
**UNDERSTANDING INSURANCE POLICIES AS
NONCONTRACTS: AN ALTERNATIVE APPROACH TO
DRAFTING AND CONSTRUING THESE UNIQUE
FINANCIAL INSTRUMENTS**

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ABSTRACT

Insurance policies commonly are understood to be a species of standardized contracts. This Article challenges that conventional wisdom and argues that insurance policies do not actually qualify as contracts under the doctrinal and theoretical bases of contract formation. It examines the process by which insurance policies are created and sold, and measures that process against the requirements for contract formation. This Article also distinguishes insurance policies from other types of standardized contracts, such as wrap agreements, which currently are the subject of much litigation and scholarly commentary. It then explores the doctrinal and theoretical bases underlying the specialized rules that courts have developed to interpret insurance policies—rules that incorporate public policies such as ensuring that injured parties are compensated and that powerless consumers receive protection against overreaching by insurers—and explains how courts implicitly have recognized that insurance policies are not simply a type of standardized contract.

Then, in order to avoid the current problem of regulatory capture associated with the approval of policy language, this Article proposes a reform of insurance law. It advocates that an independent third party should draft insurance policies into shorter, more understandable documents with input from both insurers and policyholders. And it recommends that instead of using the current rules of insurance policy interpretation, courts would use the canons of statutory interpretation to interpret insurance policies. Under this approach, consideration would be given to the drafting history, societal interests, and overriding purpose of insurance, and Chevron deference would be afforded to the drafter's interpretation.

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INTRODUCTION

Conventional wisdom provides that an insurance policy is simply a type of standardized contract. This Article challenges that conventional wisdom. In recent years, other legal scholars have noted that insurance policies can be conceptualized in numerous ways.¹ This Article takes such analysis further by

1. See, e.g., Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 657 (2013) [hereinafter Abraham, *Four Conceptions*] (describing four conceptions of insurance: (1) as a contract, (2) as a public utility/industry, (3) as a product, and (4) as a surrogate government for regulating policyholder behavior); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1397–1400 (2007) [hereinafter Schwarcz, *A Products Liability Theory*] (analyzing insurance policies as though they were products); Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1495–1513 (2010) [hereinafter Stempel, *The Insurance Policy as Social Instrument*] (emphasizing the socially important role that insurance plays such that it should not be viewed simply

arguing that mandatory insurance policies should not be treated as contracts because they do not satisfy the doctrinal or theoretical requirements for the formation of a contract, particularly when one considers insurance's socially important role.

If insurance policies were contracts, then interpreting them would simply be a straightforward application of the rules of contract interpretation. Yet the outcomes in insurance disputes often do not align with those rules.² This incongruity occurs because courts have created special rules that differ significantly from the traditional rules of contract interpretation.³ These special rules for construing insurance policies incorporate public policy and societal interests, such as the protection of powerless consumers and the compensation of injured parties, which sometimes override the actual policy language.

Although there are numerous reasons why the current rules of insurance policy interpretation developed as they did, the origins of the special rules can be traced to the idea that insurance policies do not qualify as contracts under the traditional rules regarding contract formation.⁴ A fundamental requirement for the formation of a contract is that both parties assent to the agreement. Freedom to enter or not enter a contract is a fundamental theoretical basis of contract law.⁵

In the insurance context, there is no meeting of the minds between the purchaser and the insurer regarding the policy's terms and conditions.⁶ Nor are the terms and conditions the result of arm's-length bargaining.⁷ Instead, insurance policies are complex documents drafted by the insurance industry and generally sold industry-wide on a take-it-or-leave-it basis.⁸ Not only do the purchasers have no input regarding the terms and conditions of the policies, but most purchasers do not even see or receive a copy of the policy until long after purchase.⁹ Then, if and when the purchasers receive a copy, most do not read it, and even if they did, they could not understand it due to its length, structure, and

in terms of contract law); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 835 (2009) [hereinafter Stempel, *The Insurance Policy as Thing*] (arguing that insurance policies are "things" rather than contracts). In *Four Conceptions of Insurance*, the most recent article to explore this topic, Professor Abraham concludes that when insurance policies are considered across all lines of insurance, they do not all neatly fit within any of the four different conceptions of insurance he describes in his article. See Abraham, *Four Conceptions*, *supra*. This Article takes the scholarly analysis even further by considering the way that insurance policies are drafted and sold, as well as the theoretical bases for the rules of insurance policy interpretation, to reach the conclusion that mandatory insurance policies are not really contracts at all. It then considers the normative implications of that conclusion.

2. See *infra* Part IV.C.

3. See *infra* Section III.

4. See *infra* Parts III.B–C and Part IV.A.

5. See *infra* Section I.

6. See *infra* Section II.

7. See *infra* Section II.

8. See *infra* Section II.

9. See *infra* Section II.

complexity.¹⁰

The fact that insured individuals do not even see the policies until after purchase is one of several things that distinguish insurance policies from most other standardized contracts.¹¹ For most standardized contracts, the consumer at least has an opportunity to review the terms before agreeing to them. Or if the terms are provided after the contract allegedly has been formed, as is the case with the “shrink wrap” contracts that accompany many products, then the person can return the product and cancel the contract after reviewing the terms.¹² With mandatory lines of insurance, such as auto, homeowners, and health, it would be pointless for the insured to cancel the policy—even after receiving and reviewing it (in the unlikely event that the person can actually understand the policy’s terms and conditions)—because other insurers sell the same or substantially the same policy, and the policyholder is *required* to purchase a policy somewhere.¹³ In addition, unlike with standard form contracts, the only thing a purchaser of insurance receives in exchange for the payment of a premium is the policy itself—a lengthy, complex, and incomprehensible bundle of terms and conditions. Under most standard form contracts, the purchaser receives a good or service in exchange for money, and the contract is secondary to the primary transaction.¹⁴ Further, unlike standard form contracts that accompany purchases such as cell phone service, where the buyer can simply switch to a competing service provider in the event the cell phone service is unacceptable or a dispute with the cell phone service provider arises, a policyholder cannot buy replacement insurance to cover a loss after the loss has occurred and the insurer refuses to pay.¹⁵

Against this factual background, a number of societal and public policy interests are in play. Insurance serves a quasi-public function as a social safety net by which risks are distributed from individuals to a group or community.¹⁶

10. See *infra* Section II.

11. The problems associated with standardized contracts have been a subject of fascination for legal scholars for decades. See generally, e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Omri Ben-Shahar, *Foreword*, 104 MICH. L. REV. 821 (2006); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 240 (1995); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer Contracts*, 59 UCLA L. REV. 676 (2012); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971). This Article adds to the discussion by considering whether insurance policies should even be considered standardized contracts.

12. See *infra* Section II.

13. See *infra* Section II.

14. See *infra* Section II.

15. See *infra* Section II.

16. See, e.g., Abraham, *Four Conceptions*, *supra* note 1, at 668; Christopher C. French, *The Role of the Profit Imperative in Risk Management*, 17 U. PA. J. BUS. L. 1081, 1092–93 (2015) [hereinafter French, *The Role of the Profit Imperative*]; Stempel, *The Insurance Policy as Social Instrument*, *supra* note 1, at 1497.

This important function traces its roots in the United States to the first insurance sold—fire insurance.¹⁷ Originally, members of a community contributed to a pool of money from which a member would be paid if fire damaged or destroyed his property.¹⁸ The first of these “mutual” companies was the Philadelphia Contributorship for Insuring Houses from Loss by Fire, established in Philadelphia in 1752, with Benjamin Franklin as one of its first directors.¹⁹ Similar mutual companies subsequently formed throughout the country to protect people and businesses against fire losses.²⁰ Over time, the scope of insurance expanded to cover the other myriad risks of loss. Thus, through the collective actions of communities and businesses, insurance in America began to serve as a social safety net, with the collective community or group acting for the benefit of the unlucky few who suffer a loss.²¹

Since the 1750s, insurance has become even more integral to people’s lives and the conduct of business.²² Without insurance, people and businesses simply could not function in today’s world, particularly because several lines of insurance are mandatory. For example, anyone who wants to purchase a house using a bank to finance a mortgage must have homeowners insurance adequate to cover the mortgage amount.²³ Anyone who wants to drive a car must have auto insurance.²⁴ Americans currently must have health insurance.²⁵ Additionally, every state except Texas requires businesses to have workers’ compensation insurance.²⁶ In many business transactions, such as construction

17. French, *The Role of the Profit Imperative*, *supra* note 16, at 1092 (citing JAY M. FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON’T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT 21 (2010); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 18 (5th ed. 2012)).

18. See French, *The Role of the Profit Imperative*, *supra* note 16, at 1092.

19. *Id.*

20. *Id.*

21. *Id.* at 1093.

22. See Stempel, *The Insurance Policy as Social Instrument*, *supra* note 1, at 1497.

23. See, e.g., MARTIN F. GRACE ET AL., CATASTROPHE INSURANCE: CONSUMER DEMAND, MARKETS AND REGULATION 83 (2003) (“[H]omeowners insurance . . . is essentially mandatory . . .”); Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders’ Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 363, 368 (1998); Stempel, *The Insurance Policy as Social Instrument*, *supra* note 1, at 1497.

24. See, e.g., EMMETT J. VAUGHAN & THERESE M. VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 539–41 (8th ed. 1999) (conducting a fifty-state survey of the compulsory automobile liability insurance laws); Anderson & Fournier, *supra* note 23, at 368; Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 125 (2007) [hereinafter Randall, *Freedom of Contract*]; Stempel, *The Insurance Policy as Social Instrument*, *supra* note 1, at 1497–98.

25. See Patient Protection and Affordable Care Act of 2010, 26 U.S.C. § 5000A (2012).

26. See, e.g., TEX. LAB. CODE ANN. § 406.002(a) (West 2015) (“Except for public employers and as otherwise provided by law, an employer may elect to obtain workers’ compensation insurance coverage.”); KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION 421 (6th ed. 2015) (“[W]orkers compensation is a no-fault substitute for employers’ tort liability and is mandated in every state except Texas, where employers may opt-out, and about one-third of employers do so.”); GEORGE E. REJDA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE 556 (9th ed. 2005) (“All states today have workers compensation laws.”); Randall, *Freedom of Contract*, *supra*

contracts, one party typically must maintain insurance to cover the project.²⁷ In addition, aside from mandatory insurance, if people live or do business in areas prone to natural disasters such as hurricanes, tornadoes, or floods, then they need insurance to protect their homes and businesses. Without it, they risk bankruptcy with each passing storm.

The compensation of injured parties is another overriding societal concern. Public policy strongly favors compensating injured parties.²⁸ In the absence of insurance, most injuries would go uncompensated because most people in America are judgment proof.²⁹ This means that without insurance many injured people would not be able to pay their medical bills or recover lost wages. Indeed, ensuring that injured parties will be compensated is the primary reason automobile insurance is mandatory in this country.³⁰

Historically, notwithstanding the quasi-public function insurance plays and the way insurance policies are created and sold, most courts have analyzed

note 24, at 125 (“Workers’ compensation insurance is another form of required insurance.”); Stempel, *The Insurance Policy as Social Instrument*, *supra* note 1, at 1498 (“[T]he State effectively mandates workers’ compensation coverage.”).

27. See Stempel, *The Insurance Policy as Social Instrument*, *supra* note 1, at 1499, 1505 (discussing construction contracts that require the builder to maintain various types of liability insurance and Amtrak’s insistence that the State of Rhode Island “buy \$200 million in liability insurance if it wants to extend commuter rail service to Warwick and South County” (internal quotation marks omitted)).

28. See, e.g., *Yousuf v. Cohlmi*, 718 F. Supp. 2d 1279, 1288 (N.D. Okla. 2010) (finding that compensating a wrongdoer’s innocent victims would outweigh the concern that the wrongdoer would unjustly benefit); *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 163–64 (E.D. Va. 1993) (explaining that where insurance policy does not explicitly exclude coverage of intentional acts, public policy of compensating innocent victims outweighs public policy of not permitting coverage of intentional action); *St. Paul Fire & Marine Ins. Co. v. Asbury*, 720 P.2d 540, 542 (Ariz. Ct. App. 1986) (discussing how Arizona public policy favors compensating injured persons); *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170–71 (Del. 1990) (refusing to void coverage for intentional wrongdoing under an automobile policy because of the competing public policy behind the state motor vehicle financial responsibility law); *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 539, 541 (Iowa 2002) (“Compensating [the policyholder’s] innocent victims . . . outweighs the concern that [the policyholder] will unjustly benefit from coverage.”); *Vigilant Ins. Co. v. Kambly*, 319 N.W.2d 382, 385 (Mich. Ct. App. 1982) (allowing insurance recovery for a physician’s sexual assault of his patient because “[i]t is not the insured who will benefit, but the innocent victim who will be provided compensation for her injuries”); *S.S. v. State Farm Fire & Cas. Co.*, 808 S.W.2d 668, 671 (Tex. Ct. App. 1991) (concluding that a homeowner’s insurance policy provides coverage for the transmission of a sexually transmitted disease by relying on the analogous context of automobile insurance in which public policy favors the compensation of tort victims).

29. See, e.g., Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006) (discussing the reasons why judgments against most people are uncollectible); Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 TEX. L. REV. 1375, 1375–76 (1994) (discussing the impact insurance has on the judgment-proof problem); S. Shavell, *The Judgment Proof Problem*, 6 INT’L REV. L. & ECON. 45, 47–52 (1986) (analyzing the problems that result from judgment-proof individuals).

30. See, e.g., JERRY, II & RICHMOND, *supra* note 17, at 924–25 (stating that the obvious purpose of mandatory auto insurance is to provide victims of automobile accidents with access to funds to cover their losses); Stempel, *The Insurance Policy as Social Instrument*, *supra* note 1, at 1498 (noting that every state effectively requires auto insurance in order to license a car).

insurance policies as standardized contracts.³¹ When it comes to resolving insurance disputes, however, courts have employed special rules that incorporate public policy and societal interests when they construe the insurance policy language.³² These rules help advance the goals of compensating injured parties and protecting uninformed and powerless consumers.³³

Insurance law should be explicitly reconceptualized rather than maintaining the fiction that there is mutual assent to insurance policies or that they are a type of standardized contract subject to special rules of interpretation. Specifically, this Article proposes that an independent third party draft insurance policies into short, understandable documents based upon input provided by insurers and policyholders. Then, in recognition that insurance policies are not contracts, courts would interpret them according to the canons of statutory interpretation, with consideration given to the drafting history, the purpose of insurance, the societal interests at stake, and with *Chevron* deference given to the drafters' interpretation of the policy language.³⁴

This Article proceeds in four parts. Section I discusses the doctrinal and theoretical requirements for the formation of a contract, including for standardized contracts. Section II explains the process by which insurance policies are drafted and sold, in order to provide the factual context surrounding courts' development of the special rules of insurance policy interpretation currently used. Section III discusses these special rules: strict liability *contra proferentem* and the "reasonable expectations" doctrine. Section III also provides a theoretical basis for understanding the rules of insurance policy interpretation and their application. Section IV sets forth a normative proposal in which an independent third party would redraft insurance policies to make them more understandable and fairer to consumers. Under this proposal, courts would transparently interpret the policies according to the canons of statutory interpretation instead of using the general rules of contract interpretation and the specialized rules of insurance policy interpretation.

I. THE REQUIREMENTS FOR CONTRACT FORMATION AND STANDARDIZED CONTRACTS

The term "contract" has been used to describe a variety of things. Sometimes, the term is "a synonym for 'agreement' or 'bargain.'"³⁵ Sometimes it is used to describe a document that sets forth a legal relationship between two parties.³⁶ Under the Restatement (Second) of Contracts, a contract is "a promise

31. See *infra* Section III.

32. See *infra* Section III.

33. See *infra* Section III.

34. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (stating that the Court will accept an agency's construction of a statute if the agency's interpretation is "reasonable" and Congress has not addressed the specific interpretive issue before the Court).

