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ARTICLES

PROTECTING AUTO ACCIDENT VICTIMS
FROM THE UM/IM INSURER IDENTITY CRISIS
*Jeffrey W. Stempel &
Erik S. Knutsen*

SYMPOSIUM

A USER'S GUIDE TO THE RESTATEMENT OF THE LAW,
LIABILITY INSURANCE
Jay M. Feinman

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PROTECTING AUTO ACCIDENT VICTIMS FROM THE UM/UIM INSURER IDENTITY CRISIS

JEFFREY W. STEMPEL AND ERIK S. KNUTSEN *

Automobile liability insurance is mandatory for drivers in all states, so as to provide for an available source of compensation for auto accident victims. Yet more than 20% of drivers in some states drive without valid, collectible automobile liability insurance. Another vast proportion of drivers have woefully inadequate financial limits of liability insurance that could not pay for even a modest percentage of a typical accident victim's compensatory needs. An auto accident victim cannot choose which tortfeasor driver injures her in a collision. Without the at-fault tortfeasor driver's liability insurance to act as a source of full compensation for her injuries, an injured accident victim risks having her compensation fall drastically short. In response to prodding, the insurance industry invented two types of insurance coverages to fill in the gaps created when an accident victim wants a higher level of potential accident compensation if injured by an uninsured or underinsured at-fault tortfeasor driver: uninsured motorist and underinsured motorist coverage (collectively "UM/UIM"). These two coverages allow prudent auto insurance policyholders to purchase insurance that takes over if the policyholder is injured by a tortfeasor driver who has no or insufficient insurance to cover the victim's injury costs. UM/UIM coverage pays the policyholder, the first party, but acts in the context of third-party liability insurance because UM/UIM coverage is triggered only when the policyholder is in an accident and the at-fault tortfeasor driver has inadequate liability insurance to respond to the loss.

UM/UIM coverage can be thought of as both first-party (purchased by the policyholder as part of a bilateral contract with the insurer, who is the second party) and third-party insurance in that it is designed to replace the liability insurance that in theory should have been purchased by the tortfeasor causing injury to the conscientious policyholder who purchased UM/UIM insurance. But courts and commentators have not definitively addressed the proper function of UM/UIM insurers in responding to

* Respectively, Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas and Professor of Law and Associate Dean (Academic), Queen's University Faculty of Law; Thanks to Bill Boyd, Jay Feinman, Chris French, Dan Hamilton, the late Doris Lee, Ted Lee, David McClure, Ann McGinley, Dan Schwarcz, and Jeff Thomas. Special thanks to David McClure and Jessica Story Agostino for research support. © 2019 Jeffrey W. Stempel & Erik S. Knutsen.

policyholders' claims. Despite its role as additional liability insurance for the inadequately insured tortfeasor, UM/UIM insurers routinely take the position that their standard of care is less demanding than that imposed on an ordinary third-party liability insurer and that UM/UIM carriers are not required to make the reasonable settlement decisions required of an ordinary liability insurer. UM/UIM insurers take the position that they may instead deny policyholder claims so long as there is any colorable basis for disputing the extent of injury, the volume of treatment, or medical billings. Insurers then routinely argue that they have a "fairly debatable" basis for valuing the amount of injury at a lower amount than that sought by the policyholder just as a true first-party insurer such as a property insurer might assess the worth of lost property at a lower amount than does a policyholder. The insurer does all this with a considerably reduced chance of incurring significant liability for even a recklessly wrong decision.

This self-serving perspective of many UM/UIM insurers is wrong in light of the history, purpose and operation of UM/UIM coverage. It undermines the basic contractual and public policy goals of the UM/UIM policy feature which are to put the policyholder in a position equivalent to that it would have if suing an adequately insured tortfeasor. Under the first-party UM/UIM perspective, the insurer's own policyholder – the customer who prudently paid for protection – is treated worse than the third party the policyholder would sue. This occurs because the first-party construct preferred by insurers imposes weaker incentives on an insurer than the more stringent obligation of liability insurers to make reasonable settlement decisions in light of the range of results possible at trial and the duty to protect a policyholder from the risk of a judgment in excess of policy limits.

As a result of the misunderstanding that many UM/UIM insurers hold about their duties to their policyholders, UM/UIM policyholders tend to receive harsher treatment than they would if suing a stranger tortfeasor and his liability insurer who, unlike the UM/UIM insurer, has never received a dime of premium from the claimant. In addition to harsher treatment of policyholders, who are injured victims, lowball offers, and reduced compensation, this situation causes unnecessary waste of social, economic, and judicial resources due to the reduced incentives UM/UIM insurers have for settlement.

A proper understanding of the history, purpose, and function of UM/UIM coverage requires that the insurers fully assume their proper role: acting as if they were an additional form of a tortfeasor's liability insurance. The liability insurer orientation more fairly, transparently and efficiently fits the contours of UM/UIM claims. It also makes a meaningful improvement to the public policy buttressing the automobile collision compensation system.

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I. HOW UM/UIM INSURANCE WORKS: THE POLICHOLDER'S SAFETY NET ON THE INADEQUATELY INSURED ROAD

Born in the 1950s (but arguably in gestation since the 1930s),¹ uninsured/underinsured motorist insurance is automobile insurance coverage purchased by drivers to supplement the standard² automobile policy (which

¹ See *infra* Part V.

² Automobile insurance policies remain fairly uniform in design and language. See 1 ALAN I. WIDISS & JEFFREY E. THOMAS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 3.4 (3d ed. 2005) (Although there are variants, “[i]n practice, most insurance companies have used the standard forms for the uninsured motorist coverage, either in their entirety or with minor variations or deletions.”). But see *id.* § 5.10 (describing denials of coverage to “‘clause (b) insureds’ [vehicle occupants] based on coverage terms that are less comprehensive than coverage provided by the terms used in the standard forms.”) (boldface removed).

Regarding the history of the standardization of auto policy forms, see ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 4.9(f) (1988) (noting that a nationally standardized policy was in use beginning in 1935). See also Thomas L. Wenck, *The Historical Development of Standard Policies*, 35 J. RISK & INS. 537 (1968); George Simmons, *Developments in Insurance Policies*, 21 J. AM. INS. 15 (1944).

Standardization abounds in insurance. See CHRISTOPHER C. FRENCH & ROBERT H. JERRY, II, INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES 35–40 (2018); MARK S. DORFMAN & DAVID A. CATHER, INTRODUCTION TO RISK MANAGEMENT & INSURANCE 177 (10th ed. 2013); JEFFREY W. STEMPEL & ERIK S. KNUTSEN, STEMPEL AND KNUTSEN ON INSURANCE COVERAGE § 2.06 (4th ed. 2016) [hereinafter STEMPEL & KNUTSEN]; JEFFREY W. STEMPEL, PETER N. SWISHER & ERIK S. KNUTSEN, PRINCIPLES OF INSURANCE LAW Ch. 1 (4th ed. 2011).

Automobile and other insurance policies sold to individuals also tend to be contracts of adhesion that are offered for sale on a “take it or leave it” basis in which there is no bargaining over particular terms or specific policy language. See STEMPEL AND KNUTSEN ON INSURANCE, *supra*, § 4.06. Although the lack of policyholder negotiating power is not a significant factor in our analysis advocating that UM/UIM insurers fully assume a

covers owner liability as well as damage to the insured vehicle from collision or other factors such as weather or vandalism) by providing compensation for injuries incurred due to the actions of an uninsured or underinsured at-fault motorist tortfeasor.³ The policy reasons behind requiring automobile

liability insurer's role in adjusting claims, the adhesive nature of personal lines insurance products supports this view. We posit UM/UIM policyholders would favor our suggested approach because of the greater protection it provides should they be insured by a tortfeasor lacking adequate insurance—but policyholders are not realistically able to bargain to have this expressly provided in their auto insurance policies.

In some instances, there is not as much standardization as one might expect. *See* ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 130, at 805 (6th ed. 2018) (“In automobile insurance, considerable variety exists in the language of particular forms used by different companies, more so than in other common personal lines. One common form is the ‘Personal Auto Policy’ drafted by the Insurance Services Office (ISO), and another is the ‘Family Car Policy’ drafted by the National Association of Independent Insurers (NAII).”) (footnote omitted); Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011) (empirical examination of content of homeowner's insurance currently sold reveals significant differences in policy terms). *See also* EMMETT J. VAUGHAN & THERESE M. VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 529 (11th ed. 2014) (using ISO Personal Auto Policy as focus and noting that it “is only one of several auto forms in use” but that it “is the most widely sold of the various auto insurance forms and serves as a standard against which other policy forms may be compared.”). *Accord* GEORGE E. REJDA & MICHAEL J. MCNAMARA, PRINCIPLES OF RISK MANAGEMENT & INSURANCE 426 (13th ed. 2017) (noting ISO form “widely used throughout the United States.”).

³ For clarity, we will generally use the term “policyholder” to refer to any insured even though this blurs to some extent the distinction between a named insured and persons or entities that become insureds by operation of the policy.

A minimum amount of automobile liability insurance is effectively required in every state because of laws that require proof of financial responsibility as a precondition for registering a vehicle and obtaining license plates. *See* DORFMAN & CATHER, *supra* note 2, at 177 (“Nearly all states have compulsory liability insurance laws that require drivers to

liability insurance are simple. Automobile operation is a highly risky activity and accidents are prevalent and costly. Most drivers do not have sufficient assets to satisfy a judgment against them for injuring another driver. Policymakers have chosen to mandate that drivers obtain automobile liability insurance so that, in the event that a driver injures someone else, the victim will have a source of accident compensation.

The essence of this mandatory automobile liability insurance is to have a financial backstop for injured auto accident victims. One can look at the system this way: drivers pay for and underwrite the risk of driving by purchasing automobile liability insurance. Otherwise, the massive cost of road accidents would instead be offloaded on to the state (through social safety net programs) if injured accident victims had no financial recompense for their injuries because most drivers would be unable to absorb the cost of an injury lawsuit. Or victims would be left completely uncompensated (as opposed to undercompensated by safety net programs).⁴ There would be lost

purchase auto liability insurance, thus making [auto insurance] one of the most widely purchased types of personal insurance coverage.”). Although most such laws also allow financial responsibility to be shown by a posting of a bond or other assets, drivers typically elect to purchase auto liability insurance. *Id.* at 184. Each state sets a minimum amount required. Most automobile policies also include “collision” coverage for property damage to the insured vehicle due to an accident and “comprehensive” coverage that pays for losses occasioned by theft, vandalism, and external forces such as a hailstorm. DORFMAN & CATHER, *supra* note 2, ch. 12; REJDA & MCNAMARA, *supra* note 2, ch. 20; VAUGHAN & VAUGHAN, *supra* note 2, ch. 30.

⁴ Even industrialized “welfare states” are unlikely to provide social insurance equivalent to the losses incurred by collision victims. For example, the average Social Security Disability Insurance (“SSDI”) monthly benefit is approximately \$1,200. The amount is based on a formula that has been criticized as making “[t]he severity of the disability . . . irrelevant in calculating your SSDI.” Jason Baril, *How Much Does Permanent Social Security Disability Pay?*, DISABILITY ADVANTAGE GRP. (July 5, 2017), <https://www.socialsecuritylawcenter.info/articles/how-much-does-permanent-social-security-disability-pay/> (website of plaintiff’s social security law firm). The maximum benefit is less than \$3,000 per month even for complete disability that might result after a catastrophic collision. See Bethany K. Laurence, *How Much in Social Security Disability Benefits Can You Get?*, DISABILITY

time at work and many of the injured would be destitute, depending on comparatively modest social benefits to survive.

In a straightforward automobile accident, an injured accident victim would normally seek compensation for those injuries from the at-fault motorist tortfeasor driver who injured her. The auto accident victim sues the at-fault motorist tortfeasor driver (hereinafter “tortfeasor”). This lawsuit triggers the tortfeasor’s own automobile liability insurance policy, which provides insurance coverage for legal liability arising from ownership, use or operation of an automobile.⁵ The tortfeasor’s policy would then indemnify the tortfeasor for any financial amounts he is found legally liable to pay to the injured accident victim. In essence, the tortfeasor’s insurance policy pays the tortfeasor to pay the injured accident victim. But what if the tortfeasor has no valid, collectible automobile liability insurance? Or what if the tortfeasor has inadequate financial limits on his liability insurance to fully compensate the accident victim?

The purpose of UM/UIM insurance is relatively straightforward: if a policyholder is injured in an automobile accident by a tortfeasor who has either no liability insurance (is “uninsured”) or not enough liability insurance limits to cover the policyholder victim’s losses (is “underinsured”), the policyholder victim’s own UM/UIM insurance steps in to make up the difference as would a tortfeasor’s liability insurer with higher limits.⁶ The

SECRETS, <https://www.disabilitysecrets.com/how-much-in-ssd.html> (last updated Jan. 3, 2019).

⁵ This is the standard requirement for coverage: that the loss arise out of the “ownership, maintenance or use of an insured vehicle.” *See* STEMPEL, SWISHER & KNUTSEN, *supra* note 2, §13.04.

⁶ The following is representative of common policy language used, providing that the insurer:

[w]ill pay compensatory damages which an “insured” is legally entitled to recover from the owner or operator of an “uninsured motor vehicle” because of “bodily injury”:

1. Sustained by an “insured”, and
2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle."

Any judgment for damages arising out of a suit brought without our written consent is not binding on us.

"Insured" as used in this Part means:

1. You or any "family member."
2. Any other person "occupying" "your covered auto."
3. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in 1. or 2. above.

"Uninsured motor vehicle" means a land motor vehicle or trailer of any type:

1. To which no bodily injury liability bond or policy applies at the time of the accident.
2. To which a bodily injury liability bond or policy applies at the time of the accident. In this case its limit for bodily injury liability must be less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged.
3. Which is a hit-and-run vehicle whose operator or owner cannot be identified and which hits:
 - a. Your or any "family member";
 - b. A vehicle which you or any "family member" are "occupying"; or
 - c. "Your covered auto."

UM/UIM policyholder is paid by her insurer an amount equal to what the uninsured or underinsured tortfeasor motorist's liability insurance would have paid, had the tortfeasor carried sufficient collectible liability insurance (up to the policy limits of the UM/UIM coverage).⁷ Distilled to its essence, UM/UIM coverage indirectly provides additional liability insurance to an

4. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company

a. Denies coverage; or

b. Is or becomes insolvent.

However, "uninsured motor vehicle" does not include any vehicle or equipment

1. Owned by or furnished or available for the regular use of you or any "family member".

2. Owned or operated by a self-insurer under any applicable motor vehicle law, except a self-insurer which is or becomes insolvent.

3. Owned by any governmental unit or agency.

4. Operated on rails or crawler treats.

5. Designed mainly for use off public roads while not on public roads.

6. While located for use as a resident or premises.

ISO Personal Auto Policy No. PP 00 01 01 05 (2003), Part C, *reprinted in* FRENCH & JERRY, *supra* note 2, at 492. In addition, various exclusions apply and the limit of liability for the UM/UIM coverage is the amount of the liability policy limits purchased by the policyholder. *Id.*

⁷ JERRY & RICHMOND, *supra* note 2, § 135, at 843–44.

uninsured or underinsured at-fault tortfeasor driver. It makes up for the “pocket” that the driver does not have.⁸

Even though legislation mandates that drivers must carry automobile liability insurance in order to operate a motor vehicle, motorists cannot always rely on other drivers being adequately insured. In fact, the problem is staggering – in some states, one out of every four or five drivers is on the road without liability insurance. On average, 13 percent of American drivers are uninsured.⁹ In some states, the uninsured driver problem is far more common: in Florida it is 26.7% of drivers, in Mississippi 23.7%, in New Mexico 20.8%, in Michigan 20.3% and Tennessee 20%.¹⁰ Some drivers are uninsured either because they have not purchased automobile liability insurance, contrary to the law, or because some kind of conduct they have done has rendered their insurance void. This could be anything from driving without the consent of the auto owner to failing to pay insurance premiums.

Other drivers may well be driving insured, but the financial limits of their insurance may be viewed by many policyholders as inadequate to be able to effectively compensate them in the event of an accident. Those drivers are underinsured relative to the financial level of insurance expected of many other motorists. This underinsurance happens largely because most state mandatory minimum levels of insurance are shockingly and impractically low, to the point that they nearly fly in the face of the compensatory policy behind mandating auto liability insurance for every driver. Most drivers also choose to purchase only the mandatory minimum limits. The modal financial limits of automobile liability policies in the United States are \$25,000 per person, or \$50,000 per accident.¹¹

⁸ In theory, the victim can pursue compensation from the tortfeasor’s personal assets and refuse to accept a policy limit offer from his insurer. This is a realistic option only if the tortfeasor has significant assets that can satisfy a judgment or a sufficiently remunerative salaried position enabling a successful plaintiff to garnish tortfeasor wages in gradual satisfaction of the judgment. Because most Americans have only modest wealth and very few liquid assets, the tortfeasor’s policy limits are, as a practical matter, the only source of compensation for the auto collision victim.

⁹ This has been the same level for more than 25 years. *See Facts + Statistics: Uninsured motorists*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-uninsured-motorists>.

¹⁰ *Id.*

¹¹ *See Vehicle insurance in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Vehicle_insurance_in_the_United_States (last

For the middle-class driver, policy limits are typically increased to either one of \$100,000 per person and \$300,000 per accident, or \$250,000 per person and \$500,000 per accident. When considering that \$500,000 is often wholly inadequate to fully compensate a moderately injured accident victim, the state mandated minimum limits of \$25,000 are almost farcical.

Thus, for most middle-class drivers, there is a high likelihood that injuries in an auto accident will be at the hands of an inadequately insured motorist when one measures “adequacy” as “financial ability to full[y] compensate for resulting injuries.” A policyholder worried about being injured by an at-fault tortfeasor driver who has either nonexistent or

visited Jan. 14, 2019); Mila Araujo, *Understanding Minimum Car Insurance Requirements*, THE BALANCE, <https://www.thebalance.com/understanding-minimum-car-insurance-requirements-2645473> (last updated April 10, 2019); VAUGHAN & VAUGHAN, *supra* note 2, at 531 (“In most states the minim bodily injury limits are \$25,000/50,000 and the minimum property damage limits is generally \$10,000 or \$20,000 . . .”). *See, e.g.*, NEV. REV. STAT. ANN. §§ 690B.020(2) (West 2016), 485.3091(b) (West 2018) (\$25,000/\$50,000); ALA. CODE §§ 32-7-23(a), 32-7-6(c) (1975) (\$25,000/\$50,000); MO. REV. STAT. ANN. § 303.190 (West 2019) (\$25,000/\$50,000). Prior to July 1, 2018 Nevada required an even lower \$15,000 per person/\$30,000 per accident limit, which is the requirement in Arizona, California, Delaware, Louisiana, and Pennsylvania. *See* UNINSURED MOTORIST AND UNDERINSURED MOTORIST COVERAGE COMPENDIUM (2016), <http://www.dri.org/legal-point/um-uim-coverage-compendium> [hereinafter DRI COMPENDIUM]. Statutory minimums range from a low of \$10,000 per person/\$15,000 per accident in Florida to \$50,000 per person/\$100,000 per accident Alaska and Maine. *See* DRI COMPENDIUM, *supra*; Araujo, *supra*.

We pause to note our disagreement with such low mandatory limits. The cost of even a mildly serious collision accident far exceeds most state minimum limits. Other jurisdictions, such as Ontario, Canada, set the mandatory minimum bodily injury limits far higher: at \$200,000 (though most drivers regularly purchase liability insurance coverage for \$1 million or more, and insurance professionals regularly recommend \$2 million). *See, e.g.*, Adam Wagman, *Canada: How Much Car Insurance Do I Really Need? – Third Party Liability*, MONDAQ, <http://www.mondaq.com/canada/x/746816/Insurance/How+Much+Car+Insurance+Do+I+Really+Need+> (last updated Oct. 18, 2018).

inadequate liability insurance can thus purchase UM/UIM coverage. In this way, the policyholder can be seen as prudent in making the wise decision to at least protect herself in the event she is injured by an inadequately insured motorist. UM/UIM insurance is designed to make up the difference for the victim.

Distilled to its essence, UM/UIM coverage indirectly provides additional liability insurance to an uninsured or underinsured tortfeasor. A victim or the tortfeasor may then not only seek compensation from whatever insurance the third-party tortfeasor possesses¹² but may also seek compensation pursuant to the victim's own first party auto insurance that provides UM/UIM coverage.

However, to collect the UM/UIM coverage purchased, the policyholder injured in a collision must establish that he or she is "legally entitled to recover" against the tortfeasor.¹³ In other words, the policyholder victim *qua* UM/UIM claimant must not be at greater fault than the tortfeasor.¹⁴

Consequently, even if a policyholder is badly injured by an underinsured or uninsured tortfeasor motorist, the policyholder can obtain UM/UIM benefits pursuant to that coverage only if able to prove a winning case against that tortfeasor motorist¹⁵ – as well, of course, as being able to prove an amount of damages exceeding the tortfeasor motorist's insurance. If the policyholder *qua* UM/UIM claimant can make this showing, UM/UIM benefits are available up to the policy limits purchased.

¹² See *supra* note 8.

¹³ See WIDISS & THOMAS, *supra* note 2, at 361 ("Determining When An Insured is 'Legally Entitled' to Recover") (boldface removed).

¹⁴ Nearly all states have a tort regime of modified comparative negligence in which a plaintiff may recover so long as he or she is not at greater fault than the defendant. This is contrasted with pure comparative negligence in which a plaintiff who is more negligent than the defendant may recover but the recovery is proportionally reduced according to the parties' relative fault. The most notable example of this is the Federal Employers Liability Act (FELA), 45 U.S.C. § 51 *et seq.* (2018). Under the traditional a contributory negligence regime, which appears to still be followed in handful of states, a plaintiff is barred from recovery if he or she was in any way negligent. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 218 (2d ed. 2019).

¹⁵ See WIDISS & THOMAS, *supra* note 2, ch. 7.

II. THE DIFFERING STATE APPROACHES TO UM/UIM
INSURANCE

Some jurisdictions have statutes mandating the design of UIM coverage and a small proportion of states even require mandatory purchase of UIM coverage.¹⁶ States have one of two possible forms of UIM insurance.¹⁷ Under the first form, which we call the “gap-filling” approach, if there is a difference between the injured UIM policyholder’s UIM coverage and the tortfeasor’s liability coverage (or if the injured UIM policyholder’s actual losses are greater than the limits of the tortfeasor’s liability coverage), the injured UIM policyholder’s own UIM policy steps in to pay the difference. It is as if the injured policyholder is injured by a driver with the same insurance limits as her own. In this respect, it ensures the policyholder has the same level of insurance protection available for herself as she purchased in liability insurance.

This gap-filling additional UIM coverage caps recovery basically at the amount of the UM limit available: the same amount the injured victim would recover if the tortfeasor had no liability insurance at all. Under this model, the UIM insurer is entitled to set off the difference between what the policyholder would receive from the tortfeasor’s liability insurance and what the UIM would be expected to pay as the difference.

Under the second form of available UIM insurance, UIM functions as a “topping off” coverage so that the amount of the policyholder’s liability coverage acts as an add-on to the tortfeasor’s liability insurance limits if the tortfeasor’s limits are not enough to compensate the injured policyholder’s loss.

Our preference is for the topping-off approach as this holds a better chance of adequately compensating the collision victim and facilitating

¹⁶ JERRY & RICHMOND, *supra* note 2, § 135[C], at 850-51 (footnote omitted). *Accord* STEVEN PLITT & JORDAN ROSS PLITT, PRACTICAL TOOLS FOR HANDLING INSURANCE CASES, § 11:18 (2011).

¹⁷ The states divide roughly equally regarding the two approaches, although the gap-filling model may be most prevalent. *See* PLITT & PLITT, *supra* note 16, § 11.18 (identifying Colorado, Arizona, and Florida as “excess coverage” or topping-off jurisdictions and Illinois, Kansas, Vermont, Tennessee, New Jersey, and South Dakota as gap filling or “gap coverage” jurisdictions).

payment of all of the policy limits protection that has been purchased.¹⁸ Importantly, however, the problem we identify – what role should be

¹⁸ Like UM/UIM coverage generally, an assessment of the relative merits of the two approaches is beyond the scope of this article.

In brief, the gap-filling approach logically should result in lower premiums on average because the UM/UIM insurer will be able to pay less than the policy limits purchased by the policyholder because the UM/UIM insurer's payment (and the total payment of the injured policyholder) is reduced by whatever (yet still inadequate) liability insurance possessed by the tortfeasor. The disadvantage, of course, is that the UM/UIM coverage purchased by the policyholder is reduced. In contrast, under the topping-off approach, the injured UM/UIM policyholder may be able to receive—if the extent of injury merits—as much as the combined tortfeasor liability limits as well as the UM/UIM policy limits.

Because the UM/UIM insurer in a topping-off state is not allowed to diminish its responsibility according to the amount of the tortfeasor's insurance, this creates some upward pressure on premiums but—in our view—is a price worth paying in order to get closer to the adequate compensation for the accident victim. Recall that even in a topping-off state where both tortfeasor and victim have purchased substantial insurance, the UM/UIM payment is not automatic. The policyholder must prove both a valid claim against the tortfeasor and that damages exceed the tortfeasor's policy limits before a dime of UM/UIM coverage is collected.

One can make an aggregate efficiency argument in favor of gap-filling that has superficial appeal (e.g., a premium savings of \$100/year results in aggregate premium savings of hundreds of millions in premium savings), this comes at the cost of depriving some victims of underinsured drivers of tens of thousands or even hundreds of thousands of dollars. Our view is that it is more important to better compensate an actually injured person rather than save uninjured policyholders eight dollars and change each month (the \$100 annual premium saving divided by twelve, which is a mere twenty-seven cents per day).

The ultimate decision is one of public policy, values, and empirical data unconnected to the problem we address in this article. For example, if it was the case that average auto insurance premiums in topping-off states were double or triple those of gap-filling states, we would be quick to reconsider our position. But there appears to be no definitive evidence of this purported discrepancy. For example, although Jerry & Richmond note that topping off UIM structures should logically result in higher premiums, they cite no

assumed by the UM/UIM carrier – applies to both forms of UIM insurance. And, for the reasons set forth below, the proper role under both UIM regimes is for the UM/UIM carrier to behave like an ordinary liability insurer in valuing the damage payments due the collision victim.

As noted above, the typical auto policy also provides for reducing the UM/UIM payment by any medical payments or other liability payments received as well as any payments received pursuant to workers compensation or disability benefits as well as an “other insurance” clause coordinating coverage that make the policyholder’s UM/UIM coverage excess of any other collectible insurance or provide for proration of the coverage responsibilities of various triggered insurers.¹⁹ States may also regulate permissible offsets or reduction in UM/UIM payments.²⁰

empirical data on the matter. *See* JERRY & RICHMOND, *supra* note 2, § 135. Plitt & Plitt, while discussing the operational differences between the two approaches, expressly posit higher premiums in the topping-off states. *See* PLITT & PLITT, *supra* note 16, § 11:18. One study by a consumer advocacy group concluded that the additional premium required for a 30-year old driver to purchase \$100,000 per person/\$30,000 per accident auto liability policy limits was roughly \$100 per year (\$112 to be precise) in California, \$66 per year in Pennsylvania, and only \$30 per year in Illinois. *See* Lacie Glover, *Uninsured Motorist Coverage Explained: Uninsured Motorist Coverage Can Spare You from Shelling Out Your Own Money for Crashes You Didn’t Cause*, NERD WALLET (Aug. 12, 2019), <https://www.nerdwallet.com/blog/insurance/get-car-insurance-with-uninsured-motorist-coverage> (discussing both UM and UIM insurance and conducting field research on UIM pricing). While this may in part reflect the impact Illinois’s status as a gap filling state, *see* PLITT & PLITT, *supra* note 16, § 11:18, it also suggests that any pricing difference among the two competing state models is unlikely to be large in relation to overall insurance premium costs.

¹⁹ *See, e.g.*, ISO Personal Auto Policy No. PP 00 01 01 05, Part C (2003), *reprinted in* FRENCH & JERRY, *supra* note 2, at 492; ISO Personal Auto Policy No. PP 00 011 06 98, Part C (1997), *reprinted in* STEMPEL, SWISHER & KNUTSEN, *supra* note 2, app. B at 7-8.

