RETHINKING THE DEVELOPMENT OF MODERN TORT LIABILITY

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ABSTRACT

The standard story of the development of modern tort liability is straightforward, but it turns out to be seriously misleading. The story is that in the second half of the nineteenth century, negligence liability replaced the premodern forms of action as the principal basis for the imposition of liability for accidental bodily injury and property damage. Suits for negligence arose, and insurance against liability for negligence was introduced. Both the tort system and the liability insurance system that emerged to accompany it were then quiescent for the next half century. Around 1970, tort liability began to expand substantially. For several decades, there have been contentions that at that point there was an "explosion" of tort liability.

The problem with this story is that it trades on a misleading caricature of what was occurring in the tort system before 1970. Tort law doctrine *was indeed largely quiescent during the middle four or five decades of the twentieth century, just as the story suggests, until the well-known doctrinal expansions of 1965 to 1985 began. But tort* liability *was not quiescent at all. The magnitude of payments made to tort victims increased exponentially between 1920 and 1970—by some measures, at a much greater rate than after 1970—and the magnitude of premiums paid for liability insurance increased in the same exponential manner. In addition, after liability insurance was introduced late in the nineteenth century, it did not simply become a behind-the-scenes source of financing for tort defendants, the way a passive guarantor stands behind a debtor. Rather, between 1920 and 1970, the courts confirmed, created, and extended liability insurers' duty to defend their policyholders in tort suits and their duty to accept reasonable offers to settle tort suits against their policyholders. Liability insurers' active performance of those duties created an unrecognized dynamic cycle that intensified the growth of tort liability, bringing it to where it stood in 1970. This Article rethinks the conventional story by examining the important developments in tort liability and liability insurance that preceded the "explosion" of tort liability and offers historical, political, and intellectual reasons as to why the misleading conventional story took root.*

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CONTENTS

INTRODUCTION

The standard story of the development of modern tort liability is straightforward, but it turns out to be seriously misleading. According to this story, in the second half of the nineteenth century, negligence liability replaced the premodern forms of action as the principal basis for the imposition of liability for accidental bodily injury and property damage.[1] Individuals began pursuing suits for negligence, necessitating insurance to protect against such claims.[2] Shortly after the turn of the century, there was a prolonged controversy over the inability of negligence liability to provide adequate compensation to the victims of workplace injuries.[3] By 1920, states had therefore adopted a system of workers' compensation to replace negligence liability, removing the task of compensating employment-related injuries from the tort system altogether.[4] Liability for injuries outside the workplace remained the province of tort.

Further, according to the story, both the tort system[5] and the liability insurance system that arose to accompany it were then quiescent for the next half century. Around 1970, tort liability began to expand substantially.[6] States began embracing strict products liability, medical malpractice liability gained a higher profile, and the "mass tort" came on the scene.[7] Further, states eliminated no duty and limited duty restrictions on negligence liability,[8] as well as contributory negligence as a complete defense to a negligence suit.[9] In the mid-1980s, a crisis in the availability and affordability of liability insurance brought about contentions that there had recently been an "explosion" of tort liability.[10] The crisis led to the enactment of dozens of state legislative reforms, mostly restricting awardable pain and suffering damages.[11] The (putatively) $429

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[1] KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 20 (2008).

[2] *Id.*

[3] *Id.* at 39.

[4] *Id.* at 29.

[5] There are many different torts, but our concern here is with liability for accidentally caused bodily injury and property damage, which constitute the vast majority of tort liability. For simplicity of expression, we will therefore use the terms "tort liability" and "tort system" to encompass liability for accidentally caused bodily injury and property damage because that is what most of the tort system addresses. We recognize, however, that the terms technically refer to far more than that.

[6] *See infra* note 14 and accompanying text (describing expansion of tort liability in 1970s).

[7] *See generally* TORT POL'Y WORKING GRP., DOJ, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986) [hereinafter TORT POL'Y WORKING GRP.] (discussing state of tort law in 1980s).

[8] ABRAHAM, *supra* note 1, at 172.

[9] 2 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM RECONSTRUCTION THROUGH THE 1920S 254 (2016).

[10] TORT POL'Y WORKING GRP., *supra* note 7, at 2.

[11] ABRAHAM, *supra* note 1, at 128.

billion per year tort system that we have today,[12] addressing auto, products, environmental, and other forms of bodily injury and property damage, was fully established by about 1990.

There is no single place to find the full-blown conventional story as we have just articulated it. Pieces of the story must be drawn from different sources,[13] although most of the underlying message about tort law's post-1970 expansion has been consistently delivered for some time.[14] But there is an implicit part of the story that is not expressed anywhere. There has been so little scholarly interest in the early trajectory of tort liability that explicit assertions that the tort system was quiet, or that substantial increases in tort liability were not occurring prior to its "explosion" or "expansion" after 1970, do not exist. But that is the strong implication of accounts of post-1970 tort liability. The conventional story portrays the "explosion" during this period as surprising and unexpected—as a sharp break with the past.[15]

The problem with this story is that it trades on a misleading caricature of the pre-1970 tort system. There was a whole lot more going on in tort before 1970 than the caricature reveals. Tort law *doctrine* was indeed largely quiescent during the middle four or five decades of the twentieth century, just as the story suggests, until the well-known doctrinal expansions of 1965 to 1985 began. But tort *liability* was not quiescent at all. The magnitude of payments made to tort victims increased exponentially between 1920 and 1970[16]—by some measures, at a much greater rate than after 1970—and the magnitude of premiums paid for

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[12] U.S. CHAMBER INST. FOR LEGAL REFORM, COSTS AND COMPENSATION OF THE U.S. TORT SYSTEM 4 (2018).

[13] All the pieces, however, can be found at various points in KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW (5th ed. 2017) and ABRAHAM, *supra* note 1.

[14] *See, e.g.*, RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 644 (11th ed. 2016) (referring to decline in accident rates between 1945 and 2013 that "started before the expansion in tort liability"); JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 38 (4th ed. 2016) (referring to "certain changes in mid-twentieth-century law" that "expanded the potential reach of tort liability"); PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 7 (1988) (arguing that, beginning in late 1950s, proponents of expansion of tort liability "started sketching out their intentions," and that "within two short decades they had achieved virtually every legal change that they originally planned"); 1 AM. L. INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 3, 14 (1991) (referring to crisis in tort litigation and insurance system that was occurring in 1986 and to "the burgeoning of tort litigation"); Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 645 (1985) (referring to "the enormous expansion of products liability in the last generation"); Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 963 (1981) (referring to "explosion of tort liability during the past quarter-century").

[15] *See, e.g.*, TORT POL'Y WORKING GRP., *supra* note 7, at 2 (asserting that "in the past decade there has been a veritable explosion of tort liability in the United States").

[16] *See infra* Tables 1, 2.

liability insurance increased in the same exponential manner.[17] Contentions made after 1970 that there was an "explosion" of tort liability did not recognize this consistent growth, although there were undoubtedly important doctrinal and certain quantitative changes that the explosion thesis got right. In short, the conventional story fails to accurately portray how the tort system came to be in the condition in which it was in 1970.

At least as important to tort liability's very substantial growth before 1970, we contend, is that, after liability insurance was introduced late in the nineteenth century, it did not simply become a behind-the-scenes source of financing for tort defendants, the way a passive guarantor stands behind a debtor.[18] Rather, between 1920 and 1970, the courts confirmed, created, and extended liability insurers' duty to defend their policyholders in tort suits and their duty to accept reasonable offers to settle such suits against their policyholders.[19] The performance of those duties created a dynamic cycle that fueled the growth of tort liability: tort liability created demand for liability insurance, and the active way that insurance and insurers operated generated tort liability, thereby expanding liability insurers' exposure to ever-greater liability.[20] Consequently, liability insurers charged more for their product and their revenue increased. In the short run, a particular liability insurer may have objected to the contention that it had a duty to defend or settle a tort suit, but in the long run, the entire liability insurance industry benefited enormously from enforcement of those duties.[21]

This Article rethinks the conventional story of tort liability's development by taking into account what actually happened from the late nineteenth century until about 1970. Tort law changed a lot after 1970, but it also changed a lot before that. The earlier period of change has received insufficient attention in the story. Part I qualitatively and quantitatively describes the development of tort liability during this period. Among other things, this Part demonstrates the enormous increases in tort payouts that occurred over this period, particularly after 1920, because that is the point at which meaningful growth began for both negligence liability and liability insurance.

Part II examines how the courts established and blessed liability insurance, how the duty to defend and the duty to settle interacted within tort suits and in the insurance marketplace to promote the expansion of tort liability, and how, as a consequence, premium revenues grew exponentially. Here we also explore the political economy of liability insurers' seemingly curious, continuing decision never to modify their policies to restrict or eliminate the duties to defend and settle. By virtue of this stance, liability insurers declined to modulate the increased exposure to liability that the duties created for them and left in place

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17 *See infra* Tables 3, 4.

18 ABRAHAM, *supra* note 1, at 36-37.

19 *Id.* at 35-36.

20 *Id.* at 38.

21 *See id.* at 36.

the ingredients that then contributed to the changes in tort liability that occurred after 1970.

Finally, Part III considers why the conventional story of tort law's development took root. The reasons, we argue, are historical, political, and intellectual. Some of our revised story is new because its occurrence was never recognized. Rather, the persisting conventional story is the result of misleading impressions created by the work of prominent mid-twentieth-century tort scholars, whose main focus was the expansion of liability; the politics of tort reform that raged in the mid-1980s as a result of a liability insurance crisis; and the existence of walls of academic separation between tort law, insurance law, and legal history. These combined historical, political, and intellectual contingencies led to the creation and maintenance of a story that now requires rethinking.

If Holmes was correct when he said that, to know what the law is, "we must know what it has been,"[22] then a rethinking of what tort law has been is necessary. This Article demonstrates why the conventional story about the development of tort law in the twentieth century must be rethought and provides that rethinking.

The broader lesson of the Article is about the way that common law develops. Forces both internal and external to tort liability influenced its modern development. Legal doctrine—the late nineteenth-century establishment of negligence as the basis of liability for accidental injury and the meaning that twentieth-century courts then attributed to liability insurance policy provisions governing defense and settlement—was a fundamental prerequisite to what occurred. But forces outside of doctrine—increases in rates of accidental injury and the incentives that liability insurance created for tort litigants and liability insurers, both within tort suits and in the insurance marketplace—were as essential as legal doctrine. In short, the story of the development of modern tort law suggests that a bright-line distinction between the causal roles of doctrine and context, between law and matters that are not law, is likely to mask a more complicated interaction.[23]

I. THE RISE AND GROWTH OF MODERN TORT LIABILITY

Tort liability as we now know it has its direct origins in the emergence of liability for negligence late in the nineteenth century. This growth of negligence liability was partly the product of a substantial increase in accidental injury and

[22] O.W. HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown & Co. 1881).

[23] For two examples of contrasting "internalist" and "externalist" perspectives on causation in legal history generally, and on tort law in particular, see generally Forum, *The Debate over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005); and Symposium, *American Association of Law Schools Torts & Compensation Systems Panel*, 88 IND. L.J. 419 (2013).

property damage that occurred at that time,[24] and partly (as we will show in Part II) the result of the way in which liability insurance—which also was introduced late in the nineteenth century—interacted with negligence liability.[25]

A. *The Origins of Negligence Liability: From the Civil War to 1920*

Prior to the close of the Civil War, tort actions had a limited role in the American common law system.[26] There were social, economic, and doctrinal reasons for that state of affairs. The social reasons included the largely agrarian character of American society, the relative absence of heavy-duty machinery capable of inflicting serious injuries, the comparatively limited mobility of most Americans, the absence of mechanized forms of transportation capable of inflicting serious injury, and the fact that most victims of accidental injuries were neighbors or relatives of the persons who injured them, helping to facilitate informal redress of their injuries.[27]

The doctrinal reason was the late development of negligence as a generic category of tort liability.[28] There was not even a treatise on American tort law until 1859, and torts was not taught in an American law school before 1870.[29] Previously, actions for accidental injury were limited to a few specific categories in which persons were said to owe special "duties" to other persons.[30] In addition, affirmative defenses further limited the scope of liability, including through the doctrines of contributory negligence, assumption of risk, and the "fellow servant rule" that barred most employees from suing their employers when injured by the negligent acts of fellow employees.[31]

1. New Developments

After the Civil War, however, certain developments raised the possibility that suits for accidental injuries might increase dramatically and that limitations on the scope of actions in negligence might be overcome. Two developments were prominent. One was the growth of railroads and streetcars as common modes of

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[24] *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 26-30 (2004).

[25] *See* ABRAHAM, *supra* note 1, at 32-38.

[26] WHITE, *supra* note 9, at 232.

[27] *See* ABRAHAM, *supra* note 1, at 19-20. *See generally* R. DOUGLAS HURT, AMERICAN AGRICULTURE: A BRIEF HISTORY (rev. ed., Purdue Univ. Press 2002) (1994) (noting transformation in agriculture during Civil War era which led to revolution in technology and labor, replacing commonly used hand-powered tools).

[28] *See* WHITE, *supra* note 9, at 235-38.

[29] *Id.* at 230. For more detail on the social and economic barriers to actions in tort prior to the Civil War, see *id.* at 240-44.

[30] *See, e.g.*, Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 933-37 (1981) (describing early development of landowner and product liability).

[31] *Id.* at 939.

transportation.[32] Railroads and streetcars were relatively dangerous in their infancy, not infrequently subjecting employees or passengers to the risk of serious injuries.[33] The other development was the comparable growth of enterprises and factories that worked with heavy machinery in their operations. There was dramatic growth in factory industries in the last three decades of the nineteenth century, exposing workers to risks in connection with industrial equipment.[34] For workplace accidents, however, defenses to negligence made it difficult for most injured employees to recover in tort against anyone except fellow employees, most of whom lacked significant assets.[35]

But transportation accidents involving passengers were a different matter entirely, where the above limitations on negligence liability often did not apply. By the 1880s, railroads and streetcars were becoming widespread.[36] They remained, for the duration of the nineteenth century and beyond, quite dangerous for passengers.[37] Importantly, the enterprises in question were classified as "common carriers."[38] This legal status granted passengers a special advantage in tort suits because common carriers owed special duties to their passengers.[39] Specifically, the standard of conduct for such enterprises with respect to their passengers was "utmost care," which exceeded the "ordinary care" standard for most actions in negligence and approached strict liability.[40]

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[32] ABRAHAM, *supra* note 1, at 26.

[33] WHITE, *supra* note 9, at 240.

[34] For evidence of sharply rising accident rates in late nineteenth-century America, particularly to employees and passengers on railroads and streetcars, and workers in mines and factories, see WITT, *supra* note 24, at 26-30.

[35] *See* WHITE, *supra* note 9, at 255.

[36] *See* CENSUS OFF., DEP'T OF THE INTERIOR, REPORT ON TRANSPORTATION BUSINESS IN THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, at 615-16 tbl.10 (1895) (documenting 100% increase in railroad passengers carried during 1880s, from approximately 241 million in 1881 to approximately 482 million in 1889); *id.* at 681 (noting that during 1880s, "[the length of] street railways increased over 7 times as fast as the population of the country").

[37] *See* WITT, *supra* note 24, at 26 (noting increased deaths caused by railroad accidents between 1860 and 1890); BUREAU OF THE CENSUS, U.S. DEP'T OF COM., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 740 (bicentennial ed. 1975) (illustrating increasing railroad passenger injuries and deaths between 1890 and 1914 followed by decline).

[38] WHITE, *supra* note 9, at 250.

[39] *Id.* at 249-50.

[40] In an 1873 decision the Supreme Court made it plain that the standard of common carrier liability for damages to passengers or property injured in the course of transit was "utmost care." *See* R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 377 (1873) ("In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties . . . ."). For additional evidence of the ubiquity of the "utmost care" standard of common carrier liability in late nineteenth-century state cases, see Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1155-62 (1990). For more detail on the history of the heightened standard for common carriers, see Joseph Henry Beale, Jr., *The History of the*

Facing an increasing number of railroad and streetcar accidents that could be shown to have been caused by some negligent conduct, railroad and streetcar companies initially responded with a legal tactic.[41] They created "boilerplate" language, typically included in tickets or bills of passage, in which passengers either waived their right to recover from the carrier for personal injury or damage to property in the course of transit or agreed to "indemnify" the carrier against any liability for such injury or damage.[42] Those tactics were challenged in nineteenth-century courts as against public policy.[43]

The basis of the challenge, although not expressed in such language, was that enforcing the waivers would encourage moral hazard.[44] If a common carrier could contract out of its liability to passengers for negligent conduct that injured them or damaged their property, it had reduced incentives to take all possible care to ensure the safety of its passengers or their property.[45] As the Supreme Court put it in an 1873 case, "a modification [of the utmost care standard for common carriers] which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants" was "altogether null and void; or, at least null and void under certain circumstances."[46] By the 1880s, then, railroad and streetcar companies had potentially substantial liability exposure for negligence in their operations and no obvious doctrinal way to forestall that exposure.[47] That potential then became a reality. In 1880 there had been 120 such actions in Boston,[48] 13 in Manhattan in 1870,[49] and 66 in three West Virginia counties between 1872 and 1880.[50] By 1900, however, there were 3,300 such actions in Boston[51] and 112 in Manhattan.[52] Between 1901 and 1910, there were 292 such actions in the same three West Virginia counties.[53]

Carrier's Liability, *in* 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 148, 148 (Comm. of the Ass'n of Am. L. Schs. ed., 1909). For an early Supreme Court case applying the "utmost care" standard where a stagecoach overturned because of its driver's error, seriously injuring a passenger, see *Stokes v. Saltonstall*, 38 U.S. (13 Pet.) 181, 190 (1839).

41 ABRAHAM, *supra* note 1, at 23.

42 *Id.* at 23-24.

43 *Id.* at 15-17.

44 *Id.* at 16.

45 *Id.*

46 R.R. Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 360, 384 (1873); *see also* Stinson v. N.Y. Cent. R.R. Co., 32 N.Y. 333, 337 (1865) (holding defendant company liable for negligently causing passenger's death).

47 ABRAHAM, *supra* note 1, at 35.

48 ROBERT A. SILVERMAN, LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900, at 113 (1981).

49 RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910, at 21 (1992).

50 Frank W. Munger, *Social Change and Tort Litigation: Industrialization, Accidents, and Trial Courts in Southern West Virginia, 1872 to 1940*, 36 BUFF. L. REV. 75, 82 (1987).

51 SILVERMAN, *supra* note 48, at 113.

52 BERGSTROM, *supra* note 49, at 21.

53 Munger, *supra* note 50, at 82.

A considerable portion of the defendants in those negligence actions were common carriers. In Boston, while there were barely more than a dozen bodily injury suits against "horsecars" in 1880, there were an estimated 1,400 bodily injury claims for negligent operation of a streetcar in 1900.[54] Approximately 41% of all bodily injury suits brought in Alameda County, California between 1901 and 1910 were against common carriers.[55] Twenty-five percent of all bodily injury suits filed in New York City in 1890 were against streetcar companies.[56]

2. Crystallization of the Modern System and the Removal of Workplace Liability from Tort

Thus, between 1890 and 1910 there was much more bodily injury litigation in some urban areas of the United States, and much more of it against common carriers, than there had been prior to this time.[57] To be sure, the populations of Alameda County, Boston, and Manhattan sharply increased in that time interval.[58] Alameda County's population quadrupled,[59] Boston's grew by almost 85%,[60] and between 1870 and 1910 the population of Manhattan went from 950,000 to 2,750,000.[61] That population growth provided more individuals to be exposed to accidents and to potentially file tort suits, including in response to the increasing number of automobile accidents.[62] It is no surprise, then, that a specialized plaintiffs' personal injury bar also emerged between 1880 and 1910, featuring the use of contingent fees and the "recruitment" of clients from relatively impecunious classes of injured persons.[63]

Although the number of workplace accidents sharply increased in the same time period, the number of suits did not keep pace.[64] The social costs of injuries suffered in those accidents began to penetrate public consciousness in the late nineteenth and early twentieth centuries. This resulted in commission studies

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[54] SILVERMAN, *supra* note 48, at 105.

[55] Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295, 303 tbl.6 (1990). Interestingly, the 40.8% from 1901-1910 represented a decrease from the prior period, as 62.6% of tort cases filed in Alameda County from 1880-1900 were against common carriers. *Id.* The decrease was offset by an increase to the shares of cases filed due to traffic and work injury. *Id.*

[56] BERGSTROM, *supra* note 49, at 21 tbl.5.