35. See RESTATEMENT (SECOND) OF CONTRACTS § 1 cmt. a (AM. LAW INST. 1981) (internal quotation marks omitted).

36. *Id.*

or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”³⁷

Six essential elements must be satisfied in order to form a contract: (1) mutual assent,³⁸ (2) consideration,³⁹ (3) at least two parties, (4) sufficient definiteness, (5) legal capacity to enter a contract, and (6) no legal prohibition that precludes the formation of a contract.⁴⁰ Mutual assent, which is the key requirement when one is discussing insurance policies, is the “manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”⁴¹ Freedom of choice is the basic theoretical value that underlies the mutual assent requirement—a party cannot be forced to enter a contract.⁴² As American contract jurisprudence has evolved from “classical” to “modern” over the past hundred years, the assent requirement has not changed.⁴³

The most obvious manifestation of assent is a signed, written agreement.⁴⁴

37. See RESTATEMENT (SECOND) OF CONTRACTS § 1.

38. See RESTATEMENT (SECOND) OF CONTRACTS § 23 (stating that an essential requirement that must be satisfied before a contract is formed is that “each party manifest assent [to enter a contract] with reference to the manifestation of the other”); see also JEFFREY T. FERRIELL, UNDERSTANDING CONTRACTS § 5.01, at 167 (2d ed. 2009) (“Mutual assent is one of two key elements of the contract formation process. Where mutual assent and consideration (or one of its substitutes) are present, a contract has been formed.”).

39. RESTATEMENT (SECOND) OF CONTRACTS § 71; Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 585 (1998) (“By the late nineteenth century, if not earlier, the most important basis for enforcing promises was the bargain theory of consideration. To be enforceable under the bargain theory, a promise had to be supported by consideration, meaning that the promisor would receive something in exchange for the promise.” (footnotes omitted)).

40. See JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 29 (5th ed. 2011).

41. See RESTATEMENT (SECOND) OF CONTRACTS § 2.

42. See, e.g., P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 403 (1979) (“The agreement must be made ‘freely’ and without ‘pressure’”); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1247 (1998) (“Contract law proceeds from the premise that obligation is established by the existence of voluntary and informed choice to enter into a contract.”); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 479 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986)) (claiming classical theorists “considered three principles to be central to a free contract system,” one of which was the principle that a party could not be forced to contract against her will).

43. See, e.g., U.C.C. § 2-207 (AM. LAW INST. & UNIF. LAW COMM’N 2002); RESTATEMENT (SECOND) OF CONTRACTS §§ 3, 23. “Modern” contract law rejects the formalism of “classical” contract law and is intended to address some of the perceived shortcomings of classical contract law. For a discussion of the differences between classical and modern contract law, see generally Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743 (2000); Melvin A. Eisenberg, *The Revocation of Offers*, 2004 WIS. L. REV. 271; Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Charles L. Knapp, Commentary, *An Offer You Can’t Revoke*, 2004 WIS. L. REV. 309; Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254 (1995).

44. See RESTATEMENT (SECOND) OF CONTRACTS § 3.

Words or conduct can also sufficiently convey assent.⁴⁵ In determining whether a party has agreed to enter a contract, courts use an objective standard by which they consider external expressions of intention to enter a contract as opposed to the parties' subjective intention.⁴⁶

Today, the most common form of contract is a standardized agreement drafted by one party to the transaction.⁴⁷ Standard form contracts typically are contracts of adhesion, which one party drafts and the other party is required to accept on a take-it-or-leave-it basis.⁴⁸ Standard form contracts have become ubiquitous because they allow for the mass production and distribution of products or services without negotiation for each transaction.⁴⁹ This simplifies transactions and reduces costs.⁵⁰ Indeed, an advantage of standard form contracts is that they eliminate the need to bargain over details.⁵¹

In addition, because the language is typically nonnegotiable, there is little incentive for the consumer to read or understand the terms.⁵² Standard form contracts generally bind consumers whether they have read them or understood them,⁵³ except under limited exceptions intended to protect against unfairness—

45. See RESTATEMENT (SECOND) OF CONTRACTS § 3 cmt. b; E. ALLAN FARNSWORTH, CONTRACTS § 3.6 (4th ed. 2004) (explaining that the real but unexpressed state of a party's mind is irrelevant); MURRAY, *supra* note 40, § 31 (identifying ways to express the intent to be legally bound).

46. See RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b.

47. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c; Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 977 n.51 (explaining that standardized forms are the dominant form of contracting); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 465 (2006) ("Standard form contracts have been with us for decades, and they can serve useful purposes in reducing transaction costs in mass-market, repeat-play settings." (footnote omitted)); Sajida A. Mahdi, *Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and the Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods*, 96 NW. U. L. REV. 403, 403 (2001) ("[T]he use of standard form contracts prevails in today's ordinary, routine commercial transactions." (footnote omitted)); Slawson, *supra* note 11, at 529 ("Standard form contracts probably account for more than ninety-nine percent of all the contracts now made.").

48. See, e.g., 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.27C (Joseph M. Perillo ed., rev. ed. 2016) ("A contract which is a mass standardized form is always a contract of adhesion, because it cannot be negotiated about."); Rakoff, *supra* note 11, at 1177 (identifying the seven characteristics of a model "contract of adhesion" typically evidenced in standard form contracts).

49. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a; Mahdi, *supra* note 47, at 403.

50. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a; Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 437–39 (2002); Lemley, *supra* note 47, at 465.

51. See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b.

52. See *id.*; Lemley, *supra* note 47, at 463; Rakoff, *supra* note 11, at 1179 ("[T]he adhering party [under a contract of adhesion] is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them. Virtually every scholar who has written about contracts of adhesion has accepted the truth of this assertion, and the few empirical studies that have been done have agreed." (footnote omitted)).

53. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c; Rakoff, *supra* note 11, at 1185 (explaining that for a standardized agreement that has been signed, "[i]t is legally irrelevant whether the adherent actually read the contents of the document, or understood them, or subjectively assented to them.").

such as the implied duty of good faith,⁵⁴ *contra proferentem*,⁵⁵ public policy,⁵⁶ and the unconscionability doctrine.⁵⁷ With that said, for the terms of a standard form contract to be enforceable, as with all contracts, the party against whom enforcement is sought must have agreed to the terms.⁵⁸ Assent is an essential requirement for the formation of a contract, whether the contract is standardized or customized.⁵⁹ To satisfy the assent requirement, the party must have had a reasonable opportunity to accept or decline the terms.⁶⁰

Due to the mutual assent requirement, there is significant debate among courts and scholars regarding the enforceability of many types of standard form contracts used today in the Internet age,⁶¹ such as “browse wrap,”⁶² “shrink

54. See RESTATEMENT (SECOND) OF CONTRACTS § 205.

55. See RESTATEMENT (SECOND) OF CONTRACTS § 206.

56. See RESTATEMENT (SECOND) OF CONTRACTS § 207.

57. See RESTATEMENT (SECOND) OF CONTRACTS § 208; Mahdi, *supra* note 47, at 428–30. Courts rarely employ the unconscionability doctrine to protect consumers against unfair contract terms. See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 306–07 (1995) (noting that by 1995, unconscionability analysis by courts in published opinions was rare); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 75, 93–94 (2007) (noting that in 2004, only seven cases ended with a court invalidating a contract on the basis of unconscionability).

58. See RESTATEMENT (SECOND) OF CONTRACTS § 211.

59. See *supra* Section I.

60. See 7 KNIFFIN, *supra* note 48, § 29.10, at 419 (explaining that under contracts of adhesion or other standard form contracts, “if the terms (or a term) of the contract are unfair under the circumstances[, then] the ordinary manifestation of assent implicit in signing or accepting a document is insufficient because the assent is not reasoned and knowing. Such consent involves an understanding of the clause in question and a reasonable opportunity to accept or decline. Even then, if the clause is sufficiently odious, it will be struck down as unconscionable or contrary to public policy.” (footnotes omitted)).

61. See, e.g., *id.*, at 416 (“[T]here is a growing body of case law subverting the traditional duty-to-read concept in adhesion or other standard form contracts, on three different grounds: (1) there was not true assent to a particular term; (2) even if there was assent, the term is to be excised from the contract because it contravenes public policy; or (3) the term is unconscionable and should be stricken. At times, the same decision may employ all three rationales.” (footnotes omitted)); Lemley, *supra* note 47, at 469 (arguing that the enforcement of wrap agreements has eroded the requirement of assent in the formation of contracts and stating that “the clickwrap and shrinkwrap cases may have conditioned courts to abandon the idea of assent when it comes to browserwraps”); Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777, 803 (criticizing the holdings and reasonings of *ProCD vs. Zeidenberg* and *Brower v. Gateway*, stating, “Professor Todd Rakoff may have put his finger on my immediate reaction to the *ProCD* and *Gateway* cases. It hurts to be told that these are contracts. *ProCD* and *Gateway* could have printed these clauses in invisible ink without changing the court’s opinion significantly. The consumer would not have had much less notice.” (footnotes omitted)); Mahdi, *supra* note 47, at 414–25 (discussing the conflicting case law regarding wrap agreements); Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 132 (2012) (“Contract law is now facing a crisis of theory [due to wrap agreements] that requires us to consider how far the balance has been lost and how it must be restored. Contractual liability imposed without knowing assent, with burdensome terms, and without an opportunity to negotiate was anathema to traditional contract law.”); Leon E. Trakman, *The Boundaries of Contract Law in Cyberspace*, 38 PUB. CONT. L.J. 187, 216 (2008) (noting that courts that have refused to enforce wrap agreements have found that “the essential features of a

wrap,”⁶³ “click wrap,”⁶⁴ and “rolling”⁶⁵ agreements. Although the arguments

contract and the reasonable opportunity for the purchaser to review and disseminate conditions before acceptance were more fictional than real”).

62. See, e.g., *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1173 (9th Cir. 2014) (refusing to enforce an arbitration clause in a browse wrap agreement because there was no evidence the user was aware of the clause and affirmatively demonstrated consent to the agreement); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 429 (2d Cir. 2004) (“[A] browse wrap license is part of the web site[, e.g., license terms are posted on a site’s home page or are accessible by a prominently displayed hyperlink.] and the user assents to the contract when the user visits the web site.” (alterations in original) (quoting *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000))); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D. N.Y. 2009) (“It is a basic tenet of contract law that in order to be binding, a contract requires a ‘meeting of the minds’ and ‘a manifestation of mutual assent.’ . . . On the internet, the primary means of forming a contract are the so-called ‘clickwrap’ (or ‘click-through’) agreements, in which website users typically click an ‘I agree’ box after being presented with a list of terms and conditions of use, and the ‘browsewrap’ agreements, where website terms and conditions of use are posted on the website typically as a hyperlink at the bottom of the screen. Unlike a clickwrap agreement, a browsewrap agreement ‘does not require the user to manifest assent to the terms and conditions expressly . . . [a] party instead gives his assent simply by using the website.’” (alteration and second omission in original) (citations omitted) (second quoting *Sw. Airlines Co. v. Boardfirst, L.L.C.*, Civ. A. No. 06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)); *MetroPCS Wireless, Inc. v. Virgin Mobile USA, L.P.*, No. 3:08-CV-1658-D, 2009 WL 3075205, at *22 (N.D. Tex. Sept. 25, 2009) (holding that terms of internet browser wrap agreements are enforceable only if it is proven that the parties manifested assent to the terms) (citing *Adsit Co. v. Gustin*, 874 N.E.2d 1018, 1023 (Ind. Ct. App. 2007)).

63. See, e.g., *Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215, 243 (2000) (“Commonly used in software packaging, ‘shrink-wrap’ contracts provide that an offeree accepts all provisions of the sales agreement simply by opening the software package.”). Compare *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565–69 (9th Cir. 2014) (refusing to enforce an arbitration clause contained in a contract that was not provided until after services already had begun being provided), and *Morgan Labs, Inc. v. Micro Data Base Sys. Inc.*, No. C96-3998 TEH, 1997 WL 258886, at *3 (N.D. Cal. Jan. 22, 1997) (voiding forum selection clause in a shrink wrap agreement), and *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000) (finding that a shrink wrap license was not enforceable), and *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 108 (3d Cir. 1991) (finding that a shrink wrap license was not enforceable), with *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 572 (1998) (ruling that a shrink wrap agreement was enforceable because the buyer had the right to return the product if the terms were unacceptable, and there were comparable substitute products available from other vendors), and *ProCD vs. Zeidenberg*, 86 F.3d 1447, 1450–51 (7th Cir. 1996) (holding the shrink wrap agreement enforceable because the buyer had the right to return the product if the terms were unacceptable).

64. See, e.g., *Oracle USA v. Graphnet Inc.*, No. C06-05351 MJJ, 2007 WL 485959, at *1 (N.D. Cal. Feb. 12, 2007) (“The ‘click-wrap agreement’ requires the potential customer to manifest his or her assent to the terms of a license by clicking a button on a dialog box or pop-up window before the customer can download the software being licensed or before the software media will be shipped to the customer.”); *Hotels.com, L.P. v. Canales*, 195 S.W.3d 147, 154–55 (Tex. App. 2006) (“‘Click-wrap’ agreements require the user to review or scroll through terms and assent to the contractual terms by clicking a button that reads ‘I Agree’ or manifesting some other means of express assent . . .”). Compare *Specht v. Netscape Comm. Corp.*, 306 F.3d 17, 20–21 (2d Cir. 2002) (holding that the arbitration clause in a click wrap agreement was unenforceable due to a lack of mutual assent to the clause), and *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (ruling that the arbitration clause in a click wrap agreement was unconscionable), with *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 530–31 (N.J. Super. Ct. App. Div. 1999) (holding that the forum selection clause in a click wrap agreement was enforceable because the party had to manifest assent by clicking the “I

that such agreements are not enforceable due to a lack of meaningful assent by the consumer are equally applicable to insurance policies, as discussed in the next Section, insurance policies fundamentally are different from these types of standardized agreements.

II. THE DRAFTING AND SALE OF INSURANCE POLICIES

Insurance policies, almost without exception, are lengthy, complex standard form contracts of adhesion drafted by insurers and sold on a take-it-or-leave-it basis with respect to their terms.⁶⁶ Indeed, insurance policies were the first type of standardized form agreements to be described as contracts of adhesion.⁶⁷ Consequently, purchasers have no input regarding the policy language. The only negotiations between a policyholder and an insurer typically relate to the policy limits, premium, deductible, and endorsements added in some circumstances.⁶⁸ Except for clerical matters, even the endorsements are drafted by insurers and use standard form policy language.⁶⁹ “Manuscript” policies, which are policy forms typically created by brokers for corporate policyholders and then presented to insurers for adoption, are also effectively drafted by insurers,

agree” box), and *Groff v. Am. Online, Inc.*, No. PC 97-0331, 1998 WL 307001, at *5 (R.I. Super. Ct. May 27, 1998) (holding that the buyer manifested his assent to the terms by clicking the “I Agree” button twice).

65. See, e.g., Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 681 (“These arrangements essentially permit parties to reach agreement over basic terms, such as price and quantity, but leave until a later time, usually simultaneous with the delivery or first use of the goods, the presentation of additional terms that the buyer can accept, often by simply using the good, or reject, by returning it.”); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 747 (2002) (arguing that rolling contracts should be legally analyzed like other types of standard form contract).

66. See, e.g., 1 JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 4.06[b], at 4–37 (Aspen 2d ed. 1999) [hereinafter STEMPEL, LAW OF INSURANCE] (“In a sense, the typical insurance contract is one of ‘super-adhesion’ in that the contract is completely standardized and not even reviewed prior to contract formation.”); Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1091 (2010) [hereinafter Boardman, *Insuring Understanding*] (describing the “hyperstandardization” of insurance policies); James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 996 (1992) (“The only part of the standard policy that is generally customized to the consumer-insured is the Declarations Sheet . . . [T]here is little, if any, freedom to negotiate the standardized language of the insurance contract that determines the scope of coverage.” (footnote omitted)); Randall, *Freedom of Contract*, *supra* note 24, at 125 (“[I]n some lines of insurance, all insurance companies provide identical coverage on the same take-it-or-leave-it basis.”); Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1270–74 (2011) [hereinafter Schwarcz, *Reevaluating*] (discussing the history of standardized insurance policies); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1153 (1990) (“[P]roperty owner’s liability insurance contracts are standardized across insurers in a form few insureds have the power or experience to bargain around.”).

67. See Preston & McCann, *supra* note 61, at 131 (citing Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (describing standardized life insurance policies as contracts of adhesion)).

68. See, e.g., Anderson & Fournier, *supra* note 23, at 373.

69. See, e.g., *id.*

because brokers merely cut and paste the language from insurers' policy forms to create the manuscript policy.⁷⁰ Consequently, even with manuscript policies, the policyholder has no role in the drafting of the terms.

