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Tort Trial & Insurance Practice Law Journal
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A TORT WITHOUT A CAUSE: SECTION 12 OF *THE RESTATEMENT OF THE LAW, LIABILITY INSURANCE*

*Kim V. Marrkand**

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I. INTRODUCTION

The *Restatements* of the American Law Institute ("ALI") occupy a unique place in American jurisprudence. In a divided system of federal and state courts and other authorities, the ALI's *Restatements* have long sought to provide an authoritative distillation of what the law *is*.[1] This purpose, as the name "*Restatement*" suggests, is descriptive rather than prescriptive: The rules crafted and "reported" in the *Restatements* are understood to be rooted in extant case law, not to be creating new law.[2] For this very reason, judges often rely upon *Restatements* as reflecting the law as it is, and as providing a shorthand for a guiding and well-established legal principle.

In 2019, the ALI finalized a new restatement: *The Restatement of the Law, Liability Insurance* ("*RLLI*" or "*Restatement*").[3] Much ink was spilled along the path to this *Restatement*, with contentious debates over whether the "rules" articulated in the *RLLI* were supported by existing case law, and

1. *See Frequently Asked Questions, ALI Operations, "What Is the Difference Between Restatements, Principles, and Model Codes?,"* Am. L. Inst., https://www.ali.org/about-ali/faq (last visited Apr. 30, 2020).

2. *See* Am. Law Inst., Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 5–6 (rev. ed. 2015), https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf [hereinafter ALI Style Guide] (stating that a Reporter may not adhere to what Herbert Wechsler called "a preponderating balance of authority," and noting that, "if a Restatement declines to follow the majority rule, it should say so explicitly and explain why").

3. Restatement of the Law, Liability Insurance (Am. Law Inst. 2019) [hereinafter RLLI].

how far the *RLLI* could go in blazing a new trail for the legal responsibilities of liability insurers. Among the 50 sections of the *RLLI* lies Section 12. Section 12, titled "Liability of Insurer for Conduct of Defense," breaks with the traditional understanding of what a Restatement does. Rather than "restating" an existing rule regarding an insurer's liability for the malpractice of defense counsel the insurer selects on behalf of its insured, Section 12 invents wholly new rules and a cause of action without either the support of existing case law or even a compelling policy rationale.

Section 12 purports to impose tort liability on insurers for the malpractice of defense counsel retained to represent an insured in two circumstances: (1) when the insurer fails to take reasonable care in selecting defense counsel, and defense counsel's malpractice is "within the scope of the risk that made the selection of counsel unreasonable"; and (2) when the insurer "directs the conduct" of defense counsel with respect to defense counsel's malpractice "in a manner that overrides the duty of the counsel to exercise independent professional judgment."[4] Both subsections of Section 12 suffer from the same shortcomings: Each is an innovation, more or less completely lacking support in existing case law and creating a new tort; each lacks a compelling, real-world justification for the innovation—i.e., presenting no actual problem that it is needed to solve; and each ignores that a remedy to the insured already exists if an insurer breaches its duty to defend.

Part I of this article explores the *RLLI*'s origins as a principles project and situates Section 12's innovation of a new tort in this context. Part II explains that the tort liability imposed by Section 12 finds no support in pre-existing case law—which is not surprising given its principles project origins—yet also lacks a compelling policy justification. Part III analyzes Section 12's new tort in relation to the existing contractual obligation for an insurer to provide a defense, concluding that the conduct for which Section 12 purports to hold the insurer liable in tort is already fully redressed through a contractual claim. Part IV explores the consequences of introducing new tort liability, most substantially by expanding available damages in a way that directly contradicts the foundational legal principle embodied in the economic loss rule. Part V discusses the three cases that have applied Section 12 to date. Finally, this article concludes that courts should not adopt Section 12 as stating a tort or permitting any damages for an insurer's breach of its duty to defend beyond damages that may apply to a breach of the duty to defend.

4. *Id.* §12.

II. THE ORIGINS OF SECTION 12 AND *THE RESTATEMENT OF THE LAW, LIABILITY INSURANCE*

A. *The Troubled History of* The Restatement of the Law, Liability Insurance

The *RLLI* finds its roots in an intended "Principles of Liability Insurance" ("PLI") publication by the ALI.[5] First proposed in 2010, the document's initial approved purpose was to advocate a particular position regarding how the law *should* exist as it relates to the topic of liability insurance.[6] The ALI drastically shifted its direction in 2014, when, in an unprecedented development, the ALI elected to turn the PLI into a restatement of law. Unlike principles projects—which are intended to advocate for a shift in the law and "are primarily addressed to legislatures, administrative agencies, or private actors,"—restatements "are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court."[7] To successfully restate the law, restatements must rely on existing case law, or they run the risk of blurring the distinction between a restatement and a principles document, without any clear warning to the reader and, in particular, to the judge whom restatements were designed to serve.[8]

The *RLLI*'s move from a principles project to a restatement was initially perceived as a potentially positive development, because the ALI's

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5. *See* Kim Marrkand, *ALI Shouldn't 'Teach' Insurance Restatement in a Courthouse*, Law360 (Feb. 11, 2019), https://www.law360.com/articles/1127838/ali-shouldn-t-teach-insurance-restatement-in-a-courthouse (explaining RLLI origins). According to its founding document, the purpose of the ALI is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." Certificate of Incorporation, Am. L. Inst. (Feb. 23, 1923), https://www.ali.org/media/filer_public/10/62/106284da-ddfe-4ff4-a698-0a47f268ee4c/certificate-of-incorporation.pdf.

6. *See* ALI Style Guide, *supra* note 2.

7. *See Frequently Asked Questions*, *supra* note 1; *see also Past and Present ALI Projects*, Am. L. Inst. (Mar. 2019), https://www.ali.org/media/filer_public/c5/38/c5387be9-980a-4d69-af6d-ad4d4a067606/past-present-3-19.pdf. Principles projects seek "to unify a legal field without regard to whether the formulations conformed precisely to present law . . . mak[ing] clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such." ALI Style Guide, *supra* note 3, at 4, 13. Because the primary purpose of principles projects is to advocate for a shift in the law, not only do such publications not have to rely on case law to support their assertions, but they often cannot rely on case law because it may not exist. Instead, they primarily rely on public policy arguments to persuade legislators and administrators to enact laws in accordance with the ideas set forth in the document. *See, e.g.*, Principles of the Law, Aggregate Litigation (Am. Law Inst. 2003–2010); Principles of the Law, Family Dissolution: Analysis and Recommendations (Am. Law Inst. 1989–2002); Principles Projects, Software Contracts (Am. Law Inst. 2004–2010).

8. *See, e.g.*, *Frequently Asked Questions*, *supra* note 1 ("Restatements typically synthesize existing case law from across U.S. jurisdictions, and they offer commentary explaining varying approaches."); ALI Style Guide, *supra* note 2.

standards governing restatements—stating the law *as it is*—in contrast to the aspirational qualities endemic to a principles project, would apply. This hope that the new *RLLI* would articulate the law of liability insurance as it exists, rather than as some think it should be, was short-lived, so much so that, at its annual meeting on May 23, 2017, the ALI stated that it would not vote on the *RLLI* to allow the Reporters an additional year to address the mounting concerns.[9] Nevertheless, three months later, in August of 2017, the Reporters released an updated draft of the *RLLI*, which failed to address or respond to the dissenting concerns, and did not materially change the document.[10] The *RLLI* was subsequently approved by the ALI and its final version released in 2019.[11]

B. *Section 12*

Section 12 of the *RLLI*, "Liability of Insurer for Conduct of Defense," appears in the second chapter of the *RLLI*, "Management of Potentially Insured Liability Claims," within the first topic thereunder, "Defense." The first Comment on Section 12 explains its purpose:

> When a defense counsel selected by an insurer to represent an insured commits professional malpractice, the insured may recover from that attorney for any harm that results, subject to meeting the standard elements of a tort claim for professional malpractice. Under the rule stated in this Section, an insured may also seek recovery in tort for harms caused by that malpractice from the liability insurer in two limited sets of circumstances.[12]

Section 12 is accordingly divided into two subsections, one for each "limited set[] of circumstances." Subsection 12(1) provides for insurer liability for harm caused to the insured due to the insurer's negligent selection of counsel:

> If an insurer undertakes to select counsel to defend a legal action against the insured and fails to take reasonable care in so doing, the insurer is subject to liability for the harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable.[13]

Subsection 12(2) provides for insurer liability for harm to the insured if the insurer overrides the duty of counsel to exercise independent professional judgment:

9. *See* Marrkand, *supra* note 5 (outlining timeframe for RLLI's publication).
10. Restatement of the Law, Liability Insurance, Reporters' Memorandum (Am. Law Inst. Council Draft No. 4, Dec. 4, 2017).
11. *See* Marrkand, *supra* note 5.
12. RLLI, *supra* note 3, § 12, cmt. *a*.
13. *Id.* § 12(1).

> An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs the conduct of the counsel with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent professional judgment.[14]

III. SECTION 12 CREATES A NEW TORT WITHOUT ANY LEGAL OR POLICY JUSTIFICATION

A. *Section 12's Tort Cause of Action Finds No Support in Pre-*RLLI *Case Law*

Given that, for nearly four years, the *RLLI* proceeded with the understanding that, as a principles project, it could set forth aspirational rules, Section 12's innovative rather than jurisprudential quality is not surprising. As a practical matter, because the stated purpose of a principles project is to advance an argument that the law ought to be a certain way, it makes sense that the existing *RLLI* suffers from the vestiges of that process and thus lacks support. But when the PLI project became the *RLLI*, the document as drafted should have been evaluated to determine which of its sections in fact capture the law as it is, and which sections should have been stricken as purely aspirational and suitable only for a principles project. Section 12 falls into this latter category.

The Reporters' notes accompanying Section 12 repeatedly acknowledge the dearth of any case law supporting either Subsection 12(1) or Subsection 12(2).[15] The notes state that "there are no published cases expressly dealing with a situation in which the liability insurer hires counsel who turns out to have insufficient liability insurance coverage, and as a result is unable to pay a malpractice claim brought by insured against counsel."[16] The notes further acknowledge that "a thorough research of the case law reveals that insurers are rarely held liable in this way" (referring to "direct insurer liability for negligent supervision of counsel representing the insured"), and that "no cases were found holding a liability insurer liable for the torts of counsel on a theory of apparent authority or negligent supervision."[17]

14. *Id.* § 12(2).

15. Reporters' Note *a* refers readers to section four of the *Restatement Third, Torts: Liability for Economic Harm*, for the general proposition that attorneys (not insurers) are responsible for the "economic harms that they negligently cause their clients in the performance of their professional obligations." RLLI, *supra* note 3, § 12, Reporters' Note *a*. But it fails to offer any support for extending insurer liability for defense counsel's malpractice, referring only to the *Restatement Third, Torts: Liability for Economic Harm* for the general proposition that "lawyers are liable for the economic harms that they negligently cause their clients in the performance of their professional obligations to those clients." *Id.* In turn, that section of the *Economic Harm Restatement* makes no mention of insurance companies. *See* Restatement Third, Torts: Liability for Economic Harm, § 4, cmt. *b* (Am. Law Inst. 2020).

16. *See* RLLI, *supra* note 3, § 12, Reporters' Note *c*.

17. *Id.* Reporters' Note *d*.

Indeed, the notes concede that "very few cases can be found even hinting at insurer liability for the misconduct of counsel retained on behalf of an insured."[18] One commentator whose work is cited in the Reporters' notes, Professor George Cohen, observed that he could not find a single case "addressing the issue of whether a liability insurer can be liable for negligent selection of defense counsel if the insurer fails to require that the defense counsel maintain liability insurance."[19] Moreover, the cases cited in the notes to Section 12 do not lend support to either Subsection 12(1)[20] or Subsection 12(2).[21]

18. *Id.*

19. George M. Cohen, *Liability of Insurers for Defense Counsel Malpractice*, 68 Rutgers L. Rev. 119, 134 n.77 (2015); *see* RLLI, *supra* note 3, § 12, Reporters' Note *b*.

20. For example, the Reporters' Notes cite a number of cases for the proposition that an insurer's duty to defend "entails an obligation on the insurer to select competent and qualified counsel." RLLI, *supra* note 3, § 12, Reporters' Note *b*. None of these cases fully supports this proposition. *See* R.C. Wegman Constr. Co. v. Admiral Ins. Co., 629 F.3d 724, 728 (7th Cir. 2011) (recognizing that an insurer has a duty to notify the insured of a conflict of interest if and when it learns of such a conflict arising, not recognizing a duty to hire "competent counsel"); Merritt v. Rsrv. Ins. Co., 110 Cal. Rptr. 511, 527 (Ct. App. 1973) (rejecting the extension of vicarious liability to an insured, and holding instead that "if trial counsel negligently conducts the litigation, the remedy for this negligence is found in an action against counsel for malpractice and not in a suit against counsel's employer to impose vicarious liability"); *see also* Aetna Cas. & Surety Co. v. Protective Nat'l Ins. Co. of Omaha, 631 So. 2d 305, 306 (Fla. Dist. Ct. App. 1993) (applying vicarious liability, which Section 12 explicitly rejects); Hackman v. W. Agric. Ins. Co., No. 104-786, 2012 Kan. App. Unpub. LEXIS 311, at *21, 29 (Apr. 2, 2012) (upholding lower court's finding that the insurer did not breach its duty to provide a defense to plaintiff). The Reporters' Notes also cite to three cases that the notes claim "suggest[] the possibility of such a cause of action," but do not actually suggest the possibility of a cause of action for negligent selection of counsel. *See* RLLI, *supra* note 3, § 12 Reporters' Note *b* (citing Brown v. Lumbermens Mut. Cas. Co., 369 S.E.2d 367, 372 (N.C. Ct. App. 1988) (analyzing under what circumstances an attorney is an independent "actor" for purposes of establishing vicarious liability, and emphasizing that the "right to control the details of a person's work is primarily characteristic of an agency relationship," which is not the type of relationship at issue in Section 12)); *see also* Pac. Emps. Ins. Co. v. P.B. Hoidale Co., 789 F. Supp. 1117, 1122 (D. Kan. 1992) (analyzing whether an insurer was liable for the acts of defense counsel under a theory of agency and therefore vicarious liability, which Section 12 explicitly rejected); Evans v. Steinberg, 699 P.2d 797, 799 (Wash. Ct. App. 1985) (dismissing the plaintiff's negligent selection of counsel claim in a single sentence). In accepting the duty to defend, an insurer recognizes that it may also have a duty to indemnify. As such, it has every incentive to hire competent defense counsel, relying upon defense counsel to decline the representation if counsel lacks the competency to handle the matter.

21. The only case the Reporters' Notes cite as offering an inkling of support for Subsection 12(2)'s concept of insurer liability for overriding defense counsel's professional judgment is Lloyd v. State Farm Mutual Automobile Ins. Co., 860 P.2d 1300, 1301 (Ariz. Ct. App. 1992). In *Lloyd*, the court observed that, "when an insurer has assumed the defense of its insured, the failure to file a timely answer can be negligence." *Id.* at 1305. The court analyzed this issue in relation to the plaintiffs' contention that the insurer acted negligently in discharging its duty to defend and concluded that there was no evidence that the insurer overrode defense counsel's independent professional judgment. *Id.* at 1306. The court declined to resolve at summary judgment whether the insurer was negligent in failing to file an answer, because there were disputed factual issues, including whether the insureds caused the delay by belatedly notifying the insurer about the claim. *Id.* at 1305. Finding support in Arizona's Rules of

This undisputed lack of case law supporting the liability articulated in Section 12 reveals that this section of the *RLLI* did not make the transition from a principles project to a restatement, and does not belong in the *RLLI*.

B. *Section 12's Tort Claim Lacks a Compelling Justification for Its Innovation*

Even if an innovative legal standard were appropriate for a restatement, Section 12 lacks a supported policy rationale for the tort liability it imposes. Neither Subsection 12(1) nor Subsection 12(2) identifies or addresses a real-world problem justifying its extension of tort liability to insurers for defense counsel's misconduct.

1. Subsection 12(1)

Subsection 12(1) attempts to remedy a problem that—as far as anyone who has looked into it can discern—does not exist, and if it does, is already redressed by existing solutions that do not necessitate the creation of a new cause of action and collateral litigation about what Subsection 12(1) does and does not provide. Aggrieved insureds already have remedies against defense counsel for their malpractice: They may file a grievance with the state bar association, which could result in bar sanctions,[22] or bring a malpractice action against the attorney.[23] Subsection 12(1) thus seems to be concerned with insurers hiring attorneys who do not have enough

Professional Conduct, the court granted summary judgment for the insurer on the plaintiffs' claim that the insurer was negligent in failing to notify them about a settlement offer because it was the attorney, not the insurer, who had the obligation to notify the insureds of the settlement offer. *Id. Lloyd* thus stands for a far narrower principle that the Reporters' Notes attribute to it, going no further than stating that an insurer's liability for defense counsel's conduct is concurrent with its liability for breaching the contractual duty to defend the insured, and does not include additional tort liability.

22. In most states, an insured—like any individual or entity represented by an attorney—is able to file a grievance with the state bar association. *See, e.g.*, *Filing a Complaint Against an Attorney*, Mass. Bd. of Bar Overseers, https://www.massbbo.org/Complaints (last visited May 5, 2020); *Filing a Grievance*, N.C. State Bar, https://www.ncbar.gov/for-the-public/i-am-having-a-dispute-with-a-lawyer/filing-a-grievance; *File a Grievance*, State Bar of Tx., https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemswithanAttorney/GrievanceEthicsInfo1/File_a_Grievance.htm (last visited May 5, 2020). If the grievance demonstrates conduct that potentially violated a rule of professional conduct, state bar associations complete an investigation, and then may impose sanctions ranging from a letter of caution to disbarment.

23. An attorney who violated a rule of professional conduct may also have committed legal malpractice if the attorney failed to exercise reasonable care in his or her representation of a client and that failure was the proximate cause of the client's unfavorable legal result. A plaintiff in a malpractice action must prove that his or her attorney "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and . . . that the attorney's breach of the duty proximately caused the plaintiff actual and ascertainable damages." *See* Schurz v. Bodian, 92 A.D. 753, 753 (N.Y. App. Div.2012); *see also* Dina M. Cox & Neal Bowling, *Malpractice v. Misconduct*, LewisWagner (May 2012), https://www.lewiswagner.com/9C8985/assets/files/News/malpractice%20article%20-%20national%20-%20marketing%20-%205162012%20_2_.pdf.

malpractice insurance.[24] In theory, the purpose of Subsection 12(1) is to provide aggrieved insureds with the full damages awarded to them in a malpractice action against defense counsel, if defense counsel (or her malpractice carrier) is unable to satisfy the full judgment.[25] Subsection 12(1) purports to allow insureds to recover this award against the insurer who appointed defense counsel.[26]

This rationale for the "solution" devised by Subsection 12(1) assumes that there is a problem of insureds being left without remedies for the malpractice of defense counsel. But there is no indication that lawyers are carrying insufficient malpractice insurance to cover judgments entered against them or that aggrieved insureds are routinely unable to collect on malpractice judgments against defense counsel.[27] We could find no studies or data indicating that there is an epidemic of judgment-proof defense counsel. We could find no articles or cases noting that insureds are being left without remedies for the malpractice of defense counsel.[28] In other words, there is no documented problem with insureds—or anyone—being unable to recover against their malpracticing attorneys.[29] This lack

24. *See* RLLI, *supra* note 3, § 12, cmt. *c*.

25. In comment *a*, the Reporters note that an insured may recover against defense counsel for professional malpractice and that, under Section 12, "an insured may also seek recovery in tort for harms *caused by that malpractice* from the liability insurer in two limited sets of circumstances." RLLI, *supra* note 3, § 12, cmt. *a* (emphasis added).

26. But, even under that rationale, subsection 12(1) should have provided that insurers are a last recourse; in other words, recourse must first be sought (and fail) against the malpracticing defense counsel. *See, e.g.*, Country Mut. Ins. Co. v. Martinez, No. CV-17-02974, 2019 U.S. Dist. LEXIS 69283, at *39-41 (D. Ariz. Apr. 24, 2019).

27. The Reporters acknowledge this lack of any jurisprudence addressing the issue of insurer liability for selecting an attorney with inadequate malpractice insurance. *See* RLLI, *supra* note 3, § 12, Reporters' Note *b*.

28. Cohen, *supra* note 19, at 134 n. 77.

29. If there were a rampant problem with underinsured attorneys, presumably states would have acted to address this problem and mandated that attorneys have malpractice insurance, perhaps even with certain minimum limits. But with only a handful of exceptions, states have not done this. As of April 2020, only two states require attorneys to have malpractice insurance—Oregon and Idaho. Several other states—California, Nevada, New Jersey, and Washington—have considered it and decided not to require attorneys to carry malpractice insurance. Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, 9 St. Mary's J. Legal Malpractice & Ethics 190, 193-95 (2019). Instead, many states have malpractice disclosure requirements for attorneys under which attorneys must disclose whether they are currently covered by professional liability insurance. *See* State Implementation of ABA Model Court Rule on Insurance Disclosure (Am. Bar Ass'n Mar. 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.pdf; *see also* ABA Model Court Rule on Insurance Disclosure (Am. Bar Ass'n 2005), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_court_rule_on_insurance_disclosure.pdf. The fact that only two states currently require practicing attorneys to hold malpractice insurance, while many other states require merely a disclosure of whether an attorney has malpractice insurance, demonstrates that the issue of attorneys not carrying enough malpractice insurance has already been considered and addressed by multiple states and determined not to be such a major concern that mandatory attorney malpractice insurance is necessary.

of support for the existence of a problem is at odds with the ALI's own directive that the Reporters cite to relevant "social science evidence and empirical analysis" when "ascertain[ing] the relative desirability of competing rules."[30]

2. Subsection 12(2)

Similarly, Subsection 12(2) seems designed to ensure that an insured can recover fully on any judgment entered against its attorney. In addition, Subsection 12(2) appears to be concerned that an insurer will select an attorney who will serve its own interests rather than those of the insured, and who will put the insurer's interests and directives above those of the insured. But as with Subsection 12(1), there is no indication that this is in fact a problem. Subsection 12(2) assumes that defense counsel's judgment could be overridden by an insurer without consequence, and that insurers "supervise" defense counsel in a way that allows insurers to be held liable for defense counsel's misconduct. Neither of these assumptions are true.

Attorneys whose primary duty of loyalty runs to the insured are prohibited from putting the insurer's interests above the insured's.[31] Moreover, attorneys are bound by rules of professional ethics to exercise their independent professional judgment in service of their clients, and are subject to liability for malpractice if they fail to do so. A third party such as an insurer may direct an attorney's conduct, with some limitations, so long as "the direction does not interfere with the lawyer's independence of professional judgment" and "is reasonable in scope and character."[32] However, substantial insurer control of defense counsel breaches the rules of professional

30. ALI Style Guide, *supra* note 2, at 5.

31. *See infra* notes 33, 42.

32. Restatement, Third, The Law Governing Lawyers § 134(2) (Am. Law Inst. 2000); *see* RLLI, *supra* note 3, § 12, Reporters' Note *d* (acknowledging this section of the *Restatement Governing Lawyers*); *see also* Model Rules of Prof'l Conduct, r. 1.8(f) (Am. Bar. Ass'n 2020) [hereinafter Model Rules] ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 16."); Model Rules, *supra*, r. 5.4(c) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."); Model Rules, *supra*, r. 1.7, cmt. 13 (when a lawyer is paid by someone other than the client, the arrangement "cannot compromise the lawyer's duty of loyalty or independent judgment to the client"). Directions are "reasonable in scope and character" if they "reflect obligations borne by the person directing the lawyer," and if, for example, "the third party will pay any judgment rendered against the client and makes a decision that defense costs beyond those designated by the third party would not significantly change the likely outcome." Restatement, Third, The Law Governing Lawyers, *supra*, § 134, cmt. *d*. Elsewhere in the RLLI, the Reporters acknowledge that "[r]ules governing lawyers' professional obligations are outside the scope of this Restatement," and look to the *Restatement Governing Lawyers* for guidance on such obligations. *See* RLLI, *supra* note 3, §11, cmt. *d*.

conduct for attorneys, and could not even occur very effectively in light of defense counsel's limited ability under those same rules and other portions of the *RLLI* to share information with the insurer.[33]

Moreover, as noted above with respect to Subsection 12(1), aggrieved insureds already may file a grievance with the state bar association or bring a malpractice action against defense counsel for alleged misconduct. Defense counsel retained by an insurer to represent an insured cannot, as a practical or ethical matter, cede control of the conduct of the representation to the insurer. Although Subsection 12(2) speaks to a situation in which defense counsel has followed directives of an insurer against the dictates of counsel's professional judgment, that act of defense counsel allowing her personal judgment to be overridden by the insurer, in and of itself, could be deemed a violation of the rules of professional conduct or attorney malpractice. Subsection 12(2) is thus not needed to provide an insured with essentially duplicative redress for defense counsel's misconduct.

IV. SECTION 12 CREATES A NEW TORT CLAIM FOR CONDUCT ALREADY REDRESSED BY A BREACH OF CONTRACT CLAIM

The consequences of Section 12's invention are dramatic. While purporting to provide a "clear formulation[] of common law . . . as it presently stands or might appropriately be stated by a court,"[34] Section 12 actually introduces a new tort claim. Although the lack of support from pre-existing case law or a compelling policy justification for Section 12 are troubling, perhaps the most significant problem with Section 12 is its attempt to punish—in tort—conduct that is already redressed in contract through the duty to defend. This new cause of action is unnecessary—because it is entirely duplicative of the contractual claim for breach of the duty to defend—and problematic—because it fundamentally changes the damages model that has consistently applied to the insurer-insured relationship.

33. *See, e.g.*, Restatement, Third, The Law Governing Lawyers, *supra* note 32, § 134, cmt. *f*; *see also, e.g.*, RLLI, *supra* note 3, §11 ("Confidentiality," limiting insurer's access to information covered by privilege or "defense lawyer's duty of confidentiality under the rules of professional conduct"), § 14 ("Duty to Defend: Basic Obligations," requiring defense counsel to keep certain relevant information from insurers). Defense counsel's fiduciary duties to the insured do not necessarily run to the insurer, and prevent the insurer from having all of the information that guides defense counsel's professional judgment in handling the case. Defense counsel may not share with the insurer adverse, confidential information without the insured's explicit informed consent where the insurer is defending under a reservation of rights, or there is some question as to whether a claim against the insured is within the policy coverage. Restatement, Third, The Law Governing Lawyers, *supra* note 32, § 134, cmt. *f*.

34. *See* ALI Style Guide, *supra* note 2, at 3.

A. *An Insurer's Conduct with Respect to Defense Counsel Is Embedded in Its Contractual Duty to Defend*

The insurer-insured relationship is a contractual one arising out of the insurance policy.[35] In a general liability policy, assuming coverage exists, two principal duties owed by an insurer to an insured are the duty to defend, and the duty to indemnify. Section 12 bears upon the duty to defend. In fulfilling its duty to defend, the insurer may play a role in defense strategy, attorney selection, and settlement. In many circumstances, the insurer has a contractual right or obligation to select defense counsel for the insured. Because of the possibility that the insurer will indemnify the insured for damages within the limits of the insured's policy, the insurer has a keen interest in selecting competent defense counsel who will resolve the underlying litigation favorably for the insured, and, relatedly, for the insurer in limiting the insured's liability.

In discharging its duty to defend, the insurer either creates or joins two new relationships: The insured-defense counsel relationship, and the insurer-defense counsel relationship. The insured-defense counsel relationship is an attorney-client relationship, and may also be contractual.[36] Under professional conduct rules, lawyers owe unique duties to their clients, which include an obligation to provide competent representation, including possessing "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"; to act promptly in representing a client; to consult with the client regarding the objectives of the representation and the means by which to accomplish those objectives; to enable the client to make informed decisions regarding the representation; to "abide by a client's decision whether to settle a matter"; and to maintain the confidentiality of information provided by a client and communications with a client, and to protect this information from disclosure.[37] Among the most significant of an attorney's duties to her clients is the obligation to exercise her own independent professional judgment in the representation.[38] Defense counsel cannot abrogate these ethical obligations.

In fulfilling its duty to defend, the insurer also necessarily creates its own relationship with defense counsel. This relationship is generally contractual, but benefits from some aspects of the attorney-client relationship

35. *See* 1 New Appleman on Insurance Law Library Edition § 3.01 (2020) [hereinafter Appleman on Insurance]; *see, e.g.*, Bank of the West v. Superior Court, 833 P.2d 545, 551–52 (Cal. 1992).

36. *See, e.g.*, Restatement, Third, The Law Governing Lawyers, *supra* note 32, § 134, cmt. *f* (an insurer may designate a lawyer to represent the insured, and, in such situations, it is "clear" that the lawyer designated to defend the insured "has a client-lawyer relationship with the insured").

37. Model Rules, *supra* note 32, pmbl., rr. 1.1, 1.3, 1.2 (a), 1.4 (a), 1.6 (a).

38. Restatement, Third, The Law Governing Lawyers, *supra* note 32, § 134 (2), 134 cmt. *f*; *see also* Model Rules, *supra* note 32, rr. 1.8(f), 1.7 cmt. 3, r. 5.4 (c).

between the insured and defense counsel.[39] Nonetheless, many courts have recognized the need for close communication between the insurer, defense counsel, and the insured, and absent a conflict, permitted the exchange of privileged information and communications with the insurer.[40] Moreover, while as noted above, an insurer may pay for defense counsel's work and provide some direction, that direction may "not interfere with the lawyer's independence of professional judgment."[41] It is equally well-settled that the primary duty of loyalty of defense counsel flows to the insured.[42]

B. *Section 12 Impermissibly Creates a Tort Cause of Action Arising out of the Insurer's Existing Contractual Obligations*

Because the selection and supervision of defense counsel flows from the insurer's contractual duty to defend, the tort cause of action contemplated by Section 12 of the *RLLI* is redundant to a breach of contract claim against an insurer for a breach of the insurer's duty to defend. Section 12 thus imposes tort liability for conduct that is already accounted for by the parties through their contractual relationship, and for which both a legal cause of action and a damages framework already exists.

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39. *See* Restatement, Third, The Law Governing Lawyers, *supra* note 32, § 134, cmt. *d* (acknowledging that insureds have typically "contractually conferred the power of direction" of counsel to the insurer).

40. *See* Appleman on Insurance, *supra* note 35 § 16.04; Restatement, Third, The Law Governing Lawyers, *supra* note 32, §134, cmt. *f*; *id.*, Reporters' Note *f*; *see also* Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 596, 599 (Ariz. 2001) (stating that defense counsel "does not *automatically* represent the insurer," and recognizing but not holding that there could be circumstances in which defense counsel has an attorney-client relationship with the insurer, such as in the absence of a conflict of interest); *see also, e.g.*, Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 449 (Minn. 2002); Leaphart v. Nat'l Union Fire Ins. Co., No. DA 15-0583, 2017 Mont. Dist. LEXIS 16, at *7–8 (Mont. Dist. Ct. July 28, 2017) (citing *In re* the Rules of Professional Conduct, 2 P.3d 806 (Mont. 2000)); Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, 607 (Utah 2003); Gen. Sec. Ins. Co. v. Jordan, Cyone & Savits, LLP, 357 F Supp. 2d 951 (E.D. Va. 2005); Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 93 Cal. Rptr. 2d 534, 541–43 (Ct. App. 2000).

41. Restatement, Third, The Law Governing Lawyers, *supra* note 32, § 134 (2); *see id.*, cmt. *f*; Model Rules, *supra* note 32, r. 1.8 (f).

42. *See* Model Rules, *supra* note 32, r. 1.7, cmt. 13; Restatement, Third, The Law Governing Lawyers, *supra* note 32, § 134 (2) (a); Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294, 297 (Mich. 1991) (recognizing that "courts have consistently held that the defense attorney's primary duty of loyalty lies with the insured, and not the insurer"); Peterson v. St. Paul Fire & Marine Ins. Co., 239 P.3d 904, 918 (Mont. 2010) (citing *In re* Rules of Prof'l Conduct, 2 P.3d 806, 814 (Mont. 2000) (defense counsel owes "a duty of undivided loyalty to the insured," must consult with insurer and is accountable for his or her work); Feliberty v. Damon, 72 N.E.2d 112, 265 (N.Y. App. 1988) ("The paramount interest independent counsel represents is that of the insured, not the insurer."); *see also, e.g.*, First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 671 (Ark. 1990); Higgins v. Karp, 687 A.2d 539, 543 (Conn. 1997); Niedzwiadek v. Laliberte, No. C.A. PC 98-2880, 2001 R.I. Super. LEXIS 147, at *2 (Nov. 20, 2001) (citing Casco Indem. Co. v. O'Connor, 755 A.2d 779 (R.I. 2000)); State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 628 (Tex. 1998).

If an insured believes that an insurer has breached its duty to defend, the insured has recourse in the form of a breach of contract claim.[43] To the extent a claim against an insurer rises to the level of asserting bad faith, there is a contractual remedy for that as well. Despite these existing contractual obligations, Section 12 imposes the identical duty in tort.[44] As drafted, any liability under Section 12 necessarily arises out of the same actions that would give rise to an insured's claim for breach of the duty to defend by the insurer. There is no additional duty imposed by Section 12 that could not be captured in a breach of contract claim; in other words, there is no conduct that would be actionable under Section 12 but not as a breach of contract, or vice versa.

As a general matter, a duty in tort must exist independently from any contractual duty.[45] As the California Supreme Court explained in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, "[c]onduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law."[46] A breach of contract alone

43. Appleman on Insurance, *supra* note 35, § 7.06 ("Breach of contract claims by the policyholder may cover the full spectrum of obligations under the policy, but often involve breach of the duty to defend, breach of the duty to settle, and breach of the duty to indemnify."); *see* Signal Prods. v. Am. Zurich Ins. Co., Case No. 4:14 CV 1112 CDP, 2014 U.S. Dist. LEXIS 203534, at *45-46 (C.D. Cal. Aug. 4, 2014) (insured argued insurer breached its duty to defend by (1) accepting defense of insured's claim too late; (2) "adopting unreasonable coverage positions"; (3) refusing to pay certain of defense counsel's fees; and (4) "agreeing to pay only a portion of the fees owed, and conditioning the partial payment on insured consenting to reduce the fees under various billing guidelines"); Fireman's Fund Ins. Co. v. CTIA, 480 F. Supp. 2d 7, 16 (D.D.C. 2007) (striking insured's tort claim for bad-faith breach of contract claim but keeping insured's breach of contract claim against insurer); Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co., 963 F. Supp. 452, 455 (M.D. Pa. 1997) (observing that insured may bring a claim for breach of an insurer's contractual duty to exercise due care in defending the claim if the insured believes that the insurer exercised "an abnormal degree of control over the litigation"); *see also* R.C. Wegman Constr. Co. v. Admiral Ins. Co., 629 F.3d 724, 728 (7th Cir. 2011); Merritt v. Rsrv. Ins. Co., 110 Cal. Rptr. 511, 527 (Ct. App. 1973); Aetna Cas. & Sur. Co., 631 So. 2d at 306.

44. The notes to Section 12 acknowledge that tort liability under the section will mirror contract liability in most circumstances and that "there are no judicial decisions that have held an insurer liable in tort for negligent selection of counsel." RLLI, *supra* note 3, § 12 Reporters' Note *b*.

45. *See, e.g.*, 8 McNamara, New Hampshire Practice: Personal Injury—Tort and Insurance Practice § 4.43 (4th ed. 2019) ("Only if the facts constituting the breach of the contract also constitute a breach of the duty owed by the defendant to the plaintiff independent of the contract will a separate claim for the tort lie."); *see also, e.g.*, Colorado Construction Law § 8.4.11 (2013) ("In Colorado, then, the application of the economic loss rule is determined by a comparison of the contractual duty and duty in tort alleged to have been breached. Where those duties overlap and where there is no special independent duty of care in tort, the economic loss rule applies."); 2 Products Liability § 13.07 (1) (a) (2020) ("In the overwhelming majority of jurisdictions, the economic loss rule prevents plaintiffs from recovering for economic losses in tort.").

46. Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 460 (Cal. 1994); *see also* Travelers Indem. Co. v. Royal Oak Enters., 429 F. Supp. 1265, 1273 (M.D. Fl. 2004) (holding insured's tort counts "[were] barred by Florida's economic loss rule, which states that a party

cannot give rise to an independent tort action absent *additional* tortious conduct.[47] A separate tort cause of action, thus, must arise from acts that are *separate* from those that gave rise to the breach of contract claim.

Under Section 12, tort liability would necessarily arise out of the insurer's breach of its existing contractual duty to defend, and not an independent duty arising out of tort law.[48] The Reporters' notes acknowledge that "the scope of liability under the rule stated in [section 12] will mirror liability under a breach-of-contract theory," and posit without explanation that the additional tort theory will "*reinforce*[] the importance of the duty to-defend by creating an added incentive to select competent and qualified counsel."[49] Not even the Reporters have identified what separate conduct an insurer will have to engage in to be liable for both breach of contract and for a related tort under Section 12, where Section 12 was purportedly designed to "reinforce" the existing contractual duty to defend.

There is also nothing inherent in the tripartite relationship created by the duty to defend—the relationship among the insurer, the insured, and defense counsel[50]—that warrants additional tort duties. None of these relationships are agency relationships that would give rise to tort claims under a typical agency analysis. The insurer-insured relationship is purely a contractual one. Because general agency laws do not apply to lawyers, over whom employers and principals do not have the control required for liability,[51] neither the defense counsel-insured relationship (as an

may not pursue a claim in tort solely for economic losses unless the party breaching the contract has committed a tort which is distinguishable from or independent of the breach of contract."); Elrich v. Menezes, 981 P.2d 978, 982 (Cal. 1999) (stating that the "distinction between tort and contract is well grounded in common law" and while "contract actions are created to enforce the intentions of the parties to the agreement, tort law is designed to vindicate 'social policy'").

47. *See* Elec. Sec. Sys. v. S. Bell Tel. & Tel. Co., 482 So. 2d 518, 519 (Fla. 3d Dist. Ct. App. 1986); *see also Fireman's Fund*, 480 F. Supp. 2d at 15 (refusing to recognize insured's tort claim of "bad faith breach of contract against insurer and explaining that a plaintiff cannot recover punitive damages for a contract cause of action unless "the breach of contract merges with an independent, recognized tort, such as IIED or fraud").

48. *See Travelers Indem.*, 429 F. Supp. 2d at 1273 ("If the insurer acts negligently in carrying out its duty to defend, its conduct constitutes a breach of contract, entitling the insured to recover all damages naturally flowing from the breach."). The court also held that insured's tort claims against insurer were barred under Florida's economic loss rule. *See id.*

49. *See* RLLI, *supra* note 3, §12, Reporters' Note *b* (emphasis added).

50. *See generally*, *e.g.*, Robert E. O'Malley, *Symposium: Marine Insurance: Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 Tul. L. Rev. 511 (1991); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 Geo. J. Legal Ethics 15 (1987).

51. This principle is well-established by the *Restatement*, *Third*, *Law Governing Lawyers*, the rules of professional conduct governing lawyers, and the body of ethical and legal opinions that apply to the practice of law. *See* Restatement, Third, The Law Governing Lawyers, *supra* note 32, § 134, cmt. *f* (an insurer may designate a lawyer to represent the insured, and, in such situations, it is "clear" that the lawyer designated to defend the insured "has a client-lawyer relationship with the insured"); Model Rules, *supra* note 32, rr. pmbl, 1.8 (f).

attorney-client relationship that imposes independent ethical and legal obligations)[52] nor the insurer-defense counsel relationship fit the contours of an agency relationship.[53] Indeed, the Reporters' notes to Section 12 acknowledge that agency principles do not apply: "Because defense counsel are not generally agents of the insurer, vicarious, apparent-authority, and negligent-supervision liability claims would not make sense."[54] Section 12's imposition of direct tort liability for conduct that is already fully redressed by contract law is thus at odds with the well-established distinction between tort and contract claims.[55]

V. BY PENALIZING AN INSURER'S CONDUCT IN SELECTING AND OVERSEEING DEFENSE COUNSEL IN TORT AND IN CONTRACT, SECTION 12 IMPOSES GREATER DAMAGES AGAINST INSURERS WITHOUT CAUSE

Creating a separate cause of action in tort law for conduct that already is captured within a breach of contract claim is problematic because it fundamentally changes the damages analysis, and alters the universe of available damages to an insured plaintiff without requiring any additional breach of duty by the insurer. Through an action for breach of the duty to defend, an insured can recover for those losses that are reasonably foreseeable at the time of contract. Yet despite acknowledging this available contractual recovery, Section 12 effectively allows insured plaintiffs to contravene the traditional principles of contract law—including the important limitations of contract damages—to attempt to recover tort damages, which may extend to all losses that are proximately caused by one party's conduct.[56]

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52. *See, e.g.*, 4 Bender's New York Evidence § 160.02 [2] [b] (b) (2020).

53. This relationship also cannot be characterized as an agent/sub-agent relationship, with the principal being the insured. First no agency relationship exists between either defense counsel and the insured or the insurer and the insured. Second, while defense counsel selected by an insurer to represent an insured receives some limited information from the insurer, he or she gathers much more information from her own investigation or the insured, who is the target of the plaintiff's claim and has personal knowledge of the merits and defenses to the plaintiff's allegations regarding the insured's alleged wrongdoing. Moreover, defense counsel owes duties to the insured stemming from the attorney-client relationship (*e.g.*, to keep privileged communications confidential) that do not necessarily run to the insurer, and therefore prevent the insurer from having all of the information that guides defense counsel's professional judgment in handling the case.

54. *See* RLLI, *supra* note 3, § 12, Reporters' Note *d* ("Lawyers hired by insurers to represent insureds are not understood to be agents of the insurers.").

55. The Reporters concede that section 12 of the *Restatement* rejects vicarious liability. *See* RLLI, *supra* note 3, cmt. *e* ("This Section declines to follow the vicarious-liability rule. . . .").

56. *See id.* §12, Reporters' Note *b* (noting that "an insured may seek damages from the insurer under a breach-of-contract theory based on the insurer's selection of incompetent or unqualified counsel to defend its insured"). "In addition to the availability of contractual remedies, [Section 12] states that an insured may seek remedies in tort based on an insurer's negligent selection of counsel." *See id.*; *see also* RLLI, *supra* note 3, § 12 cmt. *b*. ("Under the

This is in direct contravention to the distinct purposes of tort and contract remedies, and the long-recognized ban on double-dipping remedies for the same conduct, as expressed by the economic loss rule.

A. *Contract Remedies and Tort Remedies Serve Different Purposes and Result in Different Damages Models*

Contract damages and tort damages derive from different models of risk allocation and responsibility for harm. Parties owe contractual duties only to one another, while in tort, all individuals owe a duty to all foreseeable plaintiffs.[57] The scope of damages is also different. Contract damages are foreseeable at the time of the parties' creation of the contract, whereas a party may be liable in tort for all damages that are proximately caused by the alleged tortious conduct.[58]

In contract, plaintiffs typically may recover only those damages that naturally flow from the breach or were foreseeable, and cannot recover for other economic losses or punitive damages.[59] These limitations for contract damages exist "to encourage contractual relations and commercial activity" as parties are expected to allocate their rights, duties, and relative risk prior to the formation of their commercial relationship.[60] Contract damages thus "seek to approximate the agreed-upon performance" and are "generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time."[61] The contract-based remedies available to an insured under a theory of breach of duty to defend are those damages that would typically flow from the breach.[62] These include contract damages,[63] defense costs,[64] interest, and in some jurisdictions, attorney's fees for breach of the duty to defend. [65]

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rule stated in this Section, an insured may . . . seek recovery in tort for harms caused by that malpractice from the liability insurer in two limited sets of circumstances.").

57. *See, e.g.*, Palsgraf v. Long Island R. Co., 162 N.E. 99, 101 (N.Y. 1928).

58. Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 460 (Cal. 1994).

59. 11 Corbin on Contracts § 59.2 (2019).

60. *Applied Equip. Corp.*, 869 P.2d at 460.

61. *Id.*

62. Courts already recognize the fact that insureds may already recover for an insurer's failure to provide adequate defense under a contract theory. *See* Travelers Indem. Co. v. Royal Oak Enters., 429 F. Supp. 1265, 1273 (M.D. Fl. 2004) ("If the insurer acts negligently in carrying out its duty to defend, its conduct constitutes a breach of contract, entitling the insured to recover all damages naturally flowing from the breach.").

63. *See* Mont. Petroleum Tank Release Comp. Bd. v. Crumleys, Inc., 174 P.3d 948, 960–61 (Mont. 2008) (explaining a party may recover proximate and consequential damages for breach of contract).

64. *See* Greer v. Nw. Nat'l Ins. Co., 743 P.2d 1244, 1250 (Wash. 1987).

65. *See* Hogan v. Midland Nat'l Ins. Co., 476 P.2d 825, 831 (Cal. 1970); Appleman on Insurance, *supra* note 35, §§ 1.04[6], 7.06.

Tort damages, on the other hand, compensate the victim for the injury he or she has suffered, and the measure of damages will therefore often account for the "detriment proximately caused . . . whether it could have been anticipated or not."[66] Tort damages are designed to serve three purposes: (1) make the plaintiff whole; (2) deter the defendant's conduct; and (3) punish the defendant for acting in a way that is inconsistent with societal standards.[67] A tort claim permits the recovery of non-contract damages, including compensatory damages, damages for emotional distress, punitive damages, and attorney's fees.[68] Punitive damages in particular—damages intended solely to punish the party found to be at fault—represent a substantial risk accompanying tort claims that are not permitted for breach of contract claims, whose damages are generally limited to returning the aggrieved party to the position it would have been in but for the breach.

B. *Enhanced Tort Damages Are Not Available for a Breach of Contract*

As discussed above, a plaintiff may only recover damages in tort and in contract when the defendant committed both a tort and a breach of contract separately. Invoking tort law to penalize what is effectively a breach of contract is a common tactic to obtain greater damages than would be permitted in a straightforward contract action—and it is a commonly rejected one. In many jurisdictions, the economic loss rule prohibits plaintiffs from recovering purely economic losses in a tort action.[69] The rule

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66. Appleman on Insurance, *supra* note 35, § 1.04 [6].

67. *See* Corbin on Contracts, *supra* note 59, § 59.2 ("Breaches of contract, in general, do not cause as much resentment or other mental and physical discomfort as do torts and crimes. Therefore, the remedies to prevent them and to prevent disorder and breach of the peace by satisfying the injured parties are not so severe upon the wrongdoer. Pecuniary compensation given to the injured party has been found to be sufficient, without the necessity for satisfying the party's feelings and allaying community resentment by fines or physical punishment."); *see also* Restatement of the Law, Second of Torts, § 901 (Am. Law Inst. 1979) (explaining purposes to bring tort actions are "(a) to give compensation, indemnity or restitution from harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help").