²⁰ *See, e.g.*, Michael C. Mills, *Nevada*, in DRI COMPENDIUM, *supra* note 11 (“Offsets or credits are allowed against UM or UIM settlements for medical payments so long as the insurance contract allows it and the contract language is clear and understandable. Offset provisions reducing UM

State statutes or judicial decisions also may affect the enforceability of these provisions or prompt insurers to revise typical terms to comply with the law. For example, a common UM/UIM provision defines an underinsured vehicle as one with less than the statutory minimum limits,²¹ which (as noted above) are comparatively low in relation to the injuries that a collision may inflict.²² Other states may define an underinsured motor vehicle as one with limits insufficient to compensate the injured policyholder.²³

States also differ regarding the definition and treatment of uninsured and underinsured motorist coverage. Some treat the two as synonymous²⁴ (a literal “UM/UIM” fusion akin to the shorthand reference we use in this article)²⁵ while others may have differing requirements regarding the provision of UM and UIM insurance.²⁶

coverage by amounts paid or payable under worker’s compensation, disability or similar laws are enforceable. However, offset provisions are unenforceable as to benefits received from privately purchased disability insurance.”) (citations omitted). *See also* St. Paul Fire & Marine Ins. Co. v. Emp’r Ins. Co. of Nev., 146 P.3d 258, 262-63 (Nev. 2006) (holding that pursuant to NEV. REV. STAT. ANN. § 616C.215(3) (2019), governing workers’ compensation carrier subrogation rights against UM/UIM insurance purchased by employer, workers’ compensation carrier has independent right of action against UM/UIM carrier irrespective of claims made against UM/UIM coverage by the insured).

²¹ *See* WIDISS & THOMAS, *supra* note 2, ch. 32 (describing state legislation regarding UIM insurance).

²² *See supra* notes 4-5.

²³ *See* WIDISS & THOMAS, *supra* note 2, ch. 32 (describing state legislation regarding UIM insurance).

²⁴ *See, e.g.*, NEV. REV. STAT. ANN. § 687B.145(2) (LexisNexis 2009) (requiring insurers to offer both UM and UIM coverage to policyholders on the same terms). *Accord* Peterson v. Colonial Ins. Co., 686 P.2d 239 (Nev. 1984). *See also*, Mills, *supra* note 20, at 186.

²⁵ For a discussion of the distinctions between UM and UIM coverage, and the history of the evolution producing required UIM coverage as well as required UM coverage, *see* WIDISS & THOMAS, *supra* note 2, ch. 31.

²⁶ *See* WIDISS & THOMAS, *supra* note 2, ch. 32. *See generally* DRI COMPENDIUM, *supra* note 11 (50-state survey published by Defense Research Institute or “DRI”).

As noted, UM/UIM legislation is common.²⁷ In many states, the coverage is required, sometimes not only for automobiles but also for all vehicles.²⁸ In nearly all states, the coverage must be offered at the time auto insurance is purchased but may be declined by the policyholder.²⁹ There also

²⁷ WIDISS & THOMAS, *supra* note 2, § 2.1, at 17 (“Forty-nine states currently have uninsured motorist insurance legislation.”). *See generally* DRI COMPENDIUM, *supra* note 11.

²⁸ *See* WIDISS & THOMAS, *supra* note 2, § 2.1, at 17-18; *see also id.* § 2.2 (noting that “approximately thirty-five states” have legislation appearing to require UM/UIM coverage but doing so in vague terms). “Some states have enacted legislation which makes uninsured motorist insurance mandatory. In these states, uninsured motorist insurance must be included in all motor vehicle liability policies issued or delivered.” *Id.* § 2.5 at 25 (identifying South Carolina as one such state and citing *S. Farm Bureau Cas. Ins. Co. v. Fulton*, 244 S.C. 559, 137 S.E.2d 769 (1964)). “The remaining states have established a mandatory offering requirement. Insurance companies are required to include the coverage in all policies issued or delivered in these states, but the purchaser is permitted to reject the coverage.” *Id.* § 2.5 at 26. The current count of Allstate Insurance finds 21 states and the District of Columbia that mandate UM coverage in auto policies sold in the state. ALLSTATE, <http://www.allstate.com/tr/car-insurance/uninsured-motorist-coverage.aspx> (last visited Jan. 21, 2019) (listing Connecticut, DC, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, West Virginia and Wisconsin as the states that require UM coverage in some form in auto policies). *See id.* (identifying these same states, minus DC, Massachusetts, Missouri, Rhode Island, South Carolina and Wisconsin, as states requiring UIM coverage in auto policies).

²⁹ *See* WIDISS & THOMAS, *supra* note 2, § 2.1, at 18; *see also* Penny Gusner, *What is uninsured and underinsured motorist coverage?*, INSURE.COM, <https://www.insure.com/car-insurance/uninsured.html> (last updated Nov. 16, 2017) (containing state-by-state listing of UM/UIM requirements reflecting that nearly every state requires agents to offer UM/UIM coverage as part of an auto insurance sale but that most states permit prospective policyholders to reject the UM/UIM coverage option).

may be additional regulatory provisions such as those requiring or limiting specific terms of coverage.³⁰

In many states, the insurer must offer UM/UIM insurance in the same amount as the liability limits of the auto policy.³¹ However, just as the policyholder is allowed to reject UM/UIM coverage altogether, he or she may also elect to purchase a reduced amount of UM/UIM insurance.³²

III. THE RISKS TO THE POLICYHOLDER IN TODAY'S UM/UIM CLAIMS PROCESS

In practice, an injured policyholder initially makes a claim against the at-fault tortfeasor motorist.³³ Unless the tortfeasor motorist is particularly wealthy or very gainfully employed, the only realistic source of compensation is the tortfeasor's insurance (or lack thereof).³⁴ Where

³⁰ See WIDISS & THOMAS, *supra* note 2, § 2.1, at 18. See generally *id.* §§ 2.8-2.14 (Regarding UM/UIM regulation).

³¹ See, e.g., NEV. REV. STAT. ANN. § 687B.145(2) (West 2016). See WIDISS & THOMAS, *supra* note 2, § 2.12, at 56. See generally DRI COMPENDIUM, *supra* note 11.

³² See, e.g., NEV. REV. STAT. ANN. § 690B.020(1) (West 2016); Phelps v. State Farm Mut. Auto. Ins. Co., 917 P.2d 944 (Nev. 1996); State Farm Mut. Auto. Ins. Co. v. Hinkel, 488 P.2d 1151 (Nev. 1971). See generally DRI COMPENDIUM, *supra* note 11.

³³ Standard practice is for the policyholder to keep its UM/UIM insurer advised of the matter and to obtain the consent of the UM/UIM insurer to the settlement with the tortfeasor's insurer. Consent is required by some policy form language but where the UM/UIM insurer unreasonably refuses consent, this is usually not a bar to UM/UIM recovery. Regarding prosecution of claims against the tortfeasor and UM/UIM claims, see WIDISS & THOMAS, *supra* note 2, chs. 16-20.

³⁴ It appears that less than half the public have any significant liquid savings. See *Report on the Economic Well-Being of U.S. Households in 2017*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. 2 (May 2018) ("Four in 10 adults, if faced with an unexpected expense of \$400, would either not be able to cover it or would cover it by selling something or borrowing money."); see also Ylan Q. Mui, *The shocking number of Americans who can't cover a \$400 expense*, WASH.

policyholder claimant injuries are at all serious and the tortfeasor has a minimum statutory limit policy, the tortfeasor's insurer is likely to agree to pay the policy limits in settlement in order to prevent a bad faith or unfair claims practices action by the tortfeasor against his liability insurer (for failing to act as a reasonable liability insurer).³⁵

POST., <https://www.washingtonpost.com/news/wonk/wp/2016/05/25/the-shocking-number-of-americans-who-cant-cover-a-400-expense/?noredirect=on> (last updated May 25, 2016) (noting Federal Reserve survey of 5,000 persons in which 46 percent of respondents stated that they "did not have enough money to cover a \$400 emergency expense. Instead, they would have to put it on a credit card and pay it off over time, borrow from friends or family, or simply not cover it at all.").

As reflected by the shutdown of the U.S. Government that began in December 2018 and ended January 25, 2019, it appears that many workers, even those with jobs traditionally viewed as middle class, cannot continue to make mortgage or car payments without a regular paycheck. *See During Government Shutdown, Many Federal Workers Can't Afford To Miss A Paycheck*, NAT'L

PUB.

RADIO, <https://www.npr.org/2019/01/19/686935272/during-government-shutdown-many-federal-workers-cant-afford-to-miss-a-paycheck> (last updated Jan. 19, 2019). Tortfeasors of this economic status are not generally considered worth pursuing for compensation beyond the liability insurance they possess, even if beyond liquid savings they have some assets. Such assets are likely to be modest except for perhaps a family home, which will be exempt from judgment execution to at least a large degree (an unlimited degree in some states). On occasion, a tortfeasor (e.g., a doctor, lawyer or other professional in early or mid-career) may have relatively few assets but earn a good income, which may spur a plaintiff to garnishment of wages or some tortfeasor contribution to an insurer's settlement payment. But this is quite rare.

³⁵ RESTATEMENT OF THE LAW LIAB. INS. § 27 (AM. LAW INST., 2019) (approved at May 2018 ALI Annual Meeting) (formal publication pending) [hereinafter RLLI] provides that where the liability insurer breaches its duty to make reasonable settlement decisions, the insurer is liable for the full excess judgment and its liability is not restricted to the policy limits. *See also* Century Sur. Co. v. Andrew, 432 P.3d 180 (Nev. 2018) (liability insurer that breaches its duty to defend liable for full resulting judgment without regard to policy limits).

Without doubt, a common bad faith scenario – perhaps *the* leading cause of insurer bad faith liability – is a “blown settlement” opportunity in which the claimant offers to settle for policy limits, the tortfeasor’s liability insurer refuses, and the claimant obtains a judgment at trial in excess of the tortfeasor’s policy limits.³⁶ This exposes the tortfeasor’s own personal assets

An insurer’s rejection of a policy limits settlement demand involving a low limits policy followed by excess verdict and judgment against the tortfeasor almost certainly reflects unreasonable settlement behavior by the insurer, although the situation is of course fact specific. For example, if the insurer refuses a \$15,000 policy limits settlement demand and the plaintiff obtains a \$500,000 verdict, it is hard to conjure any scenario in which a reasonable insurer would have passed up the opportunity to protect its policyholder for such a small amount in the face of a claim capable of half-million-dollar verdict. The burden to demonstrate unreasonable behavior remains with the policyholder but is an easy burden in such situation unless the insurer can point to unusual factors producing an unanticipatedly high, unreasonably large verdict or unless developments postdating the settlement demand account for the excess verdict. *See* STEMPEL & KNUSTEN, *supra* note 2, ch. 10 (reviewing bad faith concept and legal doctrine).

³⁶ *See* RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE 408 (Matthew Bender, 4th ed. 2018) (insurer failure to settle claim against policyholder within policy limits a common source of bad faith claims); Ronald J. Cook, *The “Letter Perfect” Policy Limit Demand Letter: Writing an Effective Demand Letter Can Lead to a Faster, Better Settlement or Make it Easier to “Open Up” Defendant’s Policy Limits*, PLAINTIFF MAG. (March 2011), <https://www.plaintiffmagazine.com/recent-issues/item/the-letter-perfect-policy-limit-demand-letter> (reflecting plaintiffs’ bar focus on demanding policy limits with prospect that liability insurer will unreasonably refuse such demands and thereby be responsible for excess judgment bad faith claim by policyholder that may in most states be assigned to the plaintiff); Gene Killian, *Can an Insurance Company be Liable for Bad Faith in Settling a Liability Suit?*, N.J. INS. COVERAGE LITIG.: KILLIAN FIRM, P.C. (Nov. 27, 2017), <https://www.newjerseyinsurancecoveragelitigation.com/bad-faith/can-an-insurance-company-be-liable-for-bad-faith-in-settling-a-liability-suit> (plaintiff and policy holder counsel describing failure to settle a strong claim within policy limits one of two major sources of insurer bad faith liability,

because of a litigation decision by her own insurer. In essence, it is the tortfeasor's own insurer throwing the tortfeasor's interests under the bus in the hopes the insurer can roll the dice at trial and save on the payout.³⁷

Where those limits are at or only slightly above the statutory minimum, an excess judgment greater than the available policy limits exposing the personal assets of the tortfeasor is a real risk to the tortfeasor's insurer. After even a modest collision, the victim may have tens of thousands of dollars in medical bills, weeks or even months of lost income, and pain and suffering or loss of consortium claims. A verdict in excess of tortfeasor policy limits of \$15,000 or \$25,000 is a real risk. Higher limits of \$50,000, \$100,000 or more provide greater security but are still fairly often at risk of being insufficient.

Recognizing this, the prudent tortfeasor's liability insurer wanting to protect its policyholder from the risk of an excess judgment will prudently be willing to pay policy limits in settlement unless there are serious questions regarding liability or the extent of injury.³⁸ Otherwise, that liability insurer

the other being unreasonable denials of coverage). The famous *Campbell v. State Farm* cases (State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) in the Supreme Court) in which a \$145 million punitive damages award was overturned, eventually resulting in a \$9 million punitive damages award (see *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004), *cert. denied*, 543 U.S. 874 (2004)) was one in which a low policy limit (\$25,000 per person) auto liability insurer repeatedly refused policy limits settlement offers in a case resulting in a verdict of more than \$200,000. See JEFFREY W. STEMPEL, *LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM* 114-33 (1st ed. 2008) (describing pre-trial and trial proceedings in underlying auto collision case that eventually became the multi-million dollar bad faith case).

³⁷ An extensive discussion of bad faith law or unfair claims practices is beyond the scope of this article. Regarding bad faith and unfair claims practices generally, see MANILOFF & STEMPEL, *supra* note 36, § 21 (reviewing state-by-state the first-party and third-party standards for bad faith); Kenneth S. Abraham, *The Natural History of the Insurer's Liability for Bad Faith*, 72 TEX. L. REV. 1295 (1994).

³⁸ In some cases, the claimant's injuries may be so severe that even if liability is unclear, reasonable insurer conduct requires paying the relatively low policy limits in order to eliminate the risk of a crushingly large judgment that would economically destroy the policyholder. Although bankruptcy

risks a bad faith claim against it, as a result of its behavior acting against its own insured's interests.

In the UM/UIM world, one would think the same dynamic about insurer fear of bad faith would follow, but this is not necessarily the case. After having obtained settlement from the tortfeasor's low-limit liability insurer, the UM/UIM policyholder is likely to be undercompensated relative to his or her injuries. The policyholder then seeks payment from its own UM/UIM insurer. At this point, the "legally entitled to recover" requirement has essentially been met.³⁹ The tortfeasor's insurer ordinarily would not have paid its policy limits if there had been any significant question regarding the tortfeasor's liability.⁴⁰ The remaining issues are the full extent

may be an option, some automobile liability judgments (e.g., involving drunken driving, reckless driving, or illegal activity) may be non-dischargeable.

³⁹ UM/UIM insurance commonly contains a provision requiring the policyholder to notify the insurer of the collision and of any action against the tortfeasor, commonly requiring the insurer's consent to settling with the tortfeasor. In practice, UM/UIM insurers seldom refuse such consent, for reasons both practical and legal. Courts typically require that such consent not be unreasonably withheld. In the UM/UIM context, the injured policyholder ordinarily is interested in settling only for policy limits, which maximizes coverage from the tortfeasor's carrier and gives the UM/UIM insurer nothing of which to complain.

Absent very rare circumstances (e.g., the policyholder plaintiff is willing to settle with a \$2 million/per year orthopedic surgeon for the doctor tortfeasor's \$15,000 auto liability limits), UM/UIM insurers tend to show no interest in settlement with the underinsured tortfeasor and have no plausible ground for objections to a policy limits settlement.

⁴⁰ Save for the prospect that the tortfeasor's insurer was excessively generous in settlement because it was unreasonably concerned about an excess judgment and bad faith action. Although the prospect of bad faith liability undoubtedly prompts insurers to be more forthcoming in settlement in order to avoid an excess verdict, the effect appears to be slight. See Mark J. Browne, Ellen S. Pryor & Bob Puelz, *The Effect of Bad-Faith Laws on First-Party Insurance Claims Decisions*, 33 J. LEGAL STUD. 355 (2004) (finding significant increase in average claims payment of in states permitting first-party bad faith actions by policyholders. Most claims involving an underinsured tortfeasor appear to involve statutory minimum or low limit policies where the prospects of an excess verdict are quite clear and

of the policyholder's damages over and above what the policyholder has received from the tortfeasor's insurer.

It is at this juncture that conflict may arise. For example, the victim policyholder may have received the tortfeasor's \$25,000 policy limits and have a policy with \$100,000 per person UM/UM coverage. If the policyholder has more than \$25,000 in damages, he or she is entitled to at least some portion of the UM/UM coverage they purchased. If the policyholder claims damages in excess of the combined policies, he or she will expect to receive the full \$100,000 limits in compensation. If correct, the policyholder, although better off than if UM/UM coverage had been declined, will nonetheless be undercompensated relative to the amount they would receive as an injured plaintiff suing a tortfeasor with an adequate amount of liability insurance.

This prompts the question: what is the apt role of the UM/UM insurer processing and valuing a UM/UM claim? Is it that of an ordinary first-party insurer contesting a homeowner's valuation of fire damage or a hospital charges incurred by a medical insured? Or should it be that of a liability insurer facing a claim against a policyholder with modest policy limits? Should the UM/UM insurer be expected to be guarding its own policyholder against insufficient compensation in the same way a liability insurer would guard against exposing the personal assets of its own policyholder who was liable for an accident at or near the limits of the liability policy?

IV. FIRST PARTY V. THIRD PARTY: THE IDENTITY CRISIS OF UM/UM INSURERS

UM/UM coverage is typically categorized as first-party insurance because it is purchased by the policyholder (the first party) as part of a bilateral contract with the insurer (the second party).⁴¹ In this regard, it is

stark rather than farfetched. For example, even in a modestly bad collision, the victim's claim can easily implicate \$25,000 policy limits. The same collision is unlikely to prompt an insurer with \$250,000 limits to rapidly write a check due to excessive paranoia about an excess verdict and subsequent bad faith liability).

⁴¹ The insurer's role as a consistent second party of any insurance policy is often overlooked. In first-party insurance such as homeowners', business property, life, health, or disability insurance there are only two parties to

akin to purchasing property insurance (e.g., a homeowner's policy, although these policies also usually provide modest liability insurance) or health, disability, or life insurance. But UM/UIM insurance is different than those other types of first party insurance. Property insurance is designed to pay the policyholder: the first party. UM/UIM insurance also pays the policyholder first party but it does so with necessary reference to the availability and context of the third-party insurance of the at-fault tortfeasor driver. It is designed to replace the availability of the liability insurance that in theory should have been purchased by a tortfeasor who caused injury to the UM/UIM policyholder. It has been aptly labeled a "hybrid" type of coverage.⁴²

This hybridity is important in understanding the unique context at work with UM/UIM coverage and why it is so crucial to insurer behavior in this context. UM/UIM coverage is not triggered for a policyholder unless the injured policyholder was "legally entitled to recover" from the at-fault tortfeasor motorist.⁴³ This means the insurer can avoid payment if the

the contract: policyholder and insurer. More important, there are only two parties that will be involved in litigation with one another. In a third-party policy – which is a liability policy of some type (general liability, professional liability, directors' & officers' liability, errors & omissions liability), there remain only two parties to the contract itself – but the purpose of the insurance is to protect the policyholder from the liability claims of a third-party such as a plaintiff injured by the policyholder's driving. Because the UM/UIM policyholder pays the premium and receives payment, the coverage is technically first-party coverage. But, as discussed in the text, the coverage is designed to supplement inadequate auto liability (third-party) insurance.

⁴² See KEETON & WIDISS, *supra* note 2, § 4.9(e), at 399 ("Uninsured motorist insurance, which is now included in almost all automobile insurance policies, is a hybrid coverage. It is a first-party accident insurance, which means that insurance benefits are paid by the insurance company to the persons who are identified as insured in the policy terms. It is fault-based insurance because the coverage for these insureds only applies when they are legally entitled to recover damages. . . ."). Accord PLITT & PLITT, *supra* note 16, § 11:1, at 2 (UM and UIM coverages "are hybrid types of coverage because they blend the features of both first-party and third-party coverage.").

⁴³ This is both because of the design of UM/UIM coverage and also because standard policy language specifically states that the policyholder

policyholder was the at-fault driver or if the at-fault tortfeasor who injured the policyholder enjoyed immunity or has the benefit of another technical defense such as expiration of the statute of limitations.⁴⁴ The insurer providing UM/UIM coverage is essentially processing a liability insurance claim but with a different arrangement as to who is the policyholder and who is the end result payee.

With UM/UIM insurance, the money goes to the policyholder victim, not the at-fault tortfeasor motorist (who would then pay it to the policyholder). And the policyholder is also the victim, not the at-fault tortfeasor motorist who typically is the liability insurance policyholder hoping his liability policy will cover what he owes to the accident victim he injured or defend against unwarranted claims. Other than these two aspects, UM/UIM insurance operates as liability insurance. Coverage is only applicable if the injured policyholder is “legally entitled to recover” from some other driver’s liability insurance (which, of course, in the UM/UIM context, is either non-existent or has inadequate limits).

The same equities and legal defenses and doctrines available in assessing a liability insurer’s responsibility to pay in a typical accident

may obtain UM/UIM benefits only if legally entitled to recover from the inadequately insured tortfeasor – which means that the third party causing injury to the policyholder must have more fault than the policyholder.

⁴⁴ PLITT & PLITT, *supra* note 16, §11:1, at 2 (“the insured must be able to establish fault on the part of the uninsured or underinsured motorist and must be able to prove the extent of the damages to which he or she would be entitled. The insurance company may assert all defenses that would be available to the uninsured or underinsured motorist within the context of the duty of good faith and fair dealing it owes to the insured.”). *See, e.g.*, *Smerdon v. Geico Cas. Co.*, 342 F. Supp. 3d 582 (M.D. Pa. 2018) (holding that a policyholder who was injured when attempting to thwart a robber at Wal-Mart, where she was shopping, was not legally entitled to recover on the grounds that she assumed the risk of injury by voluntarily pursuing robber). In addition, the policyholder must be legally entitled to recover under the terms of the insurance policy; *see also* *Erie Indem. Co. v. Estate of Harris*, 99 N.E.3d 625 (Ind. 2018) (holding that employee riding lawnmower when killed by uninsured driver did not qualify as a person protected within the meaning of UM coverage of employer’s policy). *But see* *Eastman v. Farmers Ins. Co.*, 423 P.3d 431 (Idaho 2018) (maintaining that a non-owned vehicle exclusion in UIM coverage, although textually applicable, violated public policy and was not enforceable).

situation applies in the same fashion in UM/UIM insurance (except to the policyholder victim, not the at-fault tortfeasor policyholder). Therefore, the UM/UIM insurer has all the advantages of running the UM/UIM claim as would any liability insurer – except the claim is against its own policyholder, who also happens to be the auto accident victim.

By contrast, a true first party insurer must pay if the covered event takes place. Unlike liability insurance, policyholder error does not permit the insurer to deny benefits.⁴⁵ The mere occurrence of the insured event, or the “happening” in the world, triggers payment. Absent an unusual exclusion, a life insurer cannot avoid payment by arguing that the decedent should have eaten a healthier diet, just as a disability insurer cannot refuse to pay because the policyholder should have been more careful when painting while on a ladder or scaffold. Likewise, a medical insurer cannot refuse to pay for knee surgery by arguing that the policyholder was stupid to play pick-up basketball in November with patches of ice on the court.

To this end, we think that UM/UIM insurance suffers from a sort of identity crisis: is it first-party insurance or third-party insurance? That categorization matters because first-party insurers have traditionally behaved differently than third party liability insurers defending a claim against an insured tortfeasor.⁴⁶ The first party insurer has comparatively greater leeway

⁴⁵ See REJDA & MCNAMARA, *supra* note 2, ch. 22 (describing property component of homeowners insurance); *id.* ch. 25 (describing commercial property insurance); *id.* at 478 (describing homeowner leaving fireplace unattended, which contributed to extent of fire damage but no mention of denying coverage on the basis of policyholder fault); STEMPEL & KNUTSEN, *supra* note 2, ch. 15 (describing property insurance); JERRY & RICHMOND, *supra* note 2, §§ 63, 63A (describing requirement of fortuity generally and issue of intentional conduct and property insurance; noting that intentional destruction such as arson voids coverage with no mention of negligent or reckless stewardship of property barring coverage); VAUGHAN & VAUGHAN, *supra* note 2, ch. 24 (describing homeowners insurance); *id.* ch. 31 (describing commercial property insurance); DORFMAN & CATHER, *supra* note 2, ch. 13 (describing homeowners insurance); *id.* ch. 22 (describing commercial property insurance); STEMPEL, SWISHER & KNUTSEN, *supra* note 2, at 657-661.

⁴⁶ This observation is based on our collective 50 years of viewing these cases as well as regularly/habitually reading case reports. UM/UIM insurers are in our view consistently less generous in their valuation of claims than

to dispute issues such as: the extent and expense of medical treatment; whether a car is a total loss; or whether a home can be rebuilt or must be razed and replaced after a fire. The third-party liability insurer defending a claim must make reasonable settlement decisions to protect the policyholder against judgment in excess of policy limits that could in turn economically imperil the policyholder. The latter standard encourages the insurer to give more attention to the interests of the policyholder.

Courts and commentators have not definitively addressed the proper standard of care expected of UM/UIM insurers in responding to policyholders claims. UM/UIM insurers routinely take the position, at least implicitly, that the standard is less demanding than that imposed on an ordinary liability insurer and that UM/UIM carriers are not required to make the reasonable settlement decisions required of an ordinary liability insurer and may instead deny policyholder claims so long as they have an arguable basis for valuing the amount of injury at a lower amount than sought by the policyholder.⁴⁷

We regard this perspective as dramatically incorrect in light of the history, purpose and logic underlying UM/UIM coverage. It undermines the basic contractual and public policy goal of the UM/UIM policy feature: putting the policyholder in a position equivalent to that which it would be in if it were suing an adequately insured at-fault tortfeasor motorist.

Pursuant to the self-serving insurer perspective, the insurer's own policyholder – the customer who prudently paid for protection – is treated less favorably because it imposes weaker incentives on an insurer than the more stringent obligation of liability insurers to make reasonable settlement

are front-line auto liability insurers. Because the injuries incurred are presumably randomly distributed across both types of cases, the most likely reason for the higher valuations made by liability insurers is that these insurers must err on the side of caution and more generous valuations because of the risk of an adverse judgment exceeding policy limits for which the ordinary liability insurer will be responsible, even in the absence of a specific finding of bad faith or statutory violation. By contrast, UM/UIM insurers are not disciplined by this risk nor as obviously subject to this measuring stick or accountability.

⁴⁷ See, e.g., cases cited *infra* note 60; *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276, 279 (Ariz. 2000); *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 722 (Ariz. 1990).

decisions in light of the range of results possible at trial and the duty to protect a policyholder from the risk of a judgment in excess of policy limits.⁴⁸

As a result of the misunderstanding of duties held by many UM/UIM insurers, UM/UIM policyholders tend to receive harsher treatment than they

⁴⁸ This problem – or at least what we regard as a problem – would exist to a degree even if UM/UIM insurers are relieved of the duty to behave like reasonable liability insurers. Despite the strong incentives provided by the excess judgment measure of damages when a liability insurer unreasonably refuses to settle for policy limits (or in some states, breaches the duty to defend, *see* *Century Surety Co. v. Andrew*, 432 P.2d 180 (Nev. 2018)), liability insurers continue to blow golden settlement opportunities or fail to defend even when the face of a complaint alleges a potential for coverage triggering the duty. For example, in *Century Surety Co. v. Andrew*, the insurer failed to defend and was ultimately held responsible for an \$18 million judgment). But notwithstanding such cases, gross error of this sort by liability insurers is rare and liability insurers generally view the excess judgment measure as a powerful incentive to protect the policyholder and refrain from quibbling about cases that may be close to the policy limits line regarding damages.

The problem of use of a first-party standard rather than a third-party standard can also be exacerbated when UM/UIM insurers make the situation worse by taking an extreme view of what constitutes sufficiently fair debatability. For example, an insurer trying to take undue advantage of a first-party standard may argue that its refusal to pay even a dollar in a UM/UIM claim is justified because it has obtained a single nurse's opinion that the policyholder suffered no injury even in the face of three medical doctor opinions concluding that the policyholder did indeed incur substantial injury from an auto accident. This is not a fair application of the fair debatability standard. But, unfortunately, this standard lends itself more easily to such extreme insurer behavior than does the third-party standard of reasonable settlement behavior by the liability insurer. In the nurse-vs-doctors illustration, for example, it is in our view easier to recognize the error of turning down a policy limits settlement and subjecting the insured to potentially crushing liability than it may be for a court to declare that the single nurse's assessment (even if sincere and unbiased) is not enough to create an issue of fair debatability when weighed against the analysis of three physicians.

would if suing a stranger tortfeasor motorist and his liability insurer. This strikes us as a most curious result in that it means that, at the margin at least, liability insurers are likely to give greater benefit of the doubt to strangers suing their policyholders than UM/UIM insurers give to their policyholders themselves after injury at the hands of an uninsured or underinsured driver.