An organization known as the Insurance Services Office, Inc. (ISO) drafts many policy forms.⁷¹ Insurers pay fees for ISO membership.⁷² As members of ISO, insurers can, and many do, use the policy forms drafted by ISO.⁷³

Many of the terms and conditions contained in standard form ISO policies were drafted many years ago and are reused each time ISO issues new versions of the policy form.⁷⁴ For example, the policy language in the 1943 New York Standard Fire Insurance Policy is still used today in some homeowners' insurance policies.⁷⁵ Because much of the standard form policy language used today was drafted long ago, the original drafters are often dead or unknown.⁷⁶ Documentation regarding the drafters' intent also rarely exists.⁷⁷ Consequently,

70. See, e.g., *id.* at 371; Hazel Glenn Beh, *Reassessing the Sophisticated Insured Exception*, 39 TORT TRIAL & INS. PRAC. L.J. 85, 94 (2003); Fischer, *supra* note 66, at 996, 1011, 1015; Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807, 829, 833, 840, 849–52 (1993) [hereinafter Stempel, *Reassessing*].

71. ISO is an influential organization within the insurance industry that promulgates standard form insurance policies, including Commercial General Liability (CGL) policies that insurers across the country use to conduct their business. See, e.g., *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 879 n.6 (Fla. 2007). In particular, the organization develops its own standard policy forms and makes them available to its member insurers, which then adopt them and present them to state insurance regulators for approval. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993). ISO is comprised of approximately 1,400 property and casualty insurers and "is the almost exclusive source of support services in this country for CGL insurance." *Id.* As a result, "most CGL insurance written in the United States is written on [ISO] forms." *Id.*

72. See, e.g., ABRAHAM & SCHWARCZ, *supra* note 26, at 36.

73. *Id.* at 36–37.

74. See, e.g., JOHN F. DOBBYN & CHRISTOPHER C. FRENCH, *INSURANCE LAW IN A NUTSHELL* 64 (5th ed. 2016) ("[M]any of the terms and conditions contained in standard form policies were drafted many years ago and are reused each time a new version of the policy form is issued."); DONALD S. MALECKI, *COMMERCIAL GENERAL LIABILITY COVERAGE GUIDE* app. (9th ed. 2011) (attaching as appendices the standard ISO CGL policy forms used since 1973, which reveals that identical or substantially similar language has been used in many sections of the policies during the past fifty years); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1113 (2006) [hereinafter Boardman, *Contra Proferentem*] (arguing that predictability in the interpretation of policy language by courts incentivizes ISO not to change policy language unless courts are consistently interpreting the language in a manner unfavorable to insurers); see also Christopher C. French, *The "Non-Cumulation Clause": An "Other Insurance" Clause by Another Name*, 60 U. KAN. L. REV. 375, 388 (2011) [French, *The "Non-Cumulation Clause"*] (discussing the transfer of the non-cumulation clause that originally was drafted in 1960 for the London form CGL policy to the 1971 version of the policy).

75. See Randall, *Freedom of Contract*, *supra* note 24, at 130; see also DOBBYN & FRENCH, *supra* note 74, at 64.

76. E.g., DOBBYN & FRENCH, *supra* note 74, at 64; see also French, *The "Non-Cumulation Clause"*, *supra* note 74, at 386–89 (relying upon the deposition testimony of a second generation drafter of the London CGL policy form to discern the original deceased drafters' intent regarding the non-cumulation clause).

77. See, e.g., French, *The "Non-Cumulation Clause"*, *supra* note 74, at 386–89 (stating that due to lack of documentary evidence of a deceased underwriter's intent in 1960 policy language, only

it is difficult, if not impossible, to discern the drafters' intent if the policy language is ambiguous.

In addition to drafting standard policy forms, ISO also collects claims data and provides actuarial services for its insurer members.⁷⁸ Two of the advantages of using ISO's nonnegotiable, standard form policies are (1) it reduces transaction costs because there are no negotiations regarding the policy language, and (2) it increases the predictive power of the claims data for actuarial purposes because of the lack of variation in coverage and exclusions among different companies' policies.⁷⁹

Insurers' use of the same policy forms and the industry-wide sharing of claims data would be considered anticompetitive or even collusive behavior in most industries. Consequently, when the U.S. Supreme Court ruled in 1944 that the insurance industry was subject to the antitrust provisions of the Sherman Act,⁸⁰ insurers lobbied hard for exemption and were successful when Congress passed the McCarran-Ferguson Act, which insurer representatives drafted.⁸¹

Regardless of whether a policy form was drafted by ISO or the insurer itself, the individuals responsible for selling the policies generally do not have authority to make any changes to the policy language.⁸² Consequently, purchasers cannot negotiate the language because insurers generally use the same policy forms and the insurer representatives who are in direct contact with purchasers lack the ability or authority to make any changes to the terms.⁸³

In addition to having no role in the drafting of insurance policies, policyholders typically do not even get a chance to review the policy they are purchasing prior to payment. Instead, the policy is provided to the policyholder weeks or months (if ever) after the policyholder has paid for the policy or at least

hearsay, secondhand deposition testimony was available).

78. See FEINMAN, *supra* note 17, at 13–14; Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 199, 206, 209–11 (2012); Fischer, *supra* note 66, at 1047–48, 1054; Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1245, 1248–49 (2004).

79. See, e.g., Anderson & Fournier, *supra* note 23, at 366–67; Boardman, *Contra Proferentem*, *supra* note 74, at 1107, 1113, 1116–17, 1128.

80. *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 553 (1944); 15 U.S.C. § 1 (2012).

81. See ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2012)); Abraham, *Four Conceptions*, *supra* note 1, at 669; Anderson & Fournier, *supra* note 23, at 401–02; Fischer, *supra* note 66, at 1054; Stempel, *Reassessing*, *supra* note 70, at 826.

82. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b. (AM. LAW INST. 1981) (“Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them.”); Anderson & Fournier, *supra* note 23, at 364.

83. See, e.g., ABRAHAM & SCHWARCZ, *supra* note 26, at 34 (“[S]tandardization in insurance not only involves a take-it-or-leave-it offer of the same policy by one company to all its customers, but (in the extreme case) a take-it-or-leave-it offer of the same policy, to all customers, by all companies.”); Anderson & Fournier, *supra* note 23, at 365; Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966–67 (1970); Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171, 174 (1995).

the initial premium.⁸⁴ If and when policyholders receive a copy, they rarely read it.⁸⁵ And if they do, few can understand the policy's terms and conditions because of its length and complexity.⁸⁶ At no point in the sales process does the insurer explain the terms of coverage to the policyholder.⁸⁷ And the policyholder never signs the policy to indicate agreement to its terms and conditions.⁸⁸

The insurance policies drafted by ISO and sold by insurers have become more complex over time. As an illustration of the complexity, consider ISO's 2010 standard form homeowners policy. It is twenty-four pages long, contains thirteen sections of coverage provisions, thirty-one exclusions, and thirty-seven conditions.⁸⁹ In addition to the confusing language, the length and complex organization of the terms, conditions, and exclusions make such insurance policies incomprehensible to most consumers.⁹⁰

The incomprehensibility of today's insurance policies to the average policyholder has prompted the Supreme Court of South Carolina to describe insurance policies as "impenetrable thicket[s] of incomprehensible verbosity":

Ambiguity and incomprehensibility seem to be the favorite tools of the insurance trade in drafting policies. Most are a virtually impenetrable thicket of incomprehensible verbosity. It seems that insurers generally are attempting to convince the customer when selling the policy that everything is covered and convince the court when a claim is made that nothing is covered. The miracle of it all is that the English language can be subjected to such abuse and still remain an instrument of communication. But, until such time as courts generally weary of the task we have just experienced and strike down the entire practice, we feel that we must run with the pack and attempt to construe that which may well be impossible of construction.⁹¹

84. See, e.g., Anderson & Fournier, *supra* note 23, at 363; Boardman, *Contra Proferentem*, *supra* note 74, at 1120; Keeton, *supra* note 83, at 968; Randall, *Freedom of Contract*, *supra* note 24, at 107; Rappaport, *supra* note 83, at 174.

85. See, e.g., Abraham, *Four Conceptions*, *supra* note 1, at 660; Anderson & Fournier, *supra* note 23, at 363–64; Boardman, *Contra Proferentem*, *supra* note 74, at 1120; Keeton, *supra* note 83, at 968; Randall, *Freedom of Contract*, *supra* note 24, at 107, 125; Rappaport, *supra* note 83, at 174; Stempel, *Reassessing*, *supra* note 70, at 810, 830.

86. See, e.g., Abraham, *Four Conceptions*, *supra* note 1, at 660; Anderson & Fournier, *supra* note 23, at 363–64; Boardman, *Contra Proferentem*, *supra* note 74, at 1120; Fischer, *supra* note 66, at 1049; Keeton, *supra* note 83, at 968; Randall, *Freedom of Contract*, *supra* note 24, at 107; Rappaport, *supra* note 83, at 174; Stempel, *Reassessing*, *supra* note 70, at 810, 830.

87. See, e.g., Anderson & Fournier, *supra* note 23, at 364.

88. See, e.g., DOBBYN & FRENCH, *supra* note 74, at 64.

89. See ABRAHAM & SCHWARCZ, *supra* note 26, at 185–209.

90. See Boardman, *Insuring Understanding*, *supra* note 66, at 1119 ("It is not just the language of insurance policies that makes for difficult reading. The order of the language, the parochronistic structure of the policy, and the intimate connection between clauses found in separate 'sections' pages apart, sap the reader's will to continue, assuming sufficient fortitude to begin. A consumer who reads from page one and stops when he reaches a clause on point will often miss additional controlling clauses.").

91. S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, 489 S.E.2d 200, 206 (S.C. 1997) (quoting Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W.2d 616, 622–23 (Ky. Ct. App. 1970)).

The Supreme Court of New Hampshire similarly has described insurance policies as “inexplicable riddle[s]”:

[I]nsurance policies are weighted with such a prolixity of complex verbiage that “they would not be understood by men in general, even if [the policies were] subjected to a careful and laborious study. . . . [The policy] if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish on the back side of the policy and the following page . . . where scarcely any one would think of looking for information so important. . . . As if it were feared that, notwithstanding these discouraging circumstances, some extremely eccentric person might attempt to examine and understand the meaning of the involved and intricate net in which he was to be entangled, it was printed in such small type, and in lines so long and crowded, that the perusal of it was made physically difficult, painful, and injurious.”⁹²

Because the policyholder has no role in the drafting of the insurance policy and typically does not even get a copy of it prior to purchase, a policyholder’s understanding of the coverage typically is based upon the type of insurance at issue, the statements of the broker⁹³ and the insurer’s agents during the sales process, and insurer advertisements.⁹⁴ In advertisements, insurers seek to create the impression that their policies provide broad coverage and that policyholders’ claims will be paid promptly—messages conveyed by using scenes of devastation followed by marketing phrases like “you’re in good hands” and “like a good neighbor” to describe the coverage provided and the insurers’ claims payment practices.⁹⁵

92. *Storms v. U.S. Fid. & Guar. Co.*, 388 A.2d 578, 580 (N.H. 1978) (first alteration and second and third omissions in original) (quoting *DeLancy v. Ins. Co.*, 52 N.H. 581, 587–88 (1873)).

93. Although brokers are commonly viewed as representing policyholders during the policy procurement process, that is not really true in many circumstances. *See, e.g.*, *Rich Maid Kitchens, Inc. v. Pa. Lumbermens Mut. Ins. Co.*, 641 F. Supp. 297, 303 (E.D. Pa. 1986), *aff’d*, 833 F.2d 307 (3d Cir. 1987) (“A broker is usually an agent for the insured but in some situations can be an agent for the insured in some respects and an agent for the insurer in other respects.”); *Holmes v. McKay*, 513 S.E.2d 851, 855 (S.C. Ct. App. 1999) (“Whether a broker represents the insurer or the insured depends upon the facts in each case.” (quoting *Allstate Ins. Co. v. Smoak*, 182 S.E.2d 749, 754 (1971))). Further, even when acting on behalf of a policyholder, questions arise regarding the broker’s loyalty to the policyholder in light of the fact that brokers typically are paid a commission by the insurer for the sale of the policy. *See, e.g.*, Daniel Schwarcz, *Beyond Disclosure: The Case for Banning Contingent Commissions*, 25 YALE L. & POL’Y REV. 289, 291–97 (2007) (discussing both regular commissions and contingent commissions paid by insurers to brokers, and arguing that contingent commissions should be banned).

94. *See, e.g.*, Anderson & Fournier, *supra* note 23, at 393–96; Arthur J. Park, *What to Reasonably Expect in the Coming Years from the Reasonable Expectations of the Insured Doctrine*, 49 WILLAMETTE L. REV. 165, 173–74 (2012).

95. *See, e.g.*, *State Farm Fire & Cas. Co. v. Nicholson*, 777 P.2d 1152, 1155 n.6 (Alaska 1989) (“[A] related concern is the expectation of the insurance-consuming public which the industry has fostered itself. Allstate’s slogan ‘You’re in Good Hands,’ Travelers’ motto of protection ‘Under the Umbrella,’ and Fireman’s Fund symbolic protection beneath the ‘Fireman’s Hat,’ exemplify the industry’s own efforts to portray itself as a repository of the public trust.” (alteration in original))

So, how effective are insurer advertisements and statements by insurance brokers and agents in informing purchasers about the scope of policy coverage? Not very. For example, recent studies by the National Association of Insurance Commissioners (NAIC) and other institutions have revealed that purchasers of homeowners insurance have very little understanding of the losses their policies actually cover.⁹⁶ Set forth below are the percentages of consumers who mistakenly believed that their homeowners insurance covered the following losses:

- 68%—cars, boats, and motorcycles stolen from, or damaged on, their property;
- 51%—a break in their water supply line;
- 37%—a break in the sewer line on their property connecting to the municipal sewer system;
- 35%—damage from earthquakes;
- 31%—damage from termites, rats, mice, and other infestations;
- 33%—flood damage, even after Hurricane Katrina, when it was widely reported that homeowners policies do not cover flood losses.⁹⁷

In short, many homeowners mistakenly believe that many types of losses are covered when, in fact, they are not.

In addition, more than 70% of homeowners did not understand that they would be compensated at actual cash value, meaning the value after depreciation, not replacement cost, for damage to personal property.⁹⁸ In other words, most homeowners did not know that they would receive only pennies on the dollar for most of their covered personal property that is damaged or destroyed.

Even though most consumers cannot negotiate the terms of policies and do not even understand the scope of coverage they are receiving when they buy an insurance policy, they do not really have a choice whether to purchase many types of insurance in today's complex world. For example, automobile insurance

(quoting Russell H. McMains, *Bad Faith Claims Handling—New Frontiers: A Multi-State Cause of Action in Search of a Home*, 53 J. AIR L. & COM. 901, 904 (1988)); *Rawlings v. Apodaca*, 726 P.2d 565, 571 n.3 (Ariz. 1986) (en banc) (“Advertising programs portraying customers as being ‘in good hands’ or dealing with a ‘good neighbor’ emphasize a special type of relationship between the insured and the insurer—one in which trust, confidence and peace of mind have some part.”); see also Anderson & Fournier, *supra* note 23, at 359, 393–97, 419; Park, *supra* note 94, at 174.

96. See Boardman, *Insuring Understanding*, *supra* note 66, at 1082 (first citing Press Release, Termite Inst., Termite Institute Website Clears Up Consumer Confusion over a \$5 Billion Problem (Mar. 15, 2007); then citing Press Release, Nat'l Ass'n of Ins. Comm'rs, What Isn't Covered by Your Homeowners Insurance? (June 4, 2007), http://www.naic.org/legislative_toolkit/Not_In_Homeowners_Policies.doc [<http://perma.cc/2245-A33V>] (providing these statistics on what homeowners believe are covered by their insurance); and then citing Bradley Steffens, *Homeowners Insurance—Six Risks Not Covered*, ALL ABOUT BUS. (Mar. 10, 2008), <http://business.dailydb.com/insurance/homeowners-insurance-six-risks-not-covered.html> [<http://perma.cc/F6FK-YDN2>]).