68. *See* Brit UW Ltd. v. City of San Diego, No. 14cv2195 JM (WVG), 2015 U.S. Dist. LEXIS 94988, at *12 (S.D. Cal. July 21, 2015); Restatement of the Law, Second of Torts, *supra* note 74, § 901.

69. *See* Phoenix Packaging Operations, LC v. M&O Agencies, Inc., No. 7:15cv569, 2016 U.S. Dist. LEXIS 72945, at *15 (W.D. Va. June 3, 2016) (holding that professional negligence claim was breach of contract claim disguised as tort action, and parties could only recover economic damages "where the parties are in contractual privity and their relationship gives rise to duties not imposed by the explicit terms of the contract but by common law"); Filak v. George, 594 S.E.2d 610, 613 (Va. 2004) ("[W]hen a plaintiff alleges and proves nothing more than disappointed economic expectations assumed only by agreement, the law of contracts, not the law of torts, provides the remedy for such economic losses."); *see also* 2 Products Liability § 13.07 (1) (a) (2020) ("In the overwhelming majority of jurisdictions, the economic loss rule prevents plaintiffs from recovering for economic losses in tort."); William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract over Tort*, 44 U. Miami L. Rev. 731, 799 (1990) (listing jurisdictions that have adopted the economic loss rule in commercial sales transactions).

exists to prevent a contracting party from using tort claims to obtain damages she cannot obtain through contract claims—that is, from recovering damages beyond contract damages for a pure breach of contract.[70] On its face and in its accompanying comments and notes, Section 12 offers no basis upon which a plaintiff should be entitled to recover in tort, under the cause of action articulated in Section 12, for damages in excess of what she could recover for the same insurer conduct in a breach of contract action. In fact, not only does Section 12 offer no foundation for extending tort liability to a breach of contract claim in contravention of the economic loss rule, but the Reporters' notes to Section 12 explicitly acknowledge the existence of the economic loss rule, and its application to situations in which parties attempt to obtain additional damages for a purely contractual harm.[71] Instead of articulating why the economic loss rule is no bar to tort recovery under Section 12 when a breach of contract claim would suffice, the Reporters' notes suggest that we simply ignore the economic loss rule when considering the application of Section 12.[72] This is illogical; the economic loss rule exists to prevent double-dipping in contract and tort for claims that sound solely in contract. Where adequate remedies are available in contract for a breach of the duty to defend, tort remedies are unnecessary, and would impose the type of punitive sanction for a breach of contract that the economic loss rule prohibits. Absent any separate, tortious conduct, the appropriate remedy for the type of conduct addressed by Section 12 is a contractual one, and not one sounding in tort.[73]

VI. THE DECISIONS CITING SECTION 12 HAVE FRAMED SECTION 12 AS ARTICULATING POTENTIAL BREACHES OF THE DUTY TO DEFEND, AND HAVE NOT EXPLICITLY RECOGNIZED THE AVAILABILITY OF TORT DAMAGES

At the time of this writing, only three cases have discussed Section 12: *Country Mutual Ins. Co. v. Martinez*, a decision of the U.S. District Court for the District of Arizona, *Sapienza v. Liberty Mutual Fire Insurance Co.*, a decision of the U.S. District Court for the District of South Dakota,

70. *See* Chi. Title Ins. Co. v. Commonwealth Forest Invs., Inc., 494 F. Supp. 2d 1332, 1337 (M.D. Fla 2007) (explaining that Florida's economic loss rule bars "tort actions when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising from the contract [because] the economic loss rule protects . . . contractual expectations").

71. RLLI, *supra* note 3, § 12, Reporters' Note *d*.

72. *Id.* The Reporters' Notes acknowledge "the general rule . . . disfavoring tort law remedies for purely economic harms, particularly where those harms arise from contractual relationships" and then ask readers to "set[] [it] aside." *Id.*

73. Indeed, the Reporters' Notes acknowledge that "[i]n many if not most cases, the scope of liability under the rule stated in this Section will mirror liability under breach-of-contract theory" and that it is only in some "cases on the margins," which the Notes do not further identify or define, where a tort remedy would purportedly better serve the insured. *Id.*

and *Progressive Northwestern Insurance Co. v. Gant*, a decision of the U.S. Court of Appeals for the Tenth Circuit applying Kansas law. All three cases confirm that an insured may bring a breach of contract claim against an insurer for breach of the duty to defend. *Martinez* stated that any claims regarding the selection or conduct of defense counsel are claims that would arise under the duty to defend, if they are permitted at all. *Gant* further explained that a claim of negligent hiring of defense counsel, the subject of Subsection 12(1), should be understood as a contract claim, and not a freestanding tort claim. Both *Martinez* and *Gant* confirm that courts should look to applicable case law first and then turn to the *RLLI* only to the extent it comports with existing common law.

With respect to Subsection 12(2), *Martinez* declined to address the concept, noting only that it could constitute a breach of the contractual duty to defend, and although both *Sapienza* and *Gant* adopted the concept articulated in Subsection 12(2), they did so on a very limited basis. In *Sapienza*, the court utilized Subsection 12(2) to analyze whether the plaintiffs had stated a claim for a breach of the duty to defend, and ultimately concluded that their claim barely passed muster. In *Gant*, the court adopted Subsection 12(2) but concluded that the standard had not been satisfied. In neither case did the court discuss whether Subsection 12(2) provides tort remedies beyond those available in a breach of contract/breach of the duty to defend claim. Accordingly, there is to date no case law supporting Subsection 12's imposition of tort liability for conduct that can be redressed through a breach of the duty to defend claim.

A. Country Mutual Insurance Co. v. Martinez

The *Martinez* case arose out of a lawsuit brought by the father of two children who were seriously injured in an automobile accident during which the mother of the children, his ex-wife, was driving.[74] The father sued a number of parties, including the mother, who was insured by Country Mutual Insurance Company. Country Mutual agreed to defend the mother without any reservation of rights and retained an attorney to defend her.[75] During the litigation, the mother's attorney took a less active role because he believed, based on conversations he had with the father's counsel, that the father's strategy was to shift all fault to the other defendants and away from the mother.[76] The mother's attorney did not retain any experts, instead relying upon the experts retained by the father. The defense attorney for the mother also declined to pursue any separate summary judgment motions

74. Country Mut. Ins. Co. v. Martinez, No. CV-17-02974, 2019 U.S. Dist. LEXIS 69283 (D. Ariz. Apr. 24, 2019).

75. *Id.* at *7.

76. *Id.* at *7–8.

or join in a summary judgment motion filed by the father. Over time, the father's counsel "became frustrated with [the mother's attorney's] allegedly insignificant efforts at defending [the mother]."[77] The parties engaged in settlement conversations, leaving the mother as the only remaining defendant.[78] The last settlement offer authorized by Country Mutual was for up to $100,000 beyond the policy limits.[79] A year later, the mother settled, and assigned all of her claims against Country Mutual to the father as guardian ad litem for the children; the father agreed not to execute the $30 million settlement against the mother.[80] At the time of the settlement, the mother believed that the defense provided to her by Country Mutual was inadequate.[81]

Country Mutual filed a declaratory judgment action against the children and their father on the basis that the mother had "breached implied and express terms" of the insurance policy and forfeited coverage.[82] The father asserted a counterclaim alleging that Country Mutual breached the insurance policy, including its duty of equal consideration, its duty to defend, and its duty to indemnify, and that, by committing an anticipatory breach, the insurer permitted the mother to enter into the settlement agreement.[83]

The U.S. District Court for the District of Arizona granted Country Mutual's motion for summary judgment, concluding that Country Mutual did not breach any of its duties to the mother such that she could enter into the settlement agreement.[84] With respect to the duty to defend, the district court concluded that so long as the insurer retained an attorney to provide a defense to the insured, which Country Mutual did, it fulfilled its duty to defend. The court differentiated "between an insurer taking no action to defend its insured and an insurer retaining counsel to defend the insured."[85] "In the latter circumstances, an insurer has discharged its duty to defend and any failures must be attributed to counsel, not the insurer."[86] Relying on an Arizona Court of Appeals decision, the district court explained that:

> [A]n insurer cannot be found to have breached its duty to defend based on the failures of counsel. In general, once an insurer hires competent counsel and allows that counsel to perform as he deems appropriate, an insurer has

77. *Id.* at *10–11.
78. *Id.* at *15–16.
79. *Id.* at *5, *17.
80. *Id.* at *17; *id.* at *3–4.
81. *Id.* at *3–4.
82. *Id.* at *3–4, *18.
83. *Id.* at *18.
84. *Id.* at *19. In so doing, the district court concluded that Country Mutual did not breach any of the three duties it owed to the mother: "the duty to treat settlement proposals with equal consideration, the duty to defend, and the duty to indemnify." *Id.*
85. *Id.* at *39.
86. *Id.* (citing Lloyd v. State Farm Mut. Auto. Ins. Co., 860 P.2d 1300, 1305 (Ariz. Ct. App. 1992)).

> discharged its duty to defend and cannot be liable for counsel's failures. Such failures must be attributed to counsel, not the insurer. There may, of course, be exceptions to this general rule. For example, if an insurer were to retain unqualified counsel or specifically direct counsel to take inappropriate action, a court might find an insurer breached the duty to defend despite having formally hired counsel to defend the insured. Those exceptions, however, do not change the general rule that the duty to defend is discharged by hiring counsel.[87]

In recognizing this potential exception, the district court cited to a draft of Section 12 of the *RLLI*.[88] But because the court concluded that the exception did not apply, and that the experienced attorney exercised his independent judgment in making strategic defense decisions, it concluded that Country Mutual did not breach its duty to defend, and the court did not further discuss the potential application of Section 12 of the *RLLI*.[89] *Martinez* is instructive because it explicitly classifies any of the conduct identified in Section 12 as a potential breach of the duty to defend, and not as extracontractual conduct subject to tort liability.[90]

B. Sapienza v. Liberty Mutual Fire Insurance Co.

The *Sapienza* case arose out of a lawsuit brought against the insureds, the Sapienzas, by their neighbors, who alleged that the Sapienzas violated height and setback regulations in their renovations of a home in a historic district.[91] The Sapienzas retained defense counsel and answered the complaint, and it was not until two months later that they notified Liberty, with whom the Sapienzas had a homeowner's policy and an excess policy, of the lawsuit.[92] Liberty agreed to defend the Sapienzas in the lawsuit under a reservation of rights because it appeared that there could be a property damage claim.[93] Defense counsel retained by the Sapienzas continued to represent them, with Liberty paying his attorney's fees.[94] In the underlying lawsuit, the state court ultimately entered a mandatory injunction requiring the Sapienzas to bring their house into compliance with applicable regulations or rebuild it, and did not award any monetary damages.[95] Based

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87. *Id.* at *41 (footnotes and citations omitted).
88. *Id.* at *41 n.15.
89. *Id.* at *41–42.
90. In so doing, the *Martinez* court also demonstrated that the Reporters' reliance on *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 860 P.2d 1300, 1305 (Ariz. Ct. App. 1992), as support for Section 12 stating a tort cause of action is misplaced, as the *Martinez* court interpreted *Lloyd* as recognizing a variation of the contractual duty to defend and nothing more. *See Martinez*, 2019 U.S. Dist. LEXIS 69283, at *39–41.
91. Sapienza v. Liberty Mut. Fire Ins. Co., 389 F. Supp. 3d 648, 650 (D.S.D. 2019).
92. *Id.* at 650–51.
93. *Id.*
94. *Id.*
95. *Id.* at 651–52.

on this order, Liberty informed the Sapienzas that it would continue to provide a defense for the lawsuit, but that it would not provide indemnification for the injunctive relief ordered by the state court judge, because such relief and the costs of complying with it did not constitute "damages" under the policies.[96]

The state court judge's ruling in the underlying lawsuit was affirmed by the South Dakota Supreme Court with respect to the injunctive relief and was remanded for further consideration based on the court's conclusion that "[p]ecuniary compensation would not provide adequate relief" for the harm caused to the neighbors and the historic district.[97] The state court judge, on remand, gave the Sapienzas six weeks to submit plans for compliance to the board; the Sapienzas submission was rejected by the board, and they were precluded from submitting any future plans.[98] The Sapienzas' defense counsel did not attend the board meeting.[99] Thereafter, the state judge issued a writ of execution giving the Sapienzas thirty days to demolish their home, with which they complied and incurred greater than $60,000 in so doing.[100]

After incurring these expenses, the Sapienzas filed suit against Liberty, alleging that it breached its duty to defend, breached its duty to indemnify the Sapienzas, provided them with an inadequate defense and acted in bad faith in failing to defend.[101] Liberty moved to dismiss the complaint.[102] The court granted the motion to dismiss as to the Sapienzas' bad faith claims, and gave the Sapienzas two weeks to amend their complaint to survive the motion to dismiss as to the breach of the duty to defend claims.[103]

In its opinion on the motion to dismiss, the court observed that there are no South Dakota cases "addressing an insurer's liability for an inadequate defense."[104] In the absence of such precedent, the court *sua sponte* looked to "a draft of the Restatement addressing this issue" and cited to Subsection 12(2) of the *RLLI* as support that a claim could be brought against Liberty for an "inadequate" or "improper defense," if "the insurer itself . . . engaged

96. *Id.* The court certified a question to the Supreme Court of South Dakota as to whether the costs incurred by the Sapienzas to comply with the injunction constitute "damages" under the insurance policies. *Id.* at 663. The court explained that "[t]he answer to this question will be determinative of the Sapienzas' claim that Liberty Mutual breached the insurance contract by refusing to indemnify them for these costs." *Id.* at 659. That question is still pending before the South Dakota Supreme Court at the time of this writing.

97. *Id.* at 652.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 650.

103. *Id.* at 663.

104. *Id.* at 653.

in some misconduct."[105] The court predicted that, in the absence of South Dakota precedent, the Supreme Court of South Dakota "would adopt the Restatement's position on insurer liability for an improper defense" because that court has previously found *Restatements* "persuasive in many instances," and because "the draft Restatement follows the well-reasoned majority rule."[106]

In applying Subsection 12(2) to the Sapienzas' allegations, the court concluded that the Sapienzas had not stated a claim for breach of the duty to defend based on the provision of an inadequate defense, because the Sapienzas did not allege that Liberty overrode defense counsel's professional judgment.[107] Despite this conclusion, the court gave the Sapienzas two weeks to seek leave to amend their complaint "if indeed there is a basis under the facts for a claim for breach of the duty to defend."[108] The court reasoned that immediate dismissal was not appropriate, because "the Sapienzas may not have contemplated in the absence of settled South Dakota precedent application of the most recent draft of § 12 of the *Restatement* to dismiss their breach of the duty to defend claim."[109]

The Sapienzas accordingly sought leave to amend their complaint to allege that Liberty had breached its duty to defend by failing to provide them with an adequate defense.[110] In granting the Sapienzas leave to amend, the court again acknowledged that "there is no South Dakota precedent on an insurer's liability for providing an inadequate defense," and therefore that it must "predict how the Supreme Court of South Dakota would treat the Sapienzas' claims."[111] The court reasoned that, since the South Dakota

105. *Id.* (citing Restatement of the Law, Liability Insurance § 12 (Am. Law Inst., Revised Proposed Final Draft No. 2, Sept. 7, 2018)).

106. *Id.*

107. *Id.* at 655. The Sapienzas alleged that Liberty issued "instructions to defense counsel" and refused "to pay for certain activities," but did not allege what those instructions were or for what Liberty Mutual refused to pay, or that "Liberty Mutual's instructions and refusal to pay overrode defense counsel's independent professional judgment or caused the Sapienzas harm." *Id.* The court similarly concluded that the Sapienzas' allegation that Liberty "controlled the defense by . . . failing to retain an independent expert architect or contractor" did not state a claim under Subsection 12(2) because the Sapienzas did not allege "that defense counsel wanted to hire an expert or that Liberty Mutual overrode defense counsel's professional judgment that an expert was necessary" or that "the failure to hire an expert hurt the Sapienzas' defense." *Id.* Finally, the court concluded that the Sapienzas' allegation that Liberty breached its duty to defend because defense counsel "did not attend" the Board's hearing on the Sapienzas' new application also did not allege a breach under Subsection 12(2), because the Sapienzas did not allege "that Liberty Mutual engaged in any wrongdoing" or "that Liberty Mutual was so closely involved in the Sapienzas' defense that it could be liable for failing to require or direct counsel to attend the Board hearing." *Id.* at 655, 656.

108. *Id.* at 656.

109. *Id.*

110. Sapienza v. Liberty Mut. Fire Ins. Co., No. 3:18-CV-03015-RAL, 2019 U.S. Dist. LEXIS 179017, at *2 (D.S.D. Oct. 16, 2019).

111. *Id.* at *10.

Supreme Court has found the *Restatements* persuasive in the past, it would likely follow the *RLLI* with respect to "insurer liability for an improper defense."[112] The court thus adopted Section 12 of the *RLLI* as the putative law of South Dakota on this issue.[113]

The court rejected Liberty's challenge to this approach based on the court's view that "[t]here are cases supporting the Restatement's position that insurer's [sic] can be liable for overriding defense counsel's independent professional judgment" and therefore "the American Law Institute did not fashion § 12(2) out of whole cloth as Liberty Mutual contends."[114] The court also rejected the suggestion that "the Supreme Court of South Dakota would protect an insurer from liability in the rare instance when the insurer is able to override counsel's independent professional judgment and thereby harm the insured."[115]

Analyzing the Sapienzas' proposed amended allegations, the court concluded that the Sapienzas stated "a thin but plausible claim for breach of the duty to defend" under Subsection 12(2), even though they did not allege that "it was defense counsel's independent professional judgment that these services were necessary and that Liberty Mutual overrode this judgment."[116] The court concluded that the amended complaint did "not provide much of a factual basis for [the plaintiffs'] 'belief' that Liberty Mutual engaged in the alleged misconduct, but it [went] beyond pure speculation," and therefore the amendments to the Sapienzas' claim for breach of the duty to defend were not futile.[117]

Sapienza offers two important takeaways. First, although the court stated that several cases "support[] the Restatement's position that insurer's [sic] can be liable for overriding defense counsel's independent professional judgment," the cases it cited show that there is in fact no support for Subsection 12(2).[118] Second, the court explicitly framed the plaintiffs' claims

112. *Id.*

113. *Id.* at *10–12.

114. *Id.* at *14.

115. *Id.* at *15.

116. *Id.* at *16. The court found that the Sapienzas alleged "that Liberty Mutual directed defense counsel not to contact experts in the field of historic districts and regulations, not to present expert testimony before the state court, not to respond to the written arguments that the McDowells submitted to the Board, and not to attend the Board hearing on the Sapienzas' proposed renovations to their home." *Id.* at *15. They further alleged that Liberty Mutual "took steps to overrule [defense counsel's] professional judgment" by telling him that he would not be paid for the tasks described above. *Id.*

117. *Id.* at *17. With respect to the bad faith claim, the court applied South Dakota's first-party bad faith test and concluded that the Sapienzas' bad faith claim would rise and fall with the amended claim for breach of the duty to defend. *Id.* at *17–18. The court accordingly reserved ruling on whether the Sapienzas could state a claim for bad faith. *Id.*

118. *Id.* at *13. While acknowledging that "§ 12 rejected the rule applied by a minority of states that insurers are vicariously liable for all malpractice by defense counsel they hire," *id.* at *11, four of the six cases the court cited as supporting the RLLI's position are actually

to which it applied Subsection 12(2) as asserting a breach of the duty to defend, and not as asserting a separate tort claim.[119] In fact, the court dismissed the plaintiffs' bad faith claims, leaving no tort remedies available.[120] Thus, even under *Sapienza*, the court's reliance on Subsection 12(2) is nonetheless grounded in stating a variety of a contractual breach of the duty to defend claim, not a separate tort claim.

C. Progressive Northwestern Insurance Co. v. Gant

This case arose out of a wrongful death action filed in Kansas state court by the surviving spouse of a woman who was killed in a vehicular accident against the young man driving the car that killed her, his parents, and their family business.[121] The individual defendants held a Progressive automobile-liability policy with a liability limit of $250,000; the business had an automobile-liability policy with Bitco with a policy limit of $1 million.[122] Shortly before trial, two important events occurred. First, the defendants assigned to the plaintiff, Gant, their rights to the policy limits under the Progressive and Bitco policies, and any claims that the defendants had against Progressive for breach of contract, negligence, or bad faith, and Gant agreed not to execute any judgment against the individual defendants.[123] Second, Progressive moved to intervene so that it could move to compel the withdrawal of defense counsel it had selected from representing the insureds.[124] Progressive was concerned with defense

vicarious liability cases from minority jurisdictions. *See id.* at *13–14 (citing Progressive Nw. Ins. Co. v. Gant, No. 18-3226, 2016 WL 4430669 (D. Kan. Aug. 22, 2016)); *see also* Gibson v. Casto, 504 S.E.2d 705, 708 (Ga. Ct. App. 1998); Hackman v. W. Agric. Ins. Co., 275 P.3d 73 (Table) (Kan. Ct. App. Apr. 27, 2012); Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 697 (Tenn. 2002). The remaining two cases the court cited, while somewhat consistent with the RLLI in blurring the lines between breaching the duty to defend and creating a new cause of action, did not uphold claims against the insurer like those levied in *Sapienza*. *See* Mentor Chiropractic Ctr., Inc. v. State Farm Fire & Cas. Co., 744 N.E.2d 207, 211, 211 n.3 (Ohio Ct. App. 2000) (rejecting vicarious liability concept, noting in a footnote that "if there is evidence to show that an insurance company interfered with the strategy of the counsel it retained, then under a given fact scenario, such counsel might not be found to be an independent contractor," and affirming the lower court's grant of summary judgment for the insurer, because there was no evidence that the attorney committed any malpractice or was not competent, and no evidence that the insurer acted in bad faith); Ingersoll-Rand Equip. Corp., 963 F. Supp. at 455 (dismissing the plaintiff's claims against its liability insurer and defense counsel selected by insurer because if the plaintiff wished to pursue a remedy for any harm suffered as a result of legal malpractice, it could pursue a negligence claim against the attorney or a breach of the insurer's contractual duty to exercise due care in defending the claim, but it had not done so).

119. Sapienza v. Liberty Mut. Fire Ins. Co., 389 F. Supp. 3d 648, 650, 653, 656 (D.S.D. 2019).

120. *Id.* at 662, 663.

121. Progressive Nw. Ins. Co. v. Gant, 957 F.3d 1144, 1148 (10th Cir. 2020).

122. *Id.* at 1147.

123. *Id.*

124. *Id.* at 1149.

counsel's "handling of the [insureds'] defense, including the imposition of sanctions that resulted in the deemed admission of hundreds of requests for admission and a finding that [the insureds' company] was the alter ego of [the insureds]."[125] Defense counsel withdrew before the court ruled on the motion.[126]

Following a bench trial, the judge found that the insured who drove the car was liable for the death of the plaintiff's wife, his parents (also insureds) were liable for negligently entrusting the vehicle to their son, and their family business was liable under the doctrine of respondeat superior.[127] The judge awarded Gant $6.7 million in damages.[128] Thereafter, Progressive filed a declaratory judgment action in federal district court seeking a declaration that Progressive had fulfilled its duties to its insureds under the policy and was not liable beyond the policy's $250,000 liability limit.[129] Gant counterclaimed, asserting that, among other things, Progressive was negligent in hiring defense counsel to defend the suit, and was vicariously liable for defense counsel's conduct.[130]

The district court granted summary judgment for Progressive on its claim and Gant's counterclaim.[131] The Tenth Circuit affirmed the district court's ruling, including that Progressive was not negligent in hiring McMaster and any alleged negligence was not harmful to Gant, and that Progressive was not vicariously liable for McMaster's conduct because it did not impose on his independent judgment as an attorney.[132]

Gant argued on appeal that Progressive's decision to hire defense counsel to represent its insureds "was negligent because (1) [defense counsel] had mishandled settlement discussions in the past and (2) allowing [defense counsel] to represent all [the defendants] created potential conflicts of interest."[133] The Tenth Circuit reasoned that this negligent hiring claim was properly assignable by the insureds to Gant because it "is part of Gant's breach-of-contract claim asserting bad faith and negligence—not a separate tort claim as Progressive contends."[134] Relying on *Hackman v. Western Agricultural Insurance Co.*, the court observed that Progressive "was contractually obligated to provide [the insureds] with competent counsel to

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 1147.
129. *Id.* at 1147, 1149.
130. *Id.* at 1147.
131. *Id.*; *see* Progressive Nw. Ins. Co. v. Gant, No. 15-9267-JAR-KGG, 2018 U.S. Dist. LEXIS 163624, at *3 (D. Kan. Sept. 25, 2018), *aff'd*, 957 F.3d 1144 (10th Cir. 2020).
132. *Gant*, 957 F.3d at 1147. The Tenth Circuit noted that, under Kansas law, insurance contracts contain an implied term that an insurer providing a defense owes a duty to act in good faith and without negligence to the insured. *Id.* at 1150.
133. *Id.* at 1151.
134. *Id.* at 1151 n.2.

defend the claim."[135] The Tenth Circuit also looked to Subsection 12(1) of the *RLLI* as affirming that an insurer can be liable for breaching the duty to provide competent counsel.[136] However, the court did not discuss what damages would be available for a breach. Presumably if it did, it would limit the damages to those available for a breach of the duty to defend, based on its observation that Gant's negligent hiring claim was part of his breach of contract claim.

Ultimately, the court concluded that there was insufficient evidence "to support a finding that Progressive was unreasonable in thinking that [defense counsel] would provide competent representation of the [insureds]."[137] In addition, the Tenth Circuit concluded that Gant had not demonstrated causation or harm as required by Subsection 12(1) of the *RLLI* and Kansas law.[138] Gant had not established a causal link between "the types of deficiencies of [defense counsel] alleged in the past (unresponsiveness in settlement discussions)" and defense counsel's alleged failures in this representation, and had not presented any evidence that Progressive was aware of these particular deficiencies in defense counsel's skill set.[139] Moreover, "there was no apparent harm from the deficiencies in [defense counsel's] performance," none of which related to the misconduct defense counsel was alleged to have engaged in on previous representations, and which ultimately led to Progressive asking defense counsel to withdraw from the case.[140]

Gant also argued that Progressive was negligent in hiring defense counsel to represent all of the defendants because there were potential conflicts of interest among the individual defendants (specifically the son who was involved in the accident, compared to his parents) and between the individual defendants and the defendant business.[141] The court rejected this argument because one of the family members testified that they did not want to place blame on one another and took a unified position, and

135. *Id.* at 1152 (citing Hackman v. W. Agric. Ins. Co., 275 P.3d 73 (Kan. Ct. App. 2012)).

136. *Id.*

137. *Id.* at 1153. Gant submitted statements from three attorneys who alleged that they had informed Progressive of certain misconduct by defense counsel, mainly around not scheduling or appearing for settlement hearings. *Id.* at 1152. The Tenth Circuit reasoned that these allegations were insufficient to create a genuine issue of material fact as to whether Progressive was negligent in hiring this defense counsel, because "in the highly competitive world of personal-injury litigation, complaints of allegedly unreasonable conduct of opposing counsel are hardly uncommon," and defense counsel had substantial experience, especially with jury trials, in suits involving serious bodily injury. *Id.* Moreover, defense counsel's law license had never been suspended or revoked. *Id.*

138. *Id.* at 1153. The Tenth Circuit quoted Subsection 12(1) for the proposition that "harm caused by any subsequent negligent act or omission of the selected counsel that is *within the scope of the risk that made the selection of counsel unreasonable*." *Id.* (emphasis added by court).

139. *Id.*

140. *Id.*

141. *Id.*

because defense counsel had obtained a conflict waiver signed by all of the defendants after consultation with their personal attorney.[142]

Finally, the Tenth Circuit rejected Gant's argument that Progressive was vicariously liable for defense counsel's negligent misrepresentation.[143] The court emphasized that attorneys have an "ethical obligation . . . to exercise independent judgment," as acknowledged by the Restatement (Third) of the Law Governing Lawyers § 134, and for this reason, courts have largely rejected the concept of "an insurer's general vicarious liability for negligent representation by the insured's attorney."[144] Instead, the court speculated that the Kansas Supreme Court would likely adopt the standard articulated in Subsection 12(2) of the *RLLI* that an insurer may be subject to liability for harm caused by defense counsel's negligence if "the insurer directs the conduct of the counsel with respect to the negligent act or omission *in a manner that overrides the duty of the counsel to exercise independent professional judgment*."[145] This speculation was supported by a decision of the Kansas Court of Appeals stating that vicarious liability would be permitted only "if, at the time in question, the attorney's acts or omissions were directed, commanded, or knowingly authorized by the insurer."[146] In this case, the court concluded that Progressive had not acted in the way contemplated by Subsection 12(2) because there was no evidence that it intruded on defense counsel's professional judgment.[147] In particular, the court rejected Gant's argument that Progressive's Defense Counsel Guidelines, "which require defense counsel to obtain prior approval from Progressive for certain tasks, including engaging in over one hour of legal research and filing motions," demonstrated Progressive's "control" over defense counsel, and emphasized that the actual exercise of control, not the assertion of the right to do so, is determinative of whether an insurer overrides the professional judgment of defense counsel.[148]

Although *Gant* purported to adopt Subsection 12(1) and Subsection 12(2), the court concluded that neither standard had been satisfied. Moreover, the Tenth Circuit explicitly considered the Subsection 12(1) claim to be a part of Gant's breach of contract claim, and not to state a separate tort claim. Accordingly, like *Sapienza*, *Gant* supports the framework advanced by this article that Section 12 should be interpreted as doing nothing more than articulating conduct that could potentially be considered a breach

142. *Id.* at 1153–54.
143. *Id.* at 1154.
144. *Id.* at 1155.
145. *Id.* (quoting RLLI, *supra* note 3, § 12(2) (emphasis added by court)).
146. *Id.* (quoting Hackman v. W. Agric. Ins. Co., No. 104-786, 2012 Kan. App. Unpub. LEXIS 311, at *16 (Apr. 27, 2012)).
147. *Id.*
148. *Id.* at 1156.

of an insurer's existing contractual duty to defend. In addition, *Martinez*, *Sapienza*, and *Gant* illustrate the futility of asking a court to adjudicate a legal malpractice claim within an insurance coverage dispute regarding the duty to defend. If an attorney has acted negligently in her representation of her client, that conduct deserves direct adjudication in a separate legal malpractice lawsuit between the insured plaintiff and defense counsel. Section 12 should not be used as a shortcut to determining that predicate liability.[149]

VII. CONCLUSION

If the insurer breached its duty to defend, a remedy in contract is already available, and double-dipping into tort damages for identical conduct is not permitted. And if the insurer did not breach its duty to defend, and has otherwise faithfully performed its obligations, imposing liability on the insurer for the misconduct of defense counsel would run far afoul of well-established principles of contract law and impose agency liability in a relationship that is purely a contractual one.

Given the lack of support or justification for the rules announced in Section 12, and the existence of a well-established and adequate remedy under contract law, Section 12 should not be adopted as establishing a tort cause of action for insureds against their insurers. Instead, courts should hold insurers and insureds to the terms of their contractual relationship. Like the courts in *Martinez*, *Sapienza*, and *Gant*, courts considering relying on Section 12 in future cases should limit the scope of both parts of Section 12 to breach of contract claims, and should be wary of adjudicating attorney malpractice as a threshold question to determining an insurer's contractual liability. Further, courts should be wary of efforts to utilize Section 12 to obtain tort damages for a breach of an insurer's duty to defend when recourse to the insured already exists under the well-developed body of law regarding an insurer's breach of the duty to defend.

149. Although neither *Sapienza* nor *Gant* reached the point of addressing what damages would be available under Subsection 12(1) or Subsection 12(2), by entertaining the application of Section 12 in a case in which a judgment in excess of the policy limits was at issue, *Gant* implied that tort damages could be available for the conduct identified in Section 12. But even the Reporters' Notes to Section 12 show that tort damages for an insurer's conduct in selecting and overseeing defense counsel are not appropriate because such conduct is already actionable in contract. Where there is already a contractual remedy for the same conduct, extending tort liability would violate the principle embodied in the economic loss rule.

POLICE LIABILITY INSURANCE AFTER REPEAL OF QUALIFIED IMMUNITY, AND BEFORE

*Kenneth S. Abraham**

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In the wake of the Black Lives Matter movement and many alleged excessive uses of force by police over the past few years, recently there have been calls for and legislation proposed to repeal or modify the defense of qualified immunity in suits against police for deprivation of individuals'

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civil rights under Section 1983.[1] These reforms would expand the liability of police, and other law enforcement agents and agencies, by closing off a defense that limits such liability.[2]

An issue that naturally arises in connection with these possible reforms is the impact that they could have on the availability and affordability of insurance against liability imposed under Section 1983. The implicit assumption behind stating the issue this way is that the market for insurance against Section 1983 liability might be disrupted by an expansion of such liability. It turns out, however, that the market for insurance of liability under Section 1983 is already disrupted, at least as compared to a comparatively stable market in which insurance is generally available at what seems like an acceptable cost, given the scope of the underlying form of liability that the insurance covers. For that reason, this article not only predicts the condition of the market after repeal, but also addresses the current state of the market. This is because we need to understand the condition of the market now, to understand what the condition of market might be later.

The impact of a reform on liability insurance is a common consideration whenever the expansion of civil liability is contemplated, just as enhancing the availability and affordability of insurance is a commonly mentioned goal when restricting various forms of civil liability is considered.[3] In my experience, there is a tendency for considerations from both of these standpoints to be overemphasized. The potential impact of most liability reforms on liability insurance is likely in most instances to be minimal or moderate, not substantial or radical. In this instance that may also be true, but the baseline is not stability; it is turmoil. A market that is already in turmoil because of the uncertain scope of future liability will find that it is aggravated by the expansion of liability. Consequently, in my view, the amount of aggravation that will occur if qualified immunity is repealed certainly is likely to be noticeable, and it could be substantial.

To explain why this is the case, Part I describes the market context in which police liability insurance is situated, including the other devices – intergovernmental municipal risk pools, and self-insurance – that serve as alternatives to commercial insurance. Part II details the current condition

1. See 42 U.S.C. §1983.

2. *See*, *e.g.*, Ending Qualified Immunity Act, H.R. 7085, 116th Cong. 2020) (proposing abolition of both the good faith defense and the defense that the law was not "clearly established" at the time of the alleged misconduct); Justice in Policing Act, H.R. 7120, 116th Cong. (2019–2020) (proposing abolition of qualified immunity in suits against certain police and federal law enforcement officers); Reforming Qualified Immunity Act, S. 4036, 116th Cong. (2020) (narrowing the defense and placing certain burdens of proof on defendants).

3. *See*, *e.g.*, Kenneth S. Abraham, The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11 163–65 (2008) (discussing the impact of expanded liability on liability insurance during the "crisis" of the mid-1980s and the tort-reform legislation enacted in response).

of the market for police liability insurance, and the generic reactions and adjustments that insurance markets typically employ when their policyholders are suddenly faced with a new or newly expanded liability. This Part then shows why some of these reactions and adjustments are available, but others are not available in this context, and why others are already being employed and would be further employed if qualified immunity were repealed.

Finally, Part III steps back from these immediate concerns to address the way the essential dilemma of insurance in modern settings—finding a balance between the moral hazard created by insurance and preserving or generating loss prevention incentives—plays out in the Section 1983 setting. I argue that it would be a mistake to rely heavily on liability insurance to generate the additional incentives that would be necessary to reduce the incidence of police misconduct. Surrogate regulation of police conduct by liability insurers would be no substitute for addressing and better regulating this conduct directly.

I. HANDLING POTENTIAL LIABILITY: COMMERCIAL INSURANCE, RISK-POOLING, SELF-INSURANCE, AND SELF-PROTECTION

There has been no systematic or quantitative study of the liability insurance programs covering what I will call "municipalities"—cities, towns, counties, and other governmental units within states. We do know from a number of sources, including the extensive analysis by John Rappaport,[4] that police departments and municipalities have three potential sources of protection against Section 1983 liability. The first is conventional liability insurance obtained in the commercial insurance market. The second is protection provided by risk pooling organizations formed by groups of municipalities. The third is self-insurance. Along with these forms of addressing and managing the costs of liability goes self-protection: the process by which the risk of liability is reduced by taking measures that prevent it.[5]

A. *Commercial Market Insurance*

Many municipalities, especially mid-sized cities, have traditionally purchased insurance against police liability in the commercial market.[6] In

4. John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1539 (2017).

5. Isaac Erlich & Gary S. Becker, *Market Insurance, Self-Insurance, and Self-Protection*, 80 J. Pol. Econ. 623 (1972).

6. Rappaport, *supra* note 4, at 1559. Municipalities are liable under Section 1983 for their own civil rights violations, but they are not vicariously liable for violations committed by their police officers. Monell v. New York City Dep't Soc. Servs., 436 U.S. 658, 691–95 (1978). Nonetheless it is common practice for municipalities to purchase insurance that covers both

principle this coverage could be provided either as an endorsement to a municipality's general liability, or "public entity" insurance policy, or as a standalone policy. In either case, this form of coverage insures both the municipality and individual police officers. But at present, standalone coverage is scarce; most such coverage is available only as an add-on to the municipality's general liability policy. The add-on coverage is typically against liability for damages imposed because of bodily injury, property damage, and personal injury (including false arrest, detention or imprisonment and deprivation of civil rights) arising out "wrongful acts" occurring in the course of "law enforcement activities." Much of this generic law enforcement liability is liability under Section 1983. The principal exclusion relevant here applies to the "deliberate violation of law committed by or with the knowledge and consent of the insured."[7]

This coverage provides insurance against a conceptually thin but important slice of Section 1983 liability: liability imposed when the individual police officer (or the municipality) did not deliberately and knowingly violate a party's civil rights, but qualified immunity does not preclude liability because the violation involved "clearly established statutory or constitutional rights of which a reasonable person would have known."[8] There is too much moral hazard associated with deliberate and knowing violations for liability insurance to cover them. In any event, public policy would probably preclude such coverage.[9] And there is no need for insurance against liability for violations of rights that are not clearly established, because they do not result in liability under Section 1983.

Although the policies providing protection against this slice of Section 1983 liability constitute the first layer of insurance protecting municipalities, and although the policies contain many terms that are typical of primary liability insurance policies, most of these policies provide what amounts to excess coverage, because they are subject a sizable deductible, usually called a self-insured retention, or "SIR." Aggregate data on

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the municipality against liability incurred in its own right, and the officers whom it employs for their liability, sometimes because the municipality has agreed to or is required to indemnify the officers against liability.

7. *See generally* Jason E. Doucette, *Wading in the Pool: Interlocal Cooperation in Municipal Insurance and the State Regulation of Public Entity Risk Sharing Pools—A Survey*, 8 Conn. Ins. L. J. 533 (2002).

8. Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982). Municipalities are not vicariously liable for constitutional violations of their police officers under Section 1983, but it is common practice for municipalities to purchase insurance that covers the officers. In addition, a municipality might be liable in its own right, even apart from qualified immunity, for a constitutional violation of a right that was not clearly established, if the violation occurred pursuant to the law, custom, or policy of the city. Police liability insurance covers this form of liability as well.

9. *See* Kenneth S. Abraham & Daniel Schwarcz, Insurance Law & Regulation 103 (7th ed. 2020).

the amount of coverage, or "policy limits," provided by the policies, and the amount of SIRs, does not appear to be available, but anecdotally the retentions at present are almost always six (in the hundreds of thousands) or seven (in millions) figures. These probably vary a lot depending on the size of the insured municipality and (as I indicate later) the condition of the market. Moreover, unlike typical primary liability insurance policies, the policies in this field that I have seen do not contain a duty to defend.[10] Rather, the policyholder defends itself and defense costs (above the SIR) are indemnified, but defense costs are not paid "outside limits;" that is, every dollar the insurer pays for defense reduces the amount of coverage available to indemnify the insured against liability. As I indicate next, both of these features of risk-pooling arrangements are sometimes a bit different.

B. *Risk-Pooling*

A second and also important method of insuring against the risk of police liability is through participation in an intergovernmental risk pool. These are mostly state-based. Although their legal structure varies, economically the pools function like a mutual insurer, charging members what amounts to a premium and covering liability on terms (including being subject to SIRs) that roughly parallel those provided by commercial liability insurance.[11] The pools then tend to reinsure, typically on an excess-of-loss basis. In effect, then, the pools themselves maintain an SIR and (re)insure above it. My sense is that, because the pools tend to insure smaller municipalities on average than do commercial insurers, their SIRs are smaller. Their arrangements may also sometimes embody a duty to defend paid outside of limits that is less common in commercial policies.

The pools originated several decades ago, during a general crisis in the availability and affordability of liability insurance.[12] Today, the existence of pools—and to a lesser extent the ever-present possibility of municipalities banding together to form a pool—serves as a generic competitive alternative to commercial insurance.

This competitive alternative is likely to have advantages and disadvantages. Pools may sometimes provide price competition that helps to limit the cost of commercial insurance. And pools may have greater familiarity

10. Rappaport, *supra* note 4, at 1572, reports that these policies typically contain a duty to defend. But he was writing based on exemplars by only two insurers. *Id.* at 1571 n.171. Thus, a 2009 Travelers Law Enforcement Liability Insurance add-on does contain a duty to defend. Travelers Indem. Co., Law Enforcement Liability Coverage Form (2009), https://agenda.wilco.org/docs/2019/COM/20190827_1480/22614_PRT104%2802-09%29%20LEL.pdf. The same is true of an Insurance Services Office form. https://www.jwfspecialty.com/wp-content/uploads/2018/06/Law-Enforcement-Liability-Coverage-Part.pdf.

11. *Id.* at 1558–66.

12. *Id.* at 1555–58. For discussion of the crisis, see Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 Ohio State L.J. 399 (1987).

with the needs and idiosyncrasies of their members than commercial insurers. On the other hand, people in a position to know seem to differ about whether, because of their structure and the dynamics of control within their ranks, pools engage more or less loss prevention activity as commercial insurers.

C. *Self-Insurance*

The term self-insurance has a number of related meanings that center on the obvious – a party that is self-insured has no commercial market or other insurance including protection provided by a risk pool. But self-insurance can be accomplished in a variety of ways. It can take the form of establishing a wholly owned "captive" insurance company that reinsures none, some, or all of the risk that the captive insures. Self-insurance may instead consist of a formal internal budgetary arrangement that sets aside reserves or maintains a budget line to cover losses or liabilities. Or self-insurance may consist of adopting neither of these approaches, but simply not insuring and paying losses out of revenue or assets.

Large municipalities tend to self-insure against police liability, apparently through either the second or third approach.[13] Some then buy reinsurance covering them against liability in excess of sizable sums, thus rendering their self-insurance effectively an SIR. In my experience this approach parallels the practice of many sizable companies and entities in connection with the other forms of liability that they regularly face. They are self-insured through a very large SIR and then buy excess insurance covering liability above this SIR. It makes economic sense for large entities to bear the risk of highly predictable, regularly incurred liability themselves and thereby self-manage the administrative, claim-processing, and defense expenses they would otherwise pay insurers to manage as part of a premium. Above the retained (and sometimes quite high) level of predictable liability, it may make more sense to buy excess liability or reinsurance, depending on the legal structure of the self-insurance.

D. *The Role of Self-Protection*

Self-protection—the prevention of losses—is a compliment to the insurance-focused forms of handling liability. Municipalities can potentially reduce their cost of engaging in the insurance-focused approaches by reducing the

13. For example, the city of Louisville's $12 million settlement with the family of the late Breonna Taylor was paid with $5 million from the city's risk management fund and $7 million from its self-insurance fund. Aviva Shen, *Defund the Louisville Police by $12 Million*, SLATE (Sept. 16, 2020), https://slate.com/news-and-politics/2020/09/breonna-taylor-settlement-police-taxpayers.html. Whether any portion of this amount was subject to reinsurance was not reported.

frequency and severity of the liabilities they incur.[14] An economically rational party will engage in loss prevention as long as the cost of loss prevention is lower than the benefits it generates—in the insurance context, up to the point at which additional expenditures on loss prevention yield no greater savings on the cost of insurance.[15]

Commercial insurers and municipal insurance pools may help to reduce policyholders' cost of loss prevention through various forms of "education" regarding methods of preventing losses, audits, and recommendation of behavioral and structural reforms, among other things.[16] Underwriting and premium-setting based in part on whether policyholders engage in these and other methods of loss prevention may create incentives for policyholders to adopt them and thereby may help to reduce the cost of insurance. Thus, in theory insurance and self-protection may work hand-in-hand to reduce municipalities' overall cost of handling the risk of police liability. The key question here, however, is the extent to which this actually takes place. In my view (as I argue in Part III), the evidence is spotty and, at best, inconclusive.

II. THE CURRENT STATE OF THE MARKET AND POTENTIAL REACTIONS AND ADJUSTMENTS TO REPEAL OF QUALIFIED IMMUNITY

The market for police liability insurance—in most instances today, as an add-on to municipalities' public entity liability insurance—is what insurers call a "hard" market. The supply of coverage is tight. This is to a limited extent a reflection of a broader trend in all the liability lines of insurance, in which premiums have been rising for the last several years, after remaining largely flat between 2013 and 2017.[17] The result, which is symptomatic of any market with a tight supply, is that prices rise and availability becomes more scarce. As a result of the generally hard market,

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14. The incentives for governmental entities such as municipalities, however, are not necessarily the same as are those of private actors. For example, budget structures may lessen or eliminate altogether the financial impact of liability on police departments. *See generally* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144 (2016). And political rather than purely economic incentives may alter municipalities' loss prevention incentives. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000).

15. Kenneth S. Abraham, Distributing Risk: Insurance, Legal Theory, and Public Policy 11 (1986).

16. Rappaport, *supra* note 4, at 1573–86.

17. *See* Geneva Ass'n, Social Inflation: Navigating the Evolving Claims Environment 30 (Dec. 2020), https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public/social_inflation_web_171220.pdf; Judy Greenwald, *Continued Rate Increases Expected: Willis*, Bus. Ins. (Nov. 19, 2020), https://www.businessinsurance.com/article/20201119/NEWS06/912337904/Continued-rate-increases-expected-Willis-Towers-Watson (referring to generally hardening market conditions).

municipalities would have found it more difficult than in the past to buy insurance, and that less insurance is available, but at considerably higher premiums than in the past.[18]

Beyond general market conditions, however, are factors that exacerbate the problem for municipalities seeking to insure against police liability. The particular drivers of the especially hard market for police liability insurance are twofold, but related. First, insurers perceive the underlying liability picture to be worsening in many states. Juries' willingness to impose liability for alleged police misconduct, and the size of verdicts are both increasing. Without comprehensive data about outcomes and verdict sizes, it is difficult to confirm this perception, although I have no reason to doubt its accuracy.[19] Second, the social climate has become less favorable for police, and this probably influences the jury tendencies I have just mentioned. Among other things, the Black Lives Matter movement, calls to "defund" the police, and the increased attention in the conventional and social media to occasions of police misconduct are simultaneously reflections of this change in social attitudes and contributors to it. Proposals to repeal qualified immunity are a piece of these developments as well. The frequent availability of cell phone videos of police conduct may well be the single biggest factor in the developments. Footage from body cameras that individual officers wear probably has also contributed.

