JUDICIAL DEREGULATION OF CONSUMER MARKETS

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The dangers posed by insufficiently regulated consumer markets are both real and monumental. While the rights of consumers expanded drastically in the mid- to late twentieth century, these protections have weakened in the new millennium. One of the forces driving this change has been the judiciary, where an anti-consumer jurisprudence has taken root. This is surprising, given the courts' history of defending individuals' commercial rights and combating unfair market practices.

Despite the significant ramifications that the removal of consumer protections has for every individual, the evolution of anti-consumerism in the courts has received scarce attention from the academy. This Article fills this gap by collecting and analyzing the decisions underlying the judiciary's shift on consumer law issues. It describes how changes in courts' views about contractual interpretation, the propriety of judicial intervention in private relationships, and deference to alternative means of regulation have stripped consumers of their rights. It goes on to discuss the normative goals of consumer protection law and develops a framework for future pro-consumer governmental efforts. This framework challenges the pragmatic viability of doctrinal solutions to consumer law issues and describes why legislative and administrative measures are better suited to protecting consumers.

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INTRODUCTION

Consumer interests have taken a back seat to the interests of businesses. Whereas the rights of consumers expanded drastically in the mid- to late twentieth century, the last twenty years have seen many of these protections clawed back. One of the agents responsible for this change is the judiciary, where a strongly anti-consumer jurisprudence has taken root. While popular legal journalists and scholars have commented on the Supreme Court's pro-business tilt and how specific issues in commercial law have been resolved in favor of businesses,[1] there have been surprisingly few attempts to document and evaluate the

[1] *See, e.g.*, Erwin Chemerinsky, Op-Ed., *Justice for Big Business*, N.Y. TIMES, July 2, 2013, at A25; *Corporations and the Court*, ECONOMIST, June 23, 2011, at 75–76; Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1; Pat Garofalo, *Score One More for the Corporations*, U.S. NEWS & WORLD REP. (June 24, 2013, 4:32 PM), http://www.usnews.com/opinion/blogs/pat-garofalo/2013/06/24/supreme-court-sides-with-business-in-vance-v-ball-state-harassment-case.

broader changes in how courts treat consumer claims.[2] This Article fills this gap by providing an analysis of this trend both in the general context of consumer protection and in the more specific context of insurance law.

Over the last twenty-five years, lawsuits and governmental investigations have revealed the extraordinary measures that insurance companies have used to intentionally exploit policyholders.[3] The abusive practices identified included intentionally denying legitimate policyholder claims, bribing insurance brokers, and systemically underpaying claimants.[4] These events, along with individuals' personal experiences, have led to a widespread public intuition that insurance companies regularly deny legitimate policyholder claims and act in other highly reprehensible ways.[5] Yet, despite this, the judicial system has failed to punish insurers, allowing them to get away with minimizing their coverage obligations, shirking their indemnification duties, and exploiting commercially unsophisticated individuals.[6]

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2 *See, e.g.*, J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (discussing how the Court has limited private enforcement mechanisms such as consumer suits). There has been much greater academic discussion of the related, but analytically different, issue of whether the Court is "pro-business." *See, e.g.*, Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 962 (2008) (claiming that the Roberts Court "is the most pro-business Court of any since the mid-1930s"); Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (studying whether the Supreme Court's decisions have become more pro-business over time); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1020 (2009) (stating that there can be "little doubt that the Roberts Court is, broadly speaking, a business-friendly Court"). Conflating the two is incorrect, primarily because many of the decisions that have been considered pro-business have little to do with consumers—e.g., suits involving tax, environmental, or campaign contribution eligibility issues.

3 *See, e.g.*, Merrick v. Paul Revere Life Ins. Co., 594 F. Supp. 2d 1168, 1170–76 (D. Nev. 2008) (providing an account of UNUM Provident's disability claim handling practices); Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1147–50 (Utah 2001) (discussing State Farm's abusive claims handling practices), *rev'd*, 538 U.S. 408 (2003); RAY BOURHIS, INSULT TO INJURY: INSURANCE, FRAUD, AND THE BIG BUSINESS OF BAD FAITH (2005) (describing what litigation uncovered regarding the bad faith practices that were rampant at a leading disability insurance company); JAY M. FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT (2010) (reviewing a multitude of ways that insurers have shortchanged policyholders); Kenneth S. Abraham, *Liability for Bad Faith and the Principle Without a Name (Yet)*, 19 CONN. INS. L.J. 1, 3–7 (2012) (discussing the largest publicly known incidents of insurers acting in bad faith); Joseph B. Treaster, *Broker Accused of Rigging Bids for Insurance*, N.Y. TIMES, Oct. 15, 2004, at A1 (describing American International Group's illegal payments to insurance brokers).

4 *See* BOURHIS, *supra* note 3, at 3–14; FEINMAN, *supra* note 3, *passim*; Abraham, *supra* note 3, at 6.

5 *See, e.g.*, Press Release, Harris Interactive, Americans Less Likely to Say 18 of 19 Industries Are Honest and Trustworthy This Year (Dec. 12, 2012), *available at* http://harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleid/1349/ctl/ReadCustomDefault/Default.aspx.

6 *See, e.g.*, BOURHIS, *supra* note 3, at 1–12; FEINMAN, *supra* note 3, at 4–12; Eugene R. Anderson & James J. Fournier, *Why Courts Enforce Insurance Policyholders' Objectively Reasonable Expectations of Insurance Coverage*, 5 CONN. INS. L.J. 335, 336–37 (1998); David Dietz

The judiciary's retreat from protecting consumers from exploitation is also reflected in the commerce-related opinions that the U.S. Supreme Court has issued over the past two decades. The Court's assault on consumer rights has occurred on many different fronts. Recent decisions have established that private agreements should be interpreted from a formalist perspective, stacking the deck in favor of the entities that draft the terms of commercial contracts. They have also endorsed the idea that the judiciary should intervene as sparingly as possible in private contractual relationships, eliminating the equity-based mediating role that courts once assumed. The Court has even gone as far as severely limiting consumers' access to the judicial system as well as minimizing the damages victorious plaintiffs can obtain. Simply put, today's courts should not be viewed as a consumer-friendly means for wronged individuals to pursue their claims.

When considered together, the Court's recent holdings clearly indicate that it has gone through a major ideological shift. Its antagonism towards consumer rights is the most prominent thread connecting the decisions that have construed statutes to quash consumers' claims,[7] immunized businesses from tort liability to consumers,[8] and eliminated the ability of courts to use common law doctrines to invalidate contracts.[9] Not only have the substantive holdings of the Court's decisions been bad for individuals, but they have pushed the lower courts to view all consumer law issues through a pro-business schema. Furthermore, the fact that the past two decades have seen so many losses for consumers and so few wins portends that this anti-consumer jurisprudence will likely remain dominant for years to come.

This trend can also be seen in the ways that specific pro-consumer doctrines have evolved over time. Insurance law provides a particularly interesting context for observing these changes, as it is an area of law that has always reflected particular concern for consumer protection issues. Since the earliest days of insurance litigation, courts have expressed concern about the law permitting unscrupulous insurers to

& Darrell Preston, *The Insurance Hoax*, BLOOMBERG MARKETS, Sept. 2007, http://www.bloomberg.com/apps/news? pid=nw&pname=mm_0907_story1.html.

7 *See* Nw., Inc. v. Ginsberg, 134 S. Ct. 1422 (2014) (finding the Airline Deregulation Act preempts breach of good faith contract claims); Preston v. Ferrer, 552 U.S. 346 (2008) (finding the Federal Arbitration Act divests the power of state courts to hear certain claims).

8 *See* Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466 (2013) (shielding drug manufacturers from liability); Riegel v. Medtronic, Inc., 552 U.S. 312, 318 (2008) (shielding medical device manufacturers from liability).

9 *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (holding that an equitable doctrine could not be used to invalidate an arbitration clause); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (holding that the Federal Arbitration Act forecloses the ability of state courts to invalidate an arbitration provision for unconscionability).

take advantage of consumers.[10] While such judicial sentiments have occasionally been nothing more than sympathetic dicta, they have often persuaded courts to rule in favor of policyholders. More specifically, concerns about consumer welfare have inspired courts to look beyond standard principles of contract law when interpreting insurance contracts.[11] Rather than enforcing policy terms in a strictly literal manner, some courts have required insurers to indemnify policyholder losses when it would be reasonable for the policyholder to believe that the relevant type of coverage existed.[12] This form of policy construction came to be known as the doctrine of reasonable expectations and, even though it is not recognized in every jurisdiction, it has come to be recognized as one of the core doctrines in insurance law.[13]

Courts created the doctrine of reasonable expectations to address what they perceived to be shortcomings in the law's treatment of insurer-consumer relationships. By recognizing the reasonable expectations doctrine, they provided themselves with the means for protecting policyholders' interests and discouraging exploitative insurer behaviors.[14] While the number of states recognizing this consumer-friendly doctrine gradually grew over the course of the twentieth century, this trend reversed as the new millennium approached. Around the same time that the Supreme Court started expressing anti-consumer views, state courts began to construe the doctrine narrowly or, in some cases, disclaim it altogether.[15] The shift away from reasonable expectations analysis has continued on to the current day.[16]

Documenting the emergence of this anti-consumer jurisprudence is important for several reasons. Not only does it draw attention to an issue that has been largely ignored by the legal academy, but it also teases out some of the broader theoretical issues that are present in modern commercial law opinions. Additionally, it identifies specific issues upon which consumer rights advocacy should focus and provides insight concerning the types of reforms that are most likely to succeed.

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10 *See* Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 963–66 (1970) (collecting cases expressing such concerns).

11 *See, e.g.*, West v. Umialik Ins. Co., 8 P.3d 1135, 1138 (Alaska 2000); Stewart v. Estate of Bohnert, 162 Cal. Rptr. 126, 131–32 (Ct. App. 1980); Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co., 366 N.W.2d 271 (Minn. 1985); *see also* RICHARD A. LORD, 16 WILLISTON ON CONTRACTS § 49:20 (4th ed. 2000).

12 *See, e.g.*, Coleman v. Sch. Bd. of Richland Parish, 418 F.3d 511, 517 (5th Cir. 2005); Nutter v. St. Paul Fire & Marine Ins. Co., 780 F. Supp. 2d 480, 485 (N.D. W. Va. 2011); Allstate Ins. Co. v. Teel, 100 P.3d 2, 4 (Alaska 2004).

13 *See generally* JEFFREY W. STEMPEL ET AL., PRINCIPLES OF INSURANCE LAW §§ 2.09, 2.12 (4th ed. 2011).

14 *See* LORD, *supra* note 11, § 49:20.

15 *See infra* Parts I & II.C.

16 *See infra* Part II.C.

The debate among insurance scholars regarding the best ways to advance unsophisticated policyholders' rights provides a good example of how acknowledgement of larger jurisprudential changes can guide policymaking. Over the last twenty years, academics have argued that problems in consumer insurance markets would be solved if the judiciary would flex its regulatory muscles and adopt certain measures.[17] Some of these scholars' reform proposals have encouraged courts to adopt entirely novel doctrinal rules,[18] while others have advocated for the revitalization of the "reasonable expectations" doctrine.[19] These proposals have been criticized by other academics, who have argued that these types of doctrinal solutions would likely do more harm than good.[20] The jurisprudential insights contained in this Article resolve this debate by establishing that neither group's substantive claims matter, given the infeasibility of doctrinal reforms in today's judicial climate.

The fact that the courts are unlikely to help consumers in the current judicial climate, however, does not foreclose the possibility of other governmental entities improving markets through regulation. Therefore, reformists should look at other, nondoctrinal solutions. Legislative and administrative actors have the capacity to pass laws and institute rules that will advance consumers' interests. Indeed, there are reasons to believe that reform that occurs through these bodies would be superior to judicial action. Not only do nonjudicial regulators have a greater capacity to design and implement solutions prospectively,[21] but the barriers to getting such bodies to take action may be significantly less daunting than they are for doctrinal reforms.

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17 *See, e.g.*, Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007) (advocating for adoption of a products liability scheme); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181 (1998) [hereinafter *Unmet Expectations*] (arguing in favor of broader adoption of the reasonable expectations doctrine).

18 *See* Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075 (2010) (proposing that courts allow commercial entities to rebut a finding of contractual ambiguity with consumer research evidence); Schwarcz, *supra* note 17, at 1389–1400 (discussing how markets could be improved by imposing a products liability scheme on certain types of boilerplate contracts); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 822–39 (2009) (expanding upon Professor Schwarcz's suggested reform).

19 *See* Anderson & Fournier, *supra* note 6, at 366; Stempel, *supra* note 18, at 831; Peter Nash Swisher, *Judicial Interpretations of Insurance Contract Disputes: Toward a Realistic Middle Ground Approach*, 57 OHIO ST. L.J. 543, 545–46 (1996).

20 *See, e.g.*, H. Ward Classen, *Judicial Intervention in Contractual Relationships Under the Uniform Commercial Code and Common Law*, 42 S.C. L. REV. 379, 404–07 (1991); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 506–07 (2001); Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI.-KENT L. REV. 189, 196–97 (1998).

21 Courts are at a comparative institutional disadvantage, due to the fact that their capacity to act is reactive—they can only act when they hear a case that presents an issue—and localized—their decisions only directly impact a single dispute and any precedential impacts will be jurisdictionally limited.

