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Put Your Money Where Your Mouth Is: Defending Commercial Reasonableness in Insurance Law's Duty to Make Reasonable Settlement Decisions

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Comment

PUT YOUR MONEY WHERE YOUR MOUTH IS: DEFENDING COMMERCIAL REASONABLENESS IN INSURANCE LAW'S DUTY TO MAKE REASONABLE SETTLEMENT DECISIONS

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"It's not gambling if you know you're going to win."[1]

I. The Only Game in Town

Close your eyes and try to imagine the number of ways insurance affects your daily life.[2] Whether you rent an apartment or own your own

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1. The Hangover (Warner Bros. 2009).

2. The term "insurance" does not include health insurance, both for the purposes of this Comment and in general in insurance law. *See generally* Robert H. Jerry, II & Douglas R. Richmond, Understanding Insurance Law 418–22 (6th ed. 2018) (explaining the common usage of the term "insurance"). There are a number of ways in which health insurance differs from liability insurance, and commentators Jerry and Richmond best summarize those differences in their treatise:

> Perhaps the most important point to stress in any discussion of health insurance from an "insurance law perspective" is that health insurance is unlike any of the other insurance products discussed throughout this book. Although adverse health events . . . are negative risks, much health care results from expected, foreseeable incidents (e.g., everyone gets influenza at some point in their lives), and much of the care delivered is either preventative (which is not fortuitous from an insurance law perspective) or well within the range of normal out-of-pocket expenses that in a different world most citizens would expect to pay out of pocket (e.g., in a differently organized health care system, a trip to the doctor or nurse practitioner for a sinus infection would cost about the same as a tank of gas).

Id. at 418. The insurance industry is massive; according to the Organisation for Economic Co-operation and Development (OECD), in 2019 (a pre-pandemic world) Americans spent $2.7 trillion on insurance premiums and received $1.5 trillion in gross claims payments. Org. for Econ. Coop. & Dev., OCED Insurance Statistics 2020, 173 (2021) (totaling the premiums and claims payments made in the United States). Also in a pre-pandemic world, the American insurance industry alone employed 2.9 million individuals, either directly with the insurance carrier (1.7 million) or through insurance agencies, brokerages, and insurance-related services (1.2 million). *See Facts + Statistics: Industry Overview*, Insurance

house, you probably have renters' or homeowners' insurance.[3] Your local coffee shop has workers' compensation insurance and a general liability policy that covers property damage and potential liability from customer injuries.[4] Every driver you see on your commute to work has, or at least should have, the state-mandated minimum amount of automobile insurance.[5] If you turn on a television, you are likely to see at least one insurance advertisement.[6] Directors & officers insurance, professional malpractice insurance, dog bite insurance—almost every aspect of our society can be insured.[7]

In 2010, the American Legal Institute (ALI) announced a new project to collect and synthesize the varying states' laws of insurance: Principles of the Law, Liability Insurance.[8] Though the project received little attention

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INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-industry-overview [https://perma.cc/NQ8T-XFAN], (last visited June 20, 2022).

3. *See, e.g.*, INSURANCE INFO. INST., 2020 TRIPLE-I CONSUMER POLL 11 (2020), https://www.iii.org/sites/default/files/docs/pdf/2020_triple-i_consumer_poll_091620.pdf [https://perma.cc/E6TV-ZLYW] ("In 2020, 57 percent of renters said they have renters insurance, compared with 42[%] in 2018."); *see also* INSURANCE INFO. INST., HOMEOWNERS INSURANCE: UNDERSTANDING, ATTITUDES AND SHOPPING PRACTICES, 3 (2017), https://www.iii.org/sites/default/files/docs/pdf/pulse-wp-020217-final.pdf [https://perma.cc/D6FF-HCA4] ("[T]he vast majority of American homeowners—about 93[%]—maintain at least basic homeowners insurance.").

4. *See, e.g.*, INSUREON, *Business Insurance for Coffee Shops and Cafes*, https://www.insureon.com/food-business-insurance/coffee-shops-cafes/cost [https://perma.cc/WG9Z-5NLG] (last visited June 18, 2022) (detailing the average starting insurance costs for an individual looking to start a coffee shop).

5. *See, e.g.*, JERRY & RICHMOND, *supra* note 2, at 813 ("All fifty states have some kind of financial responsibility requirement . . . setting the amount of [automobile] insurance or other financial resources drivers must have if an accident occurs.").

6. *See* Sarah Barry James & Kris Elaine Figuracion, *Insurers That Spent the Most on Advertising in 2020*, S&P GLOBAL MKT. INTEL. (June 24, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/insurers-that-spent-the-most-on-advertising-in-2020-64864585 [https://perma.cc/4RST-DAWU] ("The COVID-19 pandemic forced many advertisers to do more with less . . . . Progressive spent $1.95 billion on advertising in 2020, according to an S&P Global Market Intelligence analysis of statutory data, 17.5% more than the $1.66 billion it spent in 2019.").

7. *See generally* JEFFREY THOMAS, 3 NEW APPLEMAN ON INS. L. PRACTICE GUIDE § 37.24 (2021) (providing an overview of directors & officers (D&O) insurance and a checklist for determining scope of coverage); 1 HEALTH CARE LAW: A PRACTICAL GUIDE § 12.01 (2d ed. 2021) (introducing medical malpractice insurance); Larry Cunningham, *The Case Against Dog Breed Discrimination by Homeowners' Insurance Companies*, 11 CONN. INS. L.J. 1, 1 (2004) (providing an overview of liability insurance for dog owners).

8. *See, e.g.*, Jeffrey W. Stempel, *From Quiet to Confrontational to (Potentially) Quiescent*, BRIEF, Fall 2020, at 11. Jeffrey Stempel, an Advisor on the project, explains the significance of the shift from a Principles project to a Restatement project as follows:

> At the outset in 2010, the project was labeled Principles of the Law of Liability Insurance (PLLI), a designation that did "not purport to restate but rather [to] pull together the fundamentals underlying statutory, judi-

at the beginning, it became the subject of great controversy when the ALI announced it was transitioning the project into a Restatement.[9] Although fraught with disagreement, compromise, media attention, and unprecedented government interference, the project was finally approved at the 2018 ALI annual meeting and published in print in 2019.[10]

In its final form, the Restatement of the Law, Liability Insurance (RLLI) has fifty sections of black letter law governing liability insurance.[11]

> cial, and administrative law in a particular legal field and point the way to a coherent (a principled, if you will) future.
>
> The change to a restatement in 2014 proved significant in transforming a quiet, cooperative endeavor reminiscent of a law school symposium into a more contentious process. Increased scrutiny of the project by particularly active insurance industry observers also played a key role in converting the RLLI from a low-profile compilation of insurance law into a pitched battleground.

Id. (citation omitted) (quoting AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK, ix (rev. ed. 2015)).

9. *See, e.g.*, Stempel, *supra* note 8, at 12 ("The first three years of the project, while in the principles stage, were generally not controversial . . . . This changed in 2014 when the project was converted to a restatement, which triggered an almost immediate reaction."). The transition from Principles to Restatement was unprecedented. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. PA. J. BUS. L. 718, 724–25 (2020). While some commentators referred to the beginning years as quiet, others viewed this time as one of hiding. *See, e.g.*, Kim V. Marrkand, *How a Broken Process, Broken Promises, and Reimagined Rules Justify the Bench and Bar's Skepticism regarding the Restatement of the Law, Liability Insurance*, BRIEF, Fall 2020, at 21 (providing an overview of the RLLI debate and an in-depth look at some of the controversial sections). From the insurer prospective, Kim Marrkand recounts the transition differently:

> Having determined in 2010 to delve into liability insurance, the then executive director of the ALI—highly regarded professor Lance Liebman—explicitly told the readers of the PLLI that it "would be comprised of coherent doctrinal statements based largely on current state law but also grounded in economic efficiency and in fairness to both insureds and insurers." With that understanding, the American Insurance Association (AIA) agreed to participate in the PLLI project; the AIA appointed a liaison, and he, along with a handful of other thought leaders, joined the project. This promising beginning was thwarted almost immediately, however, when the reporters chose to operate in "stealth mode" for the first two years of the PLLI project's existence, completing two chapters of a four-chapter project "before people started paying attention."

Id. (citations omitted).

10. *See Restatement of the Law, Liability Insurance: Practitioners' Perspectives*, THE ALI REP. (Am. L. Inst., Phila., PA), Fall 2019 at 1 (highlighting the most-discussed sections of the newly published RLLI); Randy Maniloff, *The Thrilla in Phila.: 2nd Anniversary: ALI Restatement of Liability Insurance*, COVERAGE OPS. (May 31, 2020), https://www.coverageopinions.info/Vol9Issue4/ThrillainPhila.html [https://perma.cc/765P-BEUA] ("The ALI is headquartered in The City of Brotherly Love. But there wasn't much evidence of that during the drafting process. At times, it resembled The Thrilla in Phila."). For more on the timeline and controversy of the RLLI, see *infra* Section II.B.

11. RESTATEMENT OF THE LAW OF LIABILITY INSURANCE (AM. L. INST. 2019) [hereinafter RLLI].

One of the more controversial sections covers an insurer's duty to make reasonable settlement decisions.[12] While no one has ever questioned an insurer's control over settlement decisions, the ALI created controversy by reorganizing what was traditionally called insurer "bad faith" into (1) a duty to make reasonable settlement decisions and (2) a higher threshold for bad faith tort.[13] Many insurer advocates publicly questioned this section and the potential impact it might have on the insurance industry.[14] Since its final publication, courts have not cited to the RLLI much, and when one does, it is to state a settled definition or an uncontroversial rule.[15] Nonetheless, with the backing of one of the most influential and well-respected legal organizations in the country, the RLLI has the potential to greatly affect insurance law.[16]

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12. *See* RLLI § 24; *see also* RLLI § 27 (outlining the remedies for breach of the duty to make reasonable settlement decisions); Kim V. Marrkand, *Duty to Settle: Why Proposed Sections 24 and 27 Have No Place in a Restatement of the Law of Liability Insurance*, 68 RUTGERS L. REV. 201, 201–03 (2015) (arguing against an early draft of the RLLI's duty to make reasonable settlement decisions). For a discussion of the history that has led to the modern-day duty, see *infra* notes 34–55 and accompanying text.

13. *See* RLLI § 24 cmt. a (introducing the relationship between the duty to make reasonable settlement decisions and the duty of good faith and fair dealing).

> Because of its origins in the duty of good faith and fair dealing, courts in many jurisdictions refer to the standard for breach of the duty to make reasonable settlement decisions as one of "bad faith." That formulation suggests the need to prove bad intent on the part of the insurer that goes beyond the reasonableness standard stated in this Section, and some courts do require such a showing. In most breach-of-settlement-duty cases, however, even those that invoke the language of bad faith, the ultimate test of liability is whether the insurer's conduct was reasonable under the circumstances.
>
> This Restatement clarifies the law by making a clear distinction among several categories of insurance-law cases that many courts classify together as insurance bad-faith cases but in practice treat as distinct from each other.

Id. For an in-depth analysis of the objective reasonableness standard, see *infra* Section III.A.

14. *See, e.g.*, Marrkand, *supra* note 12, at 216–18 (arguing the real world consequences of the RLLI's duty to settle); Schwartz & Appel, *supra* note 9, at 776–80 (stating the potential impacts of the RLLI on the insurance industry); ERIC J. DINALLO & KEITH J. SLATTERY, ALI'S RESTATEMENT OF THE LAW LIABILITY INSURANCE: REGULATORY CONSIDERATIONS (2017), https://www.namic.org/pdf/insbriefs/ali_whtppr.pdf [https://perma.cc/KP8G-K6C2] [hereinafter Dinallo & Slattery Memo] (suggesting changes to the RLLI draft because of negative effects the current draft would have on the insurance market).

15. *See, e.g.*, Webcor Constr., LP v. Zurich Am. Ins. Co., 372 F. Supp. 1061, 1070 (N.D. Ca. 2019) (using the RLLI to state the general duty to defend complaint allegation rule); *see also* Randy Maniloff, *21st Annual "Ten Most Significant Coverage Decisions of the Year"*, COVERAGE OPS. (Jan. 3, 2022), https://www.coverageopinions.info/Vol11Issue1/Introduction.html [https://perma.cc/59W6-QKNC] (listing the RLLI's presence in judicial opinions as the second biggest insurance coverage story of the year).