As a consequence of these developments, insurers not only have already seen and anticipate additional increases in police liability in the future; they are also uncertain about the magnitude of these increases. This undoubtedly varies from state to state; some states are regarded as having a more severe liability climate than others. This is not only a matter of social and political climate, but also of the varying but sometimes greater availability of state law remedies that may be alternatives to Section 1983 suits. Colorado, for example, has repealed qualified immunity in suits against police under state law.[20] And when states ban chokeholds, state law liability for

18. *See* Judy Greenwald, *Law Enforcement Liability Faces Hard Market*, Bus. Ins. 8 (Dec. 2020), *available at* https://f.hubspotusercontent10.net/hubfs/5139161/BI_1220.pdf (referring to hardening market for police liability insurance); AMWins Grp., Inc., State of the Professional Lines Market Q3-2020 (Oct. 20. 2020), https://www.amwins.com/insights/article/state-of-the-market-professional-lines (stating that "Public Entity . . . Police professional has been more difficult to place"); CRC Grp., An Arresting Fact: Municipalities Bear Growing Risk for Police Actions (2020), https://www.crcgroup.com/Tools-Intel/post/an-arresting-fact-municipalities-bear-growing-risk-for-police-actions?portalid=34 ("For public entity liability risks, many insurance carriers are reducing capacity, and some are exiting this business outright. Beyond increases in deductible and sharply higher rates from carriers still willing to quote, it is becoming more challenging to fill out an insurance program.").

19. A recent study of one insurance company's payouts provides some confirmation. *See* Aurelie Ouss & John Rappaport, *Is Police Behavior Getting Worse? Data Selection and Measurement of Policy Harms*, 49 J. Legal Stud. 153 (2020).

20. Law Enforcement Integrity and Accountability Act, S. 217 (Colo. 2020).

violation of the ban may become available, thus creating more uncertainty on the part of insurers about the extent of their exposure in these states.[21] It is even possible that the uncertainty created by the possibility that such measures may be adopted swamps uncertainty about the scope of Section 1983 liability. Whatever the scope, source, and state-based variability of this uncertainty, it is bound to be widespread, because there is widespread uncertainty about the future.

And insurance operates best in the face of risk, as distinguished from uncertainty.[22] Risk is the quantifiable probability of loss, whereas uncertainty is the unknown possibility of loss.[23] Insurers can confidently set premiums for covering the risk of loss. But when loss is uncertain, premium-setting becomes a more speculative enterprise. They are more reluctant to sell coverage, and when they do sell it, they add what amounts to an uncertainty surcharge to premiums to protect themselves from the possibility of incurring unpredictable losses.

Thus, a nearly-universal reaction to the present uncertainty in the market, and to future uncertainty if qualified immunity is repealed, has been and will be to increase premiums. In addition, the commercial market for police liability insurance is thin. Annual premiums for this form of insurance—which are small enough not even to be separately reported, as nearly as I have been able to determine—pale in comparison to the premiums paid for general liability insurance across the board, which are about 75 billion per year.[24] Comparatively speaking, there is simply not a lot of money to be made by selling police liability insurance, while there is considerable uncertainty about how much money might be lost by doing so.

This creates a practical barrier to entry into the commercial market that naturally contributes, along with the uncertainty I have mentioned, to increased premiums. But in addition to raising premiums, there are other devices that insurers sometime employ to deal with uncertainty. The actual form that these adjustments take depends on the particular circumstances, to which I now turn.

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21. *See* Katelyn Burns, *Cities and States Are Barring Police from Using Chokeholds and Tear Gas*, Vox (June 6, 2020) (cataloguing state and municipal executive and legislative bans), https://www.vox.com/identities/2020/6/6/21282453/cities-reform-police-nationwide-protests-george-floyd.

22. Kenneth S. Abraham, Distributing Risk: Insurance, Legal Theory, and Public Policy 65 (1986).

23. This distinction originated with Frank Knight, Risk, Uncertainty, and Profit 197–263 (1921).

24. A.M. Best Co., Best's Aggregates & Averages: Property/Casualty (2020), http://www3.ambest.com/aggavg/pc/20/data/2020BAAPC_001-002_IndustryUnderwritingDirect.pdf (dividing the category of "Other Liability" into occurrence and claims-made coverage).

A. *More Exacting Underwriting*

One of the moves that liability insurers make when they face an increase in the uncertainty of loss exposure is to look more carefully at the parties they are insuring, and at the apparent risks that applicants and policyholders that wish to renew their policies pose. Even when insurers have a limited actuarial basis for making their decisions, more applications for coverage are likely to be rejected; more policies are likely not to be renewed; and premiums are likely to increase for those who do obtain or renew coverage.

That is exactly what seems to have occurred in the current hard market for police liability insurance.[25] Some municipalities can no longer obtain coverage in the commercial market. They have to turn to pools to obtain coverage, and the pools themselves face equivalent obstacles in seeking excess insurance or reinsurance. For those whose policies are renewed, premiums have skyrocketed. One broker told me that this year, her clients' premiums were doubling upon renewal.

The repeal of qualified immunity probably would intensify these already tight market conditions. Applicants and renewing policyholders can expect to be required to produce even more detailed information about their operations, and to pay even higher premiums than in the past. There is support in the legal literature for the proposition that qualified immunity is rarely the reason Section 1983 suits do not make it to trial, although with acknowledgement that it may be discouraging institution of some suits at all.[26] On the other hand, some commentators argue that qualified immunity does have significant effects.[27] But whatever turns out to be the case on the issue, at the margin—and it may be a sizable margin—the removal of a potentially significant barrier to recovery under Section 1983 is bound to result in at least some additional plaintiffs' verdicts and to raise the settlement value of many cases. These consequences of repeal would therefore lead insurers to push liability insurance premiums up even further.

In addition, policyholders whose operations reveal that they have the most vulnerability as a result of the underlying change in the law should expect to encounter even more difficulty obtaining coverage if qualified immunity is repealed. The ultimate underwriting adjustment, of course, is for an insurer decline to insure some existing policyholders, or event to withdraw entirely from the market. Thus, in the extreme case, policyholders whose operations are perceived to pose the greatest uncertainty may find that their insurers decline to renew their policies. And it may well be,

25. *See* sources cited *supra* note 18.

26. *See* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 328 (2020); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 9–10 (2017).

27. *See*, *e.g.*, Aaron L. Neilson & Christopher J. Walker, *A Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1887–92 (2018).

depending on actual underwriting results, that some insurers simply decide not to offer coverage at all, instead exiting the market.

Municipal risk pools and self-insured cities can expect to encounter analogous challenges. Pools and cities that rely on stop-loss coverage or reinsurance already are likely to be facing more stringent underwriting from these suppliers of coverage protection, as well as increases in the cost of this protection. If qualified immunity is repealed, pools and self-insured cities will probably see their operations scrutinized more carefully and find that the cost of stop-loss coverage and reinsurance increases.

On the other hand, I would like to think that one feature of the repeal of qualified immunity might well be more benign than the simple increase in uncertainty about Section 1983 exposure that is already occurring. Repeal of qualified immunity is unlikely to increase the proportion of large liabilities that municipalities incur. If anything, the addition of liability for violation of a plaintiff's civil rights under circumstances where the existence and scope of the right was uncertain—the form of liability that previously was not imposed but now would be imposed upon repeal—is likely to result in smaller average judgments and settlements overall. This is because, other things being equal, juries may perceive the violation of a civil right whose existence was uncertain or not yet established to be less blameworthy than violation of an established and certain right, and awarded lesser damages when that is the case. But if qualified immunity were repealed, it is not clear to me how a defendant's attorney would be able to bring these considerations to the attention of the jury, because the repeal of qualified immunity would render them irrelevant. I do not want to underestimate the ingenuity of the defense bar, however, and therefore note this possibility in the event that it actually materializes.

B. *SIR-Expansion and Policy Limits-Management*

A second reaction of insurers when they face increased uncertainty about the scope of their exposure is to decrease the amount of coverage they are willing to provide. Insurers can decrease coverage at the bottom of the range of insurance they provide by increasing self-insured retentions. And by decreasing the size of policy limits, they can limit their exposure on the high side, thus covering a smaller proportion of any large claims.

SIR expansion and limits management, on the one hand, and premium increases, on the other hand, each are ways for insurers to address the greater uncertainty about their exposure that would result from modifying or repealing qualified immunity. In theory, some insurers may prefer one approach to the other, and some may take both approaches. But this is simply the supply side of the equation. The nature of policyholder demand is the other side. In theory, if policyholders prefer higher premiums to lower policy limits, insurers will be more inclined, other things being equal, to

raise premiums rather than lower the amount of coverage they are willing to provide.

But that is theory. In practice, insurers have been availing themselves of both ways of managing their exposure by limiting it. First, in the commercial market, SIRs have increased. Few are less than $500,000, and I have heard of one SIR of $7 million. Second, individual insurers and reinsurers are willing to take on less total risk and therefore are reducing the amount of the policy limits they are willing to offer. Policyholders seeking to maintain their previous amount of coverage must buy it in layers and/or have multiple insurers or reinsurers participate by covering only part of a layer. Doing this is cumbersome and may not fully succeed. Finally, as I noted above, on top of all this, premiums have increased substantially. Less insurance or reinsurance now costs more to buy.

If qualified immunity were modified or repealed in the near future, policyholders would be squeezed even further. Given the severe budgetary pressures that municipalities will face because of the economic disruptions that have occurred in the wake of the Covid-19 pandemic, municipalities will probably opt, insofar as it is possible, for short-run over long-run savings: they will accept larger SIRs and lower policy limits in order to avoid paying the even higher premiums that would come with maintaining the prior level of coverage, if it were even available. Better not to pay more for liability insurance now, and hope that the partially-uninsured liability chickens do not come home to roost in the future, they will say, than to stress their current budgets even more than they are already stressed.

C. *Adding Selective Limitations on and Exclusions From Coverage*

Another way for insurers to limit their exposure when uncertainty increases is to exclude or limit coverage of a new form of liability when it first emerges. In effect, they make an underwriting decision at a high level of generality not to participate in the market for coverage of the new liability. The classic example is the qualified pollution exclusion, which first appeared in Comprehensive General Liability (CGL) insurance policies around 1969, and became standard in 1973. That was the time at which insurers began to clearly recognize their policyholder's potential liability for bodily injury and property damage caused by gradual pollution. Insurers apparently were reluctant to become closely involved in insuring this new form of liability. They therefore developed an exclusion applicable to pollution, with a "qualified" exception for discharges that were "sudden and accidental." Then, unsatisfied with the way the courts were interpreting this language in the pollution exclusion, in 1986 an "absolute" pollution exclusion was incorporated in CGL policies.[28] Eventually, however, it

28. For an account of the saga of these pollution exclusions, see Abraham, *supra* note 3, at 158–65.

became possible to purchase pollution liability insurance (subject to certain limitations), as a "buyback" endorsement to CGL coverage or through standalone policies.[29]

Similarly, in the mid-1980s, courts held that Directors & Officers (D&O) liability insurance policies covered suits by insured corporations against their directors and officers, for wrongful performance of their duties.[30] Insurers quickly inserted an "insured v. insured" exclusion in their policies,[31] sometimes even seeming to exclude coverage of liability in the critically important area of derivative suits, which are nominally brought in the name of the corporation and against which corporate law does not permit directors and officers to be indemnified by the corporation.[32] Nonetheless, over time the terms of the insured v. insured exclusion have been relaxed, thus providing coverage in more situations than was originally available, and confirming coverage of liability imposed in most derivative suits.[33]

I have found no evidence, however, that insurers have employed this generic approach in dealing with liability under Section 1983. Insurers have not added substantive limitations on or exclusions from coverage. The reason, I think, is that there is no identifiable component of the liability that police liability insurance policies cover that is responsible for the uncertainty insurers are facing and that it would be feasible to exclude from coverage. Undoubtedly, insurers could exclude coverage of liability arising out of "arrests," or the "use of excessive force," for example, but for practical purposes that might eliminate the vast majority of coverage. The whole point of the insurance could be lost.

The same would be true of an exclusion for Section 1983 liability. There are other state law-based forms of police liability that policies containing such an exclusion would still cover, but a significant purpose of these policies is to cover liability under Section 1983. Moreover, there is no subdivision of Section 1983 liability that could be excluded from coverage that would both quiet the market and preserve the lion's share of the insurance that municipalities need.

Similarly, there is no exclusion that could sensibly be added to police liability insurance policies to address the increased exposure that would result if qualified immunity were repealed. The defense of qualified

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29. *See* Abraham & Schwarcz, *supra* note 9, at 560–61.

30. *See*, *e.g.*, Nat'l Union Fire Ins. Co. v. Seafirst Corp., No. C85-396R, 1986 U.S. Dist. LEXIS 28605 at *15 (W.D. Wash. Mar. 18, 1986).

31. *See*, *e.g.*, Alstrin v. St. Paul Mercury Ins. Co., 179 F. Supp. 2d 376, 384 (D. Del. 2002) (citing an exclusion applicable to any claim against an insured "brought by any Insured or by the Company").

32. Latham & Watkins, Client Alert 3 n.5 (July 29, 2008), https://www.lw.com/thoughtLeadership/insured-v-insured-exclusion-in-d-and-o-policies.

33. *See* Abraham & Schwarcz, *supra* note 9, at 599.

immunity applies except when liability is imposed for violation of "clearly established statutory or constitutional rights of which a reasonable person would have known."[34] Repeal would permit the imposition of liability for violating rights that are not clearly established and of which a reasonable person would not have known. Thus, repeal would extend liability to situations in which the defendant was *less* blameworthy than defendants must be in order to incur liability at present. That is, repeal of qualified immunity would extend liability to situations in which there is less moral hazard resulting from being insured against liability than in the situations that liability insurance currently covers. It is not plausible that insurers would want to exclude coverage of liability for deprivations of civil rights arising in these less blameworthy situations, but still maintain coverage where the conduct incurring liability was more blameworthy.[35]

In short, the selective-exclusion approach to limiting uncertainty and exposure, which has sometimes been an effective means of stabilizing insurance markets in other situations, is not available to stabilize police liability insurance. There is no discrete and identifiable slice of liability it would make sense to selectively exclude.

D. *A Shift From Occurrence to Claims-Made Coverage*

Another move that liability insurers have adopted in the past when they have faced a particular form of new liability of uncertain scope has been to shift from occurrence-based to claims-made coverage. Occurrence policies cover liability arising out of harm that occurred during the policy period, regardless of when a suit alleging liability for such harm is brought. In contrast, claims-made policies cover liability on for claims made against the policyholder during the policy period.[36]

The advantage of claims-made over occurrence coverage is that, under the former, the insurer need only predict the frequency and severity of claims that will be made against the policyholder during the next policy period (almost always one year), whereas under occurrence policies the policyholder's liability for harm occurring this year, imposed at any point until (theoretically) the end of time, must be predicted. Liability stretching far into the future in this way is often referred to as having a "long-tail."[37] Providing claims-made coverage reduces the uncertainty about future

34. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982).

35. Although it is conceivable that insurers would want to exclude the new "retroactive" liability that would result from repeal, carving that portion of liability out of the coverage otherwise provided would be difficult.

36. *See* Abraham & Schwarcz, *supra* note 9, at 570–71. Many claims-made policies also contain a "retroactive date" provision, requiring that covered harm occur after that date. *Id.* at 613.

37. *Id.* at 170.

long-tail liability that insurers face under occurrence coverage, though it does this by shifting the risk of an uncertain liability future to policyholders.

There has been no such move in the police liability market, and none should be expected if qualified immunity is repealed. First, some indeterminate fraction of police liability insurance policies already provide coverage on a claims-made basis, and there is no evidence that they are any less subject to the difficulties that afflict occurrence coverage. Second, and more importantly, there is plenty of uncertainty about the future scope of police liability now, and there probably would be somewhat more net uncertainty if qualified immunity is repealed. But it will not be the kind of uncertainty that a shift from occurrence to claims-made coverage could reduce to any significant extent. This is because (aside from liability for wrongful convictions, which do not necessarily involve police), there is no reason to think that any substantial amount of police liability arises out of long-tail claims. The harm caused by police violation of individuals' civil rights is rarely latent, and therefore is not often the predicate for claims that are made long after the harm occurred.

Rather, the harm, if it occurs, is manifest immediately, and the period prescribed by the applicable statute of limitations for bringing suit for the harm begins to run immediately. Shifting from occurrence to claims-made coverage, therefore, would not dissolve current uncertainty about liability, and it would not resolve the difficulty of predicting how much such liability will increase after the repeal of qualified immunity. The predictability challenge will exist under both occurrence and claims-made coverage, because what is uncertain will occur in the years immediately following issuance of either form of policy rather than a long way down the road. For this reason, I do not expect that there will be much shifting from occurrence to claims-made coverage, even if qualified immunity is repealed.

III. MORAL HAZARD AND LOSS PREVENTION

The lesson of my analysis to this point is clear: the underlying cause of the turmoil in the market for police liability insurance (and reinsurance) is uncertainty about the future of liability under Section 1983 and probably aspects of state-based police liability as well. Repeal of qualified immunity would aggravate this turmoil. Increased premiums and less coverage, rather than other devices internal to insurance policies themselves, are, and are going to continue to be, the insurance market's reaction to this turmoil. In this part, I address two outgrowths of my analysis. The first involves the general relationship between liability insurance and prevention of loss caused by police misconduct. The second involves recent proposals to mandate that individual police officers purchase liability insurance themselves.

A. *The Relation Between Liability Insurance and Police Misconduct*

Calming of the current turmoil, and stabilization of the insurance market, will come about only when the uncertainty currently surrounding police liability is reduced. This will not necessarily require a decrease in the amount of liability that can be anticipated, but it will require that increases in exposure enter a steady state and thereby become predictable.

There are three ways in which such a steady state may come about. The first way is through what might be called "natural" evolution, without any intervention. It is not wholly unrealistic to imagine that this might occur. Liability does not always increase steadily. Sometimes it is subject to abrupt increases, followed by steady development, for reasons that are not always explicable at the time. But it would be imprudent to rely on the assumption that this will be true of Section 1983 and related forms of police liability.

The second way is through reform that restricts the scope of liability. That also does not seem to be in prospect here. On the contrary, the reform movement seems to be inclining in favor of more liability, not less. That is the whole point of proposals for repeal of qualified immunity, as well as for the imposition of vicarious liability on municipalities and for prohibiting municipalities from indemnifying individual officers' liability.

The third way is by addressing the underlying causes of the harm for which liability is imposed, and thereby reducing the incidence of loss. Most of the methods by which law enforcement agencies could prevent the losses that result in Section 1983 liability are beyond the scope of this article. But there is one factor that may complicate these methods that falls within that scope: the relation between the moral hazard created by insurance, and loss prevention.

Until the last decade or so, both insurance theory and practical discourse has seemed to assume that insurers had no *direct* role to play in reconciling the tension between the moral hazard that is automatically created by insurance and the desirability of reducing the occurrence of loss to an optimal level. The very origin and definition of moral hazard come from insurance—the tendency, other things being equal, of a party that is insured against a loss to exercise less care to avoid the loss than would be exercised in the absence of insurance.[38] So the question is whether the very existence of police liability insurance is consistent with the goal of reducing the incidence of the harms that generate Section 1983 liability.

There has long been recognition that insurance can and does employ devices that can *indirectly* combat the moral hazard that it creates. Partial insurance in the form of deductibles and SIRs, and ceilings on policy limits, give insured parties the incentive to reduce the occurrence of loss, because

38. *Id.* at 8.

they pay for part of it.[39] In addition, experience-rating of premiums gives insured parties an incentive to prevent losses during the current policy period in order to avoid unnecessary increases in premiums during subsequent periods.[40] However, these are all methods of creating incentives for the insured to make its own calculations about how to reduce loss, by considering when the cost of reducing loss will be worth the premiums saved as a consequence.

Another indirect method of creating incentives for loss prevention in the face of insurance that I long ago called "feature rating" bases premiums on particular features of the insured's conduct or operations.[41] Instead of creating indirect incentives for the insured to decide what measures may prevent losses and thereby reduce future premiums, this approach tells insured parties what precautions the insurer expects to prevent losses and thereby to reduce premiums. The insured can reduce its premiums by taking these precautions.

In recent years there has been a burgeoning interest among legal scholars in these various ways in which insurers promote loss prevention by insured parties.[42] Much, perhaps most, of this research focuses on feature-rating. Because the research is qualitative and not quantitative, there are uncertainties associated with it. The inspections and policyholder education that insurers say on their websites that they do is not necessarily what they do as extensively as may be implied. And exactly how changes in the features of insureds' operations that insurers employ in underwriting translate into premium adjustments is unclear and for the most part unverified. It may be that in at least some cases insurers are saving themselves money by encouraging policyholders to change features of their operations, rather than saving premium costs for policyholders. In such instances insurance still promotes loss prevention, but not in the particular way that legal and economic theory postulates, because the loss prevention redounds mainly to the benefit of insurers in reduced claim costs, rather than to policyholders through reduced premiums.

39. *See generally* Steven Shavell, *On Moral Hazard and Insurance*, 93 Q. J. Econ. 541 (1979).

40. In addition, certain policy provisions, such as the exclusion of coverage of liability for harm that the insured expected or intended, directly preclude coverage of liability for harm caused by the most egregious forms of moral hazard. *See* Abraham & Schwarcz, *supra* note 9, at 530.

41. *See* Abraham, *supra* note 15, at 71–72.

42. *See, e.g.*, Rappaport, *supra* note 4; Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 Mich. L. Rev. 197 (2012); Tom Baker & Charles Silver, *How Liability Insurers Protect Patients and Improve Safety*, 68 DePaul L. Rev. 209 (2019); Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. Rev. 1412 (2013).

Rappaport's study of the involvement of liability insurers in preventing losses related to policing is the most extensive I have identified.[43] Mainly through an examination of trade literature, primary sources, and a series of interviews with police chiefs, brokers, and insurers,[44] he determined that insurers gather information about risk levels in both underwriting and premium setting ("rating"), taking into account such factors as policies on the use of force, 911 dispatching protocols, jail operations, and prior claim history.[45] He reports that, once insurance is issued, both commercial insurers and risk pools support loss prevention involving development of police policy and procedures, education and training, audits designed to ensure implementation of policy and procedures, encouraging accreditation, identification of high-risk personnel, and recommending or requiring structural reform.[46]

This is illuminating research, but I have some doubt that the extent and impact of the loss prevention efforts by insurers that he recounts are as significant as a reader of his study might infer. Four important qualifications are worth registering. First, Rappaport's survey (as he acknowledged[47]) was qualitative, not quantitative. It is impossible to know how representative his respondents were. Second, *how much* such involvement insurers have in loss involvement is not clear. It is easy enough to tell an interviewer about involvement in loss prevention without specifying its actual extent. Third, Rappaport's respondents either indicated or strongly implied that departmental involvement in loss prevention produces lower premiums, but exactly how and to what extent this occurs is unclear. Neither Rappaport nor his respondents did any real quantification.[48] Moreover, unless municipalities are told with specificity how much premiums will rise or fall as a result of taking particular precautions, they will have only a vague sense of what premium-reduction benefit they may get from taking these precautions. That is less likely to provoke behavioral change than specific information about specific premium discounts. But such information is unlikely to be provided. This is because, over time, premiums in most forms of liability insurance rise (and fall) for multiple reasons—changes in interest rates that affect income on invested premiums, increased or decreased competition, the evolution of market conditions from hard to soft, etc. Accurately pinpointing what impact a change in loss prevention

43. *See generally* Rappaport, *supra* note 4.
44. *Id*. at 1548–51.
45. *Id*. at 1587–88.
46. *Id*. at 1574–87.
47. *Id*. at 1599.
48. The exception that was particular was that gaining accreditation from a recognized accreditor may reduce premiums by twenty to twenty-five percent. *Id.* at 1584.

activities will or did have on premiums is not likely to be something that insured municipalities can do.

Finally, even accepting Rappaport's findings as accurate and generalizable, it is likely that his results are, by now, obsolete. Given the timeline for law review publication (his article was published in 2017), Rappaport's interviews probably occurred at least four and perhaps as many as five or six years ago. In the world of race-and-policing, that was a lifetime ago. The uncertainty that currently afflicts the market for insurance against police liability has intensified enormously in the period since then. A cascade of high-profile events, almost all in the last two years, have changed the overall climate in which that market is situated. And this changed climate has contributed to the evolution of the market, from what it was when Rappaport was doing his research, to its current state of turmoil.

Providing the putatively extensive loss prevention services that Rappaport chronicled would have been at least in part a method through which insurers competed for business in that earlier era. Today, in contrast, the competitive environment is very different. Insurers do not need to compete strenuously for business; it is a sellers' market. Policyholders are the parties hoping to get or maintain their coverage, and they are paying higher premiums for less coverage. Underwriting standards are more exacting, but that does not mean that insurers are more involved in ongoing loss prevention. The incentive that insurers once may have had to provide loss prevention services to their policyholder-municipalities has diminished. It would be interesting to see what an updated survey of the kind Rappaport undertook would reveal today. I doubt that respondents would place nearly as much emphasis on the loss prevention services provided by insurers as there was when he did his study.

In any event, the loss prevention services that Rappaport's respondents claimed several years ago were being broadly provided to police departments had no obvious effect on the series of well-publicized examples of egregious police misconduct that are a principal contributor to the destabilized climate in which we now find ourselves. We cannot know for certain whether there would have been even more such incidents of police misconduct if there had been even less insurer involvement, but that supposition seems doubtful.

Further, providing loss prevention services costs insurers money, and in a hard market that is money insurers do not have. The raw material of insurance is money—capital—and the shrinkage of coverage and increase in premiums that characterize the current market are symptoms of the scarcity of insurer capital, the principal ingredient of supply. When demand exceeds supply, as it does right now, sellers do not need to cater to buyers. Those in the industry with whom I have spoken report that there is currently some loss prevention involvement by insurers, especially on the part

of the risk pools. But my sense is that there is not as much involvement at present as a reader of Rappaport's article might be led to think. There is no reason to believe that this state of affairs would change upon repeal of qualified immunity.

B. *Proposals for Mandatory Insurance*

Recently there have been both legislative and academic proposals to encourage loss prevention by requiring individual police officers to purchase their own insurance against liability under Section 1983 (and sometimes other liabilities as well).[49] The express idea behind these proposals is that variation in the premiums charged individual police would give these individuals incentives to avoid conduct that risks liability, in order to save money on premiums.

Well-intentioned as they may be, important aspects of these proposals are both theoretically unsound and impractical. First, as a matter of theory, focusing loss prevention strategy on individuals within an organizational system whose overall dynamics and structure create the context in which risks occur gets the matter backward. When airplanes crash, the principal focus of liability is not the pilot, but the airline and its manufacturer. Similarly, it has long been recognized that the individual physician's conduct is not the strategic pressure point that is the most important determinant of whether malpractice occurs. Rather, malpractice within organizations such as hospitals, where most serious malpractice takes place, is the product of aspects of the organization's system for the delivery of medical care that need adjustment.[50]

This general insight is actually centuries old. It is one of the core principles behind the doctrine of *respondeat superior*, which holds employers liable for torts committed by employees within the scope of employment. Employers control the system within which employees work and within which they commit acts of negligence. The employer is strategically best situated to determine what adjustments in the work environment should be made in order to address negligent conduct.

49. *See, e.g.*, Deborah Ramirez *et al.*, *Policing the Police: Could Mandatory Professional Liability Insurance for Officers Provide a New Accountability Model?*, 45 Am. J. Crim. L. 407 (2019); Bicking v. Minneapolis, 891 N.W.2d 304 (Minn. 2017) (describing a Minneapolis ballot initiative that would have required the purchase of liability insurance by all police officers).

50. This insight goes at least as far back as the Harvard University hospitals' realization in the 1980s that changes in anesthesia policies and procedures could more effectively reduce losses than seeking to influence the behavior of individual physicians. *See* John H. Eichhorn, *Prevention of Intraoperative Anesthesia Accidents and Related Severe Injury Through Safety Monitoring*, 70 Anesthesiology 572, 575–77 (1989). For discussion, see Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 Harv. L. Rev. 381, 411–12 (1994).

Yet the rationale behind the proposals for mandatory individual police insurance is that it is individuals, and not the system, whose incentives are most in need of influence. The actual problem, as some of these proposals recognize, is that law enforcement organizations already purchase insurance that has not created powerful enough incentives for them to reduce losses. Police unions and legal protections governing disciplinary action, and other structural obstacles, make it difficult for law enforcement organizations to respond as effectively as they might to the incentives to prevent losses that the cost of insurance already creates.[51] In this sense, mandatory insurance proposals are a second-best effort to create externally derived loss prevention incentives that should already be operating more powerfully through forces internal to law enforcement organizations, but are not doing so.

Second, as a practical matter, the proposals wholly ignore the probability that commercial insurers will want little or no part of selling more insurance to a set of new policyholders whose vulnerability to liability is much harder to predict than is the vulnerability of a larger organization such as a municipality or police department. One proposal envisions variations in premiums that are highly sensitive to each officer's actuarial risk, indicating that its authors "presume successful insurance companies must be able to . . . assess actuarial risk and set premiums accordingly."[52] The authors provide no support for this presumption, and I have seen no evidence that it is valid. Nor are insurers who now insist on SIRs in the hundreds of thousands of dollars likely to be willing to sell coverage to individual police officers with the *de minimis* deductibles that the proposals for mandatory insurance envision. Nor are police unions likely to tolerate the unilateral control by liability insurers—outside, for-profit entities—of decisions that affect the income and very livelihood of individual officers, in the face of the difficulties that the law enforcement agencies that employ individual officers have already encountered themselves.[53] It is simply unrealistic to

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51. *See* Rachel Harmon, *The Problem of Policing*, 110 Mich. L. Rev. 761, 796–801 (2012); Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 St. Louis U. Pub. L. Rev. 57 (2012); Stephen Rushin, *Police Disciplinary Appeals*, 167 U. Pa. L. Rev. 545 (2019).

52. Ramirez *et al.*, *supra* note 49, at 450. A follow-up article also shows surprising confidence in insurance company abilities and willingness to provide the insurance proposed. Deborah A. Ramirez & Tamar Pinto, *Policing the Police, A Roadmap to Accountability Using Professional Liability Insurance*, __ Rutgers L. Rev. __ (forthcoming).

53. This dynamic, among other things, seems to have resulted in police departments indemnifying officers against virtually all the liability that they face through verdicts and settlements under Section 1983. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014). It stands to reason that, either directly (if permitted) or indirectly (through wage adjustments), the same bargaining leverage would result in police departments covering the entire cost of the mandatory insurance envisioned by the proposals.

expect meaningful surrogate regulation by insurers to remedy the failures of direct regulation.

IV. CONCLUSION

The market for insurance against liability under Section 1983 is tight. Municipalities and law enforcement organizations are paying higher premiums for less coverage, because liability has been expanding, and because the scope of future expansion is uncertain. Some municipalities may find in the near future that they are unable to obtain coverage in the commercial market.

The repeal of qualified immunity under Section 1983 is highly likely to aggravate a market that is already in turmoil. The devices that insurers sometimes use in other lines of liability to manage the challenges they face—principally, the use of selective exclusions from coverage and the shift from occurrence to claims-made coverage—are not suited for addressing the underlying causes of market turmoil. Consequently, we can expect that repeal of qualified immunity would generate more of what is already occurring—coverage would become even less available, and the coverage that municipalities are able to buy will provide less insurance for even higher premiums.

These problems will be solved only when the underlying liability against which liability insurance protects becomes less uncertain and more predictable. Insuring municipalities and individual police is not necessarily inconsistent with the goal of managing the incidence of this form of liability, but neither can insurers be expected to be the primary influence on this process.

THE ADA AND WEBSITE ACCESSIBILITY POST-*DOMINO'S*: DETANGLING EMPLOYERS' AND BUSINESS OWNERS' WEB AND MOBILE ACCESSIBILITY OBLIGATIONS

*Ahmed J. Kassim and Laura Lawless**

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I. INTRODUCTION

Companies that offer goods and services online or otherwise maintain an online presence continue to face an onslaught of website accessibility lawsuits. Plaintiffs with disabilities allege companies' websites are discriminatory because the websites are incompatible with assistive technologies, like screen readers for the visually impaired. Plaintiffs have sued private defendants in federal court under Title III of the Americans with Disabilities Act (ADA) and, in some cases, under similar state and local laws as well. The exposure in these cases entails not only the possibility of injunctive relief requiring extensive modifications to defendants' websites, but

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also, under some state and local laws, damages to the aggrieved plaintiffs, defense costs, and payment of the claimants' attorneys' fees.

These "surf by" claims have raised serious questions about whether, when, and how website owners must comply with the ADA. Neither Congress nor the U.S. Department of Justice (DOJ) has articulated the precise technical requirements for website accessibility under Title III. As a result, the applicability of the ADA to websites (and mobile applications) has come under intense judicial scrutiny, resulting in conflicting rulings during the past several years. Business groups hoped that the Supreme Court would hear the *Robles v. Domino's Pizza, LLC* appeal[1] and issue a decision that would end—or at least minimize—the tsunami of website accessibility lawsuits that have been filed nationwide. Since that did not happen, the waters remain murky. With the pace of these suits showing no signs of slowing, and with no clear guidance on the horizon, it is critical that every business operating a website consider how to manage the growing risk of litigation.

II. ADA AS A BASIS FOR LITIGATION OVER WEBSITE ACCESSIBILITY

A. *What Does the ADA Have to Do With the Internet?*

The ADA broadly protects the rights of individuals with disabilities in employment, access to state and local government services, places of public accommodation, transportation, and other important areas of American life. When Congress passed the ADA in 1990, it intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] However, the ADA contains no mention of websites and mobile applications because, when the law was adopted in 1990, the Internet was in its infancy. The ADA's emphasis at the time was making physical facilities accessible. Indeed, most businesses understand their obligations to make their physical facilities accessible under the ADA, and the DOJ has partnered with disability advocates to adopt a comprehensive set of technical scoping requirements to guide owners and operators of places of public accommodation. What many struggle with in the Internet age is how to ensure that their websites and mobile applications are accessible to the disabled as the web increasingly supplants brick-and-mortar institutions. To gain greater access to products and services sold and information made available online, disabled individuals have sued under the ADA, specifically under Title III, to compel private website operators to make their websites more accessible.[3]

1. *See* Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).
2. *See* 42 U.S.C. § 12101(b)(1).
3. *See* Lewis Wiener & Alexander Fuchs, *Trending: ADA Website Accessibility Lawsuits*, Law360, Dec. 15, 2016, https://www.law360.com/articles/871491/trending-adawebsite-accessibility-lawsuits.

Title III of the ADA prohibits discrimination based on disability in the activities of *places of public accommodation*.[4] It states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation."[5] The ADA expressly provides that a place of public accommodation engages in unlawful discrimination if it fails to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services."[6]

Congress designed Title III to ensure that individuals with disabilities obtain equal access to the goods and services available at a wide range of physical places open to the public, which the statute refers to as "places of public accommodation." The ADA regulations broadly define a *place of public accommodation* as "a facility operated by a private entity whose operations affect commerce" that fall under one of several enumerated categories.[7] Section 12181(7) sets forth the twelve specific categories of places deemed "places of public accommodation," including hotels, restaurants, places of entertainment, stores, and gyms.[8]

B. *Are Websites Places of Public Accommodation?*

To bring a claim under Title III of the ADA, a plaintiff "must allege (1) that she is disabled within the meaning of the ADA; (2) that defendant owns, leases or operates a place of public accommodation; and (3) that defendant discriminated against her by denying her a full and equal opportunity to enjoy the services defendant provides."[9] The applicability of the second element to the Internet—whether a website or mobile app is a place of public accommodation—is the crux of website accessibility litigation. Section 12181(7) does not include websites or mobile apps as "places of public accommodation." Since 1990, Congress has revised Title III of the ADA twice, but neither revision amended "place of public accommodation" to include the Internet or websites.[10]

Determining the definition and reach of "places of public accommodation" is, therefore, critical to assessing the rights of people with disabilities with respect to the Internet. However, there is no unifying interpretation or application of the ADA to websites as places of public accommodation.

4. 42 U.S.C. §§ 12181–12189.
5. *Id.* § 12182(a).
6. *Id.* § 12182(b)(2)(A)(iii).
7. 28 C.F.R. § 36.104.
8. 42 U.S.C. § 12181(7).
9. Camarillo v. Carrols Corp., 518 F.3d 153, 156 (2d Cir. 2008).
10. *See, e.g.*, Act of Sept. 25, 2008, Pub. L. No. 110-325, 122 Stat. 3554.

As discussed below, the DOJ has opined that the ADA applies to the Internet, but it has not clarified exactly what standards commercial websites must meet to comply with Title III. Further complicating the issue, ADA jurisprudence distinguishes between businesses that operate only online and those that operate both online and at physical locations. Some courts hold that Title III applies to online-only businesses, while others do not.[11]

1. The DOJ's Position.

The DOJ enforces and promulgates rules under the ADA consistent with Congress's mandate that the agency would apply the statute in a manner that evolved over time.[12] Consistent with this approach, the DOJ stated in the preamble to the original 1991 ADA regulations that the regulations should be interpreted to keep pace with "emerging technology."[13] DOJ regulations define *place of public accommodation* consistent to those in Section 12181(7) and clarifying that a "place" is a "facility" that offers the types of services enumerated in Section 12181(7).[14]

Although the ADA's statutory language does not address websites, the DOJ considers websites offering goods or services to consumers to be "places of public accommodation," which must be accessible to the disabled.[15] Since 1996, the DOJ has explained that it believes that "web pages" are encompassed within Title III.[16] DOJ regulations require that public accommodations "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities."[17] The implementing regulations list examples of auxiliary aids and services, including Braille materials and displays, screen reader software, and other means of informing hearing and visually impaired individuals.[18] However, even though the DOJ expects commercial websites and mobile applications to be accessible to the disabled, it has never adopted specific technical regulations under Title III. In contrast, the DOJ has adopted detailed guidance regarding website compliance under Title II of the ADA, which applies to government entities.[19] The DOJ's silence with respect to Title III was thus a source of great consternation to many in the private retail and commercial community.

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11. *See* Section B.(2), *infra*, for a discussion on the federal circuit split on this issue.
12. *See* H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 108 (1990); 42 U.S.C. § 12186(b).
13. 56 Fed. Reg. 35544-01, 35566 (July 26, 1991).
14. 28 C.F.R. § 36.104.
15. *See* 75 Fed. Reg. 43,463.
16. *See* Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., to Senator Tom Harkin (Sept. 9, 1996), https://www.justice.gov/crt/foia/file/666366/download.
17. 28 C.F.R. § 36.303(c)(1).
18. *See id.* § 36.303(b)(2).
19. *See* Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d.

In 2010, to provide guidance around website accessibility, the DOJ initiated rulemaking that would have resulted in technical standards for private websites and mobile applications.[20] This proposed rule was not only intended to clarify the application of Title III to commercial websites,[21] but also to formally adopt the Website Content Accessibility Guidelines (WCAG).[22] The WCAG, developed by the non-governmental World Wide Web Consortium (W3C), sets forth voluntary technical standards that make web content more accessible to people with disabilities.[23] From 2010 to 2015, the DOJ brought or intervened in many enforcement actions against commercial website operators where the settlements required compliance with WCAG 2.0 AA guidelines, leading many to believe the DOJ would formally adopt the guidelines as the governing accessibility standard.[24]

However, the DOJ repeatedly delayed the release of the final rule. In late 2017, with the change of administrations, the DOJ added the proposed rule to a list of "inactive" regulatory actions[25] and ultimately withdrew the proposal on December 26, 2017.[26] In 2018, members of Congress wrote to then-Attorney General Jeff Sessions complaining about the lack of clarity for website compliance under the ADA and encouraging the DOJ to clarify whether the ADA applies to websites given the increase in website accessibility lawsuits.[27]

In its response, the DOJ confirmed its position that the ADA applies to the websites of public accommodations. Assistant Attorney General Stephen E. Boyd stated that the DOJ's "interpretation is consistent with the ADA's Title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to

20. 75 Fed. Reg. 43,460 (proposed July 26, 2010).

21. *See id*. at 43,463.

22. WCAG 2.0 guidelines are private-industry standards for website accessibility developed by technology and accessibility experts. WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria. 36 C.F.R. pt. 1194, app. A (2017).

23. *See Introduction to Web Accessibility*, W3C, https://www.w3.org/WAI/fundamentals/accessibility-intro (last updated June 5, 2019).

24. *See*, *e.g*., Minh N. Vu, *WCAG 2.0 AA Is the New Accessibility Standard for Federal Agency Websites*, *ADA Title III*, Seyfarth Shaw, Jan. 10, 2017, https://www.adatitleiii.com/2017/01/wcag-2-0-aa-is-the-new-accessibility-standard-for-federal-agency-websites.

25. Office of Info. & Reg. Affairs, OMB, Inactive RINs (2017), https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf.

26. 82 Fed. Reg. 60,932.

27. *See* Letter from Ted Budd, Member of Congress, et al., to Jeff Sessions, U.S. Att'y Gen. (June 20, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/06/ADA-Final-003.pdf; and Letter from Senator Chuck Grassley et al., to Jeff Sessions, U.S. Att'y Gen. (Sept. 4, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018-10-04%20Grassley,%20Rounds,%20Tillis,%20Crapo,%20Cornyn,%20Ernst%20to%20Justice%20Dept.%20-%20ADA%20Website%20Accessibility.pdf.

people with disabilities."[28] Boyd also stated that, "absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication" and that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA." Ultimately, the lack of regulatory certainty left businesses with a mandate to make their websites accessible but no directions on how to do so.

2. The Federal Courts' Interpretation: Circuit Split.

Federal courts are not waiting on Congress or the DOJ to act, but federal case law is far from settled. Marked differences are developing within and among the circuit courts of appeals on the issue of whether websites are "public accommodations."

The courts have largely split into two factions. Within the First, Second, and Seventh Circuits, courts have found that the ADA is not limited to brick-and-mortar structures and can apply to a website independent of any nexus to a physical place.[29] Courts in these circuits highlight Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available to other members of the public and that Congress intended the ADA to adapt to evolving technology.[30] On the other end, courts in the Third, Fifth, Sixth, and Ninth Circuits interpret "place of public accommodation" to be physical places, and, therefore, goods and services provided by a public accommodation must have a sufficient nexus to a physical place in order to be covered by the ADA.[31] Courts in these circuits have concluded that a public accommodation must be a physical place because the twelve enumerated categories of public accommodations in Section 12181(7) are all physical places.

Predictably, this split has already led to conflicting rulings, even in cases involving the same defendant, making compliance untenable for website operators with a national reach. For instance, in 2012, district courts in the

28. Letter from Stephen E. Boyd, Asst. Att'y Gen., to Ted Budd, Member of Congress (Sept. 25, 2018), https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf.

29. *See*, *e.g.*, Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., Inc., 37 F.3d 12, 19 (1st Cir. 1994); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999); Morgan v. Joint Admin. Bd., Ret. Plan, 268 F.3d 456, 459 (7th Cir. 2001); Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 576 (D. Vt. 2015); Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 200–02 (D. Mass. 2012); Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017).

30. *See Scribd*, 97 F. Supp. 3d at 575; *Netflix*, 869 F. Supp. 2d at 200–02.

31. Earll v. eBay, Inc., 599 F. App'x 695, 696 (9th Cir. 2015); Ford v. Schering–Plough Corp., 145 F.3d 601, 612–14 (3d Cir. 1998); Magee v. Coca-Cola Refreshments, 833 F.3d 530, 534 (5th Cir. 2016); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–11 (6th Cir. 1997); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000).

First and Ninth Circuits considered whether Netflix's highly popular website constitutes a place of public accommodation.[32] Applying their respective circuit precedents, the district courts, just two months apart, reached opposite conclusions on the applicability of Title III to Netflix's website.[33]

The Ninth Circuit in *Robles v. Domino's Pizza, LLC* is the latest and highest court to weigh in directly on the issue.[34] In *Domino's*, the plaintiff sued the national pizza chain alleging that its website and mobile app violated the ADA because they did not work with common screen-reading software. The district court dismissed the lawsuit, holding that, although Title III applied to websites, allowing the case to proceed without clear web accessibility regulations from the DOJ would violate Domino's due process rights and that the primary jurisdiction doctrine required the court to defer to the DOJ until it acted. The district court was especially concerned about using the WCAG as a legal standard absent a specific regulation.

On appeal, Domino's argued that only physical facilities were bound by the public accommodation provision of the ADA.[35] Domino's contended that companies were not required under the law to make their websites and mobile apps fully accessible if they offered customers with disabilities other options for accessing their goods and services, such as a telephone hotline.[36]

The Ninth Circuit rejected Domino's theory, reversed the district court's dismissal, and remanded the case. The Ninth Circuit held that (1) Title III of the ADA covers websites with a nexus to a physical place of public accommodation, relying heavily on the fact that the Domino's app and website are two of the most used ways to order take-out and delivery,[37] and (2) liability for not having an accessible website, even with no regulation on the subject, does not violate due process rights of a business covered by Title III.[38] The Ninth Circuit concluded by making clear that it was *not* expressing any opinion whether Domino's website or mobile app complied with the ADA, and instructed the district court to proceed with

32. *See* Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017, 1024–29 (N.D. Cal. 2012); *Netflix*, 869 F. Supp. 2d at 201–02.

33. *Compare Cullen*, 880 F. Supp. 2d at 1024–29 (holding that "[t]he Netflix website is not 'an actual physical place' and therefore, under Ninth Circuit law, is not a place of public accommodation"), *with Netflix*, 869 F. Supp. 2d at 201–02 (holding the Netflix website is a place of public accommodation under First Circuit precedent and defendant may not discriminate in the provision of the services (i.e., streaming video) of that public accommodation).

34. *See* Robles v. Domino's Pizza, LLC, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).

35. *See id*. at 905.

36. *See id*. at 905 n.5.

37. *Id*. at 905.

38. *Id*. at 907.

discovery on that issue.[39] The U.S. Supreme Court denied Domino's petition for writ of certiorari,[40] leaving the circuit split unresolved.

