgia School of Law); Kyle D. Logue (University of Michigan Law School); Patricia A. McCoy (Boston College Law School); William M. Sage (University of Texas Law School); Brian Galle (Boston College Law School); Abbe R. Gluck (Yale Law School); Jessica L. Roberts (University of Houston Law Center); Daniel Schwarcz (University of Minnesota Law School); Amanda E.

Kowalski (Department of Economics, Yale University); Ellen R. Meara (Department of Economics, Dartmouth College); Mark V. Pauly (Wharton School of the University of Pennsylvania); Nima Farzan (Chief Operating Officer, PaxVax); Charles Klippel (Deputy General Counsel, Aetna); Thomas Leonardi (Former Connecticut Insurance Commissioner).

Sponsors: ILC; CILJ.

45. CORPORATE GOVERNANCE: WHERE WE HAVE BEEN AND WHERE WE ARE GOING

Date: Sept. 16, 2015

Speakers: Anne Sheehan (Director of Corporate Governance for the California State Teachers Retirement System); Tim Smith (Director of ESG Shareowner Engagement, Walden Assessment Management); Lucy Gilson (Professor of Management, University of Connecticut School of Business).

Moderator: Jeremy McClane (Professor, University of Connecticut School of Law).

Sponsors: UConn Law; UConn School of Business; Office of Connecticut State Treasurer Denise L. Nappier.

46. CONFERENCE: THE U.S. & CHINA: NEW INSURANCE PRODUCTS, NEW REGULATORY CHALLENGES

Date: Oct. 9, 2015

Keynote Speaker: Thomas Sullivan (Associate Director, Federal Reserve, Board of Governors).

Speakers: Jia Linqing (Professor, Deputy Director of Maritime Law & of the Insurance Law Research Institute, Renmin University of China Law school); John Buchanan (Partern, Covington & Burling); Paula M. Pallozzi (Associate Director, Rhode Island Insurance Division); Peter Molk (Professor, Willamette University College of Law); David Snyder (Vice President, International Policy, Property Casualty Insurers Association of America); Peter Kochenburger (Professor & Deputy Director, Insurance Law Center); Xin Chen (Professor & Director of the Insurance Law Center and the Law and Economics Center, University of International Business and Economics); Wes Bissett (Senior Vice President of Government Affairs and State Relations, Independent Insurance Agents and Brokers of America, Inc.); Jeffrey Stempel (Doris S. and Theodore B. Lee

Professor of Law, University of Nevada Las Vegas William S. Boyd School of Law); Jun Yao (Chief Legal Officer, Ping An Insurance Group of China); John Buchanan (Partner, Covington & Burling); Brendan Maher (Professor & Director of the Insurance Law Center, University of Connecticut); Haibao Xing (Professor, Renmin University of China Law School); Mark Geistfeld (Sheila Lubetsky Birnbaum Professor of Civil Litigation, New York University School of Law); Patricia McCoy (Liberty Mutual Insurance Professor of Law, Boston College Law School); Lynn Quincy (Director of the Health Care Value Hub, Consumers Union).

Moderator: Matthew J. Shiroma (Counsel, Day Pitney LLP).

Sponsors: ILC; Renmin Law School.

47. FIFTH ANNUAL NATIONAL BENEFITS & SOCIAL INSURANCE CONFERENCE

Date: Apr. 15, 2016

Keynote Speaker: Phyllis Borzi.

Speakers: D. Muir (Michigan); K. Moore (Kentucky); J. Turner (PPC); A. Stumpf (Michigan); N. Huberfield (Kentucky); B. Maher (UConn); J. Cogan (UConn); I. Goldowitz (PGBC); N. Shnitser (Boston College); J. Foman (Oklahoma); D. Pratt (Albany); P. Wiedenbeck (Wash. U); A. Monahan (Minnesota); D. Bogan (Oklahoma); N. Stein (Drexel); N. Stein; M. Hylton (Boston University); P. Secunda (Marquette); R. Pathak (Whittier).

Sponsor: ILC.

48. CONNECTICUT BAR ASSOCIATION ANNUAL INSURANCE LAW SYMPOSIUM: BAD FAITH LITIGATION CLE

Date: Feb. 23, 2017

Topic: This year the annual symposium, co-hosted by CBA Insurance Law Section and the Insurance Law Center at the UConn School of Law, will address bad faith litigation in Connecticut and throughout the United States. The first panel will discuss the current state of the law in Connecticut and elsewhere on what is, and is not, bad faith. The second panel will address discovery and proof at trial and whether the attorney-client privilege is eroding in the context of bad

faith litigation.
Opening Remarks: Marilyn B. Fagelson.
What is Bad Faith in 2017?: Gerald P. "Kip" Dwyer, Jr.; Peter Kochenburger; Elizabeth J. Stewart.
Bad Faith Litigation – Discovery and Proof at Trial: Hon. Charles T. Lee; Elizabeth F. Ahlstrand; Robert D. "Bert" Helfand; Jeffery J. Vita.
Sponsors: CBA Insurance Law Section; ILC.

49. LEMONADE: SHARING RISKS, SHARING PROFITS AND THE SHARING ECONOMY: AN INSURANCE PARADIGM

Date: Mar. 21, 2017
Topic: Informal workshop and dialogue with executives from Lemonade Insurance Company. Lemonade sells insurance online, through an app, and takes a fixed fee from premiums. It uses the remainder of the premiums to pay claims and buy reinsurance, with any leftover funds donated to charity instead of profiting the company.
Sponsors: ILC; the Connecticut Insurance & Financial Services Cluster.

50. FOURTH ANNUAL LAW CONFERENCE ON RETIREMENT SECURITY, PENSIONS AND INSURANCE

Date: Oct. 13, 2017
Panel 1: Annuities & Retirement Planning – Walter Welsh (Adjunct Professor of Law, UConn Law School).
Panel 2: Private & Public Pensions – Stability and Guaranty Funds – Brendan Maher (Director of the Insurance Law Center and Connecticut Mutual Professor of Law).
Panel 3: Longevity Rish – Brendan Maher (Moderator).
Panel 4: Retirement Security, Insurance and Consumer Protection - Peter Kochenburger (Deputy Director, Insurance Law Center, Associate Clinical Professor of Law).
Sponsors: ILC; Renmin Law School.

51. CBA ANNUAL INSURANCE LAW SYMPOSIUM: BIG DATA CHANGES EVERYTHING: WHY INSURANCE LAWYERS NEED TO CATCH UP FAST

Date: Apr. 13, 2018

Panel: Marilyn B. Fagelson (Murtha Cullina LLP, Insurance Law Section Chair); Peter Kochenburger (Associate Clinical Professor of Law, Executive Director of the Insurance L.L.M. Program); Jim Etkin (Agricultural Aerial Remote Sensing Standards Counsel); Robert D. Helfand (Pullman & Comley LLC); Matthew J. Smith (Coalition Against Insurance Fraud); Christopher P. Makuc (Navigant); David T. Smith (The Hartford); Timothy J. Curry (Deputy Commissioner, Connecticut Insurance Department).
Moderator: Peter Kochenburger.
Sponsors: UConn Law; ILC.

52. EVALUATING LITIGATION RISK IN THE 21ST CENTURY

Date: Apr. 27, 2018
Panel 1: Current Methods: Perspectives from Law Firms, Finance, and Insurance – William Narwold (Partner, Motley Rice); Selvyn Seidel (CEO, Fulbrook Capital Management); Elizabeth Sacksteder (Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP); James Heavner (Senior Vice President, Director of Litigation, The Hartford).
Panel 2: Innovations: Probability Theory and Data Analytics – Alexandra Lahav (Moderator); Andrew Cohen (Vice President, Burford Capital); Eric Falkenberry (Partner, DLA Piper); Daniel Martin Katz (Associate Professor, Illinois Tech - Chicago Kent Law); Marc Victor (President, Litigation Risk Analysis).
Panel 3: New Directions and Possibilities – David Abrams (Professor, University of Pennsylvania School of Law); Jonah Gelbach (Professor, University of Pennsylvania School of Law); Natalie Chairamonte (Vice President, Sovereign Insurance); Kathryn Spier (Professor, Harvard Law School).
Sponsors: UConn Law; ILC.

53. CHINA BANKING & INSURANCE REGULATORY COMMISSION TRAINING SESSION PROGRAM

Date: July 9, 2018

54. IS U.S. INSURANCE REGULATION UNCONSTITUTIONAL?

Date: Mar. 13, 2019

55. THE ALI'S RESTATEMENT OF LAW, LIABILITY INSURANCE

Date: Apr. 5, 2019

Sponsors: Insurance Law Center; Connecticut Bar Association's Insurance Law Section; Rutgers Center for Risk and Responsibility.

Panel 1: Professional Responsibility & the RLLI Professor Leslie Levin (UConn Law School); Adjunct Professor Mark Dubois (UConn Law School); Attorney Phillip Newbury (Howd & Ludorf)

Moderator: Professor Brendan Maher (UConn Law School)

Panel 2: Plain Meaning and Ambiguity in Insurance Contracts Attorney Laura Foggan (Crowell & Moring); Attorney John Buchanan (Covington & Burling); Attorney Ray DeMeo (Robinson & Cole).

Moderator: Professor Patricia McCoy (Boston College Law School).

Presentation by Professor Tom Baker

Panel 3: Duty to Make Reasonable Settlement Decisions Professor Jeff Stempel (UNLV William S. Boyd School of Law); Attorney Theresa Guertin (Saxe Doernberger & Vita); Attorney Matthew Shiroma (Day Pitney)

Moderator: Professor Adam Scales (Rutgers Law School)

Panel 4: The Restatement in Context Professor Jill Anderson (UConn Law School); Professor James Davey (Southampton University Law School, UK); Professor Qihao He (China University of Political Science and Law)

Commentator: Dean Aviva Abramovsky (University at Buffalo School of Law)

Moderator: Professor Peter Kochenburger (UConn Law School)

56. CHINA BANKING & INSURANCE REGULATORY COMMISSION TRAINING SESSION PROGRAM

Date: Sept. 16–17, 2019

Panel 1: Insurance Finance Peter Austin (Travelers); Lynne Grinsell (Zurich); Kathryn Belfi (Connecticut Insurance Department)

Panel 2: Morgan Lewis

Panel 3: Regulation of Health Insurance Charles Kippel (Aetna, Deputy General Counsel)

Panel 4: Regulatory Issues- Banking Lisa Prager (Agricultural Bank of China, General Counsel)

Sept. 17, 2019

Panel 1: Insurance, Financial Services and Connecticut: Susan Winkler (Connecticut Insurance and Financial Services Cluster)

Panel 2: Financial & Solvency Regulation: William Goddard (Day Pitney) Scott Fischer (Morgan Lewis)

Panel 3: Insolvency Regulation: Harold Horwich & Benjamin Cordiano (Morgan Lewis)

Panel 4: Big Data, Insurance and Consumer Protection: Sonja Larkin-Thorne (Consumer Advocate)

Panel 5: Regulation of Health Insurance Charles Klippel (Aetna, Associate General Counsel)

Panel 6: Regulation of Life Insurance, Annuities & Disability Income Insurance Brad Smith (American Council of Life Insurers)

Panel 7: Cybersecurity Regulation for Insurers Jon Arsenault Connecticut Insurance Department, General Counsel)

Sponsors: UConn Law; ILC.

57. AMERICAN COLLEGE OF COVERAGE COUNSEL COVID-19 WEBINAR

Date: Nov. 12, 2020

Keynote speaker: Tom Baker (William Maul Measey Professor Law, University of Pennsylvania**).**

Speakers: Jeffrey Vita (Saxe Doernberger & Vita); Jay Sever (Phelps Dunbar).

Sponsors: ILC; CBA.

58. THE ROLE OF LAW AND GOVERNMENT IN CYBER INSURANCE MARKETS

Date: Mar. 12, 2021

Panel 1–The Role of Cyber Insurers in Promoting Cyber Security: Kyle Logue (Douglas A. Kahn Collegiate Professor of Law, University of Michigan Law School); Ronen Avraham

(Professor of Law, Tel Aviv University Faculty of Law); Tom Baker (William Maul Measey Professor of Law, University of Pennsylvania Law School); Kelly Castriotta (Senior Director, Global Cyber Underwriting Executive, Markel Corporation); Rotem Iram (Founder & CEO, At-Bay); Shauhin Talesh (Professor, University of California Irvine School of Law).

Panel 2–Litigating Insurance Coverage for Cyber Losses: Chris French (Professor of Practice, Penn State Law); Michelle Boardman (Associate Professor of Law, Antonin Scalia Law School, George Mason University); Laura Foggen (Partner, Crowell Moring); Jay Kesan (Professor of Law, Illinois College of Law).

Panel 3–Cyber Insurance, Law, And Catastrophe Risk: Jessica Winkle (Assistant Professor, University of North Carolina, Wilmington); Kenneth Abraham (David and Mary Harrison Distinguished Professor of Law); Daniel Schwarcz (Fredrikson & Byron Professor of Law, University of Minnesota Law School); Erin Kenneally (Director of Cyber Risk Analytics, Guidewire/Cyence); Josephine Wolff (Assistant Professor of Cybersecurity Policy, The Fletcher School).

Panel 4–The Government's Role in Fostering Cyber Insurance Markets: Peter Kochenburger (Associate Clinical Professor of Law and Deputy Director of the Insurance Law Center); John Godfread (North Dakota Insurance Commissioner and Chair of the Innovation and Technology Task Force for the National Association of Insurance Commissioners); Asaf Lubin (Associate Professor of Law, Indiana University Maurer School of Law and Fellow at IU's Center for Applied Cybersecurity Research); Sasha Romanosky (Policy Researcher, RAND Corporation).

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SYNOPSES

THE PRESENCE OF INSURANCE AND THE LEGAL ALLOCATION OF RISK
James M. Fischer

Do courts take into consideration the presence and availability of insurance in individual case disposition, and, if so, is such consideration proper? This is the question explored in Professor Fischer's survey of American case law. This Article examines the modern judicial trend of matching liability with the party who can most efficiently absorb the loss as opposed to the party who created the risk of loss. Professor Fischer analyzes a variety of mechanisms through which courts match liability for loss with the insured party. He argues that the presence of insurance influences case specific risk allocation decisions by courts and considers whether this approach is sound public policy. Professor Fischer then offers guidelines to lead decision makers toward justifiable resolutions of disputes where risk and insurance are not in alignment.

FRAUD AND THE INCONTESTABLE CLAUSE: A MODEST PROPOSAL FOR CHANGE
Robert R. Googins

The incontestable clause in life and health insurance contracts has consistently been interpreted by courts as a bar to insurers' defenses based on material misrepresentations in the insurance application, even if the insured committed fraud in the application process. The Article reviews the case of *Paul Revere Life Insurance Co. v. Haas*, which overturned this long-standing interpretation of the incontestable clause, along with its ancestors and progeny, and discusses arguments frequently made in support of the applicability of incontestable clauses with respect to the fraudulent procurement of policies. Notwithstanding the cases that support the application of the incontestable clause regardless of the

insured's fraud, Professor Googins reviews the available equitable judicial tools that can help quell fraud in the application of insurance without detracting from the principal role of the incontestable clause—protecting insureds. In light of the increasing awareness of the fraud problem in today's society, Professor Googins concludes that the Supreme Court of New Jersey made the right decision and that instances of fraud should not routinely be shielded by the incontestable clause in life and health insurance contracts, even though the incontestable period has run.

THE INTERACTION OF THE TORT SYSTEM AND LIABILITY INSURANCE REGULATION: UNDERSTANDING MORAL HAZARD
Seth J. Chandler

The tort law system and the insurance regulatory system constantly interact to determine welfare of injurers and victims in society. The tort system attempts to deter injurers from engaging in behavior that will result in accidents, inflicting injuries on innocent victims. Injurers may purchase insurance to cover their liabilities in the event of an accident, effectively spreading cost of compensating their victims. Moral hazard is the tendency of parties that have purchased insurance to behave in a riskier fashion than they did before. Control of moral hazard is necessary to prevent an insurance regulatory system from dissipating any deterrent force that the tort system possesses. In this Article, Professor Chandler uses an innovative mathematical technique known as "simulated annealing" to study the interaction of liability insurance regulation and tort systems. Numeric optimization theory is used to analyze the behavior of "rational" human beings under representative systems of tort law. In a series of computer-aided thought experiments, Professor Chandler explores the possibilities of regulatory intervention in the liability insurance market that will most effectively compensate for deficiencies in the tort system. On the basis of the results of these experiments, Professor Chandler suggests specific factors that should be considered by courts and legislators when regulating liability insurance within the tort system.

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WHY INSURANCE NEEDS A RESTATEMENT: THE CASE OF SETTLEMENT DECISION LAW

CHAIM SAIMAN*

ABSTRACT

Even before its publication, the Restatement of the Law, Liability Insurance had been subjected to withering wholesale criticism that it creates aspirational and pro-policyholder insurance law. This view continues to be forcefully promoted by insurers and their advocates in the legal literature and by governors and state legislatures in the political areas.

This Article finds these wholesale criticisms unwarranted. Liability insurance law is not a field where law is simply found and restated. In fact, settlement law offers the most vivid examples of why the Restatement of the Law, Liability Insurance is possible, useful, and justified. It is possible because there is sufficient agreement on core doctrines to be organized into a common framework. It is useful because, though courts have been handling these cases for more than a century, the basic analytical foundations of the rules associated with this specialized insurance law remain poorly understood and often unarticulated. It is justified, because the project locates insurance settlement law within the broader framework of modern contract, tort, and fiduciary law. Notwithstanding localized quibbles, because Restatements are charged with determining the legal rules that best fit within the broader body of law, the Restatement of the Law, Liability Insurance stands as a considerable achievement.