This Article begins with an analysis of the anti-consumer jurisprudence that has been developing over the past two decades.[22] It provides an overview of the most important contemporary commercial law opinions, discussing how they have created a judicial environment that is hostile to consumers and identifying several broader theoretical points that connect these cases. Part II traces the evolution of one particular consumer-friendly doctrine—the reasonable expectations doctrine—and discusses how its gradual demise mirrors the larger anti-consumer jurisprudential trend.[23] Part III sets forth the normative goals that consumer protection efforts must satisfy.[24] Finally, Part IV concludes by discussing how the claims developed earlier in the Article should influence future reform proposals.[25]

I. THE RISE OF ANTI-CONSUMER JURISPRUDENCE IN THE MODERN ERA

The past century has witnessed massive changes in the state's role in consumer-business relationships. While the majority of the twentieth century saw the government enacting consumer protection measures and increasing its regulation of commercial transactions, such measures have come under siege in recent times. Interestingly, many of the primary assaults have originated out of the judiciary. This is peculiar, as the courts have often been viewed as the branch of the government that is most concerned with defending individuals' rights and combating inequities.

State and federal governments' efforts to protect consumers from exploitation have taken a variety of different forms. One of the first actions was the passage of the Federal Trade Commission Act of 1914 and the creation of an administrative agency—the Federal Trade Commission (FTC)—charged with prohibiting unfair and deceptive business practices.[26] Large legislative expansions of consumers' rights occurred in the 1960s and early 1970s, which saw the enactment of statutes like the Consumer Product Safety Act,[27] the Consumer Credit Protection Act,[28] and state consumer protection acts.[29]

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22 *See infra* notes 26–71 and accompanying text.

23 *See infra* notes 72–134 and accompanying text.

24 *See infra* notes 157–63 and accompanying text.

25 *See infra* notes 163–88 and accompanying text.

26 15 U.S.C. § 45(a) (2012). The other major starting point was the passage of the Pure Food and Drug Act and creation of the Food and Drug Administration, which occurred in 1906. *See* Max N. Helveston, *Preemption Without Borders: The Modern Conflation of Contract and Tort Liabilities*, 48 GA. L. REV. 1085, 1093–94 (2014).

27 15 U.S.C. § 2053.

28 *Id.* § 1601. The Consumer Credit Protection Act is divided into several different acts, such as the Truth in Lending Act (Title I of the CCPA), the Fair Credit Reporting Act (Title VI), the

The growth of consumers' rights and their ability to sue businesses, however, began to encounter resistance from the judiciary as the new millennium approached. Over the past two decades, courts have taken increasingly formal approaches to contract law and internalized skepticism about using common law doctrines to modify parties' contractual obligations.[30] Not only have they narrowly construed parties' contractual obligations—requiring parties to comply only with duties set forth in the agreement, nothing further—but they have also become increasingly unwilling to find that contractual terms are ambiguous.[31] The new millennium has also seen courts drastically limiting the types of facts that they will consider when interpreting contractual terms, minimizing (or eliminating) the role of equitable considerations. In short, liberal approaches to contract construction have been waning, and it is becoming increasingly unlikely that courts will give weight to the extracontractual factors that have traditionally benefitted consumers.

As this Article will discuss further in Part IV, one of the academy's standard responses to the decisions underlying this trend has been to suggest that the judiciary should adopt doctrinal reforms. A major flaw in many of these proposals is the fact that they never attempt to assess the likelihood that courts would actually choose to implement doctrinal reforms. Because they do not broach this topic, they fail to recognize the extent to which there have been significant shifts in how the judiciary views commercial law issues and, thus, how incongruous their suggestions are with modern reality.

Establishing the existence of global trends in the legal system is not a simple task. It is particularly difficult when discussing broad jurisprudential changes, as providing a comprehensive or near-comprehensive review is impossible. Discussing even a majority of the relevant decisions would require analyzing a massive number of cases, an endeavor that is beyond the scope of this (or any) Article. Instead, this Article focuses on a much more manageable proxy—it discusses the general state of consumer law jurisprudence as reflected in the opinions issued by the Supreme Court of the United States. While one can generate any number of reasons why this set of cases might not be

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Equal Credit Opportunity Act (Title VII), the Fair Debt Collection Practices Act (Title VIII), and the Electronic Fund Transfer Act (Title IX).

29 For an overview of each state's consumer protection act, see JOSHUA D. WRIGHT ET AL., SEARLE CIVIL JUSTICE INST., STATE CONSUMER PROTECTION ACTS: AN EMPIRICAL INVESTIGATION OF PRIVATE LITIGATION 5 (2009), *available at* http://ssrn.com/abstract=1708175.

30 *See, e.g.*, David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 842–43 (1999); Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 212–13 (2005); John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 379–80 (2013); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1226–28 (1999).

31 *See, e.g.*, Van Alstine, *supra* note 30, at 1223.

representative of the types of analysis occurring in the lower federal and state courts, supremacy rules and the Court's demonstrated willingness to overrule lower courts' decisions in these cases have caused judges to internalize the Court's views on these issues.

This Part proceeds by providing a description of how formalism has come to dominate modern contract jurisprudence. It goes on to review ways in which the modern Court has expressed the view that the judiciary should strive to intervene in privately structured commercial relationships as minimally as possible. Next, it discusses the Court's increasingly expansive conception of federal preemption and other ways in which its opinions have limited individuals' rights to sue businesses. It concludes by touching on the Court's decisions that have placed constitutional restrictions on punitive damages awards and describing the harmful economic consequences that they have had on consumers.

A. *Formalism's Resurgence*

The judiciary's participation in the consumer protection movement in the latter half of the 20th century has largely petered out.[32] At least part of the explanation for this change is how, over the past two decades, courts across the nation have shifted away from liberal theories of textual interpretation, which generally favored consumers. In their place, courts have employed formalist analyses, which attempt to derive the meaning of text independently of the context that led to its creation.[33]

The shift towards formalist interpretative methods has been most prominent in the context of constitutional and statutory analysis. The Supreme Court has relied on this mode of analysis when construing a wide array of statutes.[34] A number of scholars have noted the dominant

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32 *See* Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function, and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1131–52 (1974) (describing judicial consumer protection in the 1960s and 1970s); Shelly Smith, Notes & Comments, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1191–96 (2001) (describing how judicial decisions have kept consumer claims out of courts).

33 *See* Charny, *supra* note 30, at 842–43; Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 53 (2004); Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 499–501 (2010); Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 CARDOZO L. REV. 1529, 1529–30 (2002) (book review); *see also* Halbig v. Burwell, 758 F.3d 390, 397 (D.C. Cir.), *vacated en banc*, No. 14–5018, 2014 WL 4627181 (D.C. Cir. 2014); Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1483–84 (2008); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 891 (2002).

34 *See, e.g.*, RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012) (the bankruptcy code); Riegel v. Medtronic, Inc., 552 U.S. 312, 321–27 (2008) (the Medical Device

role that text-focused analysis played in these decisions, as well as the growing influence it is having in the nation's broader jurisprudence.[35] Indeed, one leading scholar has stated, "[t]he modern Court . . . adheres more strictly to a statute's conventional semantic meaning (the letter), even when that meaning does not capture the statute's apparent purpose (spirit)."[36]

Formalism has long played a central role in debates over the proper way to interpret contract terms. One of the theoretical constructs that contract scholars have developed contrasts functionalist (alternatively referred to as liberal or purportivist) and formalist (also referred to as conservative or textualist) approaches to contract interpretation.[37] Whereas the former approach encourages judges to look beyond the terms of a contract and reshape contractual obligations when they appear to be at odds with the parties' original intentions, the latter approach values strict adherence to the terms of the agreement and discourages judicial intervention in private relationships. Because formalism focuses exclusively on a contract's text when determining the parties' obligations, it requires courts to resist litigants' attempts to use equitable arguments to invalidate contracts, modify their terms, or advocate in favor of a particular construction of a term's meaning.[38]

The judiciary's embrace of formalism in contract interpretation has not received nearly as much attention as it has in other areas of law, but the impacts associated with the courts' shift have been similarly significant. This lack of notoriety is likely due to the fact that there are very few contract interpretation issues that end up before the Supreme Court. Despite this scarcity, a number of leading scholars have noted the influence that the jurisprudential shift toward formalism has had on

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Amendments); Duncan v. Walker, 533 U.S. 167, 172–82 (2001) (sentencing); *Duncan*, 533 U.S. at 187–90 (Breyer, J., dissenting) (same); Circuit City Stores v. Adams, 532 U.S. 105, 131–33 (2001) (Stevens, J., dissenting) (Federal Arbitration Act); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225–31 (1994) (Communications Act).

35 David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97 (2013); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2006–10 (2009) [hereinafter Manning, *Federalism*]; John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 181 [hereinafter Manning, *The New Purposivism*] ("In the past quarter-century, the Court has rejected . . . [traditional purposivism]. Nowadays, if the text of the statute is clear, that is the end of the matter . . . . The conventional wisdom is that this change is the product of the growing influence of textualism . . . ."); Jonathan R. Siegel, *Naïve Textualism in Patent Law*, 76 BROOK. L. REV. 1019, 1020 (2011).

36 Manning, *Federalism*, *supra* note 35, at 2006.

37 *See, e.g.*, STEMPEL ET AL., *supra* note 13, § 2.03(B); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1723–24 (1976); Manning, *Federalism*, *supra* note 35, at 2006; Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1042–43 (1991).

38 *See, e.g.*, STEMPEL ET AL., *supra* note 13, § 2.03(A)–(B).

contract enforcement.[39] Furthermore, the few opinions that have involved contract interpretation issues have unabashedly endorsed formalist modes of analysis.[40] The Court's endorsement of textualism for interpreting contract provisions was perhaps most unambiguously expressed as dicta in a recent bankruptcy decision, where Justice Souter stated that "it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent."[41] Given the Court's extreme reticence to find contractual or statutory text ambiguous, this essentially equates to a decree that a contract's form must always trump over its function.

B. *Increased Noninterference in Commercial Relationships*

Throughout the new millennium, mainstream media outlets and scholars portrayed the Supreme Court as increasingly conservative.[42] Even if one assumes that the claims about the Court's general conservatism are accurate, however, it does not necessarily follow that there have been concomitant theoretical shifts—towards formalism, judicial restraint, and noninterference in private relationships—in the realm of commercial law. Few cases involving contract law (and essentially no insurance law cases) appear before the Court each year.[43] Because of this fact, the best way to demonstrate a jurisprudential shift in this area is to analyze cases involving hybrid issues, where the Court has engaged in both contractual analysis and statutory (or regulatory) interpretation.

The Court's arbitration decisions provide a clear picture of how it has committed itself to views that harm consumers, e.g., that contractual text reigns supreme and that there should be limited judicial

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39 *See* Charny, *supra* note 30, at 850; Feinman, *supra* note 33, at 1; Miller, *supra* note 33, at 499–501; Movsesian, *supra* note 33, at 1529; *see also* Bridgeman, *supra* note 33, at 1483–84; Murray, Jr., *supra* note 33, at 891.

40 *See, e.g.*, Alabama v. North Carolina, 560 U.S. 330, 340–58 (2010) (limiting the parties' contractual obligations to those that were explicitly set forth in the inter-state compact's text); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) (enforcing a union contract in accordance with the "clear[] and unmistakeabl[e]" meaning of its text); Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 31–32 (2004) (enforcing a clause in an insurance contract in accordance with its "plain language"); Circuit City Stores v. Adams, 532 U.S. 105, 131–33 (2001) (Stevens, J., dissenting) (arguing that the Court employed textualism to advance its own preference for binding arbitration of employment contracts in the teeth of a contrary statutory purpose).

41 Travelers Indem. Co. v. Bailey, 557 U.S. 137, 150 (2009).

42 *See, e.g.*, Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863, 867–68 (2011); Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 692–93 (2006).

43 The dearth of contract cases before the Supreme Court can be explained, in part, by the fact that contract law is part of each state's common law. Hence, pure contract law questions will most commonly be decided by state supreme courts, either through the state's standard appeals process or certification by a federal court.

intervention in private parties' commercial affairs. A trio of decisions issued in the latter half of the 2000s demonstrates the modern Court's approach to claims that contract terms are unenforceable because they are too exploitative of consumers. In 2006, the Court found that the judicial system lacked jurisdiction over a consumer's claim that a contract was unenforceable because the parties' agreement contained an arbitration provision that violated state usury laws.[44] Two years later, the Court decided that when parties agree to arbitrate questions arising under a contract, that agreement supersedes state laws that vest primary jurisdiction over the claims in any another judicial or administrative forum.[45] The Court expanded on these decisions two terms later, when it found that contractual terms that delegate exclusively authority to resolve *any* dispute relating to the agreement's validity are enforceable and must be respected by the lower courts.[46] Collectively, these decisions have harmed consumers by making it incredibly difficult for individuals to contest the arbitration provisions contained in nearly all consumer sales contracts. They also showcase the Court's embrace of the hallmark characteristics of contractual formalism: mechanically binding parties to the terms set forth in their contracts; ignoring (or giving little weight to) equitable arguments that the parties' raise; and disavowing the judiciary's integral role in regulating contractual behaviors and relationships.

The Court took another bold step in this direction in 2011 when it decided *AT&T Mobility LLC v. Concepcion*.[47] As in its previous decisions, the Court upheld the enforceability of an arbitration provision contained in a form consumer contract. *Concepcion* is notable, however, because it overruled a California Supreme Court decision that determined that the challenged provision was unenforceable as unconscionable under state law.[48] Given the autonomy that states have traditionally enjoyed when it comes to questions of contract law, this decision constituted a significant break from precedent.[49] By effectively invalidating California's common law unconscionability doctrine, the Court sent a message to state courts that they could no longer look exclusively to their state's jurisprudence when deciding contract cases and that they needed to follow the Court's views concerning consumer law issues. The *Concepcion* decision put the rest of the judiciary on notice that the Supreme Court had no qualms with

44 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448–49 (2006).

