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The Insurance Policy As Social Instrument and Social Institution

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THE INSURANCE POLICY AS SOCIAL INSTRUMENT AND SOCIAL INSTITUTION

JEFFREY W. STEMPEL*

ABSTRACT

This Article suggests that insurance policies are not merely contracts but also are designed to perform particular risk management, deterrence, and compensation functions important to economic and social ordering. Recognizing this fact has significant implications regarding the manner in which insurance policies are construed in coverage disputes. From this insight flow interpretative consequences suggesting that policy construction can be improved by not only performing traditional contract analysis of disputed policies but also appreciating the particular function of the insurance policy in question as part of the insurance product's larger role as a social and economic instrument or institution. Applying this broader analysis, the Article examines in some detail the longstanding and frequently litigated issue of how many "occurrences" have taken place within the meaning of liability insurance, as well as examining issues of "business risk," "accidental" events, liquor liability exclusions, claims for inherent diminished value of vehicles involved in automobile collisions, trigger of coverage, and the workers' compensation implications of post-injury suicide. Appreciating the social instrument status of insurance vindicates some judicial decisions while exposing the shortcomings of others.

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INTRODUCTION

Long gone is the day when contracts were individualized agreements, negotiated separately through personal interaction between the principals. Almost forty years have passed since Professor Slawson famously observed that 99 percent of the contracts in use were in fact standard form contracts rather than customized agreements reached after significant bargaining.¹ This fact is widely recognized, but legal scholars still debate the empirical or normative consequences of this development. Recognition of the absence of particularized bargaining over contract terms should logically impact judicial approaches to standardized contracts used en masse. But although the degree to which contracts have become “things” has not gone unnoticed,² and insurance policies have been analogized to statutes,³ these perspectives remain in the minority. Mainstream legal opinion continues to characterize insurance policies as contracts rather than products and to apply long-standing classical or neoclassical contract doctrine to contract disputes, often with no acknowledgment of the degree to which insurance departs from the classic bargain model of contracting.⁴ In

1. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971); see also W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984).

2. See *infra* text accompanying notes 8-9.

3. See generally Jeffrey W. Stempel, *The Insurance Policy as Statute* (unpublished manuscript, on file with author) [hereinafter Stempel, *Insurance Policy as Statute*].

4. See, e.g., KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION: CASES AND MATERIALS* 31-103 (4th ed. 2005); EUGENE R. ANDERSON ET AL., *INSURANCE COVERAGE LITIGATION* § 2.01 (2d ed. 2004); EMERIC FISCHER, PETER NASH SWISHER & JEFFREY W. STEMPEL, *PRINCIPLES OF INSURANCE LAW* §§ 2.01-2.11 (rev. 3d ed. 2004 & Supp. 2006); ROGER C. HENDERSON & ROBERT H. JERRY, II, *INSURANCE LAW: CASES AND MATERIALS* §§ 1.02-1.04 (3d ed. 2001); ERIC M. HOLMES & WILLIAM FRANKLIN YOUNG, *REGULATION AND LITIGATION OF INSURANCE: CASES AND MATERIALS ON THE LAW OF INSURANCE* 1-161 (3d ed. 2007); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* § 25A[c] (4th ed. 2007); 1 PETER J. KALIS ET AL., *POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE* § 2 (1997 & Supp. 2004); LEO P. MARTINEZ & JOHN W. WHELAN, *CASES AND MATERIALS ON INSURANCE LAW* 59-240 (5th ed. 2006); 1 BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* §§ 1.01-1.03 (Aspen Pub. 14th ed. 2008); JEFFERY W. STEMPEL, *STEMPEL ON INSURANCE CONTRACTS* (3d ed. 2006 & Supp. 2009)

many cases, courts compound this narrow view of insurance by taking a similarly narrow view of contract—focusing excessively on only the text of the policy. More sophisticated courts take a broader view of contract law and endeavor to correctly interpret the policies at issue by reference to policy text, party intent, policy purpose, the

[hereinafter STEMPEL ON INSURANCE CONTRACTS]; ALAN I. WIDISS, *INSURANCE: MATERIALS ON FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND REGULATORY ACTS* § 6.1-6.7 (1989); 2 ALLAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS* § 11.07 (3rd ed. 1995).

One scholar posits that insurance coverage decisions have, if anything, become more classical in their contractarian approach, observing that “[i]nsurance case law is increasingly marked by judicial reliance on the principle of freedom of contract. In recent years, courts have been inclined to enforce insurance policies as written ... and the result [is] that the insurance company typically prevails.” Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 107 (2007). Professor Randall finds this reliance inappropriate because of the “adhesive nature of insurance relationships” and the highly regulated nature of the insurance industry. *See id.* Contracts of adhesion are offered on a take-it-or-leave-it basis with no bargaining over terms. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630-31 (1943). This description characterizes most insurance policies. *See* James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context*, 24 ARIZ. ST. L.J. 995, 995-99 (1992). Indeed, the term “adhesion contract” appears to have been first used in American legal literature regarding insurance policies. *See* Eric Mills Holmes & Dagmar Thürmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT’L & COMP. L. 323, 327 n.11 (1987); Edwin Patterson, *The Delivery of Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 & n.106 (1919).

This Article does not argue that insurance policies are not contracts. To the extent that insurance policies have to be classified as something, contract is the most apt category. *See, e.g.,* Little v. King, 198 P.3d 525, 528 (Wash. Ct. App. 2008) (holding that the prejudgment interest rate applicable in uninsured motorist claim under auto insurance policy was the rate applicable to contract actions rather than the rate applicable to tort actions). Despite being (in the main) contracts, insurance policies also have the characteristics of products, statutes, and, as outlined in this Article, socioeconomic instruments or institutions.

reasonable expectations of the parties,⁵ and public policy considerations.⁶

Although some bemoan the supposed degree to which insurance law diverges from contract law,⁷ the *Grundnorm* remains that insurance law is largely contract law. Although this seems both

5. The role of the reasonable expectations approach in insurance contract construction is significantly more pronounced, or at least more noticed, than in noninsurance contract law. *But see* Bird v. St. Paul Fire & Marine Ins. Co., 120 N.E. 86, 87-88 (N.Y. 1918) (noting that meaning attributed to words in contract document should generally be that which a reasonable person would attribute to the words).

In the aftermath of Robert Keeton's famous reasonable expectations articles and cases adopting the doctrine, insurance scholars noted the product-like aspects of insurance policies but did not develop the concept of insurance policies as products at length. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961 (1970) [hereinafter Keeton, *Rights at Variance I*]; Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions: Part Two*, 83 HARV. L. REV. 1281 (1970). In the wake of Keeton's seminal articles, much was written about the reasonable expectations approach to insurance policy construction. *See, e.g.*, Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981); Symposium, *The Insurance Law Doctrine of Reasonable Expectations After Three Decades*, 5 CONN. INS. L.J. 1 (1998); *see also* HOLMES & YOUNG, *supra* note 4, at 83-91 (discussing judicial construction and regulation of insurance policies with an "Implied Warranty of Fitness" approach, excerpting C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975) and Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104 (Iowa 1981) with only two pages of notes and commentary regarding the concept); 2 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 4.09; Eugene R. Anderson, Randy Paar & Sarah Hechtman, *The Submission of a Claim Under Directors and Officers Liability Insurance Will Lead to an Adversarial Response by the Insurance Company, as Evidenced by Disputes over Allocation and Advancement*, 692 PLI/Comm 191 (1994); John N. Ellison et al., *The Policyholder's Guide to Bad Faith Insurance Coverage Litigation: Understanding the Available Recovery Tools*, SK095 ALI-ABA 251 (2005); Holmes & Thürmann, *supra* note 4, at 365-75; Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986); Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729 (2000); William Mark Lashner, Note, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175 (1982); Joseph E. Minnock, Comment, *Protecting the Insured from an Adhesion Insurance Policy: The Doctrine of Reasonable Expectations in Utah*, 1991 UTAH L. REV. 837; Peter D. Rosenthal, Note, *Have Bank Regulators Been Missing the Forest for the Public Policy Tree? The Case for Contract-Based Arguments in the Litigation of Regulatory Exclusions in Director and Officer Liability Policies*, 75 B.U. L. REV. 155 (1995).

6. Regarding the "[h]ierarchy and [c]oordination" of these mainstream contract construction factors, *see* RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981); FISCHER, SWISHER & STEMPER, *supra* note 4, § 2.06.

7. *See generally* Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171 (1995); David S. Miller, Note, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988).

correct—if one is forced to select a single category in which to place insurance—and unlikely to change, alternative characterizations and their resulting perspectives can illuminate the nature of insurance policies and the correct resolution of insurance policy disputes. In cases and commentary, insurance policies have been episodically analogized to products for some time,⁸ with growing attraction to the teachings of this perspective.⁹ In addition, the most common insurance policies are produced in a manner similar to private legislation and share similarities with statutes.¹⁰

In this Article, I wish to add a further characterization to the discussion of the nature of insurance policies and an additional

8. See, e.g., *C & J Fertilizer*, 227 N.W.2d at 178-79. Prior to Keeton's articles, see *supra* note 5, and scholarly recognition of the reasonable expectations doctrine, courts on occasion had found the product/warranty analogy helpful in resolving insurance disputes. See, e.g., *Glickman v. N.Y. Life Ins. Co.*, 107 P.2d 252, 256 (Cal. 1940); *State Sec. Life Ins. Co. v. Kintner*, 185 N.E.2d 527, 531-33 (Ind. 1962) (Arterburn, C.J., concurring).

The prospect of *C & J Fertilizer* opening the door to sustained judicial examination of whether an insurance policy was fit for its intended purpose encountered a setback when the Iowa Supreme Court curtailed the use and breadth of the reasonable expectations approach to contract construction in *Sandbulte*, 302 N.W.2d at 112-14. This was part of the general "counter-revolution" against the strong form of the reasonable expectations doctrine associated with Professor Keeton's famous article. See Keeton, *Rights at Variance I*, *supra* note 5; see also 1 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 4.09[D][4]; Rahdert, *supra* note 5, at 323.

The tide against a strong form of the reasonable expectations doctrine, one that would even trump clear but problematic policy language, also tended to pull back the possible use of a breach of warranty or product defect approach to construction. Nearly thirty-five years after it was rendered, *C & J Fertilizer* remains the insurance coverage case that most directly addresses the insurance policy as a product and the insurer's promise as akin to a manufacturer's warranty; however, other cases have alluded to this aspect of *C & J Fertilizer*. See, e.g., *Carper v. State Farm Mut. Ins. Co.*, 758 F.2d 337, 340 (8th Cir. 1985); *Batton v. Tenn. Farmers Mut. Ins. Co.*, 736 P.2d 2, 6 (Ariz. 1987); *Estrin Constr. Co., Inc. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 424 n.10 (Mo. Ct. App. 1981); see also HENDERSON & JERRY, *supra* note 4, at 18 n.1 (noting that contracts scholar Samuel Williston analogized insurance policies to chattels); 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 900, at 34, 36-37 (Walter H.E. Jaeger ed., 3d ed. 1963) ("The typical [insurance policyholder] buys 'protection' much as he buys groceries.... [Although] for most purposes, insurance must still be considered a contract between insurer and insured ... it is a very special type of contract [that may] ... eventually emerge as a new and special form of chattel, or perhaps, quasi-chattel.").

9. See, e.g., Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813 (2009) [hereinafter Stempel, *Insurance Policy as Thing*].

10. See Stempel, *Insurance Policy as Statute*, *supra* note 3, at 8.

interpretative approach to the construction and application of insurance policies. In addition to functioning as contracts, products, and statutes, insurance policies exist as social institutions or social instruments that serve important, particularized functions in modern society—often acting as adjunct arms of governance and reflecting social and commercial norms.¹¹ Appreciating this aspect of insurance policies can better inform courts in assessing the meaning of disputed policies and improve insurance coverage litigation outcomes.

I. THE CONCEPT OF THE INSURANCE POLICY AS SOCIAL INSTRUMENT AND SOCIOECONOMIC INSTITUTION

The insurance policy is created and designed to play a particular role in social and economic activity. The concept I am advancing could accurately be termed the insurance policy as social instrument, business instrument, commercial instrument, economic instrument, public policy instrument, or even political instrument.

11. See RICHARD V. ERICSON ET AL., *INSURANCE AS GOVERNANCE* 43-65 (2003) (noting degree to which requirements for obtaining insurance and ground rules set by insurers shape behavior). See generally KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* (2008) (noting degree to which scope of available liability insurance coverage has shaped tort system); Tom Baker, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 4 (2005) (“[N]egotiations over the boundaries of liability insurance coverage (which appears nowhere in tort law on the books) drive tort law in action.”). As summarized by Professor Baker, insurance is a de facto element of tort liability because, without some source of recoverable funds, attorneys will be reluctant to take even a meritorious plaintiff’s case. Insurance also acts as a de facto cap on damages. Baker, *supra*, at 3. In addition, claims will be styled in the manner most likely to maximize insurance coverage, with insurers playing a major role in the conduct of litigation due to the insurers’ control of the defense of most tort actions. See *id.* at 3-13. But see JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* 211-78 (2007) (examining other factors in development of modern tort law; focusing on organizational efforts of plaintiff’s trial bar, its alliance with elements of academic community, and increasing rights consciousness of the American public during the twentieth century); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 4-5, 43-125 (2004) (tending to see development of expanded legal rights of recovery as preceding insurance and spurred by magnitude of injury problems and consequences rather than by increased availability of coverage). To grossly oversimplify, Professor Witt tends to see tort more as the “egg” whereas Professor Baker more often sees tort as the “chicken” produced as a result of the insurance “egg.”

All of these descriptions would essentially be accurate characterizations of my use and conception of the term. Standard types of insurance policies are designed by the insurance industry, which includes excess insurers and reinsurers,¹² with varying degrees of consultation, interaction, and development with respect to the policyholder and brokerage community.¹³ Standard form policies and insurance itself are also more heavily regulated than most contractual endeavors or commercial arrangements.¹⁴ In drafting insurance policies, the insurance industry also engages in de facto dialogue with the judicial system, sometimes “overruling” judicial determinations with which it disagrees or effectively acquiescing to judicial

12. See ANDERSON ET AL., *supra* note 4, app. A (noting and summarizing major industry-wide revisions of the basic commercial general liability (CGL) form); Aviva Abramovsky, *Reinsurance: The Silent Regulator?*, 15 CONN. INS. L.J. 345, 375-77 (2008-09). The Supreme Court confronted the allegedly nefarious involvement of reinsurers in the revision of the CGL form in *Hartford Fire Insurance Co. v. California*, involving an antitrust action by nineteen state attorneys general who alleged that four major insurers acted in concert with major reinsurers, particularly Lloyd’s of London syndicates, and pressured the Insurance Services Office (ISO) to revise basic CGL policy by adopting a “claims-made” trigger thought to better protect insurers from risk of long-tail injuries developing over time. 504 U.S. 764, 770-76 (1992); E. W. SAWYER, COMPREHENSIVE LIABILITY INSURANCE 11-18, 42-53 (1943) (describing gestation of the CGL policy and liability insurers’ coordinated effort to develop the standardized CGL policy); see also ABRAHAM, *supra* note 11, at 171-80 (describing evolution of CGL policy and personal liability component of homeowners insurance). *But see* Baker, *supra* note 11, at 13 & n.36 (noting that insurers also sell, primarily to low income policyholders, basic property “dwelling” coverage without personal liability insurance found in homeowners coverage); Tom Baker & Karen McElrath, *Whose Safety Net? Home Insurance and Inequality*, 21 LAW & SOC. INQUIRY 229, 235 (1996) (same).

13. See Stempel, *Insurance Policy as Statute*, *supra* note 3 (noting circumstances in which insurers respond to policyholder or broker requests for revision of scope of standard form policy coverage); *infra* text accompanying notes 30-38; see, e.g., O’Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 104-05 (Minn. Ct. App. 1996) (describing exception to exclusion for damage claims arising out of policyholder’s own defective work if work at issue was done by subcontractor, constituting a major concession to general contractor policyholders); Kalchthaler v. Keller Constr. Co., 591 N.W.2d 169, 170-71 (Wis. Ct. App. 1999) (same).

14. Accord GEORGE E. REJDA, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE 628-49 (9th ed. 2005); JAMES S. TRIESCHMANN ET AL., RISK MANAGEMENT AND INSURANCE 494-511 (12th ed. 2005); EMMETT J. VAUGHAN & THERESE VAUGHAN, FUNDAMENTALS OF RISK AND INSURANCE 92-120 (8th ed. 1999); Randall, *supra* note 4, at 107 (describing insurance as “highly regulated industry”); see MARK S. DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 107-47 (8th ed. 2005) (noting pervasiveness, rationale, and types of insurance regulation and suggesting that “if the insurance market were left unregulated it probably would not maximize consumer welfare”); FISCHER, SWISHER & STEMPEL, *supra* note 4, §§ 3.01-3.02 (describing system of insurance regulation and excerpting illustrative cases); HENDERSON & JERRY, *supra* note 4, § 3.01.

decisions it initially opposed.¹⁵ Insurers seek to further sales of their products by working to spread coverage into different corners of society—sometimes with the tacit blessing of judicial, political, and business actors.¹⁶

Insurance policies serve a function in the social ordering of personal and economic activity. Although this statement is perhaps true for any contract, commonly sold insurance policies are particularly important in that they serve as part of the infrastructure by which such activity is conducted, at least in the United States and other industrialized countries. Although the activity involved could, in theory, be conducted in the absence of insurance—and to a significant extent is conducted without insurance in less developed countries—insurance is integral to business and social activities and practically necessary to modern industrial society. Anyone needing a mortgage to buy a home, for example, is practically required to purchase homeowners insurance, at least in an amount equal to or greater than the lender's financial exposure.¹⁷ In perhaps the best known example, every state effectively requires auto insurance in

15. See ABRAHAM, *supra* note 11, at 222-23 (“[Insurers] may ... respond [to legal developments] in either of two very different ways. In most situations, the market meets the demand for insurance against the new liability by extending coverage to the new potential defendants, or to the newly relevant causes of loss.... [But] [s]ometimes insurers cannot, or will not, provide insurance against a new liability.”). The exclusion of pollution liability coverage is an example of the latter reaction. *Id.*

16. See *id.* at 173-97, 222-23 (reviewing instances in which expansion of available insurance encouraged expansion of liability rules and vice versa); see also *id.* at 223 (“[W]here civil liability goes, liability insurance will often, but not always, follow.... The insurance market has proved remarkably capable of covering risks that insurers had previously been concerned would pose ... problems, albeit sometimes without the levels of profit that insurers considered appropriate.”).

17. *Accord id.* at 177 (“[H]omeowners were in effect required to purchase [residential property insurance.]”); see MARTIN F. GRACE ET AL., CATASTROPHE INSURANCE: CONSUMER DEMAND, MARKETS AND REGULATION 83 & n.14 (2003) (assuming, for purposes of analyzing demand in the market for homeowners insurance, that “homeowners insurance ... is essentially mandatory”).

order to license a car.¹⁸ And the State effectively mandates workers' compensation coverage.¹⁹

As a result of these characteristics, insurance policies and the insurance systems of industrialized nations tend to serve socioeconomic purposes as social instruments and to take on the role of social institutions. Consider typical commercial activity. A building usually will not be built unless the developer can obtain surety bonds²⁰ and the various contractors are able to obtain general

18. See DORFMAN, *supra* note 14, at 222 (describing financial responsibility laws that require drivers to purchase liability insurance or prove their financial responsibility to retain a driver's license or to register their vehicle); REJDA, *supra* note 14, at 316-19; TRIESCHMANN ET AL., *supra* note 14, at 241-45; VAUGHAN & VAUGHAN, *supra* note 14, at 539-41 (reviewing the history and current status of compulsory automobile liability insurance laws in the fifty states). Strictly speaking, someone wanting to license a vehicle does not have to buy auto insurance in most states. See, e.g., LA. REV. STAT. ANN. § 32:861(A)(1) (2002) (requiring an auto liability policy or bond for all motor vehicles registered in Louisiana). But in the absence of proof of insurance, the applicant must give other evidence of financial responsibility, such as posting a bond, to indicate that funds will be available to compensate accident victims for any accidents involving the vehicle. *Id.*; cf. Anna Petrova, *Russian Federation: Compulsory Motor Third Party Liability Insurance: Russian Update*, MONDAQ.COM, Jan. 29, 2009, <http://www.mondaq.com/article.asp?articleid=73230> (noting that effective January 1, 2009, "Russia finally became a participant of the international motor civil liability insurance system" involving forty-five European and Middle Eastern countries).

19. See ABRAHAM, *supra* note 11, at 39-40; DORFMAN, *supra* note 14, at 462-64; LEX K. LARSON & ARTHUR LARSON, *WORKERS' COMPENSATION LAW: CASES, MATERIALS, AND TEXT* 23-26 (3d ed. 2000); JOSEPH W. LITTLE ET AL., *CASES AND MATERIALS ON WORKERS' COMPENSATION* 69-71 (5th ed. 2004) (describing workers' compensation system as "social insurance"); REJDA, *supra* note 14, at 556 (noting that since 1920, most states have had workers' compensation statutes and "[a]ll states today have workers compensation laws"); TRIESCHMANN ET AL., *supra* note 14, at 217-27 (describing how workers' compensation systems operate and noting that, although employers in most states have freedom to self-insure, most purchase insurance from state or private insurers); VAUGHAN & VAUGHAN, *supra* note 14, at 216-17. The important socioeconomic role of workers' compensation coverage is reflected in state efforts to enforce and police the workers' compensation system. See, e.g., *Audit Hits Minnesota Workers' Compensation Claims Handling*, INS. J., Feb. 27, 2009, available at <http://www.insurancejournal.com/news/Midwest/2009/02/27/98239.htm> (describing audit of state workers compensation system that found mistakes resulting in \$3 million in underpaid claims and possible improper denial of claims; although underpayments "represent[ed] less than 1 percent of overall benefits paid," auditors recommended improved oversight because of the system's importance); *Calif. Sues Firm over Alleged Workers' Comp Scam*, ADVISEN FPN, Feb. 27, 2009, <http://fpn.advisen.com/articles/article89027502-1084249472.html> ("California has sued a company that promises businesses can avoid paying state-mandated workers' compensation insurance by designating security guards, cooks and other employees as corporate officers. The suit ... claims unfair competition and deceptive business practices ... [and] seeks a permanent injunction ... and at least \$300,000 in fines.").

20. Historically, suretyship has been distinguished from insurance. See, e.g., Pearlman

liability coverage, professional liability coverage, builder's risk insurance, and basic property insurance after completion of the building.²¹ For both new and existing commercial activity, the typical business requires auto insurance, premises and operations general liability insurance, products and completed operations general liability insurance, and workers' compensation coverage mandated by state law.²² Manufacturers, in addition, will need to be sure that their liability policies have sufficient coverage for products and completed operations exposures. Similarly, professionals such as lawyers, doctors, accountants, insurance agents, and insurance brokers will need errors and omissions or professional liability insurance.²³

v. Reliance Ins. Co., 371 U.S. 132, 140 n.19 (1962) (“[T]he usual view, grounded in commercial practice, [is] that suretyship is not insurance.”); *United States v. Markowitz Bros., Inc.*, 383 F.2d 595, 599 (9th Cir. 1967) (“There are marked and traditional differences between a surety contract and a contract of insurance.”). Beginning in the 1970s, however, an increasing number of courts have recognized that insurers and sureties play largely the same socioeconomic role and hold sureties to the same standard of good faith and fair dealing as insurers—including potential liability for bad faith. *See, e.g.*, *Dodge v. Fid. & Deposit Co. of Md.*, 778 P.2d 1240 (Ariz. 1989); *Transamerica Premier Ins. Co. v. Brighton Sch. Dist.* 27J, 940 P.2d 348, 351-52 (Colo. 1997); *see also* 2 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 22.13; Troy L. Harris, *Good Faith, Suretyship, and the Ius Commune*, 53 MERCER L. REV. 581 (2002); Aron J. Frakes, Note, *Surety Bad Faith: Tort Recovery for Breach of a Construction Performance Bond*, 2002 U. ILL. L. REV. 497; *cf.* *Sur. Underwriters v. E & C Trucking, Inc.*, 10 P.3d 338, 342 (Utah 2000) (holding that a contract under which surety agreed to issue \$50,000 bond if obligor gave surety consideration was an “insurance contract” under Utah law and required a license for engaging in such business; absent the license, the contract was unenforceable).

21. To illustrate, as this Article was being written, my daily email from the Risk and Insurance Management Society contained an email from a risk manager seeking input from other subscribers to the listserv regarding the proper package of insurance coverages to protect against liability risks. *See* Posting of Jaquelyn Mittelhammer, Jacquelyn.Mittelhammer@americas.bnparibas.com, to noreply@lyris.rims.org (Jan. 16, 2008) (on file with author). Such types of requests or colloquy are a frequent occurrence on this listserv in which risk managers, brokers, and others with insurance interests trade information regarding insurance products, risk exposure, and related matters. Postings and exchanges of this sort reflect the degree to which insurance has come to be considered standard and even essential for much commercial activity.

22. This combination of insurance policies is common for most businesses. *See* DORFMAN, *supra* note 14, at 350-51, 351 fig.18-1; REJDA, *supra* note 14, at 304-17; TRIESCHMANN ET AL., *supra* note 14, 204-08, 217-20; VAUGHAN & VAUGHAN, *supra* note 14, at 580-81.

23. For construction projects, there usually will also be architects' professional liability insurance. Professional liability insurance, often denominated errors and omissions coverage or even called malpractice insurance, is common among many professions, including

Although perhaps less obvious on the level of personal insurance, the same holds true. As noted above, banks will not lend to homeowners in the absence of homeowners coverage and states will not let consumers or businesses license a car without at least minimal amounts of automobile insurance.²⁴ And the typical homeowners insurance policy also provides personal liability coverage to the homeowner.²⁵ Individuals with reasonably high net worths also frequently purchase “umbrella” insurance that provides additional and supplementary liability insurance protection.²⁶ Many states require and statutorily administer workers’ compensation insurance, making it a necessary condition for nearly any commercial activity and even for government activity.²⁷ In addition, many businesses, as a practical matter, also may need to acquire directors and officers insurance to induce people to accept these posts or to satisfy other constituencies.²⁸ Moreover, other businesses may need or strongly desire to obtain employment practices liability insurance, environmental impairment insurance, or other insurance products designed for risks presented by their enterprises.

architects, doctors, lawyers, accountants, engineers, investment advisers, insurance brokers, and insurance agents. *See* *Marx v. Hartford Accident & Indem. Co.*, 157 N.W.2d 870, 872 (Neb. 1998) (describing insurable professional services as anything “arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual” (citation omitted)); *cf.* 1 *STEMPEL ON INSURANCE CONTRACTS*, *supra* note 4, § 6.02 (noting distinctions between brokers and agents, primarily that brokers represent policyholders in procuring insurance whereas agents represent insurers in selling and servicing insurance). Commercial policyholders, and less obviously commercial entities such as homeowners associations, may also purchase directors and officers liability insurance. *See, e.g.*, Ehud Kamar, *Shareholder Litigation Under Indeterminate Corporate Law*, 66 U. CHI. L. REV. 887, 887 n.1 (1999) (noting a study that found that 92 percent of public corporations purchase director and officer liability insurance).

24. *See supra* notes 17-18 and accompanying text. *But see Texas Pulls Uninsured Motorists off the Road*, BUS. INS., Jan. 19, 2009, available at <http://www.businessinsurance.com/article/20090118/Issue0504/301189965> (noting that, despite financial responsibility laws, many drivers, perhaps 20 percent, operate vehicles illegally by driving without insurance, creating significant premium increases for law-abiding drivers).

25. *See supra* note 12.

26. *See* Joseph B. Treaster, *Umbrella Coverage for Preventing Your Ruin*, N.Y. TIMES, Mar. 18, 2008, at H10.

27. *See supra* text accompanying notes 17-19.

28. *See* MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION* 437 (2004).