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* I would like to thank Samuel Arena, Tom Baker, Kyle Logue, Luke Repici and Daniel Schwarcz. I also thank Sarah Gimbel, Caroline Keefe and Mark Lammy for their excellent research assistance on this project.

INTRODUCTION: THE RESTATEMENT OF THE LAW, LIABILITY INSURANCE AND ITS CRITICS

The *Restatement of the Law, Liability Insurance*[1] ("*RLLI*") was published by the American Law Institute ("ALI") in 2019.[2] Nearly ten years earlier, the project began in relative obscurity under the name *Principles of the Law of Liability Insurance* ("*Principles*").[3] Midway through, the ALI made the unprecedented move of converting *Principles* into the *RLLI*.[4] Interest in the project thereafter surged, especially in the form of critical responses from the insurance industry and its representatives.[5]

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[1] RESTATEMENT OF THE L., LIAB. INS. (AM. L. INST. 2019).

[2] Jeffrey W. Stempel, *From Quiet to Confrontational to (Potentially) Quiescent: The Path of the ALI Liability Insurance Restatement*, 50 BRIEF 11, 14 (2020).

[3] *See* Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767, 771 (2017).

[4] 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, 724–25 (2020) ("This decision to convert a pending Principles project into a Restatement was unprecedented in the ALI's history.").

[5] *See, e.g.*, Stempel, *supra* note 2, at 12 (citing sources); A. Hugh Scott, *Why Criticism of ALI's Insurance Restatement is Valid*, LAW360 (May 10, 2017, 11:13 AM), https://www.namic.org/pdf/insbriefs/170524_why-criticism-of-alis-insurance-restatement-is-valid.pdf; William T. Barker, *The Draft Restatement Improperly Limits Use of Extrinsic Evidence in Insurer Decision-Making on Duty to Defend*, 38 INS. LITIG. REP. 1 (2016); John K. DiMungo, *From Principles to Restatement: The Impact of the American Law Institute's Restatement, Law of Liability Insurance on*

In line with wider social trends, the ALI's most recent Restatements have become increasingly polarized and politicized.[6] A process once known for genteel academic debates that centered on the finer points of consideration law[7] or the niceties of the rule against perpetuities,[8] now increasingly mimics the harsher tactics known to the legislative and political arenas. Lines have been sharply drawn,[9] parties and interest groups are mobilized, the stakes are framed as existential, and lobbying and external pressure campaigns have become the norm.[10]

American Insurance Law, 37 INS. LITIG. REP. 569 (2015); Jeff Sistrunk, *ALI's Proposed Penalty for Spurning Defense Irks Insurers*, LAW360 (Oct. 26, 2015), https://www.law360.com/articles/716850/ali-s-proposed-penalty-for-spurning-defense-irks-insurers; Randy Maniloff, *ALI Principles of Insurance Should Concern Industry*, LAW360 (Apr. 16, 2014), https://www.law360.com/articles/528384/ali-principles-of-insurance-should-concern-industry.

[6] *See* Jay M. Feinman, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS U. L. REV. 1, 9 (2015) (discussing "the extent to which Restatements represent sound distillations of existing judicial authority, or are shaped by interest groups and politics, or whether it even makes sense to attempt an authoritative Restatement."). *See also* Jeffrey W. Stempel, *Hard Battles Over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance*, 69 CLEV. ST. L. REV. 605, 623–27 (2021) (assessing the controversial process for *Principles of Corporate Governance*, *Restatement of the Law Governing Lawyers*, and *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*).

[7] *See, e.g.*, Feinman, *supra* note 6, at 9 (reviewing the "quaint" discussion between Professors Samuel Williston and Arthur Corbin regarding the definition of consideration in the *Restatement (First) of Contracts*).

[8] *See, e.g.*, *id.* at 24 ("At the 1991 annual meeting, ALI president Roswell Perkins noted that . . . [until the 1980's] 'perhaps the most emotional debate was in 1978, . . . over the Rule Against Perpetuities.' [This changed] when, in Perkins's words, the ALI began 'to bite on more economically divisive meat . . . [that] carries the disease of polarization.'" (citation omitted)).

[9] For examples of detractors see Kim V. Marrkand, *How a Broken Process, Broken Promises, and Reimagined Rules Justify the Bench and Bar's Skepticism Regarding the Reliability of the Restatement of the Law, Liability Insurance*, 50 BRIEF 20, 22–23 (2020); Schwartz & Appel, *supra* note 4. For supporters see Stempel, *supra* note 2; Stempel, *supra* note 6; Lorelie S. Masters & Geoffrey B. Fehling, *The American Law Institute's Restatement of the Law, Liability Insurance: Scholarship and Controversy*, 27 CONN. INS. L.J. 116 (2020); Jay M. Feinman, *A User's Guide to the Restatement of the Law, Liability Insurance*, 26 CONN. INS. L.J. 93 (2019).

[10] *See, e.g.*, Stempel, *supra* note 6, at 615–19 (noting increasingly controversial nature and partisan efforts of ALI projects in recent years).

Critical assessments of the *RLLI* typically piggyback on Justice Scalia's view, found in a 2015 concurrence, directed at the *Restatement (Third) of Restitution and Unjust Enrichment*. There he warned:

> [M]odern Restatements . . . are of questionable value, and must be used with caution. The object of the original Restatements was "to present an orderly statement of the general common law." Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. . . . [Innovative] Restatement sections . . . should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.[11]

Following Justice Scalia, the *RLLI*'s critics describe it as a work of policyholder advocacy masquerading as a product of ALI neutrality. Hundreds of blogs and articles in legal trade press assert the *RLLI* (sometimes derisively called the "NEWstatement" of insurance law)[12] does not present the law as it is, but reflects an unbalanced and pro-policyholder version of aspirational insurance law that fails a Restatement's goal of describing the positive law as applied by American courts.[13] Critics claim the *RLLI* has adopted the policyholder side in nearly every issue.[14] And

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[11] Kansas v. Nebraska, 574 U.S. 445, 475–76 (2015) (Scalia, J., concurring and dissenting in part) (citations omitted).

[12] *See* Press Release, Nat'l Council of Ins. Legislators, Successful 2017 NCOIL Annual Meeting in Phoenix Concludes (Nov. 20, 2017), https://ncoil.org/2017/12/12/4675/ ("Other highlights of the NCOIL Annual Meeting included . . . General Session titled 'A Restatement or NEWstatement? – Examining the ALI's Proposed Restatement of the Law on Liability Insurance' . . . ."); Press Release, Thomas B. Considine, CEO, Nat'l Council of Ins. Legislators, NCOIL CEO Statement on ALI 'Restatement' of Liability Insurance Law (May 25, 2018), https://ncoil.org/2018/05/25/ncoil-statement-on-ali-restatement-of-liability-insurance-law/.

[13] *See, e.g.*, Schwartz & Appel, *supra* note 4, at 719.

[14] *See, e.g.*, Marrkand, *supra* note 9, at 23 ("[T]he RLLI should be viewed with caution and with the understanding that it is not a fair, balanced, or reliable statement of insurance liability law.").

though some of the more extreme formulations were revised during the drafting process, insurers maintain that the die had been cast before the change from a *Principles* to a *Restatement* was initiated and before the insurance industry became heavily involved in the process.[15] Since insurance carriers began at such a disadvantage, the final document, they argue, remains thoroughly infected with policyholder bias.[16]

As the project neared completion, anti-*RLLI* activism moved from the inner sanctum of the ALI and legal press to the political arena. Governors of six states jointly wrote an unprecedented letter to the ALI's leadership articulating their disapproval of the forthcoming *RLLI*.[17] In addition to citing Justice Scalia's lines and critiquing what they viewed as the aspirational nature of the *RLLI*, the governors included a more unusual contention: their fear that *RLLI* would usurp state lawmaking authority which "[is] properly within the prerogative of our state legislatures . . . ."[18] This is curious, because neither the *RLLI* nor any other Restatements can become the law of a state unless it is adopted by its courts or legislature. Nor was this a one-time slip of a keystroke. This argument was expanded upon by the National Council of Insurance Legislators ("NCOIL")[19] who accused the *RLLI* of encroaching on the states' legislative prerogative.[20]

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[15] *See, e.g.*, *id.* at 21 (suggesting the *Principles* project began on a good note, but was quickly thwarted when "the reporters chose to operate in 'stealth mode' for the first two years of the PLLI project's existence . . . .").

[16] *See generally id.*

[17] Letter from Henry McMaster, Governor of South Carolina, Kim Reynolds, Governor of Iowa, Paul R. LePage, Governor of Maine, Pete Ricketts, Governor of Nebraska, Greg Abbott, Governor of Texas, and Gary R. Herbert, Governor of Utah, to David F. Levi, President, Am. L. Inst. (Apr. 6, 2018), https://ncoil.org/wp-content/uploads/2018/04/2018-04-062520Governors2520to2520ALI2520re2520Draft2520Restatement-2-1.pdf.

[18] *Id.* at 1. *See also id.* ("Therefore, if the ALI does not significantly revise or rescind the Draft *Restatement*, this implicit usurpation of state authority may require legislative or executive action.").

[19] NCOIL is a national organization comprised of state legislators interested in insurance and financial institution regulation. *See generally* Press Release, NCOIL Voices Concerns with the American Law Institute's Proposed Liability Insurance Restatement; Violates "Legislative Prerogative" (May 8, 2017), http://ncoil.org/wp-content/uploads/2017/05/ALI-final-Press-Release-1.pdf.

[20] *See id.* at 2. NCOIL's CEO, Tom Considine, also sent a letter to the ALI that stated:

> I note that should the ALI refuse our invitation for a dialogue and proceed towards seeking approval of the proposed

These dire warnings did not come to pass. A March 2021 analysis by Randy Maniloff, a prominent lawyer and commentator who represents insurance companies, shows that *RLLI* is generally cited by courts for "benign reasons."[21] As Maniloff explains, though during the drafting process the "*RLLI* was predicted by some to lead to cataclysmic consequences for liability insurers. After nearly three years, and several dozen decisions citing the *RLLI*, that had not come to pass. The sky was still in the sky."[22] Instead, he notes that courts mainly use the *RLLI* to fill "voids and crevices in their own state's law" and predicts this trend will continue.[23] To the extent Maniloff sees a danger for insurers, it is only where there is national divergence on an issue or a lack of clarity within the state law.[24] Here a court "looking for a place to land, may be inclined to adopt the *RLLI*'s position [giving] insurers . . . more to fear than policyholders."[25]

> Restatement from ALI membership at its annual meeting, NCOIL will be forced to consider passing a Resolution that opposes the proposed Restatement as a misrepresentation of the law of liability insurance, and as a usurpation of lawmaking authority from State insurance legislators.

Letter from Tom Considine, CEO, Nat'l Council of Ins. Legislatures, to Richard Revesz, Dir., Am. L. Instit., and Stephanie Middleton, Deputy Dir., Am. L. Instit. 3 (May 5, 2017), https://ncoil.org/wp-content/uploads/2018/04/ALI-Restatement-Letter-5-4-17-1-7.pdf.

[21] Randy Maniloff, *Insurer Wins Biggest ALI Liability Insurance Restatement Case to Date*, ALI ADVISER (Mar. 25, 2021), https://www.thealiadviser.org/liability-insurance/insurer-wins-biggest-ali-liability-insurance-restatement-case-to-date [hereinafter Maniloff, *Insurer Wins*].

[22] *Id.* (italics added). *See also* Randy Maniloff, *3 Courts, in 3 Days, Seek Guidance from the ALI Restatement of Liability Insurance*, 10 COVERAGE OPS., Mar. 2021, https://coverageopinions.info/Vol10Issue2/3Courts.html [hereinafter Maniloff, *3 Courts*] ("I do not believe that courts will eschew their own precedent in favor of adopting a contrary rule contained in the RLLI. Rather, as I see it, the RLLI's impact will be felt by courts using it to fill voids and crevices in their own state's law. Faced with an issue on which there is no home-state law (or the law is not clear), and there is a divergence of positions nationally, the court, looking for a place to land, may be inclined to adopt the RLLI's position.").

[23] Maniloff, *3 Courts, supra* note 22.

[24] *Id.*

[25] *Id.* (italics added).

A second unprecedented response came from state legislatures who launched wholesale denunciations of the *RLLI*.[26] As of early 2021, about ten states passed legislation or resolutions singling out the *RLLI* with the purpose of downgrading it as a source of persuasive authority.[27] An Ohio statute notes that the *RLLI* "does not constitute the public policy of this state and is not an appropriate subject of notice."[28] Utah's statute explains that the *RLLI* "is not the law or public policy of the state if the statement of law is inconsistent or in conflict with . . . state statutes, state case law; or state-adopted common law."[29] Michigan upped the ante even further by legislating that the *RLLI* cannot be consulted unless the rule found therein is "clearly expressed in a statute of this state, the common law, or case law precedent of this state."[30]

This Article finds these wholesale critiques overblown and unwarranted. The primary error lies with the assumption that liability insurance law—especially the portion dealing with settlement—is a field

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[26] *See, e.g.*, Nicholas Malfitano, *Ohio Lawmakers Send First-of-its-Kind Rejection to Powerful Legal Group*, PA. REC. (Aug. 3, 2018), https://pennrecord.com/stories/511510412-ohio-lawmakers-send-first-of-its-kind-rejection-to-powerful-legal-group ("ALI's Deputy Director Stephanie Middleton confirmed no state had ever passed legislation against a Restatement in its entirety before.").

[27] *See* Masters & Fehling, *supra* note 9, at 142–44 (summarizing the legislative efforts undertaken against the *RLLI* in Ohio, Michigan, Arkansas, North Dakota, Texas, Utah, Kentucky, Indiana, Louisiana, and Oklahoma).

[28] OHIO REV. CODE ANN. § 3901.82 (LexisNexis, LEXIS through 2021-2022 Gen. Assemb.).

[29] UTAH CODE ANN. § 31A-22-205 (LexisNexis 2022). These legislative approaches are particularly ill-suited for smaller states that routinely look to sister states and secondary authority to fill the lacuna in their precedents. For example, North Dakota's statute which maintains that the *RLLI* should not be used "as an authoritative reference regarding interpretation of North Dakota laws, rules, and principles of insurance law." N.D. CENT. CODE § 26.1-02-34 (LEXIS through 2021 Sess.). These statues will most likely impact federal courts tasked with making *Erie* predictions on matters that are not addressed by the relevant states' precedents. Per the leading civil procedure treatise, this is exactly the situation in which courts look to Restatements. *See* 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (WRIGHT & MILLER) § 4507 (Westlaw, database updated Apr. 2022).

[30] MICH. COMP. LAWS § 500.3032 (2020). As Masters and Fehling point out, one wonders about Michigan's distinction between "the common law" and "case law precedent of the state." Masters & Fehling, *supra* note 9, at 148–49.

Notably, these legislative efforts have inspired their own countermeasures including a letter by three former Arizona Supreme Court chief justices urging the legislature to oppose an anti-*RLLI* bill. *See id.* at 119 n.7. *See also id.* at 152–53 (discussing the letter).

where the law can simply be found and where "majority rules" are easily identified and restated. Because settlement law reflects an undertheorized amalgamation of contract, tort, agency, and fiduciary principles, it offers a vivid demonstration of the qualities that make the *RLLI* possible, useful, and justified.[31] It is possible because there is sufficient agreement on core doctrines that can be organized into a common framework. It is useful because, though courts have been handling these cases for more than a century, the basic analytical foundations of specialized insurance law rules remain poorly understood and often unarticulated. It is justified because the project locates insurance settlement law within the broader framework of modern contract, tort, and fiduciary law. As Restatements are charged with "determin[ing] what specific rule fits best with the broader body of law and therefore leads to more coherence in the law,"[32] the *RLLI* stands as a considerable achievement.

This Article proceed as follows. Part I shows how despite attempts to characterize the *RLLI* as uniquely ultra vires of the ALI's mandate, the substantive critiques lodged against it are hardly novel and were presaged almost a century earlier in response to the *Restatement (First) of Contracts.* Part II makes a structural argument as to why the common law nature of insurance regulation calls out for the type of doctrinal re-organization enabled by the *RLLI*.

The next Parts turn to the specifics of settlement and bad faith law. Part III traces the evolution of bad faith from its origins in contract law to the present construction that does not easily fit into contract, tort, or agency law. Lastly, Parts IV and V examine the *RLLI*'s efforts to structure the insurer's settlement obligations as substantive insurance law that bears its own conceptual and doctrinal grounding. Though broadly supportive of this approach, I nevertheless offer local critiques of the *RLLI* in places where it has either overstepped its boundary or oversimplified the law where more nuance is warranted. These criticisms, however, are grounded in how courts

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[31] According to the ALI Handbook, restatements are to be "analytical, critical and constructive." AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (rev. ed. 2015) [hereinafter ALI HANDBOOK]. The ALI recognizes this, framing establishes a tension between the "impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent . . . [even as such moves likely] subtly transform[] it in the process." *Id.*

[32] *Id.* at 5.

actually use Restatements,[33] remain alert to the inherent challenges of restating this area of law, and recognize that the process is more art than science.[34] As such it is qualitatively different from the blunderbuss rejections emerging from governors' mansions, statehouses, and found in some of the legal trade press.

I. THE *RLLI* AND THE RESTATEMENT (FIRST) OF CONTRACTS

Critics of the *RLLI* have long sought to position the project as uniquely violative of the grand tradition of Restatements and ultra vires of the ALI's mandate. Since the inception of the ALI in 1923 however, it has characterized Restatements as being "at once analytical, critical and constructive."[35] Per the ALI, "constructive" means:

> [Restatements] should not be confined to examining and setting forth the law applicable to those situations which have been the subject of court action or statutory regulation, but should also take account of situations not yet discussed by courts or dealt with by legislatures but which are likely to cause litigation in the future.[36]

When faced with uncertainty, Restatements "should make clear what is believed to be the proper rule of law."[37]

Against this background, it is worth recalling how even the *Restatement (First) of Contracts*[38]—the initial Restatement published in

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[33] *See, e.g.*, Williamson v. Guentzel, 584 N.W.2d 20, 24 (Minn. Ct. App. 1998) ("Restatements of the law are persuasive authority only and are not binding unless specifically adopted in Minnesota by statute or case law."). *See also* Maniloff, *Insurers Win, supra* note 21; Maniloff*, 3 Courts, supra* note 22.