45 Preston v. Ferrer, 552 U.S. 346, 349–50 (2008).

46 Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 72–74 (2010).

47 131 S. Ct. 1740 (2011).

48 *Id.* at 1751–52.

49 *See* Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 743 (2012) (discussing how, prior to the *Concepcion* decision, the Federal Arbitration Act was not considered to preempt state common law contract doctrines).

cabining states' traditional authority concerning matters of contract law.[50]

Formalist and anti-interventionist views also played a significant role in *American Express Co. v. Italian Colors Restaurant*,[51] the Court's most recent arbitration decision. Echoing its holding in *Concepcion*, the *Italian Colors* Court decided that arbitration provisions prohibiting class arbitration, as well as any form of joinder or consolidation, are enforceable even if they leave consumers without any reasonable, cost-effective means for seeking relief.[52] In justifying this conclusion, it narrowly construed a functionalist exception—the "effective vindication" principle—that lower courts had relied on in refusing to enforce such provisions.[53] As in *Concepcion*, the Court's holding favored business interests, enforcing the literal contractual terms that companies impose on consumers and not allowing a common law judicial doctrine to modify the terms of two private parties' commercial relationship.[54]

The Court's endorsement of formalism and nonintervention has also been present in the handful of decisions that it has issued concerning contract disputes not involving arbitration provisions. For instance, its inclination against judicial intervention can be seen (albeit indirectly) in its ruling in *NRG Power Marketing v. Maine Public Utilities Commission*,[55] where it held that the fact that the parties had contractually determined electricity rates foreclosed the possibility of judicial modification of pricing terms.[56] A similar deference to contractual text is present throughout *Alabama v. North Carolina*,[57] where the Court limited the contractual obligations of the parties to an interstate compact to those actions that were expressly set forth in the agreement's text.[58]

C. *The Growth of Limitations on Individuals' Ability to Sue Commercial Entities*

In addition to depicting the Court as conservative, many have accused the Court of having a general bias in favor of corporate

50 *See, e.g.*, Michael A. Wolff, *Is There Life After* Concepcion*? State Courts, State Law, and the Mandate of Arbitration*, 56 ST. LOUIS U. L.J. 1269, 1279–82 (2012).

51 133 S. Ct. 2304 (2013).

52 *Id.* at 2310–11.

53 *See id.* at 2313–14 (Kagan, J., dissenting).

54 For another recent example of the Court construing a doctrine narrowly so that it can enforce the terms of a contract literally, see Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010).

55 NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 558 U.S. 165 (2010).

56 *Id.* at 173–75.

57 560 U.S. 330 (2010).

58 *Id.* at 353–53.

interests.[59] In support of such claims, commentators have identified a number of ways in which the Court has insulated businesses from suit by their consumers, employees, and general members of the public. While some of the Court's recent opinions do not support this narrative—e.g., *Wyeth v. Levine*,[60] *Williamson v. Mazda Motor of America, Inc.*[61]—these decisions are the exception, not the rule.

Indeed, over the past decade the Court has insulated business entities from liabilities—contractual, as well as tort and statutory—across a variety of domains. Where medical device manufacturers have gone through federal regulatory processes, the Court has expanded its federal preemption jurisprudence by granting immunity from state common law liabilities.[62] It has also used preemption doctrines to limit drug manufacturers' liabilities to individual consumers[63] and health care providers that serve the poor.[64] The Court has made it increasingly difficult for individuals to sue employers over harassment in the workplace,[65] as well as for groups of employees to obtain class certification in employment discrimination suits.[66] The Court's decisions in these cases have created a hostile judicial environment for consumer suits, where the judiciary heavily scrutinizes any claims filed by individuals against companies, and businesses' claims of immunity or preemption are viewed favorably.

These rulings are just one part of an even larger movement within the judiciary to deny individuals access to the courts.[67] Not only has the Court limited the types of claims that consumers can bring against commercial entities, but it has drastically decreased individuals' ability to challenge arbitration terms in commercial contracts.[68] Furthermore, the Court has changed its views on when statutes create implied private

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59 *See, e.g.*, Chemerinsky, *supra* note 2, at 962; Garofalo, *supra* note 1.

60 555 U.S. 555, 570–73 (2009) (holding that federal regulatory approval of a drug does not shield the manufacturer from liabilities that are based on state law).

61 562 U.S. 323 (2011) (finding that a federal automobile safety regulation did not preempt state tort claims against automobile manufacturers).

62 *Compare* Riegel v. Medtronic, Inc., 552 U.S. 312, 318 (2008), *with* Medtronic, Inc. v. Lohr, 518 U.S. 470, 500–03 (1996).

63 *E.g.*, Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466 (2013).

64 *E.g.*, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2013); Astra USA, Inc. v. Santa Clara Cnty., Cal., 131 S. Ct. 1342 (2011).

65 *E.g.*, Vance v. Ball State Univ., 133 S. Ct. 2434 (2013); Gross v. FBL Fin. Servs., 557 U.S. 167 (2009); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

66 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

67 Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Procedure*, 60 DUKE. L.J. 1, 71–77 (2010) (arguing that recent Supreme Court decisions have prevented individuals from having "meaningful access to the federal courts").

68 *Id.* at 12 (noting that "the great expansion of contractual limitations on private law enforcement by consumers through the insertion of arbitration clauses into agreements" and "the validation by the Supreme Court of such clauses" have limited individuals' access to the courts).

rights of action.[69] The judiciary used to take a permissive stance on individuals' ability to sue to enforce statutes,[70] but modern decisions have only recognized such rights when they are explicitly set forth in statutes.[71] Collectively, these jurisprudential evolutions have severely reduced consumers' judicially enforceable rights.

D. *Limitations on Consumers' Extracontractual Remedies*

Finally, the Court's rulings on the constitutionality of certain remedies have injured consumers' interests. In a series of high-profile opinions, the Court held that there are constitutional limits on the judiciary's ability to punish private actors and struck down large punitive damages awards.[72] Not only have these restrictions denied consumers the opportunity to receive massive recoveries, but they have undermined one of the chief mechanisms for deterring exploitative business practices.

Prior to the 1990s, punitive damages jurisprudence was regarded as a matter of state law that did not raise any federal constitutional issues.[73] In the early nineties, however, the Supreme Court found that it was possible that punitive damages awards could violate defendants' procedural and substantive due process rights.[74] While the first cases recognizing these constraints upheld the challenged damages awards as constitutional,[75] later decisions invalidated trial court verdicts for being "unconstitutionally excessive"[76] or for "punish[ing] the defendant for harming persons who . . . [were] not before the court."[77] Eventually the

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69 *See* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 12 (2014) (noting the evolution of the Court's views of implied private rights of action and how they are currently disfavored).

70 *Id.* at 10 (stating that "[f]or much of this nation's history," the courts were willing to recognize implied private rights of action).

71 Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009) (stating that implied private rights of action are disfavored); Wilkie v. Robbins, 551 U.S. 537, 561 (2007) (stating that there is a strong presumption against implied private rights of actions with damages remedies); Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (requiring that statutes contain clear indications that they create a private right of action).

72 *See* Philip Morris USA v. Williams, 549 U.S. 346, 349 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585–86 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454, 458 (1993).

73 *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 263–64 (1989); Banker's Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 76–80 (1988); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828–29 (1986); *see also* Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 530–32 (2011).

74 *See, e.g.*, *TXO Prod. Corp.*, 509 U.S. at 454, 458; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17–20 (1991).

75 *TXO Prod. Corp.*, 509 U.S. at 458; *Haslip*, 499 U.S. at 17–20.

76 *See Campbell*, 538 U.S. at 429; *Gore*, 517 U.S. at 585–86.

77 *Philip Morris USA*, 549 U.S. at 349.

Court specified that, barring exceedingly egregious conduct by a defendant, few punitive damages awards that exceeded "a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[78]

The Court's decision to insulate business entities from massive punitive damages liabilities harms consumers in multiple ways.[79] First, it eliminates the possibility that a consumer who is injured by abusive business practices could be the beneficiary of a colossal verdict upon bringing a meritorious case.[80] Because consumer suits are much more likely to be filed if there is a potential that they will result in a large damages award, this jurisprudential change decreases the incentive to file consumer suits and increases the number of bad acts that will escape litigation.[81] Indeed, without substantial punitive damages, recoveries will be too small to justify bringing most consumer claims.[82] Furthermore, by preventing courts from awarding punitive damages beyond a single digit ratio, the Court has practically ensured that abusive business practices that affect many, but are rarely sued over, will be insufficiently deterred.[83]

II. CONSUMER EXPLOITATION IN CONTEXT: THE INSURANCE INDUSTRY

Whereas a broad analysis like that set forth in Part I is capable of establishing the existence of a larger anti-consumer jurisprudence, an analysis focused on narrower issues can provide more granular information about how these global changes are occurring and the forces driving them. This Part supplements the review of Supreme Court decisions with an in-depth look at how the strength of a single pro-consumer doctrine has changed over time. In the course of discussing the doctrine's background, it also provides concrete examples of the types of abusive business practices that, left unregulated, would injure consumers.

As stated earlier, insurance law provides a particularly interesting context for analyzing these issues, as it is an area that has always been

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78 *Campbell*, 538 U.S. at 425.

79 *See* Steve P. Calandrillo, *Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics*, 78 GEO. WASH. L. REV. 774, 796–802 (2010).

80 Punitive damages were $79.5 and $145 million in two of the punitive damages cases that the Supreme Court reviewed. *See Philip Morris*, 549 U.S. at 349; *Campbell*, 538 U.S. at 429.

81 *See* Calandrillo, *supra* note 79, at 800.

82 *Id.* at 800–01; *see also* David M. Trubeck et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 120 (1983) ("Our data do suggest that the smaller the case, the less likely it is that litigation will 'pay.'").

83 *See* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 675–76 (7th Cir. 2003); *see also* Calandrillo, *supra* note 79, at 799–801; Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 844–50 (1989).

concerned with consumer protection issues.[84] This Part begins by describing why these markets pose unique problems for consumers, identifying three specific ways that individuals are vulnerable to insurer exploitation. It goes on to discuss one of the primary ways that courts have attempted to protect consumers—using the reasonable expectations doctrine to create coverage for policyholders. A description of the doctrine's origin is provided, as well as a summary of how it has evolved over time. Next, it discusses the current status of the reasonable expectations doctrine in jurisdictions across the country. In addition to showing that the larger anti-consumer jurisprudential trends have manifested in a decline in the number of jurisdictions that recognize the doctrine, it demonstrates how it has become less potent in the states that still recognize it.

A. *Three Forms of Policyholder Exploitation*

Before analyzing the reasonable expectations doctrine, it is necessary to discuss the consumer problems that were the impetus for its creation. The insurance policies that everyday consumers purchase are not transparent, easily understood contracts. An average person has little chance of comprehending the scope of their coverage without the aid of a lawyer or insurance professional.[85] Naturally, the companies that draft and issue these policies possess a thorough understanding of these issues. This imbalanced dynamic—one party knowing the terms of the policy, the other not—is at the core of the problems that insurance consumers face. More specifically, the informational gap between the parties makes it possible for insurers to exploit consumers by enabling them to engage in three types of unfair practices: (1) pre-purchase coverage mismatches, (2) inappropriate claim denials, and (3) technicality-related forfeitures of coverage.

Regarding the first of these practices, the complexity of insurance policies makes it incredibly difficult for consumers to determine the coverage that is provided by different policies and, consequently, increases the chance that there will be a mismatch between their desired coverage and their policy's actual coverage.[86] When consumers cannot understand the basic terms of their agreements, it is essentially impossible for them to make informed decisions about purchasing,

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84 *See supra* notes 10–21 and accompanying text.

85 *See* Keeton, *supra* note 10, at 968; Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002) ("New research measuring the literacy of the U.S. population demonstrates that even consumers who might take the time and trouble to 'read' contemporary consumer contract documents are unlikely to understand them.").

86 *See, e.g.*, FEINMAN, *supra* note 3, at 121–43; Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1266 (2011).

renewing, or modifying policies. It also increases the risk that insurers, who act through their agents, will exploit consumers by offering policies that only appear to provide the types of coverage that they seek. Widespread consumer ignorance creates market incentives for insurers to sell policies that define the scope of coverage narrowly or that include broad exclusions, as doing so decreases the chance that they will have to pay out on policyholders' claims.

A classic (if slightly dated) example of this problem was presented in *Lachs v. Fidelity & Casualty of New York*.[87] *Lachs* concerned an insurance company's sale of "flight insurance"—insurance that would pay out if the policyholder's flight crashed—to a consumer of average sophistication.[88] The consumer purchased a policy out of a vending machine that was located in her departure terminal, believing that it would provide coverage for her upcoming flight.[89] The terms of the policy, however, specified that the insurer only had to pay out for accidents that occur on "regularly scheduled" flights.[90] The policyholder's flight, like many of those leaving from that part of the airport, did not fall within the policy's definition of "regularly scheduled." If the court had enforced the policy in accordance with its terms, she would have paid a premium to an insurer without receiving any meaningful promise of indemnification in return.[91] While modern cases do not typically involve a mismatch in coverage as large as the one in *Lachs*, analogous issues have been presented in contemporary cases.[92] For instance, an insurer's addition of "anti-concurrent causation" clauses, which exclude coverage whenever an excluded cause contributes to an otherwise covered loss, to their casualty policies often raises this concern.[93]

A second way in which insurers can exploit consumers is by denying policyholders' legitimate claims. The informational disparity between insurers and policyholders and insurers' financial incentives to minimize payouts creates an environment where insurers are tempted to wrongfully deny claims. Because most policyholders lack knowledge

87 118 N.E. 2d 555 (N.Y. 1954).