Despite the split as to whether Title III extends to *all* websites or just those with a nexus to a physical location, the courts are nearly unanimous (including now the Ninth Circuit) in holding that a website can and should be construed as providing "services of a place of public accommodation" under the ADA *where the site's inaccessibility impedes access to goods and services of physical locations*.

The result of this split is that businesses are now left needing to comply with a number of different and developing interpretations of how the ADA might apply to online and mobile platforms nationwide. But without clear standards from the DOJ or the courts, businesses must speculate about how to comply with the ADA. Despite undertaking costly development, with the best of intentions to service all customers, website operators can remain vulnerable under the ADA.

C. *Lack of Clear Unified Guidance Fuels Litigation.*

The genesis of website accessibility claims under Title III is well documented.[41] Without clear congressional mandate, regulatory direction, or consistent decisional law, businesses are at the mercy of myriad and sometimes conflicting interpretations of how the ADA applies to online and mobile platforms nationwide, a phenomenon fueling an explosion of website accessibility lawsuits. In 2016, roughly 250 lawsuits were filed regarding allegedly inaccessible websites and/or mobile applications.[42] As a result of the DOJ's withdrawal of rulemaking in December 2017, the number of website accessibility lawsuits mushroomed to over 2,200 suits by the end of 2018,[43] where it roughly remained through 2019.[44] It is anticipated that federal website accessibility filings for 2020 will exceed 3,000 cases.[45]

39. *Id.* at 911.

40. *See Domino's*, 140 S. Ct. 122.

41. *See*, *e.g.*, Mark S. Sidoti, Mitchell Boyarsky & Ahmed J. Kassim, *Navigating Website Accessibility Claims*, New York Law J., Mar. 20, 2017, https://www.law.com/newyorklawjournal/almID/1202781633698/navigatingwebsite-accessibility-claims.

42. Minh N. Vu, Kristina M. Launey & Susan Ryan, *ADA Title III Lawsuits Increase by 37 Percent in 2016*, ADA Title III News & Insights, Seyfarth Shaw, Jan. 23, 2017, http://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016.

43. Minh N. Vu, Kristina M. Launey & Susan Ryan, *Number of Federal Website Accessibility Lawsuits Nearly Triple, Exceeding 2250 in 2018*, ADA Title III News & Insights, Seyfarth Shaw, Jan. 31, 2019, https://www.adatitleiii.com/2019/01/number-of-federal-website-accessibility-lawsuits-nearly-triple-exceeding-2250-in-2018.

44. Kristina M. Launey & Minh N. Vu, *The Curve Has Flattened for Federal Website Accessibility Lawsuits*, ADA Title III News & Insights, Seyfarth Shaw, Apr. 29, 2020, https://www.adatitleiii.com/2020/04/the-curve-has-flattened-for-federal-website-accessibility-lawsuits.

45. *See* Jason Taylor, Record Breaking Year for Digital Accessibility Lawsuits, Dec. 21, 2020, https://blog.usablenet.com/a-record-breaking-year-for-ada-digital-accessibility-lawsuits.

Notably, the case law has been, with rare exceptions, pro-plaintiff.[46] Business groups hoped that the Supreme Court would take up the *Domino's* case and issue a decision that would end—or at least curtail—the tsunami of website accessibility litigation nationwide, but the Supreme Court passed on the opportunity.[47]

Plaintiffs' counsel are aware of the uncertainty in the law and the fact that a vast majority of websites are substantially noncompliant with the WCAG.[48] Despite the uncertainty as to whether WCAG 2.0 or later versions will become the official legal standard for website accessibility under Title III, courts increasingly rely on the WCAG as a benchmark for measuring accessibility, and the plaintiffs' bar began to demand compliance with the WCAG as a term of pre-suit settlement.[49] As courts began to order compliance with the WCAG 2.0 AA guidelines as an equitable remedy to procure compliance with Title III, settlements incorporating WCAG substantial compliance and minimizing legal spending on both sides increased in number.[50]

Initially, plaintiffs' firms would serve a detailed demand letter to the target entities, describing the websites' deficiencies, and demanding that the website be brought to conformance with WCAG 2.0 AA (or 2.1 AA) and payment of counsel fees and costs incurred—a low-cost resolution appealing to both plaintiff and defendant. However, in recent years, plaintiffs are increasingly skipping the demand letters and immediately suing, a step that not only increases costs through filing fees and early appearances but puts other would-be claimants on notice that resolution and remediation may not be far off.

Plaintiffs are also making claims under analogous state and local laws in certain jurisdictions, such as New York[51] and California,[52] alleging that the respondents' websites violate local human rights or civil rights statutes

46. For two notable defense rulings, *see* Diaz v. Kroger Co., No. 18 Civ. 7953 (KPF) (S.D.N.Y. June 4, 2019) (dismissing complaint because the ADA claims had been rendered moot by defendant's remediation of its website to comply with the WCAG 2.0), and Himelda Diaz v. Apple, Inc., 18-cv-07550 (LAP) (S.D.N.Y. Mar. 28, 2019) (granting Apple's motion to dismiss because plaintiff had failed to allege any particularized injury and noting that the complaint was identical to over four hundred others filed over the last two years).

47. David G. Savage, *Supreme Court Allows Blind People to Sue Retailers If Their Websites Are Not Accessible*, L.A. Times, Oct. 7, 2019, https://www.latimes.com/politics/story/2019-10-07/blind-person-dominos-ada-supreme-court-disabled.

48. WCAG encompasses four principles, thirteen guidelines, and over sixty testable success criteria. *See* https://www.w3.org/WAI/standardsguidelines/wcag. Each of the sixty-plus success criteria provides three levels of conformance: A (lowest), AA, and AAA (highest). *Id.* A website failing even one of those criteria, at any level, opens the door to a lawsuit for noncompliance.

49. *See, e.g.*, *Domino's*, 913 F.3d at 907.

50. *See, e.g.*, Gil v. Winn-Dixie Stores, 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

51. *See* N.Y. State Human Rights Law, N.Y. Exec. Law § 290 *et seq*.

52. *See* Cal. Civ. Code § 51(b).

that guarantee equal access for people with disabilities. Some of these state and local laws allow for nominal monetary recovery. Whether framed as a single-plaintiff case or a threatened class action, reliance on these bases of recovery is driving up the cost of settlement.

The lawsuits are often similar in approach. Pleadings tend to repeat boilerplate allegations that a hearing or visually impaired individual was deprived of full access to website content because of digital barriers to access. Although the lawsuits often identify deficiencies in the websites' accessibility, the reliance on a cadre of frequent (and sympathetic) litigants, repetition of boilerplate allegations, and the allure of prevailing plaintiff fee recovery have spurred the creation of a cottage industry of accessibility suits that are expensive and difficult to defend.[53] The suits require little pre-filing inquiry; claimants or attorneys' staff can use free, accessible tools of varying degrees of accuracy to identify "deficiencies" on a target's site and, from there, conclude that the site as a whole is inaccessible.[54] The standard progression of such suits is toward early settlement, as the cost of remediating the target website and contributing toward the putative plaintiff's attorneys' fees is less than litigating to an uncertain outcome, which typically requires the retention of one or more website accessibility experts, the cost of which alone incentivizes early settlement.[55] Indeed, more than ninety-three percent of website accessibility cases filed in 2018 settled, and of the cases filed in 2019, fifty-five percent settled within sixty days.[56]

III. WHO IS VULNERABLE TO SUIT?

All websites that transact business with the public are potentially vulnerable to website accessibility suits. ADA lawsuits have targeted the websites of retailers (including, as noted above, Target and Winn-Dixie stores), restaurants (*e.g.*, Domino's Pizza Inc.), universities (including Harvard and MIT[57]), and celebrities (including Beyoncé[58] and Kylie Jenner[59]).

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53. *See* Sidoti, Boyarsky & Kassim, *supra* note 41; *see also* Amici Curiae Brief of Retail Litig. Ctr., Inc. & Nat'l Retail Fed'n at 16–22, Domino's Pizza, LLC v. Robles, (2019) (No. 18-1539), https://www.supremecourt.gov/DocketPDF/18/18-1539/108278/20190716175135889_18-1539%20-%20Amicus.pdf.

54. *See* Sidoti, Boyarsky & Kassim, *supra* note 41.

55. *See id*.

56. *See* Jason Taylor, *2018 ADA Website Accessibility Lawsuit Recap Report*, UsableNet, Dec. 26, 2018, https://blog.usablenet.com/2018-ada-web-accessibility-lawsuitrecap-report.

57. *Deaf Advocates Sue Harvard, MIT for Better Webcast Captions*, Law360, Feb. 12, 2015, https://www.law360.com/articles/621255/deaf-advocates-sue-harvard-mit-for-better-webcast-captions.

58. Ashley Cullins, *Beyonce's Parkwood Entertainment Sued over Website Accessibility*, Hollywood Rep., Jan. 3, 2019, https://www.hollywoodreporter.com/thr-esq/beyonces-parkwood-entertainment-sued-1172909.

59. *Kylie Jenner's Company Is Being Sued for Being Inaccessible to the Blind*, L'Officiel, Dec. 15, 2017, https://www.lofficielusa.com/beauty/kylie-jenner-s-company-is-being-sued-for-being-inaccessible-to-the-blind.

Although these lawsuits have been filed across the country, the vast majority are filed in New York, California, and Florida, jurisdictions with decisional law more favorable to Title III plaintiffs. Whether the website has a nexus to a physical location may dictate where the suit is filed because, to date, ADA jurisprudence has recognized distinctions between businesses that operate only online and those that operate both online and at physical locations. Accordingly, companies with physical locations that operate websites and/or mobile apps will need to ensure that their websites and mobile apps are ADA-compliant. Meanwhile, for those companies that *only* operate through a website and/or mobile app, the applicability of the ADA is based on jurisdiction.

Needless to say, the circuit split largely moots the issue of where plaintiffs will file suit as it has facilitated aggressive forum shopping, with plaintiffs' firms filing suit in a handful of jurisdictions that they have deemed most favorable. For example, when the district court granted Domino's motion to dismiss in 2017, website accessibility filings plummeted in California, which had been a popular forum for these suits, and skyrocketed in other jurisdictions.[60]

It is becoming common for companies to be sued more than once by different plaintiffs even after they have settled initial claims and agreed to remediate their websites.[61] For instance, many retailers have multiple brands with separate websites for each, and some mistakenly believe that one settlement will cover all future legal actions, or a company is sued during the course of its initial remediation because some of the site is still inaccessible.[62] Defendants are advised that, until their websites are fully WCAG-compliant, with user testing to ensure usability and functionality, they remain vulnerable to *seriatim* litigation.

IV. STRATEGIES FOR WEBSITE OPERATORS POST-*DOMINO'S*

The circuit split on Title III's applicability to websites and apps, and the Supreme Court's declination to review the *Domino's* appeal—as well as the DOJ's current stance—means that the deluge of website accessibility lawsuits will continue.

A business with a consumer-facing website should assume that it is a target and should develop a coordinated strategy involving internal

60. *See*, *e.g.*, Kristina M. Launey & Melissa Aristizabal, *Website Accessibility Lawsuit Filings Still Going Strong*, Seyfarth Shaw, ADA Title III News & Insights, Aug. 22, 2017, https://www.adatitleiii.com/2017/08/website-accessibility-lawsuitfilings-still-going-strong; Minh N. Vu & Susan Ryan, *2017 Website Accessibility Lawsuit Recap: A Tough Year for Businesses*, Seyfarth Shaw, ADA Title III News & Insights, Jan. 2, 2018, https://www.adatitleiii.com/2018/01/2017-website-accessibilitylawsuit-recap-a-tough-year-for-businesses; Taylor, *supra* note 56.

61. *See* Taylor, note 56.

62. *See*, *e.g.*, Haynes v. Hooters of Am. LLC, 893 F.3d 781 (11th Cir. 2018).

stakeholders, legal counsel, and website accessibility design professionals to manage risk before, during, and after a lawsuit.[63] Proactive steps to minimize the likelihood of litigation due to the inaccessibility of their website or mobile platform allow companies greater control over the remediation and implementation process and show a commitment to their disabled customers. Ultimately, the best deterrence is having a website that is accessible to the disabled.

Before receipt of a lawsuit or pre-suit demand letter, companies should have their website evaluated for compliance with WCAG 2.0's various criteria and any applicable local human rights law, preferably by a vendor employing testers with a range of visual, auditory, mobility, and cognitive disabilities using a variety of assistive technologies. The evaluation should also include a comparison of the audit results from the consultant to those generated by the readily available web tools used by plaintiffs' firms to assess WCAG compliance.

Additionally, businesses should invest in understanding the WCAG and the types of issues the guidelines address, including training their employees on website-accessibility requirements, designating personnel to ADA compliance if warranted, and adopting and posting website accessibility policies and statements. Companies often contract for content from third-party vendors. Before entering into third-party contracts for content, companies should ensure that such agreements contain adequate accessibility assurances and indemnification terms.

If any deficiencies are discovered, a business should create a remediation plan to implement upgrades on a timeline that is reasonable for that business. Until the DOJ adopts specific technical requirements for web accessibility, businesses have flexibility in determining how to make their websites compliant with the ADA's general requirements of nondiscrimination and effective communication. Short-term goals should include identifying immediate improvements (such as to top-level pages, navigations, headers, and footers) that can significantly reduce the likelihood of becoming a target. Any implementation plan should include a process for integrating accessibility into future updates, redesigns, and new pages. For the long term, website owners should establish a track record for their compliance programs and conduct regular internal and third-party audits, which will lend support to the company's contention that it intends to maintain compliance in the future.

While not a complete bar to lawsuits and settlement demands, if implemented correctly, these measures significantly bolster a respondent's defenses and position a company to expeditiously and efficiently resolve claims.

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63. *See, e.g.*, Mark S. Sidoti, *Practical Strategies for Defending ADA Website Accessibility Claims*, N.Y. L.J., Mar. 8, 2019, https://www.law.com/newyorklawjournal/2019/03/08/practical-strategies-for-defending-ada-website-accessibility-claims.

Once a pre-suit demand letter or a complaint is received, companies should act quickly. At the outset, a company should confirm the accuracy of the complaint or demand letter because plaintiffs' firms typically cut and paste the same allegations into hundreds of complaints, which may contain allegations that are either false or inapplicable to the target site. Erroneous allegations could serve as a basis for a motion to dismiss or to amend the complaint (or, once alerted, plaintiff's counsel may decide to abandon the case). In cases where the target entity has a clearly non-compliant website, knowledgeable defense counsel in this area, when engaged early, can often negotiate settlements fairly quickly.[64] Allowing a case that should, and ultimately will, settle to proceed to a default, or even to a responsive pleading and mandatory initial court conferences, only serves to increase the plaintiff's fees and costs.

Finally, if considering challenging website accessibility claims, consult experienced counsel, as it is critical for website owners at the outset to understand the precedential decisions in their jurisdiction (and those on appeal) when evaluating whether and on what basis claims might be challenged. As the cited cases demonstrate, numerous defendants and trade groups (appearing as *amici* in appeals) have invested significant resources to test the boundaries of these claims and the reach of many of the common defenses. These precedential opinions should guide website owners away from spending resources mounting otherwise futile challenges, which only serve to run up defense costs and plaintiffs' counsel fees. And, of course, failing to cite binding precedent in the jurisdiction, or filing motions over the standing orders of local judges, may result in the imposition of sanctions.

V. CONCLUSION

Most companies have faced a new reality in recent years—make their websites accessible to individuals with disabilities, or face exposure to lawsuits claiming that the sites violate the ADA. Companies should expect the seemingly endless stream of website accessibility lawsuits to continue and should, therefore, prioritize mitigation. As reliance on online services increases, the best way to avoid being a target is to achieve substantial conformance with at least WCAG 2.0 AA (preferably 2.1 AA). In short, taking swift, definitive action to guarantee and maintain accessibility for all not only reduces the risk of website accessibility exposure, but also makes good business sense.

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64. *See* Sidoti, *supra* note 63 (summary of special considerations and terms that should factor into negotiation of website accessibility settlements including elimination of class exposure, res judicata, follow-on claims, private vs. public settlement agreements, time frame for remediation, and confidentiality).

A NEW PERSPECTIVE ON COMMUNICABLE DISEASE EXCLUSIONS IN LIABILITY INSURANCE POLICIES

*Douglas R. Richmond**

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I. INTRODUCTION

In December 2019, China reported an outbreak of a coronavirus that was first identified in the city of Wuhan.[1] Coronaviruses, which are named for the crown-like spikes of protein visible on the surfaces of their particles when viewed microscopically, are a family of viruses that are common in people and many species of animals.[2] There are multiple human

1. Paul S. White & Siobhán A. Breen, *The Impact of the Global COVID-19 Pandemic on the Insurance Industry*, For the Def., Apr. 2020, at 22, 22.
2. *About COVID-19*, Centers for Disease Control and Prevention (Sept. 1, 2020), https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html (last visited Dec. 30, 2020).

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coronaviruses, including some that cause mild upper-respiratory tract illnesses.[3] The coronavirus (SARS-CoV-2) that was originally detected in Wuhan, however, was a novel disease not previously observed in humans.[4] This new coronavirus originated in bats, although the specific animal reservoir from which the virus spilled over to people remains unknown.[5] In February 2020, the World Health Organization named the disease caused by SARS-CoV-2 "coronavirus disease 2019," abbreviated and now commonly known as COVID-19.[6] Within the COVID-19 abbreviation, "'CO' stands for 'corona,' 'VI' for 'virus,' and 'D' for disease."[7]

COVID-19 rapidly spread around the globe, but the disease hit the United States particularly hard.[8] One journalist observed that "[a] virus a thousand times smaller than a dust mote . . . humbled and humiliated the planet's most powerful nation."[9] As of March 3, 2021, the United States had experienced 28,456,860 cases of COVID-19 with 513,122 deaths.[10]

In efforts to slow the spread of COVID-19, state and local governments issued shelter-in-place orders; forbid or limited public gatherings and private gatherings above certain sizes; ordered bars, restaurants, and other businesses deemed to be non-essential to close for periods of time; and established occupancy limits in bars and restaurants as part of social distancing measures, among other steps.[11] Many people either stopped going out to eat or shop or dramatically limited their public activities. Tourism quickly withered.[12] Professional services firms and other white-collar businesses either closed their offices and required employees to work from home or operated their offices with skeleton crews while most of their staffs worked remotely. Companies significantly limited, postponed, or suspended employee travel.[13] These responses to the pandemic had

3. *Id.*
4. *Id.*
5. *Id.* (noting that "the exact source of this virus has not been identified").
6. *Id.*
7. *Id.*
8. Ed Yong, *Anatomy of an American Failure*, Atl., Sept. 2020, at 32, 34.
9. *Id.* at 34.
10. *CDC COVID Data Tracker*, Centers for Disease Control and Prevention (Updated Mar. 3, 2021, 1:38 PM), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Mar. 3, 2021).
11. *See* White & Breen, *supra* note 1, at 23 (stating that COVID-19 "prompted governing bodies to issue quarantines and prohibitions on public gatherings affecting the individual lives of billions of people"); Yong, *supra* note 8, at 41 (noting that governors and mayors issued stay-at-home orders and closed schools, shops, and restaurants).
12. *See* Felix Richter, *COVID-19 Could Set the Global Tourism Industry Back 20 Years*, World Econ. Forum (Sept. 2, 2020), https://www.weforum.org/agenda/2020/09/pandemic-covid19-tourism-sector-tourism (last visited Dec. 29, 2020) ("The tourism sector has been devastated by COVID-19.").
13. Marisa Iati, *Your Workplace Has Banned Travel Because of the Corona Virus. Now What?*,

catastrophic financial consequences for many businesses and their employees, particularly small businesses and those in the hospitality and leisure industry.[14] As a result, many of those businesses made business interruption claims under their property insurance policies; those cases are making their way through the courts. And, insofar as losses attributable to the COVID-19 pandemic are viewed as an insurance event, the principal focus has been on property insurance issues.[15]

But what of the liability insurance aspects of COVID-19? Assume, for example, that a homeowner hosts a party where either she or a guest is an asymptomatic carrier of COVID-19 and infects an attendee who, in turn, becomes gravely ill. Or, perhaps the guest or homeowner is symptomatic but mistakes her symptoms for the onset of a cold, and partygoers do not notice her illness. If the seriously ill partygoer sues either the homeowner or the infectious guest for negligence, will the defendant be covered under her homeowners insurance policy? What if it were the guest who transmitted the disease, but the homeowner is sued for negligence in hosting the party? Alternatively, what if a business violates government-imposed social distancing or occupancy requirements, remains open after a government-ordered curfew, does not require customers to wear masks, or allows an employee that it knows or reasonably should know is infected with COVID-19 to continue working and a customer who allegedly was

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Wash. Post (Mar. 5, 2020, 5:00 a.m. CST), https://www.washingtonpost.com/business/2020/03/05/coronavirus-work-travel-restrictions.

14. *See, e.g.*, Thomas A. Lubik & Sonya Ravindranath Waddell, *COVID-19 and the U.S. Economy*, Econ. Impact of COVID-19 (Fed. Res. Bank of Richmond, Mar. 31, 2020), at 1, 2 (describing the harsh effects of COVID-19 on the hospitality and leisure industry).

15. *See, e.g.*, Daniel A. Cotter, *A Pandemic Walks into a Bar: The Covid-19 Pandemic and Business Interruption Insurance*, CBA Record, May/June 2020, at 30 (addressing business interruption coverage and related disputes); Tred R. Eyerly, *Is the Presence of Coronavirus "Direct Physical Loss or Damage" Under a Property Policy?*, Haw. B. J., July 2020, at 4 (discussing the "direct physical loss or damage" requirement in property insurance policies); Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 Conn. Ins. L.J. 1 (2020) (making arguments for and against business interruption coverage for COVID-19 related losses); Patrick Larkin et al., *The Business Interruption Pandemic*, Bench & B. of Minn., July 2020, at 24 (exploring some of the issues expected to arise in the context of business interruption coverage); Frederic Theodore Le Clerq & Francis J. Barry, Jr., *Business Interruption Claims and Covid-19: Is It "Reasonable" to Expect Any Coverage After This Disaster?*, La. B. J., June/July 2020, at 12 (urging courts to resist equitable temptations and to enforce property insurance policies as written). This observation is not intended to downplay the significant health insurance ramifications of the pandemic. For example, historically large layoffs led to numerous workers losing their employer-sponsored health insurance. *See generally* Josh Bivens & Ben Zipperer, *Health Insurance and the Covid-19 Shock*, Econ. Pol'y Inst. (Aug. 26, 2020), https://www.epi.org/publication/health-insurance-and-the-covid-19-shock (last visited Dec. 29, 2020). Nor is it meant to minimize the efforts of insurance industry observers who have examined the insurance aspects of the COVID-19 pandemic more broadly. *See, e.g.*, John K. DiMugno, *Implications of COVID-19 for the Insurance Industry and Its Customers*, 42 Ins. Litig. Rep. 185 (2020).

exposed to COVID-19 there dies? If the customer's estate sues the business for wrongful death, will the business be covered under its commercial general liability (CGL) policy?

Depending on the facts and the language of the subject insurance policy, coverage for the homeowner or infectious partygoer may either be questionable or out of the question. A standard homeowners insurance policy contains a communicable disease exclusion that bars coverage for "'[b]odily injury' injury or 'property damage' which arises out of the transmission of a communicable disease by an insured."[16] An individual insurer's communicable disease exclusion may be broader.[17]

Coverage for the business will also depend on the policy language. A standard CGL policy does not contain a communicable disease exclusion, but a standard communicable disease exclusion is available for endorsement onto a CGL policy.[18] The endorsement provides:

> A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability:
>
> 2. Exclusions
>
> This is insurance does not apply to:
>
> Communicable Disease
>
> "Bodily injury" or "property damage" arising out of the actual or alleged transmission of a communicable disease.
>
> This exclusion applies even if the claims against any insured alleged negligence or other wrongdoing in the:

16. Ins. Servs. Office, Inc., Homeowners 3–Special Form (HO 00 03 05 11), at 19 (2010). Individual insurers may craft their own communicable disease exclusions. For example:

> We do not cover bodily injury, property damage or personal injury which is caused by or arises out of any insured transmitting a communicable sickness or disease, including by way of example but not limited to sexually transmitted sickness or disease. This exclusion applies whether the act of transmitting the sickness or disease was consensual or non-consensual or voluntary or involuntary, or whether the insured knew he or she was infected with or bore the sickness or disease or the communicability thereof.

Farmers Ins. Exch., Farmers Next Generation Homeowners Insurance Policy 56-5537, at 41 (2d ed. 2008), *available at* https://insurance.mo.gov/consumers/home/documents (last visited Dec. 30, 2020).

17. *See*, *e.g.*, Am. Fam. Mut. Ins. Co., Missouri Homeowners Policy Special Form 3, HO-3 (MO), at 11 (1994), *available at* https://insurance.mo.gov/consumers/home/documents ("We will not cover bodily injury arising out of the actual or alleged transmission of a communicable disease.") (last visited Dec. 29, 2020).

18. Ins. Servs. Office, Inc., Communicable Disease Exclusion (CG 21 32 05 09) (2008).

a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;
b. Testing for a communicable disease;
c. Failure to prevent the spread of a disease; or
d. Failure to report the disease to authorities.

B. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage B – Personal and Advertising Injury Liability:

2. Exclusions

This is insurance does not apply to:

Communicable Disease

"Personal and advertising injury" arising out of the actual or alleged transmission of a communicable disease.

This exclusion applies even if the claims against any insured alleged negligence or other wrongdoing in the:

a. Supervising, hiring, employing, training or monitoring of others that may be infected with and spread a communicable disease;
b. Testing for a communicable disease;
c. Failure to prevent the spread of a disease; or
d. Failure to report the disease to authorities.[19]

Neither the standard homeowners policy nor the standard CGL endorsement define *communicable disease*. Some insurers have formulated their own definitions.[20] For example, one company's communicable disease endorsement intended for use with CGL policies states:

> "Communicable Disease(s)" means a contagious disease or illness arising out of or in any manner related to an infectious or biological virus or agent or its toxic products which is transmitted or spread, directly or indirectly, to a person from an infected person, plant, animal or anthropoid, or through the agency of an intermediate animal, host or vector of the inanimate environment or transmitted or spread by instrument or any other method of transmission. "Communicable Disease" shall include, but not be limited to Acquired Immune Deficiency Syndrome (AIDS) or Human Immunodeficiency Syndrome (HIV), Severe Acute Respiratory Syndrome (SARS), West Nile Disease, chicken pox, any type or strain of influenza (including, but not limited to avian flu), legionella, hepatitis, measles, meningitis, mononucleosis, whooping cough, cholera, bubonic plagues and anthrax.[21]

19. *Id.*

20. Daniel C. Eidsmoe & Pamela K. Edwards, *Sex, Lies, and Insurance Coverage? Insurance Carrier Coverage Defenses for Sexually Transmitted Disease Claims*, 34 Tort & Ins. L.J. 921, 927 (1999).

21. Colony Ins. Co., Exclusion—Communicable Disease U018-0713, *available at* https://www.colonyins.com/uwweb/forms/U018.pdf (last visited Dec. 26, 2020).

Communicable disease exclusions trace their origins to a 1985 Minnesota case.[22] There, Minneapolis lawyer Stewart Perry settled his client's claim against her former lover with the fellow's homeowners insurer, Prudential Property & Casualty Insurance Co., for the relatively paltry sum of $25,000.[23] The amount of the settlement was not newsworthy, but Perry's theory of liability and his argument for insurance coverage for his client's claim were.[24] In a nutshell, Perry's client alleged that her former lover had negligently infected her with genital herpes through voluntary sexual intercourse.[25] Upon accepting her case, Perry quickly focused on the man's homeowners policy as a source of recovery if he could establish liability.[26] In his demand letter to Prudential, Perry "was able to document . . . the merits of his client's liability case against [her former lover] by citing two cases in which juries had awarded judgments to women who had contracted herpes from their husbands."[27] From there, it was game on.

The insurance industry responded in concert to the threat of future sexually transmitted disease (STD) claims under homeowners policies by implementing the standard communicable disease exclusion.[28] In fact, insurers had little choice unless they wanted to insure such claims;[29] courts were generally rejecting their arguments against coverage for the allegedly negligent transmission of STDs in the absence of a specific policy exclusion.[30] As the *State Farm Fire & Casualty Co. v. Eddy*[31] court observed:

> State Farm argues that public policy should preclude indemnity for the results of voluntary sexual conduct because "individuals [should] shoulder the responsibility for such acts."

22. Eidsmore & K. Edwards, *supra* note 20, at 921–22.
23. *Id.* at 921.
24. *Id.*
25. *Id.* at 922.
26. *Id.*
27. *Id.* (footnote omitted).
28. *Id.* at 926–27.
29. Some individual insurers inserted STD exclusions in their policies. *Id.* at 923. Such exclusions persist today. For example, one insurer excludes coverage for:

> Bodily injury arising out of the transmission by any person of any disease or of any organisms or agents capable of causing such disease through:
> (1) personal physical contact of any person with any other person; or
> (2) the transmission of any person's bodily fluids to any other person.

Auto Club Fam. Ins. Co., Premier Homeowners Policy, Form 5103, at 53 (2011) (emphasis omitted), *available at* https://insurance.mo.gov/consumers/home/documents (last visited Dec. 30, 2020).
30. Steven Plitt & Steven J. Gross, *Communicable and Transmission of Disease Exclusions*, 33 Ins. Litig. Rep. 217, 218 (2011).
31. State Farm Fire & Cas. Co. v. Eddy, 267 Cal. Rptr. 379 (Ct. App. 1990).

> Public policy recognizes the necessity to help prevent the spread of dangerous disease. . . . If State Farm wishes to exclude from coverage the results of voluntary sexual conduct, it may do so. An insurance company can adjust and rewrite its policies to create more specific terms and exclusions. State Farm could specifically exclude coverage to policy holders for the transmission of sexual diseases.[32]

A Wisconsin court similarly observed that "[i]f an insurance company does not want to provide coverage for the negligent transmission of sexually transmitted diseases, it can preclude coverage by inserting a specific exclusion in the policy."[33]

Of course, there are many communicable diseases other than STDs. Accordingly, the communicable disease exclusion in standard homeowners policies was broadly drafted to foreclose claims arising out of insureds' transmission of those other diseases, whatever they might be. Similarly, the communicable disease exclusionary endorsement for CGL policies was created not principally in response to STD claims, but rather to address claims arising out of the full range of communicable diseases that might expose commercial insureds to liability.[34]

Reported cases involving communicable disease exclusions are rare. The reasons for their scarcity are uncertain. It may be that the exclusionary language is generally regarded by lawyers and courts alike to be unambiguous, such that it discourages related claims; insurers are settling related claims either because they do not want to test their exclusions in court or because the strength of the language enables them to settle claims for less than the cost of defense or the expense of associated coverage litigation; or the potentially embarrassing nature of many communicable disease claims discourages insureds or plaintiffs from litigating coverage. In any event, the COVID-19 pandemic has shed new light on communicable disease exclusions' existence and effect. This article examines communicable disease exclusions and two key related issues in that light.

32. *Id.* at 386 (citation omitted).

33. Loveridge v. Chartier, 468 N.W.2d 146, 158 (Wis. 1991); *see also* N. Star Mut. Ins. Co. v. R.W., 431 N.W.2d 138, 143 (Minn. Ct. App. 1988) ("An insurance company can adjust and rewrite its policies to create more specific terms and exclusions. North Star could specifically exclude coverage . . . for the transmission of sexual diseases.").

34. *See, e.g.*, Melody Olson, *The Return of the Communicable Disease Exclusion*, Parker Smith & Feek, Inc. (Oct. 5, 2020), https://www.psfinc.com/wp-content/uploads/psfinc/2020/10/PSF_The-Return-of-the-Communicable-Disease-Exclusion.pdf ("Form CG2132 (05/09), communicable disease exclusion is an overt removal of general liability coverage for the transmission of communicable disease. Originally the exclusion was created by ISO . . . in response to diseases such as the avian flu, SARS, and those caused by rotaviruses.").

II. THE "OCCURRENCE" AND "BODILY INJURY" REQUIREMENTS IN LIABILITY INSURANCE POLICIES

Before exploring the law around communicable disease exclusions in liability insurance policies, it is first necessary to discuss two coverage prerequisites: the existence of an "occurrence" and "bodily injury" to a third party.

A. *The "Occurrence" Requirement*

For there to be liability coverage under a standard homeowners insurance policy, there must be an "occurrence."[35] A standard homeowners policy defines *occurrence* as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in . . . '[b]odily injury'; or . . . '[p]roperty damage.'"[36] Standard CGL policies also require an "occurrence" for coverage where a claimant alleges bodily injury,[37] and similarly define the term: "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[38]

Where coverage is disputed, it is the insured's initial burden to establish that the claim falls within coverage.[39] Thus, in the liability insurance context, an insured must at the outset establish the existence of an "occurrence."[40] Plus, as a matter of insurance policy interpretation, the insured must establish the existence of an "occurrence" for the burden to shift to the insurer to prove that an exclusion bars the insured's claim.[41]

The key for courts, insurers, and lawyers attempting to determine whether an act or event constitutes an "occurrence" is determining whether there was an "accident."[42] Whether an act or event can be characterized

35. Ins. Servs. Office, Inc., Homeowners 3 – Special Form (HO 00 03 05 11), at 17 (2010).

36. *Id.* at 2.

37. Ins. Servs. Office, Inc., Commercial General Liability Form (CG 00 01 04 13), at 1 (2012).

38. *Id.* at 15.

39. Rocky Mountain Prestress, LLC v. Liberty Mut. Fire Ins. Co., 960 F.3d 1255, 1260 (10th Cir. 2020) (applying Colorado law); Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co., 964 F.3d 804, 810 (9th Cir. 2020) (applying Nevada law); Womack v. Mar Jay Prods., L.L.C., 298 So. 3d 745, 750 (La. Ct. App. 2020); Am. Fam. Mut. Ins. Co. v. Sharon, 596 S.W.3d 135, 143 (Mo. Ct. App. 2020); Gage Cnty. v. Emp'rs Mut. Cas. Co., 937 N.W.2d 863, 870 (Neb. 2020); McIntosh v. Ronit Realty, LLC, 121 N.Y.S.3d 88, 90 (App. Div. 2020); Wright v. Turner, 466 P.3d 682, 686 (Or. Ct. App. 2020).

40. Ins. Co. of the State of Pa. v. Am. Safety Indem. Co., 244 Cal. Rptr. 3d 310, 325 (Ct. App. 2019) (quoting Aydin Corp. v. First State Ins. Co., 959 P.2d 1213, 1215 (Cal. 1998)); Lewellen v. Universal Underwriters Ins. Co., 574 S.W.3d 251, 261 (Mo. Ct. App. 2019).

41. *Rocky Mountain Prestress*, 960 F.3d at 1260; *Zurich Am. Ins. Co.*, 964 F.3d at 810; Sherrod v. Esurance Ins. Servs., Inc., 65 N.E.3d 471, 476 (Ill. App. Ct. 2016); Messina v. Shelter Ins. Co., 585 S.W.3d 839, 843 (Mo. Ct. App. 2019); *Gage Cnty.*, 937 N.W.2d at 870; StarNet Ins. Co. v. RiceTec, Inc., 586 S.W.3d 434, 444 (Tex. App. 2019).

42. *See* Amica Mut. Ins. Co. v. Mutrie, 105 A.3d 595, 598 (N.H. 2014) ("Unless the alleged injury is the result of an accident, there is no "occurrence," and the [p]olicies do not provide coverage.").

as an "accident" is a question of fact.[43] Most courts determining the existence of an "accident" and therefore an "occurrence" examine the situation from the insured's viewpoint.[44] As a rule, "[a]n insured's deliberate actions may constitute an accident if some additional, unexpected, unforeseen, and unintended event produces the damage."[45]

In most cases, an insured's transmission of a communicable disease will likely be held to constitute an "occurrence." That would certainly seem to be the predicted result where an infected person is asymptomatic and accordingly does not know she has a communicable disease. It might also be the case where a person either knows or should know that he has a disease but is unaware that he is contagious. *Milbank Insurance Co. v. B.L.G.*[46] is illustrative.

In that case, M.M.D. sued B.L.G. for infecting her with genital herpes.[47] Before beginning his sexual relationship with M.M.D., B.L.G. had seen his doctor because he was worried about recurring genital sores that a different doctor had previously treated with antibiotics.[48] At the time, B.L.G. had no active ulcers, and the doctor advised him that a herpes culture would be unrevealing in the absence of active ulcers.[49] The doctor told him to return if he developed an active ulcer.[50] One month later, B.L.G. and M.M.D. began their sexual relationship, but B.L.G. did not tell M.M.D. of his concern that he might have herpes.[51] Fate being what it is, he did have the incurable disease, and he infected her with it.[52]

M.M.D. won a $38,300 judgment against B.L.G. for negligently failing to warn her that he had genital herpes before they began their sexual

43. Graphic Arts Mut. Ins. Co. v. Pine Bush Cent. Sch. Dist., 73 N.Y.S.3d 241, 245 (App. Div. 2018).

44. *See*, *e.g.*, C.P. *ex rel.* M.L. v. Allstate Ins. Co., 996 P.2d 1216, 1223 (Alaska 2000); USAA Cas. Ins. Co. v. Carr, 225 A.3d 357, 362 (Del. 2020); Haw. Holiday Macadamia Nut Co. v. Indus. Indem. Co., 872 P.2d 230, 234 (Haw. 1994); Ill. Farmers Ins. Co. v. Kure, 846 N.E.2d 644, 650 (Ill. App. Ct. 2006); Nat'l Sur. Corp. v. Westlake Inv., LLC, 880 N.W.2d 724, 736 (Iowa 2016); Allstate Ins. Co. v. McCarn, 645 N.W.2d 20, 23 (Mich. 2002); State Farm Mut. Auto. Ins. Co. v. Langan, 947 N.E.2d 124, 127 (N.Y. 2011); Erie Ins. Exch. v. Builders Mut. Ins. Co., 742 S.E.2d 803, 810 (N.C. Ct. App. 2013); Thomson v. OHIC Ins. Co., 780 N.E.2d 1082, 1086 (Ohio Ct. App. 2002); Donegal Mut. Ins. Co. v. Baumhammers, 938 A.2d 286, 293 (Pa. 2007); Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 308 (Tenn. 2007); King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 188 (Tex. 2002); N.M. *ex rel.* Caleb v. Daniel E., 175 P.3d 566, 570 (Utah 2008); State *ex rel.* Nationwide Mut. Ins. Co. v. Wilson, 778 S.E.2d 677, 683 (W. Va. 2015) (quoting Columbia Cas. Co. v. Westfield Ins. Co., 617 S.E.2d 797, 801 (W. Va. 2005)); Schinner v. Gundrum, 833 N.W.2d 685, 696 (Wis. 2013).

45. Robert H. Jerry, II & Douglas R. Richmond, Understanding Insurance Law 436 (6th ed. 2018) (footnote omitted).

46. Milbank Ins. Co. v. B.L.G., 484 N.W.2d 52 (Minn. Ct. App. 1992).

47. *Id.* at 54.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 54–55.

52. *Id.* at 55.

relationship.[53] In holding for M.M.D., the trial court found that B.L.G. knew or should have known that he was infected with the herpes virus before he became intimate with M.M.D.[54] After the judgment was entered, Milbank Insurance Co., B.L.G.'s homeowners insurer, filed a declaratory judgment action to determine whether it was obligated to indemnify B.L.G.[55] The parties filed cross-motions for summary judgment, and B.L.G. prevailed. Milbank appealed to the Minnesota Court of Appeals.

One of the issues on appeal was whether B.L.G.'s transmission of herpes to M.M.D. was an "occurrence."[56] Milbank contended that an "occurrence" required an "accident," which Minnesota law defined "as 'an unexpected, unforeseen, or undesigned happening.'"[57] Based on that definition, Milbank argued that if an injury was foreseeable, it could not be an "accident."[58] Milbank further argued that the trial court's finding in the underlying case that B.L.G. knew or should have known that he had herpes compelled the conclusion that B.L.G. was highly certain he would infect M.M.D.[59] In other words, B.L.G.'s infection of M.M.D. with herpes was foreseeable and consequently could not be considered an "accident" or by extension an "occurrence."[60]

The *Milbank* court was not persuaded. "It [was] settled law in Minnesota that 'foreseeable' does not mean 'expected.'"[61] Minnesota law requires a high degree of certainty to find that an injury is expected, such that it cannot be considered accidental.[62] The court did not think that to be the situation here:

> We disagree with Milbank that the holding B.L.G. "should have known" he had herpes and could infect M.M.D. compels a finding B.L.G. had a high degree of certainty he would infect M.M.D. It does not necessarily follow that an actor did actually know what a reasonable person in the actor's position would conclude. Furthermore, a reasonable possibility that an actor is contagious does not compel the conclusion that it is highly certain a particular act of his will result in the infection of another.[63]

The court reasoned that the existing definition of *accident* on which Milbank relied did not exclude all foreseeable injuries.[64] The *Milbank* court

53. *Id.*
54. *Id.*
55. *Id.* at 56.
56. *Id.* at 58.
57. *Id.* (quoting N. Star Mut. Ins. Co. v. R.W., 431 N.W.2d 138, 140 (Minn. Ct. App. 1988)).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 57 (citing Cont'l W. Ins. Co. v. Toal, 244 N.W.2d 121, 125 (Minn. 1976)).
62. *Id.* (citing Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 720 (8th Cir. 1981)).
63. *Id.* at 58.
64. *Id.*

adopted the view that the term "accident"—at least as used in liability insurance policies—"'includes all negligently caused injury, provided such injury was not intentional.'"[65] Or, as the Minnesota Supreme Court subsequently clarified in an unrelated case, "where there is no intent to injure, the incident is an accident, even if the conduct itself was intentional."[66]

There may be cases where an insured's transmission of a communicable disease does not constitute an "occurrence." Because the existence of an "occurrence" is a fact-specific inquiry, however, it is difficult to predict all the circumstances that might support such a determination. *Travelers Commercial Insurance Co. v. Ancona*[67] shows how, on the right facts, a court might reason that an insured's transmission of a communicable disease was not accidental.

In *Ancona*, Jeffrey Williams and Jennifer Ancona were in a romantic relationship when Williams asked Ancona to have unprotected sex with him. Before agreeing, Ancona insisted that Williams get tested for STDs; he represented that he did so and received a clean bill of health. The couple then began having unprotected sex. Subsequently, Williams began secretly having unprotected sex with other women, which exposed Ancona to the risk of contracting hepatitis, HIV, and other diseases.[68] Indeed, Ancona soon discovered that she was infected with herpes and the human papillomavirus.[69] She sued Williams on various theories. Travelers, which insured Williams, declined to defend the lawsuit. Ancona won a $863,000 judgment against Williams, and Travelers then filed a declaratory judgment action seeking a determination that it had no duty to defend or indemnify him.[70]

In a familiar scenario, the Travelers policy's definition of *occurrence* pivoted on an "accident."[71] Under California law, "accident," as the term is used in liability insurance policies, means "'an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause.'"[72] Additionally under California law, "an 'accident' refers 'to the nature of the insured's conduct, not his state of mind.'"[73]

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65. *Id.* (quoting Bituminous Cas. Corp. v. Bartlett, 240 N.W.2d 310, 313 n.5 (Minn. 1976), *overruled on other grounds by* Prahm v. Rupp Constr. Co., 277 N.W.2d 389, 391 (Minn. 1979)).
66. Am. Fam. Ins. Co. v. Walser, 628 N.W.2d 605, 612 (Minn. 2001).
67. Travelers Com. Ins. Co. v. Ancona, No. 14-cv-04379-RS, 2015 WL 13376709 (N.D. Cal. Apr. 6, 2015).
68. *Id.* at *2.
69. *Id.* at *1.
70. *Id.* at *2.
71. *Id.* at *4.
72. *Id.* (quoting Delgado v. Interins. Exch. of the Auto. Club of S. Cal., 211 P.3d 1083, 1096 (Cal. 2009)).
73. *Id.* (quoting Collin v. Am. Empire Ins. Co., 26 Cal. Rptr. 2d 391, 404 (Ct. App. 1994)) (footnote omitted).

From the *Ancona* court's perspective, "Williams' liability-producing conduct was decidedly not accidental."[74] Williams intentionally engaged in unprotected sex with multiple partners, deliberately had unprotected sex with Ancona during the same period, and intentionally concealed his risky infidelity from Ancona.[75] There simply was no "occurrence" on which to premise coverage.[76] After considering some additional issues, the court entered judgment on the pleadings for Travelers.[77]

With respect to COVID-19, what of the situation where a business did not enforce a mask mandate, or a restaurant did not socially distance guests or knowingly violated a curfew and customers allegedly became ill as a result? What if a homeowner hosted a party and did not require guests to wear masks, only to see some of the guests become ill thereafter? Would the customers' or partygoers' illnesses be caused by an "occurrence"? Regardless of the merit of any related tort claims, arguably analogous cases suggest little possibility of judicial consensus in such circumstances.

In *Liberty Mutual Insurance Co. v. Estate of Bobzien*,[78] for example, Michael Bobzien sued his father's estate on the theory that childhood exposure to his father's cigarette smoke caused him to develop lung disease and other illnesses.[79] The plaintiff's late father, Hugo Bobzien, had been a Liberty Mutual insured for several years. Liberty Mutual filed a declaratory judgment action to determine its defense and indemnity obligations, if any. The estate contended that Michael's disease and illnesses were an unintended result of Hugo's smoking habit and therefore were caused by an "accident" within the meaning of the Liberty Mutual policies.[80] The district court held for Liberty Mutual in part because Michael had not alleged the existence of an "accident."[81] The Sixth Circuit affirmed the district court without meaningful explanation.[82] As a concurring judge articulated the court's reasoning, however, "Michael Bobzien failed to allege an accident because his father intended to smoke in front of him, and smoking was not a chance event beyond his father's control."[83] Is *Estate of Bobzien* materially different from a case where a homeowner knowingly fails to take precautions against exposing friends to COVID-19, or a business deliberately flouts a curfew or does not enforce mask or social distancing requirements and customers are sickened as a result?

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74. *Id.*
75. *Id.*
76. *Id.* at *4–6.
77. *Id.* at *7.
78. Liberty Mut. Ins. Co. v. Estate of Bobzien, 798 F. App'x 930 (6th Cir. 2020).
79. *Id.* at 930.
80. *Id.* at 931.
81. *Id.*
82. *Id.*
83. *Id.* (Nalbandian, C.J., concurring).