97. See Boardman, *Insuring Understanding*, *supra* note 66, at 1082–83; Steffens, *supra* note 96.

98. See Boardman, *Insuring Understanding*, *supra* note 66, at 1084.

is mandatory.⁹⁹ Homeowners insurance is also essentially mandatory because a homeowner must have insurance if the mortgage for the house is federally guaranteed, which is the case for the vast majority of houses.¹⁰⁰ Health insurance is effectively mandatory because individuals without it must pay a penalty.¹⁰¹ Workers' compensation insurance is also mandatory for businesses in every state except Texas.¹⁰²

Because policyholders cannot negotiate policy language but are required to purchase many types of insurance sold by insurers using the same policy form,¹⁰³ states have the power to regulate insurers to account for this discrepancy in power. This power to regulate insurers includes (1) ensuring their solvency, (2) approving premium rates to ensure the rates are not excessive, (3) approving premium rates to ensure the rates are not unfairly discriminatory, and (4) approving policy forms.¹⁰⁴ With respect to policy forms, regulators have the power to reject policy language or terms that are unfair, ambiguous, unreasonable, contrary to public policy, or some combination of these broadly stated standards.¹⁰⁵

Unfortunately, states' regulation of the insurance industry generally, and their approval of policy forms specifically, is a classic example of regulatory capture. Regulatory capture is the phenomenon whereby the regulation of an industry is dominated by the industry itself such that the industry is actually regulated for its own benefit.¹⁰⁶

99. See *supra* note 24 and accompanying text.

100. See *supra* note 23 and accompanying text.

101. See *supra* note 25 and accompanying text.

102. See *supra* note 26 and accompanying text.

103. Insurers began using the same policy forms decades ago as a condition to gaining access to industry-wide claims data, which insurers need to establish actuarially sound premium rates. To ensure that insurers did not attempt to offer inferior insurance policy terms for lower prices, insurers were required to use the same policy terms. See, e.g., ABRAHAM & SCHWARCZ, *supra* note 26, at 33–35; JERRY, II & RICHMOND, *supra* note 17, at 195–96.

104. See, e.g., ABRAHAM & SCHWARCZ, *supra* note 26, at 107–45; Randall, *Freedom of Contract*, *supra* note 24, at 141.

105. See, e.g., ABRAHAM & SCHWARCZ, *supra* note 26, at 143 (citing ALA. CODE § 27-14-9 (2016); GA. CODE ANN. § 33-24-10 (2016); NEB. REV. STAT. § 44-7513 (2016)).

106. See, e.g., Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 4–10 (2015) (discussing the codification of judicial deference to agency decision making in the Dodd-Frank Act in light of regulatory capture concerns); Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 639, 676–78 (1999) (describing the regulation of the insurance industry as an example of regulatory capture); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1713 (1975) (“It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges, and even by some agency members, that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests. Such overrepresentation stems from both the structure of agency decisionmaking and from the difficulties inherent in organizing often diffuse classes of persons with opposing interests.” (footnotes omitted)); John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 714 (1986) (arguing that the risk of regulatory capture undermines public confidence in regulation). Most regulatory capture theorists point to George J.

State insurance regulators, despite express statutory authority to do so, generally do not exercise their power to reject policy language that could be considered unfair, ambiguous, unreasonable, or contrary to public policy.¹⁰⁷ Instead, insurance regulators typically only require insurers to submit policy forms for approval when insurers change the language, which means that policy language that may be decades old is not reviewed.¹⁰⁸ Furthermore, insurance regulators' review of policy forms generally focuses on making sure that insurers cannot cancel or refuse to renew policies without providing adequate notice and on ensuring that policies meet minimum readability requirements, based on the length of words and sentences rather than the overall complexity or comprehensibility.¹⁰⁹ During the policy form review process, only insurers are represented by attorneys, and the state regulators are typically former employees of insurers (who will return to work for insurers after serving as regulators).¹¹⁰ In short, insurance regulators do not rigorously scrutinize or police policy language.¹¹¹ Consequently, the approval process essentially amounts to a rubber stamp.

In sum, policyholders (1) have no ability to change the language contained in insurance policies, (2) do not get copies of the policies before they buy them, (3) do not have the ability to understand them even if they read them because policies are so complex, and (4) do not have a choice whether to buy certain critical types of insurance. Despite the gross disparity in power, knowledge, and resources between the sellers and buyers of insurance, state insurance regulators are essentially the only check on insurers' power over the terms and conditions in policies—but regulators do not review and revise the language contained in standard form policies to ensure fairness to consumers or comprehensibility due to regulatory capture.

III. THE RULES OF INSURANCE POLICY INTERPRETATION AND THEIR THEORETICAL FOUNDATIONS

When interpreting insurance policies, the starting point for courts' analyses has been the historical belief that insurance policies are a species of standardized

Stigler as the person who popularized the concept with his article, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–21 (1971).

107. See ABRAHAM & SCHWARCZ, *supra* note 26, at 143, 146 (noting that many state insurance departments do not even have complete copies of different insurers' homeowners policies); Keeton, *supra* note 83, at 967.

108. See ABRAHAM & SCHWARCZ, *supra* note 26, at 146 (“A 2011 study found that most state insurance departments do not have complete copies of different carriers' homeowners insurance policies in their records. The reason was that insurers typically only filed with regulators the specific policy language they sought to change, but not the entire policy” (citation omitted) (citing Schwarcz, *Reevaluating*, *supra* note 66, at 1323)).

109. ABRAHAM & SCHWARCZ, *supra* note 26, at 143.

110. *Id.* at 131; Anderson & Fournier, *supra* note 23, at 336, 402–05.

111. ABRAHAM & SCHWARCZ, *supra* note 26, at 143, 146; Abraham, *Four Conceptions*, *supra* note 1, at 663.

contracts.¹¹² From that starting point, however, special rules have been developed that implicitly or explicitly take into account insurers' role in creating and selling insurance policies, as well as the role insurance plays as a social safety net.¹¹³

A. *Basic Principles*

The basic principles regarding the interpretation of insurance policies are generally the same as the rules of contract interpretation.¹¹⁴ The interpretation of insurance policies is a question of law.¹¹⁵ The provisions of a policy that grant coverage are construed broadly, while the provisions that exclude or limit coverage are construed narrowly.¹¹⁶ Exclusions should not be interpreted in a way that allows them to swallow the basic coverage provided.¹¹⁷ The insurer has

112. See, e.g., *Sonson v. United Servs. Auto. Ass'n*, 100 A.3d 1, 2, 5 (Conn. App. Ct. 2014) ("Standardized contracts of insurance continue to be prime examples of contracts of adhesion The interpretation of a contract presents a question of law subject to de novo review.") (internal quotation marks omitted); *Pryor v. Colony Ins.*, 414 S.W.3d 424, 430 (Ky. Ct. App. 2013) ("[M]ost insurance policies are contracts of adhesion To ascertain the construction of an insurance contract, one begins with the text of the policy itself.").

113. See *infra* Parts III.B–C.

114. Oftentimes, the terms "interpretation" and "construction" are used interchangeably when it comes to interpreting contracts or insurance policies. Technically, interpretation involves attempting to discern the parties' mutual intent regarding the language, while construction involves discerning the legally binding effect of the language. Because there is no mutual intent to discern when it comes to understanding an insurance policy, insurance policies technically are construed by courts, not interpreted. See, e.g., 5 KNIFFIN, *supra* note 48, § 24.3; Boardman, *Contra Proferentem*, *supra* note 74, at 1109–10. Nonetheless, in this Article, the terms are used interchangeably because courts and commentators often use the term interpretation when discussing the construction of insurance policy language.

115. See, e.g., 2 COUCH ON INSURANCE § 21:3 (3d ed. 2016) ("As a general rule, the construction and effect of a written contract of insurance is a matter of law, to be determined by the court and not by the jury."); JERRY, II & RICHMOND, *supra* note 17, at 133 ("[T]he interpretation of [an insurance] contract is a question of law and is therefore reserved to the court.").

116. See, e.g., *Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co.*, 832 F.2d 1037, 1045 (7th Cir. 1987) (construing the policy provision excluding acts explicitly covered in prior section of policy against insurer); *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (Nev. 2011) ("While clauses providing coverage are interpreted broadly so as to afford the greatest possible coverage to the insured, clauses excluding coverage are interpreted narrowly against the insurer." (quoting *Nat'l Union Fire Ins. v. Reno's Exec. Air, Inc.*, 682 P.2d 1380, 1383 (Nev. 1984))).

117. See, e.g., *Bowersox Truck Sales & Serv., Inc. v. Harco Nat'l Ins. Co.*, 209 F.3d 273, 277–78 (3d Cir. 2000) (rejecting insurer's interpretation of policy's two-year limitation period where interpretation would have rendered coverage illusory); *Harris v. Gulf Ins. Co.*, 297 F. Supp. 2d 1220, 1226 (N.D. Cal. 2003) (rejecting insurer's interpretation of insured versus insured exclusion in policy because it "would render the coverage provided by the policy illusory"); *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 398 (D. Del. 2002) (rejecting a directors and officers liability insurer's interpretation of the policy's deliberate fraud exclusion where, if applied, "there would be little or nothing left to that coverage," because "[n]o insured would expect such limited coverage from a policy that purports to cover all types of securities fraud claims"); *Titan Indem. Co. v. Newton*, 39 F. Supp. 2d 1336, 1348 (N.D. Ala. 1999) (finding coverage even though "[t]he limitations of [the] policy completely swallow up the insuring provisions"); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1380 (Md. 1997) ("If the exclusion totally swallows the insuring provision, the provisions are completely contradictory. That is

the burden of proving that exclusions eliminating or reducing coverage apply.¹¹⁸

Courts construe policy language with the purpose of the insurance in mind¹¹⁹ as a layman would understand the terms.¹²⁰ Consequently, when interpreting policies, courts often refer to standard dictionaries, as opposed to technical insurance industry understandings or definitions of the terms.¹²¹

Another basic rule of insurance policy interpretation is that, if possible, the various provisions in the policy should be interpreted to reconcile them and give effect to all of them.¹²² In essence, this rule means that courts should give effect

the grossest form of ambiguity . . .”); *ATOFINA Petrochemicals, Inc. v. Cont’l Cas. Co.*, 185 S.W.3d 440, 444–45 (Tex. 2005) (rejecting insurer’s interpretation of additional insured endorsement because it “would render coverage under the endorsement largely illusory”).

118. See, e.g., *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 313 (Minn. 1995) (ruling that insurer has burden to prove the applicability of an exclusion as an affirmative defense); *Cont’l Ins. Co. v. Louis Marx & Co.*, 415 N.E.2d 315, 317 (Ohio 1980) (holding that defense has burden of proving defense based upon exclusion); *Brown v. Snohomish Physicians Corp.*, 845 P.2d 334, 340 (Wash. 1993) (holding that once insured has made a prima facie case that there is coverage, burden shifts to the insurer to prove an exclusionary provision applies); *Fischer*, *supra* note 66, at 1004–05.

119. See, e.g., *Fageol Truck & Coach Co. v. Pac. Indem. Co.*, 117 P.2d 669, 671 (Cal. 1941) (stating that the policy “must be given ‘such a construction . . . as, if fairly warranted, will best carry out the object for which the contract was entered into, namely, that of securing indemnity to the insured for the losses to which the insurance relates’” (omission in original) (quoting *Cutting v. Atlas Mut. Ins. Co.*, 85 N.E. 174, 175 (Mass. 1908))); *Glidden v. Farmers Auto. Ins. Ass’n*, 312 N.E.2d 247, 250 (Ill. 1974) (stating that a policy should be interpreted “in the particular factual setting in which the contract was issued”); *Allen v. Metro. Life Ins. Co.*, 208 A.2d 638, 644 (N.J. 1965) (“Where particular provisions, if read literally, would largely nullify the insurance, they will be severely restricted so as to enable fair fulfillment of the stated policy objective.” (quoting *Kievit v. Loyal Protective Life Ins. Co.*, 170 A.2d 22, 26 (N.J. 1961))); *Anderson & Fournier*, *supra* note 23, at 352; *Fischer*, *supra* note 66, at 1004–05.

120. See, e.g., *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1513 (9th Cir. 1991) (refusing to take a “technical, arcane approach in discerning the meaning of damages” under a CGL policy); *Century Bank v. St. Paul Fire & Marine Ins. Co.*, 482 P.2d 193, 194 (Cal. 1971) (Policy “language is to be construed in accord with the reasonable understanding of a layman . . .”); *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 488 A.2d 486, 488 (Md. 1985) (“In [interpreting policy language], we accord words their ordinary and accepted meanings. The test is what meaning a reasonably prudent layperson would attach to the term.”); *Kissil v. Beneficial Nat’l Life Ins. Co.*, 319 A.2d 67, 70 (N.J. 1974) (“The policy should be read as the ordinary policyholder would understand it.”); PETER J. KALIS, THOMAS M. REITER & JAMES R. SEGERDAHL, *POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE* § 20.07, at 20-13 (1st ed. 1997 & Supp. 2016) (“[A]ny disputed terms must be interpreted according to their ‘plain, ordinary, and popular’ meaning.”); *Fischer*, *supra* note 66, at 1004–05.

121. See, e.g., *Scott v. Cont’l Ins. Co.*, 44 Cal. App. 4th 24, 29 (1996) (“In seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries.”); *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 488 A.2d 486, 488 (Md. 1985) (explaining that to interpret policy language, “[t]his Court has consulted *Webster’s Dictionary*, *Random House Dictionary*, or, less often, *Black’s Law Dictionary*”); JERRY, II & RICHMOND, *supra* note 17, at 138 (“In affording terms their ordinary meaning, courts frequently consult standard English language dictionaries.”); KALIS ET AL., *supra* note 120, at § 20.07, at 20-14.1 (“In many jurisdictions, courts also look to dictionaries to assist them in determining whether insurance policy language is ambiguous.”).

122. See, e.g., GA. CODE ANN. § 13-2-2(4) (2016) (stating that contracts should be interpreted as a whole); *Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1019 (2d Cir. 1985) (applying New York law, and finding “an interpretation that gives a reasonable and effective meaning

to all of the policies' provisions if possible and should do so in a way that is consistent with the general purpose of the policy as a whole.

B. Contra Proferentem

1. The Doctrine

The doctrine of *contra proferentem* provides that any contract language that is unclear or ambiguous should be construed against the drafter.¹²³ In the insurance context, because insurers draft the policies, any ambiguities should be construed against them.¹²⁴ The test in many states for determining whether policy language is ambiguous is whether the provisions at issue are reasonably or fairly susceptible to different interpretations or meanings.¹²⁵ If the policyholder

to all the terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect"); *Fireman's Fund Ins. Co. v. Allstate Ins. Co.*, 234 Cal. App. 3d 1154, 1169 (1991) ("In short, an insurance contract is to be construed in a manner which gives meaning to all its provisions in a natural, reasonable, and practical manner, having reference to the risk and subject matter and to the purposes of the entire contract." (citation omitted) (quoting *State Farm Mut. Auto. Ins. Co. v. Crane*, 217 Cal. App. 3d 1127, 1132 (1990))); *Weiss v. Bituminous Cas. Corp.*, 319 N.E.2d 491, 495 (Ill. 1974) (noting that provisions in an insurance policy should be interpreted in context of the entire policy); *Welborn v. Ill. Nat'l Cas. Co.*, 106 N.E.2d 142, 143 (Ill. App. Ct. 1952) (explaining that "the court should determine the intention [of the parties] from the whole agreement, and endeavor to give a meaning to all provisions, so far as possible, which will render them consistent and operative"); Stempel, *Reassessing*, *supra* note 70, at 812.

123. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981), which embodies this concept. See also Boardman, *Contra Proferentem*, *supra* note 74, at 1121 n.64 ("The language of a contract will be construed most strictly or strongly against the party responsible for its use" (quoting 17A C.J.S. *Contracts* § 337 (2003))); Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 774 n.4 (2015) ("[T]he *contra proferentem* rule[] is followed in all fifty states and the District of Columbia, and with good reason. Insurance policies are almost always drafted by specialists employed by the insurer. In light of the drafters' expertise and experience, the insurer should be expected to set forth any limitations on its liability clearly enough for a common layperson to understand; if it fails to do this, it should not be allowed to take advantage of the very ambiguities that it could have prevented with greater diligence." (alterations in original) (quoting *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 312 (7th Cir. 1992))).