88 *Id.* at 556–57.

89 *Id.* at 556.

90 *Id.* at 557. It should be noted that the definition of "regularly scheduled flights" was not accessible to consumers until after they purchased a policy. Furthermore, in order to determine whether any specific flight would qualify for coverage, individuals would have had to consult a informational placard that was located in a different area of the airport. *Id.* at 557–58.

91 *Id.* at 559.

92 *See, e.g.*, Tuepker v. State Farm Fire & Cas. Co., 507 F.3d 346, 352–56 (5th Cir. 2007); Atwood v. Hartford Accident & Indem. Co., 365 A.2d 744, 745–47 (N.H. 1976); Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 801–03 (Utah 1992).

93 *See, e.g.*, Alf v. State Farm Fire & Cas. Co., 850 P.2d 1272, 1273 (Utah 1993); *see also* Peter Nash Swisher, *"Why Won't My Homeowners Insurance Cover My Loss?": Reassessing Property Insurance Concurrent Causation Coverage Disputes*, 88 TUL. L. REV. 515, 535–36 (2014).

about what losses should be covered, they can easily be duped into believing that their claims fall outside of the policy's coverage. While some consumers will contest insurers' denials, insurers reap benefits every time that a consumer accepts the denial or acquiesces to a payout that is less than the amount they are contractually entitled to receive.

Evidence concerning the prevalence of this type of misconduct is hard to pinpoint, but has occasionally been uncovered through governmental investigations and discovery in civil suits. In the early 2000s, for example, documents procured in a number of coverage disputes established that Unum Provident—a prominent player in the life and long-term disability insurance industry—and its subsidiaries actively encouraged their claims handling agents to aggressively deny policyholder claims.[94] Once these practices became publically known, the Attorneys General of a number of states jointly investigated these companies' practices.[95] While the investigation did not lead to prosecution of the companies, the resulting settlement agreements indicate that these insurers had been regularly exploiting their policyholders' ignorance for a substantial period of time.[96] Similarly, abusive practices have been uncovered in other suits.[97]

The final category of problems concerns insurers denying policyholders' claims due to the policyholder's failure to comply with procedural technicalities. In every insurance policy there are terms that condition the insurer's obligation to indemnify on the policyholder's fulfillment of certain requirements.[98] For example, most policies set forth procedural requirements that must be followed for filing a claim, impose duties on policyholders to provide the insurer with accurate information, and set deadlines for the payment of premiums.[99] By conditioning their indemnification obligations on satisfaction of these terms and refusing to provide coverage to policyholders who do not comply perfectly with these requirements, insurers create pitfalls into which some consumers will inevitably fall.[100] Financial incentives

94 Merrick v. Paul Revere Life Ins. Co., 594 F. Supp. 2d 1168, 1170–76 (D. Nev. 2008); BOURHIS, *supra* note 3: FEINMAN, *supra* note 3, at 6.

95 FEINMAN, *supra* note 3, at 6.

96 *Id.*

97 *See, e.g.*, Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1142–43 (Utah 2001), *rev'd*, 538 U.S. 408 (2003); *see also* Abraham, *supra* note 3, at 4–7.

98 *See* INS. SERVS. OFFICE, INC., HOMEOWNERS 3–SPECIAL FORM (HO3), *reprinted in* Kenneth S. ABRAHAM, INSURANCE LAW AND REGULATION 194–219 (5th ed. 2010).

99 *Id.*

100 For examples of suits where insurers have attempted to invalidate a policyholder's right to indemnification due to noncompliance with a procedural provisions, see Ram v. Infinity Select Ins., 807 F. Supp. 2d 843, 858–60 (N.D. Cal. 2011); Second New Haven Bank v. Kobrite, Inc., 408 N.E.2d 369, 370–72 (Ill. App. Ct. 1980). Most, if not all, jurisdictions have instituted doctrinal rules that prevent forfeiture of coverage unless the insurer can demonstrate that the policyholder's actions actually prejudiced the insurer, although the standards for prejudice vary significantly among states. *See, e.g.*, Estes v. Alaska Ins. Guar. Ass'n, 774 P.2d 1315, 1318 (Alaska 1989);

encourage insurers to create complex procedural hurdles and police policyholder compliance strictly. Individuals' lack of understanding of policy terms exacerbates the magnitude of this problem because it means that consumers are typically unaware of the actions they have to take to avoid forfeiting coverage.

One of the main ways in which this problem manifests involves attempts by insurers to require strict compliance with "timely notice of claim" requirements. Most, if not all, lines of consumer insurance require policyholders to provide the insurer with notice of a claim within a certain amount of time.[101] In countless cases, insurers have argued that a consumer forfeited coverage by failing to notify the company promptly. While many courts have only allowed insurers to avoid their duty to indemnify if they establish that the delay was prejudicial,[102] others have allowed any technical failure to excuse insurers from their obligations.[103]

B. *A Judicial Response: The Reasonable Expectations Doctrine*

Historically, courts have used legal and equitable doctrines to protect policyholders and discourage insurers from engaging in unfair behaviors. One doctrine in particular—the reasonable expectations doctrine—has played a large role in these efforts. The core idea of the doctrine is that courts should interpret policy terms in a way that honors "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding [coverage] . . . even though painstaking study of the policy provisions would have negated those expectations."[104] In its strongest form it permits courts to find that insurers have a duty to indemnify policyholders "even when the policy language unambiguously precludes coverage."[105]

Outside of a handful of anomalous decisions, courts have limited the doctrine's applicability to the insurance coverage context.[106] Reasonable expectations arguments have most commonly been raised in

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Zuckerman v. Transam. Ins. Co., 650 P.2d 441, 448–49 (Ariz. 1982) (en banc); Coop. Fire Ins. Ass'n of Vt. v. White Caps, Inc., 694 A.2d 34 (Vt. 1997).

101 *See, e.g.*, HOMEOWNERS 3–SPECIAL FORM (HO3), *supra* note 98.

102 *See, e.g.*, Penn-Am. Ins. Co. v. Sanchez, 202 P.3d 472, 480–81 (Ariz. Ct. App. 2008); Best v. W. Am. Ins. Co., 270 S.W.3d 398, 405 (Ky. Ct. App. 2008).

103 *See, e.g.*, *Estes*, 774 P.2d at 1325–26; Vaughn v. Shelter Mut. Ins. Co., 382 S.W.3d 736 (Ark. Ct. App. 2011); Defrain v. State Farm Mut. Auto. Ins. Co., 809 N.W.2d 601 (Mich. Ct. App. 2011), *rev'd*, 817 N.W.2d 504 (Mich. 2012); Osborne v. Nat'l Union Fire Ins. Co., 465 S.E.2d 835, 837 (Va. 1996).

104 Keeton, *supra* note 10, at 967.

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

106 *See, e.g.*, Woodruff v. Bretz, Inc., 218 P.3d 486, 491–92 (Mont. 2009).

disputes between individual consumers and insurance companies.[107] They have, however, occasionally played a role in suits where the policyholders are commercial entities or other sophisticated actors.[108]

When courts have applied the reasonable expectations doctrine, it has often been used as a means for protecting consumers from insurance companies' exploitative behaviors. The potential for abuse in consumer insurance markets is particularly large for a number of reasons. In addition to the informational gap between consumers and insurers, the standardized forms that companies use mean that individuals generally lack the ability to negotiate for different terms and are only given the option of purchasing coverage on the insurers' terms.[109] Furthermore, the timing of the parties' obligations in the insurance relationship places all the risk of nonperformance on policyholders.[110] Because policyholders have fixed obligations to pay premiums on a regular schedule and insurers' obligations to indemnify are contingent upon the occurrence of a covered loss, individuals are forced to perform before knowing whether the insurer will fulfill its end of the deal.[111]

The exact genesis of the reasonable expectations doctrine has not been identified, but it can be viewed as a natural extension of the functionalist, intent-centered theories of contract law that Karl Llewellyn and other contract scholars developed in the first half of the twentieth century.[112] Breaking sharply from the formalist approach to contract interpretation that was dominant at the time, this school of thought believed that courts should not limit themselves to analyzing a contract's text when attempting to discern an agreement's meaning. The functionalists claimed that courts would reach better results if they allowed external sources of information—e.g., the circumstances surrounding a deal, parties' prior representations, etc.—to influence

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107 *See, e.g.*, Allstate Ins. Co. v. Naai, 490 F. App'x 49, 50 (9th Cir. 2012); United Servs. Auto. Ass'n v. Neary, 307 P.3d 907, 910 (Alaska 2013); Progressive Cas. Ins. Co. v. Skin, 211 P.3d 1093, 1099 (Alaska 2009).

108 *Compare* Oritani Sav. & Loan Assoc. v. Fid. & Deposit Co. of Md., 989 F.2d 635, 642–43 (3d Cir. 1993) (stating that the reasonable expectations doctrine should only be applied to unsophisticated policyholders), *and* A.P. Pino & Assocs., Inc. v. Utica Mut. Ins. Co., No. 11-3962, 2012 WL 3263594, at *3 (E.D. Pa. Aug. 10, 2012) (same), *with* AIU Ins. Co. v. Superior Court, 799 P.2d 1253, 1266 (Cal. 1990) (en banc) (applying the reasonable expectations doctrine in a case involving a sophisticated policyholder), *and* Boeing Co. v. Aetna Cas. & Sur. Co., 784 P.2d 507, 514 (Wash. 1990) (en banc) (same); *see also* Jeffrey W. Stempel, *Reassessing the "Sophisticated" Policyholder Defense in Insurance Coverage Litigation*, 42 DRAKE L. REV. 807, 808 (1994).

109 *See* William A. Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPP. L. REV. 267, 267 (1986).

110 *See* TOM BAKER, INSURANCE LAW AND POLICY 7, 642 (2d ed. 2008).

111 *See id.*

112 *See* Robert H. Jerry, II, *Insurance, Contract, and the Doctrine of Reasonable Expectations*, 5 CONN. INS. L.J. 21, 42–50 (1998).

their interpretive decisions.[113] The academics associated with this movement published a number of articles, arguing that courts should enforce commercial contracts in accordance with the weaker party's expectations about the terms of the deal.[114] While the arguments developed in these articles were not focused on insurance—they were primarily concerned with commercial contracting in general and the use of form contracts—they often referred to insurance policies as the types of agreements that should be interpreted liberally.[115]

One of the reasonable expectations doctrine's first appearances in insurance jurisprudence occurred in 1918. In *Bird v. St. Paul Fire & Marine Insurance Co.*,[116] the New York Court of Appeals had to decide whether an insurer was obligated to indemnify a policyholder for damage done to his canal boat. The damage occurred when a fire broke out underneath a freight car that was loaded with dynamite. The car exploded, which caused a series of subsequent fires and explosions that eventually damaged the canal boat. The insurer argued that the damage done to the policyholders' property was primarily caused by the air concussions associated with the detonation of the explosives.[117] The court held that, even though the policy only covered loss arising from "sounds, harbors, bays, rivers, canals[,] and fires"[118] and the canal boat was damaged by the explosion-caused concussions, the insurer could be obligated to indemnify the loss if the fire was a proximate cause of the explosions.[119] In arriving at this conclusion, the court stated that its analysis of the policy's coverage provisions was guided by "the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract."[120]

In *Kievit v. Loyal Protective Life Insurance Company*[121]—another early reasonable expectations case—the Supreme Court of New Jersey required an insurer to indemnify a policyholder for a loss that clearly fell outside of the policy's coverage.[122] Despite the fact that the policy stated that it did not cover "disability or other loss resulting from or contributed to by any disease or ailment,"[123] the court held that coverage

113 *See* Stempel, *Unmet Expectations*, *supra* note 17, at 262–64.

114 *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943); Karl Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 673 (1925); Karl Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 704 (1939) (book review).

115 *See, e.g.*, Kessler, *supra* note 114.

116 120 N.E. 86 (N.Y. 1918).

117 *Id.* at 86.

118 *Id.*

119 *Id.*

120 *Id.* at 87.

121 170 A.2d 22 (N.J. 1961).

122 *Id.* at 32.

123 *Id.* at 24.

existed for a policyholder whose disability was partially caused by a preexisting condition.[124] In justifying its conclusion, the court stated that individuals who purchase insurance "are entitled to the broad measure of protection necessary to fulfill their reasonable expectations."[125]

Eventually, decisions like *Bird* and *Kievit* drew the attention of legal scholars and, in 1970, the first major academic article discussing the reasonable expectations doctrine as a part of insurance law was published.[126] In a piece that has been widely recognized as a seminal work in the area, then-Professor (now-Judge) Keeton described the emergence of the reasonable expectations doctrine as one of the principles that differentiated insurance law jurisprudence from traditional contract law.[127] Along with the unconscionability defense to enforcement, he pointed to the reasonable expectations doctrine as an example of how the judiciary had become more willing to step outside of its normal role in contract disputes and actively regulate commercial relationships.[128]

Throughout the second half of the twentieth century, courts in a growing number of jurisdictions began to expressly recognize the reasonable expectations doctrine as part of their insurance law jurisprudence.[129] The fact that courts have used the same name to refer to the rule they were adopting, however, projects a false impression of uniformity. The actual rules that different jurisdictions have embraced vary significantly from one another. While courts in some states have required policyholders to prove that they had certain expectations about the contract,[130] others have only required policyholders to show that a reasonable consumer would have had the relevant expectations.[131] Jurisdictions have also disagreed with one another concerning when it is appropriate to apply the doctrine—e.g., whether the rule can only be applied to contracts (or contractual terms) that are ambiguous,[132] versus whether the rule can be used to override the text of the policy.[133]

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124 *Id.*

125 *Id.* at 26. For other early cases that considered the policyholders' reasonable expectations, see Lachs v. Fid. & Cas. Co. of N.Y., 118 N.E.2d 555, 558–59 (N.Y. 1954); Bushey & Sons v. Am. Ins. Co., 142 N.E. 340, 341 (N.Y. 1923); Journal Co. v. Gen. Accident Fire & Life Assurance Corp., 205 N.W. 800, 803 (Wis. 1925).