[34] *See* ALI HANDBOOK, *supra* note 31, at 6 ("A Restatement consists of an appropriate mix of these four elements, with the relative weighing of these considerations being art and not science."). *See infra* text accompanying note 58 (listing the four main tasks).

[35] WILLIAM D. LEWIS & SAMUEL W. WILLISTON, REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE 14 (1923), https://www.ali.org/media/filer_public/c1/9d/c19dd2b2-55fa-4ee7-8664-de8f26cb0a1a/1923-rpt-establishment-of-ali.pdf.

[36] *Id.* at 14–15.

[37] *Id.* at 15.

[38] *See* RESTATEMENT (FIRST) OF CONTS. (AM. L. INST. 1932).

1932 and the oldest of the 'good ole' Restatements Scalia so admired—endured many of the same objections now lodged against the *RLLI*.[39] As far back as the early 1930s, the ALI's detractors maintained that academics centered around the ALI were "inject[ing] their own theories or opinions into a statement of 'the law.'"[40]

Writing in the 1933 volume of the *Columbia Law Review*, Professor Edwin Patterson's review of the *Restatement (First) of Contracts* demonstrates how determining the weight of authority involves far more of a judgment call than simple counting.[41] Patterson further noted how rules that appeared well-settled were, upon investigation, "supported by surprisingly few clear-cut decisions,"[42] and criticized the document for treating the underlying cases "as scaffolding to be torn down as soon as the building is finished."[43]

Though ultimately supportive of the *Restatement (First) of Contracts*, Patterson did not shy away from noting its innovative method of conceptualizing the underlying cases.[44] The approach to remedies could be easily criticized as it was "calculated to obliterate distinctions between law and equity," and thereby extend doctrines known only to equity into actions at law.[45] It likewise treated the question of mutual assent uniformly across all contract types even as many precedents tended to assume different rules

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[39] Justice Scalia had little trouble citing to the RESTATEMENT (FIRST) OF CONTS. and RESTATEMENT (SECOND) OF CONTS. *See, e.g.*, Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575 U.S. 175, 198 (2015) (Scalia, J., concurring) (citing RESTATEMENT OF CONTS. §474(b), cmt. b (1932)); Papago Tribal Util. Auth. v. Fed. Energy Regulatory Comm'n., 723 F.2d 950, 954 (D.C. Cir. 1983) (citing RESTATEMENT OF CONTS. § 554 (1932)); Langley v. Fed. Deposit Ins. Corp., 484 U.S. 86, 91 (1987) (citing RESTATEMENT (SECOND) OF CONTS. § 3 cmt. a (1981)).

[40] Edwin W. Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397, 401 (1933).

[41] *Id.* at 400 ("Yet [determining the weight of authority] is no mere matter of counting cases; respect for the reasoning of an opinion or for the reputation of the court will be thrown into the scale.").

[42] *Id.* at 401.

[43] *Id.* at 402.

[44] *Id.* at 414–15. *See also id.* at 415 ("The innovations of the Restatement, considered in relation to established precedents, have been arrived at by three methods . . . .").

[45] *Id.* at 412–13.

for different sub-species of contract.[46] Finally, Patterson, like many others, thought the *Restatement (First) of Contracts'* approach to promissory estoppel was novel and based on a decidedly minoritarian view in the then-existing caselaw.[47]

Perhaps of greatest interest to insurance lawyers, however, is the *Restatement (First) of Contracts'* innovation regarding disproportionate forfeiture. This doctrine excuses *A*'s non-performance of a condition where failure of the condition produces dire consequences for *A*, yet has minimal impact on *B*.[48] In the insurance realm, this doctrine most famously undergirds the "notice prejudice rule," which often requires an insurer to cover a claim notwithstanding the insured's failure to meet the notice conditions set forth in the policy, unless the insurer can show it was actually prejudiced by the late notice.[49] According to Patterson, this innovation was based on a constructive reading of cases decided on narrower grounds.[50]

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[46] *Id.* at 406, 409. Duncan Kennedy has noted that one of the primary innovations made by contract theorists in the generation prior to the first Restatement was to shift contract law from an area dominated by different transaction types to generalizable rules of offer and acceptance, interpretation, and remedies that prevail across different contractual settings. *See* DUNCAN KENNEDY, *Preclassical Private Law: The Transformation of Contract*, *in* THE RISE & FALL OF CLASSICAL LEGAL THOUGHT 157, 157–241 (Beard Books 2006).

[47] Patterson, *supra* note 40, at 416. *See generally* H. Mark Stichel, *The Restatements – First, Second, Third . . .*, BALT. BAR LIBR. NEWSL., Summer 2019, at 8, 10, http://www.barlib.org/NewsletterSummer2019.pdf ("Section 90 of the Restatement of Contracts, promissory estoppel, was something that Samuel Willison the Reporter for the project had advocated in his treatise but was not accepted generally by the Courts at that time."). *See also* George J. Thompson, *Some Current Economic and Political Impacts in the Law of Contract*, 26 CORNELL L. Q. 4, 9 (1940) (commentary and critique of § 90); George W. Goble, *Trends in the Theory of Contracts in the United States*, 11 TUL. L. REV. 412, 416 (1937) (same).

[48] *See* RESTATEMENT (FIRST) OF CONTS. § 302 (AM. L. INST. 1932). *See also* Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890 (N.Y. 1921) ("[A]n omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture.").

[49] *See* Alcazar v. Hayes, 982 S.W.2d 845, 850 (Tenn. 1998) (quoting Brakeman v. Potomac Ins. Co., 371 A.2d 193 (Pa. 1977)). *See also* RESTATEMENT OF THE L., LIAB. INS. § 35(1) (AM. L. INST. 2019) ("[T]he failure of the insured to satisfy a notice-of-claim condition excuses an insurer from performance of its obligations under a liability insurance policy only if the insurer demonstrates that it was prejudiced by the failure.").

[50] Patterson, *supra* note 40, at 417–18.

Nevertheless, he held that the Reporter's approach offered "a franker rationalization of what some courts are doing *sub rosa*."[51] Once reformatted in *Restatement (First) of Contract*, the doctrine is no longer limited to specific contexts but became a general principle applied across the law of contracts.[52]

Patterson's review reminds that, *pace* Justice Scalia, few *substantive* critiques raised against the *RLLI*'s approach were not already presaged in debates surrounding the very first ALI Restatements. Patterson held that the innovations in the *Restatement (First) of Contracts* relied on: (i) "deliberately choosing to canonize a minority view which the framers deemed more just;" (ii) "abstracting the net result of a line of decisions and discarding their incongruent rationalizations;" and (iii) extending existing rules to new situations by deduction or analysis.[53] While the *RLLI*'s critics use considerably darker and harsher tones than Patterson, his remarks are remarkably similar to the list of substantive criticisms lodged against the *RLLI*.[54]

While the ALI has revised its restating principles over the years, the central triad of "analytical critical and constructive" carries forward into the 2015 edition.[55] The current *ALI Handbook* explains that the Restatement process lives on the inevitable tension between the "impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent," notwithstanding that such moves are likely to "subtly transform[] it in the process."[56] When judicial results pull in different directions, Restatements are "not compelled to adhere to . . . 'a preponderating balance of authority' but is instead expected to propose the

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[51] *Id.* at 418.

[52] *See* RESTATEMENT (FIRST) OF CONTS. § 302 (AM. L. INST. 1932). *See also* RESTATEMENT (SECOND) OF CONTS. § 229 (AM. L. INST. 1981).

[53] Patterson, *supra* note 40, at 415.

[54] *See, e.g.*, Schwartz & Appel, *supra* note 44, at 738 ("[T]he RLLI recommended turning an exception to the general enforcement rule for policy conditions, whereby courts have imposed an insurer prejudice requirement in only a few distinct situations, into the new 'general rule' . . . ."); *id.* at 752 (arguing the *RLLI* does not represent the full rationale of exceptions to the duty to defend in the cited cases). *See also* Michael Menapace, *Going Beyond the Four Corners to Deny a Defense: A Critique of Section 13(3) of the Restatement of Liability Insurance*, 53 TORT TRIAL & INS. PRAC. L.J. 795, 804 (2018) (arguing the *RLLI* Reporters have underrepresented the full extent of exceptions to the duty to defend).

[55] ALI HANDBOOK, *supra* note 31, at 5.

[56] *Id.* at 4.

better rule and provide the rationale for choosing it."[57] Restatements are therefore understood to take on four main tasks: (i) "ascertain the nature of the majority rule;" (ii) "ascertain trends in the law;" (iii) "determine what specific rule fits best with the broader body of law and therefore leads to more coherence in the law;" and (iv) "ascertain the relative desirability of competing rules."[58] As the ALI emphasizes, balancing this process is an "art and not science."[59]

A more level understanding of both the Restatement process and the structure of American insurance law establishes a more sober framework to assess the *RLLI*. It is fair game to criticize the *RLLI* for adopting a clear minority rule,[60] or for amalgamating several rules to craft a new approach that has little support in the case law.[61] It is also fair to highlight when the *RLLI* favors insureds over insurers, proposes asymmetries in how the law applies to insurers and insureds, fails to take account of how a given rule will impact the day-to-day application of insurance law, or stands on shaky conceptual and analytical footing.[62] By the same token, when imbalances are well-sourced in the underlying caselaw, this criticism is correspondingly less justified.[63]

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[57] *Id.* at 5. This formulation carries forward from the 2005 edition of the ALI handbook. *See* AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 5 (2005).

[58] ALI HANDBOOK, *supra* note 31, at 5–6.

[59] *Id.* at 6.

[60] Examples can be found in earlier versions of *RLLI* §§ 9–11 dealing with misrepresentation, and the novel remedial approach to breaches of the duty to defend set forth in preliminary versions of § 19. While previous versions of § 19 would have brought more coherence and symmetry between remedies available for breach of the duty to defend and settlement obligations, the proposal could not be sufficiently anchored in caselaw and was abandoned. *See* Schwartz & Appel, *supra* note 4, at 732–36; Masters & Fehling, *supra* note 9, at 168–80.

[61] To say that such critiques are *fair* does not mean that the *RLLI* is necessarily wrong for going in this direction. Indeed, the ALI Handbook expressly notes that "an Institute Reporter is not compelled to adhere to . . . 'a preponderating balance of authority' but is instead expected to propose the better rule and provide the rationale for choosing it." ALI HANDBOOK, *supra* note 31, at 5. Nevertheless, this move puts the relevant *RLLI* rule in play where it should be subject to the normal set of arguments and debates undertaken by scholars, advocates, and commentators.

[62] *See infra* Part IV.C & Part V.A.

[63] For example, the doctrines of contra proferentem, the notice prejudice rule, and attorney fee-shifting in the context of bad faith actions reflects generally settled

More broadly, complaints that the *RLLI* is "creating" or "innovating" insurance law are markedly less compelling when the underlying law remains disparate and undertheorized; when the "majority rule" remains elusive; when central rationales are submerged rather than articulated; when significant issues have not been addressed by the states; when new market practices emerge; or when recent trends point in a different direction than older decisions.[64] As explained in Parts III–V below, these features inhere to the multi-jurisdictional common law system of insurance and are precisely what makes Restatement projects useful.

II. THE STRUCTURE OF AMERICAN INSURANCE LAW AND THE NEED FOR A RESTATEMENT

Before proceeding to the specifics of settlement law in the *RLLI*, we should consider the unusual space that insurance law generally occupies in the American legal landscape. The McCarran-Ferguson Act of 1945 established what has come to be known as "reverse pre-emption," through which federal law directs that insurance is generally left to state law and

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doctrines of insurance law that aid insureds over insurers. While jurisdictions differ regarding the scope and application of these doctrines, they are well sourced in insurance law. *See* Jeffrey E. Thomas, *Contra Proferentem and Ambiguity, in* 1 NEW APPLEMAN ON INSURANCE LAW § 5.02 (Jeffrey E. Thomas & Francis J. Mootz eds., Library ed., LEXIS, database updated through May 2022) ("By 1923, the Court, in *Mutual Life Insurance v. Hurni Packing Co.*, was prepared to say that "[t]he rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured." (citation omitted)). For the notice prejudice rule, see RANDY MANILOFF, JEFFREY STEMPEL & MARGO META, 1 GENERAL LIABILITY INSURANCE COVERAGE § 3.01 (5th ed., LEXIS, database updated through Sept. 2021) ("During the past sixty years, however, the legal landscape has completely shifted, with most states now holding that late notice defeats coverage only if the insurer has been materially prejudiced by untimely notice . . . ."). For attorney's fees, see Robert Kelly, *Costs and Attorney's Fees, in* 12 NEW APPLEMAN ON INSURANCE LAW § 156.07 (Jeffrey E. Thomas & Francis J. Mootz eds., Library ed., LEXIS, database updated through May 2022) ("Most states recognize a 'bad faith' exception to the American Rule, recognizing that the courts have inherent power to impose sanctions in the form of attorney's fees for abusive litigation practices, as where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.").

[64] *See, e.g.*, Feinman, *supra* note 6, at 14–18 (noting the complexity in establishing a majority rule and citing scholarly debate about whether given provisions of the *RLLI* adhere to the majority rule).

regulation.[65] The arrangement stands in contrast to otherwise parallel financial service industries such as banking, securities, commodities, and investment management, that are all subject to various forms of federal regulation.[66] Moreover, most practice areas that comprise the expertise of large commercial law firms such as capital markets, bankruptcy, intellectual property, and anti-trust, are regulated under federal authority, and even those matters of commercial and corporate law governed by state law are subject to both formal and informal modes of inter-state coordination and centralization.[67] Insurance, (excluding health insurance), is one of the largest

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[65] 15 U.S.C. §§ 1011–1015.

[66] Major federal banking regulations include: Banking Act of 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12, 15, and 39 U.S.C.). Major securities statutes include: Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15.U.S.C. § 77a et seq.); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15.U.S.C. § 78a et seq.); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28 and 29 U.S.C.); Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), Pub. L. No. 111-203, 123 Stat. 1376-2223 (codified as amended in scattered sections of 15 U.S.C.). *See generally* 1 LORRAINE MASSARO & ROBERT ZINN, SECURITIES PRACTICE GUIDE § 1.01 (LEXIS, database updated through July 2022). The major statutes on commodity futures include: Commodity Exchange Act, 7 U.S.C. § 1 et seq. (2006); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 96-463, 88 Stat. 1389 (codified in 7 U.S.C. § 4a, and re-codified as 7 U.S.C. § 2). *See generally* 2 ROBERT N. RAPP, BLUE SKY REGULATION § 19.01 (LEXIS, database updated through May 2022). Major federal investment management statutes include: The Investment Company Act of 1940, 15 U.S.C.S. § 80a-1 et seq.; 15.U.S.C. § 77a et seq. (regulating certain sales of investment company securities). S*ee generally* 1 JAMES E. ANDERSON, ROBERT G. BAGNALL & MARIANNE K. SMYTHE, INVESTMENT ADVISORS: LAW AND COMPLIANCE § 1.01 (LEXIS, database updated through May 2022).

[67] The *Uniform Commercial Code* performs this function for commercial law. In corporate law, the influence Delaware state law performs some centralizing functions. *See, e.g.*, Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1749 (2006) ("It is well known that among the fifty states, Delaware occupies an outsized place in the formation of business entities, particularly publicly held corporations."); *id.* at n.1 (noting more than fifty percent of all U.S. publicly traded companies have their legal home in Delaware); *See* Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 350 (2001) ("The aggregated choices of a majority of publicly traded U.S. corporations have resulted in a convergence on the Delaware General Corporation Law as a de facto national corporate law."). By contrast, though large states such as New York, Texas, and California undeniably

industry regulated primarily under state law where states have considerable latitude to craft their own versions of insurance law.

Insurance also stands apart from the foundational common law subjects that are the mainstay of the first-year law student curriculum. Every law student in America is exposed to a body of contract, tort, and property law that has been canonized by successive waves of Restatements, alongside a common scholarly culture amongst academics and between leading treatise writers. Even in areas of intense disagreement, lawyers have a clear sense of where the battle lines are drawn. This is less true of insurance law. Few law students enroll in an insurance course, and in the absence of an accepted canon of cases and concepts, there is less consensus on what "insurance law" is and how its underlying principles ground relevant doctrines.[68]

Finally, in an era of regulation by statute and rulemaking, the ad-hoc, case-driven, common-law process through which insurance law is created is an outlier. The doctrines addressed by the *RLLI* generally obtain their shape from court decisions. Though every state has a reticulated statutory framework of insurance laws and regulations—enforced by an insurance commissioner and compliance department—the law of *insurance coverage litigation* typically is created and managed by courts, and where relevant statutes are read in dialogue with judicially developed doctrines.[69]

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govern more premium dollars, there is less of a sense that these states exert a strong gravitational pull over insurance law generally.

[68] *See, e.g.*, Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA L. REV. 653, 653 (2013) (insurance may be thought of as a contact, a public utility, a product, and a form of governance); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007); Feinman, *supra* note 6, at 18 ("[C]oherence of Restatement provisions with the broader body of law is a lofty goal, but the range of potential descriptions of the broader body of law and of insurance law itself render it difficult to achieve.").