[57] ABRAHAM, *supra* note 1, at 34.

[58] *Id.*

[59] Friedman & Russell, *supra* note 55, at 295.

[60] BUREAU OF STAT., U.S. DEP'T OF COM. & LAB., STATISTICAL ABSTRACT OF THE UNITED STATES: 1910, at 50 tbl.23 (1911).

[61] BERGSTROM, *supra* note 49, at 33.

[62] *Id.*

[63] *See* WHITE, *supra* note 9, at 244-45.

[64] BERGSTROM, *supra* note 49, at 24.

documenting the dramatic increase in workplace injuries;[65] books highlighting the toll such injuries, when uncompensated, took on workers and their families;[66] and legislation modifying or abolishing the fellow-servant rule and the contributory negligence defense.[67]

Even with those modifications, tort law significantly underprotected the victims of workplace accidents in the late nineteenth and early twentieth centuries. There were three principal reasons for that phenomenon. First, the common law defenses to negligence suits against employers, despite being relaxed in some jurisdictions, combined with the social costs incurred by injured workers who sued their employers for workplace injuries to discourage many victims of workplace injuries from undertaking tort suits.[68] The very significant gap between work-related injuries in New York State[69] and tort suits for those injuries in New York City[70] in the first decade of the twentieth century provides evidence of that disincentive. Second, because so few tort suits were brought for negligently caused workplace injuries, employers had diminished incentives to make workplaces safer. Finally, there was little first-party insurance available to or purchased by employees that would adequately compensate them for workplace injuries.[71]

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[65] *See generally, e.g.*, COMM'N APPOINTED UNDER CHAPTER 518 OF THE L. OF 1909 TO INQUIRE INTO THE QUESTION OF EMPS.' LIAB. & OTHER MATTERS, REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK (1910) [hereinafter WAINWRIGHT COMMISSION REPORT] (examining rise of workplace injuries and making recommendations for reform of employers' liability).

[66] *See, e.g.*, CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW 120-21 (1910) (analyzing 235 cases of married individuals killed in workplace accidents). Eastman's 1910 study of industrial accidents in Pittsburgh found that in 222 cases where a working man had been killed in a workplace accident over a twelve-month period between 1906 and 1907, 164 dependent families received $500 or less for the deaths, 59 families recovered nothing, and only 8 families received more than $2,000. *Id.* at 121 tbl.16. Only forty-eight of the families thus received more than $500. *Id.* This was at a time when the weekly average wage for these workers was less than $15. *See id.* at 130.

[67] *See* ABRAHAM, *supra* note 1, at 52 (noting that by 1910, twenty-three states and Congress had enacted employers' liability acts abrogating or modifying traditional common law defenses to employers' negligence).

[68] *Id.* at 41-42.

[69] *See* WAINWRIGHT COMMISSION REPORT, *supra* note 65, at 5 (finding nearly 17,000 work-related injuries reported to the state in 1909).

[70] BERGSTROM, *supra* note 49, at 21 (identifying 160 work-related tort suits in 1910).

[71] For example, few employees purchased life insurance that would cover anything more than burial expenses. ABRAHAM, *supra* note 1, at 44. The average life insurance benefit in 1904 was $136. BUREAU OF STAT., U.S. DEP'T OF COM. & LAB., STATISTICAL ABSTRACT OF THE UNITED STATES: 1905, at 123 tbl.58 (1906) (reporting 15,674,384 industrial life insurance policies and $2,135,859,103 of insurance for those policies in force in 1904). There was no health insurance until the 1930s. *See* ABRAHAM, *supra* note 1, at 44-45. And cooperative societies of workingmen, which assessed their members when one of them was injured and needed medical expenses or support for lost wages, peaked around 1890 and disappeared

All of this culminated in what amounted to a nationwide decision to remove liability for workplace injuries from the tort system entirely. State by state, legislatures enacted workers' compensation, an administrative system under which employers were immunized from tort liability to their employees, but responsible for compensating employees for all injuries "arising out of or in the course of employment."[72] In one of the fastest-occurring liability reforms in history, between 1910 and 1920 forty-three states adopted workers' compensation.[73]

By roughly 1920, then, the ingredients of the modern tort liability system were in place. Liability in tort for workplace injuries, which had been one of the factors that brought the modern system into being, had been completely removed from the tort system and made the subject of workers' compensation. There was otherwise liability in negligence, however, for accidental bodily injury and property damage, subject to certain defenses and duty limitations.[74] Tort suits seeking damages for such harm were commonplace and increasing. The stage was set for what turned out to be fifty years of growth.

B. *The Growth of Liability for Accidental Injury*

Discussions of the development of tort liability generally have little to say about the four or five decades that followed. We think that this is largely because there was little doctrinal change between 1920 and 1960. Perhaps the major development was the 1916 decision *MacPherson v. Buick Motor Co.*,[75] which abrogated the privity rule that had insulated product manufacturers from liability for injuries caused by negligently manufactured products.[76] But retail sellers were already liable for such injuries; in some states they were essentially strictly liable.[77] Beyond *MacPherson*, one has to look hard to find decisions that could have had even a modest expansionary impact on the actual incidence of liability. The leading pro-liability decisions during this period were doctrinally significant, but that is all. For example, *Martin v. Herzog*,[78] *Summers v. Tice*,[79]

within the next two decades. *See generally* WITT, *supra* note 24, at 71-102 (describing history of cooperative insurance movement).

72 ABRAHAM, *supra* note 1, at 56.

73 *See id.* at 55.

74 WHITE, *supra* note 9, at 249.

75 111 N.E. 1050 (N.Y. 1916).

76 *Id.* at 1053.

77 *See* ABRAHAM, *supra* note 13, at 222.

78 126 N.E. 814, 815 (N.Y. 1920) (holding that unexcused violation of safety statute is negligence per se).

79 199 P.2d 1, 5 (Cal. 1948) (applying "alternative liability" to burden of proving causation).

The T.J. Hooper,[80] and *Ybarra v. Spangard*[81] are important cases in the tort law canon, but would have had little noticeable impact on the frequency of tort suits or the magnitude of tort payments. In fact, some of the most important decisions during this period actually restricted liability or confirmed existing limitations on liability.[82]

In conventional accounts of the emergence of modern tort liability, an "explosion" of tort claims is associated with the years following 1970.[83] Although few accounts of that "explosion" explicitly suggest that the fifty years preceding it were largely quiescent, the strong implication of the "explosion" literature is that nothing of importance was occurring in American tort law.[84] Only after strict products liability actually took hold around 1970, the adoption of comparative negligence in the 1970s, and the advent of mass tort suits in the late 1970s, the literature implies, did tort liability as we now know it take off.[85]

C. *New Evidence About the Expansion of Tort Liability, 1920-1970: Payouts*

The evidence we have uncovered directly contradicts this story. This evidence shows that the incidence of tort liability was increasing very substantially during the period, even without any impetus resulting from major doctrinal change. This growth is all the more striking in view of the fact that liability for a vast number of workplace injuries had just been removed from the jurisdiction of tort and therefore did not figure in this growth.[86] The first half of the twentieth century was not a period of quiescence in tort, followed by an explosion of liability. It was instead a period of exponential increases in tort payouts, masked by the absence of doctrinal change and the fact that liability was spread broadly rather than concentrated on a few industries or endeavors that might have sought tort protection or reform, as happened in the latter few decades of the century.

One of the reasons our evidence is seeing the light of day for the first time is that, as far as we can tell, there have been no studies of total tort payouts or expenditures during the first half of the twentieth century. The earliest start date

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[80] 60 F.2d 737, 740 (2d Cir. 1932) (noting that compliance with custom is not dispositive of negligence).

[81] 154 P.2d 687, 691 (Cal. 1944) (applying *res ipsa loquitur* to assign liability for patient's injury while in care of group of health care providers).

[82] *See, e.g.*, Balt. & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 69-70 (1927) (declaring decedent plaintiff's conduct unreasonable as matter of law); Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929) (holding that plaintiff assumed risk of injury when boarding amusement park ride); Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99-100 (N.Y. 1928) (holding that defendant owed no duty to wholly unforeseeable plaintiff).

[83] *See* TORT POL'Y WORKING GRP., *supra* note 7, at 2.

[84] *Id.*

[85] ABRAHAM, *supra* note 13, at 222.

[86] *See supra* text accompanying notes 72-73 (describing emergence of workers' compensation system).

we have been able to find in any study is 1950.[87] Consequently, we have made our own calculations.[88]

Those calculations are based on payouts made by general liability insurance and auto liability insurance, looking at the first or second year of each decade (depending on the years for which data is available), beginning in 1920 and 1921.[89] As we describe further in Part II, general liability insurance—liability insurance covering businesses against liability for bodily injury and property damage—is what we now call commercial general liability ("CGL") insurance.[90] It covers slip and falls, explosions, negligent maintenance of property, products liability, and the like, but excludes auto liability. Auto liability insurance has always resembled today's auto liability insurance policies.

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[87] *See* TOWERS WATSON, U.S. TORT COST TRENDS: 2011 UPDATE 5 (2011) (presenting tort costs from 1950 to 2010). For the sole study we have found that relies on earlier data, see Robert W. Sturgis, Tillinghast, Nelson & Warren, Inc., The Cost of the U.S. Tort System: An Address to the American Insurance Association 205 app. 2 (Nov. 14, 1985) (calculating "total cost" of tort system, including insurance company expenses and self-insurance, as $388 million in 1930 and $13.2 billion in 1970).

[88] We note that our calculations are generally consistent with and complement the work of other scholars. *See generally, e.g.*, JAMES S. KAKALIK & NICHOLAS M. PACE, RAND INST. FOR CIV. JUST., COSTS AND COMPENSATION PAID IN TORT LITIGATION (1986) (examining 1985 expenditures for tort litigation); Tom Baker, *The Shifting Terrain of Risk and Uncertainty on the Liability Insurance Field*, J. FIN. PERSPS., Nov. 2013, at 1 (comparing increases in property and liability insurance premiums between 1939 and 2011 and concluding increases were comparable to first half of twentieth century).

[89] *See infra* Tables 1 (general liability), 2 (auto liability). In contrast, medical malpractice payouts are so small in absolute dollars that we do not include them in our calculations. Between 1960 and 1970 medical malpractice losses incurred increased substantially, from $51 million to $199 million. Mark Kendall & John Haldi, *The Medical Malpractice Insurance Market*, *in* REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE app. at 494, 511 tbl.III-9 (Comm'n on Med. Malpractice ed., 1973). However, even today, medical malpractice insurance payouts on behalf of physicians total only $4.5 billion. NAT'L ASS'N OF INS. COMM'RS, COUNTRYWIDE SUMMARY OF MEDICAL PROFESSIONAL LIABILITY INSURANCE: CALENDAR YEARS 2004-2018, at 1 (2019), https://www.naic.org/documents/research_stats_medical_malpractice.pdf?47 [https://perma.cc/WV98-VCND] (recording $4.5 billion in losses incurred in 2018). For extended discussion of the "exaggeration, half truth, and outright misinformation" associated with debate about medical malpractice liability, see TOM BAKER, THE MEDICAL MALPRACTICE MYTH 1 (2005).

[90] *See* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION 465-82 (7th ed. 2020). Separate products liability insurance previously provided coverage so small that an industry record-keeper did not even begin to list it separately until 2003, at which point the premiums paid for this coverage were less than 10% of what had been paid for CGL insurance. A.M. BEST CO., *BEST'S* AGGREGATES & AVERAGES: PROPERTY/CASUALTY 357 (2003) [hereinafter *BEST'S* AGGREGATES & AVERAGES: 2003]. In addition, a form of coverage known as commercial multiple-peril insurance, which included a small liability insurance component, also potentially, but we think rarely, covered products liability. *See* TORT POL'Y WORKING GRP., *supra* note 7, at 19. For example, not one of the dozens of non-auto cases cited in the Appendix, *infra*, involves either of these forms of coverage.

1. General Liability Insurance Payouts

Table 1 displays the tort payouts made by general liability insurance from 1921 to 2017.

Table 1. General Liability Insurance Loss Payouts.

Year	Losses Paid	Percentage Increase over Previous
1921	$14.4 million[91]	—
1931	$27.8 million[92]	92.5
1941	$34.1 million[93]	22.6
1951	$181 million[94]	431.0
1961	$511 million[95]	182.6
1971	$1.19 billion[96]	132.8
1981	$3.69 billion[97]	210.2
1990	$10.0 billion[98]	170.9
2001	$14.0 billion[99]	39.6
2011	$22.5 billion[100]	61.0
2017	$34.9 billion[101]	55.2

† We calculated percentage increase based on raw, unrounded data for losses paid. We display the rounded data here.

The increase in losses paid over the entire period is obviously enormous, since the progression begins at a level of de minimis payouts ($14.4 million in 1921)

[91] BUREAU OF FOREIGN & DOMESTIC COM., U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1923, at 677 tbl.600 (1924) [hereinafter STATISTICAL ABSTRACT: 1923].

[92] BUREAU OF FOREIGN & DOMESTIC COM., U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1933, at 272 tbl.292 (1933) [hereinafter STATISTICAL ABSTRACT: 1933] (demonstrating premiums and losses by class of insurance).

[93] BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1943, at 370 tbl.399 (1944) [hereinafter STATISTICAL ABSTRACT: 1943]. Because this year's figure includes loss adjustment expenses, it is modestly overstated as compared to the figures reported for the other years in this Table.

[94] INS. INFO. INST., INSURANCE FACTS 16 (1975). Because this source reports only total premiums written ($362 million), we have discounted this figure by 50% to account for expenses and profits. The three sources cited *supra* notes 91-93 provide information about liability insurers' expenses that supports using this as an appropriate approximate discount factor. *See also infra* notes 98-99 (reporting analogous percentages of 55.2 and 77.3 for later years). Therefore, using a 50% discount is conservative because it understates the percentage of the liability insurance premium dollar that was actually paid to victims for their losses.

[95] *Id.* This estimate was made using the same method described *supra* note 94.

[96] BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1973, at 467 tbl.751 (1973) [hereinafter STATISTICAL ABSTRACT: 1973] (reporting

and ends at nearly $35 billion. What are important for our purposes, however, are the comparative rates of increase between 1921 and 1971, and between 1971 and 2017. And what the data show contradicts the received wisdom.

During the years 1921 to 1971, general liability insurance payouts increased 8,147%. This is direct evidence of a dramatic increase in the scope of tort liability during these decades, before the "explosion" of tort liability in the 1970s that the conventional story identifies. No doubt a portion of the increase is attributable to growth in the underlying activities that generated accidents resulting in tort liability for American businesses, rather than to something intrinsic to the tort and liability insurance systems. But that is part of the point. With significantly more economic activity came significantly more tort liability. More than economic growth fueled tort liability growth, however. The gross domestic product, a measure of economic activity, increased 1,426% during this period,[102] far less than the more than 8,000% increase in tort payouts. Something else was going on in the tort system itself.

However, the 8,147% increase is measured in nominal rather than real dollars. The rate of inflation between 1921 and 1971 was 126.3%.[103] Discounting the 1971 payout of $1.19 billion by the rate of inflation yields an adjusted increase

$2.38 billion premiums paid on "[l]iability, other than auto" policies). This estimate was made using the same method described *supra* note 94.

[97] BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, at 523 tbl.871 (1982) [hereinafter STATISTICAL ABSTRACT: 1982] (reporting $7.39 billion premiums paid on "[l]iability, other than auto" policies). This estimate was made using the same method described *supra* note 94.

[98] A.M. BEST CO., *BEST'S* AGGREGATES & AVERAGES: PROPERTY-CASUALTY 265 (1999) [hereinafter *BEST'S* AGGREGATES & AVERAGES: 1999]. This figure was calculated by applying the ratio of losses incurred (55.2) to the total net premiums written for the year ($18.1 billion) in the "Other Liability" category. *See id.*

[99] *BEST'S* AGGREGATES & AVERAGES: 2003, *supra* note 90, at 357. This figure was calculated by applying the ratio of losses incurred (70.3) to the total net premiums written for the year ($19.9 billion) in the "Other Liability" category. *See id.*

[100] A.M. BEST CO., *BEST'S* AGGREGATES & AVERAGES: PROPERTY-CASUALTY 382 (2018) [hereinafter *BEST'S* AGGREGATES & AVERAGES: 2018]. This figure was calculated by performing the same exercise described *supra* note 99, separately for Occurrence (loss ratio of 45.4 applied to written premiums of $28.5 billion) and for Claims-Made liability insurance (loss ratio of 52.1 applied to written premiums of $18.3 billion) and then summing the two figures ($12.96 and $9.5 billion, respectively). *See id.*

[101] *Id.* This figure was calculated by performing the same exercise described *supra* note 99, separately for Occurrence (loss ratio of 56.1 applied to written premiums of $43.3 billion) and for Claims-Made liability insurance (loss ratio of 48.9 applied to written premiums of $21.7 billion) and then summing the two figures ($24.3 and $10.6 billion, respectively). *See id.*

[102] *See* 3 HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT 3-23 tbl.Ca9-19 (Susan B. Carter et al. eds., Millennial ed. 2006) (reporting approximately $74 billion GDP in 1921 and $1.129 trillion GDP in 1971, measured in nominal dollars).

[103] *See* US INFLATION CALCULATOR, https://www.usinflationcalculator.com/ [https://perma.cc/CX2K-J6PT] (last visited Sept. 1, 2021).

in tort payouts between 1921 and 1971 of about $512 million in real dollars (from $14.4 million in 1921 to about $526 million in 1971 in real dollars, rather than $1.19 billion nominal dollars). This is an increase in real dollars of about 3,544%. This is still a very substantial increase, reflecting the increased scope of tort liability during this period.

A similar exercise can be applied to the increase in payouts between 1971 and 2017, which is nominally 2,832%. The rate of inflation between 1971 and 2017, however, was 505.2%.[104] Discounting the 2017 nominal payout of $34.9 billion by the rate of inflation yields an adjusted increase in tort payouts of $4.6 billion in real dollars (from $1.19 billion in 1971 to $5.77 billion in 2017), or 385%.[105]

Thus, using nominal dollars, the increase in tort payouts by general liability insurance between 1921 and 1971 was over 8,000%, and the increase between 1971 and 2017 was nearly 3,000%. By this measure, tort payouts increased more than twice as much during the former period as during the latter period. Comparing real dollars, the increases were 3,500% in the former period, and 385% in the latter period. By this measure, the percentage increase in general liability insurance payouts was more than nine times as great in the former period as in the latter period.

In making these comparisons, we do not mean to suggest that there were not important changes in the landscape of tort liability in the 1970s and 1980s; there were. For example, in the late 1970s and 1980s, mass tort litigation involving asbestos, DES, the Dalkon Shield, and other mass torts first appeared.[106] The liabilities generated by these new kinds of suits are undoubtedly part of what accounts for the continued, substantial increases in general liability insurance payouts during that period. Interestingly, however, those who contended in the mid-1980s that these and similar liabilities reflected an "explosion of tort liability"[107] generally did not support their contentions with data on payouts themselves, but with data on increases in the number of suits that had recently been filed[108] and with data on what turned out to be steep but short-term increases in general liability insurance premiums.[109] The liability insurance markets soon quieted down, and in retrospect there was only a steady (if choppy) increase in products liability payouts over roughly the period from 1980 to

104 *See id.*

105 The calculation was made using *Convert Current to Real US Dollars*, AREPPIM, https://stats.areppim.com/calc/calc_usdlrxdeflator.php [https://perma.cc/TFG3-DBSM] (last visited Sept. 1, 2021). The GDP increased 1,269% between 1921 and 1971 and 1,453% between 1971 and 2017. Discounting for the difference in inflation rates during the two periods of 126.3% and 505.2%, respectively, *see* US INFLATION CALCULATOR, *supra* note 103, GDP grew about four times as much during the latter period, which suggests that this factor alone should have caused tort payouts to increase at a greater rate during the latter period. *See id.*

106 *See* ABRAHAM, *supra* note 1, at 178.

107 *See, e.g.*, TORT POL'Y WORKING GRP., *supra* note 7, at 2.

108 *See, e.g.*, *id.* at 45-47.

109 *See, e.g.*, *id.* at 7-13.