126 Keeton, *supra* note 10, at 967.

127 *Id.* at 966–69.

128 *Id.* at 962–65, 967–73.

129 *See* RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE 578–79 (2d ed. 2012).

130 *See* Ingram v. Cont'l Cas. Co., 451 S.W.2d 177 (Ark. 1970).

131 C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 176 (Iowa 1975); Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1350–51 (Pa. 1978).

132 *Compare* Allstate Ins. Co. v. Teel, 100 P.3d 2, 6 (Alaska 2004) (not requiring ambiguity), *and* State Farm Mut. Auto. Ins. Co. v. Roberts, 697 A.2d 667, 671–72 (Vt. 1997) (same), *with* Richards v. Hanover Ins. Co., 299 S.E.2d 561, 563 (Ga. 1983) (requiring ambiguity), *and* Gowing

Jurisdictions that have recognized the reasonable expectations doctrine can be categorized into two groups—those that consider policyholders' expectations to be of primary importance and those that focus on contractual ambiguity.[134] Courts that have adopted the stronger, expectancy-focused approach apply the doctrine in a manner that largely resembles Keeton's characterization. These courts have attempted to determine what a reasonable consumer in the policyholder's position would have expected and then enforce the policy in accordance with those beliefs. In its most extreme form, the expectancy approach directs courts to focus primarily on policyholders' reasonable expectations, even when doing so requires courts to ignore the terms contained in the policy.[135] More moderate versions of the expectancy approach see courts scrutinizing the reasonableness of consumers' expectations and considering both policyholder expectations and policy text when deciding coverage issues.[136]

In states that have embraced the weaker, ambiguity-focused version of the doctrine, courts accord the text of insurance policies primary importance. Courts in these jurisdictions have only allowed consumer expectations to affect an insurer's indemnification obligations when the pertinent policy terms are deemed ambiguous.[137] Jurisdictions have varied significantly in the standards they have used when making an ambiguity determination. For instance, some jurisdictions have taken an objective approach, refusing to find a term ambiguous if a policyholder could have determined its meaning by consulting with the insurer, speaking to an attorney, or conducting internet research.[138]

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v. Great Plains Mut. Ins. Co., 483 P.2d 1072, 1076 (Kan. 1971) (same), *and* Simon v. Cont'l Ins. Co., 724 S.W.2d 210, 212 (Ky. 1987) (same).

133 *Compare* Storms v. U.S. Fid. & Guar. Co., 388 A.2d 578, 580 (N.H. 1978) (allowing expectations to trump a written policy term), *with* U.S. Liab. Ins. Co. v. Harbor Club, Inc., No. 06–3938–BLS2, 2008 WL 2121136, at *6 (Mass. Super. Ct. May 8, 2008) (stating that reasonable expectations cannot override the plain language of the policy).

134 Because each state has its own idiosyncratic set of rules concerning the reasonable expectations doctrine, there are some states that do not fall clearly within either of these camps. These jurisdictions tend to view consumer expectations and ambiguity, as well as other factors, as being relevant to a term's meaning. *See, e.g.*, Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467, 470 (Ind. 1985) (considering whether a policy "provides illusory coverage").

135 *See, e.g.*, Clark-Peterson Co. v. Indep. Ins. Assocs., Ltd., 492 N.W.2d 675, 679 (Iowa 1992) (en banc) (looking primarily at the policyholder's expectations when making a coverage determination).

136 *See, e.g.*, Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co., 366 N.W. 2d 271, 276–79 (Minn. 1985) (looking at both the policyholders' expectations and the policy text when making a coverage determination); Max True Plastering Co. v. U.S. Fid. & Guar. Co., 912 P.2d 861, 862–68 (Okla. 1996) (same).

137 *See, e.g.*, McMillan v. State Mut. Life Assurance Co. of Am., 922 F.2d 1073, 1075 (3d Cir. 1990).

138 *See, e.g.*, United Servs. Auto. Ass'n v. Neary, 307 P.3d 907, 911–15 (Alaska 2013) (scrutinizing policyholders' expectations about policy limits and definition of occurrence); Progressive Cas. Ins. Co. v. Skin, 211 P.3d 1093, 1099–1101 (Alaska 2009) (finding that the fact that a policy defined the term "vehicle" was sufficient to make a policyholder's expectations for

Others have considered subjective evidence to be relevant and have looked at a consumer's actual expectations when making ambiguity determinations.[139]

The difference between the expectancy and ambiguity approaches to the reasonable expectations doctrine can best be understood through an example. Consider Tom, a man of average sophistication when it comes to insurance matters, who has purchased a homeowner's policy. A week after the policy's effective date, he gets quite drunk and, in the course of trying to prepare a late night snack, starts a fire that causes significant damage to his house. He files a claim with the insurance company and the company responds by telling him that his losses are not covered due to the policy's exclusion for losses that result from negligent acts performed by an insured while inebriated.

Assuming that a reasonable consumer would expect that homeowner's policies require insurers to indemnify losses caused by a policyholder's drunken negligent conduct, a court utilizing the strong version of the expectancy approach would ignore the policy's exclusion and rule in favor of coverage. Whether a court applying the weaker version of the expectancy approach would find coverage would depend on a number of factual determinations—e.g., the robustness of the expectation, the conspicuousness of the exclusion, the language used in the policy, etc. Under the ambiguity approach, a court would affirm the insurance company's denial unless it determined that the meaning of the inebriation exclusion was ambiguous and that it would be reasonable for policyholders to expect coverage for this type of loss.

C. *The Decline of the Reasonable Expectations Doctrine*

The number of states that recognized the consumer-friendly reasonable expectations doctrine increased throughout the mid- to late twentieth century, but this growth met its end as the new millennium approached. In line with the more general rise in anti-consumer holdings, the past two decades have seen courts abandon or weaken the doctrine. While there are jurisdictions that continue to use the strong expectancy version of the doctrine to expand insurers' indemnification duties, the vast majority do not. Moreover, within the jurisdictions that

coverage of ATVs unreasonable); Mountain States Mut. Cas. Co. v. Roinestad, 296 P.3d 1020, 1023–26 (Colo. 2013) (reversing appellate court determination that a policyholder had a reasonable expectation that losses caused by a discharge of cooking grease would be covered under a CGL policy).

139 *See, e.g.*, W. Alliance Ins. Co. v. Gill, 686 N.E.2d 997, 998, 1000–01 (Mass. 1997).

recognize the doctrine, courts have begun to impose limits on when reasonable expectations can factor into their contractual analyses.[140]

While each state has its own idiosyncratic relationship with the reasonable expectations doctrine, it is possible to provide a rough estimate of the number of jurisdictions that employ the different approaches that were discussed earlier. A fifty-state survey conducted by Mandy Maniloff and Jeffrey Stempel in 2012 collected information on the status of the reasonable expectations doctrine in each state.[141] Their data confirms that a minority of jurisdictions use the expectancy-based version of the doctrine.[142] There are only three states that could be characterized as employing the strong expectancy approach,[143] with the limited expectancy version of the doctrine being embraced by a similarly small group.[144] Approximately nineteen jurisdictions use the ambiguity approach.[145] A few states have taken positions that do not fall cleanly within these categories, with the majority of these incorporating elements of the ambiguity and weak expectations approach.[146] Finally, seventeen states do not recognize the reasonable expectations doctrine,[147] with thirteen of these states explicitly rejecting it.[148]

Analysis of the recent decisions in each of these states indicates that support for the doctrine has been diminishing over time. Many of the states that have previously used the expectancy-based approach appear to be moving away from it.[149] One way in which this has occurred is through courts imposing limits on the types of situations where judicial consideration of reasonable expectations is appropriate. Similarly, many courts have begun to shift their focus away from policyholders'

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140 *See generally* Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 112–14 (2007).

141 *See* MANILOFF & STEMPEL, *supra* note 129.

142 It should be noted that Maniloff and Stempel's survey does not utilize the same organizational rubric that is described in this Article, nor does it attempt to quantify the number of states that have adopted certain approaches to the doctrine. For an article that provides an accounting of the number of jurisdictions applying different versions of the doctrine, see Randall, *supra* note 140, at 112–14. The discrepancies between Randall's numbers and those provided below are likely due to using slightly different categorical criteria and inconsistencies within certain states' jurisprudence.

143 *See* MANILOFF & STEMPEL, *supra* note 129, at 577–60 (Alaska, Hawaii, New Jersey). *But cf.* Randall, *supra* note 140, at 112 (claiming that only Alaska and Hawaii continue to use the strong expectancy version of the reasonable expectations doctrine).

144 *See* MANILOFF & STEMPEL, *supra* note 129, at 577–601 (Arizona, Colorado, Montana, New Hampshire).

145 *Id.* (Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Kentucky, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas, Vermont, West Virginia, Wisconsin, Wyoming).

146 *Id.* (Indiana, Iowa, Massachusetts, Minnesota, Pennsylvania, Tennessee).

147 *Id.* (Maryland, Mississippi, Oregon, Virginia, and the states listed *infra* note 148).

148 *Id.* (Florida, Idaho, Illinois, Kansas, Louisiana, Maine, Michigan, North Dakota, Ohio, South Carolina, South Dakota, Utah, Washington).

149 *See* Randall, *supra* note 140, at 112–14.

legitimate expectations and towards determining whether policy language is ambiguous. These trends can be seen in recent decisions in a majority of the expectancy jurisdictions, where courts have stated that a policyholder's reasonable expectations cannot have a role in determining the scope of coverage if the terms in the insurer's policy are clear or unambiguous.[150] This is a far cry from the views expressed in these states' earlier decisions, where equitable considerations were considered to provide justification for ignoring clear policy language.[151]

The doctrine's waning strength can also been seen in the jurisdictions that use the ambiguity version of the doctrine. While the courts in these states have not renounced the reasonable expectations doctrine altogether, they have modified the doctrine in ways that have substantially weakened it. The primary manner in which courts have undermined reasonable expectations arguments is by changing their conception of what it means for a contractual term to be ambiguous. Earlier decisions deemed a term in a policy to be ambiguous if an average person could not understand it upon reading it or if the policy language did not match representations that were made to the policyholder by the insurer or its agents.[152] Many contemporary decisions, on the other hand, assume that policyholders have a much greater capacity to understand policy terms. Courts have considered it fair to hold against policyholders the fact that they did not research the issue, inquire about it with the insurer, or seek legal advice.[153] This shift

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150 *See, e.g.*, Jack Daniels Motors, Inc. v. Universal Underwriters Ins. Co., 446 F. App'x 504, 505 (3d Cir. 2011) (stating that, under New Jersey law, reasonable expectations can only modify coverage where misleading terms and conditions exist); Apana v. TIG Ins. Co., 574 F.3d 679, 683–84 (9th Cir. 2009) (discussing conflicting reasonable expectations precedents from Hawaiian courts); Ace European Grp. v. Sappe, No. 08–412 (JLL), 2012 WL 3638690, at *5 (D.N.J. Aug. 21, 2012) (indicating that New Jersey law only allows reasonable expectations to have an effect on coverage when policy text is ambiguous); Struble v. Am. Family Ins. Co., 172 P.3d 950, 957 (Colo. App. 2007) (indicating that the use of "clear and unequivocal language" to limit coverage will prevent the application of the reasonable expectations doctrine); Finn v. Nat'l Union Fire Ins. Co. of Phila., 896 N.E.2d 1272, 1277–78 (Mass. 2008) (stating that the reasonable expectations doctrine should only be applied when policy language is ambiguous); Kabanuk Diversified Invs., Inc. v. Credit Gen. Ins. Co., 553 N.W.2d 65, 72 (Minn. Ct. App. 1996) ("[T]he doctrine of reasonable expectations has been limited to cases involving contracts with hidden exclusions."); Giacomelli v. Scottsdale Ins. Co., 221 P.3d 666, 672–74 (Mont. 2009) (finding that exclusion language was sufficiently unambiguous to make a policyholder's expectations unreasonable); Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co., 21 A.3d 1151, 1157–58 (N.J. 2011) (stating that the court will "enforce the terms of an insurance policy as written if the language is clear" and that the insured's reasonable expectations come into play when terms are ambiguous).

151 *See, e.g.*, Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co., 366 N.W.2d 271, 276–79 (Minn. 1985); Lachs v. Fid. & Cas. Co. of N.Y., 118 N.E.2d 555, 557–59 (N.Y. 1954).

152 *See, e.g.*, Standard Marine Ins. Co. v. Peck, 342 P.2d 661, 663 (Colo. 1959) (en banc); Buckeye Union Ins. Co. v. Price, 313 N.E.2d 844, 846 (Ohio 1974).

153 *See, e.g.*, Grinnell Mut. Reinsurance Co. v. Schwieger, 685 F.3d 697, 701–03 (8th Cir. 2012) (rejecting claim that the scope of a policy's coverage was ambiguous because coverage granted through an endorsement conflicted with the policy's exclusions); Keren Habinyon Hachudosh

has greatly reduced the likelihood that policy terms will be declared ambiguous and, consequently, reduced the number of cases where consumers' reasonable expectations can have an impact on coverage decisions.