[69] *See, e.g.*, CAL. CIV. CODE § 2860 (West, Westlaw through Ch. 16 of 2022 Reg. Sess.) (codifying and clarifying the duties first articulated in San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494 (Cal. Ct. App. 1984). *See also* Rancosky v. Wash. Nat'l Ins. Co., 170 A.3d 364, 372–74 (Pa. 2017) (interpreting Pennsylvania's "bad faith statute" in light of surrounding common law principles and judicial developments). Further, while most states maintain a version of the Unfair Claims Settlement Act regulating insurer's settlement duties, only a minority of jurisdictions allow a private right of action for breach of these statutory duties. *See* Victor Schwartz & Christopher Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1489–90 (2009). In addition, the statute's core substantive terms

Insurance coverage law is not created through a top-down and rationalized process that emphasizes what issues should be addressed, but through the vagaries of what issues are litigated and appealed. Especially at the state supreme court level, the presence of clear authority on a given issue is not necessarily a function of its significance within the conceptual scheme of insurance law or the legal community's need for guidance but may depend on whether insurance companies "want" a precedent from a given court on a given matter at a particular point in time. There may be considerable gaps in state positive law and these uncertainties are multiplied by the complexities of so-called "*Erie* predictions"[70] whereby federal courts must make non-binding predictions of how state courts would rule.[71] In other domains, Restatements offer a useful corrective to these features. Yet, prior to the *RLLI*, insurance stood as one of the most significant common law fields that had yet to be synthesized and rationalized by a Restatement.

Taken together, four characteristics make the *RLLI* a particularly worthwhile endeavor: (i) the diffuse nature of state-based regulation; (ii) the doctrinal unevenness that inheres to a body of judicially-developed law; (iii) the relative absence of developed academic and scholarly culture to create a unified set of principles; and (iv) the constellation of unique insurance doctrines that are only vaguely understood by those who do not specialize in insurance.

III. THE DOCTRINAL HISTORY OF INSURANCE BAD FAITH[72]

Of all the liability insurance issues covered by the *RLLI*, none is as doctrinally and conceptually difficult as the insurer's settlement obligations. Fair evaluation of the *RLLI* requires both a firm grasp on why this body of law is so difficult to categorize and how it diverges from the general principles of contract law from which it emerged.

This complexity is reflected in the difficulty courts and learned writers have in settling on a name for this area of law. It is referred to, alternatively, as bad faith law, extra-contractual liability, insurer's settlement obligations, insurer's wrongful refusal to settle, the duty to settle, the duty to

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usually obtain their meaning from common law caselaw, such that the specific text of the statute plays a limited role in most coverage litigation. *See id.* at 1489.

[70] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[71] *See, e.g.*, RESTATEMENT OF THE L., LIAB. INS. § 25 cmt. c (AM. L. INST. 2019). *See also id.* § 21 cmt. a.

[72] I adopt the common nomenclature of "bad faith" when discussing the area generally. When analyzing the *RLLI*'s approach, I distinguish between "settlement law/duties" and "true bad faith." *See infra* Section IV.A.

make reasonable settlement decisions, a failure to settle claim, the excess, and the excess judgment problem.[73]

A. CONTRACT LAW ORIGINS

In the early decades of the twentieth century, general liability insurance policies transitioned from contracts that provided indemnity to insureds who paid damages to third-party claimants, to the modern commercial general liability ("CGL") policies that typically grant insurers both the right and a duty to defend and settle the underlying claim.[74] Bad faith law grows out of the insurance contract granting the insurer exclusive rights to control the defense and settlement, while leaving the insured potentially responsible for at least a portion of the liability arising out of the claim.[75]

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[73] *See* Hilker v. W. Auto. Ins. Co. of Fort Scott, 235 N.W. 413, 414 (Wis. 1931) ("[W]here an injury occurs for which a recovery may be had in a sum exceeding the amount of the insurance, the interest of the insured becomes one of concern to him. At this point a duty on the part of the insurer to the insured arises."); Sukup v. New York, 227 N.E.2d 842, 844 (N.Y. 1967) (referring to "extra-contractual liability" at issue in a bad faith insurance claim); RESTATEMENT OF THE L., LIAB. INS. § 24(2) (AM. L. INST. 2019) ("A reasonable settlement decision is one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment."); A.C. Epps & R. Harvey Chappell, Jr., *Insurer's Liability in Excess of Policy Limits: Some Aspects of the Problem*, 44 VA. L. REV. 267, 271 (1958); Leslie L. Roos, *A Note on the Excess Problem*, 350 INS. L. J. 192 (1952); James R. Sutterfield, *Relationships Between Excess and Primary Insurers: The Excess Judgment Problem*, 52 INS. COUNS. J. 638, 640 (1985); Seth M. Hemming, *Insurer's Wrongful Refusal to Settle: A Note on Excess*, 15 LOY. U. L.J. 513 (1984). *See also* 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, 19–20 (1992) (discussing the origins of bad-faith law and referring to situations of excess verdict). *See generally* 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 eds., Library ed., LEXIS, database updated through May 2022).

[74] *See* Henderson, *supra* note 73, at 19–22. *See also Hilker*, 235 N.W. at 414; G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved).

[75] *See Hilker,* 235 N.W. at 414; *G.A. Stowers Furniture Co.,* 15 S.W.2d at 547; Brassil v. Md. Cas. Co., 104 N.E. 622, 624 (N.Y. 1914); Douglas v. U.S. Fid. &

The scenario described in the early caselaw is schematized as follows:

> Driver, who maintains $5,000 of insurance, injures Pedestrian. Liability is quite likely certain, and a reasonable assessment of the damages exceeds $5,000. Driver tenders the claim to Insurer who maintains sole authority to defend and settle the claim. Pedestrian offers to settle all claims against Driver for $4,800, but Insurer refuses and replies with a $1,000 counter-offer. The insured Driver (and perhaps its insurer-funded lawyer) considers $4,800 fair in light of damages and liability and urge Insurer to accept the offer. Insurer refuses and the case proceeds to trial where Pedestrian is awarded $12,000. Insurer presents its $5,000 policy limits, leaving its insured Driver with a $7,000 out of pocket liability.[76]

Courts in the nineteen-teens began allowing insureds to sue their insurers under some circumstances for judgment amounts in excess of policy limits, which came to be known as "excess verdict" claims.[77] Early caselaw grounded this type of claim in the implied covenant of good faith and fair dealing that applies to all contractual relationships. Just as a contract granting the buyer sole discretion to decide whether the goods are conforming requires discretion to be employed in good faith,[78] an insurance contract granting the insurer discretion to settle the claim also imposes an obligation to do so in good faith. Insurers that unreasonably—or in bad faith—refuse a settlement that would have alleviated the insured from personal liability, breach this duty and may be liable for amounts in excess of policy limits.[79]

Guar. Co., 127 A. 708 (N.H. 1924). *See also* Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1116–17 (1990).

[76] 74For similar factual situations, see *Hilker*, 235 N.W. at 414; *G.A. Stowers Furniture Co.*, 15 S.W.2d at 544.

[77] *See, e.g.*, *Brassil*, 104 N.E. at 624; *Douglas*, 127 A. at 712.

[78] *See generally* Balt. & Ohio R.R. Co. v. Brydon, 9 A. 126 (Md. 1886).

[79] *See generally* William T. Barker & Ronald D. Kent, *Insurer Has Duty to Make Reasonable Settlements, in* 3 NEW APPLEMAN ON INSURANCE § 23.02 (Jeffrey E. Thomas & Francis J. Mootz eds., Library ed., LEXIS, database updated through May 2022) (summarizing the history and general principles of excess verdict claims).

Though central to modern insurance coverage law, the absence of any policy language detailing this obligation[80] has long generated confusion as to the nature and scope of the duty.[81] Since the duty is sourced in the parties' requirements of good faith, its breach is often framed as "bad faith," which is sometimes interpreted as requiring dishonesty or even subjective ill-will towards the insured.[82] Other courts look to tort law and require insurers to display reasonably prudent behavior in making settlement decisions, while others frame the matter in fiduciary terms and obligate insurers to give due regard to the interest of their insureds.[83]

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[80] *See* Leo P. Martinez, *The Restatement of the Law of Liability Insurance and the Duty to Settle*, 68 RUTGERS U. L. REV. 155, 160 n.26 (2015) (citing sources).

[81] *See Hilker,* 235 N.W. at 414 (motion for rehearing granted due to "confusion with reference to the character of the duty which an indemnity insurance company owed to its insured in the matter of making a settlement," and noting there are "two lines of authority, one of which holds that the indemnity company is liable for negligent conduct, while the other holds that it is liable only when its conduct or lack of conduct amounts to bad faith."). *See also* Farmers Ins. Exch. v. Henderson, 313 P.2d 404, 406 (Ariz. 1957) (noting that "[t]he principal difficulty experienced by the courts has been in fixing a test for the degree of consideration the insurer must give the insured's interests . . . ." While some courts allow the insurer to give "paramount consideration to its interests," others demand that "paramount consideration must be given to protect the insured," while a "third position is that the insurer must give equal thought to the end that both the insured and the insurer shall be protected." The court concluded that while "enunciation of the rule is not difficult but its application is troublesome.").

[82] *See, e.g.*, *Bad faith*, BLACK'S LAW DICTIONARY 139 (6th ed. 1990):

> *Insurance.* 'Bad faith' on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (*i.e.,* good faith and fair dealing), through *some motive of self-interest or ill will*; mere negligence or bad judgment is not bad faith (emphasis added).

See also infra note 120 and accompanying text.

[83] *See, e.g.*, *Hilker*, 235 N.W. at 414–15. *See also* Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1138–41 (1954) (collecting cases from 1930s, 40s, and 50s); Douglas R. Richmond, *Bad Insurance Bad Faith Law,* 39 TORT TRIAL & INS. PRAC. L.J. 1, 22 n.129 (2003) (citing numerous sources characterizing the relationship of insurer and insured as "fiduciary").

Writing in a 1954 *Harvard Law Review* article, *Liability Insurance and Responsibility for Settlement*, still foundational to the field, Professor (later Judge) Robert Keeton framed the duty in terms of the potential conflicts that inhere to the settlement context.[84] When the settlement offer is at or near policy limits, the insurer has a strong incentive to reject the settlement and try its luck in court.[85] To the insurer, settlement requires payment at or near limits immediately, while trial affords the possibility of a defense verdict or at least considerable delay in paying the claim. The insurer may thus be tempted to gamble with the insured's money because "heads" (defense verdict) results in a win for the insurer, while "tails" (above limits recovery) is a loss that redounds to the insured alone.[86] Keeton drew on agency and fiduciary concepts to correct these misaligned incentives, arguing that insurer must give "equal consideration" to its interests and the insured's.[87] This became operationalized as the "disregard the limits rule," which requires an insurer to assess the claim against its insured as if the insurance carrier maintained sole financial responsibility for the entirety of the claim—notwithstanding the reality of policy limits.[88]

Keeton's article was soon cited by courts across the country,[89] including a series of California decisions credited with catapulting these

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[84] Keeton, *supra* note 83, at 1136–37.

[85] *Id.* at 1136 ("This simple fact situation and variants upon it present problems of great difficulty because of the conflicting interests which one party or another must represent.").

[86] *See id.* at 1138 (discussing the insurer's incentives). *See also, e.g.*, Clearwater v. State Farm Mut. Auto. Ins. Co., 792 P.2d 719, 723 (Ariz. 1990) (reviewing the unique nature of a third-party claim and the risks to the policyholder that arise under such circumstances).

[87] *See* Keeton, *supra* note 83, at 1146 ("The equality referred to is not equal weight in determination of the choice, but equality in consideration—that is, consideration of each portion of the total risk without regard to who is bearing that portion of the risk."). Though the standard draws on fiduciary principles, it does not generally transform the insurer into a full-fledged fiduciary of its insured. *See* Richmond, *supra* note 83, at 25.

[88] Keeton, *supra* note 83, at 1146–48. *See also* Jeffrey E. Thomas, *The Standard for Breach of a Liability Insurer's Duty to Make Reasonable Settlement Decisions: Exploring the Alternatives*, 68 RUTGERS U. L. REV. 229, 235–57 (2015) [hereinafter Thomas, *Exploring the Alternatives*] (critiquing the *RLLI* for conflating the two standards and offering an account of the potential difference between the equal consideration doctrine and the disregard the limits rule).

[89] In the twenty years following its publication, the article was cited in by the Supreme Courts of California, Hawaii, Iowa, Kansas, Maryland, Minnesota,

claims to the mainstream. Reaching back to language first articulated by a New York court in 1914, the California Supreme Court of the mid-century explained that "the rights of the insured 'go deeper than the mere surface of the [written] contract . . .' and that implied obligations are imposed 'based upon those principles of fair dealing which enter into every contract.'"[90] The court remained cagey however, regarding the source of this duty. Pressed whether it sounded in contract or tort law, the California Supreme Court demurred, holding it could be either. [91]

Missouri, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, and Washington, and in the Second, Third, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits, alongside numerous lower state and federal courts. *See, e.g.*, Tomerlin v. Canadian Indem. Co., 394 P.2d 571, 577 (Cal. 1964); Olokele Sugar Co. v. McCabe, Hamilton & Renny Co., 487 P.2d 769, 770 (Haw. 1971); Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 33, 35 (Iowa 1982); Associated Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65, 90 (Kan. 1997); Bean v. Allstate Ins. Co., 403 A.2d 793, 795 (Md. 1979); Bratnober v. Rowell, Inc., 123 N.W.2d 916, 921 (Minn. 1963); Linder v. Hawkeye-Sec. Ins. Co., 472 S.W.2d 412, 414 (Mo. 1971); Dumas v. State Farm Mut. Auto. Ins. Co., 274 A.2d 781, 783 (N.H. 1971); Lieberman v. Emps. Ins. of Wausau, 419 A.2d 417, 423 (N.J. 1980); Cowden v. Aetna Cas. Sur. Co., 134 A.2d 223, 227 (Pa. 1957); Emp.'s Fire Ins. Co. v. Beals, 240 A.2d 397, 404 (R.I. 1968); Helmbolt v. LeMars Mut. Ins. Co., 404 N.W.2d 55, 57 (S.D. 1987); Dillingham v. Tri-State Ins. Co., 381 S.W.2d 914, 916–17 (Tenn. 1964); Ammerman v. Farmers Ins. Exch., 450 P.2d 460, 462 (Utah 1969); Murray v. Mossman, 355 P.2d 985, 988 (Wash. 1960); Bourget v. Gov't Emps. Ins. Co., 456 F.2d 282, 284 (2nd Cir. 1972); Keystone Shipping Co. v. Home Ins. Co., 840 F.2d 181, 186 (3rd Cir. 1988); Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales v. Jernigan, 410 F.2d 718, 725 (5th Cir. 1969); Riske v. Truck Ins. Exch., 490 F.2d 1079, 1082 (8th Cir. 1974); State Farm Mut. Auto. Ins. Co. v. Brewer, 406 F.2d 610, 612 (9th Cir. 1968); Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491, 1504 (10th Cir. 1994); Lesmark, Inc. v. Pryce, 334 F.2d 942, 945 (D.C. Cir. 1964); Tyler v. Grange Ins. Ass'n, 473 P.2d 193, 199 (Wash. Ct. App. 1970); Emps. Ins. of Wausau v. Albert D. Seeno Const. Co., 692 F. Supp. 1150, 1159 (N.D. Cal. 1988).

[90] Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 200–01 (Cal. 1958) (quoting Hilker v. W. Auto. Ins. Co. of Fort Scott, 231 N.W. 257, 258 (Wis. 1931) (quoting Brassil v. Md. Cas. Co., 104 N.E. 622, 642 (N.Y. 1914))).

[91] *Comunale*, 328 P.2d at 203 ("Although a wrongful refusal to settle has generally been treated as a tort, it is the rule that where a case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract." (citations omitted)).

B. BAD FAITH IN GENERAL CONTRACT LAW

Keeton's mid-century championing of bad faith liability coincided with broader trends in general contract law. Though it has earlier antecedents,[92] the doctrine of good faith entered mainstream American contract law in the same era as it was incorporated into the *Uniform Commercial Code* ("*UCC*") and *Restatement (Second) of Contracts*.[93] This period was also the heyday of the non (or anti-) textualist approaches to contract law. Doctrines such as unconscionability were on the rise and the more formalist concepts of parol evidence and plain meaning gave way to contextualist ideas such as usage of trade and course of dealing that were canonized in the *UCC*.

Since the 1980s, good faith doctrine has come under extensive critique by neo-formalist judges and theorists, and the fate of good faith in insurance and general contract law have diverged.[94] Per the neo-formalist view, legal obligations can only be created through express contractual language[95] and do not arise from amorphous principles or implied covenants of good faith.[96]

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."[97] Judge Frank Easterbrook

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[92] *See*, *e.g.*, Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 168 (N.Y. 1933). *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).

[93] *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).

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

[95] *See, e.g.*, David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 849 (1999); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism,* 71 FORDHAM L. REV. 869, 889 (2002); Ralph J. Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131 (1995).

[96] *See generally* 11 CORBIN ON CONTRACTS § 59.2 (John E. Murray, Jr. ed. Rev. ed., LEXIS, database updated through Nov. 2021) (noting damages for breach of the duty of good faith are rare).

[97] Tymshare, Inc. v. Covell, 727 F.2d 1145, 1153–54 (D.C. Cir. 1984).

similarly 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.'"[98] Easterbrook explained how 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."[99] This is because contract law does not require the parties to act as each other's fiduciaries. A gap between party expectation and the outcome under the contract "does not imply a general duty of 'kindness' in performance" or assessment of "whether a party had 'good cause' to act as it did."[100] Easterbrook's judicial and law-faculty colleague, Judge Richard Posner, sounded similar notes, 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 . . . ."[101] More recently, a unanimous United States Supreme Court joined in on maligning the doctrine of good faith, affirmatively quoting a scholarly assessment which found "it does not appear that there is any uniform understanding of the [good faith] doctrine's precise meaning," and that "[t]he concept of good faith in the performance of contracts is a phrase without general meaning (or meanings) of its own."[102]

These views have often prevailed. For example, Montana courts in the 1970s awarded enhanced damages for bad faith breaches in diverse settings beyond insurance, such as employment, lending, legal services, franchise agreements, and other ostensibly arms-length commercial settings.[103] In the 1990s, Montana reversed course and now limits such damages to a narrow set of exceptional circumstances.[104] California law tells a similar story. Along with their expansion of insurance bad faith, mid-century California courts recognized extra-contractual damages for bad faith

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[98] Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990).