On the other hand, consider the holding in *Campanella v. Northern Properties Group, LLC*.[84] In that case, Matthew Campanella rented a house from Northern Properties that—unbeknownst to him—was rife with chicken feces.[85] Campanella claimed that he contracted histoplasmosis because Northern Properties negligently failed to clean and maintain the house.[86] Histoplasmosis is an infection caused by a fungus commonly found in soil that contains voluminous bird or bat droppings.[87] People can get histoplasmosis by inhaling the microscopic fungal spores that are present in the air.[88]

Northern Properties' liability insurer, Auto-Owners Insurance Co., intervened in Campanella's lawsuit to determine its duties to Northern Properties. The parties disputed whether Campanella's histoplasmosis was caused by an "occurrence."[89] Auto-Owners contended that Campanella's acquisition of histoplasmosis was no accident and insisted that "it [was] difficult to imagine any scenario in which the accumulation of chicken feces in a residential dwelling to a 'toxic level' due to a failure to clean the premises would be accidental."[90] The *Campanella* court disagreed:

> Even if Northern Properties intentionally allowed a toxic build-up of chicken feces on the premises, Auto-Owners cannot point to any facts suggesting that any party foresaw Campanella contracting histoplasmosis. In fact, Auto-Owners admits that "most people who breathe in the [histoplasma fungi] spores don't get sick." . . . In other words, Campanella contracting histoplasmosis was unexpected and unforeseen—an "accident" as [the states involved] have defined it. Because Campanella's histoplasmosis was an accident, it qualifies as an occurrence under the policy.[91]

Any hope of coverage that Northern Properties or Campanella might have had was soon dashed, however, because the Auto-Owners policy contained an unambiguous fungi exclusion.[92] The court applied the fungi exclusion and awarded Auto-Owners summary judgment.[93] Given the court's "occurrence" finding, *Campanella* illustrates the value to insurers of clear communicable disease exclusions in their policies.

84. Campanella v. N. Props. Group, LLC, No. 19-cv-171 (JNE/LIB), 2020 WL 979888 (D. Minn. Feb. 28, 2020).
85. *Id.* at *1.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at *2.
90. *Id.* at *3.
91. *Id.*
92. *Id.* at *3–4.
93. *Id.* at *4.

B. *The "Bodily Injury" Requirement*

Next, for there to be liability coverage in the communicable disease context, an "occurrence" must cause a claimant "bodily injury."[94] A standard CGL policy defines *bodily injury* as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."[95] A standard homeowners policy defines *bodily injury* similarly: "'Bodily injury' means bodily harm, sickness or disease, including required care, loss of services and death that results."[96]

A person who contracts a communicable disease and becomes symptomatic suffers "bodily injury" as that term is defined in a standard liability insurance policy; the inclusion of the terms "disease" and "sickness" in the definition compel that conclusion. If a person contracts a communicable disease but experiences no symptoms, whether the person has sustained "bodily injury" is a harder question. If the disease causes some physiological harm or damage, a court likely will conclude that the person has suffered "bodily injury" despite the lack of obvious effects.[97] Mere exposure to someone who has a communicable disease and thus to the disease itself, however, should not be considered "bodily injury."[98]

In considering whether contracting a communicable disease constitutes "bodily injury," it is important to acknowledge that some insurers have defined *bodily injury* in their policies to preclude communicable disease coverage rather than employing an exclusion. For example, one leading insurer's homeowners policy states that "bodily injury" does not include "any of the following which are communicable: disease, bacteria, parasite, virus, or other organism, any of which are transmitted by any insured to any other person."[99] In the next paragraph, the policy further provides that "bodily injury" does not include "the exposure to any such disease, bacteria, parasite, virus, or other organism by any insured to any other person."[100]

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94. Ins. Servs. Office, Inc., Commercial General Liability Form (CG 00 01 04 13), at 1 (2012); Ins. Servs. Office, Inc., Homeowners 3–Special Form (HO 00 03 05 11), at 17 (2010).

95. Ins. Servs. Office, Inc., Commercial General Liability Form (CG 00 01 04 13), at 13 (2012).

96. Ins. Servs. Office, Inc., Homeowners 3–Special Form (HO 00 03 05 11), at 1 (2010).

97. *See, e.g.*, Klein v. Fed. Ins. Co., 220 F. Supp. 3d 747, 763–64 (N.D. Tex. 2016) (concluding that "bodily injury" for liability insurance purposes includes injury to a person at the cellular level).

98. *See, e.g.*, Transamerica Ins. Co. v. Doe, 840 P.2d 288, 290–91 (Ariz. Ct. App. 1992) (concluding that two people who aided injured accident victims and were thus exposed to one of the victims' HIV-infected blood but who did not develop HIV, did not sustain "bodily injury" because they "suffered no physical injury, sickness, disease, or substantial pain as a direct result of exposure to the virus").

99. State Farm Fire & Cas. Co., State Farm Homeowners Policy FP-7955, at 1 (1992) (on file with the author).

100. *Id.*

Such language should preclude coverage for communicable disease claims just as effectively as an exclusion.[101]

A policy may define *bodily injury* to preclude coverage for communicable diseases and additionally include a communicable disease exclusion.[102] Although the definition of *bodily injury* in such a policy may in some courts' eyes render the communicable disease exclusion superfluous, the duplicative language does not make the policy ambiguous.[103] "Redundancy" and "ambiguity" are not synonyms.[104]

III. COMMUNICABLE DISEASE EXCLUSION CASE LAW

As noted earlier, there are few reported cases in which communicable disease exclusions have been at issue. In those cases, courts have inconsistently enforced the exclusions.

A. *Representative Cases Enforcing Communicable Disease Exclusions*

In *Plaza v. General Assurance Co.*,[105] a New York appellate court considered the application of a communicable disease exclusion to a Human Immunodeficiency Virus (HIV) transmission claim. The plaintiff in that case, Jose Plaza, sued the estate of his late companion, Scott Wisser, for Wisser's allegedly negligent, deliberate, and fraudulent conduct in infecting him with HIV.[106] Wisser's parents, as executors of their late son's estate, agreed to a $159,000 judgment and assigned Scott Wisser's rights against his homeowners insurer, General Assurance, to Plaza.[107] Plaza then sued General Assurance to recover the $159,000 stipulated judgment plus $175,000 in attorney's fees.[108] General Assurance moved for summary judgment based in part on the communicable disease exclusion in its policy.[109] The trial court granted the motion and Plaza appealed.

On appeal, Plaza argued that (1) the communicable disease exclusion did not apply because he had contracted a virus, not a disease; (2) HIV and

101. *See, e.g.*, Clarke v. State Farm Fla. Ins., 123 So. 3d 583, 584–85 (Fla. Dist. Ct. App. 2012) (denying coverage and specifically rejecting the insured's argument for coverage "for the resulting physical injuries caused by the disease—the symptoms," explaining that when "construing the policy, a 'disease' necessarily includes its symptoms").

102. *See, e.g.*, Lambi v. Am. Fam. Mut. Ins. Co., No. 4:11-CV-00906-DGK, 2012 WL 2049915, at *2 (W.D. Mo. June 6, 2012) (involving a homeowners insurance policy that defined *bodily injury* to preclude coverage for communicable diseases and which also contained a communicable disease exclusion).

103. *Id.* at *6.

104. *Id.* (quoting Lynch v. Shelter Mut. Ins. Co., 325 S.W.3d 531, 541 (Mo. Ct. App. 2010)).

105. Plaza v. Gen. Assurance Co., 664 N.Y.S.2d 444 (App. Div. 1997).

106. Plaza v. Est. of Wisser, 626 N.Y.S.2d 446, 449 (App. Div. 1995).

107. Eidsmoe & Edwards, *supra* note 20, at 928.

108. *Id.*

109. *Id.* at 928–29.

AIDS did not fall within the communicable disease exclusion because New York's Public Health Law did not list HIV and AIDS as communicable diseases for public health reporting and response purposes; and (3) the communicable disease exclusion was ambiguous and overly broad.[110] The appellate court rejected Plaza's arguments as meritless.[111] As the court succinctly explained:

> The subject policy's exclusion of coverage for bodily injury arising out of the transmission of a "communicable disease" by an insured is neither ambiguous nor unduly broad, and thus [General Assurance] had no duty to defend and indemnify plaintiff's action for personal injuries sustained as a result of the transmission of the HIV infection to him by the insured. The fact that the Public Health Law excludes AIDS, HIV infection, and HIV disease from its list of communicable diseases is not to suggest that such diseases are noncommunicable. . . . The policy reasons for excluding AIDS and HIV from the lists of communicable and sexually transmissible diseases were fully discussed in [another] case . . . and it is clear that those reasons have nothing to do with the average person's common-sense understanding of the term "communicable disease". While it is true that the term "communicable disease" could include a communicable disease that is not transmitted by sexual contact, and, in fact, includes any disease that is communicable, that alone does not render the exclusion unduly broad, invalid or inapplicable herein.[112]

The *Plaza* court easily affirmed the trial court's grant of summary judgment to General Assurance.[113]

The plaintiffs in *Alexis v. Southwood Limited Partnership*[114] were residents in a New Orleans apartment complex owned by Southwood. In October 1997, "feces and bacterial contaminated objects" began backing up into the plaintiffs' apartments through their bathroom fixtures.[115] Southwood hired Tom's Sewer and Drainage Service (Tom's) to fix the problem. Tom's, in turn, hired a subcontractor to perform the necessary work. As part of the repair project, the subcontractor dug ditches around the complex in which sewage from the apartment buildings accumulated.[116] That unsanitary condition existed for the three months that it took the subcontractor to make the repairs.[117]

The plaintiffs subsequently sued Southwood, Tom's, and the subcontractor. They alleged in their petition that windblown contaminated soil, and contaminated air, water, and raw sewage exposed during the repair project

110. *Id.* at 929; Plitt & Gross, *supra* note 30, at 219.
111. Plaza v. Gen. Assur. Co., 664 N.Y.S.2d 444, 444 (App. Div. 1997).
112. *Id.*
113. *Id.*
114. Alexis v. Southwood Ltd. P'ship, 792 So. 2d 100 (La. Ct. App. 2001).
115. *Id.* at 101.
116. *Id.*
117. *Id.*

made them ill.[118] They also listed in their petition the numerous diseases that the raw sewage might have spawned.[119]

Tom's was insured by First Financial Insurance Co. The First Financial policy contained a communicable disease exclusion that stated: "'This insurance does not apply to 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' arising out of the transmission of or alleged transmission of any communicable disease.'"[120] First Financial argued that the communicable disease exclusion foreclosed coverage under its policy.[121] The trial court agreed and awarded First Financial summary judgment. In a skeletal opinion, the *Alexis* court stated that after reviewing the communicable disease exclusion, "it [was] clear that the intent of the parties to the contract was to exclude such coverage as alleged in [the] [p]laintiffs' petition."[122] The *Alexis* court therefore affirmed summary judgment for First Financial.

Fe-Ma Enterprises v. James River Insurance Co.[123] arose out of Fe-Ma Enterprises' (Fe-Ma) operation of a rat-infested supermarket. The rats on Fe-Ma's property were infected with Typhus Murine C,[124] which was then transmitted to Fe-Ma's neighbors.[125] When some typhus-infected neighbors sued Fe-Ma, the company sought a defense from its insurer, James River. James River declined to defend Fe-Ma based on the communicable disease exclusion endorsed onto its CGL policy.[126] The exclusion stated:

This Policy does not apply to any claim or suits based on[,] or directly or indirectly arising out of[,] or resulting from:

1. Any form of communicable disease; or

* * *

5. Failure by an insured to perform services which were either intended to or assumed to prevent communicable diseases or their transmission to others.[127]

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118. *Id.*

119. *Id.* at 102.

120. *Id.* (quoting the First Financial policy).

121. *Id.*

122. *Id.*

123. Fe-Ma Enters. v. James River Ins. Co., No. M-08-373, 2009 WL 10693571 (S.D. Tex. Nov. 30, 2009).

124. Murine typhus, also known as flea-borne typhus, is a disease that is spread to people through contact with infected fleas. Fleas become infected when they bite infected animals, such as rats. When the fleas then bite people, they deposit waste that can enter the bite wound or another wound and infect the person. People can also acquire the disease by breathing in infected flea waste or by rubbing the waste into their eyes. Murine typhus is not spread person-to-person. *Typhus Fevers*, Centers for Disease Control and Prevention (Oct. 3, 2019), https://www.cdc.gov/typhus/murine/index.html (last visited Dec. 30, 2020).

125. *Fe-Ma Enters.*, 2009 WL 10693571, at *3.

126. *Id.* at *1.

127. *Id.* at *3 (alterations in original).

Fe-Ma sued James River in a Texas federal court. Fe-Ma first argued that the communicable disease exclusion was ambiguous, but that argument went nowhere fast.[128] The court found that the exclusion was clear and unambiguous and therefore valid and enforceable.[129] The question then became whether the exclusion applied to the plaintiffs' claims in the underlying case.[130]

Fe-Ma argued that the exclusion did not apply to the underlying case because the case was "essentially about negligent garbage collection."[131] Apparently, the rats were attracted to Fe-Ma's property by the garbage that accumulated there. Unfortunately for Fe-Ma, the court did not see things the same way:

> [T]his is a case about Plaintiff's alleged failure to properly maintain its premises to prevent an infestation of typhus-infected rodents. Plaintiff's alleged conduct would fall under the fifth term of the exclusion: "Failure by an insured to perform services . . . assumed to prevent communicable diseases or their transmission to others." Plaintiff's supermarket had the duty to comply with city ordinances and state codes regarding proper garbage collection and disposal. These regulations and statutes are undoubtedly focused on preventing health hazards like the one alleged in the underlying suit. Plaintiff cannot say that "picking up garbage is not 'intended to or assumed to prevent' communicable diseases." . . . If Plaintiff failed to properly collect and dispose of garbage, fostering an infestation of typhus-infected rodents and increasing the risk of infection, the communicable disease exclusion applies.[132]

Fe-Ma also argued that its failure to properly dispose of garbage was not the "but for" cause of the underlying plaintiffs' typhus infections, but that proximate cause argument did it no good.[133] The inquiry for the *Fe-Ma Enterprises* court was "whether 'the claim would [ ] exist 'but for' conduct excluded by the policy;' if it would not, 'the insurer is not liable.'"[134] The court concluded that the underlying plaintiffs' claims would not exist "but for" Fe-Ma's conduct, such that the fifth paragraph of the communicable disease exclusion applied to the underlying case.[135]

Finally, and perhaps most fundamentally, the plaintiffs' claims in the underlying case were based on a form of communicable disease, namely

128. *Id.* at *2.
129. *Id.*
130. *Id.* at *3.
131. *Id.*
132. *Id.* (footnotes omitted).
133. *Id.* at *4.
134. *Id.* (quoting Nat'l Union Fire Ins. Co. v. U.S. Liquids Inc., 271 F. Supp. 2d 926, 933 (S.D. Tex. 2003)) (alterations in original).
135. *Id.*

typhus.[136] As a result, the first paragraph of the communicable disease exclusion clearly barred coverage for the lawsuit.[137]

In conclusion, the *Fe-Ma Enterprises* court found that the communicable disease exclusion in the James River policy applied to all the facts in the underlying case.[138] The court therefore held that James River had no duty to defend or indemnify Fe-Ma and awarded the insurer summary judgment.[139]

B. *Cases Declining to Enforce a Communicable Disease Exclusion*

Now to those cases on the policyholder side of the coverage coin. *Colony Insurance Co. v. Nicholson (Colony II)*[140] arose out of Cindy Nicholson's visit to the Fancy Nails nail salon in South Florida where she allegedly contracted a serious bacterial infection after the manicurist nicked her right little finger.[141] Fancy Nails was insured under a CGL policy issued by Colony that included both a communicable disease exclusion and a fungi or bacteria exclusion. The communicable disease exclusion stated that there was "no coverage for injury or damage arising from 'the transmission of a communicable disease' or 'failure to perform services which were either intended to or assumed to prevent communicable diseases or their transmission to others.'"[142] The policy defined *communicable disease* as:

> [A] contagious disease or illness arising out of or in any manner related to an infectious or biological virus or agent or its toxic products which is transmitted or spread, directly or indirectly, to a person from an infected person, plant, animal or anthropoid, or through the agency of an intermediate animal, host or vector of the inanimate environment or transmitted or spread by instrument or any other method of transmission.[143]

The fungi or bacteria exclusion provided that there was no coverage for injury or damage

> which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. Colony Ins. Co. v. Nicholson (*Colony II)*, No. 10-60042-CIV, 2010 WL 3522138 (S.D. Fla. Sept. 8, 2010).
141. Colony Ins. Co. v. Nicholson (*Colony I*), No. 10-60042-CIV, 2010 WL 2844802, at *3 (S.D. Fla. July 19, 2010).
142. *Id.* at *1.
143. *Id.*

> or product contributed concurrently or in any sequence to such injury or damage.[144]

The court held that the fungi or bacteria exclusion did not apply because it was possible that Nicholson contracted her bacterial infection after she left the nail salon, having been exposed to that risk through the cut on her finger.[145] The fungi or bacteria exclusion, of course, was limited to contact with bacteria within the salon. The court did not think the communicable disease exclusion was relevant to its coverage inquiry because the exclusion's definition of a "communicable disease—a 'contagious disease or illness arising out of or in any manner related to an infectious or biological virus or agent'—appear[ed] to exclude bacterial infections, particularly when read in light of a separate [e]xclusion applying to bacteria and fungi (but not viruses)."[146]

Colony sought reconsideration of the court's order.[147] Colony argued that the court was wrong to discount the communicable disease exclusion. Colony contended that the exclusion applied to bacterial infections such as Nicholson's because:

> (1) [The term] "infectious . . . agent" [as defined in the exclusion] [was] broad enough to include bacteria, and (2) a number of the diseases listed within the Communicable Disease Exclusion—such as Legionella, Whooping Cough, Cholera, Bubonic Plagues and Anthrax—[were] bacterial. Unlike the Fungi or Bacteria Exclusion, the Communicable Disease Exclusion [was] not geographically or temporally limited, and its application could exclude coverage for the kind of injury at issue in this case regardless of when or where it occurred.[148]

The *Colony II* court rejected these arguments because Colony's interpretation of the communicable disease exclusion would swallow the bacteria portion of the fungi or bacteria exclusion.[149] The resulting overlap would confuse insureds and run afoul of controlling precedent holding that courts should give meaning to all portions of a policy to avoid surplusage.[150] Additionally, in interpreting an insurance policy, a court should assume the perspective of a reasonable layperson.[151] The *Colony II* court reasoned that if "a provision specifically referencing 'Bacteria' only exclude[d] coverage for injury arising from bacteria contained within the salon, a reasonable

144. *Id.*
145. *Id.* at *3.
146. *Id.* n.1.
147. Colony Ins. Co. v. Nicholson (*Colony II*), No. 10-60042-CIV, 2010 WL 3522138, at *1 (S.D. Fla. Sept. 8, 2010).
148. *Id.* at *2.
149. *Id.* at *3.
150. *Id.*
151. *Id.*

layperson [would] likely . . . conclude that the policy does indeed provide coverage for injury arising from bacteria contained without."[152] The *Colony II* court further reasoned that its conclusion respected the established principle that courts should construe exclusions narrowly.[153] The court thus denied Colony's motion for reconsideration.

Colony II is not a compelling opinion. First, as the court acknowledged, other courts have held "that multiple clauses can legitimately 'exclude separate, but potentially overlapping types of conduct,' in light of an insurer's incentive, 'given strict rules of construction against a drafter, . . . to draft overlapping and redundant clauses which exclude coverage for the same conduct.'"[154] Second, the communicable disease exclusion did not completely subsume the bacteria and fungi exclusion as the court claimed; rather, it subsumed it only to the extent a claimant was exposed to or contacted bacteria inside the nail salon. Third, with respect to the court's belief that a layperson would conclude based on the bacteria and fungi exclusion's limitation to injury arising from bacteria contained within the salon that the policy covered "injury arising from bacteria contained without,"[155] that might be true only if the person did not also read the communicable disease exclusion. It is not reasonable to predict a person's understanding of an insurance policy based on only a partial reading.

In *Paternostro v. Choice Hotel International Services Corp.*,[156] several plaintiffs sued Choice as the franchisor of a Louisiana hotel after they were exposed to *Legionella* and *Pseudomonas aeruginosa*—the bacteria that cause Legionnaire's Disease—while attending a Rotary Club meeting at the hotel.[157] Multiple insurers were involved in the loss. Merchants National Insurance Co. (Merchants) was one of the primary insurers.[158] Merchants moved to dismiss the plaintiffs' claims based on the communicable disease exclusion in its policy. The Merchants policy excluded coverage "for any claim 'arising in whole or in part, directly or indirectly out of, or which is in any way related to any communicable disease.'"[159] Merchants cited the Centers for Disease Control and Prevention (CDC) and dictionary definitions of *communicable disease* to support of its argument that its exclusion applied to *Legionella* and *Pseudomonas aeruginosa* bacteria.[160]

152. *Id.*
153. *Id.*
154. *Id.* at *2 (quoting Const. State Ins. Co. v. Iso-Tex Inc., 61 F.3d 405, 408–09 (5th Cir. 1995)).
155. *Id.* at *3.
156. Paternostro v. Choice Hotel Int'l Servs. Corp., No. 13-0662, 2014 WL 6460844 (E.D. La. Nov. 17, 2014).
157. *Id.* at *1.
158. *Id.* at *2.
159. *Id.* at *5 (quoting the Merchants communicable disease exclusion in pertinent part).
160. *Id.*

Three parties responded by arguing that the communicable disease exclusion did not apply because *Legionella* and *Pseudomonas aeruginosa* are not communicable diseases.[161] They argued that communicable diseases require transmission from person to person, whereas Legionnaires Disease is not spread from person to person, but rather by *Legionella* and *Pseudomonas aeruginosa*.[162] In other words, the parties disputed "whether a communicable disease must be transmitted from a person, or whether it can be transmitted from an inanimate environment such as a hot tub, HVAC system, or air/water supply."[163]

The *Paternostro* court denied Merchants' motion to dismiss. The court reasoned that discovery might eventually reveal that *Legionella* and *Pseudomonas aeruginosa* were not communicable diseases.[164]

Paternostro is a puzzling decision. It seems that the court could have decided the communicable disease issue as a matter of law.[165] The interpretation of an insurance policy is uniformly considered a question of law.[166] Moreover, it is not clear what facts might establish whether a disease should or should not be considered communicable for insurance policy purposes. The possibility of competing definitions of *communicable disease* in dictionaries or medical literature would not have made the question for the court any less a question of law. Furthermore, assuming Louisiana law controlled the issue, the Louisiana Court of Appeals had previously held in *Alexis v. Southwood Limited Partnership*[167] that a communicable disease exclusion barred coverage where the diseases in question were allegedly

161. *Id.*

162. *Id.*

163. *Id.* at *16.

164. *Id.*

165. For example, the CDC defines *communicable disease* to mean "an illness caused by an infectious agent or its toxins that occurs through the direct or indirect transmission of the infectious agent or its products from an infected individual or via an animal, vector *or the inanimate environment* to a susceptible animal or human host." *Menu of Suggested Provisions for State Tuberculosis and Prevention Control Laws*, *Definitions for Consideration*, Centers for Disease Control and Prevention (Sept. 1, 2012), https://www.cdc.gov/tb/programs/laws/menu/definitions.htm (last visited Dec. 29, 2020) (emphasis added). To use another example, the North Carolina Department of Health and Human Services classifies Legionellosis, which includes Legionnaire's Disease, as a communicable disease. *Communicable Disease*, NCDHHS Epidemiology (Aug. 3, 2020), https://epi.dph.ncdhhs.gov/cd/diseases.html#L (last visited Dec. 29, 2020).

166. *See, e.g.*, McFarland v. Liberty Ins. Corp., 434 P.3d 215, 218 (Idaho 2018) ("Interpretation of an insurance contract is a question of law."); Catanzarite v. Safeco Ins. Co. of Ind., 144 N.E.3d 778, 783 (Ind. Ct. App. 2020) ("In Indiana, the interpretation of an insurance policy is a matter of law."); Jeansonne v. Ohio Sec. Ins. Co., 304 So. 3d 909, 915 (La. Ct. App. 2020) ("The interpretation of an insurance contract presents a question of law. . . ."); Kaiser v. Allstate Indem. Co., 949 N.W.2d 787, 792 (Neb. 2020) ("Interpretation of an insurance policy is a question of law." (footnote omitted)); Leicht Transfer & Storage Co. v. Pallet Cent. Enters., Inc., 928 N.W.2d 534, 537 (Wis. 2019) ("The interpretation of an insurance policy presents a question of law.").

167. Alexis v. Southwood Ltd. P'ship, 792 So. 2d 100 (La. Ct. App. 2001).

transmitted through contaminated air, soil, and water, as well as raw sewage; that is, transmitted other than through person-to-person contact.[168] In short, other courts ought not afford *Paternostro* persuasive value.

IV. CONCLUSION

Communicable disease exclusions in liability insurance policies have largely been overlooked or under-appreciated since their introduction. First applied in cases involving the transmission of STDs by individual insureds, they have much broader application, as courts have recognized. The COVID-19 pandemic that spread across the United States beginning in early 2020 has shed new light on communicable disease exclusions. Whether COVID-19 will spawn claims and thereafter reported decisions that test these exclusions remains unclear. It is clear, however, that COVID-19 will not be the last communicable disease with the potential to challenge our emergency preparedness.[169] Nor will it be the last new communicable disease with liability insurance implications.

168. *Id.* at 101.

169. *The Best Time to Prevent the Next Pandemic Is Now: Countries Join Voices for Better Emergency Preparedness*, World Health Org (Oct. 1, 2020), https://www.who.int/news/item/01-10-2020-the-best-time-to-prevent-the-next-pandemic-is-now-countries-join-voices-for-better-emergency-preparedness (asserting that "COVID-19 will not be the world's last health emergency") (last visited Dec. 29, 2020).

MENTAL STRESS CAUSING MENTAL DISABILITY UNDER WORKERS' COMPENSATION LAWS: A SHORT HISTORY, THE COMPETING ARGUMENTS, AND A 2021 INVENTORY

David B. Torrey and Donald T. DeCarlo***

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I. INTRODUCTION

The law of mental stress causing mental disability, and its compensability under workers' compensation (the law of the "mental-mentals"), has

been the subject of considerable study.[1] The topic is treated in encyclopedias published for lawyers, most famously in the multi-volume treatise originally authored by Arthur Larson, and now carefully updated on the subject.[2] And, when mental-mentals constituted a crisis area of workers' compensation, the academic law journals were full of pro and con analyses of whether coverage of such claims was proper and, if so, under what conditions.[3] Such analyses can still be found in the present day.[4]

This article examines anew this still controversial aspect of workers' compensation. It does so in a period when, after several decades during which many states withdrew or limited coverage, legislatures are enacting or considering presumption and other laws to ease the ability of first responders (police, fire, and emergency medical professionals) to secure coverage for mental injury and disability, particularly Post-Traumatic Stress Disorder (PTSD). The present day is also marked by a seeming parallel trend: at least some state courts are reading their traditional laws in the mental-mental area liberally, so as to award compensation to such traumatized workers.[5] Finally, this examination of laws is undertaken in the aftermath of successive Middle East wars, which generated an epidemic of mental illness and suicide among soldiers, a phenomenon which raised awareness about PTSD and which only now is being fully analyzed.[6]

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1. *See* Donald T. DeCarlo & Roger Thompson, Workers Compensation: The First Hundred Years 54–59 (2012); Donald T. DeCarlo & Martin Minkowitz, Workers Compensation Insurance Law & Practice: The Next Generation ch. 11 (1989); Donald T. DeCarlo & Deborah H. Gruenfeld, Stress in the American Workplace: Alternatives for the Working Wounded 1–37 (1989).

2. Arthur Larson, Workers' Compensation, ch. 56 & Digest to ch. 56 (updated through June 2019); *see also* 2 Modern Workers' Compensation, § 109:29 (2019); Eric M. Larson & Jean A. Talbot, *Recovery Under Workers' Compensation Statute for Emotional Injury or Disease Caused by Work-Connected Stress Without Physical Cause or Result*, 45 Causes of Action2d 341 (2010, with Oct. 2019 update).

3. *See*, *e.g.*, Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 Notre Dame L. Rev. 879 (1987) (decrying restrictions on coverage); Edward J. Mills, *Mental Stimulus Causing Mental Disability: Compensability Under the Pennsylvania Workers' Compensation Act*, 23 Duq. L. Rev. 375 (1985) (arguing for a restrictive law).

4. *See*, *e.g.*, Logan Burke, *Finding a Way out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 W. Va. L. Rev. 889 (2015).

5. *See*, *e.g.*, France v. Indus. Comm'n, 460 P.3d 1253 (Ariz. Ct. App. 2020) (court, reversing ALJ, awards benefits to deputy who was traumatized by shotgun-wielding madman and who thereafter developed PTSD), *vacated*, 2021 WL 800755 (Ariz. Mar. 2, 2021); Moran v. Illinois Workers' Comp'n Comm'n, 59 N.E.3d 934 (Ill. App. Ct. 2016) (court, reversing Industrial Commission, awards benefits to fire company supervisor who directed firefighters at site of deadly house fire); Payes v. WCAB (Pennsylvania State Police), 79 A.3d 543 (Pa. 2013) (court, reversing lower tribunal, awards benefits to state trooper who, on darkened interstate, struck and killed woman who was apparently trying to commit suicide-by-cop).

6. *See* David Kieran, Signature Wounds: The Untold Story of the Military's Mental Health Crisis (2019) (arguing that, even in wake of Vietnam War experiences, U.S. Army and military medicine were unreceptive to, and unprepared for, phenomenon of mental stress suffered by soldiers subjected to repeated, unexpected, and seemingly endless deployments overseas).

This article features tables in which the laws of the state and federal programs are identified and specifically referenced by statute and/or important case law. The first table is an unabridged recounting of the mental-mental laws;[7] the second identifies the special first responder laws which have been enacted, or which are being considered;[8] and the third details the statutory features of the first responder laws that have been enacted as of December 28, 2020.[9]

An introduction to the law in this area requires a definition of the term *mental-mental*. In these claims, the injured worker has experienced purely mental stress and thereafter sustains a purely mental disability. An example is the bank teller faced with deadlines and mandatory overtime, without additional pay, who develops depression, agoraphobia, and panic attacks and, as a result, is unable to work.[10] Notably, while this mental-mental terminology may sound like an insensitive reductionism of a serious malady (this writer would not use the phrase in the presence of a distressed worker), the term is used by courts in published decisions[11] and by legislatures in statutes,[12] and has taken hold universally.

More importantly, the mental-mental phrase, likely coined by Arthur Larson, is intended to set off such claims from two less controversial categories of mental injury. These are the "physical-mentals" and the "mental-physicals." A physical-mental is typified by the worker who sustains a violent trauma to the body and is physically injured, but who is left, in the aftermath, with anxiety and depression.[13] A mental-physical, meanwhile, is typified by a worker who develops stress at work (for example, an encounter with a menacing supervisor) and who, in the aftermath, is left with a physical injury (for example, a heart attack).[14] These types of injuries are universally held compensable as long as medical causation is established.[15]

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7. *See infra* App. 1.
8. *See infra* App. 2.
9. *See infra* App. 3.
10. These are the facts of the Pennsylvania case, *Williams v. WCAB (Phila. Nat'l Bank)*, 548 A.2d 1344 (Pa. Commw. Ct. 1988).
11. *See*, *e.g.*, City of Lower Burrell v. WCAB (Babinsack), 2020 WL 1190603 (Pa. Commw. Ct. 2020); Moran v. Ill. Workers' Comp. Comm'n, 59 N.E.3d 934 (Ill. App. Ct. 2016).
12. *See*, *e.g.*, W. Va. Code § 23-4-1f (precluding such claims from compensation, and providing, "It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter.").
13. Donovan v. WCAB (Academy Medical Realty), 739 A.2d 1156 (Pa. Commw. Ct. 1995) (worker, a janitor who cleaned dentist's office, and who twice sustained needle sticks from moving rubbish, requiring medical treatment, and who thereafter developed "dysthymic disorder or depression," had sustained a physical-mental injury).
14. Panyko v. WCAB (U.S. Airways), 888 A.2d 724 (Pa. 2005).
15. Larson, *supra* note 2, § 56.02[1]; § 56.03[1]. An exception is found in Montana, where the workers' compensation statute provides that mental-physicals are not compensable. Mont. Code Ann. § 39-71-119(3).

These three categories are crucial to the understanding of how mental injuries are treated by workers' compensation laws. With few exceptions, state laws place a *heightened burden* of causation ("abnormal working conditions" or the like) on the mental-mental cases, or even *preclude* them. In contrast, state laws freely accommodate the compensability of the physical-mentals and mental-physicals.

The subject of this article is the mental-mental cases but, as will be seen, on occasion lawyers and/or courts blur the distinction.[16] Fortunately for the legal analyst, most courts have created impressive bright lines between the categories.

An introduction also requires appreciation of two phenomena that have attended the recognition of mental-mental injuries, a recognition that in itself has only widely existed since the 1970s. First is the majority rule that, if a workers' compensation statute will not allow, as a matter of law, a claim for mental stress causing mental disability, then presumably a negligence suit against the employer by the worker (typically based on a theory of failure to provide a safe workplace) will be cognizable.[17] Second is the majority, if not universal, rule that a worker who has completely imagined his or her workplace stress will possess no cognizable claim[18]; as the Larson treatise correctly declares, claims based on misperceived stress, though originally recognized by a few courts, "have not fared well."[19]

With these introductory items in mind, this article first provides an historical account of how mental injuries have been addressed in workers' compensation laws. This article then sets forth the arguments, pro and con, with regard to compensability. Thereafter, this article, addressing the first of the tables, discusses the laws among the states on the subject of mental-mental injuries. In that discussion, a discrete examination of each jurisdiction's laws is necessarily not undertaken (the current Larson treatise "digest," which admirably undertakes this feat, runs to 275 pages), but the discussion sets forth key statutory features and details how lawyers and judges have approached and interpreted them. That discussion is followed by an analysis of the first responder PTSD laws, which constitutes the emerging development in this area. That analysis addresses the tables of the second and third appendices. This article concludes with

16. *See infra* Part IV(E).

17. *See*, *e.g.*, LaRose v. King County, 437 P.3d 701 (Wash. Ct. App. 2019) (tort case) (genuine issue of material fact existed with regard to whether plaintiff's injuries were reflective of gradual stress or, instead, a singular incident; if the former, no claim existed as a matter of law under the Washington Act for benefits, and hence plaintiff would be allowed her negligence suit).

18. *See*, *e.g.*, Camp v. Dade-Behring, 2005 WL 2249761, at *8 (Del. Super. Ct. 2005) (no recovery for mental-mental claimant when she "merely imagine[d] or subjectively conclude[d]" that work events were the source of her problems).

19. Larson, *supra* note 2, § 56.04[4].

recommendations for how mental-mental cases are best treated under workers' compensation laws.

II. A SHORT HISTORY OF THE MENTAL-MENTAL CLAIM

A. *The Emergence of Mental-Mental Claims*

The mental-mental injury, and the popularization of the three-part categorization to which it gave rise, are phenomena that had their genesis in the 1980s. The workers' compensation literature is unanimous on this point. Donald DeCarlo and Martin Minkowitz, writing in 1989, stated that, between 1980 and 1988, such claims more than doubled. Claims for mental disability "were nearly unheard of ten years ago and nonexistent in most states five years ago."[20] The Larson treatise, meanwhile, features an entire subsection addressing the "upsurge of stress claims" during this period.[21] In California, a state which experienced a litigation explosion in this realm, the number of stress injury claims rose from 1,282 in 1980 to 6,812 in 1986.[22]

The idea that the rise of mental-mentals is a 1980s phenomenon is well apparent. One only need examine the 1972 National Commission Report to see that the issue of mental-mental claims was not only a non-issue a decade before but an item that is completely unremarked upon. The Report—relevantly—calls for "broad coverage . . . of work-related injuries and diseases," but the mental-mental claims were not on the Commission's radar.[23]

In any event, the phenomenon, at the time, was treated as a crisis, because of vast potential workers' compensation liability on the part of employers and carriers.[24] Donald DeCarlo and Deborah Gruenfeld, writing in 1989, remarked that stress claims were typically twice as expensive as traditional claims, and "once the word gets out [about the compensability of mental-mentals] . . . , the workers compensation and insurance industries could face claims of unprecedented magnitude. . . ."[25]

20. DeCarlo & Minkowitz, *supra* note 1, at 283; *see also* Donald T. DeCarlo, C*ompensating Stress in the '80's*, 52 Ins. Couns. J. 681 (1985).

21. Larson, *supra* note 2, § 56.06[1].

22. California Work Injuries and Illnesses—1986 (Cal. Div. of Lab. Stat. & Rsch. 1986), cited in Joseph W. Little, Thomas A. Eaton & Gary R. Smith, Cases and Materials on Workers' Comp'n 297 (3d ed. 1993).

23. *See* Report of the National Comm'n on State Workmen's Comp'n Laws 15 (1972), https://workerscompresources.com. Commission Recommendation 2.12 was to abolish the accident requirement and cover all injuries, but mental injuries are not otherwise referenced.

24. DeCarlo & Gruenfeld, *supra* note 1, at 10–11; *see also* Janet C. deCarteret, *Occupational Stress Claims*, 42 AAOHN Journal 494 (Oct. 1994), https://journals.sagepub.com/doi/pdf/10.1177/216507999404201007.

25. DeCarlo & Gruenfeld, *supra* note 1, at 10.

As will be seen, a pattern of many courts liberally allowing such claims, even those based upon purely subjectively perceived stress, eventually gave rise, a decade or so later, to a striking "swinging of the pendulum." Legislatures (West Virginia, for example) and courts (Pennsylvania, for example) began to prohibit, or limit the compensability of, mental-mental claims. This rise and reaction are discussed below.

B. *A Retrospective: The Prior Thinking and Cases Before the 1970s*

It is first important to consider, however, that the issue of the purely mental stress-induced impairment and disability had long been recognized. What is now called a "conversion reaction," unfolding in the wake of injury, and causing psychosomatic symptoms,[26] is addressed in both workers' compensation treatises and occupational injury texts from well before World War II. These were called "traumatic neuroses" (a now-discarded term) and typically followed a physical injury.

C. *An Early View of the Law*

The treatise writer Arthur Honnold, writing in 1917, cites multiple cases from England and the U.S. states where a sudden *physical* injury was attended by a shock or fright, which in turn led to a conversion reaction (impairment or disability with no objective findings). The book endorses compensability of such cases—at least when authentic.

Under the Honnold rule, however, even a purely *mental* shock arising out of employment can be compensable. The lead example from the text is of a worker who develops "nervous shock, producing neurasthenia and incapacity, received by a workman while assisting [the rescue of] an injured fellow workman." He adds that the "possibility of witnessing some shocking injury to a fellow workman and receiving a nervous shock therefrom is a risk of any employment. Such nervous shock arises out of and is incidental to the employment, and is compensable if it definitely causes the injury . . . ."[27]

D. *An Early View of the Diagnosis*

Meanwhile, the occupational medicine expert Henry H. Kessler, MD, writing in 1932, devoted an entire subchapter to such "traumatic neuroses."[28] Like Honnold, he was aware of mental stress developing exclusively from

26. *See, e.g.*, Commonwealth, Dep't of Highways v. Lindon, 380 S.W.2d 247 (Ky. Ct. App. 1964) (claimant sustained injury but then developed a "psychoneurosis conversion hysteria" that was superimposed on a minor foot injury; worker became convinced that he had constant pain in his foot and leg and, as a result, was unable to work—ultimately, he was obliged to undergo a "sodium amytal" (truth serum) interview).

27. 1 Arthur B. Honnold, Honnold on Workmen's Compensation § 95, at 294 (1917).

28. Henry H. Kessler, Accidental Injuries: The Medico-Legal Aspects of Workmen's Comp'n and Pub. Liab. ch. 18 (1932).

shock, and he, too, included them with other traumatic neuroses. Notably, he had sympathy for authentic cases (though he termed the subjects' mental and/or physical make-up "below par"[29]) and was not averse to compensation for the unfortunate victims of such a disabling phenomenon. He notes, in this regard, a credible account of a worker moving a co-worker's dead body; though the worker himself was unharmed, the next day his hand was paralyzed.[30]

Kessler also identified what Larson, in an entire subchapter, terms *compensation neurosis*[31]—that is, a worker who has a *bona fide* injury but who, because of the promise, or receipt of, weekly workers' compensation, authentically believes himself to be continually physically or mentally afflicted. "The constitutional make-up" of such patients, Kessler further explained, "may be such as to predispose the injured to such a psychopathic condition, and in the very nature of the case the desire for compensation is awakened following trauma."[32] Kessler added, sarcastically, that many such patients recover after a settlement is reached, referring to such resolutions as the "gold treatment."[33] While such callous assertions may seem unsurprising for the day, a further editorial remark is jarring: "During the World War, hospitals were filled with patients suffering from apparent traumatic neuroses in a different setting, but no hospitals were needed for the prisoners of war who knew they were out of danger."[34]

While a few mental-mental cases can thus be found in the older literature, most mental disability and conversion cases involved a *physical* stimulus. These older cases are of interest, however, because one can perceive in the attitudes of pivotal writers such as Kessler that mental illness and claims based on the same were looked upon with suspicion. That suspicion, and a more general frustration that the true causation of mental problems is impossible to determine, endure to the present day and have shaped the law.

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29. *Id.* at 530.

30. Still, foreshadowing the current, ubiquitous concern about purely mental phenomena, Kessler urged fellow occupational medicine practitioners to watch for the common malingerer among those suffering from *bona fide* conversion reactions. *Id.* at 542 ("It is with those persons who have more or less combined real and unreal physical injury that the greatest difficulty arises. Here is the largest field for malingering, and the abilities of the examiner are taxed in making the differentiation.").

31. Larson, *supra* note 2, § 56.05.

32. Kessler, *supra* note 28, at 531.

33. *Id.* ("What is true today in this regard was true as long ago as 1894, when Ricolins spoke of the gold treatment which can be made of bank notes, referring to the causal relation between liability legislation and traumatic hysteria."). In the present day, some cynics refer to this phenomenon as the "Greenback Poultice."

34. *Id.*

A key admonition of Kessler, an icon of the prior thinking, also defines much *current* thinking: "To define the exact causation of the neuroses in general would be equivalent to solving the riddle of human behavior."[35]

E. *Traumatic Neuroses Cases Before the 1970s*

We know from the Honnold and Kessler treatises that at least some form of mental-mentals has long been appreciated in law and medicine. They were, however, invariably limited to a sudden fright or shock as the mental cause. Courts could award benefits in such situations because the sudden and unexpected nature of the event could be conceived of as the type of "accident" that workers' compensation was intended to compensate. (That term and concept endures in most states, though typically interpreted liberally.) Of course, the idea of awarding benefits for *gradual* stress would have been thought absurd.

Throughout the decades before the 1970s, courts in many cases continued to award benefits in fright or shock cases. These cases are significant as they typically justified their holdings by explaining, over employer resistance, that an injury or accidental injury cannot reasonably be limited to one's flesh and bones. Later courts were influenced by this logic. Four such cases, long characterized as landmarks, belong in this category.

In a 1944 Virginia case, a factory worker who suffered a mental shock from being surprised by an electric flash at a nearby machine developed an immediate traumatic neurosis. Her affliction, counterintuitively, was characterized by fainting at the sight of the worker who had originally *come to her aid*. True, claimant was not physically injured, but her disabling malady was held to be an injury under the Virginia Act. In this regard (as in many of these landmarks), all physicians confirmed causal connection. And, pivotally, "her incapacity was as effectual as if it had been caused by visible lesion."[36]

In a 1953 New Jersey case, meanwhile, a maintenance worker who suffered an emotional shock from a violently exploding boiler pipe, which incident resulted in the death of his supervisor, caused him to develop a "severe state of psychoneurosis." This disabling condition was held to be an injury under the New Jersey Act. The court declared, "There is nothing in the law to exclude from the import of this term such injuries as result from non-physical, that is, psychic, trauma."[37]

In 1954, the Florida Supreme Court considered such a case. There, a hospital typist, apparently shocked when lightning struck the hospital, developing

35. Kessler, *supra* note 28, at 530.

36. Burlington Mills Corp. v. Hagood, 13 S.E.2d 291, 294 (Va. 1944).

37. Simon v. R.H.H. Steel Laundry, 95 A.2d 446, 450 (N.J. Super. 1953), *aff'd without opinion*, 98 A.2d 604 (N.J. App. Div. 1954).

chest pain and other maladies, not objectively verifiable, was held to have sustained an injury. While the compensation judge had required a "visible injury," thus dismissing her case, that requirement was error. In this regard, the pivotal Florida term "trauma" was to be defined by consulting *Webster's*: "injury, wound, shock, or the resulting condition of neuroses." Reversing the trial judge, and awarding benefits, the court declared, "We find no definition which limits the word to a *visible* injury."[38]

In a 1955 Texas case, finally, the claimant was a skilled ironworker who, in a calamitous accident, observed his co-worker fall to his death in a scaffold collapse, nearly perishing himself during the event. He thereafter developed anxiety and depression, which disabled him from his job. The Texas Supreme Court determined that claimant had sustained a compensable injury, and this was so even though the statute read, as to the definition of injury, "damage or harm to the physical structure of the body."[39] As to this tension, the court remarked:

> The substance of all of the testimony shows agreement that plaintiff's body no longer functions properly. Now, can we say that, as a matter of law, even though a "physical structure" no longer functions properly, it has suffered no "harm"? What meaning can the word "harm" to the body have if not that, as a result of the event or condition in question, the body has ceased to function properly?[40]

With this thought in mind, the court stated, "Even though an accident may not produce an anatomical pathology, nevertheless if the workman does in fact become disabled as a result of that accident, the injury is compensable, although such disability may be the result of hysteria—and may be traceable to a mental condition and not a physical disorder."[41]

F. *Mental-Mentals: Rise and Reaction*

Mental-mental cases were known to the law for decades, but it was only in the 1980s that the great surge in filings occurred. At least three forces were seemingly at work. The first was liberalized court decisions in the 1970s and early 1980s that accommodated potential recovery. The second was the socio-cultural changes of the period that caused more and more individuals to perceive disabling stress at work. Third was the sociological phenomenon that, once a diagnosis is named, and identified as compensable, individuals, with the assistance of their physicians, are more likely to pursue claims based on the same.

38. Lyng v. Rao, 72 So. 2d 53, 56 (Fl. 1954).
39. Bailey v. Am. Gen. Ins. Co., 279 S.W.2d 315, 318 (Tex. 1955).
40. *Id.* at 318–19.
41. *Id.* at 319 (quoting Peavy v. Mansfield Hardwood Lumber Co., 40 So. 2d 505, 508 (La. Ct. App. 1949)).