A relatively simple hypothetical illustrates the dynamics around UM/UIM insurance and the problems with the hybridity of treating UM/UIM as first party insurance in a third-party insurance context:

Fifty-year-old Paul is sitting at a red traffic light when Donald, driving a Ford F-150, barrels into the back of Paul's Toyota Yaris. The laws of physics prevail and the Yaris is mangled to the point of destruction, with Paul suffering a broken pelvis and several cracked vertebrae. The injuries require substantial medical care. But Paul is comparatively lucky. His bones heal. But that does not mean his damages are minor. He has ongoing, likely permanent, back pain that is significant but not completely debilitating. Paul controls it with pain medication and regular physical therapy as well as periodic procedures to reduce nerve pain that must be repeated once a year or so as needed. The injuries are serious but not catastrophic as would be a severe concussion or a severed spine and Paul is back to work after three months after missing \$15,000 in salary, with \$70,000 of past medical bills and predicted future medical costs of \$8,000 per year from the collision. He's not the person he was before but he functions somewhere between adequately and well.

Donald has only the statutory minimum of auto liability insurance required by the state: policy limits of \$25,000 per person/\$50,000 per accident.⁴⁹ Donald's insurer offers its \$25,000 limits before Paul

⁴⁹ These limits, although low, are in fact the modal limits in the United States. See *Vehicle Insurance in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/Vehicle_insurance_in_the_United_States (last visited Jan. 14, 2019); Mila Araujo, *Understanding Minimum Car Insurance Requirements: State-By-State List of Minimum Car Insurance Requirements*, THE BALANCE, <https://www.thebalance.com/understanding-minimum-car-insurance-requirements-2645473> (last updated April 10, 2019); VAUGHAN & VAUGHAN, *supra* note 2, at 531 ("In most states the minimum bodily

can even generate a demand letter. Paul now turns to his UM/UIM insurer and seeks benefits pursuant to that feature of his own automobile policy, which has liability policy limits of \$100,000 per person/\$300,000 accident.⁵⁰ Donald's auto liability insurer needs

injury limits are \$25,000/50,00, and the minimum property damage limits is generally \$10,000 or \$20,000 . . .”). *See, e.g.*, NEV. REV. STAT. ANN. §§ 690B.020(2) (LexisNexis 2017), 485.3091 (LexisNexis 2018) (\$25,000/\$50,000); ALA. CODE §§ 32-7-23(a) (1975), 32-7-6(c) (1975) (\$25,000/\$50,000); MO. REV. STAT. § 303.030 (2018) (\$25,000/\$50,000). Prior to July 1, 2018 Nevada required an even lower \$15,000 per person/\$30,000 per accident limit, which is the requirement in Arizona, California, Delaware, Louisiana, and Pennsylvania. *See* DRI COMPENDIUM, *supra* note 11. Statutory minimums range from a low of \$10,000 per person/\$15,000 per accident in Florida to \$50,000 per person/\$100,000 per accident Alaska and Maine. *See* DRI COMPENDIUM, *supra* note 11; Araujo, *supra*. We pause to query the wisdom of such low mandatory limits when we know the cost of even a minor accident is greater than most state minimum limits by a magnitude of ten. Other jurisdictions, such as Ontario, Canada, set the mandatory minimum bodily injury limits far higher: at \$200,000 (though most drivers regularly purchase liability insurance coverage for \$1 million or more, and most insurance professionals recommend \$2 million). *See, e.g.*, Adam Wagman, *Canada: How Much Car Insurance Do I Really Need?* – Third Party Liability, MONDAQ, <http://www.mondaq.com/canada/x/746816/Insurance/How+Much+Car+Insurance+Do+I+Really+Need+Third+Party+Liability> (last updated Oct. 18, 2018).

⁵⁰ These “100/300” policy limits for liability coverage are common and often recommended by insurers and insurance agents. Policy limits of \$250,000 per person/\$500,000 per accident are also relatively common for middle class automobile owners. Where UM/UIM coverage is also purchased, the UM/UIM policy limits are almost always in the same amount as the policy limits of the liability insurance component of an automobile policy. Insurance authorities encourage purchase of higher limits of both regular liability and UM/UIM coverage. *See, e.g.*, VAUGHAN & VAUGHAN, *supra* note 2, at 549 (“There is no scientific way to determine what protection level is adequate, but it makes good sense to purchase as much as you can reasonably afford (or the amount required as underlying coverage when a personal umbrella is purchased). The small premium

only a little time to agree that Donald was an underinsured motorist and that Paul has suffered more than \$125,000 of loss (the combined limits of Donald's policy and Paul's policy).⁵¹ It quickly writes a \$100,000 check to Paul for the full UM/UIM per person limits, which is nice for Paul but not all that much more money than the \$70,000 of premiums he has paid to the insurer for 30 years for family auto insurance policies.⁵² Although Paul has now benefitted

required for the higher limits of protection is a small price to pay for the security it provides.”).

⁵¹ In most states, Paul's own auto policy will also provide some coverage (\$10,000 is a common limit) for first party medical payments or “Medpay” coverage, which Paul will also have to likely use to its maximum. See REJDA & MCNAMARA, *supra* note 2, at 433; VAUGHAN & VAUGHAN, *supra* note 2, at 549; DORFMAN & CATHER, *supra* note 2, at 183-84. Thus, it may be that Paul's damages from being rear-ended will need to equal or exceed \$135,000 in order to justify payment to him of the full UM/UIM limits of his own auto policy; see also Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's Demise*, 61 DEPAUL L. REV. 303, 314-22 (2012) (describing distinctions between traditional fault-based auto liability insurance and “no-fault” auto insurance with greater first-party coverage, mixture of the two approaches in the states, and initial success and decline of the no-fault movement).

⁵² The national annual average auto insurance premium has been estimated to be \$1,365. See Mark Vallet, *Car insurance rates by state, 2018 edition*, INSURE.COM, <https://www.insure.com/car-insurance/car-insurance-rates.html> (last updated Oct. 11, 2018), with a range from Vermont at \$932 per year to Michigan at \$2,239/year. This compilation, which provides state-by-state comparison, was based on \$100,000 per person/\$300,000 per accident policy limits (with \$50,000 limits for property damage) and a \$500 deductible sold to a 40-year old male policyholder with a “clean” driving record and good credit who commutes twelve miles a day to work. Quoted prices were collected from Allstate, Farmers, GEICO, Nationwide, Progressive and State Farm insurance companies, a group that accounts for a huge segment of the auto insurance market. See *id.*

Thus, even if Paul is from pastoral Vermont with relatively low premium costs, his hypothetical two-car family will be paying roughly \$2,000 a year for auto insurance. Add some additional vehicles or move the family to Michigan or other high cost states (e.g., Louisiana, Florida, California,

Texas) and one can quickly see that collecting even full UM/UM policy limits is unlikely to be “profitable” for the average policyholder. *See id.* (listing various premium-determining factors such as collision rates, theft and vandalism rates, severity of weather, proportion of uninsured drivers and legal framework and environment). Consequently, Paul as a 30-year customer of his insurer could easily have paid somewhere between \$60,000 and \$100,000 in premiums over the years.

UM/UM coverage generally comprise between a fifth and a third of the overall premium payment, depending on the overall coverage and relevant market. For example, one of us (Stempel) has auto liability and UM/UM policy limits of \$250,000 per person/\$500,000 per accident with the UM/UM segment of the bill – according to the insurer’s calculation -- accounting for just under 33 percent of the total premium cost, in Nevada, a relatively high rate state. Although the additional UM/UM increment is not trivial, neither is it particularly large in relation to the potential benefits. Although the comparatively high 250/500 policy limits for both coverages of course increases the premium, the cost of increasing limits (as opposed to providing the coverage itself) is viewed as modest. *See VAUGHAN & VAUGHAN, supra* note 2, at 548 (“One of the poorest ways to save premium dollars in buying auto insurance is to purchase only the minimum required limits of liability. Fortunately, the cost of increased limits of liability coverage is far less proportionately than the basic limits.”) (providing illustrative table).

While a middle-class academic with good group health insurance can perhaps forgo UM/UM coverage (although medical insurance will not cover disability, lost income, or pain and suffering), the potential benefits could be very important to an auto policyholder without extensive first-party insurance. *See* April Shrewsbury, *Why You Need to Offer Excess UM/UM to Every Client*, <https://www.independentagent.com/SiteAssets/TFT/Ads/AdDocs/UMUIM/article.pdf> (last visited Jan. 28, 2019) (insurance agent posits that “[m]ost people would buy” not only basic UM/UM coverage but also excess or umbrella UM/UM coverage “if they understood it” because of protective benefits and argues that agents have done a poor job of explaining the benefits to policyholders). In a recent email thread on the listserv of the plaintiff-oriented American Association for Justice, however, one experienced attorney, although agreeing that UM/UM coverage was undersold, argued this was the result of intent rather than negligence because “[a]gents hate to sell large UM policies because it hurts their loss ratios and

standing with the insurance companies.” Posting of Joseph S. Kashi, Esq., jskashi@gte.net, to insurance@list.justice.org (Jan. 18, 2019) (on file with author). If this is correct, it reflects a flaw in the insurance marketplace in which agents are disserving customers – and probably insurers as well. Although a catastrophic collision caused by an underinsured or uninsured driver can result in a large UM/UIM claim that looks bad on the books of the agent who sold the coverage, this should not adversely affect the insurance company’s bottom line so long as it has adequately priced its UM/UIM coverage across a sufficiently broad book of business.

This may be the case in which the agent’s interest in selling less UM/UIM coverage because the increased commission from increased premiums does not offset the risk of looking bad if there is a catastrophic injury claim is at odds with the interests of the principal. The agent’s principal (the insurer) would presumably be money ahead by collecting a large amount of aggregated premiums that could be profitably invested and paid out over the years or decades as UM/UIM claims arise. Billionaire Warren Buffet regularly notes in his letter to Berkshire Hathaway shareholders that its insurance operations earn vast sums because of the “float” of investing premiums that are not returned as claims payments for years to come and perhaps not at all if there are fewer UM/UIM claims than anticipated. *See* Letter from Warren E. Buffett, Chairman of the Board of Berkshire Hathaway Inc, to Shareholders of Berkshire Hathaway Inc., at 6-8 (Feb. 24, 2018), <https://www.berkshirehathaway.com/letters/2017ltr.pdf>.

As to the economics of UM/UIM coverage in light of premiums, the math seems to us in favor of purchasing the coverage. To use a close to home example: Stempel is paying roughly \$1,300 per year to insure his 2010 Honda Accord, of which \$400 is for UM/UIM limits equal to his ample \$250,000/\$500,000 liability coverage. That means that in an estimated 70 years of driving (from age 16 to death provided by life expectancy tables), he would pay \$28,000 (a bit strained in that he would not have had such high limits when in high school and college) for a lifetime of UM/UIM coverage.

That’s a good deal of money. But in return – provided the insurer treats him fairly in the event of a collision – he has up to a half-million dollars of protection in the event of catastrophe that cannot be duplicated by even extensive medical and disability coverage. And liability coverage (which can be accessed through UM/UIM insurance) offers protections and benefits that are not ordinarily available through first-party coverages. As this article

from the UM/UIM coverage he purchased, it has hardly provided a windfall. If Paul did not have group medical insurance from work and the prospect of Medicare in retirement, he would be in a tough situation despite the prompt full payment of his UM/UIM policy limits.

This is how UM/UIM coverage is supposed to work. Paul surely would have preferred never to be slammed into by Donald – or at least that Donald would have had higher auto policy liability limits⁵³ and personal

was being written, Sen. Rand Paul (R-Ky.) won a \$580,000 verdict against a neighbor who assaulted him. *See* Debra Cassens Weiss, *Sen. Rand Paul Awarded more than \$580K in civil suit against neighbor who tackled him*, ABA JOURNAL (Jan. 31, 2019), <http://www.abajournal.com/news/article/rand-paul-is-awarded-more-than-580k-in-civil-suit-against-neighbor-who-tackled-him>. We know that Senator Paul, a physician prior to his election, has good health insurance (pursuant to the oft-praised plan covering Congress) and substantial assets (\$1.3 million net worth in 2015 according to required federal filings), which would prompt many to wonder why he brought a liability claim against the neighbor. It could have been to make a statement, even though the neighbor had already been criminally charged. But it could also reflect that certain damages are available in a tort claim that are not available from first-party coverages such as medical, disability, life, or property insurance. For example, in addition to a nearly \$8,000 medical damages award, Senator Paul's verdict included \$200,000 for pain and suffering and \$375,00 in punitive damages.

Risk acceptant consumers may rationally reject UM/UIM coverage or have lower auto liability policy limits. But this feature of the modern auto insurance policy certainly is not irrational (nor in our view overpriced) for risk neutral or risk averse policyholders. Risk preferring customers should probably have it as well if they lack medical and disability coverage or an understanding employer.

⁵³ If Paul were to successfully sue Donald for damages (likely in that Donald appears to be completely at fault), Paul could easily obtain a judgment of \$500,000 or more: \$70,000 in past medical bills, likely future medical bills of \$120,000 (probably more because we have not considered the ongoing cost of pain medicine) during the remainder of his working life (assuming he retires at age 65), future medical bills of \$144,000 from age 65 until his life expectancy age of 83, *see Actuarial Life Table*, SOC. SEC.

umbrella coverage.⁵⁴ But at least Paul has some protection. And he could have had more by purchasing an auto policy with higher limits and correspondingly higher UM/UIM limits (the premiums would have been higher but not all that much in relation to the greater protection).⁵⁵

ADMIN., www.ssa.gov/oact/STATS/table4c6.html (last visited Jan. 19, 2019), plus \$15,000 for lost wages (assuming Paul makes a modest \$60,000/year income) plus pain-and-suffering, which is likely to be valued at six figures in light of his likely 30 years of incurring such collision-related pain.

Although it is nice that Paul is obtaining \$125,000 or more of insurance-provided compensation, this is nowhere near full compensation for his injuries. Had Donald had a \$100,000/person-\$300,000/accident auto liability policy with a \$1 million umbrella policy, Paul may have obtained \$500,000 or considerably more (depending on the nature of his pain and suffering) in settlement from the insurers.

⁵⁴ Umbrella insurance policies provide additional liability or “excess” insurance that attaches when the initial “primary” liability policy has been exhausted through payment as well as some additional coverage not found in the primary liability policy (but for which the policyholder must shoulder some self-insured retention or deductible). *See* STEMPEL & KNUTSEN, *supra* note 2, § 16.02. Persons of middle class or greater economic standing often purchase a personal liability umbrella policy that provides this additional excess insurance beyond what they already have through automobile and homeowner insurance, just as commercial enterprises typically have excess or umbrella insurance in addition to their primary general liability insurance.

⁵⁵ At least that’s our opinion for the reasons set forth in *supra* Part I. While others may disagree because of the comparative economics of saving the UM/UIM premium money and investing it, perhaps for 70 or more years without being injured by an underinsured or uninsured driver, we note that the percentage of uninsured drivers, particularly in some states, is sufficiently large to tip the balance in favor of having UM/UIM coverage. *See Facts+Statistics: Uninsured motorists*, INS. INFO. INST. <https://www.iii.org/fact-statistic/facts-statistics-uninsured-motorists> (last visited Sept. 26, 2019) (on average, 13 percent of U.S. drivers are uninsured, a figure that has been the norm for more than 25 years; A fifth or more of drivers in Florida (26.7%), Mississippi (23.7%), New Mexico (20.8 percent), Michigan (20.3%) and Tennessee (20 percent) are uninsured). These figures

Unfortunately, accidents like this occur every day with less than “happy” endings. In extreme cases, Paul’s UM/UIM insurer may drag its feet in payment or even question the bona fide nature of his claim, notwithstanding Paul’s lack of fault and the clarity with which his damages appear to exceed the available insurance of \$125,000. If the facts concerning liability or the seriousness of injury are slightly changed to be less extreme, UM/UIM insurers may resist Paul’s claim as excessive and offer something considerably less than policy limits or even deny payment altogether.

Even if the policyholder suffers an unquestioned collision-related injury and damages concededly in excess of combined policy limits, the UM/UIM insurer may still attempt to defeat the claim because, as discussed below, UM/UIM insurance is subject to the requirement that Paul be “legally entitled” to recover from Donald.⁵⁶ If the collision were something other than a blatant rear-ending by Donald, Paul’s UM/UIM insurer might

do not count underinsured motorists, for which it is difficult or impossible to collect data. In addition, in some localities, the proportion of uninsured drivers may be considerably higher.

In similar fashion, a risk-acceptant economic analysis may argue that because most auto accidents result in only minor property damage and no or modest bodily injury, a policyholder should have only modest liability limits. But by definition, some collisions will deviate from the norm. A single catastrophic collision can result in sufficient liability exposure to wipe out a policyholder’s assets, a sobering thought for even the risk-acceptant. However, if it is the case that UM/UIM insurers are not assuming their proper role as substitute liability insurance and are unduly resisting claims or are unreasonable in calculating damages and processing claims, this would support arguments against purchasing UM/UIM coverage.

We are therefore puzzled that, in litigation, UM/UIM insurers embrace the pure first-party approach rather than the substitute third-party approach we advocate. While the first-party construct may serve self-interest in the short run, it has significant potential to depress the overall market for UM/UIM coverage. If policyholders perceive that they will not get the full benefit of the coverage because of self-serving insurer conduct, they logically will be less inclined to pay the additional premium. At some point, the lost revenue may be larger than the money saved by taking a harsher attitude toward claims. Or course, even if a self-serving approach to claims by insurers is profitable, that hardly provides a valid rationale for ignoring the proper role of the UM/UIM insurer.

⁵⁶ See *supra* Part I.

squabble for years as to whether Paul was at greater fault and thus unable to access his UM/UIM benefits. If the injuries to Paul are less clear or the respective policy limits larger, UM/UIM insurers may refuse to concede that Paul's injuries exceed Donald's policy limits.

For example, what if the collision takes place at a lower speed (resulting in reduced property damage that insurers often use as an indicator of the severity of injuries to occupants of vehicle)?⁵⁷ What if Paul suffered no broken bones but has "soft tissue" injury?⁵⁸ What if Paul misses less work? Or had a lower paying job? What if Donald's policy limits were

⁵⁷ A common claims adjustment practice of insurers is to examine the degree of physical destruction of the vehicles involved in a collision, with a presumptive expectation that there will be a correlation between the amount of destruction to the vehicles and the level of injury of the people involved in the collision. Insurers also often take the presumptive view that low speed collisions are unlikely to produce serious injuries. See BRUCE A. HAGEN, KAREN A. KOEHLER & MICHAEL D. FREEMAN, *LITIGATING MINOR IMPACTS SOFT TISSUE CASES* ch. 1 (2017) (describing insurance industry "agenda" of increasing profit through more aggressive claims management that includes greater resistance to claims involving collisions with comparatively lower speed, reduced property damage, or only "soft tissue" injury); Matthew J. Smith, *Updates and Developments on Defending Low-Impact Accident Claims*, SMITH, ROLFES & SKAVDAHL CO. LPA, <https://rolfeshenry.com/Uploads/files/Updates%20and%20Developments%20on%20Defending%20Low-Impact%20Accident%20Claims.pdf> (last visited Jan. 28, 2019) (attorney representing defendants in low speed collision claims treats them as a subcategory of collision claims and addresses particular attributes).

While these presumptions are correct on average, they are of course not necessarily correct in every circumstance, something insurer counsel acknowledge. See Smith, *supra*. This approach has been labeled a "MIST" (minor impact soft tissue) program, after the nature of the collision and injuries. See HAGEN, ET AL., *supra*, §§ 1.9-1.12 (describing genesis of this approach by insurers primarily through suggestions of McKinsey & Company consulting firm and acceptance by major auto insurers such as Allstate and State Farm).

⁵⁸ Insurers often take the presumptive view that collisions that do not result in broken bones or other palpable evidence of injury are less serious. See *supra* note 57.

\$100,000/\$300,000 and Paul's were \$250,000/\$500,000?⁵⁹ In many variants of the situation, the UM/UIM insurer is much more likely to argue that Paul has been "fully compensated" by the policy limit payment of Donald's insurer and make a complete denial of UM/UIM benefits. Or the insurer may argue that even if Paul has not been fully compensated by Donald's insurer, something less than his own UM/UIM policy limits will achieve full compensation.⁶⁰

Calculating the extent of what we deem UM/UIM "hardball" (acting as a frugal first-party insurer rather than a third-party liability insurer concerned with protecting a policyholder from an excess verdict) is difficult. We have seen many such cases, with many resolved without commencement of litigation and most settled not only before trial but often without judicial opinion at all, much less one assessing the proper role of the UM/UIM insurer. As a result, there are not many reported cases focusing on disputes over UM/UIM coverage in which the insurer has refused to pay policy limits

⁵⁹ Higher tortfeasor policy limits, if paid in settlement or judgment, make it less likely that the policyholder was undercompensated. Higher UM/UIM policy limits for the policyholder make it less clear as to whether the entire UM/UIM policy limits must be paid in order to fairly compensate the policyholder injured in a collision.

⁶⁰ For the reasons set forth in *supra* note 8, we think that under the facts of the hypothetical, Paul is clearly not fully compensated by anything much less than \$500,000. But depending on the facts, an insurer with higher UM/UIM limits may have a reasonable basis for contesting our assessment – especially if the insurer is permitted to apply a fully first-party concept of coverage rather than the third-party role we advocate, which looks at Donald's likely exposure to a large tort verdict.

Using this latter measure, we think that a case like Paul's would clearly require a liability insurer to make substantial efforts to settle the claim and be willing to pay \$500,000 in policy limits to accomplish this so that Donald is protected from a potentially much-larger verdict. For example, if Paul is in substantial pain with which a jury empathizes, a million-dollar award is hardly out of the question. Our view is that no reasonable liability insurer would subject Donald to this risk if it was able to settle the claim for policy limits that constitute a reasonable valuation of Paul's claim. See *infra* Part III for further discussion of the advantages of requiring a UM/UIM insurer to fully assume the third-party liability insurer perspective in valuing claims.

to its own policyholder injured by an uninsured or underinsured driver.⁶¹ But this small number of reported cases is only the metaphorical tip of the

⁶¹ But the existing cases at a minimum reflect the greater willingness of ordinary third-party liability insurers to pay limits and the correspondingly greater resistance of UM/UIM carriers. In some cases, of course, the UM/UIM insurers are correct about the amount of additional compensation owed. But far too many cases, in our view, reflect a type of insurer misconduct we believe would be reduced by requiring UM/UIM insurers to adopt a complete third-party liability insurer approach to assessing the UIM claims of their own policyholders. *See, e.g.,* *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276 (Ariz. 2000) (insurer refuses to pay \$100,000 UIM policy limits to seriously and permanently injured policyholder who had been paid available tortfeasor policy limits) (*Zilisch* is discussed further *infra* pp. 79-80, to illustrate the difference the concept of UIM insurer role makes in claims-handling and the benefits of the third-party approach); *Marshall v. Saseen*, 450 S.E.2d 791 (W. Va. 1994) (UIM insurer refuses to make any payment of its \$100,000 UIM limits to policyholder badly injured in collision who had received \$50,000 in compensation from policy limits payment by tortfeasor's liability insurer in a case where jury returned verdict of \$226,711.80); *Tracey v. Am. Family Mut. Ins. Co.*, No.: 2:09-cv-01257-GMN-PAL, 2010 U.S. Dist. LEXIS 93690 (D. Nev. Sept. 8, 2010) (policyholder's UIM insurer refuses to pay any of \$50,000 policy limit after rollover accident in which injured policyholder received \$15,000 policy limits payment by tortfeasor's insurer); *Leahy v. State Farm Mut. Auto. Ins. Co.*, 418 P.3d 175 (Wash. Ct. App. 2018) (tortfeasor insurer pays \$25,000 limits to settle claims but policyholder's UIM carrier refused to pay any of \$100,000 UIM limits and contended that damages were not collision-related but stemmed from pre-existing condition).

See also *Rickell v. USAA Cas. Ins. Co.*, No. 1:18-CV-1279, 2018 U.S. Dist. LEXIS 189257 (M.D. Pa. Nov. 6, 2018) (trial court grants Rule 12(b)(6) motion to dismiss with prejudice in which policyholder had received full payment from tortfeasor's insurer and her own UM/UIM insurer appears to have paid no additional amount). The *Rickell* court granted the motion on the strength of the *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) decisions, collectively "*Twigbal*" to many attorneys, which hold that a complaint cannot plead conclusory allegations but must plead facts which, if proven, would establish a claim for relief.

In *Rickell* policyholder Daniela Rickell was hit by an erratic driver, which appears to make negligence uncontested. She required “several major surgeries to correct injuries to her shoulder and back an” and was expected to “require additional surgeries in the future.” *Rickell*, 2018 U.S. Dist. LEXIS 189257, at *2. The tortfeasor’s insurer (Progressive) settled for the “full amount of [tortfeasor] policy limits, and [USAA] consented to such settlement in writing.” *Id.* at *2. Rickell then made a written demand for UIM benefits pursuant to her own USAA policy, which was not accepted. She then sued, with USAA responding with the motion to dismiss, which the Court granted – with prejudice – on the ground that her allegations did not include sufficient facts from which a reasonable factfinder could conclude that USAA’s failure to pay UIM benefits was reasonable. *See id.* at *7-14.

While it is true that the portions of the *Rickell* complaint quoted by the Court are of a boilerplate variety, it is not at all clear that there is not a potentially good case at the heart of Rickell’s suit. Nor does the court note the amount of tortfeasor policy limits, Rickell’s medical expenses or other special damages or the degree of her collision-related pain. But one need not have a vivid imagination to suspect that her damages in a lawsuit against the tortfeasor could easily reach middle six figures. Unless the tortfeasor policy limits were substantial, it is hard to imagine that she was not entitled to at least some relatively prompt payment by her UIM carrier.

Despite this, the trial judge not only granted the insurer’s 12(b)(6) motion, but did so without permitting leave to amend to more expressly outline the alleged unreasonable conduct by the insurer – unreasonable conduct that can be readily intuited by anyone who has dealt with similar claims (as have we).

Mr. Rickell’s loss may be significantly due to mistakes by her counsel (not only vague boilerplate pleading but also providing relatively little time for an insurer response and perhaps failing to include more description of the extent of injuries and the rationale (or lack thereof) for the insurer’s apparent position that despite very bad injuries, she was not owed even a dime of UIM benefits beyond the payment she received from the tortfeasor’s insurer.

Rickell strikes us as a case where an insurer’s arguable (we hedge because the insurer’s exact position and time constraints are not apparent in the opinion) intransigence and implicit assumption of a first-party role were rewarded when they may have deserved to be chastised. A third-party liability insurer would not delay in attempting to resolve such a case (and the tortfeasor’s actual insurer did not delay) in order to protect the

iceberg. There are many such cases in which the policyholder is forced to sue its own UM/UIM insurer in order to obtain a settlement, usually one far larger than the payment offered by the UM/UIM insurer prior to litigation.⁶²

policyholder. Amazingly, subsequent decisions, decided fewer than 90 days after *Rickell* was decided, have endorsed its approach, although perhaps not completely. See, e.g., *Grustas v. Kemper Corp. Servs.*, No. 3:18-CV-1053, 2018 U.S. Dist. LEXIS 212935 at *13-14 (M.D. Pa. Dec. 17, 2018) (Magistrate Judge recommends dismissing bad faith claim on strength of *Rickell* and similar precedent but without prejudice and providing leave to amend); *Clarke v. Liberty Mut. Ins. Co.*, 2018 U.S. Dist. LEXIS 207646 at *13-14 (Dec. 10, 2018) (similar resolution by District Judge).

But if cases like *Rickell* are indicative of judicial attitudes and aggressiveness in using *Twigbal* to attack UIM bad faith claims before even a shred of discovery, one can understand the temptation of UIM insurers to adopt the self-serving first-party pose and play hardball with their policyholders.

⁶² This has consistently been the experience of one of us (Stempel) as an expert witness or consultant retained by UM/UIM policyholders. A common scenario is that the policyholder is injured in a collision in which the fault of an uninsured or underinsured tortfeasor is clear. In UIM cases, the tortfeasor insurer pays low policy limits (\$15,000 to \$50,000) and the UIM policyholder, who often has \$50,000 or more in medical expenses alone, seeks additional payment of some or all of the UIM policy limits, which typically range between \$50,000 and \$100,000. The UM/UIM insurer not only refuses a policy limits demand but frequently takes the position that no additional compensation is owed or offers a small amount (e.g., \$5,000). The UIM policyholder sues. The matter settles, alleging bad faith and violation of the state Unfair Claims Practices Act as well as breach of contract.