124. See, e.g., *Crane v. State Farm Fire & Cas. Co.*, 485 P.2d 1129, 1130 (Cal. 1971) ("Any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer."); *Crawford v. Prudential Ins. Co. of Am.*, 783 P.2d 900, 904 (Kan. 1989) ("Since an insurer prepares its own contracts, it has a duty to make the meaning clear, and if it fails to do so, the insurer, and not the insured, must suffer." (quoting *Fowler v. United Equitable Ins. Co.*, 438 P.2d 46, 48 (Kan. 1968))); *RPM Pizza, Inc. v. Auto. Cas. Ins. Co.*, 601 So.2d 1366, 1369 (La. 1992) ("[A]ny ambiguity must be construed against the insurance company and in favor of the reasonable construction that affords coverage."); *Ohio Cas. Ins. Co. v. Flanagan*, 210 A.2d 221, 226 (N.J. 1965) ("If the controlling language will support two meanings, one favorable to the insurer, and the other favorable to the insured, the interpretation sustaining coverage must be applied." (quoting *Mazzilli v. Accident & Cas. Ins. Co. of Winterthur*, 170 A.2d 800, 803 (N.J. 1961))); *Gomolka v. State Auto. Mut. Ins. Co.*, 436 N.E.2d 1347, 1348-49 (Ohio 1982) ("[P]olicies of insurance, which are in language selected by the insurer and which are reasonably open to different interpretations, will be construed most favorably for the insured." (alteration in original) (quoting *Home Indem. Co. v. Vill. of Plymouth*, 64 N.E.2d 248, 250 (Ohio 1945))).

125. See, e.g., 2 ERIC MILLS HOLMES & MARK S. RHODES, *HOLMES'S APPLEMAN ON*

and insurer both offer reasonable interpretations, then the policy language is ambiguous and should be construed in favor of coverage.¹²⁶ Where the controversy involves a term or phrase that has generated many lawsuits with inconsistent results, many courts view the inconsistent results as indicia that the policy language is ambiguous.¹²⁷

Unlike in typical contract disputes where *contra proferentem* essentially serves as a tiebreaker when ambiguous policy language cannot be conclusively clarified by extrinsic evidence,¹²⁸ most courts simply construe any ambiguities in the policy language against the insurer and in favor of coverage.¹²⁹ For this

INSURANCE § 6.1, at 169 (2d ed. 1996) (explaining that insurer has the burden of establishing that insurer's interpretation is the only fair interpretation of contract); Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 537 (1996) [hereinafter Abraham, *A Theory*]; see also *New Castle Cnty. Del. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 243 F.3d 744, 750 (3d Cir. 2001) ("The settled test for ambiguity is whether the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." (quoting *New Castle Cnty. Del. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 174 F.3d 338, 344 (3d Cir. 1999))); *High Country Assocs. v. N.H. Ins. Co.*, 648 A.2d 474, 476 (N.H. 1994) ("If the language of the policy reasonably may be interpreted more than one way and one interpretation favors coverage, an ambiguity exists in the policy that will be construed in favor of the insured and against the insurer."); *Salem Grp. v. Oliver*, 607 A.2d 138, 139 (N.J. 1992) ("When a policy fairly supports an interpretation favorable to both the insured and the insurer, the policy should be interpreted in favor of the insured."); *Bonner v. United Servs. Auto. Ass'n*, 841 S.W.2d 504, 506 (Tex. Ct. App. 1992) ("The court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent.").

126. *Salem Grp.*, 607 A.2d at 139.

127. See *Sec. Ins. Co. of Hartford v. Inv'rs Diversified Ltd., Inc.*, 407 So.2d 314, 316 (Fla. Dist. Ct. App. 1981) ("The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language."); *Crawford v. Prudential Ins. Co. of Am.*, 783 P.2d 900, 908 (Kan. 1989) ("[T]he reported cases are in conflict, the trial judge and the Court of Appeals reached different conclusions and the justices of this court [disagree] . . . Under such circumstances, the clause is, by definition, ambiguous and must be interpreted in favor of the insured."); *Allstate Ins. Co. v. Hartford Accident & Indem. Co.*, 311 S.W.2d 41, 47 (Mo. Ct. App. 1958) ("Since we assume that all courts adopt a reasonable construction, the conflict is of itself indicative that the word as so used is susceptible of at least two reasonable interpretations, one of which extends the coverage to the situation at hand"); *George H. Olmsted & Co. v. Metro. Life Ins. Co.*, 161 N.E. 276, 276 (Ohio 1928) ("[T]he fact that such respectable authority is in irreconcilable conflict, and was so long prior to the execution of the insurance contracts here under consideration, coupled with the fact that the lower courts in the instant case are in disagreement as to whether the clause is a covenant or a condition, presents such persuasive argument of the ambiguity of the clause that if this court were in accord as to the unambiguity of the clause it would hesitate to so declare."); *Cohen v. Erie Indem. Co.*, 432 A.2d 596, 599 (Pa. Super. Ct. 1981) ("The mere fact that [courts differ on the construction of the provision] . . . itself creates the inescapable conclusion that the provision in issue is susceptible to more than one interpretation."); Boardman, *Contra Proferentem*, *supra* note 74, at 1122.

128. See Beh, *supra* note 70, at 90; Randall, *Freedom of Contract*, *supra* note 24, at 120.

129. See, e.g., *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 817 F. Supp. 1136, 1155 (D.N.J. 1993) ("The court must reject defendants' invitation to evaluate the proffered evidence of drafters' intent. . . . [T]he doctrine of *contra proferentem*—or 'against the one who proffers'—precludes this court from considering this evidence. In insurance law, the doctrine of *contra*

reason, the application of *contra proferentem* to ambiguous policy language in insurance cases has been described as strict liability for the insurer.¹³⁰

To initially determine whether policy language is ambiguous, courts in some states will consider extrinsic evidence as opposed to just the policy language itself.¹³¹ If the court determines that the policy language is ambiguous, either on its face or when applied to the facts of the case, then it also will consider extrinsic evidence, if it exists, to clarify the meaning of the policy language.¹³² If the extrinsic evidence does not clarify the meaning, then the court will resolve the ambiguities in favor of the policyholder.¹³³ Under the last step of this approach,

proferentem provides that where a term in an insurance policy is ambiguous, giving rise to two equally plausible interpretations, the term will be given the meaning that results in coverage.”), *aff’d in part and remanded*, 89 F.3d 976 (3d Cir. 1996); *Moland v. Indus. Claim Appeals Office*, 111 P.3d 507, 511 (Colo. App. 2004) (“In cases where insurance contracts are involved, Colorado courts will automatically construe ambiguities against the insurance company.”); *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 687–88 (Ga. 1989) (“The construction of a contract is a matter of law for the court.” . . . Georgia courts have long acknowledged that insurance policies are prepared and proposed by insurers. Thus, if an insurance contract is capable of being construed two ways, it will be construed against the insurance company and in favor of the insured.” (citations omitted) (quoting GA. CODE ANN. § 13-2-1 (2016))); 1 JEFFERY E. THOMAS, *NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION* § 5.02[2][a] (2016) (“The majority, almost universal, rule is that if terms of an insurance policy are ambiguous, those terms will be construed in favor of coverage.”).

130. Abraham, *A Theory*, *supra* note 125, at 538.

131. See, e.g., *Am. Nat’l Fire Ins. Co. v. Rose Acre Farms, Inc.*, 107 F.3d 451, 457 (7th Cir. 1997) (“If the ambiguity is latent, meaning the terms of the policy are unambiguous but cannot be applied to the situation in question, ‘because they do not fit the factual circumstances to which they are addressed,’ then the court may resort to extrinsic evidence in order to determine how the parties would have understood the agreement to apply to the situation in question.” (quoting *Ohio Cas. Grp. of Ins. Cos. v. Gray*, 746 F.2d 381, 383 (7th Cir. 1984))); *Charter Oil Co. v. Am. Employers’ Ins. Co.*, 69 F.3d 1160, 1167–68 (D.C. Cir. 1995) (“Evidence of the state of the world to which a contract is to be applied is necessarily admissible to reveal a latent ambiguity, as Missouri courts clearly recognize.”); Abraham, *A Theory*, *supra* note 125, at 539–40 (“[T]he ‘modern’ view [is] that extrinsic evidence of the meaning that the parties attached to a contract term may be admitted not only after the term is determined to be ambiguous, but also in order to prove that the term is ambiguous.”).

132. *Penford Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh* 662 F.3d 497, 505 (8th Cir. 2011) (“We conclude that the doctrine of *contra proferentem* is inapplicable here. . . . [T]he doctrine should not be applied when the question may be resolved in light of facts developed via extrinsic evidence.”); *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.*, 165 F.3d 1157, 1161 (7th Cir. 1999) (“[T]he rule that ambiguities in insurance contracts are to be resolved in favor of the insured comes into play only after the insurance company has had an opportunity to present evidence designed to dispel the ambiguity.”); Leib & Thel, *supra* note 123, at 785–88.

133. See, e.g., *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275–76 (2d Cir. 2000) (“Once a court concludes that an insurance provision is ambiguous, ‘the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract.’ ‘If the extrinsic evidence does not yield a conclusive answer as to the parties’ intent,’ a court may apply other rules of contract construction, including the rule of *contra proferentem*, which generally provides that where an insurer drafts a policy ‘any ambiguity in [the] . . . policy should be resolved in favor of the insured.’” (alteration and omission in original) (first quoting *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd’s*, 136 F.3d 82, 86 (2d Cir. 1998); then quoting *McCostis v. Home Ins. Co.*, 31 F.3d 110, 113 (2d Cir. 1994))); *Jefferson Block 24 Oil & Gas, L.L.C. v. Aspen Ins. UK Ltd.*, 652 F.3d 584, 589 (5th Cir. 2011) (“‘If the extrinsic evidence does not yield a conclusive answer as to the parties’ intent,’ a court may apply other rules of contract

the courts treat insurance policies like traditional contracts and the doctrine essentially serves as a tiebreaker to resolve ambiguities.¹³⁴ In the absence of extrinsic evidence regarding the drafting intent, which is typically the case, the language is construed against the insurer.¹³⁵

2. The Theoretical Bases for *Contra Proferentem*

There are numerous theoretical justifications for the strict liability version of *contra proferentem* used in insurance cases. First, by construing ambiguous language against the drafter, the drafter has an incentive to make sure the language is clear.¹³⁶

Second, allowing the court to construe ambiguous language against the drafter rather than making its meaning a question of fact to be resolved by the factfinder based upon extrinsic evidence saves judicial resources by avoiding trials.¹³⁷

Third, there is a great disparity in knowledge and expertise regarding insurance matters between insurers and policyholders.¹³⁸

Fourth, some courts view insurance policies as an extreme type of contract of adhesion because many insurers use the exact same policy form, sold on a take-it-or-leave-it basis. Therefore, not only do policyholders lack input regarding the policy language, but oftentimes, they cannot even shop around for different terms.¹³⁹ This problem is further exacerbated by the fact that many types of insurance are mandatory, requiring policyholders to purchase insurance with terms they cannot choose or negotiate.¹⁴⁰

Fifth, because there are no negotiations regarding policy language, and the policyholder does not even see the policy before purchase, there is no mutual intent to discern regarding the meaning of the policy's terms. Consequently, it is pointless to attempt to clarify the parties' mutual intent regarding ambiguous

construction, including the rule of *contra proferentem*, which generally provides that where an insurer drafts a policy "any ambiguity in [the] . . . policy should be resolved in favor of the insured." (alteration and omission in original) (quoting *McCotis*, 31 F.3d at 113)); Leib & Thel, *supra* note 123, at 785–88.

134. See *supra* note 128.

135. See Beh, *supra* note 70, at 90; Randall, *Freedom of Contract*, *supra* note 24, at 120; *supra* note 126.

136. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (AM. LAW INST. 1981) ("[The drafter] is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert."); 1 THOMAS, *supra* note 129, § 5.02; Leib & Thel, *supra* note 123, at 776.

137. See, e.g., Abraham, *A Theory*, *supra* note 125, at 538; Stempel, *Reassessing*, *supra* note 70, at 822.

138. See, e.g., 1 THOMAS, *supra* note 129, § 5.02; Fischer, *supra* note 66, at 1018, 1047–48, 1054; Randall, *Freedom of Contract*, *supra* note 24, at 125; Rappaport, *supra* note 83, at 174.

139. See, e.g., 1 THOMAS, *supra* note 129, § 5.02; Abraham, *A Theory*, *supra* note 125, at 539; Anderson & Fournier, *supra* note 23, at 364–67; Randall, *Freedom of Contract*, *supra* note 24, at 107, 126; Rappaport, *supra* note 83, at 174.

140. See *supra* Section II.

policy language through the use of extrinsic evidence.¹⁴¹

Sixth, because state insurance regulators do not actually edit the policy language, *contra proferentem* serves as a judicial restraint on overreaching by insurers.¹⁴²

Collectively, these justifications have resulted in the application of *contra proferentem* to create strict liability for insurers whenever policy language is subject to multiple reasonable interpretations. The reality, of course, is that no language can be drafted so clearly that it is unambiguous in all circumstances. Yet, when one considers the significant advantages insurers have with respect to the drafting and sale of policies, construing ambiguities against insurers where there are competing reasonable interpretations of the language is a relatively small concession to policyholders.

C. *The Reasonable Expectations Doctrine*

1. The Doctrine

Another staple of policy interpretation doctrine is that a policy should be construed to fulfill the reasonable expectations of the policyholder.¹⁴³ Over forty years ago, then-Professor Robert Keeton wrote a seminal article regarding the reasonable expectations doctrine.¹⁴⁴ In his subsequent treatise, Judge Keeton summarized the doctrine as follows:

In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage

141. See, e.g., Abraham, *A Theory*, *supra* note 125, at 540; Anderson & Fournier, *supra* note 23, at 360; Boardman, *Contra Proferentem*, *supra* note 74, at 1110; Randall, *Freedom of Contract*, *supra* note 24, at 108.

142. See *supra* Section II; see also Abraham, *Four Conceptions*, *supra* note 1, at 664; Keeton, *supra* note 83, at 963.

143. See, e.g., ROBERT E. KEETON, ALAN I. WIDISS & JAMES M. FISCHER, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES*, §§ 7.2, at 633–34 (2d ed. 1988) (discussing how the timeliness provisions of insurance contracts force insurers to meet consumer expectations); BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* §1.04[b], at 39–51 (18th ed. 2017) (identifying courts in forty-two states that have expressed support for, or applied a form of, the reasonable expectations doctrine); STEMPER, *LAW OF INSURANCE*, *supra* note 66, § 11.1, at 312 (1994); see also *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990) (explaining that ambiguous coverage clauses of insurance policies are to be interpreted broadly to “protect] the objectively reasonable expectations of the insured”); *Roland v. Ga. Farm Bureau Mut. Ins. Co.*, 462 S.E.2d 623, 625 (Ga. 1995) (“A contract of insurance should be strictly construed against the insurer and read in favor of coverage in accordance with the reasonable expectations of the insured”); *A.B.C. Builders, Inc. v. Am. Mut. Ins. Co.*, 661 A.2d 1187, 1190 (N.H. 1995) (“[T]he policy language must be so clear as to create no ambiguity which might affect the insured’s reasonable expectations.” (quoting *Cacavas v. Maine Bonding & Cas. Co.*, 512 A.2d 423, 425 (N.H. 1986))); *Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488, 495–96 (W. Va. 1987) (concluding that the court will apply reasonable expectations doctrine to construe the policy in a manner that a reasonable person standing in the shoes of the insured would expect the language to mean, even though painstaking examination of the policy provisions would have negated those expectations).

144. Keeton, *supra* note 83, at 967.

afforded by insurance contracts even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insurer.¹⁴⁵

Stated differently, under Judge Keeton's view of the reasonable expectations doctrine, "even when the policy language unambiguously precludes coverage, under certain circumstances, courts will hold that coverage exists."¹⁴⁶ In short, the policyholder receives the coverage that he reasonably expected, even when policy language or an exclusion credibly can be argued to defeat coverage of a claim.