16. *See* Jay M. Feinman, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS L. REV. 1, 7–11 (2015) (intro-

This Comment argues that a commercial reasonableness standard is the proper standard for determining whether an insurer has breached its duty to make reasonable settlement decisions.[17] As adopted in the RLLI, the objective reasonableness standard protects the interests of policyholders who are otherwise vulnerable to insurer control.[18] Insurers' interests are not at risk for abuse with this standard, and recent decisions highlight the difficulty in proving insurer breach.[19]

Part II lays some foundations of insurance law, exploring insurance law's place in our legal society, the traditional duties to defend and indemnify, and how these duties led to the duty to make reasonable settlement decisions. Part II also explores the general purpose of restatements and provides a timeline of the RLLI's nine-year journey to publication. Part III provides a critical analysis supporting the objective reasonableness standard and argues that the RLLI's acceptance of this standard was both doctrinally and practically appropriate. Part IV concludes by predicting the RLLI will continue its trajectory of impact in insurance law cases.

II. YOU'VE GOT TO KNOW WHEN TO HOLD 'EM[20]: AN INTRODUCTION TO INSURANCE LAW

Before diving into the controversy about the RLLI, this Comment will introduce some insurance foundation principles.[21] First, subsection A will present a brief outline of the history, function, and application of the insurer's duty to make reasonable settlement decisions.[22] Next, subsection B will distill the nine-year RLLI debate into a brief timeline, taking special note of discussions surrounding the duty to make reasonable settlement decisions.[23] This background information is fundamental to better understand the insurer's settlement duty, its origins, and the argument in favor of the objective reasonableness standard.[24]

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ducing some of the common disagreements about the ALI and its "concept of 'Restating' the law with a capital 'R'").

17. *See infra* Part III.

18. *See infra* Section III.A. To be clear, "objective" and "commercial" reasonableness mean the same thing, and the terms are used interchangeably in both this Comment and the RLLI. *See* RLLI § 24 cmt. a ("[C]ourts generally apply an *objective, commercial*-reasonableness standard, as distinct from a standard that relies primarily on proof of bad intent. To make clear that an insurer's settlement duty is grounded in *commercial* reasonableness, this Section does not use the term "bad faith . . . ." (emphasis added)).

19. *See infra* Section III.B.

20. KENNY ROGERS, *The Gambler*, *on* THE GAMBLER (Jack Clement Recording Studio 1978).

21. For a more in-depth look at any of the insurance law foundation topics discussed herein, see JERRY & RICHMOND, *supra* note 2.

22. *See infra* Section II.A.

23. *See infra* Section II.B.

24. For a discussion on the history of insurance law in American society, see TOM BAKER, KYLE LOGUE & CHAIM SAIMAN, INSURANCE LAW AND POLICY 1–2 (5th ed. 2020).

A. *Dealer's Choice: Insurance Law Fundamentals*

Insurance law, though essential to our modern society, is somewhat of an enigma within the legal industry.[25] In the United States, liability insurance first surfaced in the late nineteenth century, though the "modern" era of insurance law began in the early twentieth century.[26] The relationship between insurance law, contract law, and tort law is one that could, and does, occupy its own multi-chaptered treatise.[27] Therefore, for the purposes of this Comment, the focus will be not whether insurance law is unique, but rather, on issues that arise out of insurance law's unique characteristics.[28]

An insurance policy is a contract, and thus, foundations of contract law apply.[29] When interpreting an insurance policy—the contract between the insurer and the insured[30]—courts and the RLLI begin the pro-

25. *See* JERRY & RICHMOND, *supra* note 2, at 20–33 (discussing a variety of definitions of "what constitutes insurance" that hinge on which party is supplying the definition). Unlike the required first-year law school courses in torts and contracts, insurance is usually offered at law schools as an elective course, making the academic debates more niche and less generally known. *See, e.g.*, Jeffrey E. Thomas, *Insurance Law Between Business Law and Consumer Law*, 58 AM. J. COMP. L. 353, 356–58 (2010) (analyzing the status of insurance law within the U.S. law school curriculum, both as a course offered to students and as an interest among professors and chairs); David A. Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857, 876 (2001) ("Insurance law is not taught at every school (although the number of schools providing this offering appears to be increasing), and we believe it to be an elective in every law school curriculum where it is offered."); *see also* Don Macaulay, *Insurance Law: Becoming an Expert*, THE NAT'L JURIST, (June 18, 2017, 1:40 PM) https://www.nationaljurist.com/lawyer-statesman/insurance-law-becoming-expert [https://perma.cc/7H5A-8MM6] (" 'Insurance law is the least studied practice area in law schools, but it is the most practiced,' said Peter Kochenburger, Executive Director of the Insurance LL.M. program at the University of Connecticut School of Law.").

26. *See, e.g.*, ROBERT H. JERRY, II, 1 NEW APPLEMAN INS. L. § 1.02 (Jeffrey E. Thomas, Lib. Ed. 2021) [hereinafter NEW APPLEMAN ON INS.] ("Liability insurance closely followed the expansion of tort liabilities during the industrial revolution. In 1886, an English insurer issued what is commonly thought to be the first policy of liability insurance in the United States . . . . The insurance industry prospered along with the economic growth of [the Twentieth Century]." (citations omitted)).

27. *See generally* NEW APPLEMAN ON INS., *supra* note 26; STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, COUCH ON INS. (3d ed. 2021).

28. *See, e.g.*, BAKER, LOGUE & SAIMAN, *supra* note 24, at 29–31 (introducing insurance law's origins in contract law and the contract law principles that guide insurance interpretating); *see also id.* at 696–704 (discussing the impact of insurance law on tort law and tort reform).

29. *See, e.g.*, *id.* at 29 ("Historically, insurance law *was* contract law . . . . For [most] forms of insurance, the contract law foundations of insurance law continue to shape most aspects of the relationship between insurers and policyholders.").

30. For purposes of this Comment, the terms "insured" and "policyholder" are interchangeable and one may be used over the other for mere clarity. *See* RLLI § 1(10) ("In the liability insurance context, the policyholder is typically an insured under the policy, but there are often other persons or entities that also qualify as insureds.").

cess with a plain meaning reading of the policy language.[31] Both the insurer and the insured have duties and rights that originate in policy language.[32] In liability insurance, the insurer's two contractual duties are the duty to defend and the duty to indemnify.[33]

1. *The Duty to Defend and Related Duty to Make Reasonable Settlement Decisions*

The insurer's duty to defend is one of the most important parts of a liability insurance policy.[34] Not only does the insurer have the *duty* to defend, but the insurance policy also gives the insurer the *right* to defend.[35]

31. *See* RLLI § 2–4 (stating the rules of contract interpretation). A plain meaning approach is not as plain as it sounds; insurers and policyholders have vigorously debated on the correct approach to policy interpretation. *Compare* Lorelie S. Masters, *"Plain Meaning" and the Meaning of "Plain": Section 3 of the Restatement of the Law, Liability Insurance*, BRIEF, Fall 2020, at 37 (arguing in favor of the RLLI's approach to policy interpretation), *with* Laura A. Foggan & Rachael Padgett, *Rules of Policy Interpretation Reflect Lingering Policyholder Bias in the ALI's Restatement of the Law, Liability Insurance*, BRIEF, Fall 2020, at 26 (arguing against the RLLI's approach to policy interpretation). The arguments in this debate are outside the scope of this Comment, but for further reading on insurance law interpretation, see BAKER, LOGUE & SAIMAN, *supra* note 24, at 29–140 (exploring the contract law foundations of insurance law).

32. *See, e.g.*, JERRY & RICHMOND, *supra* note 2, at 475–76 (clarifying that the insured's duty to pay premiums functions more like a condition, but is traditionally called a duty); *id.* at 527 ("From the insured's perspective, the insurer's duty to pay proceeds in the event of the insured's loss, sometimes referred to as the 'duty to indemnify,' is undoubtedly the most important duty the insurer undertakes."); *id.* at 681 (introducing the insured's duty to cooperate); *id.* at 691 (explaining the insurer's duty to defend).

33. *See, e.g.*, PAUL E.B. GLAD, WILLIAM T. BARKER & MICHAEL BARNES, 3 NEW APPLEMAN ON INS., *supra* note 26, § 16.06 ("Liability insurers are often said to have two principal contractual duties: the duty to defend and the duty to indemnify."); *see also* RLLI § 14 cmt. a ("Liability insurance not only provides financial protection against judgments; it also protects insureds against the liability action itself . . . . The insurer's promise to defend a legal action provides litigation insurance that is *at least as important* as the insurer's promise to pay a judgment or settlement." (emphasis added)).

34. BAKER, LOGUE & SAIMAN, *supra* note 24, at 592 ("[T]he duty to defend transforms an insurance policy from one that offers only indemnity coverage for damages caused by the insured to one that provides 'litigation insurance' and obligates the carrier to defend the insured and pay the associated legal fees and expenses.").

35. *See, e.g.*, Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc., 948 A.2d 834, 851 (Pa. Super. Ct. 2008) (referencing the insurer's "duty and right to defend"); Evanston Ins. Co. v. Harrison, No. 220CV01672WBSKJN, 2021 WL 260011, *2 (E.D. Ca. Jan. 26, 2021) ("The policy . . . gives [the insurer] a 'duty and right' to defend any suit seeking . . . damages . . . ."); Highland Park Care Ctr., LLC v. Campmed Cas. & Indem. Co., 461 F. Supp. 3d 192, 201 (W.D. Pa. 2020) (discussing the effects of the duty and right to defend the suit on the policyholder, namely that the insurer had sole control of the litigation timeline); *see also* JERRY & RICHMOND, *supra* note 2, at 694 ("It is important to recognize that the insurer has not only a duty but also a right to defend an action against an insured that falls within coverage.").

This duty and right combination is rooted in the understanding that the average policyholder does not have the background, resources, or desire to manage a liability lawsuit.[36] Because the insurer also undertakes a duty to indemnify, the insurer wants the insured's suit to be as well-defended as possible, hopefully defeating any possibility the insurer will have to pay a judgment or settlement.[37] When a lawsuit is first initiated against the insured, the insured needs a defense *immediately*; from the insured's perspective, there is no time for the diligent and time-consuming claim investigation an insurer may want to perform.[38] Insurance law therefore begins the insurer's duty to defend upon any appearance of a potentially covered claim.[39]

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36. *See* BAKER, LOGUE & SAIMAN, *supra* note 24, at 577 ("Few ordinary people can easily afford the cost of defending a tort claim, nor are they likely to be able to identify and choose a skilled defense lawyer or monitor their defense.").

37. *See* JERRY & RICHMOND, *supra* note 2, at 694. There are a number of reasons why an insurer is better positioned than the policyholder to take on the defense:

> The insurer will usually do a better job of managing litigation than the insured, particularly when it comes to selecting and monitoring defense counsel, making judgments about the value of claims, seizing reasonable settlement opportunities, and other facets of defending a lawsuit. These advantages have meaning not only for the insurer, whose indemnity obligation may ultimately depend on how well the defense obligation is performed, but also for the insured, who benefits both in terms of lower premiums for coverage when defense costs are managed in terms of favorable judgments, secured through the contribution of skilled attorneys who specialize in defending lawsuits.

Id. (introducing the duty to defend).

38. *See, e.g.*, *id.* at 693 ("[T]he duty to defend exists as soon as the claim potentially within coverage is made, regardless of whether the law would impose liability in the circumstances."); BAKER, LOGUE & SAIMAN, *supra* note 24, at 586 ("A defendant needs legal representation as soon as the complaint is filed. At that point, however, all that is known are the allegations contained in the complaint."). *See generally* Douglas R. Richmond, *Liability Insurers' Right to Defend Their Insureds*, 35 CREIGHTON L. REV. 115 (2001) (exploring the contours and limits of the duty and right to defend).