1990.[110] In addition, there can be little question that general liability insurance payments for the cost of environmental cleanup liability under the federal Comprehensive Environmental, Response, Compensation and Liability Act of 1980[111] ("CERCLA" or "Superfund Act"), which was not (and is not) tort liability at all, played a role in the payout increases.[112] A decades-long view, then, shows that tort payouts increased continuously both before and after 1970.

2. Auto Liability Insurance Payouts

The same exercise produces similar, though even more dramatic, results for auto insurance payouts.

[110] *See* U.S. GEN. ACCT. OFF., GAO/HRD-91-108, REPORT TO THE HONORABLE FRANK HORTON, HOUSE OF REPRESENTATIVES: PRODUCT LIABILITY: INSURANCE RATE LEVELS AND CLAIM PAYMENTS DURING THE 1970S AND 1980S 3 (1991). This document refers to "products liability" insurance, but we infer that it is referring to CGL insurance, inasmuch as separate products liability insurance was not as significant as general liability insurance. *See supra* note 90 (discussing early products liability insurance). Regardless, however, there is no reason to think that the data reported in this document is unrepresentative.

[111] 42 U.S.C. §§ 9601-9675. CERCLA is directed at cleanup, or "remediation," of sites where hazardous substances (most often waste) pose an environmental health hazard. *See* §§ 9608, 9611.

[112] Under CERCLA, any party who had been associated with a site as an owner, operator, or generator of waste deposited there was subject to a rigorous regime of retroactive, strict, and joint and several liability for the cost of environmental cleanup. § 9607. Cleanup costs at a major site can be enormous; as of 1989, the average cost to remedy hazardous conditions at a site was $30 million. Kenneth S. Abraham, *Cleaning Up the Environmental Insurance Mess*, 27 VAL. U. L. REV. 601, 603 (1993) (citing U.S. GEN. ACCT. OFF., GAO/RCED-90-22, SUPERFUND: A MORE VIGOROUS AND BETTER MANAGED PROGRAM IS NEEDED 2 (1989)).

Table 2. Auto Liability Loss Payouts.

Year	Losses Paid	Percentage Increase over Previous
1921	$29.9 million[113]	—
1931	$122.9 million[114]	310.9
1941	$118.4 million[115]	-3.65
1950	$627 million[116]	429.6
1961	$2.4 billion[117]	290.6
1970	$7.5 billion[118]	208.2
1981	$12.2 billion[119]	61.6
1990	$47.4 billion[120]	288.4
2001	$66.3 billion[121]	40.0
2011	$82.7 billion[122]	24.6
2017	$117.2 billion[123]	41.8

† We calculated percentage increase based on raw, unrounded data for losses paid. We display the rounded data here.

113 STATISTICAL ABSTRACT: 1923, *supra* note 91, at 677 tbl.600.

114 STATISTICAL ABSTRACT: 1933, *supra* note 92, at 272 tbl.292.

115 STATISTICAL ABSTRACT: 1943, *supra* note 93, at 370 tbl.399. Because this year's figure includes loss adjustment expenses, it is modestly overstated as compared to the figures reported for the other years in this Table, with the exception of 1970. *See infra* note 118.

116 BUREAU OF THE CENSUS, U.S. DEP'T OF COM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1963, at 570 tbl.774 (1963) [hereinafter STATISTICAL ABSTRACT: 1963] (reporting $396 million in bodily injury-related losses and $231 million in property damage losses).

117 *Id.* (reporting $1.74 billion in bodily injury-related losses and $705 million in property damage losses).

118 STATISTICAL ABSTRACT: 1973, *supra* note 96, at 551 tbl.911 (reporting $5.3 billion in bodily injury-related losses and $2.3 billion in property damage losses). Because this year's figure includes loss adjustment expenses, it is modestly overstated as compared to the figures report for the other years in this Table, with the exception of 1941. *See supra* note 115.

119 STATISTICAL ABSTRACT: 1982, *supra* note 97, at 523 tbl.871. Because this source reports only total premiums written, we have discounted this figure by 50% to account for expenses and profits. *See id.* (reporting $24.4 billion in auto liability premiums written).

120 *BEST'S* AGGREGATES & AVERAGES: 1999, *supra* note 98, at 266. This figure was calculated by applying the ratio of losses incurred to the total net premiums written for the year in the Private Passenger Auto (81.0 and $47.8 billion) and Commercial Auto Liability (70.7 and $12.2 billion) categories, and then summing the two figures ($38.7 and $8.6 billion, respectively). *See id.*

121 *BEST'S* AGGREGATES & AVERAGES: 2003, *supra* note 90, at 360. This figure was calculated by applying the ratio of losses incurred to the total net premiums written for the year in the Private Passenger Auto (73.2 and $74.4 billion) and Commercial Auto Liability (77.6 and $15.3 billion) categories, and then summing the two figures ($54.5 and $11.8 billion, respectively). *See id.*

Payouts for auto losses increased over 25,000% between 1921 and 1970. But this increase is measured in nominal dollars. Inflation during this period was 116.8%.[124] Consequently, in real dollars the increase was about 11,500%. As with general liability insurance payouts, which were probably heavily influenced by an increase in economic activity, another very important factor influenced the growth in auto payouts. The number of registered motor vehicles increased by over 1,000%, from 9.2 million in 1920[125] to 108.3 million in 1970.[126] Undoubtedly, the increased number of vehicles on the road led to an increased number of accidents.[127]

But as with general liability insurance payouts, this is part of the point. With significantly more cars on the road came significantly more accidents and tort liability.[128] Automobiles had evolved from specialized items operated by a small number of "daredevils" to a mass-produced industry whose price structure made motor cars affordable to the average family.[129] But the fact that autos were mass produced and comparatively cheap did not make them any less risky. The early twentieth-century infrastructure of American cities and roads contributed to the risky state of automobiles. Automobiles had to coexist with streetcars, horse-drawn vehicles, and pedestrians in cities, often without speed limits.[130] They were often driven on unlighted, narrow roads made of hazardous surfaces and lacking traffic signals and posted speeds.[131] Their safety features were rudimentary, often featuring non-shatter-resistant glass[132] as well as headlights that created dangerous glare.[133] The result, in the period from 1920 to 1970, was a significant increase in the number of Americans who suffered physical injury

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[122] *Best's* Aggregates & Averages: 2018, *supra* note 100, at 383. This figure was calculated by applying the ratio of losses incurred (67.6) to the total net premiums written for the year ($122.3 billion). *See id.*

[123] *Id.* This figure was calculated by applying the ratio of losses incurred (70.6) to the total net premiums written for the year ($166.1 billion). *See id.*

[124] US Inflation Calculator, *supra* note 103.

[125] Statistical Abstract: 1923, *supra* note 91, at 379 tbl.401.

[126] Statistical Abstract: 1973, *supra* note 96, at 548 tbl.902.

[127] *See* Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941*, 4 Conn. Ins. L.J. 521, 530 (1998).

[128] *Id.* at 525.

[129] *Id.* at 531-32.

[130] *See id.* at 526.

[131] *See id.*

[132] Joel W. Eastman, Styling vs. Safety: The American Automobile Industry and the Development of Automotive Safety, 1900-1966, at 177-78 (1984).

[133] *Id.* at 9-10.

in an automobile accident,[134] in many instances because of another driver's negligence.

It seems unlikely, however, that a 1,000% increase in the number of registered vehicles during this period can entirely explain the 11,500% increase in payouts. For example, the number of auto-related fatalities rose from 13,900 in 1921 to 54,381 in 1971,[135] an increase of only 291%. Something new was also going on in the tort and liability insurance systems, as we will explain in Part II.

A comparison to the period from 1970 to 2017 is also telling. Auto payouts increased 1,453% during this period in nominal dollars. Inflation during this period was 531.8%.[136] Consequently, the increase in payouts in real dollars was about 145.9% (from $7.5 billion to about $18.6 billion in real dollars).

Thus, using nominal dollars, the increase in tort payouts by auto liability insurance between 1921 and 1971 was over 25,000%, and the increase between 1971 and 2017 was nearly 1,500%. By this measure, the percentage increase in tort payouts by auto insurers was seventeen times as great during the former period as during the latter period. Comparing real dollars, the increases were 11,500% in the former period, and 145.9% in the latter period. By this measure, the percentage increase in auto liability insurance payouts was nearly eighty times as great in the former period as in the latter period.

3. Summary and Context: A Very Different Picture

Even an enormous percentage increase from a small number can result in what amounts to a still-small number. The payouts for general liability and auto insurance in 1920 and 1921 were so small that of course a comparison to payouts in 1970 and 1971 is dramatic. But the increases between 1950 and 1971 also were significant.[137] General liability insurance payouts increased 558% during this period in nominal dollars and auto insurance payouts increased 1,104%. The cumulative rate of inflation was 61.0% between 1950 and 1970, and 55.8% between 1951 and 1971.[138] By these measures, the percentage increases in tort payouts in real dollars during the twenty-one-year period between 1950 and

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[134] *See Car Crash Deaths and Rates*, NAT'L SAFETY COUNCIL: INJURY FACTS, https://injuryfacts.nsc.org/motor-vehicle/historical-fatality-trends/deaths-and-rates/ [https://perma.cc/35R3-K6PB] (last visited Sept. 1, 2021) (reporting 12,500 motor vehicle fatalities in 1920 and 54,633 in 1970).

[135] *Id.*

[136] US INFLATION CALCULATOR, *supra* note 103.

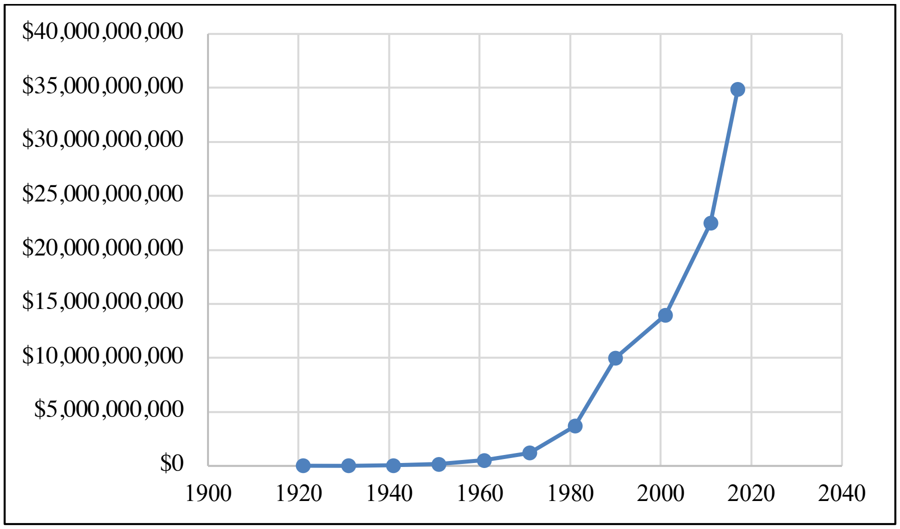
[137] *See supra* Table 1 (reporting $181 million in losses in 1951 and $1.19 billion in losses in 1971); *supra* Table 2 (reporting $627 million in losses in 1950 and $7.5 billion in losses in 1970).

[138] *See* US INFLATION CALCULATOR, *supra* note 103.

1971[139] and the forty-seven-year period between 1970 and 2017[140] were of about the same order of magnitude—generally several hundred percent.

Moreover, the graphic depiction of tort costs in encapsulated form sometimes employed[141] has the effect of overemphasizing post-1970 developments because of the need to depict both millions and billions of dollars on the same graph. Compare the data depicted below in Figures 1 and 2. Figure 1 shows increases in general liability insurance payouts in dollars.

Figure 1. General Liability Insurance Loss Payouts.



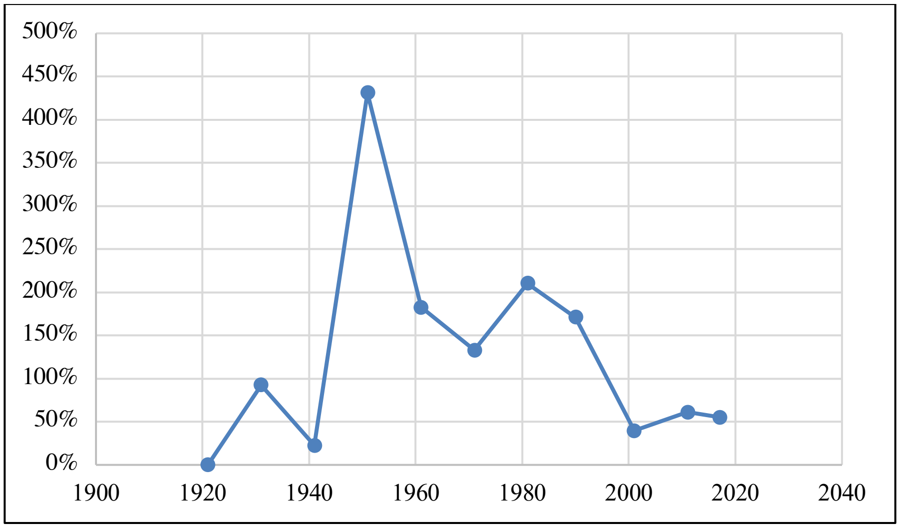
Depicting the data in this manner renders the significant increases in the period from 1920 to 1970 almost visually undetectable. This is evident if we instead depict percentage increases during the same period.

139 The increase in general liability insurance payouts for this period in real dollars is 322%. The increase in auto liability insurance payouts for this period in real dollars is 648%.

140 The increase in general liability insurance payouts for this period in real dollars is 385%. *See* text accompanying *supra* note 105. The increase in auto liability insurance payouts for this period in real dollars is 145.9%. *See* text accompanying *supra* note 136.

141 *See, e.g.*, TOWERS WATSON, *supra* note 87, at 5.

Figure 2. Percentage Increases in General Liability Insurance Loss Payouts



This method of presenting the data uncovers what Figure 1 camouflages—the very substantial increases in payouts that occurred prior to 1970.

Additional adjustments to our calculations could undoubtedly be made by introducing more-refined econometric considerations. For example, general liability insurance payouts do not capture the universe of payouts, because some business enterprises would have paid all or part of their tort liabilities themselves due to self-insurance. But it seems unlikely that this omitted self-insurance component—for which we have found no data, but which one pro-tort-reform source has long estimated at about 2% for personal lines of insurance and varying amounts for commercial lines of insurance[142]—would have influenced our conclusions in a major way. And in any event, that would not be the case for auto insurance payouts, since most uninsured drivers likely would have had no means of making payments to those to whom they were liable in tort. Auto insurance payouts therefore must constitute far more than 90% of all auto liability payouts.

There is one measure by which the increases between 1970 and 2017 were greater than between 1921 and 1971. Both general liability and auto insurance payouts as a percentage of GDP increased over both periods, but at a greater rate between 1970 and 2017.[143] However, tort payouts during each period always

[142] *See id.* at 16.

[143] For example, combined payouts for general liability in 1951 and auto insurance in 1950 totaled \$808 million. *See supra* Tables 1 (general liability insurance), 2 (auto insurance). This constituted 0.24% of the \$339.5 billion GDP in 1951. *See* 3 HISTORICAL STATISTICS OF THE UNITED STATES: EARLIEST TIMES TO THE PRESENT, *supra* note 102, at 3-23 tbl.Ca9-19. In 1961,

remained considerably under 1% of GDP, except in 1990, when they peaked at 1% and then began to decline.[144] It is not plausible that the attention paid to the "explosion" of tort liability after 1970 has been due to the fact that the tiny percentage of GDP represented by tort payouts was increasing to a larger, but still tiny, percentage of the economy after 1970.

Finally, it might be contended that proponents of the notion that there was an "explosion" in tort liability after 1970 have focused mainly on the specific areas of products liability and toxic torts, and that including auto liability in our analysis is therefore distorting. But that is not how the post-1970 period is typically described. The characterizations, either by academics who have no obvious axe to grind or by partisans, are almost always in reference to "tort liability" or "tort litigation" generally.[145]

In summary, we believe we have demonstrated two things. First, the magnitude of tort liability payouts between 1920 and 1970 increased substantially. Contrary to conventional wisdom, or at least implied conventional wisdom, this was not a period of quiescence in the tort system. On the contrary, there was an active, growing, and increasingly important tort system operating during this period. Second, when compared to the period between 1970 and 2017, the increases in the former period—at least as measured by percentages—were at least as substantial as those in the latter period. At the very least, even if there are concerns about our interpretation of the data, we have demonstrated that tort payouts grew at a significant rate throughout the entire period between 1920 and 2017, not merely after 1970.

This brings us to liability insurance. It is worth emphasizing that the data we have presented thus far reflect only tort payouts—payments to victims—and do not include other costs incurred by the tort system, which include insurance companies' costs of defending their policyholders in tort actions and other liability insurance company expenses. Increases in those costs are reflected in increases in liability insurance premiums.[146] To account for these additional factors, we next present data on liability insurance premiums and premium increases over time, and analyze the ways in which the existence of liability insurance influenced the actual operation of the tort system.

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the figure was 0.54%; in 1970-71, 0.77%; in 1981, 0.51%; in 1990, 0.99%; in 2001, 0.80%. *See id.* (recording GDP of $5.5 trillion in 1961, $1.1 trillion in 1971, $3.1 trillion in 1981, $5.8 trillion in 1990, and $10 trillion in 2001); *supra* Tables 1, 2. In 2011, the figure was 0.68%, and in 2017 it was 0.78%. *See* Kimberly Amadeo, *US GDP by Year Compared to Recessions and Events*, THE BALANCE (Apr. 28, 2021), https://www.thebalance.com/us-gdp-by-year-3305543 [https://perma.cc/VX2W-D6JA] (recording GDP of $15.5 trillion in 2011 and $19.5 trillion in 2017); *supra* Tables 1, 2.

144 *See supra* note 143.

145 *See, e.g.*, *supra* notes 7, 14. *But see, e.g.*, AM. L. INST., *supra* note 14, at 9 (distinguishing "routine" from other forms of tort litigation); DEBORAH R. HENSLER, MARY E. VAIANA, JAMES S. KAKALIK & MARK A. PETERSON, RAND INST. FOR CIV. JUST., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 3 (1987) (same).

146 *See infra* Part II (analyzing rise of insurance industry).

II. THE DYNAMIC INTERACTION BETWEEN LIABILITY INSURANCE AND TORT LAW

In this Part, we discuss the introduction of liability insurance late in the nineteenth century and analyze the operation of two duties that liability insurance policies, and the courts interpreting them, imposed on liability insurers: the duty to defend and the duty to settle. We contend that those duties had the important effect of reinforcing and fueling the growth of tort liability that we documented in Part I. We then present data demonstrating that liability insurance grew exponentially during the same period that tort liability grew. Finally, we address the paradoxical, continuing decision of liability insurers to never modify their duties to defend and settle, even though doing so would limit their liability. There are a number of explanations for this paradox, but the most important explanation, in our view, is related to the political economy of the interaction between tort liability and liability insurance.

A. *The Introduction and Validation of Liability Insurance*

Insurance existed in the United States from the eighteenth century on, principally in the form of fire insurance on buildings, marine insurance covering losses of ships and cargo at sea, and life insurance.[147] One of the central challenges for insurance, then and now, is moral hazard—the tendency, other things being equal, of insured parties to exercise less care to protect the insured subject matter than would be exercised if the subject matter were not insured.[148] Certain practices and legal rules developed in fire, life, and marine insurance that attempted to combat moral hazard.[149] Insurance was not available when the insured intentionally caused damage to occur.[150] Insurers sometimes declined to insure policyholders for the full value of their persons or property so that insureds would retain incentives to avoid losses to either.[151] And insurance would not be issued, or if issued would be invalid, unless the insured had an "insurable interest" in the subject matter being insured—a greater interest in having the subject matter preserved than destroyed or damaged.[152]

1. Judicial Concern with Insurance of Negligence

In fact, because of the concern about moral hazard, it took time for courts to conclude that losses caused by the negligence of parties who had taken out fire or marine insurance were covered under those policies.[153] It was plain that losses

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[147] ABRAHAM & SCHWARCZ, *supra* note 90, at 1.

[148] *See id.* at 8.

[149] *Id.* at 8-9.

[150] ABRAHAM, *supra* note 1, at 16.

[151] *Id.*

[152] *See id.* at 16-17.