[99] *Id.*

[100] *Id.* at 1357.

[101] Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 280 (7th Cir. 1992).

[102] Nw., Inc. v. Ginsburg, 572 U.S. 273, 285 (2014) (internal quotation marks omitted) (quoting *Tymshare, Inc.*, 727 F.2d at 1152 (quoting Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201 (1968))).

[103] *See, e.g.*, Story v. City of Bozeman, 791 P.2d 767, 773–75 (Mont. 1990) (detailing Montana's history of the doctrine of good faith).

[104] *Id.* at 776–77 (adopting the *UCC* approach to bad faith, insisting the tort should only be applied in situations where the parties have a special relationship).

breach of employment and in other commercial contracts.[105] Since the 1990s, California courts' decisions have expressly limited such damages to insurance.[106] Contemporary treatises are at pains to emphasize the limited scope of the principle noting that good faith obligations have been curtailed from earlier high water marks.[107] This shift is alternately celebrated, noted with detached neutrality,[108] or bemoaned,[109] but few doubt the shrinking or "underenforced"[110] nature of the doctrine.

This narrow conception of good faith has even worked its way into the *UCC*, the source most responsible for mainstreaming the concept into American law.[111] Amendments from the 1990s explain how the *UCC* "does not support an independent cause of action for failure to perform . . . in good

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[105] Cleary v. Am. Airlines, Inc., 168 Cal. Rptr. 722, 727–30 (Cal. Ct. App. 1980) (noting plaintiff may have a cause of action in both contract and tort for wrongful discharge), *overruled in part by* Guz v. Bechtel Nat'l Inc., 8 P.3d 1089 (Cal. 2000); Tameny v. Atl. Richfield Co., 610 P.2d 1330, 1334–35 (Cal. 1980) (under particular circumstances, employee has a cause of action in tort against the employer).

[106] *See* Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669, 674–75 (Cal. 1995) (limiting damages under a breach of contract claim). *See generally* 6 CORBIN ON CONTRACTS § 26.10 (John E. Murray, Jr. ed. Rev. ed., LEXIS, database updated through Nov. 2021); E. ALLEN FARNSWORTH, ET AL., CONTRACTS: CASES AND MATERIALS 34 (9th ed. 2019).

[107] *See, e.g.*, 6 CORBIN ON CONTRACTS § 26.11 (John E. Murray, Jr. ed. Rev. ed., LEXIS, database updated through 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."); *id.* § 26.10 ("While many states allow a tort action for bad faith breach against insurance companies, few allow it generally." (citation omitted)); *id.* §26.5. *See also* Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2052–53 (2015) ("The caselaw [on good faith] is replete with judges expressing the need for caution . . . ."); *id. at* n.11. *See generally* 2 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS §7.17b, at 394 (3d. ed. 2004).

[108] *See* Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling 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).

[109] *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).

[110] MacMahon, *supra* note 107, at 2051–52.

[111]93 *See generally* Patterson, *supra* note 94; Wiseman, *supra* note 94.

faith."[112] The commentary explains these revisions were designed to clarify that good faith "does not create a separate duty of fairness and reasonableness which can be independently breached."[113]

The doctrinal implications of neo-formalist good faith law are neatly captured in the 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 benefitting 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.[114]

Read even against the most pro-insurer expressions of blackletter insurance law, these standards reveal a vast gulf in the fortunes of good faith in the different settings. Standard liability policies not only fail to contain express language detailing the insurer's settlement obligations, but the provisions that do exist generally undercut them. The insuring clause of the standard CGL coverage form assigns all discretion to the insurer, who "may, at [insurer's] discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result."[115] The insurer's sole discretion is reinforced through the "no action" and "voluntary payment" clauses that expressly prevent insureds from settling a claim without the insurer's consent.[116]

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[112] U.C.C. § 1-103 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N, Approval Draft for the Revision of Uniform Commercial Code Article 1- General Provisions, 2001). *See also id.* § 1-201(19) (documenting changes in definition of good faith).

[113] *Id.* § 1-103 cmt. 1.

[114] Oakwood Vill. LLC v. Albertsons, Inc., 104 P.3d 1226, 1240 (Utah 2004) (citations omitted) (presented in bullet form for emphasis and ease of reference).

[115] INS. SERVS. OFFICE INC., COMMERCIAL GENERAL LIABILITY FORM (CG 00 01 04 13) 1 (2012), https://www.techriskreport.com/wp-content/uploads/sites/26/2019/05/2012-CGL.pdf.

[116] *Id.* at 11.

Notwithstanding decades of caselaw imposing heightened duties on insurers that extend beyond the express terms of the policy, insurance policies remain unchanged. The net result is almost every aspect of insurance settlement law contrasts with the oft-cited proposition that an action for beach of the implied duty of good faith "cannot be maintained (a) in derogation of the express terms of the underlying contract or (b) in the absence of breach of an express term of the underlying contract."[117]

The divergence between insurance and contract law conceptions goes even deeper. This is because from a neo-formalist perspective, insurance settlement offers a particularly *weak* case for implying rigorous good faith obligations. To the extent theorists such as Posner and Easterbrook see *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 drafting*."[118] By contrast, the conflicts surrounding settlement frequently recur and are well-known to all sophisticated players in the insurance arena. Under the dominant contract law paradigm, unless an insured expressly contracts for the insurer's settlement duties, it should be estopped from seeking those rights via implied covenants.[119] Since the insurance policies remain unchanged, however, courts in the insurance setting have wrought expansive obligations out of the implied covenant of good faith.[120]

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[117] Burger King Corp. v. Weaver, 169 F.3d 1310, 1317–18 (11th Cir. 1999) (applying Florida law). The case is cited more than 130 times under the relevant Westlaw headnote.

[118] Indus. Representatives, Inc. v. CP Clare Corp., 74 F.3d 128, 130 (7th Cir. 1996) (Easterbrook, J.) (citing Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990) (Easterbrook, J.)) (internal quotation marks omitted) (emphasis added).

[119] Indeed, some policies either assign the settlement rights to the insured or give the insured a veto over the insurer's settlement. *See* Dan A. Bailey & Timothy W. Burns, *The Insuring Clauses, in* 4 NEW APPLEMAN ON INSURANCE LAW § 26.05[4] (Jeffrey E. Thomas & Francis J. Mootz eds., Library ed., LEXIS, database updated through May 2022) (describing defense cost reimbursement policies). *See generally* Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors' & Officers' Liability Insurer*, 95 GEO. L.J. 1795 (2007) (reporting empirical evidence on the settlement tendencies of D&O insurers).

[120] Notably, while Judges Posner and Easterbrook have led the charge against expansive good faith duties in general contact law; few of these sensibilities are imported into their insurance law holdings. Whether theorized or not, these judges seem to understand that insurance bad faith is simply a different species from general contract law. *See* Lockwood Int'l, B.V. v. Volm Bag Co., 273 F.3d 741 (7th Cir.

C. EXPANSION OF INSURANCE BAD FAITH

While the general contract law concept of bad faith was shrinking, the trend in insurance law moved in the opposite direction. Initially limited to the settlement context, courts expanded it to other insurance paradigms. A 1967 California case known as *Crisci* not only found the insurer liable for failing to reasonably settle the underlying claim,[121] but allowed the policyholder to claim damages for the resulting *mental anguish* caused by liquidating its assets to satisfy the excess verdict.[122] This was justified by holding that insurance is not simply a contract to "obtain commercial advantage" but designed for "the peace of mind and security" upon loss which warranted recovery when the insurer harmed the "comfort, happiness or personal esteem" of its policyholder.[123]

This holding paved the way for subsequent cases to migrate bad faith from third to first-party settings. As a 1973 holding by California court explained:

> In [third-party] cases, we considered the duty of the insurer to act in good faith and fairly in handling the claims of third persons against the insured, described as a "duty to accept reasonable settlements"; in the case before us we consider the duty of an insurer to act in good faith and fairly in handling the claim of an insured, namely a duty not to withhold unreasonably payments due under a policy. *These are merely two different aspects of the same duty.*[124]

2001) (Posner, J.) (holding that insurer breached duty of good faith owed to its insured by paying plaintiff to replead covered claims as uncovered claims); R.C. Wegman Const. Co. v. Admiral Ins. Co., 629 F.3d 724 (7th Cir. 2011) (Posner, J.) (holding that insurer breached duty of good faith by not advising the potential of excess judgement); Transp. Ins. Co. v. Post Exp. Co., 138 F.3d 1189, 1192–93 (7th Cir. 1998) (Easterbrook, J.); Pistas v. New Eng. Mut. Life Ins. Co., 843 F.2d 1038 (7th Cir. 1988) (Easterbrook, J.).

[121] Crisci v. Sec. Ins. Co. of New Haven, 426 P.2d 173 (Cal. 1967).

[122] *Id.* at 178 (analyzing the plaintiff's claim for mental distress damages).

[123] *Id.* at 179. Similar approaches are found in Noble v. Nat'l Am. Life Ins. Co., 624 P.2d 866, 867–68 (Ariz. 1981) (en banc) and State Farm Fire & Cas. Co. v. Nicholson, 777. P.2d 1152, 1155 (Alaska 1989).

[124] Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973) (emphasis added).

This shift necessitated a change in the underlying theory. No longer centered on Keeton's conflicts of interest paradigm, insurance bad faith came to include more generic forms of insurer misconduct defined by the insurer's failure to employ reasonable diligence in determining the nature and extent of its liability. Other jurisdictions followed California's lead.[125]

This doctrinal background helps contextualize the confusion surrounding bad faith law. For nearly a century, courts have noted the muddled avalanche of standards articulated under the broad heading of "insurance bad faith."[126] As far back as 1931, the Wisconsin Supreme Court expressly set out to clarify the "confusion with reference to the character of the duty which an indemnity insurance company owed to its insured in the matter of making a settlement."[127] The court found "two lines of authority, one of which holds that the indemnity company is liable for negligent conduct, while the other holds that it is liable only when its conduct or lack of conduct amounts to bad faith."[128] Despite this apparently clear distinction, the court found that "consideration of the authorities leads us to believe that

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[125] *See* Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 375 (Wis. 1978) (citing *Gruenberg* and stating: "It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort."). *See also* Rancosky v. Wash. Nat'l Ins. Co., 170 A.3d 364, 372 (Pa. 2017) ("Of particular importance in the development of the law in this area, the Supreme Court of Wisconsin, after expressly adopting the *Gruenberg* right of action for bad faith . . . .").

[126] *See, e.g.,* Keeton, *supra* note 83, at 1139–40 (noting inconsistency in what is required to show bad faith breach by insurer); *id.* at 1139 n.6 ("There has been a variety of opinions as to the weight of authority regarding the choice between the 'negligence rule' and some form of the 'bad faith rule.' A conclusive answer as to a classification of the jurisdictions or as to a trend toward one or the other rule is impossible because so many of the opinions . . . do not conclusively select between the rules." (citations omitted)); Martinez, *supra* note 80, at 160 ("The boundaries of the duty to settle can be best described as inexact. Despite the well-settled nature of the duty, the duty is neither articulated in policy language nor addressed in any state statute."); Syverud, *supra* note 75, at 1122 ("[T]he insurance company is liable only if its behavior in failing to settle departs from some norm by a margin a jury can fairly label 'negligent,' 'bad faith' . . . or some combination of the two. Both the norm and the margin for error have been the subject of disagreement among the courts." (footnotes omitted)).

[127] Hilker v. W. Auto. Ins. Co. of Fort Scott, 235 N.W. 414, 414 (Wis. 1931).

[128] *Id.*

what confusion there is on the part of courts is purely tautological, and springs from a none too critical use of terms."[129]

In the ensuing years, bad faith has come to cover a wide range of allegations of insurance companies' malice or obduracy that extend far beyond the initial settlement conflict of interest paradigm.[130] These include defects in claims processing and mismanagement, poor lawyering by defense counsel, poor selection of defense counsel by the insurer, inadequate investigation, inadequate communication with the insured, improper focus on coverage defenses at the expense of defending the underlying claim, and more general failures to understand the law, the facts, or both.[131]

The introduction of first-party claims only compounded the underlying uncertainty, since at least some courts demand more significant showings of malice or ill-will for the first-party action to lie.[132] In addition, scholars note that courts often claim to apply one standard while actually applying another, or show little regard for what standard is, in fact, being

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[129] *Id.*

[130] ROBERT H. JERRY, II. & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW §112[b][1] (6th ed. 2018).

[131] *See* Thomas, *Exploring the Alternatives*, *supra* note 88, at 257–82; Kenneth S. Abraham, *The Natural History of Insurers Liability for Bad Faith*, 72 TEX. L. REV. 1295 (1994); Richmond, *supra* note 83, at 5; Martinez, *supra* note 80, at 166–70; JERRY & RICHMOND, *supra* note 130, §112[a]–[c]. *See also* RESTATEMENT OF THE L., LIAB. INS. § 24 cmt. a (AM. L. INST. 2019); *id.* § 24 reporters' note to cmt. a.

[132] *See* RANDY J. MANILOFF & JEFFREY W. STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE, 690–92 (4th. ed. 2018). *See also* Rancosky v. W. Nat'l Ins. Co., 170 A.3d 364, 373–76 (Pa. 2017) (analyzing whether subjective ill-will is a necessary component to make out a bad faith claim). *See generally* Martinez, *supra* note 80, at 160–70; Thomas, *Exploring the Alternatives*, *supra* note 88, at 257–82 (conducting a multi-state survey and noting the difficulties in identifying the standard courts actually apply). *See also id.* at 297–319 (analyzing the complexities in determining the correct standard based on analysis of leading cases from many states); Jeffrey E. Thomas, *Extra-Contractual Liability in the Restatement of the Law, Liability Insurance: Breach of the Duty to Settle or Bad Faith?*, 12–15 (May 17, 2017) (manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970232 [hereinafter Thomas, *Extra-Contractual Liability*].

applied.[133] Learned writers even disagree about how many standards are found in the caselaw.[134]

The rules that surround insurance settlement thus occupy a space where restating its principles is both possible and desirable. On the one hand, nearly all jurisdictions recognize that insurers owe some duty to insureds when making settlement decisions.[135] Yet, the further one digs underneath this basic premise, the less certain the law becomes. One can easily generate an impressive string cite of cases holding that only reckless disregard, ill-will, and other indicia of classic bad faith sustain findings of extra-

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[133] *See* Thomas, *Exploring the Alternatives*, *supra* note 88, at 257–82, 280–81 (surveying duty to settle standards across numerous jurisdictions and noting that "[c]ourts often make statements in dicta or for rhetorical purposes without those statements having much bearing on the outcome of the case. Sometimes those statements are picked up by later cases and become the law, but sometimes those statements are ignored and have no precedential impact."). For more on the multiplicity of standards and tests for the duty to settle, see those set forth in 1 WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION §2.03[2] (2d ed., LEXIS, database update through Nov. 2021) [hereinafter NEW APPLEMAN INSURANCE BAD FAITH LITIGATION]. *See also* 14A STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, COUCH ON INSURANCE §203:25 (3d ed., Westlaw, database updated through Dec. 2021) [hereinafter COUCH ON INSURANCE] (noting that whether framed as bad faith or negligence, courts tend to ask, "whether a prudent insurer without policy limits would have accepted the settlement offer."). Again, this issue stems back many decades. *See* Keeton, *supra* note 83, at 140, 1139–45 ("The distinction between the 'bad faith rule' and the 'negligence rule' is less marked than these terms would suggest.").

[134] For example, while the *RLLI* assumes the 'disregard the limits' rule is a subset of the equal consideration doctrine, Professor Thomas argues that equal consideration is more solicitous to the insured than a "pure" disregard the limits rule. Thomas, *Exploring the Alternatives*, *supra* note 88, at 257–82, 287. Thomas considers the latter approach the majority or near majority rule. *Id.* at 289–90.

[135] *See* Besel v. Viking Ins. Co. of Wis., 49 P.3d 887, 890 (Wash. 2002) (en banc) (deciding extra contractual liability for settlement breaches is the "majority rule in the United States."). *See also* Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases*, 78 TEX. L. REV. 599, 656–57 (2000) ("[A]ll jurisdictions require carriers to make reasonable settlement decisions . . . ."); 16 RICHARD A. LORD, WILLISTON ON CONTRACTS §49:107 (4th ed., Westlaw, database updated through Nov. 2021) ("Most courts require that an insurer act reasonably when deciding whether to settle a claim . . . .").

contractual liability.[136] But one can also construct an equally impressive string cite showing that lack of reasonableness—operationalized as a failure to give equal consideration or a failure to disregard the limits in making settlement decisions—generates liability.[137] Some writers maintain the ground has shifted to a degree that older precedents no longer reliably predict how modern courts might rule,[138] and nearly every scholar and treatise-writer studying the issue has concluded that courts employ a plethora of standards where similar words and concepts take on different and inconsistent meanings.[139] Rather than support a claim that the *RLLI* deviates from settled rules to create aspirational insurance law,[140] this cacophony demonstrates precisely why the *RLLI*'s re-conceptualization is needed.