39. *See* BAKER, LOGUE & SAIMAN, *supra* note 24, at 586. There are a number of tricky nuances that come with the timing of the duty to defend:

> It can take months—most likely years—before the underlying facts are sufficiently developed to determine whether coverage is actually owed under the policy. . . .
>
> Courts and commentators universally agree that the solution is for the carrier to offer a defense immediately, with the complaint serving as the presumptive determinant of whether a suit seeks damages that are covered under the policy. . . . Insurers . . . take the allegations in the complaint as true and compare them to the provisions of the policy. If the alleged facts state a claim that would be covered under the policy, defense coverage is owed. This rule is variously referred to as the "complaint allegation" rule, the "four corners" rule . . . or the "eight corners" rule. . . .

Id. (emphasis added). *See generally* JERRY & RICHMOND, *supra* note 2, at 696–704 (comparing different tests for determining whether the insurer must defend the claim).

Because an insurer may be defending a claim that is not covered under the insurance policy, conflicts of interest between the insured's and insurer's objectives may arise.[40] However, just because an insured may believe their insurer has conflicting objectives does not mean they can take over the defense of the claim; the insurer's right to defend the claim gives the insurer the *sole right* to control the defense.[41] There are many situations in which these conflicting objectives can arise, but the conflict relevant to this section arises in the context of settlement.[42]

This simple illustration that follows shows how a settlement conflict could arise: an insured driver, *D*, maintains an automobile policy with a liability policy limit of $100,000.[43] *D* gets into a car accident and the injured party, *P*, brings a lawsuit against *D*. *D*'s insurer, "Insco," acting in accordance with its duty to defend, hires a lawyer to represent *D* and manage her case. Even though *P* could claim $500,000 in damages, *P* offers to settle for $100,000, coincidentally the same amount as the limits of *D*'s policy.[44] *D* has an adequate defense against *P*'s claim, but if the case were to go to trial, *D* could lose and face a $500,000 judgment; *D* wants Insco to accept the settlement, pay the $100,000 policy limits, and end the suit.

Insco, as the sole controller of the defense, could settle with *P* and pay the $100,000 policy limits, but Insco has an incentive to let the case go to

40. *See* JERRY & RICHMOND, *supra* note 2, at 751–72 (introducing conflicts of interests in liability insurance); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f (AM. L. INST. 2000) (regarding an insurance defense attorney representing an insured); RLLI § 16 (addressing conflicts of interest in insurance defense representation).

41. *See* JERRY & RICHMOND, *supra* note 2, at 716 ("Although there is no doubt that the attorney who represents the insured owes duties to the insured, whether the attorney also owes duties to the insurer has engendered considerable controversy."); BAKER, LOGUE & SAIMAN, *supra* note 24, at 603 ("[G]iving the insurer total discretion over settlement decisions in situations in which there is a claim against the insured that is potentially in excess of the policy limit—creates a conflict of interest.").

42. *See* JERRY & RICHMOND, *supra* note 2, at 730 ("Liability insurance policies routinely create a contractual duty to defend, but do not by their terms impose a duty to settle. Instead, they typically reserve to the insurer a right to settle, or not to settle, as the insurer in the exercise of its discretion sees fit."); *see also* Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1116 (1990) ("Efforts to explain the settlement process, or encourage settlement, must take into account the diverse incentives of those who hold the liability and those who control the settlement.").

43. This illustration is adapted from RLLI § 24 Illus. 1. The insurer's duty to indemnify covers damages up to $100,000. Costs of the defense are typically not included in this limit. *But see* Mitchell A. Orpett & Kevin J. Grigsby, *Eroding Limits Policies: One Bad Case Away From Disaster?*, BRIEF, Spring 2020, at 36–41 (discussing the pros and cons of "eroding limits" insurance policies in which the costs of a defense eat away at the policy limit).

44. Policy limits often steer settlement amounts, even in cases where the plaintiff could pursue punitive damages. *See* Tom Baker, *Transforming Punishment into Compensation: In the Shadow of Punitive Damages*, 1998 WIS. L. REV. 211, 221 (1998) (reporting research conducted with anonymous plaintiffs' attorneys that showed plaintiffs' attorneys often "plead into coverage" to pursue insurance dollars).

trial. If the judgment comes back in favor of *P* for $500,000, Insco will only be liable for policy limits and *D* will be liable for what's called the excess verdict, $400,000 in this case.[45] On the contrary, if the judgment comes back in favor of *D*, Insco owes nothing. Insco thus has an incentive to "gamble with the insured's money" and reject the settlement; Insco is willing to risk a higher judgment for a small chance it pays nothing because it will not bear the cost of being wrong.[46] Because situations like the one just described often occur, insurance law imposes what is now known as the duty to make reasonable settlement decisions on the insurer.[47]

The duty to make reasonable settlement decisions—sometimes known as the "duty to settle"—protects the insured from an insurer making unreasonable settlement decisions to the detriment of the insured.[48] Insurance law commentators generally accept that the duty to settle is not a legal duty.[49] There is no duty to accept *any* settlement offer, but rather,

45. In a tort context, most defendants in the American legal system are judgment-proof. *See* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law In Action*, 35 L. & SOC'Y REV. 275, 277 (2001) ("Real money from real people accounts for a very small fraction of tort settlement dollars."). In practice, this means that any judgment or settlement payout is likely coming from an insurer rather than from the defendant's own bank account. *See generally*, Baker, *supra*.

46. *See* RLLI § 24 cmt. b (explaining the insurer's incentive to gamble with the insured's money); *see also* Crisci v. Security Ins. Co., 426 P.2d 173, 177 (Cal. 1967) (explaining that an insurer has an incentive to reject a settlement offer at or near policy limits and "gamble with the insured's money to further its own interests"); United States Fidelity & Guaranty Co. v. Evans, 156 S.E.2d 809, 811 (Ga. Ct. App. 1967) ("As the champion of the insured, [the insurer] must consider as paramount [the insured's] interests rather than its own, and may not gamble with [the insured's] funds." (citation omitted)).

47. *See* BAKER, LOGUE & SAIMAN, *supra* note 24, at 603 ("The duty to make reasonable settlement decisions is a response to [the] divergence of interests [between the insurer and the insured].").

48. *See, e.g.*, Syverud, *supra* note 42, at 1116–17 ("Typically, when courts find the [insurer's] conduct in refusing the [settlement] proposal to be unreasonable or in bad faith, the company is held liable to the insured for the entire judgment, including the portion in excess of the policy limits."). This Comment will use "duty to make reasonable settlement decisions" and "duty to settle" interchangeably, most often because the second phrase is much shorter.

49. *See* JERRY & RICHMOND, *supra* note 2, at 732 (introducing the various standards for an insurer's duty to settle). Jerry and Richmond explore the difficulty with finding the outside limits of the duty to make reasonable settlement decisions:

> The difficulty of articulating the scope of the duty to settle stems from two factors. First, the typical liability insurance policy gives insurers a right, not a duty, to settle. Thus, to the extent the insurer does in fact have a duty to settle, exactly where it comes from is not self-evident. Second, once a duty of some sort is acknowledged, it is apparent that the duty is not absolute, meaning no one seriously suggests that an insurer must accept *all* settlement offers. Whether to accept a settlement offer is largely a question of judgment, but it is nevertheless necessary to articulate a boundary that distinguishes between the proper and improper exercise of judgment.

Id. (emphasis added) (citations omitted). *See also* Kim V. Marrkand, Martha J. Koster & Joel S. Nolette, Commentary, *Unsettling the Law of Insurance Settlements: Sections*

there is a duty to evaluate reasonable settlement offers in full context of the likelihood of an excess judgment at trial.[50]

Beyond that general assertion, the requirements imposed on the insurer vary widely across jurisdictions.[51] The RLLI intended to simplify and clarify the responsibilities that make up the insurer's duty to settle for this reason.[52] It therefore defines a reasonable settlement decision as one that would be made by a "reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment."[53] This formulation embodies an objective, commercial reasonableness standard, "analogous to the negligence standard used in a tort law."[54] For some insurers, this formulation is controversial because several jurisdictions have used a higher subjective "bad faith" standard that makes it harder for the insured to prove the insurer acted inappropriately and should be liable for the remedies following breach.[55]

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24 and 27 of the Restatement of the Law Liability Insurance, 73 RUTGERS L. REV. 96, 98–99 (2020) (providing a brief introduction to the source of the duty to settle).

50. *See* RLLI § 24 cmt. b ("The duty set forth in this Section is a longstanding rule of insurance law that is frequently referred to in shorthand by commentators and some courts as the 'duty to settle.' This Section uses a more accurate term, the 'duty to make reasonable settlement decisions,' to emphasize that *the insurer's duty is not to settle every legal action*, but rather to protect the insured from *unreasonable exposure* to a judgment in excess of the limits of the liability insurance policy." (emphasis added)).

51. *Compare* Hartford Accident & Indem. Co. v. Aetna Cas. & Sur. Co., 792 P.2d 749, 752 (Ariz. 1990) (en banc) (holding an insurance company must refuse to settle in bad faith to be liable for the full amount of the judgment), *with* Transport Ins. Co. v. Post Express Co., 138 F.3d 1189, 1192 (7th Cir. 1998) (giving examples of reasonable settlement offers), *and* Johansen v. Ca. State Auto. Assn. Inter-Ins. Bureau, 538 P.2d 744, 748 (Cal. 1975) (holding an insurer may not reject an unreasonable settlement offer solely because it believes it has a strong noncoverage argument), *and* Carford v. Empire Fire & Marine Ins. Co., No. CG065001946, 2012 WL 4040337, at *4 (Conn. Super. Ct. Aug. 21, 2012) ("Connecticut has long recognized a cause of action for negligent failure to settle a claim.").

52. *See* RLLI § 24 cmt. a (explaining the Reporters' decision to clarify the law by making three distinct categories of conduct where the insurer has acted inappropriately).

53. RLLI § 24(2).

54. *See* RLLI § 24 Reporters' Note b ("The reasonableness standard stated in this Section is analogous to the negligence standard in tort law.").

55. *See, e.g.*, Marrkand, Koster & Nolette, *supra* note 49, at 108 ("The negligence test adopted in the Restatement wrongly exposes the insurer to liability for what are, at worst, errors of judgment. The bad faith test, however, 'strikes a fair balance between two extremes by requiring more than ordinary negligence and less than a showing of dishonest motives.'") (quoting Pavia v. State Farm Mut. Auto. Ins. Co., 626 N.E.2d 24, 28 (N.Y. 1993)); *see also* Schwartz & Appel, *supra* note 9, at 756 ("By recommending a negligence standard for an insurer's breach of the duty to make reasonable settlement decisions, the RLLI proposes to dramatically expand the scope of liability against insurers in the United States." (citations omitted)).

2. *Remedies for Breach of Duty to Make Reasonable Settlement Decisions*

If an insurer rejects a reasonable settlement offer, it may be liable for damages to the insured.[56] There is considerable debate whether a breach of the duty to make reasonable settlement decisions is a claim sounded in tort or contract law.[57] Both options would give an injured policyholder the opportunity to sue the insurer for damages, but the *type* of damages available varies depending on tort or contract law principles.[58] While the claim of insurer "bad faith" does have foundations in the implied covenant of good faith and fair dealing, most jurisdictions have recognized bad faith to be a tort of its own, either through common law determination or statutory designation.[59]

The RLLI follows the general rule that a breach of the duty to make reasonable settlement decisions sounds in tort law and so tort-like damages are available to injured parties.[60] Courts often impose liability for the excess judgment onto an insurer that breached its settlement duties by not accepting a reasonable settlement offer.[61] The foreseeability element of the RLLI formulation of damages has been a point of controversy, with some commentators arguing the tort-like element broadens damages too far.[62] Other commentators note that more extensive damages have always been available in common law, it is just a narrow set of cases in which facts

56. *See* RLLI § 27 (presenting the remedies available when an insurer breaches its duty to make reasonable settlement decisions); *see also* Hilker v. Western Auto. Ins. Co., 231 N.W. 257, 260–61 (Wis. 1930) (holding the insurer acted in bad faith against the interests of its insured); Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 374 (Wis. 1978) (holding an insurer may be liable to its insured).

57. *Compare* Marrkand, Koster & Noeltte, *supra* note 49, at 99–102 (debating whether a breach of an insurer's settlement abilities is grounded in contract law or tort law, ultimately concluding it is grounded in contract law), *with* RLLI § 27 cmt. c (concluding tort-like damages are what is embraced in the RLLI). *See generally* JERRY & RICHMOND, *supra* note 2, at 151 n.431 and accompanying text (citing scholarship debating whether tort or contract remedies were necessary to "encourage insurers to fulfill their responsibilities").