[153] *See id.* at 20-21 (citing WILLARD PHILLIPS, A TREATISE ON THE LAW OF INSURANCE 158 (1823)).

caused by policyholders' intentional wrongdoings were not covered, but moral hazard seemed to be hovering over negligently caused losses as well. In both fire and marine insurance cases in the early nineteenth century, the defense of "barratry" to a claim for coverage was permitted where the losses that an insured had sustained were the product of the insured's own negligence.[154] But only a few decades later, the barratry defense was not always permitted for these same losses.[155] The decisions were not openly grounded in a public policy of encouraging parties engaged in risky ventures to spread the risks between themselves and insurance companies, nor in encouraging compensation for losses accompanying such ventures. Yet, the decisions implied that losses caused by negligence were insurable.[156]

If liability insurance had existed during the first three quarters of the nineteenth century, the question of whether it was permissible to insure against liability for losses caused by negligence would have been a matter of concern for liability insurance as well. But there was no liability insurance during this period.[157] For example, in *Ryan v. New York Central Railroad Co.*,[158] a case featured prominently in many torts casebooks,[159] a nearby property owner sued a railroad for negligently damaging his property by fire resulting from sparks emitted from a locomotive.[160] The decision is often understood to be about a proximate cause issue.[161] But the opinion also recognized that there was no such thing as insurance against that form of liability, and implied that such insurance would be invalid:

> A man may insure his own house, or his own furniture, but he cannot insure his neighbor's building or furniture, for the reason that he has no interest in them. To hold that . . . he must guaranty the security of his neighbors on both sides, and to an unlimited extent, would be to create a liability which would be the destruction of all civilized society.[162]

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154 For more detail on the barratry defense, see *id.* at 21-22. For early nineteenth-century illustrations of courts employing the barratry defense where losses related to the "peril[s] of the sea" or fire were caused by the insured's negligence, see, respectively, *Cleveland v. Union Insurance Co.*, 8 Mass. (8 Tyng) 308, 321-22 (1811); and *Grim v. Phoenix Insurance Co.*, 13 Johns. 451, 457 (N.Y. Sup. Ct. 1816).

155 *See, e.g.*, Gen. Mut. Ins. Co. v. Sherwood, 55 U.S. (14 How.) 351, 364 (1853); Waters v. Merchs.' Louisville Ins. Co., 36 U.S. (11 Pet.) 213, 217 (1837).

156 *See, e.g.*, *Gen. Mut. Ins. Co.*, 55 U.S. (14 How.) at 364; *Waters*, 36 U.S. (11 Pet.) at 217.

157 ABRAHAM, *supra* note 1, at 20.

158 35 N.Y. 210 (1866).

159 *See, e.g.*, EPSTEIN & SHARKEY, *supra* note 14, at 403-04; MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN & MARK A. GEISTFELD, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 433 (10th ed. 2016).

160 *Ryan*, 35 N.Y. at 210.

161 *See, e.g.*, EPSTEIN & SHARKEY, *supra* note 14, at 403.

162 *Ryan*, 35 N.Y. at 216-17.

But the issue was at this point still moot. As one of us previously explained, "[i]n one sense the absence of liability insurance until late in the nineteenth century is no puzzle at all. Until then there was no substantial need for it" because there were "not enough economically significant potential defendants with substantial liability exposure to create a demand for liability insurance."[163] As we saw earlier, however, by the 1880s there were enough economically significant defendants to create demand for liability insurance: factory and mine owners, railroads, and streetcar companies, among others.[164] They all faced potential tort liability to their employees and to members of the public.

2. The Validation of Liability Insurance

At this point, the fields of tort law and insurance began to converge for the first time. In response to the expanded liability of employers, which also occurred in England, the Employers' Liability Assurance Corporation was founded in England and in 1886 opened an office in Boston.[165] Meanwhile, textile manufacturers in the Boston area decided to form the American Mutual Liability Insurance Company to issue liability insurance policies.[166] This type of coverage was called employers' liability insurance.[167] When the Massachusetts legislature passed a statute in 1887 abrogating some of the traditional defenses available to employers in tort suits,[168] demand for liability insurance in the state increased.[169]

The validity of liability insurance, however, was still open to question. Some courts had held that insuring against losses caused by negligence was permissible, but others had taken the opposite view.[170] The main form of liability against which employers' liability insurance policies insured was of course exactly that: liability for negligence.[171] Interestingly, a strong signal came from the Supreme Court in a case that involved marine insurance.

Phoenix Insurance Co. v. Erie & Western Transportation Co.[172] involved a liability waiver by a ship owner (the "common carrier") and the transfer of the benefit of the shippers' insurance to the common carrier.[173] When a loss

[163] *See* ABRAHAM, *supra* note 1, at 19-20.

[164] *See* WITT, *supra* note 24, at 26-30.

[165] ABRAHAM, *supra* note 1, at 28.

[166] *Id.*

[167] *Id.*

[168] An Act to Extend and Regulate the Liability of Employers to Make compensation for personal injuries suffered by employees in their service, ch. 270, 1887 Mass. Acts 899.

[169] For more detail on the connection between English and American statutes extending employers' liability and the emergence of liability insurance companies in England and Massachusetts in the late 1880s, see ABRAHAM, *supra* note 1, at 27-28.

[170] *See supra* notes 154-56 and accompanying text (describing rise and fall of barratry defense).

[171] *See* ABRAHAM, *supra* note 1, at 28-29.

[172] 117 U.S. 312 (1886).

[173] *Id.* at 320.

occurred, the insurer argued in part that the transfer was invalid because it amounted to insurance for property damaged by the common carrier's own negligence.[174] The Court acknowledged that an attempt by the common carrier to completely exempt itself from liability for losses caused by its own negligence would be invalid as against public policy.[175] However, in language that had strong implications for liability insurance, the Court rejected the insurer's argument and held that the transaction was valid.[176] "As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils," the Court declared, "he may lawfully stipulate with the owner [of the goods] to be allowed the benefit of insurance voluntarily obtained by the [owner]."[177] "By obtaining insurance," the Court indicated, the carrier "does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility."[178]

The fact that the "responsibility" in question was for negligence did not invalidate the means of meeting it. The *Phoenix* decision stopped short of declaring liability insurance valid, although its "means of meeting responsibilities" language implied that where enterprises such as common carriers faced regular exposure to tort liability, increasing their capacity to compensate victims by spreading the risk of responsibility for damages trumped moral hazard concerns that might result from decreased incentives for insureds to act safely.[179]

Common carriers and other potential defendants increasingly sought to take out liability insurance after *Phoenix*, and challenges in the courts to liability insurance eventually appeared.[180] Despite the moral hazard involved in liability insurance, courts upheld its validity, frequently citing *Phoenix* in support.[181] One opinion in 1909 summarized the now-rejected objections to liability insurance.[182] The principal objection, the court maintained, was the reduced incentives to act safely on the part of insureds.[183] "[W]hen a carrier knows," the

174 *Id.* at 318.

175 *Id.* at 322.

176 *Id.* at 323-24 ("No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants.").

177 *Id.* at 325.

178 *Id.* at 324.

179 *See id.*

180 *See, e.g.*, Bos. & Albany R.R. Co. v. Mercantile Tr. & Deposit Co. of Balt., 34 A. 778, 785 (Md. 1896); Trenton Passenger R.R. Co. v. Guars.' Liab. Indem. Co., 37 A. 609, 610 (N.J. 1897).

181 *See, e.g.*, *Bos. & Albany R.R. Co.*, 34 A. at 786; *Trenton Passenger R.R. Co.*, 37 A. at 611, 612.

182 Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co., 119 S.W. 576, 581-88 (Mo. 1909).

183 *Id.* at 581.

court asserted, "that [the liability insurer] is required to furnish the means from his own pocket with which to pay for the injuries done by his negligence to the passenger, then that consideration has a direct and potent influence in encouraging negligence on the part of the carrier."[184] That view equated the "responsibility" of common carriers with their duty to transport passengers and cargo safely. But the *Phoenix* case, and subsequent decisions in which liability insurance was held to be valid, equated "responsibility" with an obligation to compensate others for negligently inflicted injuries.[185]

Nothing in the opinions in late nineteenth- and early twentieth-century cases suggesting that liability insurance was valid indicates that the courts were thinking about the "risk-spreading," as opposed to risk-transferring, capacities of liability insurance. They were not contemplating that, as liability insurance spread among enterprises, "risk pools" in industries would emerge, affecting the costs of liability insurance and the costs of shipping passengers and goods. They were not demonstrating any awareness of an "actuarial consciousness" among insurers or insureds.[186] They were simply thinking of liability insurance as a two-party transaction in which financial responsibility for losses from a particular risk was transferred from one party to another through an indemnity.[187] Nonetheless, what amounted to a public policy favoring liability insurance seemed to be emerging. And as time went on, this policy would generate interpretations of and legal doctrines applying insurance policy language addressing defense and settlement that pushed insurance in the direction that public policy favored.

3. The Development of Liability Insurance

Employers' liability insurance expanded significantly in the United States between its introduction in Massachusetts in 1887 and the end of the first decade of the twentieth century.[188] By 1909, twenty-seven liability insurance companies were operating,[189] and that year the companies collected about $21.7 million

184 *Id.* The court added that "[i]f this so-called species of insurance is valid, then by the same course of reasoning a physician or surgeon may insure against his acts of malpractice." *Id.* at 584. It also noted that the Supreme Court of Pennsylvania had recently "held that the owner of an automobile may insure against all damages he may be compelled to pay to any third person in consequence of his negligence in operating the same," *id.*, and noted that "we see mere children . . . driving automobiles, with their attending dangers, along our streets at a high rate of speed, from 20 to 35 miles an hour." *Id.* at 585. The parents of those children, the court believed, would not "tolerate that recklessness for a moment if they were not indemnified against all damages which might flow from such conduct[.]" *Id.*

185 *See* Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U.S. 312, 324 (1886).

186 *Cf.* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 231 (1977).

187 *See id.* at 232.

188 *See* EDWIN W. DE LEON, MANUAL OF LIABILITY INSURANCE 15 (1909).

189 *Id.* at 3.

from premiums.[190] The average loss ratio for the forty-nine insurance and casualty companies operating in the United States in 1908 was 43.2%;[191] assuming this ratio is representative of liability insurance company losses, these companies paid out about $9.4 million in claims.[192] All told, selling liability insurance was collectively profitable.

And the companies had begun to expand their coverage.[193] Originally a response to the abolition or modification of common law defenses employers could invoke to avoid tort liability to their employees for workplace accidents, liability insurance had quickly come to be bought by common carriers and other parties who faced the risk of liability to nonemployees.[194] The coverage was extended not only to cover liability to employees—workers on railroads, streetcars, and steamships were frequently injured in the course of their occupations[195]—but to what was described as "public liability": coverage of injuries to members of the public, or their property, resulting from the conduct of the policyholder.[196] "Public liability" included not only liability exposure for injuries to passengers or their property, but to bystanders or their property injured, for instance, when a rail car derailed, or a train struck a vehicle or a person at a grade crossing, or a streetcar collided with a motorist or a pedestrian on a city street, or a factory explosion injured a third party.[197]

After the adoption of workers' compensation beginning in 1910, however, businesses were no longer liable to their employees in tort, but increasingly needed insurance against liability to members of the public.[198] Businesses therefore continued to purchase liability insurance, with the policies providing them only "public liability" insurance.[199] In 1940 these public liability insurance policies were given the name comprehensive general liability ("CGL") insurance.[200] Finally, in 1986 their name was changed to commercial general liability (also "CGL") insurance.[201]

Similarly, at the turn of the century, shortly after automobiles were introduced, liability insurance protecting owners and (soon thereafter) drivers became available.[202] As automobiles became more numerous, auto owners increasingly purchased liability insurance, and the scope of the coverage that

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190 *See id.* at 17.
191 *Id.* at 15.
192 *See id.*
193 ABRAHAM, *supra* note 1, at 33.
194 *Id.* at 33-34.
195 *Id.* at 29.
196 *Id.* at 33.
197 *See id.* at 33-35.
198 *Id.* at 55.
199 *See id.*
200 *Id.* at 155.
201 *Id.*
202 *Id.* at 77-79.

policies provided expanded, partly through the operation of market forces and partly through regulation.[203] For example, "omnibus" and "drive other cars" provisions extended coverage to anyone driving an insured vehicle with the owner's permission and to the owner and family members when driving another party's vehicle with permission.[204]

Several decades later, personal liability insurance policies covering individuals against non-auto, nonbusiness liability became available.[205] Not much such insurance was purchased.[206] By the middle of the twentieth century, however, this coverage was incorporated automatically into homeowners and renters insurance policies.[207] This form of liability insurance now covers virtually every homeowner and many renters.[208]

Over time, other forms of liability insurance, important for those who purchase them but involving only a tiny percentage of the premium dollars paid for general liability and auto liability insurance, came into existence as well. For example, professional liability, or malpractice, insurance covers physicians, attorneys, accountants, and other professionals.[209] Errors and omissions liability insurance covers liability arising out of certain nonprofessional services, such as real estate and insurance agents' services.[210] Recently, cyber liability insurance has gained a foothold in the market.[211]

The growth and unquestioned acceptance by the courts of general liability and auto insurance—as well as the later growth of other forms of liability insurance—confirmed that concern for moral hazard no longer had any bearing on the validity of liability insurance. On the contrary, public policy favored liability insurance, because (in the words of *Phoenix*) it gave defendants in tort cases a means of "meeting" their "responsibility" to victims.[212] Long before anyone accused the common law courts of judicial activism or of having a consumer-oriented viewpoint, the courts' expansive interpretations of two central provisions in liability insurance policies—addressing defense and settlement of suits against policyholders—provided graphic evidence of this principle.

[203] *Id.* at 78.
[204] *Id.* at 78.
[205] *Id.* at 174.
[206] *Id.* at 175.
[207] *Id.* at 177.
[208] *Id.* at 177-78.
[209] *See* ABRAHAM & SCHWARCZ, *supra* note 90, at 571.
[210] *Id.*
[211] *Id.* at 495.
[212] *See* Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U.S. 312, 324 (1886).

B. *The Duty to Defend*

From the beginning, liability insurance policies contained provisions addressing both defense and settlement.[213] An employers' liability insurance policy issued by the American Casualty Company around the turn of the twentieth century, for example, provided that "[i]f, subsequently, any legal proceedings, even though groundless, be instituted against the assured to enforce a claim for damages on account of injuries or death covered by this policy . . . the company will, at its own cost, undertake to defend against such legal proceedings . . . or effect a settlement."[214] Similarly, an auto liability insurance policy issued by the Travelers Insurance Company undertook to "defend in the name and on behalf of the assured any suits which may at any time be brought against him on account of such [covered] injuries" and to "serve the assured . . . by such negotiation or settlement of any resulting claims as may be deemed expedient by the company."[215]

The language of modern policies, more than 100 years later, says the same thing. For example, the duty to defend provision in today's standard-form CGL insurance policy indicates that the insurer has a "duty to defend the insured against any 'suit' seeking those damages" covered by the policy.[216] Similarly, today's standard-form auto liability insurance policy provides that the insurer "will settle or defend, as [it considers] appropriate, any claim or suit asking for these [covered] damages."[217]

In retrospect it was probably inevitable that liability insurance policies would contain a duty to defend. The liability insurer's money was at stake. It would not have made sense to allow the policyholder to defend itself and thereby have the opportunity to risk the insurer's money by adopting a wrongheaded defense strategy or investing too little in defending. In order to protect its money, the liability insurer would have had to control the defense. As a consequence, just as a specialized plaintiffs' bar emerged in the late nineteenth century, over time a defense bar also developed.[218] And ironically, a broad duty to defend was in the interest of this defense bar, for a broad duty made for more cases in which there was a duty to defend and more business as a result.

By virtue of the duty to defend, liability insurers were frequently involved in the growing number of torts suits brought from the late nineteenth century onward.[219] Insurers also settled or declined to settle these suits, as their policies afforded them the privilege of doing.[220] The celebrated Columbia Plan Report

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[213] *See, e.g.*, DE LEON, *supra* note 188, at 57-58 (providing example of early policy that included provision on defense of suits and settlements).

[214] *Id.* at 58.

[215] *Id.* at 119-20.

[216] *See* ABRAHAM & SCHWARCZ, *supra* note 90, at 467.

[217] *Id.* at 695.

[218] *See* ABRAHAM, *supra* note 1, at 85.

[219] *See id.* at 32-38.

[220] *See id.* at 37.

of 1932, for example, noted that there was payment to an auto accident victim in only 25% of the cases in which the defendant was not insured, but in 85% of the cases in which the defendant was insured.[221] The application of the policy provisions governing defense and settlement, and the interaction between them, thus had a significant influence on the growth of tort liability in the ensuing decades.[222]

1. The Scope of the Duty

The language of liability insurance policies embodying the duty to defend was so brief that it did not address myriad issues that courts were called upon to address. Courts first held, and continue to hold, that the duty to defend is linked to the allegations made in a suit against the insured.[223] If the allegations in a complaint would be covered by the policy if true, then the insurer must defend, no matter how groundless the allegations are.[224] Eventually, courts came to call this criterion the "potentiality" or "potential for coverage" test.[225]

Over time, a series of other issues arose that the policy language on its own did not resolve and that courts were called upon to address. For example, if a complaint contained allegations that might or might not be covered depending on the facts, the insurer was obligated to defend.[226] Similarly, if the allegations in the complaint were not precise enough to determine whether they would be

[221] COMM. TO STUDY COMP. FOR AUTO. ACCIDENTS, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 55-56 (1932). For discussion of the Columbia Plan, one of the early proposals for moving from negligence to strict liability for auto accidents, see ABRAHAM, *supra* note 1, at 7.

[222] Many scholars have asserted that liability insurance influences tort liability. *See, e.g.*, Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 186 (2001) (noting that expansion of pool of solvent potential defendants is likely to increase incidence of tort liability). But examinations of the manner in which this occurred as tort liability developed are rare. One of the authors briefly discussed this phenomenon in earlier work. *See* ABRAHAM, *supra* note 1, at 35-38. In addition, Professor Baker has written with insight about its contemporary impact. *See* Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 7 (2005). And Professor Syverud argued both that liability insurance in general increases tort payouts and that higher policy limits produce higher judgments and settlements for the same injury. *See* Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1634-36 (1994). An early work discussing the impact of the availability of liability insurance on certain tort doctrines is Fleming James, Jr. & John V. Thornton, *The Impact of Insurance on the Law of Torts,* 15 LAW & CONTEMP. PROBS. 431 (1951).

[223] RESTATEMENT OF THE L.: LIAB. INS. § 13 (AM. L. INST. 2019) (describing duty to defend and complaint-allegation rule).

[224] *See, e.g.*, ABRAHAM & SCHWARCZ, *supra* note 90, at 467 (providing sample CGL policy contract).

[225] *See, e.g.*, Gray v. Zurich Ins. Co., 419 P.2d 168, 176 (Cal. 1966) ("We point out that the carrier must defend a suit which *potentially* seeks damages within the coverage of the policy . . . ."); *see also* ABRAHAM & SCHWARCZ, *supra* note 90, at 623.

[226] RESTATEMENT OF LIAB. INS. § 13 cmt. c (AM. L. INST. 2019).

covered if proved to be true, there was a duty to defend.[227] If the complaint contained allegations that might or might not be covered depending on the meaning and application of the coverage language in the policy, and that meaning had not yet been authoritatively determined, then the insurer had breached its duty to defend if that coverage issue were subsequently decided in the insured's favor.[228] This gave insurers an incentive to defend even in the face of such uncertainty.[229] If the allegations contained in the complaint did not satisfy the potentiality test, but facts outside the complaint and known to the insurer would bring the claim within coverage, many courts held that there was a duty to defend.[230] If some of the allegations in the complaint satisfied the potentiality test but some did not, there was a duty to defend.[231] The insurer could defend the insured but still reserve the right to contest coverage, but only on grounds that it specified in advance, and the failure to reserve a particular basis for contesting coverage waived that basis.[232] Although jurisdictions differ on the issue, many courts held that if the insurer defended subject to such a reservation and later prevailed in its coverage defense, it still could not recoup

[227] *Id.* § 13(2)(b).

[228] *See, e.g.*, Murphy & Co. v. Mfrs.' Cas. Co., 89 Pa. Super. 281, 286 (1926) ("[W]hen the company unequivocally repudiated all liability under the policy, it was in no position to insist that the insured must do nothing until an action was brought against it . . . ."); *see also* ABRAHAM & SCHWARCZ, *supra* note 90, at 625 (describing consequences of breaching duty to defend).