Finally, courts have sidelined the reasonable expectations doctrine by scrutinizing the reasonableness of policyholders' expectations. While earlier cases tended to consider a policyholder's belief about coverage to be reasonable if an average consumer would share a similar belief, many modern cases apply a much more strenuous standard.[154] Courts in expectancy jurisdictions have found policyholders' expectations to be unreasonable whenever their beliefs about coverage are incongruent with what many would consider to be highly technical and sophisticated understandings of policy's terms. Two examples of beliefs that courts have found unreasonable are an individual's expectation that her homeowner's insurance would cover damages done to her property by a third-party's car[155] and a policyholder's expectation that his health insurance provided benefits in line with the policy's Outline of Coverage.[156]

Courts' gradual abandonment of the reasonable expectations doctrine is significant for a number of reasons. First, it removes one of the few tools that courts could use to help consumers with strong equitable claims, but weak legal ones. Consumers whose claims might have succeeded decades ago may no longer have any means of obtaining redress for harms that they have suffered at the hands of insurers. Second, this retreat constitutes a step away from the functionalist theories of contract interpretation that tend to help less sophisticated parties; instead, it represents and a step towards formalist approaches to contract construction. Finally, the rise and fall of this consumer-friendly doctrine mirrors (and is one component of) the broader anti-consumer jurisprudential trends that were discussed earlier.

D'Rabeinu Yoel of Satmar BP v. Phila. Indem. Ins. Co., 462 F. App'x 70, 72–73 (2d Cir. 2012) (refusing to find that the term "customary operations" was ambiguous); Galvani v. Tokio Marine & Nichido Fire Ins. Co., No. C11–3848 PJH, 2012 WL 2568220, at *3–4 (N.D. Cal. July 2, 2012) (holding that policy terms concerning the insurer's duty to defend were unambiguous).

154 *See* cases cited *supra* note 138; *see also* Whittier Props., Inc. v. Alaska Nat'l Ins. Co., 185 P.3d 84, 91 (Alaska 2008) (finding that a gas station did not have a reasonable expectation of coverage for losses associated with gasoline that leaked from an underground storage tank, despite the fact that coverage existed for the company's product and gasoline was the company's product).

155 Allstate Ins. Co. v. Naai, 490 F. App'x 49, 50–51 (9th Cir. 2012) (finding that the owner of a homeowner's policy had no reasonable expectation of coverage for bodily injuries on her property that were caused by a third party's use of an automobile).

156 Vencor Inc. v. Nat'l States Ins. Co., 303 F.3d 1024, 1034–38 (9th Cir. 2002) (finding that the reasonable expectations doctrine did not provide grounds for forcing an insurer to provide policyholders with the coverage described in the policy's Outline of Coverage).

III. WHY CONSUMER PROTECTION MATTERS

Parts I and II have established that jurisprudential shifts have significantly undermined consumers' legal rights. Upon recognizing that these changes have endangered consumer welfare, there is a natural impulse to jump to the question of what could be done to compensate for these changes. Before exploring how the state might bolster consumer protections, however, it is worthwhile to discuss the problems that justify state involvement in consumer markets and the goals that governmental interventions should seek to accomplish. As a whole, the consumer harms and regulatory goals discussed in this Part are less context-specific versions of the harms and goals that were identified earlier as driving forces for the reasonable expectations doctrine.

One of the easiest ways to show why consumers need state protection is to consider what a society without consumer protection laws would look like. An individual in such a world could be exploited by commercial entities in a number of ways. Without regulation, the large disparity in resources that exists between most consumers and businesses would allow companies to leverage their advantages and grant them coercive powers over their consumers. If a business had sufficient monopoly power, it could unilaterally force individuals to accept its prices and terms. Furthermore, in the absence of antitrust protections, businesses in competitive markets could also impose exploitative prices and terms on consumers either by conspiring with one another or by simply copying each others' behaviors. An example of this type of behavior would be the handful of companies that provide internet service to an area agreeing to charge inflated prices to all of their customers or deciding to include terms in their contracts allowing the companies to sell individuals' internet usage data to third parties. Because individual consumers lack the financial interests and resources that would enable them to combat such tactics, the absence of consumer protection measures would leave them vulnerable to these types of coercive measures.

A second way consumers could be harmed in a laissez-faire environment is through commercial entities' use of deception. Here, the concern is not businesses controlling individuals' ability to procure goods, but companies taking actions that impair consumers' ability to understand and evaluate the terms of a transaction. This type of deceit could occur in any number of ways—businesses could take advantage of deficits in a consumer's knowledge when marketing their services, make

misrepresentations about their products, or use sales techniques that exploit known psychological weaknesses.[157]

Third, if consumer protection laws did not exist, the deterrence effect of those laws would not exist, and consumers would be much more likely to experience harms stemming from businesses breaching their contractual obligations. The economics of standard, single-party litigation protect companies from the vast majority of consumer suits; in the case of high value tort claims, however, it makes no sense for individuals to file claims against businesses that shirk their obligations, as they will spend much more money than they could potentially recover.[158] A legal system that does not provide for class treatment of consumer claims (or some other alternative to standard litigation) would insulate businesses from these types of liability, effectively encouraging companies to opportunistically breach obligations to their customers.[159]

The final set of injuries that individuals in a world without consumer protection laws would experience are dignitary, psychic, and financial harms caused by their lack of access to justice. As mentioned above, the economics of standard litigation are such that they do not provide an effective means for pursuing consumer claims against businesses.[160] Beyond the deterrence-related consequences, individuals' inability to hold companies liable for breaching their obligations would hurt them financially by preventing them from receiving compensation for losses.[161] It would also cause intangible harms in the form of the frustration and distress that consumers would experience from having no effective means of seeking redress.[162]

In order to effectively prevent the exploitation of individuals, the state must institute consumer protection measures that deal with each of these problems. There are a multitude of ways that the government could address coercion, deceit, deterrence, and access to justice issues—

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157 For an example of the types of deceptive practices that businesses could employ, see Bennett v. Fun & Fitness of Silver Hill, Inc., 434 A.2d 476, 481 (D.C. Cir. 1981) (finding a genuine issue of fact as to whether a contract was enforceable in light of high-pressure sales tactics); Kugler v. Romain, 279 A.2d 640, 643–44 (N.J. 1971) (door-to-door sales); Toker v. Westerman, 274 A.2d 78, 80 (N.J. Union Cnty. Ct. 1970) (same); Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (Sup. Ct. 1969) (same); Bennett v. Bailey, 597 S.W.2d 532, 534–35 (Tex. Civ. App. 1980) (invalidating a contract where the stronger party used flattery to induce a lonely widow to agree to a deal).

158 *See* Max N. Helveston, *Promoting Justice Through Public Interest Advocacy in Class Actions*, 60 BUFF. L. REV. 749, 766 (2012); Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 148–50 (2011).

159 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 616–17 (1997) (noting that 23(b)(3) class actions allow for the aggregation of small recoveries which makes litigation worthwhile).

160 *See* sources cited *supra* notes 158–60.

161 *See* sources cited *supra* notes 158–60.

162 *See, e.g.*, Helveston, *supra* note 158.

different substantive rules could be enacted, different governmental bodies could be charged with enforcing these rules or otherwise regulating commercial entities' conduct, etc. But, regardless of the mechanisms used, consumer protection efforts should focus on accomplishing specific goals. Working from the harms identified above, a comprehensive system of consumer protection would need to: (1) restrict the ability of commercial entities to limit the competitive effects of markets and prevent them from dictating unfair deal terms to consumers; (2) protect consumers' ability to understand the terms of their commercial transactions by requiring disclosures and proscribing deceptive and manipulative business practices; (3) create penalties or other sanctions that are large enough to deter private entities from intentionally breaching their commercial obligations or acting in bad faith; and (4) ensure that there is a way for individuals with legitimate small-stakes claims against commercial entities to seek justice.

Ideally, rules would be put into place to address each of these objectives for consumer transactions in general, supplemented by more specialized measures to resolve problems that are specific to certain commercial sectors.

As the next Part will show, federal and state governments have taken a multi-faceted approach to tackling these issues. Executive, legislative, and judicial actors have used a variety of means to curtail generally abusive commercial practices and industry-specific problems. While the jurisprudential changes that have occurred over the past two decades have undermined the efficacy of many of these protections, governmental actors could reverse this damage by enacting further reforms.

IV. LOOKING FORWARD: INSTITUTIONAL DESIGN CHOICES AND CONSUMER PROTECTION

Having defined the concerns that justify consumer protection measures and the regulatory goals of such efforts, it is easy to see how the changes in the judiciary's views have significantly undermined individuals' rights. Thankfully, the damages caused by these trends are not permanent and can be mitigated through further governmental action. This Part focuses on outlining the different types of reforms that could advance consumers' interests and discussing their feasibility in the current political climate.

Because reviewing all of the different governmental actions that could help consumers is a task well beyond the scope of this Article, this Part concentrates on insurance markets and the problems faced by

insurance consumers that were introduced in its analysis of the reasonable expectation doctrine.[163] It begins by discussing the doctrinal reforms that several scholars have proposed as solutions to policyholder exploitation. It goes on to critique these proposals on pragmatic grounds, applying the results of the macro- and micro-trend analyses of how the judiciary currently handles consumer law issues. Next, it describes how legislative and administrative actions have attempted to address insurance consumers' problems and suggests reforms that might improve on these efforts. It closes by assessing whether these types of legislative and administrative reforms are feasible.

A. *Doctrinal Reforms*

As discussed earlier, the intentional exploitation of consumers by insurance companies can manifest in several ways. First, insurance companies could provide consumers with policies that do not provide the types of coverage they reasonably expected to receive. Second, insurance companies could refuse to indemnify consumers even though they are entitled to coverage under their policies. Finally, insurers could use procedural technicalities to selectively invalidate the policies of consumers that file claims, while collecting premiums on claimless policies that might suffer from the same technical defects.

There has been no shortage of academic commentary concerning the ability of doctrinal reforms to remedy these problems. A large number of scholars have focused on considering the effect that expansive recognition of the reasonable expectations doctrine would have on the market and consumers. Indeed, articles debating the doctrine's merits and shortcomings have regularly appeared in leading law journals over the last two decades.[164] Certain scholars have heaped praise on it, touting it as an appropriate and natural evolution of contract law in the modern era.[165] Others have viewed it as one of the best ways for the state to combat the severe economic and informational

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163 *See infra* Part II.A–B.

164 Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1119–20 (2006); Boardman, *supra* note 18, at 1079; David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 449–51 (2009); Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 967 (2010); Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323, 335 (1986); Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 496–98 (2008).

165 *See, e.g.*, Stempel, *Unmet Expectations*, *supra* note 17, at 182–83. Some scholars have expressed such views about the doctrine in contexts other than insurance law. *See, e.g.*, Scott J. Burnham, *Incorporating the Doctrine of Reasonable Expectations in Article 2*, 11 DUQ. BUS. L.J. 217 (2009).

disadvantages that consumers face when purchasing insurance coverage.[166]

Not everyone, however, has expressed such sanguine views of the reasonable expectation doctrine. Some have criticized the doctrine on theoretical grounds, arguing that it undermines contract law's philosophical foundation and cannot be applied in a consistent manner.[167] Others have critiqued the doctrine on more practical grounds—for instance, by questioning whether courts are capable of discerning what a reasonable consumer's expectations would be.[168] And yet another group of scholars have developed economic objections to the doctrine.[169]

This Article does not take a side in the ongoing normative debate concerning the value of the doctrine. Rather, it draws on this literature simply to establish that there are live debates among academics where doctrinal reform is considered a potentially viable means for improving consumer welfare. Despite the cultural and jurisprudential changes documented earlier, contemporary scholarship continues to portray broad application of the reasonable expectations doctrine or adoption of other doctrinal reforms as plausible solutions to these problems.

In the consumer insurance context, a large number of papers have discussed the reasonable expectations doctrine as a central principle that courts could use to combat exploitative practices.[170] Some scholarly articles have suggested that it provides a judicially based solution to specific issues that have cropped up in insurance law—e.g., coverage issues concerning EPA demand letters, the proliferation of step-down clauses in auto insurance policies, etc.[171] Others have portrayed the doctrine as a general panacea for the sector's shortcomings.[172]

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166 Anderson & Fournier, *supra* note 6.

167 *See, e.g.*, J.H. Baker, *From Sanctity of Contract to Reasonable Expectation*, *in* 32 CURRENT LEGAL PROBS. 17, 23–24 (Lord Lloyd of Hampstead et al. eds., 1979); Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425 (1998).

168 *See, e.g.*, Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295 (1998).

169 *See, e.g.*, Jerry, II, *supra* note 112, at 42–50; Popik & Quackenbos, *supra* note 167, at 431–32; Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989).

170 Academics have also argued that the reasonable expectations doctrine should be used to fix problems in areas of the law outside of insurance. For example, one piece argues that courts could use the doctrine to justify striking abusive terms from any boilerplate consumer contract. *See* White & Mansfield, *supra* note 85.