Job applicants always desire health insurance and some organizations may mandate health coverage, such as colleges that insist that students either prove health coverage or sign up with the college's group plan.²⁹ Proof of health or accident insurance is commonly required as a condition of children participating in sports leagues or other school or community activities.³⁰ During the mid-1980s, a crisis of sorts resulted when liability insurers were loathe to cover community swimming pools unless diving boards were removed,³¹ or to cover day-care centers in the wake of child abuse allegations.³² When insurance became unavailable or unaffordable, a number of these important institutions shut down or otherwise curtailed activity, at least temporarily.³³

Life insurance is seldom required—which is why life insurance salespersons can be some of the peskiest salespersons on the planet—and disability insurance is both underappreciated by the public and regarded as difficult to underwrite by insurers because of perceived problems of adverse selection³⁴ and moral hazard.³⁵ But

29. See, e.g., MASS. GEN. LAWS ANN. ch. 15A § 18 (West 2002) (“Every full-time and part-time student enrolled in a public or independent institution of higher learning located in the commonwealth shall participate in a qualifying student health insurance program.”).

30. See, e.g., Ruben Torrez & David Gallegos, *The Pre-Participation Physical Exam*, RISK & INJURY PREVENTION SERIES (N.M. Activities Ass'n Sports Med. Advisory Comm.), 2009, at 2, http://www.nmact.org/files/Sports_Med_Article_2009.pdf (“While requirements vary between school districts, most mandate that each participant have their own medical insurance.”).

31. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1522 (1987).

32. *Id.* at 1572 (“Virtually all insurers have excluded coverage for sexual abuse liability from their [day-care industry] policies.”).

33. See *id.* at 1521, 1566-68 (reviewing various services, products, and industries affected by the 1980s insurance crisis); George J. Church, *Sorry, Your Policy Is Canceled*, TIME, Mar. 24, 1986, at 16.

34. Adverse selection in voluntary insurance is “the disproportionate tendency of those who are more likely to suffer losses to seek insurance against those losses.” Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 102 n.82 (1993); see also DORFMAN, *supra* note 14, at 95 (describing the difficulty underwriters have in determining the risk of insuring persons in poor health); VAUGHAN & VAUGHAN, *supra* note 14, at 21-22 (noting how adverse selection accumulates bad risks, which disrupts underwriters' predictions about future losses); Abraham & Liebman, *supra*, at 102 n.82 (“Disability insurance is especially susceptible to adverse selection.”).

35. Moral hazard is the tendency to take fewer precautions to insurance. See *infra* note 350. One commentator defines related “morale hazard” as when “[a] person who deliberately

both are products that should be in wide social use to protect personal and family assets and to act as a form of risk distribution and forced saving that makes it less likely that dependents of a decedent will become a drain on the state and its public coffers.³⁶ More importantly, when consumers purchase life and disability insurance, they do so with an understanding of the role these products will play in their risk management and financial planning efforts.³⁷ In the absence of such coverage, injured persons or the survivors of decedents will have heightened incentives to bring third-party claims against persons or entities thought to play a role in the injury or death, creating more liability lawsuits and more strained theories of recovery in such suits.

Treating the insurance policy as a social instrument as well as a contract, a product, or a type of private legislation accords well with the simple reality that insurance is now part of the warp and woof of the socioeconomic fabric. For example, a recent survey revealed that consumers consider insurance premiums to be the second most important household bill, one that they pay on time, taking care to avoid the potentially disastrous consequences of late payment or nonpayment.³⁸ Only the household's monthly mortgage payment

causes a loss ... [or] exaggerates the size of a claim to defraud an insurer." DORFMAN, *supra* note 14, at 480.

36. See VAUGHAN & VAUGHAN, *supra* note 14, at 176-98 (describing the role of life and health insurance policies in protecting dependents in the event of death, serious bodily injury, or other loss that reduces or terminates income).

37. For example, for a century, life insurance has been considered as much an investment as a type of insurance. In *Grigsby v. Russell*, 222 U.S. 149 (1911), Justice Oliver Wendell Holmes, writing for a unanimous Supreme Court, permitted the assignment of the insurance policy as part of the purchase of surgical services despite the general rule, which still remains in effect, that insurance policies may not be assigned unless the contingent event insured against already had taken place. By contrast, no court would ever permit a policyholder to assign a liability policy without insurer approval and permit the assignee to obtain coverage for a liability-creating loss event that took place due to the assignee's conduct after the assignment. See 1 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 3.13 (discussing law of insurance policy assignment); see also Jeffrey Lipton, *Barbados: Asset Protection Insurance as an Alternative to Trusts and Foundations*, MONDAQ.COM, Jan. 28, 2009, <http://www.mondaq.com/article.asp?articleid=57710> (noting that it may be fraudulent to seek asset protection after a liability creating event).

38. See *Survey: Insurance Ranks No. 2 as Most Important Bill To Pay On-Time*, INS. J., Dec. 30, 2008, available at www.insurancejournal.com/news/national/2008/12/30/96652.htm.

ranked higher.³⁹ “Insurance is embedded in all aspects of daily life.”⁴⁰ If the insurance industry were a nation, it would have the world’s third largest gross national product.⁴¹

In addition, the requirements imposed by insurers upon policyholders and those doing business with policyholders often have

39. *Id.*

40. ERICSON ET AL., *supra* note 11, at 3. Ericson and his coauthors go so far as to contend that insurance is something of a private, albeit heavily regulated, governor of social and economic conduct.

In its ideal form, insurance governs through nine interconnected dimensions. First, it attempts to produce knowledge of risk by objectifying everything into degrees of chance of harm. Second, it makes everything it objectifies calculable and thereby subject to commodification. It uses actuarial techniques to convert the concrete facts of objective risks it produces into probability classifications. Each classification is then assigned its respective cost so that prices can be set and compensation for the effects of chance can be paid. Third, actuarialism creates a risk pool, a population that has a stake in the identified risks and the specific harms they entail. This stake transforms the population into a collective with an interest in minimizing loss and compensating those who have suffered loss. Fourth, insurance protects against loss of capital. What is actually insured is not the particular event that causes harm to a member of the risk pool, but the capital against which the insurer offers indemnification. Fifth, insurance is managerial. It manages risks on the basis of surveillance and audit for a population dispersed in space and time but nevertheless bound together by the collective interests noted above. Sixth, the population is also bound legally. Insurance objectifies risk by making it subject to contract and adjudication. At the same time, it helps the law to assign liability to the party most able to distribute the loss through insurance. Seventh, in providing a futures market in security, insurance offers a cultural framework for conceptions of time, destiny, providence, responsibility, economic utility, and justice. Eighth, insurance is a social technology of justice. It bridges individual and social responsibility through distributive justice (collective sharing of loss) and restorative justice (financial indemnification). Ninth, insurance is therefore political, combining aspects of collective well-being and individual liberty in a state of perpetual tension.

Id. at 5-6. Obviously, this Article and any initial attempt to apply the insurance policy as social instrument perspective to coverage disputes cannot deal with the full ramifications of the *Insurance as Governance* thesis, some of which would undoubtedly be disputed by some judges, scholars, and policymakers. But it seems that the core of its thesis—that insurance plays a central institutional role in societies and economies—is beyond question. That makes the insurance policy something more than a mere contract. Notably, this thesis is relatively new. To date, only a handful of law review articles even mention the subject. On September 5, 2009, a search in Westlaw through all law reviews and journals for “insurance as governance” produced only thirty results.

41. Allan Chen, *Climate Change and the Insurance Industry*, ENVTL. ENERGY TECH. DIVISION NEWS (Lawrence Berkeley Nat’l Lab., Berkeley, Cal.), Fall 2005, at 3, <http://eetd.lbl.gov/newsletter/nl22/eetd-n122-2-climate.htm>.

a powerful impact on shaping society. A classic example is Underwriters Laboratories' (UL) role in testing electrical appliances in order to gauge their safety.⁴² Today, one almost never reads about a tragic fire started by a short in a coffee maker, toaster, or lamp, but at one time these were major hazards. Because of the efforts of the insurance industry to define the risks associated with emerging electrical technologies, manufacturers were forced to improve the safety of their products to satisfy UL certification standards.⁴³ Safety certification is now sought out by consumers and mandated by thousands of state and local governments.⁴⁴

Health insurers often insist upon or offer financial incentives for employee wellness programs designed to reduce the incidence and severity of the group's medical problems.⁴⁵ Liability insurers also may insist policyholders take certain safety precautions.⁴⁶ We have air bags, antilock brakes, and seat belts in automobiles, and sometimes laws mandating their use, in large part because of the efforts of auto insurers.⁴⁷ Insurers are often "agents of prevention,"⁴⁸

42. See generally Underwriters Laboratories, About UL, <http://www.ul.com/global/eng/pages/corporate/aboutul/> (last visited Feb. 10, 2010).

43. See Harold Furchtgott-Roth et al., *The Law and Economics of Regulating Rating Firms*, 3 J. COMPETITION L. & ECON. 49, 87-88 (2007).

44. *Id.* at 88.

45. See Wendy K. Mariner, *Medicine and Public Health: Crossing Legal Boundaries*, 10 J. HEALTH CARE L. & POL'Y 121, 146 n.113 (2007) (listing examples of contingent health care benefit policies). In a similar but more upscale vein, "Venture Insurance Programs' Preferred Club Program teamed with CR Certification Corporation ... a provider of independent auditing and certification of cardiac emergency readiness programs to ensure a best practice cardiac emergency readiness plan is in place at the golf and country clubs it insures." Andrea Ortega-Wells, *Preferred Club Program Adds Cardiac Emergency Readiness Program*, INS. J., Feb. 27, 2009, available at <http://www.insurancejournal.com/news/national/2009/02/27/95438.htm>.

46. See Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 557-61 (1948).

47. See Hazel Glenn Beh, *Physical Losses in Cyberspace*, 8 CONN. INS. L.J. 55, 80 n.130 (2001) (noting that auto insurers were the leading proponents of mandatory air bags in automobiles as means of lowering costs of auto accidents (citing Robert Kneuper & Bruce Yandle, *Auto Insurers and the Air Bag*, 61 J. RISK & INS. 107 (1994))); John G. Van Laningham, Comment, *The Making of the 1986 Florida Safety Belt Law: Issues and Insight*, 14 FLA. ST. U. L. REV. 685, 696 (1986) (noting that auto insurers supported legislation encouraging seat belt use); see also Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559, 1613-14 (2008) (expressing guarded optimism that property insurers vulnerable to weather-related risk will support initiative to reduce and mitigate impact of climate change). See generally JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990) (describing evolution of seat belts, air bags,

encouraging greater safety and loss-minimization conduct by policyholders.⁴⁹ Not surprisingly, many court decisions describe insurance as affected with a public interest,⁵⁰ an undeniable truism in light of the substantial government regulation of insurance.

Recent episodes reflect the degree to which insurance has become central to the smooth daily functioning of society. For example, when a Mississippi police department's workers' compensation coverage lapsed in 2008, government authorities closed the police station for four days and did not reopen the station until the insurer reinstated the department's coverage.⁵¹ Although this may not have been the most citizen-friendly solution to the problem—essentially leaving a community vulnerable to crime rather than taking the risk that an officer might be hurt in the line of duty—it nicely illustrates the degree to which insurance has become central to society and even regarded as mandatory in many cases. In similar fashion, Amtrak recently insisted that Rhode Island “buy \$200 million in liability insurance if it wants to extend commuter rail service to Warwick and South County,” a requirement estimated to require premium payments of \$1.5 million per year.⁵² A community medical center in Scranton had more than \$1 million in basic

and antilock brakes).

48. ERICSON ET AL., *supra* note 11, *passim*.

49. See *generally id.* at 268-76 (detailing the many ways that the insurance industry contributed to automobile accident prevention).

50. See, e.g., Schwarz v. Liberty Mut. Ins. Co., 539 F.3d 135, 150 (2d Cir. 2008) (“Unlike most other contracts for goods or services, an insurance policy is characterized by elements of ... public interest.” (citing *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407 (1999))); *Aecon Bldgs., Inc. v. Zurich N. Am.*, 572 F. Supp. 2d 1227, 1238 (W.D. Wash. 2008) (“[T]he business of insurance is one affected by the public interest.” (quotation and citation omitted)); *Fairfield Ins. Co. v. Stephens Martin Paving*, 246 S.W.3d 653, 674 (Tex. 2008) (“One public-policy concern is whether it is or is not in the public interest for a risk to be shifted.”); see also HENDERSON & JERRY, *supra* note 4, § 1.03, at 20 (discussing “insurance and the social order”).

51. See *Mississippi Police Station Closed Due to Lapsed Workers' Compensation Policy*, INS. J., Dec. 31, 2008, available at <http://www.insurancejournal.com/news/southeast/2008/12/31/96660.htm> (“The Port Gibson, Mississippi Police Department was open Monday, three days after a payment lapse on an insurance policy forced its closure ... because the city clerk's office neglected to pay the bill, which is \$6,898 every three months.”).

52. Bruce Landis, *State Must Buy Liability Insurance To Extend Commuter Rail Service to Warwick and South County*, THE PROVIDENCE J., Feb. 25, 2009, available at http://www.projo.com/business/content/bz_rail_insurance_02-25-09_1BDEIO3_v13.3244af5.html. According to the state's Department of Transportation Director: “Our alternative is not to provide service.” *Id.*

liability coverage but faces a potential fiscal disaster now that it has been hit with a \$20.5 million medical malpractice judgment.⁵³

The number of specialized niche insurance policies regularly offered by insurers to meet particular policyholder needs underscores the role insurance policies play as building blocks in the social and commercial system.⁵⁴ The market now provides insurance coverage for farm and ranch equipment breakdown,⁵⁵ liability risks posed by hosting or sponsoring private events,⁵⁶ and even “groceries protection insurance.”⁵⁷ There is all manner of coverage available when the market is “soft”.⁵⁸ collateral damage property insurance,⁵⁹

53. See Daniel Axelrod, *CMC Faces ‘Disastrous’ Effect from \$20.5M Judgment*, SCRANTON TIMES-TRIBUNE, Jan. 16, 2009, available at <http://fpn.advisen.com/articles/article8757806135765606.html>.

54. See Andy Simpson, *ACE Adds Green Building Endorsements to Builders Risk Product*, INS. J., Feb. 20, 2009, available at <http://www.insurancejournal.com/news/national/2009/02/20/94835.htm>; Zurich Creates Policies for Carbon Capture and Sequestration Needs, INS. J., Jan. 20, 2009, available at <http://www.insurancejournal.com/news/national/2009/01/20/97104.htm>; Patricia Tom, *WKF&C Offers Employment Practices Liability Insurance*, INS. J., Feb. 12, 2009, available at <http://www.insurancejournal.com/news/national/2008/11/04/95235.htm>; Chris Boggs, *Insurance Program for Not-for-Profit Senior Living*, MYNEWMARKETS.COM, Jan. 27, 2009, http://www.mynewmarkets.com/article_view.php?id=97243.

55. See Patricia Tom, *Fireman’s Fund Offers Farm and Ranch Equipment Breakdown Coverage*, INS. J., Jan. 21, 2009, available at <http://www.insurancejournal.com/news/national/2008/11/03/95200.htm>.

56. See Andrea Ortega-Wells, *Affinity Enhances Coverages for Private Event Program*, INS. J., Jan. 23, 2009, available at <http://www.insurancejournal.com/news/national/2008/10/17/94749.htm>.

57. See Chris Boggs, *Groceries Protection Insurance—Something New in England*, MYNEWMARKETS.COM, Jan. 16, 2009, http://www.mynewmarkets.com/article_view.php?id=97017.

58. A “soft” market is one in which insurance coverage is readily available for most risks and insurers generally engage in fairly aggressive price competition for business. Soft markets generally are characterized by strong capital positions for insurers, confidence that risks are predictably under control, and good returns on insurer investments. Given these factors, insurers become hungry for premium dollars to invest. For example, interest rates during the late 1970s and early 1980s were very high, prompting insurers to seek aggressively to sell policies and bring in premium dollars for investment. Dramatic rate dips in the mid-1980s, combined with some real (for example, asbestos claims) and perceived (for example, prominent stories regarding allegations of child abuse in day-care centers or large awards against operators of recreational equipment) increases in risk, created a “hard” market. A hard market is, perhaps unsurprisingly, the opposite of a soft market and is characterized by reduced availability of coverage, higher premiums, and mediocre or bleak prospects for investment. See DORFMAN, *supra* note 14, at 332; REJDA, *supra* note 14, at 67-68; VAUGHAN & VAUGHAN, *supra* note 14, at 88; Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors’ & Officers’ Liability Insurer*, 95 GEO. L.J. 1795, 1809

interpreter-translator insurance,⁶⁰ and bloggers defamation insurance.⁶¹ Some brokerage operations are devoted to obtaining insurance to deal with especially difficult risks.⁶²

Indeed, it can be said without exaggeration that liability insurance has played a major, perhaps dominant, role in the development of modern tort law, a fact thought underappreciated by most observers.⁶³ The increasing availability of liability insurance, which was generally nonexistent prior to the latter half of the nineteenth century, radically shifted the economic incentive to pursue tort claims.⁶⁴ Prior to insurance, almost all individuals and most small businesses lacked funds sufficient to compensate injured parties.⁶⁵ Even if the case for relief was strong under the dominant tort liability regime, most potential tort claims remained dormant for the simple reason that the claims were not sufficiently worth pursuing for want of a sufficiently deep pocket defendant.⁶⁶

The advent of liability insurance changed this dynamic by making tort litigation economically attractive to injured persons and plaintiffs' lawyers, who in most situations could afford to take a case

(2007).

59. See Chris Boggs, *Crump Develops New Collateral Damages Property Coverage*, INS. J., Jan. 26, 2009, available at <http://www.insurancejournal.com/news/national/2008/12/16/96351.htm>.

60. See Interpreters and Translators, <http://www.mynewmarkets.com/main.php?p=4785> (last visited Feb. 10, 2010).

61. See Andy Simpson, *Media Bloggers Group Launches Liability Insurance Program*, INS. J., Feb. 4, 2009, available at <http://www.insurancejournal.com/news/national/2008/10/10/94525.htm>.

62. See Chris Boggs, *Hard-to-Place Risks of All Types*, MYNEWMARKETS.COM, Feb. 11, 2009, http://www.mynewmarkets.com/article_view.php?id=97790 ("Appalachian Underwriters Inc. ... [has] formed a brokerage division to place unique, unusual and/or large accounts. Target classes include: property risks with coastal and earthquake exposures; casualty risks such as swimming pool contractors, street & road contractors, crane erectors, truck body manufactures, iron & steel manufactures, ammunition manufactures; environmental risks such as hazmat contractors, mold remediation contractors up to landfills and oil and gas contractors; and risks with professional liability exposures.").

63. See ABRAHAM, *supra* note 11, at 14-15, 19, 171-73, 220-25; TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 10-21 (2005); Baker, *supra* note 11, at 4; Adam F. Scales, *The Chicken and the Egg: Kenneth S. Abraham's "The Liability Century,"* 94 VA. L. REV. 1259, 1259-60, 1279 (2008) (book review).

64. ABRAHAM, *supra* note 11, at 4-5.

65. *Id.* at 39-40.

66. Baker, *supra* note 11, at 4-5.

only if it promised a reasonably good chance of recovery and a resulting contingent fee.⁶⁷ In addition, the availability of insurance and the contours of coverage provided continue to shape tort law, particularly the selection of cases brought and settlement outcomes.⁶⁸ Perhaps most important, insurers' duty to defend, part of the standard general liability policy, systematically involves insurers and insurer-selected counsel in nearly all tort claims litigation.⁶⁹ As part of this arrangement, in which insurers agree to defend potentially covered claims even if the allegations are far-fetched on their face, insurers also have the right to control the defense⁷⁰ and settlement of the claims,⁷¹ as long as they do not unduly interfere with the attorney-client relationship between insurer-appointed defense counsel and the policyholder-defendant.⁷²

67. Most consumers would find even modest attorney hourly fees prohibitively expensive.

68. See Baker, *supra* note 11, at 4-7, 13-14.

69. See ABRAHAM, *supra* note 11, at 35-38, 63, 167-70, 223-38; Douglas R. Richmond, *Liability Insurers' Right To Defend Their Insureds*, 35 CREIGHTON L. REV. 115, 115-18 (2001); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1592-98 (1994); Kent D. Syverud, *The Duty To Settle*, 76 VA. L. REV. 1113, 1163-72 (1990); Scales, *supra* note 63, at 1262.

70. Regarding the duty to defend generally, see ANDERSON ET AL., *supra* note 4, § 3; 1 OSTRAGER & NEWMAN, *supra* note 4, § 5.02; STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 9.03. See generally James M. Fischer, *Insurer-Policyholder Interests, Defense Counsel's Professional Duties, and the Allocation of Power To Control the Defense*, 14 CONN. INS. L.J. 21 (2007).

71. Another relatively common problem occurs when plaintiff's counsel demands the full liability insurance policy limit in settlement. The insurer may doubt the strength of the claim and certainly would prefer to pay less than the policy limit. But acceptance of the demand may be highly advantageous to the policyholder who, in the absence of settlement, might face a verdict and judgment exceeding the policy limit. In such situations, under either the single or dual client model, the defense attorney should provide a fair analysis of the claim's likely success and value, and take all apt action to protect the client. Defense counsel's failure to take such action in one notorious case resulted in a \$145 million punitive damages verdict against the insurer, which stipulated that counsel was its agent in this regard, an award ultimately reduced to \$9 million after review by the Utah and United States Supreme Courts. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (striking down \$145 million punitive award affirmed by Utah Supreme Court as excessive on constitutional grounds); JEFFREY W. STEMPEL, LITIGATION ROAD: THE STORY OF CAMPBELL V. STATE FARM 1-3, 429-30 (2008) [hereinafter STEMPEL, LITIGATION ROAD].

72. There exists considerable division among courts and commentators and within the legal profession regarding whether an attorney provided by a liability insurer to defend a claim against a policyholder represents only the policyholder-defendant or whether the insurer is a "client" as well. A slight majority of the states have adopted the "two-client" view, but all states require that, when there is a conflict of interest between policyholder and

An entire body of law unique to this aspect of insurance, the tort of bad faith refusal to settle, has arisen as a result of the centrality of insurance to the institution of litigation and compensation.⁷³ Regardless of whether one approves or disapproves of this regime, there is no disputing that, to a large extent, insurers have the final word on the value of claims, whether trials and appeals will occur, and the speed with which tort disputes progress.⁷⁴

insurer regarding defense of the claim or resolution of coverage matters, the attorney's greater loyalty is to the policyholder defendant. In many cases, policyholders are permitted to select their own counsel in response to such conflicts. *See, e.g.*, *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593, 601-02 (Ariz. 2001) (adopting two-client model with policyholder-defendant as primary client and insurer as secondary client; permitting insurer to sue defense counsel for alleged malpractice in overlooking other potentially applicable coverage); *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 152 P.3d 737, 741-42 (Nev. 2007) (adopting two-client model as clear majority, but stressing that, when conflict arises, counsel's first duty is to protect policyholder-defendant and implicitly rejecting State Bar of Nevada Ethics and Professional Responsibility Committee Opinions 9, 26, and 28, which adopted the one-client model); *State Farm Mut. Auto Ins. Co. v. Traver*, 980 S.W.2d 625, 626-29 (Tex. 1998) (appearing to adopt one-client model, precluding insurer from suing defense counsel for malpractice). *See generally* Silver, *supra* note 69, at 1592-98; Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995).

Of course, even if the insurer is not a "client," it has substantial contract rights in retaining counsel for the policyholder. The attorney is required to perform competently the contractually mandated tasks of defending the policyholder, reporting to the insurer, and implementing settlement directives even if a "malpractice" action is not available. In practice this can get messy because the insurer's interest in cost control may clash with counsel's duty to provide adequate representation. For example, insurers have attempted, with mixed success, to impose litigation guidelines upon counsel, the most extreme of which usually have been considered to intrude overly upon the attorney's professional judgment and the lawyer-client relationship with the policyholder. *See In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures*, 2 P.3d 806, 810, 813-17 (Mont. 2000) (striking down guidelines that, among other things, required defense counsel to obtain permission of claims adjuster to do legal research or take depositions).

73. Inherent in all contracts is a duty of good faith and fair dealing, but insurance is different than most contracts in that the duty has real teeth. Bad faith breach by an insurer is a tort in most states and may result in imposition of a broad range of damages upon an offending insurer, including punitive damages if the bad faith was committed with willful indifference to the rights of the policyholder. *See* ANDERSON ET AL., *supra* note 4, § 11; STEPHEN S. ASHLEY, *BAD FAITH ACTIONS: LIABILITY AND DAMAGES* §§ 1:02-1:03 (2d ed. 1997); 2 OSTRAGER & NEWMAN, *supra* note 4, §§ 12.01-12.06; WILLIAM SHERNOFF ET AL., *INSURANCE BAD FAITH LITIGATION* (2009); STEMPER ON INSURANCE CONTRACTS, *supra* note 4, §§ Supp., 10.01-10.11; *see also* STEMPER, *LITIGATION ROAD*, *supra* note 71, 435-43, 456-58 (observing that, although rare, bad faith awards can reach seven figures and even reach the U.S. Supreme Court).

74. *See supra* notes 70-72 and accompanying text.

Viewing the insurance policy as social instrument or institution—part of a larger system of managing risk, facilitating commerce, encouraging socially desirable activity, and protecting the public—we can derive useful insights as to the proper construction of disputed insurance policies. Appreciating this perspective also tends to confirm better reasoned decisions and serves as a useful quality control device to gauge whether contract-based analysis of a coverage dispute resulted in the correct coverage decision. However, characterizing the insurance policy as social instrument does not auger for finding coverage in all instances. For example, when an insurer denies coverage based not only upon contract-based arguments but also a better appreciation of the social instrument aspects of a disputed policy, a finding of no coverage may better serve the social policies at issue. As the types of coverage disputes outlined in the following section reveal, appreciating the status of insurance as social instrument can help to illuminate and clarify coverage disputes, logically leading to sounder, more consistent judicial decisions. In many, perhaps most, cases, adding the social instrument perspective to traditional contract analysis will bolster a contract-driven assessment. In other circumstances, it may reveal problematic aspects of a contract-based approach, particularly excessive textualism, offering a useful check or measure of quality control for insurance coverage adjudication.

In addition, appreciating the status of insurance policies as part of social policy provides an additional supporting basis for proper application of important ground rules of contract-based insurance policy construction. For example, one of the key axioms of contract-based insurance law is that the policyholder bears the burden to show the presence of an insured event, whereas the insurer bears the burden to demonstrate the applicability of any exclusion upon which the insurer relies.⁷⁵ If the insurer successfully discharges his

75. See DORFMAN, *supra* note 14, at 173 (“If an insurer denies a claim based on an exclusion and the insured then contests the denial, the insurer has the legal burden of proving it applied the exclusion correctly.”); 1 OSTRAGER & NEWMAN, *supra* note 4, § 1.03[b]; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 2.06[C]; Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN. INS. L.J. 349, 358-60 (2006) [hereinafter Stempel, *Coverage Carnage*]; see also 1 OSTRAGER & NEWMAN, *supra* note 4, § 1.01 at 5 (“[A]ny limitation in coverage must be

burden and the policyholder then argues that an exception to the exclusion restores coverage, the policyholder bears the burden of persuasion on that point.⁷⁶

Seeing insurance policies as social instruments that are part of the social policy infrastructure buttresses this approach in that the social instrument view logically requires that a policyholder cannot obtain the advantages of insurance without first establishing that a covered event has taken place, along with other basics such as the existence of the policy, the policyholder's payment of required premiums, and so forth.⁷⁷ However, once this has taken place, an insurer who wishes to defeat coverage and implicitly defeat insurance's social policy goals must establish that an exclusion removes coverage.⁷⁸ Such a showing means that coverage is not required and thus the insurance policy's social purpose is fulfilled. In addition, the exclusion must be one that is not inconsistent with applicable insurance regulation,⁷⁹ does not violate public policy,⁸⁰ and does not

described in clear and explicit language." (alteration in original) (citations omitted)).