[229] *See* Note, *The Insurer's Duty to Defend Under a Liability Insurance Policy*, 114 U. PA. L. REV. 734, 749 (1966) ("[T]here are relatively few reported cases in which the insurer has refused to defend a suit that has proceeded to a judgment which it was then obligated to pay.").

[230] *See, e.g.*, Hardware Mut. Cas. Co. v. Hilderbrandt, 119 F.2d 291, 299 (10th Cir. 1941) ("The accidental injuries were sustained in circumstances which brought the liability of the insured well within the coverage of the policy, and the company had knowledge of the material facts. Fairly construed, the insurance contract obligated the company to defend . . . ."); *see also* RESTATEMENT OF LIAB. INS. § 13(2)(b) (AM. L. INST. 2019) (stating that for "determining whether an insurer must defend, the legal action is deemed to be based on . . . [a]ny additional allegation known to the insurer, not contained in the complaint or comparable document stating the legal action, that a reasonable insurer would regard as an actual or potential basis for all or part of the action").

[231] *See* RESTATEMENT OF LIAB. INS. § 14 cmt. b (AM. L. INST. 2019); *see also* ABRAHAM & SCHWARCZ, *supra* note 90, at 623.

[232] *See, e.g.*, Scott v. Inter-Ins. Exch. of Chi. Motor Club, 186 N.E. 176, 178 (Ill. 1933) ("The record fails to disclose any disclaimer or liability by the exchange to Hanrahan, or any reservation of rights by it so far as he is concerned."); Columbia Cas. Co. v. Ingram, 140 A. 601, 602 (Md. 1928) ("But it was not stated in the letter that the assumption by the insurer of full and sole control of the suit brought against the assured would not operate as a waiver of the insurer's right to disclaim liability on the ground of delay in the notification for which the policy provided."); *see also* RESTATEMENT OF LIAB. INS. § 15 reporters' note a (AM. L. INST. 2019) (describing basis for reservation-of-rights requirement).

its defense costs from the insured.[233] And if the insurer breached its duty to defend, some courts concluded that it had waived its right to contest coverage.[234]

It took decades for those issues to be raised and resolved.[235] As the preceding paragraph indicates, most of the issues were resolved in favor of the insured, thus effectuating a broad duty to defend. A broad duty meant that liability insurers were commonly involved in defending their insureds against tort suits, controlling the manner in which a suit was defended, and determining whether to bring the case to trial or accept an offer to settle made by the plaintiff.[236] There were other consequences as well, which had important implications for the development of tort liability.[237]

2. Consequences of the Duty to Defend

The possibility that a potential defendant in a tort suit was covered by liability insurance made it more likely that an injured individual would bring suit against that party.[238] This was especially the case if the potential defendant was an individual rather than a business, because most individuals could be presumed to be judgment-proof if they were not insured.[239] There was no point in suing a judgment-proof party. But with the advent of liability insurance, fewer parties were judgment-proof.[240] Even if nothing else in the tort system had changed, then, liability insurance produced an increase in the number of tort suits.

Second, when a liability insurer was defending, even subject to a reservation of the right to subsequently contest coverage, the insurer might accept an offer of settlement that an uninsured defendant would have rejected.[241] The difference is that uninsured defendants with some, but limited, assets have nothing to gain by paying all or most of their assets to settle a case. They will be better off if they try the case to a verdict and win, and no worse off if they suffer a judgment that exceeds the amount of their assets. So they are more likely than insurers to reject settlement offers and roll the dice. The result would have been more suits

[233] RESTATEMENT OF LIAB. INS. § 21 cmt. a (AM. L. INST. 2019). Today, there is a division of authority on the issue. *Id.*

[234] *Id.* § 50 reporters' note c (stating that "[c]ourts in a significant number of jurisdictions have adopted the rule that an insurer loses its coverage defenses when it breached the duty to defend, without regard to bad faith").

[235] For extended discussion of the rules that resolution of these issues generated, and citations to the governing case law, see *id.* §§ 10-23, including comments and reporters' notes; and ABRAHAM & SCHWARCZ, *supra* note 90, at 615-33.

[236] ABRAHAM & SCHWARCZ, *supra* note 90, at 615.

[237] *See id.* at 625.

[238] ABRAHAM, *supra* note 1, at 33-34.

[239] *Id.* at 78.

[240] *Id.*

[241] Early on, for example, an insurance company president indicated that "[t]hus far those companies which have been undertaking by prompt action to clear away liability have shown the best results." W.F. Moore, *Liability Insurance*, 26 ANNALS AM. ACAD. POL. & SOC. SCI. 319, 337 (1905).

in which liability was questionable, because such suits had a higher probability of resulting in settlement rather than in a verdict for the defendant or an uncollectible verdict for the plaintiff. This too could have produced an increase in the number of tort suits.[242]

Third, from the beginning, an insurer's costs of defense were "outside of the policy limits."[243] That is, expenditures on defense did not erode the limits of liability provided by the policy.[244] Of course, premiums reflected this treatment, but in any given case, the insurer incurred the costs of defense without reducing the amount of liability insurance protecting the insured.[245] This meant that, like any rational defendant, a rational insurer deciding whether to accept a plaintiff's offer to settle would take into account the defense costs it would incur if it rejected the offer and the costs it would save by accepting it.[246] In this respect the prospect of avoiding further defense costs through settlement was the same both for uninsured defendants and liability insurers.

But there the similarity ended. In contrast to most uninsured defendants, liability insurers had a portfolio of cases they were defending and therefore would have been less risk-averse than the ordinary defendant.[247] Consequently, the prospect of saving defense costs by settling would have been less influential for liability insurers: they would have settled fewer cases than would uninsured defendants in the same position. It is unclear whether any particular class of cases would have been settled less, or more, than others, but it is certainly possible that cases depending on new legal theories or doctrines that had not yet been adopted would have been settled less frequently. After all, these had less prospect of success than suits relying on conventional and already-established legal theories. Obviously, a new legal theory cannot be accepted by a court in a case that is settled. Consequently, this dynamic would have created greater potential for establishing new bases of tort liability. And as we know, that potential was eventually realized.

This effect would have been magnified by the fact that cases involving new legal theories or doctrines resulting in verdicts for plaintiffs were more likely to

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242 The net effect on payments to plaintiffs is less clear. The duty to defend obviously increased the number of tort suits brought. And liability insurers accepted some settlement offers that they would have rejected in the absence of the duty. *See* ABRAHAM, *supra* note 1, at 36-37. But some of the cases that would have gone to trial in the absence of the duty would have resulted in a smaller judgment than the settlement, or in a verdict for the defendant. So in this respect the net effect of the duty is difficult to assess.

243 *See id.* at 35.

244 *Id.*

245 *Id.*

246 Forrest Stuart Smith, *Evaluating Case—Whether to Settle or Try It*, 1 DEF. L.J. 71, 77 (1957) (indicating that "litigation costs have reached such proportions that insurance companies cannot longer afford to defend some cases they would prefer to defend").

247 *See id.* at 86 ("The election to try a case is almost always a gamble but it should be a calculated gamble. The odds for or against you and the exposure should be considered and carefully weighed.").

be appealed, because liability insurers had more to lose than any individual defendant if a new theory or doctrine were accepted by the courts. The cost of appeal for a rational uninsured defendant might not be worth incurring, depending on the probability of gaining a reversal. But the calculation would have been different for liability insurers, for whom the cost of appeal might be worth incurring. Liability insurers were repeat players that, in the absence of reversal, would face increased liability exposure under multiple insurance policies that they had already sold, whose premiums did not reflect the potential new form of liability. This too would have increased the potential for establishment of new bases of tort liability, or at least new doctrines that favored liability in one way or another.

Finally, we noted earlier that over decades, courts decided a series of subsidiary issues relating to the scope of the duty to defend, and that the overall tendency of these decisions was to expand the duty.[248] For each type of case in which it became clear that there was a duty to defend, liability insurers thereafter could generally be found defending.[249] Therefore, for each subsidiary issue relating to the duty to defend that was resolved to require a defense, all the effects of a liability insurer's presence in a case, as we have just described them, also became operative. As time went on, then, liability insurers were increasingly involved in defending tort suits, and their presence increasingly influenced both the frequency of suits and, at the margin, the presentation to the appellate courts of arguments for adopting new legal theories and doctrines.

C. *The Duty to Settle*

In contrast to the duty to defend, there has never been an express duty to settle in liability insurance policies. For example, the early employers' liability insurance policy we referred to in Section II.B provided that the insurer would "undertake to defend against such legal proceedings . . . or effect a settlement."[250] More than 100 years later, the current standard-form CGL insurance policy provides that the insurer may, at its "discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result."[251] And the current standard-form auto liability insurance policy provides that the insurer "will settle or defend, as [it] consider[s] appropriate, any claim or suit."[252] This language seems to afford liability insurers discretion to settle or to decline to settle, assuming that the plaintiff who has sued the insured is willing to settle.

The discretion to decline to settle even when the plaintiff would be willing to do so, however, creates a potential conflict between the interests of the insured and the insurer. Courts' recognition of this potential conflict, and their decisions

[248] *See supra* Section II.B.1 (providing history of duty to defend).
[249] ABRAHAM, *supra* note 1, at 35-38.
[250] *See* DE LEON, *supra* note 188, at 58.
[251] ABRAHAM & SCHWARCZ, *supra* note 90, at 467.
[252] *Id.* at 695.

restricting this discretion, resulted in a duty to settle. And the adoption of this duty had a substantial impact on the growth of tort liability.

1. The Conflict of Interest and the Rise of the Duty to Settle

All liability insurance policies are subject to limits of liability–ceilings on the amount of coverage provided.[253] Assuming that a claim or suit against the insured would fall within the terms of coverage if the suit were successful, the insurer is liable for any judgment that does not exceed the limit of liability. But coverage ends at the amount of this limit. By the very terms of the contract embodied in an insurance policy, the insured is not covered for the amount of any judgment in excess of the limit.[254] If the limit of liability of the insured's policy is $100,000, and the plaintiff obtains a judgment against the insured for $150,000, then the insurer will pay the plaintiff a maximum of $100,000. The insured must satisfy the $50,000 portion of the judgment that remains unpaid.

The combined discretion of the insurer not to settle, the existence of a particular monetary limit of liability, and the resulting exposure of the insured to the risk of incurring liability for the amount of any judgment in excess of the limit of liability, create an interest on the part of the insured that is not the same as the interest of the insurer.[255] It is always in insured's interest for the insurer to accept an offer to settle a suit against the insured for a sum that falls within the limits of liability afforded by the policy. Such a settlement costs the insured nothing, since the insurer pays it, whereas the insurer's failure to settle risks a judgment for an amount that exceeds the policy limits, for which the insured would be liable.

The insurer's interest, however, is more complicated, and never completely identical with the insured's interest. Sometimes the insurer's interest also favors settlement, but not always. For example, suppose the insured is covered by a policy with a $100,000 limit, and the plaintiff offers to settle for $95,000. If the insurer rejects the offer, it might be able to defeat the suit altogether, at the price only of the additional defense costs it would incur plus the risk of liability for an additional $5,000. In contrast, if the insurer takes a comparatively small risk by rejecting the $95,000 settlement offer, doing so would place the insured at risk of being liable for any judgment amount in excess of $100,000. The insured's exposure could be a vast multiple of the additional $5,000 that the insurer risked by rejecting the offer to settle. Taking only its own interest into account, as the language of liability insurance policies purported to give it the discretion to do, the insurer might well decide to reject the offer of settlement.

[253] *See, e.g.*, *id.* at 697 (highlighting "Limit of Liability" provision in standard auto insurance policy).

[254] *See id.* at 476 (setting forth provision in CGL insurance policies stating "[t]he Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of: a. Insureds; b. Claims made or 'suits' brought; or c. Persons or organizations making claims or bringing 'suits'").

[255] *See* Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1126-39 (1990).

That is exactly what increasingly occurred after liability insurance was introduced and liability insurers became routinely involved in the defense of suits against their insureds.[256] The sequence was as follows: plaintiffs in those suits offered to settle for a particular sum that happened to be within the defendant's liability insurance coverage limits, the insurer rejected the offer, the suit went to trial, the plaintiff secured a judgment in excess of the policy's limits, the insurer paid the amount of its policy limits but only this amount, and this left the insured holding the bag for the amount of the judgment in excess of the limits.[257]

Under the literal terms of their liability insurance policies, that was the end of the matter. The policies accorded liability insurers discretion regarding whether to settle or reject settlement offers.[258] The policy language said nothing about liability for any consequences of the exercise of this discretion.[259] Nonetheless, some insureds sued their insurers, arguing that the insurers had breached their duty in rejecting offers of settlement.[260] As a result of this breach, insureds argued, insurers owed not only the policy limits but also consequential damages in the amount of the judgment against the insured that was in excess of the policy limits.[261]

At first, courts applied the language of liability insurance policies as written, holding that these policies were contracts that specified the scope of the parties' duties to each other, and that the terms of the policies imposed no duty on the insurer to accept any offer of settlement.[262] But some courts began holding that, under certain circumstances, the insurer was obligated to take the insured's interest into account in acting on offers to settle.[263] At first, subjective bad faith

[256] *See* Kenneth S. Abraham, *The Liability Insurer's Duty to Settle Uncertain and Mixed Claims*, 68 RUTGERS U. L. REV. 337, 339-40 (2015).

[257] *Id.* at 340.

[258] *See* ABRAHAM, *supra* note 1, at 35-38.

[259] *See* ABRAHAM & SCHWARCZ, *supra* note 90, at 695, 705.

[260] *See id.* at 705.

[261] *See infra* Appendix. For further discussion of the cases cited in the Appendix, see *infra* Section II.C.2.b (describing case law evidence of increases in limits of liability).

[262] *See, e.g.*, New Orleans & Carrollton R.R. Co. v. Md. Cas. Co., 38 So. 89, 92 (La. 1905) (dismissing insurance company's petition and rejecting demand for relief); Rumford Falls Paper Co. v. Fid. & Cas. Co., 43 A. 503, 506 (Me. 1899) (finding for employer against insurer); C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co., 90 A. 653, 653 (Pa. 1914) (holding that insurer was obliged to defend at own cost any action against insured).

[263] *See* Abraham, *supra* note 256, at 358.

was the standard for liability,[264] but the standard evolved in an objective, and therefore pro-insured, direction.[265]

The formulation that was used to describe the objective standard varied. In some states the standard was based on whether the insurer behaved unreasonably in rejecting an offer to settle within the policy limits.[266] In other states—perhaps a plurality—the standard focused not on the conduct of the insurer but on the reasonableness of the offer.[267] Most often that standard was applied through the "disregard the limits" ("DTL") test that was subsequently articulated by Professor Robert Keeton in a classic 1954 law review article on the subject.[268] Under the DTL test, an insurer is liable for above-policy-limits judgments when it rejects an offer that a liability insurer providing a policy without any limits of liability would have accepted.[269]

2. Consequences of the Duty to Settle

Recognition of the liability insurer's duty to accept reasonable offers of settlement had substantial consequences for the development of tort liability. First, the existence of a duty to settle increased the liability insurer's net expected liability in every case in which there was the potential for a verdict in excess of the policy limit, and the plaintiff offered to settle for an amount within the policy limit. In such cases, the insurer knew that it could be liable for more than its

[264] *See, e.g.*, City of Wakefield v. Globe Indem. Co., 225 N.W. 643, 644 (Mich. 1929) (noting courts' wide recognition "that the insurer is liable to the insured for an excess of judgment over the face of the policy when the insurer, having exclusive control of settlement, fraudulently or in bad faith refuses to compromise a claim for an amount within the policy limit"); Wynnewood Lumber Co. v. Travelers' Ins. Co., 91 S.E. 946, 947 (N.C. 1917) (noting that insurer did not act "fraudulently, oppressively, or otherwise than in good faith"); Hilker v. W. Auto. Ins. Co., 235 N.W. 413, 414 (Wis. 1931) (noting that insurers must act in good faith, but signaling that "good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto").

[265] *See, e.g.*, Ballard v. Ocean Accident & Guarantee Co., 86 F.2d 449, 453 (7th Cir. 1936) (noting that under Wisconsin state law, if "insurance company fails to meet this standard [of ordinary care], it is guilty of negligence in the performance of its contract and becomes liable, upon that ground, to the assured for the excess over the policy limit, irrespective of any fraud or bad faith on its part").

[266] *See, e.g.*, Dumas v. Hartford Accident & Indem. Co., 56 A.2d 57, 60 (N.H. 1947) ("While the insurer has a reasonable right to try its case in court, it cannot be unduly venturesome at the expense of the insured. The caution of the ordinary person of average prudence should be employed."); G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929) ("[I]f an ordinarily prudent person, in the exercise of ordinary care . . . would have settled the case, and failed or refused to do so, then . . . the indemnity company, should respond in damages.").

[267] *See* Abraham, *supra* note 256, at 345.

[268] Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1147-48 (1954) ("With respect to the decision whether to settle or try the case, the insurance company must in good faith view the situation as it would if there were no policy limit applicable to the claim.").

[269] *See* RESTATEMENT OF LIAB. INS. § 24 cmt. c (AM. L. INST. 2019).

policy limit if it rejected the plaintiff's offer, the plaintiff secured a judgment for an amount in excess of the policy limit, and a court later held that the insurer had breached its duty to settle because the plaintiff's offer to settle was reasonable. Because of this increased exposure, the liability insurer's economic interest in settlement increased.[270] The average amount of settlements would therefore have increased for this reason.

Second, plaintiffs' attorneys have always handled cases on a contingent fee basis, taking a percentage of the plaintiff's recovery but receiving no fee if there is no recovery at all.[271] They therefore do a risk-reward calculation in deciding whether to take a case at all.[272] Because the duty to settle likely increased the average amount of settlements and created the prospect of an occasional recovery from the insurer in excess of a defendant's policy limit, the advent of the duty would have changed the risk-reward calculation plaintiffs' attorneys made. The expected value of at least some cases increased. As a consequence, certain cases that plaintiffs' attorneys previously would not have been willing to handle would now satisfy a risk-reward calculation. This too would have resulted in more tort suits.

Third, in the long run, the existence of the duty to settle would have increased the size and number of large verdicts, with an increase in the average amount of settlements accompanying this increase, in the following way. Plaintiffs suffering injuries with a value in excess of an otherwise judgment-proof defendant's policy limit initially had no potential source of recovery aside from the amount of this individual's liability insurance. Once the duty to settle was in place, however, plaintiffs had a new means of recovering more than the amount of the defendant's policy limit. They could offer to settle for a sum just under the policy limit in the hope that the insurer would reject the offer, the suit would result in a verdict in excess of the policy limit, and the insurer would then be held liable for having breached its duty to settle.[273] In that way, the plaintiff could recover damages in excess of the policy limit. Indeed, such offers to settle came to be known as "set-up" offers—offers intended to be rejected, but to set up the insurer for above-limits liability.[274]

This process would have enhanced tort payouts even if it did not always succeed. This is because in some cases insurers would have accepted (set-up) offers that were higher than the offers would have been if the duty to settle had not been in force. In other cases, insurers would have rejected such high offers, only to find that the result was a verdict in excess of the policy limits. It is true

[270] *See generally* Abraham, *supra* note 256 (providing overview of insurer's duty to settle).

[271] *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 9-18 (2004) (providing overview of American contingency fee practices).

[272] *See* Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. U. L. REV. 2089, 2105 (2019).

[273] *See* Abraham, *supra* note 256, at 342.

[274] *Id.* at 348-49.

that, in some cases in which a high offer to settle was rejected, the ultimate verdict was lower than an offer of settlement that the insurer would have accepted, and in some cases there would have been a defense verdict.[275] Because of these bidirectional effects, the net impact on payouts would have been uncertain in the short run.

In the long run, however, the duty to settle would have increased the size of large verdicts. This is because, in the absence of the duty to settle, when a plaintiff had the opportunity to settle for a sum approaching the policy limit of the defendant's insurance, that was the only money the plaintiff stood a chance of obtaining from an otherwise judgment-proof defendant. Plaintiffs would have taken every opportunity to settle with insurers in suits against these defendants. Once the duty to settle was in place, however, plaintiffs had a new reason to take cases to trial and, if necessary, appeal: the possibility of an excess judgment that the defendant's liability insurer would have to pay. The result would have been the occasional judgment in excess of policy limits in cases that previously would have been settled for a smaller sum.