IV. *RLLI'S* APPROACH TO SETTLEMENT LAW

A. SETTLEMENT LAW AS SUBSTANTIVE INSURANCE LAW

The doctrinal and conceptual uncertainties of bad faith law coupled with the gap between how good faith operates in contract law versus insurance law sets the stage for the most "constructive" act in the *RLLI*:[141] decoupling settlement law from its origins in contractual bad faith. By establishing settlement law as a self-standing aspect of substantive insurance

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[136] *See, e.g.*, Richmond, *supra* note 83, at 4 ("We have defined 'bad faith' as dishonest, malicious, or oppressive conduct carried out with a state of mind characterized by hatred, ill will, or a spirit of revenge.") (quoting Colum. Nat'l Ins. Co. v. Freeman, 64 S.W.3d 720, 723 (Ark. 2002)).

[137] *See, e.g.*, 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION, *supra* note 133, § 2.03; Thomas, *Exploring the Alternatives*, *supra* note 88, at 261 n.175 (collecting authority from Professors Ken Abraham and Kent Syverud, as well as noted insurance writers, Steven Ashley, William Barker and Ronald Kent, stating that the disregard the limits rule as stated in California's *Crisci* holding is the majority rule).

[138] *See, e.g.*, 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION, *supra* note 133, § 2.03[2][a][C][iii] ("States requiring subjective culpability are now a small and dwindling minority. The better rule is the 'disregard the limits' rule . . . .").

[139] *See supra* notes 130–34 and accompanying text.

[140] *See, e.g.*, 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 (2015).

[141] *See generally* ALI HANDBOOK, *supra* note 31, at 4–5.

law, the *RLLI* both conceptualizes insurance law and reconciles it with the dominant contract and fiduciary principles.[142]

RLLI § 24, captioned *The Insurer's Duty to Make Reasonable Settlement Decisions*, deliberately abjures the morally-laden terms of good/bad faith.[143] Shorn of any intent-based language, § 24 advocates for the insurer's settlement decisions to be evaluated under a reasonableness/ negligence standard, which does not require showings of malice or recklessness sometimes associated with "insurance bad faith."[144] The section also avoids the "duty to settle" shorthand that prevails amongst many courts and commentators,[145] which may give the (incorrect) impression that the insurer has a duty to settle every case.[146]

The *RLLI* justifies this somewhat novel construction through its second significant move: grounding an insurer's settlement duty in the distinctive features of the insurer-insured relationship in the third-party liability realm, which is absent from other applications of good faith law. The *RLLI*, therefore, distinguishes between claims predicated on: (i) potential conflicts of interest generated by above-limits verdicts unique to

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[142] *See* RESTATEMENT OF THE L., LIAB. INS. § 24 cmt. a (AM. L. INST. 2019).

[143] *Id.*

[144] *Id.*

[145] *Id.* For commentators, see, e.g., Syverud, *supra* note 75; Seth J. Chandler, *Reconsidering the Duty to Settle*, 42 DRAKE L. REV. 741 (1993); Robert Heidt, *The Unappreciated Importance, for Small Business Defendants, of the Duty to Settle*, 62 ME. L. REV. 75 (2010). For state supreme courts, see, e.g., Murphy v. Allstate Ins. Co., 553 P.2d 584 (Cal. 1976); Mowry v. Badger State Mut. Cas. Co., 385 N.W.2d 171 (Wis. 1986); Haddick *ex rel.* Griffith v. Valor Ins., 763 N.E.2d 299 (Ill. 2001); Whitney v. State Farm Mut. Auto Ins. Co., 258 P.3d 113 (Alaska 2011).

Kim Marrkand critiques the *RLLI* for creating a new name rather than using the more common, "duty to settle" heading, which in her view is more descriptive of the higher true-bad faith standard. *See* Marrkand, *supra* note 140, at 202, 206–10140. In my own experience teaching insurance law, students generally assume that a "duty to settle" requires insurer to settle every case or face liability—in essence, a strict liability standard that put more burdens on insurers than § 24, and certainly more than the standard Marrkand advocates for. *See id.* at 209 n.42.

[146] *See* Bruce L. Hay, *A No-Fault Approach to the Duty to Settle*, 68 RUTGERS U. L. REV. 321, 322 (2015) ("The main hypothesis of the Article is that adoption of the no-fault liability [for insurer settlement claims] would produce lower joint costs for insurer and insured."). *See also* Shamblin v. Nationwide Mut. Ins. Co., 396 S.E.2d 766, 776 (W. Va. 1990) (holding that "it will be the insurer's burden to prove by clear and convincing evidence that it attempted in good faith to negotiate a settlement, that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds, and that it accorded the interests and rights of the insured at least as great a respect as its own.").

the third-party liability context; and (ii) suits based on improper or self-interested claims management that have closer analogues outside the liability insurance setting.[147]

Thus, in addition to the duty to make reasonable settlement decisions, the *RLLI* recognizes a separate cause of action known as "insurance bad faith" (identified herein as "true bad faith" to distinguish it from the generic use of bad faith terminology throughout the case law and commentariat). This rule, along with its corresponding remedial provision, appear in §§ 49–50.[148] True bad faith applies when the insurer engages in "improper conduct in the settlement context [that] goes beyond unreasonableness," and/or "improper conduct outside of the settlement context" that is akin to first-party claims handling and misconduct claims.[149] For these more significant infractions, claimants must show an insurer failed to perform its obligations: "(a) [w]ithout a reasonable basis for its conduct; and (b) [w]ith knowledge of its obligation to perform or in reckless disregard of whether it had an obligation to perform."[150] Unlike § 24, true bad faith actions focus less on the potential of the insurer gambling with the insured's money, and more on the insurer's behavior in adjusting the claim and interfacing with the insured and third-party claimants.

The result is to divide what is generically referred to as "bad faith" into two main branches. The first focuses on conflicts of interests represented by the excess verdict and judged under a reasonableness standard. The second centers on claims handling and management conduct in the third-party context—along with all first-party claims—which are held to the more demanding standard of "true bad faith." Though the *RLLI* is limited to liability insurance and does not cover first-party insurance or first-party bad faith claims, the *RLLI* notes the standards are analogous and that "[m]uch of

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[147] For a relevant example outside of insurance, see Dalton v. Educ. Testing. Serv., 663 N.E.2d 289, 289 (N.Y. 1995) (finding relevance of good faith to a case between a student and administrators of the SAT who failed to follow their internal procedures).

[148] *See* RESTATEMENT OF THE L., LIAB. INS. § 49 (AM. L. INST. 2019) ("An insurer is subject to liability to the insured for insurance bad faith when it fails to perform under a liability policy . . . ."); *id.* § 50 (listing "remedies for liability insurance bad faith").

[149] *Id.*§ 24 cmt. a.

[150] *Id.* § 49. Note, however, that at least one commentator understands that the *RLLI* sets the bar for bad faith too high. *See* Thomas, *Extra-Contractual Liability*, *supra* note 132, at 5–7 (arguing *RLLI*'s requirement of subjective intent for bad faith is more commonly found in first-party cases but is not well supported in the liability insurance context).

the relevant law governing insurance bad faith has been developed in the first-party insurance context," since true liability insurance bad-faith actions are uncommon.[151] The *RLLI*'s distinction thus runs *within* the third-party context and offers a more conceptually refined approach than conventional views, which distinguish between somewhat lower standards for "third-party bad faith" claims against liability insurers and more demanding standards of "first-party bad faith" claims against property or disability insurers.[152]

B. "PROCEDURAL FACTORS" AND CONFLICTS OF INTEREST

While the *RLLI*'s conceptual division may be theoretically sound, it is frequently blurred in practice.[153] Many classic third-party bad faith actions reveal that the reason an entity in the business of pricing and litigating risk makes *un*reasonable settlement decisions is entwined with what the *RLLI* calls "procedural factors."[154] These include failures to: conduct a reasonable factual investigation and analysis of the claims; negotiate in a reasonable manner; follow recommendations of the adjuster or selected defense lawyer; apprehend the state of the facts or the law; or adhere to internal claims-handling procedures.[155] These defects may be exacerbated and even encouraged by plaintiffs who hope to set up the insurer for a bad faith claim.[156]

These procedural factors inevitably muddy the waters between what the *RLLI* understands as bad faith under § 49 and the conflicts-of-interest rationale underwriting § 24's reasonableness standard. The most difficult cases for the *RLLI* are when negligent (yet, less than bad faith) claims practices serve as the primary reason why the insurer unreasonably failed to settle the claim within limits.

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[151] RESTATEMENT OF THE L., LIAB. INS. § 49 cmt. b (AM. L. INST. 2019).

[152] See, for example, the framing adopted in MANILOFF & STEMPEL, *supra* note 132, at 407. *See also* Richmond, *supra* note 83.

[153] *See, e.g.*, Wade v. Emcasco Ins. Co., 483 F.3d 657, 667 (10th Cir. 2007) (listing eight factors used to determine whether insurer breached its settlement duties, which include failure to investigate, to follow advise of its own counsel, and to inform the insured of a settlement offer). Additionally, see the eleven factors cited in JERRY & RICHMOND, supra note 130, at 841. *See also* Thomas, *Extra-Contractual Liability*, *supra* note 132, at 14 ("Because third-party bad faith evolved from the duty to settle, cases addressing non-settlement bad faith commonly include failure to settle claims.").

[154] RESTATEMENT OF THE L., LIAB. INS. § 24 cmt. e (AM. L. INST. 2019)

[155] *Id.*

[156] *See* TOM BAKER, KYLE D. LOGUE & CHAIM SAIMAN, INSURANCE LAW AND POLICY: CASES AND MATERIALS 614–28 (5th ed. 2021).

A close reading of § 24, however, suggests a subtle distinction between the two settings. Illustration 1 presents the insurer's unreasonable behavior in "mathematical" or actuarial terms that deliberately absents allegations of malice, recklessness, or claims-handling deficiencies.[157] Illustration 1 states:

> A claimant files a personal-injury lawsuit against the insured seeking damages. . . . The policy contains a policy limit of $75,000 and no deductible. The claimant offers to settle for $45,000. The insurer rejects the offer. The case proceeds to trial and a judgment of $175,000 is entered against the insured. In a subsequent action for breach of the duty to make reasonable settlement decisions, the insured introduces evidence supporting the conclusion that, at the time of the settlement negotiations, $45,000 was a reasonable settlement value of the case, based on the judgment that it was reasonable to conclude that the plaintiff had a 30 percent chance of success and likely damages of $150,000. *Based on this evidence, a trier of fact could conclude that a reasonable insurer would have accepted the offer and, thus, the insurer breached its duty.*[158]

The italicized language emphasizes that when the claimant can show the insurer's decision was substantively unreasonable on mathematical/actuarial grounds, the insurer's failure to accept a reasonable settlement is ordinarily assumed to be the cause of the excess verdict.

This formulation is contrasted with Illustration 3, which outlines a claim premised on "procedural factors:"

> A claimant files a tort suit against the insured seeking compensatory damages of $500,000. The insured has a duty-to-defend liability insurance policy that assigns settlement discretion to the insurer, with a policy limit of $100,000. Early in the litigation the claimant makes a time-limited

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[157] The *RLLI* follows Keeton, *supra* note 83, at 1136, 1142, 1144 n.21, 1155 n.47. *See also* Transp. Ins. Co. v. Post Express Co., 138 F.3d 1189, 1192 (7th Cir. 1998) (using a mathematical illustration to demonstrate the values at which insurer and insured each have on a hypothetical claim).

[158] RESTATEMENT OF THE L., LIAB. INS. § 24, cmt. d, illus. 1 (AM. L. INST. 2019) (emphasis added).

> settlement offer for the policy limits directly to the insurance-claims manager, giving the insurer 60 days to investigate and either accept or reject the offer. The insurer immediately rejects the offer without conducting a reasonable investigation. The claim goes to trial and results in a jury verdict against the insured of $500,000. In the subsequent breach-of-settlement-duty lawsuit brought by the insured against the insurer, *the trier of fact may, but need not, properly* conclude from the insurer's failure to investigate that the insurer's settlement decisions were unreasonable. *If the trier of fact concludes that the $100,000 offer was unreasonably high at the time it was made and that the claimant was unwilling to accept any reasonable settlement offer, the insurer will not be held liable for the excess judgment.*[159]

The italicized language emphasizes that the insurer's negligent—though shy of bad faith—failure to live up to its procedural obligations permits—though does not require—a finding of liability. Beyond pointing out the insurer's claims management shortcomings, here the claimant must prove how these shortcomings caused the settlement negotiations to fail.[160] The corresponding comment explains that if a reasonable insurer would not have accepted the settlement offer because it was too high, then even the invocation of the insurer's many deficient claims practices is unlikely to avail.[161] Instead, the claimant will have to make recourse to *RLLI* § 49 and satisfy the higher demands of true bad faith under that section.

C. CRITIQUES OF THE *RLLI*'S APPROACH

The decision to isolate unreasonable settlement decisions from other claims processing defects has been critiqued from opposing directions. In a pair of articles (one directed to the 2015 draft of the *RLLI* and the other, written with co-authors, towards the final product), Kim Marrkand maintains

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[159] *Id.* § 24, cmt. e, illus. 3 (emphasis added).

[160] *Id.* § 24, cmt. e ("[F]ailure to employ reasonable procedures does not necessarily mean that the insurer's decision was substantively unreasonable," but a jury may nevertheless "decide based on these other procedural factors that the settlement decision was unreasonable.").

[161] *Id.*

the *RLLI*'s view of liability is too expansive.[162] She argues that the case law does not support liability predicated solely on the actuarial mismatch between the settlement offer and the underlying claim.[163] Marrkand explains that courts undertake an objective analysis of the totality of procedural and actuarial circumstances, which include not only the strength of the underlying claims, but also evaluates the actions of the insured, its defense counsel, the plaintiff(s), and their counsel.[164]

Marrkand's analysis is most on target to the 2015 *RLLI* draft the initial article commented on. This draft focused heavily on expected values and came close to creating per se liability whenever an insurer rejected an actuarially reasonable offer—notwithstanding mitigating factors that may be in play in the case.[165] Insurers could have been liable for turning down almost any settlement that could be characterized as actuarially reasonable, even if a reasonable counteroffer was presented.[166]

The *RLLI*, however, was revised in response to this line of critique.[167] The finalized blackletter law defines a reasonable settlement

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[162] Marrkand, *supra* note 140; Kim V. Marrkand, Martha J. Koster & Joel S. Nolette, Commentary, *Unsettling the Law of Insurance Settlements: Sections 24 and 27 of the Restatement of the Law Liability Insurance*, 2020 RUTGERS U. L. REV. 96 (2020).

[163] Marrkand, *supra* note 140, at 208–14; Marrkand, Koster & Nolette, *supra* note 162, at 109–10.

[164] Marrkand, *supra* note 140, at 209–10; Marrkand, Koster & Nolette, *supra* note 162, at 109–10.

[165] Marrkand, *supra* note 140, at 208 ("The focus in section 24, however, is '*only* on whether the insurer declined a reasonable settlement offer.' The settlement decision itself, stripped of consideration of reasons or factors, viewed without any context beyond numbers, is the primary concern of section 24." (footnotes omitted)).

Prior versions of § 24 Illustration 1 explained that when the insurer rejects a reasonable settlement offer, "[t]he insurer is subject to liability for the full amount of the verdict." RESTATEMENT OF THE L., LIAB. INS. § 24 cmt. d, illus. 1 (AM. L. INST., Discussion Draft 2015).

[166] *See, e.g.*, PRINCIPLES OF THE L., LIAB. INS. § 27 cmt. d (AM. L. INST., Tentative Draft No. 2, 2014) ("[O]nce a claimant has made a settlement demand in the underlying litigation that is within the range of reasonableness, a liability insurer that rejects that demand thereafter bears the risk of any excess judgment against the claimant at trial.").

[167] Notwithstanding changes to the finalized *RLLI*, insurer reactions have remained just as strongly opposed. *See, e.g.*, Marrkand, *supra* note 9, at 22–23 (calling the duty to make reasonable settlement decisions a "newly denominated

decision as "one that would be made by *a reasonable insurer*"[168]—a formulation designed to include the range of factors deemed relevant to insurers.[169] The comments stress "it will not be sufficient for the policyholder to simply demonstrate that the amount of the offer was reasonable; [because] the policyholder must also demonstrate that a reasonable insurer would have accepted the offer."[170] This concept is reinforced even by the actuarially-oriented Illustration 1, which explains that upon showing a numerical mismatch, "a trier of fact *could conclude* that a reasonable insurer would have accepted the offer . . . ."[171]

Moreover, responding to the line of critique exemplified by Marrkand, the finalized *RLLI* version expressly allows courts to consider whether the *underlying claimant* bears responsibility for failing to settle the claim.[172] This is significant because when policyholders are vastly

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duty"); Schwartz & Appel, *supra* note 4, at 756 ("By recommending a negligence standard for an insurer's breach of the duty to make reasonable settlement decisions, the RLLI proposes to dramatically expand the scope of liability against insurers in the United States."); Marrkand, Koster & Nolette, *supra* note 162, at 97–98 163(*RLLI*'s treatment of settlement law "departs from established principles, sometimes radically."). *See also* ERIC J. DINALLO & KEITH J. SLATTERY, ALI'S RESTATEMENT OF THE LAW LIABILITY INSURANCE: REGULATORY CONSIDERATIONS 3 (2017), https://wlflegalpulse.files.wordpress.com/2017/05/dinallo-white-paper-regulatory-considerations-ali-restatement-liability-insurance-jan-17-2017.pdf ("Section 24 of the Draft subjects the insurer to excess damages beyond policy limits for failure to 'make reasonable settlement decisions.'").

[168] RESTATEMENT OF THE L., LIAB. INS. § 24(2) (AM. L. INST. 2019) (emphasis added).

[169] By contrast, the *RLLI* Discussion Draft defines reasonableness in terms of a "reasonable *person* who bears the sole financial responsibility for the full amount of the potential judgment." RESTATEMENT OF THE L., LIAB. INS. § 24(2) (AM. L. INST., Discussion Draft 2015) (emphasis added). The Discussion Draft de-emphasizes the specific knowledge and business concerns held by insurers.