Exclusions may also fall, in whole or in part, on public policy grounds. *See, e.g.*, *Collins v. Farmers Ins. Co. of Or.*, 822 P.2d 1146, 1148 (Or. 1991) (holding an exclusion in an auto policy ineffective to divest the policyholder of minimum coverage required by state law); *id.* at 1162 (Unis, J., dissenting) (arguing that exclusion should be invalidated entirely and recovery permitted up to policy limits).

76. *See* 1 OSTRAGER & NEWMAN, *supra* note 4, §§ 1.01, 1.03[b]; STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, Supp., § 2.06[C]; *see, e.g.*, *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 73 (Wis. 2004) ("Exclusions sometimes have exceptions; if a particular exclusion applies, we then look to see whether any exception to that exclusion reinstates coverage. An exception pertains only to the exclusion clause within which it appears; the applicability of an exception will not create coverage if the insuring agreement precludes it or if a separate exclusion applies."). Requiring policyholders to prove the applicability of exceptions is a logical corollary to having the policyholder shoulder the initial burden of proving a claim within the insuring agreement. The policyholder thus is consistently required to demonstrate entitlement to coverage whereas the insurer consistently must negate a policyholder's proven entitlement to coverage.

77. The policyholder also must establish other basics such as the existence of the policy and the policyholder's payment of the required premiums. *See* JERRY & RICHMOND, *supra* note 4, §§ 80-82, 87; 1 OSTRAGER & NEWMAN, *supra* note 4, § 1.01; STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, Supp., §§ 2.06, 4.01, 4.04; *see, e.g.*, *Am. Girl*, 673 N.W.2d at 73 (noting that the first step in policy construction is to determine whether a policyholder's claim falls within basic scope of policy and grant of coverage).

78. *See supra* note 75.

79. *See, e.g.*, *Collins*, 822 P.2d at 1147-48, 1151; *id.* at 1162 (Unis, J., dissenting) (advocating for invalidating the exclusion entirely and permitting recovery up to policy limits); *see also* *Cal. State Auto. Ass'n v. Maloney*, 341 U.S. 105, 108, 110-11 (1951) (holding that

defeat the objectively reasonable expectations of the policyholder regarding coverage.⁸¹ Hidden, deceptive, misleading, or unclear exclusions are ineffective to defeat coverage.⁸² These norms of insurance policy interpretation not only flow from sound contract theory but also from an appreciation of the social and economic function played by insurance policies. As a logical result, a covered claim should not be denied by an exclusion unless the foregoing conditions are satisfied.⁸³

The contract rules that exclusions are strictly construed against the insurer⁸⁴ and that ambiguous language is construed against the

states have legal authority to regulate insurance business, including content of policy forms and amount of coverage provided); FISCHER, SWISHER & STEMPEL, *supra* note 4, § 3.01; JERRY & RICHMOND, *supra* note 4, § 25, at 141-44; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, §§ 2.03, 2.04, 2.05[H], 4.10; Randall, *supra* note 4, at 107.

80. See FISCHER, SWISHER & STEMPEL, *supra* note 4, § 2.13; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 4.10; *see, e.g.*, *Reliance Ins. Co. v. Kinman*, 483 S.W.2d 166, 167, 171 (Ark. 1972) (affirming decision that amputation of plaintiff's leg after the 180 day limitation did not preclude recovery); *Strickland v. Gulf Life Ins. Co.*, 242 S.E.2d 148, 148-50 (Ga. 1978) (holding it unconscionable to enforce provision that leg must be severed within ninety days of accident to obtain benefits for loss of limb; time limit in policy attempts to distort incentives regarding policyholder's willingness to follow medical advice); *Karl v. N.Y. Life Ins. Co.*, 381 A.2d 62, 63-64 (N.J. 1977) (same result regarding policy that would not consider death to result from assault if victim, who never recovered consciousness, lived beyond one year from date of assault); *see also L'Orange v. Med. Protective Co.*, 394 F.2d 57, 59, 63 (6th Cir. 1968) (holding that insurer's cancellation of doctor's medical malpractice policy was ineffective because the reason for cancellation violated public policy). *But see Kirk v. Fin. Sec. Life Ins. Co.*, 389 N.E.2d 144, 144-45, 149 (Ill. 1978) (enforcing time limit requirement for coverage).

81. See ANDERSON ET AL., *supra* note 4, § 2.05; FISCHER, SWISHER & STEMPEL, *supra* note 4, § 2.09; JERRY & RICHMOND, *supra* note 4, § 25D; 1 OSTRAGER & NEWMAN, *supra* note 4, § 1.03[b][2]; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 4.09; *see, e.g.*, *Lachs v. Fid. & Cas. Co. of N.Y.*, 118 N.E.2d 555, 556-60 (N.Y. 1954) (holding that airline trip insurance applied when sold at gate from which decedent boarded chartered flight even though language in policy was intended only to cover scheduled commercial flights).

82. See ANDERSON ET AL., *supra* note 4, § 2.05; FISCHER, SWISHER & STEMPEL, *supra* note 4, § 2.09; JERRY & RICHMOND, *supra* note 4, § 25D; 1 OSTRAGER & NEWMAN, *supra* note 4, § 1.03[b][2]; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 4.09; *see, e.g.*, *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985).

83. For this reason, *Addison Insurance Co. v. Fay*, 905 N.E.2d 747, 749, 752-53 (Ill. 2009), is not, as some commentators have suggested, an erroneous opinion. *See infra* Part II.A.

84. See ANDERSON ET AL., *supra* note 4, § 2.01; 1 OSTRAGER & NEWMAN, *supra* note 4, §§ 1.01, 1.03; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 2.06[C]; Stempel, *Coverage Carnage*, *supra* note 75, at 358-60; *see, e.g.*, *Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 17 (N.Y. 2003) (holding that an absolute pollution exclusion in liability policy did not bar coverage for claim against landlord policyholder relating to lead paint in apartment; exclusion

drafter/insurer (*contra proferentem*)⁸⁵ also serve the social instrument function by reducing the likelihood that erroneous construction of the policy will undermine social goals. However, courts differ in their acceptance of the ambiguity principle.⁸⁶ Some courts struggle against making *contra proferentem* a basis for decision, except as a last resort. Others are relatively quick to seize on ambiguity and declare a victory for the nondrafter, usually the policyholder.⁸⁷ When the insurance-policy-as-social-instrument factor is added to the analysis, it serves as a check against excessive resistance to ambiguity analysis or excessive acceptance of the concept. If a coverage resolution reached by ambiguity analysis conflicts with the social instrument function of the insurance product in question, a court would do well to reassess its application of *contra proferentem*.

II. APPLYING THE SOCIAL INSTRUMENT PERSPECTIVE: THE PERPETUALLY PERPLEXING PROBLEM OF DETERMINING THE NUMBER OF “OCCURRENCES” UNDER A LIABILITY POLICY

A recurring source of coverage litigation involving liability insurance requires determining the number of “occurrences” under an occurrence-based liability policy. The issue is important because the typical policy provides a per-occurrence limit as well as a higher overall “aggregate” limit.⁸⁸ Consequently, in most situations a determination of more occurrences makes more insurance money available under a policy. But most policies also require that the policyholder itself shoulder a deductible or self-insured retention. If this amount is high enough in relation to the exposure created by a claim or claims, the policyholder may well want a judicial determi-

must be strictly construed against insurer).

85. See ANDERSON ET AL., *supra* note 4, § 2.04; JERRY & RICHMOND, *supra* note 4, § 25A; 1 OSTRAGER & NEWMAN, *supra* note 4, § 1.03[b][1]; 1 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 4.08; Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531 (1996).

86. See 1 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 4.08.

87. See JERRY & RICHMOND, *supra* note 4, § 25D[b] (dividing jurisdictions into strong, weak, and moderate jurisdictions).

88. See *id.* § 65[a].

nation of fewer occurrences, which will permit it to pay less in deductibles or retentions and still receive enough in policy proceeds to provide a significant net financial advantage to the policyholder.

Courts, of course, are aware of the malleability of the consequences of occurrence-counting and know that their determinations could either expand or contract coverage dramatically. Observers generally posit a legal realist world in which court decisions seem analytically inconsistent but generally united in that they tend to maximize coverage for the policyholder when possible.⁸⁹ On their face, however, judicial approaches and results are highly varied, even though almost all courts purport to determine the number of occurrences by determining the number of “causes” of loss rather than focusing on the “effect” or impact of the loss.⁹⁰ For the most part, courts correctly have tended to maximize the number of occurrences in appropriate situations, but there are occasional glaring examples to the contrary.⁹¹

This Part examines recent cases that illustrate the degree to which courts can diverge on both the determination of the number of occurrences and the rationale for determining the number of occurrences. Utilizing the insurance-policy-as-social-instrument concept, it becomes clear that one decision was erroneous whereas

89. See, e.g., Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising from the World Trade Center Attacks*, 69 DEF. COUNS. J. 169, 172 (2002); James M. Fisher, *The Doctrine of Reasonable Expectations Is Indispensable, If We Only Knew What For?*, 5 CONN. INS. L.J. 151, 157-58 (1998); Thomas M. Jones & Jon D. Hirwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases*, 10 VILL. ENVTL. L.J. 25, 27 (1999).

90. See HENDERSON & JERRY, *supra* note 4, § 5.02[2]; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 2.06[H][2]; John Mumford & Kathryn E. Kransdorf, *Insurance 101—Insights for Young Lawyers: Still No Certainty-Determining the Number of Occurrences in the Context of Multiple Injuries Caused by a Single Perpetrator*, COVERAGE, Nov.-Dec. 2008, at 3, available at <http://www.hdjn.com/insurance/pdf/20090622110231674.pdf>.

91. See, e.g., *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 60-61 (3d Cir. 1982) (finding single occurrence in class action sex discrimination suit even though the conduct had “multiple and disparate impacts on individuals” and the injuries “extend[ed] over a period of time”); *Champion Int’l Corp. v. Cont’l Cas. Co.*, 546 F.2d 502, 505-06 (2d Cir. 1976) (ruling that liability claims against maker of vinyl panels for sales to twenty-six recreational vehicle makers were but one occurrence under vinyl company’s CGL policy); *Trans. Ins. Co. v. Lee Way Motor Freight*, 487 F. Supp. 1325, 1329 (N.D. Tex. 1980) (finding that discrimination claims by many employees were but one occurrence because claims attacked a single company policy).

three of the decisions were correct, even though one has been strongly criticized by insurers and their counsel.

A. Addison Insurance Co. v. Fay

In a decision noted commentator Randy Maniloff characterized as a “jaw dropper,”⁹² the Illinois Supreme Court created a bit of a stir in *Addison Insurance Co. v. Fay*, holding that the deaths of two boys in a dangerous, quicksand-like industrial pit constituted two occurrences under the property owner’s general liability policy.⁹³ The tragedy at the root of the coverage dispute involved fourteen-year-old Everett Hodgins and fifteen-year-old Justice Carr.⁹⁴ On an April evening in 1997, the boys, returning home due to a storm, attempted a shortcut through property owned by Donald Parrish.⁹⁵ Reaching the excavation pit, which was less than 150 yards from the Carr home, Carr attempted to jump over the water accumulated in the pit and became stuck in the “quick” sand and clay, unable to extricate himself.⁹⁶ Hodgins attempted to aid his friend but became trapped in the pit as well.⁹⁷ Eventually, they succumbed to hypothermia and drowned before their bodies were located three days later.⁹⁸

The boys’ families and estates sued Parrish due to the dangerous condition of the pit.⁹⁹ Parrish’s liability insurer, Addison, agreed to

92. Randy J. Maniloff, *Illinois High Court Issues a Jaw Dropper on Number of Occurrences*, BINDING AUTHORITY (White and Williams LLP, Phila., Pa.), Jan. 27, 2009, available at <http://www.whiteandwilliams.com/CM/Custom/Newsletters.asp> (follow “January, 27, 2009 – Illinois High Court Issues a Jaw Dropper on Number of Occurrences; Yes We Can Find Multiple Occurrences” hyperlink).

93. 905 N.E.2d 747 (Ill. 2009).

94. *Id.* at 749.

95. *Id.* at 750.

96. *Id.*

97. *Id.*

98. *Id.* at 749-50. According to the court,

The pit in which the boys were found was partially filled with water. The sand and clay around the pit was saturated, creating what an engineer testified is called a “quick condition.” A quick condition is one where a cushion of water prevents the soil from supporting a load of weight and can result in that load sinking and becoming trapped.

Id. at 747 (footnote omitted).

99. *Id.*

settle the two claims for Parrish's policy limits, but the parties disagreed whether those limits were \$1 million, for a single "occurrence," or \$2 million, for two "occurrences."¹⁰⁰ The insurance policy contained typical commercial general liability (CGL) language that defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" and, like almost all CGL policies, covered claims against a policyholder for bodily injury to plaintiff(s) caused by an "occurrence."¹⁰¹ The trial court ruled in favor of the plaintiffs, but the appellate court reversed.¹⁰² The Supreme Court of Illinois reinstated the trial court's determination that the tragic deaths of the two boys constituted two sufficiently distinct occurrences to merit the application of two \$1 million policy limits.¹⁰³

If the *Addison* court merely had made a summary reversal of the appellate court's one-occurrence decision, it probably would not have been noteworthy. As discussed below, there is ample precedent and logic to suggest that there cannot be an occurrence within the meaning of the CGL policy unless the plaintiff has suffered harm.¹⁰⁴ A policyholder's negligence or other wrongdoing standing alone, commonly referred to as "negligence in the air," is almost never actionable.¹⁰⁵ For example, if Parrish, without incident, kept his excavation pit as a potential death trap, there would clearly be no occurrence, no bodily injury to a third party, no lawsuit, and no valid insurance claim. However, in the actual case, two human beings tragically came in contact with the dangerous pit and separately suffered and died, albeit in close proximity to one another.¹⁰⁶

100. *Id.*

101. *Id.* at 753.

102. *Id.* at 750.

103. *Id.* at 757.

104. See ANDERSON ET AL., *supra* note 4, § 9.04; 1 OSTRAGER & NEWMAN, *supra* note 4, § 9.02[b]; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 2.06[H]. *But see* ANDERSON ET AL., *supra* note 4, §§ 9.03, 9.05 (collecting cases favoring finding of fewer occurrences unless injuries claimed are substantially separated in time from precipitating cause); 1 OSTRAGER & NEWMAN, *supra* note 4, § 9.02[a] (same).

105. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928); 65 C.J.S. *Negligence* § 189 (2009).

106. See *Addison*, 905 N.E.2d at 749-50 ("The boys were found at the edge of the pool of

Had *Addison's* holding rested on this basis, expressly or implicitly, insurers might have harrumphed at the decision, yet *Addison* hardly would have drawn great attention or ire. But the *Addison* court's approach and analysis rubbed insurers the wrong way. Notwithstanding the hornbook rule that the policyholder must establish coverage, the *Addison* court held that the insurer bore the burden of persuasion on the issue of number of occurrences.¹⁰⁷

Having found that the claims were clearly within the scope of Parrish's liability coverage, the court focused on another hornbook rule of insurance: "Once the insured has demonstrated coverage, the burden then shifts to the insurer to prove that a limitation or exclusion applies."¹⁰⁸ Because defining the events at issue as one occurrence rather than two operated to limit coverage, the court characterized the insurer as attempting to establish an exclusion.¹⁰⁹ And, as another hornbook rule of insurance posits, insurers bear the burden to establish the applicability of an exclusion, and exclusions are to be strictly construed against the insurer and in favor of the policyholder.¹¹⁰

Because there were no living witnesses to the boys' deaths, assigning to the insurer the burden of persuasion made the insurer less likely to prevail. Nonetheless, a good deal of evidence suggested that the boys entered the quicksand pit seriatim, and it was beyond question that they died individual and separate deaths, no matter how physically close their corpses may have been.¹¹¹ The *Addison* court distinguished a 2006 decision in which a defendant-policy-

water, trapped in the wet clay and sand.... Although the two boys were facing different directions, both bodies were close in proximity and indeed were physically touching.").

107. *Id.* at 752-53.

108. *Id.* at 752 (citing cases).

109. *Id.* at 753 ("Addison seeks to limit recovery [for the claimants] by applying the stricter policy limit. Therefore, we hold that Addison bears the burden of proving that the deaths of Carr and Hodgins constitute one occurrence.").

110. See 1 OSTRAGER & NEWMAN, *supra* note 4, §§ 1.01, 1.03; 1 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, §§ 2.06, 4.08; Stempel, *Coverage Carnage*, *supra* note 75, at 358-60.

111. See *Addison*, 905 N.E.2d at 750 ("The investigators concluded that when the boys reached the pit and the water, Carr attempted to jump across the water. In doing so, Carr became trapped. The investigators also concluded that Hodgins then attempted to help his friend out of the sand and clay, but became trapped himself. However, the investigators could not conclude how much time had elapsed between Carr's and Hodgins' entrapments, or whether the two boys were even together when Carr became trapped.").

holder's replacement of mercury-containing regulators went awry in some cases, resulting in mercury spills and contamination.¹¹² There, the court held that "where each asserted loss is the result of a separate and intervening human act, whether negligent or intentional, or each act increased the insured's exposure to liability ... such loss ... [arises] from a separate occurrence."¹¹³ Based on this methodology, the insurer in *Addison* argued that the boys' deaths were the result of a single negligent act of failing to maintain the property in a safe condition. But the *Addison* court saw no inconsistency between its 2006 holding and a two-occurrence ruling in *Addison*¹¹⁴ and was concerned that insisting on literal linkage between a negligent act and an injury for every occurrence could lead to absurd results.¹¹⁵

If the *Addison* court had stuck with this rationale alone, the decision may have been less of a shot across the bow to insurers. Instead, the court returned to its burden of proof theme, noting that investigation had not produced reliable information regarding the boys' respective times of death or "how closely in time the boys became trapped."¹¹⁶ The Court noted that

substantial uncertainty on this issue persuades us that *Addison* cannot meet its burden of proving that the two boys' injuries were so closely linked in time and space as to be considered one event. Because *Addison* cannot meet its burden, we hold that the injuries to Carr and Hodgins constitute two occurrences.¹¹⁷

112. *See Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 860 N.E.2d 280, 280 (2006).

113. *Id.* at 294.

114. *Addison*, 905 N.E.2d at 754-55 ("A significant distinction between *Nicor* and the instant case is that *Nicor* primarily discussed affirmative acts of negligence rather than an ongoing negligent omission. This court determined that the actions of each individual technician in replacing the old regulators constituted a separate occurrence under the terms of the insurance policy. We specifically rejected, as did the appellate court in that case, the counter-argument that *Nicor*'s negligent systemwide failure to remove the regulators safely constituted a single cause, and therefore a single occurrence.").

115. *Id.* at 755 ("Focusing on the sole negligent omission of failing to secure the property would allow two injuries, days or even weeks apart, to be considered one occurrence.").

116. *Id.* at 756.

117. *Id.* at 756-57.

The insurer community's reaction to the decision was harsh. One commentator disagreed with the burden of persuasion analysis, labeling it "sleight of hand,"¹¹⁸ and found the decision "amazing,"¹¹⁹ while others suggested that the court's holding was well outside the mainstream and the result of pro-policyholder "gymnastics."¹²⁰ According to critics, "the Illinois Supreme Court freely acknowledged that it was looking to maximize coverage,"¹²¹ lending support to the observation that judicial decisions in occurrence-counting cases are often prompted by a simple desire to "maximize coverage for the victims."¹²²

But despite the criticism, *Addison* almost certainly was correctly decided. Applying the social instrument perspective to the coverage dispute clarifies its correctness and demonstrates the manner in which this additional perspective can assist in correctly resolving coverage disputes. Although analyses of contract-based insurance policies can of course reach the right result, they may not be particularly helpful. Judicial fixation on the standard insurance policy language defining an occurrence does not readily yield an answer. Most courts agree that the apt approach to occurrence-

118. See Maniloff, *supra* note 92.

The *Addison* Court essentially likened the insurer's effort to limit its liability to one occurrence to a policy exclusion—for which insurer's [sic] traditionally have the burden of proof. Number of occurrences is certainly not an issue in every case and *Addison* may be distinguishable in future cases. But insurers' efforts to limit their liability, by means other than exclusions, arises regularly and in all sorts of cases. The *Addison* Court's sleight of hand with the burden of proof may be its greatest impact.

Id.

119. See Sally Roberts, *Ruling in Drownings Case May Spark More Occurrence Disputes: Experts; Illinois High Court Rules Against Insurer on Cause*, BUS. INS., Feb. 2, 2009, at 4, available at www.businessinsurance.com/article/20090201/ISSUE01/100027032 (quoting Maniloff).

120. See *id.* ("Addison's attorney ... said she believes that the court 'drew the wrong inference' [and the] 'most reasonable inference...was that this was one occurrence sufficiently linked in every way.'" (second ellipsis in original)); *id.* ("The court 'really did some gymnastics here to make this two occurrences [A]lmost every court [using cause theory] ... would find a single occurrence under these facts.'" (quoting Maniloff)).

121. See Maniloff, *supra* note 92.

122. See *id.* ("Insurers on the losing end of coverage cases with tragic underlying facts often feel that the court's decision was prompted by its desire—of course, unstated—to maximize coverage for the victims.").

counting is to determine the “cause” of the loss.¹²³ But is bodily injury or property damage “caused” by a bad management decision, a bad product or service design, a bad performance, oversight, manufacture, sales, shipment, or the impact of any of these on a particular victim?

Textual analysis of the policy alone is usually inconclusive. Even when courts insist they are simply giving the policy plain meaning construction, they are, at a minimum, considering the extrinsic evidence provided by their own experience with losses of this type and their common sense view of how an injury took place, often with the help of expert investigation.¹²⁴ Additional contract tools such as the ambiguity principle and the assignment of burdens of persuasion can help. But as insurer reaction to *Addison* indicates, assignment of the burden of proof is often not a neutral act but rather reflects a policy choice favoring one of the disputants at the expense of another.

Rather than ignore the factors that underlie judicial determinations styled in the language of contract alone, courts, insurers, policyholders, lawyers, and regulators would be better off bringing these factors into the open and assessing them expressly. This may involve viewing the insurance policy not only as a contract, but also as a product, or akin to a statute. Analysis certainly should involve conscious reflection on the insurance policy’s function in relation to larger socioeconomic risk management goals.

In cases involving general liability policies, the analysis is fairly uncomplicated. Insurers designed the standard CGL to serve as “one stop shopping” of sorts for businesses. For a larger premium than they would have paid for owners’, landlords’, and tenants’ coverage alone, or other coverages such as contractors’ public liability insurance, elevator liability insurance, or similarly targeted liability policies, CGL insurance provides policyholders broad liability coverage and defense of claims, which could now be left in the hands of experienced experts in litigation (the insurer and panel counsel).¹²⁵ CGL insurance allows policyholders to better participate

123. See ANDERSON ET AL., *supra* note 4, §§ 9.01-9.06; 1 OSTRAGER & NEWMAN, *supra* note 4, § 9.02; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 2.06[H].

124. See *supra* note 111.

125. See ABRAHAM, *supra* note 11, at 174; 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note

in useful economic or social activity without fear of bankruptcy or distraction from lawsuits.

As part of this arrangement, the general liability policy must provide adequate amounts of coverage so that claims can be settled or paid if they cannot be defeated at trial. Thus, the per-occurrence policy limit, styled as a “per accident” policy limit until the 1966 CGL revision, was established.¹²⁶ For decades, many CGL insurers did not even impose aggregate liability limits and were willing to bear the risk that a given policyholder could face multiple suits arising out of multiple accidents or occurrences during a policy period.¹²⁷ Over time, of course, rising tort awards pushed the average per-occurrence limit upward, and insurers were forced to protect themselves with aggregate limits and higher premiums. But they had always been willing to shoulder the general liability risk, for a price.

The resulting system was one in which most businesses, unless foolish or large enough to safely self-insure, purchased substantial amounts of CGL insurance, creating one of the most successful insurance policies or products. In order to fulfill its function, the CGL not only must have adequate limits but must provide coverage for the types of liability-creating events created or faced by the policyholder. This social instrument function of CGL insurance provides a basis for erring on the side of finding more occurrences.

In addition, the CGL policy came to be seen as part of the social safety net, providing a means of adequately compensating victims of policyholder negligence. Most businesses would not be sufficiently solvent, and certainly not sufficiently liquid, to pay large awards to persons seriously injured or killed by the business’s activities. Although this created pressure for courts to maximize coverage, this sentiment is not necessarily at odds with insurer industry goals, at least in ordinary cases.¹²⁸ Insurers have implicitly agreed not only

4, § 14.01; Scales, *supra* note 63, at 1262.

126. See ANDERSON ET AL., *supra* note 4, § 9.02[A], at 9-19 (noting change from “accident” in 1955 CGL standard form to “occurrence” in 1966 CGL policy); 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01.

127. Aggregate limits did not become uniformly standard until the 1986 revision of the basic CGL form, but were in selective use since the advent of the CGL policy. 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01[A].

128. See ABRAHAM, *supra* note 11, 173-93 (noting degree to which tort liability, in part,

to protect policyholders but also to provide a type of compensation fund for victims, as long as the insurer is adequately paid, in premiums and investment income, for taking on this function in society. In order to adequately compensate victims, each victim should generally be subject to the policy's per-occurrence limit. Although this may come uncomfortably close to an effects test rather than a cause test, this may suggest that strict adherence to a narrow application of a cause test is too inconsistent with the overall function of liability insurance.

As insurers are wont to complain, finding more occurrences usually maximizes coverage.¹²⁹ But as long as the insurer is not forced to provide coverage without compensation, maximizing the coverage is normally positive in that it better protects the defendant-policyholder and better compensates the third party victim of the policyholder's conduct. In the occurrence-counting disputes between insurer and policyholder, there is no question that the policyholder has purchased coverage that applies to the underlying claim. The only question is the number of occurrences and the total coverage available. Insurers can hardly complain that they were forced to provide free coverage. They sold policies to policyholders who experienced the unfortunate contingency for which they bought protection. Under these circumstances, courts should adopt an occurrence-counting methodology that maximizes the number of occurrences in cases of reasonable dispute. Except in unusual situations, insurers can both protect themselves and profit from this approach by electing low aggregate limits as necessary, perhaps even aggregate limits that match the per-occurrence limit if the risk facing the insurer is sufficiently difficult to underwrite or price. When pricing is not a problem, insurers can "do the math" to

expanded due to greater availability of liability insurance); *id.* at 232-35 (noting that, for large businesses, self-insurance or high-deductible catastrophic coverage would be more prudent, but liability insurance with comparatively low deductibles is a practical necessity; noting also that business considerations make such coverage attractive to even large businesses despite their ability to self-insure a greater portion of risk). Mass torts may be another matter. *See infra* Part III.E.

129. *See, e.g.*, *Addison Ins. Co. v. Fay*, 905 N.E.2d 747, 750 (Ill. 2009) (involving a \$2 million policy limit if the boys' deaths constituted two occurrences compared to \$1 million limit if only one occurrence).

determine the premium required and refuse to issue policies predicted to be unprofitable.

However, a methodology that finds multiple occurrences more easily and more frequently does not always benefit the policyholder. Policyholders may elect to reduce premium expenses through high per-occurrence deductibles or retentions. When this takes place, a decision finding multiple occurrences may force the policyholder to pay more in deductibles or retentions, eliminating the value received from the insurer's defense of claims or payments for settlements and judgments. Nonetheless, in such cases, courts generally err more by trying to help the high deductible policyholder than in simply taking a broad view of occurrence counting. By definition, a policyholder opting for high per-occurrence deductibles has agreed to self-insure a large portion of its standard business operation risks.

In a case like *Addison*, this social instrument function of insurance strongly supports the Illinois Supreme Court's determination. As discussed above, when the policyholder is willing to pay the higher premiums required of a low- or no-deductible policy, it purchases a social instrument that should, in theory, both protect the policyholder from potentially company-killing liability and provide adequate compensation to the victims of a policyholder's negligence or other wrongdoing.