58. *Compare* Marrkand, Koster & Nolette, *supra* note 49, at 100 ("Because breach of the implied covenant of good faith and fair dealing—'bad faith'—generally sounds in contract, not in tort, 'the general rule' is that 'tort recovery is unavailable' for its breach." (quoting Wash. Fed. v. Countrywide Home Loans, Inc., No. C12-1820 RSM, 2013 WL 2285966, at *1 (W.D. Wash. May 23, 2013))), *with* RLLI § 27 cmt. c ("Although this Section is agnostic as to the doctrinal label, the broader approach to whether a loss is foreseeable, which is most commonly associated with the tort-law label, is the proper approach.").

59. *See infra* notes 65–71 and accompanying text.

60. *See* RLLI § 27 cmt. c (comparing tort foreseeability and contract foreseeability, concluding the RLLI embraces the broader, "tort-like" approach).

61. *See id.* § 27(1) ("An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for any foreseeable harm caused by the breach, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits.").

62. *See, e.g.*, Marrkand, Koster & Nolette, *supra* note 49, at 112–15 (arguing against RLLI § 27); Schwartz & Appel, *supra* note 9, at 757–59 (arguing against the foreseeable damages provision in RLLI § 27).

have been severe enough to justify such damages.[63] This Comment does not make an argument for the remedies available for breach of the duty to make reasonable settlement decisions, but the remedies available do provide context in considering what standard insurance law should impose on insurers.[64]

3. *Bad Faith Terminology Murkiness*

In general, a duty means almost nothing if the injured party cannot hold the breaching party accountable. In insurance law, a breach of the duties to defend, indemnify, or make reasonable settlement decisions are all addressed in a murky area of the law called "bad faith."[65] Bad faith was first introduced to insurance law cases in the early twentieth century, but a series of California decisions in the late 1950s "ignited the evolution" of the tort of bad faith.[66] Some jurisdictions have codified the common law of bad faith into an official statutory claim.[67] Within the context of this

63. *Cf.* Leo P. Martinez, *The Restatement of the Law of Liability Insurance and the Duty to Settle*, 68 RUTGERS L. REV. 155, 178–91 (2015) (reviewing the traditional remedies for breaching the duty to settle and evaluating an early draft of the RLLI on its proposed remedies); *see also* Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767, 793–95 (defending the RLLI's decision to include punitive damages as "foreseeable" if the insurer rejects a reasonable settlement decision).

64. *See infra* notes 116–123 and accompanying text.

65. *See* RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE 407 (4th ed. 2018) ("Bad faith—or the breach of the duty of good faith, as it is also sometimes called—is one of, if not the most, complex aspects of insurance coverage."); JERRY & RICHMOND, *supra* note 2, at 147 ("One of the most significant developments in insurance law is the recognition that insurers can be held liable in tort for bad faith performance of their duties to insureds."). For a more thorough review of the history of bad faith in insurance, see Kenneth S. Abraham, *Natural History of the Insurer's Liability for Bad Faith*, 72 TEX. L. REV. 1295 (1994) (reviewing the history of bad faith in insurance and its meteoric growth in the 1970s and 80s).

66. *See* JERRY & RICHMOND, *supra* note 2, at 147–51 (discussing the beginnings of bad faith insurance law litigation); *see also* Brown v. Guarantee Ins. Co., 319 P.2d 69 (Cal. App. Ct. 1957) (introducing the term "good faith" to describe insurer duties); Comunale v. Traders & General Ins. Co., 328 P.2d 198 (Cal. 1958) (holding that the insurer breached the implied covenant of good faith and fair dealing by not giving consideration to the insured's interests in settling the case within policy limits); Crisci v. Sec. Ins. Co., 426 P.2d 173 (Cal. 1967) (linking tort law with the insurer's breach of the covenant of good faith and fair dealing in the settlement context).

67. *See* Rose v. St. Paul Fire & Marine Ins. Co., 599 S.E.2d 673, 679 n.6 (W. Va. 2004) (noting sixteen states have codified various duties of insurer "good faith" and allow an injured claimant to bring an action against an insurance company when it violates that duty). Whether the claim of bad faith sounds in tort law or contract law is a controversial and well-debated question on which reasonable minds can (and often do) disagree. *See* JERRY & RICHMOND, *supra* note 2, at 151 n.431 (citing scholarly commentary debating whether bad faith should constitute a tort or contract claim). For a thorough review of the duty to settle, the claim a breach of that duty creates, and the various standards some jurisdictions impose, see Syverud, *supra* note 42.

Comment, a breach of the duty to make reasonable settlement decisions could only be considered bad faith *if* the insurer acted *so far* outside reasonableness that it met the requirements of RLLI bad faith.[68] However, simple contract breach alone is not enough to constitute bad faith.[69] The question then becomes: what standard should a court use to determine whether insurer misconduct has risen to the level of bad faith?[70] An objective reasonableness standard, as adopted in the RLLI, is the most appropriate standard to use in order to hold insurers accountable for the responsibility they undertake in the right and duty to defend.[71]

B. *High Roller: The American Legal Institute and Its Restatements*

1. *The Role of Restatements*

The ALI has almost one hundred years of experience researching, restating, and influencing the law.[72] Among other projects, the ALI is known for compiling Restatements of the Law.[73] Familiar to generations

68. *See* RLLI § 49 cmt. b ("An action for breach of the duty to make reasonable settlement decisions that is framed as a 'bad faith' action is not a liability insurance bad-faith action under the rules followed in this Restatement, unless the more demanding two-prong standard stated in this Section is met."); JERRY & RICHMOND, *supra* note 2, at 153–54 (discussing insurer actions that may constitute bad faith). *Outside* the context of this Comment, "bad faith" can constitute a wide range of insurer misbehavior, ranging from negligent selection of counsel to breach of the duty to indemnify. *See* 3 NEW APPLEMAN ON INS., *supra* note 26, § 23.01 (examining the history of bad faith terminology and litigation in insurance law). Along with the insurer's duties, the policyholder has a duty to cooperate, and breach of this duty can also constitute bad faith. *See* RLLI § 29 ("When an insured seeks liability insurance coverage from an insurer, the insured has a duty to cooperate with the insurer."). For a larger discussion about bad faith in insurance, see JERRY & RICHMOND, *supra* note 2, at 147–60 (summarizing insurance law bad faith); BAKER, LOGUE & SAIMAN, *supra* note 24, at 120–29 (introducing the nature of bad faith liability and discussing a variety of particulars in bad faith insurance law).

69. JERRY & RICHMOND, *supra* note 2, 153 ("Bad faith involves a breach of contract *plus 'something more'*—presumably something with such serious dimensions that the machinery of tort law should be invoked so that the deterrence value associated with tort law's broader remedies can be brought to bear on the insurer's conduct." (emphasis added)).

70. *See, e.g.*, JERRY & RICHMOND, *supra* note 2, at 153–54 (comparing various standards of insurance bad faith); *see also* Syverud, *supra* note 42, at 1163–72 (discussing what may—or may not—control insurer behavior); Abraham, *supra* note 65, at 1308–12 (reflecting on the function of bad faith liability in insurance law).

71. *Infra* Section III.A. *See also* RLLI § 24 cmt. a ("In most breach-of-settlement-duty cases, however, even those that invoke the language of bad faith, the ultimate test of liability is whether the insurer's conduct was reasonable under the circumstances.").

72. *See The Story of ALI*, AM. L. INST., https://www.ali.org/about-ali/story-line/ [https://perma.cc/LF8J-F9ER] (detailing historical timeline of the ALI, beginning in the 1920s) (last visited June 20, 2022).

73. *See How the Institute Works*, AM. LAW INST., https://www.ali.org/about-ali/how-institute-works/ [https://perma.cc/W4QE-ALCK] (summarizing the mission and projects of the ALI) (last visited June 20, 2022).

of first-year law students, a restatement is a treatise that "[A]im[s] at clear formulations of common law and its statutory elements or variations and reflect[s] the law as it presently stands or might appropriately be stated by a court."[74] The first generation of restatements began in the 1930s, and many of the original topics have been revised into second or third editions.[75] The ALI has published more Restatements since its original few topics, reflecting emerging areas of the law.[76] Not all areas of the law are concrete enough to be "restated," for first they must be "stated."[77] For these areas where there may be little settled common law or a lack of uniformity across state lines, the ALI has dedicated its "Principles" projects.[78]

As the practice of law has evolved, the ALI's publication of Restatements has evolved with it.[79] The first iteration of Restatements in the early twentieth century was influential because courts had fewer resources to consult when searching for support outside their own jurisdictions.[80] One hundred years later, the depth of court precedent and scholarly articles, coupled with more access to lower court opinions (in quicker time), allows the Restatement to be less an exercise in what the law *is* and more a clarifi-

74. *Publications Frequently Asked Questions*, AM. L. INST., https://www.ali.org/publications/frequently-asked-questions/ [https://perma.cc/4ZJ8-K7QW] (last visited June 20, 2022).

75. *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS (AM. L. INST. 1933); RESTATEMENT (SECOND) OF CONTRACTS (AM. L. INST. 1981); RESTATEMENT (SECOND) OF TORTS (AM. L. INST. 1979); RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006).

76. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (AM. L. INST. 2011); RESTATEMENT (THIRD) OF SURETY AND GUARANTY (AM. LAW INST. 1996); RESTATEMENT OF EMPLOYMENT LAW (AM. L. INST. 2015). For the full list of all ALI projects, see *Past and Present ALI Projects*, AM. L. INST. (June 2021) https://www.ali.org/media/filer_public/a8/86/a88631bf-45f9-4c66-8a84-9a788e3acb6c/ali-projects-past-and-present.pdf [https://perma.cc/E4E3-YHJR] (listing all past and present ALI projects, including discontinued projects).

77. *See* PRINCIPLES OF THE LAW OF STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES (AM. L. INST., Discussion Draft, April 17, 2018). Principles projects may also be more appropriate for areas of the law that are of a sensitive nature, such as Family Dissolution, the ALI's first published Principles project. *See* PRINCIPLES OF THE L. OF FAM. DISSOLUTION, Director's Foreword (AM. L. INST. 2002) ("Restatement provisions often reflect value choices, but 'Principles' seemed the right title for a project that starts with carefully considered assumptions about the best interests of children, fairness to divorcing wives and husbands, and the legitimate economic claims of unmarried partners.").

78. *See* AM. L. INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 14–15 (rev. ed. 2015) [hereinafter ALI HANDBOOK] (defining the goals for Principles projects as compared to Restatements).

79. *See generally* Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367 (1934) (discussing the ALI's first generation of Restatements and providing constructive criticism of the ALI's process); Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 264–69 (2007) (providing a comprehensive review of common criticism of the ALI and its works).

80. *See, e.g.*, Adams, *supra* note 79, at 231–35 (presenting some of the early criticisms of restatements, including that they reflected the "false assumption that precedent can be understood logically").

cation of what the law *should be*.[81] Restatement Reporters are not confined by precedent, especially in areas of the law that are actively shifting and developing.[82] Should a court, attorney, or individual be looking for an in-depth comparison of a particular provision of insurance law, that person may consult a treatise dedicated to such a comparison.[83]

Thus, with multiple jurisdictions to reference and a variety of standards from which to choose, the Reporters needed to select and justify what they believed to be the correct standard for holding an insurer accountable when it irrationally refused to accept a settlement offer on behalf of the insured.[84] The Reporters did not ignore the view held in minority jurisdictions; instead, they noted diverging law where applicable and articulated doctrinally organized tiers for what had once confusingly been referred to collectively as "bad faith."[85] The RLLI does not disregard minority standards used for determining a breach of the duty to make reasonable settlement decisions.[86] Rather, the Reporters articulated a standard believed to encompass "the law," even if courts use language that may suggest otherwise.[87]

2. *Timeline and Controversy of the Restatement of the Law, Liability Insurance*

The ALI announced a Principles of the Law, Liability Insurance (PLLI) project in 2010, receiving little attention or disagreement.[88] Tom Baker and Kyle Logue were named Reporter and Assistant Reporter, and the ALI assembled a team of Advisors to review their work.[89] The first

81. *See* ALI HANDBOOK, *supra* note 78, at 3–9 (explaining the goals of a restatement project).