This increase in the number of comparatively high-verdict cases would have had both direct and indirect effects. Publicity given to high verdicts directly influences the general sense of the feasible or appropriate amount of a tort award, and it specifically influences lawyers who litigate such cases.[276] Similar awards tend to follow, both because jurors' attitudes reflect the general sense of what is appropriate, and because lawyers' and clients' expectations have been raised.[277] What was at first a high award becomes the norm.

High verdicts also had an indirect effect that was even more significant for the development of tort liability. Liability insurance policyholders are risk-averse; that is one of the main reasons they buy insurance.[278] Even if the probability of suffering a high verdict is very low, the higher the occasional "outlier" verdict, the greater the incentive for individuals who had not previously purchased insurance to do so now, and for existing policyholders to purchase insurance with higher limits of liability, to avoid the risk of incurring uninsured or partly-uninsured liability.[279] Consequently, as the duty to settle increased the probability of an occasional above-policy-limits judgment, it pushed upward the purchase of insurance.[280]

But this was not all. As the typical liability insurance limit increased, the other effects of the duty to settle would have been magnified as well. Settlements

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[275] *See id.* at 341.

[276] This was one of the implicit premises of a famous article by one of the preeminent plaintiffs' personal injury lawyers of his time. *See generally* Melvin M. Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951) (discussing state trends in personal injury and death verdicts).

[277] *See id.* at 27.

[278] ABRAHAM & SCHWARCZ, *supra* note 90, at 3.

[279] *See* Abraham, *supra* note 256, at 343 n.12.

[280] *See id.*

would have been for larger amounts, the size of plaintiffs' offers to settle would have approached a higher policy limit, and the occasional above-limits verdict would have exceeded a now-higher limit of liability. This cycle of escalation would then repeat itself. In effect, the advent of the duty to settle created an upward push that would have increased both the number of tort suits brought and the amounts paid in those suits.

a. *Increases in Premium Revenue*

Increases in premiums paid for general liability and auto liability insurance over time provide evidence of these effects. As depicted in Table 3 and Table 4, the very large percentage increases in liability insurance premiums from 1920 to 2017 were directly proportional to the increases in tort costs that occurred during the same period.[281]

[281] *See supra* Tables 1, 2. These premiums were consistently about 50% greater than payouts until the last few decades. The difference reflects the component of premiums that is attributable to defense costs and other expenses—about 50% for most of the period, but closer to 30% more recently.

Table 3. General Liability Insurance Premiums.

Year	Premiums Paid	Percentage Increase over Previous
1921	$31.4 million[282]	—
1931	$57.3 million[283]	82.7
1941	$88.6 million[284]	54.6
1951	$362 million[285]	308.8
1961	$1.02 billion[286]	182.6
1971	$2.4 billion[287]	132.8
1981	$7.4 billion[288]	210.2
1990	$18.1 billion[289]	145.4
2002	$29.1 billion[290]	60.6
2011	$46.8 billion[291]	60.9
2017	$65.0 billion[292]	38.8

† We calculated percentage increase based on raw, unrounded data for losses paid. We display the rounded data here.

Table 4. Auto Liability Insurance Premiums.

Year	Premiums Paid	Percentage Increase over Previous
1921	$64.8 million[293]	—
1931	$192 million[294]	195.4
1941	$234 million[295]	22.1
1950	$1.4 billion[296]	504.4
1960	$4.1 billion[297]	190.2
1970	$9.6 billion[298]	133.1
1981	$24.4 billion[299]	155.2
1990	$59.9 billion[300]	145.7
2001	$89.7 billion[301]	49.6
2011	$122 billion[302]	36.3
2017	$166 billion[303]	35.8

† We calculated percentage increase based on raw, unrounded data for losses paid. We display the rounded data here.

282 STATISTICAL ABSTRACT: 1923, *supra* note 91, at 677 tbl.600.
283 STATISTICAL ABSTRACT: 1933, *supra* note 92, at 272 tbl.292.
284 STATISTICAL ABSTRACT: 1943, *supra* note 93, at 370 tbl.399.
285 INS. INFO. INST., *supra* note 94, at 16.
286 *Id.*
287 STATISTICAL ABSTRACT: 1973, *supra* note 96, at 467 tbl.751.
288 STATISTICAL ABSTRACT: 1982, *supra* note 97, at 523 tbl.871.
289 *BEST'S* AGGREGATES & AVERAGES: 1999, *supra* note 98, at 265.

These data on premium increases show the undoubted effect of the growth of tort liability during the entire period. But the increases would have been the result not simply of increases in the incidence of tort liability that liability insurance covered but also of increases in the number of individuals and businesses purchasing insurance, of increases in the amount of insurance that individuals and businesses purchased, or (most probably) of some combination of these factors. One of the features of our argument in this Part is that the interaction of tort liability and liability insurance created a cycle of increasing liability and the increasing purchase of insurance. Our hypothesis is that the combined effect of the duty to defend and duty to settle would have been to increase the size of tort settlements and judgments. As a consequence, the amount of liability insurance that policyholders purchased would have increased, which in turn would have contributed to a further increase in settlement and judgments, with a continuing cycle of escalation. Ideally, therefore, it would be helpful to have data on the increases over time in the amount of insurance policyholders purchased—that is, on the rate of increases in the limits of liability provided by the liability insurance that was purchased.

b. *Case Law Evidence of Increases in Limits of Liability*

We have been unable to locate any data directly related to this factor. In order to make an informal estimate, we examined a sample of nearly 100 appellate cases cited in the two leading articles on the duty to settle, published in 1954[304] and 1990.[305] The cases were decided between 1915 and 1984 and are cited in the Appendix, along with the relevant figures regarding the amount of insurance that had been purchased by the policyholder. In each of these cases, the opinion

290 *BEST'S* AGGREGATES & AVERAGES: 2003, *supra* note 99, at 357.

291 *BEST'S* AGGREGATES & AVERAGES: 2018, *supra* note 100, at 382.

292 *Id.*

293 STATISTICAL ABSTRACT: 1923, *supra* note 91, at 677 tbl.600.

294 STATISTICAL ABSTRACT: 1933, *supra* note 92, at 272 tbl.292.

295 STATISTICAL ABSTRACT: 1943, *supra* note 93, at 370 tbl.399.

296 STATISTICAL ABSTRACT: 1963, *supra* note 116, at 570 tbl.774 (recording $931 million in bodily injury premiums written and $482 million in property damage premiums written).

297 *Id.* (recording $2.8 billion in bodily injury premiums written and $1.3 billion in property damage premiums written).

298 STATISTICAL ABSTRACT: 1973, *supra* note 96, at 551 tbl.911 (recording $6.7 billion in bodily injury premiums written and $2.8 billion in property damage premiums written).

299 STATISTICAL ABSTRACT: 1982, *supra* note 97, at 523 tbl.871.

300 *BEST'S* AGGREGATES & AVERAGES: 1999, *supra* note 98, at 266 (recording $47.8 billion in private passenger premiums written and $12.2 billion in commercial premiums written).

301 *BEST'S* AGGREGATES & AVERAGES: 2003, *supra* note 99, at 360.

302 *BEST'S* AGGREGATES & AVERAGES: 2018, *supra* note 100, at 383.

303 *Id.*

304 *See* Keeton, *supra* note 268.

305 *See* Syverud, *supra* note 255.

identified the policy limit of the party alleging that a liability insurer had breached its duty to settle by rejecting an offer to settle within the limit. Virtually all of the cases involved general liability or auto liability insurance.

In general, as is well-known, appellate cases are not necessarily representative of all litigated cases, and the facts of litigated cases are not necessarily representative of the facts in a field overall. More importantly, other things being equal, the higher a policyholder's limit of liability, the less likely that it would have experienced an above-limits judgment, and therefore the less likely that it would have been a party to any of the appellate cases involving an alleged breach of the duty to settle. A party purchasing $5 million of liability insurance, for example, is less likely to experience a tort judgment in excess of $5 million than a similar party purchasing $1 million of liability insurance is to experience a judgment in excess of $1 million, simply because $5 million judgments are rarer than $1 million judgments. Consequently, we think that our sample is likely to be skewed toward policyholders who purchased less liability insurance than was typical at the time, although we cannot know the extent to which the sample is so skewed.

Our review reveals that there was a steady increase in the amount of general liability insurance that businesses purchased over the decades. The typical general liability insurance policy limit in the earliest years in which appellate decisions addressed the duty to settle—prior to 1920—were between $1,500 and $5,000.[306] Fifty years later, the typical policy limit identified in these decisions was considerably larger, in some instances many times larger, with policy limits between $50,000 and $1.25 million—far more than the 94% inflation over this fifty-year period[307] would have predicted.[308] Nonetheless, in our view these figures are probably still skewed downward for the reason we indicated—because of the greater risk that policyholders with comparatively low policy

[306] *See, e.g.*, Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 240 F. 573, 576 (1st Cir. 1917) ($5,000 employers' liability insurance, $17,343.81 judgment); Brown & McCabe, Stevedores, Inc. v. London Guarantee & Accident Co., 232 F. 298, 299 (D. Or. 1915) ($5,000 employers' liability insurance, $12,000 judgment); Rumford Falls Paper Co. v. Fid. & Cas. Co., 43 A. 503, 503 (Me. 1899) ($1,500 employers' liability insurance, $2,763.90 judgment); Mears Mining Co. v. Md. Cas. Co., 144 S.W. 883, 884 (Mo. Ct. App. 1912) ($5,000 employers' liability insurance, $6,000 judgment); Brassil v. Md. Cas. Co., 104 N.E. 622, 623 (N.Y. 1914) ($1,500 employers' liability insurance, $6,000 judgment); Wis. Zinc Co. v. Fid. & Deposit Co., 155 N.W. 1081, 1083-85 (Wis. 1916) ($5,000 employers' liability insurance, $12,500 judgment).

[307] *See* US INFLATION CALCULATOR, *supra* note 103.

[308] *See, e.g.*, Larraburu Bros. v. Royal Indem. Co., 604 F.2d 1208, 1210-11 (9th Cir. 1979) ($1,250,000 general liability insurance, $1,439,200 judgment); Bd. of Educ. v. Lumbermens Mut. Cas. Co., 419 F.2d 837, 837-38 (3d Cir. 1969) ($200,000 general liability insurance, $335,140 judgment); Brockstein v. Nationwide Mut. Ins. Co., 417 F.2d 703, 704-05 (2d Cir. 1969) ($50,000 employers' liability insurance, $106,413.33 judgment); Young v. Am. Cas. Co., 416 F.2d 906, 911-12 (2d Cir. 1969) ($20,000 general liability insurance, $90,330.25 judgment); Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 323 A.2d 495, 499 (N.J. 1974) ($50,000 general liability insurance, $225,000 judgment).

limits would suffer an above-limits judgment. In fact, in our experience, by the 1950s many sizable U.S. businesses often purchased general liability insurance with a limit of $1 million or more—and sometimes in the tens of millions. Because businesses with this much insurance would rarely suffer an above-limits judgment, their absence from the appellate decisions is not surprising.[309]

Our review also reveals that there were increases in the amount of liability insurance that auto owners purchased, but not nearly to the extent that there were increases in the policy limits of general liability insurance. Limits of liability in the earliest auto liability decisions were $5,000 for injury to one person.[310] Fifty years later, the limits were between $10,000 and $100,000.[311] The reason for this smaller increase in the typical amount of auto liability insurance, we think, is that most auto owners likely have limited assets to protect; purchasing liability insurance to protect against the loss of nonexistent assets would not have made economic sense for ordinary individuals. In addition, even today, only a few states require auto owners to purchase more than $25,000 in coverage of auto liability insurance for injury to one person, or more than $50,000 for injury to two or more persons.[312] Most auto claims are for small to moderate injuries, and they are virtually always paid by auto liability insurers through settlement that occurs in a bureaucratic, virtually no-fault fashion.[313] The duty to defend and the duty to settle brought this system into existence and continue to define its parameters.

[309] These results also help to explain why, although the duty to defend and duty to settle were important ingredients in the growth of non-auto tort liability until about 1970, their influence (while still present) was not primarily responsible for the escalation in this component of tort costs that occurred after that time. By this point, major businesses would have been covered by so much liability insurance that it would have been only the rarest of tort cases that threatened a judgment in excess of such business's total policy limits, which would have been in the tens or hundreds of millions of dollars.

[310] *See, e.g.*, Neuberger v. Preferred Accident Ins. Co., 89 So. 90, 91 (Ala. Ct. App. 1921) ($5,000 auto liability insurance, $6,500 judgment); Auerbach v. Md. Cas. Co., 140 N.E. 577, 577-78 (N.Y. 1923) ($5,000 auto liability insurance, $20,500 judgment); C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co., 90 A. 653, 653-54 (Pa. 1914) ($5,000 auto liability insurance, $9,200 judgment); Hilker v. W. Auto. Ins. Co., 231 N.W. 257, 257-58 (Wis. 1930) ($5,000 auto liability insurance, $10,500 judgment).

[311] *See, e.g.*, Betts v. Allstate Ins. Co., 201 Cal. Rptr. 528, 532 (Ct. App. 1984) ($100,000 auto liability insurance, $450,000 judgment); Farmers Grp., Inc. v. Trimble, 658 P.2d 1370, 1372-73 (Colo. App. 1982) ($50,000 auto liability insurance); Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 32-34 (Iowa 1982) ($25,000 auto liability insurance, $600,000 judgment); Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co., 524 N.Y.S.2d 202, 203-04 (App. Div. 1988) ($20,000 auto liability insurance, $132,500 judgment); Shearer v. Reed, 428 A.2d 635, 636 (Pa. Super. Ct. 1981) ($10,000 auto liability insurance, $34,257.15 judgment).

[312] *See* INS. INFO. INST., 2019 INSURANCE FACT BOOK 92-93 (2019).

[313] *See* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 809 (2011); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1604 (2004).

D. *The Non-Modification Puzzle*

It is clear, then, that the duty to defend and the duty to settle powerfully contributed to the growth of tort liability that we have documented. This meant that liability insurers' own costs, and the premiums they found it necessary to charge, also steadily increased.[314] The defense and settlement provisions of liability insurance policies have been standard features of those policies since they were introduced over 130 years ago.[315] As we indicated above, in the ensuing years the courts then progressively embellished the duties in ways that largely expanded liability insurers' obligations.

The puzzle is why those duties were never modified. Insurance policy provisions are simply contract terms. Judicial interpretations of the provisions are simply that—interpretations of contract terms. If the meaning courts attribute to a provision is not what the parties intend, the parties can modify the provision or delete it to clarify their intent when they execute a new contract. Further, in liability insurance a new contract was, and still is, executed on an annual basis. Over the years, liability insurers have modified any number of policy provisions in reaction to judicial interpretations that they found unacceptable. But they have not modified the provisions addressing defense and settlement.[316] On the contrary, those provisions have continued to say what they have always said, even in the face of judicial interpretations that insurers have strenuously contested in thousands of cases.[317]

We have several explanations for this puzzle, which fall into two categories. The first involves the political economy of liability insurance. The second has to do with the administrative and technical aspects of modifying insurance policy language.

1. The Political Economy of Liability Insurance

Liability insurers' posture toward the duty to defend and the duty to settle reflected a more general paradox. In any given case, a liability insurer may have contested its purported duty to defend or settle. That is where the case law expanding these duties was generated. But over time, the expansion of those duties apparently proved generally acceptable to insurers.

The explanation lies in the actuarial character of insurance pricing. As Michelle Boardman has shown in connection with courts' interpretations of ambiguous policy language against the insurer and in favor of coverage, as long as insurers' exposure is predictable, they are often willing to live with

[314] *See* Baker, *supra* note 88, at 4-5.

[315] *See supra* notes 213-15 and accompanying text (discussing early policy contract provisions).

[316] *See supra* notes 216-17 and accompanying text (discussing modern-day standard policy contract provisions).

[317] *See supra* notes 216-17 and accompanying text.

procoverage interpretations of ambiguous policy language.[318] That is part of the reason insurers often do not modify language that they did not intend to afford coverage of certain claims but that courts interpreted in a manner favoring coverage.[319]

The same phenomenon would have been even truer of the duties to defend and to settle. As the incidence of tort liability covered by their policies increased, and as courts increasingly expanded their duties to defend and settle, liability insurers increased their premiums[320] to account for the projected cost of their increasing duties. Insurers might have opposed expansion of the duties in the short run, but in the long run they found the expansion of these duties largely acceptable.

In fact, the expansion might have been more than merely acceptable; it might have been welcomed. The expanded duties to defend and settle would have resulted in higher premiums and therefore more premium revenue. Further, other things being equal, managers—including insurance company managers—prefer more revenue because as a result they are managing larger companies, with the perquisites of office that accompany size.[321]

The data on premium increases in Tables 3 and 4 clearly reflect increased industry-wide revenue, but because they are not insurance company-specific they do not confirm this managerial exigency. But a few specific examples can help to support our contention. Because many insurers sold more than one kind of insurance, the data are only suggestive but are nevertheless telling. In 1927, Aetna Insurance Company had $26.2 million in premium revenue,[322] Hartford Fire had $47.9 million,[323] Liberty Mutual had $13.9 million,[324] and Travelers had $12.4 million.[325] In 1950, the analogous figures were $59.5 million for

[318] Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1107 (2006) ("[T]he sheer act of having interpreted a clause in a way that allows for predictable application in the future adds value to that clause. With insurance, the value is great enough that this generally makes it more likely, not less, that drafters will retain poor language.").

[319] *See id.*

[320] *See* Baker, *supra* note 88, at 4-5.

[321] *See* Syverud, *supra* note 222, at 1643-44. The fact that liability insurers have supported tort reform from time to time is not inconsistent with our argument for two reasons. First, they could not have openly opposed tort reform without alienating their customer base. Second, major reforms (placing ceilings on pain and suffering damages, and modification of the collateral-source rule, for example) have focused mostly on damages, thus rendering the amount of liability an insurer would face more predictable without actually limiting the incidence of their policyholders' liability. *See* FRANKLIN ET AL., *supra* note 159, at 824 (describing reforms). For further discussion, see ABRAHAM, *supra* note 1, at 129-30.

[322] MOODY'S INVS. SERV., MOODY'S MANUAL OF INVESTMENTS: AMERICAN AND FOREIGN 800 (1928).

[323] *Id.* at 1267.

[324] *Id.* at 2309.

[325] *Id.* at 1342-43.

Aetna,[326] \$126.8 million for Hartford Fire,[327] \$137 million for Liberty Mutual,[328] and \$83.6 million for Travelers.[329] In twenty-three years, premium revenue increased 127, 165, 884, and 573%, respectively, for those companies. Their managers were presiding over much larger enterprises, with the additional prestige and income that the change would have afforded them. In the short run, increased claim payouts may have been against the interest of an insurance company manager. But in the long run, other things being equal, there were probably considerable advantages accompanying the continually increasing premium revenue that resulted from increased payouts. This supported insurers' decision to leave the duties to defend and settle in place.

Those protections also were highly valuable to policyholders. As tort liability expanded and policyholders became increasingly aware of the liability threat they faced, the insurance protection provided by the expanding duty to defend and the soon-created duty to settle proved to be highly valuable features of liability insurance policies. Policyholders evidently wanted and were willing to pay for these protections. Insurers do not make profits by declining to provide policyholders the coverage they want and are willing to pay for, if it is feasible to provide this coverage. Rather, insurers make a profit by providing coverage that policyholders want, and then charging as much for it as the market will bear. As the data we presented in Tables 3 and 4 show, that is what happened. The total amount of money paid for liability insurance increased several thousand percent during the middle decades of the twentieth century.[330]

The duty to defend proved to be especially important in an era of increasingly frequent tort suits. As we have seen, the duty to defend applied not only to valid suits but also to groundless suits that would have been covered if they were successful.[331] Policyholders needed protection against the cost of defending such suits. The cost of defending a suit could be many times the amount of liability that would be imposed if the suit were successful. Because a defense was provided "outside of limits"—that is, without the costs of defense eroding the amount of insurance provided[332]—the duty to defend was often more valuable to the policyholder than the insurance against actual liability that the policy provided.

In addition, it was often in the insurer's interest to attempt to settle groundless or highly questionable suits for nuisance value, in order to save anticipated

326 MOODY'S INVS. SERV., MOODY'S MANUAL OF INVESTMENTS: AMERICAN AND FOREIGN 1247 (1951).

327 *Id.* at 1476-77.

328 *Id.* at 1427.

329 *Id.* at 1317.

330 *See supra* Tables 3, 4.