171 *See, e.g.*, Sarah M. Barrios, Comment, *Meeting Expectations: Arizona's Approach to the "Potentially Responsible Party" Notification and Coverage Under Commercial General Liability Policies*, 42 ARIZ. ST. L.J. 381 (2010) (discussing how the reasonable expectations doctrine could be used to resolve coverage disputes about whether EPA demand letters constitute "suits" in favor of CGL policyholders); Christopher C. French, *Construction Defects: Are They "Occurrences"?*, 47 GONZ. L. REV. 1, 13–15 (2011) (discussing whether construction defects qualify as occurrences under Commercial General Liability policies); Christopher C. French, *The "Non-Cumulation*

One of the best examples of work in this vein of scholarship is *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, written by distinguished insurance scholar Jeffrey Stempel.[173] After providing an introductory description of the doctrine, the article outlines the different interpretations of the doctrine that courts have adopted, provides examples of states that follow each approach, and discusses trends in how jurisdictions' views have shifted over time.[174] It then notes several instances in the 1990s where courts expressed extreme hostility to the doctrine, attributing the doctrine's waning popularity to the growing influence of contractual formalism and narrowing conceptions of the judiciary's proper role in private disputes.[175]

After building this impressively thorough and descriptive foundation, Stempel develops his prescriptive claim, arguing that courts should take the objectively reasonable expectations of both the policyholder and the insurer into account both when they are determining whether policy terms are ambiguous and when they are deciding the meaning of these terms.[176] At the end of the article, Stempel also argues that there are times when courts should allow unambiguous policy terms to be trumped by reasonable expectations.[177] More specifically, he contends that when a term in a policy substantially undermines that line of insurance's generally accepted purpose, allowing expectations to trump text is the only way that courts can "bring the application of the product more in line with its seeming coverage and prevent[] the insurer from enjoying an unfair financial windfall."[178] In essence, the article closes with an argument in favor of doctrinal reform through adoption of the strong expectancy version of the reasonable expectations doctrine.[179]

Other scholars have argued that many of the problems that consumers face in insurance markets could be resolved by doctrinal

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Clause": An "Other Insurance" Clause by Another Name, 60 U. KAN. L. REV. 375, 401–03 (2011) (discussing the proper interpretation of non-cumulation clauses in the context of long-tail liabilities); Johnny Parker, *The Automobile Liability Step-Down Clause: The Real Deal or Merely the Calm Before the Storm?*, 10 GEO. MASON L. REV. 33, 49–53 (2001) (discussing how the reasonable expectations doctrine supports a particular interpretation of "step-down" clauses in auto insurance).

172 *See* Stempel, *Unmet Expectations*, *supra* note 17, at 182–84.

173 *Id.*

174 *Id.* at 184–206.

175 *Id.* at 263–77. It should be noted that Stempel also discusses how several other developments—e.g., the rise of the law and economics movement—may have contributed to this trend. *Id.* at 273–74.

176 *Id.* at 278–81.

177 *Id.* at 279.

178 *Id.* at 291–92.

179 *Id.*

reforms unrelated to the reasonable expectations doctrine.[180] A piece written by another leading insurance academic—Daniel Schwarcz's *A Products Liability Theory for the Judicial Regulation of Insurance Policies*[181]—is a prime example of such scholarship. It advocates for improving consumer protection in insurance markets by regulating insurer conduct through holding insurers to the standards set forth in products liability law.[182] He identifies a number of reasons why making insurers liable under products liability law could be an effective mechanism for reforming markets and inducing insurers to make consumer-friendly changes.[183] For instance, if courts imposed failure to warn liability on insurers, this would likely result in consumers receiving more effective information disclosures.[184] Similarly, imposing design defect liability would obligate insurers to take actions to ensure that their policies provide coverage that is compatible with consumers' expectations and do not contain unjustifiably broad exclusions.[185]

B. *The Implausibility of Pro-Consumer Doctrinal Reforms*

Could doctrinal reforms improve consumer insurance markets? One way of assessing the proposals that have been set forth would be to question whether adopting such changes would actually improve the status quo. It is questionable, however, whether it makes sense to use the *potential* utility of reforms as the primary metric of evaluation. The fact that society would benefit greatly if courts embraced certain doctrinal reforms is only meaningful if there is a real chance that courts would actually do so. Despite this, the scholars advocating for these types of reforms do not discuss the likelihood that such changes could actually be instituted. While forecasting such matters is difficult, the plausibility of these types of proposals can be assessed by examining whether structural or political obstacles exist that would preclude their adoption.

Policyholder-friendly reform proposals are incompatible with modern contract jurisprudence. As discussed earlier, the Supreme Court has increasingly embraced contractual formalism and judicial nonintervention in commercial relationships over time. The Court's decisions have also created norms that have discouraged other courts from engaging in the forms of contractual interpretation that have traditionally advanced consumer interests. While establishing direct causation would be impossible, it seems likely that these norms have

180 *See* Schwarcz, *supra* note 17, at 1439.
181 *Id.*
182 *Id.* at 1435–36.
183 *Id.* at 1439–40.
184 *Id.*
185 *Id.* at 1459–60.

influenced how courts have approached insurance coverage disputes and are a part of the explanation for why so few jurisdictions continue to apply the most radical versions of the reasonable expectations doctrine.

Given the dominance of formalism in modern contract jurisprudence, it is almost unimaginable that courts would, of their own volition, institute sweeping doctrinal reforms. The idea that courts across the nation could be convinced to start employing the expectancy version of the reasonable expectations doctrine, for instance, is simply out of sync with the realities of today's juridical climate. First, it is highly unlikely that judges in jurisdictions that have been hostile to consumer-friendly doctrines would be willing to diverge from established precedents. Regardless of how strong the equitable arguments for reform are, most judges consider themselves to be obligated to follow their state's precedent and, as discussed earlier, more than forty states have rejected the expectancy version of the reasonable expectations doctrine.[186] Second, the direction that contract law is moving towards—focusing on contract text above all else, limiting judicial intervention in commercial relationships—is diametrically opposed to this type of reform.[187] Today's courts are highly unlikely to adopt any doctrinal change that would force them to give significant weight to off-contract factors or result in greater judicial involvement in the obligations of the parties.

Due to the courts' anti-consumer jurisprudence, individuals hoping for a resurgence in the popularity of consumer-friendly doctrines should be prepared for a long wait. In today's judicial climate, the idea that the judiciary will lead the charge against the exploitation of consumers in insurance markets is implausible. There are simply too many factors working against such a result. The fact that courts are unlikely to institute consumer-friendly reforms, however, does not foreclose the possibility of beneficial governmental intervention.

C. *Legislative and Administrative Regulatory Actions*

Because the courts are unwilling to protect consumers, alternative means must be used to address the problems that arise in insurance markets and achieve the regulatory goals identified earlier. Thankfully, the judiciary is just one of several governmental actors who could take action. While there is no single course of action that would solve these problems, it is possible to identify discrete types of regulatory changes—enhanced term regulation, increased claims-related data transparency,

186 *See* cases cited *supra* Part II.C.

187 *See* cases cited *supra* Parts I.A, I.C.

more consumer-friendly disclosure requirements, and additional statutory liability for insurer malfeasance—that would measurably improve the lot of consumers. Furthermore, unlike doctrinal reforms, these types of changes do not appear to face insurmountable obstacles to enactment.

Administrative and legislative actions targeting four different aspects of insurance markets—term regulation, data transparency, disclosure, and bad faith punishments—could help tackle each of these problems. This Section provides an overview of each of these areas of regulation and examples of what legislative and administrative bodies have already done in these domains to protect consumers. It also assesses the capacity of regulators to take further actions to improve consumer insurance markets.

1. Term Regulation

Every state's insurance regulatory body has the ability to control what terms insurers can use in their insurance policies.[188] The extent of their authority, as well as the degree to which they actually exercise it, however, varies significantly among jurisdictions.[189] Term regulation also occurs via state and federal legislation. For instance, many states have laws that require auto insurance policies to provide a certain amount of coverage for injuries to third parties,[190] and the Affordable Care Act dictates the grounds on which insurers can vary premium rates.[191]

In asserting control over the content of insurance policies, states have created a number of different mechanisms for preventing insurers from engaging in certain abusive behaviors. Rules that provide that modifications to policy forms are unenforceable until they obtain administrative approval, for instance, help prevent insurance companies from altering the coverage offered by their policies in ways that could confuse or surprise consumers.[192] Similarly, legislative and administrative bodies have used minimum coverage requirements and similar substantive mandates to prevent insurers from selling policies

188 *See, e.g.*, CAL. INS. CODE § 795.5 (West 2004); FLA. STAT. ANN. § 627.643 (West 2004); 215 ILL. COMP. STAT. 5/143 (West 2014); N.Y. INS. LAW § 3201 (McKinney 2004).

189 *See* STEMPEL ET AL., *supra* note 13, at 225–26, 352–53; *see also* Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471 (1961).

190 *See, e.g.*, TEX. INS. CODE ANN. § 1952.101-.105 (West 2007); *see also id.* § 1952.056 (requiring coverage for certain spouses).

191 *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1201, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (amending section § 2701(a)(1)(A)(iii) of the Public Health Service Act).

192 *See, e.g.*, CAL. INS. CODE § 795.5; 215 ILL. COMP. STAT. 5/143.

that contain terms that are deemed to be socially undesirable.[193] Unethical rate discrimination and price gouging, for instance, have been prohibited by statutes that bar certain rate-setting practices[194] and requirements that rates receive approval from a state's insurance regulatory body.[195]

2. Data Aggregation and Transparency

Compared to states' regulation of the terms in insurance policies, there is much less uniformity in how they have approached data aggregation and insurer transparency. The basic logic behind their practices, however, is the same across jurisdictions. First, insurers will be deterred from engaging in bad behavior if they know that data concerning their practices will be publicly aired. Second, publicizing information about how insurance companies treat their customers will enhance the ability of market forces to police insurer conduct.

Every state insurance department has some type of system for collecting and publicizing information about insurers' relationships with their policyholders.[196] Some provide the public with access to statistics about the number of complaints that consumers have filed against particular companies.[197] Others generate reports for consumers that allow them to determine whether their premiums are in line with market prices.[198] Certain nongovernmental actors—most notably the National Association of Insurance Commissioners—have also gotten

193 *See, e.g.*, Howell v. State Farm Fire & Cas. Co., 267 Cal. Rptr. 708, 716 (Ct. App. 1990); W. Nat'l Mut. Ins. Co. v. Univ. of N.D., 643 N.W.2d 4, 13 (N.D. 2002). State legislatures have also considered prohibiting the use of "lead in" or "anti-concurrent causation" clauses. *See N.Y. Assemblyman Takes Aim at Anti-Concurrent Causation Clauses*, INS. J., (May 22, 2013), http://www.insurancejournal.com/news/east/2013/05/22/292893.htm.

194 *See, e.g.*, 215 ILL. COMP. STAT. 5/424 (2013); TEX. INS. CODE ANN. § 544 (West 2013).

195 *See, e.g.*, MICH. COMP. LAWS ANN. § 500.1615 (West 2013).

196 *See, e.g.*, *Company Profile Search*, ILL. DEP'T INS., http://insurance.illinois.gov/applications/RegEntPortal (last visited Apr. 21, 2015) (select "General Information"; then input company name into the search box for public insurance company information); *Filing a Complaint with DIFS*, MICH. DEP'T INS. & FIN. SERVS., http://www.michigan.gov/difs/0,5269,7-303-12902_12907---,00.html (last visited Apr. 21, 2015) (complaint registration); *I Have an Insurance Related Issue*, ILL. DEP'T INS., https://mc.insurance.illinois.gov/messagecenter.nsf (last visited Apr. 21, 2015) (same).

197 *See Complaint Information*, TEX. DEP'T INS., http://www.tdi.texas.gov/consumer/cpportal.html (last visited Apr. 21, 2015) (publically accessible insurance company reports); *Insurance Complaint Statistics*, MICH. DEP'T INS. & FIN. SERVS., http://www.michigan.gov/difs/0,5269,7-303-12902_62295_12912---,00.html (last visited Apr. 21, 2015) (same).

198 *Market Conduct Examination Reports*, N.H. INS. DEP'T, http://www.nh.gov/insurance/lah/lah_market_conduct.htm (last visited Apr. 21, 2015).

involved in these efforts, aggregating and publishing data concerning how different insurance companies treat their customers.[199]

3. Consumer Disclosures

A third consumer protection measure employed by state regulators involves requiring insurers to make certain disclosures to their current and potential policyholders. Hoping to increase the degree to which consumers understand their policies, regulators have mandated that insurers provide specific pieces of information to consumers and, in some instances, have instituted requirements concerning how it is presented. Enhancing policyholders' knowledge through such measures is meant to help ensure that they know when they should file a claim, allow them to better evaluate alternative policies, and force insurers to clearly describe what is covered by their policies. Better-informed consumers are less susceptible to exploitative acts and are more likely to exercise their contractual rights.

Because of the diversity of interests that are involved across the different lines of insurance, it is not surprising that global disclosure requirements have not surfaced. Rather, the rules that exist in this area tend to target specific types of insurance and, except in areas where the federal government has asserted jurisdiction, vary significantly from state to state. For example, only a handful of states have passed legislation that requires life insurers to provide policyholders with information about the financial implications of letting their policies lapse, surrendering their policies to the insurer, or taking other actions.[200] Federal agencies that oversee investment companies that market insurance products have promulgated regulations that mandate that certain disclosures be made to consumers.[201] Finally, federal law requires that companies that sell group health policies provide enrollees with a written summary of benefits and coverage,[202] and a number of states have imposed similar obligations on specific lines of insurance.[203]

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199 *Consumer Information Source*, NAT'L ASS'N INS. COMMISSIONERS., https://eapps.naic.org/cis (last visited Apr. 21, 2015) (providing access to insurance company's financial statements and aggregated consumer complaint reports); *View BBB Complaint Statistics*, BETTER BUS. BUREAU, http://www.bbb.org/council/consumer-education/complaints/view-national-complaint-statistics (last visited Apr. 21, 2015) (providing data on insurance company's consumer complaint histories).

200 *See, e.g.*, KY. REV. STAT. ANN. § 304.15-710 (West 2013); NAT'L CONFERENCE OF INS. LEGISLATORS, PROPOSED LIFE INSURANCE CONSUMER DISCLOSURE MODEL ACT (2010), *available at* http://www.ncoil.org/Docs/2010/AnnualMeeting/2006991d.pdf.