82. *See id.* (noting that a Restatement is not bound to inappropriate or inconsistent precedent).

83. *See generally* Maniloff & Stempel, *supra* note 65 (providing a two-volume treatise comparing the major points of insurance law divergence in each state in the United States).

84. *See* RLLI § 24 Reporters' Note a (comparing standards articulated by courts and commentators).

85. *See supra* notes 65–71 and accompanying text.

86. *See, e.g.*, RLLI § 27 cmt. d ("A minority of jurisdictions limit the damages imposed in duty-to-settle cases when the insured has insufficient assets to cover the excess judgment . . . ."); *id.* § 27 Reporters' Note d (discussing minority rule on damages and giving more reasoning on why the Reporters chose to adopt the majority rule).

87. *See* RLLI 24 cmt. a (articulating the three types of insurer actions that were once all considered "bad faith").

88. *See infra* note 93 (discussing the project's beginnings).

89. *See* Jay M. Feinman, *A User's Guide to the Restatement of the Law, Liability Insurance*, 26 CONN. INS. L.J. 93, 104–05 (2019) (naming Reporters and describing the process by which the ALI appoints Advisors to represent policyholders and insurers in reviewing the project). Tom Baker is widely regarded as an insurance law expert and is a professor at the University of Pennsylvania Law School. *Faculty: Tom Baker*, U. PA. L., https://www.law.upenn.edu/faculty/thbaker/ [https://perma.cc/68UV-HUA8] (listing Professor Baker's credentials and areas of scholarship) (last visited June 20, 2022). Kyle Logue also has vast experience with insurance law and is a professor at the University of Michigan Law School. *Our Faculty:*

four years of the project's life were relatively quiet, likely because the ALI's principles projects receive less attention from the legal community as they are less influential to courts and legislatures.[90] Though the pro-insurer community contests the project began in "stealth mode,"[91] the ALI and the Reporters followed typical project procedure in establishing a group of Advisors comprised of "judges, law professors, policyholder attorneys, and insurer attorneys or executives."[92] The project became controversial when converted from the PLLI into the RLLI in 2014, sparking debate and evoking strong arguments on both sides.[93]

Kyle D. Logue, U. MICH. L., https://michigan.law.umich.edu/faculty-and-scholarship/our-faculty/kyle-d-logue [https://perma.cc/DT5N-HFR4] (listing Professor Logue's credentials and areas of scholarship) (last visited June 20, 2022).

90. *See, e.g.*, *Frequently Asked Questions*, AM. L. INST., https://www.ali.org/publications/frequently-asked-questions/#differ [https://perma.cc/XC82-PFTR] (last visited July 14, 2022). The ALI addresses the difference between restatements and princinples as a FAQ on its website:

> Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court. Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

Id. (comparing the main purpose of restatements and principles).

91. Marrkand, *supra* note 9, at 21.

92. *See, e.g.*, Jeffrey W. Stempel, *Hard Battles Over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance*, 69 CLEV. ST. L. REV. 605, 628 (2021). The insurer side also had a dedicated "insurer . . . liaison" to assist with insurer-specific concerns. *Id.* at 628–29 n.80.

93. *See* PRINCIPLES OF THE LAW OF LIABILITY INSURANCE, Introductory Note (AM. L. INST., Tentative Draft No. 1, 2013) ("The [ALI] Council approved the initiation of this project in May 2010."); RESTATEMENT OF THE LAW OF LIABILITY INSURANCE, Foreword (AM. L. INST., Discussion Draft 2015). When the ALI decided to convert the project, it addressed the decision in the Foreword of the next draft:

> This Annual Meeting will be the fourth one to discuss ALI's Liability Insurance project, but the first one since the Council recharacterized the project last October from Principles of the Law of Liability Insurance to Restatement of the Law, Liability Insurance, following a sustained review of the nomenclature for all ALI projects. The Council decided that, consistent with our traditional practice, the Restatement label should be used for projects that seek to provide guidance to the courts and where there is an established body of positive law. In contrast, the Principles label is appropriate for projects where the main intended audience for the Institute's guidance are institutions other than the courts, such as legislatures, administrative agencies, or private actors. Under this categorization, Liability Insurance clearly belonged on the Restatement side of our ledger and the Council approved the name change.

Id. See generally Stempel, *supra* note 8; Marrkand, *supra* note 9.

In 2014, the ALI announced that the Principles project would be converted into a Restatement project.[94] The insurer community met this unprecedented change with swift, divisive action.[95] The first confrontation between insurer-backed RLLI attackers and RLLI-defenders occurred the night before an Advisers meeting.[96] As one Adviser describes it, "[A]ll Advisers received via FedEx a letter signed by ten insurer counsel accompanied by an approximately twelve-inch stack of hardcopy enclosures attacking the RLLI sections currently drafted."[97] The force and frequency of these insurer-backed attacks increased after this moment.[98]

Over the next four years, the controversy continued to grow.[99] The RLLI was attacked via member and nonmember comments on the ALI

94. *See* Schwartz & Appel, *supra* note 9, at 724–25 (noting the change from principles to restatement was unprecedented). The ALI justified the transition as meeting the newly revised definitions for principles and restatement projects. *See* ALI HANDBOOK, *supra* note 78, at 13–15 (showing that in 2015 the ALI revised its handbook on writing and reviewing ALI projects, clarifying the distinction between Principles and Restatement projects); *see also* Feinman, *supra* note 89, at 104 (narrating the RLLI's early history).

95. *See* Schwartz & Appel, *supra* note 9, at 724–25 ("This decision to convert a pending Principles project into a Restatement was unprecedented in the ALI's history." (citation omitted)). One commentator opined that this is one of, if not the first Restatement project that addresses an *industry* rather than just an area of law, and the financial implications on the industry may be what drove some of the strong resistance. Randy Maniloff, Esq., American Legal Institute Restatement of the Law — Liability Insurance: Lessons Learned After Three Years (Oct. 4, 2021) (presentation slides available via White & Williams, LLP and on file with author) [hereinafter RLLI Webinar].

96. *See* Stempel, *supra* note 8, at 12. Though principles and restatements serve different purposes, the process for reviewing and finalizing both projects is relatively similar. *Id.* Reporters draft black-letter sections along with comments and Reporters' Notes and present these drafts to four groups: the Advisers, the Members Consulting Group (MSG), the Council, and the general members of the ALI. *Id.* at 11 (introducing the procedural requirements for a restatement).

97. *See, e.g.*, Stempel, *supra* note 92, at 630–31. The letter was signed on behalf of the General Counsel at the Corporate Offices of ACE, AIG, Allstate, Chubb, Hartford, Liberty Mutual, State Farm, Travelers, USAA, and Zurich. *Id.* at 631 n.87.

98. *See* Stempel, *supra* note 92 at 631; *but see* Marrkand, *supra* note 9, at 22 (reasoning that the insurer industry supporters used the most direct method at their disposal—presumably the public comments posted to the ALI website—to voice their opinion(s)).

99. *See, e.g.*, Randy Maniloff, *A Curious Letter Is Sent To The ALI About Its Liability Insurance Restatement*, COVERAGE OPS. (May 17, 2017), https://www.coverageopinions.info/Vol6Issue5/ACuriousLetter.html [https://perma.cc/DJF7-8G8V].

> While the Restatement was relatively unknown in the early years, that hasn't been the case for the past several. To the contrary, the ALI's Insurance Restatement has been the most talked-about, and controversial, topic in liability coverage circles—being the subject of countless articles, as well as being discussed and debated at numerous insurance conferences. The ALI Insurance Restatement has been the Kardashians of insurance coverage.

Id. (covering the ongoing debate regard the RLLI).

website,[100] through motions at ALI annual meetings, in media articles,[101] and across academic scholarship.[102] In 2018, lobbying efforts brought support from state courts, state legislators, and even governors.[103] The governors of six states—South Carolina, Iowa, Maine, Nebraska, Texas, and Utah—wrote directly to the ALI President to strongly encourage the redrafting of the RLLI to favor insurers, and, in the event redrafting was not sufficient, the elimination of the project altogether.[104] A few state legislatures went even further, passing legislation denouncing parts or all

100. *See* Stempel, *supra* note 8, at 12 (discussing the insurer advocates' approach to voicing their concerns); Marrkand, *supra* note 9, at 22 (justifying the overwhelming number of comments made on the ALI website).

101. *See, e.g.*, A. Hugh Scott, *Why Criticism of ALI's Insurance Restatement is Valid*, LAW360 (May 10, 2017, 11:13 AM), https://www.law360.com/articles/922277/why-criticism-of-ali-s-insurance-restatement-is-valid [https://perma.cc/KRB2-JTJ8]; Tiger Joyce, *Tort Lawyers Take Over the American Law Institute*, WALL ST. J. (June 29, 2017, 6:40 PM), https://www.wsj.com/articles/tort-lawyers-take-over-the-american-law-institute-1498776033 [https://perma.cc/3FCL-P23G].

102. *See, e.g.*, Stempel, *supra* note 8, at 12 ("[T]here was a relatively pointed clash between a prominent insurance law professor and the RLLI [R]eporters." (citing George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 GEO. MASON L. REV. 635 (2017) and Tom Baker & Kyle Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767, 768 (2017))); *see also* Schwartz & Appel, *supra* note 9, at 720 n.12 (citing legal scholarship criticizing the RLLI).

103. *See* Stempel, *supra* note 8 (criticizing state legislature interference); Marrkand, *supra* note 9, at 21–22 (insinuating state legislature intervention was necessary to reign in RLLI).

104. *See* Letter from Governors Henry McMaster (S.C.), Kim Reynolds (Iowa), Paul R. LePage (Me.), Pete Ricketts (Neb.), Greg Abbott (Tex.), and Gary R. Herbert (Utah), to David F. Levi, President, ALI (Apr. 6, 2018), http://ncoil.org/wp-content/uploads/2018/04/2018-04-062520Governors2520to2520ALI2520re2520Draft2520Restatement-2-1.pdf [https://perma.cc/47XK-B3XR]. This unprecented letter addressed the governors'

> concern[] that the Draft *Restatement* could negatively affect our states' economic development opportunities by creating uncertainty and instability in the liability insurance market. If this trend continues, and courts embrace the ALI's aspirational approach, it could potentially jeopardize the availability and affordability of liability insurance. Therefore, if the ALI does not significantly revise or rescind the Draft *Restatement*, this implicit usurpation of state authority may require legislative or executive action.

Id.; *see also* Stempel, *supra* note 92, at 607–08 (discussing the gubernatorial letter); Marrkand, *supra* note 9, at 22 (arguing the governors' letter showed the Restatement's overreach); Lorelie S. Masters & Geoffrey B. Fehling, *The American Law Institute's Restatement of the Law, Liability Insurance: Scholarship and Controversy*, 27 CONN. INS. L.J. 116, 142 n.86 (2020) ("It seems fair to assume that these Governors had encouragement from the insurance industry.").

of the RLLI.[105] Ultimately, the final version of the RLLI was approved at the May 2018 ALI annual meeting and published in 2019.[106]

III. PLAYING THE ACE: COMMERCIAL REASONABLENESS IS THE APPROPRIATE STANDARD

Amid varying state judicial precedents, policy decisions regarding the insurance industry, and a growing chorus of scholarly commentary, the threshold standard for what constitutes breach of an insurer's settlement duty is continually up for debate.[107] The objective reasonableness standard embraced in the RLLI is not only appropriate for maintaining doctrinal clarity, but is also necessary to protect the insured's vulnerable interests.[108]

A. *Commercial Reasonableness Hits the Jackpot*

The commercial reasonableness standard is the right standard because it protects consumer interests from a situation in which they have no control and because it creates doctrinal clarity within insurance law.[109]

105. *See, e.g.*, OHIO REV. CODE ANN. § 3901.82 (2022); *see also* Nicholas Malfitano, *Ohio lawmakers send first-of-its-kind rejection to powerful legal group*, PA. RECORD (Aug. 3, 2018), https://pennrecord.com/stories/511510412-ohio-lawmakers-send-first-of-its-kind-rejection-to-powerful-legal-group [https://perma.cc/NEX7-2V7C] ("ALI's Deputy Director Stephanie Middleton confirmed no state had ever passed legislation against a Restatement in its entirety before.").