Although numerous courts have adopted Judge Keeton's version of the reasonable expectations doctrine, it is not the only version of the doctrine courts employ.¹⁴⁷ Some courts only apply the reasonable expectations doctrine if the exclusion or limitation in the policy is concealed or difficult to find.¹⁴⁸ Thus, under this version, courts implicitly resort to equitable principles when interpreting the policy.

Other courts only apply the reasonable expectations doctrine if they conclude the policy language is ambiguous.¹⁴⁹ In such jurisdictions, the

145. KEETON ET AL., *supra* note 143, § 6.3(a)(3), at 633. For commentary regarding the reasonable expectations doctrine and the various iterations of it, see Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 825 (1990) (providing a detailed historical account of the doctrine, and asserting that the doctrine is principled and can be applied within justifiable guidelines); Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 35–41 (1998) (discussing the doctrine as conceptualized by Keeton); William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267, 287–96 (1986) (formulating standards for applying the doctrine); Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 392 (1986) (arguing for refinements to the doctrine in response to the fading appeal that the doctrine holds for courts and commentators, and contending that courts should "discard their unfortunate tendency to speak the platitudes of reasonable expectations without undertaking a careful and systematic analysis"); Daniel Schwarcz, *A Product Liability Theory*, *supra* note 1, at 1395 (criticizing the reasonable expectations doctrine, and arguing that the case law endorsing the doctrine is "confused and inconsistent"); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 182–83, 191 (1998) [hereinafter Stempel, *Unmet Expectations*] (describing the various judicial approaches to the doctrine, and noting both liberal and narrow approaches among the numerous states that have adopted the doctrine).

146. Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 22 (1997).

147. Some commentators have argued that there are as many as seven versions of the reasonable expectations doctrine used by courts. See Stempel, *Unmet Expectations*, *supra* note 145, at 192–93. This Article only addresses the three principal versions of the doctrine that are used by the majority of courts that have adopted some version of the doctrine.

148. See, e.g., Park, *supra* note 94, at 169; Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425, 429 n.14 (1998) ("Courts have invalidated exclusions as not conspicuous where not in a section labeled exclusions and placed on an overcrowded page . . . or in a section labeled 'General Limitations' but in a 'dense pack' format . . . or hidden in a subsequent section of the policy bearing no clear relationship to the insuring clause and concealed in fine print." (omissions in original) (quoting *Chu v. Allianz Life Ins. Co.*, 980 F. Supp. 1086, 1092 (N.D. Cal. 1997))), *rev'd*, 156 F.3d 1236 (9th Cir. 1998).

149. See, e.g., Park, *supra* note 94, at 169–70; Popik & Quackenbos, *supra* note 148, at 429.

reasonable expectations doctrine becomes duplicative of *contra proferentem* and is arguably unfavorable from the policyholders' perspective.¹⁵⁰ Courts that employ this version of the reasonable expectations doctrine reduce the policyholder-friendly effect of *contra proferentem* because the ambiguous language is construed in a manner that a reasonable policyholder would expect, as opposed to simply against the insurer. The basic reasoning of such courts is that it cannot be reasonable, as a matter of law, for a policyholder to expect coverage for a claim under a policy that unambiguously excludes it.¹⁵¹

2. The Theoretical Bases for the Reasonable Expectations Doctrine

Theoretically, several grounds justify the reasonable expectations doctrine. Many of them overlap with the justifications for use of the strict liability version of *contra proferentem* in the insurance context.

First, there is a great disparity between insurers and policyholders, both in knowledge and expertise regarding insurance matters and in economic power generally.¹⁵² Thus, vulnerable policyholders need protection against insurers overreaching.¹⁵³

Second, policyholders have no input into the policy language. Policyholders also do not receive the policies until after purchase and they generally cannot understand the terms and conditions due to their complexity. Consequently, the policy language does not serve as the source of policyholders' understanding regarding the scope of coverage.¹⁵⁴ Other considerations necessarily must come into play when determining the scope of coverage provided once it is accepted that, unlike in traditional contract disputes where the goal is to determine the parties' mutual intent, mutual intent does not exist in insurance policies.¹⁵⁵ Such considerations include the type of insurance at issue, insurer ads, and agents' and brokers' statements, all of which shape a policyholder's beliefs regarding

150. See, e.g., Henderson, *supra* note 145, at 827 (“[D]ecisions using this [reasonable expectations] test solely to construe policy language do not support a new principle at all, but fall within the time-honored canon of construing ambiguities against the drafter of the contract . . .”); Park, *supra* note 94, at 169–70, 186; Popik & Quackenbos, *supra* note 148, at 429 n.16 (“It is doubtful whether application of [this] version of the reasonable expectations doctrine can be distinguished from, or adds anything to, the application of the canon of construction resolving ambiguities against the drafter and reforming the contract accordingly.” (quoting *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 807 (Utah 1992))).

151. See, e.g., *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 312 (Ala. 1999) (“[E]xpectations that contradict a clear exclusion are not ‘objectively reasonable.’” (quoting *Wellcome v. Home Ins. Co.*, 849 P.2d 190, 194 (Mont. 1993))).

152. See, e.g., Beh, *supra* note 70, at 85–86; Fischer, *supra* note 66, at 1018, 1047, 1049; Keeton, *supra* note 83, at 963; Park, *supra* note 94, at 171; Randall, *Freedom of Contract*, *supra* note 24, at 125; Stempel, *Reassessing*, *supra* note 70, at 822, 826.

153. See, e.g., Keeton, *supra* note 83, at 963; Park, *supra* note 94, at 171.

154. See *supra* Section II for a discussion of the adhesive nature of insurance contracts. See also Abraham, *A Theory*, *supra* note 125, at 540; Anderson & Fournier, *supra* note 23, at 360; Park, *supra* note 94, at 170; Randall, *Freedom of Contract*, *supra* note 24, at 108; Stempel, *Reassessing*, *supra* note 70, at 827.

155. See Boardman, *Contra Proferentem*, *supra* note 74, at 1110.

coverage.¹⁵⁶

Third, the Restatement (Second) of Contracts specifically contemplates that courts can refuse to enforce terms contained in standardized insurance policies that the insurer knows policyholders would not accept if they were aware of the terms and could reject them: “Where the other party has reason to believe that the party manifesting [assent to a written agreement] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”¹⁵⁷ The official comment to this section of the Restatement specifically states:

[C]ustomers . . . are not bound to unknown terms which are beyond the range of reasonable expectation. . . . [A] party who adheres to the other party’s standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.¹⁵⁸

Thus, the Restatement specifically recognizes courts’ authority to employ interpretive tools such as the reasonable expectations doctrine when construing insurance policies.¹⁵⁹

Fourth, because state insurance regulators have the power to reject policy terms that are unreasonable, unfair, ambiguous, or contrary to public policy,¹⁶⁰ courts likewise have the power to refuse to enforce terms that insurance regulators arguably should not have approved.¹⁶¹

Fifth, insurers are in a quasi-fiduciary relationship with policyholders under liability policies because of their ability to control the defense and settlement of claims asserted against policyholders. Thus, policyholders need greater protection by the courts than parties who enter arm’s-length contracts and have the ability to control the defense and settlement of claims asserted against them.¹⁶²

156. See, e.g., Anderson & Fournier, *supra* note 23, at 359, 393–97, 419; Park, *supra* note 94, at 174.

157. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981).

158. *Id.* § 211 cmt. f.

159. See, e.g., Anderson & Fournier, *supra* note 23, at 345; Randall, *Freedom of Contract*, *supra* note 24, at 113.

160. See *supra* note 107 and accompanying text.

161. See, e.g., Randall, *Freedom of Contract*, *supra* note 24, at 146.

162. See, e.g., Anderson & Fournier, *supra* note 23, at 385–87; Beh, *supra* note 70, at 86; Fischer,

Sixth, policyholders are also vulnerable because they already have performed their end of the bargain by paying the premium and, unlike parties in a typical contract dispute, they cannot get another insurer to replace the breaching insurer after a loss occurs.¹⁶³ Stated differently, unlike typical breach of contract situations where the nonbreaching party has the ability to “cover” the subject of the contract by hiring another party to perform in the event of a breach, the policyholder has no ability to obtain replacement coverage once a loss has occurred.

Seventh, public policy can trump policy language.¹⁶⁴ Public policies in play include (1) ensuring that injured parties are compensated, and (2) fulfilling the purpose of insurance as a social safety net that is intended to prevent the financial ruin of individual policyholders.¹⁶⁵

Some commentators have described these theoretical justifications for the reasonable expectations doctrine as an amalgamation of the doctrines of waiver, estoppel, unconscionability, reformation, and rescission.¹⁶⁶ Regardless of which theoretical justifications may apply, the reasonable expectations doctrine is not really a rule of contract interpretation. Rather, it is a judicially created rule that many courts have employed in their attempts to reach fair and equitable results where insurers may be relying upon policy language to defeat coverage in a way that is at odds with the general purpose of insurance.¹⁶⁷

IV. A NEW MODEL FOR DRAFTING AND INTERPRETING INSURANCE INSTRUMENTS

Is there a cohesive theory underlying the rules of insurance policy interpretation? If so, what are the implications of that theory? The short answer to the first question is *yes*, and one implication is that the drafting and interpretation of insurance policies should be changed as a result.

supra note 66, at 1025–26, 1028.

163. See, e.g., Anderson & Fournier, *supra* note 23, at 377; Fischer, *supra* note 66, at 1036.

164. See, e.g., 7 COUCH ON INSURANCE § 101:11 (3d ed. 2016) (“All contracts must be consistent with public policy, and insurance contracts are no exception. Contracts against public policy are considered illegal and void. Consequently, the parties to an insurance contract are free to agree to coverage terms as they desire so long as the policy terms do not violate public policy. An insurance policy whose direct purpose is to promote, encourage, or effectuate a violation of the law is considered illegal and void.” (footnote omitted)); Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1062 (1991) (“The test of whether or not an insurance contract is void as against state public policy is whether it is injurious to the public or contravenes some important established societal interest, or when its purpose is to promote, effect, or encourage a violation of law.”).

165. See, e.g., Fischer, *supra* note 66, at 1060; French, *The Role of the Profit Imperative*, *supra* note 16, at 1081–82 (arguing that the profit imperative that drives publicly traded insurance companies has undermined the social safety net purpose of insurance); Stempel, *Insurance as a Social Instrument*, *supra* note 1, at 1500–06.

166. Park, *supra* note 94, at 179.

167. See *supra* notes 147–48 and accompanying text for a discussion of the application of the reasonable expectation doctrine’s application in the courts.

A. *Insurance Policies Are Not Contracts*

The rules of insurance policy interpretation have developed the way they have because insurance policies do not fit within the legal framework of contracts. Without openly acknowledging that the process by which insurance policies are created and sold does not satisfy the requirements for contract formation, courts have developed special rules designed to protect policyholders in light of the social importance and necessity of insurance. Consequently, insurance policies are more accurately described as financial instruments (e.g., insurance instruments) than contracts.

As discussed in Section II, essentially incomprehensible insurance policies are drafted and sold by insurers with little regulatory oversight on a take-it-or-leave-it basis with near unanimity among insurers regarding policies' terms and conditions.¹⁶⁸ The actual terms and conditions of policies are provided only after purchase.¹⁶⁹ Policyholders effectively have no choice regarding the policy language or whether to even purchase many critical lines of insurance because the insurance is mandatory.¹⁷⁰ Thus, it is a legal fiction for courts to treat insurance policies as contracts, where the goal is to discern the parties' mutual intent.¹⁷¹

But are insurance policies really all that different from standardized contracts of adhesion such as mortgages, wrap agreements, and cell phone contracts? Courts generally treat these as contracts but enforce them subject to certain protective measures such as the unconscionability doctrine to ensure that they are not oppressively unfair to consumers.¹⁷² Nonetheless, the answer is *yes* because insurance contracts are different from these other standardized contracts of adhesion for several reasons.

First, consumers are not required to purchase the products that are accompanied by standard form terms and conditions, but they are required to buy certain types of insurance. Consequently, unlike most things that are subject to standardized contracts, a consumer has no choice regarding whether to buy mandatory lines of insurance.

Second, with respect to the purchase of cell phones and other products accompanied by a contract of adhesion, the consumer has a myriad of choices and can simply take her business elsewhere. With insurance, all insurers sell policies with the same, or substantially the same, terms and conditions,

168. *See supra* Section II.

169. *See supra* Section II.

170. *See supra* Section II.

171. *See, e.g.*, 1 THOMAS, *supra* note 129, at § 5.02[2][b] (“[B]ecause of the use of policy forms, parol evidence often provides little insight regarding interpretation of an insurance policy. Similarly, because insureds have little opportunity to negotiate the policy terms (or in many cases even read them in advance) the search for the parties’ intention is strained and artificial.”).

172. *See supra* Section I. Notably, although there is an ongoing debate regarding the enforceability of some types of standardized agreements, many courts have refused to enforce various types of “wrap” agreements on the basis that consumers have not actually assented to the terms of them. *See supra* notes 61–65 and accompanying text.

effectively eliminating consumer choice.

Third, the consumer actually gets a product such as a computer program or a cell phone when he enters into these other types of standardized contracts. Consequently, the standardized terms and conditions are secondary to the transaction, which is the exchange of money for the product. With insurance, in exchange for the payment of premiums, the consumer only gets a complex, incomprehensible set of terms and conditions pursuant to which the insurer promises to do things in the future if certain events occur.

Fourth, for other standard form agreements, the consumer has an opportunity to review and accept the terms and conditions either before or after entering the agreement.¹⁷³ Indeed, even for shrink wrap agreements in which the purchaser does not get an opportunity to review the terms and conditions until after the product has been purchased and the packaging opened, courts that have enforced such agreements generally have done so on the grounds that the purchaser has the option of returning the product upon reviewing the terms and conditions.¹⁷⁴ That, of course, is not true with respect to mandatory lines of insurance. And, as discussed above, it would be meaningless for someone to return a product that they are required to purchase when substitute vendors sell an essentially identical product with the same, or substantially similar, terms and conditions.

Fifth, unlike other standard form agreements, when an insurer breaches the terms of a policy—meaning the insurer declines to cover a loss after the loss has occurred—the policyholder has no ability to cover its loss by buying a substitute product.¹⁷⁵ Once a loss has occurred, no other insurer is willing to sell insurance to cover it.¹⁷⁶ On the other hand, when a person's cell phone breaks, that person can buy another cell phone while it disputes whether the warranty covers the damage to the first cell phone.

Sixth, unlike standard form agreements for which the nonbreaching party generally cannot recover extra-contractual damages,¹⁷⁷ a policyholder can recover extra-contractual damages such as attorneys' fees and punitive damages when an insurer unreasonably refuses to honor the terms of an insurance policy.¹⁷⁸ Indeed, many states treat an unreasonable failure to honor the terms of

173. See *supra* notes 61–65 and accompanying text for a discussion of the difference in the manifestation of assent in “click wrap” and “rolling” contracts.

174. See *supra* note 63 and accompanying text.

175. See *supra* note 163 and accompanying text.

176. See *supra* note 163 and accompanying text.

177. See, e.g., *Mannheimer Bros. v. Kansas Cas. & Sur. Co.*, 184 N.W. 189, 191 (1921) (“[T]he general rule [is] that the measure of damages for the breach of a contract for the payment of money is the amount agreed to be paid with interest.”); RESTATEMENT (SECOND), CONTRACTS, §§ 346–56 (AM. LAW. INST. 1981) (addressing the various damages available for breach of contract, which do not include extra-contractual damages such as punitive damages or awards for emotional distress).

178. See, e.g., 42 PA. STAT. AND CONS. STAT. ANN. § 8371 (West 2016) (allowing for an award of attorneys' fees, interest, and punitive damages for insurers' unreasonable failure to honor the terms of insurance policies). The standards for proving when an insurer's failure to honor the terms of an insurance policy warrants an award of extra-contractual damages (i.e., insurer bad faith) vary from

an insurance policy as a tort.¹⁷⁹ In fact, some states even allow for the recovery of damages for emotional distress when an insurer unreasonably fails to honor its policy's terms.¹⁸⁰ That is quite different than how courts treat breach of contract claims for which the nonbreaching party can only recover contractual damages. If insurance policies are simply a variety of standardized contracts, then why can policyholders recover extra-contractual damages for a breach?