To be fair to insurers, the settlements are not always at or above policy limits, although this happens with some frequency, which suggests that the insurer was concerned about bad faith liability and even possible punitive damages. But at a minimum, even in the settlements that might not be very remunerative for the policyholder (or counsel working on a contingent fee), the settlement is always larger than the UM/UIM insurer's valuation. While some of this may result from litigation dynamics and a desire to save on disputing costs, it to us most strongly suggests that the UM/UIM

Although precise calculation is difficult, our view is that there are far more of these cases of policyholder disputes with their own UM/UIM carrier than there are cases where a “regular” liability insurer takes a similarly hard line in evaluating a collision victim’s damages.⁶³ In our

policyholder has been lowballed by its own insurer and that the insurer has been unreasonable in assessing the claim.

In addition, insurers do prevail via summary judgment in a significant number of UM/UIM cases. While these victories are undoubtedly deserved in cases where the injury to the policyholder is small in relation to available tortfeasor limits or where the policyholder could not prevail on liability, a significant number of these victories undoubtedly result because the trial court was tacitly adopting the pure first-party approach we regard as misguided and was willing to consider the insurer position “fairly debatable” so long as the insurer proffered even a modest amount of evidence favoring its assessment of the claim.

To some extent, every settlement by a UM/UIM insurer that exceeds its initial evaluation and offer reflects error and defeat. If otherwise, the insurer – which is a classic “repeat player” who can rationally invest large resources to establish favorable precedent or to develop a reputation as an entity that will not be buffaloeed into an overly generous payment – would logically refuse to settle and seek to make an example of a claimant that has unduly inflated or fabricated injuries. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (introducing and developing now widely accepted template of litigants as “one-shot” players (e.g., consumers) and “repeat” players (e.g., banks, government, manufacturers, retailers, insurers) and the institutional advantages held by the latter). But that does not happen.

Our logical conclusion is that when forced to assess the case in the light of litigation, insurers implicitly concede that they have undervalued UM/UIM claims, often unreasonably so. These types of erroneous assessments of UM/UIM claims would be reduced if insurers were held to a complete third-party liability insurer role and prevented from taking the insurer-serving role of a first-party insurer able to argue about the extent of injury without fear of a judgment in excess of policy limits

⁶³ See *infra* Part II. See, e.g., *Thornton v. State Farm Ins. Cos.*, 2015 U.S. Dist. LEXIS 27216 (D. Neb. Mar. 5, 2015) (tortfeasor liability insurer pays \$25,000 policy limits to injured motorcyclist whose own UIM insurer offers \$25,000 of its \$100,000 policy limits despite plaintiff’s more than \$50,000

of medical bills and related costs); *Zweber v. State Farm Mut. Auto. Ins. Co.*, 39 F. Supp. 3d 1161, 1164 (W.D. Wash. 2014) (after suffering serious injuries, victim promptly paid tortfeasor's \$100,000 policy limits and then demands his insurer's \$250,000 UIM limits; insurer counteroffers \$100,000; eventual jury verdict of \$1.3 million); *Rowe v. Nationwide Ins. Co.*, 6 F. Supp. 3d 621, 624-26 (W.D. Pa. 2014) (insurer of tortfeasor rear-ending victim causing injury and "substantially destroying the car" paid \$15,000 policy limit while victim's UM/UIM insurer rejects \$313,500 demand, contends no additional compensation is owed, offers \$5,000 UM/UIM payment and eventually settles UIM claim for \$50,000 after litigation commenced. Despite this, court finds insufficient evidence of bad faith by insurer, finding that it "had a reasonable basis for its decision" and had conducted a substantial, thorough investigation." Court implicitly applies a first party standard focusing on whether valuation of claim was arguable rather than what tortfeasor liability insurer would have done if facing the claim); *Williams v. Auto-Owners Ins. Co.*, No. 12-cv-00999-MSK-CBS, 2014 U.S. Dist. LEXIS 40140, at *3-10 (D. Colo. Mar. 24, 2014) (collision victim obtains \$50,000 policy limits from tortfeasor insurer; UM/UIM insurer rejects \$100,000 policy limits demand and offers \$50,000 based on valuation of non-doctor adjuster and rejects opinions of treating physicians; court finds no bad faith and tacitly agrees with insurers implicit adoption of first-party role of UM/UIM insurer rather than third-party viewpoint cognizant of value of claim against tortfeasor and potential for excess judgment); *Richardson v. United Fin. Cas. Co.*, No. 11-7688, 2013 U.S. Dist. LEXIS 75713, at *2-15 E.D. Pa. May 30, 2013) (tortfeasor pays full \$50,000 policy limits in case involving low speed and little or no property damage but where UIM policyholder hit steering wheel and claims substantial back and nerve problems; UIM insurer offers \$5,000 while arbitrators award \$625,000 in damages); *Montagne v. Safeco Ins. Co.*, 2008 U.S. Dist. LEXIS 42243, at *2-5 (D. Alaska May 27, 2008) (tortfeasor's insurer pays \$50,000 policy limits while UIM policyholder's insurer refuses to pay any of \$250,000 UM/UIM limits); *Brown v. Progressive Ins. Co.*, 860 A.2d 493, 495 (Pa. Super. 2004) (tortfeasor's insurer pays \$25,000 per person policy limits to injured insured following collision while victim's UM/UIM insurer valued case at only \$35,000 and refused to pay \$50,000 per person UM/UIM policy limits; court finds no bad faith because no deception by insurer and implicitly no unreasonable conduct).

experience over a combined fifty years in several U.S. States and Canadian provinces, ordinary liability insurers only rarely “blow” a good policy limits settlement opportunity.⁶⁴ The reason, in our view, is that these regular

Ordinary third-party auto liability insurers are generally held to a fairly high standard of reasonableness in response to claims against a policyholder defendant that could result in a verdict in excess of policy limits. *See, e.g.,* *Badillo v. Mid Century Ins. Co.* 121 P.3d 1080 (Okla. 2005) (low policy limit auto liability insurer had affirmative duty to pursue policy limits settlement on behalf of policyholder who struck pedestrian in crosswalk, resulting in \$2.2 million verdict); *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 415 (Colo. 2004) (en banc) (“To establish that the insurer breached its duties of good faith and fair dealing, the insured must show that a reasonable insurer under the circumstances would have paid or otherwise settled the third-party claims.”); *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983) (the duty of good faith for a liability insurer “includes an obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration of the financial exposure of the insured.”); *Crisci v. Security Ins. Co. of New Haven, Conn.*, 426 P.2d 173, 176 (Cal. 1967) (test for third-party liability insurer is whether a “prudent insurer without limits would have accepted” a policy limits settlement demand by injured plaintiff against policyholder defendant tortfeasor). *See generally* RLLI, *supra* note 35, § 24; MANILOFF & STEMPEL, *supra* note 36, ch. 21 (4th ed. 2018) (noting distinctions in first-party and third-party law of bad faith and differences in acceptable conduct for first and third-party insurers); 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 2.03 (2d ed. 2019) (same); 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. 299 (2015) (noting prevalence of disregard the limits and equal consideration analysis governing third-party liability insurer claims decisions).

⁶⁴ Because of the relative absence of reported cases, we realize that empirical determination is difficult and we may not convince all readers – although we invite comments from both policyholder and defense counsel as to which takes place more frequently: A verdict in excess of third-party liability insurer policy limits or a UM/UIM policyholder dispute over the insurer’s valuation of the claim. Based on personal experience and considerable interaction with practicing attorneys, we are confident it is the latter (but are happy to explore contrary views).

liability insurers typically are not willing to risk having the policyholder they defend become subject to a judgment in excess of policy limits, which not only is likely to require the errant insurer to cover the difference⁶⁵ but can lead to claims of bad faith,⁶⁶ unfair claims handling,⁶⁷ and resulting consequential and even punitive damages as well as payment of the policyholder's counsel fees.⁶⁸ In short, a liability insurer's rejection of a reasonable settlement demand comes with considerable risk.

See RLLI, supra note 35, § 49 cmt. b. ("The relative dearth of true liability insurance bad-faith actions likely results from the fact that other liability insurance rules [such as the excess judgment rule] provide an incentive for insurers to behave reasonably. These rules include the duty to make reasonable settlement decisions and the inclusion of attorneys' fees as damages under the law of many states when the insurer breaches the duty to defend. Because there are fewer rules that create similar incentives in the first-party insurance context, insurance bad-faith actions have a larger role in first-party insurance.").

⁶⁵ *See RLLI, supra* note 35, § 27 ("An insurer that breaches the duty to make reasonable settlement decisions 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 policy limits.") (boldface removed). Almost by definition, a liability insurer has failed to make a reasonable settlement decision if it does not offer policy limits to the case like that use in the hypothetical, one in which there is no question as to liability, policy limits are low, and there is clear evidence of damage exceeding those low policy limits.

⁶⁶ *See RLLI, supra* note 35, § 49 ("An insurer is subject to liability to the insured for insurance bad faith when it fails to perform under a liability insurance policy: (a) Without a reasonable basis for its conduct; and (b) With knowledge of its obligation to perform or in reckless disregard of whether it had an obligation to perform.") (boldface removed).

⁶⁷ *See* NAT'L ASS'N OF INSURANCE COMM'RS, NAIC MODEL LAWS, REGULATIONS, GUIDELINES AND OTHER RESOURCES, <https://www.naic.org/store/free/MDL-900.pdf>; NEV. REV. STAT. ANN. § 686A.310 (West 2019) (state version of NAIC model act).

⁶⁸ *See RLLI, supra* note 35, § 50 ("The remedies for liability insurance bad faith include: (1) compensatory damages, including the reasonable attorneys' fees and other costs incurred by the insured in the legal action establishing the insurer's breach of the liability insurance policy and any

By contrast, UM/UIM insurers in our experience tend to take a harder line on claims than do third-party liability insurers actually facing real third-party claims, sometimes even to the point of extremism (e.g., taking the position that Paul in the initial hypothetical has been fully compensated by Donald's relatively meager \$25,000 insurance payment).⁶⁹ This occurs even though the claimant in these cases is the insurer's own policyholder, who has paid premiums to the insurer, perhaps for decades.

UM/UIM insurers attempt to explain away this discrepancy solely on the basis that they are, unlike ordinary liability insurers, not literally subject to a duty to defend and there is not an actual risk of an excess judgment against the tortfeasor as is the case for ordinary liability insurers because there is not an actual lawsuit pending against the underinsured

other loss to the insured proximately caused by the insurer's bad-faith conduct; (2) other remedies as justice requires; and (3) punitive damages when the insurer's conduct meets the applicable state-law standard") (boldface removed).

⁶⁹ We're not making this up. One of us (Stempel) is familiar with several cases in which a UM/UIM policyholder was rear-ended by the tortfeasor (making the case one of almost certain tortfeasor liability), incurred tens of thousands of dollars of medical bills as well as missed work and pain and suffering, received a \$15,000 policy limits settlement from the tortfeasor and then was told by his own UM/UIM carrier that he had been fully compensated. This is tantamount to a liability insurer facing a claim of clear liability by a plaintiff with \$50,000 in medical bills and similar injury and refusing to pay the tortfeasor's \$25,000 policy limits – one simply never sees such extreme behavior by regular liability insurers but it is not uncommon among UM/UIM insurers.

Insurers in these cases of course disagree that they have been unfair. Their argument generally is that one may have a "fairly debatable" difference of opinion as to the extent of the policyholder's injury. Implicitly, these insurers have embraced a first-party perspective and are not actually behaving as would a real third-party liability insurer. The latter would be very concerned about a verdict in excess of policy limits imposing financial burdens on a defendant policyholder while the former is focused on trying to minimize its out-of-pocket costs to redress injury. As discussed in Part III, *infra*, our view is that the first-party position is self-serving and unreasonable because the intent and purpose of UM/UIM insurance is to place the UM/UIM insurer in the same position as a tortfeasor insurer with higher policy limits, which would invariably require consideration of the value of a claim in litigation and the risk of an excess verdict.

motorist, whose insurer normally has already tendered the tortfeasor's modest policy limits.⁷⁰ But this (hyper)literal truth ignores that the entire objective of UM/UIM coverage is to place the policyholder's own insurer in the role of the at-fault tortfeasor motorist's missing or insufficient insurance as well as to provide the policyholder the compensation it would have had the tortfeasor motorist been adequately insured.

This seemingly counter-intuitive insurer behavior is in our view explained by the uncertainty surrounding the proper role and claims adjusting behavior of the UM/UIM insurer. Simply put, the current legal landscape in which there appear to be no definitive cases, and little detailed scholarly commentary on the issue, has permitted UM/UIM insurers to adopt an unduly self-serving view of their role that allows them to resist UM/UIM claims in a manner that prudent liability insurers would never adopt.

Taking an approach we regard as self-serving and conceptually incorrect, UM/UIM insurers tend not to evaluate UM/UIM claims according to what may occur at trial and the concern of exposing the tortfeasor to a verdict in excess of policy limits. Instead, UM/UIM insurers treat their policyholders' requests for UM/UIM benefits like a first-party claim that can, as a practical matter, be rather vigorously disputed without much risk of penalty, a common occurrence regarding property loss and medical claims. In addition to taking this harder line as if they were true first-party insurers, UM/UIM insurers will also, when it suits them, emphasize the liability side of their hybrid role seeking to discount the amount of damages owed according to questions regarding liability. In other words, the UM/UIM insurer wrongfully attempts to "have it both ways" in derogation of the intended purpose of the coverage, which is to provide the larger liability limits lacking in the tortfeasor's auto insurance policy that are made up for by the policyholder's prudent purchase of UM/UIM coverage.

Unless the pure first-party approach taken by many UM/UIM insurers is clearly rejected by courts, insurers will continue to follow an approach that systematically drags out claims and imposes undue burdens on their policyholders and society. Without definitive legal precedent protecting policyholder rights, UM/UIM insurers will continue to resolve

⁷⁰ There ordinarily is no actual lawsuit against an uninsured motorist because such tortfeasors usually cannot pay any resulting judgment without at least some liability insurance. Only if the tortfeasor is comparatively wealthy will most plaintiffs be able to convince an attorney to prosecute an action against a prospective defendant that lacks insurance.

any perceived uncertainty in their favor (which is itself arguably bad faith)⁷¹ and attempt to force the injured policyholder to accept reduced payment and

⁷¹ At least we think so – under both the prevailing definition of bad faith in insurance matters and a more comprehensive approach to the issue. Because the bulk of bad faith claims stem from denials of coverage or claims-handling failures, such as unreasonable rejection of a settlement demand, the standard definition of bad faith is aimed at such conduct. *See* RLLI, *supra* note 35, § 49 (insurer acts in bad faith when it “fails to perform under a liability insurance policy . . . [w]ithout a reasonable basis for its conduct” and “[w]ith knowledge of its obligation to perform or in reckless disregard of whether it has an obligation to perform.”). Standard bad faith law also provides that it is the insurer’s obligation to give equal consideration to the interests of the policyholder on a par with the concern the insurer gives to its own interests. *See* *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719 (Ariz. 1990) (setting forth standard and list of factors for consideration in determining whether insurer has accorded equal consideration); *see also* U.C.C. § 2-103 (AM. LAW INST. & UNIF. LAW COMM’N 1977) (defining “good faith” for merchants as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”).

Bad faith can be generally defined as opportunistic behavior or depriving the other party of the benefit of the bargain. *See* STEMPEL & KNUTSEN, *supra* note 2, § 10.01[C]; *Market Street Assocs., Ltd v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991) (applying Wisconsin law) (“The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule. ‘Good faith’ is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting and which therefore was not resolved explicitly by the parties. The contractual duty of good faith is thus not some newfangled bit of welfare state paternalism or the sediment of an altruistic trend in contract law”)(citations omitted); *Keene Corp. v. Bogan*, No. 88 Civ. 0217 (MBM), 1990 U.S. Dist. LEXIS 220, at *14 (S.D.N.Y. Jan. 11, 1990) (bad faith occurs if breaching party has acted in manner “depriving the other party of the ‘benefit of the bargain.’”); *Zilg v. Prentice-Hall, Inc.*, 515 F. Supp. 716, 718-19 (S.D.N.Y. 1981) (publisher required to exercise discretion in a manner that “would not deprive” the author of “any bargained for benefits under the contracts.”); *Hirsch v. Food Res., Inc.*, 808 N.Y.S.2d 618, 621-22 (N.Y. App. Div. 2005) (even express contract right of unfettered discretion

must be exercised in good faith, which mean not frustrating “the basic purpose of the agreement and depriv[ing the other party] of the rights to its benefits.”); *Dakota, Minn. & E.R.R. Corp. v. Acuity*, 771 N.W.2d 623, 629 (S.D. 2009) (bad faith is the “absence of a reasonable basis for denial of policy benefits or failure to comply with a duty under the insurance contract and the knowledge or reckless disregard of the lack of a reasonable bases for denial. . . . [I]mplicit in that test is our conclusion that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of reasonable basis for denial or a reckless indifference to the fact or to proofs submitted by the insured.”).

Other analysts view good faith in similar fashion as “simply another embodiment of the basic principle of contract law – the protection of reasonable expectations.” See Jay Feinman, *Good Faith and Reasonable Expectations*, 67 ARK. L. REV. 525, 526 (2014); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 393 (1980) (good faith, if observed, should permit a contracting party to rely on the agreement and the foregone opportunities represented by the decision to commit to the contractual undertaking). See generally MANILOFF & STEMPEL, *supra* note 36, ch. 21 (state-by-state review of first-party and third-party bad faith standards)); E. ALAN FARNSWORTH, *CONTRACTS* §§ 12.8, 7.17 (4th ed. 2004) (noting duty of good faith implied in all contracts and availability in most jurisdictions of tort action for bad faith conduct by insurers); Jeffrey E. Thomas, *supra* note 63 (discussing variant definitions and standards of bad faith).

Although there is divergence in the nomenclature of bad faith, scholarly and judicial applications of the concept cluster around a core concept akin to the Golden Rule: insurers should treat policyholders with the same fairness they expect from others, including business associates and government regulators as well as policyholders and third-party claimants. Coupled with the well-established “equal consideration” standard, this logically means that where the required standard of conduct is uncertain, the insurer should resolve doubts in favor of the policyholder. Baseball fans are familiar with the adage that “ties” are to “go to the runner” in determining whether there has been a base hit or an out. The same logic applies to insurers, who by definition have accepted the risk of contingent uncertainty in return for a set and certain premium payment. See FRENCH & JERRY, *supra* note 2, at 1 (defining insurance as taking place when a person or business “incurs a

less protection than was purchased. Aggrieved UM/UIM policyholders must in turn make inordinate resort to litigation, needlessly raising costs (for all concerned) and diminishing net compensation to the policyholder. Requiring UM/UIM insurers to fully step into the shoes of the tortfeasor's liability insurer eliminates these pernicious effects.

V. THE GENESIS OF UM/UIM COVERAGE: UNSATISFIED JUDGMENT WORRIES

The genesis of UM/UIM insurance in the 1950s stems from concern over unsatisfied judgments.⁷² This is entirely consistent with the view that

relatively small certain loss by paying a premium in order to avoid the risk of larger, uncertain future losses.”); KENNETH S. ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW & REGULATION* 3-4 (6th ed. 2015) (defining insurance as the incurrence of a small but certain loss – premium payment – in return for protection against a larger but uncertain loss – the risk of an insured event such as fire or a claim); STEMPEL, SWISHER & KNUTSEN, *supra* note 2, §1.03 (same).

⁷² See Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Coverage*, in 6 NEW APPLEMAN ON INSURANCE § 65.01 (Jeffrey E. Thomas ed.). *Accord*, WIDISS & THOMAS, *supra* note 2, §§ 1.10, 1.11, 31.2-5; Harry Edgar Rice III, *Uninsured Motorist Insurance: California's Latest Answer to the Problem of the Financially Irresponsible Motorist*, 48 CAL. L. REV. 516 (1960); Norman E. Risjord & June M. Austin, *The Problem of the Financially Irresponsible Motorist*, 24 U. KAN. CITY. L. REV. 82 (1955-1956); Calvin M. George, *Insuring Injuries Caused by Uninsured Motorists*, 1956 INS. L.J. 715 (1956); Robert E. Helm, *Motor Vehicle Liability Insurance: A Brief History*, 43 ST. JOHN'S L. REV. 25 (1968); Skip Short, et al., *Understanding Uninsured Motorist Coverage*, in 3 NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE § 32.05; John Palombi & Eve Blackwell, *Uninsured Motorists Coverage*, in 4 NEW APPLEMAN LAW OF LIABILITY INSURANCE § 43.01; *Uninsured Motorist Insurance: A "New" Proposal*, 1 UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 1.8; Raymond N. Caverly, *New Provisions for Protection from Injuries Inflicted by an Uninsured Automobile*, 396 INS. L.J. 19 (1956). See also Raymond N. Caverly, *New Provisions for Protection from Injuries Inflicted by an Uninsured Automobile*, BROOKLYN LAW SCHOOL FORUM ILJ (Jan. 1956) at 19 (vice president of America Fore Insurance Group reports less than five percent of drivers as uninsured). Although the proportion of uninsured

the UM/UIM insurer logically is required to fully assume the role of the missing or inadequate tortfeasor insurance. The relationship between UM/UIM insurance and unsatisfied judgment insurance or an unsatisfied judgment fund strongly suggests that the purpose of UM coverage (which was later followed by UIM coverage) was to provide compensation akin to that available from a successful claim against a solvent tortfeasor or one who possessed a sufficient amount of liability insurance. As the name implies, unsatisfied judgment insurance and unsatisfied judgment funds were established as sources from which a prevailing party could seek compensation when a judgment debtor was unable to pay the judgment.⁷³

drivers varies by locale, today it appears that the percentage of uninsured drivers is at least 20 percent in nearly all jurisdictions and may be as high as 40-50% in some urban areas. *See* REJDA & MCNAMARA, *supra* note 2, at 436 (2015 Insurance Information Institute data show proportion of uninsured motorists ranging from 3.9 percent (Massachusetts) to 25.9 percent (Oklahoma)).

⁷³ *See* REJDA & MCNAMARA, *supra* note 2, at 509 (describing unsatisfied judgment fund as “a state fund for compensating auto accident victims who have exhausted all other means of recovery”) (italics removed); VAUGHAN & VAUGHAN, *supra* note 2, at G-21 (defining unsatisfied judgment fund as “a state fund created to reimburse persons injured in automobile accidents who cannot collect damages awarded to them because the responsible party is either insolvent or uninsured. Such funds are often financed by an addition to the regular automobile registration fee and will only pay unsatisfied judgments up to fixed limits.”); DORFMAN & CATHER, *supra* note 2, at 184 (“A few states operate unsatisfied judgment funds. These states use revenue collected from license plate sales or from taxes levied on insurers to make payments to injured victims of uninsured motorists.”) (boldface removed). Such funds normally are not available to victims of underinsured motorists.

Unsatisfied judgment insurance

was first offered by the Utilities Indemnity Exchange in about 1925. The insurance provided indemnification when the insured showed both (1) that a claim of tort liability had been reduced to judgment and (2) that it was not possible to collect the judgment from the negligent party. Unsatisfied judgment insurance was

The history and development of UM and UIM insurance buttresses this analysis. During the first half of the twentieth century, policymakers and the insurance industry became increasingly concerned with the problem of uninsured motorists inflicting injury upon law-abiding, insurance-purchasing policyholders who were not at fault, even though it was thought that only ten percent of motorists were uninsured.⁷⁴ During the mid-century, there was considerable debate as to how best to respond to the problem. Underinsured at-fault drivers were later included as part of this problem, but the initial focus was almost exclusively on purely uninsured motorists.⁷⁵

marketed by several companies during the years from 1925 until 1956. Uninsured motorist insurance—as proposed and subsequently issued—differed significantly from this precursor in that it eliminated the requirement that the insured obtain a judgment against the uninsured motorist prior to recovery under the new type of coverage. When the uninsured motorist insurance coverage became generally available, the unsatisfied judgment insurance was abandoned.

WIDISS & THOMAS, *supra* note 2, § 1.9, at 8. Although unsatisfied judgment insurance now appears a historical relic, insurers, according to one court such policies were sold “[f]or decades” by insurers “knowledgeable in the art of specifically requiring an unsatisfied judgment as a condition precedent to their liability and to a suit directly against the insurer . . .” *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606, 611 (Mo. Ct. App. 1963).

⁷⁴ See Alfred J. Bohlinger, *Compulsory Automobile Insurance – Open or Covert?*, 25 N.Y. ST. B. BULL., 336, 336 (1953) (“Students of the problem are agreed that the owners of over 90% of the cars registered in New York State are financially responsible.”) (quoting Report of the New York State Joint Legislative Committee to Study the Problem of Unsatisfied Judgment Fund and Compulsory Insurance, Legislative Document No. 30 at 19 (1953) (article based on speech given by Bohlinger, who was then New York’s Superintendent of Insurance, to the State Bar Association (Sept. 25, 1953))).

⁷⁵ See also WIDISS & THOMAS, *supra* note 2, §§ 1.6-1.8 (describing concern about auto tortfeasor financial responsibility and “[t]he New York debates on financial responsibility legislation” and the emergence of proposed UM solution to problem); Norman E. Risjord & June M.

Compulsory auto insurance as a condition for licensing – which has been the law in nearly every state since the 1960s – was controversial at first and actually opposed by factions of the insurance industry, a view that now seems somewhere between quaint and ridiculous.⁷⁶

Mandated uncollected judgment coverage of the type described above or the creation of a state fund for paying such judgments (similar to the guaranty funds that states now have in case of insurer insolvency) was also suggested but resisted by insurers on the ground that this would have the effect of unduly encouraging litigation to completion of policyholder claims against the uninsured motorist.⁷⁷

Austin, *The Problem of the Financially Irresponsible Motorist*, 24 U. KAN. CITY L. REV. 82 (1955); Peter Ward, *Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFF. L. REV. 283 (1960).

⁷⁶ See WIDISS & THOMAS, *supra* note 2, §§ 1.5-1.10, at 5-10; Bohlinger, *supra* note 74, at 339-43 (defending concept of required auto insurance against industry objectors).

⁷⁷ See Bohlinger, *supra* note 74, at 344 (noting that the New York State Bar has then supported fund for payment of unsatisfied judgments and opposing the idea because it would require funding from policyholders: “[i]t is certainly unfair and inequitable, however, to levy upon insured motorists any of the cost of eliminating a problem which they do not create.”) (citing Paul S. Wise, *Which Road for the Insured Motorist*, FED’N. INS. COUNS. Q. 38, 46 (July 1953) (attorney for American Mutual Insurers Alliance, opposing idea of unpaid judgments fund); see also Calvin M. George, *Insuring Injuries Caused by Uninsured Motorists*, INS. L.J 715, 716 (Nov. 1956) (Assistant Counsel of Zurich Insurance Company takes similar view of unpaid judgment coverage; also pegging October 1955 as the date of introduction of UM coverage in New York). Nonetheless, unsatisfied judgment coverage was offered by several insurers during the 1925-1956 period prior to the turn toward UM insurance. See WIDISS & THOMAS, *supra* note 2, §1.9, at 8; see also *id.* §1.10, at 9-10 (describing UM’s origin as industry-sponsored alternative to mandatory vehicle liability insurance); *id.* §§ 1.12-1.13, at 10-14 (describing continued persistence of problems with uninsured and underinsured motorists, the rise of no-fault insurance, and insurer offerings of expanded UM/UIM coverage in modern policies); Robert E. Helm, *Motor Vehicle Liability Insurance: A Brief History*, 43 ST. JOHN’S L. REV. 25, 29-51 (1968) (describing origin and

Instead of mandated compulsory coverage, insurers suggested the voluntary addition of uninsured (and later underinsured) motorist coverage as an alternative because it would (according to insurers) remove the need for greater command-and-control regulation by leaving the decision to purchase UM/UIM coverage to policyholders.⁷⁸ If policyholders purchased the additional coverage (and the expectation was that most would), they would be protected just as if the tortfeasor possessed adequate insurance, but without the absolute imperative of reducing a claim to judgment and without mandatory minimum insurance limits that some insurers regarded as excessive government regulation.⁷⁹ As a response, the insurance industry created uninsured motorist coverage to discourage state enactment of compulsory insurance requirements or the establishment of other compensatory funds to quell the problem of uninsured motorists.⁸⁰

To the degree that the auto insurance industry has designed UM/UIM insurance and written the text of the policies (which appears functionally the case in spite of UM/UIM statutes – which were to a large degree the product of industry lobbying), any uncertainty regarding the behavior of the UM/UIM carrier facing a claim should be resolved in favor of an approach giving the benefit of the doubt to claimant accident victims. To the extent that the “reasonable settlement conduct approach” we suggest provides greater insurer incentive to treat policyholders fairly, it is not only a superior approach, but is also an approach that should be applied to insurers because they have failed to clarify any understanding to the contrary in spite of their decades-long opportunity to do so. Insurer commentary at the time of inception of UM/UIM extolled the virtues of this type of coverage for a policyholder and reinforced the notion that the insurer takes the place of the uninsured driver’s liability insurer for claims handling purposes.⁸¹

development of UM insurance, in particular in New York); Ross D. Netherton & Frederick N. Nabhan, *The New York Motor Vehicle Financial Security Act of 1956*, 5 AM. U. INTRAMURAL L. REV. 37, 37 (1956) (describing legislation establishing mandatory auto insurance in New York).