106. *See* Randy Maniloff, *Approved: ALI Restatement of Liability Insurance*, COVERAGE OPS. (June 6, 2018) https://coverageopinions.info/Vol7Issue5/ApprovedALI.html [https://perma.cc/FGS9-EWHX] ("On May 22[, 2018] white smoke billowed from the chimney of the Ritz-Carlton hotel in Washington as the American Law Institute voted to give final approval to its Restatement of the Law of Liability Insurance (RLLI).").

107. *Compare* Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994) (articulating the elements of insurer bad faith as codified in 42 PA. CONS. STAT. § 8371 (2022)), *with* Shamblin v. Nationwide Mut. Ins. Co., 396 S.E.2d 766, 776 (W. Va. 1990) ("We believe that wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to so settle and where such settlement within policy limits would release the insured from any and all personal liability, that the insurer has prima facie failed to act in its insured's best interest and that such failure to so settle prima facie constitutes bad faith towards its insured."). *Compare* George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 GEO. MASON L. REV. 635 (2017) (arguing the RLLI draft does not have an economically sound foundation), *with* Tom Baker & Kyle D. Logue, *In Defense of the Restatement of Liability Insurance Law*, 24 GEO. MASON L. REV. 767 (2017) (defending the Reporters' approach to RLLI and insurance law). The debate is especially spirited in jurisdictions that large insurers call home. *See* Maniloff & Stempel, *supra* note 65, at 462–63 (summarizing New York bad faith law); *id.* at 476–77 (summarizing Texas bad faith law).

108. *See infra* Section III.A.

109. *See* RLLI § 24 cmt. b ("[A]n insurer that that rejects a reasonable settlement offer in favor of going to trial is effectively 'gambling with the insured's money,' . . . because the insured . . . will have to pay any verdict in excess of the policy limit."); *see also id.* § 10 cmt. b ("The right to defend gives the insurer con-

The right to control the defense gives the insurer complete authority over the management of the insured's case, including whether to settle and for how much.[110] Even in cases where all parties, including a judge, want to settle the case, only the insurer controls that decision.[111] The consequences to the insurer upon rejecting a settlement offer are often insignificant; the insurer will contribute up to the policy limits which is only what it was required to contribute in the first place.[112] In contrast, the consequences to the policyholder can be enormous—facing an excess judgment can mean loss of a home or life savings.[113] An objective reasonableness standard does not unfairly require an insurer to accept *every* settlement offer, nor does it mandate that an insurer *make* a settlement offer.[114] The RLLI encourages a structure in which the insurer is responsible for its own actions, just as in tort law, where individuals are liable for their own actions.[115]

A common remedy for breach of the duty to make reasonable settlement decisions is assigning the insurer the liability it unreasonably passed onto the policyholder.[116] This remedy introduces a common-sense disin-

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trol over the defense of a legal action for which the insured seeks coverage, including the activities of the defense lawyer.").

110. *See supra* notes 34–42 and accompanying text (introducing the insurer's duty and right to defend).

111. *See* The Birth Ctr. v. St. Paul Cos., Inc., 787 A.2d 376, 380 (Pa. 2001) (indicating that the insurance company was not willing to settle despite pleas from their client, opposing counsel, and two judges overseeing the case because the insurer wanted to appear tough as a repeat player in "bad baby" cases); *see also* BAKER, LOGUE & SAIMAN, *supra* note 24, at 633 ("St. Paul hoped that its tough litigation stance in this case would demonstrate to other potential plaintiff[s] that it was not a pushover.").

112. *See, e.g.*, Comunale v. Traders & General Ins. Co., 328 P.2d 198, 200 (Cal. 1958) (questioning whether the insurer was liable for the *excess* verdict because the insurer had already paid the policy limits); Wade v. Emcasco Ins. Co., 483 F.3d 657, 669 (10th Cir. 2007) (holding that the insurer was *not* liable for the excess judgment because it had been "set up" for a bad faith action and was not in the wrong for making a settlement offer of policy limits).

113. *See, e.g.*, Whiteside v. GEICO Indem. Co., 847 F. App'x 810, 810–11 (11th Cir. 2021) ("GEICO's insured driver[ ] 'thought GEICO was handling the case, so she threw away her summons and complaint, failed to answer either, and decided against notifying GEICO.' That resulted in a $2.9 million default judgment against Winslett, who was then forced into involuntary bankruptcy.").

114. *See* RLLI § 24 cmt. b ("[T]he insurer's duty is not to settle every legal action, but rather to protect the insured from unreasonable exposure to a judgment in excess of the limits of the liability insurance policy."); *id.* § 24 cmt. f (explaining situations under which it *may* be reasonable for an insurer to affirmatively make a settlement offer); *id.* § 24 cmt. g (identifying the causation problem between failure to affirmatively make a settlement offer and an excess judgment).

115. *See* RLLI § 24 Reporters' Note b ("The reasonableness standard stated in this Section is analogous to the negligence standard in tort law.").

116. *See* RLLI § 27(1) ("An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for any foreseeable harm caused by the breach, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits.").

centive for the insurer to reject a reasonable settlement offer, demonstrated by continuing the illustration from above: if the plaintiff offers to settle for $100,000, and the insurer determines that to be a reasonable settlement offer, the insurer may (a) pay the reasonable settlement amount of $100,000, or (b) risk a liability judgment at trial that brings a $500,000 expense ($100,000 of policy contribution required by the duty to indemnify plus the excess judgment liability imposed by the breach of the duty to make reasonable settlement decisions).[117] In contrast, an insurer need not fear a required payment of an *un*reasonable settlement offer, because the insurer will not have breached its duty—the duty is only to make reasonable settlement decisions.[118] An insurer can defend its decision to reject the settlement offer with facts that detail the offer's unreasonable nature.[119] In both scenarios, the insurer no longer has an incentive to gamble with the insured's money because the insurer may end up liable for a gamble that does not pay off.[120] Even though the insured does not have ultimate control over the defense of the case, the insured can be comforted knowing that there is law in place to protect the insured's interests.[121]

117. *See supra* notes 56–64 and accompanying text; *see also* RLLI § 27 Reporters' Note a ("[T]he majority rule[ ] is that the measure of damages in a bad faith failure to settle the case is the amount by which the judgment rendered in the underlying action exceeds the amount of insurance coverage." (quoting Med. Mut. Liab. Ins. Soc. of Md. v. Evans, 622 A.2d 103, 114 (Md. 1993))).

118. *See infra* Section III.B. (showing two recent cases in which the insurer's actions were found to be reasonable using the commercial reasonableness test, and therefore the insurer was not liable).

119. *See, e.g.*, Columbia Ins. Co. v. Waymer, 860 F. App'x 848, 855 (4th Cir. 2021) (holding that the plaintiff's settlement offer was unreasonable and therefore the insurer could not be held liable for rejecting that offer). For more on the *Waymer* case, see Section III.B. In general, factors that can help the insurer prove that the settlement offer was unreasonable include time the insurer has to investigate the claim, arbitrary deadline of any offer, and facts from the investigation that would make it likely the insured would not be found liable at trial. *See* Wade v. Emcasco Ins. Co., 483 F.3d 657, 667 (10th Cir. 2007) (discussing factors that can make or break a settlement offer's reasonableness); *see also* JERRY & RICHMOND, *supra* note 2, at 739 (listing relevant factors courts consider in evaluating duty to settle cases).

120. *See* RLLI § 24 cmt. c (explaining the "disregard the limits" formulation of how to consider whether a settlement offer was reasonable); Baker & Logue, *supra* note 107, at 792 ("[The duty to make reasonable settlement decisions] also creates efficient settlement incentives—incentives to make decisions that maximize the joint well-being of policyholder[s] and insurers." (citing Syverud, *supra* note 42, at 1164)).

121. *See* RLLI § 24(2) ("A reasonable settlement decision is one that would be made by a reasonable insurer that bears the *sole financial responsibility* for the full amount of the potential judgment." (emphasis added)). *But see* Martinez, *supra* note 63, at 171–78 (arguing that a commercial reasonableness standard is more *pro-insurer* than should be allowed and instead arguing that the RLLI should have adopted a strict-liability standard). *Contra* Marrkand, Koster & Nolette, *supra* note 49, at 109 ("The *draconian* approach to liability presented in Section 24 [of the RLLI] can only lead insurers to settle many cases, either unnecessarily or at inflated values, regardless of the weakness or value of the claim." (emphasis added)).

Insurer advocates argue that an objective reasonableness standard will expose insurers to liability for unpredictable jury decisions, but this fear is baseless.[122] By definition, for a jury verdict to be unpredictable or irrational, there must have been evidence that strongly suggested the defendant-insured would not be found liable.[123] Therefore, if a settlement offer by the plaintiff would be *un*reasonable; the defendant was expected to win at trial.[124] The insurer does not get exposed to liability unless its decision to reject a settlement offer was objectively unreasonable.[125]

The objective reasonableness standard organizes and clarifies a traditionally confusing area of insurance law—claims of insurer bad faith.[126] The RLLI defines three distinct scenarios of insurer misbehavior: breach of the duty to make reasonable settlement decisions, bad faith within the context of settlement, and bad faith outside the context of settlement.[127]

Restatements are widely used, but the primary audience is courts.[128] If this reorganization of doctrinal law can bring clarity to courts hearing

122. *See, e.g.*, Marrkand, Koster & Nolette, *supra* note 49, at 108–09 ("A negligence test would effectively subject the insurer to per se liability in the event of an excess verdict, even when the insured's case was 'seemingly sound and grounded on solid case law,' and the insurer's decision to litigate was therefore reasonable." (quoting Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co., 690 P.2d 1022, 1024 (N.M. 1984))); Schwartz & Appel, *supra* note 9, at 755–57 (arguing that though it is supported by caselaw, the RLLI's objective reasonableness standard will ultimately expand litigation against insurers); Dinallo & Slattery Memo, *supra* note 14, at 11–25 (arguing that RLLI §§ 24 and 27 will cause "market disruptions"); Priest, *supra* note 107, at 661–62 (concluding that a number of RLLI sections, including sections 24 and 27 on the duty to make reasonable settlement decisions, do not consider "the economics of the insurance process" which may ultimately affect "insurance availability generally").

123. *See* 1 NEW APPLEMAN INS. BAD FAITH LITIG., § 2.03[d] (2nd 2021) (introducing Professor Keeton's "Disregard the Limits" rule that is adopted in the RLLI duty to make reasonable settlement decisions). This rule incorporates the chance that the insured will be found liable at trial, leaving little up to question. *Id.* at n.50 and accompanying text. Critics are concerned with hindsight bias poisoning a determination of whether the insurer was reasonable, but hindsight bias is unavoidable. *Id.* § 2.03[h] ("But hindsight bias is unavoidable, no matter what standard is chosen. And one of the purposes of insurance is to protect against flukes. The Restatement standard simply requires insurers to incorporate the costs associated with possible flukes into their settlement calculus.").

124. *See id.* § 2.03[h] ("The incentive which the law ought to be providing, and which the Restatement rule provides, is to make an offer at the projected verdict value, which would be in the *center of the range of reasonableness, not at the high end.*" (emphasis added)).

125. *See* RLLI § 24 cmt. d (listing factors relevant to determining reasonableness of a settlement decision).

126. *See infra* notes 65–71 and accompanying text.

127. *See* RLLI § 24 cmt. a ("This Restatement clarifies the law by making a clear distinction among several categories of insurance-law cases that many courts classify together as insurance bad-faith cases but in practice treat as distinct from each other."); *see also supra* notes 65–71 and accompanying text.