1. Liberalized Legal Doctrine

At least three cases, all from influential courts, are well known for having hastened the rise of the mental-mental claim. It is with these three cases that the modern legal history of the mental-mental begins.

In the 1975 decision *Wolfe v. Sibley, Lindsay & Curr Co.*,[42] the New York Court of Appeals awarded benefits in a case with jarring facts. There, the claimant was a key assistant to the security chief of a large department store. The chief became highly stressed with work and developed a fear of failure. When he finally committed suicide by gunshot, in his office, claimant was the first to discover the body. She developed not some conversion reaction but, instead, an "acute depressive reaction." The appellate division turned down the claim, ruling that mental-mentals were not compensable as a matter of law. In its view, a physical stimulus was required.

The Court of Appeals, rejecting an explicit opening-of-the floodgates argument, and featuring a dissent, which warned of significant costs in allowing such claims, reversed. Recognizing the mental-mental cause of action, the court remarked, poetically, that there is "nothing talismanic about physical impact"[43] and held:

> We hold today that psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury. This determination is based on two considerations. First, as noted in the psychiatric testimony there is nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. The determinative factor is the particular vulnerability of an individual by virtue of his physical makeup. In a given situation one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case the result is the same—the individual is incapable of functioning properly because of an accident and should be compensated under the Workmen's Compensation Law.[44]

In the 1978 Massachusetts case, *In re Fitzgibbons*,[45] meanwhile, the Supreme Judicial Court recognized mental-mentals. It did so in a case where a corrections supervisor, who had dispatched a subordinate to an emergency, sustained a "psychotic depression," culminating in suicide, after the subordinate perished in the course of his task. As far as the Massachusetts court was concerned, "There is no valid distinction which would preclude mental or emotional stimulus caused by mental or emotional trauma from compensation."[46]

42. Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505 (1975).
43. *Id.* at 506.
44. *Id.*
45. *In re* Fitzgibbons, 373 N.E.2d 1174 (Mass. 1978).
46. *Id.* at 1177.

In the 1982 California case, *Albertson's Inc. v. WCAB (Bradley)*,[47] finally, a California court awarded benefits in a case where a supermarket cake decorator, who suffered from significant pre-employment emotional problems, suffered a nervous breakdown. The worker in that case accused her supervisor of a series of various harassments, and she eventually went off of work. During the proceedings, the credible lay and medical evidence was that claimant had in essence imagined the harassments. Yet, the same expert testimony certified that claimant was authentic in her *imaginings*. This fact was enough for the court to award benefits:

> The proper focus of inquiry, then, is not on how much stress should be felt by an employee in his work environment, based on a "normal" reaction to it, but how much stress is felt by an individual worker reacting uniquely to the work environment. His perception of the circumstances (e.g., crowded deadlines, mountains of paper, a too-fast assembly line) is what ultimately determines the amount of stress he feels.[48]

The court compared this approach to the Michigan "honest perception" rule, and it identified that state as one where the courts had created a similarly permissive standard.[49]

This case led Larson to remark, "It is difficult to overstate the breadth of coverage implied by the court's holding. Compensability was judged purely on claimant's subjective perception of work stress, not objective reality."[50] As discussed below, the legislature overthrew this rule (as did the Michigan legislature), but in the intervening decade California experienced an unequalled upsurge in claims, lawyer involvement, and fractious litigation.

2. Social Developments

A major theme of current literature is that life in the present day is afflicted with much more stress than prevailed in an earlier day, before the rise of the service-based economy, automation, globalization, and the astonishing advances in communications that largely fueled all three. Such stress can afflict an individual both at work and in one's personal life, a fact that complicates the mental-mental claims and guarantees that, in essence, each and every such claim is subject to denial and, typically, litigation.

One writer, asserting in 2000 that the Missouri workers' compensation law should more freely cover mental-mental claims, summarized common thinking about how social developments have caused more stress at work:

> America's shift from a manufacturing industry towards a more service-oriented industry has introduced workers to divergent task requirements,

47. Albertson's Inc. v. WCAB (Bradley), 182 Cal. Rptr. 304 (Ct. App. 1982).
48. *Id.* at 308.
49. *Id.* at 314–15 (citing Deziel v. Difco Lab'ys, Inc., 268 N.W.2d 1 (Mich. 1978)).
50. Larson, *supra* note 2, at § 56.06[1][a].

> atypical work environments, new technology, and an unfamiliar social setting. . . . Furthermore, the likelihood that an employee remains with the same company until retirement has decreased. Instead, employee stress levels have increased with the realization that one's job is in constant jeopardy because of "plant closings, technological obsolescence, mergers and acquisitions, the replacement of people with technology, and downsizing . . . . Moreover, the market's demand for increased productivity has resulted in additional work-related stress because of the need for new products and services to stay viable with competitors . . . ."[51]

Commentators who were experiencing the rise of mental-mental claims in real time also endeavored to identify the cause of the phenomenon. DeCarlo and Minkowitz (1989) identified economic conditions (which were poor in the United States during the 1980s), increased automation, employee surveillance via monitoring, and sexual harassment perceived by female workers.[52] Larson, meanwhile, observed, "In a world of computer cubicles and global competition, stress-related disability is . . . no longer a rare occurrence."[53]

DeCarlo and Gruenfeld, in *Stress in the American Workplace: Alternatives for the Working Wounded* (1989) dug deeper with their inquiry into why more and more Americans felt such stress in that era (which they referred to as a period of "plague") that workers' compensation claims were often the result. They identified the introduction of computers, increased workloads, time pressures, poor relationships with supervisors and co-workers, troublesome relationships with the public and other customers, noise pollution, and "densely-populated offices."

Meanwhile, citing a study by the National Council on Compensation Insurance (NCCI), DeCarlo and Gruenfeld also identified many white-collar workers developing anxiety over the "merger mania" of the day—and the plant closings and lay-offs that often attended that phenomenon. And, like Larson, DeCarlo and Gruenfeld identified the very nature of a service-based economy:

> In times when work involved physical output, overworked employees felt the wear and tear on their bodies. In today's world, the mental capacity of humans to absorb and digest information is being put to the test. As workloads and stressful conditions exceed our power to think, the damage is bound to be mental.[54]

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51. Natalie Riley, *Mental-Mental Claims—Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 Mo. L. Rev. 1023, 1024 n.6 (2000) (citing Amy S. Berry, *The Reality of Work-Related Stress: An Analysis of How Mental Disability Claims Should Be Handled Under the North Carolina Workers' Compensation Act*, 20 Campbell L. Rev. 321 (1998)).
52. DeCarlo & Minkowitz, *supra* note 1, at 280–82.
53. Larson, *supra* note 2, § 56.06[1].
54. DeCarlo & Gruenfeld, *supra* note 1, at 47.

The two authors, in their exhaustive inquiry, also identify a stressor that was certainly one of the times—many workers' often unfounded fear of contracting AIDS in the workplace.[55]

3. Social Factors and the Filing of Claims

If one accepts that the 1980s were a period when Americans felt an onslaught of stress in general, and at work, and were dealing with poor economic times, the question remains as to why the workers' compensation *claims* upsurge—and a resulting crisis in many jurisdictions—unfolded. Presumably, sufferers of such stress could have simply lived with the malady, had their providers submit treatment billings to group health insurance, filed for unemployment compensation, or simply absorbed the costs.

As submitted above, the advent of case law in many jurisdictions *allowing* mental-mental cases was critical. Lawyers will not file claims unless some reasonable prospect of recovery exists. This was the striking lesson of the Pennsylvania experience. When mental-mentals were first judicially recognized, a liberal rule encouraged a torrent of claims. After the pendulum swung back, with courts enforcing the restrictive "abnormal working conditions" rule with an iron fist, the upsurge ended: now, a very organized and skilled injured workers' bar will rarely file a mental-mental claim.

DeCarlo and Minkowitz added that, during the crisis period, tort law had also been liberalized to allow recovery for personal injury in negligence cases, even in lieu of physical injury. "It would not be surprising," they remarked, "if this increased recognition of mental injury in tort would also spill over into workers compensation, which, after all, replaces the employee's tort remedy against an employer for injuries arising out of employment."[56] DeCarlo and Minkowitz also identified the familiar phenomenon that, in general, lay-offs, common at the time, result in an upsurge in claim filing. Finally, they identified as a cause for the upsurge publicity surrounding the awarding of mental-mental claims:

> It has often been suggested that highly publicized workers compensation recoveries spur similar claims. This may be especially important in mental stress claims because of the universality of mental stress. . . . [M]ost workers can identify with an employee experiencing mental stress from such job pressures as a change in duties or a conflict with supervisors.[57]

DeCarlo and Gruenfeld, interestingly, suspected that many mental-mental claims of the period had their genesis in stressed-out workers

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55. *Id.* at 69–75. Seven single-spaced pages of the book are devoted to workplace fear of AIDS.

56. DeCarlo & Minkowitz, *supra* note 1, at 281.

57. *Id.* at 280.

simply wanting a good old-fashioned "pound of flesh." In a stressful, unfair society, "an overwhelming sense of powerlessness" exists. As a result:

> Society feels duped by the rule makers and is out for revenge. People are turning to lawsuits in an attempt to claim what they feel is rightfully theirs. . . .
>
> The victims of stress are finding their niche in this litigious society. Protesting excessive job pressures, harassment, and unpalatable supervisory conduct, the working wounded are queueing up to receive compensation for their troubles.[58]

In some jurisdictions, the lawyer community contributed significantly to the increase in mental-mental filings and consequent litigation. In California, the temptations of the *Albertson's* case (which held that even imagined stress was compensable) was apparently too much for certain attorneys to resist. Many lawyers advertised the recoverability of stress claims and/or unethically solicited workers to file for workers' compensation based on contrived allegations of stress.[59] When the final pro-business reform came, the governor remarked, alluding to lawyers and their associated doctors, "these reforms crack down on those who are defrauding the system. This legislation marks the beginning of the end for the stress-mill millionaires."[60]

4. Experts, Social Factors, and Moral Hazard

The rise in filings of mental-mental claims could never have unfolded without psychiatrists and psychologists validating work-stress induced diagnoses, and by thereafter providing expert reports and testimony. Workers' compensation systems, it has been correctly observed, ultimately look to physicians as the "gatekeeper[s], whose pronouncements about occupational causality affect subsequent actions by workers, employers, insurers, and public health officials." Disputes over causation "are generally resolved in the court of medical opinion, with physicians acting as experts on both sides of the issue." And social factors are involved in leading doctors to acknowledge particular ailments as work-related. Determination of work causation "is not merely a matter of gathering and interpreting empirical evidence but rather a complex social phenomenon."[61]

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58. DeCarlo & Gruenfeld, *supra* note 1, at 6.

59. Aya V. Matsumoto, *Reforming the Reform: Mental Stress Claims Under California's Workers' Compensation System*, 27 Loy. L.A. L. Rev. 1327, 1337 (1994), https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1862&context=llr.

60. *See* Sakotas v. WCAB (Motel 6), 95 Cal. Rptr.2d 153, 160 (Ct. App. 2000).

61. Allard Dembe, M.D., Occupation and Disease: How Social Factors Affect the Conception of Work-Related Disorders xi, 5, 12 (1996).

Other experts beyond psychiatrists and psychologists during the crisis period also identified for the working public the import of stress at work. DeCarlo and Gruenfeld verify in the 1980s that an entire industry developed: "In recent years," they noted, "the stress problem has been addressed by social scientists, organizational psychologists, family therapists, and

Mental health professionals, during the rise of claim filings, supported workers' claims, certifying, no doubt in most cases correctly, that injured workers' mental-mental claims were valid. But plainly social factors were at play in validating such diagnoses and their assignment as work-related.

Allard Dembe, M.D., in *Occupation and Disease: How Social Factors Affect the Conception of Work-Related Disorders* (1996), asserts persuasively that social factors are relevant for understanding how occupational disorders are initially recognized and conceived. Virtually all of his principal points are pertinent in the expert-supported 1980s rise of the mental-mentals.

He notes, for example, that new technologies, and the reaction to the same by various societal groups, can lead to the increased reporting and diagnosis of occupational disorders. Meanwhile, legal decisions establishing financial compensation can bring increased attention to the question of whether or not a disorder is work-related. Further, occupational disorders are apt to be initially recognized during periods of economic instability and job loss, and attention by the national mass media to a particular workplace disorder can heighten medical awareness of the problem. Finally, medical attitudes arising in the course of military conflicts can influence the way that occupational disorders are subsequently studied and understood.[62]

Another social factor that was at work in the upsurge of claims filing was simple moral hazard, that is, the potential availability of workers' compensation. Once the courts accommodated such recoveries in terms of *legal* causation, and psychiatrists and psychologists were available to verify *medical* causation, the door was open to such claims' filing. It is likely that many mental disabilities depicted as having their genesis in work stress would never have manifested themselves in the first place if not for the presence of insurance. Mandatory insurance schemes like those of motor vehicle law and workers' compensation are known to create illnesses, drive treatment, and breed litigation.[63]

5. Rise and Reaction in Four Select States

As demonstrated by the table in Appendix 1, seventeen states now feature exclusions of mental-mental cases, most by statute. Several other states have provisos that specially *burden* recovery in such claims. These exclusionary and restrictive provisos were reactions to the pattern of liberalized case law, perceptions of increased worker stress, and the consequent increase in claims filings which have been discussed above. The "California

management consultants. . . . The deluge of media coverage it has received has progressively broadened the term 'stress' into a generic, catch-all concept that generally refers to the feelings of frustration and anxiety that are exceedingly common in a complex society such as ours." DeCarlo & Gruenfeld, *supra* note 1, at 1–2.

62. Dembe, *supra* note 61, at 19–20.

63. *See* Andrew Malleson, M.D., Whiplash and Other Useful Illnesses 1–6 (2002).

story" was—and remains—the most prominent of these episodes, but the rise and response has been well-documented in a number of jurisdictions.

Arkansas. The Arkansas legislature abolished mental-mental compensability as part the major 1993 amendments to the Act. Mental injuries had been "generous[ly]" compensated by the Arkansas Commission and courts.[64] The court in the case that recognized mental-mentals, notably, remarked, "We can conceive of no reason why harm to the body of a worker should be limited to visible physical injury to the bones and muscles and should exclude work-related trauma which results in an injury to the mind. We hold that that such psychological injuries may be compensable under our Act."[65]

The law did require, as part of the claim, a showing that "more than ordinary day-to-day stress to which all workers [were] subjected." Thus, in the decision quoted above, a delivery driver who had fallen behind in her deliveries and sustained a nervous breakdown was *denied* benefits.

Despite this elevated burden, compensability of such claims did not survive a reform effort that had its genesis in perceptions of system-wide fraud, premium rates which had increased 72.3% between 1987 and 1992, and the "expansion" of the law by administrative law judges (ALJs), the Commission, and the courts.[66] A critic at the time decried this complete abolition of the mental-mental claim, lamenting that Arkansas had "deserted" what Larson had described as the "impressive majority" approach.[67]

West Virginia. The West Virginia legislature, in a scenario similar to that of Arkansas, disallowed mental-mentals in a 1993 reform.[68] The Supreme Court had, in 1981, recognized mental-mental cases in a case where a grocery store worker had alleged a series of harassing comments and acts by a supervisor.[69] Later, after complaints of claim and litigation abuse, the legislature eliminated such claims, overturning the leading case and declaring,

64. John D. Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Swing too Far?*, 47 Ark. L. Rev. 1, 17 (1994).

65. Owens v. Nat'l Health Lab'ys, Inc., 648 S.W.2d 829 (Ark. 1983).

66. Copeland, *supra* note 64, at 3.

67. *Id.* at 18.

68. *See* Logan Burke, *Finding a Way out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 W. Va. L. Rev. 889 (2015).

69. Breeden v. Workmen's Comp. Comm'r, 285 S.E.2d 398 (W. Va. 1981) (relying on Montgomery v. State Comp. Comm'r, 178 S.E. 425 (W. Va. 1935) (addressing claim of miner suffering from exhaustion and disability after having been lost in his mine for a period of seven days, and stating "it is clear that the term 'personal injury' as used in the . . . Act . . . contemplates and includes the result of unusual exposure, shock, exhaustion, and other conditions not of traumatic origin, provided that they are attributable to a specific and definite event arising in the course of, and resulting from, the employment.")).

explicitly, "It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter."[70]

Pennsylvania. The Pennsylvania legislature, in 1972, eliminated the restrictive "accident" requirement and replaced that concept with the term *injury*. In so doing, Pennsylvania was responding to the National Commission recommendation that the accident terminology be jettisoned and that, instead, "broad coverage of work-related injuries and diseases" be afforded. The courts have, since then, afforded a liberal interpretation to the term *injury*.[71]

One occasion for liberal interpretation was the Commonwealth Court's 1979 recognition of purely mental-mental cases. There, a University of Pittsburgh physician and the head of a major clinic developed a stress-induced psychosis and ultimately committed suicide.[72] The employer opposed the claim, asserting that, despite the elimination of the accident requirement, "the term 'injury' [should be] confined to the occurrence of physical harm to the body."[73] The court, rejecting this assertion and affirming an award to the widow, quoted at length the influential comment of the Larson treatise: "[T]here is no really valid distinction between physical and 'nervous' injury. Certainly[,] modern medical opinion would support this view, and insists that it is no longer realistic to draw a line between what is 'nervous' and what is 'physical.'"[74]

This ruling was perceived by some as heralding an era of wide-open compensability of mental-mental cases. And, indeed, many were filed. In a remarkable development, however, several judges of the Commonwealth Court (a middle-level appeals court) came to question whether such claims should be freely cognizable. This cynicism was exacerbated after one panel of the court, in 1984, granted benefits in what came to be known derisively as the "Peter Principle" case.[75] There, an employee suffered a disabling mental illness as a result of the stress involved in his promotion from man-

70. W. Va. Code § 23-4-1f. In referencing the 1993 reform, Burke notes that "West Virginia's workers' compensation system has been through several rounds of reform. One of the recurring concerns of [such] reform is preventing abuse of the system and fraudulent receipt of benefits, which, in turn, creates a drag on the entire system. In the 1990s, reform measure specifically targeted preventing abuse by claimants and health care providers. One of these reforms addressed mental-mental claims. . . ." Burke, *supra* note 68, at 905.

71. For a thorough retrospective of how the "injury" criterion was interpreted by Pennsylvania courts, see Justin D. Beck, *From the Glass Lined Tanks of Old Latrobe: 30 Years of Pawlosky*, in VII Pa. B. Ass'n Workers' Comp'n L. Sec. Nwsltr No. 129 (Appendix) (Mar. 2017) (noting that the term *injury* in Pennsylvania is defined as "any adverse or hurtful effect").

72. Univ. of Pittsburgh v. WCAB (Perlman), 405 A.2d 1048 (Pa. Commw. Ct. 1984).

73. *Id.* at 1050.

74. *Id.* at 1051 (quoting 1B A. Larson, Workmen's Compensation Law § 42.23(a), at 7-632 (1978)).

75. Bevilacqua v. WCAB (J. Bevilacqua Sons, Inc.), 475 A.2d 959 (Pa. Commw. Ct. 1984). The Peter Principle provides that "anything that works will be used in progressively more challenging applications until it causes a disaster."

ual tasks to a management job. The court held, in that case, that he had sustained a compensable mental-mental injury. The mental stress cynics at the court, in the face of that case, thereafter started to resist the idea that routine promotions, demotions, and lay-offs should form the basis of workers' compensation claims.

This concern, and the worry that Pennsylvania would experience a California-style mental-mental litigation crisis, soon won the day.[76] In a series of rulings, the pendulum swung dramatically, and the court soon generated a series of rules that significantly burdened mental-mental claims.[77] Now, stress cannot be a subjective reaction to normal working conditions and, to the contrary, must be an objective reaction to abnormal working conditions—with the point of reference the stresses of similarly situated workers.

The Supreme Court was soon to ratify this doctrine,[78] and the Commonwealth Court in turn enforced the "abnormal working conditions" rule with the proverbial iron fist. If the stressor was foreseeable, given the type of occupation involved, it could not be deemed abnormal.[79] This rule was (and remains) particularly burdensome on police and corrections officers, who generally must be ready for virtually any stressful circumstance.[80]

Pennsylvania does not exclude mental-mental claims, but the effort of the Commonwealth Court to avoid a California-style crisis worked. One modern critic has correctly remarked that "Pennsylvania's approach . . . effectively close[d] the floodgates before they [could] open . . . ."[81] While the Supreme Court, in a surprising 2013 case, lightened the worker's burden somewhat,[82] it is still correct that "the abnormal working conditions

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76. David B. Torrey & Andrew E. Greenberg, Pennsylvania Workers' Compensation: Law & Practice, § 4:9 & n.8 (2008 & Supp. 2020–2021).

77. An account of the swinging of the pendulum is found in Bradley R. Smith, *Pennsylvania's Mental Lapse: A History of Pennsylvania's Treatment of Mental Disabilities Caused by Mental Stress in Workers' Compensation* ch. 17, *in* The Centennial of the Pa. Workers' Compensation Act: A Narrative and Pictorial Celebration (David B. Torrey ed., 2015).

78. Martin v. Ketchum, 568 A.2d 159 (Pa. 1990).

79. Torrey & Greenberg, *supra* note 76, § 4:24; *see* City of Pittsburgh v. WCAB (Plowden), 804 A.2d 82, 87 (Pa. Commw. Ct. 2002) (municipal worker who was employed in job seeking rehabilitation of urban gang members did not experience abnormal working conditions: "[C]ertainly, when Plowden accepted these job duties, working with the 'Mayor's Task Force on Youth Violence,' he should have realized that conflict, and perhaps even some slight element of danger or unrest, might be involved.").

80. Torrey & Greenberg, *supra* note 76, § 20:83 ("[L]aw enforcement professionals such as police officers and prison guards typically face a difficult burden when seeking to establish a compensable 'mental-mental' claim because of the unusual environment in which they work and the inherent dangers associated with criminal activity.").

81. Burke, *supra* note 68, at 910.

82. Payes v. WCAB (State Police), 79 A.3d 543, 555 (Pa. 2013) (one cannot simply conclude that because an occupation is inherently stressful that any eventuality, no matter how shocking, is normal; court, on appeal, must take into account and be bound by the "unique factual findings of the case"). *See* Smith, *supra* note 77, at 472-74.

rule and the specificity of medical evidence linking the injury to work-related causes continues to be prohibitive of most claims of mental injury caused by mental stimuli."[83]

California. The experience of California with the rise of mental-mentals had such notoriety that Larson devotes an entire subsection to it, called the "California Story."[84] In the wake of the *Albertson's* case, noted above, mental-mentals became very popular. Claim filings increased dramatically. Stress claims in the state went from 1,282 in 1980 to 4,236 in 1984 to 6,812 in 1986.[85] By 1992, the volume was still increasing to the low double-digits.[86] A contemporary account, which characterizes *Albertson's* having "good intentions but unintended results," states that the "flood-gates" really did open.[87] These claims were said to be especially onerous for business, as the cost of defending and resolving them was "typically much higher than for 'old-fashioned' physical claims."[88]

By several accounts, the upsurge in claims was caused, or at least attended by, overreaching and outright fraud:

> Advertising by physicians and attorneys [was undertaken] which invited dissatisfied workers to file stress claims. [Such activities were often] criticized as fostering fraud. [S]ome attorneys and physicians involved in high-volume workers' compensation practice assert[ed] a stress disability for virtually every applicant. Additionally, some practitioners employ[ed] recruiters to encourage workers to file claims in order to generate medical charges for insurance billings.[89]

In one case, by report, a large restaurant closed permanently, and 115 of its 119 employees purportedly filed stress claims. According to the report, "Attorneys had stationed themselves outside the door the day of the lay-offs to intercept the newly unemployed, influencing them to file these claims . . . ."[90]

The 1993 amendments to the law (the third of a series) tightened coverage standards by requiring (1) that the complained of stress must be based on "actual" employment conditions; (2) that the claim be proven by the preponderance of the evidence; (3) that the diagnosis must be made under the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM*); (4) that the employee be employed for at least six months; and (5) that the claim cannot

83. *Id.* at 475.
84. Larson, *supra* note 2, § 56.01[1][a].
85. *Id.*
86. Janet C. deCarteret, *Occupational Stress Claims*, 42 AAOHN J. 494, 497 (Oct. 1994), https://journals.sagepub.com/doi/pdf/10.1177/216507999404201007.
87. Matsumoto, *supra* note 59, at 1336–37 (1994) ("As if the floodgates had opened, claims for mental stress injuries have inundated workers' compensation systems."), https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1862&context=llr.
88. Larson, *supra* note 2, § 56.01[1][a].
89. Matsumoto, *supra* note 59, at 1337.
90. deCarteret, *supra* note 86, at 497.

be based on a "good faith personnel action." The revised law also sharply limited the post-employment filing of claims.[91]

III. ARGUMENTS FOR AND AGAINST COMPENSABILITY

Legislative and judicial disputes addressing under what conditions mental-mentals should be covered, if at all, by workers' compensation are now largely quiescent. The period of state legislatures taking drastic action and *completely eliminating* coverage seems to have ended. Further, though claims in California and Illinois are said to be increasing,[92] no jurisdiction seems to be experiencing any remarkable crisis of claims filing that is kindling the fires of retractive reform.

On the other hand, in the present day a trend exists for legislatures to enact special laws that will provide coverage for mental-mentals, particularly PTSD, for first responders like police officers, firefighters, and EMTs.[93] To a limited extent, accordingly, the pendulum seems to be swinging back in favor of compensability.

Also, some advocates, not surprisingly, assert that complete elimination, found in seventeen states, as noted, is unfair and that the issue of coverage should be revisited. In South Carolina, for example, the Supreme Court has derided as anachronistic the restrictive abnormal working conditions rule of that state and has called for the legislature to abandon it.[94]

It is worthy, accordingly, to revisit the arguments for and against compensability.

A. *Arguments for Compensability and Against Exclusion*

The most compelling argument favoring compensability is that mental injuries and their causes are no longer great mysteries as they were in the past.[95] Larson, in his treatise, has long admonished that drawing a distinction between mental injuries and physical injuries is simply "unsound." A

91. Larson, *supra* note 2, § 56.01[1][a]. The law is currently codified in substantially the 1993 form at Cal. Labor Code § 3208.3. The California provisions are plainly the most detailed of the state mental-mental laws. *See also infra* Part IV(A)(5).

92. Louise Esola, *Reviews of Psych Claims in Comp Increase*, Bus. Ins. (Oct. 2, 2019), https://www.businessinsurance.com/article/20191002/NEWS08/912330957/Reviews-of-psych-claims-in-comp-increase#.

93. *See infra* Part V(D).

94. Bentley v. Spartanburg County, 730 S.E.2d 296 (So. Carolina 2012) (deputy who shot umbrella-wielding suspect at short-range, and observed him die, did not experience unusual stress; though denial of benefits was affirmed, court recommends that legislature abandon the restrictive statutory test); *see also* Burke, *supra* note 68.

95. *See*, *e.g.*, *Bentley v. Spartanburg Co.*, at 299 ("those in favor of allowing broader recovery point out that advances in medical science have made it easier for medical professionals to diagnose and verify the validity of mental injuries, enabling courts to weed out fraudulent claims."); Larson, *supra* note 2, § 56.04[1].

well-known dissent in a West Virginia case exemplifies this advocacy. In disagreeing that a PTSD-like reaction by a coal miner who had been traumatized, and feared for his life, was different from that of a lung injury, the dissent asserted:

> [M]odern medical science shows that traumatic stress disorders are, in fact, a physical injury. The shock of a terrifying event—like a rape, a robbery at gunpoint, or fearing death by suffocation when lost in the smoky darkness of a mine for ninety minutes—triggers chemical reactions in the brain that measurably scar and injure nerve tissue. The brain is actually, physically "rewired" and injured. To somehow suggest that the injury to the plaintiff's brain is different from the lung injury that suffocated the decedent in *Jones* [the other case] reflects a primitive, outdated view of science.[96]

This argument is likely the best as against those who would argue that workers' compensation is simply not an appropriate remedy for mental injury. If such injuries arise out of and in the course of employment, and medical cause is persuasively established, no basis exists to assert that this time-honored test of compensability has not been met.

Related to this argument is the assertion that it is simply unfair, indeed intolerable, to deny insurance benefits to a worker when all experts agree that work stress has caused impairment and disability. Such are the circumstances of many reported cases in the modern day. To the reply that the afflicted worker simply did not have the necessary mettle and true grit to withstand the emotional challenges of work, another time-honored proposition applies: that the employer should take the employee as it finds him or her.[97]

One skilled commentator, like Larson, condemns hostility to mental-mental cases as retrograde and inconsistent with the whole purpose of workers' compensation. Viewing the issue in a historical light, he remarks:

> The reluctance of most courts to extend workers' compensation coverage to injuries not traceable to a single isolated event reflected a conservatism which contrasts markedly with their stated desire to liberally construe workers' compensation statutes. . . . This conservatism appears to stem from a fear that to adopt a broad definition of injury would lead to a large number of cases being found compensable, thus resulting in great economic liability for employers. This is a theme repeatedly found throughout the history of workers' compensation laws in this country, and explains much of the judicial and statutory approach to stress-related disability today.[98]

96. Bias v. E. Associated Coal Corp., 640 S.E.2d 540, 553 (W. Va. 2006) (Starcher, J., dissenting); *see also* Burke, *supra* note 68, at 898–900 (setting forth the ways in which stress affects the body).

97. *See* Glenn M. Troost, *Workers' Compensation and Gradual Stress in the Workplace*, 133 U. Pa. L. Rev. 847, 860–61 (1985).

98. Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 Notre Dame L. Rev. 879, 886 (1987).

Proponents of a wide availability of benefits for mental-mental injuries do not deny that causation may be at issue in many cases, despite the advances of medicine and psychiatry. Many argue, however, that if causation is in question, simply let the judge or hearing officer decide the issue. "Undoubtedly," one 1980s advocate asserted, "some claimants will attempt to recover for feigned mental injuries or mental injuries unrelated to work, but it is preferable to adopt a broad rule and administer it closely than to allow the fear of overcoverage to compromise the workers' compensation system as a whole."[99] Advocates, with the same reasoning, often dismiss claims that freely allowing mental-mentals will open the floodgates. In objecting to *institution* of a restrictive abnormal working conditions rule, the dissent in a Rhode Island case declared:

> [P]rotection against abuse in the award of workers' compensation lies in the competence and good judgment of the members of the commission, an organization that through the years has performed its duties in an exemplary fashion. "In the last analysis, the problem of malingering is one of fact, which must be left to the skill and experience of medical and psychiatric experts, and of compensation administrators, who usually manage in time to develop considerable facility in detecting malingerers at the factfinding level."[100]

Many proponents of compensating mental-mentals *do perceive*, as appropriate, unusual stress as part of the worker's burden.[101] The same advocate of open compensability (quoted above), however, complains:

> A serious shortcoming of the unusual-stress test is that it is predicated on the fallacious belief that the existence of extraordinary or unusual events assures that subsequent mental injuries are genuine and work-related and on the converse belief that the absence of such events indicates that the alleged injuries are not genuine or work-related. . . . [But] judicial reliance on tangibility as one of the indicia of an injury's genuineness is misguided.[102]

He would again leave the question of genuineness to doctors and judges: "[A]lthough the concern over fraudulent claims is valid, professionals may be able to detect certain feigned psychoneurotic reactions more easily than some more commonly feigned physical injuries."

An intuitive argument favoring coverage of mental-mentals is that, if employers are free of liability for even *bona fide* mental-mental claims, they will not be leveraged to safety in the area of employee mental health. "The

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99. Troost, *supra* note 97, at 864.

100. Seitz v. L&R Indus., 437 A.2d 1345, 1354 (R.I. 1981) (Kelleher, J., dissenting) (quoting Arthur Larson, *Mental and Nervous Injury in Workmen's Compensation*, 23 Vand. L. Rev. 1243, 1259 (1970)).

101. *See, e.g.*, Natalie D. Riley, *Mental-Mental Claims—Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 Mo. L. Rev. 1023 (2000).

102. Troost, *supra* note 97, at 863.

present state of affairs," one observer comments, referring to abnormal working condition requirements, "provides the employer with no incentive to work on reducing stresses that are hard to detect, or to create a more bearable or pleasant working environment."[103]

B. *Arguments Against Unrestricted Compensability of Mental-Mentals*

Arguments resisting compensation of mental-mentals, and even for completely outlawing them, have often succeeded. In excluding such claims from compensation, for example, the Montana legislature included a public policy statement which remarks, "The legislature recognizes that these claims are difficult to objectively verify and that the claims have the potential to place an economic burden on the workers' compensation and occupational disease systems."[104] These two concerns, voiced unapologetically, underlie most resistance to unrestricted compensability of mental-mental claims. In a 2007 case, meanwhile, a Nevada court claimed that "stress-related injury claims are the most nebulous type of workers' compensation claim, and the most susceptible to fraud."[105]

The precise anxieties are (1) fear of compensating mental ailments that are not, in any material contributing aspect, related to work exposures; (2) fear of compensating claims which are authentic when they first manifest, but then morph into assertions of indefinite disability; and (3) fear of outright fraud.

Most agree that medical science has progressed and that psychic injuries and disabilities are better understood in the present day. Certainly no one would characterize (as in the old days) those susceptible to stress as mentally "below par." Yet, many have argued that, while physicians say that mental injury is real, the science is still weak on diagnosis and causation of the same. To declare that mental-mental injuries are equal to physical injuries may sound compelling "idealistically," but, in the end, experience shows that psychiatrists and psychologists are indeed weak on causation.[106] Notably, many have assailed the integrity of the PTSD diagnosis itself.[107]

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103. Letitia J. Mallin, *Disease, Not Accident: Recognition of Occupational Stress Under the Workmen's Compensation Laws*, 13 Colum. J. of Env't L. 357, 386 (1988).

104. Mont. Code § 39-71-105(5).

105. McGrath v. Dept. of Pub. Safety, 159 P.3d 239, 243 n.13 (Nev. 2007) (citing, in support, Gatlin v. City of Knoxville, 822 S.W.2d 587 (Tenn. 1991)).

106. Edward J. Mills, *Mental Stimulus Causing Mental Disability: Compensability Under the Pennsylvania Workmen's Compensation Act*, 23 Duq. L. Rev. 375, 382 (1984) ("[S]erious questions still exist with respect to whether the fields of psychology and psychiatry have advanced to the point where it is possible to consistently give a credible and unequivocal opinion regarding causation.").

107. *See infra* this section (discussing Deirdre Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 Temp. L. Rev. 1 (2011)).

DeCarlo and Minkowitz (1989) concluded that it is "not surprising that courts are cautious" in the realm of mental-mental claims.[108]

A lawyer from the insurance industry, writing in 1984, voiced the concern as follows:

> "No method exists either to quantify or qualify the extent to which one reality and not the other is a cause of the mental disorder." . . . Thus, the door is left wide open for the claimant who has filed or plans to file a workmen's compensation claim to emphasize the stresses of his workplace over the numerous other personal, social and environmental stresses which have contributed to his mental disorder. Unless the psychiatrist or psychologist has reason to believe that the claimant is not giving a full and accurate history, it is highly possible, if not probable, that he will accept the claimant's emphasis on the work stress and conclude that the disorder was primarily the result of those stresses.[109]

To blithely say that questions as to cause can simply be fought out in dispute resolution before compensation judges is not a satisfying answer to these concerns. Litigation over mental-mentals encourages individuals to stay out of work, generates discovery of the most invasive kind, and engenders hostility between employers and employees.

And, at the end of the dispute, a layperson (in most jurisdictions) will be choosing one expert another in another iteration of the "dueling doctors" situation. Notably, scholars Little, Eaton, and Smith characterize as especially acute the cynicism of such dueling-expert regimes in the context of mental injuries.[110] In this spirit, they identify the 1954 Louisiana case *Ladner v. Higgins.* There, in response to the question, "Is [it] your opinion that this man is a malingerer?," the expert responded, "I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post traumatic condition."[111]

Wariness of compensating mental-mentals includes a concern that, once the claim is accepted, and the worker receives treatment and disability, he or she will develop, rightly or wrongly, a sense of enduring entitlement. The precise worry is that the claim, particularly in a wage loss state, will continue indefinitely. Workers who seem to develop this picture are not, typically, malingering. A psychiatrist who testified for many decades in Pittsburgh characterized as simply *stubborn* the workers who insisted that,

108. DeCarlo & Minkowitz, *supra* note 1, at 288 (discussing the "uncertainty of psychiatry").

109. Mills, *supra* note 106, at 382 (quoting Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 Vand. L. Rev. 263, 272 (1983)).

110. *See* Joseph W. Little, Thomas A. Eaton & Gary R. Smith, Cases and Materials on Workers' Compensation 300 (3d ed. 1993).

111. Ladner v. Higgins, 71 So. 2d 242, 244 (La. Ct. App. 1954).

because of continuing anxiety, they could not return to work. Utilizing old cigarette commercial lingo, he would posit, as to such an obdurate worker, "He'd rather fight than switch."

However, some portray this aspect of mental claims as in essence reflecting fraud. An insurance analyst, commenting on the 2019 rise in requests for psychiatric independent medical examinations (IMEs), remarked that PTSD is increasingly a common condition in claims, "but often it's added later, which employers say can be attempts to prolong the claim, an industry term known as 'malingering.'" "People [a defense lawyer stated] are getting a whole lot more treatment than they used to and in my practice in Illinois a lot of the cases I see start off as legitimate and then turn into malingering, which is why IMEs are being requested as frequently as they are . . . ."[112]

Opponents of unrestricted mental-mental compensability warn, of course, of opening the floodgates to uncontrolled litigation. This has been a caution raised both in the past and in the present.[113] When, for example, in 2013, injured-worker advocates in South Carolina advanced a bill that would eliminate the abnormal working conditions requirement, industry made precisely this argument.[114]

While some critics dismiss such cautions as phony catastrophism masking a judicial concern over narrow economic considerations,[115] the California experience, which everyone agrees was a misfortune, was attended by the opening of floodgates. In the realm of the mental-mental debates, the concern over a cascade of filings is the one concern that seems evidence-based.

112. Louise Esola, *Reviews of Psych Claims in Comp Increase*, Bus. Ins. (Oct. 2, 2019), https://www.businessinsurance.com/article/20191002/NEWS08/912330957/Reviews-of-psych-claims-in-comp-increase#.

113. The dissent in the leading New York case *Wolfe*, summarized above, was full of foreboding:

> In an era marked by examples of overburdening of socially desirable programs with resultant curtailment or destruction of such programs, a realistic assessment of impact of doctrine is imperative. An overburdening of the compensation system by injudicious and open-ended expansion of compensation benefits, especially for costly, prolonged, and often only ameliorative psychiatric care, cannot but threaten its soundness or that of the enterprises upon which it depends.

Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 513-14 (N.Y. 1975) (Breitel, C.J., dissenting).

114. Frank Knapp, *Lawmakers Grapple with Mental-Mental, Longshore Bills*, Blog Post, S.C. Small Bus. Chamber Com. (Feb. 15, 2013), https://scsbc.org/lawmakers-grappling-with-mental-mental-longshore-bills ("Mike Chase, legal advisor to SCSIA, said Thursday that Pope's bill will allow claimants' attorneys to argue that workers suffered compensable mental trauma from normal working conditions and may open the flood gates to mental-mental claims.").

115. *See* Cook, *supra* note 98, at 897–98 (charging that courts resist recognizing mental-mental cases on doctrinal grounds "as convenient ways in which to deny compensation for legal disability which courts and legislatures deem unwise due to economic considerations.").

Another concern over mental-mentals (connected with the causation problem) is the sense that many claimants with a purported work-induced mental disorder (like PTSD) are simply riding the wave of the current (or, in this case, ongoing) diagnosis *de jeur*, with their providers as facilitators. As discussed above, researchers have long pointed to social factors like the popularity of certain diagnoses as influencing doctors to diagnose them—and workers to suffer from them.

Defenders of heightened-burden requirements, like abnormal working conditions, emphasize that such controls work to ferret out false or weak claims, those based primarily on pre-employment maladies,[116] and ensure (by definition) that claims based merely on subjective reactions to normal work conditions will not end in a disability claim. This position seems correct to this writer. A supporter of unrestricted mental-mentals, quoted above, asserts that "judicial reliance on tangibility as one of the indicia of an injury's genuineness is misguided," but this assertion is itself misguided—and even strange. Corroboration and plausibility are factors that any judge utilizes to estimate whether a purported harm has occurred.[117] Identification of abnormal working conditions, or some "untoward" event, helps to satisfy these inquiries.

Many are wary of unrestricted compensability of mental-mentals, particularly where PTSD is implicated. System participants have argued that PTSD is over-diagnosed and that the diagnosis itself is a construct not based on scientific evidence.[118]

The impression of this writer has been that PTSD may, indeed, be over-diagnosed in compensation cases. Indeed, this assertion has been a common charge heard throughout the community for more than twenty years. This writer has seen many cases where a treating psychiatrist or psychologist perhaps sloppily makes the diagnosis, only to have it effectively picked apart by the IME psychiatrist. This phenomenon hardly means that the claimant was not credible or worthy of compensation, but it certainly raises an eyebrow as to the validity and basic integrity of the diagnosis.

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116. *See* Riley, *supra* note 101, at 20 ("Requiring unusual stress for recovery also reduces the possibility of an employer becoming a general health insurer when an employee with pre-existing metal health problems is hired.").

117. *See* David B. Torrey, *How Judges Judge and Why*, Seminar Paper, ABA Workers' Compensation Sections CLE, Coral Gables, Fla. (Mar. 16, 2013), https://paworkinjury.files.wordpress.com/2013/03/torreycredibility.pdf; *see also* John L. Kane, *Judging Credibility*, 33 LITIG. (No. 3) (ABA Spring 2007).

118. Deirdre Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1 (2011). Smith asserts that lawyers should gain sophistication about the legal history—and legalistic aspects—of PTSD: "Courts," she accurately posits, "are likely unaware of PTSD's legal origins, the persistent controversies within psychiatry and psychology about the theoretical underpinnings of the diagnosis, and the complicated notion of 'causation' within contemporary psychiatry." *Id.* at *4.

IV. LAWS AMONG THE STATES

A. *General Findings; Categorization of State Laws*

Currently, among the fifty states, thirty-three permit recovery, under various tests, for mental-mental injuries. Seventeen, meanwhile, exclude such claims. The District of Columbia, the Longshore Act, and Federal Employees' Compensation Act (FECA) also allow recovery for mental-mentals.[119] Generally, bright lines are in place.

Still, it is difficult, in this realm, to speak in absolutes. Nuance attends some state laws. Thus, in Arkansas, mental-mentals are prohibited, except when the mental stress is attended by an act of violence.[120] Thus, presumably, an employee who is robbed, kidnapped, tied up, and otherwise terrorized, with no physical injury, can establish a claim.[121] Meanwhile, in California, mental-mentals are prohibited for gradual stress experienced in the first six months of employment, but such claims may be cognizable even during this initial period of employment if they have their genesis in a "sudden and extraordinary employment condition."[122] And, of course, some of the most restrictive states, like Florida, have established carve-outs accommodating mental-mentals, particularly for PTSD, in the case of first responders.[123]

The laws of the fifty states are depicted, with statutory and case law references, in the table of Appendix 1. The laws of states introducing and enacting special laws for first responders, some featuring causation presumptions, are depicted in the tables of Appendices 2 and 3. What follows is a brief account of statutory and case law features based on these three tables.

1. States Disallowing Mental-Mentals

DeCarlo and Minkowitz, surveying the laws in 1989, noted that the law of mental-mentals was almost entirely in the cases; in contrast, statutes on the subject were rare.[124] The landscape is different in the present day, with fourteen states featuring statutes that exclude mental-mental claims. These jurisdictions have, in effect, cut off at the pass the compensability of such claims. As discussed, Arkansas and West Virginia are states in this category.[125] Connecticut is the unusual northeastern state that is likewise

119. *See* App. 1.
120. Ark. Code Ann. § 11-9-113.
121. *See*, *e.g.*, Pa. Liq. Control Bd. v. WCAB (Kochanowicz), 108 A.3d 922 (Pa. Commw. Ct. 2014) (benefits granted under such a scenario under Pennsylvania's abnormal working conditions rule).
122. *See* Cal. Lab. Code § 3208.3.
123. *See infra* Section V(C).
124. DeCarlo & Minkowitz, *supra* note 1, at 284.
125. *See supra* Section II(F)(5).

in this category. (The law has since been amended to allow for PTSD in police officers.)[126]

Notably, not all states that exclude mental-mentals do so by statute. Some undertake the prohibition by common law: these states are Georgia, Kansas, and Nebraska.[127]

A complete denial in a common law state is exemplified by a 2007 Nebraska case. There, the court denied benefits to the dependents of a state police trooper who committed suicide in response to alleged stress. He had, in this regard, detained and then released a motorist who shortly thereafter committed a murder during a robbery. The trooper's distress at contemplating that scenario led him to take his own life. Yet, as far as the court was concerned, mental-mentals are not covered either as injuries or occupational diseases under the Nebraska Act.[128]

2. States Not Requiring Exceptional Stress

Four states do not seem to maintain a rule that extraordinary stress is required before a mental-mental is cognizable as a matter of law. In these states, presumably, certain episodes of gradual stress may be compensable. These jurisdictions are California (with the major caveat noted above), Delaware, Hawaii, and New Jersey. The laws of the District of Columbia, the Longshore Act, and FECA also do not seem to require abnormal working conditions.

A Hawaii case illustrates the compensation of a gradual stress injury. There, a municipal employee who developed an anxiety disorder from the back and forth of what sounds like a poorly administered system of promotions and demotions was held entitled to benefits.[129] This type of claim would likely not be cognizable in jurisdictions that require unusual stress.

3. States Requiring Abnormal Working Conditions

A plurality of states feature a regime that precludes gradual stress and will only recognize a mental-mental when abnormal working conditions (the phrase in Pennsylvania), unusual or untoward work conditions, or the like,[130] have been proven by the injured worker.

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126. Conn. Gen. Stat. § 31-275(16)(B)(ii) ("'Personal injury' or 'injury' shall not be construed to include: . . . (ii) A mental or emotional impairment, unless such impairment ([1]) arises from a physical injury or occupational disease, [except] ([2]) in the case of a police officer [detailing certain circumstances] . . . .").

127. *See infra* App. 1.

128. Zach v. Neb. State Patrol, 727 N.W.2d 206 (Neb. 2007).

129. Davenport v. City & County of Honolulu, 59 P.3d 932 (Haw. Ct. App. 2002).

130. This writer has, in this article, used the phrase "abnormal working conditions" as a shorthand to capture all the characterizations of the unusual stress necessary to make out a cognizable claim in this category.