[170] RESTATEMENT OF THE L., LIAB. INS. § 24 cmt. d (AM. L. INST. 2019).

[171] *Id.* § 24 cmt. d, illus. 1 (emphasis added).

[172] *Id.* § 24 cmt. e:

> By the same token, it may also be appropriate in some cases for the trier of fact to consider procedural factors that affect whether the claimant in fact would have accepted a reasonable offer to settle within the policy limits. . . . If the trier of fact concludes that the claimant would not have accepted a reasonable settlement offer within the policy limits, then the causation element required to recover for a breach of the duty to make

underinsured as compared to the losses they cause, it may be in the claimant's interest to goad the insurer into rejecting the initial settlement offer and setting up a bad faith claim.[173] The *RLLI* therefore allows courts to expressly consider whether the claimant's—rather than the insurer's—conduct was the proximate cause of the failure to reach a settlement.[174] These changes expressly move the *RLLI* away from what even in Marrkand's updated article charges as the "Restatement's firm focus . . . on numbers" at the expense of other factors.[175]

Where Marrkand finds the *RLLI* too solicitous of insurer liability, Professors Jeffrey Thomas and Leo Martinez attack it as too restrictive.[176] They agree that recoveries can be predicated on unreasonableness as measured by the expected value of the claim, but do not think these claims should be privileged over those sounding in negligent claims management or procedural defects.[177] Thomas proposes shifting the emphasis away from the fear an insurer will gamble with the insured's money and advocates instead for an "equal consideration" standard that takes all decisions made by a liability insurer into account.[178]

The critics are right to focus on the inevitable imprecision the *RLLI*'s scheme creates around the edges. But this is endemic to a body of law whose conceptual foundations remain uncertain and where the caselaw does not yield clean results. And this criticism can be equally leveled at the alternative reconstructions of this body of law offered by these writers. The advantage of the *RLLI* is that, in focusing on the unique structure of the insured/insurer relationship, it reconciles settlement law with other areas of private law,

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> reasonable settlement decisions will not be satisfied and, thus, the insurer's liability will be limited to the policy limits.

[173] *See* BAKER, LOGUE & SAIMAN, *supra* note 156, at 614–28.

[174] RESTATEMENT OF THE L., LIAB. INS.§ 24 cmt. e (AM. L. INST. 2019). The Reporters' notes cite to well-known "bad faith set-up" holdings where the combination of low-limits policies and high-damage injuries means that claimant's best chance for meaningful recovery lies in winning a bad faith action against the insurer. *See id.* § 24 reporters' note to cmt. e.

[175] Marrkand, Koster & Nolette, *supra* note 162, at 109.

[176] *See* Thomas, *Extra-Contractual Liability, supra* note 132, at 5, 18–20132; Martinez, *supra* note 80, at 183.

[177] *See* Thomas, *Extra-Contractual Liability*, *supra* note 132, at 15–18; Martinez, *supra* note 80, at 173 (owing to § 24's focus on conflict of interest rationale: "[T]he Reporters necessarily arrive at a more *pro-insurer* position than would otherwise be the case." (emphasis added)).

[178] Thomas, *Extra-Contractual Liability, supra* note 132, at 21.

offering a rationale for why good faith looms much larger in substantive insurance law than in general contract law.

When a claim is wholly covered, few conflicts of interest arise and the insurer's duties of good faith are correspondingly narrow. In a case of a potential excess verdict, however, though decisional authority remains solely with the insurer the financial liability can fall on the insured. This mimics a classic fiduciary structure where the fate of one party lies in the discretion granted to a party with potentially adverse interests. Just as fiduciary (not contract) law calls for oversight to prevent abuses of trust, liability insurance law slides from the purely contractual paradigm towards the fiduciary model.[179] The same analysis applies to the questions of causation. When a fiduciary breach is proven, questions of causation and damages typically are resolved in favor of the entrusting party.[180] The *RLLI* adopts this model to explain that when the insurer's breach is predicated on the conflicts of interest, the ensuing causation questions are generally adjudicated in favor of the insured.[181]

RLLI § 24 responds to the distinctive features of liability insurance relationships. The more the financial conflict of interest hovers over a case, the greater reason to lean on fiduciary principles, which assume the insurer's questionable decisions were motivated by placing its financial interest ahead of the insured's interests.[182] However, when the claims derive from the allegedly poor quality of the insurer's claims-handling techniques, the presumption reverts back to the more typical approach where claimants carry

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[179] *See, e.g.*, Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1055–56 (1991) (fiduciary law alters the usual rules of tort liability by shifting the burden of proof from a plaintiff to a defendant).

[180] *See* RESTATEMENT (THIRD) OF THE L. OF TRUSTS § 100 cmt. f (AM. L. INST. 2012) ("[I]n matters of causation . . . when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach.").

[181] The fiduciary analogy is only partial since true fiduciaries must give "sole" or "paramount" consideration to the interests of their beneficiaries, while insurance law usually demands no more than giving "equal" consideration to each parties' interests. *See* Richmond, *supra* note 83, at 25–34. The *RLLI* operationalizes this quasi-fiduciary concept in terms of the "disregard the limits rule." *See* RESTATEMENT OF THE L., LIAB. INS. § 24 cmt. c (AM. L. INST. 2019).

[182] RESTATEMENT OF THE L., LIAB. INS. § 24 cmt. b (AM. L. INST. 2019).

the burden of showing how the insurer's conduct caused the excess verdict.[183]

V. REMEDIES FOR BREACH OF SETTLEMENT OBLIGATIONS

The complexities regarding the substantive basis of settlement liability flow into the remedies available upon breach assessed in *RLLI* § 27.[184] Courts have little difficulty concluding the primary remedy is to find the insurer liable for the excess verdict.[185] Recoveries beyond this amount, or what the *RLLI* labels "other foreseeable loss,"[186] however, remain both undertheorized and uncertain. The *RLLI* does a reasonable job of making sense of this complicated area of law. Nevertheless, it oversteps its mandate on one issue and missed an opportunity to speak with greater clarity on others.

A. EXPANDED DAMAGES

What the *RLLI* terms other foreseeable loss are potentially available in two basic settings:

> ***Emotional damages*** suffered by the insured due to the potential financial insecurity of having to pay the excess verdict.[187] These may include emotional harm from the loss of reputation or negative publicity from the insured's conduct in the underlying case.[188]
>
> ***Consequential damages*** such as lost profits, loss of business reputation or business opportunities that arise as a

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[183] *See* RESTATEMENT OF THE L., LIAB. INS. § 24 cmt. e (AM. L. INST. 2019) ("[I]t may be appropriate in some cases for the trier of fact also to consider procedural factors that affected the quality of the insurer's decision making . . . . Such factors . . . can make the difference in a close case by allowing the jury to draw a negative inference from the lack of information that reasonably should have been available . . . ."). *See also id.* § 24 cmt. e, illus. 3.

[184] *See id.* § 27.

[185] *See generally* 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION, *supra* note 133, § 2.03.

[186] RESTATEMENT OF THE L., LIAB. INS. § 27 cmt. c (AM. L. INST. 2019).

[187] *See id.* § 27 cmt. c, illus. 1; *id.* § 27 reporters' note to cmt. c.

[188] *See id.* § 27 cmt. c, illus. 4–5; *id.* § 27 reporters' note to cmt. c.

> consequence of the insurer's failure to accept a reasonable settlement offer.[189]

It is difficult to draw a clear line between harms caused to the insured because of its own conduct and harms that flow specifically from the insurer's breach of settlement duties. A baseline level of risk attaches whenever a defendant is sued for injuring a third-party. The ensuing suit and investigation may reveal embarrassing details or generate negative publicity resulting in loss of income, profits, reputation, or opportunities. Corporate defendants may be distracted by the litigation or find their trading partners withdrawing, while individual insureds may face considerable anxiety over the trial outcome and erosion of their personal or professional reputation.

In most cases, these costs are held to arise from tortious conduct by the insured and is not covered under standard liability policies.[190] Though insurers are obligated to resolve the claims in good faith, they have no obligation to restore the policyholders to the pre-claim status quo.[191] Likewise, insurers are not responsible for uninsured harms that arise on account of the underlying conduct or litigation.[192] While policyholders certainly hope their insurers will mitigate these costs and quickly settle within policy limits, as long as the litigation and settlement strategy are conducted in good faith, insurers are not required to sacrifice their own interest to mitigate these harms.[193]

The conceptual difficulty is that these uninsured harms can be significantly exacerbated if the insurer *un*reasonably refuses to settle the claim and protracts litigation beyond where a reasonable insurer would have taken it. In these scenarios, courts tend to permit recovery for negative

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[189] *See id.* § 27 reporters' note to cmt. c.

[190] *See* 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION, *supra* note 133, § 9.03[3] ("Where insurance against punitive damages is against public policy, an insured cannot shift to the insurance company its responsibility for punitive damages awarded to a claimant based on the insured's egregious conduct."). *See also id.* § 9.04[3] ("The insurer's bad faith conduct must be the cause of any damages to permit recovery. . . . No recovery will be permitted for injury to interests of the insured unrelated to the contract . . . .").

[191] *See id.* § 9.03. *See also* Apollo Educ. Grp., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 480 P.3d 1225, 1232 (Ariz. 2021) ("The insurer may however, discount considerations that matter only or mainly to the insured—for example, the insured's financial status, public image, and policy limits—in entering into settlement negotiations.").

[192] *See* RESTATEMENT OF THE L., LIAB. INS. § 27 cmt. C, illus. 3 (AM. L. INST. 2019).

[193] *See id.* §24, cmt. b, cmt. c.

publicity, loss of income or emotional harms even though drawing a line between damage caused by the insured's underlying conduct, and the insurer's failure to reasonably settle remains conceptually and practically elusive.[194]

1. State of the Law

The absence of clear distinctions leaves many issues in this area unsettled and in need of restating. Commentators have even offered different assessments as to whether such remedies are available. In the 1990s, two of the most respected insurance academics noted that only a handful of cases imposed liability for noneconomic loss.[195] More recently, commentators explain that a policyholder may "generally recover damages for emotional distress caused by the insurer's misconduct . . . ."[196] The current *New Appleman* treatise on bad faith litigation states, "there is little question that economic damages resulting from entry of an excess judgment are recoverable."[197]

Courts and commentators are similarly divided as to whether the cause of action for an insurer's breach of settlement obligations is best conceptualized as a tort, contract, a species of professional liability, or grounded in state-specific statutory provisions.[198] While it is generally assumed that the tort conception dominates,[199] this does not answer whether

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[194] *See* 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION, *supra* note 133, § 1.06[2] ("Most jurisdictions now authorize tort recovery for breach of the duty to settle. . . . Under the tort theory, an insured can therefore recover damages for emotional distress, as well as economic loss, suffered in consequence of the insurer's tortious conduct, regardless of whether the specific consequences were foreseeable at the time of contracting.").

[195] Abraham, *supra* note 131, at 1302 n.30 (citing the "handful of reported cases" that have allowed non-economic damages); Syverud, *supra* note 75, at 1121 n.18 (noting emotional damages available in three states: California, Colorado, and Montana).

[196] STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY & DAMAGES § 8:4 (2d ed., Westlaw, database updated through Oct. 2021).

[197] 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION, *supra* note 133, § 9.03[3]. *See also* 12 COUCH ON INSURANCE, *supra* note 133, § 172:31.

[198] *See* Jeffrey E. Thomas, Crisci v. Security Insurance Co.: *The Dawn of the Modern Era of Insurance: Bad Faith and Emotional Distress Damages*, 2 NEV. L.J. 415, 425–28 nn. 80–98 (2002) (citing sources).

[199] *See* Richmond, *supra* note 83, at 21 n.122 (citing STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY & DAMAGES § 5A:02, at 5A-7 to 5A-8 (2d ed. 1997).

such claims must fit into the general tort law rubric for emotional harms;[200] whether special, somewhat more permissive, rules apply uniquely to the insurance context;[201] or what standards are used to determine the availability of such damages.[202] Further uncertainty surrounds whether these claims are limited to third-party liability insurance or are also available in first-party insurance; and, if the latter, is there a meaningful difference between the two scenarios?[203]

These issues are no less complex under the contract route. Are claims for expanded damages basic extensions of standard contract law, or do they depend on the specific characteristics of the insurance relationship?[204] If the latter, are these unique to the settlement context of liability insurance, or relevant to other insurance lines?[205]

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[200] Under traditional tort law, emotional damages are not recoverable unless the claimant can show they resulted from physical harms caused by defendant's conduct. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 4 cmt. c–d (AM. L. INST. 2010). Some courts work around this rule by allowing evidence of physical manifestations of emotional harm (e.g., sustained nausea, headaches, panic attacks) to satisfy the physicality requirement. *See id.* § 4 reporters' notes to cmt. c–d.

If physical harm cannot be shown, courts have allowed direct claims for emotional damages as claims for either intentional or negligent infliction of emotional distress. *See id.* §§ 46–47. Most relevant to the insurance setting are claims for negligent infliction which are typically limited to "specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm," to a reasonable person. *Id.* § 47(b). *See id.* § 47 cmt. f., cmt. i. Framed in insurance law terms these cases usually veer closer to bad faith than to commercial unreasonableness. *See id.* § 47 reporters' notes to cmt. f. *See also* John H. Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith,* 46 DRAKE L. REV. 717, 722–32 (1998).

[201] *See* Thomas, *supra* note 198, at 437–41. *See also* Bauman, *supra* note 200, at 754.

[202] *See* Thomas, *supra* note 198, at 428 (showing a variety of standards).

[203] *See, e.g.*, Braesch v. Union Ins. Co., 464 N.W.2d 769, 778 (Neb. 1991) (recognizing the crossover nature of first and third-party damages).

[204] *See, e.g.*, Birth Ctr. v. St. Paul Cos., 787 A.2d 376 (Pa. 2001) (discussing the extent of damages available). *See also* Bauman, *supra* note 200, at 747; *Braesch*, 464 N.W.2d at 774–75, *overruled on other grounds* by Wortman v. Unger, 578 N.W.2d 413, 417 (1998).

[205] *See, e.g.*, Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 375 (Wis. 1978) ("The rationale which recognizes an ancillary duty on an insurance company to exercise good faith in the settlement of third-party claims is equally applicable and of equal importance when the insured seeks payment of legitimate damages from his own insurance company.").

There is even disagreement regarding whether the tort or contract route offers claimants more fertile grounds for recovery.[206] Emotional harms are more common in tort than contract,[207] but at least some courts demand enhanced showings of insurer recklessness/willfulness prior to awarding damages in tort.[208] But others disagree.[209] By contrast, consequential damages foreseeable at the time of contracting are part of the standard suite of contract awards.[210] Therefore, to the degree courts frame insurance policies as contracts specially designed to protect the insured against "mental distress which might follow from the losses,"[211] emotional damages may be seen as foreseeable and more easily recoverable under contract than tort. Yet even this conclusion is hardly universal, as at least some courts hold that emotional damages are not recoverable for breach of contract absent evidence of bad faith.[212]

Because few of these questions are definitively settled,[213] any attempt to restate the law will be open to critique. Indeed, whereas Professors Thomas and Martinez fault the *RLLI* for presenting too narrow a view of expanded remedies, Professor Victor Schwartz writing with Christopher Appel, and Kim Marrkand, argue the opposite.[214] Perhaps the most accurate description is simply to state that the more egregious the insurer's conduct,

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[206] *Compare* 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION, *supra* note 133, § 9.03 (noting jurisdictions that treat bad faith claims as a contract offer more restricted consequential damage remedies), *with* RESTATEMENT OF THE L., LIAB. INS. § 27 cmt. e (AM. L. INST. 2019) (noting damages in contract law terms offers a broader set of remedies).

[207] RESTATEMENT (SECOND) OF CONTS. § 353 cmt. a (AM. LAW. INST. 1981) ("Damages for emotional disturbance are not ordinarily allowed.").

[208] *See, e.g.*, Bauman, *supra* note 200, at 742 (giving an example from Arizona courts).

[209] *See, e.g.*, *id.* (giving an example from an Alabama court).

[210] RESTATEMENT (SECOND) OF CONTS. § 351 (AM. LAW. INST. 1981).

[211] Crisci v. Sec. Ins. Co. of New Haven, 426 P.2d 173, 179 (Cal. 1967). *See* Farmers Grp., Inc. v. Trimble, 691 P.2d 1138, 1141 (Colo. 1984) ("By obtaining insurance, an insured seeks to obtain some measure of financial security and protection against calamity, rather than to secure commercial advantage.").

[212] *See* Bauman, *supra* note 200, at 751–52.

[213] *See* Thomas, *supra* note 198, at 425 (noting that "it is difficult to generalize about the case law allowing emotional distress damages.").

[214] *Compare* Thomas, *Exploring the Alternatives*, *supra* note 88, Thomas, *Extra-Contractual Liability, supra* note 132, at 15–20, *and* Martinez, *supra* note 80, 178–83, 187–91, *with* Marrkand, *supra* note 140, Marrkaand, Koster & Nolette, *supra* note 163 *and* Schwartz & Appel, *supra* note 4.

the more likely for a court to allow expanded damages beyond the excess verdict.

2. The *RLLI*'s Approach to Expanded Damages

Because *RLLI* § 27 continues its overall approach of characterizing settlement law as sui generis insurance law, it side-steps the contract vs. tort debate arguing that doctrinal labels make little difference anyway.[215] Analysis of the caselaw bears this out.[216]

More debatable is the *RLLI*'s reluctance to hierarchically order liability for the excess verdict itself with liability for expanded damages that may follow. *RLLI* § 27 blackletter states a breaching insurer "is subject to liability for any foreseeable harm caused by the breach, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits."[217] Though the excess verdict is emphasized, it is fundamentally on par with other forms of expanded damages. The comments likewise descriptively note that liability for the excess verdict is "the paradigmatic measure of damages"[218] whereas emotional or consequential damages are supported by "at least a plurality of jurisdictions."[219] Yet the text does not suggest a normative difference between them.