There is nothing in the *Addison* case record to suggest that policyholder Donald Parrish was a bad man or even that he was a poor steward of his land. He may simply have been busy or inattentive in failing to realize that his excavation pit had become a death trap. Parrish was negligent¹³⁰—but CGL insurance is designed to protect policyholders, for a fee, from the most devastating financial consequence of their negligence.¹³¹ Insurance, whether styled as contract, product, or statute, is unquestionably expected to fulfill certain functions in the aftermath of certain events. As the *Addison* court correctly noted, the deaths of Carr and Hodgins resulted from the type of mishap that is squarely within the scope of the standard CGL policy and within the contemplation of insurers, policyholders,

130. *Id.* at 754-55.

131. See 2 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 14.01[A], at 14-12.

and regulators concerning CGL's function.¹³² When tragedy struck twice, Parrish was entitled to have his CGL policy play its intended role as part of the local and national system of risk shifting and risk distribution.

Coverage should ordinarily follow, as necessary, up to the limits of the policy, at least when the injuries suffered by the third party claimant(s) justify the payments. Parrish paid for a policy with \$2 million in aggregate limits and the insurer agreed to provide this amount if necessary to resolve any catastrophically tragic events for which he could be held liable.¹³³ When two victims with million-dollar claims are killed under circumstances even suggesting differentiation, resolving the case in favor of two occurrences is much more consistent with the socioeconomic role anticipated for the policy.¹³⁴

When the defendant-policyholder's insurer argues that the policyholder should get less, the insurer is indeed seeking to eliminate a portion of the coverage. Elimination of coverage is what exclusions do. Consequently, insurer attempts to invoke policy provisions limiting coverage are in the nature of an exclusion and should logically be treated as exclusions for purposes of burden of proof, strict construction, and ambiguity analysis. The court in *Addison* was correct to take this approach regarding insurer attempts to invoke occurrence characterization to reduce or eliminate coverage, and a similar burden would exist if the insurer attempted to characterize the loss as subject to a lower sublimit or excluded altogether because of the nature of the loss or liability.

Further, in a case like *Addison*, the consequences to both the individual insurer and the insurance industry are not particularly onerous. For the industry as a whole, the revenues involved in this case are but a blip.¹³⁵ *Addison* may spur snide commentary about the Illinois Supreme Court, but the decision has only modest economic consequences to an individual insurer¹³⁶ and only trivial

132. See *Addison*, 905 N.E.2d at 752.

133. See *id.* at 750.

134. See *id.* at 755.

135. In 2007, the U.S. insurance industry generated gross premiums of \$1240.1 billion. DATAMONITOR, INSURANCE IN THE UNITED STATES 7 (2008).

136. Even for a single insurer like *Addison* Insurance itself, the *Addison* decision is hardly cause for consternation. A million dollars is just not that much money to even a small insurer,

costs to the insurance industry.¹³⁷ The circumstances of the loss are sufficiently rare that insurers need not fear a rash of suits involving two boys injured in close but not quite congruent circumstances. More important, the insurer received premiums for \$2 million of aggregate coverage,¹³⁸ acknowledging that there was a reasonably high risk that more than one person could be seriously injured and that more than one serious liability mishap could ensue during the policy period. This is not a scenario like asbestos or environmental liability in which insurers are likely to feel the cumulative negative weight of a decision favorable to policyholder.¹³⁹ Further, after decisions like *Addison*, insurers are likely to either reduce limits, increase premiums, or both. The *Addison* decision also may spur sales of more policies at higher limits and premiums as policyholders are reminded of the risk any landowner faces.

Social instrument analysis also supports the court's view that insurance coverage for policyholders and their victims should not be reduced due to hair-splitting calculations regarding the time and circumstances of multiple injuries or deaths.¹⁴⁰ As the court noted:

If several injuries suffered over the course of several weeks could be bundled into a single occurrence, the likelihood that damages would exceed a per-occurrence limit is significant, as demonstrated by the damages in the instant case. Purchasers of insurance such as Parrish would be left unprotected by their insurance policy, and liable for any amount above the per-occurrence limit. In accepting a per-occurrence limit, Parrish could not have intended to expose himself to greater liability by allowing multiple injuries, sustained over an open-ended time period, to be subject to a single, per-occurrence limit [simply because the multiple injuries were rooted in a single cause such as failure to safeguard property].¹⁴¹

particularly when the insurer sold the policy in question in return for premiums that should logically have anticipated that the policyholder could face more than one liability event or claim during the policy year.

137. See *DATAMONITOR*, *supra* note 135, at 7-8.

138. See *Addison*, 905 N.E.2d at 750.

139. See 1 *STEMPEL ON INSURANCE CONTRACTS*, *supra* note 4, § 2[B], at 2-6.11 to 2-7.

140. See *Addison*, 905 N.E.2d at 755.

141. *Id.*

Although perhaps fated to be hated by insurers, *Addison's* basic analysis is correct, though the opinion could be clearer and more satisfying were it to address self-consciously the way in which its holding is supported by the socioeconomic role of liability insurance as a social instrument and social institution.

B. Plastics Engineering Co. v. Liberty Mutual Insurance Co.

A perhaps less controversial but probably more financially important occurrence-counting case was also decided in early 2009. In *Plastics Engineering Co. v. Liberty Mutual Insurance Co.*,¹⁴² the Wisconsin Supreme Court faced an industrial-sized version of the *Addison v. Fay* situation. Policyholder Plastics Engineering Company ("Plenco") manufactured and sold materials containing asbestos during the 1950-1983 period and subsequently was sued for alleged asbestos-related injury.¹⁴³ "In general, the claimants allege[d] that they were injured by their first exposure to asbestos, but their asbestos-related injuries did not manifest until long after their exposure to the asbestos. The claimants' exposures allegedly occurred at different times and at different geographical locations."¹⁴⁴ Among the insurers providing CGL coverage to Plenco was Liberty Mutual, which sold primary policies covering the 1968-1989 period and umbrella excess policies for 1970-1984 and 1986-1988.¹⁴⁵ For the most part, each primary policy had limits of \$500,000 per-occurrence and \$500,000 annual aggregate, with a three-year policy of \$1 million per-occurrence and \$1 million aggregate.¹⁴⁶ The umbrella policies had \$1 million per-occurrence and \$1 million annual aggregate limits for 1970 through December 19, 1972, \$5 million per-occurrence and \$5 million aggregate limits from December 19, 1972 to January 1, 1982, and \$1 million per-occurrence and \$1 million annual aggregate limits from January 1, 1982 to January 1, 1984.¹⁴⁷ In the final three years, the limits increased to \$10 million

142. 759 N.W.2d 613 (Wis. 2009).

143. *Id.* at 616.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

per-occurrence and \$10 million annual aggregate.¹⁴⁸ Post-1988 umbrella and post-1989 primary policies contained exclusions for asbestos-related liability.¹⁴⁹

Even though Liberty Mutual was protected by annual aggregate policy limits, much was at stake in *Plastics Engineering*. If Plenco's vending of products containing asbestos constituted one occurrence, the maximum coverage responsibility of Liberty Mutual could be as little as \$500,000 despite the many claimants involved who had been exposed across various years. Conversely, if each claimant's Plenco-linked injury constituted a separate occurrence, then there were many occurrences, certainly more than enough to require Liberty Mutual to pay its full aggregate limits for the years in question, though perhaps not nearly enough to satisfy Plenco's asbestos-related liabilities.¹⁵⁰ The filing of nine amicus briefs by

148. *Id.*

149. *Id.* Because of the nature of asbestos-related injury, however, the asbestos exclusion inserted into policies during the late 1980s did not operate to cut off insurer coverage responsibilities. As discussed below, courts overwhelmingly adopted the view that CGL coverage was triggered by injurious exposure to asbestos even if the claimant did not develop symptoms until years or even decades later. *See infra* Part III.E. As a result, a lawsuit filed during the 1990s could easily trigger coverage under the pre-1988 CGL policies if the claimant alleged injurious exposure to the asbestos prior to 1988. Because of the insidious nature of asbestos-related injury, its ongoing character, and defendant concealment of asbestos-related dangers, statute of limitations defenses were of little help in defeating such claims. *Accord* *Guy v. E.I. DuPont de Nemours & Co.*, 792 F.2d 457, 460 (4th Cir. 1986); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 160-61 (8th Cir. 1975); *see* *Stempel, Coverage Carnage*, *supra* note 75, at 363-81; *see, e.g., Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1102 (5th Cir. 1973) (adopting a "discovery rule" for asbestos tort claims and viewing suits as timely if plaintiff sued within statutory deadline after learning of potential asbestos-related injury, even if initial injurious exposure to asbestos occurred years beyond statute of limitations time period).

150. Liberty Mutual was protected, to a degree, by the policies' "Non-Cumulation of Liability" clause, which the court found to limit the amount of coverage owed on each claimant's injury to a maximum of the policy limits in effect at the time of first exposure to the asbestos. *See Plastics Eng'g*, 759 N.W.2d at 619 (quoting clause); *id.* at 624-25 (construing clause and rejecting argument that Wis. Stat. § 631.43(1) prohibits use of noncumulation clause as "other insurance" provision to reduce coverage below aggregate protection provided by multiple policies; statute applied only to concurrently overlapping insurance, rather than to consecutively triggered insurance). Plenco was not permitted to "stack" triggered policy limits. *Id.* However, the court also rejected the insurer's argument that coverage available to Plenco should be prorated across all years of the claimants' injurious exposures. *See id.* at 625-27.

Accepting Liberty Mutual's allocation argument would have assigned some of the coverage to calendar years in which Plenco had no available insurance due to either exhaustion of

entities affiliated with insurer or policyholder interests reflected the importance of the issue to insurers and policyholders.¹⁵¹

Plenco tendered the asbestos claims to its insurers, and Liberty Mutual argued that all claims and resulting litigation stemmed from one occurrence—the use of asbestos in Plenco products.¹⁵² Plenco in turn sought a declaratory judgment that the asbestos claims constituted multiple occurrences entitling it to full policy limit coverage for the years in question.¹⁵³ The action was initially filed in federal district court,¹⁵⁴ and the Seventh Circuit certified the following question to the Wisconsin Supreme Court: “[W]hat constitutes an ‘occurrence’ in an insurance contract when exposure

coverage from other claims or Plenco’s failure to purchase sufficient insurance during those years. In addition, Liberty Mutual’s apportionment argument, if accepted, would have prorated the insurer’s duty to defend, a result that most courts have rejected, both because it tends too greatly to gut the core of liability insurance (also described as “litigation insurance” because of the duty to defend component, 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 9.03[A], at 9-63), and because the CGL policy language obligates the insurer to defend “suits” rather than portions of suits. *See id.* § 9.03, at 9-90; *see also* *Plastics Eng’g*, 759 N.W.2d at 629 (Abrahamson, C.J., concurring) (contending that majority decided more than necessary to answer legal question presented to court via certification from U.S. court of appeals); Jeffrey W. Stempel, *Domtar Baby: Misplaced Notions of Equitable Apportionment Create a Thicket of Potential Unfairness for Insurance Policyholders*, 25 WM. MITCHELL L. REV. 769, 850-52 (1999) [hereinafter Stempel, *Domtar Baby*] (criticizing allocation across policy years when it results in policyholder being unable to recover all insurance purchased). *But see* *Plastics Eng’g*, 759 N.W.2d at 630 (Gableman, J., dissenting) (advocating application of “time-on-the-risk” pro rata risk allocation).

This Article focuses on the *Plastics Engineering* analysis of the number of occurrences and does not address the court’s other determinations.

151. *See* *Plastics Eng’g*, 759 N.W.2d at 614-15 (noting, inter alia, amicus briefs by Wisconsin Insurance Alliance, London Market Insurers, Wisconsin Paper Council, United Policyholders, National Federation of Independent Business, and Wisconsin Utilities Association).

152. *See id.* at 620 (“Liberty Mutual argues that Plenco’s manufacture and sale of asbestos-containing products without warning constitutes one occurrence regardless of the number of people injured. Plenco, on the other hand, argues that each individual’s exposure to asbestos, which results in injury, constitutes a single occurrence. Under Plenco’s argument, several occurrences have taken place because many people have been exposed over the span of many years. Given the policy language, we agree with Plenco and conclude that each individual’s repeated exposure constitutes an occurrence.”).

153. *See id.*

154. *See* *Plastics Eng’g Co. v. Liberty Mut. Ins. Co.*, 466 F.Supp. 2d 1071, 1073 (E.D. Wis. 2006).

injuries are sustained by numerous individuals, at varying geographical locations, over many years[?]"¹⁵⁵

The Wisconsin high court agreed with the policyholder, concluding that each individual's repeated exposure constitute[d] an occurrence.¹⁵⁶ The court's professed approach was primarily linguistic,¹⁵⁷ although it may of course have been unconsciously affected by a desire to maximize coverage, focusing on policy text. The court noted that "claimants were allegedly injured by continuous and repeated exposure to asbestos fibers from Plenco's asbestos-containing products" and that "without exposure, no bodily injury takes place."¹⁵⁸

Looking to the cause of the claimant's injuries,¹⁵⁹ the court stated that "where a single, uninterrupted cause results in all of the

155. See *Plastics Eng'g*, 759 N.W.2d at 615; *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 656 (7th Cir. 2008) (certifying additional questions of "(2) whether Wisconsin Statute § 631.43(1) applies to successive insurance policies; and (3) whether Wisconsin courts would adopt an 'all sums' or pro rata allocation approach to determining liability when an injury spans multiple, successive insurance policies"). The Wisconsin Supreme Court answered the three certified questions "by concluding that under the language in this policy and the facts of this case, each claimant's repeated exposure is one occurrence" and that once a policy is triggered, the insurer "must fully defend the lawsuit in its entirety and pay for all sums up to the policy limits," with no policy language support for a proration of damages. *Plastics Eng'g*, 759 N.W.2d at 615-16 (footnote omitted); *id.* at 620 (restating summary of holding).

156. *Plastics Eng'g*, 759 N.W.2d at 620.

157. See *id.* at 621 ("In this court's view, it is the policy language here that controls the analysis.").

158. *Id.* (footnote omitted) (citing *Danbeck v. Am. Family Mut. Ins. Co.*, 629 N.W.2d 150 (Wis. 2001), in support of the traditional contract rule that policy language, if ambiguous, "is construed in favor of coverage").

159. See *id.* at 622 ("American courts have developed two basic approaches for assessing the number of occurrences that took place within the meaning of policies—the cause theory and the effect theory." (quoting, ironically perhaps, *Nicor, Inc. v. Assoc. Elec. & Gas Ins. Servs. Ltd.*, 860 N.E.2d 280, 287 (Ill. 2006), a case which the Illinois Supreme Court in *Addison Insurance Co. v. Fay* took pains to explain did not require a finding that the two boys' deaths were one occurrence, 905 N.E.2d 747, 755, 757 (Ill. 2009))). According to the Wisconsin court, "[a]s long as the injuries stem from one proximate cause there is a single occurrence." *Id.* at 623 (quoting *Welter v. Singer*, 376 N.W.2d 84 (Wis. Ct. App. 1985); citing *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982) (applying Pennsylvania law)).

The court in *Plastics Engineering* is correct that the majority approach is to focus on the causes of injury, rather than the effect of negligent conduct. See ANDERSON ET AL., *supra* note 4, §§ 9.02-9.06; 1 OSTRAGER & NEWMAN, *supra* note 4, § 9.02, at 625; 1 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 2.06[H], at 2-107.

injuries and damage, there is but one ‘accident’ or ‘occurrence.’”¹⁶⁰ However, “[i]f the cause is interrupted or replaced by another cause, the chain of causation is broken and there has been more than one accident or occurrence.”¹⁶¹ “[A] separate occurrence is not found each time the same claimant is exposed to Plenco’s product.”¹⁶²

The court recognized that judicial “determination of what constitutes an occurrence in asbestos-related claims has produced varying results throughout the country”¹⁶³ and noted the nature of the division between courts that “have concluded that it is the manufacture and sale of asbestos-containing products that constitutes the occurrence”¹⁶⁴ while “[s]ome courts have concluded that when exposure occurs at the same time and place, despite the fact that many individuals are injured, there is but one occurrence per time and place.”¹⁶⁵ In addition, “courts have concluded that the individual claimant’s repeated exposure to asbestos-containing products constitutes the occurrence.”¹⁶⁶ Although the *Plastics Engineering* court professed to eschew adopting a particular school of thought in favor of looking at the instant policies’ language,¹⁶⁷ it in essence adopted this last approach, finding “each individual claimant’s injuries stem from the continued and repeated exposure to asbestos-containing products” and that “[m]ultiple occurrences

160. *Plastics Eng’g*, 759 N.W.2d at 622 (quoting *Welter*, 376 N.W.2d at 87).

161. *Id.* (quoting *Welter*, 376 N.W.2d at 87; *Olsen v. Moore*, 202 N.W.2d 236, 349 (Wis. 1972)).

162. *Id.*

163. *Id.* at 620.

164. *Id.* (citing, inter alia, *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330, 334-39 (3d Cir. 2005) (applying Pennsylvania law); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 707 F. Supp. 762, 772-74 (E.D. Pa. 1989); *Owens-Ill., Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515, 1524-28 (D.D.C. 1984)); *U.S. Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226, 1257-60 (Ill. App. Ct. 1995); *Owens-Ill., Inc. v. United Ins. Co.*, 625 A.2d 1, 21-23 (N.J. Super. Ct. App. Div. 1993)).

165. *Id.* at 620-21 (citing *Fina, Inc. v. Travelers Indem. Co.*, 184 F. Supp. 2d 547, 549-53 (N.D. Tex. 2002); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 896-909 (Conn. 2001)).

166. *Id.* at 621 (citing *In re Prudential Lines, Inc.*, 158 F.3d 65, 79-83 (2d Cir. 1998) (applying New York law); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1212-14 (2d Cir. 1995) (applying New York and Texas law); *Cole v. Celotex Corp.*, 588 So.2d 376, 390-91 (La. Ct. App. 1991)); *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1210-11 (Md. Ct. Spec. App. 1997).

167. *Plastics Eng’g*, 759 N.W.2d at 621.

arise because each individual's injury stems from his or her repeated exposure to asbestos-containing products."¹⁶⁸

The *Plastics Engineering* analysis is the correct—but not the inevitable—construction to assign to the text of the standard CGL policy. A court might reasonably, albeit in strained fashion, conclude that the “accident” causing asbestos-related injury was the manufacture or sale of asbestos products and that this larger release of asbestos into the marketplace was the “continuous or repeated exposure’ to conditions” of which the policy language speaks.¹⁶⁹ Such an interpretation would be incorrect and inferior to the construction adopted by the court in *Plastics Engineering*. But to understand the reason why requires consideration of the nontextual aspects of the CGL policy and its function as a social instrument.

Because the CGL policy serves social and economic functions by encouraging commerce through distribution of business risks, including defense and settlement of claims—the weak claims that may merely harass a business as well as the strong claims that may sink a business—the amount of CGL insurance available should, all other things being equal, align with the policyholder's risk exposure. Obviously, CGL insurance is not free. Policyholders who fail to purchase insurance, or purchase a finite amount of coverage that proves inadequate in the face of serious claims problems, are not entitled to coverage maximization through an unduly generous construction of the term “occurrence.”¹⁷⁰

However, when policyholders have CGL policies in place, they are entitled to a reasonable application of the actual injury or injurious exposure trigger, and courts should construe the number of occurrences in accord with the liability risk actually faced by the policyholder. Only injured humans can become plaintiffs and allege bodily injury liability by the policyholder. Consequently, policyholder actions that create the basis for tort liability do not actually ripen into potential tort liability (for example, a lawsuit) or actual

168. *Id.* at 623.

169. *Id.*

170. But when the policyholder did purchase coverage triggered because of injury allegedly caused by its products or activities, the policyholder is entitled to the full protection of each of those policies and coverage should not be reduced simply because the liability and damage events stretch across other years when the policyholder lacked insurance or had exhausted its insurance. See Stempel, *Domtar Baby*, *supra* note 150.

tort liability (a settlement or judgment) unless a human being alleges and/or proves injurious exposure to the policyholder's harmful product or negligent conduct.

In a variant of the famous, if perhaps sophomoric, philosophical question "If a tree falls in the forest and no one hears, does it make a sound?," there can be no tort liability and no claim for insurance coverage unless a person is impacted by policyholder conduct. Negligence or other misconduct "in the air" is insufficient. Logically, then, the potential amount of insurance available will be linked to an individual claiming injury. Under this approach, claimed injury caused by injurious exposure logically constitutes an occurrence, not only because of the text of the CGL policy, but also because of the policy's structure, design, and purpose (the insurance policy as a "product"),¹⁷¹ its quasi-governmental grant of rights by the insurance industry in return for premiums from the commercial policyholder community (the insurance policy as quasi legislation),¹⁷² and the socioeconomic institutional role played by the CGL policy.

The CGL's social instrumental role is to provide adequate, baseline general liability coverage for risks faced by commercial policyholders. If the policyholder does not skimp on purchasing coverage (for example, buy an amount of insurance clearly smaller than the norm for its type of business), the social institutional role of the policy should provide the policyholder with the per-occurrence policy limits when it faces a claim that might, on its own, consume those policy limits. If the purchaser of a CGL has its policy limits effectively reduced or compressed by undue judicial focus on negligence or misconduct (for example, distributing a product containing asbestos) rather than on what makes the negligence liability-creating (its interaction with a third party to cause bodily injury), the CGL policy then fails to fulfill its socioeconomic role in providing adequate protection (up to the policy limits) when facing suit.

When the tort exposure in question involves many claimants who were exposed to asbestos over many years, the analysis remains the same. In such cases, the expected institutional role of CGL insurance is to treat each claimant as a separate occurrence requiring a

171. See Stempel, *Insurance Policy as Thing*, *supra* note 9.

172. See Stempel, *Insurance Policy as Statute*, *supra* note 3, at 3-11.

litigation response, possible settlement, and, if necessary, trial and payment of an adverse judgment. The insurer can easily limit its exposure through the use of aggregate policy limits and a noncumulation of liability clause. Indeed, Liberty Mutual's policies at issue in *Plastics Engineering* had both.¹⁷³ If courts were to give liability insurers the benefit of an initial hidden policy sub-limit by accepting the telescoping cause/occurrence theory advanced by Liberty Mutual and other insurers, this would tend to thwart the role of the CGL policy as social instrument. The *Plastics Engineering* analysis, therefore, clearly is correct when seen in light of the insurance policy's social institutional role, even though the decision could be attacked on linguistic grounds alone.

C. Baumhammers and Koikos

In contrast to *Addison* and *Plastics Engineering*, the Pennsylvania Supreme Court in 2007 provided an example of excessive compression of the number of occurrences. In *Donegal Mutual Insurance Co. v. Baumhammers*, the Pennsylvania Supreme Court embraced a rather narrow concept of the "cause" of loss test for purposes of determining the number of "occurrences," and, hence, the number of liability limits available under a general liability policy.¹⁷⁴

On April 28, 2000, Richard Baumhammers went on an extended shooting rampage during which he killed five people and seriously injured another.¹⁷⁵ Baumhammers was convicted of five counts of first degree murder and one count of aggravated assault and attempted murder.¹⁷⁶ The victims and their estates sought damages from Baumhammers and his parents, alleging that the parents negligently failed to confiscate Baumhammers's gun, procure mental health treatment for him, and advise the proper authorities of his violent propensities.¹⁷⁷ The parents sought coverage under

173. See *supra* notes 145-49 and accompanying text.

174. 938 A.2d 286 (Pa. 2007).

175. *Id.* at 288.

176. *Id.*

177. *Id.* at 288-89.

their homeowners policy.¹⁷⁸ The policy provided a \$300,000 per “occurrence” liability limit and defined an “occurrence” as an “accident, including continuous or repeated exposure to substantially the same general harmful conditions.”¹⁷⁹ Insurer Donegal commenced a declaratory judgment action seeking a determination that it had no duty to defend or indemnify the parents.¹⁸⁰ At the trial level, the court found against Donegal, holding that Donegal had a duty to defend and indemnify the parents and that the allegations constituted six occurrences under the Donegal policy.¹⁸¹

On appeal, the Pennsylvania Superior Court, following re-argument en banc, affirmed the trial court’s decision on both issues.¹⁸² The Superior Court held that the parents’ alleged negligence constituted an accident, satisfying the policy’s “occurrence” definition, despite the fact that the ultimate injuries were caused by Baumhammers’s intentional acts.¹⁸³ Then, purporting to apply the “cause” test for determining the number of occurrences, the Superior Court noted that there were two proximate causes of the victims’ injuries: Baumhammers’s attacks and Baumhammers’s parents’ negligence.¹⁸⁴ The Superior Court was persuaded by the rationale used by courts¹⁸⁵ that found multiple occurrences by focusing on the “immediate cause of the harm, the cause that ultimately triggered the liability of the insured.”¹⁸⁶ Looking to the “immediate injury-producing act,” the Superior Court determined that there were six occurrences because Baumhammers shot six victims.¹⁸⁷ The court rejected Donegal’s argument that the parents’ negligence constituted a “continuous or repeated exposure to substantially the same general harmful conditions” because the victims were not “exposed”

178. *Id.* at 289.

179. *Id.*

180. *Id.*

181. *Id.* at 290.

182. *Id.*

183. The Superior Court adopted the Third Circuit’s rationale in *Nationwide Mutual Fire Insurance Co. v. Pipher*, 140 F.3d 222 (3d Cir. 1998) (applying Pennsylvania law). Donegal Mut. Ins. Co. v. Baumhammers, 893 A.2d 797, 808 (Pa. Super. Ct. 2006).

184. *Baumhammers*, 893 A.2d at 814.

185. See *Koikos v. Travelers Ins. Co.*, 849 So.2d 263 (Fla. 2003).

186. *Baumhammers*, 893 A.2d at 815.

187. *Id.* at 815, 817.

to the parents' negligence.¹⁸⁸ Therefore, given Donegal's \$300,000 per-occurrence limit of liability, the court determined Donegal's potential indemnity exposure was \$1.8 million.¹⁸⁹

The Pennsylvania Supreme Court reversed in part the Superior Court's decision regarding the number of occurrences and policy limits implicated.¹⁹⁰ Noting that *Baumhammers* is "a disturbing case with tragic consequences," the court found that only one "occurrence" had been alleged.¹⁹¹ Rejecting the Superior Court's application of the "cause" test, to the extent that it relied on the "immediate injury-producing act," the Supreme Court stated that "the act of the insured that gave rise to their liability should be the focus."¹⁹² The parents' negligence constituted one accident and, therefore, one "occurrence" as defined by the Donegal policy.¹⁹³

188. *Id.* at 817.

189. *Id.* at 805, 824.

190. First, the Pennsylvania Supreme Court relied on its 2006 decision in *Kvaerner Metals v. Commercial Union Insurance Co.*, 908 A.2d 888 (Pa. 2006), as well as Third Circuit precedent and affirmed the portion of the Superior Court's decision that found that there was an alleged "accident" that satisfied the Donegal policy's definition of an "occurrence." Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286, 292-93 (Pa. 2007). Citing *Kvaerner*, the court stated that it defined an "accident" in the context of insurance coverage as "an unexpected and undesirable event occurring unintentionally." *Id.* at 292. The court stated that the "extraordinary shooting spree embarked upon by Baumhammers resulting in injuries to Plaintiffs cannot be said to be the natural and expected result of Parents [sic] alleged acts of negligence." *Id.* at 293. Rather, the court determined that the shooting spree was unexpected and, therefore, constituted an accident as required under the policy's definition of an "occurrence." *Id.* Donegal, therefore, was obligated to defend the parents in the action against them. Addressing this key issue, the Pennsylvania Supreme Court noted that courts have utilized two principal tests for determining the number of occurrences at issue: the "cause" test (the majority view) and the "effect" test. *Id.* at 293 n.5. The court acknowledged that, although it had yet to adopt the "cause" test, the Superior Court had concluded on numerous occasions that the "cause" test should be followed by Pennsylvania courts. *Id.* at 294; *see, e.g.*, Gen. Accident Ins. Co. v. Allen, 708 A.2d 828, 833 (Pa. Super. 1998) (failing to prevent abuse of three children was one "occurrence"); D'Auria v. Zurich Ins. Co., 507 A.2d 857, 860-61 (Pa. Super. 1986) (adopting the cause of loss test to determine that misdiagnosis and mishandling of patient was one "occurrence").