A 2018 New York case serves as an example of a worker who did *not* meet the test. There, the court held that substantial evidence supported the Board's determination that a registered nurse, who alleged harassment and bullying in connection with her work, did not "establish that the stress that caused the injury was greater than that which other similarly situated workers experienced in the normal work environment." Further, "Claimant's supervisors described normal oversight and monitoring practices undertaken to assist her in correcting deficiencies in and improving her performance, and claimant failed to identify any unusual stressors or conduct that would constitute harassment or bullying as alleged in her claim for benefits."[131]

A 2008 Pennsylvania case, on the other hand, exemplifies a case where the claimant prevailed. There, the workers' compensation judge, Board, and court all held that claimant had been exposed to abnormal work conditions after her employer had both sexually harassed her and pressured her to participate in Islamic religious rituals, including wearing special garb.[132]

States in this category establish points of reference for what is *considered* abnormal stress. These reference points are (1) others in the general workforce; (2) others in the same type of work with the same employer; and (3) others in the same type of work regardless of employer.[133] On occasions these reference points are established by case law, but certain jurisdictions establish the criterion of comparison by statute. Of course, it is presumably easier to show abnormal working conditions when the point of reference is the general workforce.[134]

A 2017 New York case shows a state in the third category, with the coverage reference point established via case law. There, an internal claims adjuster who, after a change in company policy, was harassed by fellow employees whose claims he was adjusting, developed PTSD. He was held to have established a cognizable mental-mental claim. The court characterized the law as follows: "For a mental injury premised on work-related

131. *In re* Lanese v. Anthem Health Servs., 85 N.Y.S.3d 262, 265 (App. Div. 2018).

132. Empowerment Ass'n v. WCAB (Porch), 962 A.2d 1 (Pa. Commw. Ct. 2008).

133. These categories are discussed at length in Natalie D. Riley, *Mental-Mental Claims—Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 Mo. L. Rev. 1023, 1024 n.6 (2000).

134. *Id.* In critiquing the three standards, Riley remarks, correctly,

> Comparing the claimant's work-related stress to the "working world at large" is impractical. This standard would allow the parties to always produce a witness whose work-related stress is either significantly less or significantly greater than the stress experienced by the claimant. Furthermore, courts find this approach to be "difficult to analyze in practice and biased towards employees who work in perceived stressful occupations."

Id. at 1043 (quoting Marvin E. Duckworth & Tina M. Eick, *Recent Developments in Mental/Mental Cases Under the Iowa Workers' Compensation Law*, 45 Drake L. Rev. 809, 837 (1997)).

stress to be compensable, 'a claimant must demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment.'"[135]

Under Vermont law, meanwhile, the statute, via a 2017 amendment, provides that the criterion of comparison as to unusual stress is "pressures and tensions experienced by the average employee across all occupations. . . . "[136] That amendment, notably, overthrew a precedent that had identified the reference point as "all other employees performing similar work."[137]

4. States Requiring Shock or Fright

Jurisdictions in the most restrictive category, requiring shock or fright, maintain regimes with a heritage (if not via precedent, in spirit) in the "traumatic neuroses" claims discussed above. Many (though not all) courts, as we have seen, long accommodated recovery.[138]

Some shock or fright requirements are, as before, found in case law, while others are found in modern statutes. The preeminent case law example is the 1976 Illinois landmark, *Pathfinder Co. v. Industrial Commission.*[139] There, the court, against an argument that physical injury must always attend a cognizable mental disability, changed the law and held that a mental-mental, when supported by sudden and severe emotional shock, "traceable to a readily perceivable cause," is compensable. In *Pathfinder*, the claimant, a factory worker, had come to the aid of an injured co-worker laboring at a press, and had retrieved her severed hand from the machine. The worker's promptly ensuing anxiety reaction was held compensable.

A clear statutory example is found in the Louisiana Act. There, a mental-mental is only compensable if the "mental injury was the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence."[140] Such criteria doomed the claimant in a recent case. There, a convalescent home nurse's aide who became stressed over extra work to be done on her night shift, because of

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135. Kraus v. Wegmans Food Mkts., Inc., 67 N.Y.S.3d 702, 706 (App. Div. 2017) (quoting *In re* Guess v. Finger Lakes Ambulance, 812 N.Y.S.2d 393 (N.Y. App. Div. 2006)).

136. Vt. Stat. Ann. tit. 21 § 601(11)(J).

137. Crosby v. City of Burlington, 844 A.2d 722, 730 (Vt. 2003) (mental-mental claims are legitimate under Vermont constitution, but directing that purported unusual level of stress is determined vis-à-vis "all other employees performing similar work," and not "as compared with the general population of employees").

138. *See supra* Part II(D).

139. Pathfinder Co. v. Indus. Comm'n, 343 N.E.2d 913 (Ill. 1976). For a recent case that seems to apply the rule liberally, see *Moran v. Illinois Workers' Comp'n Comm'n*, 59 N.E.3d 934 (Ill. App. Ct. 2016) (court, reversing Industrial Commission, awards benefits to fire company supervisor who directed firefighters at site of deadly house fire and who became distraught at death of fellow firefighter).

140. La. Rev. Stat. § 23:1021(b).

the day shift's utter indolence, was held not to have experienced stress of an unexpected nature.[141]

5. Jurisdictions With Complex Laws: California and Washington

Some jurisdictions have, in their statutes, established complex schemes that stand out from most. They likely do so to try to avoid controversies as to coverage. (Pennsylvania, in contrast, is a *minimalist* state, where the entire law of mental-mentals is in the case law. Lawyers and judges are hence left to the vagaries and vicissitudes of the courts for guidance.)

California, in the wake if its claim and litigation crisis, has obviously tried to eliminate as much ambiguity in the law as possible with its Labor Code, section 3208.3. That proviso (a) allows a gradual stress mental-mental in employees with six months or more of employment; but (b) for newer workers, obliges the same to prove "a sudden and extraordinary employment condition"; and (c) in all cases, except those subject to violence, obliges claimant to prove that work stress is the predominant cause of the injury. As to (c), the statute is extraordinary in providing that, for a victim of violence, only "substantial cause" must be shown, with that phrase meaning "at least 35 to 40 percent of the causation . . . ."[142] The statute also restricts mental-mentals associated with a separation or termination of work; such claims are viable, but only under special showings—for example that the termination or layoff was attended by "sexual or racial harassment."[143]

Washington state, which may be categorized as a shock or fright state, likewise seeks to foreclose ambiguity in the law. It does so by providing administrative guidance with regard to what is and is not potentially covered. The key regulation (with statutory authority omitted here) provides, in part:

> (2)(a) Stress resulting from exposure to a single traumatic event will be adjudicated as an industrial injury . . . .
>
> (b) Examples of single traumatic events include: Actual or threatened death, actual or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury.
>
> (c) These exposures must occur in one of the following ways:
>
> (i) Directly experiencing the traumatic event;
>
> (ii) Witnessing, in person, the event as it occurred to others; or
>
> (iii) Extreme exposure to aversive details of the traumatic event.

141. Emerson v. Willis Knighton Med. Ctr., 257 So. 3d 243 (La. Ct. App. 2018).
142. Cal. Lab. Code § 3208.3(b)(3).
143. *Id.* § 3208.3(e)(4).

> (d) Repeated exposure to traumatic events, none of which are a single traumatic event as defined in subsection (2)(b) and (c) of this section, is not an industrial injury . . . or an occupational disease . . . . A single traumatic event as defined in subsection (2)(b) and (c) of this section that occurs within a series of exposures will be adjudicated as an industrial injury . . . .[144]

No other jurisdiction, notably, maintains such a regulatory feature.

B. *Select Statutory Features*

1. Purely Subjective Mental-Mentals Excluded

As noted at the outset, all jurisdictions exclude mental-mental claims based upon a worker's purely subjective feelings of stress. Even proponents of unrestricted compensability are likely to acknowledge that allowing such claims would be unworkable and an employer's "worst nightmare."[145]

In any event, this exclusionary rule is found in both statutes and case law. The Michigan statute was enacted after a memorable early court decision *allowed* a claim based on subjectively perceived stress.[146] The Michigan statute now provides, in part, "Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality."[147] A Delaware court, meanwhile, denied benefits in one claim, agreeing that claimant had "merely imagine[d] or subjectively conclude[d]" that work events were the source of her problems.[148]

2. Good Faith Personnel Action Exception

A common statutory exclusion bars a mental-mental claim when the animus for the distress is a good-faith personnel action such as demotion, discipline, layoff, or termination. The California statute noted above features such an exception, as do the laws of at least nine other states. The otherwise permissive Hawaii statute, for example, provides that mental-mental claims "resulting from disciplinary action taken in good faith by the employer" are not compensable.[149]

Pennsylvania, meanwhile (via case law), generally considers such claims to be based on normal working conditions. During the heavy litigation period of mental-mentals in Pennsylvania, an entire body of law developed that this writer categorized as "promotions, demotions, and other common workplace stresses."[150] In a renowned case of this type, the Supreme

144. Wash. Admin. Code § 296-14-300(2).
145. Glenn M. Troost, *supra* note 97, at 847, 849 n.5 (1985).
146. Deziel v. Difco Lab'ys., Inc., 268 N.W.2d 1 (Mich. 1978).
147. Mich. Comp. Laws § 418.301(2).
148. Camp v. Dade-Behring, 2005 WL 2249761, at *8 (Del. Super. 2005).
149. Hawaii Rev. Stat. § 386-3.
150. Torrey & Greenberg, *supra* note 76, § 4:25.

Court denied benefits to an ALCOA executive's "Girl Friday" who, from a demotion and purported humiliation, sustained disabling emotional symptoms.[151] According to the court, abnormal working conditions had not been shown:

> An abnormal working condition is not established by evidence that a displaced employee was unable to obtain an identical job with his same employer. We reject the [idea that our abnormal working conditions precedent] suggested by [the claimant] that would allow any change in the status quo of an employment situation to be compensable simply because a claimant established that the change was actual, rather than imagined or perceived, and resulted in psychic injury.[152]

Under this Pennsylvania rule, notably, bad economic times that give rise to stress and psychic ailments, like anxiety over business failure or laying off workers, are also not reflective of abnormal work conditions.[153]

3. Statutes Requiring Precise Diagnoses

One feature observed in at least two statutes, meant to narrow coverage and screen out marginal claims, is a proviso that requires any mental-mental to be supported with a diagnosis, typically under the DSM-5, the manual published by the American Psychiatric Association. This requirement is especially notable in the first responder laws popular in the current era,[154] but can be found in general statutes as well.[155]

The Minnesota law is most prominent in this regard. There, mental-mentals are precluded unless, as to *any* occupation, the diagnosis of PTSD under the DSM is proven. In 2019, that requirement was at center stage in a case decided by the Supreme Court. There, the claimant's expert diagnosed PTSD, but the insurance evaluator rejected the proposition that claimant suffered from the ailment. The WCJ credited the defense expert, but the Appeals Court reversed, "determin[ing] that the 2013 amendment requires that the compensation judge conduct an independent assessment to verify that the diagnosis of a psychologist or psychiatrist conforms to the PTSD criteria in the DSM-5 before accepting the expert's diagnosis." The

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151. Wilson v. WCAB (Aluminum Corp. of Am.), 669 A.2d 338 (Pa. 1996).

152. *Id. at* 344.

153. *See*, *e.g.*, McCoy v. WCAB (McCoy Catering Servs., Inc.), 518 A.2d 883 (Pa. Commw. Ct. 1986), *appeal denied*, 535 A.2d 84 (Pa. 1987) (denial of fatal claim benefits to a widowed claimant whose husband's psychological stress and resulting suicide was derived from an inability to support his family as a result of his failing catering business).

154. *See infra* Section V(H). *See* App. 3.

155. For example, the Oregon statute, which also sets forth an abnormal working conditions rule, provides that a mental-mental is only compensable when "[t]here is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community." Or. Rev. Stat. § 656.802(3).

Supreme Court reversed,[156] holding that the law said no such thing, and restoring the denial of benefits.

C. *Heightened Burdens and the Issue of Unequal Treatment*

Workers who have sustained mental injuries and have been denied workers' compensation under restrictive laws have argued that such disparate treatment is a violation of constitutional guarantees of equal protection of the laws. These arguments, however, have been unsuccessful. Courts usually respond that rational-basis review applies and that legislatures may legitimately place extra burdens on such claims.

The leading case to this effect is *Sakotas v. WCAB (Motel 6)*,[157] in which a California court identified, as legitimating the law, the legislative concern over fraudulent claims that had arisen during the period of claims-filing upsurge. The court found a legitimate state interest and a rational basis for the heightened burdens featured in the 1992 California amendment.[158]

D. *Exclusion of Mental-Mentals and the Exclusive Remedy*

Courts have held that when a workers' compensation statute is amended to exclude mental-mentals as a matter of law, the employer thereupon loses its immunity to the worker's tort suit. This was the holding in a 1996 Montana case.[159] That decision was based on the constitutional principle that a state cannot abolish the common-law cause of action to sue in personal injury (that is, by creating workers' compensation) and then abolish the same cause of action within the workers' compensation law. The principle itself derives from the state constitution's "Open Courts" provisions.

A Washington case from 2019 reveals a potentially cognizable action. There, the worker, a public defender, was stalked and otherwise harassed by a former criminal court client to whom she had been assigned. When she complained to her supervisor of repeated harassing episodes, he reportedly

156. Smith v. Carver County, 931 N.W.2d 390 (Minn. 2019) (WCCA committed error in reversing denial of PTSD claim by former police officer; ALJ had no obligation to ascertain whether defense psychologist closely held to the DSM-5 diagnosis of PTSD in his opinion), *reversing*, Smith v. Carver County, 2019 WL 235685, at *1 (Minn. W.C.C.A. 2019).

157. Sakotas v. WCAB (Motel 6), 95 Cal. Rptr.2d 153 (Ct. App. 2000).

158. *Id.* at 160 ("[T]he Legislature enacted section 3208.3, subdivision (b)(1) to combat the proliferation of fraudulent psychiatric claims and reduce the costs of workers' compensation coverage."); *see also* McCrone v. Bank One Corp., 839 N.E.2d 1 (Ohio 2006) (R.C. 4123.01(c)(1) did not violate equal protection by complete exclusion of psychological and psychiatric injuries from workers' compensation coverage); Frantz v. Campbell Cnty. Mem. Hosp., 932 P.2d 750 (Wyo.1997) (noting that state workers' compensation law did not violate equal protection by excluding mental injuries from workers' compensation coverage: "rationale behind the exclusion includes the steadily growing number of claims for psychological disorders, the difficulty with verifying such claims because the claimant's description of his condition is often the sole basis for diagnosis and the difficulty with determining whether a causal relationship exists between the claimant's employment and the mental injury").

159. Stratemeyer v. Lincoln Cnty., 915 P.2d 175 (Mont. 1996).

failed to take action. She ultimately filed for workers' compensation and instituted a negligence action against her employer. Of course, in Washington, only singular traumatic events will constitute a cognizable work injury. In civil court, the employer argued that the claimant's mental injury was from a singular event and hence that her negligence claim was barred by the exclusive remedy. The trial court agreed, dismissing the claim. On appeal, however, the court held that a genuine issue of material fact existed with regard to whether the injuries were gradual or singular. The court thus reversed and remanded. If the jury found that her injury from gradual traumatic events, she would be allowed her negligence suit.[160]

West Virginia is a jurisdiction where the argument for employer tort liability in the face of mental-mental abolition has been unsuccessful. Under the 1993 reform, mental-mentals were excepted from compensability as a matter of law. Thereafter, a coal miner emotionally traumatized by a mine explosion sued his employer in tort. The issue of availability of remedies was before the court, but such considerations were overwhelmed by the majority's conviction that the legislature desired that employers remain immune from such suits.[161]

E. *Attempts to Avoid Special Mental-Mental Rules*

A phenomenon, perhaps inevitable, of regimes that exclude or limit mental-mentals, are legal "end-runs" around such roadblocks to recovery. Three such strategies exist.

1. Casting the Mental-Mental as a Physical-Mental

Under this approach, the injured worker encounters a situation, usually an accident, that features a superficial physical affect, but then develops a mental disability. The lawyer—or court—thereupon casts the case as a physical-mental to avoid a complete prohibition or abnormal working conditions requirement. This approach has not been successful in Pennsylvania. For example, in one case, the worker, an aide in a group home for the disabled, developed a mental disability after combative residents pulled at her hair and blouse. As Pennsylvania is an abnormal-working-conditions jurisdiction, claimant sought to portray the injury as a physical-mental. This attempt was unsuccessful, with the court holding that such level of stimulus was insufficiently physical.[162] A similar portrayal, however, was

160. LaRose v. King County, 437 P.3d 701 (Wash. Ct. App. 2019). The LaRose workers' compensation claim, meanwhile, was dismissed, as the judge found that the mental injury was from gradual stress. The appellate court affirmed in a 2020 ruling. LaRose v. Department of Labor & Industries, 456 P.3d 879 (Wash. Ct. App. 2020).

161. Bias v. E. Associated Coal Corp., 640 S.E.2d 540 (W. Va. 2006). This holding provoked a blistering dissent.

162. Anderson v. WCAB (Wash. Greene Alt.), 862 A.2d 678 (Pa. Commw. Ct. 2004).

successful in Colorado.[163] There, to prevail in a mental-mental, the statute requires the testimony of a psychiatrist or psychologist. In the case at hand, claimant had no such expert evidence, but the court allowed the "grabbing, pinching, and kissing," to which she was subjected, to serve as a physical injury. In this manner, the requirement of the special expert was avoided.

2. Casting the Mental-Mental as a Mental-Physical

Under this approach, the injured worker encounters a situation, usually one of mental stress, which leads to a mental disability, but one accompanied by physical problems, such as high blood pressure or gastrointestinal upset. The lawyer—or court—thereupon casts the case as a mental-physical to avoid the complete prohibition or abnormal working conditions requirement. Larson has long identified this strategy, remarking, "There is the natural tendency for employees living in states that bar altogether claims for mental injury based on mental stimuli, but which allow claims for physical injury caused by mental stimuli, to attempt to expand the 'physical' component of their injuries in order to qualify for benefits under the statute's definitions."[164]

The exemplary case provided by Larson—*Luttrell v. Clearwater County Sheriff's Office*[165]—involved a police dispatcher. There, the claimant worked as a police dispatcher who sustained an emotional breakdown caused by a stressful emergency call. She sought to portray her disability as mental-physical, with the physical consequence reflected by an increased heart rate. The court denied the claim, holding that she had failed to present "clear and convincing evidence that the increased heart rate was anything other than part of the psychological response to her own reaction. . . . This was a 'mental-mental' case and therefore not compensable in Idaho."[166] Meanwhile, a Pennsylvania police officer who was subject to stress sought to avoid the abnormal working conditions rule by depicting his symptoms of sweating, crying, and uncontrollable bowel movements as physical injuries. The court rejected this strategy, dismissing such maladies as nothing more "than manifestations of the stress that he experienced . . . ."[167]

3. Conceptualizing the Mental Disability as a Biological Disorder

The two approaches identified above accept the proposition that mental-mental injuries are, rightly or wrongly, treated by the law in a restrictive manner. The third strategy, however, rejects the entire premise that any

163. Oberle v. Indus. Claim App. Off., 919 P.2d 918 (Colo. Ct. App. 1996).
164. Larson, *supra* note 2, § 56.02[3].
165. Luttrell v. Clearwater Cnty. Sheriff's Off., 97 P.3d 448 (Idaho 2004).
166. Larson, *supra* note 2, § 56.02[3].
167. Young v. WCAB (New Sewickley Police Dept.), 737 A.2d 317, 322 (Pa. Commw. Ct. 1999).

such disparate treatment should exist and relies, instead, on scientific arguments that mental illnesses constitute biological disorders and, hence, are really physical injuries.[168]

This strategy rejects prejudiced thinking with regard to mental illness and argues that a "duality between body and mind" exists. That is, that the "structure of the body includes the basic organ systems, as well as the brain and mind—itself anatomically sited in the frontal cortex—functioning 'as an integrated whole, chemically, electrically, biochemically,' and that there can be an injury to the mind without a physical touching of some part of the body."[169]

Though compelling, the approach has been unsuccessful. The leading case on this strategy is the 2010 case *Wheeler v. State ex rel. Wyoming Workers' Safety and Compensation Division*.[170] There, a volunteer firefighter, fighting a fire and witnessing the deaths of two co-workers, developed PTSD. His later claim of permanent partial disability was denied on the grounds that his PTSD was reflective of an excluded mental disability. Claimant sought to avoid the exclusion via expert testimony that PTSD is reflective of an organic brain disorder, to wit, a physical injury:

> Q: And, Doctor, could you explain in layman's terms what your opinion is with respect to the physical organic basis of a posttraumatic stress disorder condition?
>
> A. Very succinctly. The brain is traumatized physically by the experience of a traumatic event where one's life is threatened or one is witnessing another life-threatening or potentially life-threatening type of event. And in the experience of that the brain goes into a very heightened state of arousal biologically . . ., the chemistry that subserves that arousal sets into motion a cascade of biological events as if dominoes are falling, and they affect a number of physical aspects of brain functioning. . . . Structurally over time these events can even cause radiographically demonstrable changes. . . . And you can actually visualize radiographically changes that have occurred structurally in the brain as a result of posttraumatic stress disorder.[171]

The hearing officer and state supreme court nevertheless denied the claim. Though not discounting the expert testimony, the court held that the legislature's explicit decision to exclude mental injuries would be

168. This writer discussed the strategy at length in David B. Torrey, *Pennsylvania Experiences with the Mental Injury/Physical Injury Dichotomy: Cases Involving Schizophrenia and Shiftwork Maladaptation Syndrome*, 47 IAIABC J. 57 (2010), https://iecdp.files.wordpress.com/2011/08/iaiabc_journal_spring_2010_webversion1.pdf.

169. Todd v. Goostree, 493 S.W.2d 411, 421 (Mo. Ct. App. 1973).

170. Wheeler v. State *ex rel.* Wyo. Workers' Safety & Comp'n Div., 245 P.3d 811 (Wyo. 2010).

171. *Id.* at 815.

meaningless, and undermined, if diagnoses like PTSD were considered physical injuries and hence not excluded.[172]

The proposition that mental illness is really *biological* illness has also been floated in a Pennsylvania case. The fact-finding (though not the holding) of that decision was that mental stress causing *schizophrenia* was a biological disorder and hence could be considered a mental-physical.[173] Yet, while the court approved an award of benefits, the conceptualization of schizophrenia, or other serious mental disorders, as a physical injury, has not, since that time, captured the imagination of Pennsylvania courts.[174]

This writer, meanwhile, has argued that one DSM-recognized mental disorder, shiftwork maladaptation syndrome (SMS), caused by working unusual shifts, and never getting a good night's rest, should be conceptualized as a physical disorder. Appellate courts that have considered this diagnosis have uniformly rejected compensability. Perhaps at some point the mental injury as biological disorder will, however, be accepted in the realm of SMS. This is so as scientific evidence of verifiable pathology is strong in this realm.[175]

F. *Mental-Mental Claims Based on Sexual Harassment*

Sexual harassment via psychological pressures is typically held compensable as a claim of the mental stress causing mental disability type. For example, in a Pennsylvania case, the Supreme Court held that a coal miner, victimized by a supervisor's coarse and joking harassments proposing brutalizing same-sex rape, showed abnormal working conditions and was entitled to benefits.[176] The Ohio statute, meanwhile, excludes mental-mentals but makes an exception if the mental injury has arisen from "sexual conduct in which the [employee] was forced by threat of physical harm to engage or participate."[177]

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172. *Id.* at 817 ("Based upon the statutory language which clearly differentiates between mental and physical injuries, the fact that the legislature made a specific change in 1994 to exclude mental injuries that were not caused by compensable physical injuries and our case law interpreting the statute, we conclude that the requisite 'physical injury' must be something outside of the biological changes in the brain associated with mental disorders. While we respect that [the expert] disagrees with the legislature's policy choice to disallow mental injuries, we cannot overlook the clear language of the statute.").

173. Leo v. WCAB (Borough of Charleroi), 537 A.2d 399 (Pa. Commw. Ct. 1988). In that case, the claimant was a municipal worker for a small city. According to the opinion, "Upon transfer from the Street Department to the Police Department, Claimant experienced a mental breakdown, a biological illness diagnosed as paranoia schizophrenia. His physical illness was triggered by the stress he experienced in his efforts to fulfill the post of a police officer." *Id.* at 400.

174. Torrey & Greenberg, *supra* note 76, § 4:33.

175. Torrey, *supra* note 168.

176. RAG (Cyprus) Emerald Res., LP v. WCAB (Hopton), 850 A.2d 833 (Pa. Commw. Ct. 2004), *rev'd*, 912 A.2d 1278 (Pa. 2007).

177. Ohio Rev. Code § 4123.01 (stating in part that "[i]njury" does not include: "(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an

Of course, claims based on Title VII alleging sexual harassment are not barred by the exclusive remedy.[178] Such claims are not usually based on personal injury. However, when such lawsuits including a count alleging mental and/or physical harm, and/or the need for medical and psychiatric treatment, a court may well strike the same.[179] This is so, anyway, in jurisdictions where sexual harassment is cognizable as a work injury; in short, the worker's tort claim sounding in negligence will likely be dismissed.

The potential bar of the New York law's exclusive remedy was recently implicated in the litigation that enveloped the controversial movie producer Harvey Weinstein and his various enterprises and associates. In a decision ruling on the defendants' summary dismissal motion, a federal court ruled that the plaintiff, a victim of sexual abuse by her sometime-employer Weinstein, potentially was asserting certain claims that were barred by the exclusive remedy.[180]

There, a movie producer, Canosa, filed a multiple-count lawsuit against Weinstein, his business partners, and his business (TWC). Among the several counts were allegations of rape, sexual abuse, intimidation, and harassment. The defendants, beyond Weinstein, were implicated on allegations (among others) that they had facilitated Weinstein's behavior. The defendants raised several defenses in their 12(b)(6) motion, asserting (among others), that certain claims were barred by the exclusive remedy.

As to that defense, Weinstein's business and its officers argued that the New York workers' compensation law was "the exclusive remedy for work-related injuries, including those involving sexual assault . . . ." They hence

injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate").

178. As the editor of the Larson treatise admonishes, "It is axiomatic that the exclusive remedy provisions of a state's workers' compensation act cannot trump federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, which generally prohibits discrimination and/or harassment of employees on the basis of, among other things, their sex [see The Supremacy Clause (USCS Const. Art. VI)]." Thomas A. Robinson, *Sexual Harassment Claims and Workers' Compensation Exclusivity*, Blog Post (Dec. 12, 2008), https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/posts/larson_2700_s-spotlight_3a00_-sexual-harassment-claims-and-workers_1920_-compensation-exclusivity. He also posits, correctly, that "in most jurisdictions, . . . some tort claims are successful as against the exclusivity defense, being treated as outside the ambit of the workers' compensation system. Decisions of this kind generally rely on one of three distinguishing features: [1] the intangible or emotional nature of the plaintiff's injury; [2] the intentional—rather than accidental—quality of sexual harassment; or [3] the personal—rather than work-related—origin of sexual harassment." *Id.*

179. Torrey & Greenberg, *supra* note 76, § 4:28 ("Federal courts are often presented with civil complaints that include sexual harassment counts pleading physical and mental injury. Most courts dismiss such counts, convinced that the Pennsylvania Supreme Court would hold that sexual harassment in the workplace is a condition of work, and that when an injury from the same occurs, it has arisen in the course of employment.").

180. Canosa v. Ziff, 2019 WL 498865 (S.D.N.Y. 2019).

sought dismissal of the case. The court, however, ruled that, pending discovery, it was too early in the proceedings to ascertain whether the claims that the plaintiff was making even had their basis in the employer-employee relationship. The court, denying the motion to dismiss, stated, "The Court is persuaded that, prior to discovery, Canosa does not yet have the factual tools to make a confident showing that her work for Weinstein and TWC fell outside the WCL, so as to preserve her negligence claims. . . ."[181] The import of the ruling, however, was that, if discovery showed that she was in an employer-employee relationship with Weinstein, her sexual harassment claims would be barred.

V. THE PLIGHT OF FIRST RESPONDERS: CASES, LAWS, AND PRESUMPTIONS

A. *Work Stress and Challenges for First Responders*

Workers laboring as first responders, such as police, firefighters, and EMTs, have jobs that most agree are naturally stressful. Many such workers have encountered difficulty in succeeding with mental stress claims even when exposed to the extreme violence and appalling tragedies that are so regretfully common in the present day. As demonstrated in Appendix 1, seventeen states do not provide coverage at all. In the abnormal-working-conditions jurisdictions, meanwhile, an afflicted police officer (for example) must typically prove that his or her stress is greater than that of other police officers. When coupled with the related rule that police officers must, in effect, be ready for virtually any violent situation, they are often left without a compensation remedy.

Though some courts strain to award benefits in extreme cases,[182] in many instances brutalized police officers and others simply cannot meet the considerable burden of proof required in the mental-mental sphere.[183]

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181. *Id*. at *11.

182. *See*, *e.g*., City of Lower Burrell v. WCAB (Babinsack), 2020 WL 1190603 (Pa. Commw. Ct. 2020) (police officer already stressed from working with angina found to have experienced abnormal working conditions when he observed dead body of his colleague, who had been murdered by escaped fugitive); Moran v. Ill. Workers' Comp'n Comm'n, 59 N.E.3d 934 (Ill. App. 2016) (court, reversing Industrial Commission, holds that claimant was exposed to sudden shock or fright, and Commission's finding to the contrary was against the manifest weight of the evidence: claimant was a supervisor at fire scene at which a subordinate was caught in a flashover and died; claimant developed guilt, mental collapse, and PTSD).

183. *See*, *e.g*., Smith v. Carver County, 931 N.W.2d 390 (Minn. 2019) (court, affirming ALJ's denial of benefits, holds that court of appeals committed error in reversing denial by former police officer; ALJ had no obligation to ascertain whether defense psychologist closely held to the DSM-5 diagnosis of PTSD in his opinion); Bentley v. Spartanburg County, 730 S.E.2d 296 (S.C. 2012) (deputy who shot umbrella-wielding suspect at short-range, and observed him die, did not experience unusual stress; though denial of benefits was affirmed, court recommended that legislature abandon the restrictive statutory test).

Three responses, within workers' compensation laws, to the first responder situation are evident. The first is a law to allow the worst of the illnesses, PTSD, to be covered in the case of all occupations. The second is an enactment which covers PTSD and/or other psychological maladies, but leaving the burden of proof on the worker. The third is creation of a presumption of causation for PTSD in the case of first responders. Several states have enacted such presumption laws. Both proposals and enactments among the states are noted and referenced in the tables of Appendices 2 and 3.

This impetus toward loosening mental-mental restrictions, by whatever means, is borne of a societal view that first responders, in the modern day, deserve access to medical and disability coverage in the face of exposure to an increasingly violent society. The everyday labor of such workers is stressful, but many newspaper stories recount, as well, the appalling stresses to which first responders are exposed when they arrive at the scenes of mass shootings such as that at the Sandy Hook, Connecticut, elementary school. A psychologist commenting on such events commented, "These mass shootings, especially when children are involved, that's when you see [first responders] break down."[184]

Meanwhile, an inordinate number of first responders are, in general, reportedly diagnosed with PTSD, and this fact has increasingly been understood by the public.[185] Advocates seeking easier access to mental-mental claims for first responders often assert that suicide rates among first responders are remarkably high.[186]

The impetus of loosening restrictions has also been tied to the "debt of 9/11 and its aftermath." A risk-management expert ventures that, as a result of that catastrophe, "[f]irst responders have earned unquestionable protection of [their] health under the law . . . [and] a generation of veterans now fills the ranks of first responders."[187] The same expert suggests that workers' compensation, with its typical insistence on scrutiny as to work causation, has, in effect, been diverted. In this regard, concerns over causation fall by

184. Rene Ebersole, *First Responders Struggle with PTSD Caused by the Emergencies, Death, Tragedies They Face Every Day*, Wash. Post (Oct. 15, 2019) (including an account of a volunteer firefighter/EMT traumatized by providing aid at the Sandy Hook elementary school massacre).

185. John E. Hanson, *Addressing the Emergence of [the] PTSD Presumption: Issues and Solutions*, Power Point Slides (Willis Towers Watson 2018), https://www.nlc.org/sites/default/files/users/user118/PDF%20Hanson%20PTSD%20d.3a.pdf.

186. *See* Hannah Wiley, *New California Law Lets First Responders Seek Workers' Comp for PTSD*, Sacramento Bee (Oct. 2, 2019) (reporting on the signing of S.B. 542 and stating that more firefighters and police officers died from suicide in 2017 than injuries sustained in the line of duty).

187. Hanson, *supra* note 185, at 4.

the wayside given that providing benefits under the program becomes a "very easy means of assuaging the community's need to help."[188]

B. *The Minnesota and Colorado Enactments*

Minnesota, a state that otherwise excludes mental-mentals, enacted a unique law facilitating PTSD awards. It did so in response to a notoriously harsh denial to a police officer who had been mentally traumatized but was left without a remedy. The Minnesota law, however, is democratic and covers *all* workers. The Colorado legislature also enacted a law which covers PTSD. That state is a "shock or fright" jurisdiction where compensability of mental-mentals is hence highly restricted. After reports that first responders would routinely use group health insurance for such mental injuries, a lobby developed to amend the law. In the current version, all workers can potentially secure an award for PTSD.[189]

C. *The Florida Enactment*

Florida, a state which has traditionally been hostile to mental-mentals, took another approach. It, too, enacted a law covering PTSD, but it applies only to first responders. This expansion of rights is likely the most publicized of the statutory enactments to address the plight of such workers.

The enactment unfolded in March 2018. The legislature in that month approved Senate Bill 376, which established PTSD as a compensable occupational disease for first responders. The law as codified, notably, is not part of the workers' compensation laws (title 440) but, instead, is codified at title 112, "Public Officers, Employees, and Records."

The genesis of the law is clear. Florida, in this regard, was a state where mental-stress injuries like PTSD were covered by workers' compensation only if the condition had its genesis in a physical injury. In the wake of the massacres at Pulse nightclub and the Marjory Stoneman Douglas High School, however, a lobby developed so that law enforcement officers, firefighters, and EMTs (career and volunteer) would be covered for the condition even in lieu of physical injury.[190]

Under the law, PTSD must have been diagnosed consistently with the DSM-5 and have been occasioned by exposures to or experiences with at least one of eleven situations (for example, "directly witnessing the death of a minor" or "directly witnessing death, including suicide, that involved

188. *Id.*

189. Colo. Rev. Stat. § 8-41-301(3).

190. *See, e.g.*, Louisiana Comp Blog, *New Louisiana PTSD Law for First Responders Stands out in Region* (July 25, 2019) (observing that the "new law is part of a larger national trend that seeks to address, in part, public outcry from what some considered to be negligent treatment of first responders struggling after mass shootings like that at the Pulse nightclub in Orlando").

grievous bodily harm of a nature that shocks the conscience."). With regard to this latter criterion, the Florida agency is directed to adopt definitional rules.[191]

The first responder must, in any event, prove the existence of the disorder "by clear and convincing medical evidence."[192] Thus, Florida has added PTSD as a compensable condition. Importantly, however, the first responder in Florida does not enjoy a presumption of causation, a popular statutory device that has been enacted in several jurisdictions.[193]

D. *Presumption Laws for First Responders*

1. The Trend

A vigorous trend is for states to make exceptions, within exclusionary laws, for first responders via the legislative "presumption of causation" device.[194] In February 2020, the National Council on Compensation Insurance (NCCI), which carefully monitors proposed bills and enactments on this topic, characterized the PTSD bills, including those featuring a presumption, to be the "top trending issue" for 2019.[195] These laws, as proposed and enacted, as they stood as of December 28, 2020, are listed in the tables of Appendices 2 and 3.

First-responder advocates have argued, often with obvious success, that current workers' compensation laws are inadequate to address the problem of first responder stress, injury, and suicide.[196] The idea behind such laws

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191. These rules have now been published. They are available at *First Responder FAQs for PTSD*, https://www.myfloridacfo.com/Division/WC/InfoFaqs/PTSD-FAQs.pdf.

192. *See* Fla. Stat. Ann. § 112.1815(5)(a) *et seq.*

193. Texas is another state where eligibility standards have been eased, but where the worker still has the burden of proof. Tex. Lab. Code § 504.019.

194. Thomas A. Robinson, *Challenges for First Responders (and a Society That Respects Them)*, *in* Workers' Compensation: Emerging Issues Analysis, 2019 Ed., vii *et seq.* (2019). This writer and colleagues have also tracked the trend for the last few years. *See* David B. Torrey, Lawrence D. McIntyre & Justin D. Beck, *Recent Developments in Workers' Compensation and Employers' Liability Law (2019 Survey Issue)*, 55 Tort Trial & Ins. Prac. L.J. 467, 470 (2020); David B. Torrey, Lawrence D. McIntyre, Kyle D. Black & Justin D. Beck, *Recent Developments in Workers' Compensation and Employers' Liability Law (2018 Survey Issue)*, 54 Tort Trial & Ins. Prac. L.J. 761, 766–67 (2019). A journalist's early account of this legislative activity is Louise Esola, *First Responder Comp Bills Introduced to Limited Success*, Bus. Ins. (Sept. 19, 2018), https://www.businessinsurance.com/article/20180919/NEWS08/912324081/First-responder-comp-bills-introduced-to-limited-success.

195. Workcompwire, *NCCI Release INSIGHTS: 2020 Workers' Compensation Legislative Session Review* (Feb. 12, 2020), https://www.workcompwire.com/2020/02/ncci-releases-insights-2020-legislative-session-workers-comp-preview.

196. *See, e.g.*, *New Louisiana PTSD Law for First Responders Stands out in Region*, La. Comp. Blog (July 25, 2019), https://compblog.com/new-louisiana-ptsd-law-for-first-responders-stands-out-in-the-region (observing that the "new law is part of a larger national trend that seeks to address, in part, public outcry from what some considered to be negligent treatment of first responders struggling after mass shootings like that at the Pulse nightclub in Orlando"); *see also* Hanson, *supra* note 185, at 2.

is that when a first responder (or similar worker) develops PTSD or other listed condition, he or she will no longer bear the burden of showing causation. Instead, the law presumes, or takes for granted, that work causation exists, and it is for the employing municipality to prove that the condition has its genesis in some non-work-related cause.

Maine and Vermont were states which, in 2018, enacted such laws. Meanwhile, NCCI identified Idaho, California, Louisiana, Nevada, New Hampshire, New Mexico, and Oregon as states which, during the first half of 2019, enacted laws establishing PTSD presumption laws for first responders.[197] Minnesota and Washington also have first-responder statutes that feature presumptions.

No two presumption laws are precisely alike. All feature PTSD, as defined by the DSM, as the malady covered, though New Hampshire and Oregon also include the diagnosis, "acute stress disorder." Meanwhile, the range of occupations is different for each jurisdiction. Oregon seems the most expansive, affording the PTSD presumption to full-time firefighters, EMS personnel, police officers, correctional officers (adult and youth), parole and probation officers, emergency dispatch personnel, and 911 operators.[198]

2. Exemplary State: Vermont

An example of one of these provisos is that of Vermont. The workers' compensation law of that state now provides, "In the case of police officers, rescue or ambulance workers, or firefighters, post-traumatic stress disorder that is diagnosed by a mental health professional shall be presumed to have been incurred during service in the line of duty and shall be compensable, unless it is shown by a preponderance of the evidence [by the employer] that the post-traumatic stress disorder was caused by nonservice connected risk factors or nonservice-connected exposure."[199] Notably, other mental conditions suffered by these Vermont workers are now covered as well, but in such cases the worker will bear the initial burden of proof of causation.[200] And, notably, a statute of repose is a feature of the statute: "A police officer, rescue or ambulance worker, or firefighter who is diagnosed with post-traumatic stress disorder within three years of the last active date of employment [in such occupation] . . . shall be eligible for benefits under this subdivision."

197. *See* Nat'l Council on Comp'n Ins. Leg. Trends Report (July 2019), https://www.ncci.com/Articles/Documents/II_Regulatory-Legislative-Trends2019.pdf.
198. Or. Rev. Stat. § 656.802.
199. Vt. Stat. § 601(11)(I)(i).
200. *Id.* § 601(11)(J).

3. Presumptions as Not Meaning Automatic Payment

A worker benefitted by a presumption of causation does not automatically receive an award of compensation, at least under presumption statutes as traditionally designed.[201] Presumptions are "rebuttable," which means, in the first responder context, that the defending municipality, as in Vermont, may develop its own proofs and defend itself in litigation. The presumption gives the claimant "a leg up" in court, but is not the equivalent of a pay order. This aspect of presumptions has on occasion been misunderstood.[202]

In some jurisdictions, the presumption of causation may be very weak. For example, under the Pennsylvania Act occupational disease provisos, as soon as the defense presents any evidence of lack of causation (identifying some other potential cause) the presumption—which is merely procedural—"disappears." The claimant thereupon, once again, has the burden of proof.[203] This type of presumption, in academic literature, is called a "Wigmore-Thayer" presumption. Such presumptions are not substantive rules of law (the so-called "Morgan" approach to presumptions) as found in certain jurisdictions, which may strengthen claimant's case.[204]

Given this level of nuance, a mandate exists in this area: each state presumption law must be carefully read to determine its precise operation. Still, in *any* jurisdiction, once litigation commences, a first responder who hopes to rely solely on the presumption to win his or her case may be disappointed. Indeed, lawyers with experience in occupational-disease litigation rarely rely completely on presumptions. This was the case in southwest

201. On the other hand, the New Mexico statute seems to suggest that a claimant qualifying for the presumption is to be paid medical treatment benefits until an adjudication to the contrary. The statute provides, "Medical treatment based on the presumptions created in this section shall be provided by an employer as for a job-related illness or injury unless and until a court of competent jurisdiction determines that the presumption does not apply. If the court determines that the presumption does not apply or that the illness or injury is not job related, the employer's workers compensation insurance provider shall be reimbursed for health care costs by the medical or health insurance plan or benefit provided for the firefighter by the employer." N.M. Rev. Stat. § 52-3-32.1(F).

202. Howard Fischer, *Arizona Officials Tackle Workers' Comp Law for Firefighters with Cancer*, YourValley.net (Jan. 16, 2020) (discussing a new bill that would eliminate "loophole" of rebuttal proviso and replacing same with presumably guaranteed recovery: "This new proposal would spell out that if a firefighter was diagnosed with one of the listed cancers in the law, that provides 'conclusive and irrebuttable' evidence that the disease is work related. And that, in turn, ensures that workers' compensation benefits are available."), https://www.yourvalley.net/stories/arizona-officials-tackle-workers-comp-law-firefighters-cancer,131201

203. Bristol Borough v. WCAB, 206 A.3d 585, 607 (Pa. Commw. Ct. 2019) ("As a general rule, a presumption is but an evidentiary advantage and its only effect is to shift the evidentiary burden of going forward to the opponent. . . . When evidence is introduced that rebuts the presumption, it disappears.").

204. David B. Torrey, *Firefighter Cancer Presumption Statutes in Workers' Compensation and Related Laws: An Introduction and a Statutory/Regulatory/Caselaw Table* (Nat'l Ass'n Workers' Comp'n Judges White Paper 2012), http://www.nawcj.org/wp-content/uploads/2019/06/NAWCJ-FIREFIGHTER-PRESUMPTIONS-Essay-Table-2013.pdf.

Pennsylvania in the extensive Black Lung litigation of the 1970s and 1980s. Counsel for coal miners never relied on the pneumoconiosis presumption enjoyed by deep miners. To the contrary, they always presented an expert pulmonologist or similar specialist.

4. Opposition to and Critique of Presumption Laws

Opposition exists to the trend of PTSD presumption laws. Some argue that evidence simply does not exist that PTSD is more prevalent among first responders than in other occupations, and hence that it is unsatisfactory that such workers receive the advantage that a presumption affords. One risk management expert writing on the topic is hardly hostile to first responders, but he quips that support of presumptions is on the rise despite "lack of persuasive scientific evidence . . . ." "[S]entiment over science," he complains, prevails among presumption advocates.[205] A California-based researcher, in a full-frontal attack on firefighter *cancer* presumptions, also rejects the proposition that the presumption should be expanded to PTSD. He admonishes that "the evidence for elevated risk among firefighters for any of these conditions is nonexistent, inconsistent or even contradictory."[206]

More common opposition is voiced by those who are concerned that PTSD-presumption laws will strain or overwhelm municipal workers' compensation budgets.[207] A particular challenge is estimating costs: "every source weighs the cost of PTSD differently."[208] An NCCI actuary in 2018 remarked that

> putting a dollar amount on the presumption bills is not feasible, given that "many of the occupational diseases typically included in proposals providing presumptive coverage to first responders have long latency periods. Therefore, it may take several years before claim activity associated with first responder occupational diseases emerge in the [available] data . . . ."[209]

A critique of a different kind is that it is unfair to allow the presumption to first responders, but *disallow* it to other workers who are exposed to extreme stress—*without* such exposures even being part of their jobs. Both Robinson, the editor of the Larson treatise, and Cleveland attorney Donald Lampert question the disparate treatment that is created by PTSD presumptions. Robinson ponders:

205. Hanson, *supra* note 185, at 4.

206. Frank Neuhauser, *Cancer Presumption for Firefighters: Good Policy or Give Away?*, IAIABC Persps. 7 (July 2019).

207. Esola, *supra* note 194 (noting that PTSD presumption bills "have been opposed by municipalities concerned about the potential for their costs to run in the 'hundreds of millions of dollars'").

208. Hanson, *supra* note 185.

209. Esola, *supra* note 194.

> [O]ne might imagine that in Florida, Connecticut, Kentucky, Washington, Idaho, and any other state that limits PTSD to so-called "first responders," it is the long-haul truck driver who is actually the first on the scene at many serious auto accidents. It [was] a teacher who was first on hand [at the Sandy Hook massacre] to hold the hand of a dying child shot by a crazed assailant. It was a bartender or other wait staff employee [who] was the first to comfort a wounded customer or co-employee at Pulse, the Orlando nightclub.[210]

Lampert, noting that, in Ohio, a PTSD bill was submitted but never enacted, posits, "Police and fire unions were obviously disappointed. Absent from the debate[, however], were the legal and constitutional issues that workers' compensation practitioners would recognize. What about non-public safety workers? An over-the-road truck driver and/or Good Samaritan can just as easily come upon a horrible scene causing PTSD."[211]

A final critique of the presumption laws is that, in typically limiting recovery to PTSD, less extreme yet disabling forms of psychic illness are excluded. That critique, in other words, asserts that the presumption laws in their current typical manifestation do not go far *enough*.