There undeniably is caselaw conforming to the *RLLI*'s framing of expanded damages.[220] But explicitly or subtly, the courts tend to rely on the nature and degree of the insurer's improper conduct to draw the line between damages said to be caused by the underlying tortious actions and harms attributable to the insurer's unreasonable settlement practices.[221] This point

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[215] RESTATEMENT OF THE L., LIA. INS. § 27 cmt. c (AM. L. INST. 2019).

[216] *See id.* § 27 reporters' notes to cmt. c.

[217] *Id.* § 27(1).

[218] *Id.* § 27 cmt. a.

[219] *Id.* § 27 cmt. c.

[220] *See, e.g.*, Larraburu Brothers, Inc. v. Royal Indem. Co., 604 F.2d 1208, 1215 (9th Cir. 1979) ("An unreasonable refusal to accept a settlement offer causes the insurer to be liable for consequential damages, such as mental suffering or economic loss . . . ."); Gibson v. W. Fire Ins. Co., 682 P.2d 725, 731 (Mont. 1984) ("[F]ailure to settle may have been the result of either bad faith or negligence, and there is no clear distinction in Montana between the two terms in such cases.").

[221] *See, e.g.*, Bauman, *supra* note 200, at 748–49 ("Emotional distress damages mark the point at which the insurer's conduct crosses the line from the negligent error in judgment as to the settlement value of the case to the more egregious and

is especially relevant in light of the *RLLI*'s efforts to draw a distinction between the negligence/unreasonable standard of § 24 and the "true bad faith" standard of § 49.[222] The *RLLI* should have nuanced its discussion, explaining that cases supporting expanded liability are not typically close calls under § 24, even if they do not reach all the bad faith requirements of § 49.

This tonal difference can be illuminated by comparing the *RLLI* with California Supreme Court's decision in *Crisci*, usually seen as the *ur*-text of this area of law.[223] *Crisci* presented a suit by tenant against the insured apartment owner alleging that a faulty staircase caused the tenant to fall through the stairs and hang fifteen feet off the ground, causing her psychosis.[224] Both insurance defense counsel and the claims manager thought liability was clear and foresaw potential damages in excess of policy limits.[225] The tenant offered to settle within policy limits and the insured even offered to contribute roughly thirty percent of the claim.[226] The insurer refused, however, since its litigation strategy was to minimize damages by showing the tenant's psychosis was preexisting.[227] The jury returned a verdict of more than ten times policy limits.[228] Post-verdict, the parties settled for roughly twenty percent of the verdict in cash along with insured transferring forty percent of her stake in the apartment building—insured's primary asset—to the tenant.[229] Insured's financial and mental condition thereafter substantially worsened, leading to a decline in physical health, hysteria, and suicide attempts.[230]

These facts starkly contrast with *RLLI* § 24 Illustration 1, in which the eventual verdict is more than three times the settlement offer, the insured's liability is estimated at only thirty percent, and the insured makes

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intentionally wrongful betrayal of the rights of the insured."); *id.* at 732 (comparing bad faith damages to damages in cases of professional malpractice in that both situations, a deliberate abuse of a special relationship is often unofficially required to find emotional damages).

[222] For discussion on this distinction see *supra* Section IV.A.

[223] *See* Thomas, *supra* note 198, at 415.

[224] Crisci v. Sec. Ins. Co. of New Haven, 426 P.2d 173, 175 (Cal. 1967) (en banc).

[225] *Id.*

[226] *Id.* at 175–76.

[227] *Id.* at 175.

[228] *Id.* at 176.

[229] *Id.*

[230] *Id.*

no offer of contribution.[231] The insured in *Crisci* had real assets to protect and paid real money to the plaintiff to satisfy the claim. Further, the verdict initiated a tangible shift to her standard of living and financial security, which served as the predicate facts for the emotional damages claims. The *RLLI*, however says little about the predicate facts used by courts to sustain findings of expanded damages.[232] Thus, would the liability established in *Crisci* apply when: (i) only insurance money changes hands; (ii) the insured has no assets to satisfy the claim such that the excess verdict does not materially change its financial condition;[233] or (iii) if the underlying plaintiff is willing to covenant not to sue the insured in exchange for an assignment of the insured's claims against the insurer?[234]

Lastly, the *RLLI* should have done more to guide courts in distinguishing between harms arising out of the policyholder's conduct and harms arising from the insurer's unreasonable failure to settle. Because at least some of the emotional/consequential harms that stem from the litigation fall on the insured, more guidance on this issue would have been helpful.

B. PUNITIVE DAMAGES AS CONSEQUENTIAL DAMAGES

RLLI § 27 also states that when the underlying case results in punitive damages, an insurer that has *unreasonably* failed to settle the case should be liable for the punitive amount as part of the consequential damages arising out of the breach.[235] This presentation has generated a host of criticism.[236] While most debates surrounding the *RLLI* turn on the subtleties

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[231] RESTATEMENT OF THE L., LIA. INS. § 24 cmt. d, illus. 1 (AM. L. INST. 2019). Notably, Illustration 1 of § 27, which is based on *Crisci,* uses the 10:1 ratio drawn from the case and notes there is "a high likelihood that the insured will be found liable for the harm." *Id.* § 27 cmt. c., illus. 1. Since § 27 does not otherwise account to the severity of the insurer's conduct, it is fair to conclude that any violation of § 24 entitles the claimant to the remedies of § 27.

[232] *See generally id.* § 27 cmt. c., illus. 1.

[233] While the *RLLI* rejects the so-called "payment rule" that limits the insurer's liability for the *excess verdict* to the amounts the insured could realistically pay to the tort-claimant, it is less clear whether this rationale should apply with the same force to claims for expanded emotional damages.

[234] *See* Bauman*, supra* note 200, at 747 ("The ability to assign the third-party bad-faith claim to the holder of the excess judgment in exchange for a release from the threat of excess liability cuts against the notion that the insured is necessarily being made to suffer great emotional torment.").

[235] RESTATEMENT OF THE L. OF LIAB. INS. § 27 cmt. e (AM. L. INST. 2019).

[236] *See, e.g.*, George L. Priest, *A Principled Approach Toward Insurance Law:*

of categorizing holdings and discerning trend lines,[237] here the clash is more direct. Every reported case on the topic has ruled contrary to the *RLLI*.[238]

From an analytical perspective, insureds and their insurers approach this issue with different narratives. Policyholders favor the *RLLI* position noting that a reasonable insurer should have settled the entire claim by avoiding trial and the imposition of punitive damages. Because insureds are contractually barred from settling claims without the insurer's permission, the punitive liability only exists because the insurer placed its own interests ahead of its insured's when it failed to settle the claims.[239]

Insurers respond that punitive damages do not attach unless the insured's underlying conduct is sufficiently egregious to qualify for punitive assessments,[240] and that state law prohibits insuring against such conduct since these damages are designed to both punish the insured and deter future malicious conduct.[241] Whatever shortcomings may attend to the insurer's

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The Economics of Insurance and the Current Restatement Project, 24 GEO. MASON L. REV. 635, 660 (2017); Schwartz & Appel, *supra* note 4, at 758–59; Marrkand, Koster & Nolette, *supra* note 162, at 112–15.

[237] *See* Feinman, *supra* note 6, at 10.

[238] *See* PPG Indus. Inc. v. Transamerica Ins. Co., 975 P.2d 652, 654 (Cal. 1999) ("Although the insurance company's alleged negligent failure to settle the third party lawsuit was a cause in fact of the punitive damages award against the insured, it was not a proximate cause of those damages."); Lira v. Shelter Ins. Co., 913 P.2d 514, 516–17 (Colo. 1996) (en banc); Soto v. State Farm Ins. Co., 635 N.E.2d 1222, 1223–24 (N.Y. 1994). *See also* Wolfe v. Allstate Prop. & Cas. Ins. Co., 790 F.3d 487, 494–95 (3d Cir. 2015) (applying Pennsylvania law); Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491, 1506–07 (10th Cir. 1994) (applying Oklahoma law). At least one state trial court seems to have allowed punitive damages to be included in the claim for consequential damages against the insurer. Williamson–Green v. Interstate Fire & Cas. Co., No. 1684-CV-03141BLS2, 2017 WL 3080559, at *2–5 (Mass. Super. Ct. May 26, 2017).

[239] *See, e.g.*, *PPG Indus., Inc.*, 975 P.2d at 655 ("According to [the insured], settlement would have terminated that lawsuit, thus precluding any punitive damage liability, and therefore the insurer's failure to settle the lawsuit was a proximate cause of the award of punitive damages.").

[240] *See, e.g.*, *Soto*, 635 N.E.2d at 1225 ("[A]n insurer's failure to agree to a settlement, whether reasonable or wrongful, does no more than deprive the insured of a chance to avoid the possibility of having to suffer a punitive damage award for his or her own misconduct.").

[241] *See, e.g.*, *PPG Indus., Inc.*, 975 P.2d at 656 ("[T]he purposes of punitive damages . . . are to punish the defendant and to deter future misconduct by making an example of the defendant."). *See also Lira*, 913 P.2d at 517 ("The contract

settlement practices, the punitive damages flow from the insured's outrageous behavior and cannot be charged to the insurer.[242]

Given the tensions with state public policy and relevant decisional law, the *RLLI* should not have advocated for a new category of damages, notwithstanding the fact some of the central cases decided by state supreme courts were closely divided and elicited strong dissents.[243] The matter, however, is considerably more subtle than repeating the simple mantra that the *RLLI* invented aspirational rules of insurance law.[244] As with expanded damages, the issue turns on the elusive distinction between harms caused by the insured's conduct and harms caused by the insurer's breach of settlement duties.

Viewed from a post-verdict vantage point, punitive damages stand out as qualitatively different than ordinary compensatory damages. The former are relatively rare, correlate to the insured's distinctly reprehensible conduct, and, at least in theory, are intended to reflect the community's moral opprobrium. For this reason, about half the states hold these damages are uninsurable.[245] These stand in contrast with compensatory damages which generate limited social and political opprobrium and are freely insurable in all jurisdictions. From this perspective, it is easy to fault the *RLLI*'s rule for making insurers and, significantly, the risk pool of other insureds pay for the "[w]illful, malicious, or heinous acts [of the insured that] are not probabilistic and would not want to be insured against by normal policyholders."[246]

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between the parties expressly precluded recovery for punitive damages incurred by the insured. The insured may not later utilize the tort of bad faith to effectively shift the cost of punitive damages to his insurer when such damages are expressly precluded by the underlying insurance contract.").

[242] *PPG Indus., Inc.*, 975 P.2d at 658; *Lira*, 913 P.2d at 517.

[243] *See, e.g.*, PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652 (Cal. 1999) (splitting 4–3); Lira v. Shelter Ins. Co., 913 P.2d 514 (Colo. 1996) (en banc) (splitting 4–3).

[244] *See, e.g.*, Marrkand, *supra* note 9, at 23 ("This one section [27] forcefully illustrates that the RLLI is *not* applying or describing—or even in line with an emerging trend of—existing law; it is simply a new social policy. . . ."). *See also* Priest, *supra* note 236, at 660.

[245] *See* Catherine M. Sharkey, *Revisiting the Noninsurable Costs of Accidents*, 64 MD. L. REV. 409, 422–23 (2005) (surveying state approaches to insurability of punitive damages).

[246] *See* Priest, *supra* note 236, at 660. *See, e.g.*, *PPG Indus., Inc.*, 975 P.2d at 656 ("[T]he purposes of punitive damages . . . are to punish the defendant and to deter future misconduct by making an example of the defendant."); *Lira*, 913 P.2d

Prior to verdict or settlement, however, damages are unclassified and their amounts unliquidated. In theory, compensatory damages are tied to specific losses and should not vary based on the degree of reprehensibility of the underlying conduct. Yet, participants in the tort system report how these damages frequently rise and fall based on a moral assessment of the defendant's wrongful conduct—the very same factors that generate punitive damages.[247] This is especially true for the more subjective categories of damages such as pain and suffering, emotional, and reputational harms.[248]

By avoiding the formal enumeration into compensatory versus punitive damages set forth on a verdict sheet, the settlement process allows

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at 517 ("The insured may not later utilize the tort of bad faith to effectively shift the cost of punitive damages to his insurer when such damages are expressly precluded by the underlying insurance contract."). *See also* Schwartz & Appel, *supra* note 4, at 758–59 (warning against the *RLLI*'s rule that would "shift [the insured's] entire punishment onto the insurer" and "plainly provide a windfall to policyholders" who have committed egregious acts).

The moral sting of these criticism is somewhat blunted by the fact that many major corporate policyholders often purchase policies with choice of law provisions designed to enable such coverage, and the degree it is not available or insurable on the domestic market so called "difference in conditions" insurance is purchased offshore and designed to provide such coverage. *See* Sharkey, *supra* note 245, at 439 n.149; Gloria Gonzalez, *U.S. Insurers Broadening Side A Policies,* BUS. INS. (Oct. 31, 2004, 12:00 AM), www.businessinsurance.com/article/20041031/STORY/100015608. It would be strange to exclude such corporate consumers of insurance from the category of "normal policyholders."

[247] Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211, 226–28 (1998) (sharing lawyers' experiences that in clear liability cases compensatory damages are escalated instead of pursuing punitive damages). *See* Catherine M. Sharkey, *Crossing the Punitive-Compensatory Divide, in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 79, 79–104 (Brian H. Bornstein, Richard L. Wiener, Robert F. Schopp & Steven L. Willborn eds., 2008) (noting that empirical analysis of mock and real juries showed that when a jurisdiction had a cap on punitive damages the jury was more likely to award higher compensatory damages). *See also* Thomas Koenig, *The Shadow of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 176–78 (1998) (main impact of punitive damages is the leverage provided in settlement negotiations).

[248] *See, e.g.*, Sharkey, *supra* note 247, at 98 ("Dignitary and emotional harm cases present a fertile ground for crossover, or overlap, between punitive and compensatory damages. In these cases, the defendant's motives and the nature of its conduct—typically relevant for the determination of punitive damages—assume a relevance to compensatory damages . . . ." (footnotes omitted)).

parties to transform undefined and uncovered punitives into sums-certain of (presumably higher) insurable compensatory damages.[249] Members of both defense and plaintiff bars note they are willing to negotiate these "trade-downs" due to the uncertainty over how juries may allocate damages.[250] Moreover, in cases where defendants have few assets from which to satisfy the judgment, both parties' interests are served by structuring the settlement to effectively convert uninsured punitive damages into compensatory sums-certain that will be covered by the insurer.[251]

The impact of these trade-downs makes arguments relying on the moral outrage of insuring punitive damages lose some of their sting. Moreover, seen in terms of the negotiation process, the amounts later denominated as punitive damages arise due to the parties' inability to settle the claims before trial. To the extent this failure can be charged to the insurer's unreasonable conduct, the *RLLI*'s view is considerably less exotic.

Nevertheless, the fluidity between punitive and compensatory damages cuts equally in the opposite direction. Kim Marrkand explains that when compensatory and punitive damages are demanded by the claimant, the *RLLI*'s rule effectively forces the insurer to overpay in settlement of compensatory damages to avoid judicial imposition and the insurer's own potential liability for the punitive amounts.[252] In real terms, this comes very close to forcing insurers to use insurance funds to cover damages expressly excluded under the policy. While credible arguments can be made to support the *RLLI*, the general trend in the caselaw is to draw sharp lines between punitive and compensatory damages. The *RLLI* should have restated this decisional law and denied recovery for this form of liability.

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[249] Baker, *supra* note 247, at 227 (describing interviews with plaintiff lawyers who would "[p]ut in all the inflammatory stuff you have [in the initial complaint], then drop your punitive damages line. Who needs a million dollar verdict with nine-hundred-thousand in punitives you can't collect? This way maybe you get your punitives on the compensatory line: five-hundred-thousand that you can collect.").

[250] *See id.* at 229.

[251] *Id.* at 223–25.

[252] *See* Marrkand, *supra* note 140, at 221–22. *See also* Scott, *supra* note 5 ("If sections 24 and 27 have their expected effect, systematic costs will increase as insurers either pay inflated settlement demands or settle cases where they perceive any risk that a jury might second-guess them about the reasonableness of the settlement demand."); DINALLO & SLATTERY, *supra* note 167, at 22 ("Ultimately, the insurer is pressured to pay unreasonable settlement demands to avoid potentially funding a 'foreseeable' punitive damages award, even where affirmatively excluded.").

CONCLUSION

To the extent the relevant legal doctrines are clear, and their underlying basis is uncontested, no Restatement is necessary. Such a project is only useful when it yields a scholarly reconstruction that restates the law along conceptually tighter and more doctrinally predicable lines. Unless one assumes that contemporary liability insurance law—in contrast to nearly every other area—is in some fundamental sense not "restate-able," the *RLLI* is useful precisely because it plugs doctrinal gaps, chooses between doctrinal alternatives, and sharpens understanding of the underlying principles.

Though its detractors decry the RLLI for "creating insurance law" when evaluating its work *in the law's gray areas*—such as settlement law—the relevant standards are whether it: (i) is transparent regarding the rules it explicitly and implicitly adopts and rejects in both blackletter and comments; (ii) offers reasoned and compelling arguments for its choices; (iii) on contested matters, provides resources to sustain positions that diverge from those adopted by the Restatement; and (iv) does not depart from the weight of authority or consistently favor one class of interests over the other. Despite quibbles noted along the law, measured by these standards the *RLLI*'s most consequential sections—including the treatment of settlement law—should be deemed a success.