191. *Baumhammers*, 938 A.2d at 295-96.

192. *Id.* at 295.

193. The Pennsylvania Supreme Court in *Baumhammers* found persuasive the Nevada Supreme Court's application of the "cause" test in its 1994 decision in *Washoe County v. Transcontinental Insurance Co.*, 878 P.2d 306, 307 (Nev. 1994). *Baumhammers*, 938 A.2d at 295. In *Washoe*, a day-care center employee allegedly had sexually abused children at the center over a three year period. *Washoe*, 878 P.2d at 307. Plaintiffs alleged that Washoe County negligently licensed the day-care center during the time period in which the abuse

Formally adopting the “cause” test for determination of the number of occurrences, the Pennsylvania Supreme Court held that the number of occurrences is determined by reference to the particular insured’s act.¹⁹⁴ This act, rather than the insured’s act or the acts causing injury, gives rise to a particular insured’s liability.¹⁹⁵ The court explained that determining the number of occurrences in this manner “recognizes that the question of the extent of coverage rests upon the contractual obligation of the insurer to the insured.”¹⁹⁶ The parents’ coverage was determined by the accident over which the parents could exercise control—here, their negligent failure to confiscate their son’s weapon or to notify the proper authorities of his violent propensities.¹⁹⁷ Thus, according to the court, the causal inquiry in the case had to focus on parental failure to supervise rather than the specific acts of destruction.¹⁹⁸ The son himself could not benefit from insurance coverage because he had intentionally inflicted injury upon others, whereas the parents were only negligent in failing to attempt to impede the son’s rampage.¹⁹⁹

The *Baumhammers* decision conflicts with the Illinois Supreme Court’s approach in *Addison* and that of the Wisconsin Supreme

took place. *Id.* at 308-09. Determining that Washoe’s negligent licensing of the day care center was the “cause” of the children’s injuries, the Nevada Supreme Court stated that, because “each of the separate instances of molestation arises from the same proximate cause”—the County’s alleged negligence—that negligence was a single occurrence. *Id.* at 308.

194. *Baumhammers*, 938 A.2d at 294.

195. *Id.* at 296.

196. *Id.*

197. *Id.*

198. *Id.*

199. As *Baumhammers* demonstrated, occurrences potentially can make millions of dollars of difference in the amount of coverage applicable to a loss. In many cases, the high-low range of occurrence-counting is far greater than in *Baumhammers*. For example, what if the son had shot fifty people?

Although policyholders were handed a defeat in *Baumhammers*, all was not lost. *Baumhammers* surely will be used by policyholders to argue that, when the issue is “number of deductibles,” the court’s same rationale should lead to a decision that only one deductible applies. Occurrence-counting cases are particularly hard to classify. In general, at least prior to *Baumhammers*, it could be said that court decisions took a view of cause that maximized coverage, finding fewer occurrences when there were substantial deductibles or retentions to satisfy and finding more occurrences when this benefited the policyholder. It remains to be seen whether *Baumhammers* will introduce a less pro-policyholder regime to this often inconsistent area of insurance law.

Court in *Plastics Engineering*.²⁰⁰ *Baumhammers* is in even more direct conflict with the Florida Supreme Court's 2003 decision in *Koikos v. Travelers Insurance Co.*, a case which involved a shooting at a fraternity party from which the assailant had been ejected.²⁰¹ The victims sued the policyholder, a restaurant owner, alleging that the restaurant where the party was held had provided inadequate security on the premises.²⁰² The Florida court applied a cause test and reasoned that no bodily injury resulted from an occurrence until the assailant discharged his weapon and hit someone.²⁰³ Consequently, *Koikos* held that the separate shootings of separate people were separate occurrences, resulting in more than one occurrence, even under the cause test.²⁰⁴

In contrast to *Baumhammers*, *Koikos*, *Addison*, and *Plastics Engineering* are consistent with the great bulk of occurrence-counting decisions involving asbestos—decisions which reasoned that the cause of bodily injury due to an occurrence was not merely the manufacture or distribution of asbestos but also its ingestion by the victim/plaintiff. All apply a form of cause analysis, but the gulf between them is substantial. The *Koikos/Addison/Plastics Engineering* line of cases maximizes coverage for policyholders in cases in which the policies had no deductible or only a modest deductible. By contrast, *Baumhammers* applied cause analysis only to the definition of occurrence,²⁰⁵ and concluded that parental failure to stop a gunman's shooting spree was the same general "harmful condition." The other three cases, however, concluded that the harmful conditions differed depending on whether a third party victim was felled by a bullet, quicksand, or asbestos.²⁰⁶ The occurrence was not the underlying negligence or misconduct of the

200. See *Addison Ins. Co. v. Fay*, 905 N.E.2d 747 (Ill. 2009); *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613 (Wis. 2009).

201. 849 So.2d 263, 264-65 (Fla. 2003).

202. *Id.* at 265.

203. *Id.* at 271-72.

204. *Id.* at 273.

205. See *supra* text accompanying note 179.

206. See *Koikos*, 849 So.2d 263; *Addison Ins. Co. v. Fay*, 905 N.E.2d 747 (Ill. 2009); *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613 (Wis. 2009).

policyholder but its combination with particular injury to the victim.²⁰⁷

One might also explain *Baumhammers* using a legal realist analysis. Recall that the theory of liability in *Baumhammers* is the failure of two innocent policyholders (the parents) to control a culpable policyholder (the homicidal son), who was not himself entitled to coverage.²⁰⁸ Although such failure-to-supervise claims against innocent policyholders have long been accepted, they are, of course, recognized as a means of avoiding the bar to coverage presented by insurance policy requirements that inflicted injury be accidental, unintentional, and unexpected, rather than planned or controlled.²⁰⁹

Despite the long pedigree of these tort actions and attendant insurance coverage, courts and policymakers have never been completely comfortable with them. In effect, the insurer in *Baumhammers* was asked to pay for a policyholder's despicably criminal carnage via suing co-policyholders. This result conflicts with the principle that insurance should only be available for events of chance.²¹⁰ But permitting such actions at least provides some compensation to the victims. Unless *Baumhammers's* parents were relatively wealthy, the only realistic source of victim compensation would have been their insurance. Seen in this light, one could, at the risk of psychoanalyzing the Pennsylvania Supreme Court, see the decision as a compromise. The court rejected insurer arguments that would completely defeat coverage but was unwilling to define the number of occurrences in a manner that would effectively expand \$300,000 of coverage into \$1.8 million of coverage. However, courts are uncomfortable permitting liability claims for failure to supervise a co-insured or failure to warn potential victims. It would be far more honest and comprehensible to address these concerns as

207. The difference between the *Koikos* and *Baumhammers* approaches and results is also ironic in that *Koikos* involved shootings of separate victims within a few seconds of time whereas Richard Baumhammers conducted his grisly activities, seemingly aimed at victims who were members of racial or minority groups, over the course of two hours and at separate locations. A layperson would be justified in thinking that the case outcomes should have been reversed. But insurance law is highly state-specific, as these decisions demonstrate.

208. See *supra* notes 195-97 and accompanying text.

209. 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 1.06[A].

210. *Id.*

part of the “expected or intended injury” exclusion found in most general liability policies. In addition, of course, insurers can structure the policy so that it clearly excludes failure to supervise claims or denies coverage whenever there is intent to injure or criminal misconduct by “any” insured.²¹¹

If the two shooting spree decisions, and the issue of occurrence-counting, are examined under the lens of insurance policies as social instruments, the *Koikos* approach is more satisfying and consistent with the overall liability insurance regime. The very design of basic liability policies, the statute-like architecture of the policy, focuses on injury as the coverage trigger and injury as the covered event. Negligence in the air is not sufficient to trigger coverage. Similarly, the per-occurrence policy limits (and their cousins, the per-person policy limits in auto liability policies) link policy benefits and

211. Insurers have in fact done this to a large degree, replacing previous exclusions for intentional injury by “the” insured with exclusion if the intentional injury is perpetrated by “any” insured, a linguistic change usually enforced by the courts. *See, e.g.*, *Noland v. Farmers Ins. Co.*, 892 S.W.2d 271, 272 (Ark. 1995); *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 687 (Utah 1999); *see also* FISCHER, SWISCHER & STEMPEL, *supra* note 4, § 10.01 at 584-86; STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 1.06[B](1)(d)(i).

In addition, insurers have added criminal acts and drunk driving exclusions as a means of avoiding risks similar to those in *Baumhammers* and *Koikos*. *See* Douglas R. Richmond, *Drunk in the Serbonian Bog: Intoxicated Drivers’ Deaths as Insurance Accidents*, 32 SEATTLE U. L. REV. 83, 98-99, 122 (2008) (noting success of insurer use of such exclusions; finding noncoverage is the majority rule, but arguing against aggressive application of such exclusions because almost all drunk driving deaths are accidental within the meaning of accident policies); Gary Schuman, *Dying Under the Influence: Drunk Driving and Accidental Death Insurance*, 44 TORT TRIAL & INS. PRAC. L.J. 1, 6 (2008); *see, e.g.*, *Stamp v. Metro. Life Ins. Co.*, 531 F.3d 84 (1st Cir. 2008) (applying federal common law) (denying coverage and holding policyholder’s death nonaccidental when arising out of crash in which the policyholder was intoxicated); *Eckelberry v. ReliaStar Life Ins. Co.*, 469 F.3d 340 (4th Cir. 2006) (applying federal common law) (same); *Nelson v. Sun Life Assurance Co. of Can.*, 962 F. Supp. 1010, 1013 (W.D. Mich. 1997) (applying same self-inflicted injury exclusion to policyholder injured while driving drunk). *But see* *King v. Hartford Life & Accident Ins. Co.*, 414 F.3d 994 (8th Cir. 2005) (applying federal common law) (reversing administrator’s decision that drunk driving death was not accidental and remanding for trial on fact issues related to accidental nature of death); *West v. Aetna Life Ins. Co.*, 171 F. Supp. 2d 856, 865-906 (N.D. Iowa 2001) (holding policyholder’s death while driving drunk sufficiently accidental for coverage).

Arguably, these exclusions are inconsistent with the social instrument function of insurance policies. But if the limitations are clearly expressed in the policy language, courts are reluctant not to enforce such limitations. State insurance regulators could refuse to approve policies with this language but may find that the social instrument function is better served by removing coverage in these cases even if it results in reduced compensation to those injured by such conduct.

available coverage to the number of injury events, rather than to the number of negligence events.²¹² The negligence of Baumhammers's parents, standing alone, injured no one. Richard Baumhammers could have been hit by a car on the way to do his mischief, or could have been subdued by the police or shot in self defense by an intended victim. No one was injured until Baumhammer's shots found their marks. Similarly, inadequate security at the Tallahassee restaurant in *Koikos* did not, in itself, result in any bodily injury. Only when the inadequate security permitted a trespasser to shoot someone did injury occur.

Viewing the liability insurance regime as a socioeconomic instrument that is part of a wide-ranging system of risk management and distribution underscores this point. The focus of the liability insurance product, and liability insurers as a whole, is on injury caused by nonfeasance or misfeasance, not upon the absence of care standing alone. Consequently, to be consistent with the liability insurance system, courts must focus primarily on behavior that causes injury in a direct fashion, rather than looking too far back down the causal chain and unduly limiting the number of occurrences under the policy.

Policyholders purchase liability insurance to protect themselves from claims, not from incidents. Consequently, determinations of available insurance should focus on injuries to claimants rather than negligence in the air, no matter how neatly this may fit the modern preferred focus on the "cause" of liability. Although this may constitute a strong brief for abandoning cause analysis in favor of a return to effects analysis, this need not be the case. For example, even under an analysis such as that used in *Koikos*, *Addison*, and *Plastics Engineering*, a factory explosion could be regarded as one occurrence because it so obviously is the single cause of any injury inflicted and any claims that will follow. Nonetheless, appreciating

212. To be sure, this approach can be carried too far and become an effects-based analysis. For example, if a homicidal insured such as Richard Baumhammers had detonated a bomb in a public square, treating each victim as a separate occurrence would unduly multiply the number of occurrences. But when there is separation between causal events and injury, there logically is more than one occurrence. If Baumhammers had planted six bombs throughout Philadelphia or built a bomb that exploded in stages, causing different injury to different people at sufficiently separated, noncontiguous times, it would seem too much to say that the only cause was his bomb-making spree or his parents' failure to detect it.

the role of insurance policies as socioeconomic instruments suggests not only that the *Koikos/Addison/Plastics Engineering* line of cases is more persuasive than cases like *Baumhammers*, but also that effects analysis may provide a clearer, more predictable, fairer means of counting occurrences in a manner more consistent with the social institutional role of liability insurance. Because insurers now routinely limit their total responsibility for policyholder tort exposure through aggregate limits, this approach will not result in undue imposition of financial burden on insurers. In fact, this approach may benefit insurers through its greater predictability and creation of incentives for insurers to adequately price the CGL product and receive sufficient premiums from policyholders.

The question of deductibles and policyholder retentions of liability remains. To a degree, policyholders have talked out of both sides of their metaphorical mouths regarding occurrence counting, usually seeking a finding of multiple occurrences to maximize coverage, but occasionally arguing for a finding of fewer or a single occurrence in order to avoid the application of multiple per-occurrence deductibles or retentions. If a consistently injury-centered standard for assessing occurrences emerges, insurers not only are forewarned regarding aggregate limits and adequate premiums, but policyholders are also forewarned that they should consider seeking and paying for smaller deductible or retention amounts in order to benefit from the occurrence calculation regime. Alternatively, when policyholders are willing to accept greater risk themselves and treat their liability insurance more as a “catastrophic” insurance product, rather than something to cover almost all liability claims, policyholders can rest secure in the knowledge that when they need more than one per-occurrence limit to respond adequately to a catastrophic tort situation, the courts are likely to give it to them.

III. CONSTRUING INSURANCE POLICIES IN LIGHT OF THEIR SOCIAL INSTRUMENT FUNCTION: ADDITIONAL APPLIED EXAMPLES

A. *Business Risk Exclusions in General Liability Policies*

The function of the standard CGL policy has long been to provide protection for the business operations of commercial policyholders.²¹³ In crafting the CGL product/statute, the insurance industry tailors the product to provide broad coverage to make it attractive to policyholders and to command larger premiums than could be charged for a narrower product.²¹⁴ However, to protect themselves from risks that would make the CGL unprofitable or its claims exposure insufficiently predictable, insurers have also tailored the product by exempting from coverage particular risks that are either thought to be too difficult, at least at the prices policyholders are willing to pay, or better addressed by other policies.²¹⁵ The exclusion for all asbestos-related claims, added in 1986, is an example of a difficult risk excised from coverage.²¹⁶ So, too, is the standard exclusion for liability related to nuclear operations.²¹⁷ Other exclu

213. See 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01.

214. See *id.*; REJDA, *supra* note 14, at 44-45 (discussing identification of particular loss exposures as part of risk management); *id.* at 108-12 (discussing design of insurance policy to cover or exclude particular risks); SAWYER, *supra* note 12, at 20-21, 31, 42-44; TRIESCHMANN ET AL., *supra* note 14, at 43-52 (noting different types of risk exposures and correspondingly different types of policies); *id.* at 112-32 (discussing use of insurance policy design to cover or avoid certain risks); VAUGHAN & VAUGHAN, *supra* note 14, at 25-46; John H. Egloff, *Comprehensive Liability Insurance, the Outside*, BEST'S INSURANCE NEWS, May 1941, at 19 ("[With the CGL policy the] burden of determining what to insure and what not to insure is removed from the shoulders of the insured and placed squarely on the producer and the carrier. How much better it is to say—'We cover *everything* except this and this and this—'instead of 'We cover *only* this and this and this.' ... Since a risk cannot choose the kind of accident that will give rise to the need for liability insurance, it is wise to be protected against all losses under one policy—*One policy—one premium and worry regarding liability insurance is off his mind.*").

215. See JERRY & RICHMOND, *supra* note 4, at 517; 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01.

216. See ANDERSON ET AL., *supra* note 4, app. A (showing that the 1986 CGL Form adds a broad asbestos exclusion); 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01[A]; Stempel, *Coverage Carnage*, at 358.

217. The exclusion of nuclear-related liability or loss has been a standard fixture of both liability and property insurance policies for nearly as long as nuclear power has been used to

sions strip the CGL policy of dram shop liability,²¹⁸ auto liability,²¹⁹ or workers' compensation liability,²²⁰ all risks for which the policyholder may obtain coverage, but not through a standard CGL policy.²²¹

Seen in this light, we find the standard form CGL policy provides business actors with the basic protection they need to go into business without fear of bankruptcy from incurring liability to third parties such as patrons and bystanders. In addition, if sufficiently purchased, the CGL policy provides protection to the public much like mandatory auto insurance protects other drivers from possible injury inflicted by insured drivers.²²² Although CGL insurance is not

generate electricity. Its rationale is similarly reflected in the Price-Anderson Act, a federal statute enacted in 1957 that limits the liability of nuclear power plants. *See* Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified in scattered sections of 42 U.S.C. (2000)); Samuel B. Hardy, Commentary, *Federal Subsidy of Adjudicative Right Determination: The New Cost Shifting of Nuclear Power Litigation*, 59 ALA. L. REV. 1705, 1705-06 (2008).

218. *See* ISO Properties, CGL Policy Form CG 00 01 10 01, Exclusion C (ISO 2000), reprinted in FISCHER, SWISHER & STEMPEL, *supra* note 4, app. E [hereinafter ISO CGL Policy] (stating that CGL coverage does not apply when policyholder is held liable due to "(1) Causing or contributing to the intoxication of any person; (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages."); *infra* Part III.C (discussing the liquor liability exclusion). However, the exclusion "applies only if [the policyholder is] in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages." *Id.* In other words, the exclusion aims to remove liquor liability coverage for policyholders such as bars and restaurants and thus requires these types of businesses to purchase a separate liquor liability policy. This policy will be separately underwritten and priced in view of the differences between this type of risk exposure and the ordinary risk exposures covered by the CGL policy.

219. *See id.*, Exclusion G (excluding coverage for injury "arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured" including both "operation and loading or unloading").

220. Exclusion D of the standard CGL policy excludes "workers' compensation and similar laws," whereas Exclusion E excludes employer liability for bodily injury to employees of the policyholder arising out of workplace duties. *See id.*, Exclusions D, E. These exclusions are designed to carve risks out of the CGL policy, risks to be covered by other types of policies serving different socioeconomic roles and filling different niches in socioeconomic activity.

221. *See id.* Exclusions C, D, G.

222. Of course, compensating injured persons through liability insurance rather than through first-party insurance—for example, life, health, and disability—or insurance-like government programs—for example, Medicare, Medicaid, and Social Security—is generally thought to be less efficient. However, until people are more widely protected through government risk distribution or injury compensation programs or are required to purchase adequate amounts of first-party insurance, there remains high risk that tort victims will not

legally mandated, it is required as a practical matter for most entities. Businesses may scrimp a bit and buy lower liability limits than advisable, but few go bare unless they are large enough to self-insure.

But a general liability policy, as insurers are fond of reminding policyholders and courts, is not a performance bond.²²³ The policy is designed to defend against suits by third parties claiming bodily injury or property damage but not to guarantee the quality of the policyholder's work.²²⁴ The general liability policy is not designed to refund the customer's purchase price or to redo the policyholder's substandard work.²²⁵ Consequently, the CGL's broad insuring agreement is curtailed by several "business risk" exclusions that deny coverage when alleged damage is limited to the policyholder's "own work" or "own property" or when the injured material qualifies as "impaired property" that can be easily made good as new through

be adequately compensated. Just as an impecunious person can do great damage behind the wheel, under-capitalized businesses or businesses confronted with mass tort liability may be unable to adequately compensate victims.

223. See, e.g., *Burlington Ins. Co. v. Oceanic Design & Constr. Inc.*, 383 F.3d 940, 948 (9th Cir. 2004) (applying Hawaii law) (noting and applying distinction); *St. Paul Fire & Marine Ins. Co. v. Bldg. Constr. Enters.*, 484 F. Supp. 2d 1004, 1010 (W.D. Mo. 2008) (same), *aff'd*, 526 F.3d 1166 (8th Cir. 2008); *Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp. 2d 1275, 1280 (D. Utah. 2006) (same); *Centex Homes Corp. v. Prestressed Sys., Inc.*, 444 So. 2d 66, 67 (Fla. Dist. Ct. App. 1984) (same); *State Farm Fire & Cas. Co. v. Tillerson*, 777 N.E.2d 986, 991 (Ill. App. Ct. 2002) (same); *Qualls v. Country Mut. Ins. Co.*, 462 N.E.2d 1288, 1291 (Ill. App. Ct. 1984) (same); *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 791 (N.J. 1979) (leading case discussing distinction and concept of business risk exclusion of CGL coverage); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007) (noting distinction but finding it inapplicable to case at hand); see also 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 25.05[B][2]; Robert J. Franco, *Insurance Coverage for Faulty Workmanship Claims Under Commercial General Liability Policies*, 30 TORT & INS. L.J. 785, 786 (1995); Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 441 (1971) (observing that the CGL policy was designed to provide coverage for "tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained"); Ellen S. Pryor, *The Economic Loss Rule and Liability Insurance*, 48 ARIZ. L. REV. 905, 910-11 (2006).

224. 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.02[B].

225. See *id.* § 14.13[A].

a simple replacement of the policyholder's defective performance.²²⁶ In addition, product recall is excluded from coverage.²²⁷

In the wake of substantial construction defect litigation during the past three decades, insurers seeking to deny coverage when builders are sued by disgruntled home buyers have frequently invoked the business risk exclusions.²²⁸ For the most part, the courts have correctly applied the CGL, providing coverage when the homeowner alleges that it suffered damage to something other than a particular part of the home on which the policyholder performed construction.²²⁹ For example, if the policyholder sued is a roofer and the allegation is that the roof is composed of cheap shingles that will wear out quickly, the claim is not covered. The claim alleges no

226. See ISO CGL Policy, *supra* note 218. In particular, Exclusions J (damage to policyholder's own property), K (damages to policyholder's own product), L (damage to policyholder's own work), and M (damage to impaired property that is "not physically injured") operate, along with the product recall exclusion (discussed in the ensuing footnote), as the CGL policy's business risk exclusions. *Id.*

227. See *id.* Exclusion N. In simple, nontragic form, this exclusion operates to prevent the CGL policy from becoming a performance bond by requiring the policyholder to shoulder the costs of some deficiency in its product that requires a recall, just as the CGL policy would not cover a policyholder's need to refund the purchase price of its products. However, product recall, which is very expensive, is often used in lieu of refunds when the product in the field may be dangerous. In perhaps the most famous example, Tylenol maker McNeilab, a subsidiary of Johnson & Johnson, recalled all Tylenol products in 1982 in the wake of a deranged poisoner tampering with its products in the Chicago area. After recall, the old Tylenol packaging was replaced by tamper-proof packaging and a new product was reissued. Despite the fact that these actions are credited with Tylenol's ability to weather the incident and continue as a dominant market participant, the McNeilab/Johnson & Johnson CGL policies did not cover the costs of product recall and redesign. See *McNeilab, Inc. v. N. River Ins. Co.*, 831 F.2d 287 (3d Cir. 1987); *McNeilab, Inc. v. N. River Ins. Co.*, 645 F. Supp. 525 (D.N.J. 1986). As the trial court noted in granting summary judgment to the insurer, product recall insurance was generally available in the marketplace as a type of insurance purchased separately from the CGL, though often as part of a package of insurance policies designed to cover the policyholder's range of risks. *McNeilab*, 645 F. Supp. at 540.

228. See 2 STEMPLE ON INSURANCE CONTRACTS, *supra* note 4, § 25.01.

229. See *id.*; see, e.g., *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486, 495 (Kan. 2006) (finding unforeseen, unintended property damage from leaking windows installed by subcontractor covered occurrence under general contractor's CGL policy); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d at 1, 9 (Tex. 2007); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 78-79 (Wis. 2004) (same regarding damage to building foundation from settling due to subcontractor's negligent soil preparation). *But see Kvaerner Metals Div. v. Comm. Union Ins. Co.*, 908 A.2d 888, 899 (Pa. 2006) (finding that all damage to property due to consequences of subcontractor's negligent work was excluded as general contractor's own work); *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33, 36 (S.C. 2005) (same).

property damage to anything other than the policyholder's work.²³⁰ Further, the roof arguably is not afflicted with any "physical injury to tangible property," the definition of property damage,²³¹ but instead is simply substandard. If the cheap shingles can be removed and replaced without undue collateral damage to other parts of the house, the impaired property exclusion may even apply.²³² However, if the homeowner alleges that the poor roofing job resulted in a leaky roof, which allowed water intrusion that damaged other parts of the home, the claim logically is covered because it alleges physical injury to physical parts of the home other than the roof.²³³

When a policyholder-defendant is the general contractor rather than a specialized subcontractor, the entire home arguably is the policyholder's own work. As a result, prior to 1986, insurers seeking

230. These are the facts of one of the leading cases involving lack of CGL coverage for business risks. In *Weedo v. Stone-E-Brick*, the policyholder applied substandard stucco, rather than shingles, to a home. 405 A.2d 788, 789 (N.J. 1979). The homeowner was dissatisfied and sued to have the stucco fixed, but the vendor's CGL provided no coverage because it was only the vendor's own product that was injured, without physical injury to anything else in the house, and because the unsightly, substandard stucco, even if it was an eyesore, inflicted no bodily injury. *Id.* at 796.

231. The standard CGL policy defines "property damage" covered under the policy as "physical injury to tangible property." See ISO CGL Policy, *supra* note 218, Definition 17. If the only problem is that the shingles are ugly or the wrong color, the vast majority of courts would view this as an insufficient physical injury even in the absence of the business risk exclusions. The 1966 revision to the standard CGL form specifically added this definition to overrule prior cases that had found property damage when doors were ill-fitting or unattractive despite being serviceable. See 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 25.05[B].

232. This is because "impaired property" is defined in the CGL policy as property (for example, the house) that is less useful because it incorporates the product or work but "can be restored to use" through "repair, replacement, adjustment or removal" of the policyholder's product or work or through the policyholder "fulfilling the terms of the contract or agreement." See ISO CGL Policy, *supra* note 218, Definition 8. In this hypothetical, the problem can be solved by replacing the shingles to satisfy the contract and restore the home to the condition intended. If, however, removing and replacing the shingles would invariably injure other parts of the home, the cost of remedying that damage is covered under the CGL policy. See 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.13[C].

233. See 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, §§ 14.13[C], 25.01; see, e.g., *Lee Builders*, 137 P.3d at 495 (finding unforeseen, unintended property damage from leaking windows installed by subcontractor to be a covered occurrence under general contractor's CGL policy); *Auto-Owners Ins. Co. v. Home Pride Cos., Inc.*, 684 N.W.2d 571, 580 (Neb. 2004) (same regarding damage to other portions of building due to negligent installation of roof shingles); *Lamar Homes*, 242 S.W.3d at 9 (finding damage to portions of home beyond subcontractor's faulty work covered under CGL policy).

to bar coverage for general contractors sued by purchasers over construction defects tended to prevail.²³⁴ However, in the 1986 revisions to the standard CGL policy form, the insurance industry and commercial policyholder interests reached an accord in which the “your work” exclusion was revised to create an exception to the exclusion when the allegedly defective work was “performed on [the general contractor’s] behalf by a subcontractor.”²³⁵ Because the vast bulk of construction work today is done through subcontractors, with most general contractors operating as administrators (or “briefcase contractors”) rather than hands-on builders, the net effect of the 1986 form language is to cover construction claims under the standard CGL policies issued to general contractors.²³⁶

As a result, most construction defect suits implicate liability insurance coverage, at least when the plaintiff is alleging something more than problems with the defendant’s workmanship. When the defendant is accused not simply of the accident of faulty workmanship, but of faulty workmanship that causes an accident,²³⁷ CGL coverage normally obtains,²³⁸ although significant numbers of courts have erred and held, in unreasonably sweeping language, that any suit against a construction entity for construction defects is an attempt to turn the CGL policy into a performance bond.²³⁹ An appreciation of the role of the CGL policy as a social instrument fulfilling a particular role in the risk management of a construction vendor strengthens the case for the majority approach and likely would reduce the number of erroneous decisions.