128. *See, e.g.*, ALI HANDBOOK, *supra* note 78, at 4 ("Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statu-

insurance law disputes, it will have fulfilled one of its purposes as articulated by the ALI itself.[129]

B. *Calling the Bluff: Recent Wins for Insurers*

One of the arguments against the lower-threshold commercial reasonableness standard is the classic floodgates argument; insurers will lose every claim brought against them for breach of duty to make reasonable settlement decisions.[130] On the contrary, recent cases demonstrate that the objective reasonableness standard will not always lead to the insurer losing and the policyholder recovering:

The Texas Supreme Court visited an insurer's duty to make reasonable settlement decisions in *In re Farmers Tex. Cty. Mut. Ins. Co.*[131] in 2021. The plaintiff sought damages from a car accident with policyholder, who maintained a liability insurance policy with Farmers Texas County Mutual Insurance Company (Farmers).[132] Two months before trial, the plaintiff offered to settle the case for $350,000 despite seeking damages in his claim in excess of $1 million.[133] Farmers refused to contribute more than $250,000 to the settlement, despite the $500,000 policy limits.[134] To meet the plaintiff's settlement offer, Farmers "suggested" the policyholder make up the $100,000 difference.[135] The policyholder contributed $100,000 to the settlement and initiated a bad faith claim against Farmers for negligent failure to settle.[136]

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tory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court.").

129. *See id.* at ix ("[T]he ALI attempts to give the world a single coherent body of law, as well as the many separate segments of law that together make up our 50-foot shelf."); *see also* Martinez, *supra* note 63, at 168 ("Under the language of [a middle-ground negligence] test, it is not difficult to see why many authorities conclude that the difference between the bad faith standard and negligence standard exists in name only.").

130. *See* citations *supra* note 122 (listing concerns by pro-insurer commentators that the RLLI will unfairly saddle insurers with liability).

131. 621 S.W.3d 261 (Tex. 2021).

132. *Id.* at 265 (detailing the insured's policy).

133. *Id.* (noting the $500,000 limits of insured's policy). The insured—Cassandra Longoria—retained her own attorney in anticipation of a conflict between her own interests and the insurer's. *Id.* Plaintiff was originally seeking $1 million in damages, but after his first settlement proposal was rejected, he stated his intention to seek $2 million in damages. *Id.* ("[The plaintiff] rejected Farmers' $250,000 settlement offer and withdrew his own settlement offer [for $350,000], advising that he would now seek $2 million in damages.").

134. *Id.* (reiterating that Farmers twice refused to contribute more than $250,000 towards a settlement).

135. *Id.* ("According to Longoria's petition, Farmers 'suggested' or 'ma[de] a demand' that she 'contribute the additional $100,000 necessary to secure a release.'").

136. *Id.* at 265–66 (detailing the procedural specifics of policyholder's claim against Farmers). In Texas state law, a claim against the insurer for breach of duty to make reasonable settlement decisions is called a "*Stowers* claim." G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929). The

The court, consulting the RLLI, determined that the policyholder did *not* have a valid claim for negligent failure to settle because the insurer had settled the claim within policy limits and did not subject the policyholder to excess judgment liability.[137] This holding is consistent with the RLLI, which states that the policyholder may pursue a claim only if there is an *excess judgment* caused by the insurer's unreasonable settlement decision.[138]

Likewise, the Fourth Circuit affirmed that an insurer did not breach its duty to make reasonable settlement decisions because the settlement offer was unreasonable.[139] In *Columbia Ins. Co. v. Waymer*,[140] two plaintiffs were injured in an accident with the policyholder, who was insured by Columbia Insurance Company (CIC).[141] After a series of settlement offers and counteroffers, the plaintiffs sued the policyholder in state court.[142]

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claim is equivalent of a breach of the duty to make reasonable settlement decisions under the RLLI. *See In re Farmers*, 621 S.W.2d at 267 ("Under the *Stowers* doctrine, an insurer has a common-law [sic] duty to settle third-party claims against its insureds when it is reasonably prudent to do so."). Texas defines "reasonably prudent" as when the terms of a settlement demand are "such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." *Id.* (quoting Philips v. Bramlett, 288 S.W.3d 876, 879 (Tex. 2009).

137. *In re Farmers*, 621 S.W.2d at 267 ("We decline to extend *Stowers* to cases in which there is no liability in excess of policy limits.").

138. *See* RLLI § 27 cmt. a ("*If the insurer's breach* of the duty to make reasonable settlement decision *causes an excess judgment against the insured*, the insured is entitled to recover . . . the difference between the policy limit and the underlying judgment." (emphasis added)). If the RLLI were truly a floodgate-inducing catalyst, the court could have found that not paying the marginal $100,000 towards the settlement was an unreasonable decision considering the potential excess verdict up to $2 million. *In re Farmers*, 621 S.W.2d at 265 (explaining that after his first settlement offer was rejected, the plaintiff said he was going to seek increased damages of $2 million). Instead, the court effectively punished the policyholder for contributing towards the settlement instead of waiting for trial and a potential verdict in excess of the policy limits. *Id.* at 268 ("Our holding in [a precedential case that insured argued should extend *Stowers* liability] . . . is consistent with *Stowers*' goal of encouraging prompt and reasonable settlements within policy limits. When a claim settles within policy limits, however, *Stowers* liability is *not needed to resolve a conflict between insured and insurer*." (emphasis added) (citations omitted)).

139. *See* Columbia Ins. Co. v. Waymer, 860 F. App'x 848 (4th Cir. 2021); *see also* RLLI § 24(3) ("An insurer's duty to make reasonable settlement decisions includes the duty to make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits if *a reasonable insurer would do so in the circumstances*." (emphasis added)).

140. 860 F. App'x 848 (4th Cir. 2021).

141. *Id.* at 850 ("William and Angela Reynolds suffered severe injuries when the car they were driving hit Christopher Waymer's logging truck. An investigating officer later determined that Waymer had failed to yield the right of way and so was at fault.").

142. *Id.* at 850–52 (detailing the settlement negotiations leading up to the suit). Just over one month after the accident and before the insurer had received complete copies of the plaintiffs' requested medical records, the plaintiffs made a settlement offer of $1 million. *Id.* at 850. The plaintiffs' attorney informed policyholder's counsel and CIC that the offer would expire in ten days. *Id.* at 851. CIC

The policyholder conceded liability and a special referee awarded a combined $6.5 million to the plaintiffs.[143] CIC paid plaintiffs the $1 million policy limits.[144]

The appellate court reviewed whether CIC breached its settlement duties by rejecting the plaintiffs' settlement offers.[145] The first settlement offer was unreasonable because CIC had not yet received a complete medical records file for either plaintiff, nor had it finished its investigation into the accident.[146] Further, the plaintiffs' attorney put an arbitrary ten-day limit on the settlement offer, adding to the weight of the offer's unreasonableness.[147] At the time CIC had conducted a reasonable investigation and reviewed plaintiffs' medical records, it promptly offered to pay the amount the plaintiffs requested only weeks before.[148] The later settlement offer was similarly unreasonable because it far exceeded the policy limits, required CIC litigate on "non-traditional" terms, and mandated a waiver of "significant legal rights."[149] The Fourth Circuit did not consult

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explained to plaintiffs' counsel that the insurer could not settle yet because it needed time to investigate. *Id.* (noting that at least part of the delay in completing the investigation was that the hospital would not release patient records until after discharge). The ten-day deadline expired. *Id.* Roughly two months later, plaintiffs' counsel forwarded both plaintiffs full medical records and the medical bills the plaintiffs had incurred to date, totaling almost $700,000. *Id.* (reporting that the medical costs were $407,595.15 for Mr. Reynolds and $273,638.84 for Mrs. Reynolds). Three weeks later, the insurer offered to pay the full $1 million policy limits. *Id.* The plaintiffs rejected this offer and countered with a settlement riddled with conditions and waivers. *Id.* at 851–52 (detailing the plaintiffs' settlement offer which involved $3.5 million in stipulated damages if the jury found bad faith, $1 million if the jury found no bad faith, an option allowing CIC to pay whatever the jury found bad faith damages to be without the right to appeal, and a waiver of certain defenses). CIC rejected this counteroffer but again offered to pay the policy limits. *Id.* at 852.

143. *See id.* at 852 ("After Waymer conceded liability, a special referee awarded $3.5 million to Mrs. Reynolds and $3 million to Mr. Reynolds.").

144. *Id.* ("[Following the special referee award,] CIC then paid the Reynoldses the $1 million in Waymer's policy.").

145. *Id.* (stating the questions considered on appeal). The plaintiffs' extended their first settlement offer before CIC had received the full medical records from the hospital. *See supra* note 142 (detailing the settlement offers). The later settlement offers are not as clearly described, but the general requirements of the offers are detailed in *supra* note 142.

146. *Waymer*, 860 F. App'x at 854–55 (holding the district court was proper to grant summary judgment in favor of CIC because at the time of the January settlement, CIC had not received proper time to conduct an investigation).

147. *Id.* at 851 ("[The settlement offer letter] simply asserted that '[t]he value of these claims clearly exceeds the available insurance coverage,' and gave CIC a ten-day deadline for response, after which the offer would be 'irrevocably withdrawn.'").

148. *Id.* ("At the beginning of April 2014, [plaintiffs' attorney] forwarded to CIC the Reynoldses' full hospital records and bills. Those records substantiated medical costs to date of $407,595.15 for Mr. Reynolds, and $273,638.84 for Mrs. Reynolds. Three weeks later, CIC offered to pay the full $1 million policy limits.").

149. *Id.* at 855 (holding the district court was likewise proper to grant summary judgment on the claim of bad faith in rejecting the second settlement offer).

the RLLI, but if we analyze these facts under the RLLI's provisions, it yields the same outcome: the settlement offers were unreasonable, and therefore the insurer did not breach its duty.[150] Rejecting the settlement offers was itself a reasonable settlement decision.[151]

There are several takeaways from these two example cases. First, these cases demonstrate that insurers are not unfairly harmed by an objective reasonableness standard.[152] The insurers' decisions were upheld as reasonable in both cases (or, at least, *not un*reasonable).[153] At a minimum, the courts applied an objective standard in an even-handed manner, not employing a hidden pro-policyholder agenda.[154] Second, in *Waymer*, where there was the potential for policyholder abuse of process, the law stood by the insurer's conduct, resulting in bad faith claims as a "shield," not "a sword."[155] Because the plaintiff's settlement offer was unreasonable, it was a reasonable settlement decision for the insurer to *reject* the offer.[156] The RLLI references this situation in the comments to section 24, offering that "the insurer's duty is *not to settle every action*."[157] While some commentators believe that the RLLI objective reasonableness

150. *See* RLLI § 24 cmt. e (providing procedural factors that can be helpful in determining whether an insurer has made a reasonable settlement decision).

151. *See* RLLI § 24 cmt. b ("[T]he insurer's duty is *not* to settle every legal action . . . ."); *see also* Marrkand, Koster & Nolette, *supra* note 49, at 108 ("The decision whether to accept a settlement offer is, at base, a matter of judgment." (citing Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1168 (1954))).

152. *Contra* Marrkand, Koster & Nolette, *supra* note 49, at 108 ("The negligence test adopted in the Restatement wrongly exposes the insurer to liability for what are, at worst, errors of judgment."); Schwartz & Appel, *supra* note 9, at 755 ("The main controversy with the RLLI's approach [to the duty to settle] is that it expressly recommends subjecting an insurer to broad extra-contractual liability in the absence of any alleged 'bad faith' on the insurer's part."); Dinallo & Slattery Memo, *supra* note 14, at 11 ("[T]he insurer may be forced to accept unreasonable settlement demands to avoid the extra-contractual damages risk created by the [RLLI].").

153. *See Waymer*, 860 F. App'x at 855 (affirming the district court's grant of summary judgment in favor of insurer); *see also* In re Farmers Tex. Cty. Mut. Ins. Co., 621 S.W.3d 261, 268 (Tex. 2021) (declining to extend a negligent failure to settle claim because there was no excess verdict in the underlying suit).

154. *See Waymer*, 860 F. App'x at 855 ("[I]nsurers will not be liable for bad faith so long as there 'exists an objectively reasonable basis' for refusing a settlement offer." (quoting State Farm Fire & Cas. Co. v. Barton, 897 F.2d 729, 731 (4th Cir. 1990))); *see also* RLLI § 24 Reporters' Note a ("[M]ost courts employ an objective-reasonableness standard, as this Section does.").