201 *See, e.g.*, 12 C.F.R. §§ 343.10–343.40 (2013) (setting forth disclosure requirements for banks that sell insurance products or annuities).

202 *See* 26 C.F.R. § 54.9815-2715 (2014); 29 C.F.R. § 2590.715-2715 (2014); 77 Fed. Reg. 8668 (Feb. 14, 2012) (codified at 45 C.F.R. § 147.200 (2014)).

203 *See, e.g.*, MONT. CODE ANN. §§ 33-22-244, 33-22-521 (West 2013).

4. Bad Faith Sanctions

Finally, states have attempted to deter insurer misconduct by authorizing courts to levy punitive and statutory damages against companies that are found to engage in egregiously bad conduct. While bad faith claims exist as common law tort or contract claims in many states,[204] others have enacted statutes that have created a statutory bad faith cause of action.[205] In some, but not all, of these states, the statutory claim has explicitly supplanted the common law claim that had been recognized by the courts.[206]

There is a large degree of heterogeneity among the state statutes that punish insurers who act in bad faith.[207] For instance, some statutes only permit bad faith claims for first-party claims, while others authorize suits involving third-party claims.[208] Statutes also differ greatly in how they define bad faith conduct.[209] Perhaps the greatest variation, however, exists with regard to the amount of damages that each statute permits courts to award. While some set a hard cap on the amount that an insurer can be forced to pay, others allow complete recovery of a policyholder's consequential damages.[210]

5. Strengthening Consumer Protection Measures

While advocating for a specific package of legislative and administrative acts is beyond the scope of this Article, identifying a few pro-consumer reforms that could be implemented demonstrates how further nonjudicial action could help consumers. Drawing from the categories of regulatory action discussed immediately above, the following reforms suggest themselves: (1) Insurance regulators could institute requirements that would help guarantee that policy terms are written so that they provide the groups of individuals that buy a particular line the types of coverage they expect to receive;[211]

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204 *See, e.g.*, Major v. W. Home Ins. Co., 87 Cal. Rptr. 3d 556 (Ct. App. 2009).

205 *See, e.g.*, FLA. STAT. § 624.155 (2013); GA. CODE ANN. § 33-4-6 (2013); LA. REV. STAT. ANN. § 22:1873(A)–(B) (2013); MINN. STAT. § 604.18 (2013); MO. REV. STAT. § 375.296 (2013); MONT. CODE ANN. § 33-18-242 (2012); N.C. GEN. STAT. § 75-1.1(a) (2013).

206 *Compare* 215 ILL. COMP. STAT. 5/155 (2013), *with* State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995).

207 *See* MANILOFF & STEMPEL, *supra* note 129, at 1057–65.

208 *Id.*

209 *Id.*

210 *Id.*

211 One can imagine a multitude of ways that regulators might be able to achieve this goal, but reforms that involve conducting comprehensibility studies on actual members of the relevant populations seem particularly promising. A state administrative body could, for instance, interview panels of individuals who own their home to see whether there are parts of a

(2) Insurance regulators could mimic the "quality grading" approaches that have been used in other industries and publicize insurers ratings;[212] (3) Regulators could promulgate rules that force insurers to write policies that will be sold to individuals in a manner that an American adult with below-average reading abilities could read;[213] (4) Legislatures could enact statutes that authorize large punitive damages awards and attorney's fees in civil suits where insurers are found to have acted in bad faith.

Again, this list is not meant as an endorsement of the substantive worth of these changes, but is provided to give an idea of what alternatives to doctrinal reform could look like. The above measures would directly further the regulatory goals identified earlier—they would limit insurers' abilities to coerce consumers, bar deceptive commercial practices, create penalties that would deter exploitative conduct, and help make it possible for consumers to pursue claims against insurers. While it is likely that some of these ideas would turn out to be ineffective or politically unviable, it seems safe to assume that others would not and that there are many other alternative measures that could be implemented to replace those that fail.

D. *The Feasibility of Legislative and Administrative Reforms*

Given that doctrinal reforms were critiqued on the grounds that they have a low likelihood of being adopted by courts, the feasibility of nonjudicial reforms must also be addressed. Making predictions about potential regulatory actions is somewhat of a fool's errand, but it is possible to note recent developments in the area and identify general factors that could affect these types of reforms. While there are two significant impediments to these types of reforms being enacted—industry capture and resource scarcity—there are reasons to believe that they do not pose insurmountable barriers.

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homeowner's policy that they cannot understand. For an article discussing a similar idea, but proposing that courts should allow insurers to use these types of studies to establish that they selected the least ambiguous policy language possible, see Boardman, *supra* note 18, at 1099–112.

212 Such a system could be structured like New York City's system for rating the cleanliness of food facilities or credit rating agencies' system for indicating the default risk for bonds. *See* Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 622–26 (2012).

213 Some states have made efforts to require that all consumer contracts be written in "plain language." *See, e.g.*, CONN. GEN. STAT. ANN. § 42-152 (West 2000) (stating that consumer contracts "shall be written in plain language"); N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 2005) (stating that consumer contracts must be "[w]ritten in a clear and coherent manner using words with common and every day meanings"); 73 PA. CONS. STAT. § 2205 (2007) (stating that consumer contracts "shall be . . . easy to read and understand").

A number of leading insurance law scholars have expressed skepticism about the viability of improving insurance markets through legislative and administrative actions. The primary basis for their opinions appears to be their belief that the insurance industry has captured the governmental entities that have the power to institute these measures.[214] Furthermore, these academics have argued that the nature of the political economy of insurance regulation leaves it particularly vulnerable to industry lobbying, making significant pro-consumer reforms unlikely.[215] While the existence of regulatory capture is not something that is easy to establish objectively, scholars have attempted to do so by pointing to the significant cross-pollination between the insurance industry and state regulatory bodies and the fact that regulators have ended up taking the industry-favored side on certain issues.[216] Additionally, some have claimed that insurers' control over regulatory bodies has increased over time due to state insurance departments' increasing reliance on the National Association of Insurance Commissioners, a nongovernmental organization whose independence from the industry has been questioned.[217]

State insurance departments' lack of resources has also been identified as a factor that would inhibit reform.[218] One scholar has gone as far as stating that insufficient funding has meant that departments are often "unable to carry out basic regulatory functions adequately."[219] Obviously, if these entities are in such dire straits that they lack sufficient manpower and resources to perform their existing tasks, then it follows that they would not be able to do the work needed to create and oversee innovative regulatory schemes.[220]

While industry capture and underfunding are forces that might constrain reform, there are reasons to doubt that they would be strong

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214 *See, e.g.*, Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 662–63 (1999); Schwarcz, *supra* note 17, at 1424–25; Daniel Schwarcz, *Regulating Insurance Sales or Selling Insurance Regulation?: Against Regulatory Competition in Insurance*, 94 MINN. L. REV. 1707, 1760–64 (2010).

215 *See* Randall, *supra* note 214, at 662–63; Schwarcz, *supra* note 214, at 1760–64.

216 Randall, *supra* note 214, at 662–63.

217 *Id.*; Trevor Thomas, *Who's Watching the NAIC Henhouse*, LIFEHEALTHPRO (Nov. 22, 2010), http://www.lifehealthpro.com/2010/11/22/whos-watching-the-naic-henhouse?t=regulatory.

218 Randall, *supra* note 214, at 661–62; Press Release, Consumer Fed'n of Am., State Insurance Department Resources Have Risen over Last 10 Years But Are Still Inadequate to Fully Protect Consumers (Oct. 22, 2009), *available at* http://www.consumerfed.org/pdfs/stateinsurance.pdf; *see also* Elizabeth D. Festa, *State Insurance Department Budgets Slip for Fiscal Year 2013: NAIC*, LIFEHEALTHPRO (June 7, 2012), http://www.lifehealthpro.com/2012/06/07/state-insurance-department-budgets-slip-for-fiscal.

219 Randall, *supra* note 214, at 660–63, 699 (stating that "[m]any state insurance departments are hopelessly underfunded and understaffed and are sometimes unable to carry out basic regulatory functions adequately").

220 *Id.*

enough to completely stop nonjudicial reform efforts. First, the continued existence of regulations that burden insurers, as well as the popularity of insurer-unfriendly bills in state legislatures, indicate that the industry has, at most, only partially captured regulators.[221] Second, most reforms could be structured in ways that would eliminate or diminish the costs imposed on state insurance departments. For instance, new programs could be designed so that funds collected through fines or annual fees offset the operational costs of the reform.[222] Finally, new programs could be designed to pay for themselves, either by charging insurers additional fees or having fines that are collected for noncompliance become part of the department's revenues.

Calling upon the federal government to be the agent of change might also help overcome impediments to regulatory reforms. While states have traditionally taken the dominant role when it comes to insurance regulation, federal involvement is not unprecedented. Over the course of the last decade, the national government has taken significant steps to expand its involvement in insurance markets. Two of the more notable examples of this trend are the substantive health insurance requirements contained in the Patient Protection and Affordable Care Act[223] and the provisions that created the Federal Insurance Office in the Dodd-Frank Wall Street Reform and Consumer Protection Act.[224] In this type of climate, it is not difficult to imagine the federal government creating an insurance-specific agency or giving additional insurance-related regulatory authority to entities like the Federal Insurance Office, the Federal Trade Commission, or the Consumer Protection Financial Bureau.

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221 Chris Orestis, *New Disclosure Requirements for Insurers—What NCOIL's Life Insurance Consumer Disclosure Model Act Means to Your Client*, CHRIS ORESTIS PUBLICATION'S LIBR. (Feb. 7, 2011), http://chrisorestis.blogspot.com/2011/02/new-disclosure-requirements-for.html; Arthur D. Postal, *Illinois Bucks Trend in Other States; Looks to Establish Competitive Workers' Comp State Fund*, PROPERTYCASUALTY360° (Mar. 18, 2013, 2:10 PM), http://www.propertycasualty360.com/2013/03/15/illinois-bucks-trend-in-other-states-looks-to-esta (recounting industry opposition to the model life insurance disclosure act, which the legislature eventually enacted).

222 *See, e.g.*, Patrick O'Leary, *Funding the FDA: Assessing the User Fee Provisions of the FDA Safety and Innovation Act of 2012*, 50 HARV. J. LEGIS. 239, 240–43 (2013); Ronald D. Orol, *House-Senate Panel Rejects SEC Self-Funding*, MARKETWATCH (June 24, 2010, 6:39 PM), http://www.marketwatch.com/story/house-senate-panel-rejects-sec-self-funding-2010-06-24 (explaining that Congress rejected the proposal for the SEC to fund itself through fees it charges corporations).

223 *See* 26 U.S.C. § 5000A (2012) (requiring individuals to carry health insurance); 42 U.S.C. § 18091 (2012) (same).

224 *See* 31 U.S.C. § 313 (2012). Another interesting example of this trend is the attempt of a bipartisan group of Senators to pass the National Insurance Act of 2007, a bill that would have authorized the creation of a federal insurance regulator. *See* National Insurance Act of 2007, S. 40, 110th Cong. (2007), *available at* https://www.govtrack.us/congress/bills/110/s40. Even though the proposal never passed, its very existence indicates that there is some level of interest in granting a federal agency the power to regulate the insurance industry.

Reforms instituted at the federal level might be better able to overcome the obstacles inhibiting state-based efforts. Because the federal government's resources dwarf those of any individual state, it is less likely that reforms adopted at the national level would be undermined due to there being insufficient funding for the regulatory body enacting the changes. Second, imposing regulations nationally might reduce opposition from state politicians who fear that imposing tough standards would cause insurers to flee from their state. Finally, tackling these problems at the federal level might reduce the threat posed by industry capture. Because the federal government has traditionally taken a backseat in the realm of insurance regulation, its actors do not have the same type of long-standing relationships with insurers that individuals at state regulatory and legislative bodies do.[225]

As a whole, pro-consumer reforms are much more likely to originate from the acts of legislative and administrative bodies than those of the judiciary. While fiscal and political capital issues limit nonjudicial reforms, they can be overcome more easily than the barriers to doctrinal change imposed by courts' anti-consumer jurisprudential views. It is likely that this is also true for pro-consumer reform in sectors other than insurance, given the strength and breadth of the judiciary's partiality.

CONCLUSION

The dangers posed by insufficiently regulated consumer markets are both real and monumental. Sadly, unfavorable judicial decisions have undermined many of the protections that were created to protect consumers and enabled businesses to work around existing regulations. That the evolution of anti-consumerism in the courts has received scarce attention from the academy is odd, as it is one of the few jurisprudential changes with significant ramifications for every individual. Recognizing this shift is also important because it provides insight into which types of pro-consumer reforms have the greatest chance of being enacted.

In analyzing the normative goals of regulation, the decisions underlying the judiciary's shift on consumer issues, and the policy implications of these holdings, this Article provides a foundation for future discussions of consumer law reforms. For example, its analysis of the different ways that the state could protect insurance consumers

225 While concentrating regulatory authority in one place might make lobbying easier for companies, it would have the same effect for groups representing consumer interests. Centralization could make insurance regulation a more salient issue for the public, creating a stronger political policing mechanism.

could be replicated for other sectors of commerce. Its collection of decisions that have impaired consumers' rights draws attention to the environment in which pro-consumer reforms would have to operate. Ideally, the ideas and conclusions articulated here will challenge those who advocate for doctrinal solutions to consumer law issues to consider the pragmatic viability of their proposals and to think about whether there are alternative mechanisms for accomplishing their goals.