234. See 2 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, §§ 14.13, 25.01, 25.05.

235. See *id.* § 14.13.

236. See, e.g., *O’Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99, 104 (Minn. Ct. App. 1996); *Lamar Homes*, 242 S.W.3d at 12; *Am. Family Mut. Ins. v. Am. Girl, Inc.*, 673 N.W.2d 65, 82 (Wis. 2004); *Kalchthaler v. Keller Constr. Co.*, 591 N.W.2d 169, 172 (Wis. Ct. App. 1999) (holding that general contractor’s CGL policy provides coverage for defective work by subcontractor).

237. This phrase is adopted from *Henderson*, *supra* note 223.

238. See *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 860 N.E.2d 280, 293 (Ill. 2006).

239. See, e.g., *Kvaerner Metals Div. v. Commercial Union Ins. Co.*, 908 A.2d 888, 899 (Pa. 2006) (holding that all damage to property due to consequences of subcontractor’s negligent work was excluded as general contractor’s own work); *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33, 36-37 (S.C. 2005) (same).

B. What Constitutes a Sufficiently Fortuitous “Occurrence” or “Accident,” and the Problem of “Expected or Intended” Injury

Insurers for construction contractors have also attempted to deny coverage for builders sued over construction defects by arguing that a suit for defective construction cannot be covered because it cannot be the result of an “accident” or was otherwise insufficiently fortuitous to qualify as an insured risk. Although it is an axiom of insurance that insurance only covers fortuitous risks and that one cannot normally insure against a certainty or intentional loss, courts have concluded that the insurer’s position in such cases is unfounded.²⁴⁰ The definition of “occurrence,” found in most standard CGL policies, defines an occurrence as an “accident,” including “continuous or repeated exposure to substantially the same general harmful conditions”—language intended to convey that insurance coverage is not lost simply because the accident does not happen abruptly or reach its conclusion quickly.²⁴¹ On top of this, standard CGL policies typically exclude coverage when the plaintiff’s injury was “expected or intended from the standpoint of the insured.”²⁴²

In essence, then, the structure of the CGL policy, consistent with insurance theory, seeks to bar coverage when the policyholder’s conduct leading to injury was not accidental but intentional.²⁴³ Insurers seeking to avoid coverage in construction defect cases have sought to stretch this concept by arguing that, because construction defects arise from volitional commercial conduct by the policyholder-builder, the alleged defect and its consequences are insufficiently accidental to merit insurance coverage.²⁴⁴ The insurers are incorrect. Unless the policyholder intentionally and knowingly performed construction work with the aim of causing injury to the plaintiff,

240. See, e.g., *O’Shaughnessy*, 543 N.W.2d at 104; *Lamar Homes*, 242 S.W.3d at 9; *Am. Girl*, 673 N.W.2d at 78; *Kalchthaler*, 591 N.W.2d at 173.

241. See ISO CGL Policy, *supra* note 218; 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, §§ 14.01[A][2], 14.13.

242. See ISO CGL Policy, *supra* note 218, Exclusion A (stating that CGL insurance does not apply to injury “expected or intended from the standpoint of the insured” but that exclusion does not apply to bodily injury “resulting from the use of reasonable force to protect persons or property”).

243. 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 25.05[B].

244. See *id.*

usually the homeowner, neither the “expected or intended” exclusion nor the definition of “occurrence” should bar coverage.²⁴⁵

Simply because a policyholder voluntarily engages in an activity hardly means that any adverse consequences of the activity are intended or nonaccidental. For example, automobile drivers leaving for work, grocery shopping, or other errands are, of course, getting behind the wheel voluntarily. It is no accident that they are using their cars. But if they are involved in a collision on the way to work, the store, etc., it can hardly be said that the event was nonaccidental simply because they made the volitional decision to drive the car. Similarly, a policyholder-builder intends to build things, but, unless the builder consciously tries to make the building substandard, it can hardly be said that problems with the resulting construction are nonaccidental or that resulting injury was expected or intended by the builder.

As with the business risk exclusions, courts have generally rejected inappropriate liability insurer efforts to avoid coverage on fortuity based defenses.²⁴⁶ But a disturbing number of courts have taken the insurers’ bait and unwisely ruled that bad consequences of ordinary business activities are somehow outside the scope of general liability insurance.²⁴⁷ If these courts had possessed an adequate appreciation of the historical design, purpose, and function of the CGL policy and its role as a social and economic instrument crucial to the functioning of the modern construction industry, there would have been less likelihood of error. Similar judicial error occurs with the fortuity or accident requirement in consumer insurance policies.²⁴⁸ However, the bulk of courts recognize that

245. See *supra* notes 236, 240 and accompanying text; see also 2 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 25.05[B].

246. See *infra* notes 249-52 and accompanying text.

247. See, e.g., *Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp. 2d 1275, 1282, 1287 (D. Utah 2006); *Kvaerner Metals Div. v. Commercial Union Ins. Co.*, 908 A.2d 888, 899 (Pa. 2006) (finding that all damage to property due to consequences of subcontractor negligent work excluded as general contractor’s own work); *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33, 36-37 (S.C. 2005).

248. See *Minn. Fire & Cas. Co. v. Greenfield*, 805 A.2d 622, 624-26 (Pa. 2002) (finding no coverage for drug dealer’s neglect to seek medical assistance when customer apparently overdosed and died in sleep). Although the drug dealer in *Greenfield* was, of course, not a model citizen and was intentionally selling drugs, there was no evidence in the case that he intended to kill a customer or even expected her to die.

there is a difference between overly aggressive or stupid behavior and intent to injure.²⁴⁹

Appreciating that general liability policies are designed to protect businesses when their daily activities produce losses and claims illuminates the dividing line between uncovered intended injury and accidental damage from poorly performed work. Because the CGL is so designed, terms in the insuring agreement such as “accidental” need to be reasonably construed in a manner consistent with the social instrument function of the policy. When an insurer wants to exclude coverage for such liability, this must be done clearly so as not to disappoint the objectively reasonable expectations of the policyholder facing potentially company wrecking liability litigation.

This construct—that mishaps growing out of volitional activity usually are sufficiently “accidental” for liability insurance purposes—seems unassailable in light of the social instrument function served by liability insurance in modern society. For both businesses and individuals, basic liability protection against claims arising out of their daily activities has come to be an assumed near-essential. However, when individuals or entities step too far outside the range of ordinary conduct and engage in knowing or intentional injurious behavior, they also step outside the social instrument function of liability insurance and are no longer within coverage.²⁵⁰ Consequently, the homeowner who shoots a neighbor over a boundary dispute or the driver who intentionally rams another

249. *Accord* Amco Ins. Co. v. Haht, 490 N.W.2d 843, 846 (Iowa 1992) (en banc) (refusing to apply expected injury limitation to claim arising out of playground spat involving eleven-year-old boys); *see, e.g.*, N.M. v. Daniel E., 175 P.3d 566, 570-72 (Utah 2008) (holding that expected or intended exclusion does not bar coverage for injuries resulting from a nine-year-old boy’s response to teasing at ice hockey camp; the boy intended to use a hockey stick to intimidate others into leaving him alone but did not intend to inflict resulting head injury). Opinions like *Daniel E.* and *Haht* would be close, or even suspect, calls if the incident had involved adults or teenagers but seem correctly decided in situations involving younger children less able to envision the effects of their actions. These sentiments are expressed by the *Haht* majority. *Haht*, 490 N.W.2d at 846 (“We in no way retreat from [previous precedent finding intent to injure in adult fight cases]; we merely hold [that] it does not apply on this policy in these special circumstances. [To apply that precedent] here would grossly overemphasize the vague, uncertain meanderings in the mind of an eleven-year-old child involved in a playground spat.”); *see, e.g.*, Capitol Indem. Corp. v. Blazer, 51 F. Supp. 2d 1080, 1086-89 (D. Nev. 1999) (applying assault and battery and liquor liability exclusions to claim arising out of bar room altercation).

250. *See infra* notes 252-53 and accompanying text.

vehicle properly loses coverage. But the homeowner or driver who merely defends himself in an altercation fits comfortably within the social instrument penumbra of liability insurance and logically would be entitled to coverage even if the policy's "intentional act" exclusion lacked a specific self-defense exception.²⁵¹

First-party accident policies present a variant problem as to whether the policyholder is covered when intentionally victimized by a third party. For example, the policyholder may be on the receiving end of a bullet from an ornery neighbor in the hypothetical property dispute noted in the previous paragraph. In such cases, does the policyholder's Accidental Death and Dismemberment policy provide coverage? Although most courts correctly conclude that the policyholder should be paid,²⁵² a surprising number of courts take the formal, excessively metaphysical view that the deadly or injurious incident was not an "accident."²⁵³ Appreciating the social

251. See *infra* notes 252-53.

252. See, e.g., *Cockrell v. Life Ins. Co.*, 692 F.2d 1164, 1167-68 (8th Cir. 1982) (applying Arkansas law) (finding policyholder shot by wife suffered accidental injury within meaning of policy because he did not seek to be injured or expect to be injured); *Smith v. Equitable Life Assurance Soc'y*, 614 F.2d 720, 722-24 (10th Cir. 1980) (applying Wyoming law) (holding policyholder shot during property dispute with neighbor was covered under accidental death policy); *McElyea v. AIG Life Ins. Co.*, 326 F. Supp. 2d 960, 964-65, 968 (E.D. Ark. 2004) (holding policyholder's death in shooting sufficiently accidental and not subject to felony exclusion even if policyholder was aggressor contributing to tragic scenario); *Freeman v. Commonwealth Life Ins. Co.*, 286 N.E.2d 396, 397-98 (Ind. 1972) (denying summary judgment to insurer despite evidence that policyholder killed in fight was the aggressor); *Stogsdill v. Gen. Am. Life Ins. Co.*, 541 S.W.2d 696, 699 (Mo. Ct. App. 1976) (same); *Terry v. Nat'l Farmers Union Life Ins. Co.*, 356 P.2d 975, 976-79 (Mont. 1960) (finding policyholder's death from fistfight at card game sufficiently accidental); see also *Beckham v. Travelers Ins. Co.*, 225 A.2d 532, 535-37 (Pa. 1967) (holding policyholder's death from overdose of narcotics accidental). But see *Minn. Fire & Cas. v. Greenfield*, 855 A.2d 854, 860-61 (Pa. 2004) (tacitly overruling *Beckham*, at least in part, in context of drug dealer's claim for coverage in wrongful death claim arising out of overdose by customer).

253. See, e.g., *Jennings v. Jennings*, 109 F.3d 477, 479-81 (8th Cir. 1997) (applying Arkansas law) (holding policyholder's death to be nonaccidental when shot by divorced wife in self-defense); *Freed v. Protective Life Ins. Co.*, 551 F.2d 861 (5th Cir. 1977) (applying Mississippi law) (recognizing no accidental death in which policyholder was aggressor in incident leading to his killing by another); *McCrary v. N.Y. Life Ins. Co.*, 84 F.2d 790, 792-94 (8th Cir. 1936) (applying Nebraska law) (holding policyholder's death to be nonaccidental when he was shot and killed by a jealous husband interrupting policyholder and killer's wife in bed); see also *Byrd v. Nationwide Mut. Ins. Co.*, 415 A.2d 807, 808-09 (D.C. 1980) (affirming that policyholder shot by police during shootout not victim of accidental injury); *Carlyle v. Equity Benefit Life Ins. Co.*, 551 P.2d 663, 664, 667 (Okla. Civ. App. 1976) (concluding that policyholder's death not accidental when shot attempting to escape after robbery). Cases like

instrument function of accident insurance demonstrates that such decisions are in error.

First-party accident insurance holds a less central role in society than general liability insurance and is a more problematic product. As noted above, liability insurance is, to a large degree, a lubricant for the wheels of commerce and individual activity.²⁵⁴ Without it, there would be less economic activity, less driving, and perhaps even less social hospitality.²⁵⁵ Further, strong existing social institutions (for example, state legislators and lenders) have effectively mandated such coverage in many instances.²⁵⁶ By contrast, accident insurance is less widely imposed and is generally considered one of the less effective first-party insurance products. Rather than buying an accidental death policy, the average person is better off spending the money on a regular life insurance policy.²⁵⁷ The former covers only death due to mishap while the latter includes death from illness, injury, and in most cases even suicide.²⁵⁸ Although the

Byrd and *Carlyle* also can be explained by “commission of a felony,” “crime,” or “illegal act,” exclusions found in many accident policies as well as judicial invocation of a public policy rationale against subsidizing criminals through insurance. Cases like *McCrary*, of course, are additionally problematic given the notion of a wife as chattel that can be permissibly “defended” by force.

254. See *supra* notes 247-48 and accompanying text.

255. This is perhaps a stretch. Homeowners thinking about inviting friends for dinner probably do not consider the liability implications of such entertaining. But, at least since the 1950s, they have had liability coverage should a guest become injured through slipping on a treacherous floor, from ptomaine poisoning, from a falling light fixture, and so forth. If the homeowner is asked to host the senior class graduation party for her son’s high school, she may very well consider the liability implications and might decline in the absence of the personal liability protection afforded by homeowners insurance. Even with such coverage, she probably will be reasonably vigilant in attempting to prevent or limit alcohol consumption at the party because of the greater risks posed and the absence of this type of coverage in the standard homeowners policy.

256. See *supra* notes 11-19 and accompanying text; see also ABRAHAM, *supra* note 11, at 174-78; *id.* at 177 (“[Insurers] folded CPL [consumer personal liability] coverage into residential property insurance policies, and sold the two forms of coverage in a single package ... [in homeowners insurance, which was] becoming effectively mandatory for an increasing portion of the population during this period.... In 1950 there were 17 million mortgaged residences; by 1959 there were 46 million. All of these were likely purchasers of personal insurance that had a liability insurance component.”).

257. See DORFMAN, *supra* note 14, at 254-70; REJDA, *supra* note 14, at 350-64, 411.

258. By either the policy terms or applicable state law, most life insurance policies are required to cover suicide deaths so long as the suicide does not take place within the first two years of the policy. The rationale for this treatment posits that the two year waiting period

regular life insurance policy is more expensive,²⁵⁹ it is worth the cost because it covers much more and provides a means of financial planning and saving. Statistically, the average person is far more likely to die of disease or natural causes than from an accident.²⁶⁰

Consequently, the accidental death or injury policy does not play the same central social instrument role found with regular life insurance or general liability insurance. But this is not to say that it plays no social role. The many reported court decisions litigating the meaning of “accident” suggest that accidental death and injury coverage policies are widespread.²⁶¹ For less sophisticated persons of modest means, the accident policy, like the auto or homeowners

is sufficiently long to minimize the adverse selection that might result from depressed or suicidal persons demonstrating a disproportionate interest in obtaining life insurance. In addition, by policy terms and state law, life insurance policies generally become “incontestable” after two years, meaning that coverage cannot be denied on the basis of any applicant misrepresentations made in connection with issuance of the policy. *See* REJDA, *supra* note 14, at 396-97;2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, §§ 18.03, 18.05[A]; ANDREW TOBIAS, THE INVISIBLE BANKERS: EVERYTHING THE INSURANCE INDUSTRY NEVER WANTED YOU TO KNOW 12b (1982).

259. In comparing the cost of insurance, a typical metric is the amount of premium paid for each \$1000 or \$10,000 in coverage. By these standards, regular life insurance premiums are usually substantially higher than accidental death insurance premiums and standard disability insurance premiums are usually dramatically higher than accidental injury premiums. This results, of course, in large part because the risk of being killed or injured by *any* cause is larger than the risk of being killed or injured only in an “accident.” *See infra* note 260 and accompanying text. In addition, accident policies tend to have more limited policy benefits. For example, an accidental injury policy may pay a fixed amount or pay for only a few months of lost work due to the accidental injury. By contrast, a disability policy may pay benefits for years, typically to a maximum of age 65, if the disability is long-term. Regular disability insurance is considered particularly expensive and hard to underwrite because of heightened risks of adverse selection and ex post moral hazard. An injured policyholder with sufficient insurance may be relatively unmotivated to work hard at rehabilitation for a quicker return to work even if the person presented little ex ante moral hazard because he would be unlikely to want to endure the pain of injury. *See* ABRAHAM, *supra* note 11, at 46-47, 65-66, 227-230.

260. U.S. DEP’T OF HEALTH & HUMAN SERVS., 57 NAT’L VITAL STATISTICS REP. 1, 32-35 (2009) (reporting final data for 2006).

261. Some of the cases litigating the “accident” concept, of course, involve liability insurance, such as in the business risk CGL policy cases discussed earlier in this Part. *See supra* Part III.A. In addition, a significant number of regular life or disability policies appear to pay enhanced benefits, the fabled “double indemnity” provision being typical in some policies, if death or disability stems from an accident. But even if these cases are not considered, there remain a large number of reported decisions addressing the question of whether an occurrence is sufficiently accidental to be covered under a straight accidental death/injury policy. *See supra* notes 252-53 and accompanying text.

policy, may be all they can afford.²⁶² The accident policy premiums are substantially lower than regular life or disability premiums and provide at least some protection from the most serious risks facing a policyholder. As a result, even though holders of accident policies would almost always be better off with standard life or disability policies, the accident policy plays a significant social institutional role for at least some significant segment of the populace.

Although accident policies are not as widely woven into the social fabric as basic property, liability, or medical coverage, accident insurers have, like other insurers, used marketing strategies to attempt to integrate their products into daily life. For example, accident insurers working with credit unions frequently provide a small amount of accident insurance as a benefit to depositors. With this toehold, insurers, through the credit union, offer to sell additional insurance for a comparatively low premium, usually collected monthly through the funds on deposit with the financial institution.²⁶³ For depositors, accident insurance then becomes

262. Regular life and disability insurance policies generally are considered to be relatively “upscale” products sold disproportionately to higher income persons, who also are generally better educated persons with more access to financial planning information. However, although many employers provide workers with group life and disability insurance, typical group life insurance policy limits are low (\$50,000 or less is common and the death benefit rarely exceeds \$100,000) and group disability coverage is normally basic rather than enhanced. For example, under an enhanced disability policy, the policyholder is eligible for benefits if she is unable to return to her *specific* occupation (for example, trial lawyer, orthopedic surgeon). Under the basic disability policy, benefits cease when the policyholder is able to engage in *any* job. *See, e.g., Dowdle v. Nat’l Life Ins. Co.*, 407 F.3d 967, 968-69, 972 (8th Cir. 2005) (applying Minn. law) (holding that, under enhanced policy, orthopedic surgeon injured in plane crash entitled to full benefits because he could no longer operate due to back pain even though he could engage in office consultations; providing example of disproportionate levels of physician compensation: as surgeon, Dr. Dowdle earned more than \$1 million per year, as an office doctor, his pay was more than 80 percent lower).

263. I became aware of this relatively low profile but significant marketing of accident insurance while working on a case in which the accident insurer refused to provide coverage when the policyholder was shot and killed by a neighbor with whom he had had a long running feud.

During the course of discovery, it was revealed that the insurer sold most of its accidental death and dismemberment policies through credit unions or similar savings institutions as a common means of marketing accident policies. The marketing advantage for insurers is that it provides access to a customer base through a trusted intermediary (the credit union), which may be willing to pay the insurer to provide a modest accident policy (for example, \$2000) as an inducement for deposits. From that, the insurer may simply suggest that the policyholder purchase additional accident coverage for a relatively low monthly premium that can be

something like the personal liability protection acquired as an adjunct to the homeowners policy required by the bank or the auto policy required by the state. In light of this reality, accident insurance looks more like regular life or disability insurance in its socially instrumental role of providing some modest protection for average persons.

Appreciating the social institution aspects of even the lowly first-party accident policy makes it clear that, as long as death or injury is unexpected by the policyholder, it is clearly “accidental” for purposes of these policies, even if the person or entity intentionally caused the death or injury or knew that its actions would certainly inflict harm. Take, for example, the case of an accident policyholder who is murdered or injured in a mugging. If a court looks only at the word “accident,” which is not defined in the typical accidental death/injury policy, one can reasonably say that the event was not the type of incident generally thought of as an accident by reasonable laypersons. For example, if a friend is shot by a burglar, most of us would not say that he was “hurt in an accident.” Although the shooting may have resulted from clearly accidental events (for example, the burglar tripped and unintentionally discharged the gun or panicked when the friend appeared at the top of the stairs), in most cases such injuries were not unintended or unexpected by the perpetrator.

For some courts, these elements of nonfortuity remove the incident from the accidental and prevent coverage.²⁶⁴ Other courts

automatically deducted from the policyholder’s savings account, making premium payment rather invisible and painless to the policyholder regardless of the value of the policy.

For example, in the case in which I was involved, the monthly premium for a \$50,000 accidental death/injury policy was less than \$6 per month, an amount that would hardly be missed from even a small savings account. But at approximately \$70 per year for \$50,000 in coverage (plus inflation upgrades and \$2000 in coverage provided for “free” by the credit union), the policy probably was not a very good deal. For about the same premium, a regular life policy with broader benefits could have been purchased. But regardless of whether it is a good deal or bad deal, accidental death policies like these function as social instruments. Even if regulators or consumer advocates would prefer that consumers spend their premium dollars differently, there is no public policy case for giving such policies restrictive construction.

264. See John Dwight Ingram & Lynne R. Ostfeld, *The Distinction Between Accidental Means and Accidental Results in Accidental Death Insurance*, 12 FLA. ST. U. L. REV. 1, 13-19 (1984) (collecting illustrative cases); see, e.g., *supra* note 263. See generally Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L.

have avoided this result by treating the word “accident” as sufficiently ambiguous to mandate coverage, particularly since the insurer failed to define the word.²⁶⁵ Others have focused on the victim’s vantage point or the reasonable expectations of the policyholder.²⁶⁶ Although these coverage-finding decisions are correct and certainly better jurisprudence than decisions stripping the innocent victim of coverage, they can rely too greatly on the ambiguity doctrine or may seek a just result at the expense of fidelity to policy language. One response to this criticism, of course, is that neither insurance policies nor other contracts should be construed solely upon the text.²⁶⁷ In addition, consideration of the social instrument function of accident insurance should silence this concern.

For the policyholder and society, accidental death/injury insurance, whatever its limitations as a product, plays an important socioeconomic role. It is designed to protect the policyholder and dependents from sudden injury or death. It provides compensation that reduces the prospect that the policyholder or dependants will need government assistance in the wake of income loss and medical bills. This coverage is particularly beneficial often to persons who

REV. 173 (2000).

265. See, e.g., *Nationwide Mut. Ins. Co. v. Pipher*, 140 F.3d 222, 227 (3d Cir. 1998) (applying Pennsylvania law); *Blumer v. Globe Life & Accident Ins. Co.*, No. 4:08CV924MLM, 2008 WL 5110570, at *5 (E.D. Mo. Dec. 3, 2008); *Brumley v. Lee*, 963 P.2d 1224, 1229-33 (Kan. 1998); see also *Ingram & Ostfeld*, *supra* note 264, at 13-19 (gathering cases).

266. See, e.g., *Cole v. State Farm Mut. Ins. Co.*, 753 A.2d 533, 538-44 (Md. 2000); *Fox v. Country Mut. Ins. Co.*, 964 P.2d 997, 999-1000 (Or. 1998); *Roque v. Nationwide Mut. Ins. Co.*, 467 A.2d 1128, 1129 (Pa. 1983) (holding accidental or unexpected quality of event is “to be determined from the viewpoint of the insured” rather than the perpetrator); *Republic Nat. Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 552 (Tex. 1976); see also *Ingram & Ostfeld*, *supra* note 264, at 13-19 (gathering cases).

267. See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §§ 7.9, 7.10 (3d ed. 2004) (noting proper use of nontextual considerations in assessing policy meaning); FISCHER, SWISHER & STEMPEL, *supra* note 4, at 322 (same); 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, §§ 4.01-4.09 (same); see also STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION §§ 2.2, 4.1-4.5, 5.2 (2008) (same); Schwarcz, *supra* note 9 (advocating test for determining when policy is defective product subject to reinterpretation in favor of policyholder); Stempel, *Insurance Policy as Thing*, *supra* note 9 (asserting that insurance policy interpretation can be improved by appreciating that standard form policies function as products); Stempel, *Insurance Policy as Statute*, *supra* note 3, at 14-15 (suggesting that standardized policies are type of private legislation that of which interpretation can be improved by applying statutory construction theory and methods).

are close to the economic edge should they suffer injury or a death in the family. Although not hardwired into the economy like liability, property, or medical insurance, accident insurance plays a similar, if diminished, role. The basic social function of the accident policy would be thwarted if the policy were deemed not to apply simply because the party inflicting injury or death acted volitionally. Just as a regular life or disability policy provides coverage if the policyholder is attacked,²⁶⁸ an accident policy that serves as a diminished proxy for such policies should logically provide coverage even if philosophers may disagree as to the accidental quality of the injurious incident.

In similar fashion, if the accident policy is to properly fulfill its social instrument function, accidental death policies that require death to occur within a specified time after an incident should not be strictly enforced.²⁶⁹ Courts have tended to reach the right result in such cases, but they have generally done so by invoking concepts of unconscionability and public policy,²⁷⁰ decisions which can be made to look like undue judicial activism. Although in apt cases contract terms can be validly set aside because a term is unconscionable or violates public policy,²⁷¹ it is generally acknowledged that courts should use these rationales sparingly since they contravene an acknowledged part of the contract.²⁷² By contrast, the social instrument perspective does not eliminate or revise a term but instead construes the term with an appreciation of the socio-economic role of the insurance policy. Properly applied, the social

268. Life and disability policies frequently contain a war risk exclusion that precludes coverage if the death or injury arises out of battlefield hostilities, but otherwise do not restrict benefits based on the cause of death or injury. *See* VAUGHAN & VAUGHAN, *supra* note 14, at 22.

269. For example, an accidental death policy may require that the policyholder die within a certain number of days after an accident or that a medical response to an accident take place within a set time in order to be covered under the accident policy. *See supra* note 80.

270. *See supra* note 80. *But see* Kirk v. Fin. Sec. Life Ins. Co., 389 N.E.2d 144, 149 (Ill. 1978) (enforcing 90 day time limit requirement for coverage where patient died 92 days after accident).

271. *Accord* FARNSWORTH, *supra* note 184, §§ 4.28, 5.1; *see* FISCHER, SWISHER & STEMPEL, *supra* note 4, § 2.10; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 4.10.

272. *See* Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 762-65 (2004).

instrument perspective is a modest extension of the notion that standardized contracts often operate as products more than agreements and of the concept that contracts should be construed in light of their purpose, party understanding, and policyholder expectations.