⁷⁸ See Widiss & Thomas, *supra* note 2, §§1.6-1.8.

⁷⁹ See WIDISS & THOMAS, *supra* note 2, § 1.14, at 14-15; Henry S. Moser, *The Uninsured Motorist Endorsement*, 1956 INS. L.J. 719, 719-21 (1956) (vice president of Allstate endorses UM coverage as option added to standard automobile insurance policy).

⁸⁰ WIDISS & THOMAS, *supra* note 2, § 1.14, at 14-15.

⁸¹ The vice president and claims counsel of Fireman’s Fund in 1956 endorsed UM coverage because it provides for collectability of

compensation that would otherwise be unavailable due to tortfeasor's lack of insurance and in excess of required minimum policy limits (in effect making an equivalent case for UIM insurance). *See Moser, supra* note 79, at 720-21:

We are not content with offering, however, benefits that were only equal to the recoveries that would be available under compulsory legislation. We developed and demonstrated that private industry without governmental intervention or assistance, and without the necessity of legislation would provide an infinitely broader coverage to the public than any protection which could possibly be provided by compulsory insurance. We included, therefore, protection against injuries caused by nonresidents and extended the protection to accidents occurring anywhere within the continental limits of the United States and the Dominion of Canada. We provided protection for injuries caused by the operators of stolen cars and by operators using cars without permission

Because my company felt that, pending the ultimate solution of the problem, insureds desiring to voluntarily purchase protection against injuries to themselves and the members of their families by financially irresponsible motorists should be able to do so, we recently made this coverage available in all states where the statutes permitted. We are now offering it in 49 states of the union

* * *

[D]uring the past year, more than 90 per cent of our new New York policyholders purchased the coverage and nearly 99 per cent of our existing New York policyholders purchased it upon renewal

* * *

Much has been said about the impropriety of issuing the coverage in view of the possible conflict of interests between the company and its insureds. Our claim people inform me that with intelligent handling of claims under coverage, they have experienced practically no difficulty in connections with this feared shadow

under the bet. Perhaps a more generous and sympathetic handling of these claims is essential

One of the other objections which has been urged to the coverage I that it is inequitable to ask an insured motorist to pay for protection against possible loss occasioned by uninsureds. The very large percentage of our policyholder who have bought the coverage apparently did not believe they were treated unfairly or inequitably. When it is remembered that they get far greater protection than they could get under any compulsory system and, at the same time for the very small premium involved, avoid all the evils flowing from compulsory legislation, including the reduction in the number of persons carrying excess limits and passenger medical coverages . . . the so-called inequity theory dissolves into thin air.

Accord C. A. Deschamps, *Coverage for Innocent Victim Pays Off*, 1956 INS. L.J. 722, 722 (Nov. 1956); *see also* Raymond N. Caverly, *New Provisions for Protection from Injuries Inflicted by an Uninsured Automobile*, 1956 INS. L.J. 19, 23 (Jan. 1956) (emphasis added):

[i]f you are the insured under the policy, in my opinion you get a lot. You not only get your money's worth, but you get a bargain because if you, or any person under the endorsement in the policy, are hurt by an uninsured driver anywhere, ***you have an opportunity to collect the same damages [up to policy limits] that you would have if it had been possible to collect from the uninsured driver. You get protection for yourself and for all the possible beneficiaries***

Another criticism which has been presented is the claim that through the voluntary endorsement the insurance carrier develops an adversary position with his own insured, or with the beneficiary under the endorsement. ***The insurance carrier that has to settle with the insured for the purposes of that particular action becomes a third party, and the insurance company takes the place, so to speak of the uninsured driver, at least to the extent of negotiating a settlement.***

This background, history, and development of UM/UIM insurance highlights its role as insurance that should pay what would be available to

Some people have objected to this adversary position of the companies. I don't think that is going to be a very serious problem. After all, we are in an adversary position in every third-party case. What percentage of them go to suit? Actually, in automobile cases which are with my own company, less than 1 percent of all the claims ever reach the lawsuit state. We are able to agree. People's claims generally are reasonable, and with a little negotiating it is possible to settle them.

Accord Albert L. Plummer, *The Uncompensated Automobile Accident Victim*, 1956 INS. L.J. 459, 464 (July 1956) (describing history of UM coverage as a response to then-perceived threat of "enactment of compulsory automobile financial responsibility bills" and unsatisfied judgment funds or coverage; noting emerging popularity of requirement that UM policyholder must be "legally entitled" to recover from uninsured tortfeasor driver); Vestal Lemmon, *Compulsory Insurance – A Toxic Brew*, 1956 INS. L.J. 695, 695 (Nov. 1956) (General Manager of National Association of Independent Insurers attacks idea of compulsory auto insurance); Joseph P. Murphy & Ross D. Netherton, *Public Responsibility and the Uninsured Motorist*, 1959 INS. L.J. 491, 500 (Aug. 1959) (noting that "[u]ninsured motorist coverage was first proposed as a countermeasure to compulsory insurance and state-operated unsatisfied judgment funds"); see Albert L. Plummer, *Handling Claims Under the Uninsured Motorist Coverage*, 1957 INS. L.J. 494, 494 (Aug. 1957) (boldface added) ("The insurance company agrees to pay the insured all sums that he shall be *legally entitled to recover* as damages for bodily injury sustained by accident arising out of the ownership, maintenance and use of an uninsured automobile. This coverage plans ***to do for the insured what the insurance company of the uninsured motorist would be expected to do if the uninsured had liability insurance.***"); see also George, *supra* note 72, at 718 ("If the UM coverage is intended to apply as though the uninsured motorist had insurance, two unknowns or variables immediately present themselves: (1) whether the uninsured motorist was in fact liable in law and (2) the amount of the damages."); Emanuel Morgenbesser, *Some Legal Aspects of the New York Uninsured Motorists' Coverage*, 1956 INS. L.J. 241, 243 (Apr. 1956) (similarly modeling UM coverage by analogy to ordinary liability insurance covering tortfeasor).

the policyholder/claimant if the tortfeasor had sufficient auto liability insurance in place. The roots of UM/UIM coverage grew from concern about unsatisfied judgments – a factor strongly suggesting that UM/UIM insurance should provide to the claimant the amount that would be recovered if the claim were litigated. This amount is not limited to the UM/UIM policy limits but would encompass the full amount of a judgment against the tortfeasor. This in turn supports the view that the value of the UIM claimant's tort action is the proper yardstick for measuring its value. If the amount awarded after trial is in excess of the policy limits, the UIM policyholder claimant is as entitled to these damages as is a tort defendant whose insurer fails to make reasonable settlement decisions.

The history of UM/UIM coverage coupled with its structure and purpose supports requiring the UIM insurer to act more like a general liability insurer and less like a homeowner's insurer quibbling over the cost of new countertops or questioning whether scratches on the countertops came from children playing rather than a recent fire, burglary, or hailstorm.⁸² Structurally, the "legally entitled to recover" requirement that includes tort defenses such as immunity or limitations periods, suggests that UM/UIM claims handling is liability claims handling. So, too, do the range of UM/UIM remedies available: lost income, pain and suffering, emotional distress (at least if accompanied by some physical manifestation). These remedies are available in tort actions for negligent driving but are not available in typical first party claims absent bad faith. But these remedies are routinely available to UM/UIM claimants if such injury was inflicted upon them by underinsured tortfeasors. This emphasizes the third-party, tort-like quality of a UM/UIM claim as contrasted with a first-party property damage claims in which the policyholder merely seeks reimbursement for loss of or damage to a possession.

⁸² See *Eastman v. Farmers Ins. Co.*, 423 P.3d 431, 435 (Idaho 2018) (UIM coverage intended to provide "excess coverage to compensate an insured against losses for which there would otherwise be no coverage" and noting that UIM statute is remedial in nature and must be "liberally construed to give effect") (citation omitted) (quoting *Horace Mann Ins. Co. v. Adkins*, 599 S.E.2d 720, 725-26 (W. Va. 2004)); *Cedell v. Farmers Ins. Co. of Wash.*, 295 P.3d 239, 245 (Wash. 2013) ("UIM insurer steps into the shoes of the tortfeasor and may defend as the tortfeasor would defend."); *Ellwein v. Hartford Accident & Indemnity Co.*, 15 P.3d 640, 647 (Wash. 2001) (citation omitted) (UIM insurance is "designed to place the insured in the same position as if the tortfeasor carried liability insurance.").

The background of UM/UIM coverage supports the view that UM/UIM insurance was intended as substitute or supplemental liability insurance intended to fulfill the role and function of liability insurance.⁸³ – Academic assessment also supports our analysis. As a leading treatise observed, “[t]he reported judicial decision include hundreds of statements articulating the public policies that judges view as significant in interpreting the statutory requirements and the insurance contract provisions in relation to coverage claims.”⁸⁴ The treatise then listed several case excerpts that

⁸³ See text and accompanying notes 72-82.

⁸⁴ WIDISS & THOMAS, *supra* note 2, § 2.3, at 21.

provide a sense of these judicial views.”⁸⁵ To the same effect are many other treatise descriptions of UM/UIM coverage.⁸⁶

⁸⁵ See WIDISS & THOMAS, *supra* note 2, § 2.3, at 21:

Our uninsured motorist statute establishes a public policy that every insured is entitled to recover damages he or she would have been able to recover if the uninsured maintained a policy of liability insurance in a solvent company. . . . The statute is remedial and should be liberally construed in order to carry out the intent of the Legislature . . .

(quoting *Calvert v. Farmers Ins. Co. of Ariz.*, 697 P.2d 684, 687 (1985)).

The purpose of legislation mandating the offer of uninsured motorist coverage is to fill the gap inherent in motor vehicle financial responsibility and compulsory insurance legislation and this coverage is intended to provide recompense to innocent persons who are damages through the wrongful conduct of motorist who, because they are uninsured and not financially responsible, cannot be made to respond in damages . . . As remedial legislation it should be liberally construed to provide the intended protection.

Id. § 2.4, at 22 (quoting *Winner v. Ratzlaff*, 505 P.2d 606, 610 (1973)).

The purpose of [uninsured motorist] coverage is to guarantee that the injured person will be in the same position in the event of injury attributable to the negligence of an uninsured motorist as the insured would be if he were injured through the negligence of a motorist carrying liability insurance.

Id. § 2.4, at 22 (quoting *Jarstad v. Nat’l Farmers Union Prop. & Cas. Co.*, 552 P.2d 49, 50 (Nev. 1976)).

“The [uninsured motorist insurance] statute revolves from public policy considerations and must be broadly construed to accomplish this purpose.” *Id.* § 2.4, at 22 (quoting *Weathers v. Mission Ins. Co.*, 258 So. 2d 277, 279 (Fla. Dist. Ct. App. 1972)).

Our uninsured motorist statute was enacted in response to the growing public concern over the increasing problem arising from property and personal injury damage inflicted by uninsured and financially irresponsible motorists. Its purpose is to provide, within [the policy] limits, some recompense to innocent persons who received bodily injury or property damages through the conduct of an uninsured motorist who cannot respond in damages.

Id. § 2.4, at 22 (quoting *Shoffner v. State Farm Mut. Auto Ins. Co.*, 494 S.W.2d 756, 758 (Tenn. 1972). Accord Jeffrey E. Thomas, *Uninsured and Underinsured Motorist Insurance*, in NEW APPLEMAN ON INSURANCE § 65.03 (3d ed.) (*Satisfying the “Legally Entitled to Recover” Requirement*) (noting requirement that UM/UIM demonstrate greater fault of underinsured driver and inapplicability of defenses such as immunity, statute of limitations, and workers’ compensation bar); *id.* § 65.08 (noting applicability of offsets from funds paid by or on behalf of tortfeasor); see also WIDISS & THOMAS, *supra* note 2, ch. 1 (*The Origins and Development of Uninsured Motorist Insurance*); *id.* § 3.2 (describing origins and evolution of UIM coverage); ch. 6 (describing wide range of tort damages available to UM/UIM claimant); *id.* ch. 7 (*Determining When an Insured is “Legally Entitled” to Recover*) (describing the manner in which the responsibility of a UM/UIM is determined according to a tort regime that considers driver fault and available defenses); *id.* § 7.6 (noting that insurers have argued for application of tort law statutes of limitation which are generally shorter than those for contract actions but that most courts have applied contract limitations periods).

⁸⁶ For example:

Uninsured motorist (UM) coverage provides recovery to the victim of an automobile accident who is legally entitled to recover from a tortfeasor but cannot recover because the tortfeasor has no insurance coverage. Underinsured motorist (UIM) coverage provides recovery to an automobile accident victim injured by a tortfeasor with inadequate insurance.

[UM/UIM coverage] does not create a new right in the insured to sue an uninsured/underinsured motorist; rather it creates a new

procedure and by this the insured may recover losses from the insurer.

Eileen Swarbrick, *Nature and Construction of Uninsured/Underinsured Motorist Coverage*, in JOHN ALAN APPLEMAN & ERIC MILLS HOLMES, APPLEMAN ON INSURANCE 2D §147.1 [A], at 2-3 (2004). *Accord*, Eileen Swarbrick, *Nature and Construction of Uninsured/Underinsured Motorist Coverage*, in JOHN ALAN APPLEMAN & ERIC MILLS HOLMES, APPLEMAN ON INSURANCE 2D §147.1 [E][1], at 8 (2004) (“Uninsured/underinsured motorist (UM/UIM) statutes are remedial in nature and therefore intended to be interpreted liberally on behalf of injured person seeking coverage.”) (footnote omitted).

An action under a policy affording [UM] coverage is ex contractu, and the insured must show that he or she is entitled to recover under the policy terms. Indeed, the standard UM endorsement and the UM statutes speak in terms of the damages the claimant is “legally entitled to recover” from the uninsured motorist. This requires the victim to prove more than just the provision of the policy since they, by their terms, require a showing of injury by an uninsured motorist. As pointed out earlier, the purpose of statutes requiring uninsured motorist coverage is to give citizens of that state protection equal to that which would be afforded if the offending motorist carried liability insurance at least equal to that required by its financial responsibility law; this becomes a matter of public policy, requiring a liberal construction to accomplish that objective. With this in mind, the insurer stands in the shoes of the uninsured motorist and must pay if the uninsured motorist would be required to pay.

While an insured may be entitled to recover under the UM coverages when the insured could recover against a tortfeasor, this statement is also a limitation on the insurer’s liability; the liability is derivative and dependent on the right to recover against the offending motorist. Accordingly, whether this is stated in language conferring a remedy, or as a condition precedent to and limitation on a right to recover, the insured must prove liability of the uninsured motorist in order to recover under the policy. Thus, the claimant must be able to establish fault on the part of the uninsured motorist that gives rise to damages, as well as the extent of those damages.

Both the background history and purpose of UM/UIM coverage and its design and structure augur in favor of treating the coverage – for purposes of valuing claims – as if it were “pure” third-party liability coverage. For example, first-party auto insurance does not ordinarily permit recovery of consortium, pain, suffering, or lost income. This factor again supports an approach to UM/UIM coverage that requires the UM/UIM carrier to behave like a tortfeasor’s liability insurer in evaluating a claim and its risk to the defendant policyholder rather than using a nickel-and-dime approach in arguing over cosmically precise value of a claim in circumstances where it is clear that the claim has a reasonable likelihood of exceeding the available insurance. The fact that many state statutes mandate uninsured motorist coverage in similar fashion as they do mandatory liability insurance suggests that UM/UIM really is a stand-in for a tortfeasor’s liability insurance in every way, and those insurers offering UM/UIM should be expected to act as liability insurers in the same context.⁸⁷

Gordon L. Ohlsson, *Conditions Precedent to Coverage*, in JOHN ALAN APPLEMAN & ERIC MILLS HOLMES, APPLEMAN ON INSURANCE 2D §149.2 [A], at 139-141 (2004).

The Standard Uninsured Motorist Endorsement obligates the insurer to pay all sums that the insured is legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injuries sustained by the insured, caused by the accident and arising out of the ownership, maintenance, or use of the uninsured highway vehicle.

Gordon L. Ohlsson, *Stacking and Duplicate Recovery*, in JOHN ALAN APPLEMAN & ERIC MILLS HOLMES, APPLEMAN ON INSURANCE 2D §150.4[D][1], at 226 (2004). See generally Eileen Swarbrick, *Remedies and Damages*, in JOHN ALAN APPLEMAN & ERIC MILLS HOLMES, APPLEMAN ON INSURANCE 2D §151.2 (2004) (noting that a successful UM/UIM claimant is entitled to damages for bodily injury, loss of consortium, pain, suffering, lost income, and property damages).

⁸⁷ 7 PATRICK D. KELLY ET AL., BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 315.1, at 533 (3d ed. 1966) (citing *Jarstad v. Nat'l Farmers*

VI. THE UM/UIM INSURER IDENTITY CRISIS AND INSURER HARDBALL

The multiple personalities of the UM/UIM insurer – either first-party or third-party insurer – results in insurers being incentivized to take advantage of this uncertainty and choose the most beneficial path to behave in a litigation context – a path beneficial, of course, to insurers, and against the interests of their insured policyholders. This tension arising from the hybridity of the UM/UIM insurer’s role produces misplaced insurer opposition about fully assuming the role of the tortfeasor’s liability insurer.

Consequently, in actual disputes, UM/UIM insurers appear to view themselves as free to take the position that – unlike regular liability insurers – they need not worry about a claimant’s range of recovery at trial or the prospect of a judgment against the policyholder that exceeds policy limits because there is not an actual pending tort action due to the tortfeasor’s lack of insurance or prior payment of inadequate policy limits. Rather, their position is like many true first-party insurers, they are free to contest the extent of injury to the claimant policyholder so long as their valuation

Union Prop. & Cas. Co., 92 Nev. 380, 552 P.2d 49 (1976) and other cases); *accord* NEV. REV. STAT. ANN. §§ 687B.145, 690B.020 (LexisNexis 2019); Jarstad v. Nat’l Farmers Union Prop. & Cas. Co., 552 P.2d 49 (1976); *see also* Johnny Parker, *Uninsured and Underinsured Motorist Coverage in Oklahoma*, 34 OKLA. CITY U.L. REV. 363 (2009); John Polombi & Eve Blackwell, *Purpose of Uninsured Motorists Coverage*, in NEW APPLEMAN LAW OF LIABILITY INSURANCE § 43.02, at 1 (citing cases in support from Colorado, Delaware, Indiana, Iowa, New Jersey, Oklahoma, Washington and in particular Kern v. Nevada Ins. Guar. Ass’n, 856 P.2d 1390 (1993)); *id.* § 43.02 at 1.

positions are “fairly debatable,”⁸⁸ which in the hands of less reputable insurers devolves to meaning “a scintilla of evidentiary support.”⁸⁹

The first justification for this insurer position, to the extent it has been fleshed out at all, appears to be that UM/UIM insurers differ from regular liability insurers in that they are not actually defending the policyholder and that the policyholder claimant is, unlike the policyholder defendant, not subject to the control of the insurer regarding defense and settlement of a matter. In effect, the UM/UIM insurer argues that the absence of UM/UIM insurer control over defense of an actual ongoing case sufficiently separates it from liability insurance to eliminate the liability insurer’s duty to make reasonable settlement decisions on behalf of a tortfeasor facing a claim that has a realistic probability of exceeding policy limits.

⁸⁸ A full discussion of this issue and of nuanced differences in bad faith standards is beyond the scope of this article. Our limited focus in this article is the apt orientation of the UM/UIM insurer in responding to claims. As is by now clear, we think there is no question that the UM/UIM insurer needs to behave like a true liability insurer protecting a tortfeasor policyholder rather than a first-party insurer haggling over a property damage claim. Regarding the “fairly debatable” standard for assessing first-party insurer conduct as opposed to the “equal consideration” of policyholder interests used to assess third-party insurer conduct, *see* MANIHOFF & STEMPEL, *supra* note 36, at 507-14; *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 722 (Ariz. 1990).

⁸⁹ By this, we mean that UIM insurers playing hardball tend to regard any evidence – no matter how trivial, strained, or self-serving – as sufficient to create a reasonable basis for refusing to pay or offering only a modest, even trivial amount in settlement. For example, a collision victim claimant may have four treating physicians and two experts stating that the UIM claimant has a serious collision-related injury. The insurer has a single claims adjuster or physician giving the opinion that the injuries are entirely pre-existing. Although this may be a basis for defending the inadequately insured tortfeasor, it is not sufficient to justify a UIM insurer’s complete denial of coverage or the offering of only a nuisance value settlement. In an actual tort case, the defending insurer would calibrate the range of possible trial outcomes and make a settlement offer (or accept a settlement demand) within this range in order to protect the tortfeasor policyholder and to protect itself from an excess judgment or bad faith or unfair claims handling liability.

A second justification proffered by UM/UIM insurers is that unlike an actual tort case implicating regular liability insurance, mishandled UM/UIM claims do not in fact result in real world judgments against the policyholder exceeding liability policy limits. Although this is true and not a trivial argument, it is not very persuasive. While it is true that poor claims treatment by the UM/UIM insurer does not create an actual excess judgment that must be satisfied by the policyholder, this distinction overlooks or even ignores the central purpose of UM/UIM insurance – providing the injured claimant with the amount it would have received had the tortfeasor had sufficient insurance. The fact that the claimant is a policyholder rather than a stranger does not change this objective or the larger societal purpose of providing full and fair compensation to those injured in vehicular collisions. On the contrary, it makes the case for full compensation stronger in that the claimant policyholder has specifically paid for this protection and is entitled to receive it from its own insurer, which owes this duty to the policyholder injured by the insufficiently insured tortfeasor.

As previously discussed, the historical background of UM/UIM insurance establishes that it was meant to operate like ordinary third-party liability insurance. This in turn leads to the inexorable conclusion that the UM/UIM insurer should behave like a regular liability insurer and settle claims as if it were facing the prospect of liability in excess of policy limits and must therefore display greater willingness to resolve valuation disputes in favor of protecting the policyholder from going uncompensated.⁹⁰

⁹⁰ One prominent treatise author who regularly represents insurers and is often retained as an expert witness in UM/UIM disputes has a chapter devoted to handling UM/UIM claims that opposes our analysis. He takes this position in spite of his emphasis on the fact that the third-party, liability insurer defense of the tortfeasor has substantial kinship with UM/UIM coverage. For example, he notes that an insurer may defeat UM/UIM claims not only in cases where the policyholder claiming coverage is an at-fault driver but also on technical grounds such as the running of the statute of limitations or government sovereign immunity or damage caps. *See* PLITT & PLITT, *supra* note 16, §§ 11:1, 11:8, 11:9, 11:18 (providing illustrations); Steven Plitt, *Uninsured & Underinsured Motorist Coverage*, in THE CLAIMS ADJUSTER'S AUTOMOBILE LIABILITY HANDBOOK § 5:2 (2009) (providing illustrations). This author in effect endorses the approach of treating UM/UIM claims evaluation according to a first-party yardstick rather than the third-party yardstick envisioned during its creation. We disagree and believe that his observations are at least as supportive of our position as of the industry position.

As reflected in concept of what it means to be “legally entitled to recover,” as well as the history, derivation, and purpose of UM/UIM insurance, UM/UIM coverage operates exactly like the liability insurance of a tortfeasor. The UM/UIM insurer – in return for premium payment – agrees to fulfill the role of tortfeasor liability insurance.

In taking on this commitment, the UM/UIM insurer has a considerable degree of protection in that it will not have to pay if its policyholder is the driver at fault or if there are other technical legal defenses to coverage. The UM insurer may even defend the uninsured tortfeasor in hopes of defeating the liability claim of its own policyholder.⁹¹ In such cases, the UM/UIM insurer is very much acting as the tortfeasor’s insurer. It is inconsistent for that same insurer to then refuse to assume this role in assessing the settlement value of the policyholder’s claim.

The “legally entitled to recover” requirement is a significant burden on the UM/UIM policyholder. For example, a given UM/UIM insurer may receive 20 years of premium payments from a loyal policyholder who is T-boned and catastrophically injured at an intersection by a municipal government employee running a red light, a case in which the city’s liability is capped at \$50,000. If the city has no insurance and has not waived sovereign immunity, the city is underinsured – but the policyholder cannot receive the UM/UIM benefits for which it paid even though the seriously injured policyholder is not at fault.⁹² Having to shoulder burdens like these, UM/UIM policyholders should in return have the settlement value of their claims assessed according to the yardstick of third-party claims that focus on the range of possible outcomes and the insurer is motivated by the risk of an excess judgment.

When it suits them, UM/UIM insurers are quick to seize on these similarities to tortfeasor liability insurance (which permits the insurer to defend the tortfeasor based on any available means, no matter how technical

⁹¹ See, e.g., *Allstate Ins. Co. v. Pietrosh*, 454 P.2d 106, 111 (Nev. 1969); see WIDISS & THOMAS, *supra* note 2, §§ 28.2, 28:14.

⁹² But see PLITT, *supra* note 83, § 5:1, at 91-92 (Supp. 2017) (noting that a slight majority of the jurisdictions have relaxed the “legally entitled to recover” requirement in such situations, citing and discussing *Borjas v. State Farm Mut. Auto. Ins. Co.*, 33 P.3d 1265, 1268-69 (Colo. App. 2001) (involving case of police vehicle crashing into policyholder but focusing on immunity generally conferred upon emergency medical aid providers).

and seemingly unfair to the tortfeasor's victim). But when the "substitute liability insurance" or "additional liability insurance" model is not to their advantage, UM/UIM insurers make no mention of the third-party aspects of UM/UIM coverage and instead embrace the first-party aspects of UM/UIM insurance. At the risk of invoking a cliché, we think sauce for the goose should be sauce for the gander. If UM/UIM insurers are allowed the protection of a liability defense, they should be required to act like liability insurers.

Insurers should not be permitted to in one breath posture as third-party liability insurers while in the next breath take a first-party approach to claims adjusting that gives them more leeway in disputing the magnitude of injuries suffered by the policyholder. Where the UM/UIM insurer claims that it need not evaluate the settlement posture of the case in the same manner as would be required of a tortfeasor's liability insurer, this is inconsistent with the UM/UIM insurer's required role of "stepping into the shoes" of the tortfeasor's liability insurer. It is also inconsistent with the policy of putting the policyholder in the same position they would have enjoyed had the tortfeasor been subject to higher policy limits.

The leading defender of the industry position attempts to justify this discrepancy by taking the view that because an excess judgment against the policyholder is not literally possible in the UM/UIM context, this frees the UM/UIM insurer from making the claim calculus of a liability insurer.⁹³ With all due respect to this commentator, who we credit with the scholarly literature's most complete discussion of the issue, we simply cannot agree. His analysis is simply too good a deal for UM/UIM insurers, letting them "eat" their cake and "have" it as well. Under this approach, the UM/UIM insurer gets all the advantages (and settlement value reducing hydraulics) of a liability insurer but suffers none of the disadvantages despite being compensated for having provided this coverage to policyholders, the vast majority of whom will never use it either because of collision avoidance or colliding with tortfeasors possessed of adequate insurance.

The favoritism of this analysis is reflected by its additional view that a UM/UIM insurer need not pay any agreed or "undisputed amount" to its policyholder (to whom it owes fiduciary-like duties) during the pendency of resolution of the disputed aspects of the claim.⁹⁴ For example, if the

⁹³ PLITT, *supra* note 83, § 5:23, at 129-31 (Supp. 2017) (footnotes omitted).

⁹⁴ In many situations, the insurer may dispute that the policyholder is entitled to the full UM/UIM policy limits but concede that the claim is worth

policyholder is hit and receives a tortfeasor's \$25,000 policy limits and the UIM insurer agrees that an additional \$50,000 is owed but the policyholder has demanded his full \$100,000 per accident UIM policy limits, his insurer may – at least according to this commentator – validly withhold payment of the \$50,000 that is concededly owed. We fail to see the rationale for such an approach, which unfairly permits the UM/UIM insurer to starve its own policyholder into submission in hopes of brokering for itself a better deal concerning the disputed amount.

In addition, this commentator treats the availability of arbitration as a panacea when many policyholders regard it as a pit devoid of the protections accorded by the litigation system (e.g., discovery, jury trial, independent trial judges, a broad right of appeal).⁹⁵ In the majority of states policyholders must consent to arbitration.⁹⁶ In many cases, policyholders do not,⁹⁷ which tends to confirm that arbitration is regarded as more pro-insurer

something more than the tortfeasor's policy limits and offer something less than the UM/UIM limits. That lower insurer offer or counteroffer is regarded by policyholder counsel as an undisputed amount that the policyholder is entitled to receive without waiting for resolution of the dispute as to whether greater compensation is owed. States are divided on whether this is required and where such payments are not required, insurers vary in their practices. In our view, required payment of an undisputed amount is the correct approach. At this point, the insurer itself conceded (at least implicitly) that its liability has become clear at least as to its own valuation of a claim. Forcing the policyholder to wait unfairly deprives the policyholder of the benefit of the bargain and inflicts needless hardship on the already injured policyholder.