331 *See, e.g.*, DE LEON, *supra* note 188, at 58 (showcasing early twentieth-century insurance policy contract providing that insurer would defend against "any legal proceedings, even though groundless").

332 *See* ABRAHAM, *supra* note 1, at 35.

defense costs and avoid the remote possibility of a high verdict. For practical purposes, liability insurance created an expectation on the part of policyholders that the insurer would make questionable suits "go away" by settling them. This too was valuable protection.

Finally, the duty to settle reinforced the expectation that marginally valid suits would be settled, because the threat of liability for an above-limits judgment encouraged insurers to settle marginal suits with a low probability of success but a high potential award if there was success. Modifying policy language by limiting that duty would have deprived policyholders of the protection-through-settlement that they had come to expect and were evidently willing to pay for.

2. The Exigencies of the Redrafting Process

In addition to the political economy of liability insurance, there are administrative and technical reasons that insurers modify policy provisions less frequently than might be supposed: drafting-process inertia resulting from the fact that insurance policies are industry-wide standard forms, the desire to minimize complexity, marketing and regulatory constraints, and considerations resulting from horizontal federalism.

a. *Drafting-Process Inertia*

Liability insurance policies quickly become industry-wide standard forms when or shortly after a new form of insurance is introduced.[333] Standardizing policies enabled insurers to pool their claims and loss data in a statistically meaningful way at a time when individual insurance companies did not have sufficient data to do so on their own.[334] The practice continues to this day.[335]

The result is that in order to change the wording of a policy provision, the entire industry, or a significant portion of it acting through an enterprise that does the drafting, must agree to make the change. This arrangement makes it much more difficult to change a provision in a standard-form liability insurance policy than it would be to change a provision in a form contract used by a single entity, even a single insurance company.

b. *Minimizing Complexity*

Liability insurance policies are necessarily complex documents, but their drafters ordinarily attempt to make them as simple as is feasible. As case law governing the duty to defend and the duty to settle accumulated, redrafting policies to exclude unacceptable features of the duties but retain acceptable features would have increased the complexity of the policy provisions governing defense and settlement. Other things being equal, this was undesirable. As one court has put the point:

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[333] *See* ABRAHAM & SCHWARCZ, *supra* note 90, at 40.

[334] *See id.*

[335] *See id.*

> Drafters cannot anticipate all possible interactions of fact and text, and if they could the attempt to cope with them in advance would leave behind a contract more like a federal procurement manual than like a traditional insurance policy. Insureds would not be made better off in the process. The resulting contract would be not only incomprehensible but also more expensive.[336]

Consequently, even as case law with which liability insurers were not necessarily satisfied accumulated, they did not modify the defense and settlement provisions in their policies. And when new kinds of policies were developed, the same simple defense and settlement provisions that existing policies already contained were incorporated into the new policies.[337]

c. *Marketing and Regulatory Considerations*

Liability insurance policies contain an often-lengthy series of exclusions and other limitations on coverage[338] because they are structured to contain a comparatively general affirmative grant of coverage, or insuring agreement, subject to exceptions. Simply as a public relations and marketing matter, liability insurers tend to advertise the broad coverage their policies provide.[339] Adding exclusions and limitations that expressly reduce the breadth of coverage creates tension between what insurers represent to be covered and what is actually covered. Modifying defense and settlement provisions, either directly or by adding separate exclusions or limitations, would have risked aggravating this tension.

In addition, as time went on, policy language, including modifications, had to be approved by state regulators, usually called "Insurance Commissioners."[340] The need to seek such approval would have called attention to any proposed limitation on the existing defense and settlement provisions. Scrutiny of proposed changes of policy language in the high-volume consumer line of auto insurance, for example, could have been expected. This would have been especially true of proposed restrictions on the duty to defend, as this was a very important feature of coverage because it protected ordinary individuals against the cost of defending against groundless suits and put insurers in a position to settle them.

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[336] Harnischfeger Corp. v. Harbor Ins. Co., 927 F.2d 974, 976 (7th Cir. 1991).

[337] *See supra* notes 213-17217 and accompanying text (discussing early and modern-day policy contract provisions).

[338] *See* ABRAHAM & SCHWARCZ, *supra* note 90, at 468-72 (highlighting exclusions in standard-form CGL policy).

[339] *See, e.g.*, *Unbelievable Claims*, FARMERS INS., https://www.farmers.com/learn/unbelievable-claims/ (last visited Sept. 1, 2021) (showcasing outlandish policyholder stories to emphasize advertising campaign that insurer "know[s] a thing or two because [they've] seen a thing or two").

[340] *See* ABRAHAM & SCHWARCZ, *supra* note 90, at 115-16.

d. *Horizontal Federalism*

Liability insurance policies have contained standard-form policy language from the beginning, but their interpretation has always been a matter of state contract law. When only a single state or a few states have adopted an interpretation opposed by insurers, modifying the standard-form policy language in question often would be an overreaction, and might even be thought to imply that the prior language did not mean what insurers intended it to mean all along.

But modifying the provision in question selectively, depending on the state involved, often would be awkward and cumbersome and would undermine the standard-form character of insurance policy language. Often it will simply be easier for insurers to recognize that they have greater exposure in states that have adopted the interpretation they oppose and to adjust premiums for policies sold in those states accordingly.

At some point in the history of the duty to defend and the duty to settle, enough states would have developed sufficient case law for this problem to be minimal, but at that point an across-the-board modification would have been a much more substantial change than it would have been earlier, and it would have posed many of the problems we have just discussed. The patchwork quilt of developing law in different states, then, was partly responsible for liability insurers' decisions never to modify their policies.

3. Taking Stock: Sticky Defaults

Thus, a series of factors, all operating in the same direction over more than a century, converged to encourage insurers not to modify the defense and settlement provisions of their policies. On top of those factors, the protection provided by the duty to defend and settle was increasingly valuable to policyholders as tort law expanded and tort suits became more prevalent. Policyholders were willing to pay the additional premiums that were necessary to maintain, rather than shrink, these protections. As long as the additional costs those expanded duties imposed on insurers were predictable, insurers could raise premiums to cover these costs. And the additional revenue that higher premiums generated also benefited managers by contributing to the growth of the company.

The consequence was that, although the defense and settlement provisions of liability insurance policies were merely modifiable defaults, and although the case law embellishing the duty to defend and creating the duty to settle could have been circumvented by modifying the language of liability insurance policies, that did not occur. Those policy provisions and the case law interpreting them were defaults, but they were so sticky that they have never been changed. And retention of this structure has continued to drive increases in tort liability and liability insurance premiums over time.

III. WHY THE CONVENTIONAL STORY TOOK ROOT

The preceding two Parts revealed, we think, that the conventional story of tort law's modern development is seriously misleading. In this Part, we examine the reasons the conventional story took root and had staying power. In order to do this, we first summarize the revised story that emerges from Parts I and II. We then identify the reasons that the conventional story missed so much of what our revised story includes.

A. *The Key Elements of the Revised Story*

Both the emergence of liability insurance and its general connection to tort litigation have been widely noted by scholars commenting on the growth of the tort system in the twentieth century.[341] But two features of that growth have largely been missing from conventional descriptions of it. The first feature, which we documented in Part I, was the very large expansion of tort payouts, largely by liability insurers, in the years between 1920 and 1970.[342] Those are years that the conventional story treats as preceding the late twentieth-century "explosion" in tort liability.[343] Our data suggest that a major expansion occurred much earlier than is typically thought. If percentage increases in payouts are taken as a barometer, the earlier increase was in fact of greater magnitude than the expansion which took place between 1970 and the close of the century.[344]

This dramatic growth in tort payouts by liability insurers complicates the place that liability insurance occupies in the conventional story. According to that story, the late twentieth-century "explosion" in tort liability was doctrinally driven, a product of the emergence of strict liability for defective products,[345] the widespread adoption of comparative fault principles,[346] and the emergence of mass tort litigation,[347] among other doctrinal changes. All of those developments had their primary impact after the 1970s, and the conventional wisdom assumes that they were cumulatively responsible for a liability "explosion."[348] By advancing that causal explanation of the late twentieth-century expansion of tort liability, the conventional account implicitly suggests that few dramatic changes were taking place in tort law in the years between 1920 and 1970 because that period was one of relative doctrinal quiescence. But once the earlier, major expansion of tort liability is identified, its occurrence, *even in the face of doctrinal quiescence*, must be explained.

Here is where the second feature of the growth of tort liability we have identified in the twentieth century comes into play. More economic activity and

341 *See* sources cited *supra* notes 7, 14 (discussing "explosion" of tort liability).

342 *See supra* Tables 1, 2.

343 *See, e.g.*, TORT POL'Y WORKING GRP., *supra* note 7, at 2 (describing "explosion of tort liability in the United States" in decade preceding 1986).

344 *See supra* Tables 1, 2.

345 *See, e.g.*, HUBER, *supra* note 14, at 7 (discussing changes in product liability doctrine).

346 *See, e.g.*, *id.* at 78 ("Today comparative negligence principles allow into court a steady stream of wounds that would once have been viewed as self-inflicted.").

347 *See, e.g.*, TORT POL'Y WORKING GRP., *supra* note 7, at 33-35 (discussing DES and toxic tort litigation).

348 *See* sources cited *supra* notes 7, 14 (discussing "explosion" of tort liability).

many more vehicles on the roads generated an increase in the number of accidents.[349] As that occurred, individuals and businesses increasingly purchased liability insurance to protect themselves against tort liability. The "duty to defend" and "duty to settle" provisions that became universal features of liability insurance policies gave accident victims greater reason to expect that they would be compensated by a potential defendant's liability insurer.[350] And those provisions gave potential defendants assurance that they would not have to pay the costs of litigation and that liability insurers would pay claims against them, usually by settlement.[351] The result, our data show, was that payouts increased between 1920 and 1970 in rough proportion to the general increase in the amount of liability insurance that was purchased.[352]

In addition, the duty to defend and duty to settle provisions in insurance policies, sometimes working to the disadvantage of insurers in particular lawsuits, generally advantaged liability insurers and consequently have never been modified.[353] Further, the duties to defend and settle, and courts' holdings that insurers could on some occasions be responsible for awards in excess of policy limits, provided plaintiffs with additional incentives to combine suits with settlement offers slightly under the defendant's policy limits.[354] This encouraged plaintiffs' lawyers, accepting cases on contingent fees, to consider litigating cases where they could not expect payment from judgment-proof defendants.[355] It also resulted in insurers being held responsible for some large awards where verdicts exceeded policy limits.[356]

The vulnerability of policyholders and insurers to liability in excess of a policy's limit meant that enterprises with regular exposure to tort liability from their operations were made aware of instances in which defendants in tort suits, despite having insurance coverage, were exposed to substantial verdicts. Those effects created incentives for insurers to offer, and enterprises to purchase, additional liability insurance coverage. Because insurers' duties to defend and settle, although nominally extending only to the limits of policy coverage, might extend beyond that, insurers had incentives to maintain control of tort litigation involving their insureds. The result, we suggest, was an inflationary cycle of twentieth-century tort liability in which more insurance was taken out, more lawsuits were brought, and a dramatic expansion of insurance company payouts

[349] *See supra* notes 32-40 and accompanying text (discussing increased accident rates beginning in late nineteenth century).

[350] *See supra* Sections II.B, II.C (discussing development of duties to defend and settle).

[351] *See supra* Section II.C.2 (discussing consequences of duty to settle).

[352] *Compare supra* Tables 1, 2 (documenting insurance loss payouts), *with supra* Tables 3, 4 (documenting insurance premium payments).

[353] *See supra* Section II.D (explaining non-modification of duties to defend and settle).

[354] *See supra* text accompanying notes 273-74 (describing emergence of set-up offers).

[355] *See supra* text accompanying notes 271-72 (discussing interplay of contingency fee practice and duty to settle).

[356] *See supra* Sections II.B.2, II.C (highlighting impact of duties to defend and settle on verdicts).

in tort suits occurred. Thus, the expansion of tort liability between 1920 and 1970 that we have uncovered was fueled in part by the operation of liability insurance, both in individual cases and in the marketplace.

B. *How and Why the Conventional Story Missed All This*

In our view there are historical, political, and intellectual reasons the conventional story omitted so much of what we have sought to uncover.

1. The Emphasis of Post-World War II Torts Scholarship

There is no doubt that there was major doctrinal change in tort law beginning around 1960. Our contention is not otherwise. Much of this doctrinal change was consistent with, and to some extent the product of, the work of a number of prominent torts scholars in the middle of the twentieth century. William Prosser, for example, argued that the formalistic limitations on liability for negligence, and other doctrinal barriers to the imposition of liability, were often arbitrary and unnecessary.[357] In these respects, he strongly favored the expansion of tort liability.[358] Fleming James, Jr., and Charles Gregory contended that the negligence system impeded compensating accident victims; they promoted enterprise-based strict liability.[359] Guido Calabresi's early work was critical of the fault system and can be understood to favor moving toward strict liability.[360] Robert Keeton and Jeffrey O'Connell criticized the way the negligence system operated in the auto liability field and wanted to replace it with no-fault.[361]

Each of those scholars was critical of the existing tort system; each proposed the expansion of liability. To the best of our knowledge, none took the express position that the scope of liability had not been expanding during the preceding half century. But that was not their concern, and open acknowledgment that there had been very substantial expansion of liability during that period—even in the absence of significant doctrinal change—would not have served their purposes. The inference that was easy and natural for readers of those scholars' work to

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[357] *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 162-64 (expanded ed. 2003).

[358] *See id.* at 177-78. *See generally* Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27 (2013) (exploring Prosser's life and works).

[359] *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 385 (1951) (arguing that judges implicitly imposing no-fault standard should openly acknowledge it so as to avoid confusion); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,* 14 J. LEGAL STUD. 461, 478-82, 501-02 (1985) (discussing James's contributions to development and acceptance of theory of enterprise liability).

[360] *See, e.g.*, Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 514 (1961) ("Proper resource allocation militates strongly against allocating to an enterprise costs not closely associated with it . . . . But it also militates for allocating to an enterprise all costs that are within the scope of that enterprise.").

[361] *See* ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 1-5 (1965).

draw was that tort liability had not been expanding and that this lack of expansion, and the resultant lack of civil redress for a variety of accidental injuries, was part of the reason that doctrinal change, and the expansion of liability that would accompany it, was necessary and desirable.

We have sought to show that tort liability had actually been expanding dramatically before those scholars began to argue for doctrinal changes that would extend liability. For this reason, drawing an inference of nonexpansion between 1920 and the 1960s would have been a mistake. But the mistake was understandable. The works of Prosser, James, Gregory, Calabresi, Keeton, and O'Connell helped establish the agenda of torts scholars in subsequent generations, beginning in the 1970s. As that decade opened, it appeared that the tort system was doing a poor job of compensating accidental bodily injuries; that the established doctrines of negligence law were serving as barriers to compensation; and that the promise of a standard of strict liability to govern a variety of tort claims, ranging from injuries from defective products to those inflicted by "abnormally dangerous" activities, was very great.[362] Significant doctrinal changes seemed necessary to fulfill that promise. A logical inference that could be drawn by those attracted to that policy goal in the 1970s was that "not much had happened" to expand tort liability in preceding decades. And although Prosser and the others were able to demonstrate that tort *law* had been relatively quiescent for the half century before they wrote, their readers also apparently inferred, incorrectly, that tort *liability* had been quiescent.

Although one of the primary goals of Prosser and the other leading torts scholars of the 1950s and 1960s had been increased compensation for bodily injury through the tort system, very few of those scholars had made liability insurance a major part of their proposed reforms. The one exception might be Keeton and O'Connell, whose "basic protection for the traffic victim" plan was premised on the mandatory purchase of no-fault automobile insurance by all owners of registered vehicles in a state.[363]

None of the other prominent torts scholars of the 1950s and 1960s assumed that liability insurance would play an integral role in tort reform. Dramatic evidence is provided by a statement in the third edition of Prosser's *Handbook of the Law of Torts*, which appeared in 1964.[364] Prosser—the foremost torts scholar of his time—said that "[w]hile liability insurance undoubtedly has had its effect, it is difficult to escape the impression that all this has been very much overstated."[365] He added that "[a] dispassionate observer, if such a one is to be found in this area, might quite as readily conclude that the 'impact' of insurance

[362] *See* WHITE, *supra* note 357, at 244-46.
[363] KEETON & O'CONNELL, *supra* note 361, at 326-27.
[364] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (3d ed. 1964).
[365] *Id.* at 569.

upon the law of torts has been amazingly slight."[366] For Prosser and his contemporaries, changes in the American tort system were driven by doctrine; liability insurance was a sidebar, and the growth of tort liability was not any part of their focus. It is no surprise that Prosser's readers, who subsequently would construct the conventional story, followed his lead.

2. The Politics of Tort Reform

But then, in the 1980s, an "insurance crisis" emerged, affecting the availability and affordability of liability insurance and stimulating, in some quarters, calls for a reduction in the scope of tort liability through enactment of ceilings on tort damages and other, less radical, reforms.[367] In 1986, the cost of CGL insurance suddenly skyrocketed, and for a period of time some enterprises were unable to obtain CGL insurance at any price.[368] This "crisis" in the affordability and availability of business liability insurance garnered widespread attention and publicity. *Time* magazine, for instance, ran a cover story under the headline, "Sorry, America, Your Insurance Has Been Canceled."[369]

Studies of the causes of the crisis soon appeared, and for the first time the idea that an "explosion" in the frequency and severity of tort liability had occurred was propounded. Defense-oriented groups argued that such an explosion had spawned the "insurance crisis."[370] Plaintiff-oriented groups, in contrast, argued that the "crisis" was the result of anticompetitive behavior by the liability insurance industry,[371] and that in any event, there was too little, not too much, tort liability.[372] An especially prominent study was produced by a federal interagency working group chaired by the U.S. Justice Department's Assistant Attorney General for the Civil Division.[373] Focusing not primarily on actual payouts but on insurance company unprofitability, then-recent increases in

366 *Id.* A later edition of the treatise repeated this statement nearly verbatim. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 589 (5th ed. 1984) ("Although liability insurance undoubtedly has had its effect, a dispassionate observer, if one is to be found in this area, might quite as readily conclude that the impact of insurance upon the law of torts has been amazingly slight . . . .").

367 *See* Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 399 (1987).

368 *Id.* at 402.

369 George J. Church, *Sorry, Your Policy Is Canceled*, TIME, Mar. 24, 1986, at 16.

370 *See, e.g.*, TORT POL'Y WORKING GRP., *supra* note 7, at 2-3 (describing "explosion" of tort liability as factor contributing to insurance crisis).

371 *See, e.g.*, *McCarran-Ferguson Act and the Current Crisis in Liability Insurance: Hearings Before the Subcomm. on Monopolies & Com. L. of the H. Comm. on the Judiciary*, 99th Cong. 47-48 (1986) (statement of J. Robert Hunter, President, National Insurance Consumer Organization) (arguing that crisis resulted from insurance industry's exemption from antitrust enforcement and federal regulation).

372 *See, e.g.*, Richard L. Abel, *The Real Tort Crisis—Too* Few *Claims*, 48 OHIO ST. L.J. 443, 446-47 (1987) (arguing that evidence of insurance crisis is weak and that "real tort crisis" is one "of underclaiming rather than overclaiming").

373 *See* TORT POL'Y WORKING GRP., *supra* note 7, at 5.

product liability and medical malpractice suit filings, and less-than-systematic jury verdict data, the study showed something like a recent "explosion" and recommended reforms restricting the scope of tort liability.[374]

In retrospect, however, academic studies have concluded that the "crisis" was partly a feature of the naturally cyclical character of insurance prices;[375] partly the product of accounting adjustments that insurers had made in anticipation of the enactment of the Tax Reform Act of 1986;[376] and partly the result of the threat to liability insurers posed by the enactment of CERCLA, which did not involve tort liability at all, but rather the imposition of hundreds of billions of dollars for the cost of cleanup at leaking hazardous waste deposit sites on potentially insured businesses.[377]

For present purposes, two points about the insurance "crisis" of the 1980s are worth emphasizing. First, the fact that problems with the affordability and availability of liability insurance led immediately to calls for tort reform demonstrates how closely connected tort liability and liability insurance had become by that time. Affordable and available liability insurance was understood to be essential protection against the threat of tort liability, or the crisis would not have been so visible.