C. Liquor Liability

One common exclusion to the CGL policy illustrates the degree to which the social instrument function of the standard liability policy supports application of an exclusion, although one could argue with some force that the exclusion violates the reasonable expectations of the policyholder or defeats the overall purpose of the CGL policy. The standard CGL policy contains a liquor liability exclusion barring coverage for any claims arising out of the service or consumption of alcohol.²⁷³ In fact, the exclusion expressly states that it applies only to policyholders in the business of “manufacturing, distributing, selling, serving or furnishing alcoholic beverages.”²⁷⁴ Although the language of the exclusion is quite clear, it can be argued that, when the policyholder is a bar, restaurant, convenience store, or even a grocery store—most of which now carry at least beer and wine for sale—the exclusion for liquor liability in a CGL policy runs counter to the reasonable expectations of the policyholder who, like most businesses, expects to have general liability insurance protection for the basic array of civil liability risks facing the business.²⁷⁵

273. See *supra* note 218 (citing and quoting exclusion).

274. See *supra* note 218.

275. Some policyholders have had some success in fighting the exclusion using the opposite tack:

Courts have refused to apply the exclusion, for example, to injuries arising out of the sale or serving of alcoholic beverages by churches or other nonprofit organizations at social functions or fund-raising activities, on the grounds that these organizations are not in the business of serving or selling alcoholic beverages. In response to these decisions, the ISO developed an optional endorsement that insurers can add to the policy when they anticipate a liquor liability exposure. The *Amendment of Liquor Liability Exclusion endorsement* (CG 21 50) expands the exclusion to eliminate coverage for anyone who serves alcoholic beverages for a charge, whether or not the activity is for the purpose of financial gain. This includes a variety of fund-raising and social activities

Although courts facing the issue have tended to reject this argument and instead have relied on the clear language of the liquor liability exclusion,²⁷⁶ their rationale for upholding the exclusion tends to be unsatisfactory for the usual reason: linguistic literalism is usually unsatisfactory, especially when applied to an exclusion which is construed against the insurer and on which the insurer bears the burden of persuasion. Further, like most exclusions in most policies, the liquor liability exclusion probably goes unread by all but the most sophisticated policyholders and their agents. In other situations in which liability from a core risk-creating function of the policyholder is excluded, courts have been considerably more likely to find coverage.²⁷⁷

When one looks beyond a purely textual approach and takes a broader contract approach, the case for excluding liquor liability improves because the purpose of the policy, and certainly the insurance industry intent, is not to cover dram shop-style actions in the CGL form but instead to underwrite, price, and cover these risks separately. Similarly, viewing the insurance policy as a product increases the persuasiveness of the argument for excluding coverage.²⁷⁸ Although the CGL product was generally intended to provide broad coverage, the product has long contained a clearly written liquor liability exclusion that is now well-known to brokers

sponsored by nonprofit organizations. If the insurer is willing, the exposure can be covered by scheduling the specific functions at which the liquor will be sold using the *Amendment of Liquor Liability Exclusion—Exception for Scheduled Activities endorsement* (CG 21 51).

VAUGHAN & VAUGHAN, *supra* note 14, at 615.

276. *See, e.g.*, *W. Heritage Ins. Co. v. River Entm't*, 998 F.2d 311, 313-15 (5th Cir. 1993) (applying Texas law); *Certain Underwriters at Lloyd's v. Kutchins Enters., Inc.*, No. 4:08-CV-143-A, 2008 WL 5381244, at *4-5 (N.D. Tex. Dec. 22, 2008); *Frost v. David*, 673 So.2d 340, 344 (La. Ct. App. 1996).

277. *See, e.g.*, *Aetna Cas. & Sur. Co. v. Holsten*, No. 95-3035, 1995 WL 647263 (4th Cir. Sept. 26, 1996) (applying West Virginia law); *Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co.*, 792 F.2d 1036, 1039, 1041-46 (11th Cir. 1986) (applying Alabama law) (acknowledging reasonable expectations argument but finding it unavailing in light of clear policy language). Under other circumstances, courts have been willing to apply such exclusions even though the exclusion negates coverage for a regular and ongoing activity of the policyholder, but courts then hold the policyholder's broker or agent liable for procuring an inadequate policy. *See, e.g.*, *Third Eye Blind, Inc. v. Near N. Entm't Ins. Servs., LLC*, 26 Cal. Rptr. 3d 452, 457-58 (2005).

278. *See* Stempel, *Insurance Contract as Thing*, *supra* note 9.

and experienced policyholders. In like fashion, viewing the insurance policy as akin to a statute or private legislation governing the policyholder-insurer risk distribution relationship strengthens the case for exclusion.²⁷⁹

The insurance industry is more than willing to underwrite dram shop coverage, but its arrangement with the policyholder and broker community is such that the coverage must be separately underwritten and priced, rather than being included within the broad scheme of the CGL policy and generally priced based on overall sales, number of employees, square footage of stores, or other statistics. By contrast, insuring against liquor liability requires some knowledge of the policyholder's operation, track record, and liquor dispensing routine—details not generally inquired about in the CGL application process.²⁸⁰

In addition to illuminating the benefits of the insurance-as-product and insurance-as-statute approaches, viewing the insurance policy as a social instrument strengthens the case for enforcing the liquor liability exclusion. General liability policies protect policyholders from routine, but threatening, risks inherent in operating the business and also provide a means of compensating victims, the poorest of which are unlikely to have adequate life, health, or disability insurance. However, the underwriting and claims risks presented by liquor liability are of a different genre, not only justifying industry reluctance to add it on to the CGL at minimal or no cost,²⁸¹ but also justifying society's preference that these risks be more particularly assessed so that dram shop underwriting provides some deterrence and risk management benefits that may reduce total social losses from alcohol related mishaps.²⁸²

279. See generally Stempel, *Insurance Policy as Statute*, *supra* note 3.

280. See DORFMAN, *supra* note 14, at 369-70 (noting divergence between liquor liability of social host and commercial vendor of alcohol); REJDA, *supra* note 14, at 307 (noting that liquor liability exclusion applies only to policyholders in the business of serving alcohol but that “[c]overage can be obtained by firms in the liquor manufacturing and distribution business by adding the liquor liability coverage form to the policy”); TRIESCHMANN ET AL., *supra* note 14, at 205; VAUGHAN & VAUGHAN, *supra* note 14, at 615.

281. Accord REJDA, *supra* note 14, at 307; TRIESCHMANN ET AL., *supra* note 14, at 205; see VAUGHAN & VAUGHAN, *supra* note 14, at 620-21 (noting that liquor-related liability, including sales incident to social and charitable events, “may be covered by endorsement to the CGL, or they may be covered under a *Dram Shop or Liquor Liability Policy*”).

282. See VAUGHAN & VAUGHAN, *supra* note 14, at 620 n.17.

The risk of liquor liability is different from the risk of a slip-and-fall injury to a patron or an unsafe parking lot. The patron inebriated by the policyholder's alcohol products can inflict injury not only on himself but also on many others. An underage patron may purchase a fifth of vodka or down eight cocktails, but, rather than simply suffering individual injury, like most other general liability victims, our hypothetical young drunk can get behind the wheel of a multi-ton vehicle and kill or maim several other potentially high-income victims, whose economic losses may result in giant-sized liability awards that far outstrip any losses the policyholder vendor could realistically inflict on its patrons.²⁸³

The risks and the consequences of liquor liability are sufficiently different than most general liability risks such that insurers want to examine liquor liability risk separately. Policyholders should actively focus on the policy limits needed, as well as their policies requiring identification for youthful purchasers or refusing to serve or sell to patrons who appear to have already approached or passed their limit. The overall risk management system for food and beverage vendors is designed to separate liquor liability coverage from general liability coverage. Appreciating this separation reinforces the correctness of most judicial decisions, but does so in a way that negates concern that the literal "fine print" of the exclusion has been unreasonably used to defeat legitimate policyholder expectations.

D. Inherent Diminished Value Automobile Damage Claims

There is another example in which noting the social instrument function of the basic automobile policy engenders considerable sympathy for insurers. Consider the contention of some policyholders that automobile insurance should compensate them after a crash, not only for the cost to physically repair their vehicles, but also for the diminished market value of a car that has been in an accident.²⁸⁴

283. Think of a wrong-side-of-the-tracks convenience store selling Jack Daniels to a teenage driver who joyrides through Greenwich, Connecticut "taking out" two investment bankers, a doctor and a lawyer.

284. See 2 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 22.12[G].

The theory is beguiling and has been accepted in about half of the jurisdictions with precedent on the issue and, conversely, rejected in the other half with no precedent.²⁸⁵ But accepting the idea that auto insurance should pay for diminished post-crash/post-repair market value runs counter to the social function of auto insurance. Auto collision insurance is designed to restore a damaged vehicle to its pre-accident condition. If, after a collision, the insurer pays for an adequate repair that restores the auto to its prior condition, the insurance policy has achieved its purpose.²⁸⁶

Imposing on the insurer the additional burden of paying for any loss of market value the car may have sustained, merely because it was in an accident, goes beyond the intended social purpose of collision insurance and turns auto insurance, designed to protect against the economic consequences of physical damage, into

285. See *id.* § 22-86.6, n.227 (collecting cases on both sides of issue). Compare *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114 (Ga. 2001) (holding that proper measure of collision damages is the inherent diminution of vehicle's market value compared to value of equivalent car that had not been in accident), with *Siegle v. Progressive Consumers Ins. Co.*, 819 So. 2d 732 (Fla. 2002) (holding that proper measure of value is amount necessary to fully repair or replace vehicle as required by extent of collision damage), both cases reprinted in FISCHER, SWISHER & STEMPEL, *supra* note 4, at 912-26.

286. See 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 22.12[G]. Although a substantial number of courts take the opposing view, there has been relatively little scholarly writing on the subject, although such discussion tends (like my analysis) to reject recovery for inherent diminished market value of a vehicle. Thomas Farrish argues that the plaintiffs' arguments in diminished value cases suffer from two problems: (1) "[T]he plaintiffs' construction does indeed negate the insurer's option to choose the lesser of two payment methods. Because it renders another portion of the contract inoperative, courts should regard it as an impermissible construction"; and (2) "[I]t violates the principle of contract interpretation preferring ordinary meanings over technical ones. The insurers' construction comports with definitions found in ordinary dictionaries and in the common usage of the words at issue; the plaintiffs' construction, by contrast, relies on specialized definitions from insurance law treatises." Thomas O. Farrish, "Diminished Value" in *Automobile Insurance: The Controversy and Its Lessons*, 12 CONN. INS. L.J. 39, 60 (2005). But see Katy M. Young, Comment, *Georgia Is a Peach for Insured's Right to Diminished Value*, 43 U.S.F. L. REV. 417, 434-45 (2008) (arguing that Georgia, which awards diminished values of vehicles to insureds after its decision in *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114 (Ga. 2001), has the right idea). However, these analyses, unlike mine, tend to be contract-based and more narrowly focused on policy wording alone. My argument is not that such issues should be decided solely by a reviewing court's understanding of policy language. Rather, textual analysis of the policy should be supplemented by appreciation of the insurance-policy-as-social-instrument perspective to help determine whether the court's assessment of policy text is correct and makes legal and practical sense in the larger scheme of insurance as social institution.

something of a price guarantee bond. States that have rejected such expansions of auto coverage have adopted the better view.²⁸⁷ More important, they have done so, not only on the basis of contract-based, product-based, and statutory-based considerations, but also on the basis of the auto insurance policy's function as a social instrument.

E. Trigger of Coverage and the Asbestos Mass Tort

Asbestos has caused injury to victims and their families and imposed high costs on vendors, insurers, and society.²⁸⁸ Various labels the "tort that ate the constitution"²⁸⁹ and the greatest two tort crises in history,²⁹⁰ there is no denying the legal, social, and

287. As a general matter, property and casualty insurance is designed to protect against tangible loss rather than market fluctuations or financial loss. See DORFMAN, *supra* note 14, at 353; 1 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, §§ 1.01, 15.01; TRIESCHMANN ET AL., *supra* note 14, at 157-58; VAUGHAN & VAUGHAN, *supra* note 14, at 579-81. For example, property insurance generally covers only the physical loss to a home rather than any additional diminution in value because the neighborhood has become less desirable since the house was originally built. Under the basic general liability policy, a claim alleging that the policyholder has caused property damage to the plaintiff is covered only if the complaint alleges "physical injury to tangible property." 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01 at 13-15. Prior to the 1966 version of the standard CGL form, the language was less clear and insurers became upset when court decisions mandated defense or coverage of intangible property claims. See *id.* In effect, the insurance industry as a whole expressed a clear intent to cover physical loss rather than diminished value, at least in most situations, in the absence of extenuating circumstances.

288. See PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL (1985); WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW 181-84 (2003).

289. See Roger Parloff, *The Tort That Ate the Constitution*, AM. LAW., July-Aug. 1994, at 74-79. For a recent, less negative view of the asbestos mass tort litigation, see Jeb Barnes, *In Defense of Asbestos Tort Litigation: Rethinking Legal Process Analysis in a World of Uncertainty, Second Bests, and Shared Policy-Making Responsibility*, 34 LAW & SOC. INQUIRY 5 (2009) (questioning conventional wisdom viewing judicial resolution of asbestos claims as disastrous and arguing that, although inefficient, litigation is the least bad option for vindicating rights of victims, in light of the lack of effective legislative or executive action).

290. See Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255 (2006) (noting that asbestos litigation of 1970s and 1980s, largely against asbestos manufacturers, was the largest mass tort in history, leading some to wonder what future mass tort would be the next asbestos and observing that wave suits in the late 1990s and early 2000s against nonmanufacturers selling or installing products containing asbestos created a new mass tort so that the "next asbestos" was asbestos).

economic impact of the material and the mass tort litigation it spawned. In addition, of course, it launched a long-running wave of insurance coverage litigation, some of which still continues, even though use of asbestos has been banned for more than thirty years.²⁹¹

A pivotal issue in the asbestos insurance coverage wars was the question of when asbestos vendors' CGL policies were triggered. The stakes hinging on the answer were large because of the nature of many asbestos-related injuries. In a not uncommon case, a worker in a factory, shipyard, or insulation company may have begun working with the material in Year One, continued working with the material until Year Twenty, only to be stricken with an asbestos-related disease in Year Thirty. When the worker or his estate sued the asbestos vendor, the vendors in turn tendered the matter to their insurers. Over the course of thirty years, the asbestos vendor may have purchased coverage from several different companies with different policy years holding quite different policy limits applicable to the claims.²⁹² In addition, the particular etiology of asbestos-related disease created a situation in which it could credibly be maintained that more than a single policy applied to the claim because injurious exposure to asbestos could have occurred at various times or been continuous over the years.²⁹³ The question of

291. See, e.g., *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980) (applying Illinois and New Jersey law). *Insurance Co. of North America v. Forty-Eight Insulations Inc.*, 451 F. Supp. 1230 (E.D. Mich. 1978), is generally acknowledged to be the first case of the modern era of protracted, high stakes insurance coverage disputes in which both insurers and policyholders were represented by top flight coverage counsel. The asbestos coverage wars continue in this vein. See, e.g., *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613 (Wis. 2009). Both cases involved disputes over trigger and allocation of insurer responsibilities in connection with asbestos-based suits against policyholders that manufactured, sold, and distributed asbestos products.

292. For example, in *Forty-Eight Insulations* the asbestos manufacturer policyholder had five different insurers over the twenty-one-year time period at issue. *Forty-Eight Insulations*, 633 F.2d at 1215; see also *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1038 (D.C. Cir. 1981) (involving an asbestos maker policyholder with five insurers over nineteen years); *Plastics Eng'g*, 759 N.W.2d at 616 (involving thirty-three-year time period of policyholder's asbestos manufacture and sale activity, in which insurer at issue wrote primary and excess CGL coverage for approximately twenty years).

293. See Stempel, *Coverage Carnage*, *supra* note 75, at 376-81 (describing medical aspects of asbestos injury).

crucial importance then became which insurance policies in which years were applicable to the claim.

Insurers, although sometimes taking inconsistent positions on the issue depending on their own exposure in particular cases, tended to be more comfortable with a “manifestation” trigger applicable only to those policies in which, in the policy year, the asbestos victim had tangible symptoms of asbestos-related disease.²⁹⁴ The manifestation trigger, which dominates first-party property insurance coverage,²⁹⁵ could be applied to most liability-creating events without difficulty or unfairness. For example, if a patron slips on a poorly maintained floor at the policyholder’s business premises, the patron usually suffers immediately manifested injury. The time of the liability-creating event and its impact on the plaintiff-victim are contemporaneous. In addition, the victim is unlikely to be badly injured or to be joined by many other victims facing similar injury from the peril in question. The contemporaneousness of negligence and injury also permits the policyholder to quickly become apprised of the situation and to take remedial steps to ensure that others are not similarly injured.

Asbestos, of course, was different. The victims could ingest the dangerous materials for years before anyone was aware of their injuries.²⁹⁶ When the injuries became manifest, the injuries were not limited to one or two isolated plaintiffs but to multitudes of victims.²⁹⁷ The resulting cascade of liability was potentially bankrupting to the policyholder, particularly if the policyholder was dependent on a single policy to defend the claims and provide compensation to the plaintiffs.²⁹⁸ Many of the older CGL policies

294. See, e.g., *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 829 F.2d 227, 236 (1st Cir. 1987) (applying manifestation trigger to asbestos claims); *Mraz v. Canadian Universal Ins. Co. Ltd.*, 804 F.2d 1325, 1326-27 (4th Cir. 1986) (same); *Spinx Oil Co., Inc. v. Federated Mut. Ins. Co.*, 427 S.E.2d 649 (S.C. 1993) (same). *But see Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1046 (D.C. Cir. 1981) (refusing to apply manifestation trigger).

295. See *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230, 1246 (Cal. 1990) (adopting manifestation trigger for first-party property damage insurance coverage).

296. See OLSON, *supra* note 288, at 186-87.

297. See Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2045 (2000).

298. See OLSON, *supra* note 288, at 187-94. In fact, many asbestos manufacturers, most famously Johns-Manville, did file for bankruptcy. See Resnick, *supra* note 297, at 2045-46 (2000) (noting financial pressure put on even large businesses by mass tort exposures);

covering such claims did not have aggregate limits on “pre-mises/operations” claims but had relatively low per-occurrence limits.²⁹⁹ Further, perhaps most of the policies did have aggregate limits on “products/completed operations” claims, which meant that asbestos manufacturers—as opposed to insulation installers or vendors merely using asbestos to which others were exposed during ongoing operations—effectively did have caps on each policy year’s available coverage.³⁰⁰

In response to this situation, policyholders argued that their CGL coverage should be triggered for each policy year in which plaintiffs were injuriously exposed to asbestos or suffered actual injury or injury-in-fact, even if the injury did not become diagnosable or manifest until some years later.³⁰¹ Insurers tended to strongly oppose use of either an exposure or actual injury trigger unless they were also permitted to prorate coverage among policy years that were the responsibility of other insurers or the policyholders themselves due to self-insurance, failure to purchase insurance, or because previously purchased insurance was exhausted due to other claims.³⁰² Most of all, insurers also opposed the idea promoted by many policyholders that coverage was continuously triggered from the plaintiff’s first exposure to asbestos through the time that injuries manifested or became known.³⁰³

The history of the asbestos coverage litigation is in large part the history of policyholders prevailing on the issue. A significant majority of courts have rejected the manifestation trigger for asbestos liability claims, notwithstanding its popularity for first-party property loss claims.³⁰⁴ Most courts have ruled that all policies

Stempel, *Coverage Carnage*, *supra* note 75, at 416-40; Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 107 (2004) (“Over seventy companies are in bankruptcy court as a result of their asbestos exposure.”).

299. See Stempel, *Coverage Carnage*, *supra* note 75, at 381-83.

300. See *id.* at 381-84.

301. *Id.* at 450-51.

302. See *id.* at 450-52; see, e.g., Stempel, *Domtar Baby*, *supra* note 150, at 775-88 (discussing *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997), and allocation in pollution cases); see also ANDERSON ET AL., *supra* note 4, § 4.07[A]-[C]; OSTRAGER & NEWMAN, *supra* note 4, § 9.04[b] (discussing various types of proration used by courts); 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.10.

303. 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.09[B].

304. Stempel, *Coverage Carnage*, *supra* note 75, at 399-400.

beginning with the first injurious exposure to asbestos through discovery of the injury are triggered, requiring all triggered insurers to cover the asbestos claim.³⁰⁵ Multiply this score of policy periods, hundreds of insurers, and more than a million claimants and the result is a lot of implicated insurance, particularly in cases in which the products/completed operations aggregate limits were not applicable. Although the standard CGL form has, since 1986, contained both an asbestos exclusion and aggregate limits for premise/operations liability as well,³⁰⁶ the insurance industry has been forced to pay far more than desired on asbestos claims due to the courts' adoption of injurious exposure, actual injury, or continuous triggers of CGL coverage.

Although one may be sympathetic to the insurers' plight, the broad triggers applied to CGL policies in such cases is almost certainly correct when one takes a sufficiently broad view of liability insurance not only as a contract, or a product or statute, but also as a social instrument or risk management institution designed to fill a particular social and commercial role. As noted above, the CGL policy was an industry-crafted package of broad coverage designed to make sale, underwriting, and pricing of liability insurance more attractive to commercial policyholders and more profitable for insurers.³⁰⁷ Notwithstanding the asbestos coverage imbroglio, the CGL has been an economic winner for insurers.³⁰⁸ More important

305. See ANDERSON ET AL., *supra* note 4, §§ 4.01-4.06; OSTRAGER & NEWMAN, *supra* note 4, § 9.03[a]; 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.09[B]; Stempel, *Coverage Carnage*, *supra* note 75, at 364-75.

306. 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01[B]

307. See SAWYER, *supra* note 12, at 11-25; 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01[A]; *supra* notes 12-15 and accompanying text.

308. See MARK R. GREENE, *RISK AND INSURANCE* 47-48 (4th ed. 1977) (noting overall size, strength, and financial health of entire insurance industry and substantial growth during post-World War II period, which coincides with the introduction of the standard CGL policy); REJDA, *supra* note 14, at 303 (quoting senior official of large commercial insurance broker regarding centrality of general liability insurance for managing business risk); TRIESCHMANN ET AL., *supra* note 14, at 197 ("The increasingly litigious nature of our society has made liability risk a major concern for individuals and businesses in the U.S.... [In addition to other forms of risk management,] they also spend billions of dollars each year to purchase liability insurance to protect them if they get sued."). To a large degree, industry activists like Elmer Sawyer, an attorney with the National Bureau of Casualty and Surety Underwriters, and John Egloff, a vice-president of Travelers, were correct in predicting that the bundled, broader insurance product would be easier to sell at a higher premium and that the marketing

from the social instrument perspective, the CGL has become an integral cog in the machinery of commercial risk management. Each policy is designed to provide adequate general liability protection to the policyholder.³⁰⁹ In return for required premium payment, risk is shifted from the policyholder to the insurer, who in turn further spreads the risk among reinsurers and retrocessionaires.³¹⁰ The resulting quilt of coverage is one in which the policyholder, if hit with an unexpected wave of liability claims, will generally have protection absent wrongdoing, at least up to applicable policy limits.

Seen in this light, the exposure, actual injury, and continuous triggers of CGL policies purchased by asbestos vendor policyholders all make perfect sense. The nature of asbestos-related injury was both latent and long-tailed in a manner not typically seen. The policyholders had purchased liability insurance to protect themselves against liability risks. The nature of the insurance arrangement is one in which insurers took on the contingency of unknown risk for a price, the chance that the policyholder could face substantial liability by way of factual or legal events not anticipated at the time the policy was issued. Although both policyholders and liability insurers failed to anticipate the asbestos mass tort, it was the insurers who took on this risk.³¹¹ When the unforeseen tort led to unforeseen applications of the trigger aspects of the policies, it was properly the insurers rather than the policyholders who shouldered the unexpectedly adverse consequences.³¹²

benefits of the policy would outweigh the broader risks undertaken through this product. SAWYER, *supra* note 12, at 11-25; Eglof, *supra* note 214, at 20. Bundling coverage probably helped by reducing adverse selection by forcing policyholders to purchase a general insurance product rather than cherry-picking only the coverages they were most likely to need and forcing policyholders to pay an omnibus bundled, larger premium. Although insurers, most infamously AIG, have faced tough economic times, this downturn is not a result of underwriting or claims problems, but instead stems from the sale of risky financial products coupled with poor performance on premium dollars invested.

309. 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 14.01[B]

310. Using reinsurance, insurers purchase insurance for part or all of the risks they have assumed by selling insurance policies. Retrocession is the further purchase of insurance by reinsurers. See DORFMAN, *supra* note 14, at 407-12; REJDA, *supra* note 14, at 593-98; 2 STEMPEL ON INSURANCE CONTRACTS, *supra* note 4, § 17.01; TRIESCHMANN ET AL., *supra* note 14, at 488-91; VAUGHAN & VAUGHAN, *supra* note 14, at 146.

311. Stempel, *Coverage Carnage*, *supra* note 75, at 363.

312. That is, the insurers shouldered the cost in terms of the availability of insurance coverage under several policies. As a whole, however, insurers have done better than asbestos

The broad view of policy trigger implicates many insurance policies over many years, but policyholders faced huge liability claims and paid premiums for the coverage in question throughout those same years. The CGL policy properly fills its socioeconomic institutional role in cases in which an actual injury or continuous trigger is applied. There is no unfairness to insurers and no sound jurisprudential theory in favor of restricting coverage to a single policy year unless the text of the policy itself, or some other indicia of intent or purpose, supports such restriction. The judicial preference for a broad, policyholder-friendly approach to trigger in the asbestos cases was justified not only by contract-based arguments based on text, resolution of ambiguity against policy drafters, intent, purpose, and the like, but also had a sound basis under an insurance-policy-as-social-instrument theory. Appreciating the application of this view strengthens the contract-based analyses of most courts and confirms the correctness of their approaches.

F. Workers' Compensation and Post-Injury Employee Suicide

Should workers' compensation insurance cover a worker's suicide following a painful, disabling workplace injury?³¹³ Injured workers may experience such pain or depression after a job-related injury that they take their own lives. For some time, there was doubt as to whether these resulting suicides were sufficiently work-related to be within coverage.³¹⁴ Insurance carrier counsel regularly argued that the worker's suicide was either a separate, superseding cause of the loss that was not sufficiently connected to the workplace,³¹⁵ was not covered because the suicide did not physically occur while

policyholders. *See id.* at 440-42. Over the three decades of the asbestos mass only a few liability insurers have failed, fewer still because of their asbestos coverage burdens. By contrast, scores of asbestos policyholders have filed for bankruptcy, with most disappearing as operative businesses. *See id.* at 416-18.

313. This very situation served as the basis for discussion in Leslie A. Bradshaw, Annotation, *Suicide as Compensable Under Workmen's Compensation Act*, 15 A.L.R. 3d 616 (1967 & Supp. 2008).

314. *See, e.g., In re Sponatski*, 108 N.E. 466, 467-68 (Mass. 1915) (holding that a suicide is compensable only if it was the direct result of a workplace injury); *State v. Ramsey*, 839 P.2d 936, 939 (Wyo. 1992) (observing that *Sponatski* was once followed by eleven, but now only five, states).

315. *See, e.g., Indus. Comm'n of Ohio v. Brubaker*, 196 N.E. 409, 412 (Ohio 1935).

the decedent was at work or acting within the scope of his or her employment,³¹⁶ or was the type of intentionally inflicted injury that fell outside the basic employers' liability policy purchased pursuant to the workers' compensation requirements established in all states.³¹⁷

During the first few decades of the workers' compensation system, which began during the early twentieth century, insurers had some success with this argument.³¹⁸ Beginning mid-century, workers' estates began winning these cases, with courts ruling that such

316. See, e.g., *Schell v. Buell ECD Co.*, 690 P.2d 1038, 1040 (N.M. Ct. App. 1984).

317. What generally goes by the name of workers' compensation insurance is usually technically sold as an "employers' liability" insurance. The workers' compensation statutes in the respective states require that employers, unless exempt, purchase insurance that will compensate workers injured on the job according to a pre-determined schedule of benefits. See generally 82 AM. JUR. 2D *Workers' Compensation* § 1 (2003). In many states, the state is also the provider of the insurance policy, whereas in others, private carriers regularly sell the coverage. See ABRAHAM, *supra* note 11, at 60-61; LARSON & LARSON, *supra* note 19, at 742; LITTLE ET AL., *supra* note 19, at 66-67; see also Jeffrey W. Stempel, *Judge-Made Insurance That Was Not on the Menu: Schmidt v. Smith and the Confluence of Text, Expectation, and Public Policy in the Realm of Employment Practices Liability*, 21 W. NEW ENG. L. REV. 283, 296-322 (1999) [hereinafter Stempel, *Judge-Made Insurance*] (explaining employers' liability/workers' comp insurance and distinguishing it from employment practices liability insurance (EPL), which is designed primarily to protect employers from discrimination and harassment litigation pursuant to the civil rights statutes).