⁹⁵ See Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 253-255 (2007) (reviewing purported advantages and detriments of arbitration and risks to less sophisticated or experienced disputants such as consumers or policyholders).

⁹⁶ See WIDISS & THOMAS, *supra* note 2, §§ 17.1-2.

⁹⁷ For example, in Nevada, where policyholder consent is required for arbitration, author Stempel is not aware of a single matter in which the policyholder agreed to arbitration in the dozens of cases where he has been approached as a prospective consultant or expert witness. Although it is certainly possible that arbitration is more common in less contested matters of the sort where experts are not retained, this suggests that when it is important, policyholders are not nearly as sanguine about arbitration as Mr. Plitt.

than litigation, at least by policyholder counsel. The commentator's implicit suggestion that arbitration is an expeditious and smooth path to acceptable resolution seems belied by the frequency with which it is avoided by policyholders when they have the opportunity to do so. In addition, even where arbitration takes place, this neither absolves the UM/UIM insurer from earlier unreasonable failure to provide benefits nor eliminates litigation. Rather, the litigation simply takes place after the arbitration reveals the insurer's unreasonable behavior⁹⁸ or otherwise has failed to resolve the dispute.

Further, arbitrating rather than litigating a UM/UIM dispute does nothing to resolve the central issue of concern: should the insurer be acting more like a third-party liability insurer concerned with protecting policyholders from judgments exceeding policy limits or more like a first-party property insurer worried that the policyholder may be inflating a claim of loss? Arbitration may be rightfully unpopular with policyholders to the extent the arbitrators are drawn from an insurance industry that implicitly has been using the wrong standard (garden-variety first-party claims adjusting) to determine the value of a claim rather than the correct standard of a claim's value as assessed by a third-party liability insurer with a duty to make reasonable settlement decisions.

Although courts have not always been clear regarding the degree to which UM/UIM insurers stand in for missing or insufficient tortfeasor insurance, the scholarly literature regarding the nature, conceptual underpinnings, and history of this product seems to overwhelmingly support the notion that the UM/UIM insurer should conduct itself as a liability insurer, with few adherents to the view that the absence of an actual need to defend the hypothetical suit against the tortfeasor allows UM/UIM insurers to escape the third party operation of the coverage.

There is, however, a leading treatise that can be read as consistent with the implicit insurer view that despite the third-party role of the UIM insurer, it is subject to a bad faith standard closer to that of a first party property insurer.⁹⁹ Its analysis seems to support the first-party role for a

⁹⁸ See *Richardson v. Emp'rs. Liab. Assurance Corp.*, 102 Cal. Rptr. 547 (Cal. Ct. App. 1972) (in which the policyholder brought a bad faith litigation claim after having prevailed in mandatory arbitration).

⁹⁹ See 6 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION, § 65.01[8][a], at 65-50 to 65-51 (Jeffrey E. Thomas & Christopher J. Robinette eds., 2019) (footnotes omitted); see also *Athey v. Farmers Ins. Exch.*, 234 F.3d 357 (8th Cir. 2000) (applying South Dakota law finding bad faith);

UM/UIM insurer, but only in part. In our view it is too quick to view UM/UIM coverage as first party merely because the claimant is the policyholder, when in so many other ways (all duly noted elsewhere in that same treatise), UM/UIM insurance was born as a stand-in for third-party liability insurance and is administered as if the insurer were an ordinary liability insurer defending a victim's claim against the tortfeasor.¹⁰⁰

An insurer utilizing the third-party nature of UIM insurance to defend claims on the basis of fault or technical defenses should also have to act like a liability insurer when it comes to valuing cases, making reasonable settlement decisions, and protecting its policyholder when the policyholder is not at fault, just as it must when the policyholder is at fault and concretely facing actual litigation with the risk of an excess judgment.

Safeco Ins. Co. v. Campbell, 433 So. 2d 25, 27 (Fla. Dist. Ct. App. 1983); *Zilisch v. State Farm Mut. Auto Ins. Co.*, 995 P.2d 276, 280 (Ariz. 2000) (en banc); *Wilson v. 21st Century Ins. Co.*, 171 P.3d 1082 (Cal. 2007) (failure to conduct adequate investigation was in bad faith); *Maslo v. Ameriprise Auto & Home Ins.*, 173 Cal.Rptr.3d 854, 859 (Cal. Ct. App. 2014) (where insurer rejected settlement demand without adequate investigation, failed to conduct a defense, failed to have medical examination of claimant, and failed to interview insured's treating physicians, UM/UIM insurer acted in bad faith); *Kehoe v. Lightning Rod Mut. Ins. Co.*, 685 N.E.2d 255, 257 (Ohio Ct. App. 1996) (UIM insurer's refusal to pay undisputed amount is bad faith); *Newport v. USAA*, 11 P.3d 190, 197-198 (Okla. 2000) (UIM insurer's refusal to offer in settlement what it has reserved as value of claim was bad faith). *But see Aetna Cas. & Sur. Co. v. Superior Ct.*, 778, P.2d 1333, 1335 (Ariz. Ct. App. 1989) (reasonable dispute over value of claim excuses insurer delay in payment), *Becker v. Am. Family Ins. Grp.*, 697 N.E.2d 106, 108 (Ind. Ct. App. 1998) (same); *Morgan v. Am. Family Mut. Ins. Co.*, 534 N.W.2d 92, 96 (Iowa 1995) (same).

¹⁰⁰ We are constrained to report, however, that in informal conversation with the authors, Professor Thomas has indicated some support for what might be called the Insurance Industry/Plitt position, support that we regard as misplaced and in contradiction to other portions of the WIDISS & THOMAS treatise, *supra* note 2. But Professor Thomas has yet to definitively address the issue in his treatise or other writings and we hope that upon closer and more extended analysis he will ultimately agree with us rather than Mr. Plitt and the insurance industry.

The limited scholarly opposition to our view places great, and we think undue, emphasis on the purported distinction between a UIM insurer and the tortfeasor's actual liability insurer. The distinction hinges solely on a liability insurer's actual need to protect a policyholder from an adverse judgment in excess of policy limits. This analysis essentially disregards the fact that in the UIM context, the UIM insurer is nonetheless acting as though it were a liability insurer.¹⁰¹ It also concedes, as it must, that a UIM claim is a process like a third-party tort claim. The insurer may avail itself of defenses to liability, even technical defenses unrelated to fault such as sovereign immunity, employer immunity, and the expiration of periods of limitation. And like liability insurance, UM/UIM insurance provides for payment of pain and suffering, lost income, emotional distress, and loss of consortium – all things generally outside the scope of first party insurance.

If it is beyond question that UM/UIM insurance was designed to take the place of the tortfeasor's missing or insufficient insurance, then the UIM insurer should be replacing or supplementing the tortfeasor's insurance, which in turn logically requires the UIM insurer to act as if it were the tortfeasor's liability insurer, only with higher limits. That means the UIM insurer, like the tortfeasor liability insurer, must consider the relevant factors in resolving a third-party claim: liability; competing medical assessments; the range of potential damages; and the risk of a jury award in excess of policy limits.

There is another pernicious problem with UM/UIM insurers acting as first-party insurers as against their policyholders: the policyholders are often undercompensated. This is opposite to the very purpose of mandatory automobile insurance, which is to act as a ready fund of compensation for injured auto accident victims. What is most stark is that the UM/UIM hardball is targeted at those conscientious policyholders who actually went out in the market and paid for more insurance! They accepted the insurers' marketing invitation to protect themselves from irresponsible drivers. However, they end up in worse shape in the claims process than uninsured drivers who have the good fortune to collide with a well-insured tortfeasor – a most bizarre result.

VII. THE UNFAIR EFFECTS OF THE FIRST-PARTY APPROACH TO UM/UIM CLAIMS

The undue favorability to insurers of the first-party approach is perhaps an even greater problem than failure to place the UIM carrier

¹⁰¹ See, e.g., PLITT, *supra* note 90, §7:1, at 7-13 to 7-16, 7-21 to 7-24.

completely into the shoes of the tortfeasor's liability insurer. In practice, as applied by insurers, we have seen the legal standard by which insurer conduct is judged in the claims process – the concept of “fair debatability” whereby insurers are granted some leeway as to how to act with their policyholder before attracting bad faith attention, as long as the decisions they make fulfill the standard of “fair debatability” when assessing the strength of the policyholder's claim – devolve into the view that an insurer is apparently insulated from bad faith responsibility so long as it can muster any information in favor of its valuation of a claim – which is magically always lower than the claimant's assessment.

Returning to the hypothetical collision between Paul and Donald allows us to illustrate what we regard as a misuse of the fair debatability standard. Recall that Paul has been struck by a completely at fault Donald and suffered a broken pelvis, some cracked vertebrae, three months' lost work and \$70,000 in medical bills with permanent but not completely debilitating injury that will require ongoing pain medication, physical therapy, and future medical costs of roughly \$8,000 each year. Donald has auto liability policy limits of \$25,000, which his insurer promptly pays. Paul has UM/UIM policy limits of \$100,000 per person.¹⁰²

As we noted at the outset of this article, under these circumstances, we would expect Paul's UM/UIM insurer to rather readily agree that he is entitled to his \$100,000 policy limits for which he has paid 30 years of premiums. But suppose his insurer is concerned to the point of being skeptical of the claim even though the assessment of Paul's injuries and future medical needs comes from his treating physicians, who have no black marks on their record. It retains a consulting physician or nurse to review the medical records. Or it requests a medical examination of Paul by a physician of the insurer's choice. An insurer-retained medical professional concludes that Paul has completely recovered from the collision. Or worse yet (from our perspective and the torturing of the fairly debatable standard), the insurer's claims handler assigned to the matter (who has no formal medical training) concludes that Paul has completely recovered.

The insurer then decides that its claims handler or nurse or physician is correct and that Paul's treating physicians (and perhaps an expert consulting physician retained by Paul's counsel as well) are wrong. The insurer now takes the position that it has information that makes the value of Paul's claim sufficiently fairly debatable that it need not offer the UIM policy

¹⁰² See *supra* text accompanying notes 48-52.

limits – or perhaps need not offer any UIM benefits – in settlement of Paul’s claim.

Taking the position that its medical analysis is completely correct while Paul’s treating physicians are utterly wrong, the insurer then does some self-serving math. The insurer looks at Paul’s \$70,000 in medical bills or payments and perhaps takes the position that the amount of treatment or the pricing was excessive and that \$40,000 was sufficient. The insurer looks at Paul’s three months of lost work (Paul earned gross income of \$5,000 per month) and adds another \$15,000. It values Paul’s past pain and suffering at \$5,000 (which we hope readers will agree is more than a little light for a broken pelvis and vertebrae) for a total of \$60,000 in damages, from which it subtracts not only Donald’s \$25,000 liability insurance payment but also the \$10,000 in medical payments coverage Paul receives pursuant to his auto policy in the modified no-fault state in which the collision took place. The insurer offers \$25,000 in settlement to Paul rather than the \$100,000 UIM policy limits he requested.

Notwithstanding the very self-serving nature of the insurer’s analysis – which seems to us a long way from giving equal consideration to the interests of the policyholder – the insurer takes the position that its low valuation of Paul’s claim is “fairly debatable” because it has some analytic support. Even under a pure first-party regime, we think this view is incorrect.¹⁰³ But under a first-party regime it will probably receive more judicial tolerance than it deserves because a good insurer lawyer may be able to convince a mediocre judge that the insurer has constructed a sufficiently colorable analysis to make the matter “fairly debatable.”

¹⁰³ If we substitute a fire that partially destroys Paul’s house for the auto collision, this would be the rough equivalent of Paul incurring \$15,000 of Service Master cleanup and obtaining a bid of \$150,000 for home repair only to be offered \$75,000 based on the repair estimate provided by the insurer’s preferred unlicensed contractor. In the context of bodily injury, it seems obvious to us that an insurer’s reliance on a claims adjuster in derogation of a treating physician opinion is improper as is reliance on a nurse’s assessment in derogation of the doctor’s diagnosis.

Exclusive insurer reliance on an insurer-retained physician at odds with treating physicians and a claimant’s expert is less absurd but still troublesome in that it involves the insurer assuming that the views of a minority or the less-skilled will prevail over more compelling evidence as well as an insurer unwilling to compromise or adjust to the possibility that the views it favors will be rejected.

Under the pure first-party model of UM/UIM claims valuation, the insurer can ostensibly clothe itself in the cloak of fair debatability and argue that because there is a possibility that an adjudicator will side with the claims adjuster or nurse or single physician (often one that makes a living from providing insurers with assessments) rather than agreeing with the victim policyholder's actual treating physicians (the ones facing potential claims of malpractice if they are wrong). Even under the first-party model, such conduct will often be sufficiently unreasonable to amount to a breach of the duty of good faith and unfair claims handling. But the first-party model gives the insurer at least some breathing room as compared to the third-party model, which to us makes the case for requiring UM/UIM insurers to follow the third-party model in all instances (as opposed to when costs savings incentivize insurers to do otherwise).

Consider the same situation from a third-party perspective. Paul presents to his UM/UIM insurer with his demand letter the case for full payment of his \$100,000 UIM policy limits, including medical records, treating physician assessments, and his own expert doctor's report. The insurer has a single contrary assessment from a claims adjuster, nurse, or its retained examining physician. If this insurer was defending Donald against Paul's lawsuit stemming from the collision (i.e. as if it were acting as the third party tortfeasor's liability insurer), the demand would be for \$125,000 in policy limits (Donald's plus Paul's).¹⁰⁴ The insurer would then need to determine whether refusing the demand (or counter-offering an amount such as the \$25,000 used above) would fall below the required standard of care and subject Donald to an unreasonable risk of a judgment in excess of policy limits.

A rational third-party liability insurer acting in good faith would almost certainly resolve the situation in favor of paying policy limits. At the hypothetical trial of the matter, Paul would present evidence of medical expenses and lost wages of \$85,000 as well as evidence of future medical expenses of \$8,000 per year, resulting in predicted medical expenses of nearly \$300,000 for fifty-year-old Paul, who is expected to live to be 85. And there is the pain and suffering, which even before a stoic jury will be tens if not hundreds of thousands of dollars. At trial, where the collateral source rule prevents the jury from hearing of Paul's own medical or disability insurance or other sources of payment, Paul could win a verdict in the range

¹⁰⁴ If Paul has received medical payments, these would be added. In many states, it would be as if Donald's hypothetical liability insurer had \$135,000 in limits.

of \$500,000 to a million dollars, perhaps more. He is almost certain to obtain a judgment larger than \$125,000 in this case where liability is not at issue.

Only if the jury both believes the one person (claims adjuster, nurse, or retained examining physician) finding no permanent injury and no need for future medical treatment and also agrees with the insurer's constrained view of past damages will there be a verdict for less than policy limits. The odds of this are extremely low to the point of nonexistence.

No reasonable liability insurer would roll the dice with a policyholder facing an ordinary liability claim. But UM/UIM insurers have in our experience done this with some frequency by taking the position that as first-party insurers they are entitled to cleave to the views of a single retained doctor (or nurse or an in-house claims adjuster) until those views are rejected by an adjudicator. In other words, UM/UIM insurers implicitly invoke a constrained concept of insurer role to justify an extremely self-serving view of what constitutes fair debatability or a reasonable ground for refusing to pay the amount requested by their own policyholders. By contrast, as illustrated above, a UM/UIM insurer required to follow the third-party reasonable settlement template, who is cognizant of the risk of an excess judgment, will be required to give greater attention to evidence favoring the policyholder and cannot favor its own interests to the degree permitted a first-party insurer.

According to the broad concept of fair debatability invoked by many insurers, the insurer may essentially disregard all evidence in favor of the UM/UIM policyholder claimant and seize upon the single view of a frequently allied doctor more distant from the victim than her treating physicians. The insurer can then argue that it has at least some basis for rejecting a claim or paying less than the damages submitted by the policyholder claimant even though the policyholder claimant has substantial evidence showing that his or her damages greatly exceed the combined limits of the tortfeasor's available insurance and the policyholder's own UM/UIM coverage.

By misusing the "fair debatability" standard, an insurer motivated to pay less rather than more can without consequences refuse to compromise or consider the very realistic prospect that a jury will reject information favoring the insurer's preferred lower valuation and instead embrace the opinions of the policyholder claimant's treating physicians and expert analysis. The UM/UIM insurer can in turn take the most self-serving, extreme position possible and avoid bad faith and unfair claims handling liability so long as the insurer's evaluation has at least a shred of support and

is not deemed completely absurd.¹⁰⁵ Unfortunately, there is some implicit judicial support for the position that, in the absence of an actual lawsuit against the policyholder, the liability insurer is relieved from its requirement as a liability insurer to make reasonable settlement decisions. This position is reflected in the courts' use of differing bad faith standards for first-party and third-party claims, which has been heavily premised on insurer control of the defense of claims against the policyholder and the risk of an excess verdict in third-party matters.¹⁰⁶

¹⁰⁵ In this newly added section to this chapter of the CLAIMS ADJUSTER'S AUTO LIABILITY HANDBOOK entitled *Advancing Partial Payments*, Mr. Plitt comes down on the side of not requiring the insurer to pay the "undisputed amount" to the policyholder pending resolution as to the disputed amount, a position that I regard as analytically incorrect. *See, e.g.*, PLITT, *supra* note 90, § 5:23. The custom and practice in Clark County, Nevada (where author Stempel is a member of the bar) is that insurers tender undisputed amounts even though Nevada law is not fully clear on the matter. *See* Storlie v. State Farm Mut. Auto. Ins. Co., No. 2:09-cv-02205-GMN-PAL, 2011 U.S. Dist. LEXIS 4215, at *21-24 (D. Nev. Jan. 13, 2011) (strongly implying that insurer's refusal to pay undisputed amount to policyholder is bad faith); *see also* Skinner v. GEICO Cas. Ins. Co., 2018 U.S. Dist. LEXIS 30075, at *9-*11 (Feb. 26, 2018) (assuming for purposes of decision that undisputed amounts should be paid by insurer pending resolution of matter but finding genuine dispute over amount owed in context of summary judgment motion); Everest Indem. Ins. Co. v. Aventine-Tramonti Homeowners Ass'n, No. 2:09-cv-01672-RCJ-RJJ, 2012 U.S. Dist. LEXIS 33860 (D. Nev. Mar. 13, 2012) (insurer interpleads undisputed amount of \$850,000 remaining policy limits while continuing to litigate dispute as to whether insurer owes funds in excess of stated policy limits); Parker v. Greenpoint Mortg. Funding, No. 3:11-cv-00039-ECR-RAM, 2011 U.S. Dist. LEXIS 78037, at *20 (D. Nev. July 15, 2011) ("This District has adopted the 'widely accepted' Tender Rule that a party pursuing a quiet title claim must tender the undisputed amount due and owing to challenge the validity of a sale or title to the property.").

¹⁰⁶ *See* MANILOFF & STEMPEL, *supra* note 36, at 411-13. *But see* Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc., 93 Cal. Rptr. 2d 364, 405 (Cal. Ct. App. 2000) ("A line of decisions has found liability insurers liable for bad faith without relying on the risk of excess liability") (citing cases); J.B. Aguerre, Inc. v. Am. Guarantee & Liab. Ins. Co., 68 Cal. Rptr.

By contrast, poor insurer treatment of a first-party policyholder is too often seen as simply a case of hard bargaining, a perspective that overlooks the vulnerability of policyholders in the aftermath of significant losses such as those associated with fire, hurricanes, tornados, landslides, frozen pipes or the like. In addition, treating first-party insurance disputes as the equivalent of a squabble between two widget merchants overlooks the fact that insurers are repeat players experienced in litigation that maintain an active defense apparatus.¹⁰⁷ Only if a policyholder's claim is large will it make economic sense for the policyholder to aggressively challenge a first-party insurer's inadequate settlement. Policyholders will commonly "lump it" in the face of modest undervaluation.

Thus, we have considerable concern that the fairly debatable standard is overly favorable to first-party insurers. A full examination of that issue is a subject for another article. But even if fair debatability is the right approach to first-party claims, courts and commentators are in basic agreement that it is not apt for third-party claims – and UM/UIM matters should be treated like third-party claims in light of the intent of UM/UIM coverage as additional liability insurance.

Despite this history and the clear hybrid nature of UM/UIM insurance, courts have breezily deemed it to be first-party insurance without sufficient thought as to its purpose. They gloss over actual operational substance for simple surface matters like "who is being paid." As one court summarized:

First-party actions arise when the insured sues its insurer over the insurer's treatment of the insured's claims or benefits. First-party actions are distinguishable from third-party actions, where the insured sues its insurer over the insurer's treatment of the claims of a third party against the insured. This distinction is important because an agency/fiduciary relationship is created in third-party

2d 837, 842 (Cal. Ct. App. 1997) (liability insurer can be found in bad faith for coercing policyholder into contributing own funds to settlement); *Bodenhammer v. Superior Court*, 238 Cal. Rptr. 177, 179-80 (Cal. Ct. App. 1987) (insurer may commit bad faith by delaying settlement).

¹⁰⁷ See, e.g., Tom Baker, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 9 (2005) (insurers are repeat players in the litigation game whereas policyholders and accident victims are often one-shot players).

actions between the insurer, who controls the disposition of the third party's claims, and the insured.¹⁰⁸

Unfortunately, the distinction is too simplistic as applied to UM/UIM matters. Nonetheless, it continues to be applied,¹⁰⁹ subjecting insurer misconduct in such cases to the relatively light scrutiny of the fairly debatable yardstick. This results in undue impunity for UM/UIM insurers. A case in point is *Zilisch v. State Farm*. Kimberly Zilisch was a passenger in a car hit by another vehicle drag-racing at sufficient speed that her fiancé, the driver of the car, was killed. She suffered serious injuries, recovered \$146,500 in liability insurance from at-fault drivers and then sought her \$100,000 UIM policy limits. The insurer first valued her claim at \$15,000-\$20,000, then at \$75,000 but only offered \$55,000 in settlement, spurning her policy limits demand in spite of substantial medical evidence supporting her claim of serious and permanent nerve and eye injury. Arbitrators

¹⁰⁸ *In re Eurospark Indus., Inc.*, 288 B.R. 177, 183 (Bankr. E.D.N.Y. 2003) (citing STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY & DAMAGES § 2:14 (2d ed. 1998 & Supp. 2001); *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah. 1985) (treating first-party bad faith as a breach of contract action and third-party bad faith as sounding in tort)). *Accord*, *Smith v. Scottsdale Ins. Co.*, 40 F. Supp. 3d 704, 713–14 (N.D.W. Va.) (quoting *State ex rel. Allstate Ins. Co. v. Gaughan*, 508 S.E.2d 75, 86 (W.Va. 1998), *aff'd*, No. 5:12CV86, 2014 WL 4199207 (N.D.W. Va. Aug. 22, 2014), *aff'd*, 621 F. App'x 743 (4th Cir. 2015) (“For definitional purposes, a first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured. A third-party bad faith action is one that is brought against an insurer by a plaintiff who prevailed in a separate action against an insured tortfeasor. In the bad faith action against the insurance company the third-party alleges the insurer insurance company [sic] engaged in bad faith settlement in the first action against the insured tortfeasor.”).

¹⁰⁹ *See, e.g., Cedillo v. Farmers Ins. Co.*, 408 P.3d 886, 886 (Idaho 2017), *reh'g denied* (Jan. 29, 2018) (treating UM/UIM coverage as first-party and applying fairly debatable standard very favorably for insurer, prompting strong dissent); *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 276, 279–80 (Ariz. 2000) (en banc) (treating UM/UIM claim as first-party and applying the fairly debatable standard; despite greater lenience of this approach, insurer found to have acted in bad faith).

awarded her nearly \$400,000 before the insurer finally paid the \$100,000 policy limits. Her bad faith lawsuit resulted in a jury verdict of \$460,000 in compensatory damages and \$540,000 in punitive damages.¹¹⁰

Despite this scenario that seems to us outrageous on its facts, the trial judge set aside the punitive damages award. The appellate court reversed the remainder of her award on the ground that her claim was fairly debatable as a matter of law¹¹¹ in an opinion head-scratchingly favorable to the insurer.¹¹² While it is fortunate that the Arizona Supreme Court righted this wrong, the episode stands as an example of the perils of using the first-party fair debatability test for assessing what is reasonable for third-party claims.¹¹³ Too often, insurers (and, unfortunately, some courts) interpret the term fairly debatable to mean “any shred of evidence” (such as the differing opinion of a single insurer-retained doctor)¹¹⁴ or any argument for a lower valuation.

Because most insurers can find doctors that tend to view injury claims with suspicion and most insurer attorneys can articulate an argument for a lower valuation, the result is often a toothless approach to bad faith and fair claims handling. Where valuation of a case largely hinges on amounts awarded for pain, suffering, emotional distress or other injury less easily

¹¹⁰ *Zilisch*, 995 P.2d at 278-79.

¹¹¹ *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 977 P.2d 134, 136 (Ariz. Ct. App. 1998), *vacated*, 995 P.2d 276 (Ariz. 2000).

¹¹² For example, the Court of Appeals essentially brushed off the evidentiary value of Ms. Zilisch’s complete absence of fault and large arbitration award as evidence of the value of her claim as well as essentially deeming irrelevant evidence of improper claims practices and expert testimony proffered on her behalf. *See id.* at 139-40. It is hardly surprising that the appellate court’s analysis had not a single vote of support at the Supreme Court.

¹¹³ And although the Court appeared to classify UM/UIM claims as subject to first-party analysis, its decision invoked the equal consideration standard more commonly associated with third-party insurance, noting that “[e]qual consideration of the insured requires more” than “forc[ing] an insured to go through needless adversarial hoops to achieve its rights under the policy” and that the insurer “cannot lowball claims or delay claims hoping that the insured will settle for less.” *Zilisch*, 995 P.2d at 280.

¹¹⁴ *See generally* DOROTHY CLAY SIMS, *EXPOSING DECEPTIVE DEFENSE DOCTORS* (6th ed. 2018) (arguing that many insurers seek out doctors inclined to undervalue injuries for purposes of examining and assessing claimants).

quantified, insurer use of an unduly favorable version of fair debatability becomes pernicious. Case law abounds of wide ranges of general damages awards for similar injuries, because predictability of awards for bodily injury can be somewhat unpredictable.¹¹⁵

We reject the contention that any amount assigned to a general damages/pain and suffering claim is “inherently fairly debatable.” A simple hypothetical illustrates the extremity of that position. Imagine a policyholder collision victim whose back is badly injured but in a manner that will not permit surgical intervention without undue danger and there is no need for further medical treatment – but the policyholder is in pain and has a 50-year life expectancy. The tortfeasor’s policy limits cover all medical costs but are exhausted thereby. The UIM policy limit is \$25,000 per person. Can it reasonably be suggested that this victim’s pain and suffering does not exceed the \$25,000 tortfeasor policy limits? That works out to \$1.50 per day or \$500 per year. Even people of modest means would pay that amount annually to be free of even minor nagging back pain, let alone significant pain.

Although many, if not most, states do not permit plaintiffs to make a “per diem” argument for compensation based on accumulation of a per day amount of pain, the device is of course useful for purposes of assessing magnitude of ongoing discomfort.¹¹⁶ Borrowing from economic theory, we

¹¹⁵ See Plitt, *supra* note 90, § 5:23, at 133-135 (footnotes omitted) (emphasis added). Similar views are arguably set forth in the automobile section of Mr. Plitt’s two-volume general treatise (with Jordan Plitt). The Steven Plitt edited Third Edition of Couch on Insurance can be read as supporting this view in that it suggests that UM/UIM Insurance “Not to Protect Uninsured Motorists” – but that same sentence also notes that UM/UIM insurance is not designed to protect insurers. Rather, consistent with other authorities, Couch states that the purpose of UM/UIM coverage is to protect the policyholder injured by the uninsured or underinsured driver, a position at least as consistent with our analysis as with that of Mr. Plitt in this case. See STEVEN PLITT ET AL., COUCH ON INSURANCE §§ 122.5-122.13 (3d ed. 2017).

¹¹⁶ In our view, per diem arguments for calculating pain and suffering are restricted or forbidden not because they paint an inaccurate picture (i.e., thinking about the cost of currently incurred pain and calculating a remaining life of such pain on that basis), but because they are a rhetorically powerful device that tends to result in larger jury verdicts and consequently larger

might hypothesize a “market” for avoiding pain and suffering. Imagine that one can pay to avoid the pain. If the pain in question is a hangnail, we suspect the average person, even if wealthy, would be unwilling to pay much if anything to avoid the temporary inconvenience. But if the pain is chronic back pain that limits life activity, disturbs sleep, and regularly inflicts noticeable discomfort, it is more than likely that even persons of modest means would be willing to pay to avoid 50 years of such pain.