155. Wade v. Emcasco Ins. Co., 483 F.3d 657, 669 (10th Cir. 2007) ("[T]he justification for bad faith jurisprudence is as a shield for insureds—not as a sword for claimants." (quoting Peckham v. Continental Cas. Ins. Co., 895 F.2d 830, 835 (1st Cir. 1990))); *see also Waymer*, 860 F. App'x at 853 (analyzing whether CIC acted reasonably when faced with a short settlement offer expiration before it had time to complete a reasonable investigation). A situation like that in *Waymer* and *Wade* is sometimes called a "bad faith set-up." *See* BAKER, LOGUE & SAIMAN, *supra* note 24, at 614–28 (introducing the bad faith set-up and the *Wade* case).

156. *Waymer*, 860 F. App'x at 854–55 (holding insurer acted reasonably).

157. RLLI § 24 cmt. b.

standard amounts to a strict liability, accept-every-settlement standard, the *Waymer* case proves otherwise.[158]

Lastly, these cases also show that the RLLI is a secondary source for courts to consult at their discretion, not a mandatory rule of law that dictates real-world outcomes.[159] The *In re Farmers* court arguably could have found unreasonable behavior in "suggesting" the policyholder contribute $100,000 to a settlement that was already within her policy limits, but it instead reasoned that the insurer's behavior as a matter of law, whether reasonable or unreasonable, could not be relevant to the policyholder's claim because she was not facing liability as the result of an excess judgment.[160] Even where the court cited to the RLLI, it did not blindly produce pro-policyholder precedent as some commentators originally feared.[161]

IV. CASH IN YOUR CHIPS: THE FUTURE OF THE RLLI

The RLLI is a secondary source, though admittedly an influential one, and where there is pre-existing jurisprudence, those courts will apply their binding insurance law doctrine.[162] When the RLLI was approved by

158. *Compare Waymer*, 860 F. App'x at 855 (holding that, under South Carolina law, insurers will not be held liable for breaching the duty to make reasonable settlement decisions—called "bad faith" in this jurisdiction—so long as an objectively reasonable basis exists for rejecting the settlement offer), *with* Marrkand, Koster & Nolette, *supra* note 49, at 109 ("The Restatement's approach [to the duty to make reasonable settlement decisions] . . . tacks very close to strict liability.").

159. *See* In re Farmers Tex. Cty. Mut. Ins. Co., 621 S.W.3d 261, 268 (Tex. 2021) (consulting, but not relying on, the RLLI); *see also Frequently Asked Questions: What Authority do ALI Publications Have*, AM. L. INST., https://www.ali.org/about-ali/faq/ [https://perma.cc/4377-3ZG9] (last visited June 20, 2022) ("ALI's publications are persuasive authorities, not controlling law. . . . [Restatements] serve as useful secondary sources to aid interpretation, advance understanding more generally, or provide a basis for legislation.").

160. *See In re Farmers*, 261 S.W.3d at 268–69 (outlining policyholder's argument that court precedent supports expanding *Stowers* liability when an insurer's refusal to settle *would have* led to an excess judgment). The policyholder in this case contributed $100,000 of her own funds towards the settlement when the insurer refused to accept the plaintiff's offer. *Id.* at 265. If the policyholder had not contributed and the insurer had held out, the plaintiff would have continued with his suit which claimed $2 million in damages. *Id.* The policyholder would have been exposed to over $1.5 million in excess verdict; exactly the kind of exposure the RLLI is trying to avoid. *See* RLLI § 24(1).

161. *See Farmers*, 261 S.W.3d at 268 (citing to RLLI § 24 cmt. b); *see also* Dino & Slattery Memo, *supra* note 14, at 15 ("The new [RLLI] rule would *overrule* long established case law in the majority of jurisdictions that apply a traditional 'bad faith' analysis." (emphasis added)). It is worth noting that restatements do not have the power to "overrule" anything, as they are not binding case precedent. *See supra* note 159.

162. *See* Masters & Fehling, *supra* note 104, at 181–82. It is important to remember that the RLLI cannot, on its own, change a state's insurance law:

> Some commentators have considered [the duty to make reasonable settlement decisions] "a broad duty" (meaning too broad a duty). In truth, again, it comes out of principles provided in insurance claims-handling

the ALI in its final form and subsequently published as an official Restatement, not a single court in the country became *compelled* to disregard its standing precedent on an insurer's duty to settle.[163] In general, no court has made a precedent-shattering duty to make reasonable settlement decisions opinion.[164] A status quo continuation for insurance law is likely to continue.[165]

The future of the RLLI should be expected to pale in comparison to its past.[166] Without over- or under-exaggerating the power of a Restatement, the RLLI is one of many sources a court may reference when facing issues of insurance law.[167] Those who argued the RLLI would change the legal landscape for insurers and burden them with an avalanche of

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> and settlement statutes around the country which seek to enforce reasonable claims-handling and settlement practices, and, thus, is not a fundamental reworking of insurer obligations or the law (statutory or common law) governing them. Again, if a [s]tate has established statutory or common[ ]law on these issues, that law governs.

Id. (emphasis added); *see also* Maniloff, *3 Courts, in 3 Days, Seek Guidance from the ALI Restatement of Liability Insurance*, COVERAGE OPS. (Mar. 8, 2021) https://www.coverageopinions.info/Vol10Issue2/3Courts.html [https://perma.cc/Z5QD-PX6C] ("Liability insurance coverage is an extremely well-developed body of law. On many of the RLLI subjects, the vast majority of states have already spoken. I do not believe that courts will eschew their own precedent in favor of adopting a contrary rule contained in the RLLI.").

163. *See* Randy Maniloff, *Lessons From Two Decisions On How The Restatement May Operate In Coverage Litigation*, COVERAGE OPS. (May 9, 2018) https://www.coverageopinions.info/Vol7Issue4/ALI.html [https://perma.cc/SQL7-4JWM] ("When searching for the answer to a coverage question, that otherwise has no answer, or a home-grown roadmap for finding one, courts frequently turn to out of state decisions and/or secondary sources for guidance."). In contrast, some courts were *forbidden* to consult any part of the RLLI. *See* OHIO REV. CODE ANN. § 3901.82 (2022) (stating the RLLI does not constitute the public policy of Ohio and is not "an appropriate subject of notice"). *See generally* Masters & Fehling, *supra* note 104, at 142–53 (providing an overview of some legislative reactions to the RLLI).

164. *See* Randy Maniloff, *2021: Ten Most Significant Coverage Decisions of the Year*, COVERAGE OPS. (Jan. 3, 2021) https://www.coverageopinions.info/Vol11Issue1/Introduction.html [https://perma.cc/HSN9-XTD4] ("Quite simply, it was a very blah year. There wasn't a single case in 2021 that really rocked the insurance coverage world.").

165. *See* RLLI Webinar, *supra* note 95, (stating that the RLLI has had *virtually no* impact on courts' insurance decisions, and that going forward there is little opportunity for such impact); *see also* Masters & Fehling, *supra* note 104, at 184 (concluding that, while the RLLI is not perfect, both sides should engage in fair practices in using and critiquing the Restatement, as opposed to the current trend where insurers direct their counsel not to cite the Restatement at all); Stempel, *supra* note 92, at 671–75 (arguing that insurer interference will continue to affect the RLLI's impact).

166. *See supra* notes 88–106 and accompanying text (discussing the RLLI's remarkable history).

167. *See, e.g.*, NEW APPLEMAN ON INS., *supra* note 26; COUCH ON INS., *supra* note 27; JERRY & RICHMOND, *supra* note 2.

mandatory settlement payments can exhale.[168] On the other side of the fight, policyholder advocates hoping the RLLI would bring a spur of judicial activism should probably rein in their opinion of the reach of a secondary source.[169]

An objective reasonableness standard for the duty to make reasonable settlement decisions is not novel, and so the effects of the ALI putting its full weight behind that standard may not be as dramatic as some first predicted.[170] This Comment does not wish to diminish, however, the importance of a doctrinal reorganization.[171] Practically, the RLLI probably will not stand alone as the sole determining factor in a court's decision to adopt the objective reasonableness standard.[172] Nevertheless, a hushed effect is still an effect.[173] When evaluating an opportunity to settle a claim against its policyholder, an insurer will need to think twice before refusing a reasonable settlement.[174] In order to justify its decision, an insurer may want to consult the factors the RLLI lists to be important in determining reasonableness.[175]

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168. *See supra* note 152 (citing commentators and practitioners worried for the deluge of mandatory insurer settlements); *see also* Masters & Fehling, *supra* note 104, at 154 ("[T[hus far at least, the insurance industry's fears that the Restatement will somehow distort the common law[ ] in blind support for policyholders and unfairly to their detriment[ ] are overblown.").

169. *See, e.g.*, Martinez, *supra* note 63, at 192 ("The [RLLI] should in fact be a restatement of the law—particularly in areas of the law that are well settled and not obviously wrong. Ultimately, an insurer that breaches its duty to settle should not be spared the consequences of its actions.").

170. *See* Syverud, *supra* note 42, at 1163–72 (comparing various standards for determining liability under the duty to settle); *see also* JERRY & RICHMOND, *supra* note 2, at 732–36 (discussing the "reasonable-offer" standard for determining the nature of the insurer's duty to settle and introducing the strict liability alternative).

171. *See* RLLI § 24 cmt. a ("This Restatement clarifies the law by making a clear distinction among several categories of insurance-law cases that many courts classify together as insurance bad-faith cases but in practice treat as distinct from each other."); *see also* Feinman, *supra* note 89, at 101.

172. *See* Masters & Fehling, *supra* note 104, at 154–61 (analyzing cases that have cited the RLLI to date); *see also* RLLI § 24 cmt. e (listing factors that a court could use to consider whether the settlement decision in question was reasonable; factors that are based on caselaw).

173. *See* In re Farmers Tex. Cty. Mut. Ins. Co., 621 S.W.3d 261, 268 (Tex. 2021) (citing the RLLI but declining to expand insurer liability); *see also* RLLI Webinar, *supra* note 95 (citing Cates v. Creamer, No. 7:00-CV-0121-R, 2008 WL 495710, at *5–6 (N.D. Tex. 2008) (listing sources a court may consider when it does not have direct binding precedent, including restatements), *aff'd sub nom.* Cates v. Hertz Corp., 347 F. App'x 2 (5th Cir. 2009)).

174. *See* RLLI § 24. At a minimum, the insurer will need to consider whether other insurers in the same circumstances would similarly refuse the offer, in which case that refusal would be a reasonable settlement decision. *See id.* § 24 cmt. d (defining the reasonableness standard as a reasonable insurer at the time the decision is made).

175. *See id.* § 24 cmt. d (listing factors that an insurer may want to consider when evaluating a settlement offer from opposing counsel); *but see* Marrkand, Koster & Nolette, *supra* note 49, at 108 (arguing that the decision about whether to

For those looking to master "insurance law," the practical answer to what standard is the correct standard becomes that of a stereotypical law school professor: "It depends."[176] It depends on the jurisdiction of practice; it depends who the lawyer represents; it depends, as it always does, on the facts.[177] The reasonableness of a settlement decision is a fact-dependent question—the kind that law students dread on a final.[178] Mastering the answer requires reviewing the facts and making the argument.[179] And isn't that how it should be?

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settle is one of judgment, but still arguing that the RLLI will impose too broad a liability on insurers).

176. *See, e.g.*, JERRY & RICHMOND, *supra* note 2, at 734. Jerry and Richmond describe what they call a "reasonable offer test" as a potential middle-of-the-road standard:

> The reasonable-offer test [akin to the RLLI's duty to make reasonable settlement decisions] is premised on the recognition that some settlement offers should be accepted by an insurer and others ought to be rejected . . . . This test contemplates that the insurer can permissibly reject some settlement offers, even if it turns out in hindsight that the insured would have been better served by accepting the offer.

Id. (conceding that not all settlement offers are reasonable).

177. *See* Wade v. Emcasco Ins. Co., 483 F.3d 657, 666–67 (10th Cir. 2007) ("[M]any of 'the same factors are generally relied upon in those cases finding a breach of good faith as in those finding negligence on the part of the insurer.'" (citing Bollinger v. Nuss, 449 P.2d 502, 511 (Kan. 1969))).

178. *See* RLLI § 24 cmt. d ("[I]t will not be sufficient for the policyholder to simply demonstrate that the amount of the offer was reasonable; the policyholder must also demonstrate that a reasonable insurer would have accepted the offer.").

179. *See* RLLI § 24 cmt. e (comparing factors that can tilt the scale for or against either the insured or the insurer).