Finally, as discussed in more detail in the next Part, unlike the subject matter of most standard form contracts, insurance plays a critical role in society to ensure that people and their businesses are not financially ruined by unfortunate events.¹⁸¹ The financial and social consequences when an insurer refuses to pay the amount necessary to replace a person's house or to pay for health care to treat a life-threatening disease is not really comparable to a cell phone carrier refusing to replace a broken phone or overcharging a customer five dollars and requiring the consumer to arbitrate his claim pursuant to standard form terms and conditions.

B. *Societal and Public Policy Interests*

Courts often explicitly or implicitly consider the important societal and public policy interests that underlie insurance disputes. One such interest is the fact that insurance serves the quasi-public function of sharing and spreading risk.¹⁸² This important function traces its roots in America to the first insurance sold.¹⁸³ Originally, insurers were administrators of a pool of money to which members of a community contributed and from which a member would be paid if his property was destroyed.¹⁸⁴ The purpose of these mutual insurance companies was to serve as social safety nets through which a community or

state to state. Some states require that the policyholder prove that the insurer acted egregiously or with a dishonest intent, while others require only that the policyholder prove that the insurer acted "unreasonably" with respect to the handling or payment of a claim and that the insurer knew or had reason to know that its behavior was unreasonable. *See, e.g., JERRY, II & RICHMOND, supra* note 17, at 165–70 (explaining how the determination of insurer bad faith often focuses on the unreasonableness of the insurer's conduct but it does vary across jurisdictions); Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 96–103 (1994) (discussing what constitutes insurer bad faith and looking at various standards set forth by the courts).

179. *See, e.g., Crisci v. Sec. Ins. Co.*, 426 P.2d 173, 179 (Cal. 1967) (affirming a jury verdict that included a tort damage award for the emotional distress the policyholder suffered as a result of the insurer's unreasonable refusal to settle a claim against the policyholder); *Birth Ctr. v. St. Paul Cos.*, 787 A.2d 376, 389 (Pa. 2001) (finding that an insurer's unreasonable failure to settle a claim against the policyholder can constitute both a tort claim and a breach of contract claim); ABRAHAM & SCHWARCZ, *supra* note 26, at 91 ("Some courts consider [an insurer bad faith] action to be in contract, for breach of an implied covenant of good faith. . . . [However, t]he dominant approach today is to hold that the cause of action sounds in tort . . .").

180. *See, e.g., Crisci*, 426 P.2d at 178–79.

181. *See supra* Section II.

182. *See supra* Section II.

183. *See supra* Section II.

184. *See supra* Section II.

group acted for the mutual benefit of the unlucky few who suffered losses.¹⁸⁵

Today, insurance is even more integral to people's lives and the conduct of business.¹⁸⁶ Indeed, many lines of insurance that did not even exist when the United States was first formed—auto insurance, homeowners insurance, health insurance, workers' compensation insurance—are all effectively mandatory today.¹⁸⁷

Another significant societal concern is the compensation of injured parties.¹⁸⁸ In the absence of insurance, many, if not most, injuries and related financial obligations would go uncompensated because the vast majority of people lack adequate assets to cover the injuries and damages they cause.¹⁸⁹ Indeed, the compensation of injured parties is the overriding public policy reason why automobile insurance, for example, is mandatory in America.¹⁹⁰ The public policy favoring the compensation of injured parties is also the source of many state laws and court decisions that override policy language that would not allow an injured victim to receive full compensation.¹⁹¹

Another public policy favors the enforcement of legal commitments. Insurers should honor their commitments to policyholders when they accept their policyholders' risks of loss. As one court stated, "One [public] policy is that an insurance company which accepts a premium for covering all liability for damages should honor its obligation."¹⁹² Insurers receive significant premiums to accept their policyholders' risks. When losses occur, insurers, not policyholders, should bear that financial burden.

185. See *supra* Section II.

186. See *supra* Section II.

187. See *supra* notes 23–26 and accompanying text.

188. See *supra* note 28 and accompanying text.

189. See *supra* note 29 and accompanying text.

190. See *supra* note 30 and accompanying text.

191. See, e.g., ABRAHAM & SCHWARCZ, *supra* note 26, at 656–57, 706 (discussing state legislatures' and courts' refusal to enforce "intentional act" exclusions, "family" exclusions, and "physical contact" requirements in auto policies due to the public policy favoring the compensation of auto accident victims); JERRY, II & RICHMOND, *supra* note 17, at 951, 956–57, 962–63 (same).

192. *Creech v. Aetna Cas. & Sur. Co.*, 516 So.2d 1168, 1174 (La. Ct. App. 1987); *accord* *Sch. Dist. for the City of Royal Oak v. Cont'l Cas. Co.*, 912 F.2d 844, 848–49 (6th Cir. 1990) (noting that "[p]ublic policy normally favors enforcement of insurance contracts according to their terms" and "common sense suggests that the prospect of escalating insurance costs and the trauma of litigation, to say nothing of the risk of uninsurable punitive damages, would normally neutralize any stimulative tendency the insurance might have" (first citing *Ranger Ins. Co. v. Bal Harbour Club, Inc.*, 549 So.2d 1005, 1010 n.1 (Fla. 1989) (Ehrlich, C.J., dissenting))); *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 444 (5th Cir. 1962) (Gewin, J., concurring) (noting the public policy favoring the enforcement of contracts); *Union Camp Corp. v. Cont'l Cas. Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978) ("Exercise of the freedom of contract is not lightly to be interfered with. It is only in clear cases that contracts will be held void as against public policy."); *Indep. Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co.*, 495 N.W.2d 863, 868 (Minn. Ct. App. 1993) (noting that it is questionable whether the inference that insurance stimulates wrongdoing can overcome the "competing public policies [that] favor freedom of contract and the enforcement of insurance contracts according to their terms").

C. *Understanding the Case Law*

Court decisions applying the rules of insurance policy interpretation do not seem as arbitrary when viewed through the prism of how insurance policies are created and sold, along with the related societal and public policy concerns. Rather, these decisions reflect courts' attempts to fit a square peg into a round hole—using rules of contract interpretation to resolve disputes that implicate important societal concerns even though the controlling document is not really a contract.

In reality, courts cannot reconcile the societal and public policy interests associated with insurance while interpreting policies under the traditional rules of contract interpretation. Courts, however, have not been willing to explicitly acknowledge that insurance policies are not really contracts and thus should not be interpreted using those rules. Instead, courts have attempted to vindicate the societal and public policy concerns surrounding insurance while shoehorning their decisions into a contractual analysis framework. In doing so, they have relied upon a strict liability version of *contra proferentem* where they find ambiguities in policy language and then strictly construe them against the insurer.¹⁹³ And, when the policy language is simply unambiguous, many courts use the reasonable expectations doctrine to override the unambiguous policy language.¹⁹⁴ The reasonable expectations doctrine allows a court to consider noncontractual, equitable considerations regarding the dispute and to refuse to enforce an exclusion or limitation if doing so would be unfair.¹⁹⁵

This current approach has at least three problems. First, it indulges and perpetuates the legal fiction that insurance policies are contracts.

Second, wildly different and inconsistent results can occur when the same policy language is applied to similar facts depending upon which rule or societal interest the court emphasizes.¹⁹⁶ Under the reasonable expectations doctrine, for

193. See *supra* Part III.B.

194. See *supra* Part III.C.

195. See *supra* Part III.C.

196. One of the countless examples of courts' inconsistent conclusions regarding the meaning of the same policy language under similar facts can be found in the litigation that occurred in the 1990s regarding the meaning of the "sudden and accidental" pollution exclusion that was identically worded in thousands of standard form CGL policies sold by numerous insurers. Compare *Hecla Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1092 (Colo. 1991) ("Although 'sudden' can reasonably be defined to mean abrupt or immediate, it can also reasonably be defined to mean unexpected and unintended. Since the term 'sudden' is susceptible to more than one reasonable definition, the term is ambiguous, and we therefore construe the phrase 'sudden and accidental' against the insurer to mean unexpected and unintended."), and *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 690 (Ga. 1989) ("In sum, we conclude that the pollution exclusion clause is capable of more than one reasonable interpretation. The clause must therefore be construed in favor of the insured to mean 'unexpected and unintended.'"), with *Am. Motorists Ins. Co. v. ARTRA Grp., Inc.*, 659 A.2d 1295, 1308 (Md. 1995) ("We agree with the interpretation of the pollution exclusion clause adopted in numerous other cases . . . Under those interpretations, the language of such an exclusion provides coverage only for pollution which is both sudden and accidental. It does not apply to gradual pollution carried out on an ongoing basis during the course of business."), and *Upjohn Co. v. N.H. Ins. Co.*, 476 N.W.2d 392, 397 (Mich. 1991) ("We find persuasive the recent opinions of the United States Court of Appeals for the

example, courts answer the hypothetical factual question of what the “reasonable expectations” of the policyholder are as a matter of law with or without any evidence. Typically, when answering the question, no evidence is actually introduced regarding the scope of coverage the average, reasonable policyholder thinks he has obtained when he purchases any type of policy (e.g., polls regarding what risks or losses policyholders think are covered by the particular line of insurance at issue). Instead, courts decide the factual issue regarding the expectations of a reasonable policyholder, as matter of law, based upon their own idiosyncratic ideas regarding justice and fairness. Consequently, the results vary from judge to judge.

Third, policyholders’ interests do not receive meaningful consideration at the time the policy language is created. Thus, by only considering the policyholders’ pre-policy formation interests after a loss occurs, courts that override the policy language using *contra proferentem* or the reasonable expectations doctrine undermine their image of objectivity.¹⁹⁷ Instead, it may appear that judges simply override policy language that they do not like, which calls into question their impartiality.

There must be a better way.

D. *An Alternative Approach*

So, what is the better way? Part one of the answer recognizes that insurance policies are not really contracts. Part two reconceptualizes insurance policies.

1. Stop Treating Insurance Policies as Contracts

Legislatures and courts both need to recognize and acknowledge that insurance policies are not really contracts and courts should stop applying the special rules of interpretation such as the strict liability version of *contra proferentem* and the reasonable expectations doctrine. An “agreement” that is never discussed by the parties, that the purchaser does not see until after payment, that is incomprehensible, that is never signed by the purchaser, and that cannot be rejected or returned should not be considered a contract.¹⁹⁸

Insurance policies are social safety nets sold by insurers. Insurance embodies the societal and public policy goals of (1) spreading the risk of losses from individuals to communities through an insurer intermediary, and (2)

Sixth Circuit which find the terms of the pollution exclusion to be unambiguous. We conclude that when considered in its plain and easily understood sense, ‘sudden’ is defined with a ‘temporal element that joins together conceptually the immediate and the unexpected.’” (footnote omitted) (citations omitted)).

197. See, e.g., *Atwater Creamery Co. v. W. Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 274–75 (Minn. 1985) (allowing the policyholder to recover for a burglary claim under the reasonable expectations doctrine where the policy required “actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry,” but “there were no visible marks of physical damage to the exterior at the point of entrance” (first internal quotation marks omitted)).

198. See *supra* Section II.

ensuring that injured parties are compensated.¹⁹⁹

If insurance policies are not contracts and are incomprehensible to the average purchaser, then how can they be made comprehensible and what rules should govern their interpretation? The answers to those questions follow in the next Part.

2. Reconceptualizing and Redrafting Insurance Policies

Insurance policies need to be reconceptualized and rewritten. All-risk homeowners insurance, for example, like many commercial property policies and Commercial General Liability (CGL) policies, purports to cover all risks except those specifically excluded.²⁰⁰ If all perils are covered except those specifically excluded, then an insurance policy does not need to be twenty-four pages long. Nor should it contain thirteen sections of coverage provisions, thirty-one exclusions, and thirty-seven conditions.²⁰¹

As originally conceived, certain lines of liability insurance, such as CGL policies and all-risk property insurance, were intended to provide comprehensive coverage.²⁰² Policies that provide comprehensive coverage fulfill insurance's role as a social safety net.²⁰³ As insurance providers have shifted over the past few decades from mutual companies whose owners were their policyholders to publicly traded companies whose owners are shareholders, the insurers' mandate has changed. Insurers' objectives have shifted from serving as an administrator that collects premiums and pays for losses for the benefit of policyholders to making as much money as possible for shareholders.²⁰⁴ To that end, insurance policies have become increasingly complex while providing decreasing amounts of coverage, as insurers have added exclusions for the people and risks that they do not deem adequately profitable.²⁰⁵ This has frustrated the purpose of insurance.²⁰⁶

Courts implicitly have attempted to address this erosion of the purpose of insurance, in part, by creating the special rules of insurance policy

199. See *supra* Part IV.B.

200. See, e.g., French, *The Role of the Profit Imperative*, *supra* note 16, at 1107.

201. See *supra* note 89.

202. See, e.g., E. W. SAWYER, *COMPREHENSIVE LIABILITY INSURANCE* 115 (1943). Sawyer was an attorney for the National Bureau of Casualty and Surety Underwriters, which eventually merged with the Mutual Insurance Rating Bureau to form ISO, the Insurance Services Office. See French, *The Role of the Profit Imperative*, *supra* note 16, at 1098, 1107–08; Jeffrey W. Stempel, *Assessing The Coverage Carnage: Asbestos Liability And Insurance After Three Decades Of Dispute*, 12 *CONN. INS. L.J.* 349, 358 (2006).

203. See, e.g., FEINMAN, *supra* note 17, at 22–23; JERRY, II & RICHMOND, *supra* note 17, at 47–48; French, *The Role of the Profit Imperative*, *supra* note 16, at 1092–93; James A. Smallenberger, *Restructuring Mutual Life Insurance Companies: A Practical Guide Through the Process*, 49 *DRAKE L. REV.* 513, 516 (2001).

204. See French, *The Role of the Profit Imperative*, *supra* note 16, at 1092–94, 1115–19.

205. *Id.* at 1096–1115.

206. *Id.*

interpretation.²⁰⁷ Although ameliorative, courts' efforts are insufficient because the social safety net purpose of insurance remains diminished, insurance policies remain inscrutable to consumers, and the results of insurance disputes appear to be ad hoc.

In order for insurance to serve as a social safety net, insurance policies need to be simplified such that an average high school student can understand them. And most of the exclusions contained in mandatory lines of insurance, such as homeowners insurance, should be eliminated.²⁰⁸ If a policy is going to cover all losses except for a few that are excluded, then a short document that is one to three pages long theoretically should be sufficient.

In addition, the drafting of insurance policies should not remain within the exclusive province of insurers. Instead, a neutral entity should draft a standard form insurance policy for homeowners insurance, as an example, with input from policyholder advocates and insurance industry representatives.²⁰⁹ Once finalized, the short policy form then would be presented to state legislatures for approval and adoption. If legislators have questions regarding the coverage provided or the wording of the policy, then the drafting entity could address them.

Such a process would ensure that policyholders' concerns are addressed and incorporated into the policy during the drafting process. Such a process also would result in a legislative record that courts could consult when disputes arise over policy language.²¹⁰

207. See *supra* Section III.

208. "Moral hazard" concerns may arise if certain exclusions in insurance policies that are intended to counteract moral hazard were removed. Moral hazard is a term used in insurance law to describe "the risk that an insured or insurance beneficiary would deliberately destroy the subject matter that was insured in order to obtain payment of an insurance benefit." ABRAHAM & SCHWARCZ, *supra* note 26, at 7. The term also is used to encompass the idea that people who have insurance are less likely to take steps to avoid or minimize losses because someone else will pay the losses. See, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1547 (1987) ("Ex ante moral hazard is the reduction in precautions taken by the insured to prevent the loss, because of the existence of insurance."). This Article is not proposing that exclusions such as the "Intentional Loss" exclusion in homeowners insurance policies, for example, that are designed to address moral hazard, be removed. See ABRAHAM & SCHWARCZ, *supra* note 26, at 198 (providing a homeowners sample policy that has an "Intentional Loss" exclusion provision). To the contrary, this Article is proposing that exclusions for perils such as for natural catastrophes like floods and landslides, which have the most financially devastating consequences and for which moral hazard is not a significant concern, should be removed. See, e.g., Christopher C. French, *Insuring Floods: The Most Common and Devastating Natural Catastrophes*, 60 VILL. L. REV. 53, 56 (2015) [hereinafter French, *Insuring Floods*]; Christopher C. French, *Insuring Landslides: America's Uninsured Natural Catastrophes*, 17 NEV. L.J. 63, 67–69 (2016) [hereinafter French, *Insuring Landslides*].