Contrary to the pro-insurer perspective that valuing pain and suffering is so inherently plastic as to make any assessment fairly debatable, we contend that there are reasonable ranges of valuation that preclude unduly low or excessively high valuations. An insurer such as the one in our hypothetical can act in bad faith even according to the favorable “fairly debatable” standard preferred by insurers. When one replaces a first-party perspective with a third-party perspective that asks, “what are the odds that a jury will award more than \$25,000 for this type of pain?” The unreasonableness of this insurer perspective becomes even more apparent – and provides another reason for adopting the third-party perspective.

While it is true that pain and suffering is less amenable to a fine-tuned valuation than medical costs or lost wages, it is only common sense that an insurer is not entitled to minimize severe or long-lasting pain under the cloak of fair debatability. The suggestion that any valuation of pain and suffering – no matter how low – is “fairly debatable” is untenable. That insurers feel free to take this extreme view under the current regime of unclear precedent regarding the proper role of the UM/UIM insurer underscores the public policy case for treating a UIM insurer exactly like a liability insurer defending the tortfeasor.

As is well established by custom, practice, industry norms, and case law, a liability insurer must make reasonable settlement decisions when facing the claim against the tortfeasor. The insurer cannot refuse to pay low/medium policy limits in the face of a claim involving clear liability and serious injury by taking the position that the range of general damages awards is large. The insurer – at least if it is engaged in reasonable claims handling – must consider the range of possible outcomes at trial. If this poses a serious risk of an excess judgment against the tortfeasor, the insurer must either pay the limits or promise to pay the entire judgment regardless of limits.

settlement value of claims; results opposed by powerful socioeconomic and political interests such as insurers and manufacturers who have persuaded policymakers that making such arguments gives too great an advantage to plaintiff counsel.

The excess judgment measure of damages for unreasonable failure to settle has a powerful disciplining effect on insurers by discouraging insurers from excessive gambling on the outcome of cases at the expense of the tortfeasor policyholder. The UM/UIM insurer is not only functionally subject to the same considerations because of stepping into the shoes of the tortfeasor's liability carrier but is also constrained by this approach from engaging in conduct that deprives the UM/UIM policyholder of the benefit of the bargain.

For example, if a UM/UIM policyholder/claimant such as Paul in the opening illustration of this article in which liability is clear has \$50,000 in medical bills, two months of missed work, and months of pain (even if not permanent) and has received the tortfeasor's full \$25,000 policy limits, this claimant would appear unquestionably to be entitled to UM/UIM benefits. If the tortfeasor had \$50,000 limits, they certainly would have been paid. The victim's medical bills alone equal that amount.¹¹⁷ In addition, there is the lost wages, pain and suffering, and perhaps emotional distress or a spouse's loss of consortium claim.¹¹⁸

Under these facts, the claim is likely to have a settlement value of \$150,000 or more with the risk of a larger trial verdict depending on the jury and the degree of the plaintiff's pain, suffering, emotional distress, or other "non-monetary" damages. A common shorthand rule of thumb used by attorneys across the country is that a tort claim in which liability is clear has a settlement value of roughly three times the "special" damages. Although this is hardly an ironclad rule, it provides a useful starting point for assessing the value of a claim and something of a "ballpark figure" of the claim's value.

Conversely, the UM/UIM claim could be viewed as a straight first-party claim in which the insurer is seeking indemnity for losses incurred as is the case with the property component of auto insurance and homeowner's

¹¹⁷ It is of course possible that the policyholder received excessive or overpriced medical care. But unless this is established by the facts of the case, the policyholder should recover; the possibility of inflated billings alone is not enough to deny coverage. While the burden to prove medical expenses remains with the claimant, it is the burden of a mere preponderance and thus ordinarily will be satisfied by presentation of the billings with adequate foundation by a licensed physician. At that point, it becomes the insurer's burden to establish that the treatment or billings are unreasonably excessive.

¹¹⁸ See DOBBS, ET AL., *supra* note 14, ch. 26 (reviewing tort remedies, including punitive damages).

insurance or medical (health)¹¹⁹ insurance. The policyholder may, for example seek \$40,000 in payment for an automobile destroyed in a wildfire. But if the vehicle is a 2003 Toyota Corolla with 115,000 miles, the insurer may rightly question the policyholder's valuation and offer in response a proposed payment based on the prevailing Kelly Blue Book value this type of vehicle.¹²⁰

¹¹⁹ In our view, "health insurance" is a misnomer born of marketing jargon rather than an accurate description of this type of coverage. The insurance product obviously does not ensure good health or indemnify the policyholder for loss of good health, which can result in psychic injury, loss of employment, strained personal relations, or other injury. Rather, the insurance product commonly known as health insurance merely pays medical providers for services rendered or reimburses the policyholder for medical expenses. "Medical insurance" is a far more apt term than "health insurance."

¹²⁰ Kelly Blue Book Co. is an Irvine, California-based vehicle valuation and automotive research company founded in 1918 as a car dealership that evolved into a publisher of a popular vehicle valuation guide that is available electronically. Acquired by AutoTrader.com in 2010, it provides valuations of used vehicles based on sales data. The hypothetical 2003 Toyota Corolla of the example (with 115,000 miles, standard features, and good condition) has a trade-in value range of \$1,426-\$2,073 according to the Kelley Blue Book website. The extremely inflated claim of this hypothetical might even permit the insurer to assert fraud for "false swearing" of a proof of loss. *See* KELLY BLUE BOOK, <https://www.kbb.com> (last visited March 7, 2019).

In what we term a “straight” first party insurance claim,¹²¹ this type of insurer conduct, so long as roughly reasonable,¹²² is not worrisome. The general law of bad faith and fair claims handling still applies but the roles of the straight first party insurer and liability insurer (either a true liability insurer or a substitute such as a UM/UIM carrier) are different. In the case of the car destroyed by fire, there is no pending liability claim and no risk of an excess verdict against the policyholder. Perhaps more important, the comprehensive coverage component of auto insurance was designed for a different purpose than the UM/UIM component of the policy, as reflected in the origin, purpose and evolution of the latter coverage.

If UM/UIM insurers are not required to respond to liability claims as would a tortfeasor’s own liability insurer, an insurer would owe its UM/UIM policyholder only compensation for physical injury to a vehicle and medical insurance – the two first-party coverages provided in a standard auto insurance policy. But it is agreed that a UIM insurer must consider the policyholder’s lost income, pain, and suffering in calculating the fair value of the claim. These are third party liability damages and not first-party

¹²¹ By a “straight” first-party claim, we mean a claim seeking coverage under an insurance provision that was designed to provide what might be termed “pure” first-party coverage – an agreement between policyholder (the first party) and the insurer (the second party) for the insurer to pay the policyholder the value of property lost, damaged, or destroyed by a peril within the coverage provided by the policy. But as previously noted, UM/UIM coverage is a hybrid. It is first-party in the sense that it is purchased by the policyholder, but it is third-party in that it provides additional liability insurance for the tortfeasor in which the UM/UIM insurer steps into the shoes of the tortfeasor’s insurer. Like liability insurance, recovery is available only if the claimant prevails in its tort claim and the available damages covered include damages resulting from a lawsuit rather than merely injury to physical property.

¹²² For example, if the destroyed vehicle were a 2015 Tesla Model S P90D four-door sedan, valued at between \$48,275 and \$55,780 (*See* KELLY BLUE BOOK, <https://www.kbb.com> (visited March 7, 2019)), with 25,000 miles, standard equipment, and very good condition, rather than a 2003 Toyota Corolla, the policyholder’s claim would appear to be very reasonable, making any significantly lower counteroffer by the insurer presumptively unreasonable. Correct resolution of a dispute would turn on particularized facts such as specific aspects of the vehicle that might increase or decrease value.

damages. Although lost income can be subject to insurance, it is typically the province of disability insurance. And it is widely held among scholars that first-party pain and suffering insurance does not exist.

These factors strongly support our analysis that the hybrid coverage of UM/UIM insurance should address claims valuation from a third-party perspective while addressing issues of sales, marketing and billing from a first-party perspective. Underwriting would involve a mix of first and third-party considerations with particular emphasis on the latter. Pricing UM/UIM insurance coverage involves estimating the degree to which UM/UIM insurers will be paying their own policyholders (who, it must be remembered, paid for this coverage and are not asserting a gratuitous entitlement) for injuries inflicted by inadequately insured tortfeasors.

An even stronger argument for the third-party perspective stems from the simple logic and historical purpose of UIM insurance. The UIM insurer is acting as if it were the insurer that provided the adequate insurance the tortfeasor should have possessed. The UIM insurer is not only entitled to avoid payment if the UIM policyholder is liable for the accident (a financial benefit for the UIM insurer in that it may pay nothing even when its policyholder is catastrophically injured) but also must value the claim as would a liability insurer obligated to protect its policyholder from a judgment in excess of policy limits.

Applying the third-party perspective to UM/UIM insurers is an arguable detriment to the insurer because this prevents it from deciding not to pay simply because it has a single opinion supporting non-payment that can be used as a shield against the opinions of treating physicians or other medical professionals.¹²³ A liability insurer, even if persuaded by its doctor's

¹²³ We want to continue to be clear that we think such self-serving preference for a single valuation providing economic benefit in the face of multiple contrary valuations requiring larger payment usually will be sufficiently unreasonable to constitute bad faith even according to a first-party approach or a "fairly debatable" standard. A low valuation in and of itself – even if provided by a physician – is not a "fairly" debatable ground for refusing to give credence to contrary evidence. Some degree of compromise is necessary to meet the requirement of giving "equal consideration" to the rights of the policyholder. If an insurer is going to legitimately embrace a single opinion it prefers, because it means paying less, the insurer should be required to demonstrate not only that the opinion it prefers has a reasonable basis but that contrary opinions are unreasonable.

opinion and skeptical of the opinions of other doctors or the claimant's reports of pain, must consider the possibility that a judge or jury will find the evidence favoring the claimant to be more persuasive.

Insurers may complain that this requires insurers to place a higher value range on claims because they could not embrace only damage-minimizing evaluations of a claim (such as may be provided by their own retained experts) but would be required to balance them against the damage-increasing views of treating physicians or experts retained by the claimant. Forced to consider the possibility that a trial could result in a damage assessment in excess of tortfeasor policy limits (defined to include UM/UIM limits as well), the insurer would be limited in its freedom to quibble over the value of a claim or to resolve disputes in its own favor when evidence of injury is mixed or conflicting.

This would logically have some hydraulic effect in the direction of prompting larger and swifter settlement offers and payments by UM/UIM insurers. Where an insurer must worry about an excess verdict harming the policyholder and subjecting the insurer to liability for the amount of the excess verdict, this will prompt most insurers not to quibble much about claims that pose a risk of such excess judgments even if claims professionals think that the "real" value of the claim is somewhat lower. As a result, the insurer with a true third-party liability insurer will err on the side of caution, which at the margin will increase the amounts paid to avoid this risk.

By contrast, the insurer with a pure first-party perspective that does not face the actual threat of an excess verdict will be willing – in our view, unduly willing – to "roll the dice." If a court ultimately disagrees with the insurer's lower valuation, the insurer merely pays the difference between its preferred valuation and that of the policyholder, plus some prejudgment

Unless the insurer can shoulder this burden, it should be attempting to resolve the discrepancy in fairness to the policyholder – even when using a first-party approach. For example, if after total destruction of a building due to fire, there was policyholder estimate of replacement cost of \$300,000 by three licensed contractors and an insurer appraisal of the loss at \$150,000, the insurer would (absent extenuating circumstances such as proof of fraud) be acting unreasonably if it took the position that the amount of loss was \$150,000. Giving equal consideration to the rights of the policyholder must at a minimum mean that an insurer cannot simply embrace the valuation it prefers and reject contrary valuations, particularly when there is only a single valuation supporting the insurer's position.

interest. The insurer's first-party incentive is to be less generous in all but the clearest cases. By contrast, the third-party liability insurer has sufficient fear of facing excess judgment payments or a bad faith or statutory claim that it will be more generous at the margin.

We have seen de facto demonstration of this dynamic frequently in real world UM/UIM cases. The underinsured tortfeasor's insurer may, for example, have limits of \$25,000 and pay them relatively quickly in response to claimant medical bills, pain, or lost work of any magnitude, at least in cases where liability is clear. The injured policyholder then turns to its UM/UIM carrier, which has \$100,000 or more policy limits, only to find that the UM/UIM insurer – his or her own insurer – takes the position that the policyholder victim has been fully compensated by the tortfeasor's \$25,000 payment or is entitled to only a few thousand dollars more in compensation. We think this does not reflect a rash of auto injuries falling in the \$25,000-\$35,000 range but rather reflects the differing orientations of a true third-party liability insurer and a first-party insurer, the latter having both greater incentive and greater leeway to nickel-and-dime the policyholder.

Under our approach, UM/UIM insurers would be required to fully realize their obligations to act like liability insurers required to protect a policyholder rather than property insurers seeking to hold the line on repair costs and avoid betterment. This will probably mean some increase in benefits paid to policyholders – as well as some increase in premiums as the cost of providing more representative claims settlements to policyholders is spread through the auto insurance risk pool. This is a small price to pay for better aligning the interests of UM/UIM insurers with those of their policyholders and moving closer to full compensation for policyholder victims of vehicular collisions.¹²⁴ Whatever small pressure this may place

¹²⁴ When obtaining substantial insurance payments, collision victims are almost never fully compensated for injuries suffered in an automobile collision, particularly if defendants and insurers are resistant to payment. Even when the insurer offers adequate compensation without significant resistance, the victim is required to expend time, energy, at least some money (e.g., photocopies, records) and the overall inconvenience of making a claim, all things that would have been avoided in the absence of the collision. Although there may be relatively swift informal resolution, this may be the result of the victim failing to push hard enough for full compensation. Where informal resolution fails and the victim sues for relief, the costs of claim presentation increase, often without adequate payment of counsel fees and similar litigation costs, which may not be awarded or may be awarded only at a level lower than what was spent or sought.

on premiums or profits is more than outweighed by creating a vigorous incentive for resolving UM/UIM claims fairly and expeditiously without undue wrangling (that may descend to chiseling) and delay.¹²⁵

VIII. CONCLUSION: UM/UIM INSURERS SHOULD ACT AS LIABILITY INSURERS IN THE CLAIMS PROCESS

The current approach of most insurers has the unfortunate impact of allowing insurers to treat policyholders poorly so long as the insurer can articulate a single non-ludicrous factor supporting its claim denial or lowball settlement offer. Imposing true third-party liability insurer obligations properly aligns the interests of the UM/UIM insurer and its policyholder, and vindicates the judicial system's public policy interest in having tort claims involving uninsured or underinsured motorists work in the same manner as cases in which the tortfeasor has sufficient liability insurance. Whether acting as a "front line" auto liability insurer or as a UM/UIM insurer, insurance companies should be adequately incentivized to make reasonable settlement decisions.

Unless UM/UIM carriers are held to the same standard as ordinary tortfeasor insurers, UM/UIM carriers lack sufficient incentive to act properly. Without this incentive, a UM/UIM insurer is more likely to, without judicial correction, engage in dissembling, foot-dragging, and an unrealistic approach to the case that includes a one-sided, self-serving view of the evidence that would never be done by a reasonable ordinary auto liability insurer facing the risk of an excess judgment.

Under the regime we propose, UM/UIM insurers will have greater incentive to treat policyholder claims more favorably and accord higher

¹²⁵ In addition to likely increasing insurer evaluations and payments, requiring UM/UIM insurers to assume the role of tortfeasor liability insurers will also likely save logistical costs in that it will encourage swifter settlements with less investment in disputing. Although these will probably be more generous payments because of the incentives created as a result of adoption of the liability insurer identity (which we find a good thing in that we think it will result in reduced chiseling of policyholder victims while insurers presumably will still fight fraudulent or inflated claims), the net costs to insurers may be lower overall. The funds paid to claims personnel, third-party administrators, investigators, expert witnesses, examining physicians, and defense counsel are substantial enough that even a small reduction may exceed any increase in funds paid to policyholders.

valuations to their claims. This means increased incentive to pay more than exists today and also means that UM/UIM policyholders will more often be paid policy limits or at least more significant payments by their insurers, which in turn will reduce the amount of bad faith claims against UM/UIM insurers.

Larger payments to victims are not “wasted” money but instead mean policyholder collision victims receive closer to adequate compensation¹²⁶ that provides for recovery as well as other economic benefits as health care professionals get paid, injured persons heal, employees return to work, and fewer resources are spent on litigation.¹²⁷ In fact, there may well be insurer savings in this approach. It is far cheaper for insurers to properly value a claim faster and either pay or litigate as needed. Spending more money in the claims process or in defense of a claim by one’s own policyholder is not helping insurer or policyholder.

We suspect that when the costs and benefits of requiring UM/UIM insurers to fully adhere to the third-party model are netted out, benefits outweigh the costs.¹²⁸ To be sure, the costs may fall disproportionately on

¹²⁶ We say “closer to adequate” compensation because in many UM/UIM situations, the collision victim is never made whole due to the limits of both tortfeasor insurance and the policyholder’s own UM/UIM policy limits. For example, if the policyholder becomes a paraplegic after having been rear-ended by a Ford F-150 truck with \$25,000 policy limits and the policyholder has UM/UIM policy limits of \$100,000 per person/\$300,000 per accident, there is clearly not enough liability insurance to provide adequate compensation to this catastrophically injured policyholder. The policyholder’s medical and disability insurance will help, as will government benefits. But at the end of the day, this poor victim will simply never receive an amount equal to the extent of injuries and damage.

¹²⁷ There will, of course, remain disputes. But we expect fewer disputes under a regime where insurers have greater motivation to accommodate rather than take aggressively defensive positions that in turn incentivize litigation by UM/UIM policyholders.

¹²⁸ This is not to say that under a more policyholder friendly regime, there will not be abuses. For example, insurers frequently complain that UM/UIM claimants are incentivized to increase the settlement value of their cases by incurring excessive or exorbitantly priced medical treatment, which is often provided on a “lien” basis in which the medical treatment providers do not attempt to make contemporaneous collection of the bills but instead seek to collect from a resulting settlement or judgment against the UM/UIM

UM/UIM insurers, who will in turn increase premiums – by what we suspect is a modest amount in light of the overall economic picture. More important, if there is a trade-off, we think it one worth making so long as premiums do not dramatically increase.

In our view, a rational policyholder is willing to pay higher premiums for UM/UIM coverage in return for greater assurance that, if injured by an inadequately insured driver, the policyholder will obtain as much from its own insurer as it would have had the tortfeasor had sufficient insurance. It is more important for the policyholder to receive better compensation when faced with injury than to have saved the far smaller gain of reduced premiums traded for a dicey approach to coverage when needed. In addition, both the policyholder and the insurer will gain from the likely reduced transaction costs of reduced haggling over claim valuation and reduced litigation against the UM/UIM insurer.

The hybrid nature of UM/UIM insurance continues to create confusion over the apt role of the UM/UIM insurer in responding to claims. A proper understanding of the history, purpose, and function of UM/UIM coverage requires that these insurers fully assume their proper role as additional liability insurance of a tortfeasor. Courts should adopt this view with sufficient clarity so that UM/UIM insurers will follow this approach rather than erecting undue barriers to adequate compensation for their policyholders victimized by uninsured and underinsured drivers.

insurer. Unless settlements or judgments are large, this may leave little net compensation to the policyholder after payment of attorney fees and medical bills.

Insurers thus complain with some justification that some segment of UM/UIM litigation is unduly driven by attorneys. But to the extent this is true (insurers making this criticism tend to overlook that attorneys would not be prompted to pursue bad faith and unfair claims handling cases if insurers did not make coverage decisions that attorneys think a jury would regard as unreasonable), it should in our view be attacked on a case-by-case basis rather than by adopting a construct (the first-party role, often made worse by the view that even modest support for a lower valuation makes the claim “fairly debatable”) that runs counter to the avowed purpose of UM/UIM insurance and systematically disadvantages policyholders.

A USER'S GUIDE TO THE RESTATEMENT OF THE LAW, LIABILITY INSURANCE

JAY M. FEINMAN*

At its 2018 Annual Meeting, The American Law Institute ("ALI") completed nearly a decade's worth of work on the Restatement of Torts Third: Liability for Economic Harm, marking the occasion with a celebratory breakfast. Following the same breakfast, marking a drafting process of equal duration, the ALI approved the Restatement of the Law, Liability Insurance ("RLLI"). However, the approval of the RLLI was a bit belated. The Restatement's approval was deferred for a year from the 2017 Annual Meeting, largely because of opposition from insurance industry interests.

Some Restatements, such as the Economic Harm portion of the Torts Restatement, receive little attention outside the ALI during their drafting and from anyone other than lawyers and courts following publication. The RLLI is among the smaller number of Restatements that attract unusual attention from interests outside the normal ALI process,¹ in a way that can be fairly characterized as political, in the non-pejorative sense that it involves the authoritative allocation of values.²

Most of the outside attention to the RLLI was spurred by insurance industry interests. For example, Eric Dinallo, former New York Superintendent of Insurance, and his colleague, Keith Slattery, of the Debevoise & Plimpton law firm, were retained by the National Association of Mutual Insurance Companies to prepare a white paper critiquing the Restatement.³ The Property Casualty Insurers Association of America, the National Conference of Insurance Legislators, several insurance commissioners, and six governors weighed in, all in opposition to either elements of the Restatement or the entire project. The basis for opposition

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¹ 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).

² For other examples *see id.* at 9, 24.

³ ERIC J. DINALLO & KEITH J. SLATTERY, ALI'S RESTATEMENT OF THE LAW LIABILITY INSURANCE: EXECUTIVE SUMMARY OF REGULATORY CONSIDERATIONS (Feb. 17, 2017), https://www.namic.org/pdf/insbriefs/ali_execsum.pdf.

ranged from the lack of previous knowledge of the project,⁴ to the claim that it represented a “departure from well-settled legal principles,”⁵ to the fear that it would “negatively affect our states’ economic development opportunities by creating uncertainty and instability in the liability insurance market.”⁶

The U.S. Chamber of Commerce Institute for Legal Reform also attacked the Restatement, even though the Chamber’s membership includes more corporate policyholders than insurers,⁷ as did the Defense Research Institute,⁸ most of whose members represent policyholders, though perhaps this is less odd given that they are selected and paid by insurers. And several state legislatures enacted statutes that either directly referenced the Restatement or were attempts to undercut its application.⁹

Lawyers and judges routinely look to the ALI’s Restatements of the Law as reference works for the state of the law and for arguments and analysis about the direction the law should go. Yet the controversy reflected in the complex intellectual and political history of the RLLI is likely to continue following its final adoption, and the issues raised by the controversy about the RLLI frames its use by lawyers and judges in interesting ways. This article takes account of the issues raised in the drafting process to inform the use of the Restatement going forward. The criticisms of particular sections of the RLLI will be discussed as those

⁴ Letter from Dean L. Cameron, Dir., Idaho Dept. of Ins., to Richard Revesz, Dir., Am. Law. Inst. (Apr. 5, 2017) (on file with author). This is odd, given that one would have assumed that regulators would have become aware of the project sometime in its then six year history.

⁵ Letter from Randi Cigelnik, Senior Vice President, Corp. Sec’y, and Gen. Couns., Prop. Cas. Insurers of Am. to Richard Revesz, Dir. Am. Law. Inst. 2 (May 1, 2017) (on file with author).

⁶ Letter from Governors of S.C., Iowa, Me., Neb., Tex., and Utah, to Hon. David F. Levi, President, Am. Law. Inst. (Apr. 6, 2018) (on file with author).

⁷ E.g., *ALI Should Stick to Its Mission—Clarifying the Law, Not Changing It*, INST. FOR LEGAL REFORM (Jan. 18, 2018), <https://www.instituteforlegalreform.com/resource/ali-should-stick-to-its-mission-clarifying-the-law-notchanging-it>.

⁸ Letter from John E. Cuttino, Def. Res. Inst. President, to Richard L. Revesz, Am. Law. Inst. Dir. (May 5, 2017) (on file with author).

⁹ See *infra* notes 66-67 and accompanying text.

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sections are raised, argued, and applied in litigation. But the criticism suggests that two general points need to be taken into account in using the RLLI:

- What is a Restatement?
- Whose Restatement is this?

I. WHAT IS A RESTATEMENT?

The RLLI is, of course, a Restatement. But critics question whether it really is a Restatement—that is, whether it observes the strictures of what a Restatement is supposed to be and supposed to do. The core of the criticism is that the RLLI departs from settled law. The criticism manifests in several ways.

First, some critics outside the ALI argued that the Restatement is improper in that it usurps the legislative prerogative, particularly where its terms extend beyond decided or settled law in a jurisdiction. Senator Jason Rapert of Arkansas, president of the National Conference of Insurance Legislators, stated, “NCOIL will not allow the constitutionally protected legislative prerogatives in each state to be infringed upon by an unelected body. Legislative action includes both the passage as well as the consideration and non-passage of bill language.”¹⁰ Six governors signed a letter to the ALI expressing opposition to the RLLI, essentially tracking insurance industry arguments, asserting that the proposed Restatement constituted an “implicit usurpation of state authority [that] may require legislative or executive action.”¹¹

This criticism is as puzzling as it is wrong. As a private organization, the ALI—an “unelected body”—cannot make law, so it is hard to see how it infringes on the legislative prerogative. If the argument is about the judicial adoption of the elements of the Restatement, then it is empirically wrong. Most of the Restatement derives from common law

¹⁰ Press Release, Tom Considine, NCOIL CEO, NCOIL Statement on ALI ‘Restatement’ of Liability Insurance Law (May 25, 2018), <http://ncoil.org/2018/05/25/ncoil-statement-on-ali-restatement-of-liability-insurance-law/>. For formal action by the NCOIL in response to the RLLI, *see* MODEL ACT CONCERNING INTERPRETATION OF STATE INSURANCE LAWS (NCOIL 2019), <http://ncoil.org/wp-content/uploads/2019/07/ALI-Restatement-Model-7-13-19.pdf>.

¹¹ Letter from Governors to Judge David F. Levi, *supra* note 6.

principles that have neither been preempted nor considered by legislatures.¹² Of course, a legislature could make law on these topics if it chose to do so, but in the absence of legislative action, it is the courts' task to determine what the law is, guided by the Restatement to the extent that they choose

This is familiar. Restatements traditionally address areas long governed by common law. Over time, statutes are enacted to regulate portions of those areas. In torts, for example, states have enacted statutes on areas previously governed by judicial decision, including social host liability,¹³ punitive damages,¹⁴ comparative fault,¹⁵ and sovereign immunity;¹⁶ and, by federal law, limitations on the liability of gun manufacturers.¹⁷ Statutes govern within their terms, and the common law and therefore the Restatements are residual, controlling the rest of the subject.

More serious was the criticism that the ALI produces two kinds of documents: Restatements and Principles. Because Restatements carry special weight in the courts, they should be restricted to concise expressions of well-settled law. Principles are less well established and less highly regarded and thereby less bound by settled law and may suggest changes in the law. For example, "[r]estatements are designed to contain clear formulations of common law and reflect the law as it currently stands or might appropriately be stated by a court. Principles, on the other hand,

¹² The RLLI notes a few areas in which some states have adopted relevant statutes. RESTATEMENT OF THE LAW LIAB. INS., § 3 Reporters' note d (AM. LAW INST. 2018) ; *id.* § 7 Reporters' notes c, e, f, & g; *id.* § 9 Reporters' notes b, f; *id.* § 17 Reporters' note a; *id.* § 24 Reporters' note k; *id.* § 35 cmt. f, Reporters' notes c, e, & f; *id.* § 41 Reporters' note c; *id.* § 42 Reporters' note b; *id.* § 47 cmt. h, Reporters' note c; *id.* § 50 Reporters' note b.

¹³ *E.g.*, N.J. STAT. ANN. § 2A:15-5.6 (West 2019).

¹⁴ *E.g.*, N.J. STAT. ANN. § 2A:15-5.9 (West 2019).

¹⁵ *E.g.*, N.J. STAT. ANN. § 2A:15-5.1 (West 2019).

¹⁶ *E.g.*, N.J. STAT. ANN. § 59 (West 2019).

¹⁷ 15 U.S.C. §§ 7901-7903 (2012).

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are aspirational, promoting changes that academics identify.”¹⁸

From its founding in the 1920s, Restatements have been the bulk of the ALI’s work. Beginning in the 1970s, and accelerating more recently, the Institute has also engaged in Principles projects. The consistent distinction between the two types of projects is that the former deals with common law and the latter deals with other forms of law and practice. For example, the first Principles project, “Principles of Corporate Governance: Analysis and Recommendations,” included rules “to be implemented by the courts, some by legislatures, and some by corporations themselves.”¹⁹

In 2014, following the appointment of Richard Revesz as Director, the ALI’s Council formally distinguished the nature of its projects.²⁰ As clarified:

Restatements are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a

¹⁸ Dinallo & Slattey, *supra* note 3, at 1; *see also ALI Should Stick to Its Mission – Clarifying the Law, Not Changing It*, U.S. CHAMBER INST. FOR LEGAL REFORM, <https://www.instituteforlegalreform.com/resource/ali-should-stick-to-its-mission-clarifying-the-law-not-changing-it> (last visited Aug. 27, 2019).