Second, the defense-oriented studies and reports proposing tort reform, some of which used data regarding increases that were exaggerated by their presenting in nominal dollars,[378] could have had the general effect of confirming what torts scholars would already have thought would be the case based on doctrinal changes occurring since 1960—the rise of strict products liability, relaxation of the requirements for proof of causation, and the more general idea that tort law was moving in the direction of enterprise liability.[379] It would have been natural for torts scholars, already aware that there had been comparatively little doctrinal change in tort law until 1960, to infer that there also had been little quantitative change in tort liability until that time. That impression would have stayed with any torts scholar who had no reason, going forward, to be interested in the amount of quantitative change that had occurred in tort prior to 1970. Thus, the liability insurance crisis of the mid-1980s would have served to confirm the emergence of an "explosion" of tort liability in that decade and the preceding

374 *See id.* at 1-5.

375 Abraham, *supra* note 367, at 400-01.

376 *See generally* Kyle D. Logue, *Toward a Tax-Based Explanation of the Liability Insurance Crisis*, 82 VA. L. REV. 895 (1996) (exploring liability insurance crisis through lens of federal income tax statutes).

377 *See* ABRAHAM & SCHWARCZ, *supra* note 90, at 483 (explaining CERCLA's imposed costs associated with cleanup).

378 *See, e.g.*, GOVERNOR'S ADVISORY COMM'N ON LIAB. INS., STATE OF N.Y., INSURING OUR FUTURE 37 (1986) (listing tort judgments and settlements for New York City).

379 *See generally* Epstein & Sharkey, *supra* note 14 (discussing role of insurance in expansion of products liability); Priest, *supra* note 359 (exploring 1960s civil liability developments).

one, thereby pushing awareness of what had occurred between 1920 and 1970 even further into the background.

3. Intellectual Barriers

In addition to the "insurance crisis" of the 1980s, which tended to reinforce the idea that an "explosion" of tort liability did not occur until the 1970s, as well as influential twentieth-century torts scholars' emphasis on doctrine rather than expenditures on liability or liability insurance, the subject-matter orientation of scholars in the current legal academy has contributed to this Article's inquiries not being at the top of many scholars' radar screens.

Few law professors do scholarly work in both tort and insurance law. Only one of this Article's authors (Abraham) works in both fields. Only a handful of current scholars do a substantial amount of work in both tort and insurance law, and their interest has not happened to focus on the subject of this Article. In previous generations, only Robert Keeton comes to mind as having done important work in both tort and insurance law.

The wall of separation between tort and insurance law scholarship is not merely a matter of interest, but also of expertise. There are many more law faculty teaching and writing about tort law, a required first-year course virtually everywhere, than about insurance law, which is a second-level elective at most law schools. For a torts professor or scholar to learn enough insurance law to do scholarship involving this subject would take a very substantial intellectual investment that few are willing to make. Add to this the fact that the subject of this Article is not just the interaction of tort and insurance law, but the *history* of that interaction—a topic in which only one of this Article's authors (White) possesses a passing expertise—and the improbability that our subject would already have been addressed by legal scholars becomes even greater. Only our close continuing intellectual relationship and experience collaborating on other projects made this one possible. Understood in this way, the surprise is not that the conventional story needed revision but that we happened upon this need at all. It was not only a development that had not been studied or even noticed, but one which would not tend to "leap out" from the reservoirs of history to most people. We just happen to have been thinking about the connections between tort law and the American insurance industry for some time, including historical connections, and one of us (Abraham) was sufficiently knowledgeable about liability insurance to look for data in some unexpected places.

Further, because of what we found about tort payouts and liability insurance premiums between 1920 and 1970, our rethinking of the development of modern tort liability is heavily quantitative, even if in a simple, arithmetic way. Quantitative analysis is outside the core of doctrinal, policy-oriented, and theoretical torts scholarship. There is a growing trend toward empirical work in law schools, but the rewards for doing such work go to those who employ sophisticated statistical methodologies, regression analyses, and the like. Our quantitative work relied only on our knowledge of where to look for the relevant data, a handheld calculator used to compute percentage increases in tort payouts and liability insurance premiums, and online tools for converting nominal to real dollars. What we did would get no scholarly awards from today's empirical legal scholars, though we would welcome the application of their sophisticated skills to the material we have presented.

CONCLUSION

It is a truism that the history of a common law subject is not simply the course of its doctrinal development but also its "context." Although the question of contextual causation is by no means unique to legal history, it has recently been taken as particularly pressing because scholars have differed significantly in their attitudes toward what "counts" in shaping the history of legal doctrines and fields. Attitudes exist on a spectrum from those who believe that scholars are bound to treat the "internal" dimensions of legal doctrine as entitled to great causal weight, to those who believe that most doctrinal formulations in legal fields are either infinitely malleable, capable of being employed in the service of multiple and even contradictory outcomes, or after-the-fact rationalizations designed to justify results reached on ideologically driven grounds of policy.[380]

The account we have provided in this Article may seem to require some legerdemain to fit into a model of causation in legal history in which both "internal" and "external" factors drive the development of legal subjects because we have argued that the "explosion" of tort payouts and insurance premiums between 1920 and 1970 took place in the face of doctrinal quiescence.

It is true that the dominant characteristic of the American tort system between 1920 and 1970 was not an expansion of the doctrinal reach of tort law but an expansion of liability for already existing torts. Negligence and its related doctrines did not significantly change in that period. Further, mass tort had not yet seen the light of day.

It would therefore be possible to read our revised history as attributing the development of modern tort law to phenomena that were wholly "external" to the doctrinal structure of tort law: the development of liability insurance and the rise in the incidence of accidental injury. But in our view this would be simplistic. Our story is more consistent with the proposition that change in a common law field over time comes from a recurrent, and sometimes complicated, interaction of "internal" and "external" factors, "internal" referring to the distinctive decision-making processes, doctrinal frameworks, and rhetorical patterns of a system featuring "lawmaking" by judges, and "external" referring to features in the larger economy and culture in which that common law system is embedded. It was "internal" legal doctrine that established negligence as the basis of liability for accidental harm, affirmed the validity of liability insurance, and broadly interpreted liability insurance policies as including duties to defend and settle. But then those legal doctrines influenced the "external" behavior of individuals and enterprises—on the roads, in

380 *See* sources cited *supra* note 23 (presenting "internalist" and "externalist" perspectives on causation in development of tort doctrine).

factories, in courts, and in the insurance marketplace—which in turn influenced doctrine. The result was the enormous expansion of tort liability that we have

It has come of something of a surprise, for two individuals who have been teaching and writing about tort law for more than forty years, to virtually stumble upon this important feature of the development of twentieth-century American tort law, hiding almost in plain sight. To consider that William Prosser, undoubtedly the leading torts scholar at the time, when opining in 1964 that "the 'impact' of insurance upon the law of torts has been amazingly slight,"[381] was actually egregiously wrong, and that the evidence demonstrating his error lay all around him, and us, has been a humbling experience. History, if one probes to uncover it, can be an unsettling, even subversive phenomenon.

[381] PROSSER, *supra* note 364, at 569.

APPENDIX

Table 5. Duty to Settle Cases—General Liability.

Case Citation	Coverage Type	Policy Limit	Judgment Amount
Rumford Falls Paper Co. v. Fid. & Cas. Co., 43 A. 503, 503 (Me. 1899).	Employers’	$1,500	$2,763.90
Mears Mining Co. v. Md. Cas. Co., 144 S.W. 883, 884 (Mo. Ct. App. 1912).	Employers’	$5,000	$6,000
Brassil v. Md. Cas. Co., 104 N.E. 622, 623 (N.Y. 1914).	Employers’	$1,500	$6,000
Brown & McCabe, Stevedores, Inc. v. London Guarantee & Accident Co., 232 F. 298, 299 (D. Or. 1915).	Employers’	$5,000	$12,000
Wis. Zinc Co. v. Fid. & Deposit Co., 155 N.W. 1081, 1083 (Wis. 1916).	Employers’	$5,000	$12,500
Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co., 240 F. 573, 576 (1st Cir. 1917).	Employers’	$5,000	$17,343.81
Brunswick Realty Co. v. Frankfort Ins. Co., 166 N.Y.S. 36, 37-38 (Sup. Ct. 1917).	General	$5,000	$8,000
Kingan & Co. v. Md. Cas. Co., 115 N.E. 348, 349-50 (Ind. App. 1917).	General	$5,000	$9,053.75
Wynnewood Lumber Co. v. Travelers’ Ins. Co., 91 S.E. 946, 946 (N.C. 1917).	Employers’	$5,000	$10,000
Cleveland Wire Spring Co. v. Gen. Accident, Fire & Life Assurance Corp., 6 Ohio App. 344, 345-46 (1917).	Employers’	$5,000	$20,000
Anderson v. S. Sur. Co., 191 P. 583, 583-84 (Kan. 1920).	Employers’	$5,000	$8,650
Douglas v. U.S. Fid. & Guar. Co., 127 A. 708, 709 (N.H. 1924).	Employers’	$5,000	$13,500
Best Bldg. Co. v. Emps.’ Liab. Assurance Co., 160 N.E. 911, 911 (N.Y. 1928).	Employers’	$10,000	$16,000
G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 545 (Tex. Comm’n App. 1929).	General	$5,000	$12,207

Case Citation	Coverage Type	Policy Limit	Judgment Amount
Tyger River Pine Co. v. Md. Cas. Co., 170 S.E. 346, 346 (S.C. 1933).	Employers’	$5,000	$7,000
Farmers Gin Co. v. Saint Paul Mercury Indem. Co., 191 So. 415, 415-16 (Miss. 1939).	Employers’	$5,000	$7,500
Olympia Fields Country Club v. Bankers Indem. Ins. Co., 60 N.E.2d 896, 897 (Ill. App. Ct. 1945).	General	$10,000	$20,000
Nat’l Mut. Cas. Co. v. Britt, 200 P.2d 407, 409 (Okla. 1948).	Employers’	$5,000	$10,000
Zumwalt v. Utils. Ins. Co., 228 S.W.2d 750, 751-52 (Mo. 1950).	Employers’	$10,000	$15,000
Am. Fid. & Cas. Co. v. All Am. Bus Lines, Inc., 190 F.2d 234, 236 (10th Cir. 1951).	Public	$10,000	$25,000
Ballard v. Citizens Cas. Co., 196 F.2d 96, 97 (7th Cir. 1952).	General	$2,500	$6,500
Crisci v. Sec. Ins. Co., 426 P.2d 173, 175-76 (Cal. 1967).	General	$10,000	$101,000
Young v. Am. Cas. Co., 416 F.2d 906, 908 (2d Cir. 1969).	General	$20,000	$90,330.25
Brockstein v. Nationwide Mut. Ins. Co., 417 F.2d 703, 704-05 (2d Cir. 1969).	Employers’	$50,000	$106,413.33
Bd. of Educ. v. Lumbermens Mut. Cas. Co., 419 F.2d 837, 837-38 (3d Cir. 1969).	General	$200,000	$335,140
Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 323 A.2d 495, 499 (N.J. 1974).	General	$50,000	$225,000
Larraburu Bros., Inc. v. Royal Indem. Co., 604 F.2d 1208, 1210-11 (9th Cir. 1979).	General	$1,250,000	$1,439,200
Miller v. Elite Ins. Co., 161 Cal. Rptr. 322, 327-28 (Ct. App. 1980).	General	$5,000	$11,000
Com. Union Ins. Co. v. Liberty Mut. Ins. Co., 393 N.W.2d 161, 162 (Mich. 1986).	Employers’	$100,000	$854,131.61

Table 6. Duty to Settle Cases—Auto Liability Insurance.

Case Citation	Coverage Type	Policy Limit	Judgment Amount
C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co., 90 A. 653, 653-54 (Pa. 1914).	Auto	$5,000	$9,200
Neuberger v. Preferred Accident Ins. Co., 89 So. 90, 91 (Ala. Ct. App. 1921).	Auto	$5,000	$6,500
Auerbach v. Md. Cas. Co., 140 N.E. 577, 577-78 (N.Y. 1923).	Auto	$5,000	$20,500
City of Wakefield v. Globe Indem. Co., 225 N.W. 643, 643 (Mich. 1929).	Auto	$10,000	$15,000
Hilker v. W. Auto. Ins. Co., 231 N.W. 257, 259 (Wis. 1930).	Auto	$5,000	$10,500
Davis v. Md. Cas. Co., 133 So. 769, 769 (La. Ct. App. 1931).	Auto	$2,500	$3,607.50
Ga. Cas. Co. v. Mann, 46 S.W.2d 777, 778 (Ky. 1932).	Auto	$5,000	$6,500
Am. Mut. Liab. Ins. Co. v. Cooper, 61 F.2d 446, 446 (5th Cir. 1932).	Auto	$5,000	$13,500
Boling v. New Amsterdam Cas. Co., 46 P.2d 916, 916 (Okla. 1935).	Auto	$5,000	$20,000
Hoyt v. Factory Mut. Liab. Ins. Co. of Am., 179 A. 842, 843 (Conn. 1935).	Auto	$5,000	$7,300
Johnson v. Hardware Mut. Cas. Co., 187 A. 788, 790 (Vt. 1936).	Auto	$5,000	$14,000
Abrams v. Factory Mut. Liab. Ins. Co., 10 N.E.2d 82, 83 (Mass. 1937).	Auto	$5,000	$15,000
Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 855 (Fla. 1938).	Auto	$5,000	$9,500
Blue Bird Taxi Corp. v. Am. Fid. & Cas. Co., 26 F. Supp. 808, 808 (E.D.S.C. 1939).	Auto	$5,000	$7,500
Kleinschmit v. Farmers Mut. Hail Ins. Ass'n, 101 F.2d 987, 988 (8th Cir. 1939).	Auto	$5,000	$9,000
Norwood v. Travelers Ins. Co., 284 N.W. 785, 785 (Minn. 1939).	Auto	$5,000	$7,500

Case Citation	Coverage Type	Policy Limit	Judgment Amount
Berk v. Milwaukee Auto. Ins. Co., 15 N.W.2d 834, 834-36 (Wis. 1944).	Auto	$5,000	$10,000
Kallas v. Lincoln Mut. Cas. Co., 16 N.W.2d 99, 99-100 (Mich. 1944).	Auto	$2,500	$6,400
Francis v. Newton, 43 S.E.2d 282, 284-85 (Ga. Ct. App. 1947).	Auto	$5,000	$7,500
Dumas v. Hartford Accident & Indem. Co., 56 A.2d 57, 59 (N.H. 1947).	Auto	$5,000	$13,002.70
Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., 215 S.W.2d 904, 906 (Tex. Civ. App. 1948).	Auto	$5,000	$11,000
Hart v. Republic Mut. Ins. Co., 87 N.E.2d 347, 348 (Ohio 1949).	Auto	$6,000	$12,000
Wilson v. Aetna Cas. & Sur. Co., 76 A.2d 111, 111-12 (Me. 1950).	Auto	$10,000	$12,100
Am. Cas. Co. v. Howard, 187 F.2d 322, 323, 325 (4th Cir. 1951).	Auto	$5,000 (personal injury); $5,000 (property damage)	$7,000 (personal injury)
S. Fire & Cas. Co. v. Norris, 250 S.W.2d 785, 786 (Tenn. Ct. App. 1952).	Auto	$10,000	$25,000
Fid. & Cas. Co. v. Gault, 196 F.2d 329, 329-30 (5th Cir. 1952).	Auto	$5,000	$16,200
Evans v. Cont'l Cas. Co., 245 P.2d 470, 471-73 (Wash. 1952).	Auto	$5,000 (personal injury); $1,000 (property damage)	$10,000
Hall v. Preferred Accident Ins. Co., 204 F.2d 844, 845-46 (5th Cir. 1953).	Auto	$5,000	$8,000
Brown v. Guarantee Ins. Co., 319 P.2d 69, 70 (Cal. Dist. Ct. App. 1957).	Auto	$5,000	$15,000
Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 200 (Cal. 1958).	Auto	$10,000	$26,250
Bell v. Com. Ins. Co., 280 F.2d 514, 515 (3d Cir. 1960).	Auto	$10,000	$24,000

Case Citation	Coverage Type	Policy Limit	Judgment Amount
Seguros Tepeyac, S.A. Compania Mexicana v. Bostrom, 347 F.2d 168, 172 (5th Cir. 1965).	Auto	$5,000	$270,000
Seward v. State Farm Mut. Auto. Ins. Co., 392 F.2d 723, 724-25 (5th Cir. 1968).	Auto	$10,000	$57,000
Groce v. Fid. Gen. Ins. Co., 448 P.2d 554, 556-57 (Or. 1968).	Auto	$10,000	$73,830.98
Cheek v. Agric. Ins. Co., 432 F.2d 1267, 1268-69 (5th Cir. 1970).	Auto	$10,000 (bodily injury); $5,000 (property damage)	$85,000
Chenoweth v. Fin. Indem. Co. 476 P.2d 519, 520 (Ariz. Ct. App. 1970).	Auto	$10,000	$35,000
Netzley v. Nationwide Mut. Ins. Co., 296 N.E.2d 550, 560 (Ohio Ct. App. 1971).	Auto	$20,000	$75,000
Brochstein v. Nationwide Mut. Ins. Co., 448 F.2d 987, 988-89 (2d Cir. 1971).	Auto	$50,000	$95,000
Merritt v. Rsrv. Ins. Co., 110 Cal. Rptr. 511, 513, 516 (Ct. App. 1973).	Auto	$100,000 (bodily injury); $25,000 (property damage)	$434,000 (bodily injury); $21,000 (property damage)
Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850, 852 (7th Cir. 1974).	Auto	$10,000	$210,000
Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493, 494-96 (Ky. 1975).	Auto	$10,000	$20,000
Eastham v. Or. Auto. Ins. Co., 540 P.2d 364, 366-67 (Or. 1975).	Auto	$25,000	$50,000
Alt v. Am. Fam. Mut. Ins. Co., 237 N.W.2d 706, 708 (Wis. 1976).	Auto	$50,000	$329,478.30
Fulton v. Woodford, 545 P.2d 979, 981 (Ariz. Ct. App. 1976).	Auto	$100,000	$200,000
Coleman v. Holecek, 542 F.2d 532, 534-35 (10th Cir. 1976).	Auto	$100,000	$353,117.20
Coe v. State Farm Mut. Auto. Ins. Co., 136 Cal. Rptr. 331, 334 (Ct. App. 1977).	Auto	$25,000	$250,000

Case Citation	Coverage Type	Policy Limit	Judgment Amount
Covill v. Phillips, 452 F. Supp. 224, 227, 229 (D. Kan. 1978).	Auto	$50,000 (bodily injury)	$125,000
Kriz v. Gov't Emps. Ins. Co., 600 P.2d 496, 498-500 (Or. Ct. App. 1979).	Auto	$10,000	$97,898.26
Ranger Ins. Co. v. Travelers Indem. Co., 389 So. 2d 272, 274 (Fla. Dist. Ct. App. 1980).	Auto	$100,000	$170,000
Shearer v. Reed, 428 A.2d 635, 636 (Pa. Super. Ct. 1981).	Auto	$10,000	$34,257.15
Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 32-33 (Iowa 1982).	Auto	$25,000	$600,000
Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co., 524 N.Y.S.2d 202, 203-04 (App. Div. 1988).	Auto	$20,000	$132,500
Betts v. Allstate Ins. Co., 201 Cal. Rptr. 528, 532 (Ct. App. 1984).	Auto	$100,000	$450,000

Table 7. Duty to Settle Cases—Other Liability Insurance.

Case Citation	Coverage Type	Policy Limit	Judgment Amount
Am. Fid. & Cas. Co. v. G.A. Nichols Co., 173 F.2d 830, 831 (10th Cir. 1949).	Unspecified	$10,000	$22,360, later settled for $15,500
Aetna Cas. & Sur. Co. v. Price, 146 S.E.2d 220, 221-22 (Va. 1966).	Physician's	$50,000	$100,000
Puritan Ins. Co. v. Canadian Universal Ins. Co., 586 F. Supp. 84, 86 (E.D. Pa. 1984).	Product	$500,000	$1,413,152.35
Gibson v. W. Fire Ins. Co., 682 P.2d 725, 729-30 (Mont. 1984).	Malpractice	$100,000	$175,000
Losser v. Atlanta Int'l Ins. Co., 615 F. Supp. 58, 59 (D. Utah 1985).	Unspecified	$100,000	$200,000
Aetna Life & Cas. Co., 687 F. Supp. 249, 251, 251 n.1 (E.D. La. 1988).	Unspecified	$500,000	$864,500, negotiated down to $839,500