EPL insurance is a relatively recent innovation and during its early years was considered to have high premium costs relative to its scope. Stempel, *Judge-Made Insurance*, *supra*, at 314. In recent years, however, the market for EPL insurance has broadened, and it now appears to have become an example of insurance as social instrument, albeit a less important one than workers compensation, general liability, or property coverage. *Id.*

318. See, e.g., *In re Schofield v. White*, 95 N.W.2d 40, 41-42, 46 (Iowa 1959); *Sponatski*, 108 N.E. 466, 467-68; *Anderson v. Armour & Co.*, 101 N.W.2d 435, 439-40 (Minn. 1960); *Konazewaska v. Erie R.R. Co.*, 45 A.2d 315, 315 (N.J. 1945); *Indus. Comm. v. Brubaker*, 196 N.E. 409 (Ohio 1935). This traditional "voluntary willful choice" test treated suicide as a break in the causal chain linking work and injury unless the worker committed suicide while gripped with an uncontrollable impulse. See *Sponatski*, 108 N.E. at 467-68. In a sign of the fading authority of that approach, Massachusetts has legislatively modified and largely overruled the *Sponatski* decision. See LARSON & LARSON, *supra* note 19, § 20.07. In addition, there has arisen what is sometimes termed the "New York rule" that requires some physical injury to the brain if suicide is to be considered insufficiently involuntary to merit workers' comp coverage. See *Food Distributions v. Estate of Ball*, 485 S.E.2d 155, 159, n. 1 (Va. Ct. App. 1997) (citing *State v. Ramsey*, 839 P.2d 936, 940 (Wyo. 1992)) (noting but not following this approach). Finally, the "English rule" requires that to be covered a suicide must be the direct result of the injury itself coming as a shock to the worker rather than "brooding" over the injury and its impact. *Id.* (noting but rejecting rule; observing that English rule, like New York rule, is "rarely, if ever, applied"); see also Bradshaw, *supra* note 313, at 621-31.

deaths were sufficiently work-related to fall within coverage and that the decedents' suicides were not the type of misconduct, willful acts of self-injury, or separate, intervening actions that negated the workplace origins of the injury.³¹⁹ Although the decisions are not unanimous and the question remains open in some jurisdictions,³²⁰ the tide has clearly turned in favor of considering injury-related suicides to be work-related losses subject to workers' compensation coverage.³²¹

In deciding whether the suicide of an injured worker falls within or outside the scope of coverage, most jurisdictions have come to hold that suicide is not a per se bar to recovery.³²² But states are divided on the test for determining the circumstances under which suicide may preclude coverage. A minority of states follow a "voluntary willful choice" test that essentially requires the deceased worker to have been insane or unable to control suicidal impulses, while the majority of states follow a chain-of-causation test that considers suicide deaths compensable if the suicide results from an "unbroken chain of causation between an industrial injury and the employee's eventual suicide."³²³

The issue remains open in some jurisdictions. Under the majority rule approach, suicide is not a per se bar to receipt of benefits and

319. See, e.g., *Estate of Jenkins v. Recchi Am.*, 658 So. 2d 157, 158-60 (Fla. Dist. Ct. App. 1995); *Wells v. Harrell*, 714 S.W.2d 498, 501-02 (Ky. Ct. App. 1986); *Campbell v. Young Motor Co.*, 684 P.2d 1101, 1102-03 (Mont. 1984); *Schell v. Buell ECD Co.*, 690 P.2d 1038, 1041-43 (N.M. Ct. App. 1983); *Stroer v. Ga. Pac. Corp.*, 672 P.2d 1158, 1160-62 (Okla. 1983); *Food Distribs.*, 485 S.E.2d at 158-62; *Hall v. State Workmen's Comp. Comm'r*, 303 S.E.2d 726 (W. Va. 1983); see also *Bradshaw*, *supra* note 313, at 621-32.

320. *Bradshaw*, *supra* note 313, at 637-39.

321. The workers' compensation liability scheme differs from that of tort law. Workers' compensation statutes came into vogue during the late nineteenth and early twentieth century as an alternative to tort litigation for injured workers. See ABRAHAM, *supra* note 11, at 52-55. Workers were relieved of the burden of proving employer fault and instead needed only to show that the injury was job-related and not intentionally inflicted. Employers in turn benefited from caps on the amounts paid out in compensation for injury or death according to an established schedule rather than the potentially idiosyncratic views of a particular jury. Nonetheless, workers' compensation or industrial accident insurance claims can be hotly litigated, often concerning issues of whether an employee brought about the injury through willful misconduct or by self-infliction in order to collect benefits.

322. See *Bradshaw*, *supra* note 313, at 621.

323. See *Vredenburg v. Sedgwick CMS & Flamingo Hilton-Laughlin*, 188 P.3d 1088, 1088-90 (Nev. 2008) (citing LEX K. LARSON & ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 38.02; MODERN WORKERS COMPENSATION LAW § 115:5 (1993)).

the family of a deceased worker can recover if it is shown that (1) the employee suffered an industrial injury, (2) that the injury caused a psychological condition severe enough to override the employee's rational judgment, and (3) the psychological condition caused the employee to commit suicide.³²⁴ This chain-of-causation test in essence provides industrial insurance benefits to workers who take their own lives because of severe pain or depression causally related to a workplace injury.³²⁵ The exclusion for willful self-injury provided by statute³²⁶ and contained in most employers' liability policies does not automatically preclude benefits if a worker commits suicide in the aftermath of a work-related injury. The suicide may be covered depending on whether the claimant satisfies the chain-of-causation test outlined above.³²⁷

324. See *id.* at 1089-90; see also *Graver Tank & Mfg. Co. v. Indus. Comm'n*, 399 P.2d 664, 668 (Ariz. 1965); *Lead v. Workers' Comp. Appeals Bd.*, 796 A.2d 431, 436 n.14 (Pa. Commw. Ct. 2002).

325. In *Vredenburg*, worker Danny Vredenburg, a bartender at the Flamingo Hilton-Laughlin, slipped on a flight of stairs and suffered a severe back injury while working. *Vredenburg*, 188 P.3d at 1086. There was no dispute that the injury was compensable under the hotel's policy and he began to receive benefits. *Id.* Unfortunately, despite treatment, he experienced severe neck and lower back pain resulting from "internal disc derangement at several locations along his spine." His treatment included a "360-degree anterior-posterior fusion surgery," pain medication, therapy, epidural steroid injections, and implantation of a morphine infusion pump in his spine. *Id.* Despite this, the pain continued to be "intractable" according to his doctor, who also noted that Danny had become "psychologically de-stabilized" and completely disabled. *Id.* at 1086-87. Observers noted a deterioration in his mood, weight loss, and great difficulty walking. Danny eventually shot himself in the head. *Id.* at 1086. When his widow sought workers' compensation death benefits, the Flamingo's insurance administrator rejected the claim. Sharon Vredenburg continued to prosecute the claim but lost again before a hearing officer and an appeals officer. *Id.* The Supreme Court of Nevada reversed and remanded the matter, essentially providing a roadmap and directive to award benefits.

326. See, e.g., NEV. REV. STAT. ANN. § 616C.230(l) (West 2008).

327. An appeals officer's factual decision in a workers' compensation matter is reviewed under a "clear error" or "abuse of discretion" standard in which the officer's "fact-based conclusions of law are entitled to deference and will not be disturbed if supported by substantial evidence"; the court accepts the evidentiary record without substituting its judgment for that of the appeals officer as to the weight of the evidence. *Vredenburg*, 188 P.3d at 1087. "Pure questions of law, however," are reviewed de novo. *Id.* at 1088 (footnotes omitted). "Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion." See *Manwill v. Clark County*, 162 P.3d 876, 879 n.4 (Nev. 2007) (citing *Ayala v. Caesar's Palace*, 71 P.3d 490, 491 (2003)). Because the appeals officer in *Vredenburg* had either failed to use the chain-of-causation test or misapplied it, the case was remanded. *Vredenburg*, 188 P.3d at 1092.

An alternative test for determining whether worker suicide falls within coverage is a “voluntary willful choice” criterion. Associated with an old Massachusetts case,³²⁸ this test in modern form allows compensation for worker suicide after injury “only if [the suicide] (1) resulted from an uncontrollable impulse or delirium of frenzy, and (2) occurred without the employee’s knowledge of the physical consequences of his or her actions.”³²⁹ If either the first prong (volition) or the second prong (understanding) is not met, the suicide is viewed as an intervening act that breaks the connection between the worker’s injury and his death.³³⁰ The two-pronged willful choice test essentially requires the deceased worker to have been insane (unable to understand) or unable to control his actions.

Nevada only definitively decided this issue in 2008, following the majority view in a case with heart-rending but hardly unusual facts. In *Vredenburg v. Sedgwick CMS & Flamingo Hilton-Laughlin*, the court held that suicide by an injured worker was not, as a matter of law, willful self-inflicted injury and did not automatically bar recovery of the death benefits ordinarily available in cases of

In addition, although the court’s review focused on errors of law and the lower court’s articulation the apt test for assessing death by suicide claims, its opinion quite clearly takes issue with the appeals officer’s apparent view that Sharon Vredenburg had not supplied sufficient evidence of the relationship between Danny’s severe back injury and the pain and depression that drove him to suicide.

[W]e conclude that substantial evidence does not support the appeals officer’s finding of fact that Danny’s “suicide constituted a deliberate decision on his part,” which suggests that the appeals officer concluded that Danny’s suicide must have stemmed from a source other than his industrial injury. Notably, the record before the appeals officer contained [his physicians’ evaluations] ... and the affidavits of multiple friends and coworkers, which together implicate many of the hallmarks of a compensable suicide under the chain-of-causation test: an irreversible injury, unrelenting pain, a possible psychoactive reaction to prescribed medication, and extreme depression....

In contrast to Vredenburg, the Flamingo presented little, if any, evidence to counter the causal narrative displayed by Vredenburg’s evidence.

See id. at 1091. Thus, although the case was remanded to the appeals officer “for proceedings consistent with the standard announced in this opinion,” *id.* at 1092, the court essentially held Danny’s death eligible for workers’ compensation benefits unless the Flamingo could present persuasive evidence to the contrary on remand.

328. *See In re Sponatski*, 108 N.E. 466, 468 (Mass. 1915).

329. *Vredenburg*, 188 P.3d at 1088 (citing LEX K. LARSON & ARTHUR LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 38.02[2], at 38-5 (2007)).

330. LARSON & LARSON, *supra* note 19, at 494.

workplace-related death.³³¹ The court also adopted the chain-of-causation test used by the bulk of courts, which does not automatically bar workers' compensation benefits in such cases.³³²

In reviewing the case law, the *Vredenburg* court found overwhelming support for the pro-coverage side of the controversy. One need not be crazy or completely stripped of free will to be driven to suicide by the pain and related problems caused by a severe workplace injury. As noted in *Vredenburg*, the willful choice test also improperly introduces elements of fault into workers' compensation law.³³³ The court observed that, because of problems with the willful choice test, even jurisdictions that purportedly adopt it have modified it to relax the first prong (volition) and to "practically eliminate" the second prong (understanding).³³⁴ By contrast, the Nevada Supreme Court found the chain-of-causation test more consistent with the nature of the workers' compensation system, constituting both a better rule and the majority rule.³³⁵ In *Vredenburg*, a unanimous en banc court correctly aligned the state with the majority of jurisdictions in taking a sounder approach to the question of suicide's impact on receipt of workers' compensation benefits.

Although justice was done in the case, which was correct as a matter of statutory and insurance policy interpretation, it remains more than a little disturbing that the widow of the dead worker was forced to prosecute the case to the state's highest court after her late husband's employer, a hearing officer, and an appeals officer denied benefits. The case is clearly one in which the injured worker did not improperly "choose" to injure himself in order to extract undeserved benefits from his employer and its insurance carrier. There was no

331. 188 P.3d 1084, 1088 (Nev. 2008).

332. *Vredenburg*, 188 P.3d at 1089-90.

333. *Id.* at 1090.

334. *Id.* at 1089; *see, e.g.*, Schwab v. Dept. of Labor & Indus., 459 P.2d 1, 6 (Wash. 1969); *see also* LARSON & LARSON, *supra* note 19, § 38.02.

335. *See Vredenburg*, 188 P.3d at 1089. The seminal case enunciating and applying the chain-of-causation is *Graver Tank & Manufacturing Co. v. Industrial Commission*, 399 P.2d 664 (Ariz. 1965). "[T]he chain-of-causation test accords with the basic policy of this state's workers' compensation scheme: to deliver 'economic assistance to persons who suffer disability or death as a result of their employment,' regardless of fault, in exchange for limiting the tort liability of employers." *See Vredenburg*, 188 P.3d at 1090 (citing *Gallagher v. City of Las Vegas*, 959 P.2d 519, 521 (Nev. 1998); *Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984)).

dispute that the worker was badly injured in a workplace injury and there was overwhelming evidence of the connection between that injury, its pain, and the failed treatment of the pain to lead to an inference that Vredenburg experienced a reaction to pain medication that affected his mental faculties.³³⁶ If this was not a case meriting workers' compensation benefits after suicide, it is hard to imagine any case that would qualify.

Why, then, was there so much resistance to the claim, at least prior to review by the Nevada Supreme Court? One disturbing possibility is that longstanding concern about holding the line on industrial insurance premiums and fostering a good business climate for employers has created an atmosphere unduly resistant to workers' claims.³³⁷ But hardline resistance to worker suicide claims is also unlikely to make much fiscal difference. Comparatively few injured workers commit suicide and, when they do, the death benefit, although of course important to the widow or widower and family, is unlikely to make any difference to the overall fiscal health of the insurance system or the business climate. Nonetheless, because of its centrality to American business and the American workplace, workers' compensation is of major economic, political, and social importance, making it a frequent topic of interest group and legislative concern.³³⁸ Employers' liability insurance is

336. See *Vredenburg*, 188 P.3d at 1086-87. Contrast Mrs. Vredenburg's arduous path to relief to that of worker Kenneth Ball's widow ten years earlier in Virginia. See *Food Distribs. v. Estate of Ball*, 485 S.E.2d 155 (Va. Ct. App. 1997). Both the original hearing officer and the state review board found coverage even though Mr. Ball's suicide came more than five years after the workplace accident, a trip-and-fall that badly injured his shoulder, causing chronic nerve pain and limitations in use. *Id.* at 157-58. The state's high court merely affirmed rather than overturned the state's administrative apparatus. By contrast, the Nevada administrative system seemed to want to live in the early twentieth century in its embrace of the now largely discredited "voluntary willful choice" test. Of course, both Mr. Vredenburg's employer and Mr. Ball's insisted on requiring their widows to litigate the issue to the maximum possible extent, a troubling reflection on the motivational matrix of employers in what was supposed to be a kinder, gentler system of injury compensation.

337. See LITTLE ET AL., *supra* note 19, at 74 ("In the real world of workers' compensation ... theoretical niceties often give way to political realities."); see also JACK B. HOOD ET AL., *WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS* 133-38 (3d ed. 1999) (discussing proposed reforms to workers' compensation that have obtained varying degrees of success); 2 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 21.07 ("[W]orkers' compensation law is also often a politically salient issue engaging important business and labor groups.").

338. See LITTLE ET AL., *supra* note 19, at 73-74 (observing that, although there is general agreement on the goals of workers compensation system, employers, workers, the public, and

insurance as social instrument and social institution and is subject to more than “mere” contract-based assessment.

Like the majority of decisions, the Nevada Supreme Court’s assessment in *Vredenburg* seems correct and is appropriately reached through a contract-based analysis of the coverage dispute. However, bringing to bear the insights of a social instrument perspective makes the correctness of the pro-coverage position even clearer in such circumstances. If better appreciated by administrative tribunals and lower courts, the realization that workers’ compensation coverage is a social instrument rather than a mere piece of paper documenting a contract might have avoided the protracted litigation that finally placed Nevada in the majority rule column of states regarding worker suicide.

As reflected in the Mississippi police station example, workers’ compensation insurance is a legal requirement as well as a practical necessity for responsible employers.³³⁹ Most businesses will not operate without workers’ compensation coverage in place and state authorities will shut down businesses operating without the statutorily required coverage, requiring rectification and inflicting financial penalties.³⁴⁰ Workers’ compensation insurance, despite those legal and social policy criticisms that may be properly leveled at it, is part of the basic fabric of economic life.³⁴¹

The importance of insurance to everyday economic and social functioning does not, of course, require that the insurance in place be deemed applicable to every loss. There may be good socioeconomic reasons why noncoverage and nonpayment are more consistent with the proper role and functioning of the insurance policy at issue. However, in the case of the employee driven to suicide by the aftermath of a workplace injury, the social role of the insurance policy strongly supports the prevailing judicial norm of holding such deaths to be sufficiently workplace-related to qualify for coverage.

academic analysts frequently differ over availability and benefit levels that best meet these goals); see also HOOD ET AL., *supra* note 337, at 133-37; 2 STEMPER ON INSURANCE CONTRACTS, *supra* note 4, § 21.07.

339. See *supra* Part I.

340. LARSON & LARSON, *supra* note 19, at 569.

341. See ABRAHAM, *supra* note 11, at 64-68; LARSON & LARSON, *supra* note 19, at 13.

Recall that the workers' compensation system came into existence as an alternative to a tort law system that was problematic for both employers and employees.³⁴² During the late nineteenth and early twentieth century, workers faced an unfavorable tort system, which included defenses such as the fellow servant rule, denying recovery when the injury was the fault of a co-worker, and contributory negligence, a doctrine which, at the time, denied recovery to an injured worker who was even slightly at fault in bringing about his or her injury.³⁴³ The workers' compensation laws replaced the then employer-friendly tort system with one of strict liability; if a worker was injured on the job, he or she was entitled to benefits according to a set schedule.³⁴⁴

Today, we see this tradeoff (strict liability for caps on damages) as a roughly equivalent compromise of employer and employee interests. But in the early twentieth century, this was not a tradeoff but a great victory for workers. Formidable barriers to liability were removed and, at that time, the schedule of benefits was munificent as compared to typical jury awards in tort cases.³⁴⁵ But during the ensuing century, legislatures largely refused to index the benefits schedule for inflation and have updated award rates only episodically, resulting in a situation in which workers' compensation awards, even for serious injuries (or perhaps especially for serious injuries), seem meager when compared to comparable tort awards.³⁴⁶

342. See ABRAHAM, *supra* note 11, at 40-41.

343. See *id.* at 42; LARSON & LARSON, *supra* note 19, at 16-18; LITTLE ET AL., *supra* note 19, at 1, 6-7, 19-20.

344. See ABRAHAM, *supra* note 11, at 57.

345. *Contra* Scales, *supra* note 63, at 1263:

From a modern standpoint, workers' compensation seems to create significant under-deterrence relative to tort liability. Compensation awards are partial—they replace only a portion of wages and offer nothing at all for noneconomic damages. Thus it is easy to assume that workers' compensation does not result in optimal rates of accident prevention.

At the time of adoption, however, workers' compensation promised significantly more liability than employers had experienced under the parsimonious tort law of the times.

346. For example, maximum disability and death benefits available through workers' compensation can vary dramatically between states, although the most common formula is two-thirds of the worker's average weekly wage up to a statutory or administrative maximum. In 2003, New York's maximum was \$400 per week, Georgia's \$425, but New Hampshire's maximum could reach \$1018. See LITTLE, ET AL., *supra* note 19, at 391-92. But even in the most munificent jurisdictions, the amounts awarded are far less than what would be

Another part of the tradeoff, of course, was that in return for the protections afforded by workers' compensation, employees were stripped of the right to sue in tort. A workers' compensation claim became the exclusive legal remedy against an employer, no matter how negligent the employer's conduct and no matter how unsafe the workplace.³⁴⁷ Thus, workers were in a position similar to investors who sold a growth stock too early. They missed out completely on the bull market in tort liability that took place for most of the century.

But whatever its flaws or unintended consequences, workers' compensation clearly was intended and designed to operate as the primary social safety net for workers and their families if the worker was injured on the job. Although the establishment of Social Security thirty years later and the adoption of other social welfare programs, for example, Medicare and Medicaid, still later in the century spread the burden, workers' compensation remains a pillar of government-mandated economic and social protection for workers. Because the program operates by statutorily mandating that employers purchase insurance, the resulting employers' liability policies share contract, statute, and social instrument characteristics.³⁴⁸ Simply put, the workers' compensation policy is designed to provide a reliable and adequate means of replacing a significant portion of an injured worker's lost income, even if it is

recovered in a comparable tort action or the amounts that would be paid pursuant to a reasonably good first-party insurance policy. In 2003, maximum payment to a Tennessee worker who lost a hand was \$89,850 for permanent partial disability; in South Carolina, the maximum limit for total disability was payment of wage replacement formula for a maximum of 500 weeks or less than 10 years while in Illinois such benefits were available for the life of the worker. *See id.* at 392-93. In addition, some states terminate death benefits to a surviving spouse that remarries, a limitation never placed on tort awards or first-party insurance proceeds. *See id.* at 477 ("Most workers' compensation statutes terminate a surviving spouse's weekly death benefits upon remarriage.").

347. Another unintended consequence of workers' compensation and its protection of employers from tort liability has been the drive by plaintiffs to recover damages against manufacturers of workplace products to gain additional compensation beyond the oft-inadequate workers' compensation payment schedule. While many of these claims have been well-taken, many others have been strained or even frivolous but made nonetheless because greater recovery against the employer, who is often the primary culprit in workplace injuries, is foreclosed. *See Scales, supra* note 63, at 1264-65 (noting that workers' compensation has not been effective in increasing workplace safety or deterring accidents).

348. LARSON & LARSON, *supra* note 19, at 569.

not effective in fully compensating the injured worker (or his or her family in the case of workplace related death).³⁴⁹

Appreciating workers' compensation insurance as a socioeconomic instrument and institution makes the case for covering post-injury suicides like that of *Vredenburg* even stronger and confirms the correctness of *Vredenburg* and the majority of judicial decisions in such cases. So long as a worker's suicide can be fairly traced to the consequences of workplace injury, covering the suicide is completely consistent with the purpose of the workers' compensation system and employers' liability insurance sold as part of that system. The decedent's family is not given a gratuity, but rather receives the type of compensation families were intended to receive in the event of the death of a worker.

Providing benefits in such circumstances presents insurers little concern over adverse selection, moral hazard, or other insurer risks in attempting to design policies or protect risk pools.³⁵⁰ Assuming that the causal connection is not overly attenuated, there is no concern that the decedent sought work as a means of procuring insurance to benefit his family in the aftermath of a planned suicide. Certainly, nearly every worker sufficiently values his or her person such that there is adequate worker incentive to use care simply to avoid the pain, inconvenience, and debilitation of injury, an incentive that grows logically stronger when the consequences of a mistake at work are death rather than a broken ankle and a couple weeks at home catching up on television programming.

Similarly, there is no serious argument that an injured worker disappointed in the benefits received for the injury will take his life simply to procure somewhat higher benefits for his or her surviving

349. *Id.* at 4.

350. See Scales, *supra* note 63, at 1263 (citing ABRAHAM, *supra* note 11, at 45-48):

Moral hazard is the tendency to take fewer precautions in the presence of insurance. Adverse selection is the tendency of riskier people to gravitate towards unsuspecting insurance pools, eventually raising premium rates and causing less risky people to exit. A great deal of insurer behavior is designed to combat, or at least manage, these problems.

Id.; see also DORFMAN, *supra* note 14, at 480 (differentiating between the moral hazard of intentional destruction by policyholder and what the author calls "morale hazard" of policyholder being less careful due to availability of insurance); FISCHER, SWISHER & STEMPEL, *supra* note 4, at 84-85; 1 STEMPEL, *supra* note 4, § 1.06, at 1-103 to 1-105.

family. Most of all, there is no danger to the risk pool sufficient to support ending benefits when a worker's injuries have contributed to suicide. Such an argument, in effect, contends that the worker's family should be denied the planned benefits of the system because the worker was unable to cope with the consequences of the injury. In a prudent system of social insurance, the social instrument aspect of the insurance counsels in exactly the opposite direction. After injury-related suicide, the worker's family needs more protection, not less. Any result other than that reached in *Vredenburg* turns the social institution of workers compensation on its head, a fact that makes the correctness of the decision clear.

In addition, were there no workers' compensation system, relegating the worker to the tort system, modern tort law likely would have no problem concluding that, if an employer is responsible for the initial painful or disfiguring injury, the employer is responsible for all proximate damages, including death by suicide, so long as causation is proven. And, as discussed above, for most injured workers and their families, a successful tort claim will provide considerably more compensation than payment of comparable workers' compensation benefits.

Under these circumstances, denying the decedent's family death benefits because of suicide would be particularly antithetical to the socioeconomic aspects of insurance as a social instrument. What was intended as great protection for workers and improvement on the tort system would instead give an injury-victim-cum-decedent considerably fewer rights than he, or his estate and family, would have held in the absence of the workers' compensation scheme and the liability policy purchased by his employer. Consequently, denying coverage for post-injury suicide in cases such as *Vredenburg* would clearly run counter to the collective legal and lay understanding of insurance as a social instrument designed to work in concert with other aspects of the socioeconomic system.

CONCLUSION: THE NET BENEFITS OF PRUDENT USE OF THE SOCIAL INSTRUMENT PERSPECTIVE

According to the clearly established rules of the jurisprudential road, an insurance policy is a contract. But as the preceding discussion has shown, appreciating the social instrument function

of insurance policies provides substantial insight into their proper construction. In many instances, viewing insurance policies in their capacity as social instruments confirms the assessment of well-reasoned contract-based analysis, serving as a useful check on the accuracy of the contract-driven analysis. In other situations, taking the social instrument perspective on insurance policies calls into question the soundness of much traditional contract analysis and can serve as a useful “second opinion” or alarm that should prompt courts to reconsider their contractually driven constructions. As a general rule, an insurance-policy-as-contract analysis is likely to be correct only when it is consistent with an insurance policy-as-social-instrument analysis. The design and sale of insurance policies, like the crafting of legislation, is a purposive enterprise seeking to achieve established goals and to fulfill a function. Therefore correct contract analysis logically should be consistent with the social instrument function of insurance.

Contract purists may resist any supplementation of contract-based analysis on conceptual grounds. But only a purist blind to empirical reality could contend that the characterization of insurance policies as social policies is unreasonable in view of the widespread role of insurance in modern life and commerce. Contractarians might also resist applying the social instrument perspective on procedural grounds, contending that the additional value conveyed from social instrument-based analysis is not worth the extra time and judicial resources consumed. Although all analytic activity carries with it some “cost of production,” a cost-benefit argument against using social instrument analysis is unpersuasive. In “easy” cases, which comprise the vast bulk of coverage disputes, use of the social instrument perspective will require little in the way of judicial resources because the analysis will be relatively short and the results clear. But using this relatively inexpensive additional bit of assessment can confirm the court’s contractual assessment or serve as a warning when contract-based assessment has missed the mark. In “hard” cases, the correct contractarian analysis is by definition less than crystal clear. In such cases, the additional incremental time and effort devoted to a social instrument analysis is well-justified as part of the typically increased costs of resolving more complex and difficult disputes.

To a large degree, construction of insurance policies and other instruments through the lens of the social instrument perspective has been a longstanding feature of contract disputes and all legal disputes. Historically, it has traveled under the nomenclature of “public policy” or “public values.” To a significant extent, the system has long permitted judges to inject factors other than contract text or specific party intent in the process of saying what a contract means. However, decisionmaking based on a single judge’s invocation of his or her understanding of the greater good has always left the system uncomfortable, particularly where judges are not elected or otherwise responsive to public reaction to their decisions.

By contrast, interpreting insurance policies by reference to their socioeconomic role requires the court to make an empirically based assessment of the nature of the insurance policy in dispute and the role of that policy or its archetype. These assessments in turn inform the court as to the relative strength of the disputing parties’ contractual arguments, enabling the court to provide objectively better insurance policy construction while avoiding the risk that the decision will turn on “what the judge had for breakfast.” Assessing insurance policies as social instruments is not the unguided exercise of personal preferences that some find in public policy pronouncements by the judge. Rather, it flows from an objective appreciation of the manner in which insurance policies are designed to fill certain parts of the fabric of commercial and consumer activity.

Properly assessed and deployed, the insurance policy as social instrument factor provides a valuable additional tool for determining insurance policy meaning and resolving coverage questions. It complements rather than supplants traditional contract analysis and cautions against the errors that result when a narrow contract analysis misleads a judge into focusing too myopically on policy text, extrinsic evidence of intent, or party expectations in construing policies.