¹⁹ PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, President’s Foreword, at XXI (AM. LAW INST. 1994); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Director’s Foreword, at XV (AM. LAW INST. 2002) (“the Institute decided to write ‘Principles,’ rather than a ‘Restatement,’ because much of the relevant law is statutory, and what seemed to be needed was guidance to legislatures as well as to courts. Restatement provisions often reflect value choices, but ‘Principles’ seemed the right title for a project that starts with carefully considered assumptions about the best interests of children, fairness to divorcing wives and husbands, and the legitimate economic claims of unmarried partners.”).

²⁰ AM. LAW INST., CAPTURING THE VOICE OF THE AM. LAW INST.: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK (rev. ed. 2015), https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf. [hereinafter CAPTURING THE VOICE].

court. . . .

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law.²¹

This distinction embodies the traditional role of Restatements. In its early years, the ALI addressed exclusively common law issues. The first series of Restatements included Agency, Contracts, Property, and Torts.²² Early Principles projects included Corporate Governance, and Family Dissolution, and current Principles projects include Government Ethics, Policing, and Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities.²³

The distinction between Restatements and Principles is structural. Critics of the RLLI also argued that even accepting the structural distinction between a Restatement and a Principles project, Restatements ought to observe a particular function and the RLLI failed to do so. As stated by the Defense Research Institute, “the voice of the defense bar,”

Reporters are tasked to identify the majority rule and should only diverge from it if recent trends in the case law have shown the majority rule to be “outmoded or undesirable.” Respectfully, in

²¹ *How the Institute Works*, AM. LAW INST., <https://www.ali.org/about-ali/how-institute-works/> (last visited Sept. 8, 2019); *see also* CAPTURING THE VOICE, at ix (“Principles do not purport to restate but rather pull together the fundamentals underlying statutory, judicial, and administrative law in a particular legal field and point the way to a coherent (a principled, if you will) future.”).

An example of a court-directed Principles project in an emerging area of law is Principles of the Law, Software Contracts. “In light of the many percolating legal issues that pertain to the formation and enforcement of software agreements, an attempt to ‘restate’ this law would be premature.” PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS, Introduction (AM. LAW INST. 2009).

²² RESTATEMENT OF THE LAW OF AGENCY (AM. LAW. INST. 1933); RESTATEMENT OF THE LAW OF CONTRACTS (AM. LAW. INST. 1932); RESTATEMENT OF PROPERTY (1936); RESTATEMENT OF TORTS (AM. LAW. INST. 1934-39).

²³ *Past and Present ALI Projects*, AM. LAW INST., (last updated March 2019), https://www.ali.org/media/filer_public/c5/38/c5387be9-980a-4d69-af6d-ad4d4a067606/past-present-3-19.pdf.

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many instances, the black letter rules and Comments in this Restatement adopt rules that are entirely new, or have only been adopted in a handful of states, and are not in accordance with the majority rule. Furthermore, in many cases, the Reporters clearly diverge from the majority rule without demonstrating why or how the majority rule allegedly is "outmoded or undesirable."²⁴

This criticism is misguided in at least three respects. First, it resembles a simplistic originalism in its confidence in the concept of a "majority rule." Second, it fails to accurately describe what the ALI has always attempted to do in its Restatements. Third, it misrepresents the extent to which the Reporters' drafts and the resulting Restatement actually track substantial bodies of case law.

Of course, on some legal issues there are clear majority rules, where a large number of courts have considered an issue and have written opinions that clearly state a consistent rule. For example, Section 27 of the RLLI permits the insured to assign to a tort claimant the insured's cause of action against an insurer for breach of the duty to make reasonable settlement decisions. This is a position that the Reporters note is the conclusion courts have reached in every state that has addressed the issue except for one.²⁵ But that amount of authority and degree of agreement is not always, or perhaps even often, the situation.

For example, in an article for a symposium on the RLLI sponsored by the Rutgers Center for Risk and Responsibility, Jeffrey Thomas described the difficulty of stating a majority rule on the issue the RLLI characterizes as the duty to make reasonable settlement decisions.²⁶ Thomas focuses on the thirty states that use one of the two principal rules for determining the scope of such a duty: one rule requires an insurer to disregard policy limits in making settlement decisions, and the other rule requires an insurer to give equal consideration to the insured's interests in

²⁴ Letter from John E. Cuttino, *supra* note 8.

²⁵ RESTATEMENT OF THE LAW LIAB. INS. § 27, Reporters' note f. (AM. LAW. INST. 2018) (citing *Dillingham v. Tri-State Ins. Co. Inc.*, 381 S.W.2d 914, 919 (Tenn. 1964)).

²⁶ 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 (2015).

settling as to its own.²⁷ He reports that thirteen states use the equal consideration rule without reference to the disregard the limits rule, and eight states use only the disregard the limits approach. From this, one might conclude, as some commentators do,²⁸ that the former is the majority rule. But nine, and perhaps eleven states, use a blended approach, supplementing equal consideration with disregard the limits. If those states are added to the eight jurisdictions that use the pure disregard the limits approach, one instead might conclude it is the majority rule.

Further complications arise. In determining a majority rule, do size, the extent of insurance activity, and reputation of courts matter? Equal consideration states include Connecticut, Illinois, and New York. California and Florida are blended states. Massachusetts, New Jersey, and Pennsylvania use disregard the limits. Does how the courts use the rule matter?

However, stating a rule with approval is much different than applying that rule. Courts 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.²⁹

Finally, there is the issue of change over time. As the ALI notes in its style manual, “[i]f 30 jurisdictions have gone one way, but the 20 jurisdictions to look at the issue most recently went the other way, or refined their prior adherence to the majority rule, that is obviously important as well.”³⁰

In addition to the complexity of determining a majority rule, the function of a Restatement is and always has been broader; a Restatement is about weighing, not counting.³¹ Restatements “aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.”³² The “might appropriately be stated by a court” is captured in an admonition

²⁷ Other states use other rules or more complex variations. *Id.* at 257-260.

²⁸ *See id.* at 257 n.163.

²⁹ *Id.* at 280-81.

³⁰ CAPTURING THE VOICE, *supra* note 20, at 5.

³¹ Feinman, *supra* note 1, at 16.

³² CAPTURING THE VOICE, *supra* note 20, at 4. (emphasis added).

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from former director Herbert Wechsler, prominent on the wall of the conference room in ALI headquarters in Philadelphia in which Restatements are debated: “We should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.”³³ The Restatement drafting process should consider four elements, and “the relative weighing of these considerations [is] art and not science.”³⁴ The majority rule, when one can be determined, receives great weight. But also relevant are “trends in the law,” “what specific rule fits best with the broader body of law and therefore leads to more coherence in the law,” and “ascertain[ing] the relative desirability of competing rules.”³⁵

In its quest to “ascertain the relative desirability of competing rules,” the RLLI almost always follows a clear majority rule where there is one.³⁶ The Comments and the Reporters’ Notes document where this occurs. Sometimes the RLLI follows a majority rule and clarifies it; one notable innovation is to change the terminology from an insurer’s “duty to settle” a claim against its policyholder where the policyholder is at risk of an excess judgment to a “duty to make reasonable settlement decisions.”³⁷ The latter better describes the insurer’s duty, which is not to settle automatically but only to act reasonably, considering the policyholder’s interests as well as its own, in deciding or declining to do so. And where there is not a majority rule, the Restatement discusses alternatives and arrives at a considered judgment about a desirable rule.

There is nothing new in this process. One of the first Restatements, the original Restatement of Contracts, included Section 90 on enforcement of a promise on the basis of detrimental reliance rather than consideration.³⁸ That was an innovation that surely would not have been considered to be a majority rule, but was included because the drafters and the ALI, at the urging of Professor Corbin, recognized an emerging body of case law on

³³ *Id.* at 6.

³⁴ *Id.*

³⁵ *Id.* at 5-6.

³⁶ Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767, 768 (2017).

³⁷ RESTATEMENT OF THE LAW LIAB. INS. § 24, Reporters’ note b. (AM. LAW. INST. 2018).

³⁸ RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. LAW. INST. 1932).

detrimental reliance.³⁹ The key provisions on liability for a defective product in both the second and third Restatements of Torts arguably were not majority rules, but both were included and had enormous influence in the courts.⁴⁰

The debate on particular provisions in the RLLI, both black letter and comments, included much discussion of whether the provisions were supported by majority rules. For example, from high-visibility, industry-supported attacks on the project:

- “The proposed Restatement sets forth a revision of insurance law that dramatically departs from the law.”⁴¹
- “[The Reporters] view themselves as visionaries not bound by the common law method or its principles which has been the backbone of the ALI’s Restatement projects over the many past decades.”⁴²

The Reporters responded:

All of the rules adopted by the Restatement are grounded in existing case law. In that sense, none of them are new, and certainly none are radical. Most of the rules in the Restatement have in fact been adopted by a majority of the U.S. jurisdictions that have considered them. The Restatement follows a minority rule in only a few instances and only when the minority rule is better reasoned and will likely lead to better consequences than the alternatives. This is a common practice among ALI Restatement projects.⁴³

In the drafting process, some sections raised more controversy than others, on both the issue of whether there was adequate case law support for the positions the Restatement took and on the ultimate policy question

³⁹ GRANT GILMORE, *THE DEATH OF CONTRACT* 67–71 (Ronald K. L. Collins ed., 2d ed. 1995).

⁴⁰ See Feinman, *supra* note 1, at 22.

⁴¹ DINALLO & SLATTERY, *supra* note 3, at 1.

⁴² George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 GEO. MASON L. REV. 635, 652 (2017).

⁴³ Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767, 768 (2017).

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about “the relative desirability of competing rules.”⁴⁴ No doubt this type of controversy will continue, and the debate will be about the support for individual provisions more than the RLLI as a whole. Litigation, after all, is about the application of rules to facts, so the particular rules are key. But debate also is likely to continue about the process by which the Restatement was drafted. Figuring into that debate is an important issue: Whose Restatement is this?

II. WHOSE RESTATEMENT IS THIS?

The Restatement of the Law, Liability Insurance is, of course, a product of The American Law Institute. The RLLI stands as a product of its own, but a great deal of its influence and authority will be shaped by the fact that it is an ALI product.

The ALI was founded in 1923, following a report of a "Committee on the Establishment of a Permanent Organization for the Improvement of the Law."⁴⁵ The ALI aimed to resolve uncertainty in the law that “stemmed in part from a lack of agreement on fundamental principles” and complexity in the law that resulted from jurisdictional variation.⁴⁶ More ambitiously, it aimed “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work.”⁴⁷

⁴⁴ See *supra* note 35.

⁴⁵ *About ALI*, AM. L. INST., <https://www.ali.org/about-ali/>.

⁴⁶ *Id.*

⁴⁷ *How the Institute Works*, AM. LAW INST., <https://ali.org/about-ali/how-institute-works/>.

What aspirations lay behind the organizational efforts of legal elites has been disputed. N.E.H. Hull argued that the driving force behind the creation of the ALI was “reformist progressive-pragmatists who viewed law as the means to achieving social ends, believers in the power of the legal profession to bring about positive change.” N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 83 (1990). A more critical view casts the early ALI and its Restatements as “perhaps the high-water mark of conceptual jurisprudence They took fields of living law, scalded their

Today, the ALI aptly describes itself as “the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.”⁴⁸ Its regular membership is limited to 3,000 members, and it is governed by a self-perpetuating council of judges, practitioners, and academics.⁴⁹ At any time it has a dozen to twenty projects in process, some in its traditional areas of expertise in common law subjects, and others in areas of current interest in which the ALI sees itself as a useful forum for debate.

The American Law Institute’s liability insurance project began as the Principles of the Law of Liability Insurance in 2010. When the ALI clarified the distinction between Restatements and Principles in 2014, the project was recharacterized as a Restatement.⁵⁰ The Principles-turned-Restatement went through the long-established ALI drafting process. Drafts are produced by the project reporters: leading insurance law scholars Professor Tom Baker of the University of Pennsylvania Law School was Reporter and Professor Kyle Logue of the University of Michigan Law School, Associate Reporter. The drafts are vetted by four groups: Advisers, the Members Consultative Group, the Council, and the membership present at the Annual Meeting.⁵¹

A project’s Advisers are both members of the ALI and non-members, selected by the Institute’s Director “for their particular knowledge and experience of the subject or the special perspective they are able to provide.”⁵² Those with “particular knowledge and experience” include academics who work in the field and lawyers and judges who may provide useful perspectives. Insurance law practice ordinarily divides into insurer-side and policyholder-advocates. Both groups were well

flesh, drained off their blood, and reduced them to bones.” LAWRENCE M. FREIDMAN, *A HISTORY OF AMERICAN LAW* 676 (2d ed. 1985).

⁴⁸ *About ALI*, AM. LAW INST., <https://www.ali.org/about-ali/>.

⁴⁹ *2017-2018 Annual Report*, AM. LAW. INST. 3, https://www.ali.org/media/filer_public/91/2e/912ed8da-ac5b-4763-806d-ff2b30b91ad3/2017-2018_annual_report.pdf.

⁵⁰ *RESTATEMENT OF THE LAW LIABILITY INSURANCE* intro. note, ix (AM. LAW INST., Discussion Draft 2015).

⁵¹ *How the Institute Works*, AM. LAW. INST., https://www.ali.org/media/filer_public/91/2e/912ed8da-ac5b-4763-806d-ff2b30b91ad3/2017-2018_annual_report.pdf.

⁵² *Project Life Cycle*, AM. LAW INST., <https://www.ali.org/projects/project-life-cycle/>.

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represented, often by persons who were not ALI members. Thus, the American Insurance Association, Allstate, State Farm, Dentons, and Aon had seats at the table, as did the leading insurance consumer organization and practitioner policyholder advocates. Jeffrey Stempel characterizes the Advisers group as “evenly balanced” among insurer attorneys or executives, policyholder attorneys or advocates, professors, and judges.⁵³

Advisers are invited to participate; the larger Members Consultative Group consists of ALI members who have a special interest in the subject. For the RLLI, the Members Consultative Group consisted of about 150 members, who had varying degrees of participation, again including those with a range of interests and perspectives on the subject. The Council is the governing body of the ALI. Upon its approval, drafts are sent to the Annual Meeting for approval. In addition to discussion at the various meetings, both members and non-members may submit written comments, which are then available to ALI members on its website. Stempel reports that from 2014 forward,⁵⁴ 300 formal comments were submitted, about 80 percent of which were from the insurer side.⁵⁵

As one might expect with a process that extended for nine years and involved recurrent debate among four different groups and formal approval by two of them, the debate over the RLLI was extensive and intense. Portions of the RLLI went through thirty-four drafts, during which numerous changes were made, both large and small.⁵⁶ Perhaps the best illustration of the detailed and often contentious nature of the drafting process is the section on insurance policy interpretation. In early drafts, the Reporters aimed “to strike a middle ground between what are commonly referred to as the ‘liberal’ Corbin and ‘conservative’ Williston approaches to contract interpretation.”⁵⁷ They defined objectives of interpretation,

⁵³ Jeffrey W. Stempel, *Hard Battles over Soft Law: The Substantive and Political Implications of Controversy Surrounding the American Law Institute Restatement of the Law of Liability Insurance* (2018) (unpublished draft) (on file with author).

⁵⁴ Earlier comments were not retained.

⁵⁵ Stempel, *supra* note 53 (draft at 46, 28 n.64).

⁵⁶ In addition to the drafts posted on the ALI website, the Reporters prepared nineteen comparison documents, showing changes from one draft to the next, each of which includes substantial redlining.

⁵⁷ *PRINCIPLES OF THE LAW LIABILITY INSURANCE* (AM. LAW. INST. Preliminary Draft No. 1, 2011).

including “[e]ncouraging the accurate marketing of insurance policies, especially in the consumer market” and “promoting the financial responsibility of insured parties.”⁵⁸ Until quite late in the process, the Reporters offered a complex interpretation principle that established a presumption in favor of plain meaning, which would apply “unless the court determines that a reasonable person would clearly give the term a different meaning in light of extrinsic evidence.”⁵⁹ Insurer advocates strongly objected to this approach, arguing, for example, that it allowed “the insured to disregard unambiguous policy terms” in a way that could cause “market disruption.”⁶⁰ In the end, the Restatement incorporates a vanilla plain meaning rule, with the Comments and the Reporters’ Notes ambiguously suggesting modest expansion of the concept.⁶¹

The ALI process stands as its own response to many of the criticisms of the RLLI. Surely not every judgment made by the Reporters or the bodies that review, modify, and ultimately approve their work is correct. But the process is unique in debates about American law. The ALI is a unique institution in which different approaches are represented, views are heard, and documents are drafted and redrafted in an attempt to “ascertain the desirability of competing rules.”⁶²

And, as every lawyer knows, the process has been recognized. Restatements have been cited by courts tens of thousands of times. Often during the drafting process critics cited Justice Scalia’s recent critique of Restatements in *Kansas v. Nebraska*: “[M]odern Restatements . . . are of questionable value, and must be used with caution. . . . 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.”⁶³ Yet during the three terms, ending with the one in which he made the statement, the justice authored nine opinions citing Restatements, including citing newer Restatements seven times in five cases.⁶⁴

⁵⁸ *Id.* § 1.08.

⁵⁹ RESTATEMENT OF THE LAW LIABILITY INSURANCE § 3 (AM. LAW. INST., Preliminary Draft No. 1, 2015).

⁶⁰ DINALLO & SLATTERY, *supra* note 3, at 1-2.

⁶¹ RESTATEMENT OF THE LAW LIAB. INS. § 3 (AM. LAW INST. 2018).

⁶² *Supra* note. 36.

⁶³ *Kansas v. Nebraska*, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part).

⁶⁴ Richard L. Revesz, *The Director’s Letter: The American Law Institute & the U.S. Supreme Court*, THE ALI REPORTER 3

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Indeed, the controversy over the RLLI demonstrates the importance of the ALI’s work.⁶⁵ Business interests tend to make rational investments in time and money. The investment in criticizing the RLLI must be worthwhile because a Restatement matters.

III. HOW TO USE THE RESTATEMENT OF THE LAW,
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Critics of the Restatement of the Law, Liability Insurance, argue that it is not properly a Restatement, does not observe existing law as a Restatement should, and is the product of an ALI that has lost its way. Those charges are misguided. But the controversy raises issues about what lawyers and judges should do with the RLLI now that it has been adopted.

In some jurisdictions lawyers and judges will have to deal with statutes that have been or may be enacted in response to the RLLI. So far there are at least two kinds of such statute; both are poorly drafted and likely to sow disputes.

One type of statute is directed at the Restatement itself, as in Ohio: “The ‘Restatement of the Law, Liability Insurance’ that was approved at the 2018 annual meeting of the American Law Institute does not constitute the public policy of this state and is not an appropriate subject of notice.”⁶⁶

Here, the legislature declares the public policy of the state, which it has the constitutional authority to do. But what is that policy? Surely it cannot be that every principle included in the Restatement is void as against public policy. The RLLI itself cites numerous instances in which its provisions are consistent with Ohio law. Instead, the statute seems to prohibit citation to the RLLI, effectively making it “not an appropriate subject of notice.” Whether the legislature can direct the courts as to what

(2016), http://www.law.nyu.edu/sites/default/files/2016--ALI-Winter_Quarterly_Letter_0.pdf.

⁶⁵ As ALI President David Levi noted, “The occasional controversies over project drafts only highlight the continuing influence and importance of the ALI.” AM. LAW INST., ANNUAL REPORT 4 (2016-2017).

⁶⁶ OHIO REV. CODE ANN. § 3901.82 (West 2018); *see also* MODEL ACT CONCERNING INTERPRETATION OF STATE INSURANCE LAWS (NCOIL 2019), <http://ncoil.org/wp-content/uploads/2019/07/ALI-Restatement-Model-7-13-19.pdf>; H.B. 1142, 66th Leg. Assemb., Reg. Sess. (N.D. 2019).

materials the courts may consider is an issue of Ohio constitutional law. But assuming the statute is constitutional in Ohio, the RLLI becomes a treatise to be used in most of the ways described below, although one that must not be cited.

A second kind of statute aims to reverse what are presumed to be the most problematic provisions of the RLLI. For example, the Tennessee legislature has focused on interpretation and the duty to defend:

- a) A policy of insurance is a contract and the rules of construction used to interpret a policy of insurance are the same as any other contract.
- (b) A policy of insurance must be interpreted fairly and reasonably, giving the language of the policy of insurance its ordinary meaning.
- (c) A policy of insurance must be construed reasonably and logically as a whole.
- (d) An insurance company's duty to defend depends solely on the allegations contained in the underlying complaint describing acts or events covered by the policy of insurance. This subsection (d) does not impose a duty to defend on an insurance company that has no duty to defend pursuant to this Act or that has an express exclusion of the duty to defend in the policy of insurance.⁶⁷

This Tennessee statute tracks early criticism of the RLLI before it adopted a simpler version of the plain meaning rule for insurance policy interpretation. Essentially, the statute restates maxims of interpretation aiming at plain meaning. But like many such maxims, and like the concept of plain meaning itself, the statute is open-ended and somewhat contradictory. For example, what is ordinary meaning? Whose ordinary meaning – general dictionary, actual policyholder, reasonable policyholder, insurer, reasonable insurer, or someone else? Similarly, what does “reasonably” mean? According to what standard – economic rationality, common sense, consumer knowledge of insurance, specialized knowledge of insurance – or whose standard – reasonable person, reasonable policyholder, reasonable insurer? Ditto as to fairness. And what if the ordinary meaning of the policy leads to a reading that is unreasonable or unfair? The only sure consequence of such statutes is that confusion will ensue.

⁶⁷ TENN. CODE ANN. § 56-7-102 (2019).

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There will likely be few explicit statutes targeting the RLLI, and lawyers and judges will have to consider the use of the Restatement in the ordinary common law process. Given the RLLI's political history, there may be a temptation to treat all or part of it differently than an ordinary Restatement. Part of the project of criticism, especially in its late stages, seemed to aim at delegitimizing the RLLI project as a whole, so advocates could argue that its provisions ought to be given less weight as a general matter than is ordinarily accorded a Restatement. Lawyers disadvantaged by a particular section might focus on the criticism that some sections fail to represent majority rules. Lawyers arguing for expansive views of insurance policy interpretation could suggest that the plain meaning rule in section 3 represents as much a capitulation to industry interests as a considered judgment of the ALI.

Or the RLLI could just be regarded as an ordinary Restatement and used by lawyers and courts the way other Restatements are used.

Beginning law students confronted with Restatement rules in casebooks often regard the black letter as authoritative embodiments of the law. Of course it is not that, in part because the Restatement is not itself law, and in part because the black letter is only part of a Restatement. The black-letter rule is a concise and simple rule, principle, or statement of law by the ALI.⁶⁸ The accompanying Comment, also officially adopted by the ALI, explains "the background and rationale of the black letter and the details of its application" and identifies "the competing considerations encapsulated in the black-letter provision."⁶⁹ The Reporters' Notes, although reviewed by the ALI, are the province of the Reporters and "set forth and discuss the legal and other sources relied upon by the Reporter in formulating the black letter and Comment and enable the reader better to evaluate these formulations, [] provide avenues for additional research, [and] furnish a vehicle for the Reporter to convey views not necessarily those of the Institute and to suggest related areas for investigation that may be too peripheral for treatment in the black letter or Comment."⁷⁰

As the controversy over the RLLI demonstrates, there can be dispute about whether the ALI adopted the correct rules. When the black letter, Comments, and Reporters' Notes are read together, however, each section provides a fair account of the rules, authority, and rationale.

Consider as an example Section 24, on the insurer's duty to make

⁶⁸ CAPTURING THE VOICE, *supra* note 20, at 36.

⁶⁹ *Id.* at 42.

⁷⁰ *Id.* at 45.

reasonable settlement decisions. The general principle is almost universally accepted, but throughout the drafting process there was considerable debate about the precise formulation of the black letter and comment. Some of the criticism of the Reporters' earlier drafts was incorporated. The section as adopted provides a twenty-four-page treatise on the issue. The black letter provides a rule of reasonableness and defines reasonableness.⁷¹ The comment begins by relating the rule to the broader question of the duty of good faith, referring to different approaches and explaining the Restatement's reframing of the rule from bad faith or a duty to settle to a duty to make reasonable settlement decisions.⁷² It refers to the common competing descriptions of the duty as giving equal considerations to the insured's interests and disregarding the policy limits and explains how its rule fits with those descriptions.⁷³ Then it explores the concept of reasonableness, including factors that a reasonable insurer would consider and the relevance of whether an insurer failed to make an offer or counter-offer, as distinguished from failing to accept a settlement offer.⁷⁴ The comment concludes by exploring subsidiary issues, such as the lack of duty to excess insurers or third parties.⁷⁵ Then the Reporters' Note provides extensive discussion, sources, and case-law examples for each part of the previous discussion, including noting alternative approaches that the RLLI did not adopt.⁷⁶ Particularly on issues where there is a split of authority, which often were the subject of debate during the drafting process, the note recognizes and cites sources.⁷⁷

For a lawyer in a case in which this rule is relevant, the RLLI provides both authority and a roadmap. Suppose in the course of defending its insured in a personal injury case under a policy with a \$100,000 policy limit, the insurer estimates a reasonable value of the case to be \$35,000-\$45,000. The plaintiff does not offer to settle, but the insurer offers to settle for \$5,000. The plaintiff rejects the offer, and at trial the plaintiff receives a judgment of \$150,000. Is the insurer liable for the \$50,000 excess

⁷¹ RESTATEMENT OF THE LAW LIAB. INS. § 24 (AM. LAW. INST. 2018).

⁷² *Id.* at cmt. a.

⁷³ *Id.* at cmt. c.

⁷⁴ *Id.* at cmts. d-f.

⁷⁵ *Id.* at cmts. j-k.

⁷⁶ *E.g.*, a strict-liability standard rather than reasonableness. *Id.* at Reporters' Note b.

⁷⁷ *E.g.*, on the insurer's failure to make offers or counter-offers, *Id.* at Reporters' Note f.

judgment?⁷⁸

The Restatement applies a rule of reasonableness here. The black letter sets the standard: “a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment.”⁷⁹ The comment⁸⁰ spells out the concept of reasonableness in general, and comment f. speaks specifically to the insurer’s failure to make reasonable settlement offers. That comment describes a variety of relevant circumstances making it unreasonable to fail to make an offer, including the strength of the plaintiff’s case and the size of the potential damages. It also suggests when it is reasonable to fail to make an offer, as when an insurer does so for strategic reasons such as forcing the plaintiff to reveal more about its case. And it lays out reasons that are impermissible for the reasonable insurer to consider, such as its interest in managing its portfolio of cases, as in developing a reputation as a tough bargainer. Then the Reporters’ Note describes the split of authority on this issue, giving ample citations.⁸¹

The lawyer (either lawyer, actually) can thus use the Restatement as a roadmap to analyze their case, including providing relevant authority and policy arguments. So, in one sense, the Restatement is a treatise. But some treatises have more weight than others. Today, as legal subjects have both expanded and fragmented, and the statutes and judicial decisions have proliferated, some treatises address narrower legal topics. Those treatises that aim to cover whole fields of law tend to be directed by publishers and written by groups. Once, though, author and treatise were linked in a way that conferred almost magisterial authority: Williston on Contracts; Wigmore on Evidence; Prosser on Torts. The authors of those treatises collected, sifted, analyzed, reported, synthesized, proposed, formulated, and reformulated the law.⁸² One could find fault with the treatise and disagree with its conclusions or even its entire approach, but the treatise demanded respect because the author was respected for his careful and deliberate approach to the law.

⁷⁸ *Id.* § 24 cmt. g, illus. 5.

⁷⁹ *Id.* § 24(2).

⁸⁰ *Id.* § 24 cmt. f.

⁸¹ *Id.* § 24 Reporters’ Note f.

⁸² Prosser provides the best example. *See* G. EDWARD WHITE, TORT LAW IN AMERICA 155-63 (1985).

The Restatements of the Law, including the RLLI, are at least treatises that reflect the old form. They are uniquely collective products – the Reporters’ work in part, but also the product of the deliberative process of the ALI. Like the classic treatises, Restatements command respect because of the careful and deliberate approach that produced them. And like the classic treatise authors, with over nearly a century of commentary the American Law Institute has earned its stature in the legal community. The Restatements, including the RLLI, have weight not just because of the work behind them, but also because of who is behind them. The American Law Institute and its process have gained respect and while its views do not command agreement they do merit consideration.

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