209. One obvious choice to serve the role of insurance policy drafter under this proposal would be the NAIC, which currently creates model insurance statutes for states to adopt. Unfortunately, as discussed in Section II, the NAIC is not well suited to serve this role because it is not neutral. To the contrary, it largely is comprised of former and future insurance industry representatives, and the regulation of the insurance industry is a classic example of regulatory capture wherein the regulators of the industry actually serve the interests of the regulated industry.

210. Professor Jeffrey Stempel has argued that insurance policies currently are analogous to statutes with ISO and insurers serving the function of legislatures with respect to the drafting of insurance policies. See Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV.

Under this approach, a copy of the much shorter, simpler, and comprehensible policy form also would be provided to the policyholder before the policy is purchased. Thus, this proposal would eliminate the current problem of policyholders not understanding what coverage they have purchased because the terms of the policies are not provided until after purchased and even then they are incomprehensible.

3. Use of the Canons of Statutory Interpretation Instead of the Rules of Contractual Interpretation

In addition, because all insurance policies would be drafted by a neutral entity, approved by state legislatures, and then sold by all insurers using uniform policy language, courts could interpret and enforce them like statutes. In this way, courts would treat them as public financial instruments instead of contracts, applying the canons of statutory construction rather than the rules of contract interpretation. Using the canons of statutory construction would allow courts to openly consider extrinsic evidence regarding the purpose of the insurance, the societal goals at stake, and the intent of the drafter to ensure the court's construction is consistent with all of these sources.

There are three categories of canons of statutory construction: (1) textual canons, which address construction of a statute's words and grammar;²¹¹ (2) substantive canons, which include presumptions regarding statutory meaning in light of the common law, other statutes, and the Constitution,²¹² and (3) reference canons, which specify the types of extrinsic evidence that can be used to aid in the construction of the statute (e.g., legislative history, agency regulations, and agency interpretations).²¹³

Although there are some differences between the rules of contract interpretation and the textual canons (category one) for statutory construction, they are similar enough that they can be considered the same for purposes of this proposal. For example, under both the rules of contract interpretation and the textual canons of statutory construction, courts interpret the contract or statute as a whole, attempt to treat the various provisions consistently, and try to reach a conclusion that does not produce an absurd result.²¹⁴

203, 206–15 (2010) [hereinafter Stempel, *The Insurance Policy as Statute*]. Unlike statutes, however, insurance policies currently are not drafted and approved through a process in which the interests of the various parties impacted by the legislation are represented and their concerns are publicly discussed and debated. Instead, insurance policies are drafted solely by insurers behind closed doors and insurers typically refuse to disclose any information regarding the drafting history of the policy language at issue because they contend the policy language is unambiguous, and therefore, extrinsic evidence to construe the language is neither discoverable nor admissible. *See supra* Section II.

211. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 848 (4th ed. 2007) [hereinafter ESKRIDGE, JR. ET AL., *CASES AND MATERIALS*].

212. *Id.*

213. *Id.*

214. *See King v. Burwell*, 135 S. Ct. 2480, 2483, 2489 (2015) (“If the statutory language is plain, the Court must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of

The substantive and reference canons (categories two and three) of statutory construction are where these rules diverge from those of contract interpretation in ways that could result in meaningful improvements to the resolution of insurance disputes. Unlike the rules of contract interpretation that, absent ambiguity, do not consider anything other than the policy language itself, the substantive and reference canons of statutory construction dictate that a statute should be construed in light of the societal values and the goals it furthers.²¹⁵ These are some of the same considerations that courts implicitly consider when they employ the strict liability version of *contra proferentem* and the reasonable expectations doctrine.²¹⁶

In short, courts construing language in statutes not only look to the language itself but also consider the legislative intent and purpose.²¹⁷ This allows courts to consult the legislative history and agency interpretations of the language at issue to achieve a construction consistent with the purpose of the statute—considerations generally not permitted in contract interpretation.²¹⁸

certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ . . . Our duty, after all, is ‘to construe statutes, not isolated provisions.’” (citation omitted) (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); then quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)); ESKRIDGE, JR. ET AL., CASES AND MATERIALS, *supra* note 211, at 862; John H. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003) (“[S]tandard interpretive doctrine . . . defines an ‘absurd result’ as an outcome so contrary to perceived social values that Congress could not have ‘intended it.’”); Stempel, *The Insurance Policy as Statute*, *supra* note 210, at 255–56; *supra* Part III.A.

215. See ESKRIDGE, JR. ET AL., CASES AND MATERIALS, *supra* note 211, at 880–81, 971–1035 (noting extensive use of legislative history in statutory construction); Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1982) (discussing the frequency of court citations to legislative history in statutory construction cases); Stempel, *The Insurance Policy as Statute*, *supra* note 210, at 215, 256; *supra* Part III.B.

216. See *supra* Parts III.B–C.

217. See LINDA D. JELLUM & DAVID CHARLES HRICK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 93–101 (2006) (describing the three primary approaches to statutory construction of textualism, intentionalism, and purposivism); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–61 (1992) (discussing the use of legislative histories by courts in construing statutes); Stempel, *The Insurance Policy as Statute*, *supra* note 210, at 217.

218. There is an ongoing debate in judicial and academic circles regarding the use of legislative histories and other extrinsic evidence when interpreting statutes. Textualists, with Justice Scalia and Judge Easterbrook as two of its most vocal advocates, challenge the legitimacy of using legislative histories to understand statutes. See, e.g., JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 128, 151–52, 164 (2d ed. 2013). Although it has gained some followers over the years, the textualist approach has not been embraced by a majority of the Supreme Court or academics. *Id.* at 170–71; WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 297 (2d ed. 2006) (“The traditional approach to statutory interpretation by American judges routinely includes consideration of the common law, legislative history, and agency interpretations even when the statutory text has an apparent plain meaning.”); George Costello, *Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Textualism, The Unknown Ideal?*, 1990 DUKE L.J. 39, 61–70 (criticizing Justice Scalia’s textualist

In implementing this proposal, when inevitable disputes arise between policyholders and insurers regarding whether a claim is covered, either party could seek an advisory opinion from the drafting entity regarding the purpose and meaning of the policy language in question—akin to the IRS issuing an opinion letter regarding a tax issue.²¹⁹ If the dispute proceeds to court, then the drafting entity's opinion would be entitled to deference as the “agency” charged with interpreting the policy.²²⁰ In addition, a court could review the drafting entity's legislative record to illuminate any uncertainties regarding the meaning or purpose of the policy language.

The substantive and reference canons of statutory construction generally encompass the theoretical justifications for *contra proferentem* and the reasonable expectations doctrine. Consequently, the theoretical bases of such doctrines would not be undermined if insurance policies were drafted by a neutral entity, approved by state regulators, and then treated by courts as regulations or statutes. Courts would no longer need to engage in the fictional exercise of imagining the reasonable expectations of the policyholder at the time of purchase, and they would no longer need to strictly construe the policy language against the insurer. This is because (1) the policy language would be less complex, (2) policyholders' expectations would be reflected in the policy's drafting history, and (3) insurers would not be the drafters of the language.

Consequently, reducing insurance policies to simple documents and treating them like statutes for purposes of construction would benefit both insurers and policyholders. Insurers would benefit because the interpretation of policies would not be done in the shadows of two swords of Damocles—the strict liability version of *contra proferentem* and the reasonable expectations doctrine. Policyholders would benefit because they would have input in drafting the policy; they could understand the policy; and many of the current exclusions would be eliminated, thereby expanding the scope of coverage to fulfill the social

approach to statutory interpretation); Daniel A. Farber & Phillip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 457–61 (1988) (same); Phillip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 205–08 (1999) (same). Consequently, the proposal in this Article is premised upon the prevailing view that legislative histories and other extrinsic evidence are permitted when interpreting statutes and thus, they would be for insurance policies as well.

219. See Treas. Reg. § 601.201(a)(1) (as amended in 2002) (“It is the practice of the Internal Revenue Service to answer inquiries of individuals and organizations, whenever appropriate in the interest of sound tax administration, as to their status for tax purposes and as to the tax effects of their acts or transactions.”).

220. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (“When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron* Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable.”); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (holding that the Court will accept an agency's construction of a statute if the agency's interpretation is “reasonable” and Congress has not addressed the specific interpretive issue before the Court); Stempel, *The Insurance Policy as Statute*, *supra* note 210, at 244 (“[W]hen questions about statutory meaning arise, courts almost always consult and frequently defer to agency interpretations.”).

safety net purpose of insurance. In addition, although the results in many insurance disputes may be the same under the canons of statutory construction and rules of insurance policy interpretation, the analytical process used to reach those results would be transparent and more credible. And for most claims, no disputes would even arise because the policy language would be simpler and clearer so the parties would agree whether there is coverage for a claim.

E. Resistance Points

The impediments to the implementation of the reforms discussed in this Article are considerable. First, insurers would resist ceding control of drafting policies to a neutral entity. And insurers would not likely welcome the involvement of policyholders during the drafting process. Recall that the insurance industry lobby, which represents one of the largest industries in the world (collecting over four trillion dollars annually in premiums and accounting for more than seven percent of the world's gross domestic product)²²¹ convinced Congress to overturn the Supreme Court ruling that the antitrust provisions of the Sherman Act applied to insurers by passing the McCarran-Ferguson Act. This demonstrates that one should not underestimate the insurance industry lobby's ability to protect insurers' interests.²²²

Second, insurers likely would argue that their policies are not unnecessarily complex and do not need to be simplified. The complexity is due to the difficulty of drafting a document that anticipates and addresses the multitude of risks and circumstances that could arise in a complex and dangerous world. Insurers have decades of experience honing the current policy language, which courts have already interpreted and allows for a certain level of actuarial predictability,²²³ so it would be counterproductive and potentially disruptive to insurance markets if policies were dramatically redrafted. Actuarial tables would become inaccurate with new, untested policy language, which in turn could result in inaccurate premium rates and, potentially, insurer insolvencies.

Third, insurers also likely would resist the elimination of exclusions in insurance policies, particularly for catastrophic risks such as floods, earthquakes, and landslides. Because insurers contend that losses caused by natural catastrophes are correlated risks that cannot be insured profitably, their position on the issue likely would be entrenched.²²⁴ Similarly, insurers likely would argue that freedom of contract and the purported unprofitability of covering certain

221. See, e.g., JERRY, II & RICHMOND, *supra* note 17, at 18.

222. See *supra* note 80–81 and accompanying text.

223. See, e.g., Boardman, *Contra Proferentem*, *supra* note 74, at 1107, 1116–18, 1128.

224. See French, *The Role of the Profit Imperative*, *supra* note 16, at 1109–12, 1127–29; *supra* Parts II.B.1 and III.C.2; see also French, *Insuring Floods*, *supra* note 208, at 63; French, *Insuring Landslides*, *supra* note 208, at 67. These Articles challenge the conventional wisdom that natural catastrophes are correlated risks that are uninsurable today in light of the emergence of global insurance companies, global reinsurance, and catastrophe bonds through which the risk of catastrophic losses in geographically isolated areas are now spread to policyholders and investors throughout the world.

noncatastrophic losses, such as environmental contamination and asbestos injuries, support the continued use of exclusions for any risks they do not want to cover.²²⁵ Insurance regulators generally have accepted the insurers' position, as evidenced by the fact that they have approved the ISO policy forms containing exclusions for such losses since 1986, when the asbestos and absolute environmental pollution exclusions were first introduced.²²⁶

Fourth, a mandate that all insurers use the exact same policy form likely would face immense political opposition in many states. Many Americans value freedom of choice quite highly, and if people thought they would be left with only one policy form option, they would likely oppose such a regime.²²⁷ Indeed, look at the political debate surrounding the Affordable Care Act, which requires everyone to acquire health insurance or pay a penalty.²²⁸ It was passed by a heavily Democratic Congress and has been subject to dozens of repeal efforts since Republicans obtained a majority in the House of Representatives.²²⁹ It also has been subject to numerous challenges in court, with some reaching the U.S. Supreme Court.²³⁰ If something as critical as ensuring access to health care in this country has been met with so much political resistance, then one can expect loud opposition to legislation that could result in meaningful changes to insurance markets.

Fifth, another major objection to this proposal would be that capitalism and competition result in more efficient outcomes than government mandates. Indeed, one can point to the National Flood Insurance Program (NFIP), administered by the federal government, to support the argument that governments should be less involved with the drafting and sale of insurance.²³¹ The NFIP historically has used outdated floodplain maps due to a lack of funds to update them, so in many instances the wrong homes were insured or

225. Some policy exclusions are appropriate and should be maintained. For example, property policies commonly exclude coverage for losses intentionally caused by the policyholder such as intentionally burning down a home in order to collect insurance proceeds. *See supra* note 208. Exclusions that eliminate coverage for the most common and financially devastating catastrophic losses, however, need to be removed if insurance is going to fulfill its purpose as a social safety net.

226. *See* French, *The Role of the Profit Imperative*, *supra* note 16, at 1104, 1106, 1136.

227. The irony of this argument is, of course, that purchasers of insurance today already do not have any meaningful choice for many lines of insurance due to the widespread use of standard form ISO policies. *See supra* Section II. Because most purchasers of insurance do not read their policies and could not understand them even if they did, they may not realize that they currently do not have any meaningful choice when it comes to purchasing insurance. *See supra* Section II.

228. *See* Patient Protection and Affordable Care Act of 2010, 26 U.S.C. § 5000A (2012); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2572 (2012).

229. *See* Ed O'Keefe, *The House Has Voted 54 Times in Four Years on Obamacare. Here's the Full List.*, WASH. POST (Mar. 21, 2014), http://www.washingtonpost.com/news/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/?utm_term=.75e3926b78a2 [<http://perma.cc/8R5E-WAV2>].

230. *See* King v. Burwell, 135 S. Ct. 2480, 2482–83 (2015); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2572 (2012).

231. *See* National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 572 (codified as amended at 42 U.S.C. §§ 4001–4127 (2012)).

uninsured.²³² Additionally, the NFIP is actuarially unsound, which has led to frequent periods of insolvency.²³³ Consequently, if insurance were only about providing policies to consumer through the most efficient source without regard to societal and public policy interests, then the case for private insurers creating and selling policies with as little government involvement as possible could be made simply by saying “NFIP.”

With that said, arguments based upon the NFIP in the context of reforming the policy drafting process and rules governing interpretation are actually red herrings. This Article’s proposal does not favor creating a government program that involves the sale and administration of an insurance program, like the NFIP. To the contrary, this Article proposes the simplification of insurance policies, the drafting of policies by a neutral third party that considers policyholders’ interests, and the judicial interpretation of such policies using the canons of statutory construction instead of the rules of contract interpretation. These changes would not result in the creation of a governmental insurance program like the NFIP.

CONCLUSION

Insurance policies are not agreements reached as a result of arm’s-length negotiations. Many insurers use the exact same ISO policy forms. These forms have become so lengthy and complex that the average purchaser cannot even understand what the policy covers. Even essentially mandatory types of insurance, such as auto and homeowners, are sold to the public on a take-it-or-leave-it basis. In an attempt to treat insurance policies as contracts while also recognizing their social importance and the imbalance of power between consumers and insurers, courts have developed special rules of insurance policy interpretation. This has led to a body of case law in which the outcomes of insurance disputes turn on whether the policyholder can find an ambiguity in the policy language or credibly argue that he reasonably expected coverage notwithstanding the policy language. The current approach creates the appearance that judicial decisions are ad hoc and undermines the credibility of courts without addressing in a cohesive way the underlying problems associated with insurance policies.

Instead, courts and legislatures should embark on a better approach and recognize that insurance policies are not contracts and therefore should not be subject to the rules of contract interpretation. As part of this reform, a neutral third party should draft simpler insurance policies, with input from both insurers and policyholders. Then, when courts must construe these policies, they should use the canons of statutory construction instead of the rules of contract interpretation. This would allow courts to openly consider the societal and public policy interests underlying insurance.

232. See, e.g., French, *Insuring Floods*, *supra* note 208, at 70; French, *The Role of the Profit Imperative*, *supra* note 16, at 1112.

233. See, e.g., French, *Insuring Floods*, *supra* note 208, at 65–66, 69.