VI. CONCLUSION

The last word has obviously not been spoken on the issue of mental-mentals. As demonstrated by the last section, evidence exists that the pendulum has begun to swing back towards a more available mental-mental remedy. This is so, at least, when a pinpointed diagnosis of PTSD is made and the victim is a first responder. It may be, however, that the increased sensitivity to mental suffering that is reflected by the trend of first-responder laws may transfer to the benefit of the general working public. That seems to have been the case in Minnesota and Colorado.

It is submitted that complete disallowance of mental-mental cases is unsatisfactory. While, on the one hand, such exclusionary rules by their very nature prevent fraudulent and exaggerated claims, many workers who sustain serious mental injuries arising in the course of their employment are denied the reasonable remedies of medical treatment and disability payments during their period of convalescence. On the other hand, unrestricted compensability seems unworkable and, to revisit some earlier rhetoric, may be the employers' "worst nightmare." We know from the California and Pennsylvania experiences that open-ended regimes invite all sorts of marginal claims, contentious litigation, and public disrespect for

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210. Thomas A. Robinson, *Challenges for First Responders (and a Society that Respects Them)*, *in* WORKERS' COMPENSATION: EMERGING ISSUES ANALYSIS, 2019 ED. ix–x (2019).

211. Donald E. Lampert, *Recent Developments in Ohio*, *in* WORKERS' COMPENSATION: EMERGING ISSUES ANALYSIS, 2019 ED. 165 (2019).

the system. A reasonably applied abnormal-working-conditions rule seems best suited as a compromise.

It is submitted, also, that allowing mental-mentals indiscriminately and simply letting the judge decide all disputed claims is no answer to the overall challenge of the mental-mentals. True, it is the office of courts to decide disputes. Yet, virtually *all* mental-mentals *are* disputed, and litigation of many such claims encourages individuals to stay out of work, generates invasive discovery, and promotes hostility between workers and their employers.

Perhaps another compromise measure (for the exclusionary jurisdictions) is to allow, for the mental-mental case, psychiatric and psychological treatment only, and/or a maximum number of weeks of disability.[212] True, such a proposal goes against the National Commission condemnation of arbitrary limits on duration of benefits,[213] but such a compromise may relieve the employer anxiety that mental-mental claims will be of indefinite duration and unpredictable cost while providing injured workers with some measure of reasonable care.[214]

212. Some states limit the maximum number of weeks of disability available in *physical-mental* claims to six months after maximum medical improvement. *See*, *e.g.*, Fla. Stat. Ann. § 440.093(3). Wyoming maintains essentially the same law. Wyo. Stat. § 27-14-102(xi)(J)(I). The new Virginia first-responder PTSD statute imposes a cap of fifty-two weeks on duration of disability payments; meanwhile, a statute of repose provides that no medical treatment or disability payments may be made beyond four years from the date of the qualifying event. *See* Va. Code § 65.2-107.

213. *See* Recommendation 3.17, Report of the Nat'l Comm'n on State Workmen's Comp'n Laws 65 (1972), https://workerscompresources.com.

214. By way of analogy, it is notable that, in the wake of the chronic pain/opioid abuse crisis, employers and carriers have been encouraged, as a substitute for narcotic use, to point workers to psychotherapy for pain management. This is so in the name of cost savings, but also for the improved health of the patient.

APPENDIX 1

COMPENSABILITY OF MENTAL STRESS/MENTAL DISABILITY CLAIMS UNDER STATE WORKERS' COMPENSATION LAWS (JANUARY 2021)

C = Potentially Compensable
GS = Gradual Stress Potentially Compensable
AWC = Abnormal Working Conditions/Unusual or Untoward Work Conditions Required
S/F = Sudden Stimulus: Shock, Fright, or the Like

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
AL	No				Ala. Code § 25-5-1(9) ("Injury does not include a mental disorder or mental injury that has neither been produced nor been proximately caused by some physical injury to the body.").	
AK	Yes		x		Alaska Stat. § 23.30.010(b) ("compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. . . .").[215]	*Kelly v. State of Alaska (Dep't of Corrections)*, 218 P.3d (Alaska 2009) (correctional officer who was threatened with death by inmate, and who developed PTSD, encountered "extraordinary and unusual" work circumstances).

215. **Alaska:** Alaska Stat. § 23.30.010(b) also provides, "The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer." This latter requirement is hereinafter referred to as the "Good-Faith Personnel Action" exception.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
AZ	Yes		x		Ariz. Rev. Stat. § 23-1043.01(B) ("A mental injury, illness or condition shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless some unexpected, unusual or extraordinary stress related to the employment or some physical injury related to the employment was a substantial contributing cause of the mental injury, illness or condition.").	*France v. Indus. Comm'n*, 2020 WL 772524 (Ariz. Ct. App. Feb. 18, 2020) (court, reversing ALJ, awards benefits to deputy who was traumatized by shotgun-wielding madman and who thereafter developed PTSD), *vacated*, 2021 WL 800755 (Ariz. Mar. 2, 2021); *Marks v. Indus. Comm'n (Crossroads Carriers, LLC & Sentry Ins. Co.)*, 2016 WL 3176467 (Az. Ct. App. 2016) ("A disabling mental condition is not compensable if it is brought about by the general building of emotional stress rather than an injury-causing event. . . .").
AR	No[216]			x	Ark. Code Ann. § 11-9-113 (disallowing all mental-mental claims, except when injury is sustained by "any victim of a crime of violence.").[217]	*Amlease, Inc. v. Kuligowski*, 957 S.W.2d 715 (Ark. 1997) (interpreting statute and denying claim to truck driver for his PTSD, incurred after motor vehicle accident involving fatality).

216. **Arkansas**: An exception exists when the claimant is a victim of a "crime of violence."

217. **Arkansas**: The restrictive 1993 reform in Arkansas was noted and criticized in John D. Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Sw*ing too Far?, 47 Ark. L. Rev. 1 (1994).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
CA	Yes	x[218]			Cal. Labor Code § 3208.3 (extensive proviso on compensability of psychiatric injuries, (a) seemingly allowing gradual stress in employees with six months or more of employment, but (b) for newer workers obliging same to prove "a sudden and extraordinary employment condition"; and (c) in all cases, except those subject to violence, obliging claimant to prove that work stress is the predominant cause of the injury).[219]	*Sakotas v. WCAB (Motel 6)*, 95 Cal.Rptr.2d 153 (Cal. Ct. App. 2000) (claimant, front desk clerk and occasional manager, who became stressed by increase of work over time, failed to show that such stress was predominant cause of injury).
CO	Yes			x	Colo. Rev. Stat. § 8-41-301(2), (3) (stating, *inter alia*, that, to constitute an injury, a "psychologically traumatic event" must have been experienced, and "the claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment.").[220]	*Kieckhafer v. Indus. Claim App. Off.*, 284 P.3d 2020 (Colo. Ct. App. 2012) (mental health nurse, in failing to submit expert report, necessarily failed to establish psychologically traumatic event, and ALJ and Appeals Office committed no error in dismissing claim).

218. **California**: Gradual stress claims not cognizable for workers who have been employed fewer than six months. The California law, and how it was changed in 1993, is discussed at Aya V. Matsumoto, *Reforming the Reform: Mental Stress Claims under California's Workers' Compensation System*, 27 Loy. L.A. L. Rev. 1327 (1994), https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1862&context=llr.

219. **California**: Statute features a Good-Faith Personnel Action exception. Lighter burden of proof on claimant when injury alleged to have been caused by violent act or exposure to same.

220. **Colorado**: July 2018 amendment clarifies that PTSD is covered. Also, statute features a Good-Faith Personnel Action exception.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
CT	No				Conn. Gen. Stat. § 31-275(16)(B)(ii) ("'Personal injury' or 'injury' shall not be construed to include: . . . (ii) A mental or emotional impairment, unless such impairment ([1]) arises from a physical injury or occupational disease, [except] ([2]) in the case of a police officer [detailing certain circumstances]. . . .").[221]	
DE	Yes	x			Del. Code Ann. tit. 19, § 2301(12) (basic definition of injury; does not refer to mental stress).	*State v. Cephas*, 637 A.2d 20 (Del. 1994) (claimant must prove that the mental illness was the result of stressful working conditions by an objective causal nexus test; claimant must prove both the existence of the stressful working conditions and relate those conditions to the mental disorder; here, correctional officer established his case under this test by showing that his duties had increased significantly over time) (court reviewing Larson treatise and, as well, the then-extant laws of multiple jurisdictions).

221. **Connecticut**: *See generally* Lee R. Hansen, "*Mental-Mental" Workers' Compensation in Nearby States*, Office of Legislative Research Report (March 3, 2014) (examining the law of mental-mental injuries in Massachusetts, New Jersey, New York, and Rhode Island), https://www.cga.ct.gov/2014/rpt/pdf/2014-R-0080.pdf.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
FL	No				Fl. Stat. § 440.093(1) ("A mental or nervous injury due to stress, fright, or excitement only is not an injury by accident arising out of the employment. Nothing in this section shall be construed to allow for the payment of benefits under this chapter for mental or nervous injuries without an accompanying physical injury requiring medical treatment. A physical injury resulting from mental or nervous injuries unaccompanied by physical trauma requiring medical treatment shall not be compensable under this chapter").	*Kneer v. Lincare (Travelers)*, 267 So. 3d 1077 (Fla. Dist. Ct. App. 2019) (limit on psychiatric care (post-physical injury) was not unconstitutional) (noting also, "benefits have never been available for stand-alone mental injuries without an accompanying physical injury.").
GA	No				Ga. Code Ann. § 34-9-1(4) (basic definition of injury; does not refer to mental stress).	*Abernathy v. City of Albany*, 495 S.E.2d 13 (Ga. 1998) (mental-mentals are not compensable; hence, where municipal worker, after massive flooding, had to retrieve unearthed caskets and corpses, and suffered nervous breakdown, claim denied).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
HI	Yes	x			Hawaii Rev. Stat. § 386-3 (basic definition of injury; refers to mental stress only to exclude certain claims "resulting from disciplinary action taken in good faith by the employer. . . .").	*Davenport v. City & County of Honolulu*, 59 P.3d 932 (Haw. Ct. App. 2002) (explaining 1998 amendment which recognizes good faith disciplinary action exclusion, and holding that claimant, who sustained anxiety disorder from the back-and-forth of promotions and demotions, was not subject to such exclusion).
ID	No				Idaho Code Ann. § 72-451 (allowing mental stress claims only for mental-physicals, and expressly disallowing mental-mental claims).	*Luttrell v. Clearwater Cnty. Sheriff's Office*, 97 P.3d 448 (Idaho 2004) (clarifying that mental-mentals are not compensable).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
IL	Yes			x	Ill. Comp. Stat. § 305/1(d) ("To obtain compensation . . . , an employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment.").[222]	*Moran v. Ill. Workers' Comp'n Comm'n*, 59 N.E.3d 934 (Ill. App. Ct. 2016) (court, reversing Industrial Commission, awards benefits to fire company supervisor who directed firefighters at site of deadly house fire); *GM Parts Div. v. Indus. Comm'n*, 522 N.E.2d 1260 (Ill. App. Ct. 1988) (claimant did not show that altercation with supervisor met the test of *Pathfinder*, which requires "a sudden severe emotional shock which produces immediate disability and is caused by an uncommon nontraumatic work-related experience out of proportion to the incidents of normal employment activity."); *Pathfinder Co. v. Indus. Comm*'n, 343 N.E.2d 913 (Ill. 1976) (landmark case changing the law and confirming that a mental-mental claim, when supported by sudden and severe emotional shock, "traceable to a readily perceivable cause," is compensable; in case, prevailing claimant, a factory worker, had come to aid of injured co-worker laboring on press, and had retrieved severed hand of such co-worker from machine, thereafter suffering an anxiety reaction).

222. **Illinois**: "Accidental" is not defined in the Act.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
IN	Yes		x		Ind. Code § 22-3-6-1(e) (basic definition of injury – does not mention mental injuries).	*Hansen v. Von Duprin*, 507 N.E.2d 573 (Ind. 1987) (claimant, a victim of past violence, harassed by a teasing supervisor (who was unaware of such history, and who in the end set off a cap pistol near claimant), causing claimant's nervous breakdown, demonstrated cognizable injury).
IA	Yes		x		Iowa Code § 85.3(1) (referring to employer's obligation to pay for "any and all personal injuries sustained by an employee arising out of and in the course of the employment").[223]	*Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845 (Iowa 1995) (landmark case allowing for mental-mental claims, in case involving an insurance executive who had developed psychological condition in face of increased duties; remand required for determination of whether claimant met test of compensability, which is as follows: "in order for an employee to establish legal causation for a nontraumatic mental injury caused only by mental stimuli, the employee must show that the mental injury 'was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs,' regardless of their employer").

223. **Iowa**: Statute does not otherwise refer to mental injuries.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
KS	No				Kan. Stat. Ann. § 44-508 (general definition of injury; does not mention psychological injuries, but has been interpreted to exclude them).	*Followill v. Emerson Elec. Co.*, 674 P.2d 1050 (Ks. 1984) (claimant who developed PTSD after seeing co-worker's dead body, in a "grisly" scene, did not have cognizable claim); *see also Howell v. State of Kansas*, 84 P.3d 636 (Kan. 2004) (claim denied: suicide case involving corrections psychologist who had developed depression from work stressors).
KY	No				Ky. Rev. Stat. § 342.0011 (general definition of injury, stating that stress injuries can only be cognizable if prompted by physical animus).	
LA	Yes			x	La. Rev. Stat. § 23:1021(b) ("Mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident . . . and is not compensable . . . unless the mental injury was the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence.").	*Emerson v. Willis Knighton Med. Ctr.*, 257 So. 3d 243 (La. Ct. App. 2018) (convalescent home nurse's aide who became stressed at extra work to be done on her night shift, because of day shift's indolence—experiencing the "same old thing"—did not experience stress of an unexpected nature as required by the statute).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
ME	Yes		x		Me. Rev. Stat. Ann. tit. 39-A, § 201 (3-A) ("Mental injury resulting from work-related stress does not arise out of and in the course of employment unless: A. It is demonstrated by clear and convincing evidence that: (1) The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and (2) The work stress, and not some other source of stress, was the predominant cause of the mental injury. . . .").[224]	*Caron v. Maine Sch. Admin. Dist. No. 27*, 594 A.2d 560 (Me. 1991) (school teacher who experienced increased pressures after her duties were drastically changed, did establish claim under this statute).

224. **Maine**: Statute features a Good-Faith Personnel Action exception.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
MD	Yes		x		Md. Code Ann., Labor and Employment § 9-101(b) (providing that "Accidental personal injury" means: "(1) an accidental injury . . . ," including "frostbite or sunstroke caused by a weather condition," but not referencing mental injuries).	*Belcher v. T. Rowe Price Found., Inc.*, 621 A.2d 872 (Md. Ct. App. 1993) (court recognizing mental-mental claims but requiring objective proof of harm and excluding gradual stress claim: "an injury under the Act may be psychological in nature if the mental state for which recovery is sought is capable of objective determination"); *Means v. Baltimore Cnty.*, 689 A.2d 1238 (Md. Ct. App. 1997) (paramedic who developed PTSD could potentially prevail on her claim as an occupational disease).
MA	Yes		x		Mass. Gen. Laws ch. 152, § 1(7A) ("Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment.").	*Bisazza's Case*, 897 N.E.2d 1 (Mass. 2008) (substantial evidence existed that claimant, correctional officer harassed in the wake of prison murder of renowned pedophile, did incur his PTSD in wake of series of such harassments, court remarking, as to intent of statute, "amendments are consistent with the goal of denying compensation for nonspecific emotional and mental disabilities.").

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
MI	Yes		x		Mich. Comp. Laws § 418.301(2) ("Mental disabilities . . . are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality.").	*Robertson v. DaimlerChrysler Corp.*, 641 N.W.2d 567 (Mich. 2002) (in case dealing with autoworker who felt he had been maltreated by supervisor, court insists that objective standard is to apply, and that claimant's perception of events must be "grounded in reality").
MN	Yes			x	Minn. Stat. § 176.011(15), (16) (providing, in definitions of occupational disease and injury, that PTSD is included).[225]	*Smith v. Carver Co.*, 931 N.W.2d 390 (Minn. 2019) (WCCA committed error in reversing denial of PTSD claim by former police officer; ALJ had no obligation to ascertain whether defense psychologist closely held to the DSM-5 diagnosis of PTSD in his opinion); *Schuette v. City of Hutchinson*, 843 N.W.2d 233 (Minn. 2014) (pre-amendment case disallowing PTSD in a police officer who had responded to fatal motor vehicle accident scene in which family friends were involved).

225. **Minnesota**: Statute features a Good-Faith Personnel Action exception.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
MS	Yes			x	Miss. Code. Ann. § 71-3-3 ("'Injury' means accidental injury or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results. . . .").	*Scarborough v. Miss. Dep't of Transp.*, 764 So. 2d 488 (Miss. 2000) (worker who felt unsupported by co-workers and supervisors, especially after he alleged various conspiracies, did not persuade ALJ and Commission that he had sustained a cognizable mental-mental injury; opinion setting forth required burden of proof, to wit, injuries caused "by some untoward or unusual event or events," and remarking that ordinary stress not sufficient enough to establish cognizable claim).
MO[226]	Yes		x		Mo. Rev. Stat. § 287.120.8, .9 (indicating, *inter alia*, that stress must be "extraordinary and unusual").	*Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804 (Mo. 2017) (highway department worker who was exposed to repeated stressful highway accident scenes did not show extraordinary and unusual work conditions); *Schaffer v. Litton Interconnect Tech.*, 274 S.W.3d 597 (Mo. Ct. App. 2009) (executive in charge of national workplace safety programs did not show that stress was extraordinary and unusual).

226. **Missouri**: Statute discussed at Natalie Riley, *Mental-Mental Claims—Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 Mo. L. Rev. 1023 (2000).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
MT	No				Mont. Code Ann. § 39-71-119(3) (injury does not mean a physical or mental condition arising from emotional or mental stress; or a nonphysical stimulus or activity); § 39-71-116(23) (occupational disease does include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity).[227]	*Yarborough v. Mont. Mun. Ins. Auth.*, 938 P.2d 679 (Mont. 1997) (in light of statute, firefighter's PTSD was excluded from coverage, court finding unpersuasive the theory that violence of fireball at fire scene constituted a physical animus); *Stratemeyer v. Lincoln Co.*, 915 P.2d 175 (Mont. 1996) (police officer with PTSD did not sustain injury which was compensable under WCA; thus, he was able to sue employer in tort—exclusive remedy is not applicable if the *quid pro quo* of the compromise fails).
NE	No				Neb. Rev. Stat. § 48-141(4) (basic definition of injury; does not refer to mental stress).	*Zach v. Neb. State Patrol*, 727 N.W.2d 206 (Neb. 2007) (police trooper who committed suicide in response to alleged stress did not sustain compensable death; this was so even if evidence showed chemical imbalances within brain; also, mental-mentals are not covered either as injuries or as occupational diseases).

227. **Montana**: Law precludes not only "mental-mentals" but "mental-physicals" as well.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
NV	Yes			x	Nev. Rev. Stat. § 616C.180 (statute providing for "[i]njury or disease caused by stress" stating, *inter alia*, that "extreme stress in time of danger" must attend any mental-mental injury, and not be caused by "any gradual mental stimulus").	*McGrath v. Dept. of Pub. Safety*, 159 P.3d 239 (Nev. 2007) (state trooper who alleged mental injury from series of harassing and retaliatory acts by co-workers showed only gradual stress injury, and did not make out a claim under this statute).
NH	No				N.H. Rev. Stat. § 281-A:2(XI) (injury does not include disease or death "resulting from stress without physical manifestation").[228]	*Appeal of Lettelier*, 35 A.3d 629 (N.H. 2011) (company president, seriously depressed after failure of his steel-making business, did not establish compensable mental injury).
NJ	Yes	x			N.J. Stat. Ann. § 34:15-31 (basic definition of injury; does not refer to mental stress).	*Rizzo v. Kean Univ.*, 2014 WL 2590281 (N.J. Super. 1981) (social work professor did not meet burden of proof to show mental breakdown from perceived stressors at work; said burden of proof requires "objectively stressful working conditions . . . 'peculiar' to the particular workplace").

228. **New Hampshire**: Statute features a Good-Faith Personnel Action exception.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
NM	Yes		x		N.M. Stat. § 52-1-24 (defines "primary mental impairment" to rule out gradual stress and requires a "psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances").[229]	*Romero v. City of Santa Fe*, 134 P.3d 131 (N.M. Ct. App. 2006) (worker who was obliged to daily attend to pigeon excrement as part of his job as municipal pool manager did not suffer psychologically traumatic event); *Douglass v. State of New Mexico*, 812 P.2d 1331 (N.M. Ct. App. 1991) (white collar worker with responsible job, who developed increase in duties because of personnel cutbacks, did not suffer traumatic event but, instead, gradual stress) (court referring to leading case of *Jensen*, which explained the nature of the legislative enactment) (citing *Jensen v. N.M. State Police*, 788 P.2d 382 (N.M. Ct. App. 1990)).

229. **New Mexico**: Gradual stress was held to be compensable in one case, but legislature thereafter changed the law to require a psychologically traumatic event. See Candelaria v. Gen. Elec. Co., 730 P.2d 470 (N.M. Ct. App. 1986).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
NY	Yes		x		N.Y. Workers' Compensation Law § 2(7) ("'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom. The terms 'injury' and 'personal injury' shall not include an injury which is solely mental and is based on work-related stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer.").	*Matter of Lanese v. Anthem Health Servs.*, 85 N.Y.S.3d 262 (App. Div. 2018) (substantial evidence supported Board's determination that RN, who alleged harassment and bullying in connection with her transfer within the employer to a different job, did not "establish that the stress that caused the injury was greater than that which other similarly situated workers experienced in the normal work environment"); *Kraus v. Wegmans Food Markets, Inc.*, 67 N.Y.S.3d 702 (App. Div. 2017) (internal claims adjuster who, after change in policy, was harassed by fellow employees whose claims he was adjusting, developing PTSD, did establish cognizable mental-mental claim, court characterizing law as follows: "For a mental injury premised on work-related stress to be compensable, 'a claimant must demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment.").

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
NC	Yes		x		N.C. Gen. Stat. § 97-2(6) (basic definition of injury; does not refer to mental stress).	*Bursell v. Gen. Elec. Co.*, 616 S.E.2d 342 (N.C. 2005) (worker accused of theft—as it turned out, wrongfully—potentially established claim of work injury for his subsequent psychic illness; psychic trigger must be an "unlooked for and untoward event"); *Pitillo v. N.C. Dep't of Env't Health & Nat. Res.*, 566 S.E.2d 807 (N.C. Ct. App. 2002) (worker who felt unfairly treated in employment performance review did not meet burden of showing mental stimulus).[230]
ND	No				N.D. Cent. Code § 65-01-02(11)(b)(10) (the term *injury* does not include a "mental injury arising from mental stimulus.").	

230. **North Carolina**: For an academic treatment, see James R. Martin, Comment, *A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims*, 32 Wake Forest L. Rev. 193 (1997).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
OH	No[231]				Ohio Rev. Code § 4123.01 (stating, among other things, "injury" does not include: "(1) [p]sychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate").	*Armstrong v. John E. Jurgensen Co.*, 990 N.E.2d 568 (Ohio 2013) (truck driver who suffered physical injuries in accident, in the aftermath of which he also observed dead body, and who thereafter developed PTSD, did not establish a physical-mental claim, court rejecting theory that, because worker had sustained physical injury in collision, claim was cognizable; in this regard, credited medical evidence was that PTSD developed from observing the dead body, not the physical aspects of the accident).
OK	No[232]				Okla. Stat. tit. 85A, § 13 ("A mental injury or illness is not a compensable injury unless caused by a physical injury to the employee, and shall not be considered an injury arising out of and in the course and scope of employment or compensable unless demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.").	

231. **Ohio**: Exception for injury via "sexual conduct in which the claimant was forced by threat of physical harm to engage or participate. . . ."
232. **Oklahoma**: An exception is made with regard to a victim of violent crime.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
OR	Yes		x		Or. Rev. Stat. § 656.802(3) ("[A] mental disorder is not compensable under this chapter unless the worker establishes all of the following: (a) The employment conditions producing the mental disorder exist in a real and objective sense; (b) The employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles; (c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community; (d) There is clear and convincing evidence that the mental disorder arose out of and in the course of employment.").[233]	*Whitlock v. Klamath Co. Sch. Dist.*, 974 P.2d 705 (Or. Ct. App. 1999) (elementary school teacher whose duties were vastly expanded after ballot measure eliminated music classes, requiring him to undertake hours of off-duty preparation, experienced obligation not "generally inherent in every working condition").

233. **Oregon**: Requirements codified in the occupational disease sections.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
PA	Yes		x		Section 301(c)(1) of the Workers' Compensation Act, Pa. Stat. Ann. tit. 77, § 411(1) (defining *compensable event* as "injury" without reference to mental stress injuries).[234]	*City of Lower Burrell v. WCAB (Babinsack)*, 2020 WL 1190603 (Pa. Commw., filed Mar. 12, 2020) (police officer already stressed from working with angina found to have experienced abnormal working conditions when he observed dead body of his colleague, who had been murdered by escaped fugitive); *Payes v. WCAB (State Police)*, 79 A.3d 543 (Pa. 2013) (while "abnormal working conditions" must be proven before a mental stress case is cognizable, here state trooper who struck and killed woman, who was apparently seeking to commit "suicide by cop," had established cognizable claim).

234. **Pennsylvania**: Case law has interpreted "injury" to include mental-mentals, but the injured worker must show abnormal working conditions—a heavy burden. Gradual stress claims, meanwhile, are not cognizable.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
RI	Yes		x		R.I. Gen. Laws § 28-34-2(36) ("The disablement of an employee resulting from mental injury caused or accompanied by identifiable physical trauma or from a mental injury caused by emotional stress resulting from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental injury shall be treated as an injury as defined in § 28-29-2(7).").	*Tessier v. R.I. Hosp.*, W.C.C. 02-01732 (R.I. Work. Comp. App. Ct. 2003) (phlebotomist who felt harassed and unfairly treated at work did not establish cognizable claim; employer's motion for summary judgment granted).[235]
SC	Yes		x		S.C. Code Ann. § 42-1-160(B)(1) (providing, *inter alia*, that the "employee's employment conditions causing the stress, mental injury, or mental illness were extraordinary and unusual in comparison to the normal conditions of the particular employment").	*Bentley v. Spartanburg Co*, 730 S.E.2d 296 (S.C. 2012) (deputy sheriff who developed PTSD after he shot and killed a suspect who attempted to assault him did not establish cognizable claim —"incident was not extraordinary and unusual, but was a standard and necessary condition of a deputy sheriff's job.").

235. **Rhode Island**: A leading case from 1981, *Seitz v. L&R Indus.*, 437 A.2d 1345 (R.I. 1981), addressed mental-mental cases, and a rule allowing the same under certain conditions was eventually codified. The *Seitz* case is still cited as precedent even though a statute is now in place. In *Seitz*, the court held that an office manager who suffered from the ordinary stress and rigors of moving her office from one city to another was not entitled to obtain benefits under the Workers' Compensation Act for her alleged psychological injuries.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
SD	No				S.D. Codified Laws § 62-1-1 (“The term [injury] does not include a mental injury arising from emotional, mental, or non-physical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought. . . .”).	
TN	Yes			x	Tenn. Code Ann. § 50-6-102. (17) (“‘Mental injury’ means a loss of mental faculties or a mental or behavioral disorder, arising primarily out of a compensable physical injury or an identifiable work-related event resulting in a sudden or unusual stimulus, and shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities.”).	*Edwards v. Fred’s Pharmacy*, 2018 WL 9365652017 (Tenn. Work. Comp. App. Bd. 2018) (retail manager who was assaulted by shoplifter established “sudden and unusual stimulus”).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
TX	Yes			x	Tex. Lab. Code § 408.006 (announcing, as to the 1993 amendments to law, "(a) It is the express intent of the legislature that nothing in this subtitle shall be construed to limit or expand recovery in cases of mental trauma injuries. . . .").[236]	Appeal No. 030169, 2003 WL 1733971 (Tex. Work. Comp. Comm'n 2003) (claimant, director of victim advocacy center, who suffered mental breakdown after learning that district attorney was calling organizations to attempt to get her fired, did not establish cognizable claim, Commission noting that claimant suffered mental stress from multiple stressors which were not work-related and that hearing officer specifically found that "the claimant did not suffer a work related single event which resulted in a work related mental trauma injury."; Commission also stating, "While a specific stressful incident of sufficient magnitude occurring on the job can result in a compensable mental trauma injury, repetitive mentally traumatic activity or stressful events do not constitute a compensable injury.").

236. **Texas**: Statute features a Good-Faith Personnel Action exception.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
UT	Yes			x	Utah Code Ann. § 34A-2-402(2)(a) ("extraordinary mental stress from a sudden stimulus" required to establish a cognizable claim).	*Marks v. CLR Transp., Inc.*, 2019 WL 2100963 (Utah Labor Comm'n 2019) (although truck driver involved in catastrophic motor vehicle accident with multiple fatalities "resulted from a sudden stimulus," remand required so that determination could be made as to whether "such stress was greater than [his] non-industrial stress . . . .").
VT	Yes		x		Vt. Stat. Ann. tit. 21 § 601(11)(J) (providing, *inter alia*, that, for mental condition to be compensable, "the work-related event or work-related stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee across all occupations").[237]	*Crosby v. City of Burlington*, 844 A.2d 722 (Vt. 2003) (mental-mental claims are legitimate under Vermont constitution, but directing that purported unusual level of stress is determined vis-à-vis "all other employees performing similar work," and not "as compared with the general population of employees").

237. **Vermont**: Statute features a Good-Faith Personnel Action exception. **Note also**: The *Crosby* standard of assessing extraordinary stress via-a-vis similarly-placed workers was changed, in a 2017 amendment, to average employees across all occupations. Bergeron v. City of Burlington, 2018 WL 5823071 (Vt. Dep't of Lab. & Indus., 10.25.2018).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
VA	Yes			x	Va. Code Ann. § 65.2-101 ("'Injury' means only injury by accident . . .") (no reference to mental injury).	*Owens v. Va. Dep't of Transp.*, 515 S.E.2d 348 (Va. Ct. App. 1999) ("To qualify as a compensable injury by accident, a purely psychological injury must be causally related to a physical injury or to a sudden shock or fright arising in the course of employment," and highway worker exposed to unexpected loud noise of dropped manhole cover did not reflect exposure to sudden shock or fright).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
WA	Yes			x	Wash. Rev. Code § 51.08.100 ("'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom."). Essential regulation pursuant to this section: Wash. Admin. Code § 296-14-300(2)(a) (stress from a "single traumatic event"—like "threatened death or assault"—can constitute a work-related injury).	*Larose v. Dep't of Lab. & Indus.*, 456 P.3d 879 (Wash. Ct. App. 2020) (public defender who suffered repeated episodes of harassment at the hands of a former criminal court client did not suffer mental injury cognizable under statute); *Kinzey v. Dep't of Lab. & Indus.*, 2015 WL 7723006 (Wash. Ct. App. 2015) (paramedic's mental stress and breakdown developed over time, so hence could not qualify as either an injury or an occupational disease); *Rothwell v. Nine Mile Falls Sch.*, 295 P.3d 328 (Wash. Ct. App. 2013) (high school custodian's mental breakdown came on in response to stress of a single event, and hence she was limited to workers' compensation and had no cognizable claim against employer in tort—exclusive remedy applied).[238]

238. **Washington**: A program remarkable in that discrete mental injuries are recognized via administrative *r*egulation. Meanwhile, statute provides that mental-mentals cannot be recovered as an occupational disease.

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
WV	No				W. Va. Code § 23-4-1f ("[N]o alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. . . .").[239]	
WI	Yes		x		Wis. Stat. § 102.01(2)(C) ("'Injury' means mental or physical harm to an employee caused by accident or disease. . . .").	*Highman v. LIRC*, 621 N.W.2d 385 (Wis. Ct. App. 2000) ("Pursuant to the standard established in *School Dist. # 1*, Highman cannot recover duty disability benefits unless he experienced stress of a greater dimension than that ordinarily experienced by police officers.") (citing landmark case, *School Dist. #1 v. DILHR*, 215 N.W.2d 373 (Wis. 1974) (guidance counselor, exposed to harsh criticism and calls for resignation by students, did not prove extraordinary stress)).

239. **West Virginia**: Statute provides, remarkably, "It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter." This statute is thoroughly discussed at Logan Burke, *Finding a Way out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 W. Va. L. Rev. 889 (2015).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
WY	No				Wyo. Stat. Ann. § 27-14-102(a)(xi) (injury does not include "[a]ny mental injury unless it is caused by a compensable physical injury").	*Wheeler v. State*, 245 P.3d 811 (Wyo. 2010) (volunteer fire-fighter did not prove a physical injury in the form of PTSD—mental-mentals are barred under Wyoming statute, and while some experts believe that PTSD is conceptually a physical injury, because of changes caused by trauma to the brain, such was not the spirit of the exclusion as established by the legislature).
DC	Yes	x			D.C. Code § 32-1501(12) ("'Injury' means accidental injury or death . . . and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . . .") (no reference to mental injury).	*Jones v. D.C. Off. of Unified Comm'ns*, CRB No. 09-049, 2009 WL 1651413 (2009) (911 operator, to establish a mental-mental claim, did not have to show that work incident that gave rise to stress was peculiar to her occupational duties).
Longshore Act	Yes	x			33 U.S.C. § 902(2) ("The term 'injury' means accidental injury or death . . . and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . . .") (no reference to mental injury).	*Ceres Marine Terminals, Inc.*, 848 F.3d 115 (4th Cir. 2017) (court rejecting employer's argument that, for mental-mental injury, with worker in case alleging PTSD, said worker had to prove that he was in "zone of danger," as under Federal Employers Liability (FELA)).

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
FECA	Yes	x			5 U.S.C. § 8102(a) (establishing criterion of personal injury as one "sustained while [worker is] in performance of his duty . . . .").	*Lilian Cutler*, 28 ECAB 125 (1976) ("Where the disability results from his emotional reaction to his regular and specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act."). *See Claim of G.J.* (Dep't of Def., Defense Logistics Agency), No. 19-0801 (Sept. 16, 2019) (Board, affirming denial of benefits, sets forth law of mental injuries as established in *Cutler*; claimant had alleged mental injury from being publicly berated by a supervisor).[240]

240. The law under FECA surrounding stress claims is discussed at American Postal Workers Union, *Stress Claims*, https://apwu.org/news/stress-claims.

APPENDIX 2

JURISDICTIONS WITH SPECIAL FIRST RESPONDER PTSD/MENTAL STRESS LAWS AS PART OF, OR PROPOSED FOR, THEIR WORKERS' COMPENSATION STATUTES

State	Statute or Proposed Legislation
AL	Proposed Legislation: H.B. 44, https://legiscan.com/AL/bill/HB44/2020.
AK	No special workers' compensation law with regard to first responders.
AZ	Proposed Legislation: HB 2501 passed the House in 2018. Note: A separate law imposes counseling responsibilities on municipalities.
AR	No special workers' compensation law with regard to first responders.
CA	Cal. Labor Code § 3212.15.
CO	Colo. Rev. Stat. § 8-41-301(2)(a), (b). Proposed Legislation: SB20-026 (expanding coverages).
CT	Conn. Gen. Stat. § 31-275(16).
DE	No special workers' compensation law with regard to first responders.
FL	Special legislation for first responders. (No presumption.) Fl. Stat. § 112.1815(5)(a)-(e). 2019: HB 983 ratifies adopted rule 69L-3.009, F.A.C. that specifies the types of third-party injuries qualifying as grievous bodily harm of a nature that shocks the conscience, for the purposes of allowing wage replacement benefits for first responder post-traumatic stress disorder. Proposed legislation has been proposed to add corrections officers.
GA	No special workers' compensation law with regard to first responders.
HI	Proposed Legislation: https://www.capitol.hawaii.gov/session2020/bills/HB263_.HTM.
ID	Idaho Code § 72-451(4).
IL	Proposed Legislation: SB 2530, http://www.ilga.gov/legislation/billstatus.asp?DocNum=2530&GAID=15&GA=101&DocTypeID=SB&LegID=123351&SessionID=108.
IN	No special workers' compensation law with regard to first responders.
IA	No special workers' compensation law with regard to first responders.
KS	No special workers' compensation law with regard to first responders.

State	Statute or Proposed Legislation
KY	No special workers' compensation law with regard to first responders. Note: BR140 of 2019 did not advance in the legislature.
LA	SB 107 (2019), 23 La. Rev. Stat. § 1036.1, 33 La. Rev. Stat § 2581.2, and 40 La. Rev. Stat. § 1374.
ME	39-A Me. Rev. Stat. § 201(3-a)(B).
MD	No special workers' compensation law with regard to first responders.
MA	Proposed Legislation: SB 1509, https://malegislature.gov/Bills/191/S1509. Note: Most police are not covered by workers' compensation; a separate statute, Chapter 111F, which provides injured on duty pay, is the statute to be amended.
MI	Proposed Legislation, House Bill No. 4473, http://www.legislature.mi.gov/documents/2019-2020/billintroduced/House/pdf/2019-HIB-4473.pdf.
MN	Minn. Stat. § 176.011(15)(e).
MS	No special workers' compensation law with regard to first responders.
MO	Proposed Legislation: SB 710, http://senate.mo.gov/20info/BTS_Web/Bill.aspx?SessionType=R&BillID=26838225.
MT	Legislature, in 2019, amended section 39-71-105 to suggest that firefighters with mental injuries may be covered, but statutory language is inconclusive.
NE	Neb. Rev. Stat. § 48-101.01(B-D).
NV	AB 492: Nev. Rev. Stat. § 616C.180, § 616C.400, § 616C.420, and § 617.420.
NH	SB 59: N.H. Rev. Stat. § 281-A:2 and § 281-A:17; new sections § 281-A:17-b and c.
NJ	No special workers' compensation law with regard to first responders.
NM	N.M. Rev. Stat. § 52-3-32.1.
NY	Proposed Legislation: Senate Bill 5292A, https://legislation.nysenate.gov/pdf/bills/2019/S5292A.
NC	Proposed Legislation: H.B. 622, https://www.ncleg.gov/Sessions/2019/Bills/House/PDF/H622v2.pdf.
ND	No special workers' compensation law with regard to first responders.

State	Statute or Proposed Legislation
OH	Proposed Legislation: House Bill 308, https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-308.
OK	Proposed Legislation: H.B. 3360. Note: Covers correctional officers; Term "PTSD" not featured, H.B. 2271 Note: Covers first responders.
OR	Ore. Rev. Stat. § 656.802.
PA	Proposed Legislation, H.B. 432, https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=B&billNbr=0432&pn=2568.
RI	No special workers' compensation law with regard to first responders.
SC	Proposed Legislation: H. 3106, https://www.scstatehouse.gov/query.php?search=DOC&searchtext=H%203106&category=LEGISLATION&session=123&conid=29470597&result_pos=0&keyval=1233106&numrows=10.
SD	Proposed Legislation: H.B. 1142, https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=HB1142&Session=2020.
TN	Proposed Legislation: HB2577/SB2691, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2577.
TX	Tex. Lab. Code § 504.019.
UT	Utah said to have passed legislation establishing a working group to study the compensability of mental stress claims from first responders. (NCCI 2019).
VT	Vt. Stat. § 601(11)(I)(i).
VA	Va. Code § 65.2-107.
WV	Proposed Legislation: HB 440 http://www.wvlegislature.gov/Bill_Text_HTML/2020_SESSIONS/RS/bills/HB4400%20INTR.pdf.
WA	Wash. Rev. Code § 51.08, § 51.08.142, § 51.32.185.
WY	Wyo. Stat. § 27-14-102.
WI	Proposed Legislation: AB 569, also SB 511, https://docs.legis.wisconsin.gov/2019/proposals/reg/sen/bill/sb511.
DC	No special workers' compensation law with regard to first responders.

APPENDIX 3

STATUTORY FEATURES: SEVENTEEN STATES WITH FIRST RESPONDER PTSD/MENTAL STRESS LAWS

State	Occupations	Injury	DSM noted?	Presumption?	Effective Date	Citation; Select Remarks
CA	Firefighters (career and volunteer), peace officers, fire and rescue service coordinators.	PTSD	Yes	Yes	1/2/20	Cal. Lab. Code § 3212.15. Sunset 1/1/2025.
CO	All employees.[241]	PTSD with three enumerated criteria.	No	No	7/1/2018	Colo. Rev. Stat. § 8-41-301(2)(a), (b). Expands statute to detail that “psychologically traumatic event” includes PTSD.
CT	Police officers, parole officers, firefighters.	PTSD with six enumerated criteria.	Yes	No	7/1/19	Conn. Gen. Stat. § 31-275(16). DSM “most recent edition” is to be used.

241. **Colorado**: The law as ultimately enacted does not limit expanded PTSD coverage to first responders, but had its genesis in a concern that such employees typically did not recover workers’ compensation for the condition. A unique 2020 amendment clarified that “audible trauma” is covered. By this amendment, the legislature intended to include mental trauma sustained by 911 operators.

State	Occupations	Injury	DSM noted?	Presumption?	Effective Date	Citation; Select Remarks
FL	Law enforcement officers, EMTs (career and volunteer).	PTSD with eleven enumerated criteria.[242]	Yes	No	10/1/18	Fl. Stat. § 112.1815(5)(a)-(e). No six-month duration of TTD as otherwise applicable to physical-mentals.
ID	Peace officers, firefighters, career and volunteer EMTs, EMS providers, emergency telecommunications officers.	PTSD	Yes	No	7/1/19	Idaho Code § 72-451(4). Claim must be proven by clear and convincing evidence.
LA	Firefighters, career and volunteer, EMS personnel, police, state police.	PTSD	Yes	Yes	2019	SB 107 (2019), 23 La. Rev. Stat. § 1036.1, 33 La. Rev. Stat. § 2581.2, and 40 La. Rev. Stat. § 1374. Psychologist or psychiatrist must verify the diagnosis.
ME	Law enforcement officers, firefighters, EMS personnel.	PTSD	No	Yes	11/1/17	39-A Me. Rev. Stat. § 201(3-a)(B). Rebuttal must be by clear and convincing evidence.

242. **Florida**: These items are further refined by regulation.

State	Occupations	Injury	DSM noted?	Presumption?	Effective Date	Citation; Select Remarks
MN	Police officers, firefighters, EMTs, police dispatchers, correctional officers, sheriffs, deputy sheriffs, state patrol officers.	PTSD	Yes	Yes	6/1/18	Minn. Stat. § 176.011(15)(e). Presumption must be rebutted by "substantial factors." To gain presumption, worker must establish lack of pre-existing PTSD.
NE	Sheriffs, deputy sheriffs, police officers, state patrol officers, firefighters (career and volunteer), EMS personnel (career and volunteer), corrections officers, other state employees with contact with "high-risk individuals."	"Mental injuries and mental illness."	No	No	8/24/17	Neb. Rev. Stat. § 48-101.01(B-D).
NV	Firefighters (career and volunteer), police officers, emergency dispatch operators, EMTs.	Injury from "extreme stress," defined in detail, with two enumerated criteria.	No	No	6/3/19	AB 492: Nev. Rev. Stat. § 616C.180, §§ 616C.400, 616C.420, 617.420. No waiting period.

State	Occupations	Injury	DSM noted?	Presumption?	Effective Date	Citation; Select Remarks
NH	Firefighters (career and volunteer), law enforcement officers, corrections officers, emergency communications dispatchers, EMTs (career and volunteer).	PTSD and acute stress disorder.	No	Yes	1/1/21	SB 59: N.H. Rev. Stat. §§ 281-A:2, 281-A:17; new sections § 281-A:17-b, -c.
NM	Firefighters (career).	PTSD	No	Yes	6/14/19	N.M. Rev. Stat. § 52-3-32.1. (1) If claimant does not qualify for the presumption, claim can be proven with claimant carrying the burden of proof. (2) A claimant qualifying for the presumption is to be paid medical treatment benefits until an adjudication to the contrary.

State	Occupations	Injury	DSM noted?	Presumption?	Effective Date	Citation; Select Remarks
OR	Full-time firefighters, EMS personnel, police officers, correctional officers (adult and youth), parole and probation personnel, emergency dispatch and 9-1-1- operators.	PTSD, acute stress disorder.	Yes	Yes	9/29/19	Or. Rev. Stat. § 656.802. (1) Nature of rebuttal defined: “clear and convincing medical evidence that duties as a covered employee were not of real importance or great consequence in causing the diagnosed condition.” (2) Seven-year statute of repose.
TX	Peace officers, EMTs, firefighters.	PTSD	Yes	No	9/1/19	Tex. Lab. Code § 504.019. DSM-V “or a later edition adopted by the commissioner of Workers’ Compensation” is to be used.

State	Occupations	Injury	DSM noted?	Presumption?	Effective Date	Citation; Select Remarks
VA	Law-enforcement officers, fire-fighters, and emergency medical service workers (as to the last two, both career and volunteer).	PTSD	Yes	No	7/1/20	Va. Code § 65.2-107. A cap of 52 weeks on duration of disability payments; statute of repose provides that no medical treatment or disability payments may be made beyond four years from the date of the qualifying event.
VT	Police officers, EMTs, firefighters.	PTSD	No	Yes	6/8/17	Vt. Stat. § 601(11)(I)(i). Three-year statute of repose.
WA	Firefighters, law enforcement officers.	PTSD	Yes	Yes	6/7/18	Wash. Rev. Code §§ 51.08, 51.08.142, 51.32.185. 60-month maximum statute of repose.

State	Occupations	Injury	DSM noted?	Presumption?	Effective Date	Citation; Select Remarks
WY	Peace officers, career and volunteer firefighters, search and rescue personnel and ambulance personnel.	PTSD	Yes	No	7/1/20	Wyo. Stat. § 27-14-102. Benefits for mental injuries shall not extend for more than 36 months beyond diagnosis.[243]

243. During consideration of the Wyoming law, Professor Michael C. Duff expressed concern that the proposed PTSD presumption might be constitutionally questionable as an impermissible "special law." Michael C. Duff, *Is Wyoming's Proposed Workers' Compensation PTSD Bill a "Special Law"?*, Workers' Comp'n L. Prof Blog (Mar. 7, 2020), https://lawprofessors.typepad.com/workerscomplaw/2020/03/is-wyomings-proposed-workers-compensation-ptsd-bill-a